Washington and Lee Journal of Civil Rights and Social Justice

Volume 28 | Issue 1 Article 3

Winter 2022

The Pandemic and the Public Nuisance: Judicial Intervention in the Era of COVID-19 and the Collective Right to Public Health

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Recommended Citation

Kyra Ziesk-Socolov, *The Pandemic and the Public Nuisance: Judicial Intervention in the Era of COVID-19 and the Collective Right to Public Health*, 28 Wash. & Lee J. Civ. Rts. & Soc. Just. 1 (2022).
Available at: https://scholarlycommons.law.wlu.edu/crsj/vol28/iss1/3

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The Pandemic and the Public Nuisance: Judicial Intervention in the Era of COVID-19 and the Collective Right to Public Health

Kyra Ziesk-Socolov*

Abstract

Amidst the unprecedented disruption caused by COVID-19, workplace lawsuits around the country began to apply a longstanding common law theory in a novel way: employee plaintiffs argued that their employers' noncompliance with state and federal public health guidance designed to curb the spread of the virus should be enjoined as a public nuisance. Although some of these initial public nuisance suits were dismissed, others successfully forced defendant businesses to either alter their COVID safety practices or temporarily close. This Article explores the first pandemic-era public nuisance suit, Rural Community Workers Alliance v. Smithfield Foods*, brought by meatpacking plant workers in Missouri to challenge conduct they alleged exacerbated their risk of exposure to the virus. Next, it analyzes the suit's dismissal under the primary jurisdiction doctrine and examines subsequent civil actions predicated upon analogous legal theories. It also argues that the outcome of the* Smithfield *suit should not be dispositive for courts considering future similar claims. The Article subsequently explores the historical origins of public nuisance and its contemporary expansion into the public health sphere. Finally, it makes the case for further extension of the public nuisance*

* J.D., Harvard Law School (2020). This article was inspired by conversation that occurred during a September 2020 session of Harvard Law School's COVID-19 and the Law lecture series and is indebted to the work of the activists at the forefront of this crisis advocating for fundamental public health protections for essential workers and their families. My thanks to my thorough, incisive readers, especially Dessie Otachliska, and to the staff of the Washington & Lee Journal of Civil Rights and Social Justice.

doctrine in the era of COVID-19, utilizing instances of evictions and obstacles to absentee voting as opportunities to advocate for the theory's continued employment to challenge conduct injurious to the public health.

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I. Introduction

On April 23, 2020, just over a month after President Trump issued a proclamation declaring the novel coronavirus ("COVID-

19") a national emergency,[1] workers at Smithfield Foods' meat processing plant in Milan, Missouri, brought a class action lawsuit against the corporation in federal court.[2] The plaintiffs in *Rural Community Workers Alliance v. Smithfield Foods* ("*Smithfield*")[3] leveraged the common law principles of public nuisance and breach of the duty to provide a safe workplace to attack the Milan plant's precautionary and safety measures as inadequate to protect Smithfield's workers.[4] Among other allegations, the plaintiffs challenged Smithfield's refusal to provide plant workers with sufficient personal protective equipment ("PPE"),[5] as well as the company's failure to implement a comprehensive contact-tracing protocol to identify and isolate infected workers and inform others who had been exposed.[6] The suit sought declaratory judgments and injunctive relief on both claims.[7]

The Milan plant workers' case was not ultimately decided on the merits:[8] the U.S. District Court for the Western District of Missouri granted Smithfield's motion to dismiss under the primary jurisdiction doctrine.[9] The court further held that, even if primary jurisdiction had not been applicable, the plaintiffs had failed to meet their burden to justify the issuance of a preliminary

1. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020) [https://perma.cc/SK9C-DB88].

2. Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1234 (W.D. Mo. 2020).

3. *See Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1232 (referring to Defendant Smithfield Foods, Inc. and its wholly owned subsidiary, Defendant Smithfield Fresh Meats Corporation, as "Smithfield," collectively).

4. *See id.* at 1234 (arguing that failure to take adequate steps to prevent transmission of the virus at the plant and is therefore endangering workers and members of the surrounding community).

5. *See* Complaint at 10, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (No. 5:20-06063), 2020 WL 1969164.

6. *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1235.

7. *Id.* at 1234.

8. *See infra* Part II (providing detailed discussion of the facts and procedural posture of the case).

9. *See* Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517, at 1517 (2007) ("[t]he doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts but involves issues that fall within the special competence of an administrative agency. Under the doctrine, a court can stay litigation and refer such issues to the agency for its decision.").

injunction.[10] While the plaintiffs did not prevail on their claims against Smithfield, the case's use of the public nuisance doctrine as a mass public health tort to challenge their employer's insufficient safety precautions was the latest development in the contemporary evolution of nuisance law in the public health context, offering a blueprint for subsequent analogous litigation in the COVID-19 era.

Smithfield was ultimately the harbinger of a wave of COVID-related class action litigation that continued throughout 2020 and into 2021.[11] Many plaintiffs in the employment law context have mirrored the allegations of the *Smithfield* case, using the public nuisance doctrine to challenge insufficient pandemic precautions in their workplaces that leave employees vulnerable to infection and exposure.[12] While the labor arena arguably furnishes the most relevant venue for public nuisance claims related to COVID, this Article explores the potential of expanding the pandemic-specific utilization of the doctrine to claims arising out of COVID-impacted activity in other arenas, such as to challenge evictions effectuated during the pandemic[13] or voter suppression measures like polling station closures and absentee voting restrictions.[14]

The public nuisance doctrine is a common law legal theory, historically utilized in disputes regarding property use and cases alleging the infringement of public rights, such as the collective right to health or public safety.[15] In Missouri, where the Smithfield workers brought the initial COVID-related lawsuit, public

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10. *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1241.

11. *See, e.g., Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, NAT. L. REV. (Nov. 13, 2020) [https://perma.cc/6ZM9-B7WU].

12. *See* discussion *infra* Part II.B.

13. *See* discussion *infra* Part IV.A.

14. *See, e.g.,* Edward Lempinen, *Stacking the deck: How the GOP works to suppress minority voting*, BERKELEY NEWS (Sept. 29, 2020) (noting that municipal officials in Milwaukee provided only five polling places for the entire city during the April 2020 presidential primary, forcing in-person voters to stand in long lines in close proximity to one another with little opportunity to practice social distancing) [https://perma.cc/A3RH-9LTC]; *see also* discussion *infra* Part IV.B.

15. *See* Vin Gurrieri, *COVID Suits Test 'Public Nuisance' Claim in Workplace Cases*, LAW360 (June 9, 2020) (discussing public nuisance cases brought against McDonalds and Amazon for failure to provide safe working conditions) [https://perma.cc/G565-W5CZ]. *See also* State v. Kansas City Firefighters Local 42, 672 S.W.2d 99, 114 (Mo. Ct. App. 1984).

nuisance is defined as "any unreasonable interference with common community rights such as the public health, safety, peace, morals or convenience."[16] Determining the existence of a public nuisance requires courts to resolve whether the alleged conduct "annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property *of the whole community*."[17] This inquiry is fact-specific and undertaken on a case-by-case basis.[18] In recent decades, litigants have increasingly adapted the public nuisance doctrine to the public health context, using it as a basis for claims against manufacturers of tobacco and opioids.[19] This Article posits that the doctrinal evolution of the public nuisance claim renders it uniquely relevant as a pandemic-era tool to challenge conduct that infringes on the public right to health due to the specific precautionary measures required to prevent the spread of COVID-19.

This Article proceeds in three parts. Part II[20] examines *Rural Community Workers Alliance v. Smithfield Foods* in detail, analyzing the elements of and evidence presented to support both the public nuisance and negligence claims alleged in the complaint. It[21] goes on to discuss the U.S. District Court for the Western District of Missouri's order granting Smithfield's motion to dismiss the Milan plant workers' claims. Part II[22] also introduces other public nuisance claims brought on the basis of insufficient precautionary measures or safety practices related to COVID-19, analyzing subsequent similar suits brought against Amazon and

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16. Kansas City Firefighters Local 42, 672 S.W.2d at 114.

17. State v. Errington, 317 S.W.2d 326, 331 (Mo. 1958) (emphasis added).

18. *See* Frank v. Environmental Sanitation Management, 687 S.W.2d 876, 881 (Mo. 1985) (en banc) (internal quotation marks omitted) (quoting *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801, 805 (Mo. 1943)) ("[t]here is no exact rule . . . by which the existence of a nuisance . . . may be determined . . . but when an appreciable interference with the ordinary enjoyment of property . . . is clearly made out as the result of a nuisance, a court of equity will never refuse to interfere.").

19. *See* Gurrieri, *supra* note 15 (noting that public nuisance "has expanded over the past two decades to product liability cases involving tobacco products and litigation surrounding the opioid crisis.").

20. *See* discussion *infra* Part II.

21. *See* discussion *infra* Part II.

22. *See* discussion *infra* Part II.

McDonald's.[23] Part III[24] details the history and development of the public nuisance doctrine, evaluating its historic origins as a bulwark against the infringement of community rights, examining its more contemporary expansion to environmental public health claims in climate change, tobacco, and opioid litigation, and evaluating its applicability in the COVID litigation landscape. Finally, Part IV[25] explores the possibility of further expansion of the doctrine's public health dimension to other pandemic-related litigation, focusing specifically on its potential utilization in eviction defense and claims related to obstructive electoral practices.

II. COVID as a Cause of Action: Smithfield *and the Workplace as a Public Nuisance*

This Part begins with a discussion of the first public nuisance lawsuit filed to challenge noncompliance with precautionary COVID-19 guidance: *Rural Community Workers Alliance v. Smithfield Foods*.[26] It examines the suit's plaintiffs, allegations contained in the complaint, and ultimate dismissal by the United States District Court for the Western District of Missouri on the basis of the primary jurisdiction doctrine. This Part then explores subsequent suits brought against other employers in the aftermath of the *Smithfield* case and analyzes the reasons for and relevance of their disparate outcomes for future pandemic-related litigation of public nuisance claims. Finally, this Part examines the ongoing viability of public nuisance claims in the COVID-19 context. It then discusses lower court's arguable misapplication of the primary jurisdiction doctrine to grant defendants' motions to dismiss in *Smithfield* and *Palmer v. Amazon.com, Inc*,[27] a subsequent public nuisance case in the Eastern District of New

23. *See* discussion *infra* Part II.B.

24. *See* discussion *infra* Part III.

25. *See* discussion *infra* Part IV.

26. Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020).

27. Palmer v. Amazon.com, Inc., No. 20 C 2468, 2020 U.S. Dist. LEXIS 203683 (E.D.N.Y. Nov. 2, 2020) (finding that the primary jurisdiction doctrine precluded public nuisance claims brought by Amazon workers alleging unsafe working conditions at a fulfillment warehouse in New York City).

York, as a means to evade adjudicating politically-charged claims. Finally, it explores the implications of these decisions for future public nuisance litigation in response to the coronavirus.

A. An Examination of Rural Community Workers Alliance v. Smithfield Foods

A class action suit brought against Smithfield Foods by workers in its Milan, Missouri plant was the first case of the COVID era to challenge an employer's workplace safety measures as inadequate to protect employees from the virus.[28] The named plaintiff in the suit, Rural Community Workers Alliance (RWCA), was a local nonprofit workers' rights organization.[29] RWCA was joined by Jane Doe, an anonymous Smithfield employee who "fear[ed] contracting the disease in the plant and spreading it in the community."[30] The anonymous plaintiff, who worked "side-by-side with several other workers . . . for up to eleven hours a day"[31] on the plant's "cut floor,"[32] chose to proceed under a pseudonym because she feared retaliation from Smithfield and could not afford to risk losing her job as a result of her involvement in the lawsuit.[33] Nonetheless, the complaint alleged that Jane Doe opted to participate in the suit despite these fears because she considered

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28. *See* Press Release, *Smithfield Workers Ask Court to Force Company to Protect Them from COVID-19*, PUBLIC JUSTICE (Apr. 24, 2020) [hereinafter PUBLIC JUSTICE PRESS RELEASE] (stating that "[the Smithfield workers'] action filed yesterday is the first lawsuit seeking to secure injunctive relief to protect frontline workers from the coronavirus.") [https://perma.cc/TKR4-R8UW]. *See also* Nilan Johnson Lewis PA, *COVID-19: The Next Public Nuisance?* JDSUPRA (June 5, 2020) [https://perma.cc/VR6T-ZSWU].

29. *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1234.

30. *See* PUBLIC JUSTICE PRESS RELEASE, *supra* note 28.

31. *See* Complaint at 25, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (No. 5:20-06063), 2020 WL 1969164 (describing plaintiff Jane Doe's work as "grueling, repetitive, and in many cases, dangerous," even without the risks posed by potential COVID-19 exposure).

32. *See id.* at 24 (noting that the cut floor is where the cutting and butchering of the plant's meat takes place).

33. *See id.* at 22, 27 ("Plaintiff Jane Doe is participating in this action under a pseudonym because her years of experience working for Smithfield suggest to her that Smithfield is likely to retaliate against her for speaking out against the company.").

Smithfield's failure to implement appropriate preventative measures to mitigate the threat of COVID-19 exposure "a dire threat to her health, the health of coworkers, her family, including her children, and to her entire community."[34] The plaintiffs were represented by three nonprofit legal advocacy groups dedicated to advancing economic justice and protecting workers' rights.[35]

The *Smithfield* complaint outlined five major violations of public health guidelines issued by the Centers for Disease Control and Prevention ("CDC") for which plaintiffs alleged the company was responsible:

> [A]t its Milan, MO plant Smithfield (1) provides insufficient personal protective equipment; (2) forces workers to work shoulder to shoulder and schedules their worktime and breaks in a manner that forces workers to be crowded into cramped hallways and restrooms, (3) refuses to provide workers sufficient opportunities or time to wash their hands, (4) discourages workers from taking sick leave when they are ill and even establishes bonus payments that encourage workers to come into work sick, and (5) has failed to implement a plan for testing and contact-tracing workers who may have been exposed to the virus that causes COVID-19.[36]

These areas of noncompliance, plaintiffs argued, rendered the Milan plant a public nuisance that failed to adequately protect its workers from exposure to COVID-19.

Although the Milan Smithfield plant remained open as an essential business after the enactment of Missouri's stay-at-home order on April 3, 2020, the suit's plaintiffs alleged that Smithfield had failed to comply with CDC guidance for such entities regarding social distancing, provision of adequate personal protective equipment, and the implementation of "flexible" and "non-punitive" leave policies to encourage employees to stay home if they were exposed to or infected with the virus.[37] Among other

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34. *Id.* at 28.

35. *See* PUBLIC JUSTICE PRESS RELEASE, *supra* note 28 (noting that the plaintiffs were represented by the Public Justice Food Justice Project, Towards Justice, and the Heartland Center for Jobs and Freedom).

36. *See* Complaint at 10, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (No. 5:20-06063), 2020 WL 1969164 (listing the five violations at issue in the case).

37. *See id.* at 64 (citing the February 2020 iteration of the CDC's guidance for businesses remaining operational during the pandemic, which encouraged

deficiencies, the complaint asserted that Smithfield did not provide any workers with masks until April 16, 2020—nearly two weeks after the issuance of the CDC guidance recommending face coverings[38]—with some workers not receiving their issued masks until even later.[39] Moreover, when masks were ultimately provided to workers in the Milan plant, each worker was only issued one and told that they would receive a replacement only if the first mask broke.[40]

The complaint did acknowledge that Smithfield had implemented some precautionary COVID measures at the Milan plant, but argued that these preventative steps were plainly insufficient to combat the spread of the virus and reflected the corporation's prioritization of profit over the health and welfare of their meatpacking workers.[41] Smithfield's refusal to "slow[] the [production] line"[42] left workers "force[d] . . . to work so closely together that they [were] literally touching."[43] Plexiglass barriers erected by the company to separate employees (which were nonetheless not placed between each worker on the line), failed to account for disparate worker height and therefore did not fully

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flexible sick leave policies, no touch receptacles, and flexible work hours to allow for physical distancing); *see also Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19),* CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 2020) (providing the CDC's full interim guidance for businesses and employers to plan to respond to COIVD-19) [https://perma.cc/B9DB-L8HL].

38. *See Factors Associated with Cloth Face Covering Use Among Adults During the COVID-19 Pandemic–United States, April and May 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (July 17, 2020) ("On April 3, 2020, the White House Coronavirus Task Force and CDC recommended that persons wear a cloth face covering in public to slow the spread of COVID-19.") [https://perma.cc/B9VH-RTFN].

39. *See id.* at 69 (noting that any Smithfield plant workers did not receive a mask until the following day).

40. *See* Complaint at 70, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020).

41. *See id*. at 73 ("To process as much meat as possible, as quickly and cheaply as possible, Smithfield packs many workers together in cramped spaces along processing lines.").

42. *See id*. at 81.

43. *See id*. at 77.

cover the faces of the limited number of plant workers whom the dividers ostensibly protected.[44]

Similarly, although Smithfield installed additional handwashing and sanitizer stations, it did not provide tissues or additional break time for workers to wash or disinfect their hands while on the line.[45] Even more disturbingly, the complaint alleged that the company implemented "punitive measures to ensure its preferred line speed [was] maintained."[46] These policies exacerbated the risk of adverse consequences for workers who stopped to clean their face or cover their nose and mouth when coughing or sneezing.[47] This systemic deterrent to compliance with public health best practices complemented the company's explicit incentivization of unsafe behavior: Smithfield offered a $500 pandemic-related bonus to all employees, *provided they did not miss a single shift between April 1 and May 1*.[48] For many plant workers, who were already fearful of losing their jobs amidst the economic instability occasioned by the pandemic, the bonus represented a significant amount of money and amplified the barriers to taking sick leave at the height of the virus' first spike.[49]

Based on the forgoing violations of CDC guidance, the *Smithfield* plaintiffs brought suit against the corporation, alleging that Smithfield's "failure to comply with minimum basic health and safety standards" constituted both a public nuisance and a breach of its duty to provide a safe workplace.[50] Both claims sought

44. *See id.* at 79–80 (describing the conditions in which the workers worked).

45. *See id.* at 84–86 (explaining while there were technically sanitation measures in place, they were not always practical or able to be used).

46. *Id.* at 83.

47. *See id.* at 83–87 (discussing the feared consequences of slowed production).

48. *See id.* at 95 (explaining that the pandemic related bonus was only offered to employees who did not miss work).

49. *Id.* a 99–101. ("Jane Doe and RWCA's members cannot afford to lose their jobs, and $500 represents a significant amount of money for them . . . [m]any of the workers have families, including children they need to support, and many are currently living paycheck-to-paycheck. The $500 bonus is a substantial incentive for workers to continue working at the Plant even when they are experiencing symptoms.").

50. *See id.* at 108, 118. This Article will focus on the public nuisance claim. Neither claim survived Smithfield's subsequent motion to dismiss. *Id.* at 108.

a declaratory judgment and injunctive relief.[51] The public nuisance claim specifically asserted that Smithfield's lack of adequate precautions "[was] causing, or [was] reasonably certain to cause, community spread of the disease."[52] Although the company's insufficient protections exposed the suit's plaintiffs to special harm, Jane Doe and RCWA argued that the spread of COVID-19 at the plant would also exacerbate community spread on both local and national levels as infected workers continued to interact with their families and members of the public in the course of their essential daily activities.[53] Ultimately, the complaint argued, "Smithfield's current operations constitute a public nuisance because they unreasonably interfere with the common public right to public health."[54] Absent judicial intervention, it asserted, the continuing operations at the Milan plant without the implementation of additional COVID precautions would "result in disease and possibly death. [The community spread would] also stress healthcare resources and cause financial harm."[55]

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51. *See id.* at 117, 122. The injunctive relief sought by plaintiffs sought "to force Smithfield to: provide masks; ensure social distancing; give employees an opportunity to wash their hands while on the line; provide tissues; change its leave policy to discourage individuals to show up to work when they have symptoms of the virus; give workers access to testing; develop a contact-tracing policy; and allow [plaintiffs'] expert to tour the Plant."; *see also* Order Granting Mot. To Dismiss at 4–5, Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. May 5, 2020) (May 5, 2020).

52. *See* Complaint at 108, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (stating that Smithfield's actions was potentially causing the spread of the disease).

53. *Id.* at 109–110 ("[I]ncreased community spread at the Plant will cause increased community spread in the cities of Milan and Kirksville, Sullivan and Adair Counties, the State of Missouri, and the United States.").

54. *See id.* at 112 ("[Under Missouri law,] a public nuisance is an offense against the public order and economy of the state and violates the public's right to life, health, and the use of property, while, 'at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons."); *see also* Order Granting Mot. to Dismiss at 21 (quoting State ex rel. Schmitt v. Henson, 604 S.W.3d 793, 801 (Mo. Ct. App. 2020)).

55. *See* Complaint at 111, Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228 (W.D. Mo. 2020) (explaining that without the additional COVID-19 precautions the Milan plant would risk possible death and financial harm to the company).

Four days after the complaint was filed in the Milan case, Smithfield filed a motion to dismiss, arguing that the plaintiffs' claims were barred by the primary jurisdiction doctrine and that the court should therefore defer to the judgment of the Occupational Safety and Health Administration ("OSHA").[56] The doctrine of primary jurisdiction exists to resolve potential overlaps of judicial and agency jurisdiction when a court's original jurisdiction is invoked to decide a controversy on the merits.[57] The doctrine "allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, *even when* the matter is initially cognizable by the district court."[58]

The day after Smithfield filed its motion to dismiss, President Trump signed an executive order pursuant to § 4511(b)[59] of the Defense Production Act of 1950 ("DPA") delegating authority to the Secretary of Agriculture to "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."[60] Smithfield subsequently filed a brief supplementing their motion to dismiss arguing that, in light of the newly-issued executive order, jurisdiction over the matter

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56. *Rural Cmty. Workers All.*, 459 F. Supp. 3d at 1235.

57. Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037 (1964) (explaining the scope of primary jurisdiction).

58. Access Telecomm. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998) (emphasis added).

59. Section 4511(b) of the DPA states "The powers granted in this section shall not be used to control the general distribution of any material in the civilian market *unless* the President finds (1) that such material is a *scarce and critical material essential to the national defense*, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship." 50 U.S.C. § 4511(b) (2012) (emphasis added). President Trump's executive order found that "meat and poultry in the food supply chain" met the criteria outlined in this provision such that a delegation of enforcement authority to the Department of Agriculture was appropriate. *See* Donald J. Trump, *Exec. 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* (Apr. 28, 2020), [https://perma.cc/8XL8-YZJ5] [hereinafter FOOD SUPPLY CHAIN EXEC. ORDER].

60. FOOD SUPPLY CHAIN EXEC. ORDER, *supra* note 59.

now resided in the United States Department of Agriculture ("USDA").[61]

The district court ultimately granted Smithfield's motion to dismiss, finding that the primary jurisdiction doctrine applied in the case.[62] Judge Greg Kays identified two questions central to the primary jurisdiction inquiry: (1) "whether the issues raised in the case 'ha[d] been placed within the special competence of an administrative body,'" and (2) "whether the court's disposition of the case could lead to inconsistent regulation of businesses in the same industry,"[63] and found that, in the present suit, both questions were answered in the affirmative and thereby counseled in favor of applying the doctrine.[64] In addressing the first question, Judge Kays found that, because the "determination of whether the Plant [was] complying with the Joint Guidance" issued by OSHA and the CDC was dispositive of the suit's ultimate issues, OSHA's "expertise and experience with workplace regulation" rendered the agency a more appropriate forum for adjudication of the controversy than the district court.[65] The court further found that "only deference to OSHA/USDA [would] ensure uniform national enforcement of the Joint Guidance," since any ruling on the merits would be binding on Smithfield but have no impact on its competitors, leading to varied enforcement of "rapidly evolving" COVID guidelines.[66]

Although the district court declined to reach the merits in the case, Judge Kays nonetheless addressed whether the plaintiffs had successfully met their burden for a preliminary injunction, such that injunctive relief would be appropriate if the court were to

61. *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1235.

62. *See id.* at 1240 (finding that the district court granted Smithfield's motion to dismiss because the primary jurisdictional doctrine applies).

63. Sprint Spectrum L.P. v. AT&T Corp., 168 F. Supp. 2d 1095, 1098 (W.D. Mo. 2001) (quoting United States v. W. Pac. R.R. Co., 352 U.S. at 64).

64. *Rural Cmty. Workers All.,* 459 F. Supp. 3d at 1240.

65. *Id.* at 1241 ("This determination goes to the heart of OSHA's special competence: its mission includes "enforcing" occupational safety and health standards.").

66. *See id.* ("Under these circumstances, where the guidelines are rapidly evolving, maintaining a uniform source for guidance and enforcement is crucial.").

adjudicate the suit's substantive claims.[67] Citing the four factor test for a preliminary injunction,[68] the court found that the *Smithfield* plaintiffs had not met their burden on three of the test's prongs: they had failed to demonstrate either a threat of irreparable harm or that the balance of harms favored the issuance of a preliminary injunction, and they had not shown that they were likely to succeed on either the public nuisance or right to a safe workplace claim.[69] Moreover, the court opined that the plaintiffs' prayer for relief was insufficiently specific to justify granting a preliminary injunction.[70] Describing Smithfield's attempts to comply with OSHA/CDC guidance and the lack of COVID cases at the Milan plant, Judge Kays found that the issuance of a preliminary injunction would be inappropriate even if the claim were not barred by the primary jurisdiction doctrine.[71]

In evaluating the merits of the plaintiffs' public nuisance claim, the *Smithfield* court found that, due to the "significant measures Smithfield ha[d] implemented to combat the disease and the lack of COVID-19 at the facility, the Plant [could not] be said to violate the public's right to health and safety."[72] Therefore, although the court did not decide the Smithfield workers' public nuisance claim on the merits, the verbiage of its order granting

67. *See id.* at 1241–1242 (addressing whether the plaintiff had successfully met their burden for a preliminary injunctive and providing an example of when such injunctive relief would be appropriate).

68. The factors for assessing the merits of a preliminary injunction claim are as follows: 1) the threat of irreparable harm to the movant; 2) the balance between this harm and any injury that granting the injunction will inflict on the non-moving party; 3) the likelihood that the moving party will prevail on the merits; and 4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112 (8th Cir. 1981).

69. *See Rural Cmty. Workers All.*, 459 F. Supp. 3d. at 1242–1245 (finding the "public interest" prong of the preliminary injunction test to be neutral).

70. *Id.* at 1245 ("Plaintiffs request this Court enter an injunction requiring Smithfield to make all reasonable changes to its production practices . . . Plaintiffs do not explain what changes would be reasonable, except for potentially reducing line speeds. In other words, they do not specify in reasonable detail what Smithfield should do.") (internal quotations omitted).

71. *See id.* at 1243 (providing Judge Kays reasoning that not barring the claim does not matter and that the issuance of a preliminary injunction is inappropriate).

72. *See id.* at 1244 (defending Smithfield's case by showing that the Plant did not violate the public's right to health and safety).

Smithfield's motion to dismiss evinces its opinion that the claim was unfeasible on the case's particular facts. However, mere days after the *Smithfield* court's May 5th, 2020, ruling, at least two dozen workers at the Milan plant tested positive for the virus, thereby undermining the order's primary substantive argument against granting injunctive relief in the suit.[73]

As this Article goes on to discuss, the failure of the public nuisance claim in *Smithfield* was not dispositive of the viability of similar subsequent suits, and its persuasive value may have been even further reduced in light of the subsequent COVID-19 outbreak that occurred at the Milan plant.[74] Part II.B[75] discusses similar class action suits alleging public nuisance in lawsuits challenging employers' insufficient compliance with precautionary guidance designed to contain the spread of the virus, some of which have successfully obtained injunctive relief for impacted workers. Part II.C[76] discusses the ongoing viability of public nuisance claims in pandemic-related litigation, arguing that courts' reliance on the primary jurisdiction argument in this context is both a misapplication of the doctrine and a reflection of the judiciary's reticence to adjudicate such politically-charged claims. Part II.C goes on to advocate for expansion of the public nuisance cause of action to litigation challenging institutional responses to COVID-19 outside of the employment sphere.[77]

B. Public Nuisance Claims in the Era of COVID-19: Public Nuisance in the Employment Context

In the wake of *Smithfield*, and its failure at the district court level notwithstanding, similar public nuisance claims were brought against corporate employers nationwide. Defendants in

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73. *See* Aliza Karetnik Brian D. Pedrow, & Elizabeth Schilken., *INSIGHT: The Doctrine of Primary Jurisdiction–An Ace for Dismissing COVID-19 Suits*?, BLOOMBERG LAW (June 11, 2020, 4:00AM) [https://perma.cc/REE5-YJNZ].

74. *See id.* (finding that the public nuisance claim might have been reduced due to the COVID-19 outbreak).

75. *See infra* Part II.B.

76. *See infra* Part II.C.

77. For a more comprehensive discussion of the broader potential applicability of the public nuisance doctrine, *see* Part IV *infra*.

these actions included McDonald's,[78] Amazon,[79] and Dollar Tree.[80] Subsequent suits invoked similar liability theories of public nuisance and breach of the duty to provide a safe workplace as those advanced in the *Smithfield* case, citing specific violations – including employer failures to properly sanitize workspaces, provide adequate PPE, properly implement social distancing measures, and test and quarantine exposed and infected employees, among others – to bolster their claims.[81]

Despite the paucity of legal precedent for public nuisance claims in the employment law context, these suits offered plaintiffs a significant potential advantage: the possible evasion of the exclusive remedy limitation that would have likely applied had the employees sought recovery under the more traditional theory of workers' compensation.[82] The exclusive remedy provision "substitutes the remedies of the workers' compensation statute for those the employee might otherwise have obtained in a tort action against the employer."[83] In other words, an injured employee who is eligible for recovery under a workers' compensation scheme forfeits, by virtue of that recovery, the ability to also bring suit against their employer to challenge the conduct that occasioned the injury.[84] However, because the plaintiffs in *Smithfield* and similar suits did not seek damages for individual, on-the-job injuries, and rather petitioned the court for a preliminary injunction to force their employers to "abate" or "eliminate" the nuisance caused by insufficient COVID precautionary measures, public nuisance suits seeking injunctive relief may not be

78. Massey v. McDonald's Corp., No. 20CH4247, 2020 WL 5700782 (Ill. Cir. Ct. June 22, 2020); Hernandez v. VES McDonald's, No. RG20064825, 2020 Cal. Super. LEXIS 125 (Super. Ct. Cal., June 22, 2020).

79. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359 (E.D.N.Y. 2020).

80. Esco v. Dollar Tree Stores, Inc., No. 2020-00280479 (Super. Ct. Cal., June 10, 2020).

81. Seth Tucker, Deanna Wilcox, & Jad Khazem, *A Guide to Insurance Protections as Businesses Reopen* 2–3, LAW360 (Sept. 4, 2020, 4:26PM) [https://perma.cc/G4KC-X39C].

82. *See* Gurrieri, *supra* note 15.

83. Mark R. Jensen, *Post-Employment Failure to Warn: A Viable Means of Circumventing the Exclusive Remedy Rule*, 17 PAC. L. J. 1477, 1490 (1986); *see also* Oscar Leija, *The Novel Coronavirus is Giving Rise to Novel Lawsuits Against Employers*, JDSUPRA (July 13, 2020) [https://perma.cc/QJ5Z-Y62S].

84. *See* Jensen, *supra* note 83, at 1490.

preemptively precluded by the exclusive remedy rule if courts decline to find that the only relief available to plaintiffs is monetary damages under a workers' compensation scheme.[85]

Given the strategic advantage of public nuisance claims to circumvent the exclusive remedy limitation and the unique circumstances presented by the COVID-19 pandemic, subsequent plaintiffs have advanced similar claims against their employers with varying degrees of success. In *Palmer v. Amazon.com, Inc.*,[86] a suit filed in November 2020 in the U.S. District Court for the Eastern District of New York, the plaintiffs alleged public nuisance and breach of the duty to provide a safe workplace based on Amazon's insufficient safety precautions in a fulfilment center located on Staten Island.[87] The suit also included a claim alleging Amazon's failure to timely pay workers for COVID-19-related sick leave in compliance with New York Labor Law § 191.[88] Among other allegations, the plaintiffs in *Palmer* asserted that "Amazon's productivity requirements prevent[ed] employees from engaging in basic hygiene, sanitization, and social distancing" due to fear of disciplinary consequences and potential termination if they accrued excessive "time off task."[89] Plaintiffs also challenged the

85. *See* Leija, *supra* note 83 ("The case law addressing this question is relatively scarce, but not all courts take the view that the exclusive remedy principle bars *all* actions in tort against employers."); *see also* Gurrieri, *supra* note 15 (noting that the family members of workers whose employers take insufficient COVID precautions may be more likely to prevail on public nuisance claims if those insufficient precautions result in employees' household members being exposed to or infected with COVID-19); Massey v. McDonald's Corp., No. 20CH4247, 2020 WL 5700782 (Ill. Cir. Ct. June 22, 2020) (granting in part plaintiffs' prayer for a preliminary injunction on public nuisance grounds).

86. 498 F. Supp. 3d 359 (E.D.N.Y. 2020).

87. *See id.* (stating the allegations brought forth by the plaintiff against Amazon for its unsafe workplace).

88. *See id.* (noting the plaintiff's allegation of Amazon's failure to act in compliance with New York Labor Law § 191).

89. *Id.* at 366. Although Amazon had officially suspended its productivity requirements at the outset of the pandemic in March, 2020, the *Palmer* complaint alleged that this policy change "was not effectively communicated to employees until July, [that] there [was] still confusion over the policy, and [that] the productivity requirements could be reinstated at any time." *Id.*

adequacy of Amazon's contact tracing and quarantining procedures.[90]

Like the Missouri district court, the Eastern District of New York determined that the primary jurisdiction doctrine precluded the *Palmer* plaintiffs' public nuisance claim, and further held that, even if the public nuisance claim had been cognizable, plaintiffs had failed to assert an actionable injury resulting from Amazon's actions that could sustain the suit.[91] In his order granting Amazon's motion to dismiss, Judge Brian Cogan cited *Smithfield* and invoked the Second Circuit's four-factor primary jurisdiction test[92] before ultimately concluding that "it [was] appropriate to apply the doctrine of primary jurisdiction to plaintiffs' public nuisance . . . claim[]."[93] The *Palmer* court held that, because "courts are not expert in public health or workplace safety matters and lack the training, expertise, and resources to oversee compliance with evolving industry guidance," jurisdiction properly vested in OSHA to adjudicate Amazon's compliance with state and federal COVID-19 preventative guidance.[94]

Judge Cogan further found that, even if the primary jurisdiction doctrine did not require deferral to OSHA, plaintiffs' public nuisance claim would not survive Amazon's motion to dismiss.[95] Defining public nuisance as "conduct that 'amounts to a

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90. *See id.* ("Amazon conducts contact tracing for COVID-19 infections among its employees, but plaintiffs claim that it fails to do so adequately.").

91. *See id.* at 368–71 (establishing that the primary jurisdiction doctrine is applicable to the plaintiff's claims).

92. *Id.* at 368 (quoting Ellis v. Tribune Television Co., 443 F.3d 71, 82–83 (2d Cir. 2006)). The four factors cited by the *Palmer* court are:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

93. *Id.* at 370.

94. *Id.*

95. *See* Palmer v. Amazon.com Inc., 498 F. Supp. 3d 359, 370–71 (E.D.N.Y. 2020) ("Even if I did not defer to OSHA's primary jurisdiction, plaintiffs' public nuisance and NYLL § 200 claims would not survive Amazon's motion to dismiss.").

substantial interference with the exercise of a common right,'"[96] the court acknowledged that "[c]onduct that causes the spread of contagious disease can constitute such an interference if it violates the public's right to health and safety."[97] However, to sustain an actionable public nuisance claim, plaintiffs must demonstrate "special injury beyond that suffered by the community at large."[98]

The Amazon plaintiffs' alleged injury was an increased risk of being exposed to and subsequently transmitting the COVID-19 virus, an injury the court deemed "common to the New York City community at large."[99] Because the injury was neither caused by nor specific to the Amazon fulfillment center at which the plaintiffs worked, the court found that they had failed to allege a sufficiently particular injury to sustain a public nuisance claim.[100] The district court therefore dismissed the suit without prejudice, and the plaintiffs appealed to the Second Circuit, arguing that "the civil justice system, and not an [OSHA] that has been AWOL throughout this crisis, is the right place for these . . . workers and members of their households to pursue their claims."[101]

Although public nuisance claims in *Smithfield* and *Palmer* were ultimately unsuccessful, two more recent class action lawsuits filed against McDonald's by franchise employees who made analogous allegations evince the feasibility of these claims and are therefore likely to empower future litigants seeking to raise similar theories at trial.[102] In *Massey v. McDonald's*,[103] an

96. *See id.* at 371 (quoting Benoit v. Saint-Gobain Performances Plastics Corp., 959 F.3d 491, 504 (2d Cir. 2020)).

97. *Id.*

98. 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1104 (N.Y. 2001).

99. *Palmer*, 498 F. Supp. at 371.

100. *See id.* ("Both plaintiffs' concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large and thus is not actionable in a private action for public nuisance.").

101. Danielle Nicole Smith, *Amazon Workers Turn to 2nd Circ. in COVID-19 Safety Suit*, LAW360 (Nov. 24, 2020) [https://perma.cc/8L6H-MEFB].

102. *See* Leija, *supra* note 83 ("In the wake of [the preliminary injunction issued in *Massey*], similar claims may follow.").

103. *See* Massey v. McDonald's Corp., No. 20CH4247, 2020 WL 5700782, at *53 (Ill. Cir. Ct. June 22, 2020 (granting motion for preliminary injunction ensuring that the defendant correctly trains employees and enforces the mask requirements).

Illinois state court granted plaintiffs' request for a preliminary injunction, finding that, although defendants had attempted to establish appropriate COVID precautions, deficiencies in their implementation made plaintiffs' risk of infection at the locations in question "highly probable," and that plaintiffs had thereby shown a "likelihood of success on the merits of their public nuisance claim."[104]

Engaging in a highly fact-specific analysis and citing precedent supporting "prospective injunctive relief in instances of public nuisances,"[105] the court explicitly departed from the reasoning in *Smithfield* to find that not only did COVID-19 present an immediate harm, "it [was] difficult to imagine a harm more irreparable than serious illness or death caused by this highly contagious disease."[106] Because the plaintiffs and the public had a right to be free from "an environment that may endanger public health," the court held that the risk of COVID exposure was not compensable in monetary damages and the balance of equities therefore favored granting injunctive relief.[107] Accordingly, the court enjoined the franchise owner defendants from providing social distancing training inconsistent with guidance issued by the Illinois governor and ordered them to enforce McDonald's' mask policies when store employees were not six feet apart.[108] Although the Illinois court did not explicitly address a primary jurisdiction

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104. *Id.* at *12, *46; *see also id.* at *45–46 (citations omitted).

> The current McDonald's environment leads employees, including managers, to believe they can take off their masks and stand within 6 feet of each other as long as they do not do so in excess of 10 minutes. This increases the health risk for the employees, their families, and the public as a whole and conflicts with the Governor's Executive Order.

105. *See id.* at *46 (citing Wilsonville v. SCA Services, Inc., 426 N.E.2d. 824 (Ill. 1981)).

106. *Id.* at *50.

107. *Id.* at *44, *51, *52–53; *see also* James Chou et al., *The Unhappy Meal – A Case Study in the Importance of Developing & Executing an Effective Return-to-Work Policy*, JDSUPRA (July 27, 2020), (discussing the *Massey* case and the importance of companies preparing for their employees to return to work during the health crisis created by COVID-19) [https://perma.cc/3G7A-FFJE].

108. *See* Massey v. McDonald's Corp., No. 20CH4247, 2020 WL 5700782, at *54 (Ill. Cir. Ct. June 22, 2020) (listing the Court's order, requiring McDonalds to implement better safety protocols).

argument in its order, its decision on the merits regarding the impact of the defendants' deficient implementation of state and federal COVID guidance implicitly repudiated the inevitability of judicial deference to the expertise of OSHA or the CDC in public nuisance claims related to the pandemic.[109]

Similarly, in *Hernandez v. Ves McDonald's*, [110] a California class action filed by McDonald's employees alleging public nuisance[111] and violations of Oakland's emergency paid sick leave ordinance,[112] the court granted plaintiffs' request for a temporary restraining order ("TRO").[113] California Superior Court Judge Patrick McKinney enjoined the defendant from operating the franchise location in question[114] pending a show cause hearing to

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109. *See id*. (stating the Court's decision regarding how McDonald's implemented COVID-19 guidelines).

110. *See* Hernandez v. Ves McDonald's, No. RG20064825 LEXIS 125, *1 (Super. Ct. Cal. June 22, 2020) (stating that employees at McDonalds alleged the company did not follow correct procedures during the COVID-19 pandemic).

111. Defined in California statute as a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." CAL CIV. CODE § 3480 (Deering 2020).

112. *See* Complaint at 64–112, Hernandez v. Ves McDonald's, No. RG20064825 LEXIS 125, *1 (Super. Ct. Cal., June 22, 2020) (highlighting the causes of action brought by the plaintiff); *see also* Karen F. Tynan, *California Judge Grants TRO Related to COVID-19 Risks at Fast-Food Restaurant*, OGLETREE DEAKINS (July 2, 2020) ("The plaintiffs allege causes of action for public nuisance, unfair and unlawful business practices, and violations of Oakland's Emergency Paid Sick Leave Ordinance.") [https://perma.cc/XSU8-WJTK]; *see generally City of Oakland, Emergency Ordinance (1) Adding Chapter 5.94 to the Oakland Municipal Code to Establish Emergency Paid Sick Leave for Oakland Employees During the Novel Coronavirus (Covid-19) Pandemic*, (last updated May 12, 2020) [https://perma.cc/C6Y9-2TCD].

113. *See generally* Application re: Temporary Restraining Order Granted in Part, Hernandez v. Ves McDonald's, No. RG20064825, 2020 Cal. Super. LEXIS 125 (Super. Ct. Cal., June 22, 2020).

114. The defendant McDonald's in *Hernandez*, located at 4514 Telegraph Avenue in Oakland, made national headlines a month before the TRO was granted for allegedly telling its workers to wear masks made out of unused dog diapers or coffee filters when the PPE distributed by the store's management ran out. In addition to filing the class action suit, workers at the franchise went on strike. *See* ASSOCIATED PRESS, *Oakland McDonald's Workers on Strike After Allegedly Being Told to Wear Dog-Diaper Masks*, L.A. TIMES (May 26, 2020) ("The 22 workers of the Telegraph Avenue fast-food restaurant did not show up to work Tuesday, striking to demand a two-week paid quarantine period, company-paid

allow McDonald's to present evidence as to why the preliminary injunction sought by the plaintiffs should not be granted.[115] Although *Hernandez*, like *Massey*, reflects courts' willingness to entertain public nuisance claims and grant—or consider granting—injunctive relief to abate unsafe working conditions that expose employees to COVID-19, it is notable that three of the five employee-plaintiffs in *Hernandez* alleged that they had been exposed to COVID-19 while working at the restaurant and "unknowingly" spread the disease to family and community members.[116]

While Judge McKinney's order did not specifically invoke these contentions, it is nonetheless possible that the concrete and demonstrable injury alleged by the *Hernandez* plaintiffs influenced the court's decision to adjudicate their request for a preliminary injunction on the merits, rather than deferring to a state or federal agency in the case of a more speculative harm, as was the case in *Smithfield*.[117] The *Hernandez* complaint further

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medical costs and a deep cleaning of the store, plus proper personal protective equipment.") [https://perma.cc/7HAN-BARQ].

115. *See* Hernandez v. Ves McDonald's, No. RG20064825 LEXIS 125, at *1 (Super. Ct. Cal., June 22, 2020) (stating that McDonald's shall appear in court to show cause why the preliminary injunction requested by the plaintiff should not be granted). According to the court's order, the preliminary injunction, if granted, would enjoin the defendants from reopening the franchise until they "[d]esist[ed] from refusing their employees' lawful sick leave requests," "[p]erformed a deep cleaning by professional cleaners of the restaurant," "[m]a[de] possible and enforce[d] reasonably safe physical distancing," and "[p]rovide[d] adequate and sufficient masks and gloves to employees," among other requirements." Hernandez v. Ves McDonald's, No. RG20064825 LEXIS 125, at *2–3 (Super. Ct. Cal., June 22, 2020).

116. *See id.* at *1–3 (putting forth the possibility of injunctive relief for the employees). The two remaining plaintiffs in the case were the infant son of one of the infected plaintiffs, who allegedly contracted the virus from his parent, and a fourth worker from the Telegraph Avenue store who "worked . . . in close proximity with co-workers who later tested positive for COVID-19" . . . [and] fear[ed] becoming infected and spreading the disease to others." Complaint at 2, Hernandez v. Ves McDonald's No. RG20064825 LEXIS 125, *1 (Super. Ct. Cal., June 22, 2020).

117. Rural Cmty. Workers All. v. Smithfield Foods, 459 F. Supp. 3d 1228, 1242 (W.D. Mo. 2020) ("Plaintiffs argue that their injury is potentially contracting COVID-19, which could result in serious illness or even death. But this injury is too speculative under Eighth Circuit precedent."); *see also* Hernandez v. Ves McDonald's, No. RG20064825 LEXIS 125, at *1 (Super. Ct. Cal., June 22, 2020) (establishing a preliminary injunction based on the plaintiff's alleged injuries).

highlights, however, that three of the suit's plaintiffs joined other McDonald's employees in filing complaints against the defendant with both the Alameda County Public Health Department and Cal-OSHA.[118] Despite these pending administrative proceedings, the California court chose to grant plaintiffs' request for a TRO without reference to the agencies' potential role in resolving the suit's claims.[119] The concrete harm suffered by the plaintiffs who had been exposed to and infected by COVID-19 as a result of the Oakland franchise's deficient safety program might have influenced the court's decision to review plaintiffs' application for a TRO on the merits. Moreover, when considered alongside *Massey*, this outcome indicates that the espousal of the primary jurisdiction doctrine by the *Smithfield* and *Palmer* courts is not a universal jurisprudential posture and may not be warranted under certain factual circumstances.[120]

Similarly and most encouragingly, a common law public nuisance claim filed against two Missouri gyms in May 2020 produced an outcome diametrically opposed to *Smithfield* and explicitly demonstrated the viability of the claim to challenge corporate action injurious to the public health.[121] Shortly after the initial COVID-related shutdown, St. Louis County brought suit

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118. Cal-OSHA is the California Division of Occupational Safety and Health Administration, a state-level body tasked with regulating workplace safety. *See* Complaint at 60, Hernandez v. Ves McDonald's No. RG20064825 LEXIS 125, *1 (Super. Ct. Cal., June 22, 2020) (describing how the complaint in the case was filed against McDonald's); *Cf. Rural Cmty. Workers All.*, 459 F. Supp. 3d at 1241 ("OSHA has already requested information about the [Milan] plant's safety measures. And if OSHA fails to act quickly on this information, Plaintiffs have a remedy: they may receive emergency relief through OSHA's statutory framework.").

119. *See generally* Application re: Temporary Restraining Order Granted in Part, Hernandez v. Ves McDonald's, No. RG20064825, 2020 Cal. Super. LEXIS 125 (Super. Ct., Cal., June 22, 2020).

120. The primary jurisdiction argument in *Smithfield* and *Palmer* was raised in Smithfield and Amazon's motions to dismiss, both of which were ultimately granted by the court. McDonald's failure to a primary jurisdiction defense in *Hernandez* is not dispositive, however, as a court is empowered to raise the issue *sua sponte*. *See, e.g.*, Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 674 (2003) (Breyer, J., concurring) ("[C]ourts may raise the [primary jurisdiction] doctrine on their own motion.").

121. *See* Jeremy Kohler, *Judge Orders House of Pain gyms to shut down amid St. Louis County Health Order*, ST. LOUIS POST-DISPATCH (May 23, 2020), [https://perma.cc/LQR5-EH9L].

against two gyms it alleged were operating in violation of the stay-at-home order issued by the county's department of public health.[122] The county filed the public nuisance claim and an accompanying motion for a TRO after defendants alleged that the stay-at-home order was "blatantly unconstitutional" and that the county's attempts to enforce it constituted "tyrannical persecution."[123]

Departing from the *Smithfield* court's reasoning, the Eastern District of Missouri found the county's public nuisance claim to be viable.[124] Specifically, despite the county's failure to exhaust their administrative remedies under an existing public nuisance ordinance, the court found the claim to be a properly-brought common law public nuisance action because the county "lacked an adequate remedy at law to address the . . . COVID-19 public health crisis through the . . . public nuisance ordinance."[125] Finding that the county would be rendered impotent to seek injunctive relief to protect the health, safety and welfare of its citizenry"[126] without the possibility of relief under a common law public nuisance theory, Judge Ronnie White pronounced the defendant gyms a threat to public health and ordered them to temporarily close.[127]

The disparate outcomes in the two Missouri cases underscore the highly fact-specific nature of adjudicating public nuisance claims in the COVID-19 era. Therefore, such suits, when brought to challenge COVID-19 safety measures in the workplace, cannot reflexively be considered dead on arrival. Instead, recognizing the individualized analysis required to evaluate such claims, the cause

122. *See generally* St. Louis County v. House of Pain Gym Services, No. 4:20cv655 RLW (E.D. Mo., May 22, 2020) at *2-3.

123. *Id.*

124. *Id.* at *4.

125. *Id.* at *4-5. ("If the County pursued shutting down Defendants' gyms through the County's public nuisance ordinance, then the County would have to abide by the ordinance's notice (allowing 30 days for Defendants to remedy the violation and then another 21 days' notice *5 for a hearing under SLCRO §§ 716.310.2 and 716.320.1), plus another 30 days after the order was posted on the structure before the St. Louis County Police Department could enforce the order (under SLCRO § 716.320.5)).

126. *Id.* at *5 (quoting City of Kansas City v. Mary Don Co., 606 S.W.2d 411, 415 (Mo. Ct. App. 1980)).

127. *See* Kohler, *supra* note 121.

of action should be expanded to pandemic litigation beyond the employment context.[128]

C. The Primary Jurisdiction Dodge and the Ongoing Practical Utility of Public Nuisance Employment Claims

As the dispositions of *Massey*, *Hernandez*, and *St. Louis County* demonstrate, the *Palmer* and *Smithfield* courts' receptivity to their respective defendants' primary jurisdiction arguments does not necessarily sound a death knell for COVID-related public nuisance claims challenging employers' compliance with public health and safety guidelines.[129] Rather, these decisions may be read as misapplication of the primary jurisdiction doctrine itself,[130] misuse which is accompanied by the potential for significant and irreparable harm in the context of the pandemic.[131] The arguable misemployment of the doctrine by the Western District of Missouri in *Smithfield* and the Eastern District of New York in *Palmer*, therefore, may not definitively foreclose the potential success of future similar public nuisance claims, as the invocation of primary jurisdiction in COVID workplace suits may be challenged on the grounds of the superfluous delay and insufficient remedies available to prevailing parties that may result from discretionary judicial deference to agency determinations.

To refute Amazon's primary jurisdiction defense, the *Palmer* plaintiffs argued that "their workplace safety claims simply 'require[d] the application of law to disputed facts' and [did] not implicate OSHA's expertise or discretion,"[132] echoing the reasoning

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128. *See generally infra* Part IV.

129. *See* Massey v. McDonald's Corp., No. 20-CH-4247, 2020 Ill. Cir. LEXIS 465 at *50 ("*Smithfield* is not binding authority and Illinois allows for injunctive relief for a prospective nuisance.").

130. *See generally* Diana R. H. Winters, *Restoring the Primary Jurisdiction Doctrine*, 78 OHIO ST. L.J. 541 (2017); Barry S. Port, *Primary Jurisdiction*, 39 BROOK. L. REV. 790 (1972–1973).

131. *See* Massey v. McDonald's Corp., No. 20-CH-4247, 2020 Ill. Cir. LEXIS 465 at *50 ("[I]t is difficult to imagine a harm more irreparable than serious illness or death caused by this highly contagious disease. The possibility of being infected by COVID-19 is an irreparable harm.").

132. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 369 (E.D.N.Y. 2020).

of *St. Louis County*.[133] The *Palmer* court rejected this contention on the grounds that it misstated the case's central question: whether Amazon's policies at the fulfillment center "adequately protected the safety of its workers during the COVID-19 pandemic."[134] Further finding that the "[p]laintiffs' claims . . . turn[ed] on factual issues requiring both technical and policy expertise," the Eastern District of New York held that OSHA was better positioned to "analyze how Amazon's employment practices and policies impact transmission of a poorly understood disease."[135] Similarly, in *Smithfield*, the court wrote that "[p]laintiffs' both succeed[ed] or fail[ed] on the determination of whether the Plant [was] complying with the Joint Guidance," and that OSHA was the appropriate body to adjudicate this question.[136] These divergent outcomes further underscore the determinative impact of varying judicial interpretations of the central issue requiring resolution in common law public nuisance suits.

Despite the contrary outcome in *St. Louis County*, the *Smithfield* opinion's description of the court's adjudicative undertaking functions as a preemptive endorsement of the *Palmer* plaintiffs' characterization of the central issue in a subsequent suit with nearly identical causes of action and a similarly comprehensive record.[137] Courts in both the New York and Missouri cases were presented with COVID-19 safety guidance issued by state and federal agencies and a factual record of the precautionary and preventative measures implemented by the respective corporate defendants.[138] The district courts who heard these suits were then asked to resolve, among other questions,

133. *See* St. Louis County, No. 4:20cv655 at *7.

134. *Id* at 370.

135. *Id.*

136. *Rural Cmty. Workers All.*, 459 F. Supp. 3d. at 1240–41.

137. *See id.* at 1241 ("[T]he Court holds that the issue of Smithfield's compliance with OSHA's guidelines and regulations falls squarely within OSHA/USDA's jurisdiction. The Court finds dismissal without prejudice is preferable to a stay here so that Plaintiffs may seek relief through the appropriate administrative and regulatory framework.").

138. *See* Complaint at 66–107, Rural Cmty. Workers All. v. Smithfield Foods, 459 F. Supp. 3d. 1228 (W.D. Mo. 2020) (establishing the health standards and the ways the defendant failed to satisfy them); Complaint at 55–184, Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359 (E.D.N.Y. 2020) (listing the relevant safety guidelines and how the defendant failed to follow them).

whether defendants' compliance—or lack thereof—with public health and safety protocols constituted a public nuisance by specifically interfering with plaintiffs' right to community or public health.[139] Not only is this precisely the type of question courts are routinely called upon to adjudicate, it is an inquiry that strikes at the very heart of the judicial function.[140]

Espousing nearly identical reasoning, the *St. Louis County* court endorsed this rejection of the primary jurisdiction doctrine in a striking departure from the final adjudication in *Smithfield*. Defendants in *St. Louis County* cited the earlier case to bolster their argument that the appropriate decisionmaker was the county's Public Works Director, whom, they alleged, had "special competence in the area of public nuisances."[141] Although the court found that House of Pain failed to enumerate any relevant expertise of the Public Works Director, the crux of its refusal to apply the primary jurisdiction doctrine was predicated upon a more fundamental understanding of the judicial role.[142] In finding the primary jurisdiction doctrine inapplicable to the county's cause of action, the court wrote that the case "involve[d] the interpretation of laws, orders, and rules. Interpretation of such materials is well within the conventional experience of judges."[143]

While courts are competent to assess compliance with public health and safety directives, agencies are unable to adjudicate the resulting public nuisance and breach of duty claims that would remain subsequent to a determination that a given defendant had failed to observe appropriate COVID safety guidelines.[144] Once

139. *See Rural Cmty. Workers All.*, 459 F. Supp. 3d. at 1244 ("[T]he Court finds that Plaintiffs are unlikely to be succeed on their public nuisance claim."); *see also Palmer*, 498 F. Supp. 3d at 371 ("Both plaintiffs' concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large and thus is not actionable in a private action for public nuisance.").

140. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

141. St. Louis County, No. 4:20cv655 at *7.

142. *See id.*

143. *Id.* (quoting Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005) (internal quotation marks omitted)).

144. *See* Santaguida, *supra* note 9, at 1517; *see also* Paula K. Knippa, *Primary Jurisdiction Doctrine and the Circumforaneous Litigant*, 85 TEX. L. REV. 1289, 1290 n.11 (2007) ("Properly applied, primary jurisdiction doctrine requires the

again, consideration of such claims is appropriately within the province of trial courts. The *St. Louis County* opinion acknowledged this explicitly,[145] while the orders in both *Smithfield* and *Palmer* contained non-binding assessments of plaintiffs' public nuisance claims on the merits to exemplify the analysis in which the court would engage had it declined to defer to OSHA's primary jurisdiction.[146]

That both the *Palmer* and *Smithfield* courts found the plaintiffs' respective public nuisance claims unlikely to succeed on the merits is irrelevant to this aspect of the issue—both opinions clearly establish the courts' competence to assess and adjudicate these claims. Their employments of primary jurisdiction simultaneously fail to advance the doctrine's objectives and augment the possibilities of prejudice to the plaintiffs' interests in the form of inadequate remedies and delayed disposition.[147] Even assuming, *arguendo*, that the Eastern District of New York's conception of the central inquiry in workplace public nuisance class action suits correctly states the case's central issue, this question nonetheless remains properly within the ambit of the court to adjudicate.

The primary jurisdiction doctrine is invoked to advance the twin aims of uniformity and reliance on agency expertise,[148] but

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court to stay the proceedings before it until the issue that implicates the regulatory scheme has been resolved by the administrative or regulatory entity.").

145. No. 4:20cv655 at *7.

146. *See Rural Cmty. Workers Alliance*, 459 F. Supp. 3d. at 1244 ("The issue [before the court] is whether the Plant, as it is currently operating, constitutes an offense against the public order. Because of the significant measures Smithfield has implemented to combat the disease and lack of COVID-19 at the facility, the Plant cannot be said to violate the public's right to health and safety."); *see also Palmer*, 2020 U.S. Dist. LEXIS 203683, at *20–*21 ("A private action for public nuisance cannot be maintained where the injury is 'so general and widespread as to affect a whole community' . . . Both plaintiffs' concern and their risk present a difference in degree, not kind, from the injury suffered by the public at large . . . ").

147. *See, e.g.*, Catherine T. Struve, *Greater and Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039, 1044–1045 (2008) (highlighting several arguments in favor of primary jurisdiction).

148. *See, e.g.*, Tassey v. Brunswick Hosp. Ctr., Inc., 296 F.3d 65, 68 (2d Cir. 2002) (discussing the importance of uniformity and reliance on administrative expertise in the primary jurisdiction doctrine); *see also* Winters, *supra* note 130, at 547–550 (discussing the use of primary jurisdiction).

the issues raised by the public nuisance suits may arguably be decided without adverse implication in either category. As *St. Louis County* noted,[149] no specialized expertise is needed to determine whether a workplace is providing its employees personal protective equipment[150] or sanitizing supplies,[151] and compelling compliance with federal and state social distancing guidelines[152] does not implicate uniformity concerns. Rather, it enhances nationwide adherence to agency regulations. The *Smithfield* court found that "only deference to OSHA/USDA will ensure uniform national enforcement of the Joint Guidance," because the Western District of Missouri lacked personal jurisdiction over other meatpacking facilities,[153] but it is far from clear that referral of the case to an executive agency would effectively further this objective either. Not only would judicial implementation of state and federal COVID precautionary guidance ostensibly establish a compliance benchmark by which to adjudicate similar subsequent suits, but the prospect of any enforcement proceedings on the part of the agency was dubious at best: OSHA had already indicated reluctance to initiate enforcement proceedings against employers "outside the health care and emergency response sectors when addressing [COVID]-19-related complaints."[154]

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149. St. Louis County, No. 4:20cv655 at *7.

150. *See Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1234 (outlining an investigation into Smithfield's practices regarding the use of protective equipment).

151. *See* Palmer v. Amazon.com, Inc., No. 20-CV-2468 (BMC), 2020 U.S. Dist. LEXIS 203683, at *6 (E.D.N.Y. Nov. 2, 2020) (explaining New York State's COVID-19 guidance for businesses, including the use of sanitation supplies).

152. *See id.* at *11 (describing the plaintiffs' proposed injunction to comply with New York State law); *see also Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1241 (examining various issues of compliance with OSHA and USDA guidance).

153. *See Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1241.

154. *See* Karetnik et al., *supra* note 73; *see also* Patrick J. Kapust, Acting Director, Directorate of Enforcement Programs, *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Apr. 13, 2020) [hereinafter *OSHA Interim Response Plan*] ("Area Offices should process complaints from non-healthcare and non-emergency response establishments as 'non-formal phone/fax,' following the non-formal complaint and referral procedures.") [https://perma.cc/U25R-4BT2].

OSHA's reluctance to undertake a comprehensive COVID-19 workplace enforcement effort likely reflects resource limitations and prioritization of high-risk or frontline industries.[155] However, the agency's reticence simultaneously undermines a central contention of the *Smithfield* court and underscores the paucity of existing administrative remedies for suits that are referred under the primary jurisdiction doctrine. The *Smithfield* court partially predicated its deferral to OSHA on the fact that "OSHA ha[d] already shown interest in determining whether the Plant is complying with the Joint Guidance,"[156] an assertion explicitly at odds with the priority order indicated by the agency just weeks earlier.[157] Moreover, invocation of the primary jurisdiction doctrine is more likely (and more appropriate) when the agency to which a claim is referred is capable of providing the relief sought by the plaintiffs.[158] Although OSHA is competent to adjudicate compliance with national COVID-19 safety guidelines, its enabling statute contains no private right of action, requiring prospective plaintiffs whose workplaces the agency finds noncompliant to separately and subsequently pursue legal action to obtain injunctive relief.[159]

155. *See OSHA Interim Response Plan*, *supra* note 154 ("High and very high exposure risk jobs are those with high potential for exposure to known or suspected sources of SARS-CoV-2 that occurs during specific medical, postmortem, or laboratory procedures. Workplaces considered to have job duties with high risk of exposures to COVID-19 include, but are not limited to, hospitals treating suspected and/or confirmed COVID-19 patients, nursing homes, emergency medical centers, emergency response facilities, settings where home care or hospice care are provided, settings that handle human remains, biomedical laboratories, including clinical laboratories, and medical transport."); *see also* Knippa, *supra* note 144, at 1307 (explaining how an agency may not wish to address certain issues).

156. *See Rural Cmty. Workers All.*, 459 F. Supp. 3d at 1241.

157. *See* OSHA Interim Response Plan, *supra* note 154.

158. *See, e.g.*, Anna Stapleton, *In Defense of the Hare: Primary Jurisdiction Doctrine and Scientific Uncertainty in State-Court Opioid Litigation*, 86 U. CHI. L. REV. 1697, 1718 (2019) (discussing the importance of an agency's ability to provide the relief sought); Struve, *supra* note 147, at 1045–1046.

159. *See* Robert J. O'Hara, *Smithfield, Safety and OSHA: Navigating through Litigation in the COVID-19 Era*, WASH. LEGAL FOUND. (June 9, 2020) (explaining that the OSH Act does not allow for any private right of action) [https://perma.cc/CYN6-7KQW].

As an argument against application of the primary jurisdiction doctrine, the inadequacy of potential remedies is compounded by the possibility of significant delay in disposition of a claim that is referred to an agency for internal adjudication, as evinced by the independent requirement of obtaining a court order to effectuate a noncompliance finding.[160] In the OSHA context, this drawback is uniquely relevant in coronavirus-related litigation, where the additional days, weeks, or even months required for an agency adjudication[161] may significantly exacerbate the risk of COVID-19 exposure and infection for plaintiffs and their families, with potentially devastating consequences.[162]

Courts determining whether to apply the primary jurisdiction doctrine are forced to weigh the benefits of agency expertise against the risks of "undue delay."[163] Several courts of appeals, including the Second Circuit, currently hearing an appeal in the

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160. *See, e.g.*, Richard J. Pierce, Jr., *Primary Jurisdiction: Another Victim of Reality*, 69 ADMIN. L. REV. 431, 436 (2017).

> Invocation of the primary jurisdiction doctrine has one major disadvantage: it has the potential to delay resolution of the suit before the court. In recent years, courts have expressed increasing concern about that effect of primary jurisdiction. They have become reluctant to invoke primary jurisdiction[.] . . . That reluctance . . . has increased significantly as a result of increases in delay in the agency decision-making process, decreases in agency resources[,] . . . and judicial recognition that courts cannot force agencies to reallocate their scarce resources . . . to resolve an issue a court has referred to the agency through invocation of primary jurisdiction.

See also Struve, *supra* note 147, at 1040.

161. *See* Knippa, *supra* note 144, at 1305–1306 (2007) (noting that there exists no consistent mechanism or procedure to effect referrals under the primary jurisdiction doctrine for either courts or agencies).

162. *See, e.g.*, Massey v. McDonald's Corp., No. 20CH4247, 2020 WL 5700782, at *52 (Ill. Cir. Ct. June 22, 2020).

> The potential risk of harm to these Plaintiffs and the community at large is severe. It may very well be a matter of life or death to individuals who come in contact with these restaurants or employees of these restaurants on a regular . . . basis, during the COVID-19 pandemic.

163. *See* Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 320 (1973) (Marshall, J., dissenting).

Palmer case,[164] have held that "the burden on the parties is a unique factor . . . that has the potential to become the controlling consideration."[165]

Given the lethality, ubiquity, and uniquely contagious nature of the virus,[166] the potential burdens of delay imposed upon litigants may constitute harms of significant magnitude, and must therefore counsel in favor of efficient judicial disposition of COVID-19-related employment claims.[167] The *Smithfield* case itself exemplifies the prospective dangers of delay posed by such suits: within two weeks of the district court's order granting Smithfield's motion to dismiss, at least two dozen workers at the Milan plant were diagnosed with the coronavirus.[168]

Any application of primary jurisdiction necessarily requires a court to balance the interests of the "plaintiffs and the public" against those of the administrative agency or designee under whose jurisdiction a given issue may fall, the administration whose policy the agency is tasked with enforcing, and, if applicable,[169] the defendant who has asserted the doctrine as a defense.[170] A court's discretionary invocation of the primary jurisdiction doctrine, therefore, operates as a *de facto* judgment that, as a comparative

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164. *See* Aidan O'Shea, *Plaintiffs in* Palmer v. Amazon *COVID-19 Safety Suit Appeal to Second Circuit*, PUB. JUST. (stating the plaintiffs' intention to appeal) [https://perma.cc/ADC8-SLSH].

165. *See* Aaron J. Lockwood, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE. L. REV. 707, 737 (2007); *see also id.* at n.237 (providing examples of cases from the First, Second, and Fifth Circuits requiring courts to consider the burdens that agency referral under primary jurisdiction would impose on litigants before invoking the doctrine).

166. *See generally Why Is COVID-19 So Contagious?*, UCI HEALTH (Apr. 29, 2020) [https://perma.cc/LS7B-TZ3J].

167. *See* Lockwood, *supra* note 165, at 737 (discussing the impact of the burdens on the parties as a consideration for primary jurisdiction).

168. *See* Karetnik et al., *supra* note 73 (noting that two dozen workers were diagnosed with COVID-19 after the motion to dismiss).

169. Courts may invoke the primary jurisdiction doctrine *sua sponte*. *See, e.g.*, Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 674 (2003) (Breyer, J., concurring) (asserting that courts may raise the primary jurisdiction doctrine *sua sponte*).

170. *See* Bruce R. Runnels, *Primary Jurisdiction in Environmental Cases Suggested Guidelines for Limiting Deferral*, 48 IND. L. J. 676, 682 (1973) (explaining the balancing test that must be done when considering the various outcomes of invoking the primary jurisdiction doctrine).

matter, the prospective harms faced by the plaintiff in a given case are insufficiently imminent or irreparable to mandate immediate judicial disposition.[171] Such a determination inevitably implicates policy considerations, but deference to agency authority in the COVID-19 context is particularly fraught given the politicization of the pandemic response: OSHA's response to the pandemic under former President Trump reflected the priorities of an administration committed to reinvigorating the economy at the expense of public health and safety.[172]

As of December 2020, OSHA had received over 13,000 federal complaints and referrals and over 42,000 state complaints and referrals related to COVID-19 but had only initiated 1,345 federal and 4,215 state inspections.[173] Despite these reported figures, however, the Trump-era agency has faced criticism over its deficiencies and inertia regarding COVID safety, oversight, and enforcement since the coronavirus appeared in the United States. Despite pleas from at-risk workers and organized labor, OSHA refused to issue a temporary emergency standard for pandemic safety guidelines[174] and issued only one citation to an employer during the first three months of the pandemic, despite receiving

171. *See* Stapleton, *supra* note 159, at 1700 (explaining that because state court tort systems are focused on the specific harms to plaintiffs, they are better able than agencies to research addressing those questions, making it more likely accurate assessments of liability will be reached).

172. *See, e.g.*, Nicole Narea, *The Federal Agency That's Supposed to Protect Workers is Toothless on Covid-19*, VOX (Jul. 13, 2020) (arguing that OSHA was ineffective at enforcing COVID-19 safety standards) [https://perma.cc/U7QM-5XQW]; *see also* Eli Rosenberg, *Health-Care Workers File Lawsuit Against OSHA, Accusing Agency of Failing to Keep Them Safe*, WASH. POST (Oct. 29, 2020) (reporting on a lawsuit against OSHA alleging that the agency failed to adequately protect workers) [https://perma.cc/5BCK-25SS]; Bryce Covert, *How OSHA Went AWOL During the Pandemic*, AM. PROSPECT (Oct. 6, 2020) (stating that OSHA failed to address complaints regarding coronavirus protections) [https://perma.cc/DJ8H-ZEPD].

173. *See COVID-19 Response Summary*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (figures current as of Dec. 12, 2020) (last updated Oct. 25, 2021) [https://perma.cc/Z8QG-GEYS].

174. *See* Covert, *supra* note 173 ("The agency also has failed to put in place an emergency standard that former OSHA officials and labor advocates say would require workplaces to address the dangers of COVID-19.").

over 6,000 complaints during that time period.[175] By September 2020, the number of employers cited had doubled to two.[176]

OSHA's inaction was spurred significant responsive litigation: the agency has faced lawsuits brought by the American Federation of Teachers, AFSCME, the AFL-CIO, and workers at a Maid-Rite Specialty Foods meatpacking plant in Dunmore, Pennsylvania, among others. The suits alleged that the agency has failed to adequately protect workers and seek to compel the issuance of a temporary emergency standard.[177] While the agency finally did issue a citation to Smithfield in September 2020, proposing a fine of $13,494—the maximum amount allowable for a single violation[178]—its pattern of inaction and insufficient worker protection over the first nine months of the COVID-19 pandemic, which were arguably motivated by the Trump administration's business-friendly posture and attempts to downplay the seriousness of the virus, should give courts considering employer-defendants' primary jurisdiction claims considerable pause regarding the efficacy and prudence of such a referral to furnish adequate relief for meritorious complaints.[179]

Under President Biden, OSHA has adopted a significantly more affirmative stance regarding investigation and sanction of non-compliant employers, implementing an updated National Emphasis Plan at the direction of the President to proactively investigate complaints.[180] However, courts to whom workplace

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175. *See* Meghan Bobrowsky, *'OSHA is AWOL': Critics Say Federal Agency is Where Workplace COVID-19 Complaints Go to Die*, MIAMI HERALD (July 3, 2020) (noting that the citation was a proposed $6,500 fine for a nursing home's failure to report six hospitalizations within 24 hours) [https://perma.cc/88Z2-ZSAK].

176. *See* Covert, *supra* note 172 (explaining that the agency had cited only two employers in six months).

177. *See generally* Rosenberg, *supra* note 173; *see also* Covert, *supra* note 172; Fatima Hussein, *AFL-CIO Sues OSHA to Force Temporary Worker-Safety Standard*, BLOOMBERG LAW (May 18, 2020) (explaining the AFL-CIO's lawsuit) [https://perma.cc/UYR2-MM3U].

178. *See* Covert, *supra* note 172 (stating the proposed fine as the maximum penalty allowed).

179. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1167 (2014) ("The White House regulatory review process . . . as well as political considerations can shape agency decisions in ways not permitted or imagined by the explicit terms of the statute.").

180. *See, e.g.*, Noam Scheiber, *Biden Tells OSHA to Issue New Covid-19 Guidance to Employers*, N.Y. TIMES (Jan. 21, 2021) (describing an executive order

public nuisance suits are originally brought have the initial, and therefore most meaningful, opportunity to abate reckless and dangerous conduct that poses tangible health risks to employees, their households, and communities at large. Regardless of executive branch policies governing agency action, invocation of the primary jurisdiction doctrine in the context of COVID-19 public nuisance suits facilitates piecemeal adjudication of time-sensitive claims with potentially deadly ramifications at the caprice of politically motivated executive agencies.

Agency inaction, inadequate administrative remedies, and the possibility of unconscionable delay occasioned by judicial referral of tort claims under the primary jurisdiction doctrine counsel against its invocation in public nuisance suits. The *Smithfield* and *Palmer* judgments notwithstanding, *St. Louis County* avers that the case against primary jurisdiction remains strong, and the viability of similar future public nuisance claims arising from insufficient COVID-19 precautions persists. The subsequent sections of this Article explore the viability of COVID-related public nuisance claims from two perspectives. Part III[181] traces the evolution of public nuisance, examining its roots in English common law and subsequently detailing its expansion to public health and environmental mass tort action litigation, to make the case for the doctrine's unique applicability as a pandemic-era cause

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intended to increase OSHA enforcement) [https://perma.cc/4UHU-5X66]*; see also Inspections with COVID-19 Related Violations*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (last updated Dec. 12, 2021) [https://perma.cc/4Q97-2UW2]; OCCUPATIONAL SAFETY AND HEALTH ADMIN., REVISED NATIONAL EMPHASIS PROGRAM – CORONAVIRUS DISEASE 2019 (COVID-19) [https://perma.cc/A8WN-72V6].

> Implementing a revised program "to ensure that employees in high-hazard industries or work tasks are protected from the hazard of contracting SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the cause of Coronavirus Disease 2019 (COVID-19). The NEP augments OSHA's efforts addressing unprogrammed COVID-19-related activities, e.g., complaints, referrals, and severe incident reports, by adding a component to target specific high-hazard industries or activities where this hazard is prevalent. The NEP targets establishments that have workers with increased potential exposure to this hazard, and that puts the largest number of workers at serious risk.

181. *See infra* Part III.

of action. Part IV[182] explores alternative contexts in which such claims could be utilized to challenge noncompliance with public safety and precautionary guidelines, proposing challenges to evictions and electoral administration as potential avenues for expansion.

III. Public Nuisance in Historical Context: A Broadening Conception of Public Rights

This Part begins with a brief exploration of the history of the public nuisance doctrine, tracing its origins in English common law and examining its utility as a tool to protect communal rights. It subsequently considers the contemporary expansion of the public nuisance doctrine, focusing specifically on its employment in class action suits alleging infringement upon community rights to health and safety. This Part next focuses on the utilization of the public nuisance theory in two distinct substantive contexts: public health and environmental litigation. It explores suits filed against tobacco, firearm, opioid, and lead paint manufacturers, as well as actions challenging emissions of environmental pollutants as exacerbators of climate change. Finally, this Part posits that, when aggregated, claims predicated on the infringement of a community right to health and the traditional injunctive relief remedy pursued by environmental suits for infringement of similar public rights create a relevant analog for future public nuisance suits alleging harm to a specific class due to increased collective risk of or exposure to COVID-19.

A. Origins: English Common Law

Nuisance constituted one of the earliest offenses at common law and initially referenced a tort against land.[183] This early conception of public nuisance as a cause of action soon evolved to denote a more comprehensive body of infringements against the

182. *See infra* Part IV.

183. *See generally* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966) (explaining the history of nuisance offenses).

rights of the crown,[184] and, later, against the rights of the general public.[185] Early British commentators further developed this interpretation of public nuisance as an offense against or an infringement of community or public rights, with Bracton describing the claim as "a nuisance by reason of the common and public welfare,"[186] and Hawkins as "an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires."[187] Based on this conception of the rights infringed by an alleged public nuisance—rights Merrill describes as "public bads," or conditions that "produce[] undesirable effects that are nonexcludable and nonrivalrous"[188]—public nuisance actions were originally criminal in nature and prosecuted by an agent of the government.[189]

By contrast, early actions for private nuisance were brought under the auspices of tort law and functioned as remedies for private actors contesting interference with the "use and enjoyment of [their] land.[190] While the causes of action enjoyed disparate doctrinal origins and, initially, different procedural attributes, a sixteenth century innovation in the English common law empowered private plaintiffs to bring civil public nuisance actions

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184. *See id.* at 998 ("The earliest [nuisance] cases involved purprestures, which were encroachments upon the royal domain or the king's highway, and so might be redressed by the king's justice in a criminal proceeding.") (citing GARRETT AND GARRETT, NUISANCES 1 (3d ed. 1908)).

185. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. [ii], 7 (2011) ("All accounts of public nuisance agree on the description of the right the action is designed to protect: the right of the general public.").

186. *See* HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 191, f. 232b (Samuel E. Thorne ed. 1977).

187. *See* WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 197, ch. 75, § 1 (photo. reprint 1978) (1716).

188. *See* Merrill *supra* note 185, at 8 ("The undesirable effect [of the nuisance], given existing technology, cannot be limited to particular members of the community or particular parcels of property—it is nonexcludable. And the undesirable effect does not dissipate as it spreads—it is nonrivalrous.").

189. Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after* Boomer, 54 ALB. L. REV. 359, 362 (1990) (explaining the history of a public nuisance).

190. *See id.* (citing J. R. Spencer, *Public Nuisance – A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989)).

seeking damages as a remedy.[191] Fitzherbert J. qualified the rule in a 1535[192] case,[193] writing that

> each nuisance done in the King's highway is punishable in the Leet[194] and not by action, *unless it be where one man has suffered greater hurt or inconvenience than the generality have*; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt.[195]

This modification to the legal understanding of public nuisance enabled the claims brought by the *Smithfield*, *Palmer*, *Massey*, and *Hernandez* plaintiffs. The claims in these suits are classified by scholars as "public nuisance torts:"[196] civil actions brought by individuals for infringement upon public rights whose plaintiffs can demonstrate particular harms arising out of the challenged conduct that are greater or more acute than the damages suffered by the public at large.[197]

B. Traditional Application: Public Rights and Private Land

The cause of action for private nuisance is narrowly defined to encompass any conduct, condition, or activity that interferes with the complaining party's use or enjoyment of their own land,[198]

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191. *See* Spencer, *supra* note 190, at 73–74 (describing how the current public nuisance rule came to be).

192. *See* Prosser, *supra* note 183, at 1005 (noting that Prosser documents the case year as 1536).

193. Kiralfy identifies the case in question as *Southall v. Dagger*, C.P. roll Hil. 26 Hen. VIII m. 280, but this identification is disputed. *See id*. at 73, n.79.

194. *See Court Leet*, ENCYCLOPEDIA BRITANNICA (last accessed Jan. 9, 2021) (describing the Court Leet as an English criminal court with jurisdiction over small, misdemeanor-equivalent offenses) [https://perma.cc/NU34-VNQM].

195. *See* Spencer, *supra* note 190, at 73 (emphasis added).

196. *See* Prosser, *supra* note 183, at 1005.

197. *See* Abrams & Washington, *supra* note 189, at 364–65 (detailing the characteristics of public nuisance as including interference with a public right held by the community at large and actions brought by government entities "with the jurisdiction and authority to represent the public at large" in the absence of individual plaintiffs alleging special damages).

198. *See, e.g.*, Michael S. McBride, *Critical Legal History and Private Actions Against Public Nuisances, 1800–1865*, 22 COLUM. J.L. & SOC. PROBS. 307, 313 (1989) ("Private nuisance has been defined as anything that by its continuous use

while public nuisance refers specifically to "behavior which unreasonably interferes with the health, safety, peace, comfort, or convenience of the general community."[199] Despite the semantic similarity of the two causes of action, public and private nuisance actions are generally distinct from one another, representing infringements upon different rights and vindicated through disparate procedural frameworks.[200] Private nuisances may ripen into public ones, but contain no analogous conception of the violation of a public or community right.[201]

The rights for whose infringement public nuisance claims seek to furnish a remedy are arguably internally coherent: they include those related to the "safety, health, or morals of the public."[202] In other words, public nuisance claims supply a remedy for rights derived from the police power of the state, or within the government's corresponding enforcement purview.[203] In practice, however, the conduct that constitutes such infringement is ill-defined and subject to enumeration through an ad-hoc and fragmented body of case law. Prosser details how the offense of public nuisance in the context of infringement of the right to public health was variously determined to include a "hogpen," a "malarial pond," and "carrying a child with smallpox along the highway."[204] Public nuisances interfering with the public safety included "storage of explosives" and "the practice of medicine by one not qualified,"[205] while those affecting the public morals comprised

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or existence works annoyance, harm, inconvenience, or damage *to another landowner in the enjoyment of his property*.") (citations omitted).

199. *Public nuisance,* BLACK'S LAW DICTIONARY (5th ed. 1979).

200. *See* Prosser, *supra* note 183, at 999 n.12 ("Public and private nuisances are not in reality two species of the same genus at all. There is no genetic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour.") (quoting SALMOND, TORTS 229 (9th ed. 1936)).

201. *See id.* at 1001 ("[T]he pollution of a stream which merely affects a large number of riparian owners is a private nuisance only; but it becomes a public one when it kills the fish.").

202. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 746 (2003) (quoting Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 337 (Ill. 2002)).

203. *See* Abrams & Washington, *supra* note 190, at 362.

204. Prosser, *supra* note 183, at 1000 (citations omitted).

205. *Id.* (citations omitted).

cases dealing with prostitution, "illegal liquor establishments," "indecent exhibitions," and bullfights.[206]

While this fragmented body of case law—a "very miscellaneous and diversified group of petty offenses"[207]—may minimize the coherence of antecedent public nuisance jurisprudence, it nonetheless establishes a body of precedent upon which contemporary COVID-related suits may rely to challenge conduct that disregards state or federal guidance or otherwise exacerbates exposure risk as injurious to public health and safety. In the evolving landscape of public nuisance claims, suits brought under the doctrine consistently reflect the "public's contemporary standards of decency and morality."[208] Actions for public nuisance have been used to challenge perceived violations of particularly relevant community rights, from the production and sale of tobacco and opioids to the environmental destruction wrought by fossil fuel emissions, for nearly half a century.[209]

The coronavirus pandemic has presented a range of novel legal questions unique to the contemporary era.[210] These issues may lack precedent, but their potential impacts on community health and safety and provocation of the special harm required to establish standing for private individuals by creating conditions in which prospective plaintiffs have no choice but to flout public health guidance to maintain their livelihoods thereby drastically increasing their own risks of exposure and infection. This amalgamation of infringement upon a community right shared by the general public and the existence of a class of plaintiffs suffering special damages render COVID-related cases appropriate common law public nuisance tort actions, especially in light of the theory's contemporary extension to public health claims.[211]

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206. *Id.* (citations omitted).

207. *Id.*

208. Steven Czak, *Public Nuisance Claims After ConAgra*, 88 FORDHAM L. REV. 1061, 1074 (2019) (quoting Fed. Amusement Co. v. State *ex rel.* Tuppen, 159 Fla. 495, 497 (Fla. 1947) (upholding the prohibition of a nightclub whose performances were considered lewd, indecent, and obscene)).

209. *See id.* at 1075 (describing the variety of violations public nuisances have been used to challenge).

210. *See, e.g.*, *Health Law COVID-19 Resources,* A.B.A. [https://perma.cc/45LA-LWN3].

211. *See infra* Part III.C.

C. Expansion: Climate Change and Public Health

In recent decades, utilization of the public nuisance doctrine has expanded significantly beyond the property law context to encompass a range of environmental[212] and public health claims,[213] both of which furnish relevant analogs to newly conceived pandemic suits. In the latter half of the 20th century, suits alleging public nuisance on the basis of insufficient regulation of products injurious to the public health or welfare have been brought against carbon polluters, as well as manufacturers of lead paint, tobacco, and opioids, among others.[214]

While actions against manufacturers have sought to establish the feasibility of public nuisance to allege infringement of a public right to health,[215] these claims typically advance theories of products liability and therefore pursue damages as a remedy.[216] In contrast, public nuisance suits in the environmental context, which often operate on more traditional land use theories,

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212. *See e.g.*, Merrill, *supra* note 185; Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 FORDHAM ENV'T. L.J. 55 (2002); Siobhan O'Keeffe, *Using Public Nuisance Law to Protect Wildlife*, 6 BUFF. ENV'T. L. J. 85 (1998).

213. *See e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287 (2001); Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance against the Gun Industry*, 90 IOWA L. REV. 1163 (2005); *see also* Merrill, *supra* note 185, at 2–3; Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); *In re* Lead Paint Litigation, 924 A.2d 484 (N.J. 2007).

214. *See* Michael J. Purcell, *Settling High: A Common Law Public Nuisance Response to the Opioid Epidemic*, 52 COLUM. J.L. & SOC. PROBS. 135, 136 (2018) (citing *In re* Lead Paint Litigation, 924 A.2d 484 (N.J. 2007) and People v. Sturm, Ruger & Co., 309 A.D.2d. 91 (N.Y. App. Div. 2003) as examples of litigation against lead paint and firearms manufacturers, respectively); *see also* Gifford, *supra* note 203, at 743.

215. *See* Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE. L. REV. 207, 231–32 (2012) ("[The] central element [of a public nuisance] is an 'unreasonable interference' with a right common to the general public, including 'interference with the public health, the public safety, the public peace, the public comfort, or the public convenience.'") (quoting RESTATEMENT (SECOND) OF TORT § 821B (1979)).

216. *See* Merrill, supra note 185, at 2 (discussing the growing interest in using public nuisance law to get damages).

generally seek more traditional injunctive relief.[217] Suits for damages are a relatively recent development in public nuisance law, and their prayer for monetary remedies stands in contrast to pandemic-related workplace safety claims, which have uniformly sought injunctive relief in the form of temporary business closures and improved regulatory compliance.[218] Although both of these lines of contemporary public nuisance litigation have arguably exposed the deficiencies of the doctrine as a means to remedy the societal harms occasioned by climate change, smoking, gun violence, or opioid addiction, this section posits that elements of each of these types of forgoing public nuisance claims may be aggregated to bolster effective pandemic-related actions.

One significant difference between COVID-19 workplace nuisance claims and previous public health-based suits is the respective plaintiffs in the various actions: while COVID-related claims, such as those alleged in *Smithfield*, *Hernandez*, and *Palmer* have typically been brought by employees, prior public nuisance suits have often been brought by government entities, similar to the action in *St. Louis County*.[219] Furthermore, tobacco, opioid, and firearm suits typically allege harms caused by the manufacturers of these respective products, such as "tobacco-caused cancer . . . or gunshot wounds."[220] As discussed above,

217. *See, e.g.*, Ellis v. Gallatin Steel Co., 390 F.3d 461, 472 (6th Cir. 2004) (upholding district court's grant of a preliminary injunction based on Clean Air Act and state law nuisance claims upon a finding that dust from defendants' steel manufacturing operations had migrated onto plaintiffs' property); *see also* California *ex rel.* California Dep't of Toxic Substances Control v. Campbell, 138 F.3d 772, 783–84 (9th Cir. 2004) (affirming the district court's holding that enjoined defendants' contamination of groundwater via the dumping of hazardous chemicals from a manufacturing plant on the grounds that such conduct constituted a public nuisance), *cert. denied*, Campbell v. California, 525 U.S. 822 (1998).

218. *See, e.g.*, Rural Cmty. Workers All. v. Smithfield Foods, 459 F. Supp. 3d. 1228 (W.D. Mo. 2020); Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359 (E.D.N.Y. 2020); Massey v. McDonald's Corp., No. 20-CH-4247, 2020 Ill. Cir. LEXIS 465 (Ill. Cir. Ct. June 24, 2020); Hernandez v. VES McDonald's, No. RG20064825, 2020 Cal. Super. LEXIS 125 (Cal. App. Dep't Super. Ct. June 22, 2020).

219. *See* Gifford, *supra* note 202, at 753 ("Mass tort product actions frequently are now brought not by individual plaintiffs, but by states and municipalities seeking to recoup or be reimbursed for expenses that have been borne by state or local governments . . . ").

220. *Id.*

because the public nuisance claims in these lawsuits are premised upon a theory of products liability, they typically seek to recoup damages, rather than the more traditional public nuisance remedy of injunctive relief.[221] While these divergences from the COVID-related model described in Part II[222] are significant, earlier cases are nonetheless relevant to contemporary public nuisance actions because they established the viability of the claim as a means to effectuate a remedy for infringement on the public right to health.[223]

The expansion of public nuisance to the public health context began in the mid-1980s with suits against manufacturers of products containing asbestos.[224] The asbestos suits, which affirmatively applied the public nuisance doctrine to alleged violations of the public right to health,[225] were generally unsuccessful, with courts finding the causal connection between the manufacture of asbestos-containing products and the harms alleged by the actions' plaintiffs too attenuated to sustain a public nuisance claim. Courts also expressed trepidation regarding excessive expansion of the doctrine.[226] Despite judicial rejection of asbestos-related public nuisance suits, numerous state attorneys general included similar claims in 1990s mass actions against

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221. *See* Merrill, *supra* note 185, at 17 (highlighting that damages are not the traditional remedy for public nuisance remedies).

222. *See supra* Part II.

223. *See* Wiley, *supra* note 215, at 210 (explaining public nuisance suits were meant to substantiate the common law right to non-interference with public health and safety).

224. *See* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom – The Transmutation of Public Nuisance Litigation,* 2007 MICH. ST. L. REV. 941, 957 (2007) (explaining that municipalities and school districts brought the first non-pollution related public nuisance cases in the 1980s and 1990s against asbestos manufacturers).

225. *See* Wiley, *supra* note 215, at 210 ("[G]overnmental plaintiffs have brought public nuisance suits against these industries to vindicate collectively held, common law rights to non-interference with public health and safety."); *see generally* DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION (Univ. of Mich. Press 2010).

226. *See* Cnty. of Johnson by Bd. of Ed. v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A]llowing the plaintiff to bring this action under a nuisance theory would convert almost every products liability action into a nuisance claim . . . [A] nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality.").

tobacco manufacturers.[227] While the only court to adjudicate a public nuisance claim against a tobacco manufacturer on the merits dismissed it, finding that the state had "failed to plead essential allegations under . . . public nuisance law,"[228] the consolidated tobacco litigation, which contained multiple additional suits alleging public nuisance, ultimately settled for a staggering $246 billion in 1998.[229]

Although the tobacco settlement did not offer proof of the efficacy of public nuisance claims as a means for plaintiffs to obtain remedies at trial, its remunerative nature invigorated the efforts of both state attorneys general and private plaintiffs' attorneys to "use . . . the public nuisance action to achieve social policy goals."[230] After the settlement, public nuisance suits were brought against manufacturers of firearms, lead paint, and opioids, as well as against coal-burning and petrochemical utilities for harms associated with or exacerbated by environmental pollution and climate change.[231] These claims enjoyed varying degrees of success, both within the courtroom and outside it. For example, while motions to dismiss were granted in many of the firearm public nuisance suits,[232] a sufficient number of claims were allowed to

227. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 554 (2006) (describing tobacco litigation as "[t]he watershed event for product-based litigation in public nuisance theory"); *see also* Gifford, *supra* note 203, at 759–60 (noting that the litigation sought reimbursement from the defendants for expenditures related to Medicaid and other smoking-related medical program, in addition to damages and injunctive relief, on a variety of legal theories beyond public nuisance, including "common law misrepresentation, deceptive advertising, antitrust violations, and federal [RICO] theories").

228. *See* Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997).

229. *See* Clyde Hughes, *20 Years After Settlement, Billions in Anti-Tobacco Funds Spent Elsewhere*, UPI (Dec. 3, 2018) (discussing how The Campaign for Tobacco-Free Kids estimated that the annual payments will have netted to $246 billion) [http://perma.cc/VT5J-2TXV].

230. Merrill, *supra* note 185, at 2 (discussing how earlier cases settled for a sum of $246 billion caused private tort lawyers to become interested in the area).

231. *See id.* at 1–2 (discussing how different types of public nuisance actions began appearing in courts soon after the tobacco settlement).

232. *See, e.g.*, City of Chicago v. Beretta U.S.A., 821 N.E. 2d 1136 (Ill. 2004) (holding that the gun manufacturers and distributers did not owe a duty to the public and could not be liable for public nuisance); *see also* Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) (holding

proceed to trial that the gun industry, concerned by the possibility of unfavorable outcomes in the ensuing litigation, lobbied Congress for legislation preempting future claims.[233]

The diverse legal contexts in which public nuisance claims have arisen in recent decades continue to evince the variability of the doctrine's success. Although plaintiffs initially won judgments in several significant lead paint cases, at least two high profile victories were ultimately overturned on appeal.[234] Several opioid suits brought on public nuisance theories resulted in small, individual settlements with drug manufacturers and distributors. Finally, in the 2011 case of *American Electric Power Co. v. Connecticut* ("*AEP*")[235] the Supreme Court reiterated its 2007 holding in *Massachusetts v. EPA*,[236] finding that Congress had delegated regulatory authority regarding greenhouse gas emissions to the EPA, and that such delegation "displace[d] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[237] The Court in *AEP* therefore refused to expand the efficacy of the public nuisance doctrine as a tool to challenge environmental polluters contributing to climate change and to pursue environmental reform through the judiciary.[238]

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that manufacturers' lawful distribution of handguns cannot constitute a public nuisance).

233. Protection of Lawful Commerce in Arms Act, 119 Stat. 2095 (2005), 15 U.S.C. § 7901-03; *see also* R. Clay Larkin, *The Protection of Lawful Commerce in Arms Act: Immunity for the Firearm Industry Is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187 (2006) (stating that supporters for the bill were very forceful in having their voice heard to Congress).

234. *See* State v. Lead Industries Assn., 951 A. 2d 428 (R.I. 2008) (holding that lead paint did not constitute a public nuisance because it did not interfere with a public right); In re Lead Paint Litigation, 924 A.2d 484 (N.J. 2007) (holding that distribution of lead-based paint products did not constitute actionable conduct for purposes of public nuisance action).

235. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (holding that corporations cannot be sued for greenhouse gas emissions under federal common law).

236. *See* Massachusetts v. EPA, 549 U.S. 497 (holding that greenhouse gasses are considered air pollutants).

237. *See Am. Elec. Power Co.*, 564 U.S. at 424.

238. *See* Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut*, 2010 CATO SUP. CT. REV. 295, 295–96 (2010–2011) ("In *AEP*, a unanimous Court hewed closely to well-settled precedent . . . refus[ing] to open new avenues of litigation for climate

The primary jurisdiction defense that facilitated the dismissal of the *Smithfield* and *Palmer* suits notwithstanding, public nuisance claims challenging compliance with COVID-19 guidance are arguably more feasible than either prior public health or climate change class action litigation. Critics of the comparatively recent developments in public nuisance jurisprudence have argued that utilizing the doctrine to challenge the manufacture of tobacco, opioids, or firearms in mass actions seeks to recast public nuisance as a "kind of 'super tort,'" and, in so doing, improperly empowers courts to "address a variety of social ills regarded by the plaintiffs as being inadequately regulated by more conventional political processes."[239] While courts evaluating these claims against manufacturers have frequently found causal connections between the actions of the defendant and the alleged infringement upon a public right too attenuated to sustain a public nuisance action, suits challenging insufficient compliance with COVID-19 precautionary guidance may not confront equivalent vulnerabilities.[240]

The definition of public nuisance offered by the *Restatement (Second) of Torts* "recognizes a negative right to be free from private interference with the public's health."[241] Employer noncompliance with public safety guidelines that augments employees' risk of COVID-19 exposure and infection could readily be considered a "private interference with the public's health," given the potential second-order exposure risks posed to those

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plaintiffs . . . [I]n explaining its decision, the Court raised cautions about trying to make climate change policy through the judiciary.").

239. *See* Merrill, *supra* note 185, at 4 (quoting Schwartz & Goldberg, *supra* note 227, at 552).

240. *See, e.g.*, Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance*, 77 TEMP. L. REV. 825,875 (2004) (citing the Third Circuit's decision in Camden County Board of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001) that the "causal chain [was] simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim."); *see Beretta*, 273 F. 3d at 541 (stating that even if public nuisance law could reach distribution, there is a chain of linkage that would not permit the manufacturers to be sued). *See also* Gifford, *supra* note 225,at 929 n.268.

241. *See* Wiley, *supra* note 215, at 232 n.9 (citing RESTATEMENT (SECOND) OF TORTS, § 821B (1979)).

employees' contacts.[242] Moreover, although the permissibility of a public nuisance suit for damages remains an open question for both courts and legal scholars,[243] the workplace-related pandemic litigation discussed in this Article has uniformly sought the traditional remedy of injunctive relief.[244] While opioid, firearm, and tobacco public nuisance claims offer relevant precedent for actions challenging insufficient COVID-19 precautions as an infringement of the public right to health, more traditional actions seeking injunctive relief also offer useful strategic analogs.

Public nuisance litigation alleging public health and environmental violations has thus far enjoyed only limited success.[245] However, the substantive and procedural differences outlined above distinguish COVID-related suits from these other contemporary expansions in public nuisance jurisprudence, while allowing plaintiffs to augment relevant recent precedents regarding infringement upon a public right to health.[246] Future public nuisance suits in the COVID-19 context, therefore, should aggregate the public health elements of prior actions against opioid

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242. *See id*. Potential contacts include household members, neighbors, and fellow commuters, among others.

243. *See* David A. Dana, *The Mismatch Between Public Nuisance Law and Global Warming*, 18 SUP. CT. ECON. REV. 9, 14 (2010) (discussing how federal judges have struggled to attack different global challenges through public nuisance claims).

244. *See, e.g.*, Compl., Rural Cmty. Workers Alliance v. Smithfield Foods, at 16 ("This suit does not seek money damages. All Plaintiffs seek is an injunction to force Smithfield to change its practices such that if it continues to operate, it must comply with, at a bare minimum, CDC guidance, the orders of state public health officials, and additional protective measures that public and occupational health experts deem necessary based on the particular structure and operation of the Milan plant.").

245. *See, e.g.*, State v. Lead Indus. Ass'n., 951 A.2d 428 (R.I. 2008) (overturning a judgment by a state trial court imposing liability on lead paint manufacturers on a public nuisance theory); *see also* Am. Elec. Power Co. v. Connecticut, 131 S.Ct. 2527 (2011) (reversing a decision by the Second Circuit allowing public nuisance claims against coal-fired power plants predicated on federal common law to proceed and finding that the Clean Air Act had replaced federal common law on this issue); *see generally* Faulk & Gray, *supra* note 225 (describing the failure of public nuisance litigation against lead paint manufacturers in Wisconsin and New Jersey).

246. *See* Rocky Tsai & Andrew O'Connor, *Covid-19 Public Nuisance Claims*, BLOOMBERG LAW, ("Despite its uncertain foundations, the expansion of public nuisance law heralded by the opioid litigation may impact companies whose Covid-19 response is perceived as inadequate.") [https://perma.cc/RD52-QKNV].

and tobacco manufacturers with the conduct-based challenges and prayers for injunctive relief of more traditional public nuisance claims.

Actions challenging compliance with pandemic-related regulations are arguably more suited to successful public nuisance claims than other contemporary attempts to expand the doctrine.[247] Unlike the public health claims discussed earlier in this Part, COVID-19-related public nuisance actions do not seek to redress attenuated harms caused by the production and distribution of potentially dangerous products.[248] Rather, these claims espouse a more traditional theory of public nuisance, seeking injunctive relief to abate conduct injurious to a public right to safety or health.[249] Recent public nuisance claims arising out of pandemic regulations, therefore, may be interpreted as simultaneously amplifying contemporary expansions of the cause of action in the public health sphere[250] and returning to a conception of the doctrine more faithful to both its origins and traditional application.[251]

The final Part of this Article explores potential expansion of pandemic-related actions predicated on the theory that conduct resulting in increased community exposure to COVID-19 constitutes a public nuisance. Part IV[252] posits that allegations of infringements upon the community right to public health may be extended beyond the workplace context, drawing on public nuisance precedent challenging private conduct that augments

247. *See* Wiley, *supra* note 215, at 233–34 (discussing how public nuisance law has emerged through the years to expand to be used for public health issues).

248. *See id.* (stating that public nuisance litigation that occurred in the 1990's and 2000's focused on the harms of potentially dangerous products such as noxious odors).

249. *See id.* at 231–33 (focusing the discussion on how over time public nuisance litigation has changed its focus from interfering with the common right to the general public to interfering with public health and public safety).

250. *See id.* at 232–33 (describing how the contemporary causes of action are related to public health issues such as tobacco use).

251. *See* James A. Sevinsky, *Public Nuisance: A Common-Law Remedy Among the Statutes,* 5 NAT. RES. & ENVT., 29, 29 (1990) ("At heart, public nuisance is . . . essentially an exercise of the police power to protect public health and safety.").

252. *See infra* Part IV.

public risk of contagion[253] in the spheres of both housing and election law.

IV. COVID Claims: Public Nuisance as a Challenge to Evictions and Voter Suppression

Despite the variable success of public nuisance claims predicated on insufficient workplace safety precautions, the cause of action has potential implications for pandemic-related litigation in other areas of advocacy. Specifically, this Part explores the utility of public nuisance actions in the housing and election law contexts, where it may be employed to challenge pandemic-era evictions and voter suppression, respectively, on the grounds that such conduct may unjustifiably exacerbate community risk of COVID-19 exposure and transmission.

A. Housing: Contesting Pandemic-Era Evictions

Pandemic-era evictions may offer an additional opportunity to challenge conduct that strengthens the community threat of COVID-19 under a public nuisance theory.[254] Many jurisdictions implemented eviction moratoria when then-President Trump declared the coronavirus a national emergency and state and local governments nationwide implemented stay at home orders and

253. *See, e.g.*, John Copeland Nagle, *Moral Nuisances*, 50 EMORY L. J. 265, 291 (2001) (citing "[s]everal cases decided in the late nineteenth and early twentieth centuries [that] held that a facility for those who had a contagious disease constituted a nuisance when located in a residential neighborhood"); *see also* Wiley, *supra* note 215, at 222 (discussing the evolution of public health theory and accompanying jurisprudence to the contemporary ecological model, which "places supposedly private, individual choices into their social context and emphasizes structural explanations for health behaviors and outcomes"). In a subsequent climate change suit alleging public nuisance theories against numerous energy companies for greenhouse gas emissions that the plaintiffs alleged exacerbated the imminent destruction of the Alaskan Native Village of Kivalina, the Ninth Circuit relied on AEP to find that the public nuisance claims under federal common law were preempted by the Clean Air Act. *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 865 (9th Cir. 2012).

254. *See, e.g.*, Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (updated Jan. 15, 2021) (discussing different eviction policies throughout the coronavirus pandemic) [http://perma.cc/HZ3D-WCFX].

mandated lockdowns and closures of nonessential businesses.[255] While these freezes sought to preserve housing for tenants experiencing COVID-related losses of income,[256] they also fulfilled a vital public health function: ensuring that evicted renters with limited financial resources do not move in with friends or family or into group residential settings like shelters, introducing new avenues of infection and diminishing compliance with pandemic safety measures such as social distancing in the households or residential settings they enter.[257] These increased domestic risks concurrently augment the potential for infection within the broader community, as those in newly expanded households must still visit and utilize essential services such as grocery stores and gas stations, thereby jeopardizing the health of any contacts made in the course of those activities.[258]

Despite the temporary adoption of eviction moratoria across the country, evictions have continued in significant numbers nationwide throughout the pandemic.[259] The Princeton Eviction Lab, which tracks eviction filings in six states and thirty-one cities, reports that, as of this writing, there have been 658,699 evictions in those jurisdictions alone since mid-March 2020.[260] This ongoing trend may have devastating impacts on the spread of COVID-19: medical research has repeatedly demonstrated correlation between overcrowded living conditions and incidence of respiratory infectious diseases whose transmission resembles that of the

255. *See id.* (detailing eviction policies on a state-by-state basis and at the federal level).

256. *See, e.g.*, Elizabeth Kneebone & Carolina Reid, *COVID-19 and California's Vulnerable Renters*, TERNER CENT. FOR HOUSING INNOVATION (Aug. 4, 2020) (stating that California has pursued its own measures of relief to help the most vulnerable renters during the pandemic) [http://perma.cc/S8TV-K2N6].

257. *See* Emily Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, J. URBAN HEALTH (2021) (describing how the program is able to comply with certain new strategies that are necessary to promote social distancing, self-quarantining, and hand hygiene) [http://perma.cc/JAJ2-8VDY].

258. *See id.*

259. *See Eviction Lab*, PRINCETON UNIVERSITY (Jan. 2, 2022) (sharing the Princeton Eviction Lab results which show how many covid-related evictions there have been since March 2020 on a state-by-state basis) [http://perma.cc/XWE6-PRK2].

260. *See id.*

coronavirus.[261] Moreover, eviction in the United States disproportionately impacts populations with preexisting COVID-19 comorbidities such as high blood pressure, diabetes, and respiratory diseases,[262] as well as those in substandard housing conditions that may exacerbate their vulnerabilities to the virus,[263] and Black and Latinx populations, whose COVID infection and mortality rates are significantly higher than those of non-Hispanic whites.[264] In the aggregate, pandemic-era evictions compound the

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261. *See, e.g.*, E. Drucker et al., Childhood Tuberculosis in the Bronx, New York, 343 LANCET 1482 (1994) (discussing the correlation between crowded living spaces and contraction of Tuberculosis); *see also* Kimberly M. Yousey-Hindes & James L. Hadler, Neighborhood Socioeconomic Status and Influenza Hospitalizations Among Children: New Haven County, Connecticut 2003–2010, 101 AM. J. PUB. HEALTH 1785 (2011) ("influenza-associated hospitalization in high-poverty and high-crowding census tracts was at least 3 times greater than that in low-poverty and low-crowding tracts.").

262. *See* Benfer et al., *supra* note 242 (listing pulmonary disease, high blood pressure, diabetes, obesity, chronic liver or kidney disease, and respiratory disease as comorbidities that increase the risk of severe illness with COVID-19).

263. *See, e.g.*, Wilhelmine D. Miller et. al, *Healthy Homes and Communities: Putting the Pieces Together*, 40 AM. J. PREV. MED. SUPP. 1, S48 (2011) (reviewing the spread of COVID-19 in public housing).

264. *See* Benfer et al., *supra* note 242, at nn.89–92.

> The CDC reports Black Americans are dying at 2.1 times the rate of non-Hispanic Whites. Indigenous Americans as well as Hispanic/Latinx persons face an infection rate almost 3 times the rate of non-Hispanic Whites. Asian, Black, and Hispanic/Latinx persons are 1.3, 4.7, and 4.6 times more likely to be hospitalized with COVID-19, respectively, than non-Hispanic Whites. Others have found similarly stark disparities in COVID-19 death rates: 2.3 times higher for Black people, 1.5 for Hispanic and Latinx, and 1.75 for indigenous people. Black and Hispanic/Latinx people are dying at the rate of White people a decade or older.

(citations omitted); Craig Evan Pollack et al., *When Storms Collide: Evictions, COVID-19, and Health Equity*, HEALTH AFFAIRS (Aug. 4, 2020).

> Evictions during COVID-19 are also likely to perpetuate and worsen racial health inequities at both individual and community levels. Structural racism drives inequities in labor and housing markets, resulting in increased risk of both COVID-19 and eviction for Black and Latinx individuals. Black and Latinx individuals are also more likely to live in communities characterized by high levels of eviction with important spillover effects on health.

already disproportionate community risks posed by the coronavirus for the most vulnerable members of American society, and, in so doing, infringe on the community's general right to health more broadly.[265]

Given the continuing prevalence of evictions nationwide and the deleterious impacts of housing instability on the spread of COVID-19,[266] a public nuisance theory may prove utile to renters seeking to challenge their displacement during the pandemic. While there is no explicitly established public right to housing in the United States and courts have continually rejected efforts to assert one,[267] the object of nuisance law—both public and private—may be interpreted as seeking to functionally establish one by protecting the right of those in possession of land or property to "use and enjoy" it absent unreasonable disturbance.[268] Moreover, in potential COVID-era eviction cases proceeding on a public nuisance theory, plaintiffs may credibly allege that, by exacerbating their risk of exposure or infection, the infringed public right in question is the right to health, which enjoys significant precedent in nuisance law.[269]

Given the rapid transmissibility of COVID-19, evictions that lead to transience, homelessness, additional residents in group or transitional housing, and overcrowding in private units augment

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[perma.cc/LM38-WZPT].

265. *See* Yung Chun, *Housing Inequality Gets Worse as the COVID-19 Pandemic is Prolonged*, THE BROOKINGS INSTITUTION (Dec. 18, 2020) (discussing how disproportionate housing hardships and evictions across racial groups widened during the pandemic) [perma.cc/4P8T-VLR3].

266. *See* Benfer et al., *supra* note 242 ("Eviction is likely to increase COVID-19 infection rates because it results in overcrowded living environments, doubling up, transiency, limited access to healthcare, and a decreased ability to comply with pandemic mitigation strategies").

267. *See* NAT'L. LAW. CTR. ON HOMELESS & POVERTY, *Right to Housing Fact Sheet in the United States* (Jan. 26, 2021) (discussing the United States history of the Right to public housing even though the United States has not ratified the International Covenant on Economic, Social and Cultural Rights which recognizes the human right to adequate housing as a government obligation) [http://perma.cc/4CYH-SFRL].

268. *See* Emily Bergeron, *Adequate Housing is a Human Right*, AM. BAR ASSN. (Oct. 1, 2019) [http://perma.cc/WKT3-AMHG].

269. *See, e.g.*, Prosser, *supra* note 183, at 1000 (citing examples of cases where the nuisance was an infringement on public health).

existing collective vulnerability to the virus and concurrent environmental health risks for the communities in which they occur.[270] Evicted tenants can allege the special, individualized harm required to sustain an action for public nuisance, but the class of plaintiffs may be expanded to include the friends and family members whose households expand to accommodate recently evicted tenants.[271] Consequently, actions challenging pandemic-era evictions satisfy the three traditional characteristics of the public nuisance cause of action,[272] and the theory may therefore conceivably be employed as a bulwark against ongoing tenant displacement in the midst of the public health crisis.

A federal eviction order issued by the CDC, along with concurrent state-level moratoria, helped limit the relevance of public nuisance as a tool to challenge future evictions during the coronavirus pandemic. On September 4, 2020, the CDC issued an agency order implementing a nationwide moratorium on evictions.[273] On December 27, then-President Trump signed the Consolidated Appropriations Act, 2021, which extended the CDC's order through January 31, 2021.[274] Passed under § 361 of the Public Health Service Act,[275] the CDC order recognized that "eviction moratoria . . . can be an effective public health measure

270. *See* Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality,* AMERICAN JOURNAL OF EPIDEMIOLOGY 1, 5 (2020) (citing *Assessing Risk Factors for Severe COVID-19 Illness,* CENTER FOR DISEASE CONTROL AND PREVENTION, (last updated Nov. 30, 2020) [http://perma.cc/E2ZE-QWML]) [perma.cc/9EL6-6GDX].

271. UNITED STATES CENSUS BUREAU, AMERICAN HOUSING SURVEY, *2017 National – Delinquent Payments and Notices – All Occupied Units* (2017) (stating that, of the estimated 44,000 households surveyed, approximately 10,500 indicated that they would move in with family in the event of eviction, while an additional approximate 3,500 indicated they would move in with friends) (hereinafter AMERICAN HOUSING SURVEY) [https://perma.cc/TZ2L-HZR8].

272. *See* Abrams & Washington, *supra* note 189, at 364–65 (explaining the three ways in which a public nuisance differs from a private nuisance: interference with a public right, an affected interest shared by the general public, and a government plaintiff with the authority to represent the community as. whole).

273. CTRS. FOR DISEASE CONTROL AND PREVENTION, TEMPORARY HALT IN RESIDENTIAL EVICTIONS TO PREVENT THE FURTHER SPREAD OF COVID-19 (2020) [hereinafter CDC EVICTION ORDER] [https://perma.cc/S8RC-F62F].

274. Consolidated Appropriations Act, 2021, Pub. L. No. 116–260 (2020).

275. 42 U.S.C. § 264 (2020).

utilized to prevent the spread of communicable disease."[276] The order enjoined landlords from evicting certain classes of "covered person[s]," although it did not include concurrent relief from rent or mortgage obligations or protections from landlord-levied fees or penalties as a result of failure to make requisite payments.[277]

To be designated a "covered person" by the CDC order, a renter or homeowner must (1) have used "best efforts" to obtain housing-related government assistance; (2) meet certain income criteria;[278] (3) be unable to make their full payment as a result of "substantial loss of household income, loss of compensable hours of work or wages, a layoff, or extraordinary out-of-pocket medical expenses;" (4) be using "best efforts" to make timely payments as close to the full amount due as feasible given other expenses; and (5) be rendered homeless or forced to move into a "new congregate or shared living setting" by the eviction due to lack of other available housing options.[279] The CDC order therefore attempts to address the particular economic hardship and circumstantial uncertainties caused by the pandemic and temporarily sever their connection to housing instability for those experiencing the highest levels of coronavirus-related disruption as a result of employment loss or unanticipated medical expenses.[280] Covered persons must execute and submit to their landlord, or other person with a right to evict them, a declaration under penalty of perjury indicating that they fulfill the enumerated criteria.[281]

Although the CDC order represented a substantial amelioration of the COVID-19 eviction crisis, which placed an estimated thirty to forty million Americans at risk of housing

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276. CDC EVICTION ORDER, *supra* note 273.

277. *See id.* (This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation. . . Nothing in this Order precludes the charging or collecting of fees . . .").

278. *See id.* (detailing the requirement that "covered person[s]" either: (1) expected to earn no more than $99,000 during the 2020 calendar year; (2) had no reportable income in the year 2019; or (3) received a stimulus payment under the Coronavirus Aid, Relief, and Economic Security (CARES) Act).

279. *Id.*

280. *See generally id.* (explaining the purpose of the order).

281. *See id.* (outlining the declaration to be submitted by covered persons).

displacement before the federal relief was enacted,[282] the eviction moratorium it imposes nonetheless contained significant vulnerabilities that may lead to evictions amenable to challenge on public nuisance grounds. Specifically, the order provided that covered persons "may . . . still be evicted for reasons other than not paying rent or making a housing payment."[283] The order recognized that "many evicted renters move into close quarters in shared housing"[284] either with friends, relatives, or in transitional housing settings and shelters.[285] As a result, evicted tenants unprotected by the moratoria would augment the household sizes of the friends and family with whom they would be forced to reside or swell the numbers of residents in group living environments.[286]

Because intra-household incidence of COVID-19 transmission is approximately six times higher than the infection rate of other close contacts, any eviction in the pandemic era conceivably exacerbates the risk of exposure, both for evicted tenants and those with whom they may subsequently share living space.[287] The CDC order explicitly preserved landlords' ability to evict for reasons unrelated to nonpayment of rent (including, ironically, "threatening the health or safety of other residents"),[288] thereby

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282. *See* Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30–40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020) (explaining that, absent government intervention, 30–40 million people were at risk of eviction) [https://perma.cc/AP7V-VZ5B].

283. CDC EVICTION ORDER, *supra* note 273.

284. *Id.*

285. *See id.* (citing that 32% of renters reported they would move in with friends or family upon eviction and that "[r]esidents [in shelters or other shared housing arrangements] often gather closely or use shared equipment, such as kitchen appliances, laundry facilities, stairwells, and elevators").

286. *See* AMERICAN HOUSING SURVEY, *supra* note 271.

287. *See* Qifang Bi et al., *Epidemiology and Transmission of COVID-19 in 391 Cases and 1286 of Their Close Contacts in Shenzen, China: A Retrospective Cohort Study*, 20 LANCET 911, 911 (2020) (explaining that household contacts are at a higher risk of infection than other close contacts) [https://perma.cc/LGD4-URQD].

288. *See* CDC EVICTION ORDER, *supra* note 273.

> Nothing in this Order precludes evictions based on a tenant, lessee, or resident: (1) Engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar

entrenching perverse incentives for landlords to justify evictions for nonpayment on other grounds, and facilitating the continuation of a practice that infringes upon the broader community's right to public health or safety and imposes special harms upon the evicted tenant(s).

After two extensions, the Alabama Association of Realtors challenged the CDC eviction moratorium in federal court.[289] While the U.S. District Court for the District of Columbia concurred with plaintiffs that the order was unlawful, the court issued a stay of its order pending appeal.[290] The D.C. Circuit concurred, and, despite finding that the CDC "exceeded its existing statutory authority by issuing a nationwide eviction moratorium," the Supreme Court declined to vacate the stay, based in part upon the CDC's representation that it would not further extend the moratorium past its then-scheduled expiration.[291] Four justices noted that they would vacate the stay, and, while Justice Kavanaugh concurred that the order was likely unlawful, declined to vacate it because it was set to expire only a few days later.

When the CDC reimposed the moratorium upon its expiration, however, the Supreme Court ultimately vacated the stay, in a *per curiam* opinion released on August 26th, 2021.[292] Endorsing the district court's "comprehensive opinion" documenting the CDC's lack of statutory authority to impose the eviction moratorium, the Court wrote that "the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-

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> regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).

289. *See* Ala Ass'n of Realtors v. U.S. Dep't. of Health, 20-cv-3377 (D.D.C. Aug. 13, 2021).

290. *Id*. at *1.

291. *See* Ala. Ass'n. of Realtors v. Dep't. of Health & Hum. Servs., 141 S.Ct. 2320, 2320–21 (2021) (Mem.) (Kavanaugh, J. concurring); D. Alicia Hickock & Nicholas Nelson, *Supreme Court Decides* Alabama Assn' of Realtors v. Deparment of Health and Human Services, JDSUPRA (Aug. 31, 2021), [https://perma.cc/A42R-JXPV].

292. Ala. Ass'n. of Realtors v. Dep't. of Health & Hum. Servs., 541 U.S. __ (2021).

old statute that authorizes it to implement measures like fumigation and pest extermination."[293] The Court further found that "[i]t strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts."[294]

The Court's rejection of the national eviction moratorium significantly diminished comprehensive protections for renters across the country.[295] As of this writing, eviction bans are still in place in only a handful of states, with many of those protections scheduled to expire early in 2022.[296] Despite these few ongoing moratoria, however, evictions have continued throughout the pandemic[297] and are likely to increase in volume as remaining state level bans expire.[298] The housing context may therefore be a timely and relevant proving ground to challenge evictions on a public nuisance theory.

B. Elections: Voter Suppression as Public Nuisance

In addition to its potential utilization in the housing context, public nuisance claims may also conceivably be used to challenge state and local regulations that impose obstacles to absentee or early voting in elections held during the COVID-19 era. To comply with social distancing guidelines and minimize risks associated with the coronavirus, many states relaxed absentee voting restrictions during the 2020 election cycle in an attempt to minimize Election Day crowds at polling places.[299] In a number of

293. *Id.* at 1.
294. *Id.* at 1–2.
295. *See, e.g.*, Sophie Kasakove, *For Tenants Nationwide, a Scramble to Pay Months of Rent or Face Eviction*, N.Y. TIMES (Nov. 7, 2021), [https://perma.cc/A679-UV9N].
296. *See* Ann O'Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO, [https://perma.cc/GS5W-BBHX].
297. *See Eviction Lab*, *supra* note 259.
298. *See, e.g.* Caitlin Dewey, *'Deluge' of eviction cases expected as moratorium nears its end*, BUFFALO NEWS (Dec. 31, 2021), (discussing potential ramifications of the expiration of New York State's eviction moratorium, scheduled to expire on January 15, 2022 as of this writing) [https://perma.cc/MYP3-FDC6].
299. *See* Wendy R. Weiser et al., *Mail Voting: What Has Changed in 2020*, BRENNAN CTR. FOR JUST. (Sep. 17, 2020) (explaining the various efforts that were

primarily conservative states,[300] however, obstacles to absentee voting persisted despite the unprecedented circumstances of the pandemic, operating to render ballot access significantly more difficult for vulnerable populations hesitant to risk COVID-19 exposure by voting in person.[301]

The public health concerns provoked by the pandemic did prompt numerous U.S. states to expand access to mail-in ballots and improve the ease of absentee voting.[302] Among other reforms, a federal court ordered South Carolina to temporarily suspend its requirement that absentee ballots be signed by a witness,[303] while Missouri waived its mail-in ballot notarization requirement for individuals who tested positive or were at high-risk for COVID-19 (though the state supreme court upheld the requirement for all other voters).[304] Additionally, many states still requiring an excuse or justification to vote absentee allowed fear of COVID-19 transmission to satisfy this requirement,[305] and over half sent

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taken to expand access to absentee or mail voting during the COVID-19 pandemic) [https://perma.cc/JBF3-87C8].

300. *See In State After State, Voters Face Barriers to the Ballot Box*, PEW (Oct. 15, 2020) [hereinafter *Barriers to the Ballot Box*] (detailing the steps that each state took regarding voting processes) [https://perma.cc/2SHT-5WDA].

301. *See* Alison Leal Parker, *What Democracy Looks Like, Protecting Voting Rights in the US During the Covid-19 Pandemic*, HUM. RTS. WATCH (Sept. 22, 2020) (describing decisions made by election officials in various states and comparing those decisions against international human rights standards) [https://perma.cc/YG92-MZ4F].

302. *See Barriers to the Ballot Box*, *supra* note 300 (listing each state along with measures taken to expand or restrict access to voting during the COVID-19 pandemic).

303. *See* Sara Coello, *SC Absentee Voters Won't Need a Witness Due to Coronavirus, Court Rules*, POST & COURIER (May 25, 2020) (last updated Sep. 14, 2020) (explaining that COVID-19 health concerns were sufficient to warrant elimination of the witness requirement for absentee ballots) [https://perma.cc/V6PE-7QC3].

304. *See* Rachel Lippmann, *Missouri Supreme Court Upholds Notary Requirement For Most Mail-In Ballots*, ST. LOUIS PUB. RADIO (Oct. 9, 2020, 5:15 PM) (illustrating that while the notary requirement was waived for high-risk and infected individuals, ". . .a fear of contracting COVID-19 was not the same as being unable to vote because of illness.") [https://perma.cc/82UZ-XLFT].

305. *See* Weiser et al., *supra* note 299, at nn.10–12 (confirming that 13 states modified rules to allow mail-in ballots for the primary and runoff elections and 11 states modified rules to allow absentee or mail-in ballots for the general election).

mail-in ballots or ballot applications to the homes of many or all eligible voters during primary and runoff elections.[306]

Despite these expansions of the franchise, however, other states refused to improve the accessibility of absentee voting to accommodate high-risk populations.[307] Five states[308] refused to accept risk of COVID-19 transmission or exposure as an excuse sufficient to obtain a mail-in ballot.[309] Wyoming did not waive its requirement that voter registration forms be notarized,[310] Mississippi maintained a similar official witnessing obligation for absentee ballots,[311] and, although Oklahoma waived its requirement that absentee ballots be notarized, voters opting to submit non-notarized ballots were instead obligated to include a copy of their identification, forcing many Oklahomans to expose themselves to COVID-19 in pursuit of a copy machine, rather than a notary public.[312]

Compounding these obstacles to safe, responsible voting during the 2020 election cycle were the polling place closures that occurred nationwide[313] during in-person voting for the 2020

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306. *See id.* at n.28 (explaining that 28 states sent absentee or ballot request forms to registered voters).

307. *See id.* at n.3 (explaining that some states did not take action to modify voting procedures during the COVID-19 pandemic).

308. *See id.* at n.8 (listing Arkansas, Louisiana, Mississippi, Tennessee, and Texas).

309. *See id.* (clarifying that, in certain states, voters who feared spreading or contracting COVID-19 were unable to utilize mail-in voting).

310. *See* Sarah Kleiner, *Voter Registration Isn't Available Online in Wyoming, Creating Hurdles for Residents*, CTR. FOR PUB. INTEGRITY (Oct. 16, 2020) (pointing out that Wyoming is the only state to require notarized voter registration forms) [https://perma.cc/AK68-GNUU].

311. *See* Jamie Smith Hopkins, *In Mississippi, Vote-by-Mail Rules Make It Hard to Actually Vote by Mail*, CTR. FOR PUB. INTEGRITY (Oct. 15, 2020) (explaining that Mississippi not only required absentee ballots to have a witness signature, but also requires a notary signature to obtain an absentee ballot) [https://perma.cc/AK68-GNUU].

312. *See* Liz Essley Whyte, *You'll Either Need a Copy Machine or a Notary to Vote by Mail in Oklahoma*, CTR. FOR PUB. INTEGRITY (Oct. 22, 2020) (detailing that voters must submit a copy of their identification if they do not notarize their ballots) [https://perma.cc/KGQ6-RH2D].

313. *See, e.g.*, Kate Payne et al., *Polling Places Are Closing Due to COVID-19. It Could Tip Races in 1 Swing State*, NPR (Oct. 30, 2020) (stating that *Iowa* lost 261 polling places between the 2016 and 2020 general elections) [https://perma.cc/44YG-9WPE]; Kevin Morris, *Did Consolidating Polling Places*

primaries and general election. Although the CDC issued guidance recommending states increase the number of available locations to facilitate social distancing,[314] polling stations across the country closed their doors, many due to a shortage of poll workers, more than half of whom, nationally, are over sixty-one and therefore considered high-risk for COVID-19.[315] Many of these closures sought to effect the voter suppression goals of state lawmakers – in the 2020 Wisconsin primary, for example, the drastic constriction of available polling stations in the largely-Democratic city of Milwaukee depressed turnout by 8.6 percent, despite the availability of mail-in voting.[316]

When aggregated with the above-described limits on absentee voting, consolidating polling places resulted in long lines,[317] a result that was inconvenient or obstructive in prior years but potentially lethal in the midst of the coronavirus pandemic given the increase, prolonged close contact with strangers such conditions necessitate. The imposition of limitations that forced many voters denied absentee ballots into close personal contact may therefore be susceptible to challenge on a public nuisance theory. While the requisite harm occasioned by these tactics may no longer be timely in the context of the 2020 election, public

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in Milwaukee Depress Turnout?, BRENNAN CTR. FOR JUST. (June 24, 2020) (detailing that in Wisconsin's 2020 primary election, the number of available polling locations dropped from 182 in the 2016 general election to five, while the number of Wisconsin polling locations statewide declined by eleven percent) [https://perma.cc/4Y4C-6LPA]; Lisa Autry, *Coronavirus Pandemic Reshapes Kentucky's 2020 Primary*, HOPTOWN CHRON. (June 20, 2020) (stating that the majority of Kentucky counties had only one polling location during the state's 2020 primary, regardless of size) [https://perma.cc/6MGT-U82B].

314. *See Polling Locations and Voters*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Jan. 4, 2021) (recommending ways to safely vote on election day) [https://perma.cc/LXC5-UJPA].

315. *See* Carrie Levine, *Elderly Workers Run Elections. But COVID-19 Will Keep Many Home*, CTR. FOR PUB. INTEGRITY (May 13, 2020) ("More than half the country's poll workers in 2016 were 61 or older.") [https://perma.cc/PX2T-2TM6].

316. *See* Morris, *supra* note 313.

317. *See, e.g.*, Lia Eustachewich, *2020 Election: Long Lines Reported Across America as Voters Head to the Polls*, NY POST (Nov. 3, 2020, 10:37 AM) (describing the long voting lines despite the pandemic) [https://perma.cc/N5NS-TYXG]; Stephen Fowler, *'It Was Very Chaotic:' Long Lines, Voting Machine Issues Plague Georgia Primary*, NPR (June 9, 2020, 12:01 PM) (describing the long lines and longer wait times during the Georgia primary)[https://perma.cc/LY2B-TF6P].

nuisance claims may be brought to challenge similar actions as the nation looks ahead to the 2022 midterms amidst rising COVID-19 cases and vaccine-resistant variants.

As in the eviction setting, actions challenging restrictive voting measures on public nuisance grounds may allege infringement upon the community right to health, either by forcing voters to risk COVID-19 infection by denying them the right to vote by mail, or by limiting the possibility of compliance with social distancing and other safety guidelines by reducing available polling locations, thereby forcing large number of voters into proximity with one another if they wish to vote in person. Potential plaintiffs in such actions include high-risk voters unable to use fear of COVID-19 exposure or similar grounds as an excuse to obtain an absentee ballot and vulnerable voters forced to stand in long lines as a result of polling station consolidation.

Attempted application of the doctrine in the electoral context is likely to face at least two significant obstacles, however. With the 2020 election cycle concluded, injunctions are no longer a viable remedy for ex-post suits challenging conduct that impacted voting during the recent presidential contest (although they remain highly relevant in the context of the 2022 midterms), and courts are unlikely to grant relief on a public nuisance theory without a concrete demonstration that plaintiffs have suffered the requisite special harm—in this instance, arguably, a documented COVID-19 positive with a demonstrable attribution to an in-person voting experience.[318]

Nonetheless, while the 2020 presidential election cycle has concluded, state and local elections continued throughout 2021. As the United States prepares to begin its third year until COVID-19 restrictions, the nation faces the prospect of holding the 2022 midterm elections, or at least their primaries, under equivalent or similar public health conditions and social distancing orders in many jurisdictions. With state legislatures already preparing to pass additional voter suppression measures in advance of the

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318. *See, e.g.*, Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 761 (2001).

upcoming elections,[319] voting rights advocates must identify and pursue creative litigation strategies to protect ballot access and safe pandemic-era voting. Public nuisance may therefore be a means to preemptively challenge barriers to absentee or early voting, polling station consolidation, and other measures that exacerbate restrictions of the franchise by appending grievous health risks to existing obstacles to vote.

V. Conclusion

Although contemporary developments in public nuisance law are frequently neglected by legal scholars, the cause of action has arguably never been more relevant, and COVID-19 presents an unrivaled opportunity to test the boundaries of its recent expansion as a public tort. Like the dangers posed by tobacco, opioids, or climate change, unprecedented, grave, and extremely urgent threats posed by the coronavirus to the public health and welfare manifest in ways the state police power is ill-equipped or simply unable to confront.[320] However, the uncertainty, economic instability, and societal strife occasioned by the virus have generated a perverse incentive structure whereby those who disregard its concomitant precautionary guidelines may take advantage of opportunities to maximize their economic interests or advance discriminatory, anti-democratic political agendas.[321]

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319. A report by NYU's Brennan Center for Justice reports that, as of December 21, 2021, 13 bills seeking to restrict access to the ballot box have been pre-filed in four states, with 88 similarly restrictive measures carrying over from the 2021 session in nine states. The bills encompass a range of electoral measures seeking to obstruct voting access, including criminal penalties for anyone assisting voters (including those with disabilities) in sending out mail-in ballots, eliminating COVID-19 as grounds to obtain a mail-in ballot, and imposing stricter voter ID regulations for both in-person and absentee voting. *See Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Dec. 21, 2021), [https://perma.cc/FKA3-4UTE].

320. *See* Amanda Holpuch, *'We Can't Go Back to Normal': The People Left Behind in America's Covid Recovery*, GUARDIAN (Aug. 14, 2021, 2:00 AM) (illustrating the health and economic inequities highlighted by the COVID-19 pandemic and noting that a structural change would manage them) [https://perma.cc/ZQ3F-CS5S].

321. *See* Douglas MacMillan, Peter Whoriskey & Jonathan O'Connell, *America's Biggest Companies Are Flourishing During the Pandemic and Putting Thousands of People Out of Work*, WASH. POST (Dec. 16, 2020, 5:28 PM)

Moreover, workplace violations of federal and state COVID-19 safety requirements, pandemic-era evictions, and conduct that obstructs the right to vote by exacerbating the associated risk of virus exposure disproportionately impact socioeconomically disadvantaged Americans, who tend to have lower levels of health insurance coverage and potentially higher rates of COVID-19 mortality.[322] The pandemic has compounded both the environmental hardships and adverse health outcomes faced by low-income Americans, forcing them to determine, on a near-daily basis, whether to risk their lives to maintain employment, housing, and access to the vote.

When confronting an antagonist as dangerous and novel as COVID-19, invocation of innovative legal theories is a vital component of the effort to ensure all Americans can simultaneously preserve their livelihoods and exercise their basic rights while minimizing their risk of exposure and infection. The success of the mass public nuisance tort in the public health space may be ambiguous, but the combined impact of private actors who thwart compliance with public health guidance and exacerbate threats of COVID-19 transmission and the inaction of the state and federal agencies tasked with enforcing public safety regulations renders the judiciary a critical and unrivaled safeguard against conduct that increases risks associated with the virus.

While the plaintiffs in cases like *Smithfield* have suffered the special harm requisite to grant standing in public nuisance actions, decisions that grant injunctive relief on a public nuisance theory do not only protect workers at meatpacking plants from

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(explaining that, while 45 of the 50 largest American companies made a profit during the first six months of the COVID-19 pandemic, 27 of the 50 also laid off a collective 100,000 employees) [https://perma.cc/5SQL-YXVU].

322. *See, e.g.*, Munira Z. Gunja & Sara R. Collins, *Who Are the Remaining Uninsured, and Why Do They Lack Coverage?*, COMMONWEALTH FUND (Aug. 28, 2019) (stating that roughly 30.4 million people were uninsured in 2018 and, of those people, 58% of them had incomes below 200% of the federal poverty level) [https://perma.cc/23CC-9LS4]; J.A. Patel et al., *Poverty, Inequality, and COVID-19: The Forgotten Vulnerable*, 183 PUB. HEALTH 110 (2020) (explaining that people who are socially and economically deprived are more vulnerable based due to housing, employment, and health factors) [https://perma.cc/F7ZP-XBAC]; Basit Mahmood, *Poverty Linked to Higher Risk of COVID-19 Death*, NEWSWEEK (Dec. 15, 2020, 5:09 AM) (explaining that individuals in the most deprived places suffered more than those in less deprived locations) [https://perma.cc/SL7U-YF6H].

dangerous employment conditions or low-income renters facing pandemic-related economic instability from eviction. Rather, such decisions play a vital role in preserving the public health. Public nuisance actions for noncompliance with COVID-19 health and safety guidance offer a uniquely efficacious avenue to identify and excise conduct that threatens the collective welfare, with consequences that may be physically devastating, financially ruinous, or worse. Such suits therefore personify both the utility of public nuisance as a tool of "corrective justice"[323] and its concomitant potential to enhance the public good.

323. *See generally* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 49 (1979).