

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

United Food and Commercial Workers  
Union, Local No. 633, et al.,

Plaintiffs,

v.

United States Department of Agriculture,  
Defendant.

Case No. 19-cv-2660 (JNE/TNL)

**PROPOSED AMICUS CURIAE BRIEF  
BY ATTORNEYS GENERAL OF  
MINNESOTA, CALIFORNIA,  
ILLINOIS, MARYLAND,  
MASSACHUSETTS, MICHIGAN AND  
VIRGINIA.**

**IDENTITY AND INTEREST OF AMICI CURIAE**

The States of Minnesota, California, Illinois, Maryland, Massachusetts, Michigan, and Virginia (“Amici”) file this brief in support of the Plaintiffs. The Amici have a vital interest in protecting workers within their borders and ensuring the wholesomeness of consumer meat products. Collectively, the Amici are home to thousands of swine-processing facility workers whose safety is jeopardized by the United States Department of Agriculture (USDA) Food Safety and Inspection Service’s (FSIS) New Swine Inspection System, 84 Fed. Reg. 52,300, AR100193 (Oct. 1, 2019) (NSIS or Final Rule). Based on the Amici’s substantial interest in the Court’s resolution of the issues presented in this litigation, the Amici respectfully submit this amicus curiae brief.<sup>1</sup>

**INTRODUCTION**

This case concerns FSIS’s decision to eliminate maximum line speeds in swine-processing facilities without giving adequate consideration to worker safety, in violation

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<sup>1</sup> Although states may file an amicus brief without consent or leave of court in an appellate proceeding, Fed. R. App. P. 29(a)(2), the Amici here seek leave of court to file this brief in a contemporaneously filed motion.

of the Administrative Procedure Act (APA). The Amici have a substantial interest in supporting Plaintiffs' efforts to vacate the challenged Final Rule: protecting the health, safety, and welfare of their residents by ensuring that the FSIS adequately regulates swine-processing facilities. The Final Rule endangers the health and safety of workers and consumers, dangers that the FSIS failed to address during the rulemaking process.

The Amici file this brief to share information about their residents that work in the swine-processing industry and to further inform the Court about how the Final Rule adversely affects workers in the context of current events. We support Plaintiffs' Motion for Summary Judgment. We believe that the NSIS rulemaking was unlawful under the APA, and request that the Court grant Plaintiffs' request to vacate the Final Rule.

## ARGUMENT

### **I. THE AMICI HAVE A SUBSTANTIAL INTEREST IN PROTECTING THE HEALTH AND SAFETY OF THEIR RESIDENTS AND WORKERS.**

Pursuant to historic police powers, the Amici and their political subdivisions enforce myriad state laws to protect the public health and safety of their residents. While the Amici regulate facilities exempt from the Federal Meat Inspection Act, the Amici are home to swine-processing facilities that fall under FSIS's purview, 21 U.S.C. § 605. Three facilities in the Amici States took part in the NSIS pilot program,<sup>2</sup> but FSIS predicts that all 40 high-volume swine-processing facilities in the country will choose to implement the NSIS at some point. 82 Fed. Reg 52,305 (Oct. 1, 2019). Thousands of the

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<sup>2</sup> USDA, *List of Participating Plants* (Mar. 23, 2020), <https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/haccp/haccp-based-inspection-models-project/HIMP-list-of-participating-plants>.

Amici's residents work in these facilities and will be—or already are—harmed by FSIS's repeal of line speed limitations through the Final Rule. And the Amici rely upon strong implementation of federal food safety standards to ensure that the pork products consumed by their residents are safe for consumption.

**A. SWINE-PROCESSING WORKERS ARE A DIVERSE GROUP IN A HIGH-RISK PROFESSION.**

Workers in the meat processing industry constitute a particularly vulnerable group of the American workforce. About 40% of workers in the meat processing industry are foreign-born and may lack work opportunities in their regions.<sup>3</sup> Some came to the United States as refugees, while others entered the country without documentation or overstayed visas.<sup>4</sup> This diverse group of workers perform this dangerous work for well less than the national average annual salary. In 2017, the 77,570 people working as slaughterers and meat packers earned an average annual wage of \$27,830.<sup>5</sup> For the workers who perform routine cutting and trimming of animal products, the numbers are even bleaker. The more than 150,000 meat, poultry, and fish cutters and trimmers in the United States earn an average annual wage of \$26,430 per year.<sup>6</sup>

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<sup>3</sup> Stephen Groves & Sophia Tareen, *U.S. meatpacking industry relies on immigrant workers. But a labor shortage looms*, LA Times (May 26, 2020), <https://www.latimes.com/food/story/2020-05-26/meatpacking-industry-immigrant-undocumented-workers>.

<sup>4</sup> *Id.*

<sup>5</sup> U.S. Bureau of Labor Statistics, *Occupational Employment and Wages for Slaughterers and Meat Packers* (May 2017) <https://www.bls.gov/oes/2017/may/oes513023.htm>.

<sup>6</sup> U.S. Bureau of Labor Statistics, *Occupational Employment and Wages for Meat, Poultry, and Fish Cutters and Trimmers* (May 2017) <https://www.bls.gov/oes/2017/may/oes513022.htm>.

Swine-processing workers earn low pay for difficult, dangerous work. The Final Rule notes that employer-reported injury rates for swine-processing workers are 2.4 times the rate of workers in other private-sector industries. 84 Fed. Reg. 51324. Even an injury rate this high fails to capture the actual danger of swine-processing work due to chronic underreporting. Despite legal protections, swine-processing employees fear retaliation from their employers if they report injuries to the Occupational Safety and Health Administration (OSHA).<sup>7</sup> The estimates also undercount injuries because the Department of Labor only collects data if a worker misses work—not if the worker continues to work while sick or injured.<sup>8</sup> Yet another mechanism by which injuries are undercounted is the classification of workers, which may exclude meat sanitation workers employed by contractors from the industry’s injury rate. *Id.* The Final Rule recognizes OSHA guidance that instructs that one way to decrease injury rates at these plants is to slow line speeds and production rates. The NSIS does the opposite.

**B. THE COVID-19 PANDEMIC FURTHER ENDANGERS SWINE-PROCESSING WORKERS.**

In addition to dangerous working conditions, meat-processing workers are currently battling a new workplace hazard: COVID-19. Although the pandemic began after FSIS published the Final Rule, the crowded workplace conditions of meat-

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<sup>7</sup> See U.S. Gov’t Accountability Office, GAO-18-12, *Workplace Safety and Health: Better Outreach, Collaboration, and Information Needed to Help Protect Workers at Meat and Poultry Plants* 24 (2017).

<sup>8</sup> U.S. Gov’t Accountability Office, GAO-16-337, *Additional Data Needed To Address Continued Hazards In The Meat And Poultry Industry Report To Congressional Requesters* ii (2016).

processing facilities have fueled some of our nation's worst COVID-19 outbreaks.<sup>9</sup> More than 30,000 meat-processing workers have been infected with COVID-19, and at least 100 have died.<sup>10</sup> This concern may lie outside the administrative record, but it has direct relevance to the Amici and their residents. California's largest swine-processing facility—the Smithfield facility in Vernon—is an NSIS participant and has the largest number of non-residential COVID-19 positive diagnoses in Los Angeles County.<sup>11</sup> Out of the Smithfield facility's 1,837 staff members, 205 have tested positive for COVID-19.<sup>12</sup> A similarly dire situation exists at Minnesota's JBS Pork facility in Worthington. Of the more than 2,000 employees, at least 350 have tested positive for COVID-19.<sup>13</sup>

COVID-19 spreads quickly through populations of meat-processing employees largely because the demands of processing over 1,000 hogs an hour require employees to work in close quarters, which provides limited space for social distancing. The Center for

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<sup>9</sup> Jonathan W. Dyal, et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—19 States*, 69 MMWR Morb Mortal Wkly Rep. 557–61 (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e3.htm>.

<sup>10</sup> Adam Belz, et al., *Meatpacking production is nearly normal, but workers are still coping with COVID-19*, Star Tribune (July 10, 2020), <https://www.startribune.com/meatpacking-production-is-nearly-normal-but-workers-are-still-coping-with-covid-19/571630672/>.

<sup>11</sup> Laura Newberry, *Coronavirus outbreaks hits Farmer John, 8 other plants in Vernon*, LA Times (May 24, 2020), <https://www.latimes.com/california/story/2020-05-24/coronavirus-outbreaks-occur-at-9-industrial-facilities-in-vernon>.

<sup>12</sup> See *id.*; LA Dept. Public Health, Laboratory-confirmed COVID-19 Cases, <http://publichealth.lacounty.gov/media/Coronavirus/locations.htm>.

<sup>13</sup> CBS Minnesota, *Coronavirus in MN: Worthington's JBS Pork Processing Plant to Reopen After 350+ Workers Tested Positive* (May 3, 2020), <https://minnesota.cbslocal.com/2020/05/03/coronavirus-in-mn-worthingtons-jbs-pork-processing-plant-to-reopen-after-350-workers-test-positive/>.

Disease Control and Prevention (CDC) and OSHA have published best practices to minimize the risk of COVID-19 transmission at meat-processing facilities by limiting the number of workers on the line so that employees do not stand shoulder-to-shoulder or directly across from one another and providing employees with personal protective equipment,<sup>14</sup> but there is little hope that these recommendations will be implemented so long as facilities are focused on maximizing the number of hogs that they process on an hourly basis.<sup>15</sup>

**C. THE ELIMINATION OF LINE SPEED LIMITS IN THE FINAL RULE IS ARBITRARY AND CAPRICIOUS AND MUST BE VACATED.**

FSIS acted arbitrarily and capriciously by promulgating the Final Rule without considering commenters' evidence related to worker safety and by failing to explain why it departed from its previous position that worker safety ought to be considered as part of the rulemaking. Moreover, there is no support for the agency's new position that, because it lacks authority to regulate worker safety, it cannot even consider it.

A reviewing court sets aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sierra Club v. EPA*, 252 F.3d 943, 947 (8<sup>th</sup> Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)). "An agency decision is

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<sup>14</sup> See CDC & OSHA, *Interim Guidance to Meat and Poultry Processing Workers and Employers*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

<sup>15</sup> See Michael Grabell, Claire Perlman, Bernice Yeung, ProPublica, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in their Plants* (June 12, 2020), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants>.

arbitrary or capricious if: [1] the agency has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Nat’l Parks Conservation Ass’n v. McCarthy*, 816 F.3d 989, 994 (8<sup>th</sup> Cir. 2016) (quoting *Lion Oil Co. v. EPA*, 792 F.3d 978, 982 (8<sup>th</sup> Cir. 2015)).

**1. FSIS Failed To Adequately Consider Comments and Disclose Data**

In making a determination, “[a]n 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). On February 1, 2018, FSIS published its proposed rule to “modernize swine slaughter inspection” and asked for comments on “the effects of faster line speeds on worker safety.” 83 Fed. Reg. 4780, 4796 (Feb. 1, 2018) (the Proposed Rule). Thousands of commenters responded. *See* Final Rule at 52,304, AR100197. Yet FSIS’s October 2019 decision to eliminate the maximum line speed ignored crucial data and commenters’ concerns. In failing to consider the Final Rule’s impact on worker safety, FSIS acted in a manner that was arbitrary and capricious.

The evidence establishes that increased line speeds will negatively affect worker safety. For example, according to Plaintiffs’ comments on the Proposed Rule, “There are over three decades of studies that point to fast line speeds in swine-processing facilities as the root cause for the high numbers of serious injuries and illnesses.” *UFCW Comments in Docket FSIS-2016-0017* at 2 (May 2, 2018), AR90717, AR90721. The comments describe how the facilities already subject workers to high rates of repetitive stress and

traumatic injuries. The comments correlate an increase in injuries with an increase in line speed: “If the chain speed increases, the increased speed will increase the number of repetitions by those workers on the line, and thus increase the risk of exposure to hazards and increase the risk of injury.” *Id.* at 6. These facts are supported by official studies referred to by many of the commenters. “[OSHA] has acknowledged the role line speed has played in the development of musculoskeletal disorders among workers in hog slaughter plants going back as far as 1988.” *Id.* at 7. OSHA’s “guidelines specifically identify line speed as a workplace condition that creates biomechanical stress on a worker, and outlines risk factors that are related to line speed, such as repetition rate and work/rest regimens.” *Id.* (citing Ergonomics Program Management Guidelines For Meatpacking Plants, OSHA (1993), <https://www.osha.gov/Publications/OSHA3123/3123.html>).

Plaintiffs’ comments are but one example of commenters providing FSIS with the evidence it requested: “faster line speeds will increase the risk of physical harm to Plaintiffs’ members.” *Order Denying in Part and Granting in Part Defendants’ Motion to Dismiss* at 9 (Apr. 1, 2020) (hereinafter Order) (citing Compl. At ¶¶ 28–30, 41). In addition to Plaintiffs’ own comments, the Complaint cites to comments submitted by the Association of Occupational and Environmental Clinics; the American Public Health Association—Occupational Health and Safety; Professor Melissa Perry, National Employment Law Project; and a Government Accountability Office Report, GAO-16-337, all of which provide additional evidence that increasing line speeds will lead to more injuries.



Additionally, as Plaintiffs detail in their Motion for Summary Judgment, FSIS withheld worker safety data until after the comment period on the Proposed Rule had closed. Once FSIS disclosed the data and analysis, researchers determined that they were insufficient to serve as the bases for a statistically valid conclusion about worker injury rates. Plfs. MSJ at 12. A review of the rulemaking by the USDA's Office of the Inspector General (OIG) confirmed that FSIS failed to comply with agency guidelines regarding data presentation and data transparency.<sup>16</sup>

## **2. FSIS Changed Its Position On Worker Safety Without A Reasoned Explanation**

The requirement that “[a]n agency [must] provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It “must show that there are good reasons for the new policy.” *Id.* Where, as here, a new policy rests on factual or legal determinations that contradict those underlying the agency's prior policy, the agency must provide a more detailed explanation for its policy. *Id.* “Unexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

FSIS published its Final Rule in October 2019, following an opaque rulemaking process. Rather than explain its rationale for eliminating the line speed limitation in light

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<sup>16</sup> OIG, FSIS Rulemaking Process for the Proposed Rule: Modernization of Swine Slaughter Inspection, Inspection Report 24801-001-41 (June 2020), <https://www.usda.gov/oig/webdocs/24801-0001-41.pdf>.

of the overwhelming evidence of harm to worker safety, FSIS instead disclaimed authority to regulate safety in the workplace—an abrupt change from its prior position. As the Court has recognized, FSIS previously assessed the effects of line speeds on worker health and safety. “In a prior rulemaking related to line speeds in poultry slaughterhouses, FSIS devoted five pages of the Federal Register to assess the effects of line speeds on worker health and safety.” Order at 19–20. The Court also noted that FSIS invited comments on the relationship between line speeds and worker safety in the Proposed Rule before it reversed course. Although FSIS had specifically requested comments on the relationship between its Proposed Rule and worker safety, the Service suddenly disclaimed any authority to regulate worker safety in the Final Rule. *See* 84 Fed. Reg. 52,305 (stating that FSIS lacks the “authority” to “regulate issues related to establishment of worker safety”). FSIS failed to provide an adequate explanation of its change in position, rendering the Final Rule arbitrary and capricious.

## **II. THE AMICI HAVE AN INTEREST IN ENSURING SAFE FOOD FOR CONSUMERS.**

The Amici’s interests are not limited solely to the health and safety of swine-processing workers, but also include concerns about food safety for consumers in their states. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7<sup>th</sup> Cir. 1997) (finding a substantial government interest in safety of the food provided in Chicago). As the nation’s 40 high-volume swine-processing facilities account for 93% of the total annual swine slaughter in the United States, consumers across the country will receive pork from NSIS-participating facilities. 82 Fed. Reg 52,305 (Oct. 1, 2019).

NSIS's delegation of ante-mortem inspection duties to facility employees, a task traditionally reserved for federally licensed inspectors, exacerbates the public health concerns from eliminating line speed limits. FSIS attempts to address these concerns by noting that federal inspectors will conduct more off-line checks under the NSIS and that employees will still identify suspect hogs for federal inspection. But this system only ensures that inspectors will check hogs that employees have identified as suspect; it does not guarantee that hogs not flagged as suspect are fit to enter the food supply. The danger of having suspect hogs enter the food system is heightened by the removal of line speed limits. Under the NSIS, the untrained workers charged with these ante-mortem duties will be evaluating more hogs at a faster pace than their federal counterparts did under the traditional system. In tandem, the replacement of expert inspectors with facility employees during ante-mortem inspection and the introduction of faster line speeds raise serious concerns about the safety of the food production system.

The Final Rule does not analyze the cumulative impacts of these changes. Instead, FSIS relied on a pilot program, the Hazard Analysis and Critical Control Point (HACCP) Inspection Models Project (HIMP), and summary report to assert that raising line speeds will not pose a risk to food safety. *See* 84 Fed. Reg. 52310 (“While the relationship between line speeds and *Salmonella* prevalence was not incorporated into the risk assessment model, FSIS did consider the impact of line speed on HIMP establishment performance in the Hog HIMP Report.”). But the pilot program and summary report suffer from serious flaws and cannot provide the sole support for the agency's conclusions.

First, the pilot program was managed ineffectively for much of its duration and the data produced from studying it is of limited use. Oversight errors make it impossible to use the pilot program data to conclude that there is no food safety risk from transitioning to NSIS processes. FSIS's own report, for example, analyzes data from two periods, 2006–10 and 2012–13. *See* HIMP Report at 5. But the five pilot facilities adopted those alternative processes as early as 1997, meaning that the data FSIS relies upon misses the first nine years of the pilot program's implementation. That period is extremely important, as it represents the time when both facility employees and FSIS inspectors would be adjusting to new procedures. By the time this data was collected, however, the pilot facilities had already been operating under the pilot program for almost a decade. The data used in the report does not, therefore, provide much clarity about food safety in the early years of transition from traditional to NSIS procedures.

Second, the report itself presents mixed results concerning food safety at HIMP facilities. Three of the five facilities engaged in the pilot program ranked among the top ten facilities nationwide in noncompliance records (NRs). *See* FSIS—Inspection and Enforcement at Swine Slaughter Plants, Audit Report 24601-0001-41 (May 2013) at 17-19. The fact that facilities implementing the pilot program led the nation in noncompliance records undermines the FSIS's use of that program as the model upon which to conclude that widespread adoption of NSIS procedures will not pose a risk to food safety.

And even where the HIMP report notes improvements in compliance procedures, those gains are undercut by increases in public health related violations. For example,

while the report documents more offline inspections at NSIS than traditional facilities, it also records more instances of noncompliance with public health requirements at facilities. See USDA, Food Safety and Inspection Service, *Evaluation of HACCP Inspection Models Project (HIMP) for Market Hogs*, November 2014, at 5 (noting much higher rates of offline verification at HIMP than non-HIMP establishments); *id.* at 6 (noting that from 2006 to 2010 public health-related noncompliance rates were 1.2 times higher at HIMP than non-HIMP establishments). The report therefore cannot provide the sole basis for concluding that increasing line speeds will not negatively impact food safety.

#### CONCLUSION

That other agencies have authority over worker safety does not relieve FSIS of its obligation to consider the impact its rule will on the vulnerable populations working in swine-processing facilities. These individuals already work in some of the country's most dangerous professions, earning low wages while keeping America fed. Yet in promulgating the Final Rule, FSIS failed to fulfill its legal obligations under the APA to consider the impact that the NSIS will have on these workers. The Court should therefore vacate the NSIS.

Dated: July 21, 2020

Respectfully submitted,

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*/s/ Peter Surdo*

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