

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

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NOLECHEK’S MEATS, INC.,  
a Wisconsin corporation,

Plaintiff,

v.

THOMAS J. VILSACK, in his  
official capacity as United States  
Secretary of Agriculture;  
U.S. DEPARTMENT OF  
AGRICULTURE; and FOOD  
SAFETY AND INSPECTION  
SERVICE,

Defendants.

No. 3:21-cv-762

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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The plaintiff, Nolechek’s Meats, Inc., is a privately owned Wisconsin corporation with its principal place of business located in Thorp, Wisconsin (“Nolechek’s”). By and through its undersigned attorneys, Nolechek’s states and alleges as follows:

## INTRODUCTION

1. Nolechek's is a Wisconsin award-winning premium meat establishment that has been in the Nolechek family for four generations.<sup>1</sup> Including its private owners, Nolechek's has a total of nine employees and team members.

2. Nolechek's obtained a Federal Grant of Inspection in 2017, which authorized it to display the federal "USDA Mark of Inspection" on its meat and food products.

3. This USDA Mark of Inspection contains the federal inspection number of the facility that produced the product. Nolechek's USDA Mark of Inspection number is 48256.

4. The Food Safety and Inspection Service ("FSIS"), an agency within the U.S. Department of Agriculture ("USDA"), inspects meat establishments, such as Nolechek's, that have obtained the Federal Grant of Inspection and the right to display the USDA Mark of Inspection on its meat products upon satisfactory FSIS inspections.

5. The primary purpose of FSIS and its inspections of authorized meat establishments is to protect consumers from unsafe meat and food.

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<sup>1</sup> See <https://www.nolechekmeats.com/>.

6. Being a select meat establishment authorized to display the USDA Mark of Inspection allows Nolechek's to sell its food and meat products commercially wholesale within Wisconsin and out of state.

7. This ability to sell its food and meat products wholesale within Wisconsin and out of state has led to a significant increase in Nolechek's business revenues.

8. Since Nolechek's obtained the right to display the federal USDA Mark of Inspection on its meat products in 2017, FSIS inspectors have never reported that Nolechek's food or meat products were unsafe.

9. On August 20, 2021, the USDA and FSIS issued FSIS Notice 34-21. This notice was to take effect on August 25, 2021, and the purpose of FSIS Notice 34-21 was to reduce the risk of COVID-19 infection to FSIS employees conducting inspections on-site at privately owned meat establishments. Attached hereto as Exhibit A is a true and accurate copy of FSIS Notice 34-21.

10. Despite the USDA and FSIS acknowledging they did not have legal authority to abate hazardous conditions for FSIS employees and inspectors conducting inspections in privately owned meat establishments, FSIS Notice 34-21 required employees of these meat

establishments to wear masks, regardless of their vaccination status. *See Exhibit A*, p.1.

11. This Notice further indicated FSIS would withhold inspection services and the USDA Inspection Mark from those meat establishments that refused to have their employees wear masks during inspections, even if the meat product was safe. *See generally Exhibit A*.

12. The Centers for Disease Control and Prevention (“CDC”) has indicated that coronaviruses are generally thought to be spread from person-to-person through respiratory droplets. Currently there is no evidence to support transmission of COVID-19 associated with food.<sup>2</sup>

13. Based on a business judgment decision, Nolechek’s owners declined to force its employees to mask when an FSIS inspector visited Nolechek’s soon after the Notice took effect.

14. They did so because employees are able to socially-distance themselves during production because of the small employee-team size. Further, they also made this business judgment decision out of respect to their employees’ individual discretion and autonomy to make their own health choices, and because they believed that FSIS did not have legal

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<sup>2</sup> *See* <https://www.cdc.gov/foodsafety/newsletter/food-safety-and-Coronavirus.html>.

authority to impose a federal mask mandate upon meat establishment employees, for the sole purpose of protecting FSIS employees and inspectors.

15. Nolechek's owners further declined to force their employees to mask during inspections because the CDC itself acknowledges that there is no scientific evidence that COVID-19 may be transmitted from person to food and meat products.

16. However, FSIS then issued Nolechek's a Notice to Withhold the Marks of Inspection without indicating the meat was unsafe, which prevented Nolechek's from selling its meat and food products wholesale within Wisconsin or out of state, a core component of its business.

17. After a fruitless administrative appeal, Nolechek's now seeks declaratory and injunctive relief from this Court.

18. This Court should hold unlawful and set aside FSIS Notice 34-21 because it is an improper exercise of executive agency authority that does not comply with federal law nor does it regulate the safety of meat and food products, the primary legal authority conferred upon FSIS.

19. FSIS Notice 34-21 violates the established principle of administrative law that an agency must abide by its binding regulations in dealing with regulated parties whose rights they protect.

20. FSIS Notice 34-21 is arbitrary and capricious because FSIS's stated reason for issuing it is pretextual and contradicted by the overwhelming evidence before the agency.

21. Finally, FSIS Notice 34-21 exceeds FSIS's statutory authority to protect food safety, which violates the Administrative Procedure Act ("APA") and raises serious constitutional questions.

### **PARTIES AND JURISDICTION**

22. As indicated above, Nolechek's is a Wisconsin corporation with its principal place of business located in Thorp, Clark County, Wisconsin, which is situated in this district.

23. Defendant United States Department of Agriculture is an agency within the executive branch of the federal government that oversees farming, forestry, rural economic development, and food.

24. Defendant Secretary of Agriculture Thomas J. Vilsack in his official capacity ("Secretary Vilsack"), is the current and 32<sup>nd</sup> Secretary of Agriculture since 2021 in the Biden Administration, having previously

held the same office from 2009 through 2017 in the Obama Administration.

25. Defendant Food Safety and Inspection Service is an agency of the United States Department of Agriculture, responsible for ensuring the commercial supply of meat, poultry, and egg products is safe, wholesome, and correctly labeled and packaged.

26. This case raises federal claims under the Administrative Procedure Act (5 U.S.C. §§ 702, 706), federal administrative common law, and the Fifth Amendment of the United States Constitution; therefore, the Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

27. Venue is appropriate under 28 U.S.C. § 1391(b)(3) because Defendants carry out their official business in the Western District of Wisconsin, and Nolechek's is situated and located within this district.

## **FACTUAL ALLEGATIONS**

### **Nolechek's**

28. Nolechek's is an unassuming building that blends into the storefronts along the main strip of Thorp, Wisconsin (population 1,598).

29. But despite this unassuming building façade, inside the owners of the fourth-generation family business and their handful of employees

are busy making award-winning gourmet meat products that are enjoyed by the citizens of Wisconsin and shipped throughout the state and country.

30. Since the early 1970s, the Nolechek family has been crafting and selling safe, delicious, and high-quality bacon, sausage, hams, and more.

31. Nolechek's is owned and operated by Lindsey Fox, Kelly Nolechek, and Chad Nolechek.

32. In August 2017, Nolechek's completed the extensive process to obtain an FSIS Grant of Inspection for their meat establishment. This process included developing written Sanitation Standard Operating Procedures, conducting a hazard analysis, developing and validating a Hazard Analysis Critical Control Point (HACCP) plan, and implementing these procedures in accordance with regulatory requirements.<sup>3</sup>

33. Becoming an FSIS-inspected establishment opened up a much larger market for Nolechek's products by allowing it to wholesale its products within Wisconsin and out-of-state. Since 2017, Nolechek's has

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<sup>3</sup> See FSIS, General Information: Applying for a Grant of Inspection, [https://www.fsis.usda.gov/sites/default/files/media\\_file/2020-08/Grant\\_of\\_Inspection.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/Grant_of_Inspection.pdf) (updated Aug. 29, 2012).



expanded its in-state and out-of-state wholesale operations into a significant component of its business.

34. FSIS inspectors and fellow meat product specialists alike have repeatedly praised Nolechek's HAACP program. To Nolechek's owners, Nolechek's HAACP program demonstrates its commitment to food safety and helps educate its customers.

35. During the global pandemic, Nolechek's implemented a COVID-19 safety policy for its employees, which entails monitoring for COVID-19 symptoms, quarantining of symptomatic employees, and detailed guidance on appropriate mask-wearing.

36. Consistent with Nolechek's owners' commitment to honoring people's personal morals, values, autonomy, and convictions, Nolechek's leaves the decision to wear masks to each employee's individual discretion.

### **FSIS**

37. FSIS is the agency of the USDA responsible for ensuring that the nation's commercial supply of meat and certain other food products are safe and properly labeled and packaged.

38. FSIS's meat inspection authority originates from the Federal Meat Inspection Act (21 U.S.C. § 601 et seq.).

39. That Act is designed to protect “the health and welfare of consumers . . . by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.” 21 U.S.C. § 602.

40. The Federal Meat Inspection Act and the regulations promulgated under it prohibit establishments such as Nolechek's from selling their meat products wholesale without a USDA label or mark. 21 U.S.C. § 610.

41. Meat product-producing establishments may not affix the USDA label to their products unless they have obtained a Grant of Inspection, been inspected by FSIS inspectors, and been deemed in compliance with applicable regulations.

42. FSIS inspections are governed by the Rules of Practice (9 C.F.R. §§ 500.1-500.8), which define a “[W]ithholding [A]ction” as “the refusal to allow the marks of inspection to be applied to products.” 9 C.F.R. § 500.1(a).

43. The Rules of Practice specifically enumerate the grounds on which FSIS may take a Withholding Action against an establishment that has obtained a Grant of Inspection. *See* 9 C.F.R. §§ 500.3, 500.4.

**FSIS Notices**

44. On August 4, 2021, FSIS distributed a first notice, Notice 30-21, without going through the notice-and-comment procedure, that purported to give it authority to take various actions up to and including withdrawing inspection from an FSIS-inspected establishment in a county with “substantial” or “high” COVID-19 community transmission if the establishment did not require its employees to wear masks while FSIS inspectors were present.

45. The notice described these measures as necessary for FSIS to provide a safe workplace for its employees in compliance with the Occupational Safety and Health (OSH) Act of 1970 and the regulations promulgated pursuant to it.

46. On August 23, 2021, FSIS provided Nolechek’s owners with a second notice, FSIS Notice 34-21, also without notice-and-comment, that replaced the first notice.

47. FSIS Notice 34-21 was substantially the same as the first notice but explicitly provided that FSIS would withhold inspection service from any establishment in a county with “substantial” or “high” community COVID-19 transmission that did “not require employees and contractors to wear masks when FSIS personnel are present,” regardless of the employees’ vaccination status. *See generally* Exhibit A.

48. According to the CDC COVID Data Tracker, the overwhelming majority of counties in the United States had high or substantial COVID-19 community transmission at the time FSIS issued the two notices. No county in the entire state of Wisconsin had moderate or low COVID-19 community transmission.

49. In both notices, FSIS stated that “[f]or FSIS employees working in privately owned establishments, [it] does not have authority to abate hazardous conditions directly.” *Id.*

50. Despite this candid acknowledgment of its lack of legal authority to impose mask requirements upon meat establishments, FSIS proceeded to try to accomplish indirectly what it could not legally and directly require.

51. In attempting to impose a mask requirement, FSIS has strayed far from its directive to ensure safe and properly-labeled packaged food. The CDC, FDA, and USDA have all stated that there is no credible evidence of COVID-19 spreading through food or food packaging.

52. Thus, FSIS Notice 34-21 is not about food safety and expressly acknowledges this fact. It is not even primarily about the safety of FSIS inspectors. FSIS continued inspections without requiring employees of inspected establishments to mask earlier this year while vaccination rates were much lower but COVID-19 rates remained high.

53. Instead, FSIS Notice 34-21 is about implementing the Biden Administration's public health agenda and attempting to utilize a legitimate government agency for an illegitimate purpose for which it has no legal authority.

54. During the pandemic, COVID-19 outbreaks in meatpacking and food processing plants have been widely reported.

55. As President Biden assumed office, he faced calls from various activist organizations to enact PPE mask requirements and social distancing inside meatpacking plants.

56. Then, in February of this year, the House Select Subcommittee on the Coronavirus Crisis launched an investigation into meatpacking plant outbreaks.

57. In a letter to large meatpackers, Subcommittee Chairman Rep. James Clyburn wrote: “Public reports indicate that meatpacking companies . . . have refused to take basic precautions to protect their workers . . . and have shown a callous disregard for workers’ health. These actions appear to have resulted in thousands of meatpacking workers getting infected with the virus and hundreds dying.” The subcommittee’s letter to OSHA upbraided the agency for failing to protect meatpacking workers during the pandemic.<sup>4</sup> *Id.*

58. In light of these developments, FSIS Notice 34-21 appears to be a response to political pressure for increased regulation of large meatpacking plants, although it also broadly sweeps up small meat establishments like Nolechek’s.

59. It joins the late eviction moratorium attempted by the CDC and later over-turned by the United States Supreme Court, and OSHA’s vaccine mandate upon private employers that has been stayed by the

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<sup>4</sup> The referenced letter may be accessed in the underlined hyperlink.

Fifth Circuit Court of Appeals on November 12, 2021,<sup>5</sup> as yet another one of the Biden Administration's dubious tactics to enforce its political agenda through an executive branch agency, despite its lack of police power over the states and despite the misuse of various agencies' long-standing and historical purposes.

**Adverse actions taken by FSIS against Nolechek's**

60. As indicated above, following the first notice by FSIS, Nolechek's owners informed the inspector of Nolechek's' COVID-19 and Mask-Wearing Policy and provided the inspector with a copy of the policy.

61. On August 20, FSIS sent Nolechek's an email stating that "[a]s of August 25, 2021, FSIS will not provide inspection to the establishment unless it meets this requirement [that employees wear masks when FSIS personnel are present]." Addendum from 08.20.21 attached hereto as Exhibit B.

62. On August 23, a FSIS inspector provided Nolechek's with a copy of FSIS Notice 34-21. Nolechek's owners informed the inspector that they would not be changing their establishment's masking policy.

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<sup>5</sup> Undersigned counsel for Nolechek's were counsel of record for the lead petitioners in the Fifth Circuit Court of Appeals. See *BST Holdings, et al v. OSHA, et al*, Case No. 21-60845, Fifth Circuit Court of Appeals.

63. On August 25, a FSIS inspector stopped by Nolechek's, determined that its employees were not wearing masks, and reported the establishment to its supervisor. Nolechek's owners spoke with the supervisor and emailed them their mask-wearing policy they had previously provided to FSIS.

64. That same afternoon, Nolechek's owners received a call from the FSIS district manager informing them that they would receive a Notice to Withhold the Marks of Inspection the following day. The district manager told Nolechek's owners that if they produced any product with the mark of inspection after receiving the notice, FSIS would consider the product adulterated and initiate a recall, despite FSIS not conducting an actual inspection of Nolechek's meat or food products.

65. On August 26, an FSIS inspector personally delivered to Nolechek's notice of FSIS's Withholding Action that would remain in effect until Nolechek's complied with FSIS Notice 34-21's mask "requirement." Notice to Withhold the Marks of Inspection attached hereto as Exhibit C.

66. According to this Notice to Withhold the Marks of Inspection, "[t]his action was taken due to [the] establishment's failure to comply



with face mask requirements set forth in FSIS Notice 34-21.” *Id.* The Notice did not cite to any of the reasons FSIS may take a Withholding Action that are enumerated in 9 C.F.R. § 500.4, the applicable regulation in the Rules of Practice.

**Nolechek’s response**

67. The Withholding Action immediately prevented Nolechek’s from selling its products wholesale within Wisconsin or out of state. Further, because withholding actions are only issued for serious breaches of regulations such as inadequate sanitary conditions and failure to adequately control pathogens, the Withholding Action seriously harmed Nolechek’s reputation and standing in the community and throughout Wisconsin and the country.

68. On August 27, 2021, Nolechek’s appealed the decision to the FSIS administrator, who is the next immediate supervisor with jurisdiction over the subject matter of the appeal, having power to grant the requested relief. *See* 9 C.F.R. § 306.5. The same day, its appeal was denied by an assistant FSIS administrator on behalf of the FSIS administrator. Denial Letter attached hereto as Exhibit D.

69. Having exhausted their administrative appeals and facing significant economic harm to their wholesale business from the unlawful and illegal Withholding Action, Nolechek's owners were forced to take "corrective actions" in order to comply with the illegal and unlawful FSIS Notice 34-21 for the time being.

70. The corrective actions are that all of Nolechek's employees will wear masks when FSIS personnel are present and that employees who can't or won't wear a mask will be excused while FSIS personnel are present. Corrective Action attached hereto as Exhibit E.

71. Despite the forced corrective action taken, Nolechek's owners sincerely believe FSIS Notice 34-21 is illegal and unlawful. They are presently complying with it only to save their business reputation and revenues.

72. Operating under the corrective action plan in response to the unlawful and illegal FSIS Notice 34-21 has eroded the community and meat industry's confidence in Nolechek's and its meat products, undermined its relationship with its employees, and increased its cost of doing business.

**COUNT I—Violation of Administrative Procedure Act  
(FSIS Notice 34-21 is illegal, not in accordance with law,  
and must be set aside)**

73. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

74. FSIS Notice 34-21 is an “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. It represents the consummation of FSIS’s decision-making process about protective measures for its employees in response to COVID-19. And it affects Nolechek’s legal rights and obligations because it forces it to choose between submitting to a burdensome requirement or losing a significant portion of its business revenue.

75. A court must “hold unlawful and set aside agency action ... found to be ... not in accordance with law.” 5 U.S.C. § 706(2)(A).

76. FSIS Notice 34-21 is not in accordance with law because it instructs FSIS not to comply with its own binding regulations.

77. The Supreme Court has ruled on numerous occasions that agencies must follow their own regulations. *See, e.g., Fort Stewart Sch. v.*

*Fed. Lab. Rels. Auth.*, 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”).

78. The Rules of Practice are binding regulations issued via notice-and-comment rulemaking pursuant to FSIS’s statutory authority under the Federal Meat Inspection Act (21 U.S.C. §§ 601–695).

79. The Rules of Practice specifically enumerate the grounds on which FSIS may take a Withholding Action against an FSIS-inspected facility. Conversely, they provide notice to these facilities about which acts or omissions may result in adverse regulatory actions.

80. As discussed above, establishments undergo a strenuous process to obtain a Grant of Inspection. They do so because being inspected by FSIS and permitted to place the USDA mark on their products provides significant benefit by (1) opening additional wholesale markets for their products and (2) enhancing their reputation for quality and safety in their food products.

81. FSIS took a Withholding Action against Nolechek’s pursuant to FSIS Notice 34-21 even though the establishment had complied with all of the requirements in 9 C.F.R. §§ 500.3 and 500.4 that would constitute grounds for a Withholding Action if violated.

82. FSIS issued FSIS Notice 34-21 as a policy document without notice-and-comment proceedings or any form of public input.

83. FSIS Notice 34-21 instructs FSIS personnel to take Withholding Actions without reference to the Rules of Practice that govern withholding actions. These actions affect the rights of FSIS-inspected facilities such as Nolechek's.

84. Because FSIS Notice 34-21 instructs FSIS personnel to adversely affect the rights of regulated parties without providing them the benefit of the agency's established regulations, it is invalid and should be set aside. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *Samirah v. Holder*, 627 F.3d 652, 664 (7th Cir. 2010) ("[R]ules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency.")

**COUNT II—Violation of Administrative Procedure Act  
(FSIS Notice 34-21 is arbitrary and capricious because  
FSIS's explanation for its decision is pretextual)**

85. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

86. The Supreme Court requires agencies to use “logical and rational” processes to make decisions and instructs lower courts to “set aside agency regulations which . . . are not supported by the reasons that the agencies adduce.” *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

87. FSIS Notice 34-21 stated that FSIS would impose a mask mandate on FSIS-inspected establishments in order to comply with its obligations under the Occupational Safety and Health (OSH) Act of 1970 and the regulations promulgated pursuant to it to provide a safe workplace for its employees.

88. While FSIS is an employer subject to the OSH Act, OSHA, not FSIS, is tasked with interpreting the Act and issuing regulations under it. Thus, FSIS cannot independently interpret the OSH Act to require what OSHA has not interpreted it to require. *Cf. Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (stating that courts should only defer to an “agency’s construction of the statute *which it administers*”) (emphasis added); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2409 (2019) (stating courts should only defer to an “agency’s construction of *its own regulation*”) (emphasis added).

89. As an employer, FSIS exposes its employees to COVID-19 but cannot correct the hazard itself because, by its own admission, it lacks authority to control private workplaces. See Exhibit A, FSIS Notice 34-21 II(B).

90. Under OSHA’s interpretation of the OSH Act, FSIS would be compliant if it “(1) ask[ed] the creating and/or controlling employer to correct the hazard; (2) inform[ed] its employees of the hazard; and (3) t[ook] reasonable alternative protective measures.”

91. The OSHA directive states that only “[i]n extreme circumstances (e.g., imminent danger situations), [is] the exposing employer . . . citable [i.e., for violating OSHA regulations] for failing to remove its employees from the job to avoid the hazard.” *Id.*

92. FSIS Notice 34-21 ignores the actual OSHA standard, omits “reasonable alternative protective measures” short of removal (for example, equipping inspectors with highly effective and now-plentiful N95 respirators), and jumps straight to “remov[ing] its employees from the job.” *Id.*

93. FSIS has failed to establish, or even assert, that its employees' risk of COVID-19 exposure from unmasked workers at FSIS-inspected facilities is an "extreme circumstance" or "imminent danger situation."

94. FSIS would be hard pressed to do so, given that it continued inspections without a mask requirement for months while vaccination rates were much lower and COVID-19 rates remained high.

95. Moreover, FSIS Notice 34-21's mask mandate applies to all employees in a facility when an FSIS inspector is present, not just those in close contact with the inspector. Unmasked employees in one part of a massive meatpacking facility pose zero danger to an inspector in another part of the facility, much less an "extreme circumstance."

96. But under FSIS Notice 34-21, the presence of a single inspector anywhere in the building means that all of these employees must wear masks, regardless of vaccination status, even if the inspector never comes close enough to be at risk of COVID-19 exposure from them.

97. Further, FSIS inspectors must be present at all times during livestock slaughter operations, which means that FSIS Notice 34-21 requires anyone working in a facility that slaughters livestock to mask at virtually all times.



98. Given that FSIS would not violate OSHA regulations by continuing inspections without a mask requirement, FSIS's stated reason for the mask mandate is pretextual. The real reason is to enforce the Biden Administration's public health agenda in settings it otherwise lacks legal authority to regulate.

99. In *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), the Supreme Court overturned a Trump Administration rule as arbitrary and capricious because its stated grounds were pretextual. The Court held that "[a]ccepting contrived reasons [for administrative law decisions] would defeat the purpose of the enterprise." *Id.* at 2575.

100. This Court should likewise invalidate FSIS Notice 34-21 as pretextual and thus arbitrary and capricious because the stated purpose and reasons for Notice 34-21 are contrived.

**COUNT III—Violation of Administrative Procedure Act  
(FSIS Notice 34-21 is unlawful under the APA because it  
exceeds FSIS's statutory authority)**

101. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

102. FSIS's authority to create rules that bind third parties is limited to its mission of ensuring that meat and certain other food products are safe and properly labeled and packaged. *See* 21 U.S.C. §§ 451, 621, and 1043.

103. Therefore, FSIS has no statutory authority to enforce public health measures unrelated to food safety.

104. The binding regulations FSIS has promulgated through notice-and-comment procedures to govern its inspections are grounded in its food safety authority.

105. Each of the reasons for which the Rules of Practice permit FSIS to take a Withholding Action against a facility have to do with its mission of ensuring food safety, whether directly (e.g., because the facility's quality control procedures are deficient) or indirectly (e.g., because facility personnel impeded an inspector's ability to inspect the facility). *See* 9 C.F.R. § 500.3.

106. FSIS Notice 34-21 directs FSIS personnel to withhold marks of inspection for reasons irrelevant to the agency's purpose of ensuring food safety.

107. In issuing FSIS Notice 34-21, FSIS did not cite to any statute that FSIS is tasked with implementing. In fact, FSIS has not cited to any particular statutory or regulatory provision giving it authority to affect the rights of third parties in this manner—because there are none.

108. If FSIS can impose mask mandates on inspected facility employees, so can any agency which sends its employees into private businesses, such as the FDA, EPA, and Commerce’s NOAA Inspection Program, regardless of whether public health measures are within their purview.

109. Further, if FSIS can impose upon private third parties a mask mandate for the safety of FSIS employees, there is no logical objection to it, by the same reasoning, imposing a vaccine mandate or requiring all inspected meat establishments have a windowless room meeting certain architecture design standards in which an inspector can take shelter from severe weather events.

110. These hypotheticals serve to illustrate that FSIS’s purported authority lacks a limiting principle. Fortunately, established administrative law provides one.

111. A court must “hold unlawful and set aside agency action ... found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

112. The Supreme Court recently overturned the CDC’s eviction moratorium on these grounds. *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (affirming the district court’s determination that the agency “lacked statutory authority to impose the moratorium”).

113. Courts are skeptical of agencies “discover[ing] in a long-extant statute” broad new powers, especially when the claimed powers are inconsistent with those the agency has invoked before. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Loving v. I.R.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

114. FSIS now claims to have discovered in the OSHA regulations the affirmative legal authority to impose on third parties, such as meat establishments like Nolechek’s, a public health measure unrelated to its food safety mission and purpose.

115. This Court should hold unlawful and set aside FSIS Notice 34-21 because FSIS acted “in excess of” its statutory authority. 5 U.S.C. § 706(2)(C).

**COUNT IV—Violation of Administrative Procedure Act  
(FSIS failed to observe the notice and comment procedure  
required by law)**

116. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

117. Assuming, arguendo, that FSIS did have the statutory authority to impose a workplace safety rule on inspected third-party establishments, FSIS Notice 34-21 would still be unlawful because it is a legislative rule that FSIS was required to issue through the notice-and-comment process.

118. A court must “hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

119. FSIS Notice 34-21 is a rule within the meaning of the APA because it is “an agency statement of general or particular applicability

and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4).

120. The APA requires agencies to issue legislative rules (i.e., those that are not interpretive rules or general statements of policy) through a notice-and-comment process. *See* 5 U.S.C. §553(b)(3)(A); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002).

121. While FSIS styles FSIS Notice 34-21 as an internal policy for protecting its employees, this characterization does not change the fact that it qualifies as a legislative rule.

122. According to the D.C. Circuit, “An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule.” *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).

123. The D.C. Circuit recognizes that “withholding the mark of inspection from meat products or suspending the assignment of inspectors to a plant” is an enforcement action. *Munsell v. Dep’t of Agric.*, 509 F.3d 572, 575 (D.C. Cir. 2007).

124. FSIS Notice 34-21 purports to impose an obligation on FSIS-inspected establishments to make their employees wear masks. It states that FSIS will “withhold inspection service from . . . establishment[s]” that do not comply with the requirement. *See Exhibit A.*

125. Because FSIS Notice 34-21 purports to impose an obligation and makes violation of that purported obligation the basis for an enforcement action, it is a legislative rule.

126. FSIS issued FSIS Notice 34-21 without engaging in the notice-and-comment process. *See 5 U.S.C. § 553.*

127. Good cause does not excuse the FSIS's failure to comply with the notice-and-comment process. *See 5 U.S.C. § 553(b)(3)(B).*

128. Therefore, this Court should hold unlawful and set aside FSIS Notice 34-21 because it violates the APA’s notice-and-comment requirement. 5 U.S.C. § 706(2)(D).

**COUNT V— Violation of the Administrative Procedure Act (FSIS Notice 34-21 deprives Plaintiff of procedural Due Process)**

129. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

130. A court must “hold unlawful and set aside agency action ... found to be ... contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B).

131. The Fifth Amendment’s Due Process Clause states: “No person shall ... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

132. The Rules of Practice establish the standards of conduct that Nolechek’s must satisfy to retain its Grant of Inspection and create a clear expectation that it will maintain its Grant of Inspection absent proof of violation.

133. Therefore, Plaintiff has a protected property interest in maintaining the Grant of Inspection and its accompanying benefits as long as they comply with the terms of the Rules of Practice. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Simpson v. Brown Cty.*, 860 F.3d 1001, 1006 (7th Cir. 2017).

134. FSIS Notice 34-21 deprives Plaintiff of these rights without satisfying the requirements of due process—in this case, extending to Plaintiff the benefit of the procedures in the Rules of Practice as discussed herein.



135. Further, Plaintiff was deprived of its protected property interest without notice and an adversary hearing and FSIS failed to demonstrate exigent circumstances in order to justify dispensing without notice and an adversary hearing, prior to depriving Nolechek's of its property interest.

136. Thus, this Court should hold unlawful and set aside the FSIS Notice 34-21 as "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

**COUNT VI—Violation of the Separation of Powers  
(FSIS Notice 34-21 is an invalid interpretation of the OSH  
Act because it would result in an improper  
delegation of legislative power)**

137. Plaintiff realleges and incorporates by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

138. The U.S. Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Under the nondelegation doctrine, Congress cannot transfer legislative power to the Executive Branch. Acts of Congress must supply an intelligible principle to guide the Executive Branch's enforcement discretion.

139. If FSIS's interpretation of the OSH Act in FSIS Notice 34-21 is correct, the OSH Act violates Article I's Vesting Clause and the separation of powers because Congress would have delegated legislative power to FSIS (and, as discussed herein many other federal agencies subject to OSHA requirements) with no intelligible principle to guide its discretion. Vesting federal agencies with such broad authority and discretion without an intelligible principle violates the nondelegation doctrine.

140. This Court should declare that FSIS's interpretation of the OSH Act in FSIS Notice 34-21 is invalid and unconstitutional in violation of Article I and the separation of powers.

### **PRAYER FOR RELIEF**

A. For a declaration by this Court that FSIS Notice 34-21 violates the Administrative Procedure Act and is null and void;

B. For an injunction by this Court permanently enjoining FSIS, USDA, and Secretary Vilsack from enforcing FSIS Notice 34-21 upon Nolechek's and all applicable meat establishments in Wisconsin and across the country;

C. For an injunction by this Court ordering FSIS, USDA, and

Secretary Vilsack to permanently remove the prior FSIS Withholding Action from Nolechek's record;

D. For an injunction by this Court ordering FSIS, USDA, and Secretary Vilsack to permanently remove the corrective action previously taken by Nolechek's in response to the illegal FSIS Notice 34-21;

E. For attorneys' fees, expenses, and costs incurred by Nolechek's in having to bring this action; and

F. For such other relief this Court deems just and equitable.

Dated: December 2, 2021

Respectfully Submitted,  
**NOLECHEK'S MEATS, INC.**

By: /s/ Daniel R. Suhr

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

***Attorneys for Plaintiff  
Nolechek's Meats, Inc.***