

1 KARLA GILBRIDE (Cal. Bar No. 264118)  
Public Justice, P.C.  
2 1620 L Street NW, Suite 630  
Washington, DC 20036  
3 (p) 202-797-8600 / (f) 202-232-7203  
kgilbride@publicjustice.net

4 ANITA YANDLE\*  
Public Justice, P.C.  
5 1620 L Street NW, Suite 630  
Washington, DC 20036  
6 (p) 202-797-8600 / (f) 202-232-7203  
7 ayandle@publicjustice.net

8 DAVID MURASKIN\*  
Public Justice, P.C.  
9 1620 L Street NW, Suite 630  
Washington, DC 20036  
10 (p) 202-797-8600 / (f) 202-232-7203  
dmuraskin@publicjustice.net

11 \* Not admitted in this jurisdiction

12  
13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
15 **OAKLAND DIVISION**

16 CENTER FOR FOOD SAFETY, *et al.*,

17 *Plaintiffs,*

18 v.

19 SONNY PERDUE, in his official  
20 capacity as the Secretary of the U.S.  
Department of Agriculture, *et al.*,

21 *Defendants.*

Case No. 4:20-cv-00256-JSW

**MOTION FOR LEAVE TO FILE  
BRIEF *AMICI CURIAE* AND BRIEF  
OF *AMICI CURIAE* U.S.  
REPRESENTATIVE MARK POCAN,  
U.S. SENATOR CORY A. BOOKER,  
AND FOUR OTHER MEMBERS OF  
THE U.S. HOUSE OF  
REPRESENTATIVES IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

Judge: Honorable Jeffrey S. White

No hearing has yet been scheduled

1                   **MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE***

2                   *Amici Curiae* U.S. Representative Mark Pocan, U.S. Senator Cory A. Booker,  
3 and four other members of the U.S. House of Representatives respectfully request  
4 this Court to grant leave to file an *amicus curiae* brief in the above captioned case.

5                   Due to the congressional power to delegate authority to administrative  
6 agencies, including the United States Department of Agriculture, *amici* have both a  
7 special interest in and the unique ability to speak to the issues in this case. Both  
8 parties in this case planned for the likely submission of *amicus* briefs. Plaintiffs'  
9 counsel have consented to the admission of this brief and Defendants' counsel have  
10 chosen to take no position.

11                   As detailed in the following brief, the Court should grant the Plaintiffs'  
12 motion and vacate Defendants' New Swine Inspection System rules.

**BRIEF OF AMICI CURIAE**

**TABLE OF CONTENTS**

**Interest of Amicus Curiae** ..... 6

**Summary of Argument**..... 6

**Argument** ..... 7

    1. *Congress passed the FMIA to protect consumers from unsafe meat, ensured through federal oversight.*..... 7

    2. *The NSIS turns over inspection to pork companies.* ..... 12

    3. *Defendants’ rules jeopardize consumer safety, and therefore are ultra vires and contrary to Congress’s intent.* ..... 15

**Conclusion** ..... 18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

<b>Cases</b>	<b>Page(s)</b>
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013) .....	7
<i>Ernst &amp; Ernst v. Hochfelder</i> , 425 U.S. 185 (1976) .....	11, 12
<i>NLRB v. Brown</i> , 380 U.S. 278 (1965) .....	7
<i>Schneider v. Chertoff</i> , 450 F.3d 944 (9th Cir. 2006) .....	7
 <b>Statutes</b>	
21 U.S.C. § 602.....	6, 7
21 U.S.C. § 603.....	6, 8, 9, 12
21 U.S.C. § 604.....	8
21 U.S.C. § 605.....	8
21 U.S.C. § 606.....	8, 9
21 U.S.C. § 607.....	8
21 U.S.C. § 609.....	8
21 U.S.C. § 611.....	8
21 U.S.C. § 615.....	8
21 U.S.C. § 617.....	8, 9
21 U.S.C. § 621.....	8
21 U.S.C. § 622.....	9

1 **Regulations**

2 9 C.F.R. § 309.19 (2021)..... 6, 12

3 9 C.F.R. § 310.26 (2021)..... 6

4 Modernization of Swine Slaughter Inspection,

5 83 Fed. Reg. 4780 (proposed Feb. 1, 2018) ..... 13

6 Modernization of Swine Slaughter Inspection,

7 84 Fed. Reg. 52,300 (Oct. 1, 2019) ..... 6, 12, 13, 14

8

9 **Other Authorities**

10 *Audit Report 24601-0001-41, Food Safety and Inspection Service – Inspection and*

11 *Enforcement Activities at Swine Slaughter Plants*, Off. Inspector Gen.

12 (May 2013) ..... 13, 15, 16

13 Ctr. for Progressive Reform, Comment Letter on Proposed Rule, Modernization

14 of Swine Slaughter Inspection (Apr. 30, 2018)..... 17

15 Ctr. for Science in the Pub. Interest, Comment Letter on Proposed Rule,

16 Modernization of Swine Slaughter Inspection (May 2, 2018) ..... 17

17 Food & Water Watch, Comment Letter on Proposed Rule, Modernization of

18 Swine Slaughter Inspection (May 2, 2018) ..... 14, 16

19 David Greenberg, *How Teddy Roosevelt Invented Spin*, The Atlantic,

20 Jan. 24, 2016..... 11

21 *Guideline for Training Establishment Sorters under the New Swine Slaughter*

22 *Inspection System*, Food Safety and Inspection Serv., U.S. Dep’t of Agric.

23 (Sept. 2019)..... 12, 13

24 *Hearings Before the Committee on Agriculture, Conditions in Chicago Stock*

25 *Yards, Message from the President of the United States, Transmitting the*

26 *Report of Mr. James Bronson Reynolds and Commissioner Charles P. Neill,*

1 *Special Committee Appointed to Investigate the Conditions in the Stock Yards*  
2 *of Chicago*, 59th Cong., 1st Session, Doc. 873 (1906)..... 9, 10, 11  
3 Dirk Lange, European Union, Comment Letter on Proposed Rule, Modernization  
4 of Swine Slaughter Inspection (May 2, 2018)..... 15  
5 *More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and*  
6 *Hog Inspections*, Gov’t. Accountability Off. (Aug. 2013) ..... 15  
7 Name Redacted, Aff. (Oct. 2014), A-0267 ..... 16, 17  
8 Zoe Novic, *Too Fast, Too Furious: Slaughterhouse Line Speeds in The Era of*  
9 *Covid-19*, Pub. Health Theses, Yale Sch. of Pub. Health (Jan. 2021) ..... 16  
10 Angela Stuesse and Nathan T. Dollar, *Who are America’s meat and poultry*  
11 *workers?*, Econ. Pol’y Inst. (2020) ..... 13  
12 USDA data on fiscal years 2008 to 2011 (2018), released under the Freedom of  
13 Information Act (FOIA) to Food & Water Watch, A-0882 ..... 16  
14 Catherine L. Viator, *Costs of Food Safety Investments*, RIT Int’l (May 2015) ..... 13

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## 1 **Interest of *Amicus Curiae***

2 *Amici* are a United States Senator and five Members of the United States  
3 House of Representatives concerned with the rules promulgated by the United  
4 States Department of Agriculture (“USDA”) in its New Swine Slaughter Inspection  
5 System (“NSIS”). The full list of *amici* is included in Appendix A. When Congress  
6 delegates authority to an agency, it retains an interest in ensuring the agency does  
7 not exceed that authority, so as to protect the separation of powers.

8 In this case, USDA promulgated rules related to meat inspection that run  
9 contrary to the congressional intent and purpose of enacting the Federal Meat  
10 Inspection Act (“FMIA”). The FMIA instructs USDA to protect public welfare  
11 through monitoring meat safety. *Amici*, as both members of the legislative branch  
12 and representatives of the people in their states and districts, have an interest in  
13 ensuring that agencies do not promulgate rules that disregard legislation aimed at  
14 protecting public welfare and that jeopardize their constituency.

## 15 16 **Summary of Argument**

17 USDA’s NSIS rules are inconsistent with the congressional intent and  
18 purpose of passing FMIA and are therefore invalid as *ultra vires*. Congress passed  
19 the FMIA to protect consumers from contaminated food products by ensuring  
20 independent federal inspection of those goods. *E.g.*, 21 U.S.C. § 602, 603. The NSIS  
21 rules issued by USDA’s Food Safety and Inspection Service (“FSIS”) contradict that  
22 purpose. The NSIS increases risks for consumers by delegating core components of  
23 ante-mortem inspection to the slaughter plants’ own employees, without even  
24 requiring proper training for those individuals, and lessening the opportunity to  
25 perform post-mortem inspections by increasing line speeds. 9 C.F.R. §§ 309.19(a)-  
26 (b), 310.26(b)-(c) (2019); Modernization of Swine Slaughter Inspection, 84 Fed. Reg.  
27 52,300 (Oct. 1, 2019) (promulgating the NSIS rules). FSIS’s disregard for consumer

1 welfare, and in particular the ways in which its rules undermine the inspection  
2 process, abandons the primary purpose of the FMIA.

3       Because the NSIS is inconsistent with the intent and purpose of the FMIA,  
4 its rules are unlawful. “[F]or agencies charged with administering congressional  
5 statutes[, b]oth their power to act and how they are to act is authoritatively  
6 prescribed by Congress, so that when they act improperly, no less than when they  
7 act beyond their jurisdiction, what they do is *ultra vires*.” *City of Arlington v. FCC*,  
8 569 U.S. 290, 297 (2013). Indeed, “the question — whether framed as an incorrect  
9 application of agency authority or an assertion of authority not conferred — is  
10 always whether the agency has gone beyond what Congress has permitted it to do,”  
11 *id.*, which is the case here. Administrative policymaking “inconsistent with a  
12 statutory mandate or that frustrate[s] the congressional policy underlying a  
13 statute” is unlawful. *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *see also, Schneider*  
14 *v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). The NSIS rules are invalid as *ultra*  
15 *vires* because they decrease consumer protection, both by diminishing federal  
16 oversight and by hampering crucial food safety protections, contrary to the FMIA’s  
17 legislative purpose.

## 18 19 **Argument**

- 20  
21       1. *Congress passed the FMIA to protect consumers from unsafe meat, ensured  
22 through federal oversight.*

23       The legislative intent behind the FMIA is consumer protection secured  
24 through government supervision. All rulemaking under the auspices of the Act  
25 must reify that intent, not undermine it.

26       Congress passed the FMIA to “protect the health and welfare of consumers.”  
27 21 U.S.C. § 602. The drafters repeatedly emphasized that purpose, referring four  
28 times to protecting consumers in the Statement of Findings alone. *Id.* The



1 Statement continued that not only was Congress enacting the FMIA because of the  
2 central role meat had in “the Nation’s total supply of food,” but also because  
3 Congress believed if it “protected ... the health and welfare of consumers,” it would  
4 simultaneously aid “livestock producers and processors,” food “markets,” and the  
5 “public welfare.” *Id.* Congress stated that ensuring meat is “not adulterated, and  
6 properly marked, labeled and packaged,” would create consumer confidence and  
7 “eliminate burdens upon” the meat industry generally. *Id.* Consumer protection was  
8 both an end goal of the FMIA, and the means by which it would accomplish its other  
9 goals of benefitting farmers, meat producers, and the general public good.

10 Unsurprisingly, central to this scheme was a comprehensive system to review  
11 and certify animals and meat products meant for consumption. The FMIA directs  
12 “inspection of all amenable species before they shall be allowed to enter into any”  
13 slaughterhouse, *id.* § 603(a), as well as “post mortem examination and inspection of  
14 carcasses and parts thereof,” *id.* § 604; *see also* § 605, § 615. Indeed, the Act directs  
15 that “inspectors shall have access at all times, by day or night” to ensure this  
16 review.” *Id.* § 606(a); *see also* § 609. Following the inspector’s review of the animals,  
17 inspectors also oversee meat labeling to further promote consumer confidence in the  
18 items they are purchasing. *Id.* § 606(a), 607, § 611(a); *see also* § 617 (requiring “any  
19 vessel” carrying meat for export to obtain “a certificate that the [] amenable species  
20 were sound and healthy at the time of inspection, and that their meat is sound and  
21 wholesome”).

22 Core to the review and approval process that Congress designed was that the  
23 inspectors would be independent federal officers whose allegiance would be to  
24 enforcing the FMIA, not to the plant’s bottom line. The FMIA emphasizes that its  
25 inspection regime is to be carried out by inspectors “appointed” by the Secretary of  
26 Agriculture “for that purpose.” 21 U.S.C. § 603(a) (regarding pre-slaughter  
27 inspection); *see also* § 604 (same regarding post-mortem inspection); § 621 (similar).

1 Likewise, Congress explained the labeling process is to be carried out by “said  
2 inspectors,” which it defined to be those “appointed” by the Secretary “for that  
3 purpose.” *Id.* § 606(a); *see also id.* § 617 (explaining certificate for sale in foreign  
4 country must be provided by “an inspector appointed under the provisions of this  
5 chapter”). Underscoring the intent (and need) that the inspectors be independent,  
6 Congress emphasized that the inspectors must be able to “refuse to provide  
7 inspection” or “cause inspection to be temporarily suspended” and thereby stop the  
8 slaughter process. *Id.* § 603(b) (regarding violations of humane methods of  
9 slaughter); § 606(a) (“the Secretary may remove inspectors from any establishment  
10 which fails to so destroy [] condemned meat food products,” preventing the products  
11 from being labeled as compliant). Moreover, Congress created criminal penalties if  
12 the corporations that inspectors supervise seek “to influence” inspectors’ decision  
13 making, and equivalent penalties for inspectors who accept such bribes, as they  
14 would be violating their duties as an “officer or employee of the United States.” *Id.*  
15 § 622.

16 The history underlying the FMIA confirms that Congress set out to protect  
17 consumer welfare through the independent federal oversight of the meat supply. In  
18 the lead up to passage of the FMIA, President Theodore Roosevelt transmitted a  
19 letter to the Agriculture Committee along with an investigative report that, in the  
20 President’s words, “shows the urgent need of immediate action by the Congress” to  
21 pass this consumer protection legislation. *Hearings Before the Committee on*  
22 *Agriculture, Conditions in Chicago Stock Yards, Message from the President of the*  
23 *United States, Transmitting the Report of Mr. James Bronson Reynolds and*  
24 *Commissioner Charles P. Neill, Special Committee Appointed to Investigate the*  
25 *Conditions in the Stock Yards of Chicago*, 59th Cong., 1st Session, Doc. 873, 261-63  
26 (1906) [hereinafter *Conditions*]. In particular, he emphasized the need for Congress  
27 to develop a system of “*thoroughgoing inspection by the Federal Government* of all

1 stock yards and packing houses and of their products,” because at that time the  
2 national government had “no power to enforce inspection” of meat products. *Id.*  
3 (emphasis added). As the President explained, “It is imperatively necessary in the  
4 interest of health and decency” that Congress pass a law “which will enable the  
5 inspectors of the General Government to inspect and supervise from the hoof to the  
6 can the preparation of the meat food product.” *Id.* at 261-62.

7         Indicating that the Department would inspect the meat to ensure safe food,  
8 the President advised Congress to pass a law that “will enable the Department of  
9 Agriculture adequately to inspect the meat and meat food products entering into  
10 interstate commerce.” *Id.* He explained that the federal government needed to  
11 “supervise the methods of preparing the same, and to prescribe the sanitary  
12 conditions under which the work shall be performed.” *Id.* Without such  
13 intervention, “a recrudescence of the abuses [that is, health and safety violations] is  
14 absolutely certain.” *Id.*

15         The report accompanying the President’s letter likewise emphasized the  
16 necessity of adding “government inspection” to slaughterhouses, explaining that  
17 only that sort of oversight could provide “assurance [that these meat-food products  
18 are wholesome and fit for food.” *Id.* at 267-68. The report also raised concerns that  
19 inadequate government oversight would result in inaccurate labeling that would  
20 deceive consumers. *Id.* “[T]he burden of protecting the cleanliness and  
21 wholesomeness of the products and the health of the workers and of improving the  
22 conditions under which the work is performed, must fall upon the National  
23 Government,” the report authors urged. *Id.* at 265. Accordingly, they recommended  
24 the development of “Special Government inspection” to implement new rules on  
25 “cleanliness and wholesomeness,” and that any government label of approval only  
26 be permitted where a product has “been subject to Government inspection at any  
27 and every stage of the process of preparation.” *Id.* at 270-271.

1 Further still, the letter and report came immediately on the heels of Upton  
2 Sinclair's *The Jungle*. David Greenberg, *How Teddy Roosevelt Invented Spin*, *The*  
3 *Atlantic*, Jan. 24, 2016. Sinclair "document[ed] the indifference of management" to  
4 the conditions of meatpacking workers and the animals alike, which he attributed  
5 to "the lack of government oversight." *Id.*

6 The congressional record confirms that the drafters of the FMIA, spurred by  
7 Sinclair's exposure of horrid practices in slaughterhouses, meant to institute  
8 independent federal oversight of the meat supply. *See, e.g., Conditions* at 161, 194,  
9 346-47 (showing times where the Committee on Agriculture mentioned its  
10 motivation from *The Jungle*). During the Committee hearings and debates, there  
11 was "no objection whatever" to the proposal that "Special Government inspection []  
12 be carried on continuously to prevent violations of the law and general abuses in the  
13 trade." *Conditions* at 30. Even the representative for Chicago packers testified, "We  
14 have always felt that Government inspection, under proper regulations, was an  
15 advantage to the livestock and agricultural interests and to the consumer," *Id.* at  
16 55, and that,

17 [H]ere is a measure for all the people. It is a health measure; it benefits  
18 the producers fully as much as ourselves, if not more. It benefits the  
19 consumer, and the expense should be apportioned over them; and I know  
no better way for that to be accomplished than through the Government.

20 *Id.* at 89. Congress agreed, with one member of the Committee on Agriculture  
21 noting, "Now, I believe that every man in the hearing of my voice ... will  
22 admit that there is only one kind of inspection that will fully answer the  
23 requirements, and that is Government inspection." *Id.* at 200.

24 In short, the drafters of the FMIA intended to protect consumers from tainted  
25 meat products through government supervision. "The rulemaking power granted to  
26 an administrative agency charged with the administration of a federal statute ... is  
27 the power to adopt regulations to carry into effect the will of Congress as expressed

1 by the statute.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) (internal  
2 quotation marks omitted). Therefore, USDA rulemaking under the FMIA must have  
3 consumer protection through independent oversight at its core.

4  
5 *2. The NSIS turns over inspection to pork companies.*

6 The NSIS privatizes much of the pork inspection regime and significantly  
7 impedes what inspection does occur. It transfers federal inspection authority over  
8 live animals presented for slaughter to company employees with insufficient  
9 training, and limits federal inspectors’ time to review meat products, both of which  
10 place consumers at risk. In other words, the rules are not only inconsistent with the  
11 ways Congress directed the FMIA be implemented, but also with the statute’s  
12 overarching goal of ensuring consumer confidence in a safe meat supply.

13 The NSIS transfers live animal inspection to slaughterhouse-employed  
14 “sorters.” 9 C.F.R. §§ 309.19(a) (“The establishment must conduct market hog  
15 sorting activities before the animals are presented for ante-mortem inspection.”);  
16 *Guideline for Training Establishment Sorters under the New Swine Slaughter*  
17 *Inspection System*, Food Safety and Inspection Serv., U.S. Dep’t of Agric., 7-8 (Sept.  
18 2019) (discussing ante-mortem plant-sorter duties), A-0426-0516. Where the FMIA  
19 requires federal inspectors to conduct an ante-mortem “examination and inspection  
20 of all” swine “before they shall be allowed to enter” any U.S. abattoir, 21 U.S.C. §  
21 603(a), under the NSIS plant employee-sorters bear the duty of segregating live  
22 animals deemed to be healthy from those found to be sick. 84 Fed. Reg. 52,312.  
23 “FSIS inspectors [only] observe establishment employees performing [these] animal  
24 segregation procedures at least once per month.” *Id.* Nonetheless — in direct  
25 contravention of the government’s insistence federal inspectors continue to examine  
26 “each animal” in the same “careful” manner as before, Dkt. No. 68, at 9 — under the  
27 NSIS, federal inspectors rely on the plant sorting process to determine how they

1 proceed, only themselves “observ[ing] five to ten percent of those animals” sorted as  
2 healthy for slaughter “in motion.” Modernization of Swine Slaughter Inspection, 83  
3 Fed. Reg. 4780, 4792 (proposed Feb. 1, 2018) (describing the pilot program on which  
4 the NSIS is based). The government claims this is not problematic because FSIS  
5 inspectors still view all of the animals “at rest.” Dkt. No. 68, at 15, but it freely  
6 admits the objective of the sorting is to allow “fewer inspectors to do the same  
7 work,” Dkt. No. 68, at 9. In other words, it is reducing federal involvement by  
8 relying on slaughterhouse employees’ judgment to decrease federal inspectors’  
9 effort, a judgment that federal employees barely supervise. That is, it is not merely  
10 increasing federal “efficien[cy],” as the government pretends, *id.* at 8, but  
11 privatizing the inspection regime.

12 In fact, the rules rely on plants to develop the training for their sorters,  
13 further diminishing federal oversight and consumer safety under the NSIS.  
14 *Guideline for Training Establishment Sorters under the New Swine Slaughter*  
15 *Inspection System 6; see also* Modernization of Swine Slaughter Inspection, 84 Fed.  
16 Reg. 52,313 (Oct. 1, 2019) (“FSIS is not prescribing specific sorter training or  
17 certification.”). The plants are merely provided optional training guidelines, and an  
18 English-only pamphlet of information.<sup>1</sup> See *Guideline for Training Establishment*  
19 *Sorters, supra*. A study found that the plants devoted as few as two labor hours to  
20 training new staff and one hour provided for an annual “refresher” training.  
21 Catherine L. Viator, *Costs of Food Safety Investments*, RIT Int’l, 4-9 (May 2015). By  
22 comparison, federal inspectors receive extensive training. *Audit Report 24601-0001-*  
23 *41, Food Safety and Inspection Service – Inspection and Enforcement Activities At*

24  
25  
26 <sup>1</sup> Meanwhile, about 38 percent of animal slaughtering and processing workers are  
27 foreign-born, and often do not speak English as a first language. Angela Stuesse  
and Nathan T. Dollar, *Who are America’s meat and poultry workers?*, Econ. Pol’y  
Inst. (2020).

1 *Swine Slaughter Plants*, Off. Inspector Gen., 13 (May 2013), A-0103 [hereinafter  
2 “Audit Report”].

3 Finally, the NSIS both lifts the plants’ line-speed limits and cuts online  
4 (meaning on the meat inspection line) federal inspection staffing by more than half.  
5 Under the new rules, the plants are “allowed to have faster production line speeds  
6 with fewer FSIS inspectors,” *Id.* at 19. The plants in the pilot project that led to  
7 NSIS had an “average line speed [of] approximately 12.49 percent faster than  
8 comparable establishments,” 84 Fed. Reg. 52,335, which “results in a *2.26-fold*  
9 *reduction* in average inspector time dedicated to performing a critical appraisal” of  
10 meat products. Food & Water Watch, Comment Letter on Proposed Rule,  
11 Modernization of Swine Slaughter Inspection, 3 (May 2, 2018). Put simply, the  
12 increased line speeds mean that more meat passes over a slaughter line in less  
13 time, reducing the amount of time federal inspectors have to address food safety  
14 concerns. Reducing federal staffing further increases the amount of material an  
15 inspector must evaluate, leading to an expected doubling of the prior pace: “instead  
16 of inspecting an average of 163 heads per hour per inspector, ... each inspector  
17 would be tasked with inspecting an average of 366 slaughtered animals per hour.”  
18 Food & Water Watch Comment, *supra*; *see also*, Modernization of Swine Slaughter  
19 Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019) (listing key elements of the NSIS,  
20 including the revocation of maximum line speeds and the reduction of FSIS staff to  
21 online inspection).

22 The NSIS rules mean that company-employed, minimally trained, plant  
23 sorters are now charged with protecting consumer health. The independent federal  
24 inspectors that the FMIA drafters envisioned would play that role are relegated to  
25 reviewing only a portion of the animals and glancing at the carcasses speeding by as  
26 they head towards consumers’ plates.

1 3. *Defendants' rules jeopardize consumer safety, and therefore are ultra vires*  
2 *and contrary to Congress's intent.*

3 Academic and government research confirms that the changes made by the  
4 NSIS rules place consumers at meaningful risk. Specifically, statistical evidence  
5 shows that lack of training and faster line speeds increase error rates and the  
6 volume of contaminated meat in the food supply, and reports from inspectors and  
7 stakeholders show that the privatization of inspection duties undermines  
8 Congress's desired check on meat suppliers. To abide by congressional intent, the  
9 NSIS would need to protect consumers of meat products through government  
10 oversight; the new rules are proven to do just the opposite.

11 The government's own reports show that the absence of training for  
12 employee-sorters places consumers at risk. In their reports on the NSIS pilot  
13 project, the USDA Office of the Inspector General ("OIG") and the Government  
14 Accountability Office ("GAO") both noted several errors and areas of concern due to  
15 lack of training of employee-sorters. OIG reported that of the five pilot project  
16 plants, three had "some of the highest" rates of error nationwide. Audit Report,  
17 *supra*, at 19. As a result, the Office recommended increased training for the already  
18 extensively trained federal inspectors, warning "vague guidance as well as  
19 insufficient on-the-job training and supervision" increased the error rates and  
20 "reduced assurance that inspectors will effectively identify pork that should not  
21 enter the food supply," which must be all the truer for the poorly trained sorters. *Id.*  
22 at 12. The GAO echoed these fears, stating that the lack of training for employee-  
23 sorters "raise[s] concerns about food safety and worker safety." *More Disclosure and*  
24 *Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections, Gov't.*  
25 Accountability Off., unnumbered introductory page, 19, 22 (Aug. 2013), A-0135, A-  
26 0156, A-0159. Even the European Union raised concerns that because "[t]here is no  
27 specific requirement for training in animal health or husbandry prescribed in the  
28 Proposed Rule," they do not consider "establishment personnel" to be acceptably

Brief of *Amici Curiae*

Case No. 4:20-cv-00256-JSW



1 qualified. Dirk Lange, European Union, Comment Letter on Proposed Rule,  
2 Modernization of Swine Slaughter Inspection (May 2, 2018), A-0335-36.

3 Likewise, studies show that lifting line speed limits leads to more violations  
4 of food safety regulations. The increases in speed “create[] a pressurized  
5 environment in which workers are more likely to make a critical mistake and miss  
6 ‘carcass contamination.’” Zoe Novic, *Too Fast, Too Furious: Slaughterhouse Line  
7 Speeds in The Era of Covid-19*, Pub. Health Theses, Yale Sch. of Pub. Health (Jan.  
8 2021), <https://elischolar.library.yale.edu/ysphtdl/2083/>. In fact, the rate of  
9 noncompliance records (“NRs”) – that is, citations for violations – for fecal matter,  
10 digestive contents, and milk contamination was twice as high in the pilot project  
11 (“HIMP”) as traditional plants:

<i>Plant Type</i>	<i>Tasks Performed</i>	<i>Total NRs</i>	<i>NR Rate</i>
<i>HIMP</i>	8314	267	0.032114506
<i>Non-HIMP</i>	32499	586	0.018031324
<i>Others</i>	12259	247	0.020148462

16 USDA data on fiscal years 2008 to 2011 (2018), released under the Freedom of  
17 Information Act (FOIA) to Food & Water Watch, A-0882. Indeed, the swine plant  
18 with the most citations was a pilot project plant with increased speeds, Audit  
19 Report, *supra*, and *all* violations allowing carcasses that can cause food poisoning to  
20 enter the food supply occurred in the pilot project plants with the increased line  
21 speeds. Food & Water Watch Comment, *supra*, 12-13, A-0245-46. This is  
22 particularly troubling given that the lack of formal training for sorters makes it  
23 more “difficult for inspectors to be able to do this job.” Name Redacted, Aff., 3 (Oct.  
24 2014), A-0267.

25 Finally, numerous people have reported that through transferring  
26 responsibilities to employee-sorters, the NSIS increases the risk that plants will be  
27 able to manipulate food safety rules. A USDA inspector testified in the rulemaking

1 process that “company management is more production-oriented so they do not  
2 focus much on food safety and removing adulterated product. Actually, [company]  
3 *employees are discouraged from removing adulterated products from the line.*” Name  
4 Redacted, Aff., *supra* (emphasis added). Moreover, research and advocacy  
5 organizations emphasized reports showing workers have voiced fears of retaliation  
6 to researchers. One organization explained, “in the likely event a worker does not  
7 raise a concern because of the legitimate fear of retaliation,” then federal inspectors  
8 would be the last line of defense. Ctr. for Progressive Reform, Comment Letter on  
9 Proposed Rule, Modernization of Swine Slaughter Inspection (Apr. 30, 2018) (citing  
10 a study from Nebraska Appleseed of 455 slaughterhouse workers), A-0343.  
11 Although focusing on post-mortem inspection, worker advocates explained that  
12 FSIS inspectors do not face the same threat of retaliation as plant personnel  
13 because they are “employed independently, but the “establishment sorters ... are  
14 directly dependent for their employment on the slaughter establishment” and thus  
15 cannot exercise their judgment freely. Ctr. for Science in the Pub. Interest,  
16 Comment Letter on Proposed Rule, Modernization of Swine Slaughter Inspection  
17 (May 2, 2018), A-0445. For the sorters, “the only line of defense would be the federal  
18 inspectors,” but the NSIS decreases their presence in the plant. *Id.* This “place[s] a  
19 much heavier burden on the remaining inspectors to ensure tainted food products  
20 do not enter into commerce.” Ctr. for Progressive Reform Comment, *supra*.

21 The evidence establishes the NSIS directly undermines consumer safety,  
22 contrary to the clear-cut legislative directive. Shifting the meat inspection process  
23 from one overseen by trained, independent, federal employees to under- or  
24 untrained company sorters without any safety net, directly undermines the goals of  
25 the FMIA.

1 **Conclusion**

2 Because Defendant's NSIS rules are *ultra vires* and contradict Congress's  
3 intent in passing the FMIA, the Court should grant Plaintiffs' Motion for Summary  
4 Judgment and vacate Defendants' New Swine Inspection System rules.

5  
6 Respectfully submitted on March 10, 2022.

7 /s/ Karla Gilbride  
8 KARLA GILBRIDE (Cal. Bar No. 264118)  
9 Public Justice, P.C.  
10 1620 L Street NW, Suite 630  
11 Washington, DC 20036  
12 (p) 202-797-8600 / (f) 202-232-7203  
13 kgilbride@publicjustice.net

14 ANITA YANDLE\*  
15 Public Justice, P.C.  
16 1620 L Street NW, Suite 630  
17 Washington, DC 20036  
18 (p) 202-797-8600 / (f) 202-232-7203  
19 ayandle@publicjustice.net

20 DAVID MURASKIN\*  
21 Public Justice, P.C.  
22 1620 L Street NW, Suite 630  
23 Washington, DC 20036  
24 (p) 202-797-8600 / (f) 202-232-7203  
25 dmuraskin@publicjustice.net

26 \* Not admitted in this jurisdiction  
27  
28

**APPENDIX A: LIST OF *AMICI CURIAE***

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Amicus* U.S. Representative Mark Pocan represents the Second Congressional District of Wisconsin in the United States House of Representatives.

*Amicus* U.S. Senator Cory A. Booker represents the State of New Jersey in the United States Senate.

*Amicus* U.S. Representative Dina Titus represents the First Congressional District of Nevada in the United States House of Representatives.

*Amicus* U.S. Representative Ro Khanna represents the Seventeenth Congressional District of California in the United States House of Representatives.

*Amicus* U.S. Representative Earl Blumenauer represents the Third Congressional District of Oregon in the United States House of Representatives.

*Amicus* U.S. Representative Jesús G. "Chuy" García represents the Fourth Congressional District of Illinois in the United States House of Representatives.