

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ANIMAL WELFARE INSTITUTE and)	
FARM SANCTUARY,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 20-CV-6595
)	Honorable Charles J. Siragusa
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.)	

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs Animal Welfare Institute (“AWI”) and Farm Sanctuary challenge Defendants’ denial of their Rulemaking Petitions to the U.S. Department of Agriculture (“USDA”) requesting that its Food Safety and Inspection Service (“FSIS”) exercise its statutory authority under the Poultry Products Inspection Act (“PPIA”) to promulgate regulations addressing poultry product adulteration caused by the inhumane handling of birds at slaughterhouses. Each year over nine billion chickens and turkeys are killed to produce food for American consumers. However, despite the fact that FSIS has for over a decade recognized a direct link between the inhumane treatment of birds at slaughter and increased adulteration of the resulting poultry products, there are no requirements in place to ensure that these animals are treated humanely throughout the torturous process they endure from the time they arrive at the facility to when they are finally killed. Accordingly, in 2013, and again in 2016, Plaintiffs petitioned the USDA to promulgate regulations that would prohibit the inhumane handling of birds at the slaughterhouse in order to *prevent* such adulteration—the overriding purpose of the PPIA. *See* 21 U.S.C. § 452 (“It is hereby declared to be the policy of the Congress . . . *to prevent the movement or sale in interstate or foreign commerce of . . . poultry products which are adulterated*”) (emphasis added).

FSIS denied those Petitions in November 2019, asserting that it lacks jurisdiction to promulgate such regulations and that its current reliance on the industry’s voluntary “good commercial practices” (“GCPs”) is sufficient to address adulteration caused by the inhumane handling of birds. However, as detailed below, FSIS’s decision is at odds with the PPIA, and the agency abused its discretion and acted in an arbitrary and capricious manner within the meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). Accordingly, that decision must be set aside. *Id.*

BACKGROUND

I. RELEVANT FACTUAL BACKGROUND

The Process Used to Slaughter Poultry

Every year over nine billion chickens and turkeys are killed at American slaughterhouses for use as food. USDA Nat'l Agric. Stats. Serv., Poultry Slaughter 2018 Summary, at 5 (AR010990). When these birds arrive at the slaughterhouse, they frequently remain in overcrowded transportation crates, sitting in their own excrement, unprotected from the elements for hours or even days, while they await workers to process them. 2013 Petition for Rulemaking (hereinafter, "2013 Petition"), at 9-10 (AR000010-11). Workers often remove birds from these crates by tipping the crates over and dumping the birds onto a conveyer belt from a great height, or by using metal poles to prod the animals out of their cages. *Id.* at 10 (AR000011). Piles of hundreds of live birds enter the slaughterhouse via conveyer belts, and many suffocate in great numbers due to belt malfunctions. *Id.*; (AR000051); (AR000072).

Inside the slaughterhouse, workers hang the birds on the slaughter line by grabbing their legs and shoving them upside-down into metal shackles, at which point the birds struggle violently to escape. 2013 Petition, at 10 (AR000011). When birds do not fit into the shackles, workers break or dislocate their bones to make them fit while the birds are still alive and fully conscious. *Id.* Such rough handling practices, particularly when coupled with intentional acts of abuse inflicted on the birds, frequently lead to significant lacerations, bruising, and broken bones for the live birds. *Id.* In addition, the speed at which workers typically hang birds—140 per minute—makes it difficult for workers or USDA inspectors to detect and remove birds who are sick, injured, or even already dead. *Id.* at 14-15 (AR000015-16).

After being shackled, the birds enter what is called a “waterbath,” where their heads are submerged in water and they are given an electric shock to “stun” them. *Id.* at 12 (AR000013). A proper stun should render birds insensible to pain when they are subsequently killed. But because up to 20 birds may be in the waterbath at any one time, the amount of electrical current delivered to each bird can vary, making this form of stunning often ineffective. *Id.* Moreover, if the duration between shackling and stunning is too short, the birds may not “settle” on the slaughter line—i.e., they do not come to a resting state—increasing the likelihood that the animals will not be sufficiently submerged in the electrified waterbath and will therefore remain fully conscious prior to death. *Id.* at 12-13 (AR000013-14). Conversely, if the duration between shackling and stunning is too long, distressed birds will fight against restraints and engage in self-injurious wing-flapping or head movements in an attempt to escape. *Id.* at 13 (AR000014).



After a bird passes through the waterbath, a machine or back-up worker kills the bird by slicing the animal’s neck to sever its jugular vein and carotid arteries so that the bird bleeds to death. *Id.* Many birds—especially those improperly stunned—will try to resist this cutting, resulting in hemorrhaging, broken bones, or other forms of internal injury. *Id.* After the birds’ necks are cut, they are placed in a scalding bath of hot water to remove their feathers. *Id.* at 14 (AR000015). Birds whose necks are improperly slit will die by drowning in this scalding water, at which point they defecate, releasing *Salmonella*, *Campylobacter*, and other harmful microbes.

Id. Live birds who are subsequently placed in such water can inhale these bacteria, leading to widespread contamination. *Id.*

II. THE RELEVANT STATUTORY AND REGULATORY SCHEME

A. The Poultry Products Inspection Act and Relevant Regulations

Congress enacted the PPIA to “provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of . . . poultry products which are adulterated or misbranded.” 21 U.S.C. § 452. As explained in the statement of findings, Congress believed it is “essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome [and] not adulterated.” *Id.* § 451. Thus, Congress declared that the overall policy and purpose of the PPIA is “to prevent the movement or sale in interstate or foreign commerce of . . . *poultry products which are adulterated* or misbranded.” *Id.* § 452 (emphasis added). Indeed, Congress further emphasized that this objective—to “prevent” adulterated products from reaching the market—was to be achieved not only through the “inspection of poultry products” *after* the slaughter process, but also by “regulat[ing] the *processing*” of the poultry. *Id.* (emphasis added).

The PPIA prohibits the sale of any “adulterated” poultry product, 21 U.S.C. § 458(a)(2)(A), and provides that the Secretary of the USDA “shall promulgate . . . rules and regulations as are necessary to carry out the provisions of” the statute. *Id.* § 463(b). An “adulterated” poultry product is, in relevant part, any such product that:

- “bears or contains any poisonous or deleterious substance which may render it injurious to health,” *id.* § 453(g)(1), or “which may . . . make such article unfit for human food,” *id.* § 453(g)(2)(A);
- “consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food,” *id.* § 453(g)(3);

- “has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health,” *id.* § 453(g)(4); or
- “is, in whole or in part, the product of any poultry which has died otherwise than by slaughter,” *id.* § 453(g)(5).

FSIS is responsible for implementing the PPIA. 7 C.F.R. § 2.18(a)(1)(ii)(A). In an effort to minimize the entry into commerce of adulterated poultry products, FSIS performs both antemortem inspection of birds and postmortem inspection of poultry carcasses. 21 U.S.C. §§ 455(a)-(b). During antemortem inspection, inspectors examine birds in their transport crates either on or off the transport trucks, looking for “any disease or condition, that . . . would cause condemnation of their carcasses on post mortem inspection.” 9 C.F.R. § 381.71(a). Inspectors are to remove and “condemn” birds clearly displaying such diseases or conditions, meaning that those birds cannot be slaughtered for human consumption. 21 U.S.C. § 455(c). Birds that “do not plainly show, but are suspected of being affected with, any [such] disease or condition” are “segregated from the other poultry and held for separate slaughter, evisceration, and post mortem inspection.” 9 C.F.R. § 381.72(a). During post-mortem inspection, “a bird-by-bird” examination of “all poultry eviscerated in every official establishment” is conducted by an FSIS inspector, pursuant to one of six species-specific post-mortem inspection systems. *Id.* §§ 381.76(a)-(b).

Birds whose carcasses are “badly bruised,” 9 C.F.R. § 381.89, and birds who have died by methods “other than slaughter,” *id.* § 381.90, must be condemned as adulterated. To reduce the incidence of such adulteration, FSIS requires that facilities slaughter poultry “in accordance with good commercial practices in a manner that will result in thorough bleeding of the carcasses and ensure that breathing has stopped prior to scalding.” *Id.* § 381.65(b). However, this requirement does not address, let alone *prohibit*, any of the *other* common practices that result in adulteration, such as those that result in bruising, broken bones, and lacerations. Nor do current

regulations prohibit actions that result in birds dying other than by slaughter, such as by exposure to extreme temperatures, suffocation, or blunt force trauma. Nor does the current system require the elimination of pathogens such as *Salmonella* and *Campylobacter*—the presence of which cannot be detected by visual inspection alone.

Moreover, because FSIS’s current definition of GCPs is limited to only two requirements—i.e. (1) that a bird has stopped breathing before it is scalded and (2) that the bird is thoroughly bled, *id.*—each plant is free to devise its own GCPs with respect to any *other* practice that is inhumane and that may cause adulteration. Therefore, none of those GCPs are binding on *any* of the poultry manufacturers, let alone the industry as a whole. Finally, FSIS Rules of Practice do not allow FSIS to suspend or refuse to grant inspection for noncompliance with poultry GCPs. *See* 9 C.F.R. §§ 500.3, 500.4. Rather, the failure to abide by GCPs is instead simply documented in a Noncompliance Record (“NR”) or a Memorandum of Interview (“MOI”), with no further consequences. FSIS Directive 6110.1 (July 3, 2018) (hereinafter, “2018 Directive”) (AR010666-69).¹

B. FSIS Acknowledges That Inhumane Handling of Birds Causes Adulteration

As early as 2005, FSIS acknowledged the direct causal link between the inhumane handling of birds at the slaughterhouse and the consequent adulteration of poultry products. That year, the agency issued a Notice in the Federal Register informing the public that the humane

¹ Even this practice is woefully deficient. According to records received by Plaintiffs under the Freedom of Information Act (“FOIA”), over one-third of inspected poultry plants—105 plants—had no NRs or MOIs for GCP non-compliance from 2017-2019. *See* (AR012221-013336); (AR016617-017262). Yet, given the sheer volume of birds that would have been processed during that timeframe—i.e., almost *thirty billion birds*—it is inconceivable that there were absolutely *no deviations from GCPs* in these plants. This suggests that a large number of deviations of the type linked to adulteration of poultry products—bruising, lacerations, broken bones, and death other than by slaughter—were simply not detected by FSIS inspectors.

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.*” 70 Fed. Reg. 56,624 (Sept. 28, 2005) (AR010627-29) (emphasis added). The agency further stressed that “[t]he abuse of poultry by killing them by an unacceptable method or by treating them in a manner that is not consistent with good commercial practices *may render the poultry product adulterated, and, hence, not acceptable for human food.*” *Id.* at 56625 (AR010628) (emphasis added). For example, the agency explained, “[b]ruising is one condition that may result in condemnation (9 C.F.R. 381.89). Bruises are likely to result when birds are not treated humanely.” *Id.* at 56624 (AR010627). Thus, the agency suggested that poultry establishments “may” want to “focus on treating poultry in such a manner as to minimize excitement, discomfort, and accidental injury the entire time that live poultry is held in connection with slaughter” to prevent the poultry from becoming adulterated. *Id.* at 56625 (AR010628).

In 2009, the agency again acknowledged that “[i]n poultry operations, employing humane methods of handling and slaughtering . . . increases the likelihood of producing unadulterated product.” Directive 6910.1 (Dec. 7, 2009) (AR010632).

III. PLAINTIFFS’ RULEMAKING PETITIONS AND THE AGENCY’S RESPONSE

A. AWI and Farm Sanctuary’s Rulemaking Petitions

Based on the agency’s repeated concessions that the inhumane handling of birds can result in adulterated poultry products, on December 17, 2013, Plaintiffs submitted a Petition for Rulemaking to FSIS, urging the agency to prohibit the inhumane handling of birds to prevent such adulteration. 2013 Petition, at 1 (AR000001). The Petition included voluminous evidence further demonstrating the link between the inhumane treatment of live birds and adulteration of poultry products, including evidence of: (1) birds entering the slaughter establishment already

dead from the stressors of transport, or with bruising or dislocated or broken bones; (2) birds being defecated on while sitting in cramped transport crates for long periods of time; (3) birds dying in large numbers from extreme temperatures and weather while waiting on trucks; (4) birds suffering from lacerations and bruising from being tipped out of their transport crates onto conveyor belts; (5) birds with broken legs from being forced into shackles; (6) birds suffering bruising, lacerations, and dislocated bones from struggling violently after being hung upside down in the shackles; (7) birds being inadequately stunned before having their throats slit; and (8) birds entering the scald tank while still conscious and drowning. 2013 Petition, at 9-17 (AR000010-18).

The 2013 Petition also highlighted the role of high and increasing slaughter line speeds in exacerbating handling-caused adulteration, explaining that because birds are processed at incredibly rapid speeds, inspectors do not have sufficient time to ensure that the birds are properly stunned or slaughtered before they are put into the scalding tanks. *Id.* at 14-15 (AR000015-16). The Petition explained:

Because fast line speeds cause workers to struggle to adequately process poultry, birds are sometimes not properly stunned or slaughtered, and some are still alive when they reach the scalding tanks. Indeed, reports indicate that at some slaughter establishments up to 3 percent of all birds may enter the scald tanks alive. Additionally, according to a paper published in the Journal of the Royal Society of Medicine, high line speeds provide “little or no opportunity to sanitize implements after one bird has been dealt with and before another is ready,” preventing workers from properly sanitizing areas to prevent the spread of contaminants after a contaminated bird passes through the slaughter line.

Id. at 15 (AR000016) (emphasis added).

The 2013 Petition further demonstrated that overt acts of abuse and cruelty that occur at the slaughterhouse also cause adulteration. *Id.* at 15-17 (AR000016-18). For example, the Petition recounted:

[t]urkeys with broken wings and legs, bloody open wounds, tumors and other untreated injuries being slaughtered for human consumption . . . A worker violently punching live, shackled turkeys for ‘fun’ . . . Employees forcefully shoving their hands into the cloacae (vaginal cavities) of live chickens . . . Turkeys and chickens being thrown across the facility and up into the air . . . Workers ripping the heads off live turkeys . . . Birds being crushed to death under the wheels of trucks . . . Conscious turkeys having their throats slit.

Id. at 16 (AR000017). However, as explained by Plaintiffs’ Petition, *none of these practices is prohibited by FSIS’s existing regulations. Id.* at 17-18 (AR000018-19).

Plaintiffs’ 2013 Petition also documented the link between these inhumane handling practices and specific food safety concerns, highlighting the significant issue of contamination from bruising—e.g., that “[a] high percentage of poultry bruises harbor both aerobic and anaerobic microorganisms, including pathogens such as *Staphylococcus*,” *id.* at 5, n. 41 (AR000006) (citing McCarthy et al., *Microbiological Studies of Bruised Tissues*, 28 J. FOOD SCI. 245)—and contamination risks from *Salmonella* and *Campylobacter* caused by live birds in the scald tank inhaling microorganisms from feces and bacteria, *id.* at 14 (AR000015).

The 2013 Petition also described how the current, extremely narrow GCP regulation is insufficient to meet the PPIA’s overarching purpose to “*prevent*” adulteration. *Id.* at 17-18 (AR000018-19); 21 U.S.C. § 452 (emphasis added). It stressed that the USDA’s reliance on unspecified, non-binding “Good Commercial Practices” is inadequate because such practices “do not have the full force of regulation” and ignore “several forms of adulteration or potential adulteration, including contamination, bruising and broken bones.” 2013 Petition, at 17-18 (AR000018-19). Therefore, Plaintiffs’ Petition asked FSIS to “adopt poultry handling regulations that identify and prohibit practices that lead to adulteration.” *Id.* at 18 (AR000019).

On May 26, 2016, Plaintiff AWI provided an additional submission to FSIS with *even more* evidence of the need for such regulations. (AR000054). Based on FSIS enforcement records obtained through FOIA, AWI highlighted several incidents to demonstrate that “large

numbers of birds are suffering and dying as a result of being abandoned for extended periods of time—often during extreme weather conditions—in the holding areas of slaughter plants,” with no enforcement recourse whatsoever. *Id.* In one such incident, over 7,000 birds died after being left for two days in sub-zero temperatures, and in another, six trucks of birds were abandoned without food or water in extreme heat for a full weekend. *Id.* Accordingly, AWI again explained that humane handling requirements are necessary to carry out the PPIA’s purpose of preventing such adulteration (birds dying “other than [by] slaughter.” 9 C.F.R. § 381.90). (AR000055).

B. FSIS’s 2018 Directive

While Plaintiffs’ Petitions were still pending, in July 2018, FSIS issued a Directive entitled “Verification of Poultry Good Commercial Practices.” 2018 Directive (AR010664). This Directive again acknowledged that “the employment of *humane methods of handling and slaughtering*” poultry “*increases the likelihood of producing unadulterated product.*” *Id.* (emphasis added). Although FSIS observed that “[i]n general poultry *should* be handled in a manner that prevents needless injury and suffering in order to produce a commercially marketable product,” the 2018 Directive stressed that the only *binding* regulations governing the humane handling of poultry require adherence to “good commercial practices” which, again, FSIS narrowly defines to mean *only* “ensur[ing] that breathing has stopped before scalding, so that the birds do not drown, and that slaughter results in thorough bleeding of the poultry carcass.” *Id.* (citing 9 C.F.R. § 381.65(b)). Thus, the agency made clear that all *other* practices that can result in adulterated products—such as suffocation, blunt force trauma, and prolonged exposure to the elements—are *not* prohibited by the existing regulations.

Further, the 2018 Directive suggested that inspection personnel *observe* whether:

- establishment employees are breaking the legs of birds to hold the birds in the shackle, squeezing them into shackles or otherwise mishandling birds while transferring them from the cages to the shackles;
- in cold weather, birds are frozen inside the cages or frozen to the cages themselves; or
- birds are dead from heat exhaustion [as evidenced by] heavy panting, in addition to dead or dying birds in cages;

but stressed that these examples “*do not necessarily describe prohibited activities and noncompliance.*” *Id.* (AR010665) (emphasis added).

The 2018 Directive also explained that the improper slaughter of a “single” bird or even “small numbers of birds” is not considered a violation of the regulation that requires compliance with GCPs as narrowly defined by the agency. *Id.* (AR010667). Rather, a violation of the existing regulation occurs only when the instances of improper slaughter are so numerous it indicates that “the establishment’s *process is out of control.*” *Id.* (emphasis added).

C. AWI Again Alerts FSIS to Evidence of Inhumane Treatment and Adulteration

In August 2018, AWI again wrote to FSIS imploring it to take action to address continued incidents of slaughterhouses subjecting large numbers of birds to inhumane handling, leading thousands to become adulterated by dying other than by slaughter. (AR010709). GCP records from 2016 through early 2018, which AWI obtained under FOIA, identified more than fifty instances in which birds were knowingly mistreated, including several in which birds were “held at the slaughterhouse without protection from extreme heat or cold” and “held for days without food, water, and adequate shelter.” (AR010710).²

² For example, a Pilgrim’s plant in Mt. Pleasant, Texas “had multiple [such] incidents, including one where 1,519 birds died after being held over beyond the acceptable time limit”; and another Pilgrim’s plant in Guntersville, Alabama was cited “for parking trucks carrying birds

D. FSIS Denies Plaintiffs' Rulemaking Petitions

By letter dated November 25, 2019, FSIS denied Plaintiffs' 2013 and 2016 Petitions. (AR010706). The agency began by asserting that “[the] PPIA does not give FSIS the specific authority to prescribe requirements for the humane handling of live birds at slaughter.” *Id.* However, after claiming that it lacks jurisdiction over this matter, the agency nevertheless further asserted that “FSIS regulations [already] require poultry to be slaughtered in accordance with good commercial practices (GCP), which means that poultry *should* be treated humanely.” *Id.* (emphasis added). FSIS also summarily contended that its existing regulatory approach was adequate to “address the handling of poultry by requiring official poultry establishments to adhere to GCP”; that the “existing system enables the Agency to identify and prohibit practices that may cause poultry adulteration”; and that “additional rulemaking is not necessary to carry out the Agency’s authority under the PPIA to regulate poultry GCP.” (AR010707-08). The agency did not refer, let alone respond, to *any* of the arguments or evidence presented by Plaintiffs demonstrating the deficiencies of its current—largely voluntary—approach to preventing the inhumane handling of birds that can result in adulteration. Accordingly, Plaintiffs filed this action on August 13, 2020.

ARGUMENT

A court should grant summary judgment when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Elder v. McCarthy*, 967 F.3d 113, 123 (2d Cir. 2020) (quoting Fed. R. Civ. P. 56(a)). Under the APA, the court “shall . . . set aside” an agency’s decision if it is “arbitrary, capricious, an abuse of discretion or otherwise

in full sun on hot days; in one instance, 2,550 out of 5,250 (49%) [of those] birds died.” (AR010710).

not in accordance with law.” 5 U.S.C. § 706(2)(A). While the court may not “substitute its judgment for that of the agency,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), its “inquiry must be searching and careful.” *Nat. Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Nat. Res. Def. Council, Inc. v. F.A.A.*, 564 F.3d 549, 555 (2d Cir. 2009)).

In conducting this analysis, the court must decide whether the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made” and “must consider whether the decision was based on a consideration of the relevant factors.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, an agency’s decision is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency . . .” *Id.* at 43.

I. FSIS’S DENIAL OF PLAINTIFFS’ RULEMAKING PETITIONS WAS ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT IN ACCORDANCE WITH THE PPIA.

A. The USDA Has Authority Under the PPIA to Prohibit Inhumane Practices That Result in Adulteration.

FSIS’s first ground for denying Plaintiffs’ Petitions—that “the PPIA does not give FSIS the specific authority to prescribe requirements for the humane handling of live birds at slaughter,” (AR010706)—is patently incorrect. The PPIA was enacted to “prevent” the adulteration of poultry products. 21 U.S.C. § 452. To achieve that overarching objective, the statute provides that “[t]he Secretary *shall promulgate regulations as are necessary to carry out the purposes* [of the statute].” *Id.* § 463(b) (emphasis added). Therefore, once the agency

acknowledged the causal link between the inhumane handling of birds and the consequent adulteration of the final product, it clearly had the authority to promulgate such regulations.

Indeed, the agency's insistence that it lacks authority to issue the requested regulations is belied by the statement in its denial letter that "FSIS currently *acts within its authority under the PPIA to address the handling of poultry at official poultry establishments to prevent product adulteration.*" (AR010706) (emphasis added). Thus, the agency itself recognizes that it has "the authority under the PPIA" to address this problem. *Id.*

Moreover, when a statute like the PPIA is enacted to prevent a danger to the public health caused by adulterated products, the agency's authority must be construed broadly. For example, under the analogous scheme of the Food, Drug, and Cosmetic Act, the Court of Appeals for this Circuit has found that when a statute "has as its purpose the protection of the public . . . and the safeguarding of the public health by enforcement of certain standards . . . the provisions, touching the public interest in a direct way, are to be given a *liberal construction.*" *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 27-28 (2d Cir. 1972) (emphasis added).

As another federal court recently observed, "even FSIS has recognized that animal welfare is a relevant concern under the PPIA, for an animal that is unfit for human consumption is often itself unhealthy or has been treated inhumanely." *Animal Legal Def. Fund v. United States Dep't of Agric.*, 223 F.Supp.3d 1008, 1020 (C.D. Cal. 2016) (internal citations omitted). Accordingly, given the express purpose of the PPIA—to "prevent" adulterated poultry products from reaching the market—and FSIS's own recognition that the inhumane handling of live birds can in fact result in the adulteration of the final poultry product, there can be no serious doubt that the USDA has the requisite authority to issue the requested regulations. *See, e.g., Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018)

(considering the “purpose” of the statute in examining agency’s authority under that statute); *Nutritional Health All. v. Food & Drug Admin.*, 318 F.3d 92, 98 (2d Cir. 2003) (“When we interpret a statute and attempt to divine the intended scope of a delegation, statutory purpose . . . sets boundaries and requires consistency between purpose and textual interpretation.”); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 246 (2d Cir. 1977) (noting that an agency has authority to promulgate rules to further “the purposes of the statute”).

B. FSIS Failed to Consider Relevant Factors and Its Decision Runs Counter to the Evidence Presented in the Record.

Even a cursory read of FSIS’s letter denying Plaintiffs’ Petitions shows that the agency also failed to examine the relevant factors in this case. *State Farm*, 463 U.S. at 42; *Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498 (2d Cir. 2005) (quoting *State Farm*, 463 U.S. at 42). In fact, FSIS’s denial letter did not respond to *any* of the extensive evidence Plaintiffs submitted in support of their Petitions. Instead, the agency simply disagreed that its existing approach is insufficient to prevent adulteration, claiming, without citation or further explanation, that through its “existing framework, FSIS addresses the poultry handling concerns that you raise in the petitions.” (AR010706).

However, FSIS’s own 2018 Directive stressed that the agency’s only binding requirement for humane handling is adherence to 9 C.F.R. § 381.65(b), which “require[s] that poultry be slaughtered in accordance with GCP,” meaning only that “[p]oultry are to be slaughtered in a manner that ensures that breathing has stopped before scalding, so that the birds do not drown, and that slaughter results in thorough bleeding of the poultry carcass.” (AR 010664). Yet this sole regulation, with its narrow focus on preventing birds from drowning in the scald tank, fails to address a wide range of inhumane handling practices that cause adulteration. *See* 2013 Petition, at 9-17 (AR000010-18); *supra* at 7-9. Accordingly, in relying only on the existing

regulation as evidence that its current scheme is adequate to prevent adulteration, the agency not only failed to consider the relevant factors discussed above, but its explanation for its decision “runs counter to the evidence before [it].” *State Farm*, 463 U.S. at 43; *see also Nat. Res. Def. Council*, 658 F.3d at 216 (finding arbitrary and capricious EPA’s failure to take into account pertinent evidence in the record); *New England Health Care Emps. Union v. N.L.R.B.*, 448 F.3d 189, 196 (2d Cir. 2006) (finding agency error when it failed to consider “what the purpose of [an employers’ actions] could have been” and “acknowledge the natural and logical implications of the facts it credited”); *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014) (finding agency wrongfully “ignore[d] relevant evidence . . . by relying solely on portions favorable to its own position” and “articulat[ed] an explanation unsupported by the relevant facts”); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 57 (2d Cir. 2003) (identifying the fact that agency “d[id] not account for” key evidence before it as a “fundamental flaw” in agency’s reasoning and conclusion).

Moreover, current regulations require FSIS inspectors to condemn poultry carcasses that show evidence of certain diseases or conditions, including death by methods other than slaughter, 9 C.F.R. § 381.90, or if the carcass is “badly bruised,” *id.* § 381.89. Yet no regulations address, let alone *prohibit*, slaughter practices the agency *knows*—from both its own inspection duties and copious evidence Plaintiffs and others have presented—result in bruising and death other than by slaughter (e.g., suffocation, blunt force trauma, and exposure to extreme temperatures), and which thereby increase the risk of adulteration. The single binding GCP also fails to prohibit prolonged holding of birds on transport trucks; dumping of birds on conveyor belts in a manner that causes injury and suffocation; mixing of live birds in with dead birds; and rough handling of birds leading to lacerations, broken or dislocated bones, and excessive stress and pain throughout the shackling process. *See* 2013 Petition, at 9-12 (AR000010-13).

In other words, the current GCP regulation is patently inadequate to “prevent” significant categories of practices that the agency concedes can result in adulteration. *See* 21 U.S.C. § 452 (emphasis added); *see also* Oxford English Dictionary (3d ed.) (defining “prevent” as “to stop something from happening”); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019) (consulting a dictionary to interpret undefined statutory terms).

For example, it is well established that raw poultry can be adulterated with *Salmonella*—a bacteria that causes severe illness, particularly in children and the elderly, including diarrhea, fever, and stomach cramps.³ Moreover, the USDA itself recently reported that “more than 1 million consumer illnesses due to *Salmonella* occur annually” and that it is “estimated that over 23% of those illnesses are due to consumption of chicken and turkey.” USDA Press Release (Oct. 19, 2021), Plaintiffs’ Exhibit (“Pl. Ex.”) A. However, *Salmonella* cannot be detected upon visual inspection of the poultry carcass, and the USDA acknowledges that *stress* can increase an animal’s susceptibility to being contaminated with this and other serious pathogens. *See* USDA-FSIS, *FSIS Guideline for Controlling Salmonella in Raw Poultry* (June 2021), at 29 (“evidence suggests that stress at pre-harvest can have adverse effects on food safety”);⁴ USDA-FSIS, *FSIS Guideline for Controlling Campylobacter in Raw Poultry* (June 2021), at 13 (same).⁵

Accordingly, in order to carry out the PPIA’s overall objective to *prevent* poultry products from being contaminated with *Salmonella* and other harmful pathogens, the agency

³ *See* <https://www.cdc.gov/salmonella/general/index.html>. It is well established that courts may take judicial notice of public documents issued by government agencies. *Lewis v. M&T Bank*, No. 21-933, 2022 WL 775758, at *1 (2d Cir. Mar. 15, 2022); *Moody v. Allergan USA, Inc.*, No. 16-CV-901, 2018 WL 451824 (W.D.N.Y. Jan. 17, 2018).

⁴ Available at https://www.fsis.usda.gov/sites/default/files/media_file/2021-07/FSIS-GD-2021-0005.pdf.

⁵ Available at https://www.fsis.usda.gov/sites/default/files/media_file/2021-07/FSIS-GD-2021-0006.pdf.

must prohibit the inhumane practices that increase the risk of such contamination. *See also* 2013 Petition, at 14 (AR000015) (“As birds enter the scalding water, large numbers of organisms on their bodies, including feces, salmonella, and campylobacter, are released into the water”). In fact, the agency itself recently acknowledged that it needs a “stronger, and more comprehensive effort to reduce *Salmonella* illnesses associated with poultry products.” Pl. Ex. A; *see also id.* (Secretary Vilsack stating that “[w]e need to be constantly evolving in our efforts to prevent foodborne illness to stay one step ahead of the bad bugs” and to “help prevent *Salmonella* contamination throughout the poultry supply chain and production system to protect public health”). Thus, according to Secretary Vilsack, “[t]ime has shown that *our current policies are not moving us closer to our public health goal*” of a 25% reduction in *Salmonella* illnesses and that, therefore, “[i]t’s time to *rethink our approach.*” *Id.* (emphasis added).

Additionally, FSIS’s current definition of GCPs does not prohibit a wide range of acts of *intentional* animal abuse and cruelty that cause adulteration, including, e.g., killing birds by slamming them into walls, pulling the heads off live birds, crushing birds with machinery, and killing birds by other abusive means. *See* 2013 Petition, at 15-17 (AR000016-18). None of these practices—each of which can produce an adulterated poultry product—is currently prohibited by FSIS regulations. Indeed, as discussed *supra* at 10-11, the agency’s own 2018 Directive explained that breaking the legs of the live birds to fit them into shackles, freezing birds in cages in cold weather, or subjecting birds to death from heat exhaustion “do *not necessarily describe prohibited activities and noncompliance.*” 2018 Directive (AR010665) (emphasis added).

Moreover, FSIS’s current regulatory approach—i.e., its extremely limited definition of “GCP,” coupled with the suggestion that slaughterhouses “may” want to adopt additional unspecified GCPs (AR010628)—lacks uniformity, specificity, and binding force.

FSIS's denial of Plaintiffs' Petitions also failed to consider how the high speed at which poultry is permitted to be processed—now up to 175 birds a minute⁶—contributes to the ultimate adulteration of the final product. *See supra* at 8.

Accordingly, FSIS simply failed to justify its denial of Plaintiffs' Rulemaking Petitions. Indeed, in an analogous case, the Court of Appeals for this Circuit found a Connecticut agency's denial of a permit arbitrary and capricious because of "the [d]enial's brevity." *Islander E. Pipeline Co., LLC v. Connecticut Dep't of Env't Prot.*, 482 F.3d 79, 104 (2d Cir. 2006). In that case, "the [d]enial contain[ed] a mere two-and-a-half pages of analysis, supported by five record citations, none of which," for reasons the court discussed, "reasonably support[ed] the broad conclusions reached." *Id.* As the court explained:

the complexity of the matter under consideration did not lend itself easily to brief analysis. Thus, when the [agency]'s failures (a) to provide record support for its conclusions, and (b) *to discuss evidence to the contrary* are considered together with the surprising brevity of its [d]enial decision, the latter fact only reinforces [the] conclusion that the challenged decision is arbitrary and capricious.

Id. at 105 (emphasis added).

Given the considerable evidence and arguments Plaintiffs presented in support of their Petitions, including the agency's own pronouncements acknowledging the link between inhumane handling and adulteration, the same is true here. FSIS's failure to provide any justification for its conclusion that it need not prohibit the myriad inhumane practices that can result in adulteration of the resulting poultry product—or to discuss any of the contrary evidence submitted by Plaintiffs—amply demonstrates that the agency's denial of Plaintiffs' Rulemaking Petitions was arbitrary and capricious and an abuse of discretion.

⁶ *See* 83 Fed. Reg. 49,048 (Sept. 28, 2018).

In sum, the agency’s contention that its existing regulatory approach requires compliance with GCPs, ensures that birds are treated humanely, and prohibits practices that cause adulteration in fact ignores significant contrary evidence presented to the agency and runs counter to all of the relevant evidence before the agency at the time of its decision. *See, e.g., State Farm*, 463 U.S. at 43; *Nat. Res. Def. Council v. U.S. E.P.A.*, 808 F.3d 556, 573-74 (2d Cir. 2015) (finding decision arbitrary and capricious when the agency “turned a blind eye to significant information” that contradicted its position).

Finally, given the PPIA’s overarching statutory purpose—to *prevent* adulteration of poultry products—the agency’s deference to voluntary and inconsistent industry GCPs that are woefully inadequate to prevent the inhumane handling of the billions of birds that are processed for food each year in this country is clearly arbitrary and capricious and an abuse of discretion. *See, e.g., State Farm.*, 463 U.S. at 49 (it was arbitrary and capricious to defer to the industry’s standards given that the industry “[had] not [been] sufficiently responsive to safety concerns”).

C. FSIS Failed to Articulate a Satisfactory Explanation for its Decision.

FSIS also failed to articulate the requisite “reasoned basis” for its decision to deny Plaintiffs’ Petitions. *State Farm*, 463 U.S. at 43. Rather, the reasons the agency provided for denying Plaintiffs’ Petitions were irrational, logically unsupported, and not based in fact or law.

First, as demonstrated *supra* at 13-15, contrary to FSIS’s assertion, the agency *does* have the statutory authority to promulgate the requested regulations. *See* 21 U.S.C. §§ 452, 463(b).

Second, because FSIS’s decision was untethered to *any* supporting factual evidence, it has no rational underpinning. *See State Farm*, 463 U.S. at 43; *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 118-19 (2d Cir. 2005) (quoting *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir.1996)) (noting that the “reviewing court must be certain that an agency has considered all the important

aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made”); *see also New England Health Care*, 448 F.3d at 196 (giving no deference when there was “no apparent basis for the . . . conclusion” and “no expertise-based analysis of” the issue at hand).

II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS.

To demonstrate sufficient Article III standing, Plaintiffs must establish that: (1) they are suffering an injury-in-fact that is “concrete and particularized” and “actual and imminent”; (2) their injuries are “fairly traceable” to the challenged action of the defendant; and (3) their injuries are “likely to be redressed” by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An organization can establish standing in two ways: through representational standing based on injuries to its members, *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998), or by demonstrating that the organization itself is injured as a result of the challenged action, *Warth*, 422 U.S. at 511; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982). Moreover, when, 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). This Court has already ruled that Plaintiffs adequately alleged standing at the motion to dismiss stage. ECF No. 19. As demonstrated below, Plaintiffs have now *proven* they have standing.

A. Plaintiffs Have Organizational Standing.

In this Circuit, organizations have standing under *Havens Realty*, 455 U.S. at 379 n.19, when a defendant’s actions have “perceptibly impaired” an organization’s ability to conduct its activities *or* caused the organization to divert its resources to counteract unlawful action. *Oyster Bay*, 868 F.3d at 110; *see also N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286,

294 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993).

Here, AWI and Farm Sanctuary each meet *both* standards. *See* Declaration of Dena Jones, Pl. Ex. B, ¶¶ 7-38; Declaration of Emily von Klemperer, Pl. Ex. C, ¶¶ 8-32.

Indeed, for years Plaintiffs have labored to protect birds in slaughterhouses from suffering pain and distress from inhumane handling practices—i.e., birds with broken and dislocated bones, being suffocated and crushed by machinery, freezing or over-heating to death on transport trucks, and subjected to acts of intentional abuse. Jones Decl. ¶¶ 7-13, 26; 2013 Petition, at 9-17 (AR000010-18). Once the USDA repeatedly acknowledged that such practices can cause poultry products to be adulterated, Plaintiffs devoted substantial resources to preparing their Rulemaking Petitions demonstrating the need for regulations prohibiting such practices to “prevent” poultry products from being adulterated. Jones Decl. ¶¶ 12-14.

Because the USDA has now rejected those Petitions on unlawful grounds, this avenue for protecting birds has been closed to Plaintiffs, which impairs their missions in numerous ways, including: “creat[ing] a [public] misperception that birds are treated in a humane and lawful manner, making it harder to guide consumers in choosing higher welfare products”; preventing Plaintiff AWI from achieving its “goal of attaining humane slaughter for animals raised for food”; and “authorizing, incentivizing, and encouraging a host of cruel and dangerous factory-farming and slaughter practices.” Jones Decl. ¶¶ 19-21; *Oyster Bay*, 868 F.3d at 110.

Further, as a direct result of the unlawful denial of their Rulemaking Petitions, Plaintiffs have had to divert additional resources from other efforts to protect these animals. Jones Decl. ¶¶ 21-38; von Klemperer Decl. ¶¶ 20-31. For example, AWI has had to spend additional resources urging slaughterhouses with many “GCPs incidents and poor humane handling records” to improve their standards; reporting poor humane handling practices to an organization that

certifies certain poultry products as “humane”; regularly communicating with FSIS personnel “regarding the treatment of birds slaughtered for human consumption”; preparing and updating a comprehensive report on “The Welfare of Birds at Slaughter in the United States”; submitting repeated FOIA requests for GCPs enforcement records; and engaging in federal legislative advocacy in an effort to provide birds at the slaughterhouse with more protection. Jones Decl. ¶¶ 23-35, 37. Such ““perceptible opportunity cost[s]’ . . . suffice[] to confer standing.” *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 61 (2d Cir. 2020), *cert. granted sub nom. Dep’t of Homeland Sec. v. New York*, 141 S. Ct. 1370, 209 (2021), and *cert. dismissed sub nom. Dep’t of Homeland Sec. v. New York*, 141 S. Ct. 1292, 209 (2021) (quoting *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011)) (organizations had standing to challenge rule expansion when they “expended significant resources to mitigate the Rule’s impact on those they serve,” including by conducting educational workshops and changing outreach campaigns).

Likewise, Farm Sanctuary’s organizational mission to protect farmed animals from inhumane treatment has also been impaired by the agency’s denial of Plaintiffs’ Petitions, and this organization has also had to divert much needed resources to compensate for this impairment of its work. *See* von Klemperer Decl. ¶¶ 8, 19-31. Further, as this Court noted in its denial of Defendants’ Motion to Dismiss, in addition to its advocacy work, Farm Sanctuary operates a sanctuary for mistreated animals, and, as a result of Defendants’ denial of its Rulemaking Petitions, has had to divert resources from its provision of sanctuary to abused, neglected, and abandoned farmed animals to conduct additional research and advocacy to achieve more humane treatment of poultry at slaughterhouses. *von Klemperer Decl.* ¶¶ 31; ECF No. 19 at 8-10.

Plaintiffs’ organizational injuries are also redressable, as an order from this Court vacating the agency’s unlawful decision could result in the agency actually issuing regulations

prohibiting inhumane practices that result in adulterated poultry products. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (a litigant who challenges an agency’s denial of a rulemaking petition 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”) (emphasis added); *see also* Jones Decl. ¶ 38; von Klemperer Decl. ¶ 32.

B. Plaintiff Farm Sanctuary Also Has Associational Standing.

Plaintiff Farm Sanctuary also has associational standing to sue 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 concedes can cause adulteration. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 342-43 (1977); *Warth*, 422 U.S. at 511. Farm Sanctuary members Jody Hinkle and David Washburn’s sworn Declarations demonstrate that they would have standing to sue on their own behalf, and the interests Farm Sanctuary seeks to protect—protecting consumers from the dangers of inhumanely treated poultry—are clearly “germane to the organization’s purpose.” *Hunt*, 432 U.S. at 343.

As Ms. Hinkle explains in her sworn Declaration, because of where she lives, and the lack of local availability of poultry products from birds treated humanely at slaughter, she has “no choice but to consume poultry products that [she] ha[s] no assurance were sourced from birds that were treated humanely.” Declaration of Jody Hinkle, Pl. Ex. D, ¶¶ 10-12. This makes her fear for her health, “given the link between inhumane treatment” of birds at slaughter and the increased risk of adulteration and contamination of such products. *Id.* ¶¶ 6-9, 11, 13. Indeed, this Circuit has already recognized that the increased *risk* of consuming adulterated meat products resulting from the USDA’s failure to regulate an unsafe slaughter practice is a concrete and particularized injury that suffices for Article III. *Baur v. Veneman*, 352 F.3d 625, 632-33 (2d Cir.

2003) (the “*increased risk* of disease transmission caused by exposure to a potentially dangerous food product” may constitute Article III injury-in-fact, as long as the risk is “more than a merely speculative risk of disease transmission from” inhumanely treated animals) (emphasis in original). In reaching this conclusion, the court relied heavily on the *purpose* of the statute at issue in that case, reasoning that there is a “tight connection between the type of injury which [the plaintiff] alleges and the fundamental goals of the statutes which he sues under.” *Id.* at 635.

Mr. Washburn’s injury is similar, but tied to his career as a professional chef. He works for a corporate food service company, where he purchases and prepares large volumes of wholesale poultry products every week. Declaration of David Washburn, Pl. Ex. E, ¶¶ 5-7. Mr. Washburn fears that because of the USDA’s failure to regulate dangerous bird handling practices, inhumanely treated birds will be converted to poultry products harboring dangerous, drug-resistant *Campylobacter* and *Salmonella* that could sicken the patrons he serves, despite his best efforts to prepare and serve safe food. *Id.* ¶¶ 13-24; *see also supra* at 17-18. Such harm to his reputation is cognizable for purposes of standing. *See, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

The harms to Ms. Hinkle and Mr. Washburn are directly traceable to the USDA’s refusal to prohibit the inhumane practices that it concedes lead to adulterated poultry products, and their injuries would likely be redressed if the agency’s decision were set aside and it initiated the requested rulemaking. Hinkle Decl. ¶¶ 3, 6-8, 13; Washburn Decl. ¶¶ 3, 12-13, 20, 24-25; *Massachusetts v. EPA*, 549 U.S. at 518.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted.

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Respectfully submitted,



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