

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

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL No. 663, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE,

Defendant.

Civil Action No. 0:19-cv-02660
The Honorable Joan N. Ericksen
Magistrate Judge Tony N. Leung

**REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

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INTRODUCTION

Plaintiffs' opposition does nothing to alter the conclusion their complaint should be dismissed. These employee unions lack standing to challenge the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Services (FSIS) rule governing meat inspection and food safety because (1) they fail to identify a single member that will be harmed by the rule; (2) their allegations of injury are too attenuated and hypothetical to satisfy Article III; and (3) any alleged injury is wholly dependent upon the independent actions of third parties, and thus not fairly traceable to FSIS's actions.

Nor do Plaintiffs state a claim on the merits. The rule's authorizing legislation, the Federal Meat Inspection Act (FMIA), focuses solely upon food safety, and Plaintiffs' interest in worker well-being thus falls outside its zone of interests. Further, as Plaintiffs appear to concede, FSIS lacks the statutory mandate to regulate worker safety, and the final rule therefore adequately addresses comments concerning the subject. Finally, Plaintiffs' claims of FMIA violations are analogous to, and should be dismissed on the same grounds as, those litigated in *American Federation of Government Employees v. Veneman*, 284 F.3d 125 (D.C. Cir. 2002) (*AFGE II*). Plaintiffs' complaint should therefore be dismissed.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs agree their right to bring this action is based upon associational standing alone, which they lack unless they can demonstrate that their "members would otherwise have standing to sue in their own right." *Friends of Earth, Inc. v. Laidlaw Env'tl Servs., Inc.*, 528 U.S. 167, 181 (2000); Pls.' Opp'n 21, ECF No. 21. Here, Plaintiffs have not demonstrated standing

because they fail to meet their burden to show injury-in-fact or traceability on the part of any member. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (plurality opinion).

A. Plaintiffs’ Alleged Injuries Are Remote and Speculative.

The Government has demonstrated both that Plaintiffs failed to make concrete allegations regarding injury to any specific member, and that alleged injuries to their members in general are contingent upon multiple speculative assumptions. *See* Def.’s Mot. 18–22, ECF No. 16. Such allegations are insufficient to establish Article III injury-in-fact.

1. Plaintiffs fail to allege injury to any member.

Plaintiffs do not attempt to correct the glaring omission of any allegation that an individual member will purportedly suffer injury. Instead, they concede they have failed to overcome this hurdle, arguing that they are “not required [] to identify a specific member” with a substantial risk of future injury “at the pleading stage.” Pls.’ Opp’n 24. Both the Supreme Court and this Circuit, however, have repeatedly held organizational plaintiffs must “make specific allegations establishing that at least one identified member had suffered or would suffer harm” to show associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *see also, e.g., Defs. of Wildlife*, 504 U.S. at 563; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990); *Owner-Operator Indep. Drivers Ass’n, Inc. v. U.S. Dep’t of Transp.*, 831 F.3d 961, 967 (8th Cir. 2016); *Mo. Protection & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 809–10 (8th Cir. 2007); *accord, e.g., Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (“Because [plaintiff] has not identified a single member who was or would be injured by [defendant-agency’s] decision, it lacks standing to raise this challenge.”). And it is beyond dispute plaintiffs have the burden “clearly to allege facts demonstrating that [they are] a proper

party to invoke judicial resolution of the dispute.” *Warth v. Seldin*, 422 U.S. 490, 518 (1975).

There is no support for Plaintiffs’ claim that this burden is somehow eliminated at the pleadings stage. To the contrary, the Supreme Court has dismissed actions based on failure to allege individualized injury in a complaint. *See Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (standing absent where plaintiff “failed to allege that it or its members would be affected”). As both the Eighth Circuit and this Court have made clear, “[s]tanding is determined as of the commencement of the lawsuit.” *WaterLegacy v. USDA Forest Serv.*, 2019 WL 4757663, at *2 (D. Minn. Sept. 30, 2019) (Ericksen, J.) (quoting *Disability Support All. v. Heartwood Enters., LLC*, 885 F.3d 543, 545 (8th Cir. 2018)). Thus, dismissal at the pleadings stage is appropriate where a plaintiff fails to allege at least one of its members would have individual standing. *See Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 12–14 (D.C. Cir. 2011) (affirming dismissal where plaintiff “neither sufficiently alleged nor persuasively demonstrated any threat of injury in fact to any of its members”); *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 18–19 (D.D.C. 2018).

Here, Plaintiffs have not met this standard. It is not enough simply to allege “UFCW represents workers in seventeen of the 40 plants USDA expects will convert to NSIS.” Pls.’ Opp’n 25. The Supreme Court has rejected similar arguments that, given an organization’s sheer numbers, at least one member must be at a substantial risk of harm. In *Morton*, for example, the plaintiff-organization’s allegations that it had “approximately 27,000 members residing in the San Francisco Bay Area” and an interest in preserving the Sierra Nevada Mountains were insufficient to establish that its members would be harmed by construction in the Sequoia National Park. 405 U.S. at 735 & n.8. Likewise, in *Summers*, the Supreme Court refused to assume “there [was] a statistical probability that some of [the plaintiff-

organization’s] members [were] threatened with concrete injury.” 555 U.S. at 497. Instead, “specific allegations establishing that at least one identified member had suffered or would suffer harm” are required. *Id.* at 498.

Plaintiffs’ complaint suffers from the same defects as *Morton* and *Summers*. Although they generally allege that their members work in swine slaughter establishments that FSIS assumed, for the sake of conducting a cost-benefit analysis, would opt in to NSIS, Plaintiffs provide no specifics about any member or how that individual will allegedly be harmed. *See* Def.’s Mot. 18. There is no indication, for example, what role any member performs, or how NSIS might affect that role.¹ This is for good reason: Plaintiffs have no idea whether any establishment will adopt NSIS, how that choice will affect employees’ day-to-day responsibilities, or whether any change will subject any employee to an increased risk of injury. *See id.* at 18–21. Further, given Plaintiffs’ burden, they cannot use to their advantage their failure to submit supplemental declarations or otherwise seek to bolster the record in support of their standing allegations. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (admonishing that a plaintiff “should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto . . . in response to a motion to dismiss for want of standing”). For these reasons alone, Plaintiffs’ complaint should be dismissed.

2. Plaintiffs fail to demonstrate a substantial risk of concrete injury.

Plaintiffs’ challenge is based solely on alleged future injuries to their members. *See* Pls.’ Opp’n 23. They therefore have the burden of showing “certainly impending” threatened

¹ Vague allusions to members’ work on evisceration lines at two establishments do not suffice absent information regarding specific roles or how NSIS will cause harm to those members. *See* Compl. ¶¶ 33, 35, ECF No. 1.

injury or a “substantial risk that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). “[A]llegations of *possible* future injury” premised on an “attenuated chain of inferences” are insufficient. *Clapper*, 568 U.S. at 409, 414 n.5 (citation omitted). As the D.C. Circuit held in dismissing an analogous challenge to a similar rule for want of standing, Plaintiffs must show both that the rule “substantially increases the risk” of worker injury as compared to the traditional inspection system, and a “substantial probability” that their members will suffer injury as a result of this increased risk. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015).²

Plaintiffs fail to demonstrate either. Their allegations of injury rest upon at least *four* separate hypothetical assumptions. *See* Def.’s Mot. 18–22. First, the Court must assume establishments that employ Plaintiffs’ members implement the optional NSIS. Second, it must assume those establishments choose to increase their line speeds *above* the current maximum. Third, it must assume, contrary to collected data, that changes predicted to occur after NSIS implementation—including to workers’ numbers, employee responsibilities, and facilities—will have a negative effect on injury rates. And finally, the Court must assume that FSIS online inspectors act to protect workers under the traditional system (which Plaintiffs do not allege), and that they would do so less frequently under NSIS due to reductions in their ranks. Allegations of injury that rest upon so many speculative occurrences are neither certainly

² Plaintiffs’ attempt to distinguish *Food and Water Watch* is unavailing. *See* Pls.’ Opp’n 20–21. That the D.C. Circuit considered matters outside the pleadings, and plaintiffs’ alleged harms involved foodborne illness, *see id.*, are distinctions without a difference. The D.C. Circuit’s holding is not contrary to the law of this Circuit, *see* 808 F.3d at 916–18, and Plaintiffs’ claims likewise fail.

impending, nor do they present a substantially increased risk of harm.

Plaintiffs attempt to escape this conclusion by minimizing the importance of NSIS's optional nature and overstating the significance of FSIS assumptions. For the purpose of cost-benefit analysis, FSIS assumed that, “[d]ue to the economic constraints,” only establishments that exclusively slaughter market hogs might opt in to NSIS, and explained that 40 such establishments existed in 2016. *See* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52322 (Oct. 1, 2019) (to be codified at 9 C.F.R. pts. 301, 309 & 310). The rule also set forth the potentially significant expenses associated with implementing NSIS, and recognized that “[l]arge establishments that voluntarily switch to the NSIS incur the majority of costs.” *Id.* at 52331. Given that it is far from certain all qualifying establishments have the means or appetite to front these expenditures, FSIS included “a range of possible adoption scenarios” in its analysis, including that no new establishments adopt NSIS. *Id.* at 52339. Plaintiffs thus rely heavily upon one FSIS assumption and ignore different assumptions made elsewhere.

Even assuming all establishments considered in the rule's cost-benefit analysis adopt NSIS, there is no basis for the assumption that these establishments will increase their evisceration line speeds *above* the current maximum of 1,106 head per hour. *See* 84 Fed. Reg. at 52314. Although the HIMP pilot establishments did, on average, increase line speeds, their mean speed was *lower* than the current maximum, which Plaintiffs ignore. *Id.* Plaintiffs nevertheless refer to any increase in line speed as the alleged source of harm, not increases above the previous cap. This is a pivotal difference. Even under the traditional system, establishments may voluntarily choose to increase line speeds up to the maximum cap. Thus,

the NSIS rule would have no causal effect on an establishment's decision to increase line speeds to any point below that limit. Without allegations that establishments that employ their members will increase line speeds above the current maximum, Plaintiffs have failed to connect their claims to NSIS.

Nor do Plaintiffs' claims of injury support a showing of substantially increased risk as compared to the traditional system. These allegations focus on (1) current injury rates in the "meatpacking" industry, Compl. ¶¶ 27–30; (2) alleged injuries to their members under the traditional inspection system, *id.* ¶¶ 33–35; and (3) conclusory statements about future harms, *id.* ¶ 2 ("there is no doubt that increasing line speeds will increase laceration injuries"). The first two categories demonstrate the prevalence of worker injuries under the traditional inspection system, which is irrelevant to any alleged increased risk of injury under NSIS. The third type of allegation both references increased line speeds generally and is too conclusory to pass muster under *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). Further, it contradicts the judicially noticeable fact that mean injury rates in the five HIMP pilot establishments were lower than those in traditional establishments. *See* Modernization of Swine Slaughter Inspection, 83 Fed. Reg. 4780, 4796 (proposed Feb. 1, 2018). Plaintiffs' allegation is therefore not entitled to a presumption of truth.³ *See Yellen v. Hake*, 437 F. Supp. 2d 941, 954 (S.D. Iowa 2006) ("[W]e are not required to accept as true conclusory allegations which are contradicted by documents referred to in the Complaint." (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d

³ Plaintiffs' questioning of these data does not create an issue of fact regarding their conclusions, nor does it preclude the Court from relying upon them. *See Food & Water Watch*, 808 F.3d at 915, 917 (relying on FSIS data notwithstanding allegations of "flaws").

1293, 1295–96 (9th Cir. 1998))).

Moreover, Plaintiffs do not deny their allegations of injury depend upon the erroneous assumption that workers operating under NSIS will perform the same tasks as under the traditional system faster, in the same spaces. *See* Pls.’ Opp’n 30–31. But even the complaint recognizes establishments will have to take steps such as “expanding the kill floor” and “remodel[ing]” or “expanding” facilities. Compl. ¶¶ 10–12. And the rule makes plain that adoption of NSIS will likely result in hiring additional workers, training for new roles, and updating or reconfiguring facilities.⁴ 84 Fed. Reg. at 52324–25. Any of these factors is liable to affect injury rates. *See* 83 Fed. Reg. at 4796. FSIS’s analysis of OSHA’s injury rate data shows mean injury rates at HIMP pilot establishments were lower than those at establishments utilizing the traditional inspection system. *Id.* Plaintiffs’ allegations ignoring all aspects of NSIS, save the possibility of increased line speeds, are thus unduly speculative.

Finally, Plaintiffs do not dispute that FSIS inspectors are not charged with ensuring worker safety, under either the traditional system or NSIS. Pls.’ Opp’n 32; *see also Dawkins ex rel. Estate of Dawkins v. United States*, 226 F. Supp. 2d 750, 757 (M.D.N.C. 2002). Nor do Plaintiffs allege that FSIS online inspectors, in practice, act to protect workers under the traditional system, such that any reduction under NSIS would substantially increase the risk of worker injury. Pls.’ Opp’n 32; *see* Compl. ¶ 73. Without such allegations, Plaintiffs’ assertion that the reduction in FSIS online inspectors will harm its members lacks foundation.

⁴ Plaintiffs are wrong that additional labor costs encompass only “establishment workers hired to perform ante-mortem inspection.” Pls.’ Opp’n 31. Expected labor costs under NSIS include hiring employees to “trim and identify defects . . . before post-mortem inspection” and training for new “sorter and carcass-inspection helper positions.” 84 Fed. Reg. at 52324.

The Court need not look to the hypothetical nature of any *one* of these necessary allegations to determine Plaintiffs have failed to allege injury-in-fact; their sheer number is fatal to Plaintiffs' standing. Indeed, the cases Plaintiffs rely upon all share that no standing determination rests on so long and attenuated a series of assumptions as Plaintiffs ask the Court to embrace here. For example, in *American Trucking Associations, Inc. v. Federal Motor Carrier Safety Administration*, 724 F.3d 243 (D.C. Cir. 2013), the agency assumed longer hours would result from the promulgation of a rule, and those longer hours were themselves the plaintiff's claimed injury. 724 F.3d at 316. Other opinions upon which Plaintiffs rely similarly base injury-in-fact findings upon an agency's assumption that the plaintiffs' claimed injury would occur. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 923 F.3d 209, 226 (1st Cir. 2019) (basing injury-in-fact finding upon agency's acknowledgement that states would incur increased costs—plaintiff's claimed injury); *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 787 (9th Cir. 2019) (same). Here, in contrast, although FSIS assumed for the sake of cost-benefit analysis that certain establishments would adopt NSIS, it did *not* predict an increased risk of physical injury to workers. FSIS's analysis of OSHA's injury rate data suggests the exact opposite. *See* 83 Fed. Reg. at 4796. There are thus several additional steps, absent in Plaintiffs' cited cases, required to connect any FSIS assumption to Plaintiffs' claimed injury. Plaintiffs therefore have not demonstrated Article III injury in fact.

B. Plaintiffs' Alleged Injuries Are Not Fairly Traceable to FSIS's Actions.

Plaintiffs do not contest that NSIS does not directly regulate their members, or that any claimed injury depends on the response of swine slaughter establishments, the regulated

third parties, to the promulgated rule. Although FSIS's actions need not be "the very last step in the chain of causation," Pls.' Opp'n 33, traceability is absent where, as here, that "essential element[] of standing depends on the unfettered choices made by independent actors not before the court[]," *Devs. of Wildlife*, 504 U.S. at 562 (cleaned up). The rule does not require establishments to take any of the actions Plaintiffs claim will result in future injury to their members. Def.'s Mot. 23–24. Nor does FSIS control other choices the establishments will make that could exacerbate or mitigate the potential for injury. *Id.* at 24–25. Finally, given already-high injury rates among swine slaughter workers, there is no basis to assume future injury would result from NSIS, as opposed to preexisting industry hazards. *Id.* at 25.

Plaintiffs principally assert traceability exists because line speeds above 1,106 head per hour would be "illegal" if the rule did not exist. Pls.' Opp'n 34–35. This Circuit has never endorsed the "illegal conduct" theory of traceability, and this allegation appears nowhere in the complaint. In any event, Plaintiffs' premise is faulty. Prior to the rule, FSIS could waive "any provisions of the regulations" for reasons including "to permit experimentation." 9 C.F.R. § 303.1(h). For example, FSIS utilized this provision to waive line speed limits for HIMP pilot establishments. *See* 83 Fed. Reg. at 4796. Accordingly, certain establishments were able, with permission, to increase line speeds above the maximum under the traditional system, consistent with the law. This situation is therefore distinguishable from *American Trucking*, where it was "obviously the case" that an increase in plaintiff's working hours would have been illegal but for the challenged rule.⁵ 724 F.3d at 317; *see also Nat'l Wrestling Coaches*

⁵ Plaintiffs' argument that permitting, but not requiring, establishments to adopt NSIS is sufficient to show causation fails for a similar reason. Pls.' Opp'n 29. Their cited cases finding causation where an agency merely permitted a third party's injurious conduct *also* required that

Ass'n v. Dep't of Educ., 366 F.3d 930, 940–41 (D.C. Cir. 2004) (finding defendant's actions would not have been illegal but for a challenged policy and affirming dismissal for lack of standing).

Moreover, as explained *supra*, any purported future injury to Plaintiffs' members is not fairly traceable to FSIS because it depends upon their establishment employers' autonomous choices whether to (1) adopt NSIS; (2) increase line speed limits *above* the current maximum; and (3) implement other discretionary measures NSIS will likely necessitate—such as hiring additional employees, modifying workers' roles, and reconfiguring facilities—that could impact future injury risk. *See supra* pp. 6–8. Plaintiffs fail plausibly to allege that these choices “have been or will be made in such a manner as to produce causation.” *Def. of Wildlife*, 504 U.S. at 562. In addition, because Plaintiffs' concrete allegations all focus on the risk of injury to workers under the traditional inspection system, *see* Compl. ¶¶ 27–30, they cannot show that risk of future injury under NSIS would be substantially increased as compared to the traditional inspection system, *see Food & Water Watch*, 808 F.3d at 916–17. This is especially true given that the only available data suggests that injury rates under NSIS will be lower than under the traditional inspection system. *See* 83 Fed. Reg. at 4796.

Plaintiffs have thus not met their burden to demonstrate standing.

the conduct be otherwise illegal. *See Orangeburg v. Fed. Energy Regulatory Comm'n*, 862 F.3d 1071, 1083 (D.C. Cir. 2017) (finding traceability where “the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, *and* that conduct would allegedly be illegal otherwise” (cleaned up)); *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 442 (D.C. Cir. 1998) (same). Conversely, traceability is lacking where regulations permit, but do not require, third parties to take otherwise legal action that allegedly causes plaintiff's injury. *See* Def.'s Mot. 23–24.

II. Plaintiffs Fail to State a Claim.

A. Plaintiffs Fall Outside the FMIA's Zone of Interests.

Plaintiffs' complaint should be dismissed on the merits because their interest in worker safety falls outside the zone of interests of the statutory provisions they invoke. These provisions focus solely on food safety. Def.'s Mot. 27 (quoting 21 U.S.C. §§ 603(a), 604). And the FMIA as a whole focuses on "the health and welfare of consumers" via the provision of safe meat. 21 U.S.C. § 602. *Cf. Barnes v. United States*, 448 F.3d 1065, 1067 (8th Cir. 2006) ("FSIS conducts inspections to ensure that the poultry sold to the public is sanitary, not to benefit chicken-processing plants or their owners."). Congress simply did not intend to protect workers in enacting the FMIA; other statutes have that purpose. *See, e.g., Occupational Safety & Health Act of 1970*, 29 U.S.C. § 651 *et seq.*

Plaintiffs appear to concede, as they must, that their asserted interest in worker safety is referenced nowhere either in the specific provisions they invoke, nor in the FMIA as a whole. Pls.' Opp'n 38–40. They instead point to other statutes, legislative history, and regulations. *See id.* But whether a Plaintiff falls within the zone of interests is determined "by reference to the particular provision of law upon which the plaintiff relies." *See Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 577 (8th Cir. 2011) (quoting *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997)). Plaintiffs' reliance upon the Humane Methods of Slaughter Act (HMSA) is therefore misplaced. The purpose of the HMSA is to promote animal welfare. *See Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 456 (2012) (FMIA, as modified by HMSA, has "dual goals of safe meat and humane slaughter"). But even assuming, *arguendo*, the reference to "working conditions" in the HMSA's findings has some import with respect

to a claim brought under that Act, *see* 7 U.S.C. § 1901, “it stretches the zone-of-interests test too far” to look a different, later-enacted statute, dealing with unrelated subject matter (animal well-being), to determine whether Plaintiffs fall within the zone of interests of the provisions of law upon which they rely, *see Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 529–30 (1991) (employees’ union fell outside the zone of interests of challenged statutory provision, notwithstanding subsequent passage of a related act intended to benefit workers).

Nor does legislative history support Plaintiffs’ position. Resort to legislative history is unnecessary where the relevant provisions of the statute are unambiguous, as the FMIA’s purpose is here. *See, e.g., N. States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996). Moreover, Congress’s choice to limit the focus of the FMIA to consumer welfare and food safety, notwithstanding the report Plaintiffs cite, *see generally* 59 H.R. Doc. No. 878 (1906), cuts against, not in favor of, Plaintiffs’ argument that worker safety is within the FMIA’s zone of interests.

Finally, Plaintiffs are simply wrong that the NSIS rule somehow demonstrates FSIS believed the FMIA authorized it to act to protect worker safety. *See id.* The exact opposite is true: the rule expressly states “the Agency has neither the authority nor the expertise to regulate issues related to establishment worker safety.” 84 Fed. Reg. at 52315. Thus, to the extent legislative history or agency regulations are relevant to a zone-of-interests analysis, they support the Government’s position.

B. As a Matter of Law, FSIS Lacks the Statutory Mandate to Regulate Worker Safety Under the FMIA.

Plaintiffs do not dispute that an agency is required to regulate within the bounds of its

statutory mandate, or that the focus of the FMIA, the relevant authorizing statute, is food safety. *See* 21 U.S.C. § 602; Def.’s Mot. 28–30. The provisions pursuant to which FSIS promulgated the NSIS rule concern food safety alone. *See* 21 U.S.C. §§ 603(a), 604; *see also* Def.’s Mot. 29–30. They neither concern nor provide the agency authority to regulate worker safety. *See id.* FSIS explained as much in the rule. 84 Fed. Reg. at 52315.⁶

An agency engaging in rulemaking is entitled to focus on “significant” comments that “raise points relevant to the agency’s decision.” Def.’s Mot. 29 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam)). Nor is an agency’s obligation onerous; it must simply “respond in a reasoned manner to those [comments] that raise significant problems.” *See Reytblatt v. U.S. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997). “There is no requirement, however, that an agency respond to significant comments in a manner that satisfies the commenter.” *FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 222 (D.D.C. 2017).

Plaintiffs appear to agree the FMIA does not authorize FSIS to regulate employee health or safety. *See* Pls.’ Opp’n 41–42. Instead, they claim FSIS acted arbitrarily and capriciously in allegedly failing to consider comments regarding worker safety, and—contradicting themselves—that its response to such comments was “irrational.” *Id.*

Plaintiffs’ first argument is premised on a red herring. They assert FSIS disclaimed any ability to consider worker safety in the challenged rule. *Id.* at 42–46. But the rule nowhere so states, and as Plaintiffs eventually acknowledge, the agency’s stance is “not that it could never

⁶ To the extent the scope of FSIS’s statutory authority is ambiguous, the agency’s interpretation is entitled to deference. *See City of Arlington v. FCC*, 569 U.S. 290, 301 (2013). Any suggestion otherwise is erroneous. *See* Pls.’ Opp’n 43 n.4.

consider ways of supporting other agencies’ efforts to foster and promote worker safety.” Def.’s Mot. 30 n.6 (quoted in Pls.’ Opp’n 46). Thus, Plaintiffs’ assertions regarding what FSIS has considered in past rules do no more than knock down a straw man.

In addition, as is clear on the face of the rule, FSIS *did* acknowledge and respond to comments regarding worker safety. *See* 84 Fed. Reg. at 52314–15; Defs.’ Mot. 30–31. FSIS noted the comments and studies regarding worker safety to which Plaintiffs point, and properly explained it could not base regulatory action upon worker safety concerns. *See id.*; *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (recognizing “rel[ying] on factors which Congress has not intended it to consider” is grounds for overturning agency regulations). The agency, however, went on to explain it had supported and would continue to support OSHA’s efforts to promote worker safety. 84 Fed. Reg. at 52315. Specifically, FSIS partnered with OSHA to implement several measures to assist OSHA in fulfilling its mandate of assuring safe working conditions, while leaving to OSHA the ultimate decision whether to undertake regulatory or enforcement actions. *Id.* Given that worker safety falls outside FSIS’s regulatory authority under the FMIA, its decision to address worker-safety comments by supporting OSHA’s worker safety mission is entirely reasonable and constitutes a rational response to such comments. *See Reytblatt*, 105 F.3d at 722.

C. As a Matter of Law, NSIS Complies with the FMIA.

Finally, Plaintiffs’ attempt to escape the reasoning of *AFGE II*, which applies directly to and requires dismissal of their FMIA challenge, fails. Rather than contest that case’s application, they contend record review is necessary. Pls.’ Mot. 50–51. But dismissal of Count Two is warranted because the issue is whether the regulations comply with the statute—which

they plainly do on the face of the pleadings. Def.’s Mot. 31–35; *see also Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 271 F.3d 262, 266–67 (D.C. Cir. 2001) (record review unnecessary in challenge to rule’s compliance with its authorizing statute); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir. 2001) (same).

The undisputed salient facts here are the same as those at issue in *AFGE II*. Like Plaintiffs here, Compl. ¶ 80, those plaintiffs claimed a reduction in online FSIS inspectors violated the FMIA, *AFGE II*, 284 F.3d at 130. The pilot program considered in *AFGE II* and NSIS both reduce FSIS online inspectors in precisely the same manner: to a maximum of three. *Compare id.* at 129 *with* 84 Fed. Reg. at 52300. And both allow increased line speeds. *Compare* 284 F.3d at 130 *with* 84 Fed. Reg. at 52300. Taking these facts into consideration, the D.C. Circuit held the program complied with the FMIA “because [it] calls for federal inspectors in participating hog plants to inspect all hog carcasses, heads and viscera, as the statute demands.” *AFGE II*, 284 F.3d at 130. In support of this determination, that court found the FMIA did not “prohibit[] establishment employees from . . . removing some adulterated carcasses before they get to FSIS inspectors,” and that “higher line speeds [were] appropriate” because establishment pre-sorting resulted in “[f]ewer adulterated . . . hog parts and carcasses . . . presented for federal inspection.” *Id.*

Because the same law and the same facts are at issue here as in *AFGE II*, its conclusion applies equally.⁷ Thus, Count Two should be dismissed for failure to state a claim.

⁷ The D.C. Circuit’s statement that *AFGE II* “may not necessarily foreshadow the outcome of judicial review of [] future regulations” simply acknowledges that a future rule not identical to, but “something along the lines of” the pilot program might warrant renewed consideration. *See* 284 F.3d at 130–31. Because the features challenged here are the same as those considered in *AFGE II*, this caveat does not apply.

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed.

Dated: January 13, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ERIC R. WOMACK
Assistant Director, Federal Programs Branch

/s/ Leslie Cooper Vigen
LESLIE COOPER VIGEN
Trial Attorney (D.C. Bar No. 1019782)
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 305-0727
Fax: (202) 616-8470
Email: Leslie.Vigen@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Leslie Cooper Vigen
LESLIE COOPER VIGEN
Trial Attorney (D.C. Bar No. 1019782)
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel: (202) 305-0727
Fax: (202) 616-8470
Email: Leslie.Vigen@usdoj.gov