

PEOPLE'S PARITY PROJECT

June 3, 2020

The Honorable Lamar Alexander
Chairman, Senate HELP Committee
The Capitol
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member, Senate HELP Committee
The Capitol
Washington, D.C. 20510

Delivered via electronic mail.

Dear Chairman Alexander, Ranking Member Murray, and Members of the Committee:

The People's Parity Project is a nationwide network of law students and new attorneys advocating for the rights of workers and consumers. We are writing on behalf of our student members at fifty law schools across the country who strongly oppose legal immunity for universities and employers during the COVID-19 crisis.

We were disturbed to learn that many universities and industry groups are lobbying Congress and the Administration to demand that corporations get sweeping immunity from lawsuits if they recklessly put the lives of workers, students, or customers at risk during the COVID-19 pandemic.¹ As students, we are eager to safely return to in-person learning — and we believe that corporate immunity will only make it harder to do so. Today, state tort law merely requires that *reasonable* precautions be taken to keep us safe, like guaranteeing students and workers' access to personal protective equipment (PPE) and ensuring that we can socially distance in classrooms. Corporate immunity would make it impossible to hold universities and other corporations accountable if they refuse to take *reasonable* steps to re-open — potentially leading to a second wave of the virus and forcing schools to shut down again. This is a racial justice issue: on many of our campuses, school staff are predominantly Black and Brown workers who are bearing the brunt of the COVID-19 crisis, and who would be at extreme risk of campuses open without safety measures in place.

Corporate immunity would thus give universities a free pass to expose students and workers to the deadly coronavirus, because students are largely young people who are more likely to be asymptomatic carriers, facilitating exponential spread of COVID-19 in our crisis.

I. Immunity for Universities Will Put Students' Safety at Risk, While Making it Harder to Return to In-Person Learning

Corporate immunity would give colleges and universities a free pass to recklessly or negligently expose students to the deadly COVID-19 crisis — leaving us with no ability to hold universities accountable if students die because their schools failed to adopt basic safety precautions. Universities would have fewer incentives to take the reasonable steps needed to re-open safely, potentially leaving students vulnerable to the coronavirus, turning universities and surrounding communities into COVID-19 hotspots, and forcing schools to end in-person learning again this fall because they reopened without reasonable precautions in place. Thus, corporate immunity risks facilitating the worst possible scenario: students would get sick, the virus would spread exponentially within our communities, and schools would be forced to shut down again.

¹ Kery Murakami, *Colleges Worry They'll Be Sued if They Reopen Campuses*, INSIDE HIGHER ED (May 15, 2020), <https://www.insidehighered.com/news/2020/05/15/colleges-seek-protection-lawsuits-if-they-reopen>. Emily Bazelon, *What Will College Be Like in the Fall?*, N.Y. TIMES MAG. (June 3, 2020), <https://nytimes.com/2020/06/03/magazine/covid-college-fall.html>.

A. The Deadly Coronavirus

Corporate immunity is, effectively, a license to kill students. According to Johns Hopkins University, the case fatality rate of COVID-19 patients in the United States is a staggering 5.9%.² Worse still, it is possible that the United States, like many other countries, has “broadly undercounted cases and deaths.”³ While older people are most vulnerable to COVID-19, all age groups are susceptible both to coronavirus and conditions that may exacerbate the severity of the disease — and people in all age groups have died. Many students have disabilities or other underlying health conditions, including chronic lung disease, immune deficiencies, diabetes, obesity, and asthma, that put them at high risk of severe illness or death if universities recklessly expose them to COVID-19.⁴ Because students with disabilities are at heightened risk for contracting COVID-19, corporate immunity may also undermine equal access to education for students with disabilities.

Worse still, the coronavirus is highly contagious and spreads easily via contact with respiratory droplets or (less frequently) with a surface that has the virus on it.⁵ Most concerning, the virus can be disseminated by infected people showing mild or no symptoms. In the case of one isolated cruise ship, 59% of the passengers tested positive for COVID-19, and of those 128 positive cases, 81% of the patients were asymptomatic.⁶ Thus, without reasonable precautions in place, asymptomatic and presymptomatic students may expose other students, campus workers, and community members to the virus undetected — until it is too late to prevent an outbreak.

B. Corporate Immunity Will Disincentivize Schools From Re-Opening Safely.

As law students, we are eager to return to in-person learning — but plans to re-open must be safe. Blanket corporate immunity would remove a critical incentive for schools to take the safety precautions needed to safely re-open. For example, blanket corporate immunity might shield schools if:

- Schools unreasonably fail to provide students and campus workers with PPE
- Schools fail to take reasonable steps to ensure that students can socially distance in classrooms and student housing.
- Schools are aware that a student has tested positive for COVID-19, and the school unreasonably fails to trace and test other campus community members that the student has come into contact with.
- Schools fail to take reasonable steps to prevent students who are sick from coming to class.
- Schools unreasonably ignore clear guidance from state or federal public health officials.

If schools have blanket immunity to unreasonably gamble with students’ and workers’ lives, some will — for example, Liberty University in Lynchburg, Virginia flouted public health guidelines this March, leading to a local outbreak of COVID-19.⁷

² Sarah Toy, *Cancer Patients Are Facing More Risk*, WALL ST. J., May 29, 2020, at A5.

³ Daniel Michaels, *Statistics Suggest Virus Deaths Undercounted*, WALL ST. J., May 29, 2020, at A5.

⁴ *People Who Are at Higher Risk for Severe Illness*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last updated May 14, 2020).

⁵ *See How COVID-19 Spreads*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last updated May 22, 2020).

⁶ See Alvin J. Ing et al, *COVID-19: in the footsteps of Ernest Shackleton*, *Thorax* (May 27, 2020), <https://thorax.bmj.com/content/early/2020/05/27/thoraxjnl-2020-215091>.

⁷ Kenya Evelyn, *Liberty University student tests positive for Covid-19 as Falwell reopens campus*, *GUARDIAN* (Mar. 30, 2020), www.theguardian.com/us-news/2020/mar/30/liberty-university-coronavirus-student-positive-jerry-falwell-jr; Brandon Ambrosino, *He’s Going to Do Whatever He Wants*, *POLITICO MAG.* (March 29, 2020), <https://www.politico.com/news/magazine/2020/03/29/falwell-liberty-university-coronavirus-covid-19-pandemic-152467>.

C. Corporate Immunity is Not Necessary to Return to In-Person Learning.

Our universities may argue that they need blanket legal immunity to re-open schools and return to in-person learning — but in reality, state tort law *already* protects universities and employers from legal liability as long as they take *reasonable* steps to protect students and campus workers from suit.⁸ Thus, universities are already shielded from liability for merely failing to act perfectly or take “superhuman” precautions to avoid being sued.⁹ If a university operates with appropriate social distancing measures in place, has working ventilation, and regularly cleans and disinfects its premises, then students who get sick or their family members will likely be unable to take a university to trial for negligence.¹⁰ Students or family members suing a university for negligence would also have to prove that the university’s unreasonable failure to protect students caused that student to contract COVID-19. Existing state law already protects universities that are doing their best.¹¹ Corporate immunity is therefore protecting unreasonable failures to protect students from the deadly coronavirus, and unreasonable failures only.

Since existing case law already serves as a liability shield for universities who meet the reasonable care standard, any additional legislation is, at best, unnecessary and duplicative. At worst, it signals to universities that they are immune from COVID-19-related lawsuits in general, including in cases of gross negligence and willful misconduct. Universities will be encouraged to ignore their responsibility to provide certain minimum protections to ensure student and employee safety, such as regular cleaning and disinfecting, that would easily meet the reasonable care standard.

II. **Legal Immunity for Universities Will Put Campus Workers at Risk.**

Corporate immunity would also jeopardize the health, safety, and lives of the campus workers who keep our campuses running, from cleaning staff to cafeteria workers to graduate student workers who teach undergraduates. Blanket corporate immunity would allow universities and other employers to flout worker safety laws without consequences — leaving workers protected on paper, but unprotected in practice. Corporate immunity would thus frustrate a future binding OSHA emergency standard and other worker safety legislation, allowing companies to recklessly put workers’ lives at risk.

Many employers are already gambling with workers’ lives — driving the spread of the virus among Black and Brown communities. For example, nearly half of the US’s COVID-19 hotspots have been traced to meat-packing plants where employees were forced to work on cramped production lines without protective gear,

⁸ The reasonable care standard already serves as a robust liability shield for universities. A student or her family member who contracts COVID-19 will bear the burden of proof for a tort action. *See, e.g.*, *Bd. of Trustees, Community College of Baltimore Cty. v. Patient First Corp.*, 120 A.3d 124, 134 (Md. 2015); *Hodson v. Taylor*, 860 N.W.2d 162, 175 (Neb. 2015) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”); *Rogers v. Christina School Dist.*, 73 A.3d 1, 11 (Del. 2013) (explaining that the duty giving rise to a negligence tort “is only one to exercise reasonable care under the circumstances.”)

⁹ *See* Heidi Li Feldman, *We Need to Provide Resources for COVID-19 Victims, Not Tort Immunity for Businesses*, AM. CONSTITUTION SOC’Y (May 11, 2020), <https://acslaw.org/expertforum/we-need-to-provide-resources-for-covid-19-victims-not-tort-immunity-for-businesses>.

¹⁰ *Id.*

¹¹ Therefore, universities’ concern that “lawyers are prepping an avalanche of torts” is likely misplaced. *See* Nick Rummell, *Business-Liability Protections Face Steep Political and Legal Obstacles*, COURTHOUSE NEWS SERVICES (May 16, 2020), <https://www.courthousenews.com/business-liability-protections-face-steep-political-and-legal-obstacles>. In the two-and-a-half months since social distancing measures have been in effect, “most Covid-19-related lawsuits have been between businesses or against the cruise industry.” *See id.* One exception is a negligence claim by workers against Smithfield Foods, a meatpacking plant based in Missouri, which was recently dismissed. Reuters, *Judge dismisses lawsuit over worker safety at Smithfield pork plant*, NBC NEWS (May 6, 2020), <https://www.nbcnews.com/news/us-news/judge-dismisses-lawsuit-over-worker-safety-smithfield-pork-plant-n1201236>. So far, no university has faced a lawsuit related to their COVID-19 safety measures.

including masks, for the first several weeks of the pandemic.¹² Meatpacking plants aren't the only example. In Yakima, WA, for example, where fruit-packing workers protested lack of safety measures, the industry accounted for over 15% of reported cases.¹³ Corporate immunity will only embolden bad employers willing to gamble with workers' lives. For example, Utah passed state-level corporate immunity legislation in May.¹⁴ The very next day, a local paper reported that one Salt Lake City employer told employees not to follow public health guidance and required even those who tested positive to report to work; nearly half of its workers later tested positive.¹⁵

On many of our campuses, the people who make it possible for us to learn are overwhelmingly Black and Brown workers. Black and Brown workers are already bearing the brunt of the COVID-19 crisis¹⁶ — because systemic racism allows corporations, including our universities, to put Black workers at risk with impunity. Today, Black workers are more likely to be exposed to the virus,¹⁷ more likely to be unable to work from home,¹⁸ and more likely to face healthcare discrimination and barriers to care when they get sick. Corporate immunity will give companies, including our universities, free reign to jeopardize the lives of workers of color. As people around the country are rising up to affirm that Black Lives Matter, we cannot give corporations, including our universities, blanket immunity to jeopardize Black workers' safety.

III. Legal Immunity for Universities Will Undermine Public Health.

If universities and corporations have blanket immunity to put students and workers at risk, schools may also place the greater community at risk. COVID-19 is highly contagious — and outbreaks at schools could quickly spread among the towns, cities, and states that schools are in.

For example, an outbreak of coronavirus on a university campus also places the greater community at risk. In Canada, a COVID-19 outbreak at a single Imperial Oil Ltd. work camp was linked to 100 infections in *over four provinces*.¹⁹ Similarly, “counties in rural Alabama are facing an increase in confirmed infections,” but “[t]heir outbreaks are also affecting urban areas, since many of the sick need to be transferred to city hospitals” with more resources.²⁰ When colleges and universities decided to close their campuses earlier this

¹² Nearly half of the US's COVID-19 hotspots have been traced to meat-packing plants where employees were forced to work on cramped production lines without protective gear, including masks, for the first several weeks of the pandemic. Nina Lakhani, *US coronavirus hotspots linked to meat processing plants*, GUARDIAN (May 15, 2020), <https://www.theguardian.com/world/2020/may/15/us-coronavirus-meat-packing-plants-food>.

¹³ See Mai Hoang, *Yakima Valley fruit companies say they're following safety guidelines; protesting workers disagree*, YAKIMA HERALD-REPUBLIC (May 12, 2020), https://www.yakimaherald.com/special_projects/coronavirus/yakima-valley-fruit-companies-say-theyre-following-safety-guidelines-protesting-workers-disagree/article_692d314b-c775-57a7-bffa-8f95b9eaf958.html.

¹⁴ See Taylor Stevens, *Utah governor signs bill shielding businesses, property owners from coronavirus-related suits*, SALT LAKE TRIBUNE (May 4, 2020), <https://www.sltrib.com/news/politics/2020/05/04/utah-governor-signs-bill/> (last accessed June 1, 2020).

¹⁵ Connor Richards, *2 Utah County businesses told staff to ignore COVID-19 guidelines, resulting in 68 positive cases*, DAILY HERALD (May 5, 2020), https://www.heraldextra.com/news/local/2-utah-county-businesses-told-staff-to-ignore-covid-19-guidelines-resulting-in-68-positive/article_d8426991-a693-5879-9d88-f9e094aef5b5.html (last accessed June 1, 2020).

¹⁶ Kenya Evelyn, *'It's a racial justice issue': Black Americans are dying in greater numbers from Covid-19*, GUARDIAN (April 8, 2020), <https://www.theguardian.com/world/2020/apr/08/its-a-racial-justice-issue-black-americans-are-dying-in-greater-numbers-from-covid-19>.

¹⁷ Vanessa Williams, *U.S. government is urged to release race, ethnicity data on covid-19 cases*, WASH. POST (April 6, 2020, 6:14 PM), https://www.washingtonpost.com/politics/government-urged-to-release-race-ethnicity-data-on-covid-19-cases/2020/04/06/7891aba0-7827-11ea-b6ff-597f170df8f8_story.html.

¹⁸ Elise Gould & Heidi Shierholz, *Not everybody can work from home: Black and Hispanic workers are much less likely to be able to telework*, ECON.POLICY INST. (March 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home>.

¹⁹ See Sarach McFarlane and Vipal Monga, *Virus Outbreaks Threaten Oil Projects*, WALL ST. J., May 29, 2020, at B6.

²⁰ Reeves, *supra*.

year, some administrators, including President Maud Mandel of Williams College, cited the “shortage of medical providers and quarantine options” surrounding their campuses and the need to “reduce pressure on local caregivers.”²¹ A few short months later, we have flattened the curve — but if colleges can open without reasonable precautions against COVID-19 in place, they may cause fast-moving outbreaks that overwhelm healthcare providers again.

IV. Underfunded Public Enforcement Agencies Are Ill-Equipped to Hold Universities Accountable for Gambling with the Lives of Workers, Students, and Customers.

Corporate immunity will make it virtually impossible to hold universities accountable for violating public health guidelines, and public enforcement agencies are unable to fill the gap. For example, workers have flooded the federal Occupational Safety and Health Administration with thousands of COVID-19 safety complaints²² — from shortages of masks and gloves to being prohibited from wearing masks or forced to work within six feet of people who seem six. But by late May, OSHA had yet to cite even a single employer for safety violations.²³ Even if President Trump’s OSHA wanted to robustly enforce workplace safety protections, they wouldn’t be able to. The Economic Policy Institute and Center for Popular Democracy estimate that in 2018, every federal OSHA investigator was responsible for enforcing the rights of at least 175,000 workers — an impossible task.²⁴

V. Federal Legislation Displacing State Liability Statutes is Unprecedented and Unconstitutional.

Sweeping corporate immunity legislation would displace state tort law — violating principles of federalism, long standing constitutional practice, and the 10th Amendment.

Broad Congressional immunity from liability is unprecedented. Based on the common law, state tort rules have been traditionally within states’ domain since the nation’s founding.²⁵ In the past, when passing legislation preempting state liability laws, Congress “substituted regulatory measures designed to protect the public.”²⁶ Its purpose was to “enhance public protections, not weaken them.”²⁷ But corporate immunity legislation doesn’t raise the floor above state protections — instead, it effectively wipes out state tort legislation. It is very unclear that the “Constitution permits Congress to simply wipe away state liability rules without enacting substantive legislation imposing federal regulatory oversight or an alternative compensation system, or both.”²⁸ Because it is unclear that corporate immunity legislation is constitutional, such legislation could create a great deal of uncertainty for students, workers, and universities — undermining, rather than facilitating plans to reopen.

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²¹ Letter from Maud Mandel, President of Williams College, regarding COVID-19 (Mar. 11, 2020).

²² Peter Whoriskey, Jeff Stein & Nate Jones, *Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show*, WASH. POST (April 16, 2020), <https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints>.

²³ Noam Scheiber, *OSHA Cedes Worker Care To Employers*, N.Y. TIMES, April 23, 2020, at B1.

²⁴ KATE HAMAJI ET AL., CTR. FOR POPULAR DEMOCRACY & ECON. POLICY INST., UNCHECKED CORPORATE POWER 7 (2019), <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

²⁵ Hearing on Examining Liability During the Covid-19 Pandemic Before the Senate Judiciary Comm., 116th Cong. 2 (2020) (testimony of David C. Vladeck, Professor, Georgetown University Law Center) [hereinafter Vladeck Testimony]].

²⁶ Vladeck testimony, at 9.

²⁷ *Id.* at 10.

²⁸ *Id.* at 2

Corporate immunity will create a disturbing moral hazard for our universities. Congress will provide a disincentive for students to return to school and for workers to return to work, thereby impeding universities' efforts to safely reopen their campuses. Corporate immunity will protect schools that unreasonably fail precautions to keep them safe, while doing nothing for schools that take reasonable steps to combat the spread of the deadly coronavirus. Immunizing universities will simply pass on risk to students, university employees, and their greater communities.

If you have any questions, please do not hesitate to contact me at sejal@peoplesparity.org

Sincerely,

A handwritten signature in black ink, appearing to read 'Sejal Singh', with a stylized flourish at the end.

Sejal Singh
National Policy Director
People's Parity Project