[ORAL ARGUMENT HELD SEPTEMBER 22, 2015
PANEL DECISION ENTERED DECEMBER 22, 2015]
No. 15-5037

In the U.S. Court of Appeals for the D.C. Circuit

Food & Water Watch, Inc., *et al.*,
Plaintiff-Appellants,
v.
Thomas Vilsack, *et al.*,
Defendant-Appellees.

On Appeal From the Order
Dismissing Plaintiffs' Complaint for Lack of Jurisdiction
U.S. District Court for the District of Columbia
The Honorable Ketanji Brown Jackson
1:14-cv-01547 (KBJ)

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Glossary

FSIS:	Food Safety and Inspection Service
FWW:	Food & Water Watch, Inc.
HACCP:	Hazard Analysis Critical Control Point
HIMP:	HACCP-Based Inspection Models Project
JA:	Joint Appendix
PPIA:	Poultry Products Inspection Act
USDA:	U.S. Department of Agriculture

Introduction and Rule 35 Statement

Petitioners (hereinafter "Plaintiffs") seek rehearing of a panel decision, which, while ostensibly only about their standing to pursue their claims, has far-reaching effects both for this Court's standing jurisprudence, as well as Congress's efforts to protect consumers from unwholesome and adulterated poultry under the 1957 Poultry Products Inspection Act ("PPIA").

The decision is the first by this Court to apply the test set forth in *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.* (*Public Citizen I*), 489 F.3d 1279, 1295 (D.C. Cir. 2007), since it first did so eight years ago in *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.* (*Public Citizen II*). 513 F.3d 234, 237 (D.C. Cir. 2008). The test requires that claimants alleging an increased risk of injury show "both (i) a substantially increased risk of harm and (ii) a substantial probability of harm with that increase taken into account." *Id.*

The Panel decision re-animates the test's first prong and concludes that Plaintiffs have not demonstrated a substantially increased risk of harm from Defendants' new rules governing inspections at poultry slaughter plants. Yet it does so without either presuming Plaintiffs will succeed on their claims' merits or giving any weight to the Congressional scheme allegedly violated—contravening this Circuit, as well as the First, Second, Sixth, Ninth Circuit, and Supreme Court's precedents. As a result, in determining that the Plaintiffs' increased risk of injury

is not plausibly "substantial," the decision essentially overrides Congress's determination of how best to design an inspection system that minimizes the risks of adulterated and unwholesome poultry. Further, the Panel decision fails to accept as true demonstrable evidence supporting predictions of future injury, contrary to this Court's precedents. Therefore, the Court should reverse, not affirm, the lower court's decision. If nothing else, the Panel's decision conflicts with the Second, Fourth, Fifth, and Seventh Circuits because it does not remand the case to give Plaintiffs a full and fair opportunity to address factual standing issues not considered below.

Factual and Procedural Background

At issue in this case is whether the Plaintiffs, two poultry consumers and an organization representing such consumers, have suffered injury-in-fact to challenge Defendants' new rules prescribing how carcasses are inspected in slaughter plants under the PPIA. 21 U.S.C. §§ 451-472 (2012). The new rules delegate certain government-inspection responsibilities to company employees, namely removing adulterated carcasses that need to be condemned. 77 Fed. Reg. 4,408, 4,410 (Jan. 27, 2012); 79 Fed. Reg. 49,566 (Aug. 21, 2014). Any salvageable poultry is no longer reprocessed under government-inspector supervision. *Id.* Now relieved of these duties, inspectors are pulled off slaughter lines, allowing poultry plants to increase their line speeds—leaving one lone government inspector at the end of

each line to inspect as many as two birds per second. *See* 79 Fed. Reg. at 49,567.

Even though the rules only focus on reducing online government inspections, Defendants contend that the changes will allow offline inspectors to do more "verification" tasks—such as checking that plants are following their hazard plans—activities they contend are more effective. *Id.* at 49,566-67.

Defendants' attempt to eliminate government inspectors' responsibilities is not new to this Court, which struck down Defendants' pilot program in *AFGE v. Glickman (AFGE I)*, concluding that the PPIA does not allow the removal of all government inspectors from slaughter lines. 215 F.3d 7, 11 (D.C. Cir. 2000). The pilot survived review after it was modified to add one online inspector to each line, but this Court stated that a more extensive program would need further evaluation. *AFGE v. Veneman (AFGE II)*, 284 F.3d 125, 130 (D.C. Cir. 2002). Plaintiffs now challenge rules implementing this pilot program nationwide for an estimated 219 plants producing 99.9% of domestic poultry. 79 Fed. Reg. at 49,618.

After filing their complaint alleging that the rules are contrary to the PPIA and otherwise arbitrary and capricious under the Administrative Procedure Act (JA09-46), among other claims, Plaintiffs moved for a preliminary injunction for some of their claims and introduced standing evidence. Most relevant to the Panel's decision about whether the rules substantially increase the risk of harm, Plaintiffs introduced sworn declarations from seven of the Defendants' inspectors

and other comments indicating that having federal inspectors condemn carcasses and supervise poultry-plant reprocessing prevents adulterated product from entering the food supply. (*See* JA222-23, JA301, JA315, JA320-22.) Plaintiffs also pointed to the Defendants' own data from the pilot project indicating higher *Salmonella* rates in such plants. (JA341.) Defendants' own risk assessment also predicts an increase in *Campylobacter* illnesses for poultry establishments under some inspection scenarios under the new rules. (JA038:¶180, JA430.)

After full briefing on the injunction motion, the lower court *sua sponte* dismissed Plaintiffs' complaint for want of standing, concluding that they had not sufficiently demonstrated injury-in-fact. (JA571-626.)

Plaintiffs appealed, and on December 22, 2015, this Panel affirmed the district court's decision. While finding that the lower court had employed the wrong standard for assessing Plaintiffs' standing evidence, akin to that on summary judgment (slip op. at 8-9), the Panel still dismissed the complaint. It found that Plaintiffs had submitted detailed allegations and evidence showing that the new rules would be different and inadequate compared to the existing systems. (*Id.* at 14.) But it found that Plaintiffs did not establish a "substantially increased risk of harm" because they did not allege how the new rules, with a "key aspect" of increasing offline inspection activities, would produce significantly more adulterated, unwholesome chicken. (*Id.* at 14-15.) Moreover, Plaintiffs

"point[ed] to isolated statistics where Defendants found *Salmonella* rates to be 'higher' in chicken processed in [pilot] establishments than in non-[pilot] establishments, but . . . d[id] not specify how much higher . . . ," and the *Campylobacter* illness projections under some inspection scenarios were likewise "plucked" from Defendants' risk assessment without sufficient allegations to infer a substantially increased risk of harm. (*Id.* at 17-18.) Finally, the Panel found that the Plaintiffs' data suffered from "additional problems," including that they did not account for the lower maximum line speeds and that new system was voluntary. (*Id.* at 18-19.) Relevant to this petition, Judge Henderson concurred because Plaintiffs did not sufficiently plead that poultry not produced under the new rules would either be unavailable or unreasonably priced.

Reasons for Granting Rehearing

I. The Panel's Decision Conflicts with This Circuit and the Supreme Court's Precedents

A. The Panel Did Not Presume That Plaintiffs Would Succeed on the Merits of Their Claims and Give "Great Weight" to the Statutory Scheme When Assessing Standing.

The Panel's conclusion that Plaintiffs did not allege that the new rules "as a whole" would injure them (*see* slip. op at 15) ignores the bedrock principle that courts are to presume that Plaintiffs will prevail on the merits of their claims when assessing standing. *See Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *Public Citizen I*, 489

F.3d at 1290. It overlooks that, in challenging the rulemaking as arbitrary and capricious, Plaintiffs directly dispute there will be the same increase in offline verification tasks under the new rules as in the pilot plants.[1] (JA035:¶¶158-159, JA086, JA282) The rules certainly do not require it. *See* 79 Fed. Reg. at 49,635. Indeed, Plaintiffs allege the number of certain monthly offline sanitation inspection tasks *has already dropped* since the risk assessment. (JA039:¶182.)

Moreover, Plaintiffs have alleged that Defendants' risk assessment shows an increase in 170 *Campylobacter* illnesses, *even with an increase in offline verification activities*, if certain unscheduled tasks are not prioritized.[2] (JA038:¶180, JA430-32.) There is no reason to conclude that such activities will increase under the new rules. *See* 79 Fed. Reg. at 49,582. ("[I]nspectors assigned to establishments operating under the [new rules] will perform both scheduled and unscheduled offline procedures, *just as they currently do* in both [pilot] and non-[pilot] establishments." (emphasis added)). Defendants' pilot-plant analysis does not even mention "unscheduled" inspection tasks no less demonstrate that there were more of them. Indeed, the Defendants' response to comments does not deny that their analysis only shows an increase in *scheduled* inspection tasks. *Id.*

[1] Since the rules only reduce online inspections, any artifice of increased *offline* tasks is based on plants operating like the pilot plants supposedly did. *See* 79 Fed. Reg. at 49,635, 49,574.

[2] The Panel dismisses this data as "ambiguous" (slip op. at 18), but Defendants never claim this mattered in their decision-making. *See* 79 Fed. Reg. at 49,580-81.

The Panel decision should therefore be reheard because it falls into the "familiar trap of confusing the merits of a case with the threshold requirement of standing . . . ." *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989).

The Panel also failed to consider whether the rulemaking's alleged statutory violation supports a plausible inference of injury. When an agency's actions are alleged to be "contrary to the express provisions of the act," this Circuit gives "great weight" to Congress's scheme if designed to prevent the alleged injury. *See id.* at 1542, 1549-50 (citations omitted). As the First Circuit recognizes, injury is more easily demonstrated when "linked to a statute . . . that allegedly has been or will soon be violated . . . because . . . the branch[] tasked with evaluating risks and developing safety standards . . . ha[s] already identified the risk as injurious." *Kerin v. Titeflex Corp.*, 770 F.3d 978, 982 (1st Cir. 2014) (citations omitted).

This Court's decision in *Public Citizen v. FTC* is on point. 869 F.2d at 1549. There, the *amicus curiae* questioned the plaintiffs' standing to challenge rules that exempted public health warnings on some utilitarian items because the FTC had mandated warnings on smokeless tobacco packages and print advertising. *Id.* The Court did not simply reject this as conflating the merits and standing inquiries. *Id.* Rather, it took the "opposite tack," finding that the plaintiffs had standing after giving "great weight" to Congress's comprehensive scheme, which, by its terms, established the benefits of advertising on all items. *Id.*

The present Panel failed to accord any weight—no less great weight—to the Congressional scheme that Defendants allegedly violate. The decision construes the Plaintiffs' injuries simply as the "increased risk of foodborne illness from unwholesome, adulterated poultry resulting from Defendants' regulation." (Slip op. at 12.) But this neglects that these risks flow from the rules' elimination of statutorily mandated protections. The PPIA specifically prescribes that inspectors are to condemn "[*a*]*ll* poultry carcasses and parts" found to be adulterated. 21 U.S.C. § 455(c) (2012) (emphasis added). Defendants' new rules, on the other hand, allow plant employees to perform these tasks. (JA033:¶¶187-90.) They also prevent government inspectors from supervising plants' reprocessing of otherwise condemnable poultry, contrary to the PPIA's mandate that such poultry "need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not adulterated." § 455(c). (JA034:¶¶191-94.)

These alleged violations at least should have been *considered* by the Panel in determining whether it could plausibly infer injury.[3] *Cf. In re Conservation League*, No. 14-1149, 2016 U.S. App. LEXIS 1437, at *14 (Jan. 29, 2016) (finding petitioner's standing supported by the Congressional scheme); *Sierra Club v. U.S. EPA*, 793 F.3d 656, 664 (6th Cir. 2015) (discussed below).

[3] *See Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("[A] plaintiff's standing must be analyzed with reference to the particular claim . . . .")

If this Court is to re-energize the *Public Citizen I*'s first prong, the alleged statutory scheme becomes crucial for evaluating whether claimants have demonstrated their alleged increased risk of injury is "substantial."[4] Otherwise, courts are left without an anchor to prevent them from running aground of distinct separation-of-powers problems. They become the ultimate arbiter of tolerable risk, regardless of how well suited they are for this task. *See Baur v. Veneman*, 352 F.3d 625, 643 (2d Cir. 2003) (stating that evaluating the underlying agency action's soundness "is better analyzed as an administrative decision governed by the relevant statutes rather than a constitutional question governed by Article III").

This is consistent with the Supreme Court's *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (*Clapper*) and *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* (*Laidlaw*) decisions. 528 U.S. 167, 181 (2000) (finding that plaintiffs had standing for a Clean Water Act permit violation despite the defendant's argument that they had to show harm to their health or the environment). The *Clapper* Court ultimately upheld *Laidlaw* but distinguished it: the *Clapper* plaintiffs had not shown that they were even subject to the allegedly unconstitutional surveillance, whereas, in *Laidlaw*, the "unlawful discharges were 'concededly ongoing.'" 133 S. Ct. at 1153 (quoting 528 U.S. at 183-84).

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[4] *Accord*, *Public Citizen I*, 489 F.3d at 1289, 1291-98 (demanding more evidence when injury stemmed from a failure to promulgate the petitioners' preferred alternatives under a very broadly worded statute).

Here, it is undisputed that the unlawful behavior's result—poultry entering commerce from plants with unlawful inspection rules—is ongoing, even if the resulting risks are disputed. Such concededly ongoing unlawful activity means the Panel should have likewise concluded that Plaintiffs did not need to surmount a "standing hurdle higher than . . . for success on the merits." 528 U.S. at 181.

B. The Panel Did Not Properly Consider How Plaintiffs' Statistical Evidence Shows That Defendants' Rules Pose "Substantially Increased Risk" of Injury.

The Panel's perception that Plaintiffs cherry-picked isolated data (slip. op at 17-18) seems to come from a lack of clarity about their standing evidence.

The only data from which to estimate the challenged rules' effects comes from the Defendants' pilot project, which the Defendants describe as a before-and-after quasi-experiment. (JA440.) Despite the pilot's start in 1998, Defendants relied upon data from 2006 to 2010 to conclude that removing online inspectors would have positive health benefits. *See* 79 Fed. Reg. at 49,566-67. But Plaintiffs proffered evidence showing that the new system, even with its claimed increase in offline verification tasks, did not work. For example, Plaintiffs obtained a larger set of the *Salmonella* verification data, which showed that, over the course of 10 years, a vast majority of pilot plants, 14 of the 20 (70%), had higher *Salmonella* rates than when they were not in the pilot. (JA341.)

In fact, the pilot plants had 1.6% higher rates than when not in the pilot.

(JA341.[5]) Defendants have never contended this proffered difference is trivial, failing to even address the data during the rulemaking. (*See* JA035-36:¶162.) 79 Fed. Reg. at 49,578. Indeed, Defendants' risk assessment *presumes* that a decrease in only 2% of plants' rates would prevent more than 3,980 *Salmonella* illnesses (JA430) and is the basis for the rule. 79 Fed. Reg. at 49,611. So, given the serious exposure implications that include death, they could hardly claim that a close to 2% *demonstrated rate increase* is too small to pose a realistic threat.

This evidence does not suffer from the "additional problems" the Panel cites. (*See* slip op. at 18.) Since it is pilot-plant offline verification data, it already "takes into account the increased allocations in offline inspection[s]" under the new rules.[6] (*See id.*) Moreover, while it does not take into account the final rules' lower line-speed limits, the speeds allowed under the final rules are *higher* than the average speeds at the pilot plants.[7] Defendants essentially concede that the

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[5] 8.8 versus 7.2% for all plants combined. The Court should also consider that, for the 70% of plants with higher rates when they were in the pilot, the rates were almost double (9.5 versus 5.1%). (Lovera Decl. ¶6; Lovera Ex. A.) According to Defendants, the higher these rates, "the greater the potential for the public to consume a product that may cause foodborne illness." USDA, FSIS, "Evaluation of HACCP Inspection Models Project (HIMP)" ("HIMP Rep.") at 26 (Aug. 2011), located at http://www.fsis.usda.gov/wps/wcm/connect/fcd9ca3e-3f08-421f-84a7-936bc410627c/Evaluation_HACCP_HIMP.pdf?MOD=AJPERES. *Cf. NRDC v. EPA*, 464 F.3d 1, 7, n.6 (D.C. Cir. 2006) (stating a party's standing burden does not preclude it from correcting evidence misperceptions in a rehearing petition).

[6] This is because Defendants presume that plants will perform like the pilot plants.

[7] HIMP Rep. at 11.

voluntary nature of the rules is unlikely to matter, as they estimate that plants producing 99.9% of domestic poultry will adopt the rules. 79 Fed. Reg. at 49,618.

Thus, Plaintiffs have proffered more than mere predictions of harm, but *demonstrable evidence* supporting such a prediction, which this Court has indicated it must accept as true when assessing standing. *See Osborn v. Visa Inc.,* 797 F.3d 1057, 1065 (D.C. Cir. 2015). This evidence should have been enough to plausibly infer a substantially increased risk of harm from adulterated and unwholesome poultry under Defendants' rules and that the Plaintiffs have standing. *Cf. Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1234-35 (D.C. Cir. 1996) (finding "non-trivial variations in risk" enough to remove the threat from "the realm of the hypothetical" (internal quotation marks and citation omitted)). *See Massachusetts v. EPA*, 549 U.S. 497, 526, n.23 (2006) (citing with approval).

C. Judge Henderson's Concurring Opinion Deserves Rehearing.

In terms of the availability of poultry not produced under Defendants' new rules, Judge Henderson's concurring opinion overlooks Plaintiff Jane Foran's allegation of being "unable to find *any* farmers markets near where [her] family lives in Florida[,]" and that she must buy chicken at grocery stores, specifically demonstrating the product is not readily available.[8] (JA048:¶6 (emphasis added).) Plaintiffs now submit declarations detailing Plaintiff Margaret Sowerwine and

[8] Plaintiffs also are injured from not avoiding product. (JA010-11:¶4, JA058:¶9.)

declarant Alina Pittman's inability to find alternative poultry sources near their homes.[9] (Sowerwine Supplemental ("Supp.") Decl. ¶¶3, 6, 8; Pittman Supp. Decl. ¶¶4-8.) They also detail the unreasonable amount they have to pay for this poultry, specifying that they both pay two- to three-times more for chicken at their local farmers markets. Pittman's indicates that ground-turkey prices are cost-prohibitive, at two-and-a-half times more than that from the next-closest farmers market, 30 miles away. (Sowerwine Supp. Decl. ¶¶5-8; Pittman Supp. Dec. ¶¶4-6.)

D. In the Alternative, the Panel Should Remand the Case.

If nothing else, the case deserves to be remanded to be consistent with this Court's decisions in *Haase v. Webster* (*Haase I*), 807 F.2d 208 (D.C. Cir. 1986) and *Haase v. Sessions* (*Haase II*), 835 F.2d 902, 903 (D.C. Cir. 1987) (remanding the lower court decision when it improperly converted the plaintiff's motion to dismiss to one for summary judgment, notwithstanding that this Court found that plaintiff "failed to plead sufficient facts to warrant standing for declaratory relief").

Like there, the lower court gave no notice of that it would dismiss under a

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[9] Good cause exists to consider these. *See Ams. for Safe Access v. DEA*, 706 F.3d 438, 455 (D.C. Cir. 2013) (Henderson, J., dissenting). Plaintiffs allege injury from "spend[ing] additional resources to seek out and purchase poultry from plants that have not adopted [the new rules], if this is even possible." (JA011-12:¶6.) They did not further support this, though, as Defendants never moved to dismiss and did not even raise the issues in opposing the preliminary injunction motion below. (*See* JA557 (disputing the risks because Plaintiffs consume farmers-market chicken, but not contesting injury from either higher prices or lack of availability).

summary judgment standard. Indeed, the Defendants here did not move to dismiss. Further, the Panel based its conclusions on factual evidence not considered under the proper standard below, including the alleged pilot plants' higher *Salmonella* rates and whether these allegations accounted for increased offline verifications. Nor were Plaintiffs able to address the issues raised by Judge Henderson.

In fact, in *AFGE, AFL-CIO, v. Vilsack*, the lower court indicated that Plaintiffs would have demonstrated injury-in-fact under a dismissal standard. 14-cv-1753 (KBJ), 2015 U.S. Dist. LEXIS 100184, at *4-5, 13 (July 31, 2015) (evaluating "essentially the same standing arguments" but distinguishing that case "in one significant respect[:]" the plaintiffs there did not have the "higher evidentiary burden" because they did not move for a preliminary injunction).[10] Upon remand, Plaintiffs would be able to have their factual standing evidence properly evaluated under the correct standard.[11]

II. The Questions Presented Are of Exceptional Importance.

While Plaintiffs' standing is primarily at issue, the Panel's decision is far reaching because it finds that the increased risk of harm under the Defendants' new poultry rules was not "substantial." The decision will thus bar anyone from

[10] The court ruled that the plaintiffs there did not show causation, but they have appealed. The present Plaintiffs' evidence includes much of what the court found lacking. *See* 2015 U.S. Dist. LEXIS 100184, at *20-21.

[11] Certainly, a subsequent finding to the contrary would be reversible error.

challenging the rules—even though virtually everyone consuming poultry will be exposed to this product.

The Panel decision also conflicts with the First, Second, Sixth, and Ninth Circuits by not according weight to the Congressional scheme allegedly violated when assessing standing. *See Kerin*, 770 F.3d at 982 & n.1 (discussed above) (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 948 (9th Cir. 2002) and quoting *Baur*, 352 F.3d at 634-35). *See also Sierra Club*, 793 F.3d at 664 (finding it reasonably inferable that petitioners suffered injury-in-fact based solely upon the Clean Air Act's requirements).

Further, by not remanding the case, the Panel decision conflicts with Second, Fourth, Fifth, and Seventh Circuits. *See Heirs of Fruge v. Blood Services*, 506 F.2d 841, n.2 (5th Cir. 1975); *Charbonnages de France v. Smith*, 597 F.2d 406, 416-417, n.9 (4th Cir. 1979); *Box v. A & P Tea Co.,* 772 F.2d 1372*,* 1376 (7th Cir. 1985); *Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir. 1980).

Respectfully submitted,

DATED: February 4, 2015

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