

**THE DISPOSABLE “ESSENTIAL” WORKERS
OF COVID-19**

EVELYN MARCELINA RANGEL-MEDINA

INTRODUCTION 71

I. STRUCTURAL INEQUALITIES IN LOW-WAGE “ESSENTIAL” EMPLOYMENT..... 76

A. Six Structural Factors Underlying Inequality in Employment 76

B. COVID-19 Exacerbated Structural Inequity for Low-Wage Workers of Color 82

C. Essential Workers in the Food Chain System During COVID-19..... 88

 1. Agricultural Essential Workers 89

 2. Meatpacking Essential Workers..... 91

 3. Food Service Essential Workers 93

II. COVID-19 LOW-WAGE WORKER-RELATED CLAIMS 96

A. Wrongful Death Suits Related to Employment 98

B. Racial Discrimination Suits Related to Employment 101

III. BUILDING EMPLOYMENT EQUITY PRINCIPLES INTO LABOR AND EMPLOYMENT LAW 105

A. Address Legislative Gaps and Implement Reforms to Overcome Structural Barriers 106

 1. Eliminate Poverty Wages and Modify Low-Wage Structure(s)..... 107

 2. Amend the NLRA and FLSA to Include Agricultural and Domestic Workers 112

 3. Increase Workplace Protections for Essential Workers..... 113

 4. Provide Status to Undocumented Essential Workers 115

B. Strengthen Safety Enforcement Levers 117

C. Repeal State Shield Laws Limiting Employer Tort Liability..... 118

CONCLUSION..... 120

THE DISPOSABLE “ESSENTIAL” WORKERS OF COVID-19

EVELYN MARCELINA RANGEL-MEDINA *

Abstract: COVID-19 reshaped almost every aspect of economic activity and working life in the United States. It also amplified existing racial, gender, and economic disparities, significantly impacting working people. Specifically, low-wage essential workers of color experienced higher levels of exposure, long-term health complications, and COVID-19-related deaths than other workers. Thus, the episodic allocation of pandemic health risks tracks and illustrates inequalities that require more extensive solutions in the workplace.

This Article demonstrates how race, gender, and citizenship shape the employment and life outcomes of essential workers who sustained the economy throughout the pandemic. Building on a health justice framework, it fills a gap in legal scholarship by identifying six employment-related factors compounding systemic inequalities. Profiling COVID-19-related lawsuits involving low-wage workers, it also analyzes the effectiveness of available legal remedies.

Amid immense human loss, there are clear lessons in changing labor and employment structures to protect, rather than dispose of, essential workers from magnifying inequalities. Thus, this Article proposes adopting employment equity principles to address intersectional disparities in the workplace. Using the expertise of on-the-ground advocacy organizations, it also examines and critiques several administrative, legislative, and regulatory interventions. In light of impending health and climate change pandemics, this Article provides actionable steps to protect the most vulnerable among us.

* Assistant Professor of Law, Temple University James E. Beasley School of Law. Former University of California Presidential Law Fellow and Managing Director of the Restaurant Opportunities Centers United (ROC United) and United for Respect (UFR). This paper is partly shaped by the expertise of Tanya Wallace-Gobern and Shanika Houlder-White, who lead the National Black Worker Center (NBWC). I appreciate their generosity and courage in envisioning reconstructing an economy based on justice and equity. I am grateful to Ruqaiyah Yearby, Alina Ball, Raquel Aldana, Jennifer Lee, Jaya Ramji-Nogales, Scott Burris, Craig Green, Tom W.C. Lin, Jules Epstein, Juan Carlos Ibarra, Shauna Marshall, Dave Owen, Sheila R. Maddali, Teofilo Reyes, Christina E. Fletes-Romo, and Elizabeth M. Toledo for helpful suggestions and feedback. I presented this paper at the Third Annual Michael A. Olivas Writing Institute at the University of California, Davis School of Law. I am grateful for the feedback I received there, as well as the feedback I received at the James E. Beasley School of Law Junior Faculty Colloquium. Violeta Alvarez, Don Arrington, Joshua P. Dufour, Susana Hernandez, Katelyn Madar, Juan Andrés “Juancho” Marroquín Ceballos, Annie Murray, and Marco A. Ramirez Torres provided excellent research and writing assistance. I am also grateful to the *Boston College Law Review* editors, particularly Deepti Sailappan, Laura Stater, Carolyn Zaccaro, and Emily Saulnier, for their first-rate editorial assistance. All errors are my own.

INTRODUCTION

Two pandemics—COVID-19 and intersecting structural inequalities—impacted the U.S. economy starting in 2020.¹ Low-income communities of color experienced the most severe economic and health effects of these pandemics.² This resulted in greater unemployment, diminished economic security, and higher rates of infection and COVID-19-related deaths within communities of color.³ Workers of color and immigrants are disproportionately represented in essential low-wage sectors of the economy, such as agriculture, food processing, and home healthcare.⁴ The cumulative result is that these pandemics have exacerbated

¹ See Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 OXFORD J.L. & BIOSCIENCES 1, 4 (2020) (examining “how structural racism in employment causes disparities in exposure; structural racism in housing causes disparities in susceptibility; and structural racism in health care causes disparities in treatment”); Jason L. Williams & Quentin R. Youmans, *Two Pandemics, One Responsibility: Constructing a Response to COVID-19 and Systemic Racism*, AM. COLL. OF CARDIOLOGY (June 16, 2020), <https://www.acc.org/Membership/Sections-and-Councils/Fellows-in-Training-Section/Section-Updates/2020/06/12/14/42/Two-Pandemics-One-Responsibility-Constructing-a-Response-to-COVID-19-and-Systemic-Racism> [<https://perma.cc/U3QD-NQ8Z>] (discussing the devastations of the pandemic as well as systemic racism, which “has been present for centuries, since the very founding of our country”).

² See Elisabeth Gawthrop, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Oct. 19, 2023), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/VL5X-VL7D>] (“Indigenous, Latin[x/e], Pacific Islander and Black Americans all have significantly higher COVID-19 mortality rates than either white or Asian Americans once the data are adjusted to account for age distribution differences among racial and ethnic groups.”); Don Bambino Geno Tai et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASES 705, 705 (2020) (discussing how preexisting environmental, economic, and medical disparities produced higher mortality rates among people of color who contracted COVID-19); see also *The COVID Racial Data Tracker*, COVID TRACKING PROJECT AT THE ATL., <https://covidtracking.com/race> [<https://perma.cc/HS27-VXU7>] (recording nationwide COVID-19 contractions through early 2021, and indicating that the pandemic disproportionately impacted communities of color).

³ See *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_totaldeaths_select_00 [<https://perma.cc/YU6L-LWVH>] (showing that as of September 28, 2024, more than 1.2 million COVID-19-related deaths had occurred in the United States); Williams & Youmans, *supra* note 1 (“Systemic racism has made it such that minority populations experience the most deleterious effects with respect to social determinants of health. These include economic instability, food and housing insecurity, lower educational attainment, and lack of access to health care.”); David Michaels, Emily A. Spieler & Gregory R. Wagner, *US Workers During the Covid-19 Pandemic: Uneven Risks, Inadequate Protections, and Predictable Consequences*, BMJ, Feb. 3, 2024, at 1, 1–2, <https://www.bmj.com/content/bmj/384/bmj-2023-076623.full.pdf> [<https://perma.cc/LMB3-CB9Q>] (discussing gaps in legal protections for frontline workers during COVID-19); Valerie Wilson, *Inequities Exposed: How COVID-19 Widened Racial Inequities in Education and the Workforce*, ECON. POL’Y INST. (June 22, 2020), <https://www.epi.org/publication/covid-19-inequities-wilson-testimony/> [<https://perma.cc/DYB6-QJCD>] (stating that Latinx/e, Black, and Asian workers endured greater unemployment rates than white workers during the first months of the pandemic).

⁴ See Ruqaiyah Yearby, *Protecting Workers That Provide Essential Services*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 193, 193 (Scott Burris et al. eds., 2020), <https://scholarshare.temple.edu/handle/20.500.12613/6255> [<https://perma.cc/J6FK-4E56>] (“Most essential workers are employed in health care (30%) and in food and agricultural (21%). A majority (76%) of all essential health care workers are women, while half of all essential food and agricultural workers are racial and

ed the precarious health, employment, and economic conditions of workers at the intersection of multiple marginalities.⁵

This Article makes three contributions to address the structural flaws that COVID-19 exposed in labor and employment law and policy. First, it identifies six structural factors that magnify the impact of the pandemic on low-wage workers of color to assist policymakers in crafting equitable policy interventions.⁶ Second, it analyzes COVID-19-related wrongful death and racial discrimination lawsuits to illustrate how existing legal remedies have failed to protect low-wage essential workers.⁷ Third, it proposes employment equity principles⁸ based on the existing health justice framework on COVID-19 and essential workers.⁹ It also discusses advocacy interventions to address structural gaps in labor and employment.¹⁰ Such interventions incorporate a historical and structural analysis of labor and employment law within the context of white supremacy and patriarchy.¹¹

A racially enslaved workforce was a central pillar of forming the U.S. economy and shaped the legal systems that generated today's segregated and unequal labor market.¹² Across the economy, social norms, rather than skill or

ethnic minorities.” (citation omitted)); Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19, We Must Define Who They Are*, BROOKINGS (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are> [<https://perma.cc/6CPA-EZCU>] (explaining that the largest segments of essential workers generally earn the lowest wages, such “as cashiers (making \$11.17 per hour), food preparation workers (\$11.94 per hour), and home health aides (\$12.18 per hour),” with “three-quarters of all frontline workers, earn[ing] below-average wages”).

⁵ See Sherry M.B. Thatcher, Christina B. Hymer & Rebecca P. Arwine, *Pushing Back Against Power: Using a Multilevel Power Lens to Understand Intersectionality in the Workplace*, 17 ACAD. MGMT. ANNALS 710, 720 (2023) (describing racial disparities “whereby women of minority races/ethnicities disproportionately experience disadvantages within the workplace, such as heightened levels of discrimination/harassment and limited career opportunities, relative to [w]hite women”); see, e.g., Margaret Teresa Brower & Jamila Michener, *Latina and Black Women Lost Jobs in Record Numbers. Policies Designed for All Women Don’t Necessarily Help*, WASH. POST (Feb. 9, 2021), <https://www.washingtonpost.com/politics/2021/02/09/latina-black-women-lost-jobs-record-numbers-policies-designed-all-women-dont-necessarily-help> [<https://perma.cc/S6ZU-ADD8>] (noting that Black and Latinx/e women had higher unemployment rates than white women in January 2021, and stating that Black and Latinx/e women were less likely to benefit from stimulus payments due to being less likely to use bank accounts).

⁶ See *infra* notes 41–46 and accompanying text (listing the six factors).

⁷ See *infra* notes 154–233 and accompanying text (discussing COVID-19-related workplace lawsuits).

⁸ See *infra* notes 234–235 and accompanying text.

⁹ See *infra* notes 26–153 and accompanying text (discussing scholarship on structural racism and other forces rendering low-wage workers of color susceptible to COVID-19).

¹⁰ See *infra* notes 234–328 and accompanying text (proposing legislative and regulatory reforms to address the unique vulnerabilities that low-wage workers of color suffered during COVID-19).

¹¹ See *infra* notes 12–18 and accompanying text (discussing the evolution of labor law against the backdrop of slavery and racial segregation).

¹² See Karla M. McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 921 (2012) (“Two seemingly different federal enforce-

educational background, explain persistent occupational segregation and job stratification.¹³ Historians trace structural racism and inequalities in employment to the Jim/Jane Crow and Juan Crow regimes.¹⁴ Employment laws, like the Black Codes,¹⁵ the National Labor Relations Act of 1935 (NLRA), and the Fair Labor Standards Act of 1938 (FLSA), protected white workers while explicitly and implicitly disadvantaging immigrants and workers of color.¹⁶ Specifically,

ment systems that affect the movement of unskilled workers—the 1793 and 1850 Fugitive Slave Acts and current state immigration enforcement policies—have remarkable similarities.”); DARRICK HAMILTON, ALGERNON AUSTIN & WILLIAM DARITY JR., ECON. POL’Y INST., WHITER JOBS, HIGHER WAGES: OCCUPATIONAL SEGREGATION AND THE LOWER WAGES OF BLACK MEN 1 (2011), <https://files.epi.org/page/-/BriefingPaper288.pdf> [<https://perma.cc/48DM-K2DF>] (“After taking educational attainment into account, seven out of eight (87%) of U.S. occupations can be classified as racially segregated. Occupations with smaller shares of [B]lack men have higher wages.”).

¹³ See Kate Bahn & Carmen Sanchez Cumming, *Four Graphs on U.S. Occupational Segregation by Race, Ethnicity, and Gender*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2020), <https://equitablegrowth.org/four-graphs-on-u-s-occupational-segregation-by-race-ethnicity-and-gender> [<https://perma.cc/S6GG-SDHS>] (“Research shows that differences in education or skills fail to explain a large chunk of persisting job stratification, and that discrimination and longstanding social norms play an important role in preventing workers from being proportionately represented in the U.S. occupational structure.”); see, e.g., REST. OPPORTUNITIES CTRS. UNITED, ENDING JIM CROW IN AMERICA’S RESTAURANTS: RACIAL AND GENDER OCCUPATIONAL SEGREGATION IN THE RESTAURANT INDUSTRY 1 (Ariel Jacobson et al. eds., 2015), <https://laborcenter.berkeley.edu/pdf/2015/racial-gender-occupational-segregation.pdf> [<https://perma.cc/N4QS-DLXY>] (documenting barriers blocking workers of color from securing higher-paid positions within the food service industry).

¹⁴ See Yearby & Mohapatra, *supra* note 1, at 4 (“Racial and ethnic minorities’ disparities in exposure to COVID-19 are due in part to structural racism in employment. During the Jim Crow era (1875–1968), employment laws were enacted that provided protections for white workers and disadvantaged racial and ethnic minorities.”); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1161 n.1 (1984) (discussing how labor laws during the Jim Crow era often sought to impose restrictions on the Black population that were similar in severity to those under slavery); Roberto Lovato, *Juan Crow in Georgia*, THE NATION (May 8, 2008), <https://www.thenation.com/article/archive/juan-crow-georgia/> [<https://perma.cc/8MSR-K7R2>] (defining “Juan Crow” as “the matrix of laws, social customs, economic institutions and symbolic systems enabling the physical and psychic isolation needed to control and exploit undocumented [Latinx/e] immigrants,” and drawing parallels with the historical Jim/[Jane] Crow regime).

¹⁵ See DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 1–2 (1978) (explaining that the Black Codes, state laws enacted in the South immediately after the Civil War to protect against any “evil that may arise from [formerly enslaved people’s] sudden emancipation,” worked within the new post-Civil War constraints but sought to produce the same colonial relationship (quoting THEODORE WILSON, THE BLACK CODES OF THE SOUTH 63 (1965))); see also Stephen Middleton, *Repressive Legislation: Slave Codes, Northern Black Laws, and Southern Black Codes*, OXFORD RSCH. ENCYCLOPEDIA AM. HIST., Feb. 28, 2020, at 1, 2, 13 (tracing the metamorphosis of the slave codes, which originated in the Southern colonies before American Independence, into the post-Civil War Black Codes); BYNE FRANCES GOODMAN, THE BLACK CODES, 1865–1867, at 24–26 (1912) (explaining a Louisiana law requiring Black workers wishing to end labor contracts early to either pay twice the wages for time lost or, if the abandonment lasted longer than three days, to work without pay until they agreed to resume their original contract).

¹⁶ See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 118 (2011) (stating that legislators barred domestic laborers and farmworkers from accessing the protections in the NLRA, FLSA, and other New Deal laws in order “to exclude most [B]lack[] [people] from

the facially neutral NLRA and FLSA excluded agricultural and domestic workers, precluding workers of color—particularly Black workers—from critical labor standards and protections these laws gave white workers.¹⁷ The NLRA and FLSA’s exclusionary nature perpetuates structural inequality in employment because workers of color and immigrants remain primarily concentrated in these industries, commonly called “essential” after COVID-19 arrived.¹⁸

In addition to these historical forces, many other factors contribute to the disparate impact of COVID-19 on low-wage essential workers of color.¹⁹ The failures of labor and health safety laws in providing safeguards for these workers during the pandemic will have lasting disparate health outcomes in communities of color. Additionally, unionized labor is primarily concentrated in segments of

the economic and legal protections provided to white, industrial employees”); Yearby & Mohapatra, *supra* note 1, at 4–5 (explaining that Jim Crow laws in Southern states either expressly barred workers of color from unionizing or permitted unions to exclude them, and stating that because farmworkers are not covered under the FLSA, nearly one-third of agricultural laborers lack access to paid leave); *see also* National Labor Relations Act, 29 U.S.C. §§ 151–169 (establishing laws to protect unionization and enable bargaining power with employers); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (codifying minimum workplace requirements and creating a Wage and Hour Division within the U.S. Department of Labor to enforce the law).

¹⁷ *See* 29 U.S.C. § 152(3) (defining “employee” and explicitly excluding agricultural and domestic workers from the NLRA); Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systematic-inequality-economic-opportunity/> [<https://perma.cc/4ZWV-ZQLW>] (noting that the FLSA “introduced a 40-hour work week . . . and established a federal minimum wage and overtime requirements,” and acknowledging that “[w]hile the FLSA boosted wages and improved working conditions for thousands of white workers, it largely excluded African American workers from receiving these benefits by exempting many domestic, agricultural, and service occupations”); *see also* Maurice Jourdan, Note, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 384, 384–86 (1967) (recounting the FLSA’s legislative history, and arguing that the exclusion of agriculture in the statute resulted from a well-organized agriculture lobby and a lack of collective bargaining structures among largely migratory farmworkers); PAUL ORTIZ, AN AFRICAN AMERICAN AND LATINX HISTORY OF THE UNITED STATES 119–24 (2018) (documenting widespread state-sanctioned and vigilante violence against Black, Mexican, and other immigrant agricultural workers during the early twentieth century).

¹⁸ *See* Yearby, *supra* note 4, at 193 (stating that around 50% of the agricultural and restaurant workforces, called “essential” workers during the pandemic, are people of color).

¹⁹ *See* Martina Hund-Mejean & Marcela Escobari, *Our Employment System Has Failed Low-Wage Workers. How Can We Rebuild?*, BROOKINGS (Apr. 28, 2020), <https://www.brookings.edu/articles/our-employment-system-is-failing-low-wage-workers-how-do-we-make-it-more-resilient/> [<https://perma.cc/6TAK-PM8S>] (“The pandemic has exposed a weak point in the country’s economy: the precarity of low-wage workers. Many have adapted to unimaginable circumstances, risking their own well-being, implementing public health protocols, and keeping the essential bits of the economy, like access to food, running.”); Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFFS. (May 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full> [<https://perma.cc/JX3G-SLMF>] (defining “structural discrimination” in employment as the way “laws are used to advantage those in power, while disadvantaging powerless workers”); *see also* Efrat Shadmi et al., *Health Equity and COVID-19: Global Perspectives*, 19 INT’L J. FOR EQUITY HEALTH 104, 104 (2020) (stating that around the world, migrant, low-income, and minority communities, as well as workers in “essential roles” like “public transportation operators or grocery store or pharmacy clerks,” faced particularly high risks of contracting COVID-19).

the economy that do not represent the lowest-paid sectors. This reality leaves most low-wage essential workers without bargaining power, even during a global pandemic.²⁰

Based on scholarship that discusses structural racism, sexism, and citizenship²¹ in the context of health justice, Part I of this Article explains the disproportionate harms the global pandemic had on these workers.²² It also outlines six structural factors in labor and employment and how they shape structural inequalities in the context of a pandemic.²³ Part II analyzes lawsuits involving low-wage workers to assess how existing legal remedies provide or fail to relieve employment-related claims that arose due to COVID-19.²⁴ Part III concludes by proposing employment equity principles and making policy recommendations to address structural inequalities in labor and employment law and policy.²⁵

²⁰ See Rick Jervis, Rebecca Plevin, Trevor Hughes & Omar Omelas, *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://www.usatoday.com/in-depth/news/nation/2020/10/21/covid-how-virus-racism-devastated-latino-farmworkers-california/5978494002/> [<https://perma.cc/4W2V-J6P4>] (discussing the lack of union representation in farm work and how these workers do not have “unemployment benefits, health insurance, or worker’s compensation”); Julie Yates Rivchin, Note, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 398 (2004) (“Many low-wage immigrant workers, in particular, find that representation from unions is either inadequate or unavailable to them.”); see also ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2 (2009), <https://escholarship.org/uc/item/1vn389nh> [<https://perma.cc/DXJ6-LE9L>] (finding that more than a quarter of survey respondents, low-wage workers in major cities, had earned less than the wages stipulated by law during the prior week, and more than three-quarters of the laborers surveyed who worked overtime did not earn compulsory overtime pay).

²¹ See Evelyn M. Rangel-Medina, *Citizenism: Racialized Discrimination by Design*, 104 B.U.L. REV. 831, 843 (2024) (“*Citizenism*: (1) is a racialized hierarchical system of advantages and privileges formally premised on citizenship status, (2) legally permits the suppression of precarious rights of citizens of color through legal and presumed racialized illegality, and (3) mobilizes border and law enforcement to perpetuate structural racial subordination.” (footnotes omitted)).

²² See *infra* notes 26–153 and accompanying text; see also, e.g., Ruqaiyah Yearby, Crystal Lewis & Charysse Gibson, *Incorporating Structural Racism, Employment Discrimination, and Economic Inequities in the Social Determinants of Health Framework to Understand Agricultural Worker Health Inequities*, 113 AM. J. PUB. HEALTH 65, 68–69 (2023) (explaining that a 1996 federal welfare law bars most noncitizens, including refugees, asylees, and lawful permanent residents, from receiving Medicaid or other benefits and that noncitizens could not qualify for money the federal government distributed to individuals under the Coronavirus Aid, Relief, and Economic Security Act of 2020); Neeta Kantamneni, *The Impact of the COVID-19 Pandemic on Marginalized Populations in the United States: A Research Agenda*, 119 J. VOCATIONAL BEHAV. 1, 2 (2020) (“[T]he Asian Pacific Policy and Planning Council launched a website for Asian Americans to report incidents of discrimination during COVID-19. In its first 8 weeks, it received 1497 reports of discrimination . . .”).

²³ See *infra* notes 41–46 and accompanying text.

²⁴ See *infra* notes 154–233 and accompanying text.

²⁵ See *infra* notes 234–328 and accompanying text.

I. STRUCTURAL INEQUALITIES IN LOW-WAGE “ESSENTIAL” EMPLOYMENT

Low-income people of color consistently suffer the first and worst effects of health and economic crises impacting the United States.²⁶ This background explains how COVID-19 widened existing inequalities for low-wage essential workers of color.²⁷ This Part outlines the historical, demographic, and legal determinants that have shaped structural inequalities in low-wage employment, using race, gender, and immigration status as prisms of analysis.²⁸ It also details how COVID-19 intensified existing inequities for low-wage essential work, which exacerbated economic and health inequalities in low-income communities of color.²⁹

Section A identifies six structural factors that rendered low-wage essential workers of color disproportionately vulnerable to COVID-19.³⁰ Section B explores how the pandemic exacerbated existing inequalities in employment.³¹ It briefly contextualizes how the vulnerability of low-wage workers of color before the pandemic enabled the aggravated impact of the pandemic on communities of color.³² Finally, tracing this Article’s six structural factors, Section C examines three essential industries in which low-wage workers weathered the brutal effects of the COVID-19 pandemic: agriculture, meatpacking, and food service.³³

A. Six Structural Factors Underlying Inequality in Employment

In the United States, over one million people have died due to COVID-19-related health complications since 2020.³⁴ Low-income communities of color experienced the most profound and severe impacts of the pandemic, primarily due to the pre-existing health, social, and economic inequalities in these communities.³⁵ According to the Kaiser Family Foundation, Black, Native American,

²⁶ See, e.g., Jeneen Interlandi, *Why Doesn't the United States Have Universal Health Care? The Answer Has Everything to Do with Race*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html> [<https://perma.cc/SXZ8-BP74>] (discussing disproportionate smallpox infections among recently freed Black people after the Civil War and Southern white leaders’ reluctance to address the crisis because although they feared the epidemic’s spread and desired a continued supply of plantation labor, “they also feared that free and healthy African-Americans would upend the racial hierarchy”); Yearby & Mohapatra, *supra* note 1, at 1–3 (discussing racial disparities of the H1N1 flu).

²⁷ See Yearby & Mohapatra, *supra* note 1, at 3 (“These racial and ethnic disparities in COVID-19 infections and deaths are a result of historical and current practices of racism that cause disparities in exposure, susceptibility, and treatment.”).

²⁸ See *infra* notes 34–71 and accompanying text.

²⁹ See *infra* notes 72–98 and accompanying text.

³⁰ See *infra* notes 41–46 and accompanying text.

³¹ See *infra* notes 72–98 and accompanying text.

³² See *infra* notes 72–98 and accompanying text.

³³ See *infra* notes 99–153 and accompanying text.

³⁴ COVID Data Tracker, *supra* note 3.

³⁵ See Yearby & Mohapatra, *supra* note 1, at 3; Leo Lopez III, Louis H. Hart III & Mitchell H. Katz, *Racial and Ethnic Disparities Related to COVID-19*, 325 JAMA 719, 719 (2021) (“Black, His-

Latinx/e³⁶, and Asian and Pacific Islander (API)³⁷ communities experienced more infections and related deaths from COVID-19 than white communities.³⁸ Devastatingly, Black people generally died at twice the rate from COVID-19-related complications compared to white people.³⁹ Pre-existing structural inequalities in health and employment partly drove the disparate impact of the pandemic on communities of color.⁴⁰

panic, and Asian people have substantially higher rates of infection, hospitalization, and death compared with [w]hite people.”); Tai et al., *supra* note 2, at 705–06 (stating that disproportionate rates of comorbidities, like heart disease and diabetes, as well as a higher concentration in low-wage industries have contributed to Black Americans’ high rates of COVID-19 contractions); *see also* Samantha Artiga, Rachel Garfield & Kendal Orgera, *Communities of Color at Higher Risk for Health and Economic Challenges Due to COVID-19*, KFF (Apr. 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/communities-of-color-at-higher-risk-for-health-and-economic-challenges-due-to-covid-19/> [<https://perma.cc/YZ4F-TP9C>] (stating that preexisting health risks and comparative lack of healthcare access have contributed to higher rates of COVID-19 contraction among communities of color).

³⁶ This Article uses the nonbinary term “Latinx/e” to refer to individuals who live in the United States and have Latin American heritage, including those who are multi-racial, Black, Indigenous, Asian, and white. *See Why Latinx/é?*, EL CENTRO, COLO. STATE UNIV., <https://elcentro.colostate.edu/about/why-latinx/> [<https://perma.cc/2HQL-2U26>] (explaining that “Latinx” and “Latine” are gender-neutral terms for people of Latin American descent, and that many people employ the terms “Latinos” and “Hispanics” to describe this same population).

³⁷ This Article uses the designation “API” to describe individuals living in the United States and have heritage from Asia, Hawaii, or the Pacific Ocean islands. *See* Rosie Nguyen, *Why the AANHPI Acronym Brings Mixed Feelings for Some Within the Community*, ABC13 (May 12, 2022), <https://abc13.com/aanhpi-aapi-apa-asian-americans/11842226/> [<https://perma.cc/86EX-9CYZ>] (describing the history of the various terms used to refer to Americans of API descent).

³⁸ Lopez et al., *supra* note 35, at 719; Lowrie A. Ward et al., *COVID-19 Cases, Hospitalizations, and Deaths Among American Indian or Alaska Native Persons—Alaska, 2020–2021*, 71 MORBIDITY & MORTALITY WKLY. REP. 730, 731 (2022), <https://www.cdc.gov/mmwr/volumes/71/wr/pdfs/mm7122a2-H.pdf> [<https://perma.cc/43W5-4UYP>].

³⁹ *See* NAT’L URB. LEAGUE, STATE OF BLACK AMERICA: UNMASKED 12 (2020), <https://78ab0743.flowpaper.com/NULSOBA2020ESweb/#page=1> [<https://perma.cc/W288-4QLS>] (highlighting that per one hundred thousand COVID-19 deaths, seventy individuals were Black and thirty individuals were white); *see, e.g.*, Yearby & Mohapatra, *supra* note 1, at 3 (stating that in 2020, Black residents comprised only 12% of Washtenaw County, Michigan’s population but 46% of the county’s COVID-19 cases); Tai et al., *supra* note 2, at 705 (“The mortality rate for COVID-19 among African Americans is more than 2-fold higher than whites. In the majority of the reporting states and Washington, DC, African Americans comprise a higher proportion of deaths relative to their percentage in those jurisdictions’ population.”).

⁴⁰ *See* Tai et al., *supra* note 2, at 705–06 (contending that a greater prevalence of preexisting health risks as well as higher concentration in low-wage industries contributed to high rates of COVID-19 in Black communities); Marc A. Garcia, Patricia A. Homan, Catherine García & Tyson H. Brown, *The Color of COVID-19: Structural Racism and the Disproportionate Impact of the Pandemic on Older Black and Latinx Adults*, 76 J. GERONTOLOGY: SOC. SCIS. 75, 78 (2021) (“Given their overrepresentation in low-wage jobs that lack health benefits, older racial/ethnic minorities are less likely than [w]hites to have employer-provided health insurance, creating significant barriers to accessing and affording medical care.”). *See generally* ADEWALE MAYE, ASHA BANERJEE & CAMERON JOHNSON, CTR. FOR L. & SOC. POL’Y, THE DUAL CRISIS: HOW THE COVID-19 RECESSION DEEPENS RACIAL AND ECONOMIC INEQUALITY AMONG COMMUNITIES OF COLOR 4 (2020), <https://www.clasp.org/wp-content/uploads/2022/04/Jobs20Brief20Nov.202020.pdf> [<https://perma.cc/3VCP-M82W>]

In the employment context, six structural factors made essential workers of color more susceptible to COVID-19. The factors are:

- (1) Pre-existing health disparities in communities of color;⁴¹
- (2) Disproportionate representation of workers of color;⁴²
- (3) Lack of adequate workplace protections and safety equipment;⁴³
- (4) Inability to work remotely and to socially distance while working;⁴⁴
- (5) Poverty or sub-poverty wages;⁴⁵ and
- (6) Occupational segregation.⁴⁶

(discussing disproportionately high unemployment rates among Black and Latinx/e workers, as well as women, during the pandemic).

⁴¹ See Wilson, *supra* note 3, at 2 (“[T]he disparate racial impact of the virus is deeply rooted in historic and ongoing social and economic injustices. Persistent racial disparities in health status, access to health care, wealth, employment, wages, housing, income, and poverty all contribute to greater susceptibility to the virus—both economically and physically.”); Lonnie R. Snowden & Genevieve Graaf, *COVID-19, Social Determinants Past, Present, and Future, and African Americans’ Health*, 8 J. RACIAL & ETHNIC HEALTH DISPARITIES 12, 12 (2020) (discussing how epidemics have “followed ‘the international fault lines of inequality, poverty, and neglect’” (quoting FRANK M. SNOWDEN, EPIDEMIC AND SOCIETY: FROM THE BLACK DEATH TO THE PRESENT 38 (2019))); Yearby & Mohapatra, *supra* note 1, at 4 (“[S]tructural racism in employment causes disparities in exposure . . . and structural racism in healthcare causes disparities in treatment.”); see also Interlandi, *supra* note 26 (reviewing the United States’ centuries-long history of racially segregated healthcare).

⁴² See Celine McNicholas & Margaret Poydock, *Who Are Essential Workers? A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*, ECON. POL’Y INST.: WORKING ECON. BLOG (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates> [<https://perma.cc/NB83-CZVM>] (“People of color make up the majority of essential workers in food and agriculture (50%) and in industrial, commercial, residential facilities and services (53%).”); see also Yearby, *supra* note 4, at 193 (“Direct care workers are primarily women of color (59%), live in poverty (18%), rely on some form of public assistance including food stamps and Medicaid (53%), and do not have paid sick leave.”).

⁴³ See Jimmy O’Donnell, *Essential Workers During COVID-19: At Risk and Lacking Union Representation*, BROOKINGS (Sept. 3, 2020), <https://www.brookings.edu/blog/up-front/2020/09/03/essential-workers-during-covid-19-at-risk-and-lacking-union-representation/> [<https://perma.cc/VC9M-NHM5>] (“[O]nly 16 percent of employees at big-box superstores had access to a mask and for some superstores fewer than 10 percent had access.”).

⁴⁴ See Yearby & Mohapatra, *supra* note 1, at 4 (“[M]any racial and ethnic minorities are unable to shelter at home and socially distance . . . in part because they are employed in ‘essential jobs’ that require them to interact with others, increasing racial and ethnic minorities’ exposure to COVID-19.”); Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 887 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6927e2-H.pdf> [<https://perma.cc/TD44-8G2V>] (stating that “prolonged close workplace contact with coworkers” is a notable factor spiking COVID-19 rates among the around 525,000 people working in meat processing plants nationally); see also MICHAELS ET AL., *supra* note 3, at 1–2 (discussing the frequent lack of legal recourse for workers exposed to COVID-19 at work, including lack of workplace benefits for many low-wage workers and federal labor agencies’ inability to enforce laws effectively).

⁴⁵ See Hund-Mejean & Escobari, *supra* note 19 (“Fifty-three million Americans, 44 percent of the labor force, earn low wages. In the best of times, these workers cycle more frequently from one job to the next without wage advancement. This lack of job stability causes financial volatility for households even when the economy is growing.” (citations omitted)).

First, health justice scholars point to pre-existing health conditions shaping the life outcomes of low-wage workers even before the pandemic. These pre-existing health conditions primarily flow from structural inequalities outside of work.⁴⁷ Concretely, low-income workers are more likely than other workers to suffer from diabetes and heart disease and to experience early mortality.⁴⁸ Thus, the pre-existing health disparities in communities of color increased their vulnerability to contracting COVID-19 while at work.⁴⁹

Second, essential low-wage sectors include agriculture, food processing, delivery, retail, domestic work, home care, restaurant work, and some healthcare segments.⁵⁰ Low-wage essential workers who are disproportionately workers of color, women, and immigrants made up most of the workforce within these industries.⁵¹ Thus, the disproportionate representation in low-wage industries cre-

⁴⁶ See Kate Bahn & Carmen Sanchez Cumming, *Factsheet: U.S. Occupational Segregation by Race, Ethnicity, and Gender*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2020), <https://equitablegrowth.org/factsheet-u-s-occupational-segregation-by-race-ethnicity-and-gender> [<https://perma.cc/ENS6-LN8E>] (“Occupational segregation lowers wages partly by reducing potential opportunities because it ‘crowds’ marginalized workers into lower-paying jobs [E]mployer discrimination excludes Black men from desirable high-wage jobs for which they are qualified and steers them into lower-paying occupations.”); REST. OPPORTUNITIES CTRS. UNITED, *supra* note 13, at 1 (“White males appear to be afforded the opportunity to work in the highest paying, most exclusive bartender and server positions in fine-dining restaurants; women, in general, appear channeled toward[] lower paying positions in casual full-service restaurants; while Latin[x/e workers] and African Americans seem largely channeled to lower paying busser, runner, or kitchen positions in full service restaurants and to limited-service, fast food establishments.”); Bahn & Sanchez Cumming, *supra* note 13 (“[D]ifferences in education or skills fail to explain a large chunk of persistent job stratification . . .”).

⁴⁷ See Yearby & Mohapatra, *supra* note 1, at 2, 10, 14–15 (discussing low-wage workers’ preexisting health conditions, as well as racial disparities in access to medical care).

⁴⁸ Emily Stiehl et al., *Worksite Health Promotion for Low-Wage Workers: A Scoping Literature Review*, 32 AM. J. HEALTH PROMOTION 359, 360 (2017); see Tai et al., *supra* note 2, at 705–06 (stating that disproportionate rates of heart disease and diabetes have contributed to a high rate of COVID-19 contractions among Black Americans).

⁴⁹ See Yearby & Mohapatra, *supra* note 1, at 2 (discussing factors that contribute to racial disparities in infection and death rates during pandemics, such as disparities in contact with infected people, access to medical care, and preexisting health conditions).

⁵⁰ See Tomer & Kane, *supra* note 4 (listing critical industries); McNicholas & Poydock, *supra* note 42 (same); see also Lisa Riordan Seville, *These Are the Most Dangerous Jobs You Can Have in the Age of Coronavirus*, NBC NEWS, <https://www.nbcnews.com/health/health-news/these-are-most-dangerous-jobs-you-can-have-age-coronavirus-n1201496> [<https://perma.cc/5AVJ-LSKT>] (May 8, 2020) (“From nursing home staff members and farmworkers to bus drivers and meatpackers, the jobs deemed ‘essential’ during the coronavirus pandemic are disproportionately held by women, immigrants and people of color . . .”).

⁵¹ HYE JIN RHO, HAYLEY BROWN & SHAWN FREMSTAD, CTR. FOR ECON. & POL’Y RSCH., A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES 3 (2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf> [<https://perma.cc/CMA7-CJVK>] (“About one-half of all workers are women, but nearly two-thirds (64.4 percent) of frontline workers are women People of color are overrepresented in many occupations within frontline industries [O]ver four-in-ten (41.2 percent) frontline workers are Black, Hispanic, Asian-American/Pacific Islander, or some category other than white.”).

ated a disparate racialized, gendered, and citizenist impact on communities of color as a result of COVID-19.

Third, the existing health justice framework deems the work environment a social determinant of health.⁵² Low wages negatively contribute to workers' and communities' general well-being and health. During the pandemic, employers in low-wage essential industries generally did not follow proper safety practices or provide protective equipment to safeguard workers from contracting the deadly virus.⁵³ Part II documents wrongful death suits and racial discrimination claims, all of which point to the negligent or reckless failure of employers to provide protective equipment and follow proper social distancing protocols.⁵⁴ Thus, the pre-existing work environment, which deprioritized the health and safety of workers, transferred to the employment practices generally espoused in essential industries that effectively disposed of the health and life of a significant segment of workers.

Fourth, the inability to work from home and social distance differed significantly by race and ethnicity and contributed to the disparate impact of the pandemic on low-income communities of color during the pandemic.⁵⁵ According to the U.S. Bureau of Labor Statistics, API and white workers were more likely to work remotely, whereas just 16.2% of Latinx/e workers and 19.7% of Black workers could work from home.⁵⁶ Black and Latinx/e workers were less able to

⁵² See *Social Determinants of Health*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> [<https://perma.cc/6XPL-6KQZ>] (stating that "social determinants of health" include employment options and salaries, among other factors); Jordan Gemelas, Jenna Davison, Case Keltner & Samantha Ing, *Inequities in Employment by Race, Ethnicity, and Sector During COVID-19*, J. RACIAL & ETHNIC HEALTH DISPARITIES 350, 350 (2021) ("[E]mployment is an important social determinant of health and a potential risk factor for contracting COVID-19"); Tomer & Kane, *supra* note 4 (explaining that low pay and greater health risks combine to make frontline workers especially vulnerable to COVID-19).

⁵³ See Ruqaiijah Yearby, *Gaps in Worker Protections That Increase Essential Workers' Exposure to COVID-19*, in COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 179, 179 (Scott Burris et al. eds., 2021), https://www.networkforphl.org/wp-content/uploads/2021/05/COVIDPolicyPlaybook-v2_May2021.pdf [<https://perma.cc/32SQ-VZ2S>] ("[L]ack of protective equipment, punitive attendance policies, and the failure to track workplace infections have left essential workers vulnerable to workplace COVID-19 infections and deaths."); O'Donnell, *supra* note 43 ("[M]any of these essential workers did not receive adequate access to the necessary personal protective equipment (PPE). For example, . . . only 16 percent of employees at big-box superstores had access to a mask[,] and for some superstores fewer than 10 percent had access.").

⁵⁴ See *infra* notes 154–233 and accompanying text.

⁵⁵ See Abay Asfaw, *Racial and Ethnic Disparities in Teleworking Due to the COVID-19 Pandemic in the United States: A Mediation Analysis*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH, Apr. 2022, at 1, 1 ("[T]he odds for Black and Hispanic workers to telework were 35% and 55% lower, respectively, and for Asian workers 44% higher than for [w]hite workers.").

⁵⁶ Elise Gould & Heidi Shierholz, *Not Everybody Can Work from Home: Black and Hispanic Workers Are Much Less Likely to Be Able to Telework*, ECON POL'Y INST.: WORKING ECON. BLOG (Mar. 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home> [<https://perma.cc/547M-2SFX>] (citing Bureau of Labor Statistics data, and

socially distance in fulfilling their work functions.⁵⁷ Some segments of API workers within low-wage essential industries were also not able to socially distance at the same rate as white workers.⁵⁸ Thus, the inability to socially distance placed low-wage workers and certain segments of workers of color at a higher risk of contracting COVID-19.

Fifth, low-wage workers comprised 43% of the U.S. workforce before the pandemic and disproportionately experienced workplace displacement after the pandemic.⁵⁹ The exorbitantly low wages within essential industries maintain workers in a state of vulnerability, placing them at a higher risk of illness and death from the virus.⁶⁰ Workers of color are far more likely to be paid poverty-level wages than white workers.⁶¹ Farmworkers were among the essential workforce most impacted by the COVID-19 pandemic.⁶² Agricultural workers, who are overwhelmingly immigrants of color from Mexico and Latin America,⁶³ tend to live under the poverty line and experience some of the harshest working conditions of any industry.⁶⁴ Additionally, among the 5.8 million healthcare workers

recognizing that “low-wage workers have the least flexibility in their jobs: [o]nly 9.2% of workers in the lowest quartile of the wage distribution can telework compared with 61.5% of workers in the highest quartile”); Yearby & Mohapatra, *supra* note 1, at 2 (“[R]acial and ethnic minorities face increased risk of exposure because they work in low wage jobs that do not provide the option to work at home and they cannot afford to miss work even when they are sick.”).

⁵⁷ See Gould & Shierholz, *supra* note 56 (illustrating discrepancies across racial and ethnic lines regarding the ability to work from home during COVID-19).

⁵⁸ Kate Bahn & Carmen Sanchez Cumming, *Four Ways to Understand the Pay Divide Facing Asian American, Native Hawaiian, and Pacific Islander Women*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 8, 2021), <https://equitablegrowth.org/four-ways-to-understand-the-pay-divide-facing-asian-american-native-hawaiian-and-pacific-islander-women> [<https://perma.cc/7JXU-797F>] (discussing API women’s overrepresentation in low-wage workplaces with significant in-person exposure, such as nail salons and dressmaking operations).

⁵⁹ Nicole Bateman & Martha Ross, *The Pandemic Hurt Low-Wage Workers the Most—and So Far, the Recovery Has Helped Them the Least*, BROOKINGS (July 28, 2021), <https://www.brookings.edu/articles/the-pandemic-hurt-low-wage-workers-the-most-and-so-far-the-recovery-has-helped-them-the-least/> [<https://perma.cc/7CJ3-ZP7B>].

⁶⁰ See Yearby & Mohapatra, *supra* note 1, at 4 (“Racial and ethnic minorities’ disparities in exposure to COVID-19 are due in part to structural racism in employment.”).

⁶¹ ONE FAIR WAGE, U.C. BERKELEY FOOD LAB. RSCH. CTR. & NAT’L BLACK WORKERS’ CTR. PROJECT, ENDING A LEGACY OF SLAVERY: HOW BIDEN’S COVID RELIEF PLAN CURES THE RACIST SUBMINIMUM WAGE 1 (2021); see Molly Kinder, Laura Stateler & Julia Du, *The COVID-19 Hazard Continues, but the Hazard Pay Does Not: Why America’s Essential Workers Need a Raise*, BROOKINGS (Oct. 29, 2020), <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise> [<https://perma.cc/Y6TA-KLSE>] (“In 2018, Black workers comprised 13% of all U.S. workers, but made up 19% of all low-wage frontline essential workers. Latin[x/e] or Hispanic workers comprised 16% of all U.S. workers, but 22% of low-wage frontline essential workers.”).

⁶² See *infra* notes 102–117 and accompanying text (discussing agricultural workers).

⁶³ Yearby & Mohapatra, *supra* note 1, at 5 (“Agricultural workers tend to be immigrants from [areas] such as Mexico, Central America, and the Caribbean who work in 42 of the 50 states.”).

⁶⁴ See *id.* (highlighting the economic realities of agricultural workers and that they are “forced to work” while sick).

earning under \$30,000 annually, around 50% are people of color.⁶⁵ In 2019, nursing assistants had median wages of around \$13 per hour, and 58% were people of color.⁶⁶ Thus, low wages and stagnation stemming from occupational segregation contributed to higher virus contracture levels of COVID-19.

Sixth, occupational segregation concentrates and maintains workers in the lowest-paid segments of essential industries.⁶⁷ Occupational segregation, low industry standards, workplace discrimination, and poverty wages⁶⁸ shape the working environment in low-wage essential industries.⁶⁹ In particular, occupational segregation across essential industries concentrates and maintains workers of color, women, and immigrants in the lowest-paid jobs within each low-wage essential sector.⁷⁰ The effects of a racialized and gendered labor market⁷¹ before the pandemic contributed to the disparate impact of the virus on workers of color.

B. COVID-19 Exacerbated Structural Inequity for Low-Wage Workers of Color

Low-wage workers were particularly vulnerable to the health and economic ramifications of the pandemic.⁷² As identified in Section A, six structural factors

⁶⁵ Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html> [<https://perma.cc/3C39-WL2D>].

⁶⁶ Mignon Duffy, *Why Improving Low-Wage Health Care Jobs Is Critical for Health Equity*, 24 AMA J. ETHICS 871, 871–72 (2022).

⁶⁷ Bahn & Sanchez Cumming, *supra* note 46, at 1.

⁶⁸ See Hund-Mejean & Escobari, *supra* note 19 (describing the general lack of employer-sponsored health insurance and high turnover in low-paid jobs, particularly in retail and hospitality); Taylor E. Larson & Christina T. Pham, *Harvard Law School, Kennedy School Professors Talk Racial Inequities During COVID-19*, HARV. CRIMSON (Oct. 7, 2020), <https://www.thecrimson.com/article/2020/10/7/harvard-fimrc-racial-inequalities/> [<https://perma.cc/5MYM-HZ28>] (“Many racial minorities face greater risk of exposure due to their jobs . . . 80 percent of Black workers are unable to work at home, and Black Americans are disproportionately overrepresented in essential frontline jobs.”).

⁶⁹ See Gemelas et al., *supra* note 52, at 353 (“COVID-19 has accentuated employment inequalities . . . [L]arger issues with employment disparities have persisted for decades. Structural racism from . . . the normalization of Black or African American workers being employed at a higher proportion in at-risk occupations . . . may be driving these disparities now.” (footnote omitted)); see also Yearby & Mohapatra, *supra* note 1, at 7 (“Neither the employment laws, nor the CARES Act, ensure that racial and ethnic minority workers receive minimum wage and access to paid sick leave.”).

⁷⁰ See Bahn & Sanchez Cumming, *supra* note 46 (explaining occupational segregation, and discussing underpayment in race-based discrimination in hiring and underpayment in female-dominated industries such as healthcare and childcare).

⁷¹ See generally Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23, 2020), <https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home> [<https://perma.cc/DFW6-TGF3>] (stating that women of color disproportionately occupy essential roles, such as home health assistants, professional cleaners, and nursing aides).

⁷² See Miriam Jordan, *Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic*, N.Y. TIMES, <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farm-workers-agriculture.html> [<https://perma.cc/QCK2-PW5M>] (Apr. 10, 2020) (reporting that undocu-

drove the disproportionate impact of COVID-19 on essential low-wage workers of color.⁷³ Other dynamics also contributed to the disparate impact of COVID-19 on low-wage essential workers of color. Such workers often face ostensibly subtle discrimination, such as lengthy commute times.⁷⁴ Low-wage essential industries, as exemplified in Part II, generally operate under unsafe work environments that perpetuate disparate health outcomes for these workers and their families.⁷⁵

Legal mechanisms and a lack of bargaining power in low-wage essential industries shaped the compounding structural inequalities that marginalized workers of color face.⁷⁶ An expansion of unionized labor has been crucial to establishing and maintaining higher labor standards across industries.⁷⁷ The economic sectors with the lowest wages and labor standards but the highest concentration of workers of color are almost entirely non-unionized.⁷⁸ Laws like the

mented immigrant farmworkers find it ironic that the federal government deems them essential, but still “illegal,” during the pandemic); Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18–65 Years of Age, by Occupational Sector and Occupation: March Through November 2020*, 16 PLOS ONE, June 4, 2021, at 1, 7, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0252454> [<https://perma.cc/THW4-L3EW>] (discussing the increased mortality rates of Latinx/e and Black California residents and among workers in food, transportation, facilities, and manufacturing); Joanna Gaitens, Marian Condon, Eseosa Fernandes & Melissa McDiarmid, *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH, Feb. 2021, at 1, 7 (documenting working conditions that increase infection rates for meatpacking workers); Yea-Hung Chen et al., *COVID-19 Mortality and Excess Mortality Among Working-Age Residents in California, USA, by Occupational Sector: A Longitudinal Cohort Analysis of Mortality Surveillance Data*, 7 LANCET PUB. HEALTH 744, 744 (2022) (“Workers in essential sectors have continued to bear the brunt of high COVID-19 and excess mortality . . . This high death toll has continued during periods of vaccine availability and the delta surge.”).

⁷³ See *infra* notes 41–46 and accompanying text (discussing the six factors).

⁷⁴ See, e.g., David C. Phillips, *Do Low-Wage Employers Discriminate Against Applicants with Long Commutes? Evidence from a Correspondence Experiment*, 55 J. HUM. RES. 864, 865–66 (2018) (finding that employers hiring for low-wage jobs in Washington, D.C. called applicants whose addresses were five or six miles away from the worksite markedly less often than those whose addresses were nearer).

⁷⁵ See, e.g., JEREMY ROSEN, MILITZA PAGÁN & WENDY POLLACK, SHRIVER CTR. ON POVERTY L., *LOW-WAGE WORKERS SPEAK OUT: THE EMERGING FUTURE OF WORK IS NOT IMPROVING THEIR JOBS* 7, 14 (2022) (stating that workers in Illinois “reported that their employers required [them] to do their work in unventilated, cramped spaces, with no regard for masking or for whether other workers might be coughing or sneezing or otherwise displaying COVID-19 symptoms”).

⁷⁶ See *supra* note 15 (discussing Black Codes and the segregation of labor markets); ORTIZ, *supra* note 17, at 121–25 (describing America’s reliance on inexpensive labor within the agricultural sector).

⁷⁷ See McNicholas & Poydock, *supra* note 42 (explaining unions’ benefits). For example, the ability to bargain for the number of breaks and types of benefits and to collectively set wages turned low-quality jobs in the manufacturing industry into high-quality jobs. See Paul Krugman, *Working Out: Making Manufacturing Good Again*, N.Y. TIMES (Sept. 22, 2023), <https://www.nytimes.com/2023/09/22/opinion/union-manufacturing-jobs-wages.html> [<https://perma.cc/KP7K-F8NT>] (discussing the wage bump that heavily unionized manufacturing workers experienced during the mid-twentieth century).

⁷⁸ See McNicholas & Poydock, *supra* note 42 (stating that only 12% of essential workers belong to a union, that essential workers have undertaken often dangerous work during the pandemic, and

FLSA offer limited access to higher workplace standards, employment protections, and fair wages for sectors that are predominantly gendered and racialized.⁷⁹ Additionally, the NLRA excluded racialized sectors like agricultural and domestic workers from bargaining and unionizing.⁸⁰ Systemic discrimination and its intersectional, disproportionate impact, along with the lack of legal protections within essential industries, jointly increased the vulnerability of essential workers.⁸¹

A worker's level of marginality often determines their vulnerability in the economy. The pandemic notably widened the inequalities faced by low-income workers who experience multiple marginalities.⁸² These inequalities have paved the way for gender disparities in the labor market, which exacerbate the vulnerability of women of color and immigrants in the workforce.

Women of color tend to be the primary breadwinners in their families.⁸³ They also experience high levels of marginality, given that they confront the

that most essential workers are nonwhite); CELINE MCNICHOLAS ET AL., *ECON. POL'Y INST., WHY UNIONS ARE GOOD FOR WORKERS—ESPECIALLY IN A CRISIS LIKE COVID-19*, at 1 (2020), <https://files.epi.org/pdf/204014.pdf> [<https://perma.cc/G3Y9-KHZV>] (“In spite of efforts to push policy reforms, the U.S. entered the COVID-19 pandemic with a weak system of labor protections. As a result, working people, particularly low-wage workers—who are disproportionately women and workers of color—have largely borne the costs of the pandemic.”).

⁷⁹ See 29 U.S.C. § 152(3) (defining employees the FLSA covers, and excluding domestic and agricultural workers and independent contractors); see also Interlandi, *supra* note 26 (“[I]t was largely at the behest of Southern Democrats that farm and domestic workers—more than half the nation’s [B]lack work force at the time—were excluded from New Deal policies, including . . . the [FLSA], which set a minimum wage and established the eight-hour workday.”).

⁸⁰ See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. REV. 95, 124–26 (noting that the NLRA barred eligibility for agricultural workers because of a compromise with Southern Democrats and New Deal proponents to ensure that social benefits excluded Black laborers).

⁸¹ See Yearby & Mohapatra, *supra* note 19 (defining workplace structural discrimination); Yearby & Mohapatra, *supra* note 1, at 3–4 (“Structural racism operates at a societal level and refers to the way laws are written or enforced, which advantages the majority, and disadvantages racial and ethnic minorities in access to opportunity and resources.”); REBECCA WOLFE, KRISTEN HARKNETT & DANIEL SCHNEIDER, *HEALTH AFFS., INEQUALITIES AT WORK AND THE TOLL OF COVID-19*, at 4 (2021), <https://www.healthaffairs.org/doi/10.1377/hpb20210428.863621/full/health-affairs-brief-covid19-workplace-wolfe.pdf> [<https://perma.cc/D7TB-UZRJ>] (advocating for paid time off for illness and other policies to reduce workplace COVID-19 exposure in critical industries).

⁸² See, e.g., Brower & Michener, *supra* note 5 (describing the varied effects of policies like stimulus payments or increases in the minimum wage across racial groups, due to—for example—Black women being less likely to use bank accounts and more likely to work in tipped industries paying subminimum wages); Kathleen R. Page, Maya Venkataramani, Chris Beyrer & Sarah Polk, *Undocumented U.S. Immigrants and COVID-19*, 382 NEW ENG. J. MED. PERSP. e62(1), e62(2) (Supp. 2020) (“The profound economic impact of these measures will be especially harsh for undocumented immigrants, many of whom work in service industries such as restaurants and hotels, or . . . the informal economy. Many immigrants will have no income and are excluded from the social safety net.”).

⁸³ See Frye, *supra* note 71 (noting that “across all family structures, women of color play a vital role in providing economic support” and “many women of color experience larger pay gaps than their white counterparts and lack access to critical benefits such as health insurance,” such that “[f]or all these workers, the COVID-19 crisis makes their lives even more precarious”); see also ELISE GOULD

most profound, enduring wage gap in the economy.⁸⁴ For instance, for every dollar that white men earn, Black women only earn 62 cents, and Latinx/e women earn 54 cents, which translates to yearly gaps of \$23,540 and \$28,036, respectively.⁸⁵ Because of this racialized and gendered wage gap, there are still many essential industries that pay women under \$30,000 annually.⁸⁶ These wage gaps point to gendered and racialized occupational segregation in which nonwhite women are concentrated in the lowest-paid occupations of low-wage essential industries.⁸⁷ Specifically, Black women have experienced the largest underemployment, and Latinx/e women have had the most considerable unemployment rates of all demographics since the start of the pandemic.⁸⁸ Thus, the lasting neg-

& VALERIE WILSON, ECON. POL’Y INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 12 (2020), <https://files.epi.org/pdf/193246.pdf> [<https://perma.cc/6VTH-ZEJD>] (“If we are to protect African Americans from suffering under the same needlessly heavy burden during the next economic or public health crisis that they are suffering under [COVID-19], we must work diligently to address longstanding underlying racial disparities in economic and health outcomes.”); Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap> [<https://perma.cc/Z5MC-WUBE>] (noting that women consistently earn “less than men, and the gap is wider for most women of color”).

⁸⁴ See NAT’L P’SHP FOR WOMEN & FAMS., QUANTIFYING AMERICA’S GENDER WAGE GAP BY RACE/ETHNICITY 1–3 (2020) (providing pay statistics); see also Frye, *supra* note 71 (“Black women’s labor was exploited to serve and care for white slaveholders while different waves of immigration saw Hispanic and Asian women confined to jobs as laborers, domestic workers, and farmworkers, as well as service occupations.”).

⁸⁵ NAT’L P’SHP FOR WOMEN & FAMS., *supra* note 84, at 1, 2; see Elise Gould & Katherine DeCourcy, *Gender Wage Gap Widens Even as Low-Wage Workers See Strong Gains*, ECON. POL’Y INST.: WORKING ECON. BLOG (Mar. 29, 2023), <https://www.epi.org/blog/gender-wage-gap-widens-even-as-low-wage-workers-see-strong-gains-women-are-paid-roughly-22-less-than-men-on-average/> [<https://perma.cc/LPB8-D958>] (stating that despite historically high wage growth at the tenth income percentile, due to pandemic relief, the gender pay differential among low-paid workers increased from 2019 to 2022); JASMINE TUCKER, NAT’L WOMEN’S L. CTR., IT’S 2020 AND BLACK WOMEN AREN’T EVEN CLOSE TO EQUAL PAY 3 (2020), <https://nwlc.org/wp-content/uploads/2020/07/Black-Womens-Equal-Pay-Day-Factsheet-7.27.20-v3.pdf> [<https://perma.cc/3AME-KXS8>] (noting that Black mothers earn fifty cents per one dollar a white father earns).

⁸⁶ Robertson & Gebeloff, *supra* note 65 (“Of the 5.8 million people working health care jobs that pay less than \$30,000 a year, half are nonwhite and 83 percent are women.”).

⁸⁷ See Bleiweis, *supra* note 83 (explaining that the pay gap is starkest for nonwhite women); Milia Fisher, *Women of Color and the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 14, 2015), <https://www.americanprogress.org/issues/women/reports/2015/04/14/110962/women-of-color-and-the-gender-wage-gap/> [<https://perma.cc/H69L-VU9A>] (stating that in 2014, 62% of Latinx/e women worked in service or “sales and office” jobs, and that only 35% of Black women and 26% of Latinx/e women held professional, management, or similar positions); Bahn & Sanchez Cumming, *supra* note 58 (“[E]ven though [Asian American, Pacific Islander, and Native Hawaiian] women make up just more than 3 percent of the U.S. workforce, they represent 61 percent of all manicurists and pedicurists and 17 percent of tailors, dressmakers, and sewers.”); REST. OPPORTUNITIES CTRS. UNITED, *supra* note 13, at 1 (detailing pay gaps along gender and racial lines within the restaurant industry).

⁸⁸ See KASSANDRA HERNÁNDEZ ET AL., UCLA LATINO POL’Y & POL. INITIATIVE, LATINAS EXITING THE WORKFORCE: HOW THE PANDEMIC REVEALED HISTORIC DISADVANTAGES AND HEIGHTENED ECONOMIC HARDSHIP 9 (2021), <https://latino.ucla.edu/wp-content/uploads/2021/10/>

ative impacts of COVID-19 will affect women of color and other marginalized workers.

Undocumented immigrants, like women of color, stand at the intersection of multiple marginalities.⁸⁹ These workers tend to experience the most marginality in the economy due to existing policies that shape structural discrimination in employment.⁹⁰ The undocumented status of low-wage workers generates an atmosphere conducive to discriminatory employment practices that perpetuate structures of racial, gender, and status inequality across industries.⁹¹ Undocumented and immigrant workers are the lifeblood of our food, agriculture, infrastructure, and healthcare “essential” systems.⁹² These workers tend to suffer from some of the most dire wage theft, as well as exacerbated forms of work-

Latinas-Exiting-the-Workforce.pdf [<https://perma.cc/C96D-ZGSA>] (“By December 2020, unemployment for Latin[x/e] and Black women remained almost double that of white women who ended the year at 5.7% unemployed, compared to Latin[x/e] and Black women at 9.1% and 8.4%, respectively.”); GOULD & WILSON, *supra* note 83, at 3 (“It should be noted that across race, gender, and ethnicity, Hispanic women . . . have the highest unemployment rate as of April 2020—about one in five Latina workers are unemployed.”); JASMINE TUCKER & JULIE VOGTMAN, NAT’L WOMEN’S L. CTR., *RESILIENT BUT NOT RECOVERED: AFTER TWO YEARS OF THE COVID-19 CRISIS, WOMEN ARE STILL STRUGGLING* 6 (2022), https://nwlc.org/wp-content/uploads/2022/07/UPDATED_JULY2022_NWLC_CovidReport.pdf [<https://perma.cc/A8K3-JXRT>] (finding that 4.8% of Latinx/e women were unemployed in February 2022, while for Black women, unemployment was twice the rate for white males at 6.1%).

⁸⁹ See, e.g., SaraJane Renfroe, *Building a Life Despite It All: Structural Oppression and Resilience of Undocumented Latina Migrants in Central Florida*, 10 J. FOR UNDERGRADUATE ETHNOGRAPHY 35, 39 (2020) (recounting interviewees’ statements that their gender and lack of immigration documentation restricted them to low-paid, usually informal domestic, service industry, and farm labor).

⁹⁰ See Frye, *supra* note 71 (“[D]eep-rooted cultural attitudes and stereotypes about women of color have too often devalued their work and deprioritized their needs, leaving them without helpful supports.”); Gaitens et al., *supra* note 72, at 3 (“[M]any essential workers employed in precarious jobs, with low pay and job security, are immigrants or migrant workers, making them more vulnerable to systemic and structural racism, which can increase their susceptibility to social and health inequities.”); Fisher, *supra* note 87 (“In 2014, only 35 percent of [B]lack women and 26 percent of Hispanic women were employed in higher-paying management, professional, and related jobs—compared with 48 percent of Asian women and 43 percent of white women.”); Bahn & Sanchez Cumming, *supra* note 58 (explaining that Asian American, Pacific Islander, and Native Hawaiian women earn an average of eighty-five cents per each one dollar that white men earn).

⁹¹ See, e.g., MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY L. CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 5 (Booth Gunter ed., 2020) (“America is now at war with the immigrant hands that feed us. Communities and states across the country are enacting a patchwork of highly restrictive laws that will only drive undocumented immigrants further underground and make them even more exploitable by . . . businesses”); see also Page et al., *supra* note 82, at e62(1)–(3) (describing challenges that have severely affected undocumented people during the pandemic, including lack of health insurance, public benefits ineligibility, reliance on emergency rooms, and shoddy medical care in immigration detention).

⁹² See Tom Jawetz, *Immigrants as Essential Workers During COVID-19: Testimony Before the U.S. House Judiciary Subcommittee on Immigration and Citizenship*, CTR. FOR AM. PROGRESS (Sept. 28, 2020), <https://www.americanprogress.org/issues/immigration/reports/2020/09/28/490919/immigrants-essential-workers-covid-19> [<https://perma.cc/5QNJ-73TR>] (estimating that there are close to 389,000 undocumented farm and food workers in the United States, along with 225,000 undocumented workers in healthcare and 190,000 undocumented workers maintaining health facilities).

place discrimination, as compared to any other workforce.⁹³ The increased Indigeneity and undocumented immigration status of these workers often marginalize them and limit their ability to redress their rights at work through existing legal channels.⁹⁴ A combination of exclusionary policies, unfair employment practices, and a lack of protection in workplaces further marginalizes immigrant workers.

With minimal exceptions, undocumented workers lack workplace protections under health and safety standards, as well as wage and labor hour enforcement.⁹⁵ The Affordable Care Act bars undocumented immigrants from accessing health insurance, leaving around 7.1 million immigrants without coverage.⁹⁶ The Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), as initially enacted, excluded mixed-status families or households with both lawfully present and undocumented immigrant members, and the American Rescue Plan Act of 2021 excludes undocumented workers.⁹⁷ Such policies, along with

⁹³ See Vijay Das & Arjun Sethi, *Protect Undocumented Workers Who Fight Abusive Employers*, U.C. BERKELEY, GOLDMAN SCH. PUB. POL’Y (June 12, 2015), <https://gspp.berkeley.edu/faculty-and-impact/news/recent-news/protect-undocumented-workers-who-fight-abusive-employers> [<https://perma.cc/9CBH-4MMX>] (“The most cited problem facing unauthorized immigrants is wage theft, an illegal practice in which employers withhold workers’ pay. Every year, 6.5 million undocumented workers experience wage theft.”); BAUER & RAMÍREZ, *supra* note 91, at 25 (describing Margot, a nineteen-year-old itinerant laborer from Mexico who stated that she earned \$30 for the grape tomatoes plucked during a twelve-hour day—a yield amounting to \$1,000 in grocery prices—and that employers frequently failed to pay her earnings for the full harvest); Josselyn Andrea Garcia Quijano, *Workplace Discrimination and Undocumented First-Generation Latinx Immigrants*, U. CHI. CROWN FAM. SCH. SOC. WORK, POL’Y & PRAC., <https://crownschool.uchicago.edu/student-life/advocates-forum/work-place-discrimination-and-undocumented-first-generation-latinx> [<https://perma.cc/ES8N-CV6W>] (highlighting that undocumented Latinx/e immigrants are more likely to suffer worksite injuries and fatalities than other workers, and describing the sexual, verbal, and physical abuse that many undocumented workers face, despite federal agencies enforcing employment rights irrespective of immigration documentation).

⁹⁴ See BAUER & RAMÍREZ, *supra* note 91, at 23 (“[B]ecause of their fear of being reported to immigration authorities, [undocumented women] are reluctant to report wage violations, sexual violence or gender discrimination, or to take legal action to stop it.”).

⁹⁵ See Monika Batra Kashyap, Essay, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of COVID-19*, 11 CALIF. L. REV. ONLINE 517, 528 (2020), <https://www.california-lawreview.org/online/us-settler-colonialism-white-supremacy-and-the-racially-disparate-impacts-of-covid-19> [<https://perma.cc/H439-3NH5>] (“[W]ithout health insurance, paid sick leave, childcare, or unemployment insurance, these immigrants are left with little option but to put their lives at risk in their already-high risk occupations.”).

⁹⁶ Page et al., *supra* note 82, at e62(1)–(2).

⁹⁷ American Rescue Plan Act of 2021, 26 U.S.C. § 6428B(c)(1); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281, 337 (2020) (codified as amended at 26 U.S.C. § 6428(g)(1)(B)); see Adisa Hargett-Robinson, *As COVID-19 Relief Vote Nears, Undocumented Immigrants Struggle with No Aid*, ABC NEWS (Mar. 4, 2021), <https://abcnews.go.com/US/covid-19-relief-vote-nears-undocumented-immigrants-struggle/story?id=76141285> [<https://perma.cc/S95D-JEA7>] (stating that the CARES Act’s bar on mixed-status households barred some U.S. citizens and green card holders from receiving funds, and quoting a restaurant cook who did not receive aid despite her hours being cut fourfold during the pandemic); Catherine S. Ramírez & Glenn Kramon, *The U.S. Must Do More to Care for Its Caregivers*, THE ATLANTIC (Jan. 24, 2021), <https://>

subordinating employment practices, perpetuate the marginalization of these workers. Thus, subordinating structures determine the level of marginality a worker experiences in the economy.⁹⁸ These structures shape low-wage industries, particularly those in our food chain system.

C. Essential Workers in the Food Chain System During COVID-19

Three industries within the food chain system—agriculture, meatpacking, and food service—elucidate how COVID-19 amplified racial, gender, and economic inequalities within low-wage essential sectors. These industries exemplify how structural factor one (pre-existing health disparities) and structural factor two (the disproportionate representation of low-wage workers of color, women, and immigrants in essential sectors) helped drive the pandemic’s accentuated impact on these communities. They also exemplify how a pattern of employment practices, explained in structural factor three (lack of safety protocols and equipment) and structural factor four (inability to work from home and socially distance), contributed to the amplified impact of the pandemic on vulnerable workers. Lastly, wages and labor standards largely espoused by these industries ultimately point to how structural factor five (poverty or sub-poverty wages) and structural factor six (occupational segregation) perpetuate a vacuum of disposability across race, gender, and class for low-wage essential workers.

These industries illustrate how broader structural inequalities and employment practices rendered low-wage essential workers particularly vulnerable to COVID-19. Each Subsection that follows profiles the demographics, wages, industry standards, and aggravated impact of the pandemic on these sectors. Subsection 1 focuses on agricultural workers.⁹⁹ Subsection 2 highlights the precarity faced by workers in meatpacking facilities.¹⁰⁰ Finally, Subsection 3 examines workers in food service.¹⁰¹ These industries show how this Article’s six structural factors in employment underlie the pandemic’s disproportionate impacts on low-income communities of color.

www.theatlantic.com/ideas/archive/2021/01/reconfigure-aid-givers-not-takers/617804 [https://perma.cc/Z9A8-3N7D] (highlighting that undocumented nursing aides, home health workers, and other elder care providers were disqualified from CARES Act relief); *Coronavirus (COVID-19) Disaster Relief Assistance for Immigrants*, CAL. DEP’T OF SOC. SERVS., <https://www.cdss.ca.gov/inforesources/immigration/covid-19-drai> [https://perma.cc/AP8K-ENUN] (describing California’s “one-time state-funded disaster relief” funding to aid undocumented Californians unable to qualify for federal pandemic assistance or unemployment benefits).

⁹⁸ See Frye, *supra* note 71 (“Long-standing structural inequities—fueled by racism, sexism, ethnic stereotypes, and other forms of bias—have created an uneven landscape that makes it difficult for many people of color to secure jobs with solid wages and opportunity for advancement[] [and] access quality health care that is timely and responsive . . .”).

⁹⁹ See *infra* notes 102–117 and accompanying text.

¹⁰⁰ See *infra* notes 118–136 and accompanying text.

¹⁰¹ See *infra* notes 137–153 and accompanying text.

1. Agricultural Essential Workers

The U.S. agricultural sector has been historically racialized, and it relies on low-income immigrants of color as its primary workforce.¹⁰² There are approximately 2.4 million agricultural workers across the United States.¹⁰³ The National Agricultural Workers Survey of 2021 observed that Latinx/e workers account for 75% of all agricultural workers, and approximately 57% are immigrants of various statuses from Mexico.¹⁰⁴ These workers are frequently displaced Indigenous people from Mexico and Latin America.¹⁰⁵ These facts point to structural factors one and two.¹⁰⁶

Agricultural workers experienced dangerous, unsanitary, generally unregularized, and nonunionized workplaces before COVID-19.¹⁰⁷ For instance, women farmworkers encounter higher rates of sexual assault and harassment than in most other industries.¹⁰⁸ Notably, agricultural workers were excluded from the

¹⁰² See Bruce Goldstein & Jessica Felix-Romero, *Food Justice: Combating Racism in the Agricultural System*, 102 LIBERAL EDUC. 56, 56 (2016) (stating that Mexicans comprise most U.S. farmworkers today, and describing the Bracero Program that imported guest workers from Mexico to work on Southwestern farms during the mid-twentieth century and a similar program contracting Jamaican workers to harvest sugarcane in Florida); see also *supra* notes 15–17 and accompanying text (discussing Black farmworkers in the South in the post–Civil War era and early twentieth century).

¹⁰³ Daniel Costa, *How Many Farmworkers Are Employed in the United States?*, ECON. POL’Y INST.: WORKING ECON. BLOG (Oct. 3, 2023), <https://www.epi.org/blog/how-many-farmworkers-are-employed-in-the-united-states/> [https://perma.cc/UZ5G-JPRZ].

¹⁰⁴ WENSON FUNG ET AL., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2021–2022: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES CROP WORKERS 79 (2023).

¹⁰⁵ See Stephanie Farquhar et al., *Occupational Conditions and Well-Being of Indigenous Farmworkers*, 98 AM. J. PUB. HEALTH 1956, 1956 (2008) (observing that “increasing numbers of new migrants have been arriving in Oregon from [I]ndigenous communities in Mexico,” and noting that Indigenous people from Mexico and Guatemala made up around 40% of Oregon’s farmworkers); Isabel Gross, *Indigenous Farmworkers Face Unique Barriers to Healthcare*, FARMWORKER JUST. (Apr. 26, 2021), <https://www.farmworkerjustice.org/blog-post/indigenous-farmworkers-face-unique-barriers-to-healthcare/> [https://perma.cc/J49T-S97X] (stating that around 165,000 Indigenous agricultural workers lived in California with their families and “indigenous Mexicans are the fastest growing farmworker population in the United States”).

¹⁰⁶ See *supra* notes 41–42 and accompanying text.

¹⁰⁷ See Ruxandra Guidi, *Farmworkers Face Illness and Death in the Fields*, HIGH COUNTRY NEWS (Aug. 20, 2018), <https://www.hcn.org/issues/50.14/agriculture-californias-farmworkers-face-illness-and-death-in-the-fields> [https://perma.cc/B8M5-QKME] (documenting agricultural workplace abuses, including failure to implement precautions for heatstroke); Kamala Kelkar, *When Labor Laws Left Farm Workers Behind—and Vulnerable to Abuse*, PBS NEWS (Sept. 18, 2016), <https://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse> [https://perma.cc/WN8Y-3J2T] (“The entire agricultural industry’s greatest subsidy is the lack of protection for agricultural workers . . . [T]he system was dependent on slaves. That legacy carries through and directly affects farmworkers . . .”).

¹⁰⁸ See Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010) (finding that 80% of 150 farmworker women in the Central Valley in California reported experiencing sexual harassment); BAUER & RAMÍREZ, *supra* note 91, at 46 (explaining the existence of a “confluence of factors—

FLSA due to a political compromise that sought to exclude Black workers from statutory labor standards and protections.¹⁰⁹ As a result, this workforce has some of the most severe health disparities and subpar labor standards compared to any other workforce in the economy, and it was among the hardest hit by COVID-19.¹¹⁰ These conditions point to structural factors three and four.¹¹¹

The pandemic exacerbated the economic marginality of agricultural workers.¹¹² Farmworkers suffered from COVID-19 at disproportionately higher rates than workers in other industries. This is primarily due to occupational segregation, occupational hazards that often produce respiratory disease, and poor job sites.¹¹³ These realities point to structural factors five and six.¹¹⁴

The available data show a vastly disparate impact of the virus on this workforce. Although there is no nationwide reporting on positivity rates among agricultural workers, estimates show that rural counties with a farmworker population had a higher positivity rate than urban counties.¹¹⁵ A study in Northern Cali-

including extreme poverty, language barriers and discrimination based on race, class and gender—that make farmworker women extraordinarily vulnerable to sexual abuse”); KY Prado et al., “*It’s Wrong Because It Could Be My Sister, Wife, or Mother*”: *Workplace Sexual Harassment Among Men and Women Farmworkers in USA and Mexico*, J. AGROMEDICINE, Oct. 21, 2020, at 1, 4 (finding that women farmworkers’ workplace sexual harassment was “severe and frequent” and that “[r]egardless of age or marital status, women faced sexualized stares, stalking, assault, jokes, and sexual demands from persons at all levels of the employment organization”).

¹⁰⁹ Perea, *supra* note 80, at 124–26.

¹¹⁰ See, e.g., Yearby, *supra* note 4, at 193 (discussing agricultural workers’ hardships during COVID-19).

¹¹¹ See *supra* notes 43–44 and accompanying text.

¹¹² See Elizabeth Royle, *Covid-19 Is Spreading Among Farmworkers, and It May Get Worse*, FOOD & ENV’T REPORTING NETWORK (June 2, 2020), <https://thefem.org/2020/06/covid-19-is-spreading-among-farmworkers-and-it-may-get-worse> [<https://perma.cc/KY95-V2DK>] (discussing outbreaks of COVID-19 on farms); COVID-19 FARMWORKER STUDY, ALWAYS ESSENTIAL, PERPETUALLY DISPOSABLE: CALIFORNIA FARMWORKERS AND THE COVID-19 PANDEMIC 2 (2021), https://cirsinc.org/wp-content/uploads/2021/08/COFS_Policy_Recommendations_Feb2021v3.pdf [<https://perma.cc/SPP6-J8QC>] (“On average, nearly half of the survey respondents (52%) reported decreased farm work time resulting in income losses during the pandemic.”); Yearby, *supra* note 4, at 193 (“Agriculture workers also suffer exposure to mold and numerous work-related injuries, including musculoskeletal disorders, eye damage, respiratory conditions, heat stress, and acute and chronic poisoning from pesticides. The additional threat of contracting COVID-19 in the workplace has exacerbated these disparities in workplace injuries.” (citation omitted)).

¹¹³ CAIUS Z. WILLINGHAM & SILVA MATHEMA, CTR. FOR AM. PROGRESS, PROTECTING FARMWORKERS FROM CORONAVIRUS AND SECURING THE FOOD SUPPLY 1 (2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2021/08/Protecting-Farmworkers1.pdf> [<https://perma.cc/34PH-JNFM>]; see Rosa Tuirán & Nick Roberts, *Farmworkers Are Among Those at Highest Risk for COVID-19, Studies Show*, PBS: FRONTLINE (July 21, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-19-farmworkers-among-highest-risk-studies-show> [<https://perma.cc/Y4KE-8UX8>] (“[A]s of July 1[, 2020], the prevalence of COVID-19 for agricultural workers was 1,410 positive cases out of 100,000, while the rate for workers in all other industries was 455 cases per 100,000 . . .”).

¹¹⁴ See *supra* notes 45–46 and accompanying text.

¹¹⁵ See Tuirán & Roberts, *supra* note 113 (“[A]cross the country, the death rate from COVID-19 is much higher in counties with large populations of farmworkers. Those most at risk in rural counties: ‘Individuals who do not speak English, individuals engaged in farmwork, and individuals living in

ifornia found that agricultural workers were four times more likely to contract the virus than other categories of workers.¹¹⁶ The number of agricultural workers who tested positive for COVID-19 as of early 2023 was estimated at roughly six hundred and ninety thousand, yet this is likely a significant undercount because contractual and temporary laborers are not included in this statistic.¹¹⁷

2. Meatpacking Essential Workers

In 2018, the U.S. Department of Labor estimated that half a million people worked in meatpacking plants.¹¹⁸ Black workers, workers of color, and immigrants are disproportionately overrepresented in the low-wage meatpacking industry.¹¹⁹ Black workers represent approximately 21.9%, and Latinx/e workers represent around 34.9% of this workforce.¹²⁰ Thus, the demographics of the meatpacking industry point to structural factors one and two.¹²¹

Even before the pandemic, meatpacking plants were considered among the most dangerous workplaces in the United States.¹²² Workers consistently reported harsh working conditions before 2020.¹²³ The employment practices of this

poverty” (quoting Rebecca K. Fielding-Miller, Maria E. Sundaram & Kimberly Brouwer, *Social Determinants of COVID-19 Mortality at the County Level*, 15 PLOS ONE, Oct. 14, 2020, at 1, 9)).

¹¹⁶ See Ana M. Mora et al., *Risk Factors Associated with SARS-CoV-2 Infection Among Farmworkers in Monterey County, California*, 4 JAMA NETWORK OPEN, Sept. 2021, at 1, 2, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784117> [<https://perma.cc/JP4Q-ZQJA>] (finding that in Monterey County, California, there was “a 4-fold higher SARS-CoV-2 test positive fraction among farmworkers tested in community clinics between June and November 2020 than in the county population at large (22% vs 6%)”); see also U.C. MERCED CMTY. & LAB. CTR., FARMWORKER HEALTH IN CALIFORNIA: HEALTH IN A TIME OF CONTAGION, DROUGHT AND CLIMATE CHANGE 55 (2022) (stating that pre-pandemic, farmworkers were already at higher risk for diseases such as diabetes, obesity, and asthma, which are all “conditions and risk factors that exacerbated the consequences of COVID-19 infection”).

¹¹⁷ NAT’L CTR. FOR FARMWORKER HEALTH, INC., COVID-19 IMPACT ON AGRICULTURAL WORKERS 1 (2023), http://www.ncfh.org/uploads/3/8/6/8/38685499/final_y2q4_covid-19_fact_sheet_4.4.23.pdf [<https://perma.cc/P8H5-AG6Q>].

¹¹⁸ Angela Stuesse & Nathan T. Dollar, *Who Are America’s Meat and Poultry Workers?*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 24, 2020), <https://www.epi.org/blog/meat-and-poultry-worker-demographics> [<https://perma.cc/4BBW-79TW>].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *supra* notes 41–42 and accompanying text.

¹²² See *Meatpacking*, U.S. DEP’T OF LAB., <https://www.osha.gov/meatpacking> [<https://perma.cc/SDD3-JWUZ>] (discussing common dangers in slaughterhouses).

¹²³ See Ruqaiyah Yearby, *Meatpacking Plants Have Been Deadly COVID-19 Hot Spots—but Policies That Encourage Workers to Show Up Sick Are Legal*, THE CONVERSATION, <https://theconversation.com/meatpacking-plants-have-been-deadly-covid-19-hot-spots-but-policies-that-encourage-workers-to-show-up-sick-are-legal-152572> [<https://perma.cc/6NVN-RHPE>] (Feb. 26, 2021) (highlighting that dangerous work conditions have always accompanied working in meatpacking); Yearby, *supra* note 4, at 193 (“[I]n 2017, meatpacking workers were nearly twice as likely to suffer an injury and more than 15-times as likely to suffer an occupational illness than the average private sector worker—the second highest rate of occupational illness among all US industries.”); Heather Schlitz, *Meatpacking Workers Say Attendance Policy Forces Them to Work with Potential*

industry unreasonably put workers at risk, particularly a failure to adhere to COVID-19-related measures such as social distancing and the use of protective equipment.¹²⁴ These conditions point to structural factors three and four.¹²⁵

Black, Latinx/e, and API workers comprised 64.4% of processing line workers in meatpacking plants but only 35.3% of all U.S. workers in 2020.¹²⁶ At the start of the pandemic, more than 37% of meatpacking workers were immigrants, compared to 17% of all workers in the United States.¹²⁷ This Article portends that the existing policy and regulatory frameworks in employment allowed employers to treat meatpacking workers as disposable, shaping the structural gaps that COVID-19 exacerbated, as profiled explicitly in Part II.

Meatpacking plants were hot spots for COVID-19 exposure.¹²⁸ By July 2020, up to 8% of all cases and 4% of COVID-19-related deaths in the United States were tied to meat and poultry plants.¹²⁹ The Centers for Disease Control and Prevention (CDC) reported in 2020 that 87% of workers infected by COVID-19 in meatpacking facilities were workers of color.¹³⁰ Hence, meatpacking plants contributed to the inequalities the pandemic amplified.¹³¹

COVID-19 Symptoms, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Oct. 20, 2020), <https://investigatemitwest.org/2020/10/20/meatpacking-workers-say-attendance-policy-forces-them-to-work-with-potential-covid-19-symptoms> [https://perma.cc/ZJT9-QADF] (discussing many factories' "punitive attendance system," which gives points to workers per day missed and has managers fire workers who reach a certain number of points); FOOD CHAIN WORKERS ALL., WE ARE NOT DISPOSABLE: FOOD WORKERS ORGANIZING ON THE COVID FRONTLINES 6 (2021), <https://foodchainworkers.org/wp-content/uploads/2021/02/Food-Workers-Organizing-on-the-COVID-Frontlines-FINAL.pdf> [https://perma.cc/47U9-QN8K] ("Pre-existing problems for meatpacking and processing workers like dangerous line speeds, cramped workspaces, and poor ventilation have led to the high risk of infection in these plants.").

¹²⁴ See *infra* note 154–233 and accompanying text.

¹²⁵ See *supra* notes 43–44 and accompanying text.

¹²⁶ Shawn Fremstad, Hye Jin Rho & Hayley Brown, *Meatpacking Workers Are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL'Y RSCH. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections> [https://perma.cc/SA6S-LP6H] ("People of color, immigrants, and people in relatively low-income families are disproportionately employed in meatpacking plants.").

¹²⁷ Stuesse & Dollar, *supra* note 118 ("[T]he meat- and poultry-processing workforce is predominantly male and overwhelmingly made up of people of color, with a large percentage of immigrants and refugees."); see Yearby, *supra* note 4, at 193 (listing meatpacking as an example of a critical industry in which workers of color dominate).

¹²⁸ Leah Douglas, *Nearly 90% of Big US Meat Plants Had COVID-19 Cases in Pandemic's First Year—Data*, REUTERS (Jan. 14, 2022), <https://www.reuters.com/business/nearly-90-big-us-meat-plants-had-covid-19-cases-pandemics-first-year-data-2022-01-14/> [https://perma.cc/BS84-K8M6].

¹²⁹ Charles A. Taylor, Christopher Boulos & Douglas Almond, *Livestock Plants and COVID-19 Transmission*, 117 PROC. NAT'L ACAD. SCI. 31,706, 31,706 (2020) (finding that livestock plants had a disproportionate effect on the surrounding community's infection rates, and "estimat[ing] the total excess COVID-19 cases and deaths associated with proximity to livestock plants to be [between] 236,000 [and] 310,000 . . . as of July 21, 2020, with the vast majority likely related to community spread outside these plants").

¹³⁰ Waltenburg et al., *supra* note 44, at 888 ("Among the 9,919 (61%) cases with race/ethnicity reported, 5,584 (56%) were in Hispanics, 1,842 (19%) in non-Hispanic blacks (blacks), 1,332 (13%)

A host of policies and employment practices that deprioritize the health and safety of the meatpacking workforce created deplorable work conditions at meatpacking plants. These plants largely remained in operation during the pandemic regardless of the risk of exposure to workers in those facilities.¹³² To add to this, employment policies in these facilities permitted and pressured workers to work even when experiencing COVID-19 symptoms.¹³³ This contributed to more than seventy-four thousand slaughterhouse workers and other food processing employees testing positive for COVID-19 as of February 2021.¹³⁴ Furthermore, several pending lawsuits by meatpacking workers, analyzed in Part II, allege a range of negligent and illegal behavior by employers, including discriminatory impact on Black, Latinx/e, and API workers.¹³⁵ These conditions point to structural factors three through six.¹³⁶

3. Food Service Essential Workers

The food and beverage industry is one of the largest sectors of the U.S. economy, employing around eleven million individuals.¹³⁷ Workers of color comprise 44% of those engaged in food service and 42% of minimum-wage restaurant workers.¹³⁸ Restaurant work is highly racialized and gendered, with Black, Latinx/e, and women of color workers disproportionately occupying the

in non-Hispanic whites (whites), and 1,161 (12%) in Asians.”); *see also* Adeel Hassan, *Coronavirus Cases and Deaths Were Vastly Underestimated in U.S. Meatpacking Plants, a House Report Says.*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/world/meatpacking-workers-covid-cases-deaths.html> [<https://perma.cc/SYA9-L4S6>] (stating that up to thrice the number of COVID-19 contractions occurred in slaughterhouses as researchers had estimated during the pandemic’s first year).

¹³¹ *See supra* notes 41–46 and accompanying text (discussing the six factors).

¹³² *See* Executive Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020) (stating that meat processing facilities would remain open during the COVID-19 pandemic).

¹³³ *See* Schlitz, *supra* note 123 (describing a compulsory attendance policy that attributed negative points to workers who missed shifts, even when they were experiencing COVID-19 symptoms, which was adopted in major meatpacking companies throughout the pandemic).

¹³⁴ FOOD CHAIN WORKERS ALL., *supra* note 123, at 6; *see also* Yearby, *supra* note 123 (“In May 2020, COVID-19 infections among meat- and poultry-processing workers more than tripled, and the number of deaths quadrupled.”).

¹³⁵ *See infra* notes 154–233 and accompanying text (discussing lawsuits); *see, e.g.*, Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7; 7 C.F.R. §§ 15.1–15.12 at 1, Food Chain Workers All. v. Tyson Foods, Inc. (U.S.D.A. July 8, 2020) [hereinafter Title VI Complaint] (alleging racial discrimination by meatpacking corporations).

¹³⁶ *See supra* notes 43–46 and accompanying text.

¹³⁷ *Occupational Employment and Wage Statistics, May 2023*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/oes/current/oes350000.htm> [<https://perma.cc/6EZ8-DQ7E>]; REST. OPPORTUNITIES CTRS. UNITED, *supra* note 13, at 1.

¹³⁸ U.C. BERKELEY FOOD LAB. RSCH. CTR., U.C. BERKELEY INT’L HUM. RTS. L. CLINIC & REST. OPPORTUNITIES CTR. UNITED, *WORKING BELOW THE LINE: HOW SUBMINIMUM WAGE FOR TIPPED RESTAURANT WORKERS VIOLATES INTERNATIONAL HUMAN RIGHTS STANDARDS 1* (Laurel E. Fletcher et al. eds., 2015) [<https://perma.cc/B79X-PQLV>].

lowest-paid jobs in the industry.¹³⁹ These demographics point to structural factors one and two.¹⁴⁰ This industry, like the agriculture and meatpacking industries, is plagued with subpar labor standards and low wages that perpetuate inter-sectional inequality.

The poverty wages of this industry primarily stem from the subminimum wage for tipped workers.¹⁴¹ The subminimum wage is a legacy of enslavement that emerged shortly after Emancipation to continue the practice of free labor for formerly enslaved people.¹⁴² In forty-three states, tipped workers are still subject to a subminimum wage, set as low as \$2.13 an hour in some states based on the minimum wage and allowed tip credit.¹⁴³ Only seven states have a higher-than-federal minimum wage and no tip credit, meaning employees receive the full state minimum wage plus additional customer tips.¹⁴⁴ The subminimum wage has gendered and racialized outcomes for workers across industries, particularly in the restaurant industry.¹⁴⁵ For instance, among tipped workers, Latinx/e women earn 30% less wages than white men and 23% less than white women.¹⁴⁶ These statistics point to structural factors five and six.¹⁴⁷ Furthermore, tipped restaurant workers, like agricultural workers, experience some of the most pernicious

¹³⁹ REST. OPPORTUNITIES CTRS. UNITED, *supra* note 13, at 2.

¹⁴⁰ See *supra* notes 41–42 and accompanying text.

¹⁴¹ See Jodi Helmer, *Saru Jayaraman: Tipped Minimum Wage Is a Legacy of Slavery That Needs to Be Abolished*, HUFFINGTON POST, https://www.huffpost.com/entry/tipping-saru-jayaraman-voices-in-food_1_5fea8565c5b64e442105c4dd [<https://perma.cc/7UKH-77VL>] (Jan. 19, 2021) (“Today, 70% of [tipped] workers are women and they are disproportionately women of color who are not earning enough money in tips to survive. They use food stamps at double the rate of the rest of the U.S[.] workforce . . .”).

¹⁴² See ONE FAIR WAGE ET AL., *supra* note 61, at 6–8 (discussing Black restaurant workers during the nineteenth and early twentieth centuries); U.C. BERKELEY FOOD LAB. RSCH. CTR. ET AL., *supra* note 138, at 9 (“Toward the end of the nineteenth century, a powerful anti-tipping movement arose in the United States. Critics viewed the practice as un-American and undemocratic. They argued that the custom was ‘degrading to the tip-takers who have to ‘ask for favors’ instead of earning a fair wage’” (quoting Ofer H. Azar, *The History of Tipping—from Sixteenth-Century England to the United States in the 1910s*, 33 J. SOCIO-ECON. 745, 753–54 (2004))).

¹⁴³ Drew Desilver, *The Varied Landscape of Minimum Wages and Tip Credits in the U.S.*, PEW RSCH. CTR. (Nov. 21, 2023), <https://www.pewresearch.org/short-reads/2023/11/21/the-varied-landscape-of-minimum-wages-and-tip-credits-in-the-us/> [<https://perma.cc/RM38-2KTW>].

¹⁴⁴ *Id.*

¹⁴⁵ See Andre Manuel, *The Tipped Subminimum Wage Has Sexist and Racist Origins: It’s Time to End It*, ONLABOR (Feb. 17, 2021), <https://onlabor.org/the-tipped-subminimum-wage-has-sexist-and-racist-origins-its-time-to-end-it> [<https://perma.cc/78DW-4X6J>] (discussing discrepancies in tips by workers’ race and gender due to customer discrimination).

¹⁴⁶ Lily Roberts & Galen Hendricks, *Short-changed: How Tipped Work Exacerbates the Pay Gap for Latinas*, CTR. FOR AM. PROGRESS (Nov. 20, 2019), <https://www.americanprogress.org/issues/economy/news/2019/11/20/477637/short-changed-tipped-work-exacerbates-pay-gap-latinas/> [<https://perma.cc/3C5V-KW4V>].

¹⁴⁷ See *supra* notes 45–46 and accompanying text.

cious forms of sexual assault and sexual harassment.¹⁴⁸ The pandemic further exacerbated instances of sexual misconduct by customers and employers toward workers, as well as poverty rates within this industry.¹⁴⁹

COVID-19 also intensified the racialized, gendered, and economic inequalities experienced by restaurant workers.¹⁵⁰ Before 2020, workers of color in this industry were more likely to experience poverty than white workers.¹⁵¹ The pandemic forced the closure of thousands of restaurants nationwide, and most tipped workers did not have access to wages, unemployment, and workplace benefits, leading most members of this workforce even deeper into poverty and financial insecurity.¹⁵²

The three industries profiled in this Section illustrate the six structural factors shaping low-wage essential industries and how COVID-19 exacerbated intersecting inequalities. The trends impacting low-wage workers of color across the food chain of essential industries are noteworthy: high levels of poverty, lack of safety protocols and equipment at work, rampant sexual assault and harassment in the workplace, racial and gender discrimination, occupational segregation, and low employment standards.¹⁵³ These industries exemplify how low-wage workers and workers of color sustained the most critical sectors of the economy despite facing the high risk of contracting COVID-19. They also demonstrate how the disproportionate reliance on workers of color perpetuates inequality due to potentially negligent and illegal employment practices, as discussed in the following Part.

¹⁴⁸ See Helmer, *supra* note 141 (documenting that tipped restaurant workers “have the highest rates of sexual harassment of any industry because they have to put up with all this inappropriate customer behavior to earn enough tips to feed their families”).

¹⁴⁹ See *id.* (observing that throughout the pandemic, workers were more dependent on their customers because there were fewer customers overall, which exacerbated the worker/customer power dynamic).

¹⁵⁰ See ONE FAIR WAGE, TAKE OFF YOUR MASK SO I KNOW HOW MUCH TO TIP YOU.: WASHINGTON D.C. SERVICE WORKERS’ EXPERIENCE OF HEALTH & HARASSMENT DURING COVID-19, at 11 (2020) (“[A] \$4.79 per hour national wage gap . . . exists between Black women and white men in tipped restaurant positions.”).

¹⁵¹ ONE FAIR WAGE ET AL., *supra* note 61, at 1.

¹⁵² See Grace Baek, *Restaurant Workers, Already Living “Tip to Mouth,” Face More Hardship in Shutdown*, CBS NEWS (Mar. 26, 2020), <https://www.cbsnews.com/news/coronavirus-restaurant-jobs-tipping-cbsn-originals-documentary> [<https://perma.cc/CSG4-J8T7>] (documenting the effects of pandemic-era restaurant closures on staff); ONE FAIR WAGE, *supra* note 150, at 9 (“After nearly 1 in 4 [restaurant] workers . . . lost their jobs in the first wave of the pandemic, those . . . returning to work [ou]nd themselves under significant economic burdens . . . [because] they lacked access to unemployment benefits, [and] because their subminimum wage was too low to qualify . . . [M]any workers . . . [were] even more reliant on customer tips . . .” (footnotes omitted)).

¹⁵³ See *supra* notes 102–152 and accompanying text (discussing agriculture, meatpacking, and food service workers).

II. COVID-19 LOW-WAGE WORKER-RELATED CLAIMS

Since 2020, low-wage workers, their families, and various organizations have filed pandemic-related wrongful death and workplace-related claims, including some alleging racial discrimination. This Part presents claims related to COVID-19 and low-wage essential workers. It also analyzes how the law responded to protect or hinder workers' rights amidst a global pandemic.¹⁵⁴

Most complaints allege employers failed to provide personal protective equipment (PPE) and COVID-19 test kits.¹⁵⁵ This points to structural factor three.¹⁵⁶ They also claim that employers forced workers to use crowded workspaces and discouraged them from using sick leave.¹⁵⁷ This points to structural factor four.¹⁵⁸ Some lawsuits assert that illegal workplace practices led to adverse outcomes for workers and, in some cases, caused unnecessary deaths.¹⁵⁹ Such suits seek relief for the wrongful death of their loved ones who allegedly contracted COVID-19 at work due to employers' negligent or reckless practices.¹⁶⁰ Some plaintiffs even assert that employers knew the virus was spreading in their facilities but failed to follow proper CDC or state guidelines to prevent them from being exposed.¹⁶¹ The claims also allege employers directed man-

¹⁵⁴ See *infra* notes 157–233 (discussing lawsuits). At least two complaints by workers sought forms of relief other than damages or an injunction. See Complaint and Emergency Petition for Emergency Mandamus Relief at 2–3, *Does I, II, III v. Scalia*, 530 F. Supp. 3d 506 (M.D. Pa. 2021) (No. 3:20-cv-01260) [hereinafter *Does Complaint*] (alleging incentive pay to show up to work during the pandemic and a lack of proper safety measures); Complaint for Declaratory and Injunctive Relief at 1, 5, *Amalgamated Transit Union v. Azar*, No. 1:20-cv-02876 (D.D.C. dismissed July 8, 2022) (demanding that federal agencies invoke the Defense Production Act's authority to allocate additional PPE for essential workers).

¹⁵⁵ See, e.g., Complaint at 5, *Gutierrez v. Publix Super Mkts., Inc.*, No. 2020-025168-CA-01 (Fla. Cir. Ct. dismissed June 16, 2022) [hereinafter *Gutierrez Complaint*] (alleging that Publix employees were barred from wearing PPE); Petition at Law at 8, *Cano v. Tyson Foods, Inc.*, No. 3:20-cv-00094-JAJ-HCA (Iowa Dist. Ct. filed Nov. 19, 2020) [hereinafter *Cano Complaint*] (alleging that Tyson Foods failed to supply PPE to employees); First Amended Complaint at 20, *Buljic v. Tyson Foods, Inc.*, 2020 WL 13042580 (N.D. Iowa filed Nov. 18, 2020) (No. 6:20-cv-02055) [hereinafter *Buljic Complaint*] (alleging that Tyson management at an Iowa facility failed to give PPE to employees); Complaint at 6, *Elijah v. Port Auth. Trans-Hudson Corp.*, No. HUD-L-002137-20 (N.J. Super. Ct. Law Div. dismissed Feb. 20, 2024) [hereinafter *Elijah Complaint*] (alleging that the decedent's employer failed to provide PPE to employees).

¹⁵⁶ See *supra* note 43 and accompanying text.

¹⁵⁷ See, e.g., *Does Complaint*, *supra* note 154, at 2–3 (stating that a lunchmeat factory's management did not supply workers with masks, forced workers to work in tightly packed production lines, and encouraged workers to come in while sick).

¹⁵⁸ See *supra* note 44 and accompanying text.

¹⁵⁹ See, e.g., *Gutierrez Complaint*, *supra* note 155, at 6–8 (alleging that Publix disallowed the decedent from wearing PPE, forced the decedent to work with a known sick individual, and downplayed the severity of COVID-19, leading to the decedent's death).

¹⁶⁰ See, e.g., *id.* (alleging that supermarket managers had required a deceased worker, the plaintiff's father, to remove his mask so as not to scare away customers).

¹⁶¹ See, e.g., *id.* at 7 (stating that store management was aware that employees in Florida had contracted COVID-19, but continued to bar employees from donning masks).

agement to keep quiet, prohibited workers from using PPE, and pressured symptomatic workers to continue working.¹⁶² Other claims assert that employers threatened to fire workers for expressing concerns about coming to work during the pandemic.¹⁶³

The complaints point to how employers in essential industries unreasonably risked workers’ lives by continuing unsafe practices and disregarding CDC guidelines to prevent the spread of the virus. The employment practices and policies that these complaints discuss and the deadly outcomes for some workers point to how corporations treat low-wage workers as disposable, even as popular rhetoric dubs these workers “essential.” As Part III outlines, the lawsuits also demonstrate the need for employment equity principles to inform and strengthen labor and employment protections and provide adequate remedies for essential workers.¹⁶⁴

Section A of this Part categorizes complaints filed based on wrongful death suits.¹⁶⁵ Section B categorizes racial discrimination suits.¹⁶⁶ These suits point to failures of existing legal remedies during COVID-19 that contributed to the disproportionate contagion and deaths of essential workers of color.

¹⁶² See, e.g., Complaint at Law at 4, *Evans v. Walmart, Inc.*, No. 2020L003938 (Ill. Cir. Ct. dismissed June 29, 2023) [hereinafter *Evans Complaint*] (alleging that Walmart largely ignored safety measures that would have limited the spread of COVID-19 in its stores); Plaintiff’s Original Petition at 3–4, *Parra v. Quality Sausage Co.*, 2021 WL 9244156 (Tex. Dist. Ct. Dec. 13, 2021) (No. DC-20-06406) [hereinafter *Parra Complaint*] (claiming that the company implemented no safety measures to protect workers during the pandemic); Buljic Complaint, *supra* note 155, at 9 (alleging that a lack of proper safety measures and PPE led to a mass outbreak at a processing plant, causing multiple deaths); Notice of Removal at 13–15, *Benjamin v. JBS S.A.*, 516 F. Supp. 3d 463 (E.D. Pa. 2021) (No. 2:20-cv-02594) [hereinafter *Benjamin Notice of Removal*] (arguing that the decedent’s death was wrongful in a survival action for the negligent and reckless behavior displayed by JBS during the pandemic).

¹⁶³ See, e.g., *Benjamin Notice of Removal*, *supra* note 162, at 9 (alleging that the culture at the defendant’s meat processing plant forced sick workers to come to work for fear of losing their jobs); Buljic Complaint, *supra* note 155, at 11–12 (describing the managers’ threats); Gutierrez Complaint, *supra* note 155, at 4 (same); Class Action Complaint at 25, *Ornelas v. Cent. Valley Meat Co.*, No. 1:20-cv-01017-AWI-SKO (E.D. Cal. dismissed May 7, 2022) [hereinafter *Ornelas Complaint*] (stating that a factory required a worker to finish her shift after direct COVID-19 exposure, even as she grew dizzy and began coughing while working); *Parra Complaint*, *supra* note 162, at 3 (claiming that managers told a forklift driver to keep working, despite his COVID-19 symptoms, or face a layoff).

¹⁶⁴ See *infra* notes 234–328 and accompanying text.

¹⁶⁵ See *infra* notes 167–202 and accompanying text. Families of deceased essential workers have brought several suits. See, e.g., *Benjamin Notice of Removal*, *supra* note 162, at 2, 30–31 (wrongful death suit by a deceased worker’s family); *Elijah Complaint*, *supra* note 155, at 2, 5 (same); *Evans Complaint*, *supra* note 162, at 1, 3 (same); *Gutierrez Complaint*, *supra* note 155, at 1, 10 (same); *Parra Complaint*, *supra* note 162, at 1, 5 (same). Labor unions in critical industries have also filed class action lawsuits. See, e.g., Class Action Complaint at 1, *Smalls v. Amazon.com Servs., LLC*, 2022 WL 356432 (E.D.N.Y. Feb. 7, 2022) (No. 1:20-cv-05492-RPK-RLM) (class action suit).

¹⁶⁶ See *infra* notes 203–233 and accompanying text.

A. Wrongful Death Suits Related to Employment

Across the country, wrongful death suits have been filed against employers on behalf of essential workers.¹⁶⁷ Family members assert that the workers contracted COVID-19 at work due to the negligence or recklessness of their employers.¹⁶⁸ For example, at least one suit asserted that the employer was responsible for the wrongful death of a spouse of an essential worker who contracted COVID-19 while working.¹⁶⁹ In that case, the court found that it was foreseeable for the employer to be held liable, but it ultimately dismissed the suit on public policy grounds.¹⁷⁰ This Section profiles some of these wrongful death claims, which highlight the precarity of essential workers while employers refused to follow COVID-19 safety measures.¹⁷¹

In 2020, *Gutierrez v. Publix Super Markets, Inc.* concerned a plaintiff, Ariane Gutierrez, who argued that her father's employer prohibited him from wearing a mask or gloves for fear of scaring customers, even though the State of Florida declared a public health emergency on March 1, 2020.¹⁷² According to the complaint, on March 25, 2020, Publix's Chief Executive Officer uploaded a statement on the grocery store's website, stating that Publix had communicated with federal agencies to monitor the coronavirus's spread.¹⁷³ The complaint outlines five separate occasions in which customers reported to the Occupational Safety and Health Administration (OSHA) that Publix refused to allow workers to wear PPE.¹⁷⁴

¹⁶⁷ See, e.g., Gutierrez Complaint, *supra* note 155, at 4, 7 (alleging that managers at a supermarket required the now-deceased plaintiff to remove his mask so as not to scare away customers); Cano Complaint, *supra* note 155, at 8–9, 13 (claiming that a meat processing plant forced employees to work less than six feet apart without supplying PPE or taking additional protective measures, recklessly increasing the risk of infection); Buljic Complaint, *supra* note 155, at 9 (alleging that a lack of proper safety measures and PPE led to a mass outbreak at a processing plant, causing multiple deaths).

¹⁶⁸ See, e.g., *supra* note 167 (listing examples of lawsuits); see also Benjamin Notice of Removal, *supra* note 162, at 21–25 (alleging that JBS displayed negligent and reckless behavior during the pandemic in a wrongful death and survival action); Elijah Complaint, *supra* note 155, at 4 (alleging that managers told workers not to wear PPE unless performing specific duties); Evans Complaint, *supra* note 162, at 4 (alleging that the company largely ignored safety measures that would have limited the spread of COVID-19 in its stores); Parra Complaint, *supra* note 162, at 3–4 (claiming that the company took no action concerning the pandemic).

¹⁶⁹ See Plaintiff's Second Amended Complaint at 2–4, *Estate of De Ruiz v. ConAgra Foods Packaged Foods, LLC*, 606 F. Supp. 3d 881 (E.D. Wis. 2022) (No. 21-CV-387-SCD) (alleging that the decedent died from COVID-19 after her husband's employer failed to implement adequate safety measures, causing him to contract the virus at work and then transmit it to the decedent).

¹⁷⁰ *Estate of De Ruiz*, 606 F. Supp. 3d at 882–83; see *Estate of De Ruiz v. ConAgra Foods Packaged Foods, LLC*, 601 F. Supp. 3d 368, 382 (E.D. Wis. 2022) (analyzing and finding a duty of care because “it would be foreseeable that ConAgra’s actions (or failures to act) might cause harm, not just to employees, but also to others”).

¹⁷¹ See *infra* notes 172–202 and accompanying text (discussing wrongful death claims in detail).

¹⁷² Gutierrez Complaint, *supra* note 155, at 2, 3, 6–7.

¹⁷³ *Id.* at 3.

¹⁷⁴ *Id.* at 4–5.

Mr. Gerardo Gutierrez, a seventy-year-old Latino essential worker, worked at the Publix deli department, and the suit asserts his employer prohibited him from wearing PPE—even though his co-worker, who worked next to him, exhibited COVID-19-related symptoms.¹⁷⁵ Mr. Gutierrez’s co-workers also insisted that Publix management explicitly instructed them not to wear PPE and threatened them with disciplinary action if they refused to comply.¹⁷⁶ Mr. Gutierrez passed away a few weeks later after allegedly contracting the virus while working at the deli department.¹⁷⁷

The complaint asserts that Publix ignored CDC and state health guidelines by prohibiting workers from using PPE during a national health emergency.¹⁷⁸ Thereby, Publix endangered Mr. Gutierrez, an older man of color who was at high risk of contracting COVID-19 both because of his ethnicity and age.¹⁷⁹ These employment practices reflect trends in low-wage essential industries, as discussed in the structural factors.¹⁸⁰ The lawsuit survived the employer’s motion to dismiss, and the parties reached a confidential settlement agreement.¹⁸¹

Other plaintiffs have filed wrongful death suits related to COVID-19 against Tyson Foods, Inc., one of the world’s largest meat producers.¹⁸² Workers’ families assert that Tyson had a compulsory attendance policy, placed workers in close quarters, failed to institute sufficient safety regulations, and did not provide adequate PPE.¹⁸³ The complaints allege that Tyson fraudulently suggested to employees that COVID-19 did not threaten their lives.¹⁸⁴ The company committed gross negligence, acting in “willful and wanton disregard for worker safety,” which caused rapid viral contagion and preventable deaths.¹⁸⁵

In *Cano v. Tyson Foods, Inc.*, the family of a deceased fifty-one-year-old Latino meatpacking worker in Iowa asserts that company policy impermissibly

¹⁷⁵ *Id.* at 6–8.

¹⁷⁶ *Id.* at 4–5.

¹⁷⁷ *Id.* at 8.

¹⁷⁸ *Id.* at 2, 3, 6–7.

¹⁷⁹ See *id.* at 6–7 (noting that Mr. Gutierrez’s employer barred him from taking steps to protect himself from the virus).

¹⁸⁰ See, e.g., *supra* notes 99–153 and accompanying text (discussing workplace hazards in low-wage food-related industries).

¹⁸¹ See *Gutierrez v. Publix Super Mkts., Inc.*, No. 2020-025168-CA-01, 2021 Fla. App. LEXIS 13297, at *1 (Fla. Cir. Ct. dismissed June 16, 2022) (dismissing the case based on a settlement).

¹⁸² See Katie Warren, *Meet the Billionaire Family Behind Tyson Foods, the \$42 Billion Meat Company That’s Been Hit by COVID-19 Outbreaks at Its Plants and Is Warning of a Meat Shortage*, BUS. INSIDER (May 13, 2020), <https://www.businessinsider.com/meat-plant-covid-outbreak-tyson-foods-family-2020-5> [https://perma.cc/9E77-BL9G] (reporting that in 2019, Tyson had a sales revenue of \$42.4 billion).

¹⁸³ Buljic Complaint, *supra* note 155, at 1, 20–21; Cano Complaint, *supra* note 155, at 8–9.

¹⁸⁴ Buljic Complaint, *supra* note 155, at 10; Cano Complaint, *supra* note 155, at 9–10.

¹⁸⁵ Buljic Complaint, *supra* note 155, at 1; see also Cano Complaint, *supra* note 155, at 16–17 (alleging that Tyson’s fraudulent misrepresentations were “willful and wanton”).

endangered him.¹⁸⁶ The complaint claims that Pedro Cano was required to travel around different floors, substituting for other workers during their breaks.¹⁸⁷ Mr. Cano was exposed to multiple sets of coworkers in tightly packed workstations each day for weeks before a mass outbreak at his plant led to its closure.¹⁸⁸ Mr. Cano passed away twelve days after developing COVID-19 symptoms and was hospitalized just eight days after the plant closed down.¹⁸⁹ The U.S. Court of Appeals for the Eighth Circuit dismissed the appeal based on the parties' stipulation.¹⁹⁰

In *Buljic v. Tyson Foods, Inc.*, the families of deceased Latinx/e and other pork processing workers sued the company following a COVID-19 outbreak at Tyson's biggest plant, located in Waterloo, Iowa.¹⁹¹ The State of Iowa declared a State of Public Health Disaster Emergency.¹⁹² The complaint alleges that the local sheriff's department, Black Hawk County officials, and twenty local elected officials asked the company to shut down or implement safety measures to prevent a further outbreak.¹⁹³ Still, the company publicly denied a COVID-19 outbreak and initially refused to close the plant.¹⁹⁴

The families asserted that Tyson did not supply appropriate PPE, institute social distancing, or take other protective steps.¹⁹⁵ This points to structural factors three and four.¹⁹⁶ According to the complaint, over one thousand employees at the Waterloo plant contracted COVID-19.¹⁹⁷ After a federal court remanded the case to a state trial court in Iowa, the trial court dismissed the complaint for lack of subject matter jurisdiction, the plaintiffs appealed, and the case is pending before the Iowa Supreme Court.¹⁹⁸

¹⁸⁶ See Cano Complaint, *supra* note 155, at 8 (alleging that the defendants knew of COVID-19's risk and safety precautions that could limit that risk, yet still required individuals to work in unsafe conditions).

¹⁸⁷ *Id.* at 9.

¹⁸⁸ *Id.* at 11–12.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ Cano v. Tyson Foods, Inc., No. 22-1550, 2023 WL 2542475, at *1 (8th Cir. Mar. 6, 2023).

¹⁹¹ Buljic Complaint, *supra* note 155, at 1; Chauncey Alcorn, *Tyson Will Close Its Biggest Pork Plant After Workers Call Out Sick with Coronavirus*, CNN BUS., <https://www.cnn.com/2020/04/22/business/tyson-pork-plant-iowa-coronavirus/index.html> [<https://perma.cc/GFL8-WVQG>] (Apr. 22, 2020).

¹⁹² Buljic Complaint, *supra* note 155, at 6.

¹⁹³ *Id.* at 9–10.

¹⁹⁴ See *id.* (quoting a local sheriff who said that seeing the cramped plant “shook [him] to the core,” and alleging that managers at the Waterloo facility “organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive” (alteration in original)).

¹⁹⁵ *Id.* at 1.

¹⁹⁶ See *supra* notes 43–44 and accompanying text.

¹⁹⁷ Buljic Complaint, *supra* note 155, at 1.

¹⁹⁸ Appellants' Final Brief and Request for Oral Argument at 21, 23, *Buljic v. Tyson Foods, Inc.*, No. 23-0603 (Iowa filed Sept. 29, 2023).

In 2022, in *Estate of De Ruiz v. ConAgra Foods Packaged Foods, LLC*, the U.S. District Court for the Eastern District of Wisconsin dismissed another wrongful death suit based on public policy considerations.¹⁹⁹ The court held that the employer, a food processing plant, owed a duty of care to its employee and his wife, the plaintiff, because it was foreseeable that its failure to implement adequate safety measures might harm employees and others, given the contagious nature of COVID-19.²⁰⁰ The court dismissed the case because that recovery would present a slippery slope with potentially unlimited employer liability.²⁰¹

The deadly outcomes for essential workers point to higher workplace safety standards and regulations in low-wage essential industries, particularly when workers respond to a health crisis. As discussed, several wrongful death suits have alleged that employers failed to adhere to federal and state mandates related to COVID-19 in providing PPE and allowing workers to socially distance, which ultimately caused the untimely death of their family members because they contracted the virus at work.²⁰² These lawsuits show the failure of existing legal remedies in protecting vulnerable essential workers during a public health crisis that contributed to the disproportionate contagion and deaths of communities of color. Although courts, in some instances, found employers liable, they nonetheless refused to provide relief to families for the death of an essential worker based on abstract public policy grounds. Similar patterns are observable in the discrimination lawsuits profiled immediately next.

B. Racial Discrimination Suits Related to Employment

Structural racial and gender inequality holds many workers of color at the bottom of the lowest paying and, often, most dangerous jobs within essential industries.²⁰³ This points to structural factors one, two, five, and six.²⁰⁴ This Sec-

¹⁹⁹ 606 F. Supp. 3d 881, 882 (E.D. Wis. 2022).

²⁰⁰ *See id.* (stating that the judge had previously found that ConAgra owed a worker’s wife a duty of care); *Estate of De Ruiz v. ConAgra Foods Packaged Foods, LLC*, 601 F. Supp. 3d 368, 382 (E.D. Wis. 2022) (analyzing and finding a duty of care to the employee and his wife).

²⁰¹ 606 F. Supp. 3d at 882, 889.

²⁰² *See supra* notes 167–201 and accompanying text (discussing wrongful death suits).

²⁰³ *See supra* notes 67–71 and accompanying text (discussing occupational segregation). Several major corporations facing COVID-19-related lawsuits significantly increased their profits during the pandemic. *See, e.g., Shelley E. Kohan, Amazon’s Net Profit Soars 84% with Sales Hitting \$386 Billion*, FORBES, <https://www.forbes.com/sites/shelleykohan/2021/02/02/amazons-net-profit-soars-84-with-sales-hitting-386-billion/?sh=510aba791334> [<https://perma.cc/6HBJ-T678>] (Dec. 10, 2021) (“Amazon delivered a record performance in 2020 with annual revenue up 38% to \$386 billion, a yearly increase of over \$100 billion. Net profit for Amazon was up 84% for the year as compared to last year.”); Marianne Wilson, *Walmart Q4 Sales Soar, but Earnings Miss; Raising Wages for 425,000 Workers*, CHAIN STORE AGE (Feb. 18, 2021), <https://chainstoreage.com/walmart-q4-sales-soar-earnings-miss-raising-wages-425000-workers> [<https://perma.cc/4NHL-DG85>] (“For the full year, Walmart’s total revenue rose 6.7% to \$559.2 billion.”).

²⁰⁴ *See supra* notes 41–42, 45–46 and accompanying text.

tion discusses suits that have asserted that employment practices disproportionately impacted workers of color throughout COVID-19.²⁰⁵ For example, in complaints against Tyson, plaintiffs assert that their employer's "fraudulent misrepresentations, gross negligence, and incorrigible, willful, and wanton disregard for worker safety" led to twelve thousand confirmed COVID-19 cases for Tyson employees nationwide.²⁰⁶ The suits against Tyson point to the need for higher workplace standards in low-wage industries to protect the health and safety of vulnerable workers. Contextualizing these claims is particularly important given the racialized historical development of low-wage labor and how it generally permits employers to adopt practices that compromise the workers' health.²⁰⁷

Employees filed a civil rights administrative suit against Tyson, JBS USA, and other major meat processing facilities before the U.S. Department of Agriculture, challenging racial discrimination under Title VI of the Civil Rights Act of 1964.²⁰⁸ In *Food Chain Workers Alliance v. Tyson Foods, Inc.*, the complainants asserted that Tyson had successfully met its business needs on the backs of its Black, Latinx/e, and API workforce, all while these groups disproportionately died from contracting COVID-19 at work.²⁰⁹ The suit alleges that Tyson's practices created a pattern of racial discrimination with a disparate impact on work-

²⁰⁵ See, e.g., Complaint for Damages at 17–19, *Ringo v. Silverado Senior Living, Inc.*, No. 2:21-cv-01649-JAK-JPR (Cal. Super. Ct. filed Dec. 10, 2020) (alleging that the operator of a nursing home discouraged staff from wearing protective equipment, assigned the decedent to provide care for a resident who had tested positive for COVID-19 without informing her about it, and required asymptomatic employees who may have been exposed to COVID-19 to continue working); Plaintiffs' Second Amended Complaint at 9, 24, *Borgella v. Robins & Morton Corp.*, No. 1:21-cv-22789-JLK (S.D. Fla. dismissed June 27, 2023) [hereinafter *Borgella Complaint*] (alleging that the Black plaintiffs were left without PPE, while other employees received PPE); Second Amended Complaint at 11, *Jones v. E. Airlines, LLC*, No. 2:20-cv-01927-RBS (E.D. Pa. dismissed Nov. 30, 2022) (alleging that higher-ups forced the plaintiff, a female manager of color, to return to the office while permitting white managers to work from home); First Amended Complaint at 1, 3, *Smalls v. Amazon.com Servs., LLC*, 2022 WL 356432 (E.D.N.Y. Feb. 7, 2022) (No. 1:20-cv-05492-RPK-RLM) [hereinafter *Smalls Amended Complaint*] (initiating a class action by workers of color against Amazon for neglecting to protect the welfare of essential warehouse workers); Complaint at 2, *Alvarado v. United Hospice, Inc.*, 631 F. Supp. 3d 89 (S.D.N.Y. 2022) (No. 7:20-cv-10790) [hereinafter *Alvarado Complaint*] (alleging that management allowed white social workers to stop in-person visits with patients after the onset of the pandemic but mandated that most Latinx/e and Black social workers continue in-person visits, putting them at higher risk of COVID-19 infection); Ornelas Complaint, *supra* note 163, at 4–5 (alleging that the plaintiff contracted COVID-19 while at work and was denied bonus pay for taking time off to recover).

²⁰⁶ E.g., Buljic Complaint, *supra* note 155, at 1 (alleging employer's fraud and negligence); see also Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants> [<https://perma.cc/AK5Y-7L7Y>] (illustrating large COVID-19 outbreaks in Iowa slaughterhouses and elsewhere).

²⁰⁷ See *supra* notes 12–18 and accompanying text (discussing racialized labor law as having produced inequalities during COVID-19).

²⁰⁸ Title VI Complaint, *supra* note 135, at 1.

²⁰⁹ *Id.* at 16.

ers of color.²¹⁰ Tyson’s workforce is overwhelmingly occupationally segregated, with 73% of its salaried employees but only around 27.2% of its hourly employees being white.²¹¹ According to the suit, management allowed the predominantly white salaried workforce to socially distance while performing their work functions.²¹² Meanwhile, Black, Latinx/e and Asian workers operated in hazardous and crowded processing lines despite CDC guidelines instructing otherwise.²¹³ The outcomes for Tyson’s workers of color, as well as for other workers similarly situated, were disparate rates of contracture and COVID-19-related deaths across essential industries.²¹⁴

In *Alvarado v. United Hospice, Inc.*, three Latinas and one Black woman working for a nonprofit providing palliative end-of-life care claimed that during the COVID-19 pandemic, the overwhelmingly white management subjected them to discrimination, retaliation, and a hostile work environment.²¹⁵ The plaintiffs, Elizabeth Alvarado, Ericka Aguilar, Wanda Azu Nieves, and Marie Wood Smith, alleged that higher-ups permitted certain, primarily white workers to stop in-person visits with patients during the pandemic while requiring most Latinx/e and Black social workers to conduct in-person appointments.²¹⁶ The complaint also claims that, during training sessions on how to wear PPE, managers forced Latinx/e social workers to share PPE.²¹⁷ The plaintiffs asserted that the facility management’s discrimination unreasonably endangered workers of color during

²¹⁰ See *id.* at 2, 47 (alleging “a pattern or practice of discrimination” violating Title VI due to “(1) the Corporations’ disregard for the risk of exposure to COVID-19 through their policies; (2) the failure to ensure that workers, the majority of whom [were people of color], receive[d] protection from . . . transmission; and (3) the social distancing afforded majority white management”).

²¹¹ *Id.* at 34–35; see Laura Reiley, *As Coronavirus Ravaged Meatpackers, Minorities Bore the Brunt. Now Worker Groups Say Tyson and JBS Violated the Civil Rights Act.*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/coronavirus-meat-tyson-jbs-racial-discrimination/> [<https://perma.cc/BHS5-Q2FW>] (“Black, Latin[x/e] and Asian workers make up about 70 percent of the processing line workers in meatpacking plants but only about 29 percent of all U.S. workers However, whites dominate the management at . . . Tyson, where 73 percent of managers are white.”). But see *Diversity, Equity & Inclusion*, TYSON FOODS, <https://www.tysonfoods.com/who-we-are/our-people/inclusion-diversity> [<https://perma.cc/JD3W-583A>] (touting staff’s ethnic and linguistic diversity).

²¹² Title VI Complaint, *supra* note 135, at 47.

²¹³ *Id.* at 46–47 (asserting that less discriminatory practices are available “because coronavirus infections are preventable” and “[s]uch alternative[s] would reduce the processing rate, increase the physical space between workers on the processing line to a minimum of six feet, increase the number of processing shifts per day, and operate shifts on weekends and federal holidays”).

²¹⁴ See Lopez et al., *supra* note 35, at 719 (“Black, Hispanic, and Asian people have substantially higher rates of infection, hospitalization, and death compared with [w]hite people.”).

²¹⁵ See Alvarado Complaint, *supra* note 205, at 1–3 (“All the [United Hospice] executives are [w]hite Almost all the nurses are [w]hite. Most of the full-time social workers who travel to the community homes and other care settings of patients and their families are Hispanic. All the home health care aides are Black or Hispanic.”).

²¹⁶ *Id.* at 1–2.

²¹⁷ *Id.* at 16–17.

the pandemic.²¹⁸ A federal district court granted United Hospice's motion for summary judgment.²¹⁹

In *Borgella v. Robins & Morton Corp.*, Black construction workers complained about their employer's racially discriminatory practices, hostility, retaliation, and Family and Medical Leave Act violations.²²⁰ The plaintiffs, Katia Borgella and Anthony Williams claimed that the employer used the "N"-word to refer to Black employees.²²¹ Ms. Borgella and Mr. Williams alleged that, throughout their employment, Defendant assigned them more difficult work based on their race.²²² They also alleged that, during the COVID-19 pandemic, their employer ignored COVID-19 safety protocols and did not provide adequate equipment to employees of color.²²³ As a result, both plaintiffs contracted the virus from co-workers and were terminated after taking sick leave.²²⁴ The court dismissed the case after the parties settled.²²⁵

In *Smalls v. Amazon.com Services, LLC*, Christian Smalls, a Black Amazon employee who had worked for four years as a management associate in Staten Island, New York, filed a class action complaint on November 12, 2020, representing a class of similarly situated Black and Latinx/e workers.²²⁶ Mr. Smalls alleged that Amazon failed to implement adequate COVID-19 protections for workers of color.²²⁷ He argued that Amazon subjected its majority-minority line workers to worse conditions than its overwhelmingly white managers during the COVID-19 pandemic.²²⁸ His supervisors fired him just hours after Mr. Smalls organized a protest about Amazon's COVID-19 policies.²²⁹ As a result, he sued Amazon for race discrimination and retaliation under federal, state, and city law.²³⁰ The court dismissed the suit for failure to state a claim, but Mr. Smalls and his coworkers eventually voted to form the first union at Amazon.²³¹

²¹⁸ *Id.* at 2.

²¹⁹ *Alvarado v. United Hospice, Inc.*, 631 F. Supp. 3d 89, 97 (S.D.N.Y. 2022).

²²⁰ *Borgella Complaint*, *supra* note 205, at 1–2, 14.

²²¹ *Id.* at 3–4, 6–7.

²²² *Id.* at 8–9.

²²³ *Id.* at 6, 24.

²²⁴ *Id.* at 10–11.

²²⁵ *See Borgella v. Robins & Morton Corp.*, No. 1:21-cv-22789-JLK (S.D. Fla. dismissed June 27, 2023), <https://www.courtlistener.com/docket/60099892/borgella-v-robins-morton-corporation/> [<https://perma.cc/XPY6-UPMW>] (dismissing the case per the parties' joint stipulation).

²²⁶ *Smalls Amended Complaint*, *supra* note 205, at 1, 3, 10.

²²⁷ *Id.* at 3–4.

²²⁸ *Id.* at 3–5.

²²⁹ *Id.* at 5–6.

²³⁰ *Id.* at 9.

²³¹ *Smalls v. Amazon.com Servs., LLC*, 2022 WL 356432, at *3, *7 (E.D.N.Y. Feb. 7, 2022), *aff'd*, 2022 WL 17491259 (2d Cir. Dec. 8, 2022) (No. 22-615); Andrea Hsu & Alina Selyukh, *He Was Fired by Amazon 2 Years Ago. Now He's the Force Behind the Company's 1st Union*, NPR (Apr. 2, 2022), <https://www.npr.org/2022/04/02/1090353185/amazon-union-chris-smalls-organizer-staten-island> [<https://perma.cc/39TM-3JGD>].

These lawsuits reflect how structural racism shapes labor and employment for workers of color, as well as how COVID-19 has exacerbated racial and economic inequalities.²³² Government intervention can be significant when private employers are unwilling to eradicate discriminatory practices that continue to harm an already vulnerable workforce. Because COVID-19 amplified existing racial inequalities, policymakers should enact legislation or policy changes rooted in employment equity principles that alleviate or eliminate these structural factors.²³³

III. BUILDING EMPLOYMENT EQUITY PRINCIPLES INTO LABOR AND EMPLOYMENT LAW

The disparate and magnifying harm of COVID-19 on low-income workers of color presents clear lessons for policymakers. Building on the scholarship of health justice scholars like Professor Ruqaiyah Yearby, this Part proposes employment equity principles to address the six structural factors identified in Part I, Section A.²³⁴ In adopting these principles, this Part provides actionable steps in the forthcoming Sections to improve the efficacy of existing government responses to intersecting structural inequalities.

Considering the historically disparate impact of pandemics on vulnerable communities, changing labor and employment structures to protect rather than dispose of essential workers is necessary. The proposed employment equity principles address the six structural factors that magnified intersecting structural inequalities during and after COVID-19. These principles can guide the formation of more extensive, durable policy interventions to address intersecting inequalities. They also center on the most vulnerable low-wage workers, who will likely be deemed “essential” during impending health and climate change-related pandemics.

Below are three proposed employment equity principles:

- (1) Prioritize addressing structural barriers to pay equity, promotion, occupational segregation, and advancement for low-wage workers of color through policy and workplace regulation;

²³² See *supra* notes 34–98 and accompanying text (discussing structural racism in employment before and during the COVID-19 pandemic).

²³³ See *infra* notes 234–235 and accompanying text.

²³⁴ See *supra* notes 41–46 and accompanying text (listing the six structural factors); see, e.g., Yearby, *supra* note 53, at 179 (discussing existing policies that “prioritiz[e] the needs of employers above those of essential workers, which has resulted in increased workplace exposure to COVID-19”); Yearby & Mohapatra, *supra* note 1, at 1, 4 (defining and discussing structural racism in housing, workplaces, and medicine).

- (2) Integrate robust and holistic standards and regulatory frameworks that center the safety of vulnerable workers in low-wage industries; and
- (3) Incorporate a heightened standard of care for employers that permits relief for foreseeable harm at the workplace and extends to families and communities based on liability or public policy grounds.

The forthcoming Sections apply these principles to plausible administrative, legislative, and regulatory interventions. Section A recommends legislation to alleviate gaps in existing labor and employment laws and policies that imperil low-wage workers of color.²³⁵ In applying principle one, this Section addresses structural factors one, two, five, and six.²³⁶ Section B looks at regulatory measures that OSHA could adopt to address health disparities at work.²³⁷ In applying principle two, this Section addresses structural factors three and four.²³⁸ Finally, Section C proposes repealing state laws shielding employers from liability to provide viable tort remedies for negligent or reckless employment practices.²³⁹ In applying principle three, this Section addresses all six structural factors.²⁴⁰

A. Address Legislative Gaps and Implement Reforms to Overcome Structural Barriers

Federal interventions in response to COVID-19 overwhelmingly failed to protect low-wage essential workers of color, particularly those who stand at the intersection of multiple marginalities and those who earn the lowest incomes.²⁴¹

²³⁵ See *infra* notes 241–312 and accompanying text.

²³⁶ See *supra* notes 41–42, 45–46 and accompanying text.

²³⁷ See *infra* notes 313–319 and accompanying text.

²³⁸ See *supra* notes 43–44 and accompanying text.

²³⁹ See *infra* notes 320–328 and accompanying text.

²⁴⁰ See *supra* notes 41–46 and accompanying text.

²⁴¹ See Yearby, *supra* note 53, at 179 (“[T]he government has failed to enforce health and safety laws and permitted essential business to remain open in spite of being sites of COVID-19 outbreaks, prioritizing the needs of employers above those of essential workers, which has resulted in increased workplace exposure to COVID-19.”); Dartunorro Clark, *‘The Forgotten Ones’: Domestic Workers Fight to Be Included in the Covid Recovery*, NBC NEWS (Mar. 7, 2021), <https://www.nbcnews.com/politics/politics-news/forgotten-ones-domestic-workers-fight-be-included-covid-recovery-n1259036> [<https://perma.cc/H2BN-FXJ4>] (“Despite the risks associated with domestic labor—which is likely to take place indoors and in close proximity to other people—domestic workers . . . were among those most likely to fall through the cracks as Congress debated economic relief measures.”); Allison Dunatchik et al., *Gender, Parenting, and the Rise of Remote Work During the Pandemic: Implications for Domestic Inequality in the United States*, 35 GENDER & SOC’Y 194, 195 (2021) (“[W]omen (particularly those with less education) have suffered more job losses [than men]. Not only were they concentrated in hard-hit service sector jobs, but they also faced the loss of child care and schooling that are so essential for primary caregivers of children.”).

Because COVID-19 relief policies build on the existing inequities of labor laws, occupational segregation, and structural racism, structural remedies are needed to address these intersecting inequalities effectively.

This Section provides an overview of legislative gaps and proposed reforms that can bridge racial, gender, and economic disparities in employment and protect the health and financial security of low-wage essential workers of color. Subsection 1 proposes measures to ensure that full-time workers make a living wage.²⁴² Subsection 2 advocates for bringing agricultural and domestic workers into the sweep of federal labor laws.²⁴³ Subsection 3 urges federal policymakers to guarantee basic workplace protections to essential workers.²⁴⁴ Lastly, Subsection 4 argues for immigration relief for the undocumented workers who propelled the United States’ essential industries forward during COVID-19.²⁴⁵ These remedies would implement employment principle one.

1. Eliminate Poverty Wages and Modify Low-Wage Structure(s)

In 2020, the U.S. Bureau of Labor Statistics reported that 1.1 million workers earned the federal minimum wage or even less.²⁴⁶ Many workers are considered essential and sustained the economy through the pandemic.²⁴⁷ Inflation has increased the overall cost of living, but the federal minimum wage has remained unchanged since 2009.²⁴⁸ To build secure pathways of economic mobility that traverse structural inequality, this Article argues that the minimum wage should be increased and the subminimum wage should be eliminated. Ultimately, a living wage should be instituted.

a. Increase the Federal Minimum Wage

Increasing the federal minimum wage will address economic insecurity within low-wage sectors and structural intersecting inequalities in employ-

²⁴² See *infra* notes 246–277 and accompanying text.

²⁴³ See *infra* notes 278–284 and accompanying text.

²⁴⁴ See *infra* notes 286–299 and accompanying text.

²⁴⁵ See *infra* notes 300–312 and accompanying text.

²⁴⁶ *Characteristics of Minimum Wage Workers, 2020*, U.S. BUREAU LAB. STAT. (Feb. 2021), <https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm> [https://perma.cc/9679-S8BT].

²⁴⁷ See Yearby, *supra* note 4, at 193 (describing the low-wage essential workforce).

²⁴⁸ See DAVID COOPER, ELISE GOULD & BEN ZIPPERER, ECON. POL’Y INST., LOW-WAGE WORKERS ARE SUFFERING FROM A DECLINE IN THE REAL VALUE OF THE FEDERAL MINIMUM WAGE 1 (2019), <https://www.epi.org/publication/labor-day-2019-minimum-wage> [https://perma.cc/U5FN-CZ6H] (“The real value of the federal minimum wage has dropped 17% since 2009 and 31% since 1968. Workers earning the federal minimum wage today have \$6,800 less per year to spend on rent, food and other essentials than their counterparts 50 years ago.”); Tami Luhby, *These Two Charts Show How Much Minimum Wage Workers Have Fallen Behind*, CNN (Feb. 21, 2021), <https://www.cnn.com/2021/02/21/politics/minimum-wage-inflation-productivity/index.html> [https://perma.cc/Z8PP-4W4W] (“The minimum wage, which has been stuck at \$7.25 an hour since 2009, has fallen far behind in terms of both inflation and productivity.”).

ment.²⁴⁹ Poverty impacts low-wage workers in general, but workers of color experience higher levels of poverty than white workers.²⁵⁰ These workers are overrepresented in the minimum wage brackets, and because of occupational segregation across the economy, they are disparately relegated to the lowest-paid jobs.²⁵¹ The federal minimum wage has been set at \$7.25 an hour since 2009, even though data indicate that increasing it would alleviate poverty wages.²⁵² Since 2019, Congress has routinely considered but not yet enacted a minimum wage increase at the federal level.²⁵³

Congress should increase the minimum wage to create pathways for economic mobility for low-wage workers and close existing racial and gender wage disparities. Advocates assert that raising the federal minimum wage to fifteen dollars by 2025 would increase the pay of forty million workers, representing approximately a quarter of the American workforce, which would help shrink the pay gap for people of color and women.²⁵⁴ Roughly three out of five workers

²⁴⁹ See NAT'L EMP. L. PROJECT, WHY THE U.S. NEEDS AT LEAST A \$17 MINIMUM WAGE: HOW THE RAISE THE WAGE ACT WOULD BENEFIT U.S. WORKERS, THEIR FAMILIES, AND ENTIRE COMMUNITIES 1 (2023), <https://www.nelp.org/app/uploads/2023/07/Why-US-Needs-At-Least-17-Minimum-Wage.pdf> [<https://perma.cc/H6FK-FS5M>] (advocating for a stepped increase to a \$17 federal minimum wage by 2028, and emphasizing that this would disproportionately benefit workers of color, particularly women). But see Jeffrey Clemens, *Making Sense of the Minimum Wage: A Roadmap for Navigating Recent Research*, CATO INST. (May 14, 2019), <https://www.cato.org/policy-analysis/making-sense-minimum-wage-roadmap-navigating-recent-research> [<https://perma.cc/2QZB-WPUC>] (arguing that increasing the minimum wage would negatively impact low-wage workers and hurt the economy).

²⁵⁰ See *Poverty Rate and Percentage Point Change by Selected Characteristics: People*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/visualizations/2021/demo/p60-273/Figure9.pdf> [<https://perma.cc/76U4-2L85>] (providing data from 2020 that Black people comprise 19.5% and Hispanic people 17.0% of people living in poverty, compared to 10.1% of white people).

²⁵¹ Bahn & Sanchez Cumming, *supra* note 46; see also Molly Kinder & Laura Stateler, *Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a \$15 Minimum Wage.*, BROOKINGS (Feb. 5, 2021), <https://www.brookings.edu/articles/essential-workers-deserve-minimum-wage-increase/> [<https://perma.cc/Z8BV-V472>] (advocating for a higher minimum wage as a COVID-19 response).

²⁵² See NAT'L EMP. L. PROJECT, *supra* note 249, at 3 (stating that nationwide, a single, childless adult needs at least \$17 per hour for "a modest but adequate standard of living," but those living in with cities such as Phoenix, Fort Worth, New York City, and Washington, D.C. "will need more than \$17 an hour to get by").

²⁵³ See, e.g., Raise the Wage Act, H.R. 582, 116th Cong. (2019) (providing for stepped increases to a minimum wage of \$15 per hour); Eric Morath, *Biden's Minimum-Wage Proposal: When Would It Reach \$15 an Hour?*, WALL ST. J., <https://www.wsj.com/articles/bidens-minimum-wage-proposal-when-would-it-reach-15-an-hour-11612550898> [<https://perma.cc/JW4P-HEGU>] (Feb. 24, 2021) (discussing the minimum wage proposal included in the \$1.9 trillion pandemic stimulus bill); Emily Cochrane & Catie Edmondson, *Minimum Wage Increase Fails as 7 Democrats Vote Against the Measure.*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/us/minimum-wage-senate.html> [<https://perma.cc/GR7A-NRAV>] (discussing the Senate's rejection of the minimum wage bill).

²⁵⁴ Rose Khattar, Sara Estep & Lily Roberts, *Raising the Minimum Wage Would Be an Investment in Growing the Middle Class*, CTR. FOR AM. PROGRESS (July 20, 2023), <https://www.americanprogress.org/article/raising-the-minimum-wage-would-be-an-investment-in-growing-the-middle-class/> [<https://perma.cc/5844-E8JJ>]; see DAVID COOPER, ZANE MOKHIBER & BEN ZIPPERER, ECON. POL'Y INST.,

currently living in poverty would benefit, and among those who would see their incomes rise, six in ten are women—twenty-three percent of whom are Black and Latinx/e women.²⁵⁵ Based on data collected since the 1940s, the economy can benefit from a higher national minimum wage that ensures the lowest-paid workers share in boosts from increased nationwide productivity.²⁵⁶ Also, a minimum wage increase would improve the overall buying power of this workforce and help bridge critical race and gender divides in pay equity.²⁵⁷ There are many benefits to increasing the minimum wage and providing pathways of equitable financial security for low-wage workers, particularly those who work within essential industries.²⁵⁸

b. Eliminate the Subminimum Wage

Most states operate under a two-tiered wage structure that perpetuates economic insecurity for tipped workers, a reality that COVID-19 worsened for such workers.²⁵⁹ The FLSA established this structure, which requires employers to pay a minimum wage unless employees fit into certain age or disability exceptions, among others.²⁶⁰ The federal subminimum wage has been set at \$2.13 since

RAISING THE FEDERAL MINIMUM WAGE TO \$15 BY 2025 WOULD LIFT THE PAY OF 32 MILLION WORKERS 2 (2021), <https://files.epi.org/pdf/221010.pdf> [<https://perma.cc/U6UW-S8XQ>] (highlighting that raising the minimum wage “would disproportionately benefit Black and Hispanic workers and women”).

²⁵⁵ Justin Schweitzer, *Ending the Tipped Minimum Wage Will Reduce Poverty and Inequality*, CTR. FOR AM. PROGRESS (Mar. 30, 2021), <https://www.americanprogress.org/issues/poverty/reports/2021/03/30/497673/ending-tipped-minimum-wage-will-reduce-poverty-inequality> [<https://perma.cc/3EG8-QN49>].

²⁵⁶ See COOPER ET AL., *supra* note 254, at 3 (arguing that the minimum wage has not kept pace with soaring productivity).

²⁵⁷ See *id.* at 14 (arguing that an increased minimum wage would dramatically increase consumption by low-wage workers).

²⁵⁸ See ROBERT C. SCOTT, COMM. ON EDUC. & THE WORKFORCE DEMOCRATS, RAISING THE MINIMUM WAGE: GOOD FOR WORKERS, BUSINESSES, AND THE ECONOMY 1, <https://democrats-edworkforce.house.gov/imo/media/doc/FactSheet-RaisingTheMinimumWageIsGoodForWorkers,Businesses,andTheEconomy-FINAL.pdf> [<https://perma.cc/NY7B-ZVJV>] (describing business support for lifting the minimum wage and listing economic evidence in favor of higher wages).

²⁵⁹ See *supra* notes 141–149 (discussing the subminimum wage in the food service industry).

²⁶⁰ See Manuel, *supra* note 145; see, e.g., 29 U.S.C. §§ 206(g), 214(c) (altering the minimum wage requirements for individuals under twenty and disabled individuals).

1991.²⁶¹ Although some states set the subminimum wage at \$7.25, others have a range of wages that fall below the federal minimum wage.²⁶²

Women comprise approximately two-thirds of tipped workers, and workers of color are disproportionately represented in the subminimum wage bracket.²⁶³ Tipped workers are almost two times likelier to fall under the federal poverty line than other low-wage workers.²⁶⁴ According to advocates, the insecurity of relying on customer tips as wages places workers in precarious economic conditions, as well as at a higher risk of experiencing sexual harassment and food insecurity.²⁶⁵

By comparison, only seven states have eliminated the subminimum wage, and workers fare much better in these states than in two-wage structure states.²⁶⁶ Data indicate that tipped workers in such “One Fair Wage” (OFW) states experience lower poverty levels, as well as lower rates of sexual harassment and food insecurity.²⁶⁷ For instance, Black food service workers in OFW states earn more than in states with a two-tiered system.²⁶⁸ In OFW states, low-wage tipped workers earn a higher wage and can account for a steady hourly paycheck instead of relying on customers to subsidize most of their income through tips.²⁶⁹

²⁶¹ U.C. BERKELEY FOOD LAB. RSCH. CTR. ET AL., *supra* note 138, at 11; *see* SYLVIA A. ALLEGRETTO & DAVID COOPER, ECON. POL’Y INST. & U.C. BERKELEY CTR. ON WAGE & EMP. DYNAMICS, TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT’S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 2 (2014) (“Unlike temporary subminimum wages . . . the ‘tip credit’ provision afforded to employers uniquely established a permanent sub-wage for tipped workers, under the assumption that these workers’ tips, when added to the sub-wage, would ensure that these workers’ hourly earnings were at least equal to the regular minimum wage.”).

²⁶² *See* ALLEGRETTO & COOPER, *supra* note 261, at 5–6 (highlighting the varying state pay laws for tipped workers).

²⁶³ *Id.* at 2 (“Women comprise two out of every three tipped workers; of the food servers and bartenders who make up over half of the tipped workforce, roughly 70 percent are women.”); U.C. BERKELEY FOOD LAB. RSCH. CTR. ET AL., *supra* note 138, at 1 (“People of color comprise 44% of the workforce of the restaurant industry and 42% of restaurant workers earning at or below the minimum wage are people of color.” (footnote omitted)).

²⁶⁴ ALLEGRETTO & COOPER, *supra* note 261, at 3.

²⁶⁵ U.C. BERKELEY FOOD LAB. RSCH. CTR. ET AL., *supra* note 138, at 2; ONE FAIR WAGE ET AL., *supra* note 61, at 3; ONE FAIR WAGE, *supra* note 150, at 4; Schweitzer, *supra* note 255 (“[W]hen workers depend on tips for almost three-quarters of their income, the consequence is that customers’ whims can effectively control tipped workers’ earnings and livelihood. This power imbalance leaves women, workers of color, disabled workers, and other . . . marginalized workers particularly vulnerable to economic precarity and other injustices in these jobs.”).

²⁶⁶ *See* SYLVIA A. ALLEGRETTO & KAI FILION, ECON. POL’Y INST. & U.C. BERKELEY CTR. ON WAGE & EMP. DYNAMICS, BRIEFING PAPER 297 NO. 297, WAITING FOR CHANGE: THE \$2.13 FEDERAL SUBMINIMUM WAGE 9, 16 (2011) (noting that Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington have eliminated the subminimum wage for tipped workers, and showing the effect of this policy decision on poverty rates); Schweitzer, *supra* note 255 (explaining that states that have abolished the subminimum wage enjoy lower poverty rates).

²⁶⁷ Schweitzer, *supra* note 255.

²⁶⁸ ONE FAIR WAGE ET AL., *supra* note 61, at 15.

²⁶⁹ *See* Schweitzer, *supra* note 255 (highlighting the financial benefit experienced by tipped workers in OFW states).

Federal policymakers should consider eliminating the subminimum wage to advance economic, gender, and racial equity amongst tipped workers. Eliminating the two-tiered wage structure and implementing a single minimum wage will also bridge racial, gender, and economic divides across tipped essential sectors.²⁷⁰ Instituting OFW, as worker-rights advocates have suggested, can equalize the playing field for essential workers across the economy and address intersecting structural inequalities.

c. Institute a Living Wage

A living wage would address multiple structural inequalities and provide economic safety for low-wage workers of color.²⁷¹ The minimum wage has not kept up with inflation.²⁷² A living wage accounts for the actual cost of living in a locality, which includes housing, food, and transportation, among other necessities.²⁷³ The current minimum wage does not provide low-wage workers a living wage. One in three people, or one hundred million in the United States, live at or below two hundred percent of the poverty level.²⁷⁴ Most large urban zones have a higher cost of living; for example, New York has a living wage of \$93,851, and San Francisco has a living wage of \$94,741.²⁷⁵

Hundreds of local municipalities nationwide have enacted local living wage ordinances.²⁷⁶ Studies show that living wage ordinances increase work produc-

²⁷⁰ See *id.* (arguing that establishing OFW would particularly benefit women and racial minorities).

²⁷¹ See Kimberly Amadeo, *Living Wage and How It Compares to the Minimum Wage*, THE BALANCE, <https://www.thebalance.com/living-wage-3305771> [<https://perma.cc/MHE7-MZW4>] (Mar. 4, 2022) (explaining that the living wage, the amount of money needed to support a modest lifestyle, outstrips the federal minimum wage). But see CHARLES LAMMAM, FRASER INST., *THE ECONOMIC EFFECTS OF LIVING WAGE LAWS*, at iii, v (2014), <https://www.fraserinstitute.org/sites/default/files/economic-effects-of-living-wage-laws.pdf> [<https://perma.cc/ZHB5-HVPR>] (suggesting that living-wage legislation distorts the labor market and increases unemployment, as well as potentially causes city budgets to swell).

²⁷² Luhby, *supra* note 248.

²⁷³ See *Living Wage Calculator*, LIVING WAGE CALCULATOR, <https://livingwage.mit.edu> [<https://perma.cc/5J4K-YS8V>] (providing a calculator “to help individuals, communities, [and] employers . . . estimate the local wage rate that a full-time worker requires to cover the costs of their family’s basic needs where they live”); Eric Ravenscraft, *What a ‘Living Wage’ Actually Means*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/smarter-living/what-a-living-wage-actually-means.html> [<https://perma.cc/GY9A-XNHQ>] (explaining that living wage calculations include “the cost of food, child care, health care (both insurance premiums and typical health care costs), housing, transportation and other necessities”).

²⁷⁴ *An Overview of America’s Working Poor*, POLICYLINK, <https://www.policylink.org/data-in-action/overview-america-working-poor> [<https://perma.cc/7JZY-4NZK>] (“A family of four below 200 percent of poverty in 2012 had a family income less than \$46,000 a year.”).

²⁷⁵ Carey Ann Nadeau, *New Living Wage Data for Now Available on the Tool*, LIVING WAGE CALCULATOR (May 17, 2020), <https://livingwage.mit.edu/articles/61-new-living-wage-data-for-now-available-on-the-tool> [<https://perma.cc/X8QJ-T6PP>].

²⁷⁶ See JEFF CHAPMAN & JEFF THOMPSON, ECON. POL’Y INST., *THE ECONOMIC IMPACT OF LOCAL LIVING WAGES 2* (2006), <https://files.epi.org/page/-/old/briefingpapers/170/bp170.pdf> [<https://perma.cc/7JZY-4NZK>].

tivity, benefit working families, and decrease turnover at work.²⁷⁷ Federal policymakers should implement a living wage to alleviate poverty and ensure equitable living standards for low-wage workers.

2. Amend the NLRA and FLSA to Include Agricultural and Domestic Workers

The NLRA and FLSA excluded agricultural and domestic workers as part of a political compromise to preclude workers of color from accessing these critical labor protections.²⁷⁸ The NLRA established bargaining rights for workers across the economy, and the FLSA established a federal minimum wage, overtime pay for hours over forty per workweek, and mandatory recordkeeping, among other labor and employment standards.²⁷⁹ These rights and standards apply to workers in the private and public sectors.²⁸⁰ The NLRA and FLSA do not cover independent contractors or agricultural and domestic workers.²⁸¹ These two sectors have historically primarily relied on workers of color and continue to do so today.²⁸² By exempting agricultural and domestic workers from NLRA and FLSA protections, low-wage workers in these industries are left without basic labor rights and protections that most other workers have. The lack of protections and subpar labor standards that permeate these industries facilitated the increased racial, gender, and economic inequalities for these essential workers before and during COVID-19.

A structural remedy would be to amend the NLRA and FLSA to include agricultural and domestic workers.²⁸³ These policy interventions will provide bar-

//perma.cc/VEA3-6WX8] (“Despite having common goals, living wage laws vary considerably in practice.”); Bryan Evans & Carlo Fanelli, *A Survey of the Living Wage Movement in Canada: Prospects and Challenges*, 8 J. FOR & ABOUT SOC. MOVEMENTS 77, 80 (2016) (“[O]ver 200 other coalitions have been formed in the US, with over 140 achieving various levels of success.”).

²⁷⁷ See CHAPMAN & THOMPSON, *supra* note 276, at 2–3 (arguing that living wage laws help households without driving up unemployment, and in fact boost productivity).

²⁷⁸ Perea, *supra* note 80, at 124–26.

²⁷⁹ *Id.* at 132; *Wages and the Fair Labor Standards Act*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/QE27-GRRL>]. See generally National Labor Relations Act, 29 U.S.C. §§ 151–169; Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

²⁸⁰ *Wages and the Fair Labor Standards Act*, *supra* note 279.

²⁸¹ Perea, *supra* note 80, at 96, 114–17; JOHN O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 1 (2021).

²⁸² Kaitlyn Henderson, *Why Millions of Workers in the US Are Denied Basic Protections*, OXFAM (Nov. 20, 2020), <https://politicsofpoverty.oxfamamerica.org/why-millions-workers-us-are-denied-basic-protections> [<https://perma.cc/H9KC-MR8M>].

²⁸³ See, e.g., Fairness for Farm Workers Act, H.R. 1080, 116th Cong. § 2(a) (2019) (requiring employers to compensate agricultural workers for hours worked in excess of their regular hours at a minimum of one and one-half times the worker’s regular rate, repealing the overtime exemption); Domestic Workers Bill of Rights Act, H.R. 3760, 116th Cong. § 101 (2019) (repealing the FLSA’s

gaining power, increase labor standards, and help close existing racial inequities, given that agricultural and domestic workers are primarily women, immigrants, and workers of color.²⁸⁴ Congress should enact legislation to ensure agricultural and domestic workers attain the NLRA’s and FLSA’s basic labor standards guaranteed to most other workers across the economy, particularly in light of COVID-19’s disparate impact on the workforce of these industries.²⁸⁵

3. Increase Workplace Protections for Essential Workers

Employment-related policies, like federal sick pay, are crucial to increasing labor and employment standards for low-wage essential workers. The United States is one of the few developed countries that does not have a federal mandate for paid sick time.²⁸⁶ An estimated twenty-seven million U.S. workers—many essential workers—cannot access paid sick leave.²⁸⁷ Up to ninety percent of employees reported having chosen to work while ill for various reasons, including feeling pressure from their employer.²⁸⁸ Providing sick pay can protect the health of an entire worksite and the general population while providing economic security to low-wage workers.

In addition, Congress should include hazard pay for essential workers as part of future pandemic relief bills.²⁸⁹ Although the House of Representatives initially passed legislation that included a hazard pay fund of two hundred billion dollars for essential workers in April 2020, it dropped the provision due to strong pushback by the Republican-controlled Senate.²⁹⁰ Despite the lack of support for

exemption for live-in domestic workers from certain minimum wage and maximum hour requirements, among other provisions).

²⁸⁴ See *Who Are Farmworkers? Farmworker Justice*, FARMWORKER JUST. <https://www.farmworkerjustice.org/about-farmworker-justice/who-we-serve> [<https://perma.cc/S3XD-QTDD>] (providing the demographic makeup of farmworkers).

²⁸⁵ See *supra* notes 102–117 (profiling the agricultural industry before and during COVID-19).

²⁸⁶ Paul F. Clark, *Essential US Workers Often Lack Sick Leave and Health Care—Benefits Taken for Granted in Most Other Countries*, THE CONVERSATION (May 6, 2020), <https://theconversation.com/essential-us-workers-often-lack-sick-leave-and-health-care-benefits-taken-for-granted-in-most-other-countries-136802> [<https://perma.cc/2MCJ-M74N>]; see also The World Staff, *179 Countries Have Paid Sick Leave. Not the US.*, THE WORLD (Mar. 13, 2020), <https://www.pri.org/stories/2020-03-13/179-countries-have-paid-sick-leave-not-us> [<https://perma.cc/5VHG-FR9F>] (suggesting that the United States’ lack of paid sick time contributed to the pandemic’s spread).

²⁸⁷ Jessica Mason, *It’s a Travestry: Nearly 27 Million Workers Lack Paid Sick Days*, NAT’L P’SHIP FOR WOMEN & FAMS. (Sept. 19, 2024), <https://nationalpartnership.org/travestry-27-million-workers-lack-paid-sick-days/> [<https://perma.cc/T6RS-2LW6>].

²⁸⁸ Abigail Johnson Hess, *A Sobering Stat During Coronavirus Fears—90% of Employees Admit They Have Gone to Work When Sick*, CNBC, <https://www.cnbc.com/2019/11/03/90percent-of-employees-say-they-come-to-work-sickheres-how-to-fix-that.html> [<https://perma.cc/Z8LS-6F3J>] (Feb. 28, 2020).

²⁸⁹ See Kinder et al., *supra* note 61 (advocating for hazard pay, or “additional pay for performing . . . work involving physical hardship,” in frontline jobs).

²⁹⁰ *Id.*

essential workers at the federal level, some companies provide hazard pay, and some city and county governments passed mandates requiring it.²⁹¹ President Biden urged private companies to give the essential workers on their payroll hazard pay.²⁹² Notably, the \$1.9 trillion relief plan Congress approved on January 14, 2021, did not require hazard pay.²⁹³ The lack of hazard pay has racialized impacts on low-wage essential industries, given the overrepresentation of workers of color as essential workers. With a congressional mandate, essential workers could be adequately compensated for the risk they assume in continuing to work to sustain the economy during a pandemic.

Federal policymakers should make additional employment-related protections available to low-wage essential workers to remedy public health threats, particularly during health crises. For instance, Congress should enact health insurance coverage mandates for employers.²⁹⁴ This legislation should include other protective measures to prevent retaliation from employers and provide workers with means to identify and combat other negligent or reckless workplace behavior.²⁹⁵

Further, future pandemic relief provisions should prioritize low-wage essential workers. The CARES Act allocated cash payments to certain individuals based on their adjusted gross income, and many essential workers likely received these cash payments.²⁹⁶ The CARES Act left many essential workers

²⁹¹ Molly Kinder & Laura Stater, *Local COVID-19 Hazard Pay Mandates Are Doing What Congress and Most Companies Aren't for Essential Workers*, BROOKINGS (Jan. 27, 2021), <https://www.brookings.edu/blog/the-avenue/2021/01/27/local-covid-19-hazard-pay-mandates-are-doing-what-congress-and-most-corporations-arent-for-essential-workers> [<https://perma.cc/J6R5-DSAZ>]; see also Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1950, 1953 (2022) (analyzing conflicts in policymaking between state, local, and the federal governments during COVID-19).

²⁹² Erich Wagner, *Biden COVID-19 Relief Plan Offers More Leave for Frontline Feds*, GOV'T EXEC. (Jan. 15, 2021), <https://www.govexec.com/pay-benefits/2021/01/biden-covid-relief-plan-offers-more-leave-frontline-feds/171449> [<https://perma.cc/LR9A-WKTM>]. See generally Tami Luhby & Katie Lobosco, *Here's What's in the Senate Stimulus Plan*, CNN, <https://www.cnn.com/2021/03/04/politics/stimulus-senate-democrats-proposal/index.html> [<https://perma.cc/K9SR-9WGE>] (Mar. 6, 2021).

²⁹³ See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified as amended in scattered sections of 42 U.S.C. and other titles) (including hazard pay for health workers as one option for states to fulfill Medicaid requirements, and allowing home visit programs to offer hazard pay, but lacking a hazard pay requirement).

²⁹⁴ See Yearby & Mohapatra, *supra* note 1, at 14–15 (highlighting how a lack of health insurance can harm undocumented immigrants laboring in the often-dangerous agricultural industry).

²⁹⁵ See Yearby, *supra* note 4, at 197 (advocating for federal legislation mandating workplace protections and including anti-retaliation provisions).

²⁹⁶ See Kelsey Snell, *What's Inside the Senate's \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package> [<https://perma.cc/BJ66-F4C6>]; *What's in the \$2 Trillion Coronavirus Relief Package?*, COMM. FOR A RESPONSIBLE FED. BUDGET, <https://www.crfb.org/blogs/whats-2-trillion-coronavirus-relief-package> [<https://perma.cc/R3Y2-ZEYB>] (Apr. 29, 2020).

without cash distributions, however.²⁹⁷ Also, although the Families First Coronavirus Response Act (FFCRA) provided limited increases to paid sick leave coverage, nutrition assistance, and unemployment insurance, these protections were insufficient to protect essential workers in low-wage industries.²⁹⁸ The law’s paid sick coverage for essential workers contained substantial loopholes. For instance, the FFCRA, the CARES Act, and the American Rescue Plan exclude many undocumented workers.²⁹⁹ Future relief acts should prioritize low-wage essential workers, including undocumented workers, to adequately safeguard this population from economic insecurity.

4. Provide Status to Undocumented Essential Workers

Congress should grant undocumented immigrant essential workers COVID-19-related relief.³⁰⁰ At least five million undocumented workers are employed in essential industries.³⁰¹ The House of Representatives approved an extension of aid to undocumented immigrants in the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act). This different relief package denied such aid and ultimately replaced the proposed Act.³⁰² Notably,

²⁹⁷ See Yearby & Mohapatra, *supra* note 1, at 7 (stating that the CARES Act excluded the majority of farmworkers, who are undocumented, and the many undocumented workers in home healthcare). See generally Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of U.S.C.).

²⁹⁸ See Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of U.S.C.) (including provisions for expanded family and sick leave, unemployment pay, and food stamps).

²⁹⁹ See *supra* notes 95–97 (discussing workplace laws’ exclusions of undocumented workers); Sarah Jane Glynn, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers from Coverage*, CTR. FOR AM. PROGRESS (Apr. 17, 2020), <https://www.americanprogress.org/article/coronavirus-paid-leave-exemptions-exclude-millions-workers-coverage/> [<https://perma.cc/6NNA-U8U9>] (noting that the final version of the FFCRA included significant exclusions from the paid leave provisions such that millions of workers in essential industries were not protected by the law).

³⁰⁰ See Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.–C.L. L. REV. 257, 257, 302 (2016) (problematizing the existing legal framework, in which relief from deportation for undocumented people is “condition[ed] . . . on the performance of economic, cultural, and civic metrics,” and advocating for an alternative system to more quickly reduce immigrants’ economic precarity and promote their social integration).

³⁰¹ NICOLE P. SVAJENKA, CTR. FOR AM. PROGRESS, PROTECTING UNDOCUMENTED WORKERS ON THE PANDEMIC’S FRONT LINES 2 (2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/12/MakingTheCaseForLegalization-R.pdf> [<https://perma.cc/5YZX-X9VC>].

³⁰² See Health and Economic Recovery Omnibus Emergency Solutions Act, H.R. 6800, 116th Cong. § 30701 (2020) (awarding aid to individuals irrespective of immigration status); Jorge Loweree, *The HEROES Act Would Provide Aid to Millions of Immigrants Left Out of Other Coronavirus Relief Packages*, IMMIGR. IMPACT (May 18, 2020), <https://immigrationimpact.com/2020/05/18/heroes-act-immigrants/#.YD77-cpNKjPg> [<https://perma.cc/6E62-M5DB>] (describing the proposed HEROES Act); Katie Lobosco & Tami Luhby, *Here’s What’s in the Second Stimulus Package*, CNN, <https://www.cnn.com/2020/12/20/politics/second-covid-stimulus-package-details/index.html> [<https://perma.cc/Y72T-TKNT>] (Dec. 28, 2020) (describing the finalized stimulus package and noting that “[u]ndocumented immigrants who don’t have Social Security numbers remain ineligible for the payments[.]

California provided a one-time payment in assistance (ranging between \$500 and \$1,000) to undocumented immigrants otherwise ineligible for federal COVID-19 relief assistance.³⁰³ Federal policymakers should include undocumented immigrant workers in COVID-19 relief, given the heightened health risks they have experienced since the pandemic began.

Another feasible policy is providing a pathway for naturalized citizenship to undocumented essential workers. The United States would not be the first to adopt such a policy. In September 2020, France announced that immigrant essential workers could apply for expedited access to citizenship.³⁰⁴ According to France's Ministry of the Interior, these workers had proved their commitment to the nation, and it was time for France to do something for them in return.³⁰⁵ Although the typical path to French citizenship (like that of the United States) requires five years of residency and proof of steady income and societal integration, essential workers need only two years under this expedited measure.³⁰⁶ Notably, the measure markedly departed from France's otherwise restrictive immigration policy.³⁰⁷ Portugal pursued a similar approach and granted temporary citizenship rights to all migrants and asylum seekers to allow more accessible provision of medical care as pandemic infections grew.³⁰⁸ The Italian government followed the European trend and granted residence permits to undocumented workers in agriculture, food service, and domestic work.³⁰⁹

[b]ut in a change from the first round, their spouses and children are now eligible as long as they have Social Security numbers").

³⁰³ *Coronavirus (COVID-19) Disaster Relief Assistance for Immigrants*, *supra* note 97; see also Roberto Suro & Hanna Findling, *State and Local Aid for Immigrants During the COVID-19 Pandemic: Innovating Inclusion*, CTR. FOR MIGRATION STUD. (July 8, 2020), <https://cmsny.org/publications/state-local-aid-immigrants-covid-19-pandemic-innovating-inclusion> [<https://perma.cc/VFS5-6YUQ>] (discussing various state and municipality programs that provided aid to undocumented immigrants during the pandemic).

³⁰⁴ *Covid: France Rewards Frontline Immigrant Workers with Citizenship*, BBC (Dec. 23, 2020), <https://www.bbc.com/news/world-europe-55423257> [<https://perma.cc/9XR3-T2G5>]; Constant Méheut, *They Helped France Fight the Virus. Now France Is Fast-Tracking Their Citizenship*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/world/europe/france-naturalization-covid-frontline.html> [<https://perma.cc/4ZS3-FNAH>].

³⁰⁵ See Press Release, Ministère De L'Intérieur, *Travailleurs Étrangers en Première Ligne Pendant le Confinement: 2890 Demandes [Foreign Workers on the Front Line During Lockdown: 2,890 Naturalization Applications]* (Dec. 22, 2020), <https://www.interieur.gouv.fr/Actualites/Communiqués/Travailleurs-etrangers-en-premiere-ligne-pendant-le-confinement-2-890-demandes-de-naturalisation> [<https://perma.cc/DNF9-KDDK>] (announcing that nearly 700 of 2,890 applications had already been or were slated to be granted citizenship).

³⁰⁶ *Covid: France Rewards Frontline Immigrant Workers with Citizenship*, *supra* note 304.

³⁰⁷ Méheut, *supra* note 304.

³⁰⁸ *Coronavirus: Portugal Grants Temporary Citizenship Rights to Migrants*, EURONEWS (Mar. 29, 2020), <https://www.euronews.com/2020/03/29/coronavirus-portugal-grants-temporary-citizenship-rights-to-migrants> [<https://perma.cc/LFF4-EE7W>].

³⁰⁹ *Italy: The 2020 Regularisation Scheme Leaves Many Behind*, PICUM (Dec. 14, 2021), <https://picum.org/blog/italy-2020-regularisation-scheme-leaves-many-behind/> [<https://perma.cc/633E-8KK6>].

Congress considered a similar measure for undocumented essential workers in 2021. California Senator Alex Padilla introduced the Citizenship for Essential Workers Act.³¹⁰ The bill would have sped up the path to naturalized citizenship, starting with adjusting the status of undocumented essential workers to legal permanent residency.³¹¹ The proposal ultimately failed. Congress should enact this policy to provide status relief to essential workers to decrease the economic marginality and propensity to workplace discrimination that these workers experience.³¹²

B. Strengthen Safety Enforcement Levers

In implementing the proposed employment equity principle two discussed in this Article—adopting robust and holistic standards that center on the safety of vulnerable workers in low-wage industries—OSHA has a decisive role. Critical gaps within OSHA policy and its regulatory framework largely exclude low-wage essential workers from its protection.³¹³ For instance, OSHA does not apply to independent contractors, impacting many direct care and agricultural workers.³¹⁴ Additionally, OSHA regulations do not adequately require employers to keep workplaces free of chemicals and other dangers.³¹⁵

Even when OSHA regulations apply to workplaces, they have proven insufficient to account for the heightened health risks essential workers have faced during the pandemic. Specifically, neither OSHA’s regulatory respiratory standards nor the general duty clause of the Occupational Safety and Health Act of 1970 mandates that employers assess how a contagious airborne disease like COVID-19 could spread between workers onsite.³¹⁶ Additionally, OSHA’s regu-

³¹⁰ Press Release, Alex Padilla, U.S. Senator for California, Padilla Announces Pathway to Citizenship for Essential Workers in First Bill as Senator (Feb. 26, 2021), <https://www.padilla.senate.gov/press-releases/padilla-announces-pathway-to-citizenship-for-essential-workers-in-first-bill-as-senator> [https://perma.cc/CK5Z-Z58D] (stating that the bill “would create an expedited pathway to citizenship for the over 5 million essential workers without permanent legal status who have kept Americans healthy, fed, and safe during the COVID-19 pandemic”). See generally S. 747, 117th Cong. (2021).

³¹¹ Press Release, Padilla, *supra* note 310.

³¹² See *supra* notes 89–98 and accompanying text (discussing discrimination against low-wage workers of color, including undocumented workers).

³¹³ See Jacob Leibenluft & Ben Olinsky, *Protecting Worker Safety and Economic Security During the COVID-19 Reopening*, CTR. FOR AM. PROGRESS (June 11, 2020), <https://www.americanprogress.org/issues/economy/news/2020/06/11/486146/protecting-worker-safety-economic-security-covid-19-reopening> [https://perma.cc/QT8Q-36NH] (discussing problems with OSHA, including its severe lack of workplace inspectors and its failure to enact sufficient rules to curb the spread of infectious diseases in workplaces).

³¹⁴ Yearby, *supra* note 4, at 194.

³¹⁵ See *id.* (discussing gaps in OSHA regulations).

³¹⁶ *Id.*; see Occupational Safety and Health Act, Pub. L. No. 91-596, § 5(a)(1), 84 Stat. 1590, 1593 (1970) (codified at 29 U.S.C. § 654(a)(1)) (declaring employers’ duty to provide employees with “place[s] of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm”); 29 C.F.R. § 1910.134 (2024) (specifying respiratory protection standards).

lations do not allow for the adoption of specific measures to limit the spread of airborne infectious disease on a work site.³¹⁷ OSHA regulations before and during the pandemic do not require employers to test worksites or to mandate testing of workers.³¹⁸ Thus, employers could ignore the CDC's recommendations, which made many essential workers susceptible to contracting the virus.

OSHA can update its regulatory framework to protect workers and safeguard workplaces adequately. OSHA should expand its regulations to apply to independent contractors in the workplace, such as direct care workers and agricultural workers. OSHA should also make public findings on employers to create greater oversight and promote compliance while simultaneously alerting workers of industries and companies that were COVID-19 hotspots.³¹⁹ Additionally, OSHA should adopt specific measures to test worksites for infectious diseases and mandate workers' testing, particularly during a pandemic. Finally, during a national health crisis, the CDC's recommendations should be mandatory for employers to adequately protect essential workers in their business operations.

C. Repeal State Shield Laws Limiting Employer Tort Liability

In implementing the proposed employment policy principle three—adopting a heightened standard of care for employers—courts should hold employers liable for negligent or otherwise tortious behavior.³²⁰ Over half of the state legislatures nationwide have enacted or considered laws and policies that shield businesses from COVID-19-related liability.³²¹ These measures generally only allow liability where the plaintiff can prove that the employer acted with gross negligence, willful misconduct, or another specified state threshold of

³¹⁷ Yearby, *supra* note 4, at 194.

³¹⁸ *Id.*

³¹⁹ *See id.* (discussing OSHA's authority to either regulate private workplaces directly or establish agreements with state governments to conduct oversight).

³²⁰ Ronen Perry, *Who Should Be Liable for the Covid-19 Outbreak?*, 58 HARV. J. ON LEGIS. 253, 300 (2021) (discussing how legislatures are adopting or considering statutes to shield employers from liability for the spread of COVID-19 unless it was caused "recklessly or intentionally").

³²¹ *See* Lowell Pearson & Mackenzie Conway, *50-State Update on COVID-19 Business Protections*, HUSCH BLACKWELL, <https://www.huschblackwell.com/newsandinsights/50-state-update-on-covid-19-business-liability-protections> [<https://perma.cc/T6FU-YQNU>] (Mar. 18, 2021) (listing states that were considering or implementing a COVID-19 liability shield law order as of early 2021, which include Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming); *see also, e.g.*, ALA. CODE § 6-5-792 (2024) (providing civil immunity to businesses for certain claims relating to COVID-19); IOWA CODE § 686D.4 (2024) (same); N.C. GEN. STAT. § 99E-71 (2024) (same); OKLA. STAT. tit. 76, § 111 (same); UTAH CODE ANN. § 78B-4-517 (LexisNexis 2024) (same); WYO. STAT. ANN. § 35-4-114 (2024) (same).

wrongdoing.³²² Senators Mitch McConnell and John Cornyn introduced a federal-level employer shield bill as part of the Safe to Work Act, but it failed to pass.³²³ Congress should enact legislation prohibiting states from precluding employers’ liability for negligence or create an exception from non-liability during global pandemics, where employers should likely be held to a higher standard.

The extent to which an employer is shielded from liability varies from state to state. Some states, such as Tennessee, prohibit workers from filing a COVID-19 lawsuit without obtaining a physician’s statement indicating that the particular business caused the injuries.³²⁴ In Nevada, a plaintiff previously could not proceed to trial unless they could demonstrate that the defendant disobeyed public health guidance.³²⁵ In other states, like Arkansas and Iowa, a business’s good-faith attempts to obey public health rules could sometimes offer a defense against liability.³²⁶ Some other states’ laws, such as those in Michigan and Mississippi, could sometimes change the standard from a “good faith effort” to a “substantial” one.³²⁷

Creating such protections for employers disincentivizes them from taking steps to prevent the spread of the disease and keep workers safe.³²⁸ Shielding negligent or reckless employers from liability heightens the level of vulnerability of low-wage workers of color. Congress should preempt state laws that limit COVID-19-related liability for employers. This is particularly important given the inability of existing labor and employment laws to protect low-wage workers of color during the pandemic, as profiled in Part II.

³²² Pearson & Conway, *supra* note 321; see Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG L. (June 8, 2021), <https://news.bloomberglaw.com/daily-labor-report/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not> [<https://perma.cc/3U22-9XWM>] (“These laws protect most or all businesses from lawsuits that seek to assign blame for a person’s Covid-19 exposure, injury, or death, unless the person suing can prove gross negligence, willful misconduct, or failure to follow public health orders . . .”).

³²³ S.B. 4317, 116th Cong. § 122 (2020).

³²⁴ TENN. CODE ANN. § 29-20-310 (2024).

³²⁵ NEV. REV. STAT. § 41.835 (repealed 2023); David Sparkman, *States Forge COVID-19 Liability Shields*, EHS TODAY (Dec. 3, 2020), <https://www.ehstoday.com/covid19/article/21149476/states-forge-covid19-liability-shields> [<https://perma.cc/4HAX-WPAP>].

³²⁶ IOWA CODE § 686D.5; ARK. CODE ANN. § 16-120-1106 (expired 2023); Sparkman, *supra* note 325.

³²⁷ MICH. COMP. LAWS § 408.1085 (repealed 2023); MISS. CODE ANN. § 11-71-5 (2024; Sparkman, *supra* note 325).

³²⁸ See Yearby, *supra* note 4, at 196 (“Without clarification of the workers’ compensation laws and coverage for all essential workers, liability shields will leave many essential workers without compensation to cover missed wages and to pay for health insurance if they contract COVID-19 in the workplace.”); see, e.g., Buljic Complaint, *supra* note 155, at 12 (“High-level Tyson executives began lobbying the White House for COVID-19 related liability protections as early as March [of 2020] and continued their lobbying efforts throughout April. Tyson officials dined at the White House and participated in several calls with President Trump and Vice President Pence during March and April [of 2020].”).

CONCLUSION

Essential workers preserved the U.S. economy during the COVID-19 pandemic. Low-wage workers of color were disproportionately overrepresented in essential industries, and the pandemic profoundly impacted them. The pandemic accentuated existing racial, gender, and economic inequalities in employment for low-wage workers. Without structural changes to bridge these inequalities, the most vulnerable workers will continue to suffer dire consequences despite serving an “essential” role.

This Article identifies six structural factors contributing to the disparate health outcomes and magnifying economic inequality that low-wage workers of color faced throughout the COVID-19 pandemic. These factors illustrate how the episodic allocation of pandemic health risks demands more extensive workplace solutions. People with low incomes and gendered and racialized essential workers who sustained communities and industries during COVID-19 need adequate labor and employment policies to protect their health and economic viability.

This Article also proposes employment equity principles and discusses a range of policy interventions available to provide just compensation and proper workplace protections to workers of color and low-wage workers in general. These policies can address the intersecting inequalities in labor laws and employment practices. Such policies can provide viable remedies to protect rather than dispose of low-wage essential workers of color, particularly in light of impending health and climate change-related pandemics that will necessitate their labor and sacrifice.