IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NOLECHEK'S MEATS, INC., a Wisconsin corporation, et al., Plaintiff, v. THOMAS J. VILSACK, in his official capacity as United States Secretary of Agriculture; U.S. DEPARTMENT OF AGRICULTURE; and FOOD SAFETY AND INSPECTION SERVICE, Defendants.	No. 3:21-cv-762

MOTION AND MEMORANDUM FOR A PRELIMINARY INJUNCTION

MOTION

Pursuant to Fed. R. Civ. P. 65, Plaintiffs move for a preliminary injunction pending full resolution of this case on the merits.

BACKGROUND

After the original plaintiff, Nolechek's Meats, Inc., filed its complaint, Nolechek's counsel was contacted by We're the Wurst Incorporated of Salem, Oregon, another meat processor that lost its USDA Mark because of Notice 34-21. Counsel also connected with Golden City Meats, LLC, of Golden City, Missouri,

which similarly had lost its Mark. Nolechek's did not initially pursue preliminary injunctive relief because prior to engaging counsel, it voluntarily adopted a corrective action plan under protest to retain its Mark before seeking a legal or legislative solution to its belief about the Notice's illegality. We're the Wurst and Golden City Meats, however, have refused to accept imposition of a corrective action plan for their failure to comply with an illegal mandate. As a result, these small, family-owned meat processors are losing thousands of dollars a day without their Mark, money that they can never recover, forcing them to join this case and seek preliminary relief.

INTRODUCTION

In the last few months, the federal government has consistently asserted that its agencies possess broad authorities to impose public-health mandates on the American people by twisting and contorting their authorizing statutes in a contrived manner and bulldozing over notice-and-comment requirements. "But health agencies do not make housing policy, and occupational safety administrations do not make health policy." *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *26 (5th Cir. Nov. 12, 2021) (*citing Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488-90 (2021)). In a similar vein, meat inspection agencies do not make occupational safety policy. *Dawkins v. United States*, 226 F. Supp. 2d 750, 757 (M.D.N.C. 2002) ("the purpose and intent of the FSIS is to ensure food safety,

not workplace safety."). Yet the Food Safety Inspection Service (FSIS) is now denying its Mark to We're the Wurst and Golden City Meats for reasons entirely disconnected and untethered from the safety and quality of their meat products.

FSIS has issued Notice 34-21 (August 20, 2021), which requires that all employees in meat processing facilities inspected by FSIS personnel wear masks when FSIS inspectors are present at their facility. FSIS inspectors visit each processor virtually every day, at unannounced times, and all employees in the facility must mask regardless of whether the inspector is in the same part of the facility as the employee. In a slaughter facility such as Golden City Meats, the inspector is present the entire shift.[1] It is, in effect, a nationwide mask mandate on employees in the entire meat processing industry.

FSIS is violating federal law in four separate respects in this case: (1) it did so in violation of its own published rules for revoking a USDA mark; (2) it issued a substantive regulation via an informal guidance document without notice-and-comment rulemaking; (3) it did so in excess of its statutory authority under Section 19 of the Occupational Safety and Health (OSH) Act of 1970; and (4) it did so on a pretextual and political basis, which is by definition arbitrary and capricious. The Court should issue an injunction to prevent irreparable harm to these businesses.

[1] FSIS, *Slaughter Inspection 101*, https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/slaughter-inspection-101 ("Slaughter facilities cannot conduct slaughter operations if FSIS inspection personnel are not present.").

PROCEDURAL HISTORY

On December 2, 2021, Nolechek's filed the complaint in this case against the USDA, its secretary, and the FSIS for violations of the Administrative Procedures Act, 5 U.S.C. § 706 et seq., regarding FSIS Notice 34-21. Compl., ECF-1. On January 18, 2021, immediately prior to filing this motion, the complaint was amended pursuant to Fed. R. of Civ. P. 15(a)(1)(B) to add We're the Wurst and Golden City Meats as additional plaintiffs.

FACTS

Pursuant to the Western District's local rules,[2] Plaintiffs are filing a separate, numbered proposed statement of facts ("Stmt. of Facts"), supported by declarations from their clients, We're the Wurst ("Fidler Decl.") and Golden City Meats ("Long Decl."). The Stmt. of Facts, Fidler Decl., and Long Decl. filed contemporaneously herewith are fully incorporated herein by this reference.

STANDARD OF REVIEW

This Court may grant preliminary relief when a plaintiff shows "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). While Plaintiffs' burden for showing that they will succeed on the merits

[2] https://www.wiwd.uscourts.gov/sites/default/files/Injunctive_Relief.pdf.

is more than a "'better than negligible' standard," they "need not show that [they] definitely will win the case." *Id*.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims.

A. The Notice is in conflict with the agency's published rules, and therefore violates its legal authority.

Getting one's USDA Mark is a big deal, and the FSIS recognizes the amount of time, effort, and expense that goes into earning a Mark by carefully circumscribing its own authority to remove a Mark. 9 C.F.R. §§ 500.3-4 provide a comprehensive list of those instances in which the agency may revoke a mark without prior notice (§ 500.3) or with prior notice (§ 500.4). Across the dozen reasons for revocation, only one concerns FSIS inspector safety: "An establishment operator, officer, employee, or agent assaulted, threatened to assault, intimidated, or interfered with an FSIS employee." 9 C.F.R. § 500.3(6). There is no allegation that any employee of any of the Plaintiffs threatened or interfered with an FSIS employee, and neither the Notice nor the revocation letters reference subsection 6. Because the Plaintiffs' non-compliance with the illegal mask mandate does not rise to the level set in subsection 6 for revocation of a Mark, and because no other subsection covers inspector safety, the revocation for non-compliance is outside the bounds of FSIS's own rules.

"It is a familiar rule of administrative law that an agency must abide by its own regulations." *Fort Stewart Sch. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 654 (1990). Here the agency has set its own regulations, specifically laying out in the code what circumstances justify withdrawal of a Mark, including out of concern for inspector safety. These rules, "promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency." *Samirah v. Holder*, 627 F.3d 652, 664 (7th Cir. 2010). The agency could have amended § 500.3 to add an additional justification for revocation—failure to mask when inspectors are present—and could have done so on an emergency basis with a good-cause finding. It did not, and it may not add to or amend its formally published rules through an informal guidance document.[3] Because the agency is limited to revocation based on the grounds in its current regulation, these revocations are unlawful.

B. This is a substantive rule that should have gone through notice-and-comment rulemaking, not an informal guidance document that is binding on processors nationwide.

FSIS notices are designed to provide information, guidance, and informal updates. They are not an appropriate tool for making regulatory policy, because they

[3] "A guidance document may not amend regulations adopted through notice-and-comment rulemaking. '[A]n amendment to a legislative rule must itself be legislative.'" *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (quoting *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)). John Patrick Hunt, *Consent to Student Loan Bankruptcy Discharge*, 95 Ind. L.J. 1137, 1160 n.176 (2020).

do not go through the notice-and-comment process required by the Administrative Procedure Act.

When a rule has a substantive impact on the regulated community, it must go through formal rulemaking, wherein the agency must provide notice and accept public comment or make a formal finding of good cause that such notice is impractical or contrary to the public interest. 5 U.S.C. §§ 553(A)-(B).

"Under the APA, an administrative agency must publish in the Federal Register 'substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability. . . '" *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 558-59 (7th Cir. 2012). "A rule is defined as 'the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.'" *Id*.

The FSIS's Notice plainly fits the definition of a rule: it is a statement of general applicability (to all holders of an FSIS mark) that claims to implement law (Section 19 of the OSH Act) and prescribes law or policy (it places a burden, mandatory masking, on the regulated community), on pain of losing the mark. Courts must be wary to stop "stealth rulemaking" by "unpublished guidance statement[s]" such as this. *Exelon Generation Co., LLC v. Local 15, IBEW*, 676 F.3d 566, 578 (7th Cir. 2012).

Subsection 6 of § 500.3, regarding assaults upon or interference with inspectors, shows that the agency knows how to formally regulate for inspector safety. Its decision to do so in that instance highlights its failure to do so in this instance. Subsection 6 makes obvious what the agency should have done here: formally amended § 500.3 with an additional subsection regarding inspected site health-and-safety standards. It did not do so, and that it tried to accomplish the same through an informal notice is illegal.

The Defendants may respond that the Notice is an "interpretive" statement exempted from notice-and-comment. 5 U.S.C. § 553(A). "Distinguishing between a 'legislative' rule, to which the notice and comment provisions of the Act apply, and an interpretive rule, to which these provisions do not apply, is often very difficult--and often very important to regulated firms, the public, and the agency." *Hoctor v. United States Dep't of Agric*., 82 F.3d 165, 167 (7th Cir. 1996).

Here, the task is not difficult, because the rule is clearly legislative. The statute (the OSH Act) "does not impose a duty on the persons subject to it but instead authorizes (or requires—it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency." *Id*. at 169. A legislative rule "is intended to bind. . ." *Id*. It requires the agency to choose among several possible options for executing the statutory mandate. *Id*. at 170. Put differently, a legislative rule is one which "impose[s] a specific obligation that would

implement the general statutory goals." *Solid Waste Agency, Inc. v. United States Army Corps of Eng'rs*, 191 F.3d 845, 852 (7th Cir. 1999).

This Notice is a legislative rule. It does not "merely restate[] an obligation imposed by properly promulgated federal regulations." *Ind. by Dep't of Pub. Welfare v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991). It creates a substantive new obligation—masking when inspectors are present—that was not previously required. It is a choice among alternatives, such as requiring FSIS staff to vaccinate or wear N95 masks.[4] It creates specific obligations, not even on the agency governed by Section 19, but on third-parties not governed by Section 19, to implement the general statutory goal. It has a hammer as well: failure to comply will result in revocation of the mark. It should have been promulgated as a rule with notice-and-comment or a finding of good cause; with neither, it fails the APA's standards.

[4] Indeed, all FSIS staff are now required to vaccinate by presidential order. Ex. Or. 14,043 (Sept. 9, 2021).

C. Plaintiffs are likely to succeed on their APA claim that the notice exceeds the statutory power of the FSIS.

i. The FSIS does not have inherent statutory power to regulate worker safety in meat processing plants.

The Food Safety Inspection Service is just that—a *food safety* agency.[5] The FSIS regulates the safety of meat, not the safety of workers processing the meat. That is the province of OSHA, the Occupational Safety and Health Administration.

The federal government itself says that COVID-19 does not pass to people through food, so there is no concern that droplets from meat-processing workers are infecting food that later transmits the disease to human consumers. The USDA, U.S. Food & Drug Administration (FDA), and the U.S. Centers for Disease Control & Prevention (CDC) issued a joint statement in February 2021 saying collectively "there is no credible evidence of food or food packaging associated with or as a likely source of viral transmission of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), the virus causing COVID-19."[6]

ii. FSIS lacks statutory authority to impose a mask mandate.

FSIS's Notice styles the mask mandate as necessary to keep its own employees safe. It cites its responsibilities under Section 19 of the Occupational

---

[5] https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/02-EPIA.pdf ("FSIS sets standards for food safety and regulates . . . all raw and processed meat, poultry, and egg products sold in interstate and foreign commerce.").

[6] https://www.fda.gov/news-events/press-announcements/covid-19-update-usda-fda-underscore-current-epidemiologic-and-scientific-information-indicating-no.

Safety and Health (OSH) Act, which applies to federal agencies (29 U.S.C. § 668); Executive Order 12,196, which sets occupational safety standards for federal employees; and 29 C.F.R. § 1960, again setting safety standards for federal employees. None of these justifies the agency's exercise of power.

Section 19 of the OSH Act does not confer this power. Section 19 requires each agency to "establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6." 29 U.S.C. § 655. To that end, each agency must "provide safe and healthful places and conditions of employment, consistent with the standards set under section 6." *Id*. "Under clause (1) of subsection (a), the agency safety program must be consistent with the health and safety standards promulgated by the Secretary of Labor in accordance with section 6 of the act." Op. U.S. Comp. Gen., Jan. 31, 1972, 1972 U.S. Comp. Gen. LEXIS 201, *5. *See* Occupational Safety and Health Review Comm., OSHRC Docket No. 02-0865 (Feb. 5, 2007), 2007 OSAHRC LEXIS 8, *22 ("the government is directed by section 19(a) of the OSH Act, 29 U.S.C. § 668(a), to comply with OSHA standards."). Agencies may not lawfully expend funds to exceed the statutory floor set by OSHA under Section 6. Op. U.S. Comp. Gen., Oct. 7, 2002, 2002 U.S. Comp. Gen. LEXIS 178, *8-9, *11 (stating that agency safety measures must be "necessary to satisfy the standards promulgated by the Secretary of Labor pursuant the OSHA.").

President Carter's Executive Order 12,196, 45 Fed. Reg. 12,769 (Feb. 27, 1980), which in itself cannot confer additional agency authority beyond that provided in statute,[7] also directs that every agency must "[c]omply with all standards issued under section 6 of the Act, except where the Secretary approves compliance with alternative standards." *Id.* at § 1-201(d). Executive Order 12,196 replaced President Nixon's Executive Order 11,612, which similarly required that each agency's OSH program "shall be consistent with the standards prescribed by section 6 of the Safety Act." 36 Fed. Reg. 13,891 (July 28, 1971), § 1.[8]

Section 6 standards are those legally binding standards set by OSHA applicable to the private sector.[9] No OSHA standard currently requires masking in the meatpacking industry. Indeed, two efforts to do so fell short. In September 2020, two U.S. Senators requested that OSHA issue an emergency temporary standard (ETS) for meatpacking facilities targeting COVID-19; the agency responded that

[7] An executive order cannot "unilaterally expand Congressionally-bestowed powers." *Am. Farm Bureau Fed'n v. United States EPA*, 984 F. Supp. 2d 289, 332 (M.D. Pa. 2013). Indeed, the order itself says, "Nothing in this order shall be construed to impair or alter the powers and duties of the Secretary or heads of other Federal agencies pursuant to Section 19 of the Occupational Safety and Health Act of 1970 …" § 1-702.

[8] For a history of the development of these orders, see *Bobo v. TVA*, Civil Action No. CV 12-S-1930-NE, 2015 U.S. Dist. LEXIS 80404, at *27-29 (N.D. Ala. June 22, 2015).

[9] Thus, for instance, when OSHA issued its bloodborne pathogens standard, it clarified in an enforcement letter to a federal agency that "the head of each Federal agency is required to establish and maintain a comprehensive occupational safety and health (OSH) program which is consistent with the standards promulgated under Section 6 of the Act," which in this instance meant compliance with the bloodborne pathogens standard. Enforcement Directorate Letter to John J. Perkner (Nov. 1, 2000), 2000 OSHA Stand. Interp. LEXIS 242, https://www.osha.gov/laws-regs/standardinterpretations/2000-11-01.

enforceable standards were "not necessary at this time."[10] Again in early summer 2021, unions lobbied for OSHA to include meatpacking in its COVID ETS, but failed to persuade the agency to include the industry alongside healthcare workers. Noam Scheiber, *OSHA issues a new Covid safety rule, but only for the health care industry*, N.Y. Times (June 11, 2021).[11] The same week that OSHA refused to issue an ETS for meatpacking, it did issue non-binding guidance recommending masking in meatpacking. Meat and Poultry Processing Workers and Employers, CDC/OSHA (June 11, 2021).[12] Obviously non-binding guidance is not a required standard under Section 6. *See* 29 U.S.C. §§ 655(a)-(c) (standards shall be promulgated by rule).

Given that OSHA considered and declined to mandate masks in meatpacking plants under its Section 6 authority, FSIS cannot rely on Section 19 to create a mask mandate.[13] If OSHA has determined that a mask mandate was not necessary to protect private-sector workers from one another, FSIS cannot determine that a mask

[10] U.S. Senator Elizabeth Warren, Press Release (Dec. 22, 2021) (quoting OSHA), https://www.warren.senate.gov/newsroom/press-releases/senators-warren-and-booker-to-osha-your-persistent-failure-to-protect-workers-at-meatpacking-facilities-from-escalating-deadly-covid-19-outbreaks-is-disgraceful.

[11] https://www.nytimes.com/2021/06/10/business/economy/osha-covid-rule.html.

[12] https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html.

[13] Indeed, if FSIS is correct that it must mandate masks on employees at inspection sites under the OSH Act, it puts FSIS in the awkward position of saying that OSHA is violating its responsibility to employees by not mandating masks in meatpacking sites. *HHS Family Support Admin. v. Fed. Labor Relations Auth.*, 920 F.2d 45, 50 n.5 (D.C. Cir. 1990) (noting this irony in a different yet similar situation).

mandate is necessary to protect public-sector workers from private-sector workers in the same private-sector workplace.

Admittedly, the agency has more of a basis for Notice 34-21 under 29 C.F.R. § 1960.1(g), which says, "Although an agency may not have the authority to require abatement of hazardous conditions in a private sector workplace, the agency head must assure safe and healthful working conditions for his/her employees. This shall be accomplished by administrative controls, personal protective equipment, or withdrawal of Federal employees from the private sector facility to the extent necessary to assure that the employees are protected."

However, the regulation does not create an independent basis of authority for FSIS's Notice. To state the obvious, the power created by an agency regulation cannot exceed the power first granted the agency by Congress. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 465 (5th Cir. 2020). "A regulator's authority is constrained by the authority that Congress delegated it by statute." *Chamber of Commerce of the United States v. United States DOL*, 885 F.3d 360, 369 (5th Cir. 2018). Here, that authority is to comply with Section 6. If withdrawal of inspectors was necessary to comply with Section 19 because of a Section 6 standard, that would be lawful. Because OSHA has not acted under Section 6 to set a standard, FSIS may not rely on Section 19 to independently set such a standard.

Even if 29 C.F.R. § 1960.1(g) were an independent source of authority for the Notice, which it is not, the withdrawal of inspectors from a private facility is clearly meant to be the last resort and may only be done "to the extent necessary."

Necessary is a word that "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Necessary,* Black's Law Dictionary (6th ed. 1990).

Here, to reiterate a recent debate on a different portion of the OSH Act,[14] necessary means "really necessary," not merely convenient or helpful. Such a reading conforms with the regulatory text ("to the extent necessary") and its place at the end of the sentence, which suggests withdrawal should be the last resort after the foregoing safety measures are attempted and found insufficient. Again, this is where formal rulemaking would have been important and helpful: the agency could have established in its published rule why site masking is actually necessary.[15]

---

[14] Transcript, *Nat'l Fed. of Indep. Businesses v. OSHA*, U.S. No. 21A244 (Jan. 7, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21a244_7k47.pdf (J. Thomas: "[I]n *McCulloch versus Maryland*, Chief Justice Marshall, in looking at necessary and proper, saw 'necessary' as more expansive than that as certainly modified by 'proper' or in the context of 'proper.' So it just suggests that 'necessary' can be really necessary or not necessarily really necessary.").

[15] And, since tailoring is often a part of finding necessity, it could have explained why alternatives—FSIS inspector vaccination, now required of all federal employees; FSIS inspectors wearing N95 masks—would be insufficient to ensure the safety of FSIS inspectors.

If FSIS is permitted this interpretation of its power, there is virtually no limit to what the federal government could impose on millions of private business employees across the country. If the FSIS can impose a mask mandate to protect its staff from unmasked meat-processing workers, it can certainly impose a vaccine mandate to protect its staff from unvaccinated meat-processing workers. And because this is an interpretation not of USDA's statutes but of Section 19 of the OSH Act, it would mean any federal agency could impose a mask or vaccination mandate on any place its employees visit. If a federal agency employee visits your business, school, social services agency, farm, or home, the agency could require that you mask or be vaccinated on pain of losing your license, loan, or contract.

And COVID-19 would hardly be the end of such a power. Any agency, in the name of keeping its employees safe from domestic terrorism or workplace violence, could insist that no workers anywhere on any inspected site could possess firearms, regardless of any concealed carry permit they may hold. Any agency could insist on any regulation that would be possibly conducive to keeping its own employees safe. Agencies do not have such broad powers under Section 19 of the OSH Act; Congress did not hide industry-wide mask mandates in such mouseholes. *See Whitman v. American Trucking Assns., Inc*., 531 U. S. 457, 468 (2001).

D. FSIS adopted this policy as a pretext in response to pressure to regulate occupational safety for meat-processing plant workers.

"[W]hen a court finds the agency has relied on a pretextual justification, the court must set aside the agency's action for violating the APA. . . . An agency's actions are arbitrary and capricious under the APA if they are pretextual." *Saget v. Trump*, 375 F. Supp. 3d 280, 361 (E.D.N.Y. 2019). *Accord California v. Ross*, 358 F. Supp. 3d 965, 974 (N.D. Cal. 2019) ("[Commerce] Secretary [Wilbur] Ross's reliance on VRA enforcement to justify inclusion of the citizenship question was mere pretext and the definition of an arbitrary and capricious governmental act."). "By making a decision that may well have been pretextual, and was certainly arbitrary and capricious, Defendants undermined the core constitutional and democratic values underlying the APA." *New York v. Wolf*, No. 20-CV-1127 (JMF), 2020 U.S. Dist. LEXIS 189428, at *19-20 (S.D.N.Y. Oct. 13, 2020) (challenge to U.S. Department of Homeland Security rule).

Courts determine whether pretext exists by looking for "a significant mismatch between the decision the [agency] made and the rationale [it] provided." *DOC v. New York*, 139 S. Ct. 2551, 2575 (2019). When "the evidence tells a story that does not match the explanation the Secretary gave for his decision," the pretext renders the rule arbitrary and capricious. *Id.* Judges "are not required to exhibit a naivete from which ordinary citizens are free." *Id*. (cleaned up). Courts must reject "contrived reasons" for administrative action. *Id* at 2576. *Accord Transp. Div. of the*

IASMATW v. FRA, 988 F.3d 1170, 1182-84 (9th Cir. 2021). Courts must be on guard against "allowing a single congressional representative to compel the agency to make its decision on factors other than those set forth explicitly in the statute." *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1174 (W.D. Wis. 1996).

FSIS Notice 34-21 provides its rationale in its open sentence: "to reduce the risk of COVID-19 infection for FSIS employees." Notice 34-21, I.[16] This is perhaps true, but also pretextual; the real reason was to impose a nationwide mask mandate on the meatpacking industry.[17]

Throughout 2020 and early 2021, the entire center-left coalition came together around disproportionate outbreaks of COVID-19 in the meatpacking industry. The American Civil Liberties Union started filing lawsuits,[18] the trial lawyers started filing USDA complaints,[19] Hispanic advocacy groups started highlighting the

[16] Plaintiffs realize that the administrative record, which is the formal record of the agency's reasoning, has not been filed yet. However, the Notice itself sets out the agency's rationale in black-and-white. For the Court to undertake the pretext analysis, it can simply compare the rationale in the Notice to the information presented by the Plaintiffs showing the political pressures it faced and its pretextual rationale. If the Court agrees that the decision was based even "in part on the pressures emanating from political actors" rather than its announced purpose, it must strike the Notice. *Saget v. Trump*, 375 F. Supp. 3d 280, 359 (E.D.N.Y. 2019) (cleaned up).

[17] A pretext or political influence analysis under the APA includes the other members of the executive branch, members of congress, and interest groups. *Saget*, 375 F. Supp. 3d at 359; *Tummino v. Torti*, 603 F. Supp. 2d 519, 538 (E.D.N.Y. 2009).

[18] https://www.aclu.org/press-releases/aclu-files-federal-lawsuit-against-nebraska-meatpacking-plant-over-treacherous-covid (Nov. 23, 2020).

[19] https://thehill.com/business-a-lobbying/507373-meatpacking-plant-workers-take-new-approach-in-covid-19-safety-push?rl=1. It is appropriate for a court to consider newspaper articles when determining an APA pretext claim. *Cook Cty. v. Wolf*, 461 F. Supp. 3d 779, 785-87 (N.D. Ill. 2020) (referencing web-based articles from CNN, National Public Radio, Fox Business, and the Chicago Tribune).

disproportionate racial impact,[20] and the major union, the United Food & Commercial Workers, demanded action from USDA.[21] Democrats in Congress leveled criticism at OSHA, the USDA, and the CDC over their supposedly lackluster response to COVID-19 outbreaks.[22] Shortly after taking the majority, the Democratic House empaneled a new Select Subcommittee on the Coronavirus Crisis, whose chairman sent a scathing letter saying OSHA had taken a "failed" and "ineffectual approach" to combatting COVID spread in meatpacking plants.[23] A press release from Senators Elizabeth Warren and Cory Booker summed up the sentiment: "Senators Warren and Booker to OSHA: Your Persistent Failure to Protect Workers at Meatpacking Facilities From Escalating, Deadly COVID-19 Outbreaks is Disgraceful" (Dec. 22, 2020).[24]

During the summer of 2020, a congressional committee acted specific to FSIS inspectors. The House Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Subcommittee of the Committee on

---

[20] *LULAC Wants Food, Agricultural And Meat Packing Workers To Get Vaccine First*, https://lulac.org/news/pr/LULAC_Wants_Food_Agricultural_And_Meat_Packing_Workers_To_Get_Vaccine_First/.

[21] UFCW, Letter to USDA, Apr. 20, 2020, https://www.ufcw.org/wp-content/blogs.dir/61/files/2020/04/Letter-to-USDA-.pdf.

[22] Eli Rosenberg, *The CDC softened a report on meatpacking safety during the pandemic. Democrats say they want to know why*, Wash. Post (Sept. 20, 2020), https://www.washingtonpost.com/business/2020/09/30/cdc-meatpacking-smithfield/.

[23]https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-02-01.Clyburn%20to%20OSHA%20re%20Meatpacking%20Investigation_.pdf.

[24] https://www.warren.senate.gov/newsroom/press-releases/senators-warren-and-booker-to-osha-your-persistent-failure-to-protect-workers-at-meatpacking-facilities-from-escalating-deadly-covid-19-outbreaks-is-disgraceful.

Appropriations produced a report to accompany the 2021 USDA appropriations bill.[25] The report slammed FSIS: "During the COVID-19 outbreak, FSIS has tragically failed to protect its workforce. At least four FSIS inspectors have died from COVID-19. USDA failed to promptly provide Personal Protective Equipment to inspectors. Additional mitigation measures to protect inspectors from COVID-19 risks should have been implemented much more quickly, including mandatory social distancing and increased screening measures in establishments to reduce the spread of COVID-19."[26] The Subcommittee directed FSIS to "to publish on its website the number of confirmed COVID-19 cases and deaths among FSIS inspectors and to update those numbers within five business days of receiving any updated numbers." *Id*. When the agency did not promptly comply, Congressional Democrats again slammed USDA over safety in meatpacking plants.[27]

This pressure campaign kicked into high gear again in summer 2021. First, as noted above, groups lobbied OSHA to issue an emergency temporary standard (ETS) specific to meatpacking. When OSHA refused to do so in June 2021, the United Food & Commercial Workers, which represents 1.3 million food workers,

[25] House Report 116-446 (July 13, 2020), https://www.govinfo.gov/content/pkg/CRPT-116hrpt446/html/CRPT-116hrpt446.htm.
[26] *Id*. at *44.
[27] Megan U. Boyanton, *Coronavirus Data on Food Inspectors Overdue, House Democrats Say*, Bloomberg Government (July 28, 2020), https://about.bgov.com/news/coronavirus-data-on-food-inspectors-overdue-house-democrats-say/.

vigorously condemned it.[28] Just weeks later, this Notice was issued, and then the amended Notice came out with the enforcement angle: comply or lose your mark.

If FSIS issued Notice 34-21 because of congressional pressure to do so, whether for the FSIS workforce specifically or the meatpacking industry workforce generally, the proper course was to pass a bill. The Supreme Court has made clear that when an agency intends to regulate an entire industry nationwide, it needs explicit congressional authority to do so. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2320, 2321 (2021) (Kavanaugh, J., concurring). Sometimes that authority is clear in existing statutes. *See, e.g., Biden v. Missouri*, S. Ct. Nos. 21A240 and 21A241, 2022 U.S. LEXIS 495 (Jan. 13, 2022). Other times it does not exist in current statutes, and the agency may not suddenly discover it amidst an emergency. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam). A report of a subcommittee of a single house of Congress or a letter from a different subcommittee's chairman expressing concern cannot grant an agency new authority. Forcing such an issue through actual floor action also allows for the full Congress to participate on an issue, as some members may feel differently.[29] Acting under pressure from some congressmen but

[28] https://www.ufcw.org/press-releases/ufcw-osha-covid-workplace-safety-standard-fails-to-protect-frontline-grocery-and-meatpacking-workers-still-at-risk-from-pandemic/ (June 10, 2021).

[29] As is the case here, where at least one congressman and eight senators have expressed concern about FSIS's masking mandate. U.S. Rep. Tom Tiffany to Sec. Vilsack (Aug. 27, 2021), https://tiffany.house.gov/sites/tiffany.house.gov/files/documents/TiffanyLetter.SecVilsack.pdf; U.S. Senator Ron Johnson, et al., to Sec. Vilsack (Sept. 10, 2021), https://www.ronjohnson.senate.gov/2021/9/sen-johnson-leads-colleagues-in-pressing-usda-for-information-on-mask-mandates-at-private-businesses.

not at the direction of the actual Congress is pretextual and undermines our separation of powers.

Similarly, if FSIS issued the Notice to ameliorate interest groups disappointed by OSHA's decision not to include meatpacking in the ETS, it should not abuse its authority because OSHA has reached a different conclusion about the necessity of such an action. And if OSHA and FSIS collaborated to quietly accomplish by informal notice what OSHA did not feel it could do by formal rulemaking, dressed up as a federal employee safety measure, that is truly pretextual. In any circumstance it is an arbitrary and capricious basis for rulemaking.

II. The Plaintiffs will suffer irreparable harm absent an injunction.

Normally, damage to a business can be calculated, such that preliminary injunctive relief is unwarranted. Here, that is not the case, for two reasons.

First, USDA and FSIS enjoy sovereign immunity (and Secretary Vilsack is named in his official capacity for injunctive relief). Harm is irreparable if it "cannot be prevented or fully rectified by the final judgment after trial." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F. 3d 1034, 1045 (7th Cir. 2017) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F. 3d 1079, 1089 (7th Cir. 2008)). To show that there is no adequate remedy at law, the plaintiff is not required to demonstrate that the remedy would be

wholly ineffectual; the plaintiff must show only that any award would be seriously deficient as compared to the harm suffered. *Id*. at 1046.

Ordinarily, the federal government and its officials sued in their official capacities have sovereign immunity from damages. *See, e.g., FDIC v. Meyer,* 510 U.S. 471, 475 (1994). The Seventh Circuit has said that "a defendant's immunity from damages liability might constitute irreparable harm entitling the plaintiff to preliminary relief." *Smith v. City of Hammond*, 388 F. 3d 304, 307 (7th Cir. 2004).

The Eastern District of Wisconsin recently analyzed this issue of irreparable harm in the context of a government defendant's immunity from money damages and found irreparable harm and granted the plaintiffs preliminary injunctive relief against a different federal agency (the Small Business Administration). *Camelot Banquet Rooms, Inc. v. United States SBA*, 458 F. Supp. 3d 1044, 1062 (E.D. Wis. May 1, 2020). The Court reasoned that for purposes of the preliminary injunction motion, the plaintiffs could not obtain damages for any harm caused by the SBA's refusal to guarantee their loans; therefore, the plaintiffs lacked an adequate remedy at law, and their inability to obtain damages implied that any harm the plaintiffs suffered during the pendency of the case would be irreparable. *Id*. at 1061-62.

Other circuit courts have also concluded government's sovereign immunity creates irreparable harm for damages against it. "In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary

damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013). *See, e.g., N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 388 (3rd Cir. 2012); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Idaho v. Coeur D'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015); *Kansas v. SourceAmerica*, 874 F.3d 1226, 1251 (10th Cir. 2017). *See also Wages & White Lion Invs., L.L.C. v. United States FDA*, No. 21-60766, 2021 U.S. App. LEXIS 32112, at *22 (5th Cir. Oct. 26, 2021); *Ky., Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 759 F.3d 588, 600 (6th Cir. 2014).

Second, these businesses are bleeding cash, losing employees, and teetering on the brink of closure, all of which creates a basis for finding irreparable harm. Stmt. of Facts, ¶¶ 25, 49; Long Decl. ¶ 25; Fidler Decl. ¶ 24. As Judge Adleman wrote, "Although economic loss generally will not sustain a preliminary injunction, an award of damages can be inadequate if the damage award would come 'too late to save the plaintiff's business.'" *Camelot Banquet Rooms, Inc*., 458 F. Supp. 3d at 1063 (quoting in part *Roland Mach. Co. v. Dresser Indus., Inc*., 749 F.2d 380, 386 (7th Cir. 1984)). *Accord Girl Scouts of Manitou Council*, 549 F.3d at 1095 (finding "the potential loss of property, employees, or its entire business" sufficient for irreparable harm); *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (finding irreparable harm where potential losses "would

drive [movant] out of business within six months"). *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (concluding that irreparable harm exists when landlords have "no guarantee of eventual recovery" and many "are of modest means" at a period of decreased cash flow).

Here, both Golden City Meats and We're the Wurst are small businesses which rely on the mark for a substantial portion of their business. Stmt. of Facts, ¶¶ 8, 35; Long Decl. 8; Fidler Decl. ¶ 10. In the case of Golden City Meats' slaughter business, those employees cannot work the line as long as this mask mandate is in effect because masking while working in those conditions is incredibly uncomfortable. Though Golden City Meats' owner has worked heroically to find alternate projects in the short-term, he cannot keep them employed indefinitely if the line remains closed. And the family farms that rely on his for slaughtering will not wait indefinitely; many will find new processors and may never return to him after the mark is returned. Stmt. of Facts, ¶¶ 1-25; Long Decl. ¶¶ 1-25. We're the Wurst, meanwhile, is the quintessential American small business, growing from a food cart to a physical facility, but it operates on typically tight margins and may not be able to sustain the costs of paying for equipment and space without the income it receives from business associated with the Mark. Stmt. of Facts, ¶¶ 26-49; Fidler Decl. ¶¶ 1-24. Both are small businesses where cash-flow is king, exactly whom the Supreme Court sought to protect with immediate equitable relief in *Alabama Realtors.*

III. The balance of equities and public interest favor Plaintiffs.

It is a longstanding rule which predates the pandemic that there is "no public interest in the perpetuation of unlawful agency action. To the contrary, there is substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). If the Court agrees with the Plaintiffs on any of their claims on the merits, then it should also agree on the public interest.

And whatever the arguments may have been about "the equities" of injunctive relief in a pandemic in the past, the Supreme Court answered them definitively in its OSHA vaccine-mandate decision. "The equities do not justify withholding interim relief." *Nat'l Fed'n of Indep. Bus. v. DOL*, Nos. 21A244, 21A247, 2022 U.S. LEXIS 496, at *11 (Jan. 13, 2022). In that case, the businesses argued compliance costs and burdens on employees, while the government counted up the lives it estimated would be saved. The Court responded: "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." *Id*. Because FSIS is acting beyond the authority of the OSH Act, and beyond the authority of its published regulations, and without publishing new regulations, a preliminary injunction is appropriate to stay this rule until elected officials proceed through proper channels.

Finally, the Court should not forget that meatpacking employers may still require vaccination or masking, meatpacking employees may still choose vaccination or masking, and FSIS may still require and even provide vaccination and masking for its own employees. *Georgia v. Biden,* No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, at *40 (S.D. Ga. Dec. 7, 2021). And OSHA could act at any time with a targeted ETS or rule tailored to the meatpacking industry.[30] Similarly, state and local governments could (re)impose mask mandates as conditions evolve. With an injunction in place, FSIS simply may not require masking from private third-parties not even directly subject to OSH Act Section 19 unless OSHA promulgates a formal rule under Section 6.

Again, as the Fifth Circuit recently stated: "The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials." *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *26.

CONCLUSION

"[T]he FSIS is not in a good position to undertake a duty to protect private sector employees from occupational hazards in private sector workplaces. . . . It

[30] As even the Supreme Court suggested it could: "The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID-19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers." *Nat'l Fed'n of Indep. Bus. v. DOL*, Nos. 21A244, 21A247, 2022 U.S. LEXIS 496, at *4 (Jan. 13, 2022).

would substantially detract from the FSIS's mission of ensuring that poultry products distributed to consumers are wholesome. Further, it would alter greatly the scope and nature of the purpose of the FSIS . . ." *Dawkins*, 226 F. Supp. 2d at 758.

FSIS has never alleged We're the Wurst or Golden City Meats is producing unsafe meat products. Like Nolechek's, they should be able to operate their businesses in compliance with state and local masking requirements and OSHA rules for workplace safety, and not be subject to an unpublished and contrived stealth rule from FSIS, when Congress never conferred such powers to the USDA and FSIS.

Dated: February 2, 2022

Respectfully Submitted,

NOLECHEK'S MEATS, INC.;
WE'RE THE WURST INCORPORATED;
GOLDEN CITY MEATS, LLC

By: /s/ *Daniel R. Suhr*

Daniel R. Suhr (WI State Bar #6321108)
WDWI admission April 9, 2019
M.E. Buck Dougherty, III (TN State Bar #022474)
pro hac vice motion forthcoming
Liberty Justice Center
141 W. Jackson Blvd., Suite 1065
Chicago, Illinois 60603
Telephone (312) 637-2280
dsuhr@libertyjusticecenter.org
bdougherty@libertyjusticecenter.org

Attorneys for Plaintiffs
Nolechek's Meats, Inc., et al.