IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

MARIA YOLANDA CHAVEZ, individually and on behalf of minor LC and Estate of JOSE ANGEL CHAVEZ, ANGEL CHAVEZ and JOHNNY CHAVEZ,	§	CIVIL ACTION NO.
	§	9:20-cv-00134-RC-KFG
Plaintiffs,	§	
v.	§	
TYSON FOODS, INC.,	§	
Defendant.	§	

DEFENDANT TYSON FOODS' MOTION TO DISMISS

Oral Argument Requested

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Tyson Foods, Inc. ("Tyson Foods" or "Tyson") respectfully moves under Rule 12(b)(6) to dismiss the complaint. The complaint fails to plausibly allege that Tyson Foods caused the alleged injury, and even if the allegations were otherwise sufficient, the alleged cause of action would be preempted by federal law.

INTRODUCTION AND STATEMENT OF ISSUES

The United States is facing a global pandemic whose size and scope are without modern precedent. Millions have been infected with the novel coronavirus, and more than 150,000 Americans regretfully have died of complications related to COVID-19. The human impact from the pandemic is immeasurable.

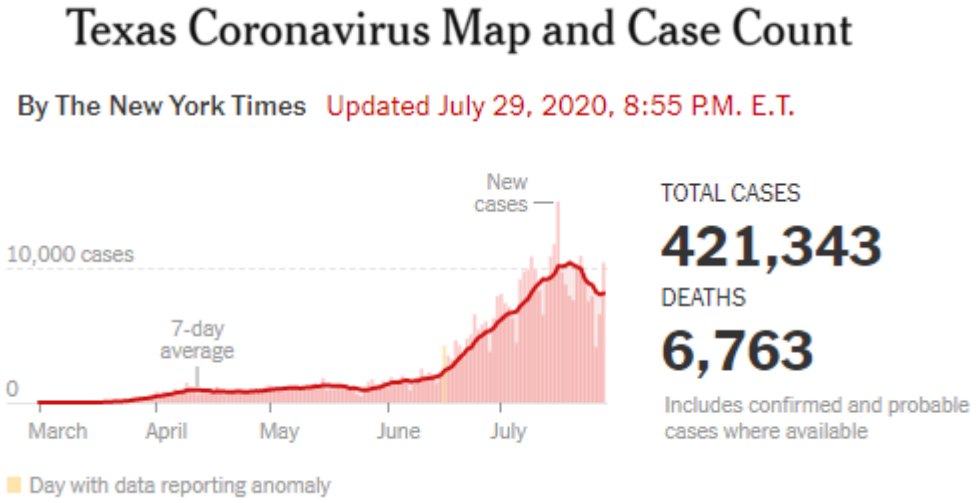
Relatives of Jose Angel Chavez allege that he worked at a Tyson Foods poultry processing facility in Shelby County, Texas; that Mr. Chavez contracted COVID-19 "at work"; and that he thereafter died on April 17, 2020.

That Mr. Chavez is one of the many thousands of Americans who have died of complications related to COVID-19 is a tragedy. But the complaint brought by his estate fails to adequately plead a plausible claim against Tyson. The complaint pleads no theory of liability or causation other than conclusory allegations that Tyson Foods was negligent for allegedly failing to shut down or provide sufficient protective measures, and the reader is left to speculate that the absence of those measures caused Mr. Chavez to contract COVID-19. The complaint does not allege any particular incident of exposure occasioned by alleged negligence, nor does it attempt to rule out other potential causes of infection. The complaint simply argues that Mr. Chavez got infected because he worked at Tyson. Without more, this case must be dismissed.

Tyson Foods has aggressively responded to the pandemic, working from the very beginning of COVID-19's appearance in the United States to meet or exceed federal workplace guidelines, and investing in protective measures for its team

members. Tyson's efforts to protect its workers while continuing to supply Americans with food in the face of the pandemic continue to this day.

It is neither just nor plausible to simply assume that Mr. Chavez must have contracted COVID-19 from his work merely because he worked at Tyson Foods, much less as the result of Tyson's alleged actions. If the sparse, conclusory allegations here were sufficient, virtually any employer, retail business, restaurant, school, or host could be sued for failing to take sufficient measures to protect anyone who worked or visited from infection. The number of suits in Texas alone would be staggering:



Federal pleading standards require plausible allegations of causation, and attention to plausibility is crucial here or the scope of litigation will become its own epidemic. Those standards are especially important when applied to allegations of liability directed to a federally-regulated food processing facility that has been designated as critical and essential to the nation in order to continue to provide much-needed food during this national emergency. The complaint should be dismissed for the following reasons.

First, plausibility. Plaintiffs must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). It is not sufficient to allege simply

that Mr. Chavez became infected because he worked at Tyson Foods. Infection, transmission, and spread of COVID-19 has been maddeningly confusing to the world's experts on infectious disease, and the recent surge of cases throughout local communities across the nation underscores that causation is still not well understood. To satisfy *Iqbal* and *Twombly*, Plaintiffs must allege "sufficient factual matter" to "plausibly" conclude (1) that Mr. Chavez was infected at Tyson Foods; and (2) the infection resulted from Tyson Foods' negligence rather than from some other cause. The complaint here falls short on both counts: Plaintiffs have not offered *any* well-pleaded factual allegations on causation—plausible or otherwise—that Mr. Chavez was infected at Tyson, much less due to Tyson's negligence. To hold otherwise would open the floodgates to potentially thousands of speculative claims.

Second, express federal preemption. Even if it could be plausibly alleged that Mr. Chavez was infected at work because of Tyson's negligence—ignoring that Tyson, in fact, provided the protective measures the complaint alleges were lacking—the complaint must also allege how its theory of liability could fit within the express preemption of the federal Poultry Products Inspection Act ("PPIA"). The PPIA authorizes the Department of Agriculture to regulate infectious diseases at poultry-processing facilities, and it has done so through a comprehensive regulatory regime that expressly prohibits states from adopting different or additional requirements. Yet the complaint makes no attempt to explain how Plaintiffs' proposed state-law standards of care are consistent with the PPIA. A sufficient complaint must do so. *See, e.g.*, *Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 280 (E.D.N.Y. 2009) (dismissing complaint for failure to plead allegations sufficient to avoid preemption under FDA regulations), *cited with approval in Bass v. Stryker Corp.*, 669 F.3d 501, 509 (5th Cir. 2012).

Finally, the federal designations and Presidential orders. The complaint also takes no account of the national emergency declared by the President of the

United States, the designation of Tyson and similar companies as critical infrastructure, and the subsequent reinforcing directives by the President. Any claim that could survive a motion to dismiss must take account of these federal actions, taken in the midst of a national emergency.

Mr. Chavez's death is a tragedy, but legal claims arising from the COVID-19 pandemic must satisfy well-established pleading standards. The complaint does not satisfy those standards, nor does it allege how Plaintiffs' claims are not preempted by federal law. For those reasons, the complaint should be dismissed.

BACKGROUND

A. The Complaint

Plaintiffs[1] filed this lawsuit in the District Court of Shelby County, Texas. [Dkt. 3] Tyson timely removed on the basis of diversity, [Dkt. 1], and Plaintiffs thereafter filed a First Amended Petition, seeking damages for Tyson's alleged negligence in connection with the death of Jose Chavez, a Tyson employee, "from complications caused by the coronavirus." [Dkt. 7 ¶ 5] Plaintiffs allege that Mr. Chavez contracted the virus "at work," but allege no additional facts as to how or why that occurred or ruling out contraction from another community source.

Instead, Plaintiffs vaguely assert that Tyson Foods "failed to protect its employees from the known dangers associated with the coronavirus," and allege in particular that Tyson Foods "failed to perform the following":

a. Maintain a safe distance between employees;
b. Provide personal protection equipment such as masks, gloves and/or face guards;
c. Require employees to not come to work who are sick;

[1] The Plaintiffs are Maria Yolanda Chavez, who was married to Mr. Chavez; his children Johnny Chavez, Angel Chavez, and Lizbeth Chavez; and his estate. [*See* Dkt. 7 ¶¶ 12-13]

d. Take the temperature of employees upon entering the building; and/or

e. Shutdown the plant for a limited time.

[Dkt. 7 ¶ 6; *see also id.* ¶ 10] Again, Plaintiffs do not allege any incident or mechanism tied to Tyson's alleged negligence that led to Mr. Chavez's illness, nor do they account for or attempt to rule out other sources of infection.

B. Federal regulation of meat and poultry facilities

Tyson Foods is the largest food company in the U.S., providing more than 20% of the nation's supply of meat and poultry—enough to feed 60 million Americans every day. Tyson employs more than 120,000 workers at processing facilities. Mr. Chavez worked at a poultry facility in Center, Texas. [Dkt. 7 ¶ 4]

Tyson's poultry facility is subject to federal regulation under the Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451 *et seq.*; *see also* FSIS Meat, Poultry and Egg Product Inspection Directory at 532 (June 8, 2020) (identifying the Center facility as establishment number P325).[2] The PPIA requires that all poultry-processing facilities satisfy "sanitary practices [that are] required by regulations promulgated by the Secretary [of Agriculture]." 21 U.S.C. § 456(a). The Department's Food Safety and Inspection Service ("FSIS") promulgates the relevant regulations. *See* 9 C.F.R. §§ 300.2(a), (b)(2). That rulemaking authority expressly preempts any attempt by the states to impose "additional" or "different" requirements. *See* 21 U.S.C. § 467e.

FSIS has issued rigorous, detailed regulations to govern poultry processors' facilities and operations. *See* 9 C.F.R. §§ 300.1 *et seq.* The Center facility is

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[2] https://www.fsis.usda.gov/wps/wcm/connect/bf8d9766-9767-4e0c-a9f1-efea0b2a42bc/MPI_Directory_Establishment_Name.pdf?MOD=AJPERES. This Court may properly take judicial notice of information contained on a governmental agency's webpage. *See Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 518-19 (5th Cir. 2015); *see also Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 490 n.12 (2013) (same); *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) ("This court and numerous others routinely take judicial notice of information contained on state and federal government websites.").

subject to hundreds of FSIS regulations—enough to fill more than 600 pages of the Code of Federal Regulations—that address poultry-processing facilities and operations in minute detail, from the physical structure of the facility, to the details of the processing operation, to the many inspection requirements such facilities must satisfy, among many other subjects. And, as discussed in more detail in Section II below, those regulations also address the use of personal protective equipment and the control of infectious disease.

C. Designation of critical infrastructure

The federal government has designated food producers as part of the country's critical infrastructure, underscoring the essential nature of meat and poultry processers by ordering those facilities to remain open during the pandemic.

Declarations of national emergency. On March 13, 2020, the President declared that "the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020." Exec. Office of Pres., *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337, 15,337 (Mar. 18, 2020). Similar emergency declarations were issued for Texas and Shelby County. U.S. Dep't of Homeland Sec., *Texas; Major Disaster and Related Determinations*, 85 Fed. Reg. 20,699, 20,699-700 (Apr. 14, 2020); State of Tex., *Governor Abbott Declares State of Disaster in Texas Due to COVID-19*, Mar. 13, 2020 (same);[3] Cty. of Shelby, Tex., *County Judge Declaration of Local State of Disaster Due to Public Health Emergency*, Mar. 20, 2020.[4]

Critical infrastructure industries must remain open. Soon after, on March 16, the President issued *Coronavirus Guidelines for America*, which

[3] https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19.

[4] http://www.co.shelby.tx.us/upload/page/2731/docs/Declaration%20of%20Local%20State%20of%20Disaster%20Due%20to%20Public%20Health%20Emergency.pdf.

emphasized that, unlike workers in some industries, employees in "critical infrastructure industr[ies]" have a "special responsibility to maintain [their] normal work schedule." Exec. Office of Pres., *The President's Coronavirus Guidelines for America* ("Coronavirus Guidelines for America"), Mar. 16, 2020, at 2.[5]

Those "critical infrastructure industries" include companies like Tyson Foods that are "necessary for the manufacturing of . . . food and agriculture" and are recognized as key parts of the critical infrastructure of the United States by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA"). CISA, U.S. Dep't of Homeland Sec., *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response*, May 19, 2020, at 17.[6] This is because "food and agriculture" workers, including those employed by "slaughter and processing facilities for livestock, poultry, and seafood," are "essential" to maintaining food-supply chains and ensuring the continued health and safety of all Americans. *Id.* at 8.

The Governor of Texas issued a similar order on March 31 recognizing food-processing facilities within the state as essential infrastructure. *See* State of Tex., *Governor Abbott Issues Executive Order Implementing Essential Services and Activities Protocols* ("Essential Services Protocols"), Mar. 31, 2020, at 3 (adopting CISA definition and declaring that "all critical infrastructure should be allowed to remain operational").[7]

Those directives were further embodied in an April 28, 2020 executive order issued by the President under the Defense Production Act of 1950 ("DPA"), 50

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[5] https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

[6] https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf.

[7] https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-implementing-essential-services-and-activities-protocols.

U.S.C. §§ 4501 *et seq*. *See* Exec. Office of Pres., *Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* ("Food Supply Chain Resources"), 85 Fed. Reg. 26,313, 26,313 (Apr. 28, 2020). In the *Food Supply Chain Resources* order, the President directed the Secretary of Agriculture "to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." *Id.* The President specifically underscored that "[i]t is important that processors of beef, pork, and poultry . . . in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans." *Id.*

The same day, the Secretary of Agriculture announced that his Department would "work with meat processing to affirm they will operate in accordance with the CDC and OSHA guidance" and "ensure that facilities implementing this guidance to keep employees safe can continue operating." U.S. Dep't of Agric., *USDA to Implement President Trump's Executive Order on Meat and Poultry Processors*, Apr. 28, 2020.[8] Reiterating that "[o]ur nation's meat and poultry processing facilities play an integral role in the continuity of our food supply chain," the Secretary explained that the CDC and OSHA guidance would "help ensure employee safety to reopen plants or to continue to operate those still open" and "ensure that these plants are allowed to operate to produce the meat protein that Americans need." *Id.*

The Department of Agriculture has continued to emphasize that "critical infrastructure meatpacking facilities across the United States" must continue operating and that the federal guidance for such facilities from the CDC and OSHA would "ensure a safe and stable supply of protein is available for American consumers all while keeping employees safe." U.S. Dep't of Agric., *America's*

[8] https://www.usda.gov/media/press-releases/2020/04/28/usda-implement-president-trumps-executive-order-meat-and-poultry.

Meatpacking Facilities Practicing Safe Reopening to Ensure a Stable Food Supply, May 8, 2020, at 1;[9] *see also, e.g.*, U.S. Dep't of Agric., *USDA, FDA Strengthen U.S. Food Supply Chain Protections During COVID-19 Pandemic* ("Food Supply Chain Protections"), May 19, 2020, at 2 ("All of the food and agriculture sector . . . are considered critical infrastructure, and it is vital for the public health that they continue to operate in accordance with guidelines from the CDC and OSHA regarding worker health and safety.").[10]

Continued operations are governed by federal standards. Following the President's direction, the Secretary of Agriculture has ordered "meat and poultry processing plants" to apply the CDC and OSHA guidance "specific to the meat and poultry processing industry to implement practices and protocols for safeguarding the health of the workers and the community while staying operational or resuming operations," Letter from Sonny Perdue, Sec'y of Agric., to Stakeholders ("Stakeholders Letter") (May 5, 2020);[11] *see also* Letter from Sonny Perdue, Sec'y of Agric., to Governors at 1 (May 5, 2020) ("Governors Letter") (same);[12] U.S. Dep't of Agric., *Secretary Perdue Issues Letters on Meat Packing Expectations*, May 6, 2020 (same).[13]

The Secretary directed plants without a clear timetable for near-term reopening to "resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." Governors Letter at 1. He further required any "[m]eat and poultry processing plants" that were "contemplating reductions of operations," or that had "recently closed . . . without a clear

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9 https://www.usda.gov/media/press-releases/2020/05/08/americas-meatpacking-facilities-practicing-safe-reopening-ensure.

10 https://www.usda.gov/media/press-releases/2020/05/19/usda-fda-strengthen-us-food-supply-chain-protections-during-covid.

11 https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf.

12 https://www.usda.gov/sites/default/files/documents/governor-letters-covid.pdf.

13 https://www.usda.gov/media/press-releases/2020/05/06/secretary-perdue-issues-letters-meat-packing-expectations.

timetable for near term resumption of operations," to "submit written documentation of their operations and health and safety protocol developed based on the CDC/OSHA guidance to USDA." *See* Stakeholders Letter. And he emphasized that "further action . . . is under consideration and will be taken if necessary" to ensure continued operations. *Id.*; *see also Food Supply Chain Protections* at 2 ("further action under the DPA may be taken, should it be needed, to ensure the continuity of our food supply").

The CDC and OSHA have continually updated their guidance as new information about the disease comes to light. *See Meat and Poultry Processing Workers and Employers Meat & Poultry Processors: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)* (updated July 9, 2020).[14] But the message from the President and the Department of Agriculture has remained clear and unchanged from the beginning: Meat and poultry processors should continue to operate subject to applicable federal guidance from the CDC and OSHA.

ARGUMENT

I. The complaint's allegations of causation are far too conclusory and speculative under *Iqbal* and *Twombly*.

Complaints must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "To be plausible, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) (quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

[14] https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html.

Applying those standards is "a two-step inquiry." *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019). *First*, the Court must "identify the complaint's well-pleaded factual content." *Id.* Significantly, the "assumption of truth" applicable to well-pleaded facts does not apply to "pleadings that . . . are no more than conclusions." *Iqbal*, 556 U.S. at 679. As this Court has frequently noted:

> The Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. *Iqbal*, [556 U.S. at 678] ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [and] [l]egal conclusions are not entitled to the assumption of truth.").

Lloyd v. Jones, No. 9:18-CV-211, 2019 WL 4786874, at *6 (E.D. Tex. Sept. 10, 2019) (Giblin, J.) (citations omitted).

Second, having identified the "well-pleaded factual allegations," *Iqbal*, 556 U.S. at 679, the Court "ask[s] whether th[ose] remaining allegations 'are sufficient to nudge the [plaintiff's] claim across the "plausibility" threshold,'" *Waller*, 922 F.3d at 599 (quoting *Doe v. Robertson*, 751 F.3d 383, 390 (5th Cir. 2014)). This is a "context-specific task" and "requires the reviewing court to draw on its judicial experience and common sense," *Iqbal*, 556 U.S. at 679, in determining whether the court "can reasonably infer from the complaint's well-pleaded factual content 'more than the mere possibility of [liability].'" *Waller*, 922 F.3d at 599 (quoting *Iqbal*, 556 U.S. 679).

This standard is not met when the alleged harm could be explained by an alternative theory that the complaint does not plead "sufficient factual matter" to rebut. *Iqbal*, 556 U.S. at 678; *see also*, *e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 998-99 (9th Cir. 2014) (dismissal required where allegations are "consistent with both [the plaintiff's] theory of liability and [an] innocent alternative"). Simply put, more than a "sheer possibility" of liability is required to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678.

Plaintiffs fail to properly allege causation. Plaintiffs allege that Mr. Chavez "died from complications caused by the [COVID-19] coronavirus." [Dkt. 7 ¶ 5] But to establish causation, Plaintiffs must plead—and ultimately prove—that Mr. Chavez contracted COVID-19 *from his work* rather than elsewhere, and then, that he contracted COVID-19 *due to Tyson's alleged negligence* rather than some other cause. *See* Texas Wrongful Death Act, Tex. Civ. Prac. & Rem. Code § 71.002(b) (1985) (imposing liability only "if the injury was *caused by* the person's . . . wrongful act) (emphasis added).

Here, the complaint has only a two-word allegation that Mr. Chavez contracted the coronavirus "at work." [Dkt. 7 ¶ 7][15] That is precisely the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation" that a court cannot accept as true in ruling on a motion to dismiss. *Iqbal*, 556 U.S. at 678. As the Supreme Court emphasized in *Iqbal*, a plaintiff cannot satisfy his pleading burden simply by "tender[ing] 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Nor are allegations based on "mere speculation" enough, as this Court has recognized. *See, e.g.*, *Price v. Wallace*, Civil Action No. 1:13cv677, 2016 WL 5339700, at *5 (E.D. Tex. Aug. 23, 2016) (Giblin, J.) (dismissing complaint that "failed to show . . . causation" or allege facts from which it "may plausibly be inferred" where allegations were based on "no more than mere speculation on the part of plaintiff"); *see also Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (causation "cannot be established by mere conjecture, guess, or speculation"); *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980) (same).

[15] The only other reference to causation—that Tyson "proximately caused" Mr. Chavez to contract COVID-19 (Dkt. 7 ¶ 11)—is not a factual allegation but a legal conclusion, and thus could not be credited even if it were non-conclusory.

Moreover, *Iqbal* requires a court to use its "judicial experience and common sense," 556 U.S. at 679, and thus Plaintiffs' bare allegation that Mr. Chavez contracted COVID-19 "at work" must be considered against the backdrop of knowledge—all of which is properly subject to judicial notice—that the SARS-CoV-2 coronavirus (which causes COVID-19) is highly contagious, has proven extremely difficult to trace, and has been transmitted widely through community spread across Texas and the nation.[16] For example:

- COVID-19 has been rapidly spreading among the population of Texas and the United States since mid-March through "community spread"—defined by the CDC to mean "people have been infected with the virus in an area, including some *who are not sure how or where they became infected*."[17]
- COVID-19 is a highly contagious disease. As of July 29th, more than 4.2 million cases have been confirmed nationwide. Texas has reported nearly 400,000 cases.[18]

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[16] As noted, this Court may properly take judicial notice of information contained on a governmental agency's webpage. *See supra* at 5 n.2 (citing authorities). This Court also may "take judicial notice of agency records and reports." *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981). Consistent with these rules, courts across the country—including the Fifth Circuit—have taken judicial notice of basic information about COVID-19 and the SARS-CoV-2 coronavirus. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020) (relying on COVID-19 statistics and information from the CDC); *Valentine v. Collier*, 960 F.3d 707, 708 n.1 (5th Cir. 2020) ("Indeed, this court has taken judicial notice of statistics concerning COVID-19 already.") (citing *Abbott*, 954 F.3d at 779).

[17] CDC, *Frequently Asked Questions: Coronavirus Disease 2019 (COVID-19)* (last updated July 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/faq.html (emphasis added); *see also* CDC, *Coronavirus Disease 2019 (COVID-19): Cases in the U.S.* ("Cases in the U.S.") (updated July 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html; Tex. Dep't of State Health Servs., *Texas Coronavirus Disease 2019 (COVID-19)* ("Texas COVID-19 Data") (updated July 28, 2020), https://dshs.texas.gov/coronavirus/additionaldata.aspx.

[18] *See* CDC, *U.S. COVID-19 Cases and Deaths by State* (updated July 29, 2020), https://www.cdc.gov/covid-data-tracker/#cases; *see also* Tex. Dep't of State Health Servs., *Texas Case Counts COVID-19* (updated July 29, 2020), https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83.

- The CDC estimates that, for every reported case of COVID-19 in the United States, there are ten more unreported cases—in part because millions of Americans have been unknowingly infected.[19]
- The number of confirmed COVID-19 cases in the U.S. and Texas continue to increase despite stay-at-home orders, mandatory-mask orders, size limitations on gatherings, etc.[20]
- The cause of coronavirus is notoriously difficult to trace because the time between exposure and symptom onset can average a week or more, and because of the large percentage of infected people who are asymptomatic.[21]
- Even for infected individuals who at some point experience symptoms, the incubation period—the time between when someone is exposed and when they have symptoms—varies on average between 2-14 days; thus, someone can be infected for up to 14 days before realizing they are sick.[22]

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[19] *See* CDC, *Transcript for the CDC Telebriefing Update on COVID-19* (June 25, 2020), https://www.cdc.gov/media/releases/2020/t0625-COVID-19-update.html.

[20] *See* CDC, *Trends in Number of COVID-19 Cases in the US Reported to CDC, by State/Territory* (updated July 29, 2020), https://www.cdc.gov/covid-data-tracker/#trends.

[21] *See The Implications of Silent Transmission for the Control of COVID-19 Outbreaks* ("Silent Transmission"), Proceedings of the National Academy of Science of the United States of America (updated July 28, 2020), https://www.pnas.org/content/early/2020/07/02/2008373117; CDC, *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* ("Clinical Guidance for Management of Patients")(updated June 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

[22] *See* CDC, *Coronavirus Disease 2019 (COVID-19): Clinical Questions about COVID-19 Questions and Answers* updated July 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission; *see also Clinical Guidance for Management of Patients*.

- Other infected individuals never realize they were sick.[23] Pre-symptomatic and asymptomatic persons are believed to be a significant cause of the pandemic's propagation.[24]
- While the CDC, OSHA, and others have identified steps that can be taken to decrease risk of the spread of infectious diseases such as COVID-19, such as using personal protective equipment ("PPE"), social distancing, and increased handwashing,[25] the effectiveness of such steps is admittedly limited.[26] As a result, even among healthcare providers and others who are using PPE and other protective measures to minimize exposure, the disease is widespread.

In short, in a society in which the coronavirus was—and still is—spreading widely throughout the community, with no feasible means of contact tracing, the conclusory allegation that an individual contracted the virus "at work" is not a well-pleaded fact and, in the absence of any further detail or support, is not entitled to an "assumption of truth." *Iqbal*, 556 U.S. at 678-79; *see also Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992) ("[C]onclusory allegations . . . are not admitted as true.").

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[23] *See* CDC, *Coronavirus Disease 2019 (COVID-19): COVID-19 Pandemic Planning Scenarios* (updated July 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html.

[24] *See Silent Transmission*.

[25] *See, e.g.*, CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others* (updated Apr. 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[26] For example, while recommended, OSHA has determined that PPE is the "least-effective mechanism for protecting employees from workplace transmission of COVID-19." OSHA COVID-19 Guidance at 14; *see also* https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Infection-Control.

In analogous cases, courts routinely dismiss complaints for failure to properly allege causation where "judicial experience and common sense" indicate that causation cannot plausibly be assumed. *See, e.g.*:

- **Pneumonia**—*Peterson v. Silverado Senior Living, Inc.*, 790 F. App'x 614, 617 (5th Cir. 2019) (affirming dismissal where, "[e]ven accepting the alleged facts as true, the Peterson's second amended complaint is insufficient to support a plausible inference that Silverado's actions were more likely than not the cause of Ruby's death" because, *e.g.*, "we are being asked first to agree that, of all possible causes, Seroquel caused Ruby's pneumonia");
- **Abdominal pain and liver problems**—*Cary v. Hickenlooper*, 673 F. App'x 870, 875 (10th Cir. 2016) ("But he makes only conclusory assertions that these conditions are the result of exposure to toxic water at SCF. He fails to present any specific facts to show that his exposure to minimally elevated levels of uranium or other toxins at SCF has caused or exacerbated these problems.");
- **Abdominal infections**—*Rincon v. Covidien*, No. 16-CV-10033 (JMF), 2017 WL 2242969, at *1 (S.D.N.Y. May 22, 2017) ("Ignoring conclusory assertions and the recitation of legal standards, however, Rincon fails to allege any facts that plausibly establish . . . causation. . . . Nothing in the Amended Complaint even endeavors to explain why the [defendant's alleged negligence] is a more likely, let alone proximate, cause of Rincon's alleged harms. In the final analysis, therefore, Rincon offers only the sort of '[t]hreadbare recital[] of the elements of a cause of action, supported by mere conclusory statements,' that the Supreme Court has made clear is insufficient to survive a motion to dismiss." (quoting *Iqbal*, 556 U.S. at 678)).

Similar to these cases, no inference of causation or wrongdoing is warranted from the allegation that Mr. Chavez became ill with COVID-19. While sudden unexpected death by any means is always tragic, not all tragic deaths raise an inference of wrongdoing. The fact that Mr. Chavez contracted a highly contagious disease does not raise any suggestion that Tyson, or anyone else, was negligent. Indeed, there are many alternative sources of infection, none of which are ruled out in the complaint. Mr. Chavez could have contracted COVID-19 outside of work in his community or residence, from an asymptomatic or pre-symptomatic person, from a symptomatic person wearing a mask, or from a virus-contaminated fomite—all potential sources unrelated to Tyson's alleged actions or inaction.[27]

The complaint fails under established standards, and it is especially important to adhere to those standards in the midst of a pandemic. The number of individuals infected and who have tragically died is staggering. If conclusory allegations of causation are permitted, virtually any employer, business, school, church, or host could be brought into protracted litigation based on nothing but speculation. Texas alone has seen more than 400,000 confirmed cases and more than 6,000 reported fatalities as of this filing. For this reason, to 'state a claim to relief that is plausible on its face,' more than conclusory allegations are required. *Iqbal*, 556 U.S. at 678.

[27] The Governor of Texas did not issue an order mandating that individuals shelter in place, and only in July issued an order directing that face masks be worn in some circumstances. https://gov.texas.gov/uploads/files/press/Governor-Abbott-Proactive-Response.pdf; https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf

II. The complaint takes no account of the broad, express preemption of the Poultry Products Inspection Act.

Even if the complaint's allegations were not conclusory, they would still fail to state a claim because they take no account of the federal preemption that applies to federally regulated poultry facilities.

The doctrine of federal preemption—based on the Supremacy Clause of the U.S. Constitution—exists "to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Amalgamated Ass'n of St.,Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 285-86 (1971). Here, Plaintiffs' claims are subject to broad federal preemption:

- The PPIA expressly preempts all state-law requirements that are "in addition to, or different than," those set through federal regulation under the PPIA.
- The operation of poultry-processing facilities—including the "control" of "infectious diseases"—is expressly and exclusively regulated by the PPIA.
- Therefore, state requirements regarding the control of infectious disease in poultry processing facilities—including the common-law duty asserted by the Plaintiffs in this case—are preempted.

Plaintiffs' state-law tort claims cannot go forward without taking account of the preemptive scope of the PPIA, which the current complaint does not do.

A. The PPIA expressly preempts state-law requirements that differ from or add to the PPIA regulations.

The PPIA expressly preempts any attempt by the states to impose regulations that are "in addition to, or different than" those prescribed under the Act:

> Requirements within the scope of this [Act] with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this [Act] may not be imposed by any State . . . .

21 U.S.C. § 467e. This provision is "substantially identical" to the preemption provision in the Federal Meat Inspection Act ("FMIA"), which the Supreme Court has emphasized "sweeps widely" and "prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459-60 (2012); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 997 (2d Cir. 1985) (PPIA and FMIA preemption provisions substantially identical) (citing 21 U.S.C. § 678).

Significantly, whether a requirement falls "within the scope of" the PPIA—and is therefore preempted—does not depend on whether the FSIS has adopted or rejected the requirement. That is "irrelevant," the Supreme Court has noted, "because the FMIA's preemption clause covers not just conflicting, but also different or additional state requirements." *Harris*, 565 U.S. at 461.

Instead, the question is whether FSIS *could have adopted* the requirement: If the FSIS "could issue regulations under the FMIA . . . mandating" the requirement at issue, then the State's requirement is preempted. *Id.* at 466.

Here, as discussed below, there is no question that FSIS "could issue regulations" regarding the use of personal protective equipment and the prevention of infectious disease within poultry processing facilities, because it has *already done so*. 9 C.F.R. § 416.5. For that reason, state requirements regarding those topics are preempted. 21 U.S.C. § 467e.

B. The PPIA regulates the control of "infectious disease" at poultry-processing facilities.

As detailed above, FSIS has promulgated hundreds of pages of federal regulations that "regulate the processing and distribution" of poultry products. Those regulations include directives regarding infectious disease, including:

- A "disease control" regulation that requires that "[a]ny person who has or appears to have an infectious disease . . . must

be excluded from any operations which could result in product adulteration and the creation of insanitary conditions until the condition is corrected." 9 C.F.R. § 416.5(c).

- Regulations regarding the required use of personal protective equipment such as "[a]prons, frocks, and other outer clothing worn by persons who handle product," as well as detailed sanitation and hygiene regulations for things such as "hand rinsing facilities must have a continuous flow of water" for onsite poultry inspectors. *Id.* §§ 415.5(b), 381.36(c).
- Regulations requiring facilities to "monitor and document any work-related conditions of establishment workers," to "encourage early reporting of symptoms of injuries and illnesses," to provide "[n]otification to employees of the nature and early symptoms of occupational illnesses and injuries"; to post "the FSIS/OSHA poster encouraging reporting and describing reportable signs and symptoms"; and to "[m]onitor[] on a regular and routine basis . . . injury and illness logs, as well as nurse or medical office logs, workers' compensation data, and any other injury or illness information available." 9 C.F.R. § 381.45.

In short, the Court need not speculate whether FSIS "could issue" regulations regarding infectious disease and the use of personal protective equipment. Those regulations already exist.

C. Plaintiffs cannot impose state-law "requirements" that differ from or add to the PPIA's regulations.

Plaintiffs allege that Tyson was negligent in failing to implement various measures, such as "maintain[ing] a safe distance between employees," "provid[ing] personal protection equipment," "requir[ing] employees to not come to work who are sick," "tak[ing] the temperature of employees upon entering the

building," and "shut[ting] down the plant for a limited time." [Dkt. 7 ¶ 10.a-e; *see also id.* ¶ 6.a-e] Tyson emphatically disputes those allegations; it implemented extensive protective measures from the outset.

But for purposes of this motion, the crucial, dispositive point is this: each of the alleged failings alleged by Plaintiffs is *different from* and *in addition to* the requirements that FSIS has imposed regarding employee hygiene and infectious disease—and therefore each is preempted.

This Court's decision in *Scott v. Pfizer Inc.* is strikingly on point. 249 F.R.D. 248 (E.D. Tex. 2008) (Heartfield, J., adopting report and recommendations of Giblin, J.). In *Scott*, the Court concluded that claims against a bone cement manufacturer were preempted by the Medical Devices Amendments ("MDA") to the Food, Drug, and Cosmetic Act. 249 F.R.D. at 255. That holding was based in large part on two factors, both of which are also present in this case.

First, the Court noted that the MDA—like the PPIA in this case—contains an express preemption clause that precludes the states from imposing any requirement for a medical device "which is different from, or in addition to, any requirement applicable under" the MDA. *Id.* at 253. *Compare* PPIA, 21 U.S.C. § 467e (states may not impose requirements "which are in addition to, or different than those made under" the Act).

Second, like the PPIA, the Court emphasized that existing federal regulations under the MDA were "rigorous," requiring manufacturers to submit "detailed information regarding the safety and efficacy of their devices" that is required by the FDA "before granting marketing approval." *Id.* at 253. *Compare* PPIA regulations, 9 C.F.R. §§ 300 *et seq.* (comprising hundreds of pages of regulations setting forth detailed sanitation requirements and inspection protocols that must be met prior to release of product to market).

The Court correctly reasoned that the plaintiff's state tort claims in *Scott* sought to impose requirements that were "different from, or in addition to" federal regulatory requirements:

> If [the plaintiff] were to prevail on his claims as pled—including [negligence and other tort claims] all based upon the Simplex bone cement—it would result in the imposition of a state requirement which is "different from, or in addition to" the requirements and regulations already imposed by the FDA.

Scott, 249 F.R.D. at 255. For that reason, the Court concluded that under "Fifth Circuit and Supreme Court precedent, the Plaintiff's state law claims are subject to preemption under the statutory preemption language of . . . the MDA." *Id.*

The same analysis and result apply here: Plaintiffs' claims would impose requirements that are "in addition to, or different than" the requirements of the PPIA, in direct contradiction to the express preemption requirements of that Act, and are, therefore, preempted.

And as *Scott* itself makes clear, preemption applies even where a claim seeks to impose different and additional requirements through a tort claim rather than by state statute. The Supreme Court has confirmed that because "common-law liability is 'premised on the existence of a legal duty,'" "a tort judgment therefore establishes that the defendant has violated a state-law obligation" and is a "requirement" for purposes of preemption. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992)); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445 (2005) (same).

For this reason, "common-law duties" imposed by tort law are just as much "requirements" as a state's statutory law. And because the requirements urged

by Plaintiffs here fall within the PPIA's scope and differ from the FSIS's regulations, Plaintiffs' claims are expressly preempted by the PPIA.[28]

* * *

The complaint as drafted takes no account of the PPIA, but a complaint sufficient to survive Rule 12(b)(6) must do so. There is preemption in this area, and any statement of a state-law standard of care cannot conflict with or add to the standards of the PPIA. *See Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 280 (E.D.N.Y. 2009) (dismissing complaint that failed to include allegations to avoid preemption under FDA regulations); *Delaney v. Stryker Orthopaedics*, Civil Action No. 08-03210 (DMC), 2009 WL 564243, at *4 (D.N.J. Mar. 5, 2009) (similar).

III. The complaint takes no account of the federal designation of Tyson facilities as critical infrastructure.

The complaint also fails to take account of the designation of food companies as critical infrastructure by the President of the United States, as well as repeated federal directives that Tyson and other meat and poultry processors continue operations to the extent possible as a critical source of food during the pandemic.

Just days after declaring a national emergency, the President explained that employees in "critical infrastructure industr[ies]," including food and agricultural workers, have a "special responsibility" to continue providing food during the national emergency, *Coronavirus Guidelines for America* at 2, a directive he reinforced through the *Food Supply Chain Resources* executive order under the DPA:

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[28] A state-law requirement that "endeavors to regulate the same thing, at the same time, in the same place—except by imposing different requirements" than the federal requirements—is expressly preempted. *See Harris*, 565 U.S. at 468; *Osburn v. Anchor Labs., Inc.*, 825 F.2d 908, 911 (5th Cir. 1987) ("State common law as well as state statutes and regulations can be preempted by federal law."); *see also*, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000) (same).

> It is important that processors of beef, pork, and poultry ("meat and poultry") in the food supply chain **continue operating and fulfilling orders** to ensure a continued supply of protein for Americans.
>
> * * *
>
> [C]losures **threaten the continued functioning** of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency.
>
> * * *
>
> [T]he Secretary of Agriculture shall take all appropriate action . . . to **ensure that meat and poultry processors continue operations** consistent with the guidance for their operations jointly issued by the CDC and OSHA.

85 Fed. Reg. at 26,313 (emphases added).

The President's determinations preempt state law. Congress gave the President discretion to determine the "manner," "conditions," and "extent" of critical infrastructure industries' operations during a national emergency. 50 U.S.C. § 4511(a). Moreover, the DPA "accord[s] the Executive Branch great flexibility" in "seek[ing] compliance with its priorities policies," ranging from "informal means of persuasion" (such as the *Coronavirus Guidelines for America*) to more "formal or technical acts" (such as the *Food Supply Chain Resources* executive order). *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 993-94 (5th Cir. 1976). Once the President has made those determinations, however, "state law is naturally preempted to the extent of any conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

Significantly, "[s]uch a conflict occurs" whenever state law would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The President's determinations here—concerning the ongoing operations of critical infrastructure during a

national emergency—"represent[] a national response to a specific problem of 'truly national' concern." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1078-79 (D.C. Cir. 2003) (quoting *United States v. Morrison*, 529 U.S. 598, 617-18 (2000)). Subjecting those national determinations to "concurrent jurisdiction" by "local law" would "fully . . . defeat the congressional goals underlying" the DPA. *Lockridge*, 403 U.S. at 286. Indeed, "[t]o interpret . . . the exercise of the [President's] power" as permitting "the continuance of a state power limiting and controlling the national authority" would simply "deny its existence." *N. Pac. Ry. Co. v. State of N. Dakota ex rel. Langer*, 250 U.S. 135, 150 (1919); *see also Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981) (rejecting argument whose "practical effect" would "allow individual claimants throughout the country to minimize or wholly eliminate" the President's statutory authority); *Dakota Cent. Tel. Co. v. State of S. Dakota ex rel. Payne*, 250 U.S. 163, 185, 186 (1919) (state lacked "power . . . to 'incumber' the authority of the United States" by "limit[ing] the grant of authority" to the President). For that reason, the President's determination of priorities preempts states' attempts to impose their own determinations.

The Supreme Court's decision in *Crosby* illustrates this point. *Crosby* invalidated a Massachusetts law prohibiting its agencies from transacting with companies that also conducted business with Burma "owing to [the state law's] threat of frustrating federal statutory objectives." 530 U.S. at 366. But Congress had clearly given the President "flexible and effective authority over economic sanctions against Burma." *Id.* at 374. Because Congress had "gone to such lengths to empower the President," a state law that would "blunt the consequences of discretionary Presidential action" under the statute would impermissibly "compromise his effectiveness" and thus is preempted. *Id.* at 376.

Similarly here, there is no way that states can impose their own determinations regarding the "manner," "conditions," and "extent" of meat and poultry processors' operations during COVID-19 without compromising the President's ability to make those determinations for the entire nation. 50 U.S.C. § 4511(a). The President confirmed as much in the *Food Supply Chain Resources* order. In directing meat and poultry processors to "continue operating and fulfilling orders" to the extent possible, the President emphasized that the nation's interest in the "continued supply of protein for Americans" had been jeopardized by "recent actions in some States" that "have led to the complete closure of some large processing facilities." 85 Fed. Reg. at 26,313. He explained that additional executive action to enforce his priorities determinations—in the form of an executive order—was warranted because "[s]uch closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency." *Id.* As this explanation makes clear, the President's national priorities determinations under the DPA must preempt states' abilities to make their own determinations in order for that statutory authority to have any meaning.

Preemption applies to tort claims. The preemption doctrine applies not only to state statutes and regulations, but also to common law tort claims. *See, e.g.*, *Geier*, 529 U.S. at 874-86 (state-law tort preempted by federal safety standard); *see also San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 246-47 (1959) (Congress's "concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered," and "[s]uch regulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

Plaintiffs seek to impose liability based on Tyson's alleged failure to operate consistently with state-law standards governing its operations. [Dkt. 7 ¶¶ 6, 10] But application of those standards to a meat or poultry processor's operations

during COVID-19 would "stan[d] as an obstacle to the accomplishment and execution of [Congress's] full purposes and objectives" in the same way as a state statute or regulation imposing the standards: They would impermissibly undermine the President's statutory authority to adopt national priorities determinations. *Hines*, 312 U.S. at 67. Plaintiffs' claims are therefore preempted.

CONCLUSION

The coronavirus pandemic has presented unprecedented challenges to governments, businesses, and organizations around the world. Tyson Foods has responded to those challenges, working to meet or exceed federal workplace guidelines to mitigate risks and protect worker safety. Despite the tragedy of Mr. Chavez's death, pleading standards require that a lawsuit allege facts that "state a claim to relief that is plausible on its face." The complaint does not satisfy that standard. Tyson respectfully requests the complaint be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on July 30, 2020, a true and correct copy of the foregoing document was served upon all counsel of record via the Court's CM/ECF system as follows:

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