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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

In a series of legislative enactments throughout the twentieth century, Congress recognized that swine slaughter and processing plants had adopted practices that resulted in unacceptably dangerous and unsanitary conditions for workers in those plants, and dangerous outcomes for pork product consumers. For decades, defendant United States Department of Agriculture (USDA) has had rules in place implementing Congress's mandates to reduce harm to consumers and workers, including limits on how quickly the lines at the facilities can operate

and requirements for certain numbers of federally employed inspectors on the lines. In 2018, USDA proposed to change this regulatory regime by, among other things, eliminating maximum speed limits for the line and reducing the number of federally employed inspectors.

In support of its proposal to create this "New Swine Inspection System" or NSIS, USDA explicitly sought comment on the impact of the proposed changes on the health and safety of plant workers. In response, workers and worker advocates, public health professionals, and respected scientists submitted comments opposing the proposal, citing peer-reviewed data and expert analysis and explaining that NSIS would significantly increase the risk of injury for workers in swine slaughter plants. These commenters noted an array of evidence that showed that increased line speeds would lead to a rise in the already high rates of injuries in packinghouses, which include amputations, muscle tears, joint pain, and daily cuts and lacerations. Commenters also noted that they could not meaningfully respond to the "analysis" of worker safety that USDA referenced in its proposal, or the conclusions the agency drew from it, because USDA refused to either make it publicly available or provide sufficient information about its methodology.

USDA's final rule did not meaningfully depart from its proposal. On the issue of worker safety, USDA did not respond to commenters' concerns about how

the proposed system would harm plant workers or their criticisms of the conclusions contained in the notice of proposed rulemaking. Rather, USDA abandoned altogether its consideration of worker safety. Despite its earlier statement that "evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety," USDA, Proposed Rule, Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4796 (Feb. 1, 2018) (NPRM), USDA now took the position that it could not consider the impact of its actions on worker safety because USDA does not "regulate" worker safety. The agency thus refused to address any of the scientifically credible evidence presented by commenters showing that USDA's rule would harm plant workers or to address commenters' critiques of its purported analysis.

Plaintiffs commenced this action pursuant to the Administrative Procedure Act (APA), alleging that USDA's rule reflected arbitrary and capricious decisionmaking and is contrary to law. Plaintiffs include the United Food and Commercial Workers Union (UFCW), which represents the workers at 42 percent of the plants that USDA expects will adopt NSIS, and three UFCW locals (the Locals) that represent workers at plants in Minnesota, Iowa, Missouri, and Oklahoma. USDA now moves to dismiss Plaintiffs' claims on both standing and merits grounds pursuant to Rules 12(b)(1) and 12(b)(6). USDA's arguments lack merit.

First, Plaintiffs have adequately alleged that USDA's action creates a realistic danger of increased risk to their members' health and safety. USDA itself has stated that it expects the specific plants at which the members of the Locals work, as well as fourteen other plants where UFCW members work, will adopt NSIS, increase their line speeds, and reduce the number of online inspectors. Plaintiffs have alleged that plants at which their members work are taking preparatory steps to convert to NSIS, and, citing extensive scientific evidence, Plaintiffs have also alleged that these changes will increase their members' risks of repetitive stress injuries, lacerations, and amputations. In considering USDA's Rule 12(b)(1) facial attack on standing, the Court must accept these factual allegations as true. USDA's request that the Court ignore these allegations, and that it instead credit the conclusions of a preliminary analysis that USDA failed to make available to commenters, and that Plaintiffs contend is methodologically flawed, is improper. As to causation and redressability, USDA's arguments ignore case law from this and other circuits that recognizes plaintiffs have standing to sue an agency where it has made legal injurious conduct that would otherwise be illegal.

USDA's merits attacks likewise fail. Plaintiffs meet the lenient zone-of-interests test, as their interests are not "marginally related to or inconsistent with the purposes implicit" in the relevant statutes. *Match-E-Be-Nash-She-Wish Band of*

Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399–400 (1987)). Indeed, in limiting the methods of slaughter that USDA can authorize, Congress stated that one of its goals was "safer and better working conditions for persons engaged in the slaughtering industry." 7 U.S.C. § 1901. And in this very rulemaking, USDA acknowledged that an analysis of the "effects of line speed on food safety should include the effects of line speed on establishment employee safety." NPRM, 83 Fed. Reg. at 4796. Plaintiffs are squarely within the underlying statutes' zone of interests.

Addressing Plaintiffs' arbitrary and capriciousness claims, USDA argues that Plaintiffs cannot challenge the agency's failure to consider the impact of its actions on worker safety because USDA does not have a "statutory mandate" to "regulate" worker safety. Def. Mem. at 28. USDA ignores, however, that it is not precluded from considering the real-world effects of actions that it *does* have authority to take. To the extent USDA refused to do so here, whether based on an incorrect view of the law or any other reason, its action was arbitrary and capricious. To the extent that USDA claims that it sufficiently responded to worker safety concerns simply by pointing to its supposed lack of regulatory authority and the existence of the Occupational Safety and Health Administration (OSHA), it is wrong.

Finally, Plaintiffs have adequately alleged that the changes to the inspection model are contrary to law by asserting that the evidence before USDA showed that the combination of increased line speed and reduction in the number of online inspectors makes it impossible for inspectors to conduct the statutorily-required critical appraisal of each carcass. USDA's reliance on a case decided seventeen years ago on a different record is misplaced, particularly because the court in that case explicitly noted that its holding would not dictate the result in future cases such as this one.

The Court should deny USDA's motion to dismiss.

FACTS

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 prior to slaughter, post-mortem, and before entrance into any slaughtering or packaging establishment. 21 U.S.C. §§ 603–05. For post-mortem inspections, the statute provides that "the Secretary shall cause to be made *by inspectors appointed for that purpose* a post mortem examination and inspection of the carcasses and parts thereof of *all* amenable species to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment." *Id.* § 604 (emphases added). 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.

Regulatory Background

Pursuant to the FMIA, as amended, the USDA's Food Safety and Inspection Service (FSIS) has promulgated regulations concerning the processing and inspection of swine. Swine slaughtering and processing plants in the U.S. are organized around "lines," which ferry animals across facilities through the various stages of the slaughtering and disassembling process. Compl. ¶ 23. 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-

0017-8009 at 2 (UFCW Comments), cited in Compl. ¶¶ 28, 42. For the past thirty-four years, regulations have set a maximum speed for swine slaughter lines, tied to the number of online, federally-employed inspectors and the type of swine being slaughtered, topping out at a rate of 1,106 head per hour, with seven online FSIS inspectors. *See* USDA, Final Rule, 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, USDA 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. USDA 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 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 USDA 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 2013, USDA's Office of Inspector General (OIG) conducted an audit of FSIS's inspection and enforcement activities at swine slaughter plants, including plants participating in HIMP. *See* USDA, OIG, *Food Safety and Inspection Service – Inspection and Enforcement Activities at Swine Slaughter Plants*, Audit Report 24601-0001-41 (May 2013), https://www.usda.gov/oig/webdocs/24601-0001-41.pdf. OIG concluded that FSIS had "not adequately oversee[n] the [HIMP] program," noting:

> In the 15 years since the program's inception, FSIS did not critically assess whether the new inspection process had measurably improved food safety at each HIMP plant, a key goal of the program.

Id. at i. The OIG audit also concluded that, "[s]ince FSIS did not provide adequate oversight, HIMP plants may have a higher potential for food safety risks." *Id.* at 17. OIG noted that three of the five plants participating in HIMP had the highest noncompliance records (NRs) in the industry, and that one of those was "the swine plant with the most NRs nationwide." *Id.* at 18, 19.

In August 2013, the Government Accountability Office (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), https://www.gao.gov/assets/660/657144.pdf. That 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 9, 18. It criticized the methodology USDA had used in the assessment it had done, which was limited to the poultry pilots. *Id.* at 23–26. GAO also noted concerns "that faster line speed creates food safety and worker safety concerns" and that the program created a "reduced ability [of inspectors] to see potential defects." *Id.* at 20.

In 2014, USDA conducted its own evaluation of HIMP, which replicated many of the methodological flaws that GAO had noted in USDA's assessment of the poultry pilots, including generalizing data and using data only from snapshot years rather than from the duration of the program. USDA, Final Report, *Evaluation of HACCP Inspection Models Project (HIMP) for Market Hog*s (November 2014), https://www.fsis.usda.gov/wps/wcm/connect/f7be3e74-552f-4239-ac4c-

59a024fd0ec2/Evaluation-HIMP-Market-Hogs.pdf; *see also* Comments from Consumer Federation of America, May 2, 2018, FSIS-2016-0017-81413 (CFA Comments) at 6 (cited in Compl. ¶ 57) (explaining flawed analysis). The evaluation did not address the worker safety concerns that GAO noted.

The Proposed Rule and Comments

On February 1, 2018, USDA 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." NPRM, 83 Fed. Reg. 4780. The main elements of the proposed NSIS were a revocation of maximum line speeds; a reduction of the number of FSIS online 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. 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 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— only pointing to the generic website for the Bureau of Labor Statistics' Survey of Occupational Injuries and Illnesses. *Id.*

Via both comments and other communications with USDA, several entities requested that USDA produce its analysis, its methodology, and the data it relied upon, and extend the comment period, so that interested members of the public could analyze the data themselves and comment on it meaningfully. Compl. ¶ 39. As one commenter put it, "How can the public comment on a review when there is no study publicly available to review?" *Id.* (citing Comments from Worksafe, May 1, 2018, FSIS-2016-0017-79029, at 2 (Worksafe Comments)). USDA did not make the study publicly available during the comment period. *See* Compl. ¶¶ 40, 46.

USDA received more than 83,000 comments in response to the NPRM. Compl. ¶ 41. In addition to Plaintiff UFCW, several UFCW locals, and over 6,000 individual UFCW member workers, commenters included national occupational health and safety organizations and well-respected academics who explained that NSIS, as proposed, would have significant negative impacts on workplace health and safety. *See id.* ¶¶ 2, 28, 41–42 (citing comments). 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. *Id.* ¶ 27 (citing Comments from the National Employment Law Project (NELP Comments), Apr. 30, 2018, FSIS-2016-0017-76250 at 2 (citing Bureau of Labor Statistics, *Employer-Reported Workplace Injuries and Illnesses (Annual)* (Nov. 8, 2018), https://www.bls.gov/web/osh.supp.toc.htm)); ¶ 42 (citing Comments from George Washington University Professor Melissa J. Perry, May 8, 2018, FSIS-2016-0017-83467 (Perry Comments); Comments from the American Public Health Association, Occupational Health & Safety Section, May 1, 2018, FSIS-2016-0017-611 (APHA Comments); UFCW Comments at 6). 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. Compl. ¶¶ 28, 42 (citing NELP Comments at 2; UFCW Comments at 6–7; Comments from Association of Occupational and Environmental Clinics, May 8, 2018, FSIS-2016-0017-79890 (AOEC Comments) at 3; APHA Comments at 3–7; GAO, GAO-16-337, *Additional Data Needed to Address Continued Hazards in the Meat & Poultry Industry* (2016), https://www.gao.gov/assets/680/676796.pdf). 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. Compl. ¶¶ 29, 42. 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. Compl. ¶ 30 (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" and that the elimination of a maximum line speed will "potentially cause an epidemic of disabling work-related MSDs [musculoskeletal disorders]." Compl. ¶ 2 (quoting Perry Comments)).

In addition to concerns about the impact of the line-speed-increase elements of NSIS, commenters explained how reducing the presence of government-trained food inspectors on the lines would reduce worker and food safety. Compl. ¶ 43 (citing NELP Comments; Comments from Food & Water Watch, May 2, 2018, FSIS-2016-0017-82026 (FWW May 2 Comments)); *see also* UFCW Comments at 10 (explaining how change to inspection system harms workers and food safety). They also explained how, more generally, worker safety plays a role in consumer food safety. *See* Compl. ¶ 57 (citing CFA Comments at 16). As one commenter 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." CFA Comments at 16 (cited at Compl. ¶ 57); *see also* UFCW Comments at 3, 9 (explaining connection between injury rates and turnover).

USDA's "Analysis" Becomes Public

Although several groups submitted Freedom of Information Act (FOIA) requests for USDA's worker safety analysis, USDA did not provide the information before the comment period closed. Compl. ¶ 46. 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. *Id.*

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. Compl. ¶ 47 (quoting 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*, https://www.nelp.org/wp-content/uploads/Monforton-Vaughan-Review-USDA-FSIS-Injury-Data.pdf.). 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.*

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. Compl. ¶ 48. USDA denied these requests, asserting that the reference to the Survey of Occupational Injuries and Illnesses it provided in the NPRM had been sufficient to allow members of the public to respond. Compl. ¶ 49. The linked website, however, contained only aggregate industry-wide data; given the lack of information about USDA's methodology, members of the public could not replicate USDA's purported analysis. *Id.*

Final Rule

On October 1, 2019, USDA published the final NSIS rule, with an effective date of December 2, 2019. USDA, Final Rule, Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019) (the Rule). Consistent with the NPRM, the Rule eliminated maximum line speeds, shifted online 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.*

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, stating that "all the information that FSIS used in its analysis is publicly available." *Id.* at 52,305. USDA did not acknowledge commenters' point that the NPRM did not provide the public sufficient information as to precisely what data on which 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 it received laying out how harmful NSIS would be to workers. *Id.* at 52,314–15. 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," and stated that FSIS was "authorize[d] [] to administer and enforce laws and regulations solely to protect the health and

welfare of consumers." *Id.* at 52,315. 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.

In response to comments about the inability of a reduced number of line inspectors to conduct critical appraisals of animals at unlimited speeds, USDA noted that the remaining inspectors would retain authority to slow the line speed. *See id*. at 52,312.

ARGUMENT

I. Plaintiffs have adequately alleged facts demonstrating their standing to sue.

A. Legal standard

USDA seeks dismissal of Plaintiffs' claims for a lack of standing pursuant to Rule 12(b)(1). In this circuit, "a court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack.'" *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). A facial attack "challenges the sufficiency of a

plaintiff's pleadings," whereas "a factual attack challenges the existence of subject-matter jurisdiction." *Smith v. Bradley Pizza, Inc.*, 314 F. Supp. 3d 1017, 1022 (D. Minn. 2018). Here, USDA makes only a facial attack. *See* Def. Mem. 16. Accordingly, Plaintiffs "receive[] the same protections as [they] would defending against a motion brought under Rule 12(b)(6)." *Osborn*, 918 F.2d at 729 n.6. The court thus "accepts all factual allegations in the pleadings as true and views them in the light most favorable to the nonmoving party," *Hussey v. Minn. State Servs. for the Blind*, Civ. No. 18-2753 (DSD/ECW), 2019 WL 2436253, at *3 (D. Minn. June 11, 2019) (citing *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008)), and considers "only the materials that are necessarily embraced by the pleadings and exhibits attached to the complaint," *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (cleaned up). In considering standing, the Court also "assume[s] that on the merits the plaintiffs would be successful in their claims." *Am. Farm Bureau Fed'n v. U.S. EPA*, 836 F.3d 963, 968 (8th Cir. 2016) (quoting *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106 (D.C. Cir. 2008)); *see also United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006) (rejecting standing argument that would require addressing "the ultimate question to be decided by this court").

Notably, this standard differs from that utilized in the D.C. Circuit and applied in *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), cited by USDA. That court looks beyond the pleadings in evaluating motions to dismiss

on standing grounds. *See id.* at 913; *e.g.*, *id.* at 917–18 (examining affidavits and evaluating the merits of statistical arguments). Moreover, the injury from increased line speeds at issue in *Food & Water Watch* that the D.C. Circuit found too speculative to support standing was an increased risk to consumers of foodborne illness as a result of changes to the poultry system. That risk is not the basis for Plaintiffs' standing in this case.

B. Plaintiffs' complaint satisfies each element of associational standing.

Plaintiffs bring this action on the basis of associational standing. "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)). USDA does not challenge the second two prongs, nor could it: the safety of a labor union's members' workplace is plainly germane to its purpose, and an APA case like this one, which is largely confined to the administrative record and does not seek member-specific relief, 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.").

USDA argues, however, that Plaintiffs' members would not have standing to sue in their own right, because the likelihood of injuries is too remote and speculative and because any such injuries are not traceable to the Rule. As to the former, the complaint and documents referenced therein provide a sufficient, nonspeculative factual basis for Plaintiffs' allegations that the Rule will place Plaintiffs' members—who work at the plants that USDA itself has identified will convert to NSIS—at an increased risk of physical injury. As to the latter, case law is clear that where, as here, a government agency makes lawful third-party conduct that would otherwise be unlawful, and that conduct causes injury, the injury is sufficiently traceable to government action.

1. The increased risk of physical harm to Plaintiffs' members is not speculative.

"The Eighth Circuit has repeatedly held that a plaintiff … need not 'await consummation of threatened injury' before filing suit to block a new statute or regulation." *Shiraz Hookah, LLC v. City of Minneapolis*, No. 11-CV-2044 PJS/JJK, 2011 WL 6950483, at *2 n.2 (D. Minn. Dec. 30, 2011) (quoting *S.D. Mining Ass'n v.*

Lawrence Cnty, 155 F.3d 1005, 1008 (8th Cir. 1998)). Rather, a plaintiff must allege facts that demonstrate a "substantial risk" that the harm will occur. *In re SuperValu, Inc.*, 870 F.3d 763, 769 (8th Cir. 2017) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014)). This standard requires a plaintiff "merely [to] demonstrate 'a realistic danger of sustaining a direct injury as a result of the [law]'s operation or enforcement.'" *Shiraz Hookah*, 2011 WL 6950483 at *2 n.2 (quoting *S.D. Mining Ass'n*, 155 F.3d at 1008); *see also Ia. Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 584 (8th Cir. 2013); *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 687 (8th Cir. 2012). Here, the facts in the complaint and the reasonable inferences that can be drawn from them, along with USDA's own assertions in the Rule's preamble, demonstrate a sufficiently "realistic danger" that the plants in which Plaintiffs' members work will convert to NSIS, increase the line speeds, and reduce the number of FSIS inspectors, thus increasing their risk of physical injuries. *See Levine v. Johanns*, No. C 05-04764 MHP, 2006 WL 8441742, at *9 (N.D. Cal. Sept. 6, 2006) (finding poultry plant workers had sufficiently alleged injury-in-fact where they alleged USDA policy was allowing plants to adopt certain inhumane slaughter practices, increasing risk of physical injury). USDA's contrary assertions disregard both the relevant legal standards and the procedural posture of their Rule 12(b)(1) facial attack.

First, USDA suggests that Plaintiffs lack standing because they did not identify "any individual member" who would be harmed. Defs.' Mem. 18. Plaintiffs are not required, however, to identify a specific member at the pleading stage. The one Eighth Circuit case cited by USDA, *Owner-Operator Independent Drivers Ass'n, Inc. v. U.S. Department of Transportation*, 831 F.3d 961, 968 (8th Cir. 2016), arose in the context of a petition for review filed directly in the court of appeals where, specifically noting that context, the court went beyond the petition to consider a supplemental declaration. In contrast, the rule for district court complaints is that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)), *quoted in WaterLegacy v. USDA Forest Serv.*, Case No. 17-cv-276 (JNE/LIB), 2019 WL 4757663, at *2 (D. Minn. Sept. 30, 2019). *See also Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (organizational plaintiff was required to provide evidence of standing at the petition stage "[i]n contrast to the plaintiff in a case that has not yet progressed beyond the pleading stage in the district court").

Given this standard, the general allegations that UFCW represents workers in seventeen of the 40 plants USDA expects will convert to NSIS—including, as

USDA concedes in its memorandum, workers on evisceration lines—are more than sufficient to allow the Court to conclude that at least one of Plaintiffs' members (and, in fact, many) work in the plants identified by USDA. *See* Def. Mem. 18 (citing Compl. ¶¶ 10–13, 33–35); Compl. ¶¶ 70.

Nonetheless, USDA argues that it is speculative that any plants will adopt NSIS, because NSIS is "optional," Def. Mem. 18–19, and that simply because NSIS allows plants to increase their line speeds does not mean that any plant will do so, *id.* at 20. This argument belies USDA's own statements that plants will do so: USDA stated that "40 market hog establishments are expected to choose to implement the optional NSIS." Rule, 84 Fed. Reg. at 52,322. This figure includes the four plants where the Locals' members work, and thirteen other plants where workers are represented by UFCW. Compl. ¶¶ 69–70. Further, Plaintiffs have alleged that one of the plants where the Locals' members work has begun preparatory steps that will allow conversion to NSIS (Compl. ¶ 10), two have expressed plans to do so (*id.* at ¶¶ 11,12), and one is already equipped to do so (*id.* ¶ 12). Indeed, Smithfield, the owner-operators of the plant at which plaintiff UFCW Local 440's members work, submitted comments specifically endorsing the revocation of maximum line speeds, which is relevant additional evidence that Smithfield will likely take advantage of the Rule. *See* Comments of Smithfield Foods, FSIS-2016-0017-83035 (May 2, 2018); *see also* Comments of North American

Meat Institute, FSIS-2016-0017-80474 (May 2, 2018) (supportive comments from industry association to which the owner-operators of all of the plants at issue belong).

USDA argues that Plaintiffs cannot rely on the agency's own expectations that the plants in which Plaintiffs' members work will adopt NSIS—even while it asks the Court to defer to such expectations for other purposes. *Cf.* Def. Mem. 21 (asking the court to defer to agency's "predict[ion]" to find plaintiffs lack standing). But it is absurd for an agency to justify its rule based on its conclusions that forty specific plants will adopt NSIS, increase their line speeds by 12.5 percent, and reduce the number of online inspectors, and then argue that Plaintiffs have no basis to believe these same plants will adopt NSIS, increase their line speeds, and reduce the number of online inspectors. Courts have repeatedly rejected similar attempts by agencies that sought to use the reasons they gave to justify the adoption of a rule as a shield against merits attacks, while arguing that plaintiffs may not rely on those same agency statements from the rulemaking record to support standing. *See, e.g.*, *City & County 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); *Pennsylvania v. President United States*, 930 F.3d 543, 562 (3d Cir. 2019) (basing conclusion that injury is not conjectural on agencies' regulatory impact analysis);

Massachusetts v. U.S. Dep't of Health & Human Servs., 923 F.3d 209, 224–25 (1st Cir. 2019) (citing agencies' assumptions in regulatory impact analysis as evidence in support of standing); *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (same); *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). At the pleading stage, particularly, the Court should not assume USDA's rule will not succeed in achieving the agency's goal. *Cf. Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 9 (D.C. Cir. 2015) (citing agency's expressed "motivation" as evidence in support of standing).

The D.C. Circuit rejected an argument similar to USDA's here in *American Trucking Ass'ns*, 724 F.3d 243. There, a truck driver challenged a rule that would increase the number of hours a driver could work without a break. The agency disputed his standing, noting that "nothing in the rule affirmatively require[d] [him] to log those [additional] hours." *Id.* at 248. The D.C. Circuit explained, however, that it was "'a hardly-speculative exercise in naked capitalism' to suggest motor carriers would respond to the hours-increasing provisions by requiring their drivers to use them and work longer days." *Id.* (quoting *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006)). The court noted that the agency "counted on that fact when it

increased driver hours and flexibility to help counteract the imposition of new limits and costs elsewhere. The agency cannot now ignore this reality." *Id.*

Similarly, in *Massachusetts v. U.S. Dep't of Health & Human Services*, the government argued that it was speculative that any women in Massachusetts would lose contraceptive coverage based on a rule that granted exemptions from requirements that insurers provide contraceptive coverage. Citing the government's own regulatory impact analysis, the First Circuit explained that it was "improbable based on the evidence that *no* women in [Massachusetts] would lose contraceptive coverage." 923 F.3d at 225.

Likewise here, it is not speculative that a rule that eliminates limits on line speeds and reduces the number of online inspectors will prompt plants to increase their line speeds and reduce the number of online inspectors in order to facilitate increased production. The agency counted on that fact in promulgating the Rule. *See, e.g.*, Rule, 84 Fed. Reg. at 52,335 (explaining that an "increase in line speed is synonymous with an increase in industrial efficiency"). USDA's own conclusions make it improbable that none of the seventeen plants where UFCW members work—42.5 percent of the plants USDA expects will convert to NSIS—will adopt NSIS and increase their line speeds by 12.5 percent. At this early procedural posture, Plaintiffs have thus sufficiently established that at least some members work in plants that will adopt NSIS. *See Ia. League of Cities v. EPA*, 711 F.3d 844, 869

(8th Cir. 2013) (plaintiffs need not establish that all of their members would have standing to sue individually so long as they can show that one of them would have standing (citing *Warth v. Seldin,* 422 U.S. 490, 511 (1975)).

USDA further suggests that the agency's adoption of NSIS is not the cause of any injury because the agency is merely *allowing* plants to act in a way that puts Plaintiffs' members at increased risks, not *requiring* them to do so. That suggestion runs contrary to the principle, reaffirmed by the Supreme Court last term, that plaintiffs can show a non-speculative injury by pointing to "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). As the D.C. Circuit, sitting *en banc*, has explained, the Supreme Court has never suggested "that the challenged law must *compel* the third party to act in the allegedly injurious way." *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998). In that case, the court found that an animal enthusiast had standing to sue USDA over its failure to establish requirements for humane living conditions in animal exhibitions. Although USDA was not mandating inhumane conditions, it was permitting them, thus causing harm. *See also Kuehl v. Sellner*, 161 F. Supp. 3d 678, 683 (N.D. Iowa 2016) (citing *Animal Legal Def. Fund* approvingly), *aff'd*, 887 F.3d 845 (8th Cir. 2018).

Next, USDA takes issue with Plaintiffs' allegations that plants that increase line speeds and reduce the number of inspectors will pose an increased risk to

worker safety. *See* Def. Mem. 20–22. In their complaint, Plaintiffs have made credible allegations that both increased line speeds *and* the reduction in inspectors will cause their members to experience an increased likelihood of harm, explained why this is so, and cited to evidence. *See, e.g.*, Compl. ¶¶ 2, 28, 29, 30, 42, 43, 72, 73. Plaintiffs quoted, for example, the comment of an occupational health expert stating that "there is no doubt that increasing line speed will increase laceration injuries to workers" and that the elimination of a maximum line speed will "potentially cause an epidemic of disabling work-related MSDs [musculoskeletal disorders]." Compl. ¶ 2 (quoting Perry Comments). *See also* UFCW Comments at 8–9 (explaining, based on member experiences, that increased line speeds will increase risk of "neighbor cuts" and musculoskeletal disorders). USDA's assertion that its own "preliminary analysis" suggested otherwise at best creates a merits dispute not properly addressed at this juncture—particularly given Plaintiffs' allegation that USDA's analysis lacks probative value due to its unsound methodology, Compl. ¶ 47, and given USDA's decision to disclaim reliance on this analysis in the final rule, Rule, 84 Fed. Reg. at 52,305 ("FSIS did not use the analysis to draw conclusions on worker safety in HIMP or non-HIMP establishments…."). And although USDA maintains that Plaintiffs do not assert that the reduction in the number of inspectors has "any bearing on worker safety," Def. Mem. 18, Plaintiffs explicitly alleged that commenters warned USDA of "the harms that

reducing the presence of government-trained food inspectors on the lines would cause to *worker* and food safety," Compl. ¶ 43 (emphasis added) (citing NELP Comments; FWW May 2 Comments), and explained that with "fewer inspectors observing the lines, inspectors are less likely to observe dangerous conditions and to halt the line when necessary to protect workers," *id*. ¶ 73. These allegations are sufficient for standing purposes at the pleadings stage.

Finally, USDA's argument that plants may increase the numbers of workers on each line is irrelevant. First, increasing the number of workers on the line would not eliminate the increased risk of worker injury. If the line is moving faster, workers are performing tasks faster, increasing their risk of repetitive stress injury and increasing the risk of accidental lacerations and amputations. Compl. ¶¶ 28–29. Increasing the numbers of workers performing at an increased speed would not ameliorate that risk; to the contrary, it would lead to workers standing in closer proximity to one another, further increasing the risk of "neighbor cuts." Second, USDA assumed that the only additional labor costs would relate to additional establishment workers hired to perform ante-mortem inspection tasks previously performed by FSIS inspectors. *See* Rule, 84 Fed. Reg. at 52,324–26. Its suggestion here that plants will hire more workers thus contradicts the assumption it made during the rulemaking process and is thus not owed any credence. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Although USDA argues that reducing FSIS inspectors will not affect worker safety, it also acknowledges the factual predicate of Plaintiffs' argument: that government inspectors have the power to stop the lines to prevent or minimize injury and will do so if they observe injurious conditions. USDA argues, though, that inspectors do not have a legal responsibility to protect workers, and thus, inspectors who stop the line to prevent injury are doing so only out of "decency." *See* Def. Mem. 22. But this argument does not mean that workers will not be harmed by the reduction in online inspectors; the "known, predictable consequences" of a rule can give rise to an injury-in-fact, regardless of whether those consequences are mandated. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004). Further, USDA has designed the increased line speeds and reduction in number of federal inspectors to work in tandem; the harms caused by these two aspects of NSIS are intertwined. *Cf. Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (suggesting provisions need only be analyzed individually for standing purposes where they are severable from one another); *Lewis v. Alexander*, 685 F.3d 325, 338 (3d Cir. 2012) (same); *Cal. Ass'n of Private Postsecondary Schools v. DeVos*, Civ. No. 17-999 (RDM), 2019 WL 6117418, at

*6 (D.D.C. Nov. 18, 2019) (intervenors had standing to defend entire rule because one portion of the rule would benefit them and the provisions were inseverable).[1]

2. The alleged injury is caused by USDA and redressable by this action.

USDA argues that the presence of third-party action—the adoption of NSIS by plants—means that Plaintiffs cannot show that their injury is caused by USDA or that their injury would be redressable by this action. This argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). "A plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury." *City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1151–52 (D. Minn. 2016) (citing *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 714 (6th Cir. 2015); *Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345–47 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011)). USDA's action is necessary for the plants in which Plaintiffs'

[1] The Rule contains a narrow severability provision, stating a court finding that the worker safety attestation requirements are invalid would not affect any other provision of NSIS. *See* Rule, 84 Fed. Reg. at 52,349 (codified at 9 C.F.R. § 310.28). The presence of this provision suggests the other provisions of NSIS are not severable from one another.

members work to alter their operating procedures in a manner that increases risk to Plaintiffs' members bodily safety. This is enough to meet the causation standard.

The Supreme Court has noted that privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976). Thus, "standing exists where the challenged government action authorized conduct that would otherwise have been illegal. In such cases, if the authorization is removed, the conduct will become illegal and therefore very likely cease." *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) (citing *Nat'l Wresting Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004)). "Causation and redressability are satisfied in this category of cases, because the intervening choices of third parties are not truly independent of government policy. They could only preclude redress if those third parties took the extraordinary measure of continuing their injurious conduct in violation of the law." *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 940–41 (cleaned up). *See also Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1080 (D.C. Cir. 2017); *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014); *Am. Trucking Ass'ns*, 724 F.3d at 248; *Cares Cmty. Health v. U.S. Dep't of Health & Human Servs.*, 346 F. Supp. 3d 121, 128 (D.D.C. 2018).

Plaintiffs' claims fall well within this precedent. For purposes of causation and redressability, Plaintiffs are no differently situated than the truck driver in *American Trucking Ass'ns*, who could be required to work longer hours only because of a rule that allowed longer hours. *See* 724 F.3d at 248. Increased line speeds would be illegal absent the Rule; the plants Plaintiffs work at would be required to maintain the current system of inspection absent the Rule.

USDA's argument that Plaintiffs' workplaces are already so dangerous that the Rule cannot cause additional injury is also misplaced. Def. Mem. 25. Plaintiffs need not show that their members' workplaces would be risk-free absent the Rule; they only need to show that the Rule increases the risk of injury. *See Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (to show standing, a party "need not show that a favorable decision will relieve his *every* injury" (quoting *Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982) (plurality opinion)); *see also NRDC v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 441 (S.D.N.Y. 2019) (for redressability purposes, "[t]he prevention of even *one* injury fairly traceable to an agency's challenged conduct … suffices").

Plaintiffs have alleged, with citation to data and expert analysis, that NSIS will increase their members' risk of injury, and such an increased risk of harm is an injury-in-fact. *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) ("the injury-in-fact requirement can be satisfied by a threat of future harm or 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"). As with its speculativeness argument, USDA cannot point to its flawed analysis to defeat these allegations in a Rule 12(b)(1) facial attack.

II. Plaintiffs have adequately stated claims against USDA.

A. Legal standard

In addition to its standing challenge, USDA seeks dismissal of each of Plaintiffs' claims for failure to state a claim. In this circuit, courts apply the same standard to motions to dismiss APA claims under Rule 12(b)(6) as they do to claims brought under any other statute, asking if the complaint "contain[s] 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) (citations omitted), *quoted in McChesney v. Fed. Election Comm'n*, 900 F.3d 578, 583 (8th Cir. 2018). In so doing, a reviewing court "must primarily consider the allegations in the complaint,

although matters of public and administrative record referenced in the complaint may also be taken into account." *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000). To the extent the administrative record has *not* been fully produced, as is the case here, the plaintiff "receives the benefit of the doubt: his representation about the record is presumed true." *McChesney*, 900 F.3d at 583.

B. Plaintiffs are sufficiently within the zone of interests.

USDA argues that the complaint should be dismissed because Plaintiffs are outside the "zone of interests" of the FMIA. The zone of interests test, which is not jurisdictional, requires a plaintiff to show that the interest it seeks to protect "is *arguably* within the zone of interests to be protected by the statute." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Engineers*, 279 F. Supp. 3d 846, 863 (D. Minn. 2017) (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 491 (1998)). This "test is 'generous and relatively undemanding.'" *Id.* (quoting *Nat'l Wildlife Fed'n v. Westphal*, 116 F. Supp. 2d 49, 53 (D.D.C. 2000)). As the Supreme Court has explained:

> We apply the test in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." We do not require any "indication of congressional purpose to benefit the would-be plaintiff." And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff. The test 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."

Match-E-Be-Nash-She-Wish, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399–400). Plaintiffs meet this lenient standard, as there is ample evidence that Congress not only considered worker safety to be consistent with the FMIA's goals of food safety, but explicitly had worker safety in mind in enacting the statutory regime.

The Supreme Court has directed courts to utilize the "traditional tools of statutory interpretation" in determining whether a plaintiff comes within the zone of interests of that statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014); *see also Indian River Cty., Fla. v. U.S. Dep't of Transp.*, No. 19-5012, 2019 WL 6972874, at *9 (D.C. Cir. Dec. 20, 2019) ("In assessing whether a plaintiff's interests fall within the zone-of-interests protected by a statute, we must consider the 'context and purpose' of the relevant statutory provisions and regulations at issue." (quoting *Match-E-Be-Nash-She-Wish*, 567 U.S. at 226)). Here, the legislative history, the plain text of the statute, and the agency's own historical interpretation of the statute are relevant evidence.

First, the Neill-Reynolds Report, which directly led to the passage of the FMIA, explicitly found that poor working conditions' impact on worker health and safety resulted in harms to food safety and were a "menace" to consumers. H.R. Doc. No. 59-873 at 8, 9–10 (1906). Consistent with this finding, Congress's subsequent alterations to the statutory scheme included specific references to worker safety goals. The HMSA of 1958 specified that "the use of humane methods

… results in safe and better working conditions for persons engaged in the slaughtering industry," 7 U.S.C. § 1901, and directed USDA to "conform to the policy stated herein" in "designating methods of slaughter and of handling in connection with slaughter" pursuant to the FMIA—*i.e.*, what USDA is doing here, *id.* § 1904. *See also* 21 U.S.C. § 610 (prohibiting the slaughter of animals "in any manner not in accordance with" the 1958 HMSA); *Levine*, 2006 WL 8441742, at *13 (accepting plaintiffs' argument that "safer working conditions in slaughterhouses is one of the primary interests protected by the HMSA"). Congress's incorporation into the statutory scheme of an explicit goal of "better working conditions for persons engaged in the slaughtering industry," 7 U.S.C. § 1901, is more than adequate to show that workers in slaughterhouses fall within the FMIA's zone of interests.[2]

Like Congress, USDA has acknowledged—including in this rulemaking—the connection between food safety and worker safety. In the NPRM, USDA stated that 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." 83 Fed.

[2] While USDA correctly states that the zone-of-interests test focuses on the zone of interest of a specific statutory provision, courts "do not look at the specific provision said to have been violated in complete isolation, but rather in combination with other provisions to which it bears an integral relationship." *Indian River Cty.*, 2019 WL 6972874, at *9 (quoting *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002)) (internal marks omitted).

Reg. at 4796. And in the Rule, USDA included provisions requiring NSIS plants to complete attestations related to worker safety. *See* 84 Fed. Reg. at 52,349. Given that USDA itself understood the FMIA to authorize it to take action to protect worker safety, Plaintiffs' members must be, at the very least, "arguably" within the statute's zone of interests. *See Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1126 (8th Cir. 1999) (looking to implementing regulations as indicative of Congressional intent for zone of interests analysis); *see also Davis by Davis v. Phila. Hous. Auth.*, 121 F.3d 92, 100 (3d Cir. 1997) (finding plaintiffs met test where they "could at least arguably be considered intended beneficiaries of the statutory and regulatory scheme imposed by [statute] and its implementing regulations").

C. Plaintiffs have alleged arbitrary and capricious decisionmaking.

Plaintiffs bring two claims alleging that USDA engaged in arbitrary and capricious decisionmaking. An arbitrary and capricious action is one in which:

> the agency 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)).

In determining whether an action is arbitrary and capricious, a reviewing court's ultimate determination is based on "a 'searching and careful' review of the administrative record." *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 2017 WL 359170 (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)). A 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)). On a 12(b)(6) motion to dismiss such a claim, the question is plausibility. *See James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 284 (D.C. Cir. 2000) (dismissal of arbitrary and capricious claim improper since, "[i]f USDA did, in fact, fail to proffer an adequate explanation for its decision [at issue], or if it did in fact fail to consider factors deemed relevant by Congress, a court could conclude that the agency acted arbitrarily and capriciously").

Plaintiffs' arbitrary and capricious claims are based on USDA's failure to consider the impact of increased line speeds and the reduction of the number of inspectors on worker health and safety. *See* Compl. ¶¶ 74–77, 81–83. These claims have two aspects: (1) USDA did not meaningfully respond to the comments submitted about the harm NSIS would cause to workers, and (2) what USDA did say was irrational. Although neither argument is premised on the proposition that

USDA was required to "regulate" worker safety, USDA contends that Plaintiffs fail to state a claim "because FSIS does not have the statutory mandate to regulate worker safety in implementing the FMIA." Def. Mem. 28. USDA's argument relies on a non sequitur: whether or not USDA has a "statutory mandate" to regulate worker safety does not change the fact that USDA can take worker safety into account when evaluating the impacts of its actions, and in fact has historically, consistently done so.[3]

1. USDA's failure to consider the impacts of NSIS on worker safety is arbitrary and capricious.

Although the NPRM discussed the impacts of the proposed rule on worker safety, USDA in the Rule disclaimed any consideration of worker safety. In promulgating rules, however, agencies have authority to consider, and are indeed *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). While USDA here states that "issues

[3] As alleged in the complaint, USDA ignored comments explaining that it *does* have authority to "regulate" worker safety. *See* Compl. ¶ 59 (citing comments of former OSHA Administrator David Michaels, Apr. 30, 2018, FSIS-2016-0017-74002, including memorandum from the Office of the Solicitor of Labor). To the extent USDA argues otherwise, it was required to address contrary comments such as these; it did not.

of workplace safety" are not "reasonably related to FSIS's food safety mission," Def. Mem. 29, Congress, and the agency itself, have said otherwise.[4]

As noted above, in limiting USDA's authority under the FMIA 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. Congress then, in 1978, amended the FMIA to prohibit slaughter inconsistent with the HMSA of 1958, 21 U.S.C. § 610. Thus, USDA's assertion that the FMIA does not mention worker safety, Def. Mem. 29, is misleading.

Like Congress, USDA itself has repeatedly recognized that worker safety is related to 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. 83 Fed. Reg. at 4796, 4799. The agency also cited its own analysis of worker safety at certain establishments as a reason to proceed with its proposal. *Id.* at 4796. The agency's recognition, at the NPRM stage, that worker safety is relevant to its exercise of

[4] Agencies are not owed deference to determinations that their action or inaction is compelled by statute. *See, e.g.*, *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004) ("[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress.'"). The Court must determine *de novo* whether USDA was allowed to take into account the potential harms to plant workers in making its decision to adopt NSIS.

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* USDA, Final Rule, Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566, 49,567 (Aug. 21, 2014). Indeed, in that rule, USDA devoted five pages to discussing comments related to line speeds and worker safety. *Id.* at 49,566–49,601.[5]

That USDA has reversed this longstanding approach further shows that its failure to consider worker safety here is arbitrary and capricious. Although an agency is entitled to change its position in rulemaking, it must acknowledge that reversal of position and give an explanation for it. USDA did not do so here. *See,*

[5] *See also* USDA, Final Rule with Request for Comments, Pathogen Reduction; Hazard Analysis & Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,812 (Jul. 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"); USDA, Final Rule, Meat Produced by Advanced Meat/Bone Separation Machinery and Meat Recovery Systems, 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"); USDA, Final Rule, 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").

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."); *Formula v. Heckler*, 779 F.2d 743, 761 (D.C. Cir. 1985) (agency is required to provide a "reasoned basis" for final rule's departure from approach in proposal); *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.").

Moreover, 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, 84 Fed. Reg. at 52,315, it considered other non-consumer factors. For example, the agency stated that it was acting in order to "remove unnecessary regulatory obstacles to industry innovation," *id.* at 52,300, and to respond to "concerns about the regulatory burden," *id.* at 52,310. While such goals are not facially illegitimate, they are no more relevant to "the health and welfare of consumers" than the health and safety of the workers in plants. The agency did not explain why it considered the former and not the latter. *See also id.*at 52,342 (discussing impact on Indian tribes); *id.* at 52,342–43 (discussing environmental impact). USDA's examination of these other factors thus shows it cannot justify its failure to consider worker safety on the basis that the statute

strictly circumscribes the scope of its consideration. Such an internally inconsistent decision is arbitrary and capricious. *See, e.g.*, *ANR Storage CO. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

Perhaps for this reason, USDA now states that "the agency's stance is that it lacks authority under the FMIA to regulate worker safety, not that it could never *consider* ways of supporting other agencies' efforts to foster and promote worker safety." Def. Mem. 30 n.6 (citing Compl. ¶¶ 75–76) (emphasis in original). USDA's concession that it can take worker safety into account is difficult to reconcile with its argument that considering the impacts of its actions on worker safety would go beyond "the bounds of congressional authorization." *Id.* at 28–30. Moreover, in light of the statutory recognition of the tie between worker safety and consumer protection, the agency's consideration of worker safety in other rulemakings, and the many comments submitted concerning the impact of the proposed rule on worker safety, this concession further supports Plaintiffs' argument that the Final Rule is arbitrary and capricious.

Finally, the existence of OSHA does not bar USDA from considering how its actions impact 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.

2. USDA's response to the worker safety comments reflects arbitrary and capricious decisionmaking.

"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). And "[a]n agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (cleaned up). Here, USDA suggests both that the comments of scholars, experts, and worker safety advocates raising concerns about NSIS's impacts on illnesses and injuries were not "significant," and that it meaningfully responded to them. Both suggestions are inconsistent with the complaint and the record.

USDA suggests that a comment is "significant" if it addresses "relevant" factors. Def. Mem. 29. For the reasons explained above, worker safety is "relevant" to USDA's exercise of authority, the rulemaking, and the underlying scheme. The comments raised concerns that, if USDA agreed with them, "would require a change in [USDA's] proposed rule": abandoning NSIS due to its harmful effects. *Home Box Office, Inc. v. FCC*, 569 F.2d 9, 35, n.58 (D.C. Cir. 1977) (per curiam) (quoted in Def. Mem. 29). Accordingly, USDA was required to respond to the comments on worker safety submitted in response to the NPRM.

As to the sufficiency of the agency's response, "an agency need not discuss every item of fact or opinion included in the submissions made to it. But an agency

must respond sufficiently to enable us to see what major issues of policy were ventilated ... and why the agency reacted to them as it did." *Del. Dep't of Nat. Res.*, 785 F.3d at 15 (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)) (internal quotation marks omitted). But USDA did not meet even this forgiving standard: The Rule and its preamble offer no indication whether USDA believes that NSIS will increase the risk of worker injury and why (or why not). USDA simply refused to address the issue. It neither explained why it disagreed with commenters as to their predictions about the worker safety consequences of its actions, nor explained that it agreed but nonetheless chose to adopt the Rule.

USDA contends that it adequately responded by stating that it lacked "authority [and] expertise to regulate issues related to establishment worker safety" and referring to the existence of OSHA. Def. Mem. 30. That response is inadequate, both because, as explained above, the comments did not ask USDA to "regulate" worker safety but to consider it as one relevant factor, and because it fails to offer any substantive response to the comments. *See, e.g.*, *Am. Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (finding analysis "heavy on unsubstantiated inferences and *non sequiturs*" did not comply with APA). Moreover, 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 absolve USDA of its obligation to respond to comments. The duty to respond to comments made to USDA and to consider the impact of USDA's actions lies with USDA. In *Delaware Department of Natural Resources*, the D.C. Circuit rejected another agency's attempt "to excuse its inadequate responses by passing the entire issue off onto a different agency," explaining that "[a]dministrative law does not permit such a dodge." 785 F.3d at 16 (citing *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987)). USDA's similar dodge is arbitrary and capricious.

To meet the APA's reasoned decisionmaking standard, "an agency need not quantify all costs 'with rigorous exactitude,' but it must consider them all." *Citizens Telecomms.*, 901 F.3d at 1010–11 (quoting *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986)). Despite the benefit of a detailed administrative record, USDA took no account of the costs associated with harms to worker health and safety. These include not only costs to workers themselves, but also costs to the larger economy due to the resulting loss of productivity and efficiency. *See, e.g.*, UFCW Comments at 12 (discussing productivity losses associated with

increased worker injury as a result of line speed increases). "[A]n administrative agency that just plows ahead and announces a new rule, without taking the reasonably foreseeable potential negative impacts of the policy determination into account … might as well have picked its policy out of a hat." *Make the Rd. N.Y. v. McAleenan*, No. 19-cv-2369 (KBJ), 2019 WL 4738070, at *39 (D.D.C. Sept. 27, 2019). Plaintiffs have alleged that USDA has done just that here, and thus have stated claims that USDA acted arbitrarily and capriciously.

D. Plaintiffs have plausibly alleged that NSIS is contrary to law.

In their second cause of action, Plaintiffs allege that, in reducing the number of online agency inspectors by 40 percent while allowing unlimited line speeds, NSIS does not ensure an adequate number of inspectors to conduct the critical appraisal of each carcass as the FMIA requires. *See* Compl. ¶¶ 78–80. In its motion, USDA argues that this claim fails on the merits, relying on the D.C. Circuit's decision in *AFGE II* and principles of deference in statutory interpretation under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). USDA's argument misconstrues Plaintiffs' claim, which is not about the definition of "inspection" under the FMIA, but rather about whether the record supports USDA's conclusion that NSIS is consistent with the FMIA's requirements. The Court should not reach the merits of this claim at the motion to dismiss stage, prior to the production of the administrative record.

The parties appear to agree that the D.C. Circuit's determination in *AFGE I* as to what the statute requires is correct: a "critical appraisal" of every carcass by a FSIS inspector—one in which an inspector "pay[s] close attention" to each carcass that passes by. *AFGE I*, 215 F.3d at 10–11; *see* Def. Mem. 32–34 (quoting and citing *AFGE I*). *AFGE II* did not call that conclusion into question; rather, the court there held, based on the record before it, including declarations, that the revised pilot program appeared to meet that requirement. The record-based nature of *AFGE II*'s conclusion is clear from its statement that its holding "may not necessarily foreshadow the outcome of a judicial review" of "a rulemaking to adopt as a permanent change something along the lines of the modified program," because "experience with the program's operation and its effectiveness will doubtless play a significant role." *AFGE II*, 284 F.3d at 131. Whether NSIS, based on the 2019 rulemaking record, allows for a critical analysis of every carcass by a FSIS inspector was not addressed in *AFGE II*.

Furthermore, USDA's conclusion that features of NSIS "allow[] for FSIS to comply with the FMIA with fewer online federal inspectors and higher line speeds," Def. Mem. 33 (citing Rule, 84 Fed. Reg. at 52,300), is not owed deference under *Chevron*. Rather, the Court should conduct "a searching and careful review of the record," *Thomas v. Jackson*, 581 F.3d 658, 664 (8th Cir. 2009)—which it cannot do at this stage of the proceedings. Plaintiffs have expressly alleged that record

evidence does not support this conclusion, *see, e.g.*, Compl. ¶ 45 (citing comments), and their "representation about the record is presumed true," *McChesney*, 900 F.3d at 583. Plaintiffs have thus stated a claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendant's motion to dismiss.

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Respectfully submitted,

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