

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL No. 227,  
330 Pinecroft Drive  
Louisville, KY 40219;

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL No. 1529,  
8205 Macon Road  
Cordova, TN 38018;

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL No. 1995,  
4207 Lebanon Road, Suite 100  
Hermitage, TN 37076;

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL No. 2008,  
7924 Interstate 30, Suite A  
Little Rock, AR 72209-2900;

RETAIL, WHOLESALE AND  
DEPARTMENT STORE UNION – MID  
SOUTH COUNCIL,  
1901 10th Avenue South  
Birmingham, AL 35205-2601

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, AFL-CIO, CLC,  
1775 K Street, NW  
Washington, DC 20006,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
AGRICULTURE,  
1400 Independence Avenue, SW  
Washington, DC 20250-1400

Defendant.

Civil Action No. 1:20-cv-2045

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. Plaintiffs, five local labor unions and their affiliated international labor union, bring this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 & 706(2), to set aside a waiver program adopted by defendant United States Department of Agriculture (USDA) through its Food Safety Inspection Service (FSIS) and seven waivers granted by FSIS to poultry plants at which Plaintiffs' members work. FSIS adopted the waiver program without using procedures required by the APA, and the program is arbitrary and capricious.

2. FSIS's waiver program permits plants that obtain a waiver to exceed the maximum line speed set forth in a regulation that FSIS adopted in 2014. When FSIS issued its 2014 regulation, it considered an extensive rulemaking record demonstrating the harms that faster line speeds can cause poultry workers. On the basis of that rulemaking record, FSIS abandoned a proposal to allow poultry processing plants to operate at a maximum line speed of 175 birds per minute (bpm), instead capping the maximum line speed at 140 bpm and adopting other regulations designed to protect worker safety at poultry processing plants.

3. With its new waiver program, FSIS reversed course, creating a program under which plants can operate at speeds up to 175 bpm. As a result, although the 2014 regulation adopted through notice-and-comment rulemaking states a maximum line speed of 140 bpm, FSIS now permits nearly 43 percent of all plants subject to that regulation to operate at 175 bpm.

4. In adopting the new waiver program, FSIS ignored concerns—raised by plaintiff UFCW and others—that increasing line speeds at poultry processing plants would increase the risk of injury to workers on the line. Instead, the agency asserted that it lacked the legal authority to address worker safety concerns, even as it acknowledged that it had considered and addressed worker safety concerns in its 2014 rulemaking.

5. FSIS did not promulgate its new waiver program through notice-and-comment rulemaking procedures. Instead, FSIS sought to justify the new program as an application of an existing waiver regulation through which FSIS may grant waivers to experiment with new technologies to facilitate “definite improvements.” The new waiver program does not fall within that regulation, however, because faster line speeds are neither a new technology nor a definite improvement.

6. FSIS’s failure to consider and address the impact of its actions on worker safety violates basic standards of reasoned decisionmaking, and its unexplained departure from the conclusions set forth in its 2014 rulemaking represents classic arbitrary and capricious action. In addition, FSIS violated the APA’s procedural requirements by failing to undertake notice-and-comment rulemaking procedures to adopt its new waiver program. For these reasons and those set forth below, the waiver program and waivers granted under it violate the APA and must be vacated.

#### **JURISDICTION AND VENUE**

7. This Court has jurisdiction under 28 U.S.C. § 1331.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1) and 5 U.S.C. § 703 because defendant resides in this district.

#### **PARTIES**

9. Plaintiff United Food and Commercial Workers Union, Local No. 227 is a labor organization headquartered in Louisville, Kentucky. Local 227 represents workers who work on the poultry processing line in Tyson Foods plants in Robards, Kentucky (FSIS Establishment No. P-19514) and Corydon, Indiana (FSIS Establishment No. P-1241). In April 2020, the Robards and Corydon plants received waivers from FSIS that allow each plant to increase its line speed from 140 birds per minute to 175 birds per minute.

10. Plaintiff United Food and Commercial Workers Union, Local No. 1529 is a labor organization headquartered in Cordova, Tennessee. Local 1529 represents workers who work on the poultry processing line in the Wayne Farms plant in Laurel, Mississippi (FSIS Establishment No. P-519). In April 2020, the Laurel plant received a waiver from FSIS that allows the plant to increase its line speed from 140 birds per minute to 175 birds per minute.

11. Plaintiff United Food and Commercial Workers Union, Local No. 1995 is a labor organization headquartered in Hermitage, Tennessee. Local 1995 represents workers who work on the poultry processing line in the Wayne Farms plant in Albertville, Alabama (FSIS Establishment No. P-1317). In April 2020, the Albertville plant received a waiver from FSIS that allows the plant to increase its line speed from 140 birds per minute to 175 birds per minute.

12. Plaintiff United Food and Commercial Workers Union, Local No. 2008 is a labor organization headquartered in Little Rock, Arkansas. Local 2008 represents workers who work on the poultry processing line in the Wayne Farms plant in Danville, Arkansas (FSIS Establishment No. P-1009), and in the Tyson Foods plants in Dardanelle, Arkansas (FSIS Establishment No. P-72) and Noel, Missouri (FSIS Establishment No. P-1362). In September 2019, the Dardanelle plant received a waiver from FSIS that allows the plant to increase its line speed from 140 birds per minute to 175 birds per minute. In April 2020, the Danville and Noel plants received waivers from FSIS that allow each plant to increase its line speed from 140 birds per minute to 175 birds per minute.

13. Plaintiff Retail, Wholesale and Department Store Union – Mid South Council (Mid-South) is a labor organization headquartered in Birmingham, Alabama. Mid-South represents workers who work on the poultry processing line in the Wayne Farms plants in Jack, Alabama (FSIS Establishment No. P-7485) and Decatur, Alabama (FSIS Establishment No. P-1235), and in

the Tyson Foods plant in Forest, Mississippi (FSIS Establishment No. P-164). In September 2019, the Jack plant received a waiver from FSIS that allows the plant to increase its line speed from 140 birds per minute to 175 birds per minute. In April 2020, the Decatur and Forest plants received waivers from FSIS that allow each plant to increase its line speed from 140 birds per minute to 175 birds per minute.

14. Plaintiff United Food and Commercial Workers International Union (UFCW) is an international labor organization headquartered in Washington, DC. It has approximately 1.3 million members and represents approximately 180,400 workers in the meat and poultry processing industry. It represents approximately 70,600 poultry processing workers. Members of UFCW Local 227, UFCW Local 1529, UFCW Local 1995, UFCW Local 2008, and Mid-South are also members of UFCW.

15. Defendant U.S. Department of Agriculture is an agency of the United States within the meaning of the APA.

## FACTS

### *Poultry Processing and Worker Safety*

16. In the United States, chickens are slaughtered for meat primarily in poultry processing plants regulated by FSIS. These plants take in live birds and convert them into food products ready to be packaged and shipped to restaurants and retail outlets.

17. Despite the increasing use of automation, plants continue to rely on human workers to perform many tasks involved in transforming live chickens into poultry products.

18. The process of converting live birds into food products is organized around “lines.” Workers hang chickens on the lines that will carry their carcasses throughout the plant. Workers use saws, knives, scissors, and other tools to cut up and debone the birds prior to packaging. The

workplace environment is often coated with grease and blood, and workers must stand in close quarters to ensure that they can keep up with the speed at which the poultry is moving down the line.

19. Poultry processing is highly dangerous for workers on the line.

20. Musculoskeletal problems—such as carpal tunnel syndrome (CTS), tendonitis, and “trigger finger”—are “common” among poultry workers and “of particular concern.” Memo from Thomas Galassi, Director Directorate of Enforcement Programs, Occupational Health and Safety Administration, to Regional Administrators and State Designees (Oct. 28, 2015), [https://www.osha.gov/dep/enforcement/poultry\\_processing\\_10282015.html](https://www.osha.gov/dep/enforcement/poultry_processing_10282015.html). Musculoskeletal disorders arise because workers need to make thousands of repetitive movements each work day to process chicken carcasses into food product that is suitable for human consumption. In 2013, poultry workers suffered CTS at “more than seven times the national average,” and they were more than “4.5 times more likely to identify repetitive motion as the exposure resulting in a serious injury” as compared to all industries. *Id.* Likewise, the Department of Labor’s Occupational Health and Safety Administration (OSHA) has noted, based on 2017 data, that the CTS rate for poultry workers is 4.3 times higher than for workers in all of private industry. OSHA Regional Instruction, Region IV, Directive No. CPL-2 02-02-030A, Executive Summary (effective date Oct. 1, 2019), at 2, [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_2\\_02-02-030A.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_2_02-02-030A.pdf).

21. Poultry workers are also at heightened risk of suffering acute physical injuries. According to 2017 data, poultry workers suffer amputations at twice the rate as workers in private industries generally. *Id.* at 4. One recent analysis showed that the poultry industry ranks as the fourteenth most dangerous industry for workers. Indeed, an average of eight workers per year died on the job between 2013 and 2017 (excluding transportation-related injuries). Human Rights

Watch, *When We're Dead and Buried, Our Bones Will Keep Hurting: Workers' Rights under Threat in Meat and Poultry Plants* 30 & n.66 (2019) (HRW Report), [https://www.hrw.org/sites/default/files/report\\_pdf/us0919\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0919_web.pdf). Sprains, lacerations, and contusions are common acute injuries suffered by workers in poultry processing establishments.

22. Federal and private research, as well as workers' experiences, point to work speed as a "major contributing factor" to the high injury rates suffered by poultry workers. HRW Report 49 (citing studies). When the same number of employees process more birds to match an increase in line speed, the number of repetitive motions they must undertake increases, which increases the risk of long-term musculoskeletal disorders; and the faster the workers must process chickens, the greater the risk of acute physical injuries. *Id.*

23. As the National Institute for Occupational Safety and Health (NIOSH) explained to FSIS in 2014, the risk of carpal tunnel syndrome for workers in poultry processing plants arises from "the repetitive and forceful motions required by exposed workers to process poultry," and "[I]ne speed affects the periodicity of repetitive and forceful movements, which are the key causes of musculoskeletal disorders." Letter from John Howard, Director, to Alfred V. Almanza, Administrator, FSIS (Apr. 4, 2014), at 2–3, [https://www.cdc.gov/niosh/topics/poultry/pdfs/LTR.Almanza.7.April\\_.2014.pdf](https://www.cdc.gov/niosh/topics/poultry/pdfs/LTR.Almanza.7.April_.2014.pdf).

24. FSIS has acknowledged that an increase in line speed may affect "the safety of establishment workers." *See* Final Rule, Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,565, 49,600 (Aug. 21, 2014) (Final Rule). Referring to NIOSH's findings, FSIS noted "a strong relationship between risk factors, such as prolonged or repetitive hand activity, gripping force and exposure to cold, and [musculoskeletal disorders] including carpal tunnel syndrome" in poultry processing. *Id.* at 49,598. And it concluded that "[i]ncreasing line speed in processing,

without changing other factors, could result in an increase of work pace for establishment employees, and increasing work pace among establishment employees, without taking appropriate mitigation actions, could increase risk of injuries and illnesses among establishment employees.”

*Id.*

***FSIS’s Regulation of Poultry Line Speed***

25. FSIS regulates poultry line speeds pursuant to the Poultry Products Inspection Act (the Act). The Act “provide[s] for the inspection of poultry and poultry products and otherwise regulate[s] the processing and distribution of such articles” to prevent the sale of “poultry products which are adulterated or misbranded.” 21 U.S.C. § 452. Poultry establishments are prohibited from processing poultry products in a manner that does not comply with the Act’s requirements. *Id.* § 459(a).

26. FSIS regulations require that all poultry products processed in an establishment be inspected to ensure compliance with the Act’s requirements. 9 C.F.R. §§ 381.7; 381.76(a).

27. FSIS regulations authorize six types of inspection systems for poultry. *Id.* § 381.76(b)(1). For each of these systems, the regulations establish a maximum line speed at which the establishment can operate. The maximum line speed, measured in “birds per minute,” “reflect[s] the time it takes for an inspector to effectively perform the online carcass inspection procedures.” *See* Final Rule, 79 Fed. Reg. at 49,567; *see also* 9 C.F.R. §§ 381.67, 381.69, 381.76(b)(3)(ii)(b), 381.76(b)(4)(iv) (establishing maximum line speeds for various poultry inspection systems).

28. The newest of FSIS’s poultry inspection systems is called the New Poultry Inspection System (NPIS). The NPIS differs from previous poultry inspection systems in that it



relies on establishment employees to sort and remove unacceptable carcasses before birds are inspected.

29. When FSIS proposed the NPIS in 2012, it proposed setting the maximum line speed at 175 bpm—a twenty-five percent increase from the fastest maximum line speed (140 bpm) permitted under other inspection systems. Proposed Rule, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4407, 4423 (Apr. 26, 2012) (Proposed Rule).

30. FSIS recognized in the Proposed Rule that it should consider the effects of line speed on establishment worker safety. *Id.* at 4423.

31. In extending the period for commenting on the Proposed Rule, FSIS reiterated that it had “consider[ed] the potential effects on [worker] safety” and that it was “interested in comments on the effects of line speed and worker safety.” Notice, Extension of Comment Period, Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 24,873, 24,875 (Apr. 26, 2012).

32. FSIS adopted a final rule creating NPIS in 2014. Final Rule, 79 Fed. Reg. 49,565.

33. In the Final Rule, FSIS did not adopt its proposal to allow poultry establishments to operate at 175 bpm. *Id.* at 49,591. Instead, under NPIS, the maximum line speed is set by regulation at 140 bpm. 9 C.F.R. § 381.69(a).

34. In setting the maximum line speed at 140 bpm, FSIS cited data from poultry processing plants that had previously received line-speed waivers pursuant to an FSIS pilot study. Final Rule, 79 Fed. Reg. at 49,590–91. Although those waivers authorized the plants to operate lines at 175 bpm, FSIS noted that the average speed at which those plants operated was 131 bpm. *Id.*; see also Evaluation of HACCP Inspection Models (HIMP), USDA, FSIS (Aug. 2011), at 11, [https://www.fsis.usda.gov/shared/PDF/Evaluation\\_HACCP\\_HIMP.pdf](https://www.fsis.usda.gov/shared/PDF/Evaluation_HACCP_HIMP.pdf). FSIS relied on that

evidence in setting the maximum line speed for NPIS at 140 bpm. Final Rule, 79 Fed. Reg. at 49,591.

35. FSIS permitted the establishments under the pilot study to continue operating at a maximum line speed of 175 bpm. *Id.* FSIS anticipated comparing the data from the establishments in the pilot study with data from establishments that had converted to NPIS.

36. FSIS noted that it had received extensive comments about the effects on worker safety of increasing the line-speed limit. Final Rule, 79 Fed. Reg. at 49,598. These commenters “were concerned that an increase in production line speed would lead to increased rates of musculoskeletal disorders, other traumatic injuries, and potentially adverse health effects of psychological and emotional stress among industry workers, particularly in processing jobs involving highly repetitive knife use.” *Id.*

37. FSIS acknowledged that “[i]ncreasing line speed in processing, without changing other factors, could result in an increase of work pace for establishment employees,” which, in turn, could, “increase risk of injuries and illnesses among establishment employees.” *Id.*

38. To address concerns about worker safety, FSIS “establish[ed] a new subpart” in its regulations that require poultry establishments to attest that they “maintain[] a program to monitor and document any work-related conditions that arise among establishment workers.” *Id.* at 49,600.

39. FSIS also revised its regulations to provide that NPIS establishments must “comply with all other applicable requirements of the law,” including, specifically, 29 U.S.C. § 654(a). *Id.* at 49,597. Section 654(a) of Title 29 requires each employer to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

40. FSIS also promised that it would “consider the available data on employee effects collected from NIOSH activities when implementing the final rule.” Final Rule, 79 Fed. Reg. at 49,596.

***The 2018 Waiver Program***

41. In September 2017, the National Chicken Council, a trade association for the broiler chicken industry, petitioned FSIS to waive the maximum line speed regulation for NPIS plants. *See* Petition to Permit Waivers of the Maximum Line Speed Rates for Young Chicken Slaughter Establishments under the New Poultry Inspection System and Salmonella Initiative Program, National Chicken Council (Sept. 1, 2017) (NCC Petition), at 1, <https://www.fsis.usda.gov/wps/wcm/connect/7734f5cf-05d9-4f89-a7eb-6d85037ad2a7/17-05-Petition-National-Chicken-Council-09012017.pdf?MOD=AJPERES>.

42. FSIS treated the NCC Petition as a petition for rulemaking and sought comment on the petition. FSIS received over 100,000 comments in response to the NCC Petition. Letter from Carmen Rottenberg, Acting Deputy Under Secretary, Office of Food Safety, to Michael Brown, President, National Chicken Council (Jan. 29, 2018) (FSIS Denial Letter), at 2, <https://www.fsis.usda.gov/wps/wcm/connect/235092cf-e3c0-4285-9560-e60cf6956df8/17-05-FSIS-Response-Letter-01292018.pdf?MOD=AJPERES>.

43. UFCW submitted comments explaining that eliminating line-speed restrictions “will put hard-working poultry workers at greater risk of being injured.” Comments of UFCW to NCC Petition (Dec. 12, 2017), at 1; *see also* Comments of Oxfam America (Oct. 12, 2017) (addressing worker safety issues); Comments of Southern Poverty Law Center (Oct. 13, 2017) (same); Comments of Interfaith Worker Justice (Dec. 12, 2017) (same).

44. Other commenters argued that FSIS could not grant the NCC Petition under existing regulations, that the petition was inconsistent with the agency's stated position on line speed in the Final Rule, and that the maximum line speed could not be changed without undertaking notice-and-comment rulemaking under the APA. Comments of National Employment Law Project (Dec. 11, 2017), at 2–9; Comments of Food & Water Watch (Oct. 5, 2017), at 1–3.

45. FSIS denied NCC's petition in January 2018. At the same time, FSIS stated its intent to “make available criteria that it will use to consider waiver requests from young chicken establishments, in addition to the current twenty [operating under the pilot program], to operate at line speeds of up to 175 bpm.” FSIS Denial Letter at 2.

46. FSIS subsequently announced its line-speed waiver criteria through two documents.

47. First, on February 23, 2018, FSIS issued a “Constituent Update” that set forth “FSIS’ Criteria for Consideration of Waiver Requests from Young Chicken Establishments to Operate at Line Speeds Up to 175 Birds Per Minute.” 21 FSIS Constituent Update No. 19 (Feb. 23, 2018) (2018 Constituent Update), [https://www.fsis.usda.gov/wps/wcm/connect/ee977696-7f87-4b87-8717-15a824ce0a81/ConstiUpdate022318.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ee977696-7f87-4b87-8717-15a824ce0a81](https://www.fsis.usda.gov/wps/wcm/connect/ee977696-7f87-4b87-8717-15a824ce0a81/ConstiUpdate022318.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ee977696-7f87-4b87-8717-15a824ce0a81).

48. Second, on September 28, 2018, FSIS published a notice in the Federal Register that elaborated on and modified the waiver criteria set out in the 2018 Constituent Update and responded to comments submitted in response to the NCC Petition. *See* Notice, Petition To Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken

Establishments To Operate at Line Speeds of Up to 175 Birds per Minute, 83 Fed. Reg. 49,048 (Sept. 28, 2018) (2018 Waiver Notice).

49. Under the February and September documents (together, the 2018 Waiver Program), an NPIS establishment may apply for a waiver to operate lines at up to 175 bpm if it (1) has been operating in compliance with NPIS requirements for at least one year, (2) is in one of the top two “Salmonella performance standard categor[ies],” (3) has a “demonstrated history of regulatory compliance,” and (4) is “able to demonstrate that the new equipment, technologies, or procedures that allow the establishment to operate at faster line speeds will maintain or improve food safety.” 2018 Constituent Update at 1; *see also* 2018 Waiver Notice, 83 Fed. Reg. at 49,050 (adding “good commercial practices” regarding the humane slaughtering of birds as a regulatory-compliance criterion).

50. The establishment must document how increased line speed will not negatively impact the safety of FSIS employees. 2018 Constituent Update at 2.

51. FSIS does not require a waiver applicant to demonstrate that increased line speed will not negatively impact plant workers.

52. FSIS does not require a waiver applicant to demonstrate that faster line speeds will improve food safety. 2018 Constituent Update at 2.

53. FSIS asserted that it adopted the 2018 Waiver Program to allow NPIS establishments to test new technologies, citing 9 C.F.R. § 381.3(b), which authorizes waivers to test new technologies that would “facilitate definite improvements.” *See* 2018 Constituent Update 1; *see also* 2018 Waiver Notice, 83 Fed. Reg. at 49,048.

54. The 2018 Waiver Program treats faster line speeds as a new technology.

55. The 2018 Waiver Program treats faster line speeds as a “definite improvement[.]” even if it does not result in an improvement in food safety.

56. The 2018 Waiver Program does not address the effect of line-speed increases on establishment worker safety, although FSIS received comments addressing the risk to worker safety in response to the NCC Petition.

57. In adopting the 2018 Waiver Program, FSIS stated that it “has neither the legal authority nor the expertise to regulate or enforce workplace standards for establishment employees.” 2018 Waiver Notice, 83 Fed. Reg. at 49,057.

58. FSIS acknowledged that it had adopted regulations in the Final Rule that address worker safety. *Id.* FSIS did not explain why it now believed that it lacked the legal authority to deny or condition waivers to protect worker safety at establishments operating at faster line speeds.

59. An NPIS establishment that receives a waiver “will routinely need to operate at least one line at speeds above 140 bpm on average” to avoid the risk of having the waiver revoked. 2018 Waiver Notice, 83 Fed. Reg. at 49,051.

60. In adopting the 2018 Waiver Program, FSIS cited its experience with the establishments in its pilot program that are authorized to operate at speeds up to 175 bpm. *Id.* Unlike in the 2014 Final Rule, FSIS did not indicate the average line speed at which these plants had been operating. FSIS did not provide an explanation of how its experience with those plants informed its decision to allow additional establishments to operate lines at up to 175 bpm.

61. FSIS asserted that it intends to use data from plants that received waivers under the 2018 Waiver Program to inform its decision on a future rulemaking. *Id.* at 49,052. NPIS did not explain why data from the establishments with waivers under the pilot program did not provide sufficient information to inform decisions about a future rulemaking. NPIS also did not explain

why it departed from its statement in the 2014 Final Rule that it intended to compare the data from the pilot program establishments with data from NPIS establishments “once the NPIS is fully implemented at most establishments.” Final Rule, 79 Fed. Reg. at 49,591.

62. FSIS did not publish a notice of proposed rulemaking in the Federal Register before adopting the 2018 Waiver Program.

***Current Status of the 2018 Waiver Program***

63. On April 24, 2020, FSIS announced that, as of March 20, 2020, it was no longer accepting applications for waivers under the 2018 Waiver Program. 23 FSIS Constituent Update No. 29 (Apr. 24, 2020).

64. To date, FSIS has granted new line-speed waivers to 35 chicken processing establishments under the 2018 Waiver Program. In total, 53 of the 124 NPIS chicken processing plants currently are authorized to operate lines at 175 bpm.

***Application of the 2018 Waiver Program to Plaintiffs’ Members’ Establishments***

65. Each Plaintiff represents workers who work on poultry processing lines at plants that are subject to the NPIS. Each such plant would be subject to the 140-bpm line-speed limit set forth in 9 C.F.R. § 381.69(a) but for a waiver granted by FSIS that establishes the maximum line speed at 175 bpm.

66. FSIS does not publicly disclose waiver applications under the 2018 Waiver Program.

67. With respect to the Wayne Farms plant in Danville, Arkansas, Wayne Farms submitted a line-speed waiver application to FSIS on November 11, 2019. The Danville plant waiver application did not propose to experiment with any new technology.

68. With respect to the Wayne Farms plant in Albertville, Alabama, Wayne Farms submitted a line-speed waiver application to FSIS on December 12, 2019. The Albertville plant waiver application did not propose to experiment with any new technology.

69. With respect to the Tyson Foods plant in Forest, Mississippi, Tyson Foods submitted a line-speed waiver application to FSIS on an unknown date. The Forestville plant waiver application did not propose to experiment with any new technology.

70. On information and belief, Tyson Foods and Wayne Farms submitted line-speed waiver applications to FSIS for the other plants at which Plaintiffs' members work that did not propose to experiment with any new technology.

71. On information and belief, FSIS applied its 2018 Waiver Program to grant each of the line-speed waiver applications submitted by the plants at which Plaintiffs' members work.

72. On information and belief, in granting these line-speed waivers, FSIS did not impose any conditions on plants that address the increased risk to worker safety that would result from an increase in line speed.

73. The line-speed waivers substantially harm Plaintiffs' members by authorizing and requiring Plaintiffs' members' employers to operate at least one line at speeds above the 140-bpm limit set forth in 9 C.F.R. § 381.69, putting those members at substantially increased risk of injury.

74. The 2018 Waiver Program is final agency action under the APA.

75. Each line-speed waiver granted pursuant to the 2018 Waiver Program is final agency action under the APA.

**FIRST CAUSE OF ACTION**  
**(Violation of the APA – Notice and Comment)**

76. The 2018 Waiver Program is a legislative rule under the APA for which prior notice and an opportunity to comment were required pursuant to 5 U.S.C. § 553 before the rule could be



issued.

77. FSIS failed to promulgate the 2018 Waiver Program in accordance with the APA's notice-and-comment requirements.

78. The 2018 Waiver Program was accordingly promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

**SECOND CAUSE OF ACTION  
(Violation of the APA – Action Contrary to Law)**

79. FSIS's waiver regulation authorizes FSIS to grant waivers to "permit experimentation so that new procedures, equipment, and processing techniques may be tested to facilitate definite improvements." 9 C.F.R. § 381.3(b).

80. The 2018 Waiver Program was not adopted for the purpose of permitting experimentation.

81. The 2018 Waiver Program incorrectly treats a maximum poultry line speed of 175 bpm as a "new procedure[], equipment, and processing technique[]" for purposes of 9 C.F.R. § 381.3(b).

82. The 2018 Waiver Program does not have facilitating definite improvement as its objective because it does not require waiver recipients to demonstrate an improvement to food safety and does not consider the increased risk to workers in evaluating improvement.

83. The 2018 Waiver Program is accordingly "not in accordance with law." 5 U.S.C. § 706(2)(A).

84. Each waiver granted under the 2018 Waiver Program is not in accordance with law.

**THIRD CAUSE OF ACTION  
(Violation of the APA – Arbitrary and Capricious Action)**

85. FSIS failed to provide an adequate rationale for its decision to issue line-speed waivers beyond the establishments in the pilot program.

86. FSIS failed to provide an adequate explanation for reversing its position in the 2014 Final Rule that it had the authority to adopt requirements that protect worker safety.

87. FSIS failed to provide an adequate explanation for its conclusion that it lacked authority to deny or condition waivers in order to protect worker safety.

88. FSIS failed to consider the risks to workers' health of increasing the maximum line speed at NPIS establishments from 140 bpm to 175 bpm.

89. FSIS ignored its commitment in the 2014 Final Rule that it would take worker safety into account in implementing the Final Rule.

90. The 2018 Waiver Program, and each waiver granted pursuant to that policy, is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this Court:

(A) Declare that the 2018 Waiver Program was adopted without observance of procedure required by law;

(B) Declare that the 2018 Waiver Program is arbitrary, capricious, and contrary to law;

(C) Set aside the 2018 Waiver Program;

(D) Set aside each of the line-speed waivers issued by Defendant to the ten poultry processing establishments at which Plaintiffs' members work;

(E) Award Plaintiffs their costs and expenses, including reasonable attorney's fees and expert witness fees; and

(F) Grant such other relief as this Court deems just and proper.

Dated: July 28, 2020

Respectfully submitted,

s/ Nandan M. Joshi

Nandan M. Joshi (D.C. Bar No. 456750)  
Adam R. Pulver (D.C. Bar No. 1020475)  
PUBLIC CITIZEN LITIGATION GROUP  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000  
njoshi@citizen.org

Sarai K. King  
UNITED FOOD & COMMERCIAL  
WORKERS INTERNATIONAL UNION,  
AFL-CIO, CLC  
1775 K Street, NW  
Washington, DC 20006-1598  
(202) 223-3111  
sking@ufcw.org

*Counsel for Plaintiffs*