No. 21-2220

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 663; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 222; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 2; and UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

QUALITY PORK PROCESSORS, INC.; WHOLESTONE FARMS COOPERATIVE, INC.; and CLEMENS FOOD GROUP, LLC,

Putative Intervenors-Appellants.

On Appeal from the United States District Court for the District of Minnesota
Hon. Joan N. Ericksen
No. 19-cv-2660 (JNE/TNL)

BRIEF OF PLAINTIFFS-APPELLEES

Timothy J. Louris
MILLER O'BRIEN JENSEN P.A.
120 South Sixth Street
Suite 2400
Minneapolis, MN 55402

Adam R. Pulver
Nandan M. Joshi
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Plaintiffs-Appellees

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SUMMARY OF THE CASE AND ORAL ARGUMENT STATEMENT

More than a month after the district court issued a 62-page summary-judgment decision, operators of four swine slaughter facilities (hereafter, Appellants or the Plants) moved to intervene to seek "clarity" as to the scope of the district court's remedial order vacating one part of a U.S. Department of Agriculture (USDA) rule. The Plants explained that, if intervention were granted, they would ask the court to address a new argument: that vacatur did not impact the Plants because its effect was to undo other final agency action by USDA that was not challenged in the case. The district court, in a ruling reviewed for abuse of discretion, applied the four-factor standard dictated by this Court's precedent and denied the motion as untimely. This decision was well-supported by the record, particularly given the unusual circumstances here—where two of the three putative intervenors had earlier filed declarations urging the Court not to vacate the rule because such vacatur *would* impact them. Nothing in the district court's summary judgment decision, adopting a remedy that USDA had suggested as an alternative nine months earlier, created a divergence of interests. That the Plants came up with a novel argument as to why vacatur should not impact them, after the Court rejected their (and USDA's) arguments against vacatur, is not a basis for delayed intervention. Given the discretionary standard of review and the district court's reasoned analysis applying this Court's test, Plaintiffs-Appellees suggest that oral argument is unnecessary.

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INTRODUCTION

In October 2019, Plaintiffs-Appellees challenged a U.S. Department of Agriculture (USDA) rule that created a new, optional program for swine slaughter facilities, called the New Swine Inspection System (NSIS). Facilities that participated in NSIS could operate differently from those under the standard inspection regime in several ways. One of the many features was a new exemption from the regulatory line-speed limits that have long applied to plants, absent waivers granted pursuant to other regulatory provisions. In April 2021, after extensive briefing by the parties and amici, the district court held that USDA's creation of this new line-speed exemption was arbitrary and capricious and vacated the line-speed portion of the NSIS Rule.

More than a month after the court's ruling, three pork-processing plant operators (the Plants) filed a motion to intervene for the purpose of "obtain[ing] clarity" from the district court that its order vacating the line-speed provision of NSIS did not impact them, based on the novel legal theory that vacatur of the new NSIS line-speed exemption provision reinstated waivers that the Plants had previously held pursuant to a separate regulatory provision, which USDA had terminated separate from this case. App.119, 131; R. Doc. 150, at 3, 13.

Although the question whether vacatur was an appropriate remedy had been squarely addressed by the parties and amici in the earlier briefing, no

party or amicus previously had argued that vacatur of NSIS's line-speed exemption provision would not affect plants that previously had waivers under other USDA programs. In fact, two of the three plants had filed declarations during summary judgment briefing attesting to the fact that vacatur of NSIS *would* require them to operate their evisceration lines at the standard regulatory limit and asking the Court not to vacate any provision that it found arbitrary and capricious for that reason.

Given these facts, the district court acted well within its discretion in denying the Plants' motion to intervene on the threshold ground of timeliness. In so doing, it considered each of the four factors prescribed by this Court, including the Plants' claim that the delay in seeking intervention was justified because the district court's summary judgment decision created a divergence of position between the Plants and USDA. But as the district court explained, there is no reason why the Plants "could not have asked [it] to consider their concerns nine months ago when they submitted affidavits through amici." A79. "The fact that the case was not resolved in their preferred manner does not justify an untimely intervention." A77.

The Plants are correct that "[t]his litigation threatened to force Appellants to slow down the evisceration line speeds used in their plants." Appellants' Br. 10. But that was true from the time Plaintiffs commenced this case in October 2019. They are also correct that "*no party* asked the district court" to order the Plants' non-NSIS waivers reinstated. *Id.* at 10. But that

was clear in July 2020. Nonetheless, the Plants waited until May 2021 to file a motion to intervene. Post-summary-judgment intervention is not a tool to raise a new argument that could have been, but was not, raised earlier. The district court's finding that the Plants' attempted flip-flop came too late was not an abuse of discretion.

STATEMENT OF ISSUES

The issue on appeal is whether the district court abused its discretion when, based on its analysis of the four factors dictated by this Court's precedent, it denied a post-summary judgment motion to intervene for purposes of "obtaining clarity," based on a new argument that the putative intervenors could have raised, but did not raise, earlier in the case. The record also presents an alternative basis for affirmance, the putative intervenors' failure to meet the requirements of Rule 24(a)(2), as their interest in waivers issued pursuant to a different regulation is not implicated by this action.

- Fed. R. Civ. P. 24(a)
- *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761 (8th Cir. 2017)
- *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867 (8th Cir. 2014)
- *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088 (8th Cir. 2011)
- *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993)

STATEMENT OF THE CASE

I. Regulatory History

Since 1985, the maximum speed at which large swine-slaughter plants can operate their slaughter lines has been set at a rate of 1,106 head per hour (hph). *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). USDA's regulations provide it the discretionary authority to waive this limit in certain circumstances, *see* 9 C.F.R. § 310.26(c), and USDA has periodically done so pursuant to various pilot programs, including the Salmonella Initiative Program (SIP) and HACCP-Based Inspection Models Project (HIMP). *See* A70. Among these waivers were those granted to Putative Intervenor Quality Pork Processors, Inc. (QPP) for its Austin, Minnesota facility, to Putative Intervenor WholeStone Farms Cooperative, Inc. (WholeStone) for its Fremont, Nebraska facility, and to Putative Intervenor Clemens Food Group, LLC (Clemens) for its Hatfield, Pennsylvania and Coldwater, Michigan facilities. *Id.*

On October 1, 2019, USDA issued a final rule creating the New Swine Inspection System (NSIS). *See* USDA, Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300. NSIS was similar, but not identical, to HIMP, and, as with HIMP, plants that opted into NSIS could, as of March 30, 2020, operate their slaughter lines without regard to line-speed

limits. *See id.* at 52,314. Nothing in the regulatory text of the NSIS rule addressed USDA's authority under 9 C.F.R. § 310.26(c), or waivers issued pursuant to that authority. In the Rule's preamble, USDA mentioned that it would terminate waivers issued under its "SIP" program, such as that given to Clemens's Coldwater plant, and that "FSIS w[ould] announce new waiver criteria in a future Federal Register document." *Id.* at 52,301. USDA did not address the "HIMP" waivers held by the other four facilities. Each of the five facilities operated by the Plants voluntarily converted to NSIS on March 30, 2020. R. Doc. 90, at 2 ¶ 5.

Although the Plants suggested the district court should interpret its own order "to restore their prior waivers," A72, the record does not indicate when or how those waivers were terminated.

II. Procedural History

A. The Case through Summary Judgment

Six days after USDA published the NSIS Rule, the United Food and Commercial Workers International Union and three of its local unions that represent workers in plants that USDA had identified as likely to convert to NSIS[1] (collectively, UFCW) commenced this action under the Administrative Procedure Act (APA). App. 1; R. Doc. 1. UFCW argued that two aspects of the Rule—the new line-speed exemption and the reduction of the number of

[1] This includes the workers at QPP and WholeStone's NSIS facilities. R. Doc. 71, at 2–3; *see also* R. Doc. 186-3, at 2; R. Doc. 186-4, at 2.

federally-employed inspectors—was arbitrary, capricious, and contrary to law, and requested that the entire Rule be vacated. *Id.* As to the line-speed exemption, they argued that USDA's explicit refusal to consider the impact of its action on worker health and safety—despite specifically asking for, and receiving, comments on that subject in its notice of proposed rulemaking and consideration of this factor in prior rulemakings—showed a lack of reasoned decisionmaking. *See* App. 11, 14–16, 18; R. Doc. 1, at 11, 14–16, 18.

On December 6, 2019, USDA filed a motion to dismiss the action. R. Doc. 14. On April 1, 2020, the district court granted in part and denied in part the motion. *United Food & Commercial Workers Union, Local No. 663 v. USDA*, 451 F. Supp. 3d 1040 (D. Minn. 2020) (Plaintiffs-Appellees' Separate Appendix (P.App.) 1; R. Doc. 30). While the court dismissed UFCW's challenge to the changes regarding inspectors for lack of standing, it found that UFCW had standing to challenge the line-speed provision. *Id.* at 1048–51 (P.App. 8–12; R. Doc. 30, at 8–12). Further, it concluded UFCW stated a claim that the line-speed provision was arbitrary and capricious, pointing out "internal inconsisten[cies]" in how the agency addressed worker safety, and stating that the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 1054–56 (P. App. 19–23; R. Doc. 30, at 19–23).

On May 15, 2020, USDA filed a motion to stay proceedings and for voluntary remand without vacatur. R. Doc. 40. UFCW opposed, arguing that

the court should vacate the rule if UFCW prevailed in the lawsuit. *See* R. Doc. 49. On July 22, 2020, the Court denied USDA's stay request, noting that it would "consider the propriety of a voluntary remand without vacatur alongside" UFCW's motion for summary judgment. *United Food & Commercial Workers Union, Local No. 663 v. USDA*, 2020 WL 4218211, at *1 (D. Minn. July 22, 2020) (P. App. 59; R. Doc. 85).

The parties then briefed summary judgment. As to remedy, UFCW argued for vacatur of the NSIS Rule. P.App. 57; R. Doc. 69, at 34. USDA disagreed, arguing that vacatur would create costs for regulated entities. P.App. 99–100; R. Doc. 89, at 37–38. In the alternative, USDA argued that vacatur should be limited to the new line-speed exemption provision. P.App. 100–02; R. Doc. 89, at 38–40. USDA stated that it did not consider the line-speed exemption essential to NSIS and that it "would have adopted the unchallenged provisions of the Final Rule without the line-speed provision." P.App. 102; R. Doc. 89, at 40. It did not ask the court to address waivers issued pursuant to *other* regulations or even mention those waivers in its discussion of remedy.

After USDA filed its principal summary-judgment memorandum, in which it argued that partial vacatur would be an appropriate remedy, two trade groups, the North American Meat Institute and National Pork Producers Council, moved to appear as amici curiae, to "speak on behalf of their member pork farmers and processors against vacatur of the New Swine

Inspection System (NSIS) Rule." They argued that the lower line-speed limit that would result from vacatur would harm their members, and asked the district Court to "exercise its 'remedial discretion'" and to decline to vacate the rule based on these harms. P.App. 123–24; R. Doc. 105, at 13–14.

In support of their arguments, the trade group amici submitted sworn declarations from executives of three companies whose plants were participating in NSIS: Seaboard Foods (R. Doc. 104-3), Clemens (P.App. 105; R. Doc. 104-1), and WholeStone (P.App. 109; R. Doc. 104-2). Both Clemens's and WholeStone's executives acknowledged that vacatur would require them to lower their line speeds to the 1,106 limit. *See* P.App. 107–08; R. Doc. 104-1, at 3–4 ¶¶ 14–15 (stating that vacatur would "force[]" Clemens's facilities "to run with a maximum line speed of 1,106 head per hour"); P.App. 110; R. Doc. 104-2, at 2 ¶ 9 (noting WholeStone would "suffer significant consequences if the NSIS rule is vacated"). Neither Clemens nor WholeStone, nor the trade group association amici they were speaking in support of, suggested that non-NSIS waivers would, or should, be restored if the Court were to vacate the line-speed provision of, or even all of, NSIS. To the contrary, their declarations made clear that they expected that vacatur would require them to reduce their line speeds, and they argued that result was a reason why the district court should *not* vacate the Rule.

In its reply memorandum, filed in September 2020, USDA did not controvert Clemens and WholeStone's assertions that vacatur of NSIS would

require them to slow their line speeds to 1,106 hph. To the contrary, it pointed to this consequence as a reason for the Rule to not be vacated. P.App. 141; R. Doc. 121, at 16.

On March 31, 2021, the district court granted UFCW's motion for summary judgment in part and denied USDA's motion for summary judgment and motion for remand without vacatur, supported by a 68-page written opinion. A1. As to the merits, the court held that USDA's refusal to consider worker safety in adopting the line-speed provision "failed to satisfy the APA's requirement of reasoned decision-making." A2; *see also* A49–57.[2]

The district court then discussed remedy at length, considering the arguments and evidentiary submissions of the parties and amici, including the declarations of the plant executives. A57–68. First, accepting USDA's arguments "that the agency would have still implemented NSIS even if it had retained the line speed limits" and "that the NSIS program can function without the elimination of line speed limits," the district court held the line-speed provision severable from the rest of the Rule. A59. The court then

[2] While the merits of the underlying action are not at issue in this appeal, the Plants' suggestion that "the district court recognized" that the record showed there was "no adverse effect on worker safety" after the Plants increased their line speeds under HIMP, Appellants' Br. 7 n.5, is inaccurate. As the district court stated, "there is some reason to be skeptical of the data" on which the Plants relied, which was counter to other, more scientifically sound evidence in the record. A33 n.6; *see generally* A27–33 (surveying record evidence as to the correlation between line speed and worker illness and injury).

applied the factors set out by the D.C. Circuit in *Allied Signal v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), to determine whether it should remand with or without vacatur. A60–61. The court stated that it was "unclear whether FSIS c[ould] rehabilitate its Final Rule without taking an entirely new agency action," which counseled against remand without vacatur. A63. The court also noted that many of the costs incurred in converting to NSIS would "not be forfeited by a vacatur" of the line-speed provision alone, given other benefits of NSIS. A65. And it found that many plants had already slowed their line speeds due to COVID-19, demonstrating that such reductions were feasible. *Id.*

Although the court declined to remand without vacatur, it acknowledged that if "vacatur were to take effect immediately, pork producers may be forced into a period of noncompliance with the line speed limits." A65–66. Thus, the court invoked its "remedial discretion" to stay vacatur for 90 days to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change." A67–68.

B. The Intervention Motions

Despite Clemens and WholeStone's earlier acknowledgments that vacatur of NSIS would require them to slow their lines to 1,106 hph, and after waiting 37 days into that 90-day period, the Plants filed a motion seeking leave to intervene for the sole purpose of "obtain[ing] clarity" that

the Court's vacatur of the line-speed provision of the NSIS rule "automatically" reinstated their non-NSIS waivers and, thus, that they were *not* required to slow their lines to 1,106 hph. A69; App. 119, 131; R. Doc. 150, at 3, 15.[3]

USDA and UFCW both opposed the motion. USDA argued that the Plants had not established inadequate representation and that a desire for "clarification" was not a reason for intervention. App. 172–73; R. Doc. 157, at 2–3. USDA also argued that the Plants' position that vacatur of the line-speed exemption provision of the NSIS Rule reinstated waivers granted and terminated pursuant to independent regulatory authority was wrong. App. 174; R. Doc. 157, at 4. UFCW argued that the Plants' motion was untimely and that their ability to protect their interests in obtaining waivers was not impaired by the court's decision. App. 142; R. Doc. 156.

On May 20, 2021, the district court denied the intervention motions on the threshold ground of timeliness and thus did not address the other intervention requirements. A74.[4] The court addressed each of the four

[3] Seaboard Foods separately moved to intervene for the purpose of obtaining a 10.5-month stay of the district court's order as to its Oklahoma plant. Seaboard later voluntarily dismissed its appeal from the denial of that motion. *See* 8th Cir. Appeal No. 21-2243 (dismissed July 29, 2021).

[4] The Plants state that the district court "did not allow a reply brief" before ruling. Appellants' Br. 9. But the Local Rules of the District of Minnesota state that no reply briefs are allowed in support of motions to intervene, D. Minn. LR 7.1(b)(2)–(3), and the Plants never asked for an exception to this rule.

timeliness-related factors identified by this Court and concluded that each weighed against a finding of timeliness. A76–80.

First, the court found that the progression of the litigation weighed against intervention as "consideration of the case on the merits ha[d] concluded." A76. Second, the court noted that the proposed intervenors had knowledge of the litigation for a significant period of time but "did not move to intervene or share the concerns raised [in their intervention] motions until after the Court ruled on summary judgment." A77. Third, the court rejected the notion that its ruling on summary judgment raised new issues that justified late intervention, finding that the Plants had "assumed the risks associated with a complete or partial vacatur of the Final Rule 'by choosing to protect [their] interests through third parties rather than to join the litigation directly at the outset.'" A78 (quoting *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867 (8th Cir. 2014)). Noting that both UFCW and USDA had made their positions as to remedy clear no later than August 2020, and noting that the court's consideration of the effects of vacatur was based on the parties' and amici's submissions (including the representations of Clemens and WholeStone), the district court found "no reason that [the putative intervenors] could not have asked the Court to consider their concerns nine months ago when they submitted affidavits through amici." A78–79. Rather than reflecting any new change in position, the intervention motion reflected nothing more than an attempt to "supplement the record to

relitigate the remedy" and was thus improper. A79 (citing *Arizona v. California*, 460 U.S. 605, 615 (1983)). Finally, the Court noted that, although not necessary to find the motion untimely, further delay to address the new arguments about remedy the putative intervenors sought to raise risked prejudice to "USDA's ability to manage a national food safety system." A79–80 (citing *ACLU*, 643 F.3d at 1095).

The Plants appealed the district court's decision and moved the district court to stay the forthcoming judgment "as to them" pending appeal. R. Doc. 165. The district court denied that motion. P. App. 146; R. Doc. 189. The Plants then moved this Court for a stay pending appeal, which this Court denied. *See* July 15, 2021 Order.

On June 30, 2021, the district court entered final judgment. A81. Plants that had been running their lines in excess of 1,106 hph based solely on the NSIS exemption were required to slow their lines as of that date. *See* USDA, Special Alert: Constituent Update – May 26, 2021 (R. Doc. 178).[5] No party filed an appeal from that judgment within the 60-day period prescribed by Fed. R. App. P. 4(a)(1)(B).

SUMMARY OF ARGUMENT

The district court was well within its discretion in denying the motion to intervene as untimely based on its consideration of the four factors

[5] https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-may-26-2021.

specified by this Court. While the Plants barely address the actual basis of the district court's decision, that decision is amply supported by the record.

First, there is no dispute that this case had substantially progressed prior to the Plants' filing of their motion to intervene. Second, there is no dispute that the Plants knew of this litigation well before they filed their motion. Relatedly, there is no dispute that the Plants knew—at least eight months before they filed their motion to intervene—that no party or amicus was arguing that the vacatur of any part of the NSIS Rule would result in their non-NSIS waivers being restored. Indeed, two of the three Plants themselves had submitted declarations making a contrary argument. Third, the district court acted within its discretion in rejecting the Plants' theory that their delay was justified because the summary judgment decision raised new issues or otherwise created a divergence of interests between the Plants and USDA. As the court recognized, the fact that it ruled based on the parties' positions did not change the fact that the parties' positions had been made clear nearly a year earlier. Finally, the district court's conclusions as to the potential prejudice from late intervention—well into the transition period the district court had created to aid USDA in implementing the decision—were reasonable. Notably, the Plants' brief does not even address the district court's conclusion as to that factor.

As the district court noted, this case is not one in which the government has shifted its position. Rather, the Plants shifted their legal strategy after

the court ordered vacatur and remand. The district court did not abuse its discretion when it concluded that the Plants could have acted sooner to protect their interests.

STANDARD OF REVIEW

A district court's denial of a motion to intervene based on untimeliness is reviewed for abuse of discretion, and "should not lightly be overturned." *In re Uponor, Inc. F1807 Plumbing Fittings Prod. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2014) (quoting *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010)). *See also NAACP v. New York*, 413 U.S. 345, 365 (1973) (holding timeliness "is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review").

ARGUMENT

I. The district court's untimeliness finding was not an abuse of discretion.

"[T]he timeliness of a motion to intervene is a decision within the district court's discretion." *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011) ("*ACLU*"). This Court has consistently directed district courts to "specifically consider" four factors in exercising that discretion: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4)

whether the delay in seeking intervention may prejudice the existing parties." *Id.*; *see, e.g.*, *Smith v. SEECO, Inc.*, 922 F.3d 398, 405–06 (8th Cir. 2019); *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 767 (8th Cir. 2017); *U.S. Bank*, 765 F.3d at 869; *Uponor*, 716 F.3d at 1065; *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011); *Ritchie*, 620 F.3d at 832; *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 646 (8th Cir. 1998); *Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995).

Following this Court's instruction, the district court "listed the relevant factors and acknowledged that timeliness is determined from all the circumstances." *ACLU*, 643 F.3d at 1094; *see* A76–80 (addressing the four factors one by one). The factual findings and legal conclusions underlying its decision that each of the four factors weighed against post-summary judgment intervention were supported by both the record and the case law.

A. The district court did not abuse its discretion in finding that the progression of the litigation weighed against intervention.

As to the first factor, the district court reached the obvious conclusion that the litigation had significantly progressed because the court had already ruled on cross-motions for summary judgment and entertained three rounds of briefing related to the merits and remedy. This factor therefore weighed against intervention. A76.

The Plants do not dispute the district court's factual conclusion that the case had substantially progressed. Rather, they mischaracterize the court's discussion of this factor as a determination that "the motion was untimely because it was filed only after the ruling vacating the Final NSIS Rule," Appellants' Br. 27, and invoke case law for the proposition that an intervention motion *may* be timely any time through the expiration of time to appeal an order, *id.* at 27–28. But the district court did not suggest that *all* motions to intervene filed after summary judgment are untimely. Indeed, the district court's discussion of the first factor included the express recognition that, although the progression of the litigation is one factor set forth in this Court's cases, it "should be considered in the context of the reasons for delay and is 'not necessarily determinative.'" A76 (citing *Wholesale Grocery Prods.*, 849 F.3d at 767). The district court's conclusion that the fact that its "consideration of the case on the merits ha[d] concluded" weighed against a finding of timeliness "[u]nless the reasons for delay justify intervention at this late hour," A76, acknowledges that intervention "at this late hour" *could* be appropriate in certain situations. And while the Plants argue the district court failed to consider how the timing of the intervention motion "related to the adequacy of the USDA's representation of Appellants' interests," the district court *did* consider the Plants' claim that the adequacy of USDA's position changed after the entry of summary judgment. It simply

disagreed with the Plants, as discussed below in context with the third factor. A77–79; *see* pp. 25–26 *infra*.

Even while (incorrectly) arguing that the district court erroneously found the stage of litigation dispositive, the Plants suggest that this Court should do just that—suggesting the Court should jettison its precedent and apply a bright-line rule that *any* motion to intervene before the expiration of a party's time to appeal is *de facto* timely. *See* Appellants' Br. 27–29. Not only is this suggestion inconsistent with the four-factor totality of the circumstances test that this Court has repeatedly set forth, it is not compelled, much less supported, by the case that the Plants cite, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). There, the movant sought to intervene solely to appeal the denial of class certification—an appeal that (before Federal Rule of Civil Procedure 23(f)) could not be filed until after final judgment—and moved to intervene eighteen days after the final judgment in favor of the named plaintiffs, who could not appeal. *Id.* at 390. The Supreme Court allowed intervention at this late stage, recognizing that earlier intervention for the limited purpose of appeal of a final judgment would "have made the respondent a superfluous spectator in the litigation for nearly three years." *Id.* at 394 n.15. As several courts of appeals have recognized, *McDonald*'s holding that in "view of all the circumstances," the motion to intervene in that case was timely filed, *id.* at 394, did not establish

a bright-line rule; it was based on the specific circumstances presented.[6] *See Floyd v. City of N.Y.*, 770 F.3d 1051, 1059 n.23 (2d Cir. 2014); *S. Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 971 n.5 (10th Cir. 2008); *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999); *Garrity v. Gallen*, 697 F.2d 452, 457–58 (1st Cir. 1983); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3d Cir. 1982). There is nothing incompatible between *McDonald*'s holding that post-judgment intervention was appropriate in that case based on the circumstances, and this Court's often-stated requirement that district courts examine all the circumstances in determining timeliness. *Cf. Planned Parenthood of the Heartland v. Heineman*, No. 4:10CV3122, 2010 WL 4609299, at *3 (D. Neb. Nov. 4, 2010), *aff'd*, 664 F.3d 716 (8th Cir. 2011) (finding *McDonald* inapposite where the putative intervenor had knowledge of the claimed basis for intervention prior to judgment).

The Plants' motion was "a ninth-inning-with-two-outs intervention attempt." *Uponor*, 716 F.3d at 1066 (quotation omitted). The district court's

[6] Citing two cases, one from 1981 and one from 1982, the Plants state that this Court "often follows" *McDonald*. Br. 28 n.9 (citing *Burkhalter v. Montgomery Ward & Co.*, 676 F.2d 291, 293–94 (8th Cir. 1982); *In re Grand Jury Proc. (Malone)*, 655 F.2d 882, 886 (8th Cir. 1981)). In neither of these older cases did the Court adopt the bright-line rule the Plants ask the Court now to adopt.

well-supported conclusion that the first factor weighed against timeliness was not an abuse of discretion.

B. The district court did not abuse its discretion in finding that the Plants' knowledge of the litigation weighed against intervention.

The knowledge "factor often weighs heavily in cases where the would-be intervenor was aware of the litigation for a significant period of time before attempting to intervene." *Wholesale Grocery Prods.,* 849 F.3d at 767. The district court correctly concluded that this was such a case. A77. The district court did not, as Appellants incorrectly suggest, base this finding solely on the point in time when the Plants "learned that the lawsuit was pending." Appellants' Br. 29. Rather, the district court pointed to the declarations that two of the Plants' executives submitted during summary judgment briefing in August 2020. A77. Those declarations showed far more than the Plants' knowledge of the litigation. They show that the Plants knew that vacatur of the line-speed provision was a potential outcome of this litigation and that they were aware of USDA's brief, which acknowledged that vacatur of that provision would be an appropriate remedy but did not mention restoring prior waivers. The Plants could have moved to intervene to raise an issue about the prior waivers or could have addressed it in their filings at that time. They did not. Instead, they waited eight months, until the district court litigation had otherwise concluded. "When a party had

knowledge of all the facts … and failed to raise the issue when first presented with an opportunity to do so, subsequent intervention is untimely." *Ritchie*, 620 F.3d at 833.

C. The district court did not abuse its discretion in rejecting the Plants' reasons for delay.

The heart of the district court's analysis was its consideration of the third factor, assessing the reasons the Plants gave for their delay in seeking intervention. The court's conclusion that there was "no reason that … [the Plants] could not have asked the Court to consider their concerns nine months ago when they submitted affidavits through amici," A79, is well-supported by the record. Because no party had ever suggested that the vacatur of the line-speed provision of the NSIS Rule would reinstate earlier non-NSIS waivers, USDA's failure to file a post-summary judgment motion addressing that topic, or an appeal arguing that the district court erred in not addressing an issue no party ever raised, did not represent a "change in position." *Id.*

The district court stated that it would have considered the Plant's concerns about the status of waivers had they been raised during summary judgment briefing—as it did the other concerns raised by amici. A79. *Cf. Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000) (affirming finding of untimeliness where "[e]ven if the [putative intervenors'] concerns in this case were different from those of the Federal Defendants … [putative

intervenors] had a full opportunity to present those concerns to the district court" as amici). The Plants do not contend that this finding was an abuse of discretion. They assert instead that, while their interests were "*possibly* aligned prior to the district court's summary judgment decision, that decision revealed a divergence in interests." Appellants' Br. 27 (emphasis added). That assertion is incorrect.

In July 2020, USDA argued that vacatur of the line-speed provision was an appropriate alternative remedy to remanding without vacatur. P.App. 100–02; R. Doc. 89, at 38–40. USDA did not suggest that vacatur would restore the Plants' waivers, and it argued that the line-speed provision was not vital to NSIS. P.App. 102; R. Doc. 89, at 40. The Plants knew then that no party was arguing that waivers issued pursuant to other USDA programs should be ordered reinstated. To the extent that there is a divergence between USDA and the Plants, it was evident no later than July 2020.[7]

The Plants cannot in good faith assert that they were under the assumption that, should the NSIS line-speed provision be vacated, they would not be required to comply with the longstanding regulatory limit of 1,106 head per hour, because their prior waivers would "automatically" be

[7] Because USDA's position on remedy—that vacatur of the line-speed exemption provision of NSIS was an appropriate remedy because USDA would have adopted NSIS even without that provision—was presented in July 2020 under the prior presidential administration, the Plants' reference to changes in presidential administration, Appellants' Br. 24, are irrelevant.

reinstated. *See* Appellants' Br. 24; App. 131; R. Doc. 150, at 15. In fact, the declarations submitted by WholeStone and Clemens executives conceded that vacatur would force them to lower their line-speeds to 1,106 head per hour. P.App. 107–08; R. Doc. 104-1, at 3–4; P.App. 110; R. Doc. 104-2, at 2. The district court, which had overseen this case for nearly two years, did not abuse its discretion in finding that the Plants' desire to pursue a new legal theory, based on assertions that conflict with declarations they filed a year earlier, did not justify late intervention.

The Plants note that USDA did not appeal the district court's summary-judgment decision. But a party's decision not to appeal does not make a motion to intervene timely where the putative intervenor had reason to intervene earlier. *See*, *e.g.*, *Wholesale Grocery Prods.*, 849 F.3d at 768 (affirming finding of untimeliness after party did not appeal); *Floyd*, 770 F.3d at 1058–59 (affirming denial of intervention on timeliness grounds after appellant dropped its appeal). Further, USDA's decision not to appeal cannot help the Plants here because, even if USDA *had* appealed the district court's decision, it would not have been able to make the argument that the Plants seek to press—that the district court erred in not reinstating previously terminated waivers—because USDA never asked the district court to do so. *See*, *e.g.*, *Orion Fin. Corp. of S.D. v. Am. Foods Grp.*, 201 F.3d 1047,

1048 (8th Cir. 2000) (noting "the basic principle that one cannot raise issues on appeal that have not been raised before the district court").[8]

The cases on which the Plants reply are not to the contrary. *See* Appellants' Br. 26–30. None of those cases involved a putative intervenor that waited until late in the proceedings to raise a new issue that could have been raised earlier. And none of those cases involved an intervenor that had submitted a sworn declaration in the case that took a position contrary to the one that it sought to assert via intervention nine months later. For example, in *Peruta v. County of San Diego*, the Ninth Circuit deemed California's motion to intervene at the *en banc* stage to defend a statute timely because the plaintiffs' "original challenge to … county policies did not appear to implicate the entirety of California's statutory scheme," but "the panel opinion unmistakably did." 824 F.3d 919, 940 (9th Cir. 2016). And in *Sierra Club v. Espy*, the Fifth Circuit held timely a motion to intervene right after the district court issued a preliminary injunction, explicitly noting movants' interests in participation in the ongoing district court proceedings. 18 F.3d 1202, 1207 (5th Cir. 1994). Two other cases cited by Appellants involve motions to intervene to address proposed settlements, filed quickly after the

[8] The Plants did not seek to intervene to address the issues that USDA *could* appeal: the district court's finding that USDA acted arbitrarily and capriciously and its decision not to "exercise its discretion to depart from the normal APA remedy of vacatur." A66.

movants learned of the settlements. *See Benjamin v. Department of Public Welfare of Pennsylvania*, 701 F.3d 938 (3d Cir. 2012); *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782 (6th Cir. 2004). The circumstances in these cases are far afield from those in this one.

The Plants' excuse for their delay boils down to the fact that the district court rejected the arguments about remedy that USDA and industry amici—supported by declarations from two of the Plants—had made earlier in the case. But as the district court put it, "the fact that the case was not resolved in [the Plants'] preferred manner does not justify an untimely intervention." A78. The district court found the circumstances here analogous to those in *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), where the Sixth Circuit reversed a grant of intervention on timeliness grounds. *See* A78–79. There, after the State of Ohio decided not to appeal an adverse decision, railway companies sought to intervene to request that the district court modify the scope of its summary judgment order so that it did not impact them. The Sixth Circuit held that intervention should have been denied, explaining: "The intervenors chose to rely on the Attorney General's best efforts, which they were entitled to do. They are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution." 6 F.3d at 396. Similarly, here, the Plants relied on USDA's best efforts (bolstered by their own declarations) through summary judgment; they may not now enter the case

seeking a different resolution to avoid the consequences of that strategic decision. *See U.S. Bank*, 765 F.3d at 870 (affirming denial of intervention as untimely where movant "assumed … risk [of loss] by choosing to protect its interests through third parties rather than to join the litigation directly at the outset"); *ACLU*, 643 F.3d at 1095 (affirming denial of intervention where movants relied on defendant "to adequately represent their interests despite their knowledge of the case and its progress").

D. The district court did not abuse its discretion in finding intervention would prejudice the parties.

Finally, while recognizing that it was not necessary to consider prejudice given its conclusions as to the other timeless factors, the district court found that intervention at such a late juncture would risk prejudice to USDA. A79. The court accepted USDA's arguments that the delayed intervention "would frustrate USDA's ability to manage a national food safety system." A79–80. As the court explained, the purpose of the 90-day stay of judgment was to allow USDA time to determine how to best proceed in light of the court's invalidation of the line-speed provision. A80. Through intervention, however, the Plants sought to re-open the issue of remedy and to take the decision whether to grant new waivers out of USDA's hands and place it in the court's hands. *See* App. 176; R. Doc. 157, at 6 (USDA opposition to Waiver Recipients' motion). The Plants do not address this

finding and have thus forfeited any argument that the district court's analysis of the fourth factor was erroneous.[9]

Moreover, the issue of remedy was extensively briefed by the parties and amici and then resolved by the district court. The Plants seek to re-open that issue to raise a new legal argument. As this Court has held, the belated "introduction of a new legal theory" prejudices the parties. *ACLU*, 643 F.3d at 1094; *see also U.S. Bank*, 765 F.3d at 870 (affirming district court's denial of motion as untimely and finding "reasonable for the court to think the parties could be prejudiced by having to cover the same ground again").

* * *

While the Plants argue that "[t]his Court liberally upholds intervention against claims of untimeliness," Appellants' Br. 31, this Court's precedent establishes no such rule. To the contrary, this Court consistently defers to district judges' reasoned findings of untimeliness. *See, e.g.*, *SEECO*, 922 F.3d

[9] USDA has now done so, and has announced that it will conduct a trial for NSIS participating establishments, during which "establishments will be permitted to operate at an increased line speed for a period of up to one year during which time they will collect data that measures the impact of line speed on workers." USDA, Constituent Update – November 12, 2021, Time-Limited Trial for NSIS Establishments, https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-november-12-2021. This development highlights that allowing the Plants to re-open this litigation would be prejudicial to USDA's ability to manage its regulatory scheme, and that intervention is not necessary to protect the Plants' ability to seek waivers if they believe that they can operate at higher line speeds without putting worker safety at risk.

at 405–06; *Wholesale Grocery Prods.*, 849 F.3d at 768 ; *U.S. Bank*, 765 F.3d at 870; *Uponor*, 716 F.3d at 1065; *Osby v. Barela*, 500 F. App'x 565, 2013 WL 1285934, at *1 (8th Cir. Apr. 1, 2013); *Planned Parenthood of the Heartland*, 664 F.3d at 718; *Ritchie*, 620 F.3d at 834; *Williams v. Dover Elevator Co.*, 18 F. App'x 456, 2001 WL 1042210 at *1 (8th Cir. Sept. 12, 2001); *Minn. Milk Producers*, 153 F.3d at 646; *Northeastern Living Ctr., Inc. v. Lake Region Development, Inc.*, 89 F.3d 841, 1996 WL 343041 (8th Cir. June 24, 1996).[10] Given the circumstances here—parties seeking to intervene after summary judgment to raise a new argument that is inconsistent with an argument they made earlier in the case—the district court's considered judgment that each of the four factors supported a finding of timeliness was well within its discretion.

II. The Plants' failure to meet the requirements of Rule 24(a)(2) is an alternative basis for affirmance.

Because "[t]he issue of the timeliness of a motion to intervene is a threshold issue," *Ritchie*, 620 F.3d at 8234, the district court did not address any of the other requirements for intervention. This Court, however,

[10] For this reason, the Plants' suggestion that affirmance in this case will change practice in this Circuit and lead to "a rash of new earlier intervention motions," Appellants' Br. 30, lacks any merit. And to the extent that this Court's decision encourages parties to speak up earlier in a case if they have a concern about remedy that the parties themselves do not address, *that* would be "an affirmatively good thing" "[f]rom the standpoint of judicial efficiency." Appellants' Br. 29.

may affirm the denial of intervention "on any ground supported by the record." *P.A.C.E. v. Kan. City Mo. Sch. Dist.*, 267 F. App'x 487, 2008 WL 508608, at *1 (8th Cir. Feb. 27, 2008); *see also Restaurant Recycling, LLC v. Emp. Mut. Cas. Co.*, 922 F.3d 414, 417 (8th Cir. 2019) (noting this Court "may affirm on any ground raised in the district court"). Here, in addition to its untimeliness, the Plants' motion was properly denied because it did not meet the requirements of Rule 24(a)(2). As UFCW and USDA argued below, *see* App. 166; R. Doc. 156, at 25; App. 172; R. Doc. 157, at 2, the motion failed to satisfy Rule 24(a)(2) because the requested intervention was not based on an "interest relating to the property or transaction that is the subject of the action," and "disposing of the action" will not impair or impede the Plants' "ability to protect" the interest on which they based their motion.

The subject of this lawsuit was whether USDA's refusal to consider worker safety in adopting the NSIS line-speed exemption provision complied with the reasoned decisionmaking requirement of the APA. The Plants' moved to intervene solely to address what they claimed were "new remedial questions as to which [they] have distinct interests." App. 134; R. Doc. 150, at 18. The sole "unique interest" they sought to protect was their interest in now-terminated waivers that had been issued pursuant to a *different* regulation. App. 121; R. Doc. 150, at 5.

The resolution of this case, however, has no impact on that "unique interest" or the Plants' ability to protect it, as is clear from the district court's

actual disposition of the case. The *only* thing the district court did was vacate 9 C.F.R. § 310.26(c), the provision that granted exemptions from the 1,106 hph line speed limit to NSIS participants. A60, A68.[11] While the Plants repeatedly refer to the district court as having "reinstated prior rules," *see, e.g.*, Appellants' Br. 11, the court did not state that it was reinstating any rule. The rule that existed both before and after the 2019 NSIS Rule remained in place and provides that, absent some exemption, plants cannot run their lines faster than 1,106 hph. *See* 9 C.F.R. § 310.1(b)(3). The one vacated provision, section 310.26(c) was *not* the authority for either granting or terminating the Plants' waivers. As the Plants concede, the waivers they seek to intervene to protect were issued pursuant to 9 C.F.R. § 303.1(h). *See* Appellants' Br. 5. And the district court did nothing with respect to that regulatory provision. Indeed, it would have been outside the district court's authority under the APA to set aside the termination of non-NSIS waivers without concluding that the termination—an agency action that was not challenged in this case—met one of the criteria for vacatur listed in 5 U.S.C. § 706(2). *See, e.g.*, *Neb. Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (finding district court abused discretion in vacating agency publications when plaintiffs did not

[11] Though the Plants refer to the district court's vacatur of "the Final NSIS Rule," *see* Appellants' Br. 9, the district court agreed with USDA and did *not* vacate the entire NSIS Rule. A57–60.

challenge their validity); *Cath. Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994) (noting it "would exceed the statutory scope of review for a court to set aside" provisions not held invalid); *Colo. Enviro. Coalition v. Salazar*, 875 F. Supp. 2d 1233, 1259 (D. Colo. 2012) (declining to vacate actions purportedly based on action deemed invalid as outside "the scope of the instant action").

The Plants' interest in their section 303.1(h) waivers do not relate to the subject of *this* action, involving a challenge to a different regulation. *See* June 2, 2021 Order, P.App. 145; R. Doc. 173, at 1 ("USDA's decision to end the Pilot Participants' line speed waivers was not challenged in this litigation."). And if the Plants believe that their preexisting, non-NSIS waivers were wrongfully terminated by USDA, nothing in the district court's order bars them from challenging the termination of those waivers—a separate final agency action—in a separate case. At the same time, nothing in the district court's order precludes the Plants from seeking, or USDA from granting, a *new* exemption from the 1,106-hph limit, either via the waiver process, 9 C.F.R. § 303.1(h), FSIS's petition process, 9 CFR part 392, or otherwise. Indeed, USDA has recently announced a new program for plants to do just that. *See supra* p. 27 n.9. As this Court has previously recognized, the presence of alternative avenues to protect a putative intervenor's interest shows a lack of impairment. *See Jenkins by Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996). Applying this principle, courts have regularly

found that the fact that a party can protect its interest through a separate lawsuit precludes intervention as of right. *See, e.g.*, *Warren v. Comm'r of Internal Revenue*, 302 F.3d 1012, 1015 (9th Cir. 2002)*; see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) (superseded by statute on other grounds) (Rule 24(a)(2) not met where movant could protect interest in other action); *Wholesale Grocery Prods.*, 849 F.3d at 769 (Colloton, J., concurring) (noting disposition of action would not impair or impede putative intervenor's interest since it could pursue a separate action); *George v. Uponor, Inc.*, 290 F.R.D. 574, 578 (D. Minn. 2013) (denying motion to intervene where movant had ability to protect interest in separate litigation).

Even if the Plants' theory about the impact of vacatur (the theory that forms the basis for the motion to clarify that they seek to intervene to file) were correct, the Plants' participation in this action would be unnecessary. UFCW disputes the Plants' assertion that "the automatic effect of vacating [the line-speed exemption] was to reinstate the HIMP pilot program" that had been adopted and terminated pursuant to a different regulatory provision. Appellants' Br. 9. But if the Plants were right, the result would be the same whether the Court vacated the line-speed provision or not because, either way, the Plants would be exempted from the regulatory line-speed limits.

This outcome would have multiple consequences for the Plants' intervention motion. First, under their theory, the Plants do not have

standing to participate in this action because they have not been harmed by the district court's vacatur. *See Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 441 (D.C. Cir. 1998) (standing analysis requires accepting proponent's legal theory); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 2020 WL 7024193, at *5 (D.D.C. Nov. 30, 2020) (same). Second, if the restoration of the Plants' waivers was "automatic" and, indeed "already implicit in the Court's ruling," as they argued below, App. 119; R. Doc. 150, at 3, the Plants' participation in this case is unnecessary. Relying on what they consider a "general principle of administrative law," Appellants' Br. 16 n.7, they could have proceeded as if those waivers were restored and challenged any attempt by USDA to enforce the 1,106-hph limit as to them. That the Plants did not proceed with this course, combined with the representations they made earlier in the case as to the impacts of vacatur of the NSIS Rule, indicates that they are not as confident in this legal theory as their briefing would suggest. And it provides further evidence that what the Plants sought to intervene below not to clarify the district court's remedial order, but to attack it. Intervention, however, is not a tool "to relitigate matters already determined in the case." *Arizona*, 460 U.S. at 615; *see also Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 85 (8th Cir. 1984) ("Intervenors … must take the lawsuit as they find it."). Thus, even putting aside that the Plants' motion was untimely, it was appropriately denied.

CONCLUSION

For these reasons, Plaintiffs-Appellees respectfully request the Court affirm the district court's denial of the motion to intervene.

Respectfully submitted,

/s/ Adam R. Pulver

Timothy J. Louris
MILLER O'BRIEN JENSEN P.A.
120 South Sixth Street
Suite 2400
Minneapolis, MN 55402

Adam R. Pulver
Nandan M. Joshi
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Attorneys for Plaintiffs-Appellees

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 8,366 words.

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November 29, 2021

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which will notify all the parties.

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees