UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 663; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 440; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 2; and UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant.

Case No. 0:19-cv-02660-JNE-TNL

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

"It is well established that an agency's action must be upheld, if at all, on the basis that was articulated by the agency itself, and that it cannot be sustained on the basis of post-hoc rationalizations of [litigation] counsel." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 715 n.7 (8th Cir. 1979). As this Court previously indicated, and as Plaintiffs' opening memorandum demonstrated, the explanation that the Food Safety and Inspection Service (FSIS) provided contemporaneously with its creation of the "New Swine Inspection System" (NSIS) does not meet the

reasoned decisionmaking requirements of the Administrative Procedure Act (APA). *See* April 1, 2020 Order (ECF 30) at 19–23; Pls.' Mem. (ECF 69) at 24–30. FSIS's refusal to consider the impact on worker safety of eliminating line speed maximums on the grounds that the agency lacked "authority [and] expertise to regulate issues related to establishment worker safety," Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,315, AR100208, was illogical and internally inconsistent. To the extent that the agency refused to consider the collateral effects of actions *within* its regulatory authority, its failure to do so was insufficiently reasoned, internally inconsistent, and an unexplained reversal from its previous position.

In support of its motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment, Defendant U.S. Department of Agriculture (USDA) makes a new argument in defense of its rule. USDA argues that, once FSIS decided that eliminating maximum line speeds for NSIS would not negatively impact food safety, it was *required* to eliminate the maximum speeds—regardless of the impact on worker safety. Not only is this argument incorrect and unsupported, it is a *post hoc* rationalization on which the agency cannot properly rely to defend a rule on judicial review.

Plaintiffs are labor organizations that represent the workers at all stages of slaughter and production at eighteen of the forty plants that USDA expects to

convert to NSIS—including those at five plants that have affirmatively informed USDA of their intent to convert to NSIS. Plaintiffs have standing to bring this action because, as occupational health and safety experts have explained, eliminating line speed maximums will put workers like Plaintiffs' members of substantially increased risk of musculoskeletal injury and lacerations. USDA's speculation that these plants *might* take steps that *might* minimize the increase of harm to Plaintiffs' members—speculation contradicted by evidence in the record—does not deprive them of standing.

ARGUMENT

I. Plaintiffs have standing.

To establish standing, Plaintiffs must show a "substantial risk" that one or more of their members will suffer injury as a result of FSIS's elimination of line speed maximums as part of NSIS. *See In re SuperValu, Inc.*, 870 F.3d 763, 769 (8th Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). They have done so here, with evidence that members of each Plaintiff work on the slaughter lines at plants that have adopted NSIS or are expected to do so, that the elimination of line speed maximums increases the risk to such members' health and safety, and that that increased risk is traceable to the Rule.

A. Increased evisceration line speeds directly impact Plaintiffs' members at plants that have converted or will convert to NSIS.

There is no dispute that one or more of Plaintiffs' members work on the slaughter lines in plants that have converted to or intend to convert to NSIS, including on evisceration lines.[1] For example, Martin Rosas, President of Plaintiff UFCW Local 2, established that members of Local 2 work on the evisceration line at the Seaboard Foods facility in Guymon, Oklahoma. Rosas Decl. (ECF 73) ¶¶ 4, 6.[2] That plant has already converted to NSIS, Sidrak Decl. (ECF 90) ¶ 5, and has

[1] While USDA disputes the impact of evisceration line speed increases on workers in *processing* positions, Def.'s Mem. (ECF 89) at 14, it does not dispute that evisceration line speed increases impact workers throughout slaughter departments. To the extent this is unclear, the accompanying declaration of Mark Lauritsen explains how the speed of the evisceration line impacts not only the workers in evisceration but other workers at other points in the slaughter process. Decl. of Mark Lauritsen ¶¶ 23–24.

[2] Plaintiff disputes USDA's suggestion that these declarations were insufficient because they failed to identify members by name. Although these declarations do not refer to each of the thousand members by name, they refer to specific, actual members, not a mere "statistical probability" as USDA suggests. Def.'s Mem. at 12 (citing *Summers v. Earth Island Institute*, 555 U.S. 488 (2009)). "Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Given the declaration of Jose Quinonez, and additional declarations submitted in response to information previously withheld by USDA, however, the Court need not address this issue.

already increased its line speeds above 1,086 hogs per hour, Quinonez Decl. (ECF 72) ¶ 8. *See also* Utecht Decl. (ECF 77) ¶ 6 (members of Plaintiff UFCW Local 663 work on the evisceration line at JBS plant in Worthington, MN); Kanne Decl. (ECF 75) ¶ 6 (members of Plaintiff UFCW Local 440 work on the evisceration line at Smithfield plant in Denison, IA). Jose Quinonez, a Local 2 member who works at that plant with sharp knives, has provided a declaration as to the nature of his work.

In addition to these previously submitted declarations, Plaintiffs now submit additional evidence, based on information USDA previously withheld from Plaintiffs and the Court. USDA earlier stated that five additional establishments "informed FSIS that they plan to convert to NSIS," but it declined to identify those establishments as a matter of "policy." Sidrak Decl. ¶ 7. USDA has subsequently released documents via the Freedom of Information Act (FOIA) identifying three of these five plants as the JBS plant in Ottumwa, Iowa; the Tyson plant in Perry, Iowa; and the Tyson plant in Madison, Nebraska. Decl. of Adam R. Pulver ¶¶ 2–3, Exs. 1–2. As indicated in Plaintiffs' moving papers, all of the plant workers at the JBS Ottumwa and Tyson Perry plant, including workers on the slaughter lines, are members of Plaintiff UFCW International. *See* Olson Decl. (ECF 71) ¶ 5; *see also* Decl. of Sean Fuller ¶¶ 2–3 (UFCW member and JBS Ottumwa worker); Decl. of Chiedzo Henry ¶¶ 2–3 (same). In addition, Tyson's March 30,

2020 letter to USDA states that the company "anticipate[s] implementing" NSIS at its "remaining market hog slaughter establishments." Pulver Decl., Ex. 1. As indicated in Plaintiffs' moving papers, workers, at Tyson establishments in Waterloo, Iowa and Logansport, Indiana, including workers on the evisceration lines, are members of Plaintiff UFCW International. *See* Olson Decl. ¶ 5; *see also* Decl. of Samuel Stokes ¶¶ 2–3 (Tyson Waterloo); Decl. of Rogelio Valenzuela ¶¶ 2–3 (Tyson Logansport). Declarations from workers at these additional plants further confirm that Plaintiffs have standing. *See* Declaration of DeMarcus Sykes ¶¶ 2–5; Declaration of Robert Haskew ¶¶ 2–5.[3]

[3] To the extent this evidence is presented in reply in support of Plaintiffs' motion, it is appropriately considered, as there is no unfair surprise or prejudice to USDA. Tyson informed USDA of its intent to convert its Perry plant to NSIS on March 30, 2020, and JBS Ottumwa informed USDA of its intent to convert to NSIS on April 21, 2020, although USDA did not release these materials publicly (or to Plaintiffs, despite their requests) until July 2020. Plaintiffs introduced evidence that they represented workers at these facilities in connection with their opening memorandum, Olson Decl. at ¶ 5, and USDA knew at the time it filed its opening brief that those plants intended to convert to NSIS. In addition, USDA has the opportunity to address this evidence in its reply brief. *See, e.g.*, *Asarco LLC v. NL Industries, Inc.*, 106 F. Supp. 3d 1015, 1033 (E.D. Mo. 2015) (considering new evidence submitted on reply where opposing party had opportunity to respond). To the extent any party has "with[e]ld information…from initial moving papers [] in order to gain an advantage," 1999 Advisory Committee's Note to L.R. 7.1(b)(2), that party was not Plaintiffs.

B. Plaintiffs have established that increased line speeds create a significantly increased risk of injury to their members.

As the Eighth Circuit has held, and Defendant concedes, an increased risk of harm constitutes an injury-in-fact for standing purposes. *See, e.g.*, *Mo. Coalition for Env't. v. FERC*, 544 F.3d 955, 957 (8th Cir. 2008); Def.'s Mem. at 12. Even at the summary judgment stage, therefore, Plaintiffs need not prove to an absolute certainty that they will be injured as a result of the elimination of line speed maximums; they need only show, by a preponderance of the evidence, that the agency's action increases their risk. *See Miller v. Thurston*, 967 F.3d 727, 734–35 (8th Cir. 2020). This determination "in no way depends on the merits of the claim." *Id.* at 734 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (marks omitted)). The evidence in the record meets this standard.

The record contains extensive evidence showing that increases in line speed increase risks of both musculoskeletal injury and lacerations, cited and discussed extensively in Plaintiffs' opening memorandum. *See* Pls.' Mem. at 10 (collecting comments). USDA does not address this evidence. Rather, it suggests that, because swine slaughter workers are already at such high risk of workplace injury and illness, they are essentially "injury-proof" in terms of the impact of the agency's rule. Def.'s Mem. at 12–13. USDA also asserts that plants "may" take steps that would reduce the impact of increased line speeds and that factors other than speed contribute to high injury rates. *See, e.g.*, Def.'s Mem. at 14–15. Nothing in the

challenged rule, however, requires plants to take steps to reduce the increased risk or addresses other risk factors. And while USDA points to some evidence of additional factors that contribute to worker injury rates, none controvert that increases in line speeds lead to increased worker injury.[4]

The relevant question is not whether Plaintiffs' members' workplaces would be risk-free absent the Rule; rather, it is whether the Rule increases the risk of injury. *See Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (to show standing, a party "need not show that a favorable decision will relieve his *every* injury" (quoting *Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982) (plurality opinion)); *see also NRDC v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 441 (S.D.N.Y. 2019) (for redressability purposes, "[t]he prevention of even *one* injury fairly traceable to an agency's challenged conduct … suffices"). Evidence in the record shows just that. For example, one expert stated that "there is no doubt that increasing line speed will increase laceration injuries to workers." Comments from Professor Melissa J. Perry, May 8, 2018, FSIS-2016-0017-83467, AR96947, AR96948. And an organization of occupational health medical professionals explained that allowing plants to increase their speeds would increase "the existing high risk of

[4] The anecdotal "data" relied on by proposed industry amici, which has not been validated or analyzed by anyone with training in occupational health and safety, or even in statistics, lacks any probative value. *See* Proposed Amicus Br. of North Am. Meat Inst. & Nat'l Pork Producers Council ("Industry Br.") (ECF 105) at 4–11.

work-related MSDs [musculoskeletal disorders]," and "potentially cause an epidemic of disabling work-related MSDs." Comments from Ass'n of Occupational and Envtl. Clinics (AOEC), May 8, 2018, FSIS-2016-0017-79890, AR90512, AR90513. *See also* Comments of Am. Pub. Health Ass'n, Occupational Health & Safety Section (AR62444, AR 62446) (opining that rule would "further increase the already unacceptably high number and severity of injuries" to plant workers). The increased injury rate above the status quo is a concrete injury that confers standing.

USDA argues that, even if Plaintiffs have shown that the elimination of line speed increases their members' risk of harm, Plaintiffs have not shown that it would "substantially increase" their risk of harm. Def.'s Mem. at 15 (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015)). First, the standard on which USDA relies has not been adopted by the Eighth Circuit. Rather, as the Court stated in its April 1, 2020 Order, under Eighth Circuit precedent, the question is whether "[t]he challenged actions … increase the risk of harm to a level that is no longer speculative or hypothetical." April 1, 2020 Order at 8 (citing *Shain v. Veneman*, 376 F.3d 815, 818–19 (8th Cir. 2004)); *see also In re SuperValu, Inc.*, 870 F.3d 763, 771 (8th Cir. 2017) (finding plaintiffs lacked standing based on "a mere possibility" of increased risk); *Bond v. Liberty Ins. Corp.*, No. 2:15-CV-04236-NKL, 2017 WL 1628956, at *5 (W.D. Mo. May 1, 2017) (finding plaintiffs had standing

based on risk of future injury where it was supported by evidence, and did "not rely on a highly attenuated chain of possibilities or require speculation"). As the Court recognized, "Plaintiffs' theory of harm hardly requires speculation," April 1, 2020 Order at 10. The additional evidence cited in Plaintiffs' summary judgment papers only strengthens that conclusion. Second, even under the D.C. Circuit's standard, expert comments such as Professor Perry's establish a "substantial" increase in risk.

C. Increased risk as a result of increased line speed is directly traceable to USDA's action.

USDA's final argument as to standing is that any risk of injury that results from increased line speeds is not traceable to FSIS's rule. *See* Def.'s Mem. at 16–17. But privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). Thus, "standing exists where the challenged government action authorized conduct that would otherwise have been illegal. In such cases, if the authorization is removed, the conduct will become illegal and therefore very likely cease." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) (citing *Nat'l Wresting Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004)). Here, as USDA concedes, but for the challenged rule, it would be unlawful for swine slaughter establishments to run their evisceration lines at rates exceeding 1,106 head per hour. *See* Def.'s Mem.

at 9 (noting the Seaboard Guymon establishment "was previously subject to evisceration-line speed limits … and is no longer subject to those limits because it has converted to NSIS"). Any injury resulting from increased line speeds is thus traceable to the rule.

USDA argues that, nonetheless, establishments "retain broad discretion over [their] employees' work pace." Def.'s Mem. at 16. The evidence in the record, however, shows that "increasing line speed," not "increasing work pace," increases the risk of injury to workers. *See, e.g.*, Perry Comments, AR96948.[5] USDA's veterinarian's opinion about the latter is thus irrelevant. And to the extent USDA's argument is that NSIS establishments are not required to increase the line speeds, the Supreme Court has never suggested "that the challenged law must *compel* the third party to act in the allegedly injurious way." *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc) (holding that an animal enthusiast had standing to sue USDA over its failure to establish requirements for humane living conditions in animal exhibitions, where USDA permitted but did

[5] Notably, industry amici acknowledge that increased work pace is a consequence of the rule, arguing that faster line speeds would allow plant workers to have more weekends days off. *See* Industry Br. at 13. Inherent in industry's argument, and as reflected in the agency's economic analysis, is that increased line speeds allow the same number of workers to move the same (or greater) number of hogs through the lines in a shorter period of time. *See id.* at 12 (indicating lower line speeds would require "additional shifts"); Final Rule, 84 Fed. Reg. at 52,324–26, AR100217–19 (attributing labor cost increases solely to additional workers performing sorting and inspection tasks).

not mandate inhumane conditions); *see also Kuehl v. Sellner*, 161 F. Supp. 3d 678, 683 (N.D. Iowa 2016) (citing *Animal Legal Def. Fund* approvingly), *aff'd*, 887 F.3d 845 (8th Cir. 2018). Here, even if establishments are not required to increase line speeds (or "increase work pace") under the challenged rule, they are permitted to by the Rule. And as demonstrated by the declaration of a steward at one plant that has converted to NSIS, they have taken advantage of that permission. *See* Quinonez Decl. ¶ 14.

II. FSIS's refusal to consider the effects of eliminating line speeds on worker safety was arbitrary and capricious.

USDA's failure to consider the impact of eliminating line speeds on establishment worker health and safety was arbitrary and capricious. The brief reason given in the Final Rule for disregarding worker safety concerns was irrational, an unexplained departure from the agency's prior positions, and unsupported by the record or the law. USDA's response to these arguments are themselves contradictory and illogical, and cannot save the Rule.

A. USDA's continued focus on its "authority to regulate worker safety" is irrelevant.

In the Final Rule, USDA's sole response to worker safety concerns was that it lacked "authority [and] expertise to regulate issues related to establishment worker safety." Final Rule at 52,315, AR100208. In its memorandum, USDA continues to conflate the authority to "regulate" worker safety and the authority

to consider the impact of its actions on worker safety. But as the Court held in denying USDA's motion to dismiss, "the question of whether FSIS has the authority or expertise to directly regulate worker safety does not determine whether FSIS is forbidden from considering the collateral effects its rulemaking might have on workers." April 1, 2020 Order at 30. Thus, USDA's extensive arguments as to why it lacks authority to "regulat[e] work conditions" of establishment employees or to "promulgate requirements unrelated to food safety," and its consistency as to that position, Def.'s Mem. at 18-20, are irrelevant.

What *is* relevant is that, as USDA itself acknowledges, FSIS's "longstanding position [is] that it has authority to *consider* worker safety, even though Congress has not granted it authority to *regulate* worker safety." Def.'s Mem. at 24. But nothing in the one-sentence discussion of worker safety in the Final Rule indicates that FSIS followed that "longstanding position" here and considered the impacts of its actions on worker safety. Simply acknowledging comments raising worker safety concerns does not meet USDA's obligations to consider the "collateral effects its rulemaking might have on workers." Apr. 1, 2020 Order at 22.

B. USDA's argument that it was prohibited from considering worker safety is not properly before the Court and incorrect.

USDA's second argument appears to be that, once it decided that eliminating line speeds would not harm food safety, it could not refuse to do so—no matter how devastating the impacts on worker safety—and thus it was

appropriate not to address the collateral effects of its actions on worker safety. Def.'s Mem. at 23. This argument is not only incorrect, but not properly before the Court.

First, as USDA effectively concedes, this argument appears nowhere in the Final Rule. *See* Def.'s Mem. at 23 (noting that "FSIS's explanation of this aspect of its decision could have been more fulsome"). But "an agency's action must be upheld, if at all, on the basis that was articulated by the agency itself"; "it cannot be sustained on the basis of post-hoc rationalizations of [litigation] counsel." *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 715 n.7 (8th Cir. 1979); *see also SEC v. Chenery Corp.*, 318 U.S. 80 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained."); *Mayo v. Schiltgen*, 921 F.2d 177, 179 (8th Cir. 1990) ("It is a well-settled principle of administrative law that a reviewing court may not uphold an agency decision based on reasons not articulated by the agency itself in its decision."). In the Final Rule, FSIS did not suggest that "limitations on its regulatory authority" prohibited it from *considering* worker safety harms, or any other non-food safety issues, before creating NSIS. To the contrary, FSIS explicitly addressed several non-food safety considerations throughout the Rule. *See, e.g.*, Final Rule at 52,300, AR100193 (justifying rule based on desire to encourage "industry innovation").

This case is not a situation where the agency spoke with "less than ideal clarity," and thus the Court must attempt to "discern" "the agency's path." Def.'s Mem. at 22 (citing *Dolgencorp, LLC v. NLRB*, 950 F.3d 540, 551 (8th Cir. 2020)). The agency's rationale was clear—it was just insufficient. And tellingly, this new argument was not advanced in connection with Defendant's motion to dismiss. *See* Def.'s Mem. in Supp. of Mot. to Dismiss (ECF 16) at 28–30; Reply Mem. in Supp. of Def.'s Mot. to Dismiss (ECF 18) at 13–15. The Court should evaluate FSIS's reasoning solely based on the reason it has previously given: FSIS did not consider the impacts of its actions on worker safety because it "lacked expertise and authority" to "regulate" worker safety. That reasoning, as the Court has already acknowledged, is arbitrary and capricious.

Moreover, USDA's new argument is inadequate to save its Rule. Even under the position USDA espouses here, FSIS had the authority to consider factors bearing on food safety. And FSIS *itself* recognized the connection between worker safety and food safety in the notice of proposed rulemaking for this very Rule. *See* Proposed Rule, 83 Fed. Reg. 4780, 4796, AR100165 (noting "evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety"); 4799, AR100167 (requesting comments on "the effects of faster line speeds on worker safety"). The Final Rule does not acknowledge or explain FSIS's reversal on this point, and it does not respond to

comments that explained how worker safety impacts food safety. *See, e.g.*, Comments from Consumer Federation of America (CFA), May 2, 2018, FSIS-2016-0017-81413, AR92172, AR92188 (explaining that "[a] company's ability to effectively protect consumers from food safety risks depends in part on having a stable, skilled workforce," but "[t]he high illness and injury rates [in meatpacking] contribute to high turnover in the industry"). If FSIS determined that worker safety does not contribute to food safety, it was required to say so and explain that conclusion. *Compare with Cigar Ass'n of Am. v. U.S. FDA*, No. 1:16-CV-01460 (APM), 2020 WL 4816459, at *15 (D.D.C. Aug. 19, 2020) (agency's refusal to "meaningfully consider" comments "based on its incorrect and conclusory assertion that its hands were tied was arbitrary"). FSIS did not.

Furthermore, as explained in Plaintiffs' opening brief, under established principles of administrative law, USDA was required to consider "all relevant factors" before issuing the Final Rule. Worker safety is one relevant factor under the applicable statutes. *See* Pls.' Mem. at 26. For this reason, FSIS has previously considered the effects of its actions on worker safety. *See* Pls.' Mem. at 27 (collecting rules). USDA makes no attempt to explain why it was permissible in those situations for the agency to, for example, approve new technology on ground that "it may reduce the incidence of cumulative trauma disorder among meatcutters by eliminating some tasks which contribute to the disorder," Meat

Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery Systems, 69 Fed. Reg. 62,552, 62,561 (Dec. 6, 1994), but not permissible to consider the effect on worker safety before creating a new optional program here.

Under USDA's theory, USDA would be *required* to eliminate a regulatory requirement even if undisputed evidence showed it would cause the deaths of 100,000 plant workers, or 1,000,000 residents of a neighboring town, absent a finding that the requirement independently impacted food safety. Not only that, USDA would not even have to address the evidence and explain the agency's decision to act despite certain mass casualties. Such a theory is not consistent with the APA's requirements of reasoned decisionmaking.

C. USDA's attempts to justify the agency's inconsistencies fail.

USDA's final argument, that it did not act inconsistently when it affirmatively adopted a worker safety attestation requirement at the same time it purported to lack authority to consider the collateral effects of its actions on worker safety, Def.'s Mem. at 24–25, lacks merit. USDA attempts to distinguish its refusal to consider the impacts of its actions on worker safety from its decision to adopt a worker safety requirement on the ground that, in adopting the attestation requirement, it was "merely collaborating with another federal entity that has authority to regulate worker safety." *Id.* at 24. But that is not what FSIS did in the Rule. FSIS enacted, under its *own* rulemaking authority, a binding requirement for

swine slaughter establishments. *See* Final Rule, at 52,315; 9 C.F.R. § 310.27. If, as USDA suggests, its regulatory authority allows it to consider food safety *and only* food safety in its rulemakings, it could not *add* a worker safety requirement while refusing to even consider the collateral effects of eliminating another rule on worker safety.

In a footnote, USDA argues that its conclusion that its determination that it could adopt the attestation requirement, but not consider worker safety, is owed *Chevron* deference as "FSIS's interpretation of the scope of its own authority." Def.'s Mem. at 24 n. 5. But "not every kind of agency interpretation, even of a statute the agency administers, warrants *Chevron* deference." *Miller v. Clinton*, 687 F.3d 1332, 1340 (D.C. Cir. 2012) (citing *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001)). Interpretations contained in agency briefs, like the one offered here, do not receive *Chevron* deference. *See id.* Moreover, USDA does not explain what statutory provision it interprets to prohibit it from considering whether its actions will increase worker injury and death, but to allow it to independently impose a worker safety requirement. But any such interpretation would be illogical and an unacknowledged and unexplained departure from prior positions, and thus fail as unreasonable at *Chevron*'s second step. *See, e.g.*, *Good Fortune Shipping SA v. Comm'r of Internal Revenue Serv.*, 897 F.3d 256, 263 (D.C. Cir. 2018).

FSIS also argues that, even if enacting a worker safety requirement while disclaiming the ability to consider worker safety did reflect internal inconsistency, the inconsistency simply shows that the agency was wrong to adopt the attestation requirement, and because Plaintiffs have not challenged that requirement, there is no issue. Def.'s Mem. at 24 n.5. This argument has no legal support. When confronted with internal inconsistencies in a rule, an agency cannot simply disregard the inconvenient position. "Such picking and choosing would condone arbitrariness and usurp the agency's responsibilities." *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).

III. USDA has not rebutted the presumptive remedy of vacatur.

As this Court has previously noted, vacatur is the presumptive remedy for unlawful regulations. *See Hoban v. U.S. Food & Drug Admin.*, No. CV 18-269 (JNE/LIB), 2018 WL 3122341, at *3 (D. Minn. June 26, 2018) (citing *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). In addressing the issue, both parties reference the two-factor framework adopted by the D.C. Circuit in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993).

Under *Allied-Signal*, the first factor is the likelihood that the agency can remedy the flaws in a rule on remand. In addressing this factor, USDA argues that the Court should remand the Final Rule to the agency without vacatur so that it

can explain why the rule is justified "despite the asserted potential for increased risks" to worker health and safety. Def.'s Mem. at 27. As the Supreme Court recently held, however, an agency cannot use remand without vacatur to offer new reasons for an action when its prior reasoning was arbitrary and capricious. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907–08 (2020). That principle is fatal to USDA's request for remand without vacatur.[6] USDA ignores the *Regents* decision, instead relying on a number of decisions pre-dating that decision for the proposition "that courts regularly remand without vacatur" in situations like this one. Def.'s Mem. at 28. But this Court is bound by the Supreme Court's June 2020 decision, not the earlier D.C. Circuit cases USDA cites.[7]

As noted in the Court's order on USDA's motion for a voluntary remand and stay, the *Regents* decision stands for the proposition that, on remand, "an agency may not simply offer new reasons for a prior action; to provide new reasons, it must take an entirely new action and follow any procedural

[6] USDA points out that "Plaintiffs do not cite a single case importing" the *Regents* holding "into the *Allied-Signal* test." Def.'s Mem. at 28. This is correct, as Plaintiffs' opening brief was filed within three weeks of the Supreme Court's decision.

[7] USDA relies on the same line of D.C. Circuit authority on which the district court relied in the *Regents* case to consider new explanations provided by the Secretary of Homeland Security on remand. *See Nat'l Ass'n for Advancement of Colored People v. Trump*, 315 F. Supp. 3d 457, 464–67 (D.D.C. 2018).

requirements." July 22, 2020 Order (ECF 85) at 2 (citing *Regents*, 140 S. Ct. at 1907–08). The Supreme Court's decision reflects the well-established distinction under *Chenery* between a "new rationale for an agency action" and a further explanation "of the previously articulated rationale for the challenged action." *See* Pls.' Mem. in Opp. to Stay & Remand (ECF 49) at 16–17 (quoting *Norair Eng'g Corp. v. D.C. Water & Sewer Auth.*, No. 16-CV-1585 (DLF), 2020 WL 2541935, at *9 (D.D.C. Feb. 26, 2020)).

Given the decision in *Regents*, FSIS could not remedy the flaws in the Final Rule by "merely" offering the new explanation that the rule is justified "despite the asserted potential for increased risks" to the life and health of establishment workers, as it claims. Def.'s Mem. at 27. Such an explanation appears nowhere in the Final Rule at issue. The only thing that FSIS could do on remand is "elaborate on the reasons for the initial" rule. 140 S. Ct. at 1908. But this case is not one where the agency's existing explanation simply lacked sufficient detail, or somehow was insufficient for the Court to thoroughly assess. The issue is not, as USDA suggests, whether FSIS simply failed to meaningfully respond to comments but that FSIS took the position (and still takes the position) that it was prohibited from considering the collateral effects of its actions on worker safety as a matter of law. No mere "elaboration" could cure that flaw here. To the extent FSIS seeks to consider worker safety concerns and explain why the elimination of line speed

maximums is appropriate, despite those concerns, it must undertake a new notice-and-comment rulemaking.

"[C]ourts have declined to remand matters to an agency for 'a second bite of the apple just because [the agency] made a poor decision,' particularly where remand would make administrative law 'a never ending loop from which aggrieved parties would never receive justice.'" *Hawkes Co. v. U.S. Army Corps of Eng'rs*, No. CV 13-107 ADM/TNL, 2017 WL 359170, at *11 (D. Minn. Jan. 24, 2017) (quoting *McElmurray v. U.S. Dep't of Agric.*, 535 F. Supp. 2d 1318, 1336 (S.D. Ga. 2008)). The Court should decline to do so here, as well.

The first *Allied-Signal* factor should be dispositive, as "the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). In any event, USDA has not met its burden in showing the sort of consequences that are relevant under *Allied-Signal*, which asks not if vacatur would cause some disruptions, but rather, as a matter of equity, the seriousness of those disruptions outweighs the deficiencies (and harms caused by) the rule. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289–91 (11th Cir. 2015) (discussing equitable nature of inquiry). The agency speculates that vacatur of the Rule (in its entirety) *may* lead to plants laying off workers and FSIS needing to re-hire a similar number of workers. Def.'s Mem. at 30. But this argument is in tension

with USDA's standing arguments, which emphasize that few plants have already converted to NSIS. Regardless, these are not "the type of serious, disruptive consequences with which the second *Allied-Signal* factor is concerned." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 100 (D.D.C. 2019). In *National Parks*, for example, the court concluded that remand without vacatur was appropriate given a "risk that hundreds of thousands of people will be left with an unreliable power source." *Id.* at 102–03. Here, however, USDA has simply suggested that the agency and industry would experience some consequences if an unlawful rule was vacated, and the pre-NSIS status quo restored.[8] That alone is not enough to rebut the presumption of vacatur.

Given the equitable basis of the *Allied-Signal* exception, any disruption is easily outweighed by the increased risk of injuries to workers that would result from keeping the rule in place. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (noting remand without vacatur is appropriate when leaving the rule in place "will do no affirmative harm"). USDA "address[es] the 'potentially disruptive effects of vacatur as if they

[8] The proposed industry amici argue that vacatur of NSIS would subject plants to "a new regulatory regime overnight after years of settled expectations." Industry Br. at 14. In fact, the rule at issue was issued in October 2019. To the extent amici refer to plants that had participated in the HIMP program, this action does not challenge the HIMP program or seek any relief as to that program in this case.

occur in a vacuum,' thus giving short shrift to the 'potentially disruptive effects that could flow from remand without vacatur.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 105 (D.D.C. 2017) (quoting *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 218 F. Supp. 3d 53, 60 (D.D.C. 2016)). But here, as demonstrated by the expert comments in the record, remand without vacatur would put workers at NSIS plants at increased risk of injury—both those at plants that have already converted to NSIS and those at additional plants that will convert if the Rule is left in place during a remand. Their health and safety merits as much consideration as the speculated economic impact on industry.

Finally, to the extent USDA argues vacatur should be limited to the line-speed provision, USDA has failed to meet its burden in establishing that provision is severable. The 2014 poultry rule that USDA references, adopted by another administration on a different factual record, does not establish otherwise. In addition, in opposing vacatur, proposed industry amici attribute all of the benefits of NSIS to the elimination of lower line-speed limits. *See* Industry Br. at 13. Their position supports the "substantial doubt that the agency would have adopted" NSIS without the line-speed provision. *See ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018).

CONCLUSION

For the foregoing reasons and those stated in their opening memorandum, Plaintiffs respectfully request the Court enter summary judgment on their behalf and set aside the Final Rule in its entirety.

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Respectfully submitted,

s/ *Adam R. Pulver*

Adam R. Pulver*
DC Bar No. 1020475
Nandan M. Joshi*
DC Bar No. 456750
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Plaintiffs

Sarai K. King*
NY Bar No. 5139852
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
1775 K Street, NW
Washington, DC 20006-1598
(202) 223-3111

Timothy J. Louris
MN Bar No. 391244
MILLER O'BRIEN JENSEN, P.A.
120 South Sixth Street, Suite 2400
Minneapolis, MN 55402
(612) 333-5831

* *Admitted Pro Hac Vice*