No. 21-2220

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 663; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 550; UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 2; and UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO, CLC,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

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

Putative Intervenors-Appellants.

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

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Quality Pork Processors (QPP), WholeStone Farms Cooperative, Inc. (WholeStone), and Clemens Food Group, LLC (Clemens) (collectively, "Plants") ask this Court to stay a district court order vacating in part a U.S. Department of Agriculture (USDA) final rule and allow the rule to remain in effect as to the Plants (and no others), while they appeal the denial of their motion to intervene. That motion was based on a new legal theory, never endorsed by USDA, and contrary to the position two of the Plants took at the summary judgment stage. As a result, the district court did not abuse its discretion in finding that motion untimely.

Even if timely, the Plants' request for relief does not belong in this action. The Plants sought to intervene to move for "clarification" of the court's order on remedy. Through that potential motion, the Plants seek to litigate the status of waivers issued, and terminated, under entirely separate regulatory authority. But those waivers were neither challenged nor addressed in this litigation. Meanwhile, the Plants do not challenge the issues the district court's ruling actually *did* resolve. Because the Plants have not demonstrated any flaw in the district court's order, a stay of its remedy is not justified.

Importantly, this case is not one in which the government has shifted its position. Rather, the Plants—not USDA—shifted their legal strategy after the court

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

The equities also do not warrant a stay: The Plants alone are responsible for their decision not to timely raise their theory; denial of a stay will have minimal economic impact; and, as the district court concluded, "the weight of the evidence clearly demonstrates" that increased line speeds pose risks to the health and safety of the Plants' workers. Dist.Ct.Dkt.125 at 33.

BACKGROUND

I. Regulatory History

Since 1985, large swine-slaughter plants have been allowed to operate their slaughter lines at a maximum rate of 1,106 head per hour (hph). *See* 9 C.F.R. § 310.1(b)(3). USDA may, however, waive that limit. *Id.* § 303.1(h). At some point, each of the Plants received such a waiver. Stay Mot. 6.

On October 1, 2019, USDA issued a final rule creating the New Swine Inspection System (NSIS). *See* 84 Fed. Reg. 52,300. Plants that opted into NSIS could, as of March 2020, make certain changes to their operations, including operating their slaughter lines without regard to line-speed limits. *See id.* at 52,314. In the Rule's preamble, USDA stated that preexisting line-speed waivers issued under its "SIP" program, such as that given to Clemens's Coldwater plant, would be terminated, and that "FSIS w[ould] announce new waiver criteria in a future Federal

Register document." *Id.* at 52,301. USDA did not address the "HIMP" waivers held by the other Plants. Each of the Plants converted to NSIS on March 30, 2020. Dist.Ct.Dkt.90 ¶5.

II. Procedural History

A. The Case through Summary Judgment

Six days after USDA published the NSIS Rule, the United Food and Commercial Workers Union and three of its local unions that represent workers in plants likely to convert to NSIS[1] (collectively, UFCW) filed this action under the Administrative Procedure Act (APA) arguing that the Rule was arbitrary, capricious, and contrary to law, and requesting that the entire Rule be vacated. Dist.Ct.Dkt.1.

On December 6, 2019, USDA filed a motion to dismiss the action. Dist.Ct.Dkt.14. On April 1, 2020, the district court granted in part and denied in part the motion. Dist.Ct.Dkt.30 at 1. As relevant here, the court held that UFCW stated a claim that the line-speed provision was arbitrary and capricious, pointing out "internal inconsisten[cies]" in how the agency addressed worker safety, and finding the agency's explanation for "declining to consider" the effects of NSIS on workers "was not a rational explanation." *Id.* at 20–22.

[1] Relevant to this motion, UFCW represents QPP and WholeStone's NSIS facilities. Dist.Ct.Dkt.71; *see also* Dist.Ct.Dkt.186-3; Dist.Ct.Dkt.186-4.

On May 15, 2020, USDA filed a motion to stay proceedings and for voluntary remand without vacatur. Dist.Ct.Dkt.40. UFCW opposed, arguing that the court should vacate the rule if UFCW prevailed in the lawsuit. *See* Dist.Ct.Dkt.49. On July 22, 2020, the Court denied USDA's stay request, noting that it would "consider the propriety of a voluntary remand without vacatur alongside" UFCW's motion for summary judgment. Dist.Ct.Dkt.85 at 1.

The parties then briefed summary judgment. As to remedy, UFCW argued for vacatur of the NSIS Rule. Dist.Ct.Dkt.69 at 34. USDA disagreed, arguing that vacatur would create costs for regulated entities. Dist.Ct.Dkt.89 at 30–31. In the alternative, USDA argued that vacatur should be limited to the line-speed provision. *Id.* at 31–33. USDA did not suggest that vacatur would not impact plants that had previously held waivers of the line-speed limit. To the contrary, USDA pointed to the representations made by Clemens and WholeStone as to the impacts that vacatur would have on them. Dist.Ct.Dkt.121 at 12.

After USDA stated its position on remedy, the North American Meat Institute and National Pork Producers Council moved to appear as amici curiae. Dist.Ct.Dkt.102. They asked the Court to "exercise its 'remedial discretion'" and to decline to vacate the rule. Dist.Ct.Dkt.105 at 14. The amici submitted sworn declarations from three executives of three companies whose plants were participating in NSIS: Seaboard Foods (Dist.Ct.Dkt.104-3), Clemens

(Dist.Ct.Dkt.104-1), and WholeStone (Dist.Ct.Dkt.104-2). Both Clemens's and WholeStone's executives stated that vacatur would require them to lower their line speeds to the 1106 limit, and both argued that the Court should decline to vacate the Rule based on the resulting impact. *See* Dist.Ct.Dkt.104-1 ¶¶ 14–15 (stating that vacatur would "force[]" Clemens's facilities "to run with a maximum line speed of 1,106 head per hour"); Dist.Ct.Dkt.104-2 ¶ 9 (noting "significant consequences" of vacatur to WholeStone). WholeStone stated that it would operate additional shifts to achieve the same total production output if required to reduce its line speeds. Dist.Ct.Dkt.104-2 ¶ 10.

On March 31, 2021, the court granted UFCW's motion for summary judgment in part and denied USDA's motion for summary judgment and motion for remand without vacatur. Dist.Ct.Dkt.125. The court held that USDA "failed to satisfy the APA's requirement of reasoned decision-making" in adopting the line-speed provision. *Id.* at 2. The court then discussed remedy at length, considering the arguments and evidentiary submissions of the parties and amici, including amici's declarants. *Id.* at 57–68. Accepting USDA's arguments "that the agency would have still implemented NSIS even if it had retained the line speed limits" and "that the NSIS program can function without the elimination of line speed limits," the district court held the line-speed provision severable from the rest of the Rule. *Id.* at 59. The court then applied the factors set out by the D.C. Circuit in *Allied Signal v. United*

States Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993), to determine whether it should remand without vacatur. Dist.Ct.Dkt.125 at 60–61.

As to the first *Allied-Signal* factor, the court found it "unclear whether FSIS c[ould] rehabilitate its Final Rule without taking an entirely new agency action," counseling against remand without vacatur. *Id.* at 63. As to the second *Allied-Signal* factor, the court found vacatur of the line-speed provision appropriate. *Id.* at 64. It noted that many of the costs incurred in converting to NSIS would "not be forfeited by a vacatur" of the line-speed provision alone, given other benefits of NSIS. *Id.* at 65. It also found that many plants had already slowed their line speeds due to COVID-19, demonstrating that they can do so. *Id.*

Although the court declined to remand without vacatur, it acknowledged that if "vacatur were to take effect immediately, pork producers may be forced into a period of noncompliance with the line speed limits." *Id.* at 65–66. Thus, the court invoked its "remedial discretion" to stay vacatur for 90 days to "allow the agency to decide how to proceed in light of this opinion and give regulated entities time to prepare for any operational change." *Id.* at 67–68.

USDA has not yet decided whether to appeal, but it has informed regulated entities to "prepare" for the impact of vacatur and that the agency will "work with

the establishments to comply with the Court's ruling and minimize disruptions to the supply chain."[2]

B. The Intervention Motions

Thirty days into the 90-day period, Seaboard Foods moved to intervene for the purpose of obtaining a 10.5-month stay of the district court's order as to its Oklahoma plant.[3] A week later, the Plants filed their own motion seeking leave to intervene to "obtain clarity" that the Court's vacatur of the line-speed provision of the NSIS rule automatically reinstated their waivers. Dist.Ct.Dkt.147; Dist.Ct.Dkt.150 at 1.

USDA and UFCW opposed both motions. USDA argued that the Plants had not established inadequate representation and that a desire for "clarification" was not a reason for intervention. Dist.Ct.Dkt.157 at 2–3. USDA also argued that the Plants' position that vacatur of a single provision of the NSIS Rule reinstated waivers terminated pursuant to independent regulatory authority was wrong. *Id.* at 4. UFCW argued that the Plants' motion was untimely and that their ability to protect their interests in obtaining waivers was not impaired by the court's decision. Dist.Ct.Dkt.156.

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

[3] Seaboard's request to intervene is the subject of a separate appeal, No. 21-2243, and motion to stay, which UFCW will address in a separate filing.

On May 20, 2021, the district court denied both intervention motions on timeliness grounds. Dist.Ct.Dkt.163.[4] Twelve days later, the Plants appealed the district court's decision and moved for a stay "as to them" of vacatur pending appeal of the order denying their motion to intervene. Dist.Ct.Dkt.165. Seaboard separately appealed and sought a stay. Dist.Ct.Dkt.175.

Balancing the four factors identified in *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018), the district court denied both stay motions. Dist.Ct.Dkt.189. The court concluded that none of the plants had "made a strong showing of a likelihood of success on appeal or raised difficult legal issues." *Id.* at 2. The district court "assume[d] without deciding" that there would be irreparable harm, but it found that the balancing of any such harm and the risks to worker health and safety were policy considerations that USDA was in a better position to assess. *Id.* at 3. The court also found that the public interest weighed against a stay. *Id.*

LEGAL STANDARD

In determining whether to issue a stay pending appeal, this Court balances four factors: "(1) whether the party seeking the stay has demonstrated a strong likelihood of success on the merits; (2) whether the party seeking the stay will be

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

irreparably injured without a stay; (3) whether a stay would substantially injure other parties; and (4) the public's interest." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Brakebill*, 905 F.3d at 557.

ARGUMENT

"'A stay is not a matter of right, even if irreparable injury might otherwise result.' It is instead 'an exercise of judicial discretion,' and 'the propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). The circumstances of this particular case do not weigh in favor of a stay. The Plants are unlikely to prevail on the merits of their appeal because the district court properly exercised its discretion in assessing timeliness. The balance of equities also tilts strongly against the Plants, given their own prior representations to the district court, their lack of diligence, and the increased risk to worker health and safety that would result from a stay. Moreover, the relief they seek through intervention—an order with respect to waivers—is not properly attained through this litigation.

I. The Plants do not have a strong likelihood of success on the merits.

A stay pending appeal is only appropriate where a movant has made a "strong showing that he is likely to succeed on the merits." *Brakebill*, 905 F.3d at 557; *see also Craig v. Simon*, 978 F.3d 1043, 1050–51 (8th Cir. 2020) (finding irreparable harm does not justify a stay absent a "substantial likelihood of success").[5] The Plants have not made such a showing.

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

"[T]he timeliness of a motion to intervene is a decision within the district court's discretion." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011); *see In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 766 (8th Cir. 2017). This Court has "articulated factors that the district court should specifically consider: (1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *ACLU*, 643 F.3d at 1094. Here, the district court considered each of these factors. Dist.Ct.Dkt.163 at 3–7. The Plants

[5] Citing earlier cases, the Plants contend that they need to show only "serious and substantial legal issues." Stay Mot. at 12–13. This Court's more recent cases, however, as well as the Supreme Court's decision in *Nken*, require a strong showing of likely success on the merits. *See, e.g.*, *Org. for Black Struggle*, 978 F.3d at 607; *Brakebill*, 905 F.3d at 557; *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

have not shown a substantial likelihood that this Court will find that the district court "rest[ed] its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065 (8th Cir. 2013) (citation omitted).

1. This Court's four-factor timeliness standard applies.

In seeking intervention, the Plants conceded that the district court should analyze the four factors noted above in assessing timeliness. *See* Dist.Ct.Dkt.150 at 15. Here, they make a new argument that motions to intervene are *de facto* timely when they are filed within the time a party could have taken an appeal from the final judgment. Stay Mot. 2, 14 (citing *United Airlines v. McDonald*, 432 U.S. 385 (1977)). This new argument is irreconcilable with this Court's consistent application of the four-factor test. *See, e.g.*, *Wholesale Grocery Prods.*, 849 F.3d at 766–67; *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 636, 646 (8th Cir. 1998).

McDonald, moreover, is inapposite. There, the movant sought to intervene solely to appeal the denial of class certification—an appeal that (before Federal Rule of Civil Procedure 23(f)) could not be filed until after final judgment—and moved to intervene eighteen days after the final judgment in favor of the named plaintiffs, who could not appeal. 432 U.S. at 390. The Court recognized that earlier intervention for the limited purpose of appeal of a final judgment would "have made the respondent a superfluous spectator in the litigation for nearly three years." *Id*. at 394

n.15. Thus, as several courts of appeals have recognized, *McDonald*'s holding that in "view of all the circumstances," the motion to intervene in that case was timely filed, *id*. at 394, was limited to its facts. *See Floyd v. City of N.Y.*, 770 F.3d 1051, 1059 n.23 (2d Cir. 2014); *S. Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 971 n.5 (10th Cir. 2008); *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999); *Garrity v. Gallen*, 697 F.2d 452, 457–58 (1st Cir. 1983); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3d Cir. 1982). Here, the Plants did not move to intervene to appeal, but to raise new arguments before the *district* court. As the district court explained, their motion was untimely because they could have raised those arguments earlier, but did not. Dist.Ct.Dkt.163 at 6.

2. The district court's analysis of the four factors is well-supported by the record.

As in *ACLU*, the district court "listed the relevant factors and acknowledged that timeliness is determined from all the circumstances." 643 F.3d at 1094; *see* Dist.Ct.Dkt.163 at 3–7 (addressing the four factors one by one).

First, the court stated that its "consideration of the case on the merits has concluded." *Id.* at 3. Second, noting two of the Plants had submitted declarations nearly a year earlier, the court found the Plants had known of the litigation well before they sought to intervene. *Id.* at 4 (citing *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867, 869–70 (8th Cir. 2014)). The Plants do not challenge these conclusions.

Third, the district court found there was "no reason that…[the Plants] could not have asked the Court to consider their concerns nine months ago when they submitted affidavits through amici." Dist.Ct.Dkt.163 at 6. The court stated that it would have considered those concerns then—as it did the other concerns raised by amici. *Id.* The Plants do not contend that this finding was clearly erroneous. They assert instead that their delay is excusable because there has since been a "policy shift" by USDA. But that assertion is incorrect. In July 2020, USDA argued that vacatur of the line-speed provision was an appropriate alternative remedy to remanding without vacatur. Dist.Ct.Dkt.89 at 5. USDA did not suggest that vacatur would restore the Plants' waivers, and it argued that the line-speed provision was not vital to NSIS. *Id.* at 33. The Plants should have known then that USDA would not consider the Plants' previous waivers "automatically" restored. To the extent there is a divergence between USDA and the Plants, this divergence was evident in July 2020—during the last Administration. Nonetheless, at that time, WholeStone and Clemens *conceded* that vacatur would force them to lower their line-speeds to 1106 head per hour. Dist.Ct.Dkt.104-1 ¶ 15; Dist.Ct.Dkt.104-2 ¶ 10. Their new position that vacatur automatically restores their preexisting waivers is inconsistent with what they told the district court last year. The district court did not abuse its discretion in denying the Plants intervention to pursue a new legal theory.

That USDA has not yet indicated whether it will appeal the district court's judgment is irrelevant. A party's decision not to appeal does not *de facto* excuse an untimely motion to intervene. *See, e.g.*, *Wholesale Grocery Prods.*, 849 F.3d at 768 (affirming finding of untimeliness after party did not appeal); *Floyd*, 770 F.3d at 1058–59 (affirming denial of intervention on timeliness grounds where change in administration led to city dropping appeal). Moreover, even if USDA were to appeal, it could not then argue that the district court erred in not reinstating previously terminated waivers, because it never asked the district court to do so. *See, e.g.*, *Orion Fin. Corp. of S.D. v. Am. Foods Grp.*, 201 F.3d 1047, 1048 (8th Cir. 2000) (noting "the basic principle that one cannot raise issues on appeal that have not been raised before the district court").[6]

The district court correctly found that "the fact that the case was not resolved in [the Plants'] preferred manner does not justify an untimely intervention." Dist.Ct.Dkt.163 at 5–6. As the court explained, the circumstances here are analogous to those in *Cuyahoga Valley Railway Co. v. Tracy*, 6 F.3d 389 (6th Cir. 1993), where the Sixth Circuit reversed a grant of intervention on timeliness grounds. There, after the State of Ohio decided not to appeal an adverse decision, railway companies

[6] The Plants make no argument that the district court erred as to issues that USDA *could* appeal: its finding that USDA acted arbitrarily and capriciously and its decision not to "exercise its discretion to depart from the normal APA remedy of vacatur." Dist.Ct.Dkt.125 at 66.

sought to intervene to request that the district court modify the scope of its summary judgment order so that it did not impact them. The Sixth Circuit held that intervention should have been denied, explaining: "The intervenors chose to rely on the Attorney General's best efforts, which they were entitled to do. They are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution." *Id.* at 396. Similarly, here, the Plants relied on USDA's best efforts through summary judgment; they may not now enter the case seeking a different resolution. *See also ACLU*, 643 F.3d at 1095 (affirming denial of intervention where parties relied on defendant "to adequately represent their interests despite their knowledge of the case and its progress").

Finally, the district court found a risk of prejudice to USDA. The court accepted USDA's arguments that the delayed intervention "would frustrate USDA's ability to manage a national food safety system," by taking the decision whether or not to grant waivers out of its hands and placing it in the court's. Dist.Ct.Dkt.163 at 6–7; *see also* Dist.Ct.Dkt.153 at 10–11 (USDA opposition to Seaboard's motion); Dist.Ct.Dkt.157 at 6 (USDA opposition to Waiver Recipients' motion). The Plants do not address this finding.

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

While the district court correctly denied the Plants' motion as untimely, this Court may affirm the denial of intervention "on any ground supported by the record."

P.A.C.E. v. Kan. City Mo. Sch. Dist., 267 F. App'x 487, 2008 WL 508608, at *1 (8th Cir. Feb. 27, 2008). Here, the Plants' ability to protect their interest in waivers issued and terminated pursuant to a different regulation via alternative means provides an alternative ground for affirmance. *See* Fed. R. Civ. P. 24(a)(2) (intervention warranted when "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest").

As the district court explained, "USDA's decision to end the Pilot Participants' line speed waivers was not challenged in this litigation." Dist.Ct.Dkt. 173 at 1. If the Waiver Recipients want to challenge that entirely separate final agency action, they may do so—in a separate case. A party's interests are not deemed impaired where there are "other avenues available to it" to protect those interests. *Jenkins by Jenkins v. Missouri*, 78 F.3d 1270 (8th Cir. 1996). The district court's vacatur of 9 C.F.R. § 310.26(c) does not impair or impede the USDA's authority to issue waivers under its waiver standard. In short, the Plants do not need intervention to protect their interests.

C. The Plants are unlikely to obtain the ultimate relief they seek.

Given the equitable nature of a stay pending appeal, this Court can consider not only the Plants' likelihood of success in obtaining intervention but also whether they will likely succeed on their motion to "clarify." *Cf. Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020) (considering merits argument in denying motion

to stay judgment pending appeal of denial of motion to intervene). The Plants are not likely to succeed in arguing that vacatur of 9 C.F.R. § 310.26(c) "automatically reinstated" their waivers. In fact, Clemens and WholeStone previously argued the opposite, conceding that vacatur would require them to reduce their line speeds to 1106 hph. *See* Dist.Ct.Dkt.104-1 at ¶¶ 14–15 (Clemens); Dist.Ct.Dkt.104-2 at ¶¶ 9–10 (WholeStone). The district court relied on those representations in deciding to grant a 90-day stay of vacatur. *See* Dist.Ct.Dkt.125 at 67. In these circumstances, the district court can appropriately deny WholeStone's and Clemens's motion to "clarify" on judicial estoppel or other equitable grounds. *See, e.g.*, *United States v. Hamed*, 976 F.3d 825, 828–30 (8th Cir. 2020) (affirming district court's finding of estoppel).

The Plants' position on "automatic reinstatement" also is wrong. Vacatur of one agency action—here, part of a rule—does not undo *other* agency actions. It "would exceed the statutory scope of review for a court to set aside" actions that it had not held invalid and that the plaintiff had not even challenged. *Cath. Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994). Here, the district court declined to vacate the entire NSIS Rule and vacated *only* 9 C.F.R. § 310.26(c). Dist.Ct.Dkt.125 at 60, 68. That provision did not terminate the Plants' waivers, so vacatur of that provision would not restore them.

II. The Plants' assertions of irreparable injury are overstated.

To prove irreparable harm, the Plants "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). The Plants have not made that showing.

The Plants claim that a line speed of 1106 hph will prevent them from processing as many hogs as they now do. *See* Stay Mot. 22–23. But the Plants may avoid their feared "cascade of detrimental effects," *id.* at 22, by increasing the number of hours during which they operate their lines at slower speeds—as QPP and WholeStone expressly recognized earlier in this litigation. *See* Dist.Ct.Dkt. 171-1 ¶ 13; Dist.Ct.Dkt.171-2 ¶ 13. The Plants have not shown that increasing their hours of operation is unworkable or would result in "additional expenditures [that] will so severely impact the company's bottom line that the increased costs [associated with vacatur] threaten the company's very existence." *Am. Meat Inst. v. USDA*, 968 F. Supp. 2d 38, 78 (D.D.C. 2013), *aff'd on other grounds*, 760 F.3d 18 (D.C. Cir. 2014). Harm that can be mitigated is "not irreparable harm of the kind that could justify a stay pending appeal." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020).

The Plants assert that they "may not even be able to elect the traditional inspection model instead of NSIS," Stay Mot. at 22–23, but vacatur of the line-speed

provision does not require them to do so. Rather, as the USDA has consistently argued, and the district court concluded, "the NSIS program can function without the elimination of line speed limits." Dist.Ct.Dkt.125 at 59; Dist.Ct.Dkt.89 at 33. If the Plants opt for traditional inspection, harm resulting from that decision, if any, would be self-inflicted and would not qualify as irreparable. *See Salt Lake Trib. Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995).

Finally, even if the Plants reduce their capacity rather than run additional shifts, their predictions of devastating industry-wide impact lack merit, as explained by Professor C. Robert Taylor, an expert on the pork processing industry. Dist.Ct.Dkt.186-1 at ¶¶ 50–59.

III. A stay would substantially injure Plaintiffs' members and other workers.

Any harm to the Plants must be balanced against the harm a stay would cause to others. That balance tips decidedly against the Plants, as the stays would put the health and safety of workers at risk.

As the district court held, extensive evidence "clearly demonstrates" that increased line speeds puts the workers on those lines at increased risk of musculoskeletal injuries and lacerations. Dist.Ct.Dkt.125 at 27–33. This conclusion is bolstered by occupational health expert Professor Melissa Perry, who explained

that "increased line speeds increase the risks of injury to workers, including laceration injuries." Dist.Ct.Dkt.186-2 ¶ 16; *see also id.* at ¶¶ 17–26.

The widespread transmission of COVID-19 at meatpacking facilities poses an additional concern. *See* Tina L. Saitone, K. Aleks Schaefer, & Daniel P. Scheitrum, *COVID-19 morbidity and mortality in U.S. meatpacking counties*, 101 Food Policy 102072 (2021).[7] As explained by Professor Perry, higher line speeds contribute to this crisis by causing workers to be packed closer together on the slaughter lines. Dist.Ct.Dkt.186-2 ¶¶ 29–31; *see also* Charles A. Taylor, et al., *Livestock plants and COVID-19 transmission*, 117 Proceedings of the Nat'l Acad. of Sci. 31706, 31708 (2020) (based on poultry-plant data, finding a correlation between line speed and COVID-19 transmission).[8] Although rates of COVID-19 transmission are falling, outbreaks in meatpacking facilities continue.[9]

Although the Plants assert that the district court found that "safety concerns … did not apply" to the Plants, Stay Mot. 24, the district court actually stated that "there is some reason to be skeptical of the data" contained in the declarations submitted by WholeStone and Clemens executives, Dist.Ct.Dkt.125 at 33 n.6—a

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8026277/.

[8] https://www.pnas.org/content/pnas/117/50/31706.full.pdf.

[9] *See, e.g.*, Madison McVan, et al., *Thousands of meatpacking workers have been vaccinated, but the industry's crisis continues*, USA Today (Apr. 8, 2021), https://www.usatoday.com/in-depth/news/investigations/2021/04/08/meatpacking-workers-still-face-risks-one-year-after-coronavirus/4842584001/.

skepticism shared by Professor Perry. *See* Dist.Ct.Dkt.186-2 at 4 (stating that the Plants' submissions are "not scientifically credible"). Dr. Perry has studied working conditions in meatpacking and slaughter facilities for fifteen years and has published seven peer-reviewed scientific journal articles on worker health and safety at those facilities. *See* Dist.Ct.Dkt.186-2 at 2. Even without "specific experience" at the Plants, Stay Mot. 24, experts like Dr. Perry are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591 (1993).

Because the stay sought would put workers at increased risk of musculoskeletal injuries, lacerations, and COVID-19, the harm to workers weighs strongly against a stay.

IV. A stay is contrary to the public interest.

Finally, in assessing the public interest factor, "foremost consideration must be given to any demonstrable danger to the public health." *Rsrv. Mining Co. v. United States*, 498 F.2d 1073, 1077 (8th Cir. 1974). As discussed above, allowing plants to continue to operate at increased line speeds is demonstrably dangerous to thousands of workers, and their families and communities.

Additionally, "the public interest in expeditious resolution of litigation," *Boyle v. Am. Auto Serv.*, 571 F.3d 734, 741 (8th Cir. 2009), weighs in favor of

allowing the Court's judgment to go effect in its entirety—particularly because the Plants do not defend the agency action at issue in the litigation.

The Plants ignore these considerations, solely addressing the district court's deference to USDA's position that intervention "would frustrate USDA's ability to manage a national food safety system" and pointing to the fact that USDA has allowed different plants to operate at different speeds in the past. Stay Mot. 24 (*quoting* Dist.Ct.Dkt.163 at 6–7). But the public interest is served by allowing USDA, not a court, to make that determination. *Cf. Ofosu v. McElroy*, 98 F.3d 694, 702 (2d Cir. 1996) (in determining whether to grant stays, "courts give significant weight to the public interest served by the proper operation of the regulatory scheme"). Waivers were not part of the agency action challenged in this litigation; neither is USDA's failure to re-issue waivers.

CONCLUSION

For these reasons, Plaintiffs respectfully request the Court deny the motion to stay.

Respectfully submitted,

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June 22, 2021

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 5182 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in 14-point Times New Roman.

3. This motion has been scanned for viruses and is virus-free.

June 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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