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 SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Administrative Procedure Act (APA) directs courts to set aside agency action that is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). As this Court recognized in denying the motion of defendant United States Department of Agriculture (USDA) to dismiss Plaintiffs' claim challenging the decision of the Food Safety and Inspection Service (FSIS) to eliminate line speed maximums as part of the New Swine Inspection System (NSIS), that decision was not "adequately justified" because the agency failed to

consider NSIS's effects on worker safety. ECF 30 (April 1 Order) at 22–23. In addition, FSIS's refusal to consider the harm that eliminating line speed maximums at swine slaughter plants would cause workers like Plaintiffs' members was illogical, reflected an unexplained reversal from prior agency positions, and was internally inconsistent.

Because "FSIS's stated reason for declining to consider th[e] collateral effects [of NSIS on worker safety] was not a rational explanation," the Court should enter summary judgment for Plaintiffs, and vacate and set aside the challenged FSIS Rule in its entirety. Should FSIS desire to offer new explanations for NSIS, it must "comply with the procedural requirements for new agency action" and start rulemaking afresh. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, U.S. No. 18-587, 2020 WL 3271746 (June 18, 2020) (*DHS*).

FACTS AND BACKGROUND

I. Statutory Background

In 1906, in response to a crisis of public confidence in the sanitation of the meatpacking industry, President Theodore Roosevelt appointed a special committee to investigate industry conditions. That committee's report, referred to as the Neill-Reynolds Report, described unhealthy and dangerous working conditions in meatpacking plants and found that these conditions made "the health and comfort of the employees … impossible, and the consumer suffers in

consequence." H.R. Doc. No. 59-873, at 8 (1906); *see also id.* at 9–10 (finding working conditions were "a constant menace not only to [the workers'] own health, but to the health of those who use the food products prepared by them").

President Roosevelt transmitted the Neill-Reynolds Report to Congress in June 1906, along with a request for the "immediate enactment into law of provisions which will enable the Department of Agriculture adequately to inspect the meat and meat-food products entering into interstate commerce and to supervise the methods of preparing the same, and to prescribe the sanitary conditions under which the work shall be performed." *Id.* at 1. In response, Congress enacted the Federal Meat Inspection Act of 1906, Pub. L. 59-382 (1906), *codified at* 21 U.S.C. §§ 601 *et seq*. (FMIA).

The FMIA contains numerous provisions relating to the inspection, processing, and packaging of meat products. The statute requires federal inspectors to examine animals before entrance into any slaughtering or packaging establishment, prior to slaughter, and post-mortem. 21 U.S.C. §§ 603–605. The FMIA also gives the Secretary of Agriculture the power to regulate meat processing establishments, including the conditions at these plants. *Id.* § 608.

Fifty years after the FMIA was enacted, Congress enacted the Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, *codified at* 7 U.S.C. §§ 1901 *et seq.* (HMSA of 1958). The HMSA of 1958 declared a policy of ensuring that animals

were slaughtered only by humane methods; in so doing, Congress stated "that the use of humane methods in the slaughter of livestock … results in safer and better working conditions for persons engaged in the slaughtering industry." 7 U.S.C. § 1901. The law directed USDA to designate methods of slaughter and handling that complied with this policy. *Id*. § 1904. Twenty years later, Congress enacted a second Humane Methods of Slaughter Act, which expanded the HMSA of 1958, Pub. L. No. 95-445 (Oct. 10, 1978) (HMSA of 1978). The HMSA of 1978 expressly amended the FMIA to prohibit the slaughter of any animals not in accordance with the HMSA of 1958. *Id.* at § 3, *codified at* 21 U.S.C. § 610.

II. Regulatory Background

Pursuant to the FMIA, as amended, FSIS has promulgated regulations concerning the processing and inspection of swine. Swine slaughtering and processing plants in the United States are organized around "lines," which ferry animals across facilities through the various stages of the slaughtering and disassembling process. U.S. Gov't Accountability Off. (GAO), GAO-18-12, *Workplace Safety and Health: Better Outreach, Collaboration, and Information Needed to Help Protect Workers at Meat and Poultry Plants* (2017), AR101383, AR101425[1] (2017

[1] Defendant USDA has not lodged the administrative record with the Court. *See* ECF 63. Plaintiffs will confer with USDA to ensure that the Court has access to materials from the administrative record relied on by either party at the close of briefing on this motion. Additionally, all comments submitted in response to the

GAO Report). On each line, hogs move on chains past workers wielding knives, hooks and saws, often in close proximity to one another. *See* Comments from UFCW, May 2, 2018, FSIS-2016-0017-80091, AR90717, AR90721. For the past thirty-four years, regulations have set a maximum speed for swine slaughter lines, tied to the number of on-line, federally employed inspectors and the type of swine being slaughtered, topping out at a rate of 1,106 head per hour, with seven on-line FSIS inspectors. *See* Swine Post-Mortem Inspection Procedures & Staffing Standards, 50 Fed. Reg. 19,900, 19,903 (May 13, 1985), *codified at* 9 C.F.R. § 310.1(b)(3).

In 1998, FSIS created a "pilot" program, the HACCP-Based Inspection Models Project ("HIMP"), which included a new inspection model for the slaughter of a variety of animals, allowing federally employed inspectors to supervise plant workers who did the actual inspection of animals. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 9–10 (D.C. Cir. 2000) (*AFGE I*). The D.C. Circuit held that this program was contrary to the FMIA, as it did not require federal inspectors to inspect each carcass. *Id.* at 11–12. FSIS then modified the program, providing for initial inspections conducted by plant workers, followed by inspection by federal inspectors, and allowing higher line speeds. *See Am. Fed'n*

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proposed rule are available at https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=FSIS-2016-0017.

of Gov't Emps., AFL-CIO v. Veneman, 284 F.3d 125, 128–30 (D.C. Cir. 2002) (*AFGE II*). The D.C. Circuit allowed FSIS to proceed with this pilot, rejecting a claim that it violated the FMIA. In so doing, however, it stated expressly that its holding was limited to the modified pilot program:

> We have reviewed only the USDA's implementation of its current, modified inspection model. This is a test program, a temporary measure intended as an experiment. If the USDA undertakes a rulemaking to adopt as a permanent change something along the lines of the modified program, experience with the program's operation and its effectiveness will doubtless play a significant role. For this and other reasons, our opinion today may not necessarily foreshadow the outcome of judicial review of such future regulations.

Id. at 130–31.

In August 2013, the GAO issued a report on USDA's hog, chicken, and turkey inspection pilots. GAO, GAO-13-775, *Food Safety: More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections* (2013), AR101277 (2013 GAO Report). The report concluded that "FSIS has not thoroughly evaluated the performance of each of the three pilot projects over time even though the agency stated that it would do so when it announced the pilot projects" and that more data was needed to determine whether HIMP was "meeting its purpose of deploying inspection resources more effectively in accordance with food safety and other consumer protection requirements." *Id.* at AR101289, AR101298. GAO also noted concerns "that faster line speed creates food safety and worker safety concerns." *Id.* at AR101300.

III. The 2018–2019 Rulemaking

A. Proposed Rule

On February 1, 2018, FSIS published in the Federal Register a notice of proposed rulemaking announcing that it intended to amend meat inspection regulations for hog slaughter establishments and create a "New Swine Inspection System." Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, AR100149 (Feb. 1, 2018) (NPRM). The main elements of the proposed NSIS were a revocation of maximum line speeds; a reduction of the number of FSIS on-line inspectors; and a requirement that plants use their own employees to inspect animals on the line before FSIS ante-mortem inspection to screen out defective and contaminated animals. *See generally id.*

When issuing the NPRM, USDA "recognize[d] that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety." *Id.* at 4796, AR100165. USDA thus requested comment on "the effects of faster line speeds on worker safety." *Id*. The agency also claimed to have conducted a review of injury rates in the plants that participated in HIMP, which served as a model for the proposed rule. *Id.* It claimed that its "preliminary analysis" of 5 HIMP and 24 non-HIMP plants "show[ed] that HIMP establishments had lower mean injury rates than non-HIMP establishments." *Id.* When it issued the NPRM, USDA did not make this analysis,

or the underlying data, available to the public, and it did not explain its methodology—or even which 24 non-HIMP plants it selected—only pointing to the generic website for the Bureau of Labor Statistics' Survey of Occupational Injuries and Illnesses. *Id.*

In comments and other communications with USDA, several members of the public requested that USDA produce its analysis, its methodology, and the data on which it relied, and that it extend the comment period so that interested members of the public could analyze the data and comment on it meaningfully. *See, e.g.*, AR104601 (FOIA Request from Dr. Celeste Monforton); Comments from the American Public Health Ass'n (APHA), Occupational Health & Safety Section, May 1, 2018, FSIS-2016-0017-61127, AR62444, AR62449; Comments from the National Employmentt Law Project (NELP), Apr. 30, 2018, FSIS-2016-0017-76250, AR86564, AR86568, AR86609; *see also* Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,305, AR100198 (discussing requests); March 19, 2019 Letter from NELP and UFCW, AR103277, AR103278 (same). As one commenter put it, "[h]ow can the public comment on a review when there is no study publicly available to review?" Comments from Worksafe, May 1, 2018, FSIS-2016-0017-79029, AR89590, AR89592. USDA did not make the study publicly available during the comment period. *See* APHA Comments, AR62449; *see also*

Final Rule at 52,305, AR100198 (acknowledging agency did not identify data publicly).

USDA received more than 83,000 comments in response to the NPRM. *See* Final Rule at 52,304, AR100197. Plaintiff UFCW, several UFCW locals, and individual workers submitted comments in opposition, citing worker safety concerns. *See, e.g.*, UFCW Comments, AR 90717; Comments from UFCW Local 1776, Apr. 20, 2018, FSIS-2016-0017-55539, AR56808; Comments from UFCW Local 700, Apr. 19, 2018, FSIS-2016-0017-55453, AR56715; Comments from UFCW Local 1473, Apr. 18, 2018, FSIS-2016-0017-55360, AR56616; Comments from UFCW Local 540, Apr. 17, 2018, FSIS-2016-0017-55300, AR56550; *see also* Comments from UFCW, May 8, 2018, FSIS-2016-0017-81985, AR92784 (attaching listing of 6,370 swine slaughter workers in opposition). National occupational health and safety organizations and well-respected academics also submitted comments explaining that NSIS, as proposed, would have significant negative impacts on workplace health and safety. *See, e.g.*, Comments from Professor Melissa J. Perry, May 8, 2018, FSIS-2016-0017-83467, AR96947; NELP Comments, AR86562; Comments from Ass'n of Occupational and Environmental Clinics (AOEC), May 8, 2018, FSIS-2016-0017-79890, AR90512; Comments from the National Council for Occupational Safety and Health (NCOSH), May 8, 2018, FSIS-2016-0017-80482, AR91155; Comments from Professor David Michaels, Apr. 30, 2018, FSIS-2016-0017-74002,

AR83922; Comments from the American College of Occupational and Environmental Medicine (ACOEM), Apr. 24, 2018, FSIS-2016-0017-56898, AR58177.

While noting that meatpacking workers already suffer injuries and illnesses at a rate that is 2.3 times higher than the average for all private industries, these commenters explained that NSIS would likely further increase these rates. NELP Comments at AR86565 (citing Bureau of Labor Statistics, *Employer-Reported Workplace Injuries and Illnesses (Annual)* (Nov. 8, 2018)); Perry Comments at AR96948; APHA Comments at AR62446; UFCW Comments at AR90724. The commenters explained that methodologically rigorous, credible studies show that increased line speed rates lead to increased rates of repetitive stress injuries like carpal tunnel syndrome and tendonitis due to the increase in the number of repetitive forceful motions required. NELP Comments at AR86565; UFCW Comments at AR90724–25; AOEC Comments at AR90514. They also explained that increased line speeds increase the risk of lacerations or other injuries caused by knives and blades, as workers are placed closer together and/or are using sharp knives more quickly. Perry Comments at AR96948 (collecting studies); NELP Comments at AR86567 (same); APHA Comments at AR62448–62452; UFCW Comments at AR90724. Commenters noted that OSHA has consistently encouraged plants to adjust line speeds and take other steps to reduce the number

of repetitions per employee in order to decrease worker injury rates. *See, e.g.*, Comments from Public Citizen, May 2, 2018, FSIS-2016-0017-80154, AR90793, AR90797 (citing OSHA, *Ergonomics Program Management Guidelines for Meatpacking Plants*, OSHA 3123 (1993), https://www.osha.gov/Publications/OSHA3123/3123.html). As one occupational health expert put it, "there is no doubt that increasing line speed will increase laceration injuries to workers." Perry Comments at AR96948. Experts also noted that the elimination of a maximum line speed will "potentially cause an epidemic of disabling work-related MSDs [musculoskeletal disorders]." AOEC Comments at AR90513.

Commenters also explained, more generally, how worker safety plays a role in consumer food safety. *See, e.g.*, Comments from Consumer Federation of America (CFA), May 2, 2018, FSIS-2016-0017-81413, AR92172, AR92188. As one noted, "[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." *Id.*; *see also* UFCW Comments at AR90271, AR90727 (explaining connection between injury rates and turnover).

B. USDA's "Analysis" Becomes Public

USDA did not respond to the FOIA requests for USDA's worker safety analysis information before the comment period closed. On September 21, 2018,

more than four months after the close of the comment period, FSIS released the materials in response to a FOIA request. AR104688; *see also* Final Rule at 52,305, AR100198.

Two experts from Texas State University, one an occupational health expert and one an expert in statistical analysis, analyzed the study and concluded that it was "impossible for FSIS to draw any statistically valid conclusion about worker injury rate differences in HIMP versus traditional plants" based on the data FSIS purportedly studied. Celeste Monforton & Phillip W. Vaughan, *Review of the Analysis Prepared by the Food Safety Inspection Service (USDA/FSIS) of Plant Employee-Injury Rates at Swine Slaughtering Operations* at 4, https://www.nelp.org/wp-content/uploads/Monforton-Vaughan-Review-USDA-FSIS-Injury-Data.pdf.) (cited and discussed in NELP and UFCW Letter at AR103280). The experts identified three main flaws in USDA's study: (1) an insufficient sample size; (2) a methodology for comparisons that would make statisticians "likely [] to scratch their heads"; and (3) the lack of a truly random sample. *Id.* at 1–4.

Several interested groups shared these findings and other critiques of USDA's analysis with USDA, and they requested that USDA add its data and analysis to the rulemaking docket and reopen the comment period so that members of the public could provide comment and potentially conduct more

detailed analyses of the data. *See, e.g.*, March 19, 2019 Letter from NELP and UFCW, AR103277. USDA denied these requests. AR103272.

C. Final Rule

On October 1, 2019, USDA published the final NSIS rule, with an effective date of December 2, 2019. *See* Final Rule, 84 Fed. Reg. 52,300, AR100193 (Oct. 1, 2019). Consistent with the NPRM, the Rule eliminated maximum line speed limits, shifted on-line inspection responsibilities from federal employees to plant employees, and adopted a 40 percent reduction in the number of federal inspectors on each line. *See generally id.* Plants that sought to opt-in to NSIS were given an initial date of March 30, 2020 to do so, although they could opt-in at later dates as well. *Id.* at 52,300, AR100193.

In the preamble to the Rule, USDA addressed its refusal to publish the data and analysis of worker safety on which it relied in the NPRM, but it stated that "all the information that FSIS used in its analysis is publicly available." *Id.* at 52,305, AR100198. USDA did not acknowledge commenters' point that the NPRM did not provide the public sufficient information regarding on what data the analysis had relied or as to the methodology used. And USDA did not address any of the statistical or other flaws in the study that members of the public pointed out after the FOIA release. Instead, although USDA had relied on the analysis in issuing the NPRM, USDA now disclaimed any reliance on it, stating that "while FSIS

recognizes that working conditions is an important issue, the Agency does not have authority to regulate issues related to establishment worker safety. OSHA is the federal agency with statutory and regulatory authority to promote workplace safety and health." *Id.*

USDA also summarized the comments addressing how harmful NSIS would be to workers. *Id.* at 52,314–15, AR10027–28. USDA did not rebut the studies cited or the conclusions drawn from them. Rather, it repeated that "[w]hile FSIS agrees that safe working conditions in swine slaughter establishments are important, the Agency has neither the authority nor the expertise to regulate issues related to establishment worker safety." *Id.* at 52,315, AR10028. It then stated: "OSHA is the Federal agency with statutory and regulatory authority to promote workplace safety and health. FSIS's authority with respect to working conditions in slaughter establishments extends only to FSIS inspection personnel." *Id.* In addition, USDA stated that it had worked with OSHA to develop a worker safety poster and that USDA would require NSIS plants to submit to OSHA an annual attestation that they monitor and document "work-related conditions." *Id.* USDA did not otherwise comment on the impact of NSIS on worker safety or address any of the commenters' suggested modifications for ameliorating the impact of its action on worker safety.

IV. Plaintiffs

Plaintiffs in this action are three local labor organizations and their affiliated international labor union, each of which represents workers in one or more of the 40 high-volume swine slaughter establishments identified as likely to convert to NSIS. *See* Final Rule at 52,322, AR100215.

Plaintiff United Food and Commercial Workers Union, Local No. 663, has approximately 1,900 members who work at the JBS swine slaughter establishment in Worthington, Minnesota. Decl. of Matthew Utecht ¶ 4. Local 663's members work in all aspects of production, including on the kill floor and in evisceration. *Id.* at ¶ 6; *see also* Decl. of Pablo Martinez ¶ 2.

Plaintiff United Food and Commercial Workers Union, Local No. 440, has approximately 1,300 members who work at the Smithfield swine slaughter establishment in Denison, Iowa. Decl. of Leo Kanne ¶ 4. Local 440's members work in all aspects of production, including on the kill floor and in evisceration, and regularly use sharp knives as part of their work. *Id.* at ¶¶ 6–7; *see also* Decl. of David Eric Carrasco ¶ 5; Decl. of Marty Joseph Stein ¶ 9.

Plaintiff United Food and Commercial Workers Union, Local No. 2, has members that work at two of the 40 high-volume swine slaughter establishments expected to convert to NSIS. Local 2 has approximately 2,000 members at the Seaboard Foods plant in Guymon, Oklahoma, and 2,600 members at the Triumph

Foods plant in St. Joseph, Missouri. Decl. of Martin Rosas ¶¶ 4–5. Members at both plants work in all aspects of production and maintenance, including evisceration, and use knives and other sharp instruments. *Id.* at ¶ 6; *see also* Decl. of Amanda Miranda ¶¶ 8–10; Decl. of Jose Quinonez ¶¶ 9–10. The Seaboard plant in Guymon converted to NSIS on March 2, 2020. Since doing so, it has increased its line speed to approximately 1,200 hogs per hour. Quinonez Decl. ¶ 8.

All members of Plaintiffs Local 663, Local 440, and Local 2, are also members of Plaintiff United Food and Commercial Workers International Union (UFCW). Decl. of Richard Dennis Olson ¶ 1. Via other locals, UFCW also represents workers in the hog slaughter and processing industry at another fourteen high-volume establishments that USDA expects to adopt NSIS, four of which participated in the HIMP program, including members who work with a variety of sharp instruments across all aspects of production. *Id.* at ¶ 5; *see also* Decl. of Elizabeth Bell ¶¶ 5–8. Combined, UFCW has approximately 33,000 members who work at eighteen of the forty plants USDA expects to convert to NSIS. Olson Decl. ¶ 5.

PROCEDURAL HISTORY

Plaintiffs filed this action on October 7, 2019, bringing three claims and asking the Court to vacate the Rule pursuant to the APA. On December 6, 2019, USDA filed a motion to dismiss the action in its entirety, which this Court granted in part. The Court held that Plaintiffs lacked standing as to their two claims based

on the reduction of on-line FSIS inspectors, April 1 Order at 12–14, but denied the motion as to Plaintiffs' claim that the elimination of line speed limits was arbitrary and capricious. In so doing, the Court found that Plaintiffs had sufficiently alleged an injury-in-fact caused by the Rule, *id.* at 9–12, that "Plaintiffs' interests are arguably among those protected by the FMIA," *id.* at 17, and that Plaintiffs had "properly alleged" that "FSIS's decision to disregard the rule's effects on worker safety was [not] adequately justified," *id.* at 21–22. As to the final point, the Court identified serious shortcomings in the agency's reasoning, pointing out "internal inconsisten[cies]," "circular logic," and the "conclusory fashion" in which the agency addressed worker safety issues. *Id.* at 20–22. The Court stated that the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 22.

USDA filed an Answer on April 29, 2020, ECF 36. On May 15, 2020, USDA moved to stay summary-judgment proceedings and for voluntary remand, ECF 40, purportedly to enable it to address the Court's "concerns about whether the Agency adequately considered and responded to certain public comments it received during its rulemaking." ECF 42 at 6. Plaintiffs opposed that motion, ECF 49, and a hearing is currently scheduled for July 14, 2020.

LEGAL STANDARD

Plaintiffs argue that FSIS's decision to eliminate line speed maximums was arbitrary and capricious. An agency has acted arbitrarily and capriciously when it:

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In re Operation of Mo. River Sys. Litig., 421 F.3d 618, 628 (8th Cir. 2005) (quoting *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't. of Agric.*, 266 F.3d 889, 894 (8th Cir. 2001)). A challenge to an agency rule is appropriately resolved at summary judgment based upon the administrative record. *See Simmons v. Jarvis*, No. 8:13CV98, 2016 WL 4742256, at *10 (D. Neb. Sept. 12, 2016). The reviewing court bases its conclusions on "a 'searching and careful' review of the administrative record." *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, Civ. No. 13-107 ADM/TNL, 2017 WL 359170, at *7 (D. Minn. Jan. 24, 2017) (quoting *Downer v. U.S. Dep't of Agric. ex rel. United States*, 97 F.3d 999 (8th Cir. 1996)). In so doing, the court "cannot supply a reasoned basis for the agency's action that the agency itself has not given.'" *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1000–01 (8th Cir. 2018) (quoting *Motor Vehicles Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. Plaintiffs have standing.

Plaintiffs bring this action on behalf of their members who work in high-volume swine slaughter and processing plants. "An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 831 F.3d 961, 967 (8th Cir. 2016) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Here, that the second two prongs are met is self-evident: The safety of a labor union's members' workplace is germane to its purpose, and an APA case like this one does not require individual members' participation. *See, e.g.*, *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993) (finding case seeking similar relief does not require individual member participation); *Neb. Beef Producers Comm. v. Neb. Brand Comm.*, 287 F. Supp. 3d 740, 750 (D. Neb. 2018) ("It is only when an association seeks relief in damages for alleged injuries to its members, or other relief that must be specifically tailored to the individual injury of a member, that an individual member's participation may be required.").

As to the first prong, the record confirms that Plaintiffs' members have standing based on the injury-in-fact recognized by the Court in its ruling on the motion to dismiss: an increased risk of both musculoskeletal injuries and lacerations as a result of the increased line speeds allowed as a direct result of the challenged rule. *See* April 1 Order at 9–12. The record shows "a realistic danger of sustaining a direct injury as a result of [a regulation's] operation or enforcement." *Ia. Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013) (quoting *St. Paul Area Chamber of Commerce v. Gaerner*, 439 F.3d 381, 485 (8th Cir. 2006)); *see, e.g.*, *Mo. Coalition for Enviro. v. FERC*, 544 F.3d 955, 957 (8th Cir. 2008) (finding standing based on "potentially increased risk of environmental harm"); *Adedipe v. U.S. Bank, Nat'l Ass'n*, 62 F. Supp. 3d 879, 890 (D. Minn. 2014) (increased risk of plan default is injury in fact); *see also Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) (stating that the injury-in-fact requirement can be satisfied "by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions"); *NRDC v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (noting increases in risk can be sufficient to confer standing, given that "[e]nvironmental and health injuries often are purely probabilistic").

Specifically, as the Court previously noted, "Plaintiffs' theory of harm hardly requires speculation: slaughterhouse workers, operating in close quarters

and using sharp objects to trim meat from carcasses, will face higher rates of injury when working at faster speeds." April 1 Order at 12. This conclusion is supported by evidence in the record: Numerous commenters discussed peer-reviewed and government-funded studies that find that increases in line speeds increase the risk of both lacerations and musculoskeletal disorders. *See, e.g.*, Perry Comments at AR96948 (summarizing research); APHA Comments at AR62447–48 (noting increased rates of repetition increase risk of musculoskeletal injuries). In its 2017 report, GAO noted that "OSHA and National Institute for Occupational Safety and Health (NIOSH) officials told us that line speed—in conjunction with forceful exertions, awkward postures, and other factors—affects the risk of [musculoskeletal disorders]." 2017 GAO Report, AR101425. And Plaintiffs' members themselves have explained that, based on their experience, the faster the lines move, the more they and their coworkers suffer from both lacerations and musculoskeletal injuries. Quinonez Decl. ¶¶ 12–13; Bell Decl. ¶¶ 8, 10-11, 14; Stein Decl. ¶¶ 7, 8-10, 14; Carrasco Decl. ¶¶ 8-12, 14; Martinez Decl. ¶ 6, 10; *see also* UFCW Comments at AR90726–27 (explaining, based on member experiences, that increased line speeds will increase risk of "neighbor cuts" and musculoskeletal disorders).

Second, the record adequately shows that the plants where Plaintiffs' members work will increase their line speeds as a result of the challenged rule—

indeed, at least one has already done so. The Guymon plant where members of Local 2 work converted to NSIS on March 2, 2020, ECF 38 (Stipulation) ¶ 6, and since then has increased its line speeds over that which would have been allowed under the prior regime, *see* Quinonez Decl. ¶ 8. And as one Local 2 member at that plant explains, "[a]s the plant increased line speeds in 2020 it did not change hours or hire more workers. We are the same number of people doing the same job at a faster rate, handling a larger volume of product." *Id.* at ¶ 14.

As to the other plaintiff locals, as the Court explained in its April order, "Plaintiffs' injury-in-fact is not merely speculative in this case because they rely on 'the predictable effect of Government action on the decisions of third parties.'" April Order at 9 (quoting *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)). "The 'predictable reaction' to the FSIS rule is that slaughterhouses will increase line speeds above the [prior] maximum." *Id.* Not only is this reaction predictable, but it was the agency's predicted—and intended—outcome. *See* April 1 Order at 11 (noting "increasing line speeds is an intended outcome of this rulemaking because USDA predicted $66 million in resulting cost-savings," citing Final Rule at 52,341, AR100234). FSIS stated that it "expected" 40 establishments, including 14 non-HIMP plants where UFCW members work, to adopt NSIS, Final Rule at 52,322, AR100215, and that that each of these plants would increase their line speeds by 12.49 percent, *id.* at 52,335, AR100228. The agency's own predictions

are evidence of injury, particularly given, as the Court previously noted, "corroborating industry statements and actions." April 30 Order at 11; *see also id.* at 10 (citing Final Rule at 52,314, AR100207 (summarizing industry comments)); Comments from Michael P. Skahill, Smithfield Foods (May 2, 2018), FSIS-2016-0017-83035, AR96030); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 787 (9th Cir. 2019) (agency's own "predicted results," as set out in rule's preamble, are evidence of non-speculative injury); *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013) (considering agencies' assumptions about regulated community's response as evidence of injury).

The record thus confirms that FSIS's elimination of line speed maximums increases the risk of injury to plaintiffs' members and thus confers on plaintiffs standing to challenge the Final Rule.

II. Plaintiffs are within the zone of interests of the statutory scheme.

Plaintiffs' claims are within the "zone of interests" protected by the FMIA. The zone-of-interests test is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Here, not only does the history of the FMIA, show a longstanding recognition of the connection between workplace conditions and food safety, *see* H.R. Doc. No. 59-873 at 8, 9–10, but Congress has subsequently stated in statutory text that it was

amending the relevant statutory scheme to create "safer and better working conditions for persons engaged in the slaughtering industry," 7 U.S.C. § 1901. And like Congress, FSIS itself has repeatedly "recognize[d] that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety," including in this rulemaking. *See* NPRM at 4796, AR100165; *see also* Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566, 49,567 (Aug. 21, 2014) (NPIS Rule). Even in the rule being challenged, FSIS included provisions requiring NSIS plants to complete attestations related to worker safety. *See* Final Rule, at 52,349, AR100242. If FSIS had the authority to enact such a worker-safety-related requirement in the Rule, worker safety is certainly "arguably" within the zone of interests.

This Court previously rejected USDA's argument that Plaintiffs' claims failed the zone-of-interests test, finding that "worker conditions in slaughterhouses are arguably related to food safety" and thus that "Plaintiffs' interests are arguably among those protected by the FMIA." April 1 Order at 17. That conclusion was correct, and there is no reason to revisit it.

III. FSIS's decision to eliminate line speeds was arbitrary and capricious.

FSIS's decision to eliminate line speed maximums, despite the evidence showing its impacts on worker health and safety, was arbitrary and capricious. In its contemporaneous explanation of this decision, FSIS failed to respond

meaningfully to the comments submitted about the harm that NSIS would cause to workers, and the rationale it provided for refusing to consider the impact of its actions on worker safety was irrational. In so doing, FSIS violated basic principles of reasoned decisionmaking, including the requirement that an agency consider and respond to comments, that an agency consider all relevant factors, and that an agency acknowledge and explain its departure from previous positions.

"An agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Under any standard, the comments of scholars, experts, and worker advocates raising concerns about NSIS's impacts on worker illnesses and injuries were significant. Although FSIS had acknowledged the relevance of worker safety in the NPRM and explicitly sought comment on this topic, and despite the benefit of the substantive comments received, FSIS refused to consider worker safety in the final rule. Rather, its 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. But as the Court explained 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. Therefore, FSIS's stated reason for declining to consider those collateral effects was not a rational explanation." April 1 Order at 30.

In promulgating rules, agencies are required to consider "all relevant factors." *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Citizens Telecomms.*, 901 F.3d at 1011; *Cty. of St. Louis v. Thomas*, 967 F. Supp. 370, 374 (D. Minn. 1997). As Congress and FSIS have repeatedly recognized, workplace safety is relevant to implementation of the FMIA. For instance, as noted above, in 1958, Congress directed that the agency authorize only those methods of slaughter that are "humane" because doing so "results in safe and better working conditions for persons engaged in the slaughtering industry." 7 U.S.C. §§ 1901, 1904. And in 1978, Congress amended the FMIA to prohibit slaughter inconsistent with the 1958 provision. *See* 21 U.S.C. § 610.

FSIS has likewise addressed the connection between worker safety and food safety. In the NPRM, USDA acknowledged that "evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety" and requested comments on this topic. NPRM at 4796, 4799, AR100165, 100168. The agency also cited its own analysis of worker safety at certain establishments as a reason to proceed with its proposal. *Id.* at 4796, AR100164. The agency's recognition, at the NPRM stage, that worker safety is relevant to its exercise of statutory authority is consistent with USDA's

longstanding treatment of the impacts of its actions on worker safety as relevant to rulemakings related to the animal slaughter process. For instance, in its 2014 rule adopting the New Poultry Inspection System (NPIS), USDA tied its decision *not* to adopt a proposed increase in line speed limits in part to worker safety concerns. *See* NPIS Rule, 79 Fed. Reg. at 49,567. Indeed, in that rule, USDA devoted five pages to discussing comments related to line speeds and worker safety. *Id.* at 49,566–601. *See also* Pathogen Reduction; Hazard Analysis & Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,812 (July 25, 1996) ("reconsider[ing]" approach based on comments raising "worker safety concerns"); *id.* at 38,845 (requesting comment on worker safety concerns); *id.* at 38,855 (noting requirement of FSIS approval for experimental methods of controlling pathogens that "may affect… worker safety"); Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery Systems, 69 Fed. Reg. 62,552, 62,561 (Dec. 6, 1994) (justifying adoption of new technology on grounds that "it may reduce the incidence of cumulative trauma disorder among meatcutters by eliminating some tasks which contribute to the disorder"); Sodium Citrate as a Tripe Denuding Agent, 59 Fed. Reg. 41,640, 41,640 (Aug. 15, 1994) (justifying rule on grounds that solution was "as effective as existing tripe-denuding agents, but is less objectionable to workers than the agents now in use").

In issuing the Final Rule, however, "FSIS reversed its previous position on its ability to consider worker safety." April 1 Order at 19. Although an agency is entitled to change its position in rulemaking, it must acknowledge that reversal of position and give an explanation for it. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position."); *Sierra Club N. Star Chapter v. LaHood*, 693 F. Supp. 2d 958, 973 (D. Minn. 2010) ("[An agency]'s failure to acknowledge [its] previous position, let alone explain why, in [its] opinion, a change is justified, is the hallmark of an arbitrary and capricious decision."). USDA did not do so here. "Rather, it simply asserted, in a conclusory fashion, that it had no legal authority to regulate safety." April 1 Order at 21. "As the D.C. Circuit recently noted, '[n]odding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking.'" *Id.* (quoting *Gresham v. Azar*, 950 F.3d. 93, 103 (D.C. Cir. 2020)).

FSIS's explanation was also internally inconsistent. First, at the same time it disclaimed the ability to consider worker safety, FSIS adopted worker safety "attestation requirements," requiring NSIS-participating establishments to "monitor and document any work-related conditions of establishment workers" and to develop "[p]olicies to encourage early reporting of symptoms of injuries

and illnesses." Final Rule at 52,349, AR100242 (codified at 9 C.F.R. § 310.27). "FSIS cannot both lack authority to consider worker safety and hold authority to enact safety-related requirements." April 1 Order at 21. "FSIS's failure to recognize that inconsistency and explain its reasoning renders its decision to disregard worker safety arbitrary and capricious." *Id.* at 22 (citing *Dep't of Commerce*, 139 S. Ct. at 2569).

Second, although USDA stated that it was authorized to act "solely to protect the health and welfare of consumers," and thus could not consider the health and welfare of workers, Final Rule at 52,315, AR100208, it considered other non-consumer factors. For example, the agency stated that it was acting to "remove unnecessary regulatory obstacles to industry innovation," *id.* at 52,300, AR100193, and to respond to "concerns about the regulatory burden," *id.* at 52,310, AR100203. Such goals are no more relevant (and perhaps less so) to "the health and welfare of consumers" than the health and safety of the workers in plants. USDA's consideration of these concerns is inconsistent with its claim that it lacked legal authority to consider worker safety. Such internal inconsistency is yet another illustration of arbitrary and capricious decisionmaking. *See, e.g.*, *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

USDA's explanations beyond its purported lack of authority to consider worker safety fare no better. Disregarding comments simply because they are

outside the agency's "expertise" defies an important purpose of the notice-and-comment process: to give the agency the benefit of the "expertise and input of the parties who file comments with regard to the proposed rule." *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) ("Notice and comment … affords the agency a chance to avoid errors and make a more informed decision.").

Finally, the existence of OSHA does not bar USDA from considering the impact of its rule on worker safety. The fact that one agency has a primary purpose of preventing workplace illness and injury does not preclude any other agency from considering whether its actions will cause or exacerbate workplace illness and injury. And FSIS officials have acknowledged that OSHA "does not play a role in regulating line speed." 2017 GAO Report, AR101425. In any event, the duty to respond to comments made to USDA and to consider the impact of USDA's actions lies with USDA. An agency cannot "excuse its inadequate responses by passing the entire issue off onto a different agency. Administrative law does not permit such a dodge." *Del. Dep't of Nat. Res. & Enviro. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) (citing *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987)). USDA's dodge here was arbitrary and capricious.

IV. Because USDA cannot cure the flaws of the Final Rule, vacatur is the appropriate remedy.

Vacatur of a challenged rule held to be arbitrary, capricious, or contrary to law is the default remedy under the APA. *See FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), *cited in Hoban v. United States Food & Drug Admin.*, No. CV 18-269 (JNE/LIB), 2018 WL 3122341, at *3 (D. Minn. June 26, 2018) ("We have made clear that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated…."). This remedy is appropriate "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998).

Where courts consider whether to make an exception to the usual remedy of vacatur, they generally look to the so-called *Allied-Signal* factors: "the seriousness of the deficiencies of the action" and "the disruptive consequences of vacatur." *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009) (cleaned up). Here, both *Allied-Signal* factors weigh in favor of vacatur.

The first factor essentially asks whether there is a "serious possibility" the agency could correct the deficiencies in its action on remand. *See Milk Train, Inc. v.*

Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002). Here, the agency cannot do so. As the Supreme Court recently made clear, final agency action challenged under the APA must stand or fall on the basis of the reasons stated by the agency at the time of its action. To consider a later-supplied explanation for a prior action would violate the "'foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *DHS*, 2020 WL 3271746, at *9. Thus, where a reviewing court finds an agency action was inadequately supported by the agency's contemporaneous action, there are two possible options: The agency can obtain a remand, and "offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Id*. (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). In doing so, it cannot provide any new reasons for its action. *Id.* "Alternatively, the agency can 'deal with the problem afresh' by taking new agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)).

Here, the agency cannot fix the flaws in the Final Rule by simply providing a "fuller explanation" of the reason it gave at the time of the Final Rule—that it did not have the "authority and expertise" to consider worker safety—because that reason is wrong and illogical as a matter of law. To the extent the agency seeks to

"deal with the problem afresh," it can only do so after conducting a new rulemaking.

Not only would remand without vacatur be inconsistent here with *DHS* and *Chenery*, the existing record here would not allow USDA to move ahead with NSIS, given both the abundant evidence showing the connection between line speeds and worker health and safety and the substantive and procedural flaws in the "preliminary analysis" of worker safety FSIS relied on in the NPRM. USDA's Office of Inspector General (OIG) recently released a report explaining that "FSIS did not fully disclose its data sources in its worker safety analysis," and that "FSIS did not take adequate steps to determine whether the worker safety data it used for the proposed rule were reliable." OIG, FSIS Rulemaking Process for the Proposed Rule: Modernization of Swine Slaughter Inspection, Inspection Report 24801-001-41, at i (June 2020), https://www.usda.gov/oig/webdocs/24801-0001-41.pdf. *See also* Monforton & Vaughan, *supra* at 12 (explaining invalidity of analysis). Any action on remand that relied on FSIS's existing worker safety analysis thus would itself be arbitrary and capricious.

The second *Allied-Signal* factor—the disruptive consequences of vacatur—also weighs strongly *against* remanding without vacatur. Vacatur is the appropriate remedy where necessary "to prevent significant harm resulting from keeping the agency's decision in place." *Sierra Club v. Van Antwerp*, 719 F. Supp.

2d 77, 80 (D.D.C. 2010) (citing *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995)). Here, any disruption to regulated entities is easily outweighed by the increased risk of injuries to workers that would result from keeping the rule in place. *Cf. 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"). Furthermore, vacating the Final Rule now would ensure that no additional establishments incur the costs associated with converting to NSIS, only for the Rule to be set aside again in the future.

Finally, in light of the centrality of the elimination of line speed maximums to NSIS, the entire rule should be vacated. "Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). To find a rule severable, "the court must be able to find '*without any substantial doubt* that the agency would have adopted the severed portion on its own.'" *Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 363 F. Supp. 3d 94, 105 (D.D.C. 2019) (quoting *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018)). Here, it is extremely doubtful the agency would have adopted the other components of NSIS without the line speed provision. The major benefit associated with NSIS was

increased "efficiency," which the agency explicitly stated was "synonymous" with increases in line speed. Final Rule at 52,335, AR100228. The other changes to the inspection system were designed to allow lines to move faster. Without being able to increase their line speeds, plants would have little reason to adopt NSIS.

CONCLUSION

For the foregoing reasons, 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*

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

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

* *Admitted Pro Hac Vice*