UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL No. 227, *et al.*, *Plaintiffs*, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendant*.	Civil Action No. 20-2045 (TJK)

MEMORANDUM OPINION AND ORDER

Plaintiffs, five local labor unions and their international affiliate, sue the Department of Agriculture under the Administrative Procedure Act to challenge a waiver program for line speeds at poultry processing plants. Under the program, plants where Plaintiffs' members work are operating at speeds faster than the maximum rate set by regulation, which Plaintiffs say increases workers' risk of injury. Before the Court is Defendant's motion to dismiss under Rule 12(b)(1) for lack of standing and under Rule 12(b)(6) for failure to state a claim because, it argues, worker safety falls outside the zone of interests protected by the governing statute. For the reasons explained below, the Court holds that Plaintiffs have standing and fall within the zone of interests. Thus, it denies the motion.

I. Background

The U.S. Department of Agriculture ("USDA") regulates poultry producers through its Food Safety Inspection Service ("FSIS") under the Poultry Products Inspection Act ("PPIA"). The PPIA was enacted to protect the health and welfare of consumers "by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and

packaged." 21 U.S.C. § 451. During processing, workers perform repetitive tasks, such as hanging chickens on lines and using saws, knives, scissors, and other tools to debone the birds, while working on lines that carry chicken carcasses through the plant. ECF No. 1 ("Compl.") ¶¶ 16–18. Line speed, or the speed at which the carcasses move, is quantified by the number of birds per minute (bpm), which reflects the time it takes a carcass to be inspected. *Id.* ¶ 27.

Under its current poultry inspection system, the FSIS established a maximum line speed of 140 bpm. *Id.* ¶¶ 28–29, 32–33. After at first proposing 175 bpm, the FSIS ultimately chose the lower speed after considering comments, including some about worker safety. *Id.* ¶¶ 29, 31, 33. In 2018, the FSIS denied a petition from the National Chicken Council, an industry trade association, to increase maximum line speeds. *Id.* ¶¶ 41–45. Instead, the FSIS announced a waiver program to allow some poultry producers to operate at speeds up to 175 bpm if they satisfied certain criteria, such as a history of regulatory compliance. *Id.* ¶¶ 46–50. A plant that receives a waiver must routinely operate at least one line at speeds above 140 bpm on average. *Id.* ¶ 59. As of March 20, 2020, the FSIS is no longer accepting waiver applications, but to date it has granted line-speed waivers to 35 chicken processing plants. *Id.* ¶¶ 63–64.

Plaintiffs represent employees who work on poultry processing lines at plants that have received waivers. *Id.* ¶¶ 1, 65. Plaintiffs bring claims under the Administrative Procedure Act ("APA"), asserting that the USDA enacted the wavier program without the required notice and comment rulemaking procedures, and that its decision to do so was both arbitrary and capricious and otherwise unlawful. *Id.* ¶ 76–90. Defendant, the USDA, has moved to dismiss under Rules 12(b)(1) and 12(b)(6). Defendant argues Plaintiffs lack standing because they have not shown that an increase above 140 bpm causes a substantial increase in the risk of injury. ECF No. 9 at 3. In the alternative, Defendant argues that Plaintiffs fail to state a claim because the PPIA is

concerned with consumer, not worker, safety, and thus their claims thus fall outside the statute's zone of interests. *Id.*

II. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) "presents a threshold challenge to the court's jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). As federal courts are courts of limited jurisdiction, it is "presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Thus, when faced with a motion to dismiss under Rule 12(b)(1), "the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence." *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48, 53 (D.D.C. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In reviewing such a motion, while the Court is not limited to the allegations in the complaint and may consider materials outside the pleadings, the Court must "accept all of the factual allegations in [the] complaint as true." *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (alteration in original) (*quoting United States v. Gaubert*, 499 U.S. 315, 327 (1991)).

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court must "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

III. Analysis

A. Associational Standing

An association like Plaintiffs may have standing "to redress its members' injuries, even without a showing of injury to the association itself." *United Food & Commercial Workers Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996). At the motion to dismiss stage, the association "must plausibly allege or otherwise offer facts sufficient to permit the reasonable inference (1) that the plaintiff has at least one member who 'would otherwise have standing to sue in [her] own right'; (2) that 'the interests' the association 'seeks to protect are germane to [its] purpose'; and (3) that 'neither the claim asserted nor the relief requested requires the participation of [the] individual members in the lawsuit.'" *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 17–18 (D.D.C. 2018) (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Plaintiffs have met all three requirements, even if it is not a slam dunk for them. As explained in more detail in a separate section below, Plaintiffs have established that workers on poultry lines with increased line speeds would otherwise have standing to sue in their own right. And in turn, Plaintiffs have no trouble showing that they have "at least one member" who works on such a line. *Pub. Citizen*, 297 F. Supp. 3d at 17. Indeed, Plaintiffs represent workers who work on poultry processing lines at plants that have received FSIS waivers allowing the plants to increase line speeds from 140 bpm to 175 bpm, and have submitted declarations from such workers. *See* Compl. ¶¶ 9–14; ECF No. 11 at 20–21 (citing declarations of workers). And because a plant that receives a waiver must routinely operate at least one line at speeds above 140 bpm on average, or risk having its waiver revoked, these members have been subjected to

the faster line speeds and the associated increased risk of injury.[1] Compl. ¶ 59; ECF No. 11-5 ("Lewis Decl.") ¶¶ 11–13 (reporting faster line speeds); ECF No. 11-14 ("Foster Decl.") ¶ 8 (same). Plaintiffs satisfy the germaneness element as well because they seek to protect the safety and health of workers, which is not merely germane, but central, to a union's purpose. Finally, the asserted APA claims do not require the individual members' participation in this lawsuit. This third element "focus[es] on matters of administrative convenience and efficiency, not on elements of a case or controversy." *Loc. 751*, 517 U.S. at 557. Individual union members are unnecessary parties here because, as Plaintiffs point out, the merits of the APA claims asserted turn only on the administrative record, and not their particular circumstances. *See* ECF No. 11 at 20.

B. Article III Standing

The core of the associational standing analysis in this case turns on whether the workers have standing to otherwise sue in their own right under the familiar, three-part Article III standing test. To establish standing, a plaintiff must show that (1) he has "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) "a causal connection" exists between the injury and the challenged conduct, and (3) a favorable decision will likely redress the injury. *Lujan*, 504 U.S. at 560–61 (citations and internal quotation marks omitted).

[1] Defendant is correct that Plaintiffs must show "that at least one specifically identified member has suffered an injury-in-fact." *See* ECF No. 9 at 12 (quoting *Am. Chem. Council v. Dep't of Transp.*, 468 F.3d 810, 815 (D.C. Cir. 2006)). But to the extent Defendant suggests Plaintiffs must have done so in the complaint, that is not required. Declarations suffice, such as those submitted by Plaintiffs. *See Am. Chem. Council*, 468 F.3d at 820 (contemplating that plaintiff organization could have submitted evidence identifying members specifically harmed); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 61 (D.D.C. 2019) (declarations supported injury in fact).

1. Injury in Fact

An increased risk of harm may satisfy the injury in fact requirement when there is "*both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.,* 489 F.3d 1279, 1295 (D.C. Cir. 2007). As the Supreme Court recently put it, "a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). While the Constitution "compels a very strict understanding of what increases in risk and overall risk levels can count as 'substantial,'" *Pub. Citizen*, 489 F.3d at 1296, "the D.C. Circuit has instructed that the 'proper way' to analyze such a claim is through the lens of imminence: to 'consider the ultimate alleged harm—such as death, physical injury, or property damage from car accidents—as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently 'imminent' for standing purposes,'" *Pub. Emps. for Envtl. Resp. v. Bernhardt*, No. 18-cv-1547 (JDB), 2020 WL 601783, at *4 (D.D.C. Feb. 7, 2020) (quoting *Pub. Citizen*, 489 F.3d at 1298).

A substantial increase in the risk of harm is a "a significant increase in risk that, while not necessarily quantifiable, is 'sufficient to take the suit out of the category of the hypothetical.'" *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 189 (D.D.C.), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015) (quoting *Sierra Club v. Envtl. Prot. Agency,* 754 F.3d 995, 1001 (D.C. Cir. 2014)). While "a plaintiff must ordinarily show that the defendant's action has made it *much* more likely that the harm plaintiff fears will occur than would otherwise be the case . . . if the threatened injury is severe, 'relatively modest increments in risk should qualify for

standing.'" *Id.* (quoting *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1235 (D.C. Cir. 1996)).

Plaintiffs assert that their injury is the increased risk that their members will suffer injuries—such as musculoskeletal disorders like carpal tunnel syndrome and tendonitis—while working on chicken processing lines that, under the waiver program, run at speeds above 140 bpm. Although it is a close call, the Court finds that Plaintiffs have established injury in fact. They have submitted studies, reports, and declarations that show that faster line speeds increase the number of repetitive motions performed by poultry workers, which in turn substantially increases the risk of injury. As at least one worker has attested, line speed increases the number of motions he must make and thus, his pain. Foster Decl. ¶ 8 ("When the line speeds up and I have to make more and faster motions, my pain increases."); *see also* Lewis Decl. ¶¶ 11–13 ("Several months ago, the plant started raising line speeds to 150 birds per minute. . . . Since the speed increase, workers have had difficulty keeping up with the pace of production . . . [and] people also have complained of more pain."). Plaintiffs have also submitted reports showing that workers' reporting of these issues is widespread. *See* ECF No. 11-16 Ex. C ("Human Rights Watch Report") at 49 ("Nearly all workers who spoke with Human Rights Watch identified the same factor that compounds their risk of injury and illness: speed. . . . For decades, federal studies, medical literature, and workers' surveys have found that rapid work speed in the meat and poultry industry increases risk of injury and illness."); ECF No. 11-16 Ex. E ("Oxfam Report") at 24 ("Workers surveyed over the last several years report that the line speed is an enormous part of the reason that workers get injured.").

Moreover, expert declarations and studies bear out the connection between faster line speeds, increased repetitive motions, and a substantially increased risk of injury. *See* ECF No.

11-2 ("Fagan Decl.") Ex. B at 5–6 ("Line speed is one of many workplace factors that increase risk of injury to workers. Decreasing line speed, thereby decreasing repetitions, helps to lower ergonomic risk."); ECF No. 11-16 Ex. F ("OHSA Ergonomics Webpage") at 1 ("Most all jobs in poultry processing involve highly repetitive tasks — repeating the same motions over and over again at a fast pace with little variation in the tasks. . . . When motions are repeated frequently (e.g., every few seconds) for prolonged periods, such as several hours without any break or over an entire workshift, there may be inadequate time for muscles and tendons to recover. If the repetitive tasks also involve other ergonomic risk factors, muscles and tendons become extremely strained or fatigued more quickly."); Oxfam Report at 24 (line speeds are an "enormous part of the reason that workers get injured"). Again, while it is a close call, Plaintiffs' submissions are "sufficient to take [the] suit out of the category of the hypothetical." *Sierra Club*, 754 F.3d at 1001. Indeed, because Plaintiffs' members are at substantial risk of "permanent and disabling" injury, Human Rights Watch Report" at 35, even "relatively modest increments in risk should qualify for standing," *see Mountain States Legal Found.*, 92 F.3d at 1235.

Having established this first element of the test—albeit by a thin margin—Plaintiffs have little trouble satisfying the second: that there is a substantial probability of harm, after considering the increase in risk of injury. Plaintiffs have shown that poultry workers have a substantial probability of serious workplace injury, period—and that probability only grows with the increase in line speed. *See, e.g.*, ECF No. 11-16 Ex. B ("OHSA Regional Instruction") at 2 (noting that the rate of carpal tunnel syndrome among poultry workers is 4.3 times higher than for workers in private industry); ECF No. 11-17 Ex. G ("Galassi Memo") at 2 ("Poultry industry employers in 2013 were also more than 4.5 times more likely to identify repetitive motion as the

exposure resulting in a serious injury, compared to employers in all industries in 2013.").

Defendant argues that Plaintiffs have not shown specifically how much higher the risk is, or that there is a particular risk associated with speeds over 140 bpm, and point out that Plaintiffs have presented no evidence of increased rates of injury since the waiver program began. *See* ECF No. 9 at 15; ECF No. 12 at 6. But the D.C. Circuit has "refused to require a quantitative analysis in order to establish standing in increased risk-of-harm cases," *Food & Water Watch, Inc.*, 808 F.3d at 917, and the Court may draw on "experience and common sense" in evaluating whether there is a substantial risk of injury, *Attias v. Carefirst, Inc.*, 865 F.3d 620, 628 (D.C. Cir. 2017). Given the evidence submitted that line speed is a key factor in poultry workers' workplace injuries, it is consistent with common sense that a line speed greater than 140 bpm substantially increases their risk of injury. Moreover, although Plaintiffs have not presented statistical evidence to show that increased rates of injury have materialized, that is so because the line speed increases have not been in place long enough to cause the kinds of injuries at issue. *See* ECF No. 11-16 Ex. A ("GAO Report") at 30 (noting that 10 months "was not sufficient for a change in workers' health to appear"); Human Rights Watch Report at 35 ("Since cumulative trauma damages internal parts of the body—muscles, tendons, bones, and nerves—it may not be immediately apparent and is often not treated until damage is permanent and disabling."); ECF No. 11-17 Ex. I ("NIOSH Letter") at 2 (ten months that had elapsed since implementation of increased line speeds "was not sufficient to result in a change in health status"). Given the evidence Plaintiffs *have* submitted, this additional evidence is unnecessary for Plaintiffs to show injury in fact on an increased-risk theory.

Defendant also contends that Plaintiffs' argument does not account for countervailing measures that plants could take to reduce the risk of injury. According to Defendant, Plaintiffs

"have failed to account for the changes that plants can make to their production lines to accommodate greater speeds, such as changes to staffing levels, layout, and equipment, which [a National Institute for Occupational Safety and Health letter to the FSIS] shows can keep the overall level of exposure to repetitive and forceful motions for each worker steady." ECF No. 9 at 18. But these are merely hypothetical steps that plants *could* take to reduce worker injury. ECF No. 12 at 8. In contrast, in the case that Defendant relies on to support this argument, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), the plaintiffs failed to consider safety measures that had been *required* by rule when estimating their increased risk of harm from a new system of poultry inspection. The D.C. Circuit reasoned that the complaint did not plausibly allege that the new system substantially increased the risk of foodborne illness compared to the prior one because it failed to grapple with the fact that the new method required "increased offline verification inspectors"—and thus prevented the Court from inferring that the new system, as a whole, would impact the amount of adulterated poultry. *Id.* at 916. Here, no similar safety measures are required to receive a waiver, nor have Defendants provided evidence of any poultry producers actually trying to mitigate the risk of injury from increased line speeds.[2]

For these reasons, Plaintiffs have showed both a substantially increased risk of harm and a substantial probability of harm after taking that increased risk into account—and thus an injury in fact.

[2] In addition, *Food & Water Watch* and another case Defendant cites are distinguishable from the situation here because the plaintiffs in those cases were not directly impacted by the regulation at issue. *See Pub. Citizen*, 489 F.3d at 1284, 1291; *Food & Water Watch*, 808 F.3d at 909. In contrast, Plaintiffs represent workers directly affected by the line speed increase, and there is a straightforward causal link between increased line speeds and risk of worker injury. *See Pub. Citizen*, 489 F.3d at 1289 ("[S]tanding is 'substantially more difficult to establish' where . . . the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." (quoting *Lujan*, 504 U.S. at 562)).

2. Causation and Redressability

Plaintiffs have also satisfied the other two standing elements: causation and redressability. The causal connection between increasing line speeds and increased injury to workers is straightforward for the reasons set forth above, and the Court may redress that increased risk of injury by vacating the waiver program if it was unlawfully promulgated.

* * *

For all the above reasons, Plaintiffs have established associational standing to bring their APA claims.

C. Zone of Interests

To state a claim created by statute, a plaintiff's asserted interests must be "arguably within the zone of interests to be protected or regulated by the statute." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (quotation omitted). The zone-of-interests test is a low bar and "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 225. The Supreme Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.*

The zone-of-interests standard "is particularly generous as applied to plaintiffs who bring suit under the APA, in light of the need to 'preserv[e] the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review.'" *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 144 F. Supp. 3d 35, 58 (D.D.C. 2015) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)); *see also Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) ("[W]e apply the zone-of-interests test in a manner

consistent with 'Congress's evident intent when enacting the APA to make agency action presumptively reviewable.'" (quoting *Patchak*, 567 U.S. at 225)). In APA cases, the "relevant zone of interest" is "defined by a substantive statute, not by the APA." *Am. Inst. of Certified Pub. Accountants v. IRS*, 746 Fed. Appx. 1, 7 (D.C. Cir. 2018) (collecting cases). If an agency has a plaintiff's concerns "in mind" when exercising its authority, "[t]his alone is enough to show that [the plaintiff's] asserted interests at least arguably fall within the zone-of-interests . . . ." *Indian River Cty. v. Dep't of Transp.*, 945 F.3d 515, 529 (D.C. Cir. 2019).

Here, that statute is the PPIA. It requires USDA inspection of poultry producers and regulates sanitary practices, labeling, and other aspects of the production process. *See* 21 U.S.C. § 455 *et seq*. Defendant argues that Plaintiffs' claims fall outside the PPIA's zone of interests because the statute protects the safety of consumers, rather than workers. *See* ECF No. 9 at 20–21. But even assuming Defendant's characterization of the PPIA is right, as long as worker safety is more than marginally related to protecting consumers, Plaintiffs claims are within the PPIA's zone of interests. *See Patchak*, 567 U.S at 225–27; *Indian River*, 945 F.3d at 529–30. Plaintiffs' interests in safe line speeds are more than marginally related to consumers' interests—in fact, they are aligned with them—because, as another court has observed, "[i]f the conditions for the employees are not safe and sanitary, the safety of the food products they prepare is also at risk." *See United Food & Com. Workers Union, Loc. No. 663 v. Dep't of Agric*., 451 F. Supp. 3d 1040, 1053 (D. Minn. 2020). And Plaintiffs cite several examples of instances when the FSIS had the safety of workers in mind when administering the PPIA. *See, e.g.*, ECF No. 11 at 24 ("[W]hen FSIS adopted its current 140 bpm line speed maximum, it 'recognize[d] that evaluation of the effects of line speed on food safety should include the effects of line speed on

establishment employee safety.'") (quoting Proposed Rule, 77 Fed. Reg. at 4423); *id.* at 24–25 (collecting many more examples with citations to the Federal Register).[3]

Defendant's argument to the contrary relies heavily on the D.C. Circuit's recent pronouncement that "[p]rotected interests are ones asserted either by 'intended beneficiaries' of the statute at issue or by other 'suitable challengers'—i.e., parties whose interests coincide 'systemically, not fortuitously' with those of intended beneficiaries." *Twin Rivers Paper Co. LLC v. Sec. & Exch. Comm'n*, 934 F.3d 607, 616 (D.C. Cir. 2019). But in that case, the interests of the plaintiffs—stakeholders in the paper industry—were "systematic[ally] *mis*align[ed] with shareholder preferences" and thus the plaintiffs were distinctly "*un*qualified to advance the interests of shareholders" by challenging a Securities and Exchange Commission rule that allowed investment companies to post shareholder reports online rather than to send paper copies. *Id.* at 618. No such misalignment exists here.

Thus, Plaintiffs' claims easily satisfy the zone-of-interests test.

[3] Defendant does not dispute that the FSIS has considered worker safety but argues that the FSIS lacks the legal authority to do so. *See* ECF No. 12 at 17. But what matters for this purpose is merely whether the FSIS had workplace safety "in mind," and Plaintiffs show that it did. *See Indian River*, 945 F.3d at 529.

IV. Conclusion and Order

For all the above reasons, it is hereby **ORDERED** that Defendant's Motion to Dismiss, ECF No. 9, is **DENIED**.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: August 20, 2021