

December 4, 2020

The Honorable Mitch McConnell
Senate Majority Leader
The Capitol
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker of the House
The Capitol
Washington, D.C. 20510

Delivered via electronic mail.

Majority Leader Mitch McConnell and Speaker Nancy Pelosi:

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

Corporate immunity would thus give universities a free pass to expose students and workers to the deadly coronavirus — and since students are largely young people more likely to be asymptomatic carriers, facilitate the exponential spread of COVID-19 in our communities. For months, students have been speaking out, urging Congress to prioritize the health and safety of students, campus workers, and the communities surrounding our colleges and universities.² The undersigned organizations write today to urge you to listen to the insights and experiences of our nation's students.

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

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

² See, e.g., Emilie Erickson, *No lawsuit immunity for universities*, Minn. Reformer (July 20, 2020), <https://minnesotareformer.com/2020/07/20/no-lawsuit-immunity-for-universities/>; Trillium Chang and Will Setrakian, *Stanford, stop lobbying for immunity from COVID-19 lawsuits*, The Stanford Daily (Aug. 7, 2020), <https://www.stanforddaily.com/2020/08/07/stanford-stop-lobbying-for-immunity-from-covid-19-lawsuits/>; Aditya Vedapudi, *No corporate immunity*, The Mich. Daily (July 27, 2020), <https://www.michigandaily.com/section/opinion/op-ed-no-corporate-immunity>; Nicole M. Rubin and Sarah E. Tansey, *Harvard Must Oppose Corporate Immunity from COVID-19 Lawsuits*, The Harv. Crimson (July 28, 2020), <https://www.thecrimson.com/article/2020/7/28/rubin-tansey-corporate-immunity/>.

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

Across the country, students are eager to return to in-person learning — but plans to re-open must be safe. Blanket corporate immunity would remove a critical incentive for schools to take the safety precautions needed to safely re-open. For example, depending on its exact form, corporate immunity might shield schools if:

- Schools unreasonably fail to establish a COVID-19 testing plan or fail to provide students and campus workers with adequate, regular testing.
- Schools fail to take reasonable steps to ensure that students can socially distance in classrooms and student housing.
- Schools unreasonably fail to establish a contact tracing program or fail to exercise reasonable care when implementing it.
- Schools fail to take reasonable steps to prevent students who are sick from coming to class.
- Schools unreasonably ignore clear guidance from state or federal public health officials.

If schools have blanket immunity to unreasonably gamble with the lives of students and workers, some will. The vast majority of the more than 1,900 colleges tracked by the New York Times have reported few cases, proving that colleges can operate safely and responsibly.³ Although more than a third of U.S. colleges have brought at least some students back to school this fall, many, with widespread testing and rigorous safety measures, have kept COVID-19 cases in the single digits.⁴ But some schools have simply chosen not to do so and, by rushing to re-open, have put students' and campus workers' safety at risk. Many schools either have no clear testing plan or do not test students frequently enough to prevent rapid spread.⁵ Nearly 70 colleges have reported at least 1,000 cases over the course of the pandemic⁶ — proving that colleges that flout safety measures can quickly become local hotspots.

Schools that reopen irresponsibly have been forced to shut down again in short order. In New York, after SUNY Oneonta re-opened with too few security precautions in place, the school reached more than 500 cases within just two weeks and was forced to send students home.⁷ Notre Dame opened in-person classes for

³ *Tracking the Coronavirus at U.S. Colleges and Universities*, N.Y. Times (Nov. 19, 2020), <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html>.

⁴ *Id.*; Shawn Hubler, *Colleges Learn How to Suppress Coronavirus: Extensive Testing*, N.Y. Times (Oct. 26, 2020), <https://www.nytimes.com/2020/10/02/us/colleges-coronavirus-success.html>.

⁵ Elissa Nadworny & Sean McMinn, *Even in COVID-19 Hot Spots, Colleges Aren't Aggressively Testing Students*, NPR (Oct. 6, 2020),

www.npr.org/2020/10/06/919159473/even-in-covid-hot-spots-many-colleges-arent-aggressively-testing-students..

⁶ *Tracking the Coronavirus at U.S. Colleges and Universities*, *supra*.

⁷ Shawn Hubler & Anemona Hartocollis, *How Colleges Became the New COVID Hot Spots*, N.Y. Times (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/college-campus-outbreak-covid.html>.

students in August with too few security precautions in place; eight days later, cases soared, and the University was forced to temporarily return to online learning.

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

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

II. Corporate Immunity for Universities Will Put Campus Workers at Risk.

Corporate immunity would also jeopardize the health, safety, and lives of the campus workers who keep campuses running, from cleaning staff to cafeteria workers to graduate student workers who teach undergraduates. Blanket corporate immunity would allow universities and other employers to flout worker

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

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

¹⁰ *Id.*

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

safety laws without consequences — leaving workers protected on paper, but unprotected in practice. Corporate immunity would thus frustrate a future binding OSHA emergency standard and other worker safety protections. Colleges have seen at least 80 deaths from COVID-19 since the pandemic began, mostly among campus workers,¹² and they are not alone. According to the CDC, people who test positive for COVID-19 are nearly twice as likely to regularly go into an in-person work or school setting, rather than working from home, as people who test negative.¹³

On many campuses that our student members attend, the people who make it possible for them to learn are overwhelmingly Black and Brown workers. Black and Brown workers are already bearing the brunt of the COVID-19 crisis¹⁴ — because systemic racism allows corporations, including our universities, to put Black workers at risk with impunity. Today, Black workers are more likely to be exposed to the virus,¹⁵ more likely to be unable to work from home,¹⁶ and more likely to face healthcare discrimination and barriers to care when they get sick. Corporate immunity will give companies, including our universities, free reign to jeopardize the lives of workers of color. As people around the country continue to rise up to affirm that Black Lives Matter, we cannot give corporations, including our universities, blanket immunity to jeopardize the safety of Black workers.

III. Corporate Immunity for Universities Will Undermine Public Health.

If universities have blanket immunity to put students and workers at risk, schools may also place the greater community at risk. COVID-19 is highly contagious — and outbreaks at schools have been shown to quickly spread among the towns, cities, and states that schools are in. When colleges and universities decided to close their campuses earlier this year, some administrators, including President Maud Mandel of Williams College, cited the “shortage of medical providers and quarantine options” surrounding their campuses and the need to “reduce pressure on local caregivers.”¹⁷ This concern was well placed: when some schools reopened this fall, universities and their surrounding communities quickly became COVID-19 hotspots. By the second week in September, 19 of the top 25 most-impacted communities had significant populations of college students.¹⁸

¹² *Tracking the Coronavirus at U.S. Colleges and Universities*, N.Y. Times (Nov. 19, 2020), <https://www.nytimes.com/interactive/2020/us/covid-college-cases-tracker.html>.

¹³ Jennier Liu, *COVID-19 Patients Twice As Likely To Be Working From an Office Instead of Home, CDC Finds*, CNBC (Nov. 10, 2020),

<https://www.cnbc.com/2020/11/10/cdc-covid-19-patients-twice-as-likely-to-work-from-office-vs-home.html>.

¹⁴ Kenya Evelyn, *‘It’s a racial justice issue’: Black Americans are dying in greater numbers from Covid-19*, The Guardian (April 8, 2020),

<https://www.theguardian.com/world/2020/apr/08/its-a-racial-justice-issue-black-americans-are-dying-in-greater-numbers-from-covid-19>.

¹⁵ Vanessa Williams, *U.S. government is urged to release race, ethnicity data on covid-19 cases*, Wash. Post (April 6, 2020), https://www.washingtonpost.com/politics/government-urged-to-release-race-ethnicity-data-on-covid-19-cases/2020/04/06/7891aba0-7827-11ea-b6ff-597f170df8f8_story.html.

¹⁶ Elise Gould & Heidi Shierholz, *Not everybody can work from home: Black and Hispanic workers are much less likely to be able to telework*, Economic Policy Institute (March 19, 2020), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home>.

¹⁷ Letter from Maud Mandel, President of Williams College, regarding COVID-19 (Mar. 11, 2020).

¹⁸ Chris Quintana and Mike Stucka, *‘Astoundingly risky’: COVID-19 cases at colleges are fueling the nation’s hottest outbreaks*, USA Today (Sept. 11, 2020), <https://www.usatoday.com/story/news/education/2020/09/11/covid-cases-college-us-outbreak-rate-tracker/5759088002/>.

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

Corporate immunity could make it nearly impossible to hold universities accountable for violating public health guidelines, and public enforcement agencies are unable to fill the gap. Since the early months of the pandemic, workers have flooded the federal Occupational Safety and Health Administration (OSHA) with thousands of COVID-19 safety complaints¹⁹ — from shortages of masks and gloves to being prohibited from wearing masks or forced to work within six feet of people who are sick. Yet between the start of the pandemic and late November, OSHA issued only 232 citations, a track record described by a former OSHA official as “a stunning failure.”²⁰ Even if OSHA attempts robustly enforce workplace safety protections, they do not have the resources to do so. The Economic Policy Institute and Center for Popular Democracy estimate that in 2018, every federal OSHA investigator was responsible for enforcing the rights of at least 175,000 workers — an impossible task.²¹

* * *

Corporate immunity will protect schools that unreasonably fail to take precautions to keep them safe, while doing nothing for universities that take reasonable steps to combat the spread of the deadly coronavirus. **We urge you to pass a COVID-19 aid package that puts workers, students, and public health first by rejecting sweeping corporate immunity.**

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

Sincerely,

People’s Parity Project
Americans for Financial Reform
Young Invincibles
National Education Association
Student Borrower Protection Center
National Women’s Law Center
Ohio Student Association
U.S. Public Interest Research Group (PIRG)
Consumer Action
Clearinghouse on Women
Japanese American Citizens League
The Century Foundation

¹⁹ Peter Whoriskey, Jeff Stein & Nate Jones, *Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show*, Wash. Post (April 16, 2020),

<https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints>.

²⁰ Paul Van Osdol, *Investigation: OSHA fails to issue citations in thousands of complaints from workers related to COVID-19*, WTAE Pittsburgh (Nov. 24, 2020),

<https://www.wtae.com/article/osha-fails-to-investigate-thousands-covid-19-complaints/34759576>.

²¹ Center for Popular Democracy, *Unchecked Corporate Power* 7 (2019).

Feminist Majority Foundation
Know Your IX