

Broadening Slaughterhouse Inspections

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INTRODUCTION

On September 3, 1991, a fire erupted inside a poultry plant in Hamlet, North Carolina.¹ Workers ran for the exits, but they were trapped by doors locked from the outside, without sprinklers or an evacuation plan.² Twenty-five workers died.³ In the eleven years that the plant was in operation, a worker safety inspector had never visited.⁴ In contrast, a meat safety inspector had been there every day and had approved locking a door, ostensibly to keep flies out.⁵ Conflict between overlapping regulatory systems had deadly consequences in 1991, and similar conflicts continue to regularly occur.

Slaughterhouses contain two radically different safety regimes: one for meat, and another for workers. This Note compares the ever-present inspections performed by the Department of Agriculture's Food Safety and Inspection Service (FSIS) and the never-present inspections of the Department of Labor's Occupational Safety and Health Administration (OSHA). Both inspection regimes fall short. To improve them, Congress should require FSIS meat inspectors in slaughterhouses to identify and enforce violations of federal workplace safety laws.

The American meat⁶ industry was in crisis during the height of the COVID-19 pandemic.⁷ In the second week of April 2020, Smithfield, the largest pork processor in the country, closed a plant in South Dakota because of COVID-19.⁸ That plant accounted for approximately 4%–5% of U.S. pork production.⁹ During the week of April 25, 2020, production of beef, pork, and chicken declined by 13%, compared to the same week one year prior.¹⁰ Meat prices for producers cratered soon after.¹¹ Following public outcry and pressure from elected officials, the President issued an executive order designating the meat and poultry supply chain

1. John Drescher, *The Forgotten Lessons of the Hamlet Fire*, THE ASSEMBLY (Sept. 1, 2021), <https://www.theassemblync.com/politics/the-forgotten-lessons-of-the-hamlet-fire/> [<https://perma.cc/5HH2-J6FD>].

2. *Id.*

3. *Id.*

4. *Id.*; Anna Diamond, *The Deadly 1991 Hamlet Fire Exposed the High Cost of "Cheap,"* SMITHSONIAN MAG. (Sept. 8, 2017), <https://www.smithsonianmag.com/history/deadly-1991-hamlet-fire-exposed-high-cost-cheap-180964816/> [<https://perma.cc/6GHU-TGFG>].

5. Drescher, *supra* note 1.

6. In this Note, meat refers to both poultry (such as chicken, turkey, and duck) and the things traditionally included in the definition of meat (such as beef, pork, and mutton).

7. Jodi Schwan, *Smithfield to Close Sioux Falls Plant Indefinitely*, SIOUXFALLS.BUS., <https://www.siouxfalls.business/smithfield-to-close-sioux-falls-plant-indefinitely/> [<https://perma.cc/EQQ2-72NN>] (last visited Dec. 30, 2024).

8. Seth Millstein, *The Top Pork Producer in the U.S. Is Owned by China, But Harming Local Communities*, SENTIENT MEDIA (Feb. 26, 2024), <https://sentientmedia.org/top-pork-producing-states/> [<https://perma.cc/CK3W-H8J9>]; Schwan, *supra* note 7.

9. Schwan, *supra* note 7.

10. JOEL L. GREENE, CONG. RSCH. SERV., IN11366, COVID-19 DISRUPTS U.S. MEAT SUPPLY; PRODUCER PRICES TUMBLE 2–3 (2020).

11. *See id.* Producer prices for beef, pork, and chicken each declined by 10%, 18%, and 29%, respectively. *Id.* at 2.

as critical infrastructure, forcing them to remain open.¹² There is evidence that the meatpacking industry drafted the executive order in order to keep processing plants open.¹³ In 2020, OSHA received over 100 complaints related to meatpacking facilities, but it issued just nine citations in response.¹⁴ Meanwhile, managers at Tyson, the largest chicken processor in the country, made bets on how many employees would get sick.¹⁵ Nearly 60,000 workers in meatpacking plants contracted COVID-19, and hundreds died.¹⁶ By May 2020, four USDA meat inspectors had died.¹⁷ During a national meat shortage, worker safety became a footnote.¹⁸

This Note is not about the COVID-19 crises in American slaughterhouses; it is about the crises that the pandemic revealed. The appalling events that happened within the industry during the pandemic exacerbated pre-existing failures, demonstrated by the 1991 Hamlet fire, to keep workers safe.¹⁹ These events also

12. Exec. Order No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020); *see also* Hoeven Statement on Guidance Providing Flexibility to Meat Processing Facilities: Senator Worked with Agriculture Secretary to Help Maintain Food Supply Chain, Keep Facilities Operating Safely, U.S. SENATOR FOR N.D. JOHN HOEVEN (Apr. 27, 2020), <https://www.hoeven.senate.gov/news/news-releases/hoeven-statement-on-guidance-providing-flexibility-to-meat-processing-facilities1> [<https://perma.cc/S425-U9T6>] (urging administration officials to work toward guidance to keep meat processing facilities open and safe amidst COVID-19).

13. Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020, 2:43 PM), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open> [<https://perma.cc/ZPS9-Z2ZW>].

14. Memorandum from the Majority Staff to the Members of the Select Subcomm. on the Coronavirus Crisis 11 (Oct. 27, 2021), <https://www.documentcloud.org/documents/21093338-20211027-meatpacking-report> [<https://perma.cc/CHY3-97GN>] [hereinafter Memorandum from Majority Staff].

15. Laurel Wamsley, *Tyson Foods Fires 7 Plant Managers Over Betting Ring on Workers Getting COVID-19*, NPR (Dec. 16, 2020, 5:30 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/16/947275866/tyson-foods-fires-7-plant-managers-over-betting-ring-on-workers-getting-covid-19> [<https://perma.cc/F8AF-TZMD>].

16. Memorandum from Majority Staff, *supra* note 14, at 6. Between March 1, 2020 and February 1, 2021, at least 269 workers in meatpacking plants died from COVID-19. *Id.*; *see also* Sky Chadde, *Tracking COVID-19's Impact on Meatpacking Workers and Industry*, INVESTIGATE MIDWEST (Apr. 16, 2020), <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry> [<https://perma.cc/5546-FDKH>] (finding that there have been 423 reported worker deaths across 29 states since April 2020).

17. Kelly Struthers Montford & Tessa Wotherspoon, *The Contagion of Slow Violence: The Slaughterhouse and COVID-19*, 10 ANIMAL STUD. J. 80, 95 (2021).

18. *See* Michael Corkery, David Yaffe-Bellany & Derek Kravitz, *As Meatpacking Plants Reopen, Data About Worker Illness Remains Elusive*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2020/05/25/business/coronavirus-meatpacking-plants-cases.html> (discussing executive order issued to keep meatpacking plants open, which did not address proper COVID-19 testing for employees).

19. In this respect, meat processing plants resembled prisons, jails, and tribal reservations—places where longstanding health inequities existed long before the pandemic, with deadly consequences when COVID-19 hit. *See* Victoria Law, *Health Care in Jails and Prisons Is Terrible. The Pandemic Made It Even Worse*, VOX (June 28, 2022, 7:00 AM), <https://www.vox.com/23175978/health-care-prison-jail-covid-pandemic> [<https://perma.cc/KMW9-CZPF>]; Gloria Oladipo, *Native American Communities Lashed by Covid, Worsening Chronic Inequities*, GUARDIAN (Dec. 13, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/dec/13/pandemic-challenges-native-american-communities> [<https://perma.cc/L82T-BT5N>].

demonstrate the vast power disparity between slaughterhouse workers and their employers, as well as the need for change.

In 2020, the country prioritized meat over worker safety, just as it had in response to Upton Sinclair's 1906 novel, *The Jungle*. Sinclair famously chronicled a fictional immigrant worker's hardship—including violence, abuse, and low pay—while working for a meat processing company in Chicago.²⁰ The novel was published in a socialist magazine, and Sinclair hoped that it would garner opposition to “wage slavery.”²¹ Instead of inspiring a public outrage against abusive working conditions, Sinclair's novel sparked an outcry against stomach-turning food processes.²² *The Jungle* led to federal investigations and ultimately federal laws, including the Federal Meat Inspection Act and Pure Food and Drug Act, which created the Food and Drug Administration and the general framework that regulates food in the United States today.²³

Linking FSIS and OSHA inspections is not a new idea. In 1994, in the aftermath of the Hamlet fire, the two agencies signed a memorandum of understanding (MOU) to collaborate and train meat inspectors to recognize and report OSHA violations and otherwise resolve tensions between the two regulatory systems.²⁴ That MOU has failed. A governmental report issued more than twenty years after the MOU was enacted found that it had not been fully implemented.²⁵

This Note proposes a statutory amendment to *require* FSIS inspectors to report OSHA violations, and to subject inspectors to oversight from both the Departments of Agriculture and Labor. This proposal would not be a panacea for all the ills of modern slaughterhouse work and would be most effective if paired with other reforms. However, requiring FSIS inspectors to report OSHA violations could meaningfully make workers safer. Embedding worker safety within the FSIS inspection regime would realize the promise of the 1994 MOU by forcing agency action. Enacting this proposal would force the federal government to take a more holistic approach to food safety and strengthen worker safety enforcement for a vulnerable workforce.

The Note begins with a discussion of FSIS's and OSHA's histories, practices, and challenges in Parts I and II, respectively. Part III outlines a potential reform: amending the statute to require FSIS inspectors to enforce violations of worker safety in slaughterhouses. This reform would address areas of overlap and tension

20. UPTON SINCLAIR, *THE JUNGLE* 246–47 (Simon & Brown 2012) (1906).

21. Christopher Klein, *How Upton Sinclair's 'The Jungle' Led to US Food Safety Reforms*, HISTORY (May 10, 2023), <https://www.history.com/news/upton-sinclair-the-jungle-us-food-safety-reforms> [https://perma.cc/YA5N-XUYN].

22. *Id.*

23. *Id.*

24. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AND THE U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE (1994), <https://www.osha.gov/laws-regs/mou/1994-02-04> [https://perma.cc/5BQN-5D2N].

25. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-12, BETTER OUTREACH, COLLABORATION, AND INFORMATION NEEDED TO HELP PROTECT WORKERS AT MEAT AND POULTRY PLANTS 34 (2017).

between worker safety and food safety rules and enhance protections for a particularly vulnerable workforce. Part IV addresses counterarguments related to agency capture, overburdening inspectors, and constitutional challenges. Finally, the Note contextualizes this proposal alongside other proposals to improve modern meatpacking and concludes.

I. FSIS INSPECTIONS OF POULTRY AND MEAT

Meat inspection in the United States is old. In the century since the 1906 Federal Meat Inspection Act (FMIA) was passed, both the meat industry and our understanding of the risks of unsafe meat have radically changed. This Part begins with an overview of the sordid history that led to the creation of the federal meat inspection system. Following this is a discussion of modern FSIS inspection procedures amid high line speeds and high levels of meat production. The Part concludes with an analysis of how meat inspection has changed in response to increasing fears of risks related to pathogens, as shown by two recent regulations.

A. HISTORY OF MEAT INSPECTION LAWS

The momentum behind the Federal Meat Inspection Act was built over decades. As the country's population grew in the late nineteenth century, refrigeration and increased demand for meat led to consolidation and greater distance (both geographically and relationally) between meatpackers and consumers.²⁶ This relaxed quality controls for meat, and the meatpacking industry was frequently critiqued for processing substandard meat.²⁷ Several European countries including Italy, France, Spain, and Germany issued embargos against American meat due to its notoriously poor quality between 1879 and 1888.²⁸ In 1883, President Chester Arthur ordered an investigation of the meatpacking industry.²⁹ This led to the Federal Meat Inspection Act of 1890, which required inspections of meat intended for export but did not affect meat for domestic consumption.³⁰ The embalmed beef scandal of 1898 increased momentum for further regulation. The scandal involved rotten beef preserved with harmful chemicals, including formaldehyde, that was sent to U.S. troops during the Spanish–American War.³¹ The rotten beef may have killed hundreds of soldiers, nearly ten times the number killed in battle.³²

Upton Sinclair's *The Jungle*, published in 1906, was intended to galvanize public support against capitalism; it decried wage slavery and the crushing

26. See H. Templeton Brown, *The First 50 Years Under the Federal Meat Inspection Act of 1906*, 11 FOOD DRUG COSM. L.J. 127, 128 (1956).

27. *Id.* at 128–29.

28. *Id.* at 129.

29. *Id.*

30. *Id.*

31. Edward F. Keuchel, *Chemicals and Meat: The Embalmed Beef Scandal of the Spanish-American War*, 48 BULL. HIST. MED. 249, 249, 252–53 (1974); Deborah Blum, “Gloom and Horror Unrelieved”: Upton Sinclair’s Classic Novel “The Jungle” Almost Never Saw the Light of Day, PBS (Jan. 27, 2020), <https://www.pbs.org/wgbh/americanexperience/features/poison-squad-gloom-horror-unrelieved/> [https://perma.cc/3WLJ-7U8E].

32. *Id.*

inequality between workers and bosses.³³ This did not happen. Instead, the book inflamed public anger about contaminated meat, and sales of meat products fell by half soon after its publication.³⁴ Readers were revolted by Sinclair's descriptions of meat contaminated with dead rats, fecal matter, dust, and unsavory chemicals to disguise other contaminants.³⁵ President Roosevelt commissioned the Neill–Reynolds report to verify Sinclair's claims about adulterated meat in slaughterhouses.³⁶ Sinclair's descriptions were wholly substantiated. Consequently, eliminating meat adulteration became one of the principal goals of the laws that followed.³⁷

Even meatpackers joined the chorus calling for federal regulation: “They began to realize that government inspection was the only thing that could save their business, for that alone could restore the confidence of the public; so they faced about and supported inspection.”³⁸ Today, some of the harshest critics of modern meat inspection argue that it assuages public fears without meaningfully protecting public safety.³⁹ Ironically, *The Jungle* describes a government inspector fully aware of the risks of contaminated meat while in a slaughterhouse, conveying the imprimatur of safety while ignoring the carcasses before him.⁴⁰

33. See SINCLAIR, *supra* note 20, at 99, 246–47.

34. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 681 (2d ed. 1985).

35. See *id.*

36. Klein, *supra* note 21.

37. See CONDITIONS IN CHICAGO STOCK YARDS: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING THE REPORT OF MR. JAMES BRONSON REYNOLDS AND COMMISSIONER CHARLES P. NEILL, SPECIAL COMMITTEE APPOINTED TO INVESTIGATE THE CONDITIONS IN THE STOCK YARDS OF CHICAGO, H.R. Doc. No. 873, at 1–6 (1906). The Neill–Reynolds report is replete with grotesque descriptions: “The conditions shown by even this short inspection to exist in the Chicago stock yards are revolting. It is imperatively necessary in the interest of health and of decency that they should be radically changed.” *Id.* at 1.

Some of the privies are situated at a long distance from the workrooms, and men relieve themselves on the killing floors or in a corner of the workrooms. Hence, in some cases, the fumes of the urine swell the sum of nauseating odors arising from the dirty-blood-soaked, rotting wooden floors, fruitful culture beds for the disease germs of men and animals.

Id. at 5. “[W]e saw meat shoveled from filthy wooden floors, piled on tables rarely washed, pushed from room to room in rotten box cars, in all of which processes it was in the way of gathering dirt, splinters, floor filth, and the expectoration of tuberculous and other diseased workers.” *Id.* at 6.

38. C.C. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROBS. 3, 13–14 (1933); see FRIEDMAN, *supra* note 34, at 461.

39. Roger Roots, *A Muckracker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2425–26 (2001) (“The sad reality is that federal meat inspection laws have never been seriously designed to do anything other than placate the public's post-*Jungle* fears of meat contamination.”).

40. See UPTON SINCLAIR, *THE JUNGLE* 42 (1906). Sinclair wrote:

Before the [hog] carcass was admitted here, however, it had to pass a government inspector, who sat in the doorway and felt of the glands in the neck for tuberculosis. This government inspector did not have the manner of a man who was worked to death. . . . he was quite willing to have a conversation with you, and to explain to you the deadly nature of the ptomaines which are found in tubercular pork; and while he was talking with you you could hardly be so ungrateful as to notice that a dozen carcasses were passing him untouched.

Id.

Since 1906, the law has been revised several times, most notably in 1967.⁴¹ The core tenets of the 1906 meat inspection regime still exist, including mandatory pre- and post-slaughter inspections of meat and USDA inspection and approval of conditions within slaughterhouses.⁴² FSIS also administers the 1957 Poultry Products Inspection Act (PPIA), which similarly requires both pre- and post-mortem inspections of poultry and affixes labels to meat, attesting that it has been inspected.⁴³ Meat cannot be exported or sold interstate without these labels.⁴⁴

B. FSIS PRACTICES AND PROCEDURES

The Department of Agriculture's Food Safety and Inspection Service (FSIS) employs approximately 7,500 food inspectors to enforce the FMIA and the PPIA.⁴⁵ Inspectors must pass a written test and hold a bachelor's degree or have one year of experience in the food industry.⁴⁶ USDA describes these inspectors as "the first line of defense against diseased and adulterated meat and poultry."⁴⁷

A staggering number of animals are killed for food annually. In the United States, 34.3 million cattle and 125 million hogs were killed in 2022.⁴⁸ Nearly 10 billion chickens were killed in the same year.⁴⁹ For perspective, the global human population was just over 8 billion in 2023.⁵⁰ Slaughterhouses disassemble animals at breathtaking speed. Federal regulations allow plants to slaughter 140 chickens per minute, and waivers are available that allow plants to go as fast as 175 per minute.⁵¹ Other regulations allow plants to slaughter 390 cattle and 1,106

41. Lyndon B. Johnson, President of the U.S., Remarks Upon Signing Bill Amending the Meat Inspection Act (Dec. 15, 1967) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-upon-signing-bill-amending-the-meat-inspection-act> [<https://perma.cc/54UN-W3CQ>]). The 1967 amendments to the Federal Meat Inspection Act closed one of the initial Act's loopholes that had exempted intrastate meat from federal regulation, approximately 25% of processed meat sold at the time. *Id.* Sinclair attended President Johnson's signing ceremony for the bill, during which the President dubbed the bill a gift to American housewives. *Id.*

42. Am. Pub. Health Ass'n v. Butz, 511 F.2d 331, 332 (D.C. Cir. 1974).

43. Poultry Products Inspection Act, Pub. L. No. 85-172 (1957).

44. 21 U.S.C. § 606.

45. *See What Do the Food Safety and Inspection Service Inspectors Do?*, U.S. DEP'T OF AGRIC.: ASKUSDA (Apr. 19, 2024), <https://ask.usda.gov/s/article/What-do-FSIS-inspectors-do>.

46. *Food Inspector*, U.S. DEP'T OF AGRIC.: FOOD SAFETY & INSPECTION SERV. (Aug. 29, 2023), <https://www.fsis.usda.gov/careers/career-profiles/food-inspector> [<https://perma.cc/9PZN-P2Q9>].

47. *Id.*

48. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., LIVESTOCK SLAUGHTER 2022 SUMMARY 6 (Apr. 2023) [<https://perma.cc/PBB2-QHKC>]. This Summary does not include the entirety of animals slaughtered for food in the United States; it excludes animals such as turkeys, duck, fish, hunted animals, etc. *See id.*

49. U.S. DEP'T OF AGRIC., NAT'L AGRIC. STAT. SERV., POULTRY SLAUGHTER 2022 SUMMARY 5 (Feb. 2023) [<https://perma.cc/YE4G-QPNL>].

50. Hannah Ritchie et al., *Population Growth*, OUR WORLD IN DATA, <https://ourworldindata.org/population-growth?insight=the-world-population-has-increased-rapidly-over-the-last-few-centuries#key-insights> [<https://perma.cc/UL28-3F6S>] (last visited Dec. 30, 2024).

51. 9 C.F.R. § 381.69(a); Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System, 83 Fed. Reg. 49048, 49048 (Sept. 28, 2018).

swine per hour.⁵² The breakneck speed of modern slaughterhouses makes them difficult to regulate. The same regulations that allow such blisteringly fast line speeds state that “[a] careful post-mortem examination and inspection shall be made of the carcasses and parts thereof.”⁵³ Assuring consumers that inspections will be careful, while also allowing such rapid speeds, is misleading at best.

In order to even receive federal inspections, facilities must establish sanitation operating procedures, conduct a hazard analysis, and agree to follow FSIS regulations.⁵⁴ Inspectors are stationed on meat-production lines, and they are supposed to inspect each carcass and issue citations and condemn meat when facilities fall short.⁵⁵

In a promotional video created by the Department of Agriculture, Beverly Winston, an FSIS food inspector, stated that inspectors are “trained to identify and remove disease abnormalities on the production line as well as ensure sanitary dressing requirements are continuously carried out.”⁵⁶ This approach, guided by the senses, is colloquially known as the “poke and sniff” method and more formally described as organoleptic.⁵⁷ FSIS inspectors condemn meat that falls below their standards.⁵⁸ Another FSIS inspector, anonymously interviewed for a documentary, described their experience working at a poultry plant where they inspect 175 birds per minute.⁵⁹ The inspector stated:

I’ve seen plant person[s] throwing chickens in the chiller and would have fecal matter on them. I’ve seen inspectors sleep on the line and product just going on by. And you’ll see employees, they’ve been to the bathroom. They’re not washing their hands. I’ve seen people drop their knives and not attempt to pick them up and wash it. . . . They got a quota they gotta meet.⁶⁰

The contrast between USDA’s and the FSIS inspector’s descriptions is striking. Unfortunately, other accounts offer further support for the anonymous inspector’s descriptions.⁶¹

52. 9 C.F.R. § 310.1.

53. 9 C.F.R. § 310.1(a).

54. *Inspection for Food Safety: The Basics*, U.S. DEP’T OF AGRIC. (Apr. 10, 2024) [<https://perma.cc/RR92-544Q>].

55. *See id.*

56. USDAFoodSafety, *FSIS Employees Impact Food Safety*, YOUTUBE 3:10–3:24 (Sept. 28, 2016), <https://www.youtube.com/watch?v=v5CRdZjkhVg>.

57. *See What Is HACCP?*, PUB. BROAD. SERV., <https://www.pbs.org/wgbh/pages/frontline/shows/meat/evaluating/haccp.html> [<https://perma.cc/H97A-SRX3>] (last visited Dec. 30, 2024); CONSUMER FED’N OF AM., *THE PROMISE AND PROBLEMS OF HACCP: A REVIEW OF USDA’S APPROACH TO MEAT AND POULTRY SAFETY 4* (2015) https://consumerfed.org/wp-content/uploads/2010/06/150424_CFA-HACCP_report.pdf [<https://perma.cc/7XQ6-4YA7>].

58. *See* 21 U.S.C. § 606.

59. *Poisoned: The Dirty Truth About Your Food*, NETFLIX 51:07–52:30 (2023).

60. *Id.*

61. *See, e.g.,* Michael Fisher, *Federal Meat Inspection Has Failed to Adapt to Operational Environment*, FOOD SAFETY NEWS (Nov. 7, 2022), <https://www.foodsafetynews.com/2022/11/federal-meat-inspection-has-failed-to-adapt-to-operational-environment/> [<https://perma.cc/X73Y-HPVG>] (“The FSIS bureaucracy neither admits nor corrects mistakes.”); *Press Advisory: USDA Meat Inspectors Blow*

C. THE PIVOT TO PATHOGENS

Many dangers associated with meat lurk beyond the range of human senses, especially of humans ostensibly examining 140 chickens per minute. The federal meat-inspection regime was created to respond to extrinsic adulterants of meat rather than intrinsic, pathogen-based risks. The Centers for Disease Control and Prevention (CDC) estimates that 48 million Americans get sick, 128,000 are hospitalized, and 3,000 die of foodborne illnesses every year, many due to pathogens like *Salmonella*.⁶² Congress is aware of this, and the incidence of foodborne illnesses was a key rationale behind the passage of the bipartisan 2011 Food Safety Modernization Act, which granted the Food and Drug Administration (FDA) new authority to prevent hazards—but left USDA untouched.⁶³ USDA has jurisdiction over meat, eggs, and poultry, while FDA has jurisdiction over the other 80% of the food system.⁶⁴ Nonetheless, USDA has reconfigured its enforcement to respond to pathogen risks through regulation.

Around fifty years ago, USDA's meat-inspection procedures were challenged for insufficiently protecting consumers from pathogen-based risks. In 1974, in a case entitled *American Public Health Association v. Butz*, a nonprofit organization challenged the Department of Agriculture for labeling meat with statements like “U.S. Inspected for Wholesomeness” despite failing to perform microscopic inspections to look for pathogens like *Salmonella*.⁶⁵ *Salmonella*, a bacterium sometimes found in chicken and pork, can cause a number of adverse health effects ranging from fevers to death, but it can be destroyed through proper cooking.⁶⁶ *Salmonella* causes approximately 400 deaths in the United States every year.⁶⁷ Instead of seeking microscopic inspections as remedy, the nonprofit sought to require USDA to modify its labels to better inform consumers of the risks of pathogens and the need for proper handling and cooking.⁶⁸ The court

the Whistle on Dangerous New Hog Inspection System, GOV'T ACCOUNTABILITY PROJECT (Dec. 16, 2019), <https://whistleblower.org/press-release/press-advisory-usda-meat-inspectors-blow-the-whistle-on-dangerous-new-hog-inspection-system/> [<https://perma.cc/96CW-NFF5>] [hereinafter Press Advisory] (“This need to process as many animals as possible has created a culture of silence in which inspectors are encouraged not to report things they see. We are told that if we didn't see it, it didn't happen, and if we did see it we are doing our job wrong. I have seen contaminants being spread by workers who don't recognize when they are handling pathogenic materials, who then handle otherwise untainted meat and spread ingesta, feces, or other hazardous material.”).

62. *Estimates of Foodborne Illness in the United States: Burden of Foodborne Illness: Findings*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 5, 2018), <https://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> [<https://perma.cc/6QGH-56LB>].

63. See *Food Safety Modernization Act*, CORNELL COLL. OF AGRIC. & LIFE SCIS., <https://cals.cornell.edu/produce-safety-alliance/food-safety-modernization-act> [<https://perma.cc/5JWP-7H3N>] (last visited Dec. 30, 2024).

64. See RENÉE JOHNSON, CONG. RSCH. SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 4–6 (2016).

65. 511 F.2d 331, 331–33 (D.C. Cir. 1974).

66. Liz Weinandy, *How Dangerous Is Salmonella?*, THE OHIO STATE UNIV. WEXNER MED. CTR. (July 3, 2020), <https://wexnermedical.osu.edu/blog/how-dangerous-is-salmonella> [<https://perma.cc/KWY7-U6KV>].

67. *Id.*

68. See *Butz*, 511 F.2d at 332–33.

ruled for USDA, holding that because *Salmonella* bacteria are “inherent in the meat” they are not adulterants, and consequently the government’s labels were lawful.⁶⁹

When USDA changed its tune and sought to aggressively root out microscopic dangers, it was blocked by a court.⁷⁰ In 1996, shortly after a devastating outbreak of *E. coli* from Jack in the Box restaurants hospitalized hundreds and killed four children,⁷¹ USDA finalized regulations, known as the Hazard Analysis and Critical Control Point (HACCP) systems, to reduce the incidence of foodborne pathogens by banning and limiting certain pathogens.⁷² In *Supreme Beef Processors, Inc. v. USDA*, a meat processor challenged the HACCP regulations after repeatedly failing USDA tests for *Salmonella*.⁷³ USDA sought to withdraw its inspectors from the plant, which would have prevented the company from producing saleable meat.⁷⁴ Supreme Beef sought injunctive relief to prevent USDA from withdrawing its inspectors.⁷⁵ Despite applying *Chevron*, the court ruled against USDA and held that its *Salmonella* regulation exceeded its statutory authority.⁷⁶ Like the court in *Butz*, this court held that *Salmonella* was not an adulterant because it is destroyed by normal cooking methods and because it was a pre-existing characteristic of the meat prior to its arrival at the plant.⁷⁷

This pair of cases demonstrates how FSIS inspectors have become fully enmeshed in modern meatpacking and how they have been restricted by the FMIA’s initial purpose to root out meat adulteration. Thankfully, USDA did not give up on fighting pathogens after *Supreme Beef*. Congress, USDA, the meat industry, and other groups renegotiated the HACCP and introduced a new system in 1998.⁷⁸ This version of HACCP is largely industry driven and agency supervised; it

69. *Id.* at 334–35.

70. *See Supreme Beef Processors, Inc. v. U.S. Dep’t of Agric.*, 275 F.3d 432, 434–36, 443 (5th Cir. 2001).

71. *See Update: Multistate Outbreak of Escherichia Coli O157:H7 Infections from Hamburgers – Western United States, 1992-1993*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (MMWR) (Apr. 16, 1993), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00020219.htm> [<https://perma.cc/VYT6-GKMM>]; News Desk, *Jack in the Box E. Coli Outbreak – 25th Anniversary*, FOOD SAFETY NEWS (Dec. 27, 2017), <https://www.foodsafetynews.com/2017/12/jack-in-the-box-e-coli-outbreak-25th-anniversary/> [<https://perma.cc/6XK4-S4XS>].

72. *See* Andy Frame, *Policy Changes in the Wake of the Jack in the Box E. Coli Outbreak*, FOOD SAFETY NEWS (Feb. 1, 2013), https://www.foodsafetynews.com/2013/02/policy-changes-since-the-jack-in-the-box-e-coli-outbreak/#google_vignette [<https://perma.cc/Z66F-9EJ8>]; Helena Bottemiller, *Looking Back: The Story Behind Banning E. Coli O157:H7*, FOOD SAFETY NEWS (Sept. 14, 2011), <https://www.foodsafetynews.com/2011/09/looking-back-in-time-the-story-behind-banning-e-coli-o157h7/> [<https://perma.cc/2TEJ-3FB2>]; 9 C.F.R. § 417.

73. *Supreme Beef*, 275 F.3d at 434–36.

74. *Id.* at 435–36.

75. *Id.* at 436.

76. *Id.* at 438–40. In *Chevron*, the Supreme Court held that courts should defer to agency interpretations of ambiguous statutes. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In 2024, the Supreme Court overturned *Chevron*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

77. *Supreme Beef*, 275 F.3d at 438–41.

78. Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38806 (July 25, 1996) (to be codified at 9 C.F.R. pts. 304, 308, 310, 320, 327, 381, 416, 417).

requires meat- and poultry-processing companies to identify contamination hazards likely to occur in a plant, establish steps to control those hazards, and support those conclusions with scientific evidence.⁷⁹ FSIS inspectors oversee compliance with HACCP systems by testing for certain strains of pathogens like Salmonella, E. coli, and more.⁸⁰ This system is often criticized for failing to establish a clear protocol when facilities fail to comply with regulatory requirements.⁸¹ For the purpose of this Note, the key point is that FSIS has bifurcated inspection for pathogens from inspections for “everything else.” Dr. Parthapratim Basu, former FSIS Chief Public Health Veterinarian, emphasized that “organoleptic inspection plays a critical role in meat and poultry inspection even today in protecting meat safety.”⁸²

FSIS’s reorientation to addressing pathogens has altered the role of FSIS inspectors within slaughterhouses. The initial proposed HACCP rule radically modified the role of FSIS inspectors on the line: instead of FSIS inspectors watching slaughterhouse lines, inspectors would oversee plant employees inspecting the lines.⁸³ In 2000, the D.C. Circuit held that this violated the Federal Meat Inspection and the Poultry Products Inspection Acts, and consequently USDA kept some FSIS inspectors on the line.⁸⁴

Despite USDA’s loss before the D.C. Circuit, its later regulations would alter the position of FSIS inspectors in plants. Two regulations issued by USDA in the last ten years have reduced the number of FSIS inspectors in slaughterhouses and applied the HACCP system’s deferential approach to companies in the context of in-plant, organoleptic inspections. In 2014, the Obama Administration finalized a regulation entitled the Modernization of Poultry Slaughter Inspection.⁸⁵ This rule allowed poultry processing plants to opt into the “New Poultry Inspection System,” which emphasizes microscopic testing over on-line inspection, reduces the number of FSIS inspectors in plants, and places the onus on plant employees to sort out

79. See U.S. GEN. ACCT. OFF., GAO-02-902, BETTER USDA OVERSIGHT AND ENFORCEMENT OF SAFETY RULES NEEDED TO REDUCE RISK OF FOODBORNE ILLNESS 1–2 (2002).

80. *Id.* at 2.

81. See *id.* at 8–10, 21 (“FSIS is not ensuring that all plants take prompt and effective corrective action to return to compliance with regulatory requirements after violations have been identified. . . .”); CONSUMER FED’N OF AM., *supra* note 57, at 24 (“Two major gaps include the failure of plants to develop adequate HACCP plans and the failure of FSIS to establish a clear policy for when multiple, reoccurring non-compliances should be elevated to more stringent enforcement action.”); *What Is HACCP?*, *supra* note 57 (“To inspectors critical of HACCP, the acronym has come to stand for ‘Have a Cup of Coffee and Pray.’”).

82. Email from Dr. Parthapratim Basu to Author (Dec. 2, 2023, 9:20 AM) (on file with author).

83. Am. Fed’n of Gov’t Emps., AFL-CIO v. Glickman, 215 F.3d 7, 8–11 (D.C. Cir. 2000).

84. *Id.* at 10–11 (“The government does not deny that in the ninety or so years since passage of the FMIA in 1907, ‘inspection’ has been taken to mean an organoleptic examination of the carcass, an inspection, that is, using the senses. Now the government has discovered another meaning, . . . [T]he government believes that federal employees fulfill their statutory duty to inspect by watching others perform the task. One might as well say that umpires are pitchers because they carefully watch others throw baseballs.”).

85. Lydia Zuraw, *Reactions Vary to USDA’s Poultry Inspection Rule*, FOOD SAFETY NEWS (Aug. 1, 2014), <https://www.foodsafetynews.com/2014/08/groups-react-to-final-poultry-inspection-rule/> [https://perma.cc/NHB7-3HYH].

carcasses with visible defects.⁸⁶ The FSIS inspectors' union unsuccessfully challenged the poultry rule⁸⁷ and argued that it would "remove most federal inspectors from the slaughter line and turn over inspection activities currently performed by federal inspectors to untrained plant employees."⁸⁸ USDA itself estimated that the rule would eliminate as many as 800 inspector positions.⁸⁹ A 2018 USDA inspector general report found that while preliminary findings indicated that the regulation may have led to a decline in rates of Salmonella, the overall effectiveness of the rule was difficult to assess.⁹⁰

In 2019, under the Trump Administration, FSIS finalized a regulation entitled the New Swine Slaughter Inspection System, which would have similarly given companies greater control over line inspections in swine-processing facilities, eliminated caps on line speeds entirely, and reduced the number of FSIS inspectors in swine plants.⁹¹ The inspectors' union again protested that it would threaten inspector jobs.⁹² UFCW (representing slaughterhouse workers) and Public Citizen challenged this regulation, and a court enjoined the part of the rule that would have eliminated maximum line speeds in hog plants.⁹³ The court held that USDA inadequately considered worker safety.⁹⁴ However, the court allowed the part of the rule that reduced the number of FSIS inspectors in facilities to

86. FOOD SAFETY & INSPECTION SERV., POULTRY SLAUGHTER MODERNIZATION FAQs 1–2 (2014), https://www.fsis.usda.gov/sites/default/files/media_file/2021-02/Poultry-Slaughter-FAQ_073114.pdf [<https://perma.cc/72AE-SHTG>]; 9 C.F.R. § 381.76.

87. Am. Fed'n of Gov't Emps., AFL–CIO v. Vilsack, 118 F. Supp. 3d 292, 294–95 (D.D.C. 2015).

88. Press Release, Am. Fed'n of Gov't Emps., AFGE, Food Safety Groups Urge Congress to Reject Poultry Inspection Outsourcing Plan (Jan. 8, 2014), <https://www.afge.org/publication/afge-food-safety-groups-urge-congress-to-reject-poultry-inspection-outsourcing-plan> [<https://perma.cc/KRA4-Q6LF>]; *accord Vilsack*, 118 F. Supp. 3d at 294–95; Press Release, Rosa DeLauro, U.S. Rep., DeLauro, Slaughter Greatly Disappointed with USDA's Poultry Rule (July 31, 2014), <https://delauero.house.gov/media-center/press-releases/delauro-slaughter-greatly-disappointed-usda-s-poultry-rule> [<https://perma.cc/S9S7-6X74>].

89. Kim Geiger, *USDA May Ease Chicken Inspections*, L.A. TIMES (June 6, 2012, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2012-jun-06-la-fi-poultry-rules-20120606-story.html>.

90. OFF. OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT 24601-0006-31, FOOD SAFETY AND INSPECTION SERVICE'S OVERSIGHT OF THE NEW POULTRY INSPECTION SYSTEM 6 & n.20 (2018), <https://www.oversight.gov/sites/default/files/documents/reports/2020-05/24601-0006-31.pdf> [<https://perma.cc/9NT4-2TNS>].

91. See 9 C.F.R. §§ 309, 310; Chuck Jolley, *What's Behind the New Swine Slaughter Inspection System?*, FOOD SAFETY NEWS (Jan. 10, 2020), <https://www.foodsafetynews.com/2020/01/whats-behind-the-new-swine-slaughter-inspection-system/> [<https://perma.cc/J2N5-9K48>].

92. Eric Katz, *Federal Pork Inspectors Are Sounding the Alarm Over USDA's Plan to Give Industry More Control*, GOV'T EXEC. (Mar. 6, 2020), <https://www.govexec.com/management/2020/03/federal-pork-inspectors-are-sounding-alarm-over-usdas-plan-give-industry-more-control/163527/> [<https://perma.cc/45CA-LZP4>]; *accord* Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300, 52312 (Oct. 1, 2019) (to be codified at 9 C.F.R. pts. 301, 309, 310) (“[T]his final rule requires establishment personnel in NSIS [New Swine Slaughter Inspection System] establishments to sort and remove unfit animals before ante-mortem inspection by FSIS inspectors and trim and identify defects on carcasses and parts before post-mortem inspection by FSIS inspectors. . . . FSIS inspectors will observe establishment employees performing sorting procedures.”).

93. United Food & Com. Workers Union, Loc. No. 663 v. U.S. Dep't of Agric., 451 F. Supp. 3d 1040, 1045, 1050 (D. Minn. 2020).

94. *Id.* at 1050.

proceed.⁹⁵ The court's standing analysis neatly illustrated the perceived disconnect between FSIS inspectors and worker safety.⁹⁶ Applying the traditional standing factors outlined in *Lujan v. Defenders of Wildlife* (injury in fact, causation, and redressability),⁹⁷ the court found that the plaintiffs had standing with respect to their claim about line speeds, but that they lacked injury in fact and thus standing for their claim about the reduction of FSIS inspectors.⁹⁸ The court rejected the union's argument that fewer meat inspectors would lead to more injuries for workers.⁹⁹ USDA's recent poultry and swine rules, and the related litigation, demonstrate that inspectors' roles in meatpacking plants are changing and that their roles are still considered largely unrelated to worker safety.

II. OSHA INSPECTIONS

Federal regulation of meat safety radically differs from federal regulation of worker safety. Workers have been injured and killed at work since time immemorial, but the Occupational Safety and Health Act (OSHA) is relatively new. The array of legal systems predating OSHA partially explains why the agency (which goes by the same acronym) has been so neglected. This Part begins with a discussion of OSHA's history. The Part continues by delving into OSHA's modern enforcement, including its limited budget and personnel. Next, the Part explores OSHA inspections and enforcement in the meat industry, utilizing several case studies to demonstrate the agency's weak enforcement. OSHA's resources and remedies are inadequate to fulfill its mission.

A. HISTORY OF OSHA

For much of early American history, workers injured on the job lacked meaningful legal remedies. The so-called unholy trinity of tort defenses—assumption of risk, fellow servant rule, and contributory negligence—prevented most injured workers from receiving remedies.¹⁰⁰ In the late nineteenth century, workplace accidents rose as the nation industrialized.¹⁰¹ In response, states began to emulate European countries and adopted workers' compensation programs.¹⁰²

Workers' compensation serves as an insurance-like compromise between workers and employers. Employers benefit because the system allows them to pay workers diminished compensation (workers' compensation typically pays

95. *Id.* at 1051.

96. *See id.* at 1047–51.

97. *See id.* at 1047 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

98. *Id.* at 1050–51.

99. *Id.* at 1051.

100. Leslie Hertz Kawaler, *Intentional Torts Under Workers' Compensation Statutes: A Blessing or a Burden?*, 12 HOFSTRA L. REV. 181, 182–83 (1983); *see, e.g.*, *Lamson v. Am. Ax & Tool Co.*, 58 N.E. 585, 585–86 (Mass. 1900) (assumption of risk); *Farwell v. Bos. & Worcester R.R. Corp.*, 4 Met. 49, 50–51 (Mass. 1842) (fellow servant rule); *Schofield v. Chi., Milwaukee & St. Paul Ry. Co.*, 114 U.S. 615, 617 (1885) (contributory negligence).

101. *See* Arthur Larson, *Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 231 (1952).

102. *See id.* at 231, 233.

workers less than their regular salaries), and it allows them to avoid expensive litigation over workplace injuries.¹⁰³ Workers benefit from the guarantee that they will receive compensation if they are injured, without a legal battle.¹⁰⁴

Despite the spread of workers' compensation, many jurisdictions responded to industrial accidents, like the infamous 1911 Triangle Shirtwaist Fire in New York,¹⁰⁵ by enacting preventative—as opposed to simply remedial—worker safety legislation. After the *Lochner* era, the federal government gradually enacted limited federal worker safety legislation, such as the 1936 Walsh-Healy Act, which allowed the federal government to issue safety standards for government contractors.¹⁰⁶ Other early approaches focused on particularly hazardous industries.¹⁰⁷ During the 1940s and 1950s, unions advocated for a broader federal workplace safety law to prevent disparities between state standards and to prevent chronic hazards such as asbestos and radiation.¹⁰⁸ When OSHA finally passed in 1970, AFL-CIO President George Meany described it as “labor’s direst legislative priority.”¹⁰⁹ Upward trends in workplace-injury rates helped build momentum for the law as well.¹¹⁰ When OSHA was enacted, 3% of the nation’s labor force was annually injured on the job so significantly as to require sick leave.¹¹¹

Consequently, when OSHA became law, it was on top of a patchwork of worker safety legislation long predating it. Much of that patchwork remains, insofar as states and localities still have robust worker safety and workers' compensation laws and OSHA has delegated authority to twenty-two states to enforce federal workplace safety law so long as they are “at least as effective” as OSHA.¹¹²

103. See GRIFFIN T. MURPHY & JENNIFER WOLF, NAT'L ACAD. OF SOC. INS., WORKERS' COMPENSATION: BENEFITS, COSTS, AND COVERAGE (2020 DATA) 5, 63 (2022), <https://www.nasi.org/research/workers-compensation/workers-compensation-benefits-costs-and-coverage/> [<https://perma.cc/X9JU-XFVU>].

104. *Id.* at 5.

105. *Triangle Shirtwaist Factory Fire*, HISTORY (July 9, 2024), <https://www.history.com/topics/early-20th-century-us/triangle-shirtwaist-fire> [<https://perma.cc/ZK9V-VCBD>].

106. Robert Asher, *Organized Labor and the Origins of the Occupational Safety and Health Act*, 24 NEW SOLS. 279, 285 (2014).

107. *See id.* (railroad, mining, cargo handling).

108. *See id.* at 286; David Rosner & Gerald Markowitz, *A Short History of Occupational Safety and Health in the United States*, 110 AM. J. PUB. HEALTH 622, 625–26 (2020).

109. David E. Rosenbaum, *Bill on Job Safety Is Sent to Nixon*, N.Y. TIMES (Dec. 18, 1970), <https://www.nytimes.com/1970/12/18/archives/bill-on-job-safety-is-sent-to-nixon-his-signature-is-assured.html>.

110. *See* ROBERT STEWART SMITH, AM. ENTER. INST. FOR PUB. POL'Y RSCH., THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS 5 (1976).

111. *Id.*

112. *See State Plans*, U.S. DEP'T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/stateplans> [<https://perma.cc/44YZ-MJUD>] (last visited Dec. 31, 2024); JANE FLANAGAN, TERRI GERSTEIN & PATRICIA SMITH, NAT'L EMP. L. PROJECT, HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH 1–4 (2020), <https://www.nelp.org/publication/states-localities-can-protect-workplace-safety-health/> [<https://perma.cc/8B85-YX4Q>].

B. OSHA PRACTICES AND PROCEDURES

Fewer than two thousand inspectors are responsible for enforcing workplace safety in most workplaces across the country.¹¹³ Since OSHA’s mission is to protect approximately 130 million workers, there is approximately one inspector for every 70,000 workers.¹¹⁴ In 2022, OSHA’s budget was \$612 million, and it employed approximately 1,850 inspectors.¹¹⁵ In contrast, FSIS’s 2022 budget was \$1.372 billion, and there are approximately 7,500 FSIS inspectors.¹¹⁶

Unsurprisingly, given its limited resources, OSHA inspections are infrequent. OSHA sometimes initiates inspections of its own accord, in response to a report of an injury or referral, or to follow up on a prior citation.¹¹⁷ The agency conducted 31,820 inspections in FY 2022—more than the 24,333 it conducted in FY 2021 but fewer than the 33,393 it conducted in FY 2019, before the pandemic.¹¹⁸ OSHA has authority to enforce compliance in accordance with its hundreds of general and industry-specific standards, as well as the relatively unique general duty clause.¹¹⁹ The general duty clause is something of a catchall. It requires employers to provide employees with a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”¹²⁰ Despite the breadth of the clause’s text, its use is limited, and OSHA cited meat and poultry plants for violating the general duty clause 144 times between 2005 and 2016.¹²¹ In contrast, during the same time period, OSHA cited meat and poultry plants 3,877 times for violations of ten other standards.¹²²

113. See *Commonly Used Statistics*, U.S. DEP’T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/data/commonstats> (last visited Dec. 31, 2024).

114. *Id.* OSHA received 383 votes in the House and 83 votes in the Senate. SMITH, *supra* note 110, at 7.

115. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 113.

116. See U.S. DEP’T OF AGRIC., FY 2024 BUDGET SUMMARY 12, 67 (2024), <https://www.usda.gov/our-agency/about-usda/budget> [<https://perma.cc/2T7A-DNU9>] (“Nearly 90 percent of these [8,600 FSIS] personnel act as frontline inspectors. . .”). FSIS inspectors inspect roughly 800 slaughterhouses across the country. See Michael Corkery & David Yaffe-Bellany, *The Food Chain’s Weakest Link: Slaughterhouses*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html>.

117. See *2022 Enforcement Summary*, U.S. DEP’T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/enforcement/2022-enforcement-summary> [<https://perma.cc/9MYB-RVDV>] (last visited Dec. 31, 2024).

118. *Id.*

119. See 29 U.S.C. § 654(a)(1). OSHA standards are regulations, but they are commonly referred to as standards. See, e.g., *id.* § 654(a)(2).

120. *Id.* § 654(a)(1).

121. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 19 n.37. The use of the general duty clause may be limited since it requires the agency to satisfy an onerous four-part test to enforce the clause. See *Elements Necessary for a Violation of the General Duty Clause*, U.S. DEP’T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN. (Dec. 18, 2003), <https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1> [<https://perma.cc/A3MM-VLBP>].

122. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 18; see also *What Is the OSHA General Duty Clause?*, OSHA.COM (Jan. 12, 2023), <https://www.osha.com/blog/general-duty-clause> [<https://perma.cc/7ESL-P48N>] (stating that “OSHA issues tens of thousands of citations annually” but the general duty clause “accounts for just 1.5% of all OSHA citations”).

OSHA penalties have long been criticized as too low to meaningfully deter bad actors.¹²³ As of 2023, the maximum penalty OSHA is able to issue for “serious” and “other-than-serious” violations is \$15,625.¹²⁴ The most it can penalize an employer is for a “willful” or “repeated” violation, for \$156,259 per violation.¹²⁵

When an OSHA inspection takes place and an inspector discovers a violation of its standards, there is often a winding road from citation to penalty. Following notice of a violation, an employer can request an informal conference and settlement with OSHA.¹²⁶ In the meantime, employers are required to abate the violation and post the citation near where the violation occurred.¹²⁷ If the conference does not occur or is unsuccessful, the employer can file a notice of intent to contest.¹²⁸ Then the case is forwarded to the Occupational Safety and Health Review Commission (OSHRC), an independent agency, to adjudicate the case through a public hearing before an administrative law judge.¹²⁹ These decisions can be appealed to the full OSHRC, whose decisions can in turn be appealed to a federal circuit court.¹³⁰

C. OSHA ENFORCEMENT OF MEAT AND POULTRY PLANTS

For most Americans, the workers who slaughter and process meat are invisible. The Bureau of Labor Statistics’s data describe the size and general characteristics of this workforce.¹³¹ They estimate that in 2023, approximately 543,000 people were employed in animal slaughtering and processing.¹³² Their mean hourly wage was \$21.27, or \$44,250 per year.¹³³ Workers in this industry are concentrated in the South and Midwest.¹³⁴ A 2018 report found that relative to the U.S. workforce, slaughterhouse workers were disproportionately male, Latino, and

123. See Celine McNicholas, Margaret Poydock, Ihna Mangundayao & Ali Sait, *Civil Monetary Penalties for Labor Violations Are Woefully Insufficient to Protect Workers*, ECON. POL’Y INST.: WORKING ECON. BLOG (July 15, 2021, 12:56 PM), <https://www.epi.org/blog/civil-monetary-penalties-for-labor-violations-are-woefully-insufficient-to-protect-workers/> [<https://perma.cc/K3Q9-CMA5>].

124. *U.S. Department of Labor Announces Annual Adjustments to OSHA Civil Penalties for 2023*, U.S. DEP’T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN. (Jan. 12, 2023), <https://www.osha.gov/news/newsreleases/trade/01122023> [<https://perma.cc/4S9H-TVGU>].

125. *Id.*

126. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., OSHA 3000-02R, EMPLOYER RIGHTS AND RESPONSIBILITIES FOLLOWING A FEDERAL OSHA INSPECTION 3–4 (2023), <https://www.osha.gov/sites/default/files/publications/osha3000.pdf> [<https://perma.cc/KE8J-F8HB>].

127. See *id.* at 2.

128. *Id.* at 8–9.

129. *Id.* at 9.

130. *Id.* at 9–10.

131. See *May 2023 National Industry-Specific Occupational Employment and Wage Estimates*, U.S. BUREAU OF LAB. STAT. (Apr. 3, 2024), https://www.bls.gov/oes/current/naics4_311600.htm.

132. *Id.*

133. *Id.*

134. See Angela Stuesse & Nathan T. Dollar, *Who Are America’s Meat and Poultry Workers?*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 24, 2020, 10:00 AM), <https://www.epi.org/blog/meat-and-poultry-worker-demographics/> [<https://perma.cc/2ZRH-SRS3>].

Black.¹³⁵ While 17% of workers in the United States are foreign-born, 38% of workers in the meat-processing industry are foreign-born.¹³⁶ Seventy-one percent of foreign-born workers in the meat industry are noncitizens.¹³⁷

Workplace injuries are rampant within slaughterhouses. Consider the anatomy of a modern slaughterhouse: they are loud, cold, wet, and crowded buildings where sharp instruments rapidly disassemble thousands of cattle, hogs, and poultry daily. Common injuries range from the acute, such as cuts, burns, amputations, falls, and fractures, to the chronic, such as abnormal nerve conditions and musculoskeletal disorders.¹³⁸ OSHA required all employers within its jurisdiction to self-report serious injuries to workers starting in 2015.¹³⁹ OSHA defines serious injuries as amputations, loss of an eye, or other injuries requiring hospitalization.¹⁴⁰ In 2015, the industry reported the eighth-highest number of severe injury reports of all industries.¹⁴¹ Between January 1, 2015, and May 31, 2022, Tyson Foods reported 279 serious injuries, JBS reported 185, Cargill reported 86, and Smithfield reported 80.¹⁴² These grisly numbers ranked each of these companies in the top twenty-five worst offenders out of tens of thousands of companies.¹⁴³

To its credit, OSHA has prioritized inspections within meat and poultry plants since the early 2000s,¹⁴⁴ and the number of injuries in the industry has fallen in

135. *See id.* The report found that animal slaughtering and processing workers were approximately 36% female, 35% White, 22% Black, 35% Latinx, 7% Asian American and Pacific Islander, 0.7% American Indian, and 1.3% other. *Id.* In contrast, the overall U.S. workforce is 47% female, 64% White, 11% Black, 17% Latinx, 6% Asian American and Pacific Islander, 0.5% American Indian, and 2% other. *Id.*

136. *Id.*

137. *Id.*

138. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-96, SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED 3, 12, 21, 28 (2005), <https://www.gao.gov/assets/gao-05-96.pdf> [<https://perma.cc/YLG8-RNPX>]; JESSICA G. RAMSEY, KRISTIN MUSOLIN & CHARLES MUELLER, U.S. DEP'T HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, HHE REPORT NO. 2014-0040-3232, EVALUATION OF CARPAL TUNNEL SYNDROME AND OTHER MUSCULOSKELETAL DISORDERS AMONG EMPLOYEES AT A POULTRY PROCESSING PLANT 5–15 (2015), <https://www.cdc.gov/niosh/hhe/reports/pdfs/2014-0040-3232.pdf> [<https://perma.cc/B3V4-PH2U>].

139. *See* Debbie Berkowitz & Patrick Dixon, *An Average of 27 Workers a Day Suffer Amputation or Hospitalization, According to New OSHA Data from 29 States*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 30, 2023, 5:00 AM), <https://www.epi.org/blog/an-average-of-27-workers-a-day-suffer-amputation-or-hospitalization-according-to-new-osha-data-from-29-states-meat-and-poultry-companies-remain-among-the-most-dangerous/> [<https://perma.cc/EP3S-YDTN>]. The requirement to self-report to federal OSHA did not include states with state OSHA plans. *Id.*

140. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., SEVERE INJURY REPORT: A SEVEN YEAR LOOKBACK: A SUMMARY OF EMPLOYER-REPORTED INPATIENT HOSPITALIZATIONS, AMPUTATIONS, AND EYE LOSSES FROM 2015 – 2021, at 3 (2021), <https://www.osha.gov/severeinjury> [<https://perma.cc/C8GZ-2V39>].

141. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 1.

142. Berkowitz, *supra* note 139.

143. *See id.*

144. *See* Occupational Safety & Health Admin., U.S. Dep't of Lab., Opinion Letter on Response to Concerns About Unsafe And Unsanitary Conditions Within the Meatpacking Industry (Mar. 20, 2003), <https://www.osha.gov/laws-regs/standardinterpretations/2003-03-20> [<https://perma.cc/WGA7-VF96>].

that time.¹⁴⁵ The violations that OSHA most frequently found in slaughterhouses between 2005–2016 run the gamut, relating to exit routes, walking surfaces, materials handling, toxic and hazardous materials, electrical safety, and more.¹⁴⁶ Still, the penalties for violations are relatively minor: in 2016, the median penalty assessed by OSHA in meat and poultry plants was \$4,900, a drop in the bucket for meatpackers that make billions in annual revenue.¹⁴⁷

D. CASE STUDIES OF OSHA'S LACK OF POWER

Two tragedies in Mississippi and a pig plant in Missouri further demonstrate OSHA's shortcomings. OSHA's penalties are too low, its inspections too infrequent, and its procedures too slow to force employers to make their workplaces safer.

On May 31, 2021, Bobby Butler was killed by a poultry-plant machine owned by Mar-Jac Poultry in Hattiesburg, Mississippi.¹⁴⁸ Butler's job was to clean the slaughterhouse's machines.¹⁴⁹ OSHA inspected the Mar-Jac plant after Butler's death and cited the company twice for serious violations of two OSHA standards, one related to machine guarding and the other related to safety-instruction signs.¹⁵⁰ An administrative law judge ruled for OSHA, assessing a penalty of less than \$28,000 on October 5, 2023.¹⁵¹ FSIS inspectors testified in this case, and their testimony bolstered OSHA's position.¹⁵² While waiting for the claims related to Butler's death to be resolved, another worker at the Mar-Jac plant died.¹⁵³ This time it was a sixteen-year-old child.¹⁵⁴ Duvan Robert Tomas Perez, a Guatemalan immigrant described as "generous, smiley and very fun" by his

145. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 1.

146. See *id.* at 18. The top ten most cited standards cited by OSHA during this time period were: control of hazardous energy (791 citations); wiring methods, components, and equipment (512 citations); general requirements for all machines (477 citations); safety management of highly hazardous chemicals (463 citations); hazard communication (360 citations); general electrical standards (338 citations); ladders (259 citations); powered industrial trucks (251 citations), mechanical power-transmission apparatus (236 citations); and maintenance of exit routes (190 citations). *Id.*

147. See *id.* at 19. In contrast, the median penalty *proposed* by OSHA was \$7,000 for meat and poultry plants. *Id.* OSHA proposes penalties, which are then subject to review and adjustment by an adjudicator.

148. See WDAM Staff, *Employee Dies After Accident at Hattiesburg Poultry Plant*, WDAM (June 1, 2021, 4:22 PM), <https://www.wdam.com/2021/06/01/worker-dies-after-accident-at-hattiesburg-poultry-plant/> [<https://perma.cc/8RBR-RKEM>]; Haskel Burns, *Officials Release Identity of Man Fatally Injured at Mar-Jac Poultry*, PINE BELT NEWS (June 1, 2021, 7:10 PM), <https://www.hubcityspokes.com/mar-jac-fatality> [<https://perma.cc/32WL-XRR8>].

149. Mar-Jac Poultry MS, LLC, No. 21-1347, 1, 4 (OSHRC Oct. 5, 2023) (ALJ) (citation omitted).

150. See *id.* at 1–2.

151. *Id.* at 23.

152. *Id.* at 4–5.

153. See Dustin Jones, *A 16-Year-Old Died While Working at a Poultry Plant in Mississippi*, NAT'L PUB. RADIO (July 20, 2023, 4:23 PM), <https://www.npr.org/2023/07/20/1188959743/meatpacking-death-teenager-mississippi-poultry-plant> [<https://perma.cc/X3YN-XEDZ>]; Ashton Pittman, *Boy, 16, Dies at Hattiesburg Poultry Plant in Third Worker Death Since 2020*, MISS. FREE PRESS (July 19, 2023), <https://www.mississippifreepress.org/34806/boy-16-dies-at-hattiesburg-poultry-plant-in-third-worker-death-since-2020> [<https://perma.cc/2C3G-WMKN>].

154. Jones, *supra* note 153; Pittman, *supra* note 153.

relatives, was killed by plant machinery on July 14, 2023.¹⁵⁵ Mar-Jac's press release after Perez's death admitted that he was too young to legally work in the plant.¹⁵⁶

The FSIS inspectors' testimony in the Butler case indicates that FSIS inspectors are already playing an important role in worker safety enforcement as witnesses. The deaths in the Mar-Jac plant demonstrate the failures of OSHA's enforcement due to low penalties, infrequent inspections, and slow adjudications. Both the two-year wait from Butler's death to the decision and the paltry fines for serious violations undermine OSHA's effectiveness as a deterrent.

In February 2023, OSHA fined Republic Foods, a cattle processor in Lone Jack, Missouri, over half a million dollars for exposing workers to potentially lethal levels of carbon dioxide.¹⁵⁷ This sounds like successful enforcement until you learn that the plant had been cited for endangering workers seven times and inspected five times since 2020.¹⁵⁸ The carbon dioxide stemmed from the facility's use of dry ice to keep meat safe, yet another example of the tension between meat and worker safety.¹⁵⁹ The OSHA regional director noted that the employer's inaction risked employees' lives.¹⁶⁰ Even when OSHA inspects and fines facilities, it is not a sufficient deterrent.

The anecdote that opened this Note, the Hamlet fire, further emphasizes OSHA's shortcomings. Twenty-five workers died, trapped inside a burning poultry plant that had not been inspected by OSHA in over a decade.¹⁶¹ In the aftermath of the Hamlet fire, North Carolina Congressman Charlie Rose threatened to force FSIS inspectors to check for worker safety.¹⁶² But USDA only met his demands partway by signing the memorandum of understanding with OSHA in 1994.¹⁶³

The 1994 MOU stated that FSIS inspectors would be trained to recognize OSHA violations and report serious violations to USDA, who would then pass

155. Laura Strickler & Didi Martinez, *16-Year-Old Boy Dies in Accident at a Mississippi Poultry Plant*, NBC NEWS (July 18, 2023, 5:15 PM), <https://www.nbcnews.com/news/16-year-old-boy-dies-accident-mississippi-poultry-plant-rcna94963> [<https://perma.cc/2XZV-JEA7>].

156. See Roy Graber, *Mar-Jac Poultry: Staffing Agency Hired Teen Who Died*, WATTPOLTRY (July 21, 2023), <https://www.wattagnet.com/latest-news/article/15542824/marjac-poultry-staffing-agency-hired-teen-who-died> [<https://perma.cc/7C7J-AXKH>].

157. *US Department of Labor Again Cites Missouri Cattle Processor for Exposing Workers to Potentially Lethal Carbon Dioxide Levels*, U.S. DEP'T OF LAB.: OCCUPATIONAL SAFETY & HEALTH ADMIN. (Feb. 6, 2023), <https://www.osha.gov/news/newsreleases/region7/02062023> [<https://perma.cc/Z9BA-ZU8M>].

158. See *id.*

159. See Joey Schneider, *Missouri Meat Processor Fined Again for CO2 Workplace Exposure*, FOX 2 NOW (Feb. 7, 2023, 10:23 AM), <https://fox2now.com/news/missouri/missouri-meat-processor-fined-again-for-co2-workplace-exposure/> [<https://perma.cc/ER7L-5UKR>].

160. *Id.*

161. See Drescher, *supra* note 1.

162. See *id.*; *Congressman Cites Federal Laxity in Fire at Hamlet Chicken Plant*, GREENSBORO NEWS & REC. (Jan. 26, 2015), https://greensboro.com/congressman-cites-federal-laxity-in-fire-at-hamlet-chicken-plant/article_2996728f-a33b-5b68-b4f4-156dabba15f1.html [<https://perma.cc/KSE4-8URK>].

163. See Drescher, *supra* note 1; see also OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 24.

them along to OSHA.¹⁶⁴ This MOU achieved worse than nothing. It lulled critics into thinking that the system had been made safer when nothing had changed. The Government Accountability Office informed the agencies that the MOU had not been fully implemented twice, in 2005 and 2017.¹⁶⁵ When assessing the Butler case, the court noted that the MOU had not been followed, writing: “Although USDA inspectors were required to report safety concerns to Mar-Jac under a memorandum of understanding, Inspector 1 did not report employees reaching into the machine because ‘[i]f we observed management doing it, we was like what could we say to them.’”¹⁶⁶ Debbie Berkowitz, former OSHA Chief of Staff, said that “when she left [OSHA] in 2015, the agency had never received a complaint from USDA.”¹⁶⁷

On August 1, 2022, OSHA and FSIS renewed the MOU with a handshake between the two principals, photos, and commitments to share data and training.¹⁶⁸ Besides that, there was little difference between the 1994 and 2022 MOUs, and little reason to expect different results. In 2023, Berkowitz described the new MOU as “mostly symbolic.”¹⁶⁹

III. PROPOSAL

To improve both meat and worker safety, Congress should require FSIS inspectors to report violations of federal worker safety law. Further, Congress should require both FSIS and OSHA to supervise these inspectors. This Part begins by explaining how statutorily requiring inspectors to report worker safety violations would promote a better, more holistic approach to food safety. The analysis then explores how this proposal would partially redress power imbalances given the meat industry’s high concentration, low union density, and particularly vulnerable workforce.

A. BROADENING THE DEFINITION OF FOOD SAFETY AND IMPROVING ENFORCEMENT AT THE INTERSECTION OF MEAT AND WORKER SAFETY

A broader definition of food safety is long overdue. Professors Leib and Pollans’ article, *The New Food Safety*, encourages a more holistic understanding of food safety that includes long-term health effects, environmental effects, and workplace safety.¹⁷⁰ It is a relatively modest logical leap to predict that safer and

164. OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 24.

165. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 34–35; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 138, at 47.

166. See Mar-Jac Poultry MS, LLC, No. 21-1347, 1, 5 (OSHR Oct. 5, 2023) (ALJ).

167. Drescher, *supra* note 1. FSIS inspectors may have reported OSHA violations anonymously, but there is no way of knowing if that has happened.

168. See *FSIS and OSHA Sign Memorandum of Understanding to Protect Workers and Enhance Training*, U.S. DEP’T OF AGRIC.: FOOD SAFETY & INSPECTION SERV. (Aug. 3, 2022), <https://www.fsis.usda.gov/news-events/news-press-releases/fsis-and-osha-sign-memorandum-understanding-protect-workers-and> [<https://perma.cc/RW29-FPCT>].

169. Email from Debbie Berkowitz, Practitioner Fellow from the Kalmanovitz Initiative for Labor and the Working Poor, Georgetown University, to Author (Nov. 9, 2023, 4:36 PM) (on file with author).

170. See Emily M. Broad Leib & Margot J. Pollans, *The New Food Safety*, 107 CALIF. L. REV. 1173, 1175–79 (2019).

healthier workers are more likely to produce safer and healthier meat. There are obvious areas of overlap between food safety and worker safety. For example, when a worker suffers an amputation—as happened an average of more than once a month in plants owned by Tyson Foods in the first nine months of 2015—it is both a failure of worker safety and meat safety.¹⁷¹ Co-enforcement could also help reconcile tensions between worker safety and meat safety regulations. If the FSIS inspector at the Hamlet poultry plant had been tasked with enforcing worker safety laws, they may have reconsidered approving locking the plant's doors from the outside. Additional examples demonstrate how co-enforcement could further the goals of both statutes.

Implementing this proposal could help ensure workers are able to use the bathroom. FSIS and OSHA both have regulations related to restroom access.¹⁷² Yet, workers in meatpacking plants routinely report that they are unable to go to the bathroom as often as they need to at work.¹⁷³ This is particularly difficult for workers who are pregnant or menstruating.¹⁷⁴ Workers regularly wear diapers and restrict their intake of fluids because of restrictions on their access to bathrooms.¹⁷⁵ The co-enforcement proposal could strengthen enforcement of bathroom regulations by requiring inspectors to scrutinize bathroom access more closely and increasing the likelihood that violations would be reported. This could improve meat safety, worker safety, and protect workers' dignity simultaneously.

Embedding worker safety inspectors within meat processing plants would likely also improve compliance with OSHA's reporting requirements. In 2015, OSHA strengthened its reporting requirements, requiring employers to report all work-related fatalities within eight hours, as well as all in-patient hospitalizations, amputations, and losses of an eye within twenty-four hours of discovering the incident.¹⁷⁶ Unsurprisingly, there are allegations of noncompliance. Reports indicate that employers' medical providers downplay injuries and dissuade

171. See Celeste Monforton, *Amputations Abound at Tyson Foods, OSHA Records Shed More Light on Industrial Food Production*, SCIENCEBLOGS (Jan. 27, 2016), <https://scienceblogs.com/theumphandle/2016/01/27/amputations-abound-at-tyson-foods-osha-records-give-me-a-peek-under-the-shades-of-industrial-food-production#.Vq9sIXXtsJh.twitter> [<https://perma.cc/K224-LTYP>].

172. See 9 C.F.R. § 416.2(h)(2) (“Lavatories with running hot and cold water, soap, and towels, must be placed in or near toilet and urinal rooms and at such other places in the establishment as necessary to ensure cleanliness of all persons handling any product.”); 29 C.F.R. § 1910.141(d)(2); *Restrooms and Sanitation Requirements*, U.S. DEP’T OF LAB.: OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/restrooms-sanitation> [<https://perma.cc/EV64-4EN7>] (last visited Dec. 31, 2024).

173. See OXFAM AMERICA, NO RELIEF: DENIAL OF BATHROOM BREAKS IN THE POULTRY INDUSTRY 2 (2016), https://s3.amazonaws.com/oxfam-us/www/static/media/files/No_Relief.pdf [<https://perma.cc/3USQ-26C2>].

174. *Id.*

175. *Id.*

176. See 29 C.F.R. § 1904.39(a); *OSHA Update: New Reporting Requirements Start January 1*, U.S. DEP’T OF LAB.: OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/recordkeeping/2014/drop-in-article#:~:text=Employers%20will%20now%20be%20required,related%20fatalities%20within%208%20hours> [<https://perma.cc/686J-R5K7>] (last visited Dec. 31, 2024).

workers from taking time off.¹⁷⁷ When Melissa Bailey, a worker at a Seaboard pork plant in Oklahoma, fell and injured her hand, the plant nurse massaged her hand and sent her back to work.¹⁷⁸ Her union later helped her see a doctor at a local clinic, who diagnosed a sprain.¹⁷⁹ When she returned to work, management ignored Melissa’s doctor’s note and assigned her to lifting heavier loads than before her injury.¹⁸⁰ It is possible that some of the apparent decline in slaughterhouse injuries is due to underreporting.¹⁸¹ If FSIS inspectors were required to enforce worker safety laws, they could act as a counterweight against plant medical officials seeking to downplay worker injuries.

B. COMPENSATING FOR SLAUGHTERHOUSE POWER IMBALANCES

Enhancing OSHA inspections in the meat processing sector would bolster protections for a particularly vulnerable group of workers. The famous footnote four of *Carolene Products* argues for heightened judicial scrutiny in cases concerning prejudice against discrete and insular minorities.¹⁸² The general idea of courts compensating for defects in the democratic process—sometimes referred to as “representation reinforcement”¹⁸³—has become a core part of American jurisprudence. Regulatory regimes should similarly compensate for democratic defects.

When workers have an issue at work, they typically have two options: they can leave or they can speak up to try to improve their working conditions.¹⁸⁴ Labor scholars have dubbed this dichotomy the “exit-voice tradeoff.”¹⁸⁵ Slaughterhouse workers have limited ability to exercise either option.

It is difficult for meat processing workers to leave their jobs. Modern slaughterhouses are often in rural areas, and plants are often the biggest employer for miles.¹⁸⁶ This limits workers’ ability to leave, particularly given their low wages.¹⁸⁷ Slaughterhouse workers’ “voice,” or ability to speak up to change their

177. See Madison McVan, *PAIN DENIED: At One of the Country’s Largest Meatpacking Plants, Workers Say Their Injuries Were Ignored*, INVESTIGATE MIDWEST (Sept. 30, 2021), <https://investigatemitwest.org/2021/09/30/pain-denied-at-one-of-the-countrys-largest-meatpacking-companies-workers-say-their-injuries-were-ignored/> [<https://perma.cc/JN27-58RY>].

178. *Id.*

179. *Id.*

180. *Id.*

181. See *id.*; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 25, at 24 (“Workers . . . in four states said they fear dismissal or other punishment if they complain to OSHA or their state OSH agency about their workplace concerns, such as sustaining injuries or being discouraged from using the bathroom.”).

182. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

183. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87, 103 (1980).

184. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 94 (1984).

185. *Id.*

186. See Christopher Walljasper, *Slaughterhouses Offer Rural Communities Employment but Low Wages*, IN THESE TIMES (Aug. 2, 2018), <https://inthesetimes.com/article/slaughterhouses-employment-wages-rural-meat-maps-work> [<https://perma.cc/G27H-987L>]. Some of the largest plants in the nation are in rural towns like Tar Heel, North Carolina; Dakota City, Nebraska; Cactus, Texas; and Holcomb, Kansas. *Top 9 Meat Packing Plants in the U.S.*, INDUSTRYSELECT (July 20, 2022), <https://www.industryselect.com/blog/the-largest-meatpacking-plants-in-the-us> [<https://perma.cc/76AG-HLKZ>].

187. See Walljasper, *supra* note 186. Meat industry worker wages are both high and low; they are low relative to median household income in the U.S., but high compared to many low wage workplaces, and many rural areas. *Id.*

working conditions, is limited both inside and outside of the slaughterhouse walls. Many slaughterhouse workers experience barriers to participating in the political process either because they are not U.S. citizens or because they have limited English proficiency.¹⁸⁸ Meat processing plants have sometimes been targeted for immigration enforcement,¹⁸⁹ and this risk further diminishes the likelihood that noncitizen workers will trust federal regulators or contact OSHA about a safety risk.

Worker voice is also limited within the workplace. Few workers in meat processing today are union members.¹⁹⁰ Theoretically, all employees, regardless of immigration status, have the right to engage in protected concerted activity for mutual aid or protection such as strikes and walkouts.¹⁹¹ However, the Supreme Court has held that noncitizens are ineligible for backpay, one of the traditional remedies in such cases.¹⁹² This evokes an old cliché: a right without a remedy is no right at all. Recall that in the Butler case against Mar-Jac poultry, FSIS inspectors testified in support of OSHA.¹⁹³ That testimony demonstrates FSIS inspectors' awareness of safety hazards and their potential to speak up when it may be difficult for workers to do so.

In the 1960s, 95% of meatpacking workers outside the South were unionized and enjoyed high wages.¹⁹⁴ While some meatpacking plants are now unionized—many with United Food and Commercial Workers (UFCW)—their power has diminished significantly, and fewer than 20% of meatpacking workers are unionized today.¹⁹⁵

Meat and poultry companies' consolidation has further eroded workers' power. Consolidation in the industry in the 1980s allowed meatpacking companies to renegotiate contracts, increase line speeds, and significantly decrease wages.¹⁹⁶

188. See Shawn Fremstad, Hye Jin Rho & Hayley Brown, *Meatpacking Workers Are a Diverse Group Who Need Better Protections*, *CTR. FOR ECON. & POL'Y RSCH.* (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/> [<https://perma.cc/9HF3-YWR6>].

189. See, e.g., Zelaya v. Hammer, 342 F.R.D. 426, 430–32 (E.D. Tenn. 2022); Richard Gonzales, *Mississippi Immigration Raids Lead to Arrests of Hundreds of Workers*, *NAT'L PUB. RADIO* (Aug. 7, 2019, 9:25 PM), <https://www.npr.org/2019/08/07/749243985/mississippi-immigration-raids-net-hundreds-of-workers> [<https://perma.cc/42HN-MEBQ>].

190. See Colin Gordon, *The Coronavirus Wouldn't Be Decimating Meatpacking Plants If Company Bosses Hadn't Busted the Unions*, *JACOBIN* (May 18, 2020), <https://jacobin.com/2020/05/iowa-upw-meat-processing-unions-packinghouse-coronavirus> [<https://perma.cc/6KHF-4GZ9>].

191. 29 U.S.C. § 157.

192. *Hoffman Plastic Compounds, Inc. v. Nat'l Lab. Rels. Bd.*, 535 U.S. 137, 140 (2002).

193. See *Mar-Jac Poultry MS, LLC*, No. 21-1347, 1, 4 (OSHR Oct. 5, 2023) (ALJ).

194. Livia Gershon, *Why Does Meatpacking Have Such Bad Working Conditions?*, *JSTOR DAILY* (May 8, 2020), <https://daily.jstor.org/why-does-meatpacking-have-such-bad-working-conditions/> [<https://perma.cc/7L2K-G4CU>].

195. Barry Hirsch, David Macpherson & William Even, *Union Membership, Coverage, Density and Employment by Industry, 1983-2023*, <https://unionstats.com/> [<https://perma.cc/PZ4Q-9PQV>] (last visited Dec. 31, 2024); Gordon, *supra* note 190.

196. See *HUM. RTS. WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 12–14* (2004), <https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants> [<https://perma.cc/G8JH-KL4F>]; JAMES M. MACDONALD, MICHAEL E. OLLINGER, KENNETH E. NELSON & CHARLES R. HANDY, *U.S. DEP'T OF AGRIC., CONSOLIDATION IN U.S. MEATPACKING 14–15*

Automation of parts of meat processing has also made it easier for management to replace workers.¹⁹⁷ Today, just four companies control 85% of the national beef market, four companies control 65% of the pork market, and four companies control 60% of the poultry market.¹⁹⁸ The combined dynamics of decreased union density and increased concentration have eroded worker power in the meatpacking industry. In the absence of greater union density, vigorous enforcement of workplace safety laws could compensate for some of the power disparity.

IV. COUNTERARGUMENTS

There are several compelling counterarguments to this proposal, including the risk of overburdening FSIS inspectors, the challenges of a dual-supervision regime, the risks of agency capture, and constitutional concerns related to the Takings Clause of the Fifth Amendment. Despite the hollowness of the MOU, its existence and reaffirmation by both the Departments of Agriculture and Labor in 2022 dispel some counterarguments to codifying the MOU statutorily.

A. SUPERVISION, AGENCY CAPTURE, AND OVERBURDENING INSPECTORS

Overburdening inspectors is a legitimate concern. Implementing this proposal may require hiring additional inspectors. Asking FSIS inspectors to do more without giving them more resources would likely face opposition from inspectors and their union, the American Federation for Government Employees (AFGE). This proposal could garner the inspectors' support by giving them ammunition to oppose efforts to reduce the number of inspectors in plants. Recall that both the 2014 poultry regulation and the 2019 swine regulation proposed reducing the numbers of inspectors in plants. Rather than doing away with the traditional inspection regime entirely, this proposal is an opportunity to redefine the role of the agency's inspectors. It is worth emphasizing that given the overlap between workplace safety and meat safety described in Part IV, implementing this proposal would likely improve meat safety. Broadening slaughterhouse inspections could help protect inspectors' jobs.

Additionally, this proposal would force two agencies to work together, which would likely cause tension. Given that OSHA already delegates authority to several states to enforce federal worker safety law, sharing supervision with another federal agency would mirror the collaboration with which it is already accustomed. However, the Department of Agriculture would likely be more resistant to sharing oversight over its inspectors, given its response to prodding from the

(2000), https://www.ers.usda.gov/webdocs/publications/41108/18011_aer785_1_.pdf?v=201.8 [<https://perma.cc/THZ5-678C>].

197. See *Slaughterhouse Workers*, FOOD EMPOWERMENT PROJECT, <https://foodispower.org/human-labor-slavery/slaughterhouse-workers/> [<https://perma.cc/AR52-VZG2>] (last visited Dec. 31, 2024).

198. See Matt McConnell, "When We're Dead and Buried, Our Bones Will Keep Hurting," HUM. RTS. WATCH (Sept. 4, 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat> [<https://perma.cc/667Y-RTXS>].

Government Accountability Office to fulfill the 1994 MOU.¹⁹⁹ While OSHA embraced GAO's recommendation, USDA responded by writing:

FSIS' stated mission is protecting the public's health by ensuring the safety of meat, poultry, and processed egg products. In collaborating with OSHA, FSIS will need to ensure its primary mission is not compromised by undertaking activities that take FSIS time and resources away from our food safety inspection responsibilities.²⁰⁰

Lastly, the risk of agency capture threatens this proposal. Agency capture is distinct from banal corruption or bribery, although those are also risks. Hempling defines it as "characterized by the regulator's attitude, not the regulated entity's actions. . . . Regulatory capture is reflected in a surplus of a passivity and reactivity, and a deficit of curiosity and creativity."²⁰¹ Of course, agency capture *already* threatens the effectiveness of FSIS inspections, as noted by earlier quotes about the passivity of inspectors.²⁰² There is already inherent tension between FSIS's mission to ensure the safety of meat, poultry, and egg products and the goals of other parts of USDA tasked with promoting the American agricultural industry, such as the Agricultural Marketing Service.²⁰³ Rather than making FSIS inspectors more susceptible to agency capture, this proposal might better insulate them from it. It is harder to capture two agencies than one. Nothing in OSHA's mission compels it to promote the agriculture industry, so its supervision of inspectors should be free of that bias.

B. CONSTITUTIONAL CHALLENGE UNDER THE FIFTH AMENDMENT

Challengers of this proposal could marshal the Fifth Amendment's Takings Clause against it. The Takings Clause prevents the government from taking private property "without just compensation."²⁰⁴ In *Cedar Point Nursery v. Hassid*, the Supreme Court held that a 1975 California statute allowing union organizers to access agricultural employers' property for three hours per day for four months of the year to solicit workers violated the Takings Clause of the Constitution.²⁰⁵

Upending settled precedent, the Court ruled that the statute was a *per se* physical taking that, lacking just compensation, violated the Fifth Amendment.²⁰⁶ In

199. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 25, at 63.

200. *Id.*

201. Scott Hempling, "Regulatory Capture": Sources and Solutions, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 23, 25 (2014).

202. See Press Advisory, *supra* note 61.

203. Compare *About FSIS*, U.S. DEP'T OF AGRIC.: FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/about-fsis> [<https://perma.cc/W6CT-TZL5>] (last visited Dec. 31, 2024), with *Home*, U.S. DEP'T OF AGRIC.: AGRIC. MKTG. SERV., <https://www.ams.usda.gov/> [<https://perma.cc/8VTZ-NDD8>] (last visited Dec. 31, 2024).

204. U.S. CONST. amend. V.

205. See 594 U.S. 139, 143, 162 (2021). The statute allowed union organizers to visit agricultural employers' property for one hour before work, one hour after work, and one hour during employee lunch breaks. *Id.* at 144.

206. See *id.* at 162. Curiously, the employers in *Cedar Point* did not seek just compensation as described in the Constitution; instead they sought (and received) injunctive relief. *Id.* at 179 (Breyer, J., dissenting).

his dissent, Justice Breyer excoriated the majority for threatening a range of government inspections, including those related to food and workplace safety, writing that “the majority’s conclusion threatens to make many ordinary forms of regulation unusually complex or impractical.”²⁰⁷

This decision threatens the proposal to expand the responsibilities of FSIS inspectors for several reasons. First, it demonstrates the modern Court’s prioritization of the “right to exclude” within the so-called bundle of property rights. Second, it alters the Takings Clause analysis to make it easier for impermanent government intrusions onto private property to be classified as takings.²⁰⁸ Finally, *Cedar Point* continues the modern Court’s pattern of issuing decisions that weaken workers’ power.²⁰⁹

Still, there are reasons to believe expanding FSIS inspectors’ responsibilities to include worker safety could survive a Takings Clause challenge. First, the majority in *Cedar Point* itself argues that the dissent’s fear that the opinion could threaten federal inspections is unwarranted.²¹⁰ The Court held that when the government requires property owners to cede a right of access due to a health and safety regime as a condition of receiving certain benefits, it may not constitute a taking.²¹¹ Here, the government has a right of access to slaughterhouses as a condition of allowing companies to sell meat in interstate commerce.²¹² Over 100 years of FSIS inspectors working within slaughterhouses weighs in their inspections’ favor, particularly if defenders of the statute emphasize the areas of overlap between worker and meat safety. This proposal would not alter the physical presence of FSIS inspectors in meatpacking plants; it would merely broaden their jurisdiction and responsibilities.

The FSIS-OSHA 1994 MOU and its 2022 (post-*Cedar Point*) reaffirmation indicate that both agencies believe that having FSIS inspectors record OSHA violations complies with their existing authority and does not violate the Constitution. Statutorily codifying the meat inspectors’ responsibility to note violations of worker safety would only strengthen this authority.

CONCLUSION

Implementing this proposal would make slaughterhouses meaningfully safer workplaces. Requiring FSIS inspectors to inspect slaughterhouses for risks to

207. *Id.* at 165.

208. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982), with *Cedar Point*, 594 U.S. at 149 (majority opinion).

209. *See, e.g.*, Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771, 790–91 (2023) (Jackson, J., dissenting) (“[T]he majority also misapplies the Board’s cases in a manner that threatens to both impede the Board’s uniform development of labor law and erode the right to strike.”); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 879 (2018) (holding that public-sector workers cannot be required to pay union dues).

210. *See Cedar Point*, 594 U.S. at 161 (holding that government health and safety inspection regimes will generally not constitute takings).

211. *See id.*

212. *See* 21 U.S.C. § 606(a).

safety would augment OSHA enforcement in opaque and dangerous workplaces where workers are especially vulnerable.

The proposal advanced in this Note could build momentum for other reforms to strengthen workplace safety enforcement. A recent analysis found that press releases issued by OSHA publicizing the names of facilities that violated safety and health regulations improved compliance so dramatically that one release had the effect of 210 OSHA inspections.²¹³ Efforts like those of the Just Purchasing Consortium are working to use entities with large market power to improve meatpacking workers' safety.²¹⁴ Recent reports and litigation have revealed that child labor still occurs in meatpacking plants across the nation.²¹⁵ Congress could also consider requiring inspectors to regularly ensure workers are not illegally employing children. This proposal might even open the door for other agencies, like the EPA, to strengthen their enforcement of slaughterhouses. The meat and poultry industries are atrocious for the environment; they contribute to approximately 15% of human-induced greenhouse gas emissions and disproportionately harm poor communities and communities of color.²¹⁶

Enacting this proposal would leave many challenges within the meatpacking sector unresolved. Line speeds are too fast, while OSHA fines and workers' wages are too low. This proposal would not address the massive power disparities within slaughterhouses or the serious psychological harm that meatpacking workers experience because of their work.²¹⁷

213. See Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1888 (2020). The Food and Drug Administration (responsible for regulating the 80% of food outside of USDA's jurisdiction) uses a similar tactic through public warning letters. See *Warning Letters*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters> (last visited Dec. 31, 2024).

214. See *Harrison Institute for Public Law*, GEORGETOWN L., <https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/the-policy-clinic-climate-health-food-human-rights-and-trade-harrison-institute/> [<https://perma.cc/TY2J-WNHV>] (last visited Dec. 31, 2024).

215. *More than 100 Children Illegally Employed in Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays \$1.5M in Penalties*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV. (Feb. 17, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230217-1> [<https://perma.cc/5GUG-6U64>]; *Walsh v. Packers Sanitation Servs., Inc.*, No. 22-CV-3246, 2022 WL 16856947, at *2 (D. Neb. Nov. 10, 2022).

216. See P.J. GERBER ET AL., FOOD & AGRIC. ORG. OF THE U.N., TACKLING CLIMATE CHANGE THROUGH LIVESTOCK: A GLOBAL ASSESSMENT OF EMISSIONS AND MITIGATION OPPORTUNITIES, at xxii (2013), <https://www.fao.org/4/i3437e/i3437e.pdf> [<https://perma.cc/NU95-KRAT>]; Kenny Torrella, *This Land Isn't For You or Me. It's for the Meat Industry*, VOX (Oct. 20, 2023, 9:00 AM), <https://www.vox.com/future-perfect/2023/10/20/23924061/public-grazing-land-cattle-meat-carbon-opportunity-cost> [<https://perma.cc/5EJJ-WL5T>]; *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 980, 982 (4th Cir. 2020) (Wilkinson, J., concurring) (“Like workers, neighbors living within two miles of hog CAFOs suffer from elevated rates of respiratory problems. Nearby residents may also suffer from aggravated rates of high blood pressure, depression, and infant mortality. . . . It is well-established—almost to the point of judicial notice—that environmental harms are visited disproportionately upon the dispossessed—here on minority populations and poor communities.”).

217. See generally Jessica H. Leibler, Patricia A. Janulewicz & Melissa J. Perry, *Prevalence of Serious Psychological Distress Among Slaughterhouse Workers at a United States Beef Packing Plant*, 57 WORK 105 (2017); Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by*

Still, requiring meat inspectors to report violations of worker safety law would be a sea change. It would recalibrate enforcement to prioritize workers who are often ignored. It would be a step towards realizing the goal of *The Jungle* and the promise the federal government made to Americans after the Hamlet fire.

Slaughterhouse Employees and the Possibility of Redress Through Legal Reform, 15 GEO. J. ON POVERTY L. & POL'Y 391 (2008); Amy J. Fitzgerald, Linda Kalof & Thomas Dietz, *Slaughterhouses and Increased Crime Rates: An Empirical Analysis of the Spillover from "The Jungle" into the Surrounding Community*, 22 ORG. & ENV'T 158, 158 (2009) (“[F]indings indicate that slaughterhouse employment increases total arrest rates. . . . This suggests the existence of a ‘Sinclair effect’ unique to the violent workplace of the slaughterhouse. . . .”).