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12 SUPERIOR COURT OF CALIFORNIA  
13 FOR THE COUNTY OF LOS ANGELES

14 WESTERN GROWERS ASSOCIATION, *et al.*,

15 Plaintiffs,

16 v.

17 CALIFORNIA OCCUPATIONAL SAFETY  
18 AND HEALTH STANDARDS BOARD, *et*  
19 *al.*,

20 Defendants.

CASE NO. 20STCP04292

**EXHIBIT 1: BRIEF OF AMICI CURIAE  
SERVICE EMPLOYEES  
INTERNATIONAL UNION, SERVICE  
EMPLOYEES INTERNATIONAL UNION  
CALIFORNIA STATE COUNCIL, UNITED  
FARM WORKERS OF AMERICA,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, UNITED FOOD AND  
COMMERCIAL WORKERS UNION  
WESTERN STATES COUNCIL,  
CALIFORNIA TEACHERS ASSOCIATION,  
CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION, CALIFORNIA  
FEDERATION OF TEACHERS,  
TRANSPORT WORKERS UNION OF  
AMERICA, CALIFORNIA FEDERATION  
OF INTERPRETERS LOCAL 39000 TNG-  
CWA, SMART-TRANSPORTATION  
DIVISION CALIFORNIA STATE  
LEGISLATIVE BOARD, AND  
CALIFORNIA LABOR FEDERATION IN  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

Hearing Date: February 4, 2021

Hearing Judge: Hon. Mary H. Strobel

Time: 1:30 p.m.

Place: Dept. 82

Date Action

Filed: December 31, 2020

Trial Date: None Set

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**TABLE OF AUTHORITIES**

**Cases**

*Barenfeld v. City of Los Angeles*  
(1984) 162 Cal.App.3d 1035 ..... 16

*Basank v. Decker*  
(S.D.N.Y. 2020) 449 F.Supp.3d 205 ..... 16

*Berkeley Hillside Preservation v. City of Berkeley*  
(2015) 60 Cal.4th 1086..... 17

*Castillo v. Barr*  
(C.D. Cal. 2020) 449 F.Supp.3d 915 ..... 16

*Desmond v. Cnty. of Contra Costa*  
(1993) 21 Cal.App.4th 330..... 17

*Doe v. Regents of Univ. of Cal.*  
(2016) 5 Cal.App.5th 1055 ..... 17

*Doe v. Wilson*  
(1997) 57 Cal.App.4th 296..... 17

*Gray v. Cty. of Madera*  
(2008) 167 Cal.App.4th 1099..... 18

*Industrial Union Dept., AFL-CIO v. Am. Petroleum Institute*  
(1980) 448 U.S. 607 ..... 18

*Int’l Union, United Auto, Aerospace & Agr. Implement Workers of Am., UAW v. Pendergrass*  
(D.C. Cir. 1989) 878 F.2d 389..... 21

*Lopez v. Heckler*  
(9th Cir. 1983) 713 F.2d 1432 ..... 17

*N. Am. ’s Building Trades Unions v. Occupational Safety & Health Admin.*  
(D.C. Cir. 2017) 878 F.3d 271..... 21

*Perez v. Wolf*  
(N.D. Cal. 2020) 445 F.Supp.3d 275..... 16

*Schenley Affiliated Brands Corp. v. Kirby*  
(1971) 21 Cal.App.3d 177 ..... 17

*Society of Plastics Industry, Inc. v. OSHA*  
(2d Cir. 1975) 509 F.2d 1301 ..... 18

1 *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*  
(1987) 188 Cal.App.3d 872 ..... 17

2 *United Farm Workers et al. v. Foster Poultry Farms, et al.*  
3 No. 20CV-03605 (filed Dec. 17, 2020, Superior Ct. Cty. of Merced) ..... 12

4 *United Steelworkers of Am. v. Marshall*  
5 (D.C. Cir. 1980) 647 F.2d 1189..... 20, 21

6 **Statutes**

7 Lab. Code §6300 ..... 21

8 **Regulations**

9 8 C.C.R. §5193 ..... 21

10 8 C.C.R. §5199 ..... 21

11 8 C.C.R. §5202 ..... 21

12 8 C.C.R. §5217 ..... 21

13 **Other Authorities**

14 AP, *Farmworkers at Central California Pistachio Farm Strike After Dozens Test*  
15 *Positive for the Coronavirus* (June 25, 2020), <https://tinyurl.com/y4afytds> ..... 14

16 *California Coronavirus Map and Case Count*, N.Y. TIMES,  
17 <https://tinyurl.com/y5qr6jc5> ..... 12

18 Cal. Dep’t of Pub. Health, *COVID-19 and Reopening In-Person Instruction*  
19 *Framework & Public Health Guidance for K-12 Schools in California, 2020-*  
20 *2021 School Year*, <https://tinyurl.com/yxjrvh6x> ..... 8

21 CDC, *People with Certain Medical Conditions*, <https://tinyurl.com/y8bffjbh> ..... 14

22 Chabria, Anita, *This County Knew Coronavirus Could Ravage its Farmworkers.*  
23 *Why Didn’t Officials Stop It?*, L.A. TIMES (July 25, 2020),  
24 <https://tinyurl.com/yyq9y8cn>..... 10, 15

25 Cox, John, *State Issues \$77,500 in Fines in Aftermath of Outbreak at Primex Nut*  
26 *Plant in Wasco*, BAKERSFIELD.COM (Jan. 4 2021),  
27 <https://tinyurl.com/y3ybpmmg> ..... 13

28 Duffy, Mike, *Latino Communities See Disproportionate Rise In Coronavirus*  
*Infections*, ABC NEWS (June 25, 2020), <https://tinyurl.com/y4d7dbum>..... 15

1 Espinoza, Martin, *About 350 Sonoma County Farmworkers Have Contracted the*  
2 *Coronavirus*, Sonoma Index-Tribune (Sept. 25, 2020),  
<https://tinyurl.com/y559oxeb>..... 14

3 Federalpay.org, *PPP Loan Recipient List By State*, <https://tinyurl.com/y6a4nx6j> ..... 16

4 Fernandez, Elizabeth and Nicholas Weiler, UCSF, *Initial Results of Mission District*  
5 *COVID-19 Testing Announced* (May 4, 2020), <https://tinyurl.com/y5cugyco> ..... 8

6 Fry, Hannah, *Coronavirus Spreading Rapidly in L.A. Workplaces that Ignore Safety*  
7 *Rules*, L.A. TIMES (July 16, 2020), <https://tinyurl.com/y387dsre> ..... 8, 15

8 Grover, Joel, *More Than 800 SoCal Supermarket Workers Test Positive for COVID-*  
9 *19*, NBC4NEWS (Dec. 30, 2020), <https://tinyurl.com/yacpcq2d> ..... 8

10 Hawkins, Devan, *Differential Occupational Risk for COVID-19 and Other Infection*  
11 *Exposure According to Race or Ethnicity*, AM. J. INDUS. MED. (2020),  
12 <https://tinyurl.com/y2d29d7m> ..... 7

13 Hodgson, Mike, *Latinos, Farmworkers, 20-year-olds Have Most COVID-19 Cases*  
14 *in Santa Barbara County*, SANTA MARIA TIMES (Oct. 13, 2020),  
15 <https://tinyurl.com/y3f2wanf> ..... 15

16 Hoggard, Corin, *California’s Hispanic Community Is Being Hit The Hardest By*  
17 *COVID-19, Data Shows*, ABC 7 NEWS (May 8, 2020),  
18 <https://tinyurl.com/y3hppetj> ..... 8, 10, 15

19 Jervis, Rick, et al., *Worked To Death: Latino Farmworkers Have Long Been Denied*  
20 *Basic Rights. COVID-19 Showed How Deadly Racism Could Be*, USA TODAY  
21 (Oct. 24, 2020), <https://tinyurl.com/y6dtwjgh>..... 14, 15, 20

22 Klearman, Sarah, *Napa County’s Hispanic Residents Disproportionately Impacted*  
23 *by Pandemic*, NAPA VALLEY REGISTER (Dec. 4, 2020),  
24 <https://tinyurl.com/y52dgtap> ..... 15

25 LA Cty. Dep’t of Pub. Health, *Public Health Orders Continued Closure of Garment*  
26 *Manufacturer After More than 300 COVID-19 Employee Cases and Four*  
27 *COVID-19 Employee Deaths* (July 10, 2020), <https://tinyurl.com/y6re77at> ..... 15

28 LA Cty. Dep’t of Pub. Health, *Workplace Outbreaks Surge as Public Health Ramps*  
*Up COVID-19 Vaccination Capacity 281 New Deaths and 14,564 New*  
*Confirmed Cases of COVID-19 in Los Angeles County* (Jan. 13, 2021),  
<https://tinyurl.com/y6h4so3z> ..... 7

LA Cty. Dep’t of Pub. Health, *COVID-19 Locations & Demographics*,  
<https://tinyurl.com/yy39clac> ..... *passim*

Merced County Dep’t of Public Health, *Statement Regarding COVID-19 Outbreak*  
*at Foster Farms Facility in Livingston* (Aug. 27,  
2020), <https://tinyurl.com/y5xasxn2>..... 12

1 Miller, Leila, *Workers Vanished as coronavirus Swept Through L.A. Apparel,*  
2 *Colleagues Struggled for Answers*, L.A. TIMES (July 17, 2020),  
<https://tinyurl.com/y3sephqv> ..... 15

3 Morris, P.D., et al., *Respiratory Symptoms and Pulmonary Function in Chicken*  
4 *Catchers in Poultry Confinement Units*, 19(2) AM. J. IND. MED. 195 (1991),  
<https://tinyurl.com/y4vgy3kp> ..... 13

5 National Center for Farmworker Health, *COVID-19 in Rural America: Impact on*  
6 *Farms & Agricultural Workers*, <https://tinyurl.com/y4afytds>..... 14

7 Pérez, Omar, *Why Millions Of Latinos Throughout California–51% In Santa Clara*  
8 *County–Are Among Hardest-Hit By COVID*, KRON 4 (Jan. 12, 2021),  
<https://tinyurl.com/yymqbf14>..... 8

9 Polonijo, Andrea N., *How California’s COVID-19 Surge Widens Health*  
10 *Inequalities for Black, Latino and Low-income Residents*, U.S. NEWS (July 31,  
2020), <https://tinyurl.com/y5mqa6zd> ..... 7, 8

11 Reyes-Velarde, Alejandra, *Following Coronavirus, Outbreaks, Vernon Faces*  
12 *County Pressure to Protect its Workers*, L.A. TIMES (June 23,  
2020), <https://tinyurl.com/y2ob5pv2> ..... 12

13 The COVID Tracking Project, *Race and Ethnicity Data by State*,  
14 <https://tinyurl.com/yxvg97cp>..... 8

15 Tompkins, Lucy, et al., *Running Low on Oxygen, Emergency Workers in Los*  
16 *Angeles County Are Told to Administer the Minimum Necessary*, N.Y. TIMES  
(Jan. 4. 2021), <https://tinyurl.com/yxuwpmboa>..... 7

17 Williams, Lance, *Diaper Masks, Close Quarters: Fast-Food Restaurants Have*  
18 *Struggled To Protect Workers From COVID-19*, L.A. TIMES (Jan. 15, 2021),  
<https://tinyurl.com/y4ggenxr> ..... 10, 18

19 *12th Worker’s COVID Death Renews Pressure on California Poultry Producer*  
20 *Foster Farms*, CBS NEWS (Jan. 1, 2021), <https://tinyurl.com/y5pzoscck> ..... 12

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1 **INTRODUCTION**

2 Facing the greatest workplace safety threat in history, the California Division of  
3 Occupational Safety and Health (“Cal-OSHA”) adopted COVID-19 Prevention Emergency  
4 Temporary Standards (“ETS”) to slow the spread of COVID-19 in the workplace. *Amici* labor  
5 unions write to emphasize that an injunction would cause severe hardship to workers whose  
6 employers have, before now, lacked clear and uniform mandates and have failed to comply with  
7 public health guidance for stopping the spread of COVID-19. *Amici* support Cal-OSHA’s decision  
8 to adopt emergency regulations, including the mandate that workers who have contracted or been  
9 exposed to COVID-19 be removed from the workplace and compensated during their absence.

10 **I. The Balance of Hardships Weighs Strongly Against a Preliminary Injunction**

11 **A. California is facing a COVID-19 crisis that is spurred by workplace transmissions and**  
12 **employers’ noncompliance with public health guidelines**

13 Workplaces, particularly those of essential workers who must continue to work during the  
14 pandemic, are a critical source of COVID-19 transmission. The trajectory of this State’s COVID-19  
15 pandemic is well known and aptly summarized in the Impact Fund *amicus* brief at 1-9. Los Angeles  
16 County warns that workplace outbreaks increased from 9 per week on November 1 to **44 per week**  
17 on December 6.<sup>1</sup> The Los Angeles situation is so dire that emergency medical services are rationing  
18 oxygen to the “minimum amount of oxygen necessary” to keep patients alive.<sup>2</sup>

19 The pandemic is having a racially disparate impact, largely because Black and Latino  
20 Californians are more likely to be essential workers, to have frequent public contact through work,  
21 and to be at worksites where COVID-19 guidelines are violated.<sup>3</sup> For example, when 3,000 residents  
22 of San Francisco’s Mission District were tested as part of a study, 95% of those who tested positive

23  
24 <sup>1</sup> LA Cty. Dep’t of Pub. Health, *Workplace Outbreaks Surge as Public Health Ramps Up*  
*COVID-19 Vaccination Capacity 281 New Deaths and 14,564 New Confirmed Cases of COVID-19*  
*in Los Angeles County* (Jan. 13, 2021), <https://tinyurl.com/y6h4so3z>.

25 <sup>2</sup> Lucy Tompkins, et al., *Running Low on Oxygen, Emergency Workers in Los Angeles County*  
*Are Told to Administer the Minimum Necessary*, N.Y. TIMES (Jan. 4, 2021),  
26 <https://tinyurl.com/yxuwpmbo>.

27 <sup>3</sup> Andrea N. Polonijo, *How California’s COVID-19 Surge Widens Health Inequalities for Black,*  
*Latino and Low-income Residents*, U.S. NEWS (July 31, 2020), <https://tinyurl.com/y5mqa6zd>; Devan  
28 Hawkins, *Differential Occupational Risk for COVID-19 and Other Infection Exposure According to*  
*Race or Ethnicity*, AM. J. INDUS. MED. (2020), <https://tinyurl.com/y2d29d7m>.

1 (but only 44% of those tested) were Latino; 90% of those who tested positive reported being unable  
2 to work from home.<sup>4</sup> Black and Latino Californians, particularly those of working age, are also dying  
3 at higher rates than other demographic groups: compared to the state population, the death rate is 22%  
4 higher for Latinos, 16% higher for Blacks, and 23% higher for Pacific Islanders.<sup>5</sup>

5 Prior to the ETS petition, Los Angeles County public health officials named workplace  
6 violations of safety guidelines as a significant contributor to the increased number of cases over the  
7 summer.<sup>6</sup> The experience of workers in multiple industries in counties across the State confirms this  
8 assessment and underscores the substantial harm that will result if the ETS are enjoined.<sup>7</sup>

### 9 **1. Fast Food Industry**

10 Testimony regarding outbreaks in and noncompliance with public health guidance in the fast  
11 food industry was presented to the Cal-OSHA Standards Board.<sup>8</sup> An outbreak at an Oakland

12 <sup>4</sup> Elizabeth Fernandez and Nicholas Weiler, UCSF, *Initial Results of Mission District COVID-19*  
13 *Testing Announced* (May 4, 2020), <https://tinyurl.com/y5cugyco>.

14 <sup>5</sup> Omar Pérez, *Why Millions Of Latinos Throughout California—51% In Santa Clara County—Are*  
15 *Among Hardest-Hit By COVID*, KRON 4 (Jan. 12, 2021), <https://tinyurl.com/yymqbf14>. Latinos are  
16 39% of California’s population but 57% of COVID-19 cases and 46% of deaths; Latinos aged 18-64  
17 are 68% of COVID-19 deaths. Polonijo, *supra* note 3; *see also* Corin Hoggard, *California’s*  
18 *Hispanic Community Is Being Hit The Hardest By COVID-19, Data Shows*, ABC 7 NEWS (May 8,  
19 2020), <https://tinyurl.com/y3hppetj>; The COVID Tracking Project, *Race and Ethnicity Data by*  
20 *State*, <https://tinyurl.com/yxvg97ep> (last visited Jan 15, 2021).

21 <sup>6</sup> Hannah Fry, *Coronavirus Spreading Rapidly in L.A. Workplaces that Ignore Safety Rules*, L.A.  
22 *TIMES* (July 16, 2020), <https://tinyurl.com/y387dsre>.

23 <sup>7</sup> *Amici* highlight just a small sample of industries herein. COVID-19 cases among grocery  
24 workers, for example, is now a crisis within a crisis. *See* Joel Grover, *More Than 800 SoCal*  
25 *Supermarket Workers Test Positive for COVID-19*, NBC4NEWS (Dec. 30, 2020),  
26 <https://tinyurl.com/yaepcq2d>. And as underscored by the declarations of two janitorial employees  
27 and one airline cleaner submitted by *amici*, workers charged with disinfecting workplaces are also in  
28 dire need of protection: employers have failed to provide sufficient masks or other protective  
equipment, to provide training or information about COVID-19 safety, and to notify employees of  
exposure in the workplace. *See* Declarations of Rosa Sanchez (“Sanchez Decl.”), Maria Guadalupe  
Ramos (“Ramos Decl.”), and Luisa Cancio (“Cancio Decl.”); *see also* Declaration of David Huerta  
 (“Huerta Decl.”) ¶¶6-8. Workers have contracted COVID-19 as a result, Sanchez Decl. ¶4; Ramos  
Decl. ¶4; and a worker who sought to quarantine after a potential exposure was harassed to come  
back to work, Cancio Decl. ¶7. To date, workplace outbreaks in LA County alone have led to  
13,462 confirmed COVID-19 cases among workers. LA Cty. Dep’t of Public Health, *COVID-19*  
*Locations & Demographics*, <https://tinyurl.com/yy39clac> (last visited Jan. 18, 2021). The ETS’s  
clear uniform standards are important as well for workplaces that moved online during the pandemic  
but are looking forward to reopening in-person, such as schools and offices. Indeed, the State’s  
newly released framework relies on the ETS; as such, enjoining the ETS at this point would be  
disruptive to schools’ reopening plans. *See* Cal. Dep’t of Pub. Health, *COVID-19 and Reopening In-*  
*Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-*  
*2021 School Year*, <https://tinyurl.com/yxjrvh6x>.

<sup>8</sup> Minutes and video/audio streams of the Standards Board’s ETS meetings, which also included



1 McDonald’s restaurant well illustrates the role that a single employee contracting COVID-19 can  
2 play in community outbreaks—spreading illness to workers, their families, and the surrounding  
3 community—when employers do not implement adequate public health measures. In that case, the  
4 employer failed to distribute adequate PPE to workers or to implement adequate social distancing  
5 measures.<sup>9</sup> After a single employee came to work exhibiting symptoms—and the employer failed to  
6 require sick employees and those who had been in close contact with them to remain at home or to  
7 offer paid sick leave to those who would have done so voluntarily—COVID-19 spread rapidly  
8 through the workplace, infecting at least a third of employees (11 known cases).<sup>10</sup> As one employee  
9 explained, “managers ... required workers to come to work sick and did not explain whether we  
10 could receive paid sick leave if we missed work for COVID symptoms or testing” (much less due to  
11 close contact with a sick co-worker).<sup>11</sup> Another worker noted, “When I told the store manager I had  
12 tested positive with COVID-19, she did not tell me to quarantine or to isolate myself. She did not ask  
13 which workers I had been in close contact with. She did not explain whether I would receive paid  
14 sick leave while I recovered from the virus.”<sup>12</sup>

15 From the workplace, COVID-19 spread to employees’ families: children (including a 10-  
16 month old baby who spiked a 104 degree fever and suffered convulsions), spouses, and other  
17 community members.<sup>13</sup> And, as is common with low-wage workers, some employees worked  
18 multiple fast food jobs, and the disease spread to those workplaces as well.<sup>14</sup> The spread stopped at

19 testimony about outbreaks and employer safety practices in industries including janitorial, chicken  
20 processing, and agriculture, can be found at <https://www.dir.ca.gov/oshsb/mtgsch2020.html>.

21 <sup>9</sup> *Amici* are submitting declarations from a lawsuit against the franchise owner, which are  
properly subject to judicial notice, for the Court’s convenience. *See* Declaration of Stacey M.  
Leyton (“Leyton Decl.”), Exs. B ¶¶10-13; C ¶¶3-10; D ¶9; E ¶¶15-20; F ¶¶9, 11-19; G ¶¶11-16.

22 <sup>10</sup> *See id.* Exs. B ¶¶3-4, 7-13; C ¶¶11-14; D ¶¶3-4, 6-7; E ¶¶3-6, 11-13, 19; F ¶¶3-10, 20-21, 27;  
G ¶¶3-10, 17-18.

23 <sup>11</sup> *See id.* Ex. F ¶21.

<sup>12</sup> *See id.* Ex. G ¶17.

<sup>13</sup> *See id.* Exs. B ¶¶14-15; E ¶¶7-9.

24 <sup>14</sup> *See id.* Exs. C ¶16; F ¶¶23-24; H ¶¶3-4. Many fast food workers cannot get enough hours at a  
25 single store so work at multiple locations, and many households contain individuals who work at  
26 different fast food locations, *see, e.g.*, Leyton Decl., Ex. A at 176; *id.* at 164; *id.* at 139; *id.* at 353; *id.*  
27 at 378, or in other essential occupations who, if they contract COVID-19, can further contribute to  
community spread, *id.* at 320-321 (worker at Carl’s Jr. with 4 known COVID-19 cases, experiencing  
COVID-19 symptoms, lives with mother and brother who work in “convalescent hospital”). In  
28 addition, some fast food employers have exacerbated COVID-19 spread by transferring workers  
from stores with outbreaks to other locations, or vice versa. *Id.* at 110; *id.* at 135 (“I am worried that

1 this workplace only after workers staged a safety strike, refusing to work until conditions were made  
2 safe, and then the Alameda Superior Court issued injunctive relief.<sup>15</sup> Had the employer sent home,  
3 with pay, the original employee with symptoms and other employees who had worked in close  
4 contact with her, this community spread would not have occurred.

5 This is no outlier in the industry. *Amici* here are submitting to this Court more than 50 Cal-  
6 OSHA complaints regarding fast food restaurants.<sup>16</sup> Unsafe conditions at these workplaces have  
7 resulted in outbreaks among significant percentages of the workers at these restaurants: 12 COVID  
8 cases at a Los Angeles Domino’s Pizza, 9 at a Monterrey Park McDonald’s, 6 at a Los Angeles  
9 McDonald’s, 7 at an Oakland Kentucky Fried Chicken/Taco Bell, 7 at a Van Nuys El Pollo Loco, 2 at  
10 a Los Angeles Jamba Juice, 2 at a Castro Valley Burger King, 4 at a Whittier Carl’s Jr., and 14-15 at  
11 a Littlerock McDonald’s.<sup>17</sup> Given the nature of the virus, these outbreaks no doubt spread to  
12 workers’ family members and others in the local communities, particularly given the closely shared  
13 living space of many low wage workers.<sup>18</sup>

14  
15 COVID-19 may also spread from store to store among the 16 McDonald’s owned by this group, as  
16 workers are moved from store to store for cleaning and staffing when there is a COVID-19 case.”);  
*id.* at 154 (workers were sent to clean and work at stores with outbreaks); *id.* at 164 (same).

17 <sup>15</sup> See *id.* Exs. D ¶10; E ¶14; F ¶¶12, 28; G ¶18; J ¶3.

18 <sup>16</sup> See *id.* Ex. A. Those complaints are a small fraction of the number that have actually been  
19 filed. See Lance Williams, *Diaper Masks, Close Quarters: Fast-Food Restaurants Have Struggled*  
20 *To Protect Workers From COVID-19*, L.A. TIMES (Jan. 15, 2021), <https://tinyurl.com/y4ggenxr>.

21 <sup>17</sup> See Leyton Decl., Ex. A at 26, 190 (LA Domino’s); *id.* at 306 (Monterrey Park McDonald’s),  
22 *id.* at 135, 154, 164, 235 (LA McDonald’s), *id.* at 221 (Oakland KFC/Taco Bell), *id.* at 353 (Van  
23 Nuys El Pollo Loco), *id.* at 119 (LA Jamba Juice), *id.* at 385 (Castro Valley Burger King), *id.* at 320  
24 (Whittier Carl’s Jr.), *id.* at 303, 327, 391, 395 (Littlerock McDonald’s). Often workers are unable to  
ascertain the actual number of COVID-19 infections, because employers do not disclose positive  
tests. At a Santa Monica Burger King restaurant, employees were aware that a co-worker died after  
coming to work severely ill with COVID-19 symptoms for an entire week, and that other workers  
subsequently developed COVID-19 symptoms, but were never told whether the original worker had  
died of COVID-19. *Id.* at 149. In fact, many employers affirmatively misrepresent whether missing  
workers are sick with COVID-19. *E.g.*, *id.* at 221 (employer said store closure had nothing to do  
with COVID-19 but was because team leader was “tired” and that two COVID-positive employees  
“are ok, they aren’t sick”); *id.* at 323 (manager said missing worker had COVID-19 but then later  
denied it).

25 <sup>18</sup> See, e.g., Leyton Decl., Ex. A at 206 (complainant lives with 14 individuals from 5 separate  
26 family units); *id.* at 97 (quarantined co-worker sleeps in same room as mother and children); *id.* at 79  
27 (worker lives with 7 people including mother-in-law with asthma and child with epilepsy); *id.* at 140  
28 (worker lives with husband and child, sister and child, and father); see also, e.g., Anita Chabria, *This*  
*County Knew Coronavirus Could Ravage its Farmworkers. Why Didn’t Officials Stop It?*, L.A.  
TIMES (July 25, 2020), <https://tinyurl.com/yyq9y8cn> (farmworkers live in crowded, multi-family  
housing and are transported to job sites in groups); Hoggard, *supra* note 5 (farmworker community  
often lacks space to practice social distancing).

1 Fast food workers' complaints highlight a key flaw in employers' response to the virus:  
2 employers' failure to instruct workers to remain at home—and the lack of paid leave that would allow  
3 them to do so—after a positive COVID-19 test, symptoms, or close contact/exposure. For example,  
4 at a San Pablo McDonald's restaurant with multiple confirmed COVID-19 cases, workers who  
5 reported symptoms including high fever and body aches to their managers were allowed (and in at  
6 least one case, required) to remain at work.<sup>19</sup> At a North Highlands Jack in the Box, managers  
7 permitted a worker with a headache, body aches, chills, diarrhea, red eyes, and nausea to continue  
8 working for four days, and after she tested positive for COVID-19, instructed her to apply for  
9 unemployment or a payday loan and not to tell any co-workers that she had COVID.<sup>20</sup> Other  
10 common complaints include inadequate cleaning supplies (hand sanitizer, hand soap, and supplies to  
11 clean or disinfect surfaces and shared instruments), nonexistent or inadequate provision of PPE, lack

12  
13 <sup>19</sup> Leyton Decl., Ex. A at 148. Similar examples abound. A Gilroy McDonald's worker who  
14 later tested positive for COVID-19 was refused pay for staying home when her symptoms began;  
15 and when economic necessity forced her to return to work even while continuing to report  
16 symptoms, her manager told her “not to tell [her] co-workers that [she] had COVID-19.” *Id.* at 159.  
17 An Alameda Jack in the Box worker was refused sick pay for time she spent hospitalized with  
18 COVID-19. *Id.* at 215. A Hayward McDonald's worker was not paid for work missed when she  
19 was home sick with COVID-19. *Id.* at 176. A Santa Clarita McDonald's worker with COVID-19  
20 symptoms, who subsequently tested positive, was called back into work after two days of sick leave.  
21 *Id.* at 144. A Los Angeles McDonald's refused to allow workers to take sick leave unless someone  
22 could cover their shift. *Id.* at 96. When an employee at a Whittier Carl's Jr. where 4 workers tested  
23 positive attempted to call in sick, telling her employer that she had COVID-19 symptoms, her  
24 employer refused because no one could cover her shift; she understood she would lose hours or be  
25 removed from the schedule if she declined to come in and was unable to be tested because her  
26 manager said she would be suspended if she took time off to do so. *Id.* at 322. A worker at another  
27 Los Angeles McDonald's with confirmed COVID-19 cases was told to keep working despite  
28 experiencing COVID-19 symptoms. *Id.* at 402. Employees at a Domino's with multiple confirmed  
COVID cases were instructed to return to work after 14 days even if they were still sick. *Id.* at 26.  
A McDonald's worker in Ontario “still ... went to work one more day” after her housemates tested  
positive “because I needed the money and my employer did not ever say we would get paid leave if  
we were exposed. Even after I told them I tested positive, they did not offer paid leave.” *Id.* at 48.  
A Jamba Juice worker was told she needed to be tested due to close contact with a COVID-positive  
co-worker but that she could continue working while awaiting test results. *Id.* at 119. Another  
worker at the same location who tested positive for COVID-19 was unable to find out whether she  
would be paid to remain home and quarantine. *Id.* at 121. *See also id.* at 159 (worker who  
subsequently tested positive was denied sick pay for staying home with COVID-19 symptoms and  
later was allowed to work despite reporting such symptoms were ongoing); *id.* at 295 (Milpitas Jack  
in the Box worker who had COVID-19 symptoms was instructed by doctor to quarantine until test  
results came back; employer responded that she was a “miserable, lazy, loser” and would not be  
paid, then retaliated by taking her off schedule when she was able to return).

<sup>20</sup> Leyton Decl., Ex. A at 270. Her co-workers were told that she was home with asthma or on  
vacation. *Id.* She was eventually home for three weeks and her husband and two children also  
developed COVID symptoms. *Id.*

1 of physical barriers such as plexiglass between workers and customers, inadequate or nonexistent  
2 training on safety practices, lack of signage and instructions to customers regarding mask and  
3 distancing requirements, the absence of any exposure notification to employees who worked closely  
4 with co-workers who later tested positive for COVID-19, and retaliation against workers who  
5 complain about COVID-19-related health and safety issues.

## 6 **2. Meatpacking**

7 The workplace dangers presented by inadequate safety measures in the poultry and  
8 meatpacking industries are evident in two outbreaks at a Livingston Foster Farms chicken processing  
9 plant within a six-month period that led to at least 585 positive cases and 12 deaths.<sup>21</sup> Although  
10 local public health officials shut down the plant in late August after the company failed to implement  
11 the officials' safety recommendations, in December, the company still lacked adequate safety  
12 precautions and continued to put its remaining workers at increased COVID-19 risk—prompting  
13 employees and their union to seek an injunction in court.<sup>22</sup> *Amici* here submit declarations from that  
14 case detailing numerous safety failures by the company.<sup>23</sup>

15 Employees testified that Foster Farms failed to: enforce social distancing in break areas or  
16 where employees clock in, provide employees with PPE, ensure six feet of distance between  
17 workers, and provide adequate plastic dividers when that is not possible.<sup>24</sup> For example, a chicken

18 <sup>21</sup> *12th Worker's COVID Death Renews Pressure on California Poultry Producer Foster Farms*,  
19 CBS NEWS (Jan. 1, 2021), <https://tinyurl.com/y5pzosc6>; Merced County Dep't of Public Health,  
20 *Statement Regarding COVID-19 Outbreak at Foster Farms Facility in Livingston* (Aug. 27,  
21 2020), <https://tinyurl.com/y5xasxn2>. Foster Farms also had an outbreak at its Compton location,  
22 with at least 21 reported cases. LA Cty. Dep't of Pub. Health, *supra* note 7. Other meatpacking  
23 facilities in California have also had large outbreaks, for example: Farmer John pork processing  
24 plant, Vernon (150 cases); Central Valley Meat Plant, Hanford (187 cases), Jobbers Meat Packing  
25 Co., Vernon (80 cases), S&S Foods Meat Processing Facility, Azusa (74 cases). Alejandra Reyes-  
26 Velarde, *Following Coronavirus, Outbreaks, Vernon Faces County Pressure to Protect its Workers*,  
27 L.A. TIMES (June 23, 2020), <https://tinyurl.com/y2ob5pv2>; *California Coronavirus Map and Case*  
28 *Count*, N.Y. TIMES, <https://tinyurl.com/y5qr6jc5> (last visited Jan. 17, 2021).

<sup>22</sup> Merced County Dep't of Public Health, *supra* note 21; Compl., *United Farm Workers et al. v.*  
*Foster Poultry Farms, et al.* No. 20CV-03605 (filed Dec. 17, 2020, Superior Ct. Cty. of Merced).

<sup>23</sup> Leyton Decl., Exs. K ¶7; L ¶11; M ¶6.

<sup>24</sup> *Id.* Exs. K ¶8 (Foster Farms stopped supplying masks and workers have had to buy their own  
masks); L ¶¶5, 8 (masks issued only to half the workers in her department); N ¶¶5, 9-10 (observed  
lack of social distancing or barriers between workers in the livehang department, and crowding in  
clock-in and break areas); M ¶6 (workers received no COVID-19 trainings and foremen were  
reluctant to issue more than one mask per day); O ¶5 (foreman said he was not authorized to give out  
masks and that workers must provide their own masks); P ¶¶3-4, 6, 8-11; Q ¶¶5-7, 14 (describing

1 catcher testified that Foster Farms transported his crew by putting 5-6 of them in a 9-passenger van,  
2 and that mask-wearing was not enforced.<sup>25</sup> In the livehang department, where 6-9 workers typically  
3 stand side by side, Foster Farms has never distanced the workers nor installed barriers between  
4 them.<sup>26</sup> In various production departments, where workers stand across from each other on the line,  
5 they are less than 6 feet apart and there is no plastic divider between them.<sup>27</sup> Employees also  
6 reported the employer's failure to enforce testing and screening procedures just a few months after  
7 being permitted to reopen.<sup>28</sup> Although employees were able to obtain a temporary restraining order,  
8 their experience shows the need for mandatory standards.

### 9 **3. Agriculture and Food Production or Distribution**

10 In agricultural and food production and distribution sectors, the absence of clear, mandatory  
11 standards regarding protective equipment, social distancing, engineering controls, and protections  
12 for exposed workers has led to multiple workplace outbreaks. The most pervasive issues include  
13 failure to provide COVID-19 safety training or information, to provide masks, or to inform workers  
14 of COVID-19 cases in the workplace or on the work crew.<sup>29</sup> For example, in June 2020, state  
15 officials found that Primex, a nut processing plant, failed to provide masks, train employees on  
16 COVID-19 prevention, or notify the State when a worker was hospitalized for COVID-19. By July,  
17 80 employees at the plant (and 39 family members) had tested positive for COVID-19.<sup>30</sup> Primex  
18 ultimately was fined by the State, but its practices appear to be the norm, not the exception.

19 crowding in clock-in/out areas, failure to provide training on COVID-19 safety, and failure to  
20 provide masks to employees, requiring employees to purchase their own masks for work).

21 <sup>25</sup> *Id.* Ex. S ¶4; Chicken catchers work in crews, traveling to different farms to pick up chickens  
22 and pack them into crates for transport to slaughter. These workers often already suffer from acute  
23 respiratory illnesses from exposure to dust, dirt, manure, and feathers. *See* P.D. Morris, et al.,  
*Respiratory Symptoms and Pulmonary Function in Chicken Catchers in Poultry Confinement Units*,  
19(2) AM. J. IND. MED. 195 (1991), <https://tinyurl.com/y4vgy3kp>.

24 <sup>26</sup> Leyton Decl., Ex. N ¶5.

25 <sup>27</sup> *See id.* Exs. L ¶5; R ¶8 (in deli department, Foster Farms used a curtain hanging from the  
26 ceiling between workers, but it did not hang low enough to protect shorter workers); *id.* ¶11 &  
27 photograph attached to worker declaration as Ex. C (plastic dividers between workers did not  
adequately protect them when they leaned forward to do their work).

28 <sup>28</sup> The company reduced the frequency of testing and employees no longer had to answer  
screening questions about their symptoms before returning to work after being sick. *Id.* Exs. K ¶8; S  
¶4; L ¶¶5,8; N ¶¶5, 9-10; M ¶6; O ¶5; P ¶¶3-4, 6, 8-11; Q ¶¶4-7, 13-14.

<sup>29</sup> *See* Declaration of Armando Elenes ("Elenes Decl.") ¶¶3-8.

<sup>30</sup> John Cox, *State Issues \$77,500 in Fines in Aftermath of Outbreak at Primex Nut Plant in Wasco*, BAKERSFIELD.COM (Jan. 4 2021), <https://tinyurl.com/y3ybpmmg>.

1 According to a survey by the United Farm Workers (“UFW”), 90% of farmworkers reported not  
2 being advised by their employers on best practices to avoid the virus or being provided any  
3 information at all, and a high percentage reported that their employers had not provided them with  
4 facemasks.<sup>31</sup> UFW members consistently report that employers are not informing employees when  
5 their co-workers have tested positive for COVID-19, and that supervisors had threatened workers not  
6 to talk about the fact that other employees had tested positive.<sup>32</sup>

7 As a result, there have been numerous outbreaks at California’s fields and packing facilities,  
8 including 201 COVID-19 cases at Villa Las Brisas Berry Farm, Ventura County, 91 cases and a  
9 death at Alco Harvesting, Santa Barbara County, 35 cases at Calavo Growers, Ventura County; 28 at  
10 Magaña Labor Services, Ventura County; 12 at Rancho Nuevo Harvesting, Santa Barbara County;  
11 and 16 at Wawona Packing, Fresno County.<sup>33</sup>

12 Other *amici* have explained the workplace factors that cause farm work to be high-risk for  
13 COVID-19 spread. See Impact Fund Amicus, at 5-6. Systemic inequities also render this workforce  
14 particularly vulnerable to COVID-19. California’s farmworkers live in food deserts without access  
15 to healthy foods, breathe poor air, drink tainted water, and consequently experience high rates of  
16 obesity, hypertension, asthma, and diabetes—all co-morbidity risks for COVID-19.<sup>34</sup>

17 COVID-19 has amplified existing disparities that have long afflicted Latino farmworkers,  
18

19 <sup>31</sup> Elenes Decl. ¶5.

20 <sup>32</sup> *Id.* ¶¶7-8, 13. In the Primex outbreak, workers only learned that dozens of employees had  
21 tested positive for COVID-19 by seeing it on the news. AP, *Farmworkers at Central California  
Pistachio Farm Strike After Dozens Test Positive for the Coronavirus* (June 25, 2020),  
<https://tinyurl.com/y4afytds>.

22 <sup>33</sup> National Center for Farmworker Health, *COVID-19 in Rural America: Impact on Farms &  
Agricultural Workers*, <https://tinyurl.com/y4afytds> (last visited Jan. 15, 2021), and sources cited  
23 therein. Many counties do not report the locations or names of businesses involved in outbreaks,  
24 and often farmworkers will not disclose where they work when they test positive for COVID-19 out  
of fear of retaliation. See Martin Espinoza, *About 350 Sonoma County Farmworkers Have  
Contracted the Coronavirus*, SONOMA INDEX-TRIBUNE (Sept. 25, 2020),  
<https://tinyurl.com/y559oxeb>. The Los Angeles County Department of Public Health, however,  
25 publishes a database that identifies a large number of growers, packers, and food production and  
26 distribution employers with outbreaks. See LA Cty. Dep’t of Pub. Health, *supra* note 7 (e.g.,  
Mission Foods Corp., Commerce – 111 cases).

27 <sup>34</sup> Rick Jervis, et al., *Worked To Death: Latino Farmworkers Have Long Been Denied Basic  
Rights. COVID-19 Showed How Deadly Racism Could Be*, USA TODAY (Oct. 24, 2020),  
<https://tinyurl.com/y6dtwjgh>; CDC, *People with Certain Medical Conditions*,  
28 <https://tinyurl.com/y8bffjhb> (last visited Jan. 17, 2021).

1 who make up 93% of the workforce.<sup>35</sup> October 2020 data showed that Imperial County (85%  
2 Latino) had experienced 185 deaths per 100,000 residents (nearly triple the national rate at that  
3 time), while neighboring San Diego County—with a proportion of Latino residents less than half  
4 that of Imperial—had a death rate of just 26 deaths per 100,000.<sup>36</sup> In Stanislaus County, Latinos are  
5 48% of the population but 71% of COVID-19 cases; in Fresno County, 74.1 out of every 100,000  
6 Latinos has contracted COVID-19, far exceeding any other demographic; and in Napa County,  
7 Latinos account for 51% of COVID-19 cases, but less than 35% of the population.<sup>37</sup>

#### 8 **4. Consumer Goods Manufacturing, Distribution, and Retail**

9 Workers in the essential industries of manufacturing, distribution, and retail of consumer  
10 goods have also suffered unsafe working conditions. An outbreak at a Los Angeles Apparel factory  
11 led to more than 300 positive COVID-19 cases and four deaths, prompting the county to shut down  
12 the factory for “*flagrant* violations” of COVID-19 safety orders.<sup>38</sup> Another garment factory operated  
13 by Fashion Nova in Santa Fe Springs has had 203 COVID-19 cases.<sup>39</sup>

14 Working conditions in warehouses and distribution centers pose significant dangers. An  
15 outbreak in United Parcel Service’s Sunnyvale Distribution Center (where mask wearing was not  
16 consistently enforced and workers were not required to report exposures), which began with a

17 <sup>35</sup> Chabria, *supra* note 18.

18 <sup>36</sup> Jervis, et al., *supra* note 34.

19 <sup>37</sup> Mike Duffy, *Latino Communities See Disproportionate Rise In Coronavirus Infections*, ABC  
20 NEWS (June 25, 2020), <https://tinyurl.com/y4d7dbum>; Hoggard, *supra* note 5; Sarah Klearman,  
21 *Napa County’s Hispanic Residents Disproportionately Impacted by Pandemic*, NAPA VALLEY  
22 REGISTER (Dec. 4, 2020), <https://tinyurl.com/y52dgtap>. Workplace outbreaks among farmworkers is  
23 also contributing to cross-community spread of COVID-19 in the State. For example, Solano  
24 County officials attributed an uptick of cases in the county to a significant outbreak among farmers  
25 who live in Solano County but commute into Napa County for work; meanwhile, Napa County  
26 reported outbreaks in three farmworker housing centers. *Id.* As of October 2020, agricultural  
27 workers accounted for 1,180 of Santa Barbara County’s 8,199 cases. Mike Hodgson, *Latinos,*  
28 *Farmworkers, 20-year-olds Have Most COVID-19 Cases in Santa Barbara County*, SANTA MARIA  
TIMES (Oct. 13, 2020), <https://tinyurl.com/y3f2wanf>.

<sup>38</sup> LA Cty. Dep’t of Pub. Health, *Public Health Orders Continued Closure of Garment  
Manufacturer After More than 300 COVID-19 Employee Cases and Four COVID-19 Employee  
Deaths* (July 10, 2020), <https://tinyurl.com/y6re77at> (emphasis added); see also Fry, *supra* note  
**Error! Bookmark not defined.**; Leila Miller, *Workers Vanished as coronavirus Swept Through  
L.A. Apparel, Colleagues Struggled for Answers*, L.A. TIMES (July 17, 2020),  
<https://tinyurl.com/y3sephqv> (violations included: failing to provide safety training in Spanish, the  
workers’ primary spoken language; using cardboard as a barrier between workers; failing to make  
disinfectant readily available at shared work stations; and failing to establish 6 feet of distance  
between workstations).

<sup>39</sup> LA Cty. Dep’t of Pub. Health, *supra* note 7.

1 supervisor, spread through office clerical workers and drivers, ultimately infecting at least 16  
2 workers.<sup>40</sup> Other outbreaks in warehouses and distribution centers in Los Angeles County include:  
3 99 Cents Only Stores Warehouse and Corporate Office, Commerce (113 cases), Amazon distribution  
4 centers (255 cases across 5 centers), FedEx (517 cases across 9 locations, including 155 at the FedEx  
5 Ground Pacoima facility alone), Michael Kors Distribution Center, Whittier (80 cases), and Ontrac  
6 Shipping (73 cases across 2 locations).<sup>41</sup>

7 Los Angeles County Department of Public Health data also reveals a disturbing number of  
8 COVID-19 infections tied to retail stores, including, for example: 42 positive COVID-19 cases  
9 across two Best Buy stores, 375 across eight Costco Warehouses (71 at the Culver City Warehouse  
10 alone), 326 across nine Home Depot locations, 27 at Nordstrom, Cerritos, 62 across 6 Sprouts  
11 Farmers Market stores, 404 across 16 Target locations, and 134 across 4 Toyota locations.<sup>42</sup>

12 **B. The toll on workers’ health and lives far outweighs Plaintiffs’ claimed financial costs**

13 The equities weigh strongly in favor of protecting workers and against enjoining the ETS.  
14 Given its rapid spread, risk of death, and significant short and long-term effects, the risk of  
15 contracting COVID-19 constitutes severe irreparable harm. *See, e.g., Castillo v. Barr* (C.D. Cal.  
16 2020) 449 F.Supp.3d 915, 923; *Basank v. Decker* (S.D.N.Y. 2020) 449 F.Supp.3d 205, 210-13  
17 (citing cases); *Perez v. Wolf* (N.D. Cal. 2020) 445 F.Supp.3d 275, 293. Long-term serious health  
18 injuries and the loss of life far outweigh even severe economic effects.<sup>43</sup> “[A] choice between  
19 potential financial loss on the part of the Plaintiffs versus potential loss of life on the part of the  
20 public” warrants denial of an injunction. *Barenfeld v. City of Los Angeles* (1984) 162 Cal.App.3d

21 <sup>40</sup> Declaration of Rome Aloise (“Aloise Decl.”) ¶7.

22 <sup>41</sup> LA Cty. Dep’t of Pub. Health, *supra* note 7.

23 <sup>42</sup> *Id.*

24 <sup>43</sup> This is especially so when, unlike the health and lives of workers, Plaintiffs’ economic losses  
25 can be mitigated by government support and loans, such as the Paycheck Protection Program  
26 (“PPP”) loans and agriculture-specific support. Businesses in California have received collectively  
27 \$68.3 billion from PPP, with an average loan amount of \$111,715. *See* [Federalpay.org, PPP Loan  
28 Recipient List By State, https://tinyurl.com/y6a4nx6j](https://federalpay.org/PPP/LoanRecipientListByState) (last visited Jan. 15, 2021). California growers  
have already received approximately \$1.8 billion in USDA bailouts to date, deferrals for crop  
insurance premium payments and interest waivers, and government funding to purchase and  
distribute U.S. produce. *See* USDA, Coronavirus Food Assistance Program 2 Data,  
<https://tinyurl.com/y5vrgtcc>; Coronavirus Food Assistance Program 1 Data,  
<https://tinyurl.com/y5vrgtcc>; USDA Extends Deadlines, Defers Interest Accrual Due to COVID-19  
(Aug. 5, 2020), <https://tinyurl.com/yy6wy94f>; USDA Farmers to Families Food Box,  
<https://tinyurl.com/y74zxxww>.



1 1035, 1041; *accord Lopez v. Heckler* (9th Cir. 1983) 713 F.2d 1432, 1437 (“Faced with such a  
2 conflict between financial concerns and preventable human suffering, we have little difficulty  
3 concluding that the balance of hardships tips decidedly in ... favor” of human costs).

## 4 **II. Plaintiffs Are Unlikely to Succeed on the Merits of their Claims**

### 5 **A. Cal-OSHA’s emergency regulatory authority is broad and deference is due its findings**

6 An agency’s emergency finding is given “substantial deference” and may be overturned only  
7 if it is “an abuse of discretion.” *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306 (citing *Schenley*  
8 *Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 194-95). The substantial evidence  
9 standard is also highly deferential: The agency’s decision is presumed correct, *Desmond v. Cnty. of*  
10 *Contra Costa* (1993) 21 Cal.App.4th 330, 335, and must be affirmed if supported by “any substantial  
11 evidence, contradicted or uncontradicted,” *Berkeley Hillside Preservation v. City of Berkeley* (2015)  
12 60 Cal.4th 1086, 1114, unless “no reasonable person” could agree. *Doe v. Regents of Univ. of Cal.*  
13 (2016) 5 Cal.App.5th 1055, 1073.<sup>44</sup> And because judicial review is conducted “solely on the record  
14 of the proceeding before the administrative agency,” *Toyota of Visalia, Inc. v. New Motor Vehicle*  
15 *Bd.* (1987) 188 Cal.App.3d 872, 881, Plaintiffs’ evidence purporting to show the ETS are not  
16 needed, Plaintiffs’ Mem. Pts. & Authorities (“Pl. Mem.”) at 15-16, is inadmissible.

17 Cal-OSHA’s decision to adopt specific COVID-19 standards on an emergency basis to slow  
18 the deadly spread of COVID-19 in California workplaces was well supported. As noted in the Cal-  
19 OSHA staff report in the administrative record, “COVID-19 is an occupational health emergency  
20 causing more deaths in less time than any other workplace crisis in the nearly fifty-year existence of  
21 Cal/OSHA.” Compl., Ex. 3 at 21. And as set forth in Cal-OSHA’s emergency findings, before the  
22 ETS’s adoption, “no specific regulation ... protect[ed] all workers from exposure to infectious  
23 diseases such as COVID-19.” Compl., Ex. 8 at 5 ¶16; *see also* Compl., Ex. 3 at 22. Existing  
24 standards and guidances—which, as the Board found, varied and were sometimes contradictory,  
25 Compl., Ex. 8 at 5 ¶17—failed to give employers clarity (much less to impose specific mandates)  
26 regarding PPE, social distancing, contact tracing, or isolation or quarantine of employees with  
27

28 <sup>44</sup> Thus, even if the Board staff memo *had* contained evidence contradicting, for example, the  
need for the ETS (which it did not), that would be irrelevant under the substantial evidence standard.

1 COVID symptoms or exposure. The lack of specific mandates also made it extremely difficult, or  
2 impossible, for employees to advocate for measures necessary to keep them safe from significant  
3 public health threats. In a crisis, specific mandates allow workers to identify safety hazards to  
4 employers and, in some cases, resolve them without the necessity of government intervention.<sup>45</sup>

5 The consequences of inaction are severe. After three workers at a Littlerock McDonald's  
6 where mask wearing, social distancing, and sick leave mandates were not enforced tested positive  
7 for COVID-19, infection spread and between two outbreaks the restaurant suffered approximately  
8 14-15 known worker cases and 17 infected family members, all while management continued to  
9 misrepresent that "no one is getting COVID-19 at this McDonald's."<sup>46</sup> Or, in the case of the  
10 Livingston Foster Farms plant, official action came only after hundreds of workers had been  
11 sickened and three had died, and consistent safety measures still do not exist. *Supra* at 12-13.

12 In the occupational safety and health arena, courts must "give OSHA some leeway where its  
13 findings must be made on the frontiers of scientific knowledge." *Industrial Union Dept., AFL-CIO*  
14 *v. Am. Petroleum Institute* (1980) 448 U.S. 607, 656. "Under the command of OSHA, it remains the  
15 duty of the Secretary to act to protect the workingman, and to act even in circumstances where  
16 existing methodology or research is deficient." *Society of Plastics Industry, Inc. v. OSHA* (2d Cir.  
17 1975) 509 F.2d 1301, 1308 (internal citation omitted). The need to act before a comprehensive and  
18 certain evidentiary showing may be made is acute in the case of a fast-moving public health  
19 pandemic with ever changing scientific discoveries.<sup>47</sup>

20 **B. The requirement that ill and exposed workers be removed from the workplace, and**  
21 **that their compensation be maintained, is not outside Cal-OSHA's authority**

22 While Plaintiffs primarily argue that the ETS are *unnecessary*, they also object substantively  
23 to particular provisions: most notably, the requirements to remove COVID-positive or exposed  
24 workers from the workplace for an appropriate isolation or quarantine period, and to maintain those

25 <sup>45</sup> Aloise Decl. ¶9. This is important given the strain on OSHA resources. *See Williams, supra*  
26 note 16 (1,600 complaints concerning fast food restaurants in United States have led to only 56 site  
visits and 3 citations).

27 <sup>46</sup> Leyton Decl., Ex. A at 303, 327, 391, 395.

28 <sup>47</sup> The substantial evidence standard also allows agencies to act without further study. *See*  
*Gray v. Cty. of Madera* (2008) 167 Cal.App.4th 1099, 1125 ("The fact that additional studies might  
have been helpful does not mean that they are required").

1 workers' compensation during their removal. Plaintiffs cite no authority for their key contention  
2 that, simply because another agency might also order paid leave or otherwise has some overlapping  
3 jurisdiction, Cal-OSHA is somehow deprived of its authority to employ that same measure in the  
4 service of workplace safety. Pl. Mem. 19-22. In any event, Cal-OSHA clearly has this authority.

5 The record here confirms that the purpose of this requirement is to “ensur[e] that employees  
6 will notify their employers if they test positive for COVID-19 or have an exposure to COVID-19,  
7 and stay away from the workplace during the high-risk exposure period when they may be  
8 infectious.” Compl., Ex. 8 at 19-20. The indisputable fact that an infected or potentially infected  
9 worker’s continued presence in the workplace exposes co-workers to serious risk of infection  
10 certainly supports the need for the rule, as does the experience of *Amici*.

11 Low-wage workers cannot afford to stay home without paid leave. A McDonald’s worker in  
12 Oakland continued working alongside co-workers exhibiting COVID symptoms because “my family  
13 in Honduras relies on me to send money back to them. So I did not have a choice. I had to keep  
14 working.”<sup>48</sup> She contracted COVID-19 and likely spread it to co-workers who worked alongside her  
15 before her positive test.<sup>49</sup> A McDonald’s worker in Monterey Park reported that co-workers with  
16 COVID-19 symptoms declined to be tested because they did not want to have to quarantine without  
17 pay.<sup>50</sup> Union representatives report that workers who do not know if they will receive paid leave if

18 <sup>48</sup> See Leyton Decl. Ex. F ¶¶6-10, 25.

19 <sup>49</sup> *Id.* Ex. F ¶8.

20 <sup>50</sup> *Id.* Ex. A at 100. Other Cal-OSHA complaints contain similar reports. A San Pablo  
21 McDonald’s worker who was feeling sick and had a high fever when his temperature was taken at  
22 work was not offered sick pay and so continued to work until he could bear it no longer. *Id.* at 133-  
23 34 (“They didn’t say they would pay me the hours or sick pay. So I said, ‘I think I can keep  
24 working,’ and so they sent me back to work.... [T]hey should tell me don’t worry, we will pay for  
25 the day. I think that is why so many people are infected.”). A San Francisco McDonald’s employee  
26 continued to work with flu-like symptoms because she was offered no paid sick leave and “could not  
27 afford that.” *Id.* at 41. Another worker with flu-like symptoms, whose father had tested positive for  
28 COVID-19, could “only t[ake] 2 sick days because I need to support my family.” *Id.* at 90. A San  
Pablo McDonald’s worker showing COVID-19 symptoms told a co-worker, “I can’t stop working  
because they won’t pay us.” *Id.* at 130. A Jack in the Box employee who later tested positive for  
COVID-19 worked while extremely sick for four days because “my co-workers and I do not always  
have the option to stay home when we are sick. We cannot count on getting paid for our sick days,  
and we cannot pay our bills if we don’t get paid. Our employer retaliates against workers by cutting  
hours or whole days from our work schedule going forward when we miss days of work.” *Id.* at 260.  
Others report fears of retaliation (mainly by reducing scheduled work hours) for missing work while  
sick. *Id.* at 46, 50 (similar). See also *id.* at 53 (reporting that employee worked sick because “no one  
can afford to lose pay” and that “many workers will feel they have to come to work sick so they can  
provide food and shelter for their families”).

1 they contract or are exposed to COVID-19 in the workplace will not report potential cases to their  
2 employers or get tested.<sup>51</sup>

3 In the agricultural sector, “paid leave to quarantine ... is crucial because farmworkers  
4 currently lack access to paid sick leave or PTO.”<sup>52</sup> Left without a safety net, farmworkers must  
5 work while sick or after they have been exposed to COVID-19, out of fear that they otherwise will  
6 not be able to pay their rent or buy food.<sup>53</sup> In the Fosters Farms outbreaks, multiple workers who  
7 contracted COVID-19 at work testified that they returned to work while sick because they could not  
8 afford to go without pay.<sup>54</sup> For example, a 68-year-old worker’s supervisor tried to convince her to  
9 stay at work because he “need[ed] people” even though she reported feeling very ill and wanted to  
10 leave; she later tested positive for COVID-19 and, after staying home sick for two weeks, received a  
11 call from her employer berating her for not being back at work, saying she “should have come in  
12 today anyway to check in to work” despite still being sick.<sup>55</sup>

13 Cal-OSHA’s authority to require maintenance of pay for workers removed from the  
14 workplace for health and safety reasons is well-established. Four decades ago, the D.C. Circuit  
15 affirmed the validity of a “medical removal protection” (“MRP”) program that required maintenance  
16 of workers’ earnings (and seniority) *for up to 18 months or longer* against an industry challenge  
17 similar to that here. *United Steelworkers of Am. v. Marshall* (D.C. Cir. 1980) 647 F.2d 1189, 1230  
18 & n.61.<sup>56</sup> Indeed, in the case of COVID-19, unlike other contexts where MRP has been used, an

19 <sup>51</sup> Aloise Decl. ¶¶5-6. Further, before the ETS, even when workers did report exposure or  
20 symptoms and got tested, employers expected them work while awaiting test results. *Id.* See also  
21 Huerta Decl. ¶4 (even when COVID-19 sick leave is available, it is limited and inadequate for  
22 workers to properly quarantine, especially after multiple exposures).

23 <sup>52</sup> Elenes Decl. ¶12. When farmworkers have been too sick from COVID-19 to work, they have  
24 often been denied COVID-19 leave provided to them by applicable laws. *Id.* ¶13

25 <sup>53</sup> *Id.* ¶12; see also Jervis, et al., *supra* note 34.

26 <sup>54</sup> Leyton Decl., Exs. T ¶3; U ¶6 (stayed home when he and his wife were both sick with  
27 COVID, using their savings; he was not told he could use sick leave); P ¶¶5, 7 (after being out sick  
28 with COVID for two weeks, she went back to work even though she still felt ill because she was  
afraid she would lose her health coverage; company initially denied her COVID-pay).

<sup>55</sup> *Id.* Ex. Q ¶¶11-12 (Ms. Alvarado subsequently returned to work even though she still felt ill  
because she had no vacation or unpaid leave left).

<sup>56</sup> The court noted that while “OSHA regards MRP as a sine qua non of the lead standard,”  
because OSHA saw it as necessary to induce employees to participate in medical testing programs,  
“[t]he industry regards MRP as ... a cash subsidy ... outside OSHA’s statutory grant of authority  
....” *Id.* at 1228. The court rejected the industry argument, holding that “unmistakably ... OSHA’s  
statutory mandate”—to adopt measures reasonably necessary to provide safe and healthy

1 infected or exposed employee’s continued presence in the workplace presents a danger to *other*  
2 *workers*, because it is an infectious disease.

3 Cal-OSHA standards must be at least as protective as federal standards, and Cal-OSHA has  
4 itself adopted the federal MRP standards. There can be no question that the MRP program falls  
5 within the agency’s statutory mandate to “assur[e] safe and healthful working conditions for all  
6 California working men and women by authorizing the enforcement of effective standards, assisting  
7 and encouraging employers to maintain safe and healthful working conditions, and by providing for  
8 research, information, education, training, and enforcement in the field of occupational safety and  
9 health,” Lab. Code §6300.

10  
11 Respectfully submitted,

12 Dated: January 19, 2021

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25 *Association, California School Employees*  
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27 employment and prevent hazards—“is ... broad enough to include such a regulation as MRP.” *Id.* at  
28 1230-31. As the court explained, “OSHA found ... that unless workers were guaranteed all their  
wage and seniority rights upon removal, they would resist cooperating with the medical surveillance  
program that determined the need for removal.” *Id.* at 1237. Similar MRP programs have been  
adopted for many other workplace hazards. *See, e.g., Marshall*, 617 F.2d at 674-75 (upholding MRP  
for cotton dust); 8 C.C.R. §§5217(1)(8) (MRP for formaldehyde), 5202(j)(11) (MRP for methylene  
chloride); *cf. N. Am.’s Building Trades Unions v. Occupational Safety & Health Admin.* (D.C. Cir.  
2017) 878 F.3d 271, 307-10 (holding failure to adopt MRP for silica was unsupported by substantial  
evidence); *Int’l Union, United Auto, Aerospace & Agr. Implement Workers of Am., UAW v.*  
*Pendergrass* (D.C. Cir. 1989) 878 F.2d 389, 399-400 (similar, regarding formaldehyde). Cal-OSHA  
standards also require employers to pay employees to attend trainings on certain hazards. *E.g.,* 8  
CCR 5193(g)(2)(A), 5199(a)(4). Plaintiffs fail to address these other standards at all.

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*Transport Workers Union of America, California  
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