UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

FARM SANCTUARY; ANIMAL EQUALITY; ANIMAL LEGAL DEFENSE FUND; CENTER FOR BIOLOGICAL DIVERSITY; ANIMAL OUTLOOK; MERCY FOR ANIMALS, INC.; AND NORTH CAROLINA FARMED ANIMAL SAVE,	)	
Plaintiffs,	)	**Civil Action No.: 19-cv-6910-EAW**
v.	)	**ORAL ARGUMENT REQUESTED**[1]
UNITED STATES DEPARTMENT OF AGRICULTURE; FOOD SAFETY AND INSPECTION SERVICE; AND PAUL KIECKER IN HIS OFFICIAL CAPACITY AS FOOD SAFETY AND INSPECTION SERVICE ADMINISTRATOR,[2]	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[1] Plaintiffs respectfully request oral argument, by video or telephonic conference as necessary in light of the COVID-19 pandemic. Plaintiffs are represented by Lewis & Clark Law School's Animal Law Litigation Clinic, and oral argument would provide an important substantive opportunity for a student attorney.

[2] Pursuant to Federal Rule of Civil Procedure 25(d), former Food Safety and Inspection Service Administrator Carmen Rottenberg is automatically substituted by her successor, Paul Kiecker.

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INTRODUCTION

Plaintiffs, seven nonprofit organizations working to protect the animals, people, and environments suffering due to industrial animal agriculture, challenge a final rule that creates a new inspection system called the New Swine Slaughter Inspection System (NSIS) that largely deregulates pig slaughter. 84 Fed. Reg. 52,300 (Oct. 1, 2019) (Deregulatory Rule). The Deregulatory Rule was promulgated by Defendants, the Food Safety and Inspection Service (FSIS), an agency within the U.S. Department of Agriculture (USDA), and the FSIS Administrator (collectively, the Government).

The Government has identified forty slaughterhouses, responsible for ninety-three percent of pig slaughter in the United States, that "will" take advantage of the Deregulatory Rule and convert to the NSIS. The Rule authorizes these slaughterhouses to disregard longstanding limits on the number of pigs who can be killed per hour, delegate critical inspection responsibilities to slaughterhouse workers, and reduce overall federal oversight.

In promulgating the Deregulatory Rule, the Government determined that it would allow slaughterhouses to boost profits by increasing the number of pigs slaughtered annually at the converting plans by 11.5 million. The Government did not consider or disclose any of the well-documented significant environmental impacts of raising and slaughtering pigs. The Government also disregarded voluminous evidence that the Rule will result in increased inhumane handling and food safety risks, including increased exposure to potentially life-threatening diseases.

Plaintiffs allege that the Deregulatory Rule violates the Administrative Procedure Act (APA), Federal Meat Inspection Act (FMIA), Humane Methods of Slaughter Act (HMSA), and National Environmental Policy Act (NEPA) because, in promulgating the Deregulatory Rule, the Government impermissibly: delegated inspection responsibilities to slaughterhouse workers in

contravention of statutory mandates, disregarded the many ways that animals and food safety will be harmed, and failed to consider and disclose significant environmental impacts.

As detailed in the Complaint, Plaintiff organizations are harmed in myriad ways by the Deregulatory Rule, including by having to divert limited resources to counteract the Rule's impacts on their mission-critical activities and by being deprived of information about the Rule's environmental impacts. In addition, the Deregulatory Rule harms Plaintiffs' members' aesthetic and recreational interests by impairing their enjoyment of activities such as bird- and wildlife-watching, boating, fishing, hiking, horseback riding, and swimming, as well as their interests in observing animals in humane conditions. The Deregulatory Rule further exposes Plaintiffs' members to enhanced risks of disease transmission.

These harms fall squarely within Supreme Court and Second Circuit precedent on cognizable injuries for purposes of standing. They are also fairly traceable to the Government's unlawful conduct and can be redressed by this Court. Because Plaintiffs "allege[] facts that affirmatively and plausibly suggest that [they] ha[ve] standing to sue," *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016), they have met the "lenient" "standard for reviewing standing at the pleading stage," *Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003). Accordingly, the Court should deny the Government's motion to dismiss for lack of standing.

LEGAL AND FACTUAL BACKGROUND

I. Legal Background

A. The Humane Methods of Slaughter Act and Federal Meat Inspection Act

Based on Congressional findings that "the use of humane methods in the slaughter of livestock prevents needless suffering," "brings about improvement of products," and "produces other benefits for . . . consumers," the HMSA declares it "to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall

be carried out only by humane methods." 7 U.S.C. § 1901. To effectuate this policy, the HMSA provides that "[n]o method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane." *Id.* § 1902.

Congress intended that the USDA interpret the phrase "handling in connection with slaughter" in the HMSA broadly, "to begin at the time livestock come into the custody of the slaughtering establishment." S. Comm. Rep. No. 95-1059, at 4 (1978). Accordingly, the Government has long recognized that it must ensure humane handling starting when "a vehicle carrying livestock enters, or is in line to enter, an official slaughter establishment's premises." FSIS Directive 6900.2 Rev. 2, at 6 (Aug. 15, 2011).

The FMIA incorporates the HMSA by reference, 21 U.S.C. §§ 603(b), 610(b), and finds:

> It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome[and] not adulterated . . . . Unwholesome[or] adulterated . . . meat or meat food products . . . are injurious to the public welfare, destroy markets for wholesome, not adulterated . . . products, and result in . . . injury to consumers.

Id. § 602.

Based on these findings, the FMIA mandates that "the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all amenable species before they shall be allowed to enter into any slaughtering . . . establishment." *Id.* § 603(a). Animals "found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other . . . swine . . . and when so slaughtered the carcasses of said . . . swine . . . shall be subject to a careful examination and inspection." *Id.* When performing these inspections, USDA inspectors are also required to ensure humane handling.

The Government and experts have long recognized official inspections of all animals before they can enter the slaughter establishment as critical to protect against outbreaks of

foreign animal diseases, which are on the rise and pose devastating risks to animals, human health, and the U.S. economy. The Government has underscored that these inspections "are often the best way to detect potentially devastating diseases that may be spreading through livestock populations," and that when conducting these front-line inspections, agency "veterinarians can in turn alert other officials who can act to prevent widespread economic harm and disruption of the meat supply." Br. for the United States as Amicus Curiae Supporting Pet'r at 15, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2011) (No. 10–224), 2011 WL 3821398.

The FMIA also requires that, "[f]or the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments . . . ." 21 U.S.C. § 603(b). USDA inspectors are required to ensure that pigs "are rendered insensible to pain by a . . . means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut." 7 U.S.C. § 1902(a). Inspectors are also responsible for administering humane handling requirements, including prohibitions on forcing pigs "to move faster than a normal walking speed," the "excessive" use of prods and other devices used to drive animals, and dragging conscious animals. 9 C.F.R. § 313.2.

In furtherance of these requirements, USDA regulations set maximum slaughter line speeds, based on the number of animals per hour inspectors are able inspect. Federal regulations have long imposed a maximum line speed limit of 1,106 pigs per hour. *Id.* § 310.1.

B. The National Environmental Policy Act

NEPA is considered our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose is to "promote efforts which will prevent or eliminate damage to

the environment." 42 U.S.C. § 4321. To effectuate this purpose, NEPA directs that "all agencies of the Federal Government shall":

> include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(C).

This requirement is meant "to force federal agencies to consider environmental concerns early in the decisionmaking process so as to prevent any unnecessary despoiling of the environment," *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985), and to support informed public participation in the NEPA review process. *Pogliani v. U.S. Army Corps of Eng'rs*, 306 F.3d 1235, 1237-38 (2d Cir. 2002) ("Congress enacted [NEPA] to ensure that federal agencies examine and disclose the potential environmental impacts of projects before allowing them to proceed. . . . The agency must involve the public in the NEPA review process."); *see also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (NEPA's "twin aims" are "plac[ing] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action" and "ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns" (citations omitted)); 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . [P]ublic scrutiny [is] essential to implementing NEPA."). "Perhaps most important," a

detailed NEPA review "insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug." *Sierra Club*, 772 F.2d at 1049 (citation omitted).

C. The Administrative Procedure Act

The APA grants a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," including promulgation of a rule. 5 U.S.C. §§ 702, 551(13), (4), 701(b)(2). Under the APA, a court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Id.* § 706(2)(A). An agency action is arbitrary and capricious if "the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The APA also requires a reviewing court to "hold unlawful and set aside" any agency action taken that is "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), as well as any agency action that was promulgated "without observance of procedure required by law," *id.* § 706(2)(D), including the procedures required by NEPA, *Sierra Club v. U.S. Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985).

II. Factual Background

A. The Pilot Program

In 1997, as part of a pilot program known as the HACCP[3]-Based Inspection Models Project (HIMP), the USDA granted five pig slaughterhouses a "waiver" from legal requirements, authorizing them to operate without line speed limits and with reduced oversight. First Am. Compl. (FAC) (ECF No. 22) ¶ 121.

An audit of the pilot program by the USDA's Office of Inspector General (OIG), determined that HIMP plants "'may have a higher potential for food safety risks.'" *Id.* ¶ 124. "The OIG found that three of the ten plants with the most food safety violations were part of the pilot program, and that the slaughterhouse with the single highest rate of violations—nearly fifty percent more than the plant with the second highest number—was in the pilot program." *Id.* The OIG further determined that these slaughterhouses "'have less assurance of food safety than a traditional plant.'" *Id.* The U.S. Government Accountability Office (GAO) has also raised serious concerns about the pilot program, including with regard to food safety. *See id.* ¶ 123.

In addition to these formal government findings, USDA records confirm that HIMP slaughterhouses pose heightened food safety risks, including disproportionately high numbers of citations for carcass contamination with feces, bile, hair, and dirt. *See* Washburn Decl. ¶ 12; *see also* Mauer Decl. ¶¶ 17-18 (FSIS inspector explains that in a HIMP slaughterhouse "[d]efects such as toenails, hair, and abscesses are routinely allowed for human consumption" and under HIMP fecal contamination increased). According to the testimony of a HIMP inspector, "'Sick pigs are routinely getting into the system.'" FAC ¶ 137; *see also* Mauer Decl. ¶ 19 (FSIS inspector at a HIMP slaughterhouse "witnessed diseased pigs allowed for human consumption").

[3] HACCP refers to the USDA's Hazard Analysis and Critical Control Point program. 61 Fed. Reg. 38,806, 38,814 (July 25, 1996).

Numerous potentially fatal food-borne illnesses can be transmitted by pork, and the Centers for Disease Control and Prevention estimates that already more than eighty Americans die annually from food-borne illnesses attributable to pork. Washburn Decl. ¶ 9. These diseases include *Salmonella*, *Escherichia coli* (*E. coli*), methicillin-resistant *Staphylococcus aureus* (MRSA), trichinosis, *Campylobacter*, *Toxoplasma gondii*, *Yersinia enterocolitica*, and *Listeria monocytogenes*. *Id.* ¶¶ 10-11, 13, 15; Mauer Decl. ¶ 18; Leahy Decl. ¶ 16; *see also* FAC ¶ 159.

An undercover investigation by plaintiff Animal Outlook in HIMP slaughterhouse Quality Pork Processors, Inc. also documented chronic and overarching food safety issues, including non-ambulatory pigs being "slaughtered alongside ambulatory pigs, despite well documented links between non-ambulatory animals and food safety risks"; numerous carcasses slated for human consumption that were "riddled with growths, abscesses, and lumps, some of which contained green or yellow pus" or "visibly contaminated with fecal matter." FAC ¶ 125[4]; *see also* Mauer Decl. ¶¶ 17-19 (HIMP inspector witnessed pigs with diseases and defects, including abscesses, as well as increased rates of fecal contamination).

This investigation also "documented many instances of inhumane handling and slaughter inflicted as workers attempted to keep animals moving in pace with high-speed lines." FAC ¶ 125. These instances included "conscious pigs being dragged;" "over-utilization of electric prods to drive animals, including shocks to their faces and other sensitive areas;" "routine beatings with paddles and gates;" "and forcefully driving pigs in a manner that caused them to climb on top of one another." *Id.* ¶ 125. A slaughterhouse supervisor acknowledged that the slaughterhouse was supposed to use humane methods to move pigs who could not walk, but said

[4] This video footage, which was provided to the agency during the rulemaking process, is available at https://youtu.be/XPGIMCmpfxU. Leahy Decl. ¶ 17.

they "don't have time" to do so. *Id.* Some pigs were "dragged by a metal hook in their mouth while still conscious." *Id.* The investigation also revealed pigs being improperly stunned. "Animals who appeared to still be conscious after stunning were documented on the slaughter line, even after having their throats slit." *Id.* ¶ 126. A "supervisor acknowledged the frequency of pigs regaining sensibility after stunning, stating flippantly that 'Sometimes they come back, like zombies.'" *Id.* In addition, "several pigs showed signs of having entered the scalding tank while still alive, having ultimately died of scalding or asphyxia in the boiling water." *Id.*

A HIMP inspector has also "regularly observed hogs who were driven to move faster than a normal walking speed, workers who have raised their paddles over their heads to strike the hogs, hogs vocalizing (a sign of stress) while moving, and heavy crowding of hogs, resulting in them piggybacking one another." Mauer Decl. ¶ 7. This inspector has further observed an increase in the number of slaughtered pigs who have water in their lungs, which "is an indication that pigs were possibly still breathing at the time they entered the scalding tank." *Id.* ¶ 8.

USDA records from numerous HIMP slaughterhouses make clear that such incidents are not anomalous. Inspection records document similar humane handling violations at numerous HIMP slaughterhouses, including:

- pigs not being properly rendered unconscious before slaughter—including one who "was observed blinking and trying to right himself just 100 feet from the scalding tank";
- "pigs slipping and falling onto concrete while being forced to move";
- numerous incidents in which pigs "were beaten with excessive force and prodded";
- "pigs being so crowded into a carbon dioxide chamber that the door couldn't close properly and pigs began asphyxiating while frothing at the mouth, gasping for air, kicking, and thrashing;" and
- "an incident in which a slaughterhouse worker tried to drive twice as many pigs into a carbon dioxide chamber than it could hold, beating them on the back to force them in while they screamed and piled on top of one another to escape the beatings;"

Id. ¶¶ 129, 130, 144.

B. The Challenged Rulemaking

Despite these well-documented problems with the pilot program, in 2018 the Government proposed a rule to establish a system that would allow any pig slaughterhouse to opt out of line speed limits while reducing oversight. *Id.* ¶ 131 (citing 83 Fed. Reg. 4780 (Feb. 1, 2018)).

Opposition to the proposal was extensive: Eighty-seven percent of the more than 83,000 comments submitted to the Government were negative, including those from FSIS inspectors, slaughterhouse workers, consumer protection organizations, public health organizations, individuals living near pig slaughterhouses, and Plaintiffs. *Id.* ¶ 134. According to the USDA, only "'swine slaughter establishments, trade associations representing the pork industry, and a few private citizens supported the proposed rule.'" *Id.* ¶ 135 (quoting 84 Fed. Reg. at 52,311).

Nevertheless, on October 1, 2019, the Government finalized the Deregulatory Rule. 84 Fed. Reg. 52,300. In doing so, it identified forty slaughterhouses that account for ninety-three percent of total pig slaughter annually that it determined would convert to the procedures authorized by the Rule. FAC ¶ 171 (citing 84 Fed. Reg. at 52,322). These included the five HIMP slaughterhouses and thirty-five additional slaughterhouses. *Id.* ¶¶ 133, 171; Ex. 1 to FAC (identifying the slaughterhouses that "will convert" to the NSIS). The Government determined that, "[g]iven their large share of the market and the ability to slaughter a sufficient number of market hogs . . . , these 40 market hog establishments are expected to choose to implement" the system. 84 Fed. Reg. at 52,322; *see also id.* at 52,323 (underscoring "industry's continued interest in increasing the number of establishments participating in the HIMP pilot study").

The Government noted that HIMP slaughterhouses kill as many as 1295 pigs per hour and suggested that technological innovations could increase this number. *Id.* at 52,314, 52,320. The Government determined that "the five HIMP establishments' average line speed was

approximately 12.49 percent faster than comparable establishments" and that this increase in speeds resulted in a "change in quantity produced"—i.e., an increase in the number of pigs slaughtered. *Id.* at 52,335; *see also* Mauer Decl. ¶ 5 (FSIS inspector explaining that under HIMP her slaughterhouse "has steadily increased the number of hogs killed hourly. Currently up to 1,325 pigs are killed hourly . . . . The line speed increases have consistently resulted in greater numbers of hogs slaughtered. Being able to kill more hogs hourly has not resulted in reduced hours of operation. Thus, as the line speeds have steadily increased, so too has the number of hogs slaughtered daily and annually.").

Anticipating that the thirty-five additional slaughterhouses taking advantage of the Deregulatory Rule would similarly "increase their production," and that for each additional pig slaughtered they would yield $7.60 in profit, the Government determined that "an average large establishment's surplus could increase by approximately $3.78 million" annually. *Id.* Using simple division, this translates to nearly 500,000 additional pigs slaughtered annually per large slaughterhouse. "Combined," the Government concluded, production increases "at all 35 establishments will increase producer surplus by roughly $87.64 million." *Id.* Using simple division, that means more than 11.5 million more pigs killed annually. *See* FAC ¶¶ 3, 150, 151.

The operators of many of the slaughterhouses that the Government determined are likely to convert under the Deregulatory Rule actively supported the Rule. *See* 84 Fed. Reg. at 52,311; Walden Decl. ¶ 16. These include Smithfield, which operates one of the HIMP slaughterhouses and nine of the non-HIMP slaughterhouses the Government determined will convert, and Tyson, which operates six of the slaughterhouses that the Government determined will convert. Walden Decl. ¶ 16; Kirtright Decl. ¶ 22; *United Food & Comm'l Workers Union v. USDA*, No. 19-cv-2660, ECF No. 30 at 10 n.2 (Apr. 1, 2020), attached as Exhibit 1. In addition, the National Pork

Producers' Council, '"the global voice of the U.S. pork industry,'" and the National Pork Board both commented favorably on the Rule and asserted that '"the pilot program will be duplicated at many other facilities"' under the Rule. Walden Decl. ¶ 16. A number of slaughterhouses on the USDA's "will-convert" list are known to be working on plans to expand and/or remodel their facilities to convert to the new system. *Id.* ¶ 19; *see also* Ex. 1 to FAC (will-convert list). And Defendant Kiecker recently stated that the agency is moving forward with implementing NSIS, despite a request that it delay implementation due to worker shortages resulting from the COVID-19 pandemic. *Id.* ¶ 21.

Despite extensive comments detailing the significant environmental impacts—including greater air and water pollution—that will result from increasing the number of pigs raised and slaughtered, *see* FAC ¶¶ 148-62, the Government did not consider or disclose the environmental impacts of the Deregulatory Rule, *id.* ¶ 168. Instead, it perfunctorily declared that the rule change was "categorically excluded" from any NEPA review. *Id.* (citing 84 Fed. Reg. 52,317).

III. Procedural History

On December 18, 2019, Plaintiffs brought suit to challenge the Deregulatory Rule. ECF No. 1. On February 18, 2020, Plaintiffs amended their complaint to reflect that one of the plaintiff organizations had changed its name. ECF No. 22. On March 13, 2020, the Government moved to dismiss Plaintiffs' Amended Complaint for lack of standing. ECF Nos. 25, 26.

LEGAL STANDARD

On a motion to dismiss under Rule 12(b)(1), courts must "accept the complaint's material [factual] allegation as true, and . . . draw all reasonable inferences in plaintiffs' favor." *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 725 (2d Cir. 2017) (citation omitted). "[T]he standard for reviewing standing at the pleading stage is lenient . . . ." *Baur v. Veneman*, 352 F.3d 625, 637 (2d. Cir. 2003). Where, as here, a defendant mounts a facial challenge to standing, "the

task of the district court is to determine whether the Pleading "alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (cleaned up). "[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury. . . . It bears emphasis that under federal pleading rules, 'complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally.'" *Baur*, 352 F.3d at 631 (citation omitted).

Standing comprises three elements: (1) a "threat of a concrete and particularized injury in fact," (2) "that is fairly traceable to the challenged action of the defendant," and (3) "that a favorable judicial decision will likely prevent or redress." *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (cleaned up). As is undisputed, "a district court 'may refer to evidence outside of the pleadings in resolving a Rule 12(b)(1) [standing] motion . . . .'" Defs.' Br. at 11, ECF No. 26. *See also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court . . . may refer to evidence outside the pleadings." (citation omitted)).

"An organization can have standing to sue in one of two ways. It may sue on behalf of its members . . . [or] it can 'have standing in its own right to seek judicial relief from injury to itself . . . .'" *N.Y. Civil Liberties Union*, 684 F.3d at 294 (citations omitted). When an organization argues it has standing in its own right, the inquiry is the same three-pronged analysis as if the plaintiff were an individual. *Havens Realty*, 455 U.S. at 378-79. To assert "associational standing" on behalf of its members, an organization must show: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires

the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

ARGUMENT

Plaintiffs adequately allege both organizational and associational injuries for all claims, and these injuries are fairly traceable to the Deregulatory Rule and can be redressed by this Court. Plaintiffs' standing is squarely within Second Circuit and the Supreme Court precedent.[5]

I. Plaintiffs Adequately Allege Injuries

A. Plaintiffs Adequately Allege Organizational Injuries

It is well established that when a defendant's challenged actions "perceptibly impair" an organization's ability to fulfill its mission, "there can be no question that the organization has suffered injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This standard is not demanding. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Havens*, 455 U.S. at 379. "That the alleged injury results from the organization's noneconomic interest in encouraging [a particular policy preference] does not effect the nature of the injury suffered, and accordingly does not deprive the organization of standing." *Id.* at 379 n.20 (citation omitted); *accord Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011).

Applying this precedent, "[t]he Second Circuit has consistently found injury where an organization expends time and effort responding to the defendant's actions." *N.Y. State Citizens'*

[5] Although all Plaintiffs adequately allege standing, the Court need not examine each one's allegations. "It is well settled that where, as here, multiple parties seek the same relief, 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017) (citations omitted).

Coalition for Children v. Velez, No. 10-CV-3485, 2016 WL 11263164, at *3 (E.D.N.Y. Nov. 7, 2016) (citations omitted); *see, e.g.*, *Centro de la Comunidad*, 868 F.3d at 110 (organization had standing to challenge ordinance because it had to "divert resources from other of its activities to combat the effects of the Ordinance"); *Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014) (organization had standing to where it had "diverted resources . . . from its other advocacy and counseling activities" to "investigat[e] and advocat[e]" on behalf of the family that had been allegedly discriminated against); *Mental Disability Law Clinic v. Hogan*, 519 F. App'x 714, 717 (2d Cir. 2013) (law clinic had standing to challenge agency policy because it "ha[d] diverted resources from education and training in order to contest the" practice); *Nnebe*, 644 F.3d at 156 (New York Taxi Workers Alliance had standing to challenge policy of automatically suspending taxicab licenses upon arrest because the organization "infrequently 'counsels drivers whose licenses have been suspended pursuant to the challenged policy'"); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (organization had standing to challenge advertisements that featured only white models based on the time its staff had spent "investigating and attempting to remedy" those advertisements, which "prevented them from devoting their time and energies to other [] matters").

Plaintiffs' organizational injuries here not only fall squarely within this precedent, they are significantly more extensive than many injuries recognized by the Second Circuit as sufficient for standing purposes. Plaintiffs allege that they are "spen[ding] money to combat activity that harms [their] core activities" as a result of the Deregulatory Rule. *Centro de la Comunidad*, 868 F.3d at 111 (citation omitted). *See* FAC ¶¶ 16, 17, 23, 24, 27, 35, 38, 44-46, 52; *see also* Baur Decl. ¶¶ 11-13; Burd Decl. ¶¶ 17, 19-23; Leahy Decl. ¶¶ 20-27; Núñez Decl. ¶¶ 20, 21, 24, 28-31, 33; Seber Decl. ¶¶ 10-12; Walden Decl. ¶¶ 22, 24, 27.

Like the plaintiffs in numerous cases in which the Second Circuit has recognized standing, Plaintiffs have to devote considerable time and resources towards "investigating and attempting to remedy" the increased harms to animals, the environment, and humans caused by the Deregulatory Rule, which "prevent[s] them from devoting their time and energies to other [organizational] matters." *Ragin*, 6 F.3d at 905; *see also Olsen*, 759 F.3d at 158; *see, e.g.*, FAC ¶ 23 (the Deregulatory Rule "requires Animal Equality to divert and redirect resources from its core activities toward investigating . . . high speed pig slaughter plants"); FAC ¶ 45 (Animal Outlook must divert "resources to investigate and document conditions at slaughterhouses that opt to take advantage of the Rule . . . , in order to publicize and counteract inhumane handling"); *see also id.* Núñez Decl. ¶¶ 24, 31; Leahy Decl. ¶ 25.

Similarly, the Government's promulgation of Deregulatory Rule without complying with NEPA's mandates has deprived Plaintiffs of information about environmental impacts—information to which they are statutorily entitled, on which they rely to fulfill their missions, and which they have had to divert resources to obtain through other means. *See, e.g.*, Burd Decl. ¶¶ 19-20 (Plaintiff Center for Biological Diversity (Center) has "been forced to expend its resources to research and obtain information about the environmental and species effects of the rule. . . . In addition, . . . the Center has had to file and pursue public records requests" with various agency and "has had to resort to" separate ongoing Freedom of Information Act litigation to seek out this information.); *see also* Baur Decl. ¶ 13; Leahy Decl. ¶ 27; Seber Decl. ¶ 12; Walden Decl. ¶ 25. These injuries are cognizable injuries. *See Nat. Res. Def. Council v. Dep't of Interior*, 410 F.Supp.3d 582, 594 (S.D.N.Y. 2019) (organizations had standing where government body's "lack of transparency has caused them to devote greater 'attention, time, and personnel' to monitoring" body's activities); *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d

1087, 1095 (D.C. Cir. 2015) (organization had standing where challenged USDA action denied it of information that it used to educate the public); *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (same).

Despite these quintessential organizational injuries, the Government urges the Court to refuse to recognize Plaintiffs' standing because they are, in the Government's view, "issue advocacy groups." Defs.' Br. at 13. The only relevance of this argument is to highlight Defendants' concession that the Deregulatory Rule is germane to Plaintiffs' organizational missions and injurious to their interests. The case law, otherwise, does not discriminate against plaintiff organizations that meet the *Havens* standard merely because some of their work can be characterized as advocacy. As the D.C. Circuit has explained, "many . . . cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and, indeed, sometimes are." *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 26–27 (D.C. Cir. 2011) (citations omitted). The Second Circuit has repeatedly recognized that advocacy organizations can have standing. *See, e.g.*, *Olsen*, 759 F.3d at 158 ("a not-for-profit corporation devoted to fair-housing advocacy" had standing where it "diverted resources . . . from its other advocacy" to "advocat[e]" a particular case); *Centro de la Comunidad*, 868 F.3d at 111 (finding standing where organization's "advocacy activities" were impaired).

Moreover, many of Plaintiffs' resources are drained from the classic services these organizations were established to provide. *See, e.g.*, Baur Decl. ¶ 11 (the Deregulatory Rule forces Farm Sanctuary to divert resources from its core animal rescue and education work); Walden Decl. ¶ 4 (Animal Legal Defense Fund's (ALDF) core work, from which it is forced to divert resources, includes "providing free legal assistance and training to prosecutors handling cruelty cases" and "providing public education").

The Government's argument relies almost entirely on a single decision from the Southern District of New York that has been vacated. *See* Defs.' Br. at 14, 16, 17 (citing *Citizens for Responsibility & Ethics in Wash. (CREW) v. Trump*, 276 F. Supp. 3d 174, 191-92 (S.D.N.Y. 2017), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019)). In addition to being without precedential force, the decision is wholly distinguishable. As the court noted, "*CREW* did not expend resources in response to an 'unbidden injury'" but, "[r]ather, it sought out and voluntarily undertook efforts to investigate, research, and ultimately bring suit over Defendant's allegedly unlawful conduct." 276 F.Supp.3d at 192 (citation omitted). Here, by contrast, Plaintiffs' longstanding work specifically focused on farmed animals makes clear that their injuries were "unbidden." *See, e.g.*, Baur Decl. ¶¶ 3, 5-7; Burd Decl. ¶¶ 10-11; Leahy Decl. ¶ 5; Núñez Decl. ¶¶ 6, 9; Seber Decl. ¶¶ 5-6; Walden Dec. ¶ 4. "Here, the challenged conduct arrived at the plaintiffs' door and either created new work for them or burdened the work they were already doing." *Nat. Res. Def. Council v. Dep't of Interior*, 410 F.Supp.3d 582, 595 (S.D.N.Y. 2019) (cleaned up). Moreover, the *CREW* court underscored that "nearly *all* of the resources [CREW] expended were either in anticipation of or direct furtherance of" the litigation at issue. 276 F.Supp.3d at 192. Here Plaintiffs have expended extensive resources seeking to counteract the effects of the Deregulatory Rule wholly apart from this litigation, including through investigations and public education. *See, e.g.*, Baur Dec. ¶ 11; Burd Decl. ¶ 17; Leahy Decl. ¶¶ 24-26; Núñez Decl. ¶¶ 20-21, 24, 28-31; Seber Decl. ¶ 10-12; Walden Decl. ¶ 22.

The *CREW* decision acknowledges that organizational standing exists "where there [is] a clear, articulable nexus between the challenged conduct or policy and its effects on the organization's ability to carry out" its functions, and that "an organization has standing where it is forced to expend resources to prevent some adverse or harmful consequence on a well-defined

and particularized class of individuals." 276 F.Supp.3d at 190 (citations omitted). Plaintiffs meet both of these standards. They clearly articulate the adverse effects of the Rule on their abilities to carry out specific organizational functions. *See, e.g.*, Baur Decl. ¶¶ 10, 11; Burd Decl. ¶¶ 15, 17, 19, 24; Leahy Decl. ¶¶ 12, 19; Núñez Decl. ¶¶ 11, 12, 14, 20, 27, 30; Seber Decl. ¶¶ 9-12; Walden Decl. ¶¶ 23-25, 27. And they divert resources to prevent harmful consequences to well-defined and particularized classes of individuals that they exist to protect—including farmed animals and individuals concerned about their treatment. In short, in addition to having no precedential weight, *CREW* is inapposite.

B. Plaintiffs Adequately Allege Associational Injuries

Plaintiffs Farm Sanctuary, ALDF, Center, and North Carolina Farmed Animal Save (NCSave) also allege standing to bring suit on behalf of their members, who are harmed by the Deregulatory Rule because it impairs their enjoyment of areas affected by the rule, harms their interests in observing animals in humane conditions, and exposes them to an enhanced risk of disease transmission. FAC ¶¶ 18-19, 28-30, 35-39, 54-57. The members' interests at stake are plainly germane to the organizations' purposes, *see id.* ¶¶ 12, 26, 32, 54, and the Government doesn't contend otherwise. Likewise, the Government appears to concede, as it must, that neither the claims asserted nor the relief requested requires individual members' participation in the lawsuit. Rather, the Government's sole objections to Plaintiffs' associational standing are that, in its view, the injuries to Plaintiffs' members "rely on speculative impacts that will flow from the Rule," Defs.' Br. at 18, and any injuries to Plaintiffs' members are not "fairly traceable to the Defendants' conduct" because they "depend[] on the independent choices of third parties that are not before the Court," *id.* at 28-30.

Plaintiffs adequately allege numerous injuries to their members that are traceable to the Deregulatory Rule and the Government's violations of law in adopting it, redressable by the Court, and squarely within controlling precedent.

1. Plaintiffs adequately allege aesthetic injuries to their members

While injuries must be concrete, particular, and actual or imminent, "the injury-in-fact necessary for standing need not be large, an identifiable trifle will suffice." *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 105 (2d Cir. 2013) (citation omitted). Moreover, for environmental claims like Plaintiffs' NEPA claim, "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (citation omitted). In analyzing this standing element, courts must look to injuries to Plaintiffs' interests, not specific harms to the environment. *Pres. Coal. v. Fed. Transit Admin.*, 129 F. Supp. 2d 551, 561 (W.D.N.Y. 2000) (citing *Laidlaw*, 528 U.S. at 181).

In *Laidlaw*, members of plaintiff organizations lived and/or recreated up to forty miles away from a facility that was allegedly discharging pollutants into a river. 528 U.S. at 175, 182-84. The Supreme Court held that these members suffered injury-in-fact based on their "reasonable concerns" about the effects of pollution discharges, which affected their "recreational, aesthetic, and economic interests." *Id.* at 183-84. The Court emphasized that "reasonable concerns" and fears that prevent an organization's member from engaging in an activity or spoil their enjoyment of an impacted area satisfy the injury-in-fact requirement. *Id.* at 183-85. Accordingly, the Court found that plaintiffs had standing even though "there had been 'no demonstrated proof of harm to the environment,'" recognizing that members avoided or suffered degraded use or enjoyment of activities such as fishing, camping, swimming,

picnicking, walking, birdwatching, hiking, and canoeing in and near the river because of their concerns. *Id.* at 181-83 (citations omitted).

Following *Laidlaw*, the Second Circuit has held that an organization's members suffer injury when they live, work, or recreate near facilities that may be emitting pollution. *See, e.g.*, *N.Y. Pub. Interest Research Grp. (NYPIRG) v. Whitman*, 321 F.3d 316, 325-26 (2d Cir. 2003) ("[T]he distinction between an alleged exposure to excess air pollution and uncertainty about exposure is one largely without a difference since both cause personal and economic harm. To the extent that this distinction is meaningful, it affects the extent, not the existence, of the injury."); *accord Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003).

Here, Plaintiffs have demonstrated standing to sue on behalf of their members who "use the . . . area" affected by the government's activities and are "persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." [6] *Laidlaw*, 528 U.S. at 183. Specifically, the pleadings establish that "[m]any of the Center's members and staff reside in, explore, and enjoy recreating in and around areas affected by the [] Rule, and specifically around the thirty-five plants that the USDA has" determined will convert under the Deregulatory Rule, and these members "are concerned that their use and enjoyment of these

[6] Plaintiffs also allege procedural injuries based on the Government's NEPA violations. *See, e.g.*, FAC ¶¶ 28-29, 37-38; Baur Decl. ¶ 14; Burd Decl. ¶ 15; Leahy Decl. ¶ 28; Seber Decl. ¶ 14; Walden Decl. ¶ 26. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) (citations omitted). A "concrete interest" implicated by a procedural requirement may reflect "aesthetic, conservational, and recreational" values and need not be economic. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). Thus, a "plaintiff can demonstrate standing to enforce a procedural right under NEPA . . . by showing that they use and intend to continue to use the environment in question for 'fishing, camping, swimming, and bird watching'" *Conn. Fund for the Env't, Inc. v. U.S. Gen. Serv. Admin.*, 285 F. Supp. 3d 525, 538 (E.D.N.Y. 2018) (citation omitted)). fve, Plaintiffs make such allegations.

areas will be impaired due to . . . harm to the environment, harm to listed species, [and] increased risk of exposure to harmful pollution . . . because of" the Rule. FAC ¶ 36; *see also id.* ¶ 28 (ALDF's members work in communities adjacent to slaughterhouses that are very likely to adopt the system authorized by the Deregulatory Rule and they "fear that the noxious stench and fouled water from the pig slaughterhouses will become substantially worse and threaten their health and aesthetic enjoyment of their communities"); *id.* ¶¶ 19, 57. Plaintiffs have thus sufficiently alleged injury-in-fact. *Ctr. for Food Safety v. Price*, No. 17-CV-3833 (VSB), 2018 WL 4356730, at *7 (S.D.N.Y. Sept. 12, 2018) ("Plaintiffs need not identify the names of their injured members at the pleadings stage" (citation omitted)).

Relying on *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009), which was resolved on the merits, not the pleadings, the Government wrongly contends that Plaintiffs must specifically identify individual members to survive the motion to dismiss. Defs.' Br. at 24-25 & n.11. "[B]ut identifying members of associations is not necessary for an FRCP 12 motion." *Kern v. Wal-Mart Stores, Inc.*, 804 F. Supp. 2d 119, 130 n.5 (W.D.N.Y. 2011) (citation omitted).

While the Complaint's allegations suffice to defeat the Government's motion to dismiss, Plaintiffs additionally provide declarations of eight members in support of their interests (including biking, bird- and wildlife-watching, boating, dog walking, fishing, hiking, horseback riding, and swimming) and their injuries (curtailed and reduced use and enjoyment of these activities). *See, e.g.*, Burdette Decl. ¶¶ 5-34 (detailing aesthetic and recreational interests in recreating in and around the Cape Fear River near a slaughterhouse that the Government has determined will convert under the Deregulatory Rule, including bird- and wildlife-watching, boating, fishing, and swimming, and the harms to these interests resulting from the Deregulatory Rule, including from increased air and water pollution); Curry Decl. ¶¶ 6-19 (detailing aesthetic,

professional, recreational, and scientific interests of Center member, including looking for mussels and other wildlife on the Ohio River just downstream from a slaughterhouse that the Government has determined will convert under the Deregulatory Rule, and the harms to those interests resulting from the Rule); Kirtright Decl. ¶¶ 13, 23-25 (detailing environmental harms likely to be faced by NCSave member as a result of the Deregulatory Rule); Lockman Decl. ¶¶ 1-9 (detailing aesthetic interests of an ALDF member who lives, works, and recreates near a slaughterhouse that the Government has determined will convert under the Deregulatory Rule, and the harms to these interests resulting from the Rule); Parker Decl. ¶¶ 1-10 (detailing aesthetic interests of an ALDF member who lives and recreates near the same slaughterhouse, and faces similar harms); Thompson Decl. ¶¶ 5-10, 14-21 (detailing aesthetic interests of a Center member who lives, works, and recreates near a slaughterhouse that the Government has determined will convert under the Deregulatory Rule, including bird- and wildlife-watching, hiking, horseback riding, kayaking, and the harms these interests resulting from the Rule).

Plaintiffs' members' diminished use and enjoyment are based on "reasonable concerns" related to expanded slaughter operations at specific pig slaughterhouses across the country, as identified by the FSIS. These reasonable concerns are supported not only by the pleadings, but also "by FSIS's own findings, comments from the meatpacking industry, and actions that plant operators are taking to implement line speed increases." *United Food & Comm'l Workers Union v. USDA*, No. 19-cv-2660, ECF No. 30 at 9-10 (Apr. 1, 2020), attached as Exhibit 1, (analyzing standing in a parallel challenge to the Deregulatory Rule).

Plaintiffs further allege cognizable injuries to their members' interests in observing animals free from inhumane treatment. The Supreme Court has recognized that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable

interest for purposes of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992). As the D.C. Circuit has discussed in detail, "people have a cognizable interest in viewing animals free from inhumane treatment," and "these are classic aesthetic interests, which have always enjoyed protection under standing analysis." *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 433-34 (D.C. Cir. 1998) (en banc) (cleaned up); *see also, e.g.*, *Kuehl v. Sellner*, 887 F.3d 845, 849-51 (8th Cir. 2018) (zoo visitors had standing based on their "concerns about the animals' mental health and physical well-being," regardless of whether they visited the zoo "for the purpose of looking for claimed violations"); *Hill v. Coggins*, 867 F.3d 499, 505 (4th Cir. 2017) (holding that plaintiffs who observed bears being mistreated on one brief occasion had standing).

In *Glickman*, the court held that the plaintiff "solidly established injury in fact" where he had an interest in seeing animals "under humane treatment" and saw animals "enduring inhumane treatment" and sought to challenge a government regulation that gave rise to that inhumane treatment. 154 F.3d at 431-32. The court noted that the plaintiff had "suffered his injury in a personal and individual way . . . by seeing with his own eyes the particular animals whose condition caused him aesthetic injury." *Id.* at 433.

Similarly here, Plaintiffs allege that their members are likely to suffer harms to their interests in observing animals in humane conditions as a result of the Deregulatory Rule. *See, e.g.*, FAC ¶ 55 (The Rule "is likely to significantly increase the number of pigs entering these slaughterhouses during NCSave vigils, while also making it more likely that those animals will be sick, injured, and even dead, and will be handled in ways that violate the HMSA and FMIA. As a result, NCSave's members will suffer significantly increased aesthetic and emotional injuries."); *see also* ¶¶ 19, 28, 36 (alleging aesthetic harms to Farm Sanctuary, ALDF, and

Center members). Declarations from Plaintiffs' members elaborate on these harms. For example, NCSave member Kirtright explains:

> I am concerned that as a result of the 2019 Rule I will suffer increased aesthetic, psychological, and emotional injuries as a result of witnessing increased abuse of pigs during vigils. Already I regularly witness abuses that harm me deeply and have required me to begin regularly seeing a counselor and a psychiatrist. Commonsense dictates—and evidence from the FSIS's pilot program of high-speed pig slaughterhouses documents—that by reducing federal oversight while simultaneously increasing line speeds, the 2019 Rule makes it much more likely that pigs will suffer as they are entering the slaughterhouse and that I will witness increased suffering during vigils. Among other things, pigs are more likely to be shocked with electric prods, beaten, and otherwise cruelly forced to move quickly to keep up with line speeds.

Kirtright Decl. ¶ 26; *see also* Lockman Decl. ¶ 11 (detailing harm of witnessing more pigs suffering in trucks bound for slaughter because of the Deregulatory Rule); Parker Decl. ¶ 12 (same); Thompson Decl. ¶¶ 11-12 (same); Mauer Decl. ¶ 5 (confirming that under the system authorized by the Deregulatory Rule, more pigs are slaughtered and that "[a]s the number of hogs slaughtered increases, the number of trucks coming to the slaughterhouse necessarily increases as well"). Thus, Plaintiffs have adequately alleged harm to their members' "cognizable interest in viewing animals free from inhumane treatment." *Glickman*, 154 F.3d at 433.

Despite allegations that are consistent with the governing case law, the Government attempts to argue that Plaintiffs' aesthetic injuries are too speculative to be cognizable. Defs.' Br. at 26-27. For this argument to prevail, the Court would have to disregard Plaintiffs' well-pleaded allegations, *see, e.g.*, FAC ¶¶ 3, 149-151, 192, which it cannot do in reviewing a motion to dismiss. *See Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016).

Specifically, as detailed above, the Government itself has identified forty specific high-volume pig slaughterhouses that "will convert" under the Deregulatory Rule. The Government based its determination that these slaughterhouses will convert on the significant profits they are likely to reap as a result of the Deregulatory Rule. The operators of many of these

slaughterhouses commented favorably on the Rule, a number of them are known to be working on plans to expand and/or remodel their facilities to convert to the new system, and the Government has refused to delay implementation of the Deregulatory Rule despite slaughterhouse staff shortages due to COVID-19. *See supra* pages 10-12. Moreover, the Government's estimate that the Deregulatory Rule will increase industry profits by $87.64 million annually was based on a "change in quantity produced"—that is, an increase in the number of pigs slaughtered—at a rate $7.60 per pig, which translates to 11.5 million more pigs raised and slaughtered annually.[7] *See supra* page 11; FAC ¶¶ 3, 150, 151.

Given all of this, it is "'a hardly-speculative exercise in naked capitalism' to predict that facilities would take advantage of" the Deregulatory Rule. *Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (citing *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013)). Indeed, the Government relied on this prediction to justify the rule. 84 Fed. Reg. at 52,335. It "cannot now ignore this reality." *Am. Trucking Ass'ns, Inc.*, 724 F.3d at 248. As another court recently determined in response to similar contentions by the Government about the effects of the Deregulatory Rule, "the government action here will cause a predicable reaction by third parties." *United Food & Comm'l Workers Union v. USDA*, No. 19-cv-2660, ECF No. 30 at 9 (Apr. 1, 2020), attached as Exhibit 1, (citing *Dep't of Commerce v. New York*, -- U.S. --, 139 S. Ct. 2551, 2565 (2019)) (referring to the forty slaughterhouses identified for conversion). Thus, Plaintiffs' alleged injuries are "certainly

[7] Thus, the Government's assertion that it "in no way predicted a 12.49% increase in *production*," Defs.' Br. at 26 (emphasis in original), is false. *See also* 84 Fed. Reg. at 52335 ("Assuming establishments *increase their production* by 12.49 percent and that this *increased production* has an average packer margin of $7.60 per head, an average large establishment's surplus could increase by approximately $3.78 million . . . ." (emphases added)).

impending" for they "require[] no speculation whatsoever as to how events will unfold." *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015).

2. Plaintiffs adequately allege food safety injuries to their members

Plaintiffs also allege injuries to their members who consume pork products and are concerned about the potential health risks they face as a result of the Rule. *See* FAC ¶¶ 18, 30, 39; *see also* Washburn Decl. ¶¶ 5-22; Pierce Decl. ¶¶ 7-11. Like Plaintiffs' other injuries, these fall squarely within the Second Circuit's precedent.

Based on the recognition that "threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes," *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003) (citations omitted), the Second Circuit has recognized "that exposure to an enhanced risk of disease transmission may qualify as injury-in-fact in consumer food and drug safety suits," *id.* at 628. In so holding, the court underscored its prior recognition, discussed above, that "'uncertainty' as to [] health effects . . . constitutes cognizable injury-in-fact." *Id.* at 634 (quoting *NYPIRG*, 321 F.3d at 325). In *Baur*, the plaintiff challenged the USDA's policy of allowing non-ambulatory livestock to enter the food supply. *Id.* at 628. He "claim[ed] standing . . . as 'a regular consumer of meat products who is concerned about eating adulterated meat,' . . . alleg[ing] that 'each time he eats meat he is at risk of contracting a food-borne illness' . . . and is consequently 'injured by the risk that he may consume meat that is the product of a downed animal, and by his apprehension and concern arising from this risk.'" *Id.* at 630.

In *Baur*, as here, the Government "claimed that [the] asserted injury was simply speculative and 'based on a series of hypothetical events.'" *Id.* The Second Circuit rejected that argument. Despite recognizing that the plaintiff's "potential harm from exposure to dangerous food products" was far from certain and was "'by nature probabilistic,'" the court found that he adequately alleged standing because "an unreasonable exposure to risk may itself cause

cognizable injury." *Id.* at 634 (citation omitted). Thus, the court explained that even though "the chance that any particular plaintiff will consume the contaminated product will likely be exceedingly remote," that does not preclude standing, because the injury is the "exposure to a sufficiently serious risk of . . . harm—not the . . . harm itself." *Id.* at 641.[8]

The risk the court found cognizable in *Baur* was far more uncertain than the risks here. *Baur* focused entirely on a single disease that, the court repeatedly underscored, had undisputedly "not been detected in the United States." *Id.* at 639; *accord id.* at 628, 630. Here, Plaintiffs' members reasonably fear exposure to a host of diseases that have repeatedly been detected in pork products in the United States and have sickened and even killed many Americans. *See, e.g.*, Washburn Decl. ¶¶ 8-18, 21 (detailing food safety concerns of Farm Sanctuary member who consumes pork products at least weekly and fears contracting potentially fatal *Salmonella*, *Escheria coli (E. coli)*, methicillin-resistant *Staphhylococcus aureus* (MRSA), *Yersinia enterocolitica*, swine flu, and numerous other diseases); Pierce Decl. ¶¶ 4-11 (detailing food safety concerns of ALDF member who consumes meat from pigs); *see also* Leahy Decl. ¶ 16 ("pigs' feces can transmit a host of diseases to humans, including *Campylobacter spp.*, *Salmonella spp.*, *Listeria monocytogenes*, *Escherichia coli (E. coli)*, *Cryptosporidium parvum*, and *Giardia lamblia*, some of which can be fatal"); Mauer Decl. ¶ 18 (same).

These fears, moreover, are corroborated by the OIG's finding that the pig slaughterhouses operating without line speed limits and with reduced government oversight "'may have a higher potential for food safety risks'" and that such slaughterhouses have had a disproportionate

[8] The Second Circuit's approach is fundamentally distinct from that of the D.C. Circuit which, rather than recognizing that the exposure to the risk—apart from any materialization of the risk—constitutes injury-in-fact, requires *both* an increased risk *and* "a substantial probability" that that risk will materialize. *Food & Water Watch v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015) (citation omitted).

number of food safety violations and have "'less assurance of food safety than a traditional plant.'" FAC ¶ 124 (citation omitted); see also *id.* ¶ 137 (according to the sworn testimony of a USDA inspector, under the system that the Deregulatory Rule authorizes, "'Sick pigs are routinely getting into the system.'"); Mauer Decl. ¶¶ 17-19 (detailing inspector's observations of diseased animals, fecal contamination, and defects such as abscesses and toenails under HIMP). This "critical factor" of "government confirmation" "weigh[s] in favor of concluding that standing exists in this case." *Baur*, 352 F.3d. at 637.

That the Government apparently disputes the findings of its own OIG is not a basis to dismiss the case at the pleadings stage. "'To the degree that defendants challenge the factual underpinnings' of [Plaintiffs'] standing 'the argument is premature.'" *Id.* at 642. "Adopting a more stringent view of the injury-in-fact requirement . . . would essentially collapse the standing inquiry into the merits," which is impermissible. *Id.*

Contrary to the Government's suggestion, the D.C. Circuit's decision in *Food & Water Watch* does not compel a different conclusion. Defs.' Br. at 20-22. In addition to being of limited value here, *see supra* note 8, it is also distinguishable. There, the D.C. Circuit found that plaintiffs "fail[ed] to plausibly allege that the [challenged poultry slaughter rule] taken as a whole substantially increases the risk of foodborne illness as a result of unwholesome, adulterated poultry." 808 F.3d at 915. Here, by contrast, as discussed above, Plaintiffs include numerous allegations indicating that the overall approach that the Deregulatory Rule authorizes does indeed increase the risk of foodborne illness.

II. Plaintiffs Adequately Allege That Their Injuries Are Fairly Traceable To The Deregulatory Rule

Plaintiffs have "plausibly alleged" that these injuries are "fairly traceable" to the Deregulatory Rule. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 59 (2d Cir. 2016). "As the

case law recognizes, it is well-settled that '[f]or standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties . . . .'' *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018). "In this case, the required nexus . . . is established by the agency's own pronouncements . . . ." *Id.*

The causation requirement "does not create an onerous standard," *Carter,* 822 F.3d at 55, and "a plaintiff's injury need not be 'directly' attributable to a defendant in order to show the causation element of standing to sue that defendant," *id.* at 59. Moreover, for Plaintiffs' alleged procedural injuries arising from the Government's failure to comply with NEPA, *see supra* note 6, this already non-onerous standard is relaxed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *accord NYPIRG v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003).

It suffices for causation that the challenged action authorizes the conduct that injures the plaintiffs, when, as here, such conduct "would have been illegal without that action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976); *accord Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc) ("Supreme Court precedent establishes that the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." (citing *Simon*, 426 U.S. 26)).[9]

[9] Thus, the Government's reliance on *Simon* and cases from other jurisdictions is misplaced, as those cases did not involve third-party activities that, as here, would be illegal but for the challenged government action. *See* Defs.' Br. at 29-30. *Simon* itself expressly distinguished such circumstances. 426 U.S. at 45 n.25.

The Government tepidly argues, in a section comprised of a mere three sentences, that Plaintiffs organizational injuries are "self-inflicted." Defs.' Br. at 17. But this case is wholly distinguishable from *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013), relied upon by the Government. Defs.' Br. at. 17. In *Clapper*, the Court held that plaintiffs could not allege standing based on measures they had taken to avoid government surveillance that they could only "assume" "may" happen. 568 U.S. at 411, 415. The Court explained that they could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm" *Id.* at 416. Here, by contrast, as detailed above, Plaintiffs are already suffering injuries as a result of the Deregulatory Rule, and have adequately alleged a substantial risk that additional harm will occur. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (citation omitted); *see also Clapper*, 568 U.S. at 414 n.5.

"This case is not one where a 'highly attenuated chain of possibilities,' including uncertainty about possible government conduct, must occur for the plaintiff to be injured.'" *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 83 (2d Cir. 2013), as amended (Mar. 21, 2013) (quoting *Clapper*, 568 U.S. at 410. Plaintiffs' "theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce v. New York*, -- U.S. --, 139 S. Ct. 2551, 2566 (2019) (citations omitted). Here, Plaintiffs have amply alleged that "third parties will likely react in predictable ways" to the Deregulatory Rule, *id.* at 2566. Indeed, these reactions have already been anticipated in great detail by the Government itself, and third parties' efforts to take advantage of the Rule are already underway. *See supra* pages 10-12. Again, once the Government promulgated the Deregulatory Rule, "it was 'a hardly-speculative exercise in naked capitalism' to predict that facilities would take advantage

of it." *Nat. Res. Def. Council v. E.P.A.*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (quoting *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 248 (D.C. Cir. 2013)). The Government expressly relied on its prediction of broad conversion of slaughterhouses to NSIS to justify promulgating the Rule, 84 Fed. Reg. at 52,335, and it "cannot now ignore this reality." *Am. Trucking Ass'n*, 724 F.3d at 248.

III. Plaintiffs Adequately Allege Redressability

The Government does not challenge redressability. "Redressability . . . is closely related to the question of causation. When the injury alleged is caused by the illegal conduct, in many instances (at least where continuation of the illegal conduct will continue to cause harm), the cessation of the illegal conduct will be likely to at least diminish further instance of the injury." *CREW v. Trump*, No. 18-474, 2019 WL 8165708, at *194 (2d Cir. Sept. 13, 2019), as amended (Mar. 3, 2020). Because Plaintiffs have "alleged a plausible likelihood that [the Deregulatory Rule] caused their injuries, and the injury is ongoing, it logically follows that relief would redress their injury—at least to some extent, which is all that Article III requires." *Id.* (citing *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Moreover, as with causation, the redressability requirements for Plaintiffs' procedural injuries are relaxed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *NYPIRG v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003).

CONCLUSION

Because they have adequately alleged standing, Plaintiffs respectfully request that the Court deny the Government's motion to dismiss this case.

Respectfully submitted,

Dated April 10, 2020

/s/ Delcianna J. Winders

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Delcianna J. Winders

Delcianna J. Winders