UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ANIMAL WELFARE INSTITUTE and FARM SANCTUARY, Plaintiffs, v. TOM VILSACK, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; FOOD SAFETY AND INSPECTION SERVICE; and PAUL KIECKER, in his official capacity as Food Safety and Inspection Service Administrator, Defendants.	Case No. 20-CV-6595 Honorable Charles J. Siragusa

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their opening brief Plaintiffs explained that, for several reasons, the denial of their Rulemaking Petitions by Defendant United States Department of Agriculture ("USDA") was arbitrary and capricious, an abuse of discretion, and not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2). In response, Defendants fail to respond to many of Plaintiffs' arguments, ask this Court to ignore extremely relevant evidence, present a prohibited post hoc rationalization for their decision, and again insist that Plaintiffs lack standing despite this Court's prior ruling to the contrary. As demonstrated below, none of these arguments have any merit. Accordingly, Plaintiffs are entitled to summary judgment in this case.

ARGUMENT

I. THE USDA'S DENIAL OF PLAINTIFFS' RULEMAKING PETITIONS WAS ARBITARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

A. The Agency Now Concedes It Has Authority to Issue the Requested Regulations.

In their opening brief, Plaintiffs explained that the USDA's Denial Letter incorrectly asserted that the agency did not have the requisite statutory authority to grant Plaintiffs' Rulemaking Petitions. Plaintiffs' Summary Judgment Memorandum ("Pl. Mem."), ECF No.34-1, at 13–15. In response, the agency now acknowledges that it has such authority if the inhumane handling of birds at the slaughterhouse can cause the poultry product to be adulterated. Defendants' Opposition ("Def. Opp."), ECF No. 39-1, at 13–16. This has been Plaintiffs' sole contention on this front, and because this point has now been conceded, the only remaining question is whether the agency acted arbitrarily and capriciously or abused its discretion in denying those Petitions.

Thus, contrary to what the agency has told the Court, Plaintiffs did *not* argue that the USDA is "required" to issue the requested regulations banning such inhumane practices. Def. Opp. at 15. Rather, Plaintiffs have simply asserted that because the agency concedes that such inhumane practices can lead to adulterated poultry products, the agency has the requisite authority to grant the requested relief.

For some reason, the agency insists on stressing that the Poultry Products Inspection Act ("PPIA") does not "specifically" require it to ban such inhumane practices. Def. Opp. at 13–14. This is correct, and Plaintiffs have never argued otherwise. However, the statute *does* provide the USDA with the requisite authority to ban such practices if necessary to "prevent" poultry products from being "adulterated," 21 U.S.C. § 452, and that term is broadly defined by the statute to mean, not only that the product "is, in whole or in part, the product of any poultry which has died otherwise than by slaughter," 21 U.S.C. § 453(g)(5), but also if it "is *for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food*." 21 U.S.C. § 453(g)(3) (emphasis added). Therefore, the mere fact that the statute does not *specifically* require the agency to ban particular inhumane practices is completely irrelevant.

Indeed, the statute also does not *specifically* require the agency to ensure that poultry is "slaughtered in accordance with good commercial practices in a manner that will result in thorough bleeding of the carcasses," or to "ensure that breathing has stopped prior to scalding," 9 C.F.R. § 381.65(b), as the agency's regulations have required since 2001. Yet, because the agency determined that *those* practices could contribute to the adulteration of poultry products, it exercised its authority in 2001 to address them. Likewise, that is all that Plaintiffs have ever asked the agency to do here—in light of the agency's now repeated acknowledgement that inhumane practices can lead to adulterated products, it should also prohibit *those* practices. As an

analogy, the Motor Vehicle Safety Act does not *specifically* require the Department of Transportation to require passive restraints in automobiles. Rather, it simply requires the agency to issue safety standards to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. Yet, no one would suggest that the agency therefore lacks authority to issue a regulation requiring car companies to include airbags in their products, as it has done for many years now.

Although Defendants now *concede* that the USDA has the necessary authority to issue the requested regulations, it nevertheless also accuses Plaintiffs of misstating the scope of its authority because of a typo in Plaintiffs' brief. Thus, although Plaintiffs correctly quoted the statutory language in the Background Section of their brief –i.e., that the Secretary "shall promulgate such other rules and regulations as are necessary to carry out the *provisions* of this chapter," 21 U.S.C. § 463(b), Pl. Mem. at 4, they inadvertently substituted the word "purposes" for "provisions" when they cited that statutory language in the Argument section. *Id.* at 13. Defendants strangely assert that the difference between "provisions" and "purposes" is somehow significant—and suggest that this typo was a deliberate attempt by Plaintiffs to mischaracterize the breadth of the agency's regulatory authority. Def. Opp. at 15–16.

However, not only was this mistake completely inadvertent, but it is of absolutely no moment. Whether the agency is directed to promulgate regulations necessary to carry out the "provisions" versus the "purposes" of this statute is immaterial. Those words are virtually interchangeable, and the use of either confers broad discretion on the agency to issue regulations necessary to effectuate Congress' intent in enacting the legislation—here, to "prevent the movement or sale in interstate or foreign commerce of . . . poultry products which are adulterated or misbranded," 21 U.S.C. § 452. *Compare, e.g.*, *Nat'l Broad. Co. v. United States,* 319 U.S. 190,

215, 219 (1943) (observing that a statute delegating authority to an agency to "[m]ake such rules and regulations . . . as may be necessary to carry out the *provisions* of" the statute, gave the agency "expansive powers") *with Chauffeur's Training Sch. Inc. v. Spellings,* 478 F.3d 117, 125 (2d Cir. 2007) (noting that "[t]he Department has been granted broad rulemaking authority" to "prescribe such regulations as may be necessary to carry out the *purposes*" of the Act at issue) (emphasis added) (internal quotation omitted). Therefore, because the agency has determined that the inhumane handling of birds at the slaughterhouse can lead to adulterated poultry products, it clearly has the requisite authority to issue regulations that ban such practices.

B) The Agency's Refusal to Grant Plaintiffs' Rulemaking Request Was Arbitrary and Capricious.

In their opening brief, Plaintiffs demonstrated that Defendants' denial of their Rulemaking Petitions was arbitrary and capricious because the agency failed to consider several relevant factors, its decision is at odds with important evidence in the record, and it failed to articulate a satisfactory explanation for its decision. As demonstrated below, Defendants' responses to these arguments are without merit.

1. The Agency Failed to Justify its Reliance on Voluntary, Inconsistent Measures by the Regulated Industry.

In denying Plaintiffs' Rulemaking Petitions, the USDA relied heavily on its assertion that its existing regulatory system is sufficient to ensure that birds "should" be treated humanely during the slaughterhouse process, because the Food Safety Inspection Service ("FSIS") requires poultry to be slaughtered in accordance with good commercial practices ("GCPs"). Denial Letter (AR010706–08). However, as Plaintiffs pointed out in their opening brief, there are only *two* GCPs that are binding on the industry: producers must (1) make sure that there is thorough bleeding of the carcasses; and (2) ensure that breathing of the animals has stopped prior to

scalding. 9 C.F.R. § 381.65(b). As Plaintiffs further pointed out, all other inhumane practices that can lead to adulterated products are simply *not* covered by this regulation, and all other GCPs upon which the agency relies are *voluntary* and not consistent throughout the industry. Pl. Mem. at 16–17. Moreover, as Plaintiffs also demonstrated, even with respect to the two limited GCPs that *are* binding, the agency's own Directive explains that a violation of this regulation occurs only when the instances of improper slaughter are so numerous that it indicates that "the establishment's process is *out of control*." Pl. Mem. at 11 (quoting FSIS 2018 Directive) (AR010670) (emphasis added). Accordingly, the agency does not even enforce individual violations of these GCPs.

The agency provided no response to the argument that GCPs are inconsistent across the industry. And, as to the argument that such *voluntary* measures are insufficient to ensure that inhumane practices do not result in adulteration, the agency now asserts that, because adulterated poultry will be condemned at the end of the process, "there is a strong disincentive for poultry processors to treat poultry in a way that will lead to condemnation." Def. Opp. at 21. However, this particular argument – that voluntary measures are sufficient because they create a "strong disincentive" to mistreat the birds—is not contained in the agency's denial letter, and hence constitutes an impermissible post hoc rationalization that the Court must reject as a basis for explaining the sufficiency of this voluntary approach. *See* Denial Letter (AR010706–08); *see also, e.g.*, *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620, 634 (2d Cir. 1976) (explaining that post hoc rationalizations are "plainly unacceptable").

Further, this explanation makes no sense. To again use the motor vehicle safety standard analogy, the fact that there is a strong disincentive for car manufacturers to allow unsafe cars on the road—because the manufacturers could be liable for the costs of injuries and deaths—would

not justify the Department of Transportation's decision not to issue a necessary safety standard when Congress instructed the agency to use its authority to *prevent* further accidents and deaths. In any event, because this a new basis for the agency's decision, it cannot be relied on here.

2. The Agency has Failed to Demonstrate that the Current Regulatory System Is Sufficient to Prevent Adulterated Products from Reaching the Market.

Plaintiffs further demonstrated that the agency's existing regulatory regime, promulgated in 2001—years before the agency began recognizing the link between the inhumane treatment of birds and resultant adulterated poultry products—is inadequate to prevent adulteration caused by such inhumane practices. Pl. Mem. at 15–19. In response, the USDA continues to insist that its original regulatory approach—again, designed *years before the agency established the link between inhumane treatment and adulteration*—is sufficient, and assert that "Plaintiffs offer no basis for this Court to conclude that the difference between the agency's current approach and the full extent of its potential regulatory authority is a meaningful one." Def. Opp. at 18–19. However, the government's self-serving statement is patently incorrect.

Plaintiffs demonstrated that there is a whole slew of inhumane practices that can cause adulteration that are not currently addressed by the agency's existing regulatory scheme. Pl. Mem. at 16–17.

In addition, Plaintiffs explained that *Salmonella*—which can cause severe illness, particularly in children and the elderly—cannot be detected upon visual inspection at condemnation, and that the USDA has acknowledged that stress can increase an animal's susceptibility to being contaminated with this and other serious pathogens. Pl. Mem. at 17. Notably, the agency does not dispute either proposition, nor could it, given that Plaintiffs cited the government's own documents for these statements. *Id.* Plaintiffs also demonstrated that the agency's own Secretary last year announced to the public that "more than 1 million consumer

illnesses due to *Salmonella* occur annually," that it is "estimated [] that over 23% of those illnesses are due to consumption of chicken and turkey," and that the agency needs a "stronger, and more comprehensive effort to reduce *Salmonella* illnesses associated with poultry products." USDA Press Release (Oct. 19, 2021), Plaintiffs' Exhibit ("Pl. Ex.") A; *see* Pl. Mem. at 17–18.

Although the USDA has thrown down the gauntlet to Plaintiffs to demonstrate that its current regulatory system is inadequate, rather than dispute any of these highly relevant facts, the agency implores the Court to completely disregard them for reasons that have absolutely no validity.[1]

First, although the agency acknowledges—as it must—that Plaintiffs actually *did* discuss both *Salmonella* and *campylobacter* in their Rulemaking Petition, Def. Opp. at 22 (citing AR000015), it nevertheless asserts that Plaintiffs somehow "waived" their ability to rely on the risk of *Salmonella* to demonstrate the inadequacy of the USDA's current regulatory approach. Def. Opp. at 21–22. However, because Plaintiffs expressly discussed *Salmonella* in their Rulemaking Petition, none of the cases relied on by Defendants are applicable. Rather, every case cited by Defendants where the court found a waiver had occurred, involved a plaintiff's complete failure to raise the matter with the agency. *See id.* In fact, in *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 228 (4th Cir. 2001), upon which Defendants rely, the court found that an argument had *not* been waived even though the Petitioner had not "included a separately delineated section devoted to [the contested] claim," because the Petitioner had nonetheless refer[red] (at least implicitly) to" the contested argument.

[1] Defendants' response to Plaintiffs' Statement of Material Facts as to Which there is No Genuine Dispute asserts that these facts are "not [] material fact[s], but rather an argumentative characterization of extra-record evidence, which is improper and does not require a response." Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts, ECF No. 39-2, Response to Nos. 20, 36, 58–62.

Moreover, even if Plaintiffs had *not* specifically mentioned *Salmonella*—which they did—this would not excuse the agency from taking this matter into account, as the USDA is charged with preventing the public from getting sick from adulterated poultry products. Surely, the USDA knows—and has known for many years—that *Salmonella* is a bacteria present in poultry products that can cause serious illness. It should not have needed Plaintiffs to describe in detail every common adulterant that can result from the inhumane treatment of birds at the slaughterhouse when Plaintiffs requested the agency to regulate in this area. In any event, because Plaintiffs specifically addressed this particular problem in their Petition, they have not waived this argument. *See 1000 Friends*, 265 F.3d at 228 (even plaintiffs who raise an issue "generally" have not waived the argument as a basis for judicial review).

Second, although the agency appears to also concede that the Court can take judicial notice of Secretary Vilsack's October 2021 announcement about *Salmonella*, Def. Opp. at 22—it nevertheless instructs the Court to "disregard" this obviously relevant information from the head of the agency, because the announcement was made *after* the agency issued its decision denying Plaintiffs' Petitions. *Id.* However, this entreaty must also fail.

The mere fact that this announcement was made in October of 2021 does not mean that the USDA was unaware until that date that *Salmonella* in poultry products has been a public health concern for many years and continues to be so. Indeed, in a speech to the Consumer Federation National Food Policy Conference in October 2021, the Agriculture Deputy Undersecretary for Food Safety—the top food safety official at the USDA—recounted that "the incidence of illness from salmonella, which the Centers for Disease Control says causes about 1.35 million infections, 26,500 hospitalizations, and 420 deaths in the United States every year, *has not decreased since 2000*." The Hagstrom Report, *Eskin: Salmonella the Top Priority*, The

Fence Post (Oct. 5, 2021) https://www.thefencepost.com/news/eskin-salmonella-the-top-priority/, Pl. Ex. F. (emphasis added). Therefore, clearly the USDA knew at the time it denied Plaintiffs' Rulemaking Petitions in November of 2019 that the existence of *Salmonella* in poultry products was a serious problem. The fact that the agency failed to include any information about this particular pathogen in the Administrative Record does not mean the Court cannot consider this matter in deciding whether the agency's decision to deny Plaintiffs' Rulemaking Petitions was arbitrary and capricious. *See, e.g.*, *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) (noting that the court may consider extra-record evidence to determine whether the decisionmaker considered all environmental consequences of its action).

Thus, this case is very different from *County of San Miguel v. Kempthorne*, 587 F.Supp.2d 64 (D.D.C. 2008), upon which Defendants rely. Def. Opp. at 22. That case involved a challenge to a decision by the Fish and Wildlife Service not to list a particular bird species as an endangered species. As part of their challenge, the plaintiffs asked the Court to take judicial notice of a completely unrelated Inspector General report that raised general questions about the impartiality of a high-level FWS official who was in office when the listing decision was made. In declining to do so, the district court noted that the Inspector General report was "not the type of document about which there [could] be no reasonable dispute," and that the plaintiffs "have offered nothing more than mere speculation and conjecture that the former [official] acted improperly *in this instance*." *County of San Miguel*, 587 F.Supp.2d at 78–79 (emphasis in original). The court further observed that the rule against considering extra-record material was meant to guard against a reviewing court relying on something of which the agency did not have "the benefit" when it made its decision. *Id.* at 78. In that same case, the court determined that a

court *should* consider extra-record material "when the agency failed to consider factors which are relevant to its final decision," *id.*,— precisely the situation at issue in this case.

Here, Plaintiffs have cited an announcement by the *Secretary of the USDA* that is directly relevant to the matter at hand—i.e., preventing poultry from being adulterated with *Salmonella.* Moreover, because the announcement came from the Secretary himself, it certainly is beyond dispute by Defendants, and, as explained *supra,* the agency has also had "the benefit" of information about the *Salmonella* problem for many years, and long before it denied Plaintiff's Rulemaking Petitions. Furthermore, as Plaintiffs have demonstrated, the USDA failed to consider the increased risk of *Salmonella* contamination in their rejection of Plaintiffs' petitions. *See* Pl. Mem. at 17–18. Therefore, if anything, the *County of San Miguel* case *supports* the Court taking this highly relevant information into account.

3. The USDA's Reliance on an Earlier Response to a Different Rulemaking Petition Is Unfounded.

There also is no merit to Defendants insistence that its failure to provide a full explanation of its decision to deny Plaintiffs' Petitions can be justified on the grounds that the agency "expressly referenced its earlier statements on the same topic." Def. Opp. at 24; *see also* Petition Denial at 1–2 (AR010706–07). The previous rulemaking petition to which Defendants refer was submitted by Mercy for Animals ("MFA") and specifically requested that the agency include poultry as "livestock" under the *Humane Methods of Slaughter Act* and the Humane Slaughter Provisions of the *Federal Inspection Act*. *See* AR000062–64. That is *not* what Plaintiffs requested here. Rather, they requested the agency issue regulations under the *Poultry Products Inspection Act* prohibiting the inhumane practices that the agency has determined can cause poultry products to become adulterated. Hence, the agency's denial of MFA's Petition

cannot be used to explain the basis for the agency's decision to deny the Petitions for Rulemaking at issue here.[2]

4. The Agency's Reliance on its 2001 Regulatory Regime Ignores a Significant Change in the Facts Linking Inhumane Practices to Adulteration.

Finally, the agency's insistence that the regulatory regime it devised in 2001 is sufficient to deal with the particular problem at hand is patently unreasonable. Thus, in both its denial letter and in its opening brief, the basic—and really *only* – reason the USDA provided for refusing to grant Plaintiffs' Rulemaking request is its contention that its current regulatory system, that has been in place since 2001, is sufficient to address the problem of inhumane handling and treatment of live birds contributing to adulterated poultry products. *See* Denial Letter (AR010706) (asserting that "[t]hrough this existing framework, FSIS addresses the poultry handling concerns that you raise in the petitions"); Def. Opp. at 17–23 (asserting that "FSIS reasonably concluded that its existing regulations adequately addressed the concerns raised by the petitions"). But this reasoning makes no sense and is simply not reasonable in light of the many times *since 2005* that the agency has acknowledged that inhumane practices can cause adulteration. *See* Pl. Mem. at 6–7, 10–11. Simply put, when the agency issued its current regulations in 2001, this important link had not been established, and hence the agency had no occasion to address it.

Thus, Plaintiffs agree with Defendants that a denial of a rulemaking petition can be overturned in light of "a fundamental change in the factual premises previously considered by the agency." Def. Opp. at 13 (quoting *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 743

[2] For the same reason, the agency's reliance on *Atchison, T. & S.F.Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973), Def. Opp. at 24, is completely misplaced. That case involved an adjudicatory decision, and the Court merely noted that in issuing such decisions, an agency may reference prior adjudicatory decisions as the settled policy of the agency. 412 U.S. at 807.

(D.C. Cir. 2017) (internal quotation omitted)). That is precisely what we have here: since 2005, four years *after* the agency issued the existing regulations, the USDA has concluded that the inhumane treatment of birds at the slaughterhouse can result in an adulterated poultry product, and the agency has now reiterated that position several times, including as recently as 2018. *See* 70 Fed. Reg. 56624 (Sept. 28, 2005) (AR010627–29) (announcing to the public that humane treatment of poultry is a "high priority" because "poultry products are more likely to be adulterated if . . . they are produced from birds that have not been treated humanely"); Directive 6100.3 (Apr. 30, 2009) (AR010632) (noting that "[i]n poultry operations, employing humane methods of handling and slaughtering . . . increases the likelihood of producing unadulterated product"); Directive 6110.1 (Jul. 3, 2018) (AR010664) (same).

Accordingly, there has been a "fundamental change" in the factual situation previously considered by the agency when it issued the extant regulations—it now knows that the inhumane handling of live birds at the slaughterhouse can cause the resultant poultry product to be adulterated. The agency also knows that there is a huge and continuing problem with poultry being tainted with *Salmonella*, that stressful conditions contribute to birds being susceptible to *Salmonella*, that *Salmonella* is not detectable upon visible inspection, and that, in the words of the agency's own Secretary, the agency needs to do more to "help prevent *Salmonella* contamination throughout the poultry supply chain and production system to protect public health." USDA Press Release (Oct. 19, 2021), Pl. Ex. A. In light of all of these developments—and especially the agency's own repeated acknowledgements that inhumane practices can result in adulterated poultry products—it was arbitrary and capricious for the agency to summarily deny Plaintiffs' Rulemaking Petitions on the grounds that "FSIS addresses the poultry handling concerns" "[t]hrough [its] *existing framework*." Petition Denial Letter at 1 (AR010706)

(emphasis added); *see also American Horse Protection Ass'n. v. Lyng*, 812 F.2d 1, 4–7 (D.C. Cir. 1987) (agency decision to deny rulemaking petition was arbitrary and capricious in light of new evidence demonstrating that the existing regulation may not be effective in achieving the overall objective of the statute); *Telecommunications Rsch. & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (stressing that an agency's delay in issuing regulations "that might be reasonable in the sphere of economic regulation [is] less tolerable when human health and welfare are at stake").

II. PLAINTIFFS HAVE ADEQUATELY DEMONSTRATED STANDING.

In their opening brief, Plaintiffs also demonstrated that they had the necessary Article III standing to bring this case. In response, Defendants make all the same arguments they made in support of their earlier motion to dismiss, which have already been rejected by this Court. ECF No. 19. Those arguments fare no better at this stage of the litigation.

A. Plaintiffs Have Demonstrated Sufficient Organizational Standing.

With sworn Declarations from officials from both organizations, Plaintiffs demonstrated that they satisfy the test in this Circuit for organizational standing pursuant to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)—i.e. they have met their burden to show that the Defendants' actions in denying the Rulemaking Petitions have "perceptibly impaired" the organizations' ability to conduct their activities, including by causing the Plaintiff organizations to divert resources to counteract the agency's unlawful action. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017). They demonstrated that the agency's denial of their Rulemaking Petitions impairs their overall missions in numerous ways, and that, in response, they have had to divert additional resources from other sources to protect birds slaughtered for food. Pl. Mem. at 21–23.

In response, Defendants rely heavily on the Court of Appeals' decision in *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167 (2d Cir. 2021), Def. Opp. at 8–9 – a case that was already briefed by the parties at the motion to dismiss stage, *see* ECF Nos. 17–18, and which this Court cited when it denied the agency's motion to dismiss. ECF No. 19. As Plaintiffs explained when they previously addressed this case, in sharp contrast to what was alleged in *Connecticut Parents*, Plaintiffs here are not complaining about the cost of voluntarily launching a *new* campaign in response to the agency's denial of their Rulemaking Petitions. *See id.*; *Connecticut Parents*, 8 F.4th at 175 (noting that "it is clear that [the Plaintiff] incurred costs because it *decided to initiate a campaign against* the [challenged decision] to advance its own 'abstract societal interests.'" (emphasis added)). Rather, Defendants' denial of their Petitions impairs the organizations' abilities to carry out their long-standing, *existing* missions to protect birds from inhumane handling and treatment at the slaughterhouse. *See* Pl. Mem. at 21–23. These injuries alone are sufficient to demonstrate the requisite injuries in fact. *See Centro de la Comunidad*, 868 F.3d at 110.

Plaintiffs have also demonstrated the requisite injuries resulting from the fact that they also have had to divert resources away from other projects to compensate for the agency's refusal to ban the inhumane practices that can cause adulterated poultry products. *See* Pl. Mem. at 22–23; Jones Decl., Pl. Ex. B, ¶¶ 23–35, 37; von Klemperer Decl., Pl. Ex. C, ¶ 30–31; *see also Humane Soc'y of the U.S. v. USDA*, 41 F.4th 564, 567–68(D.C. Cir. 2022) (organization had standing because, as a result of the agency's withdrawal of the rule at issue, it had to "redirect its limited time and resources away from existing [animal protection] work to identify, investigate, publicize and counteract" the challenged practices). Moreover, the mere fact that the organizations have spent some resources on similar efforts in the past, Def. Opp. at 10, does not

negate the fact that they have had to divert their time and resources to engage in even *more* activities geared toward protecting these animals now that the USDA has refused to grant their Rulemaking Petitions.

Defendants' reliance on *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013), Def. Opp. at 10, is also misplaced. There, the Supreme Court rejected as sufficient for standing the cost and burdens undertaken because of the "fear of surveillance," because such "fears of hypothetical future harm" were far too speculative and "not certainly impending." *Clapper*, 568 U.S. at 416–17. Here, by contrast, because the agency actually denied Plaintiffs' Rulemaking Petitions, the organizational cost of compensating for this gap in the regulatory scheme governing billions of birds at slaughterhouses is present and continuing. For the same reason, Plaintiffs have amply demonstrated the requisite causation. *See also, e.g.*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018) (finding causation when the agency's "own pronouncements" recognize the connection between the challenged policy and the alleged harm).

Nor is there any basis for the government's assertion that Plaintiffs lack the requisite redressability. Def. Opp. at 10–11. Although it is disheartening to see the agency declare at this juncture—before it has undertaken the requested rulemaking effort—that *no matter what evidence and arguments would be generated by such an effort* "[t]here is no reason to believe that the agency would change its approach upon reconsidering the petition," Def. Opp. at 11, this is not the test for redressability.

It is completely immaterial whether the USDA would eventually promulgate the regulations requested by Plaintiffs. As the D.C. Circuit has explained, "standing is not defeated by the possibility that an agency might ultimately wield its discretion in a way that does not fix a

party's alleged injury." *NTCH, Inc. v. FCC,* 841 F.3d 497, 506 (D.C. Cir. 2016). Rather, as the Supreme Court long ago explained, "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground," even if the agency later reaches "the same result for a different reason." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

B. Plaintiff Farm Sanctuary Also Has Demonstrated Sufficient Associational Standing.

As demonstrated in their opening brief, Plaintiff Farm Sanctuary also has sufficient associational standing on behalf of its members who purchase and consume poultry and are at an increased risk of serving and eating adulterated poultry products because the USDA refuses to ban the inhumane practices that the agency acknowledges can cause adulteration. Pl. Mem. at 24–25; *see also Baur v. Veneman*, 352 F.3d 625, 632–33 (2d Cir. 2003).

In response, Defendants assert that "[u]nder *Baur* . . . Plaintiffs would need to show that, because of the agency denying their petition, poultry products that present a greater risk of pathogen contamination are slipping past inspections to consumers and that the pathogens are not destroyed through cooking said poultry to safe internal temperatures." Def. Opp. at 11. Plaintiffs disagree that they bear such a heavy evidentiary burden. Rather, as the Court of Appeals explained in *Baur,* "[i]n the specific context of food and drug safety suits . . . such injuries are cognizable for standing purposes, where the plaintiff alleges *exposure to potentially harmful products*." *Baur*, 352 F.3d at 634 (emphasis added). The Court further explained that even though "the chance that any particular plaintiff will consume the contaminated products 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 (emphasis added). Indeed, in *Baur,* which involved the risk of being infected with mad cow's

disease, the Court found standing *even though there had never been a single case of mad cow disease reported in the United States*. *Id.* at 639.

Moreover, while Plaintiffs disagree that they must actually prove that adulterated products will "slip[] past inspections," Def. Opp. at 11, they have now shown, based on the agency's own statements, that the risk of consuming poultry products contaminated with *Salmonella* is hardly speculative. On the contrary, as Secretary Vilsack himself explained, *"[f]ar too many consumers become ill every year from poultry contaminated by Salmonella.*" USDA Press Release (Oct. 19, 2021) Pl. Ex. A (emphasis added). As the agency also explained, "more than 1 million consumer illnesses due to *Salmonella* occur annually, and it is estimated [] that *over 23% of those illnesses are due to consumption of chicken and turkey*." *Id.* (emphasis added). As Plaintiffs have also demonstrated, the USDA knows that stress can increase an animal's susceptibility to being contaminated with this and other serious pathogens, Pl. Mem. at 17, and the USDA also does not dispute that *Salmonella* simply is not detectable by visible inspection. *Id.* Therefore, under *Baur*, Farm Sanctuary has amply shown the requisite injury to its members associated with the risk of illness from adulterated poultry products, including those that are adulterated as a result of inhumane handling and other treatment at the slaughterhouse.

Indeed, as Farm Sanctuary member Jody Hinkle explains in her sworn Declaration, she is especially concerned about the risk of contracting a foodborne illness from poultry because of her age and being "susceptible to being more seriously affected by such illness." Hinkle Decl., Pl. Ex. D, ¶9. Further, because her local grocery store sells poultry products that are not "sourced from birds that are treated humanely," she has to drive to another store an hour a way to purchase such products or assume the risk of eating adulterated poultry. *Id.* ¶¶ 10–11. Particularly in light of the agency's own admissions about the risk of *Salmonella*-infected poultry, these concerns—

as well as those expressed by Farm Sanctuary member David Washburn, Washburn Decl., Pl. Ex. E—are well founded, without Plaintiffs having to *prove* that such products actually "slip[] by inspections." Def. Opp. at 11; *see also Friends of the Earth, Inc. v. Laidlaw Env't Services*, 528 U.S. 167, 169(2000) (organization members' "reasonable concerns" that a river they wish to use may be polluted are sufficient for standing notwithstanding the lack of evidence that the river was actually polluted).

Finally, Defendants' attempt to minimize the validity of these fears by asserting that "most people" recover from *Salmonella* poisoning "within four to seven days without antibiotics," Def. Opp. at 12, n. 4, and that these particular pathogens can be destroyed "through cooking said poultry to safe internal temperatures," Def. Opp. at 11, appears quite callous. If the risk of *Salmonella* were as inconsequential as the USDA now suggests in its brief, the agency would not be making reduction of this pathogen "throughout the poultry supply chain and production system" one of the agency's "top priorities." USDA Press Release (Oct. 19, 2021) Pl. Ex. A. Accordingly, Plaintiff Farm Sanctuary has also adequately demonstrated standing on this basis.

CONCLUSION

For all the foregoing reasons, as well as those put forth in Plaintiffs' summary judgment memorandum, Plaintiffs' motion for summary judgment should be granted and Defendants' motion for summary judgment should be denied.

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