

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

NOLECHEK’S MEATS, INC.,
a Wisconsin corporation;
WE’RE THE WURST
INCORPORATED,
an Oregon corporation; and
GOLDEN CITY MEATS, LLC,
a Missouri limited liability
company,

Plaintiffs,

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

**FIRST AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

The Plaintiffs, Nolechek’s Meats, Inc., (“Nolechek’s”), a Wisconsin corporation, We’re the Wurst Incorporated (“We’re the Wurst”), an Oregon corporation, and Golden City Meats, LLC (“Golden City”), a

Missouri limited liability company, are privately owned entities and meat establishments who have earned a USDA Federal Grant of Inspection, and their principal places of business are located in their respective states (collectively the “Plaintiffs”). By and through their undersigned attorneys, Plaintiffs state and allege as follows:¹

INTRODUCTION

1. Nolechek’s is a Wisconsin award-winning premium meat establishment that has been in the Nolechek family for four generations.² Including its private owners and employee team members, Nolechek’s has fewer than one hundred employees.

2. We’re The Wurst is a family-run Oregon premium meat establishment that has grown in just a few years from a small food cart into a facility capable of producing as much as 16,000 pounds of sausage per day.³ Including its owners and employee team members, We’re The Wurst has fewer than 100 employees.

3. Golden City is a family-run slaughterhouse and premium meat establishment located in Golden City, Missouri, and its slaughterhouse

¹ Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), Plaintiffs are entitled to file this first amended complaint as a matter of course.

² See <https://www.nolechekmeats.com/>.

³ See <https://werethewurst.com/>.

operations offer full-service capabilities to a number of family farmers located in Missouri, Arkansas, Oklahoma, and Kansas.⁴ Including its owners and employee team members, Golden City has fewer than 100 employees.

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

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

6. Under the FSIS, the USDA Mark of Inspection is required for Plaintiffs to sell their food and meat products commercially wholesale within their respective states, as well as out of state. Further, with respect to Golden City’s slaughterhouse operations, the USDA Mark of Inspection is required for Golden City to service its family farmer customers located throughout the Midwest.

⁴ See <https://www.facebook.com/goldencitymeats/>.

7. This ability to sell its food and meat products wholesale and out of state has led to a significant increase in business revenues for Nolechek's and We're the Wurst. Additionally, the ability to offer full-service slaughterhouse operations to family farmers in the Midwest has led to a significant increase in business revenues for Golden City.

8. Since Plaintiffs obtained the right to display the federal USDA Mark of Inspection, FSIS inspectors have never reported that Plaintiffs' food or meat products were unsafe nor that Golden City's slaughterhouse operations were unsanitary.

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 on-site 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 and while overseeing slaughterhouse operations, even if the meat product was safe and the slaughterhouse facility was sanitary. *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. According to the CDC, “currently there is no evidence to support transmission of COVID-19 associated with food.”⁵

13. Plaintiffs do not require their employees to wears masks on the job, as employees are able to socially-distance themselves during production because of the small employee-team size. Golden City’s slaughterhouse operations occur 1 or 2 days per week and require inspectors to be on-site for 8 hours. During this entire time of inspecting

⁵ *See* <https://www.cdc.gov/foodsafety/newsletter/food-safety-and-Coronavirus.html>.

the slaughterhouse operations where Golden City's employees are diligently working, the temperatures sometimes reach 100 degrees and for sanitary purposes, the area resembles a steam room, and it is extremely difficult to breathe while wearing a mask during slaughtering during this intense heat.

14. Some of the Plaintiffs, such as Nolechek's, also made this business judgment decision out of respect to their employees' individual discretion and autonomy to make their own health choices. All of the Plaintiffs believe that FSIS does not have legal authority to impose a federal mask mandate upon meat establishment employees, for the sole purpose of protecting FSIS employees and inspectors.

15. Plaintiffs 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. Therefore, required masking is irrelevant and unscientific relevant to the safety of the food products that FSIS inspects.

16. Because of Plaintiffs' policies and refusal to implement an unlawful masking requirement, FSIS then issued each Plaintiff a Notice to Withhold the Marks of Inspection, which prevents Plaintiffs from

selling their meat and food products wholesale intra-state, or out of state, a core component of some of the Plaintiffs' businesses. Further, Golden City was unable to operate its slaughtering business that a number of Midwest family farmers utilized, which was a core component of its business.

17. The Notices to Withhold the Marks of Inspection included no evidence, claim, or even suggestion that Plaintiffs' meat was unsafe nor that the conditions of Golden City's slaughterhouse were unsanitary.

18. Plaintiffs We're the Worst and Golden City are each currently operating without the USDA Mark, which limits their business to direct wholesale or retail sales and prevents Golden City from operating its slaughterhouse operations and providing services to Midwest family farmers. Nolechek's has been permitted to continue operating with the Mark, under a corrective action, for the time being but it maintains that the FSIS notice is illegitimate, coercive, and unlawful.

19. 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 and only legal authority conferred upon FSIS.

20. 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.

21. 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.

22. 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

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

24. We're the Worst is an Oregon corporation with its principal place of business located in Redmond, Deschutes County, Oregon.

25. Golden City is a limited liability company with its principal place of business located in Golden City, Barton County, Missouri.

26. 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.

27. Defendant Secretary of Agriculture Thomas J. Vilsack in his official capacity (“Secretary Vilsack”), is the current and 32nd Secretary of Agriculture since 2021 in the Biden Administration, having previously held the same office from 2009 through 2017 in the Obama Administration.

28. 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.

29. 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.

30. 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

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

32. But despite this unassuming building façade, inside the owners of the fourth-generation family business and their employees are busy making award-winning gourmet meat products that are enjoyed by the citizens of Wisconsin and shipped throughout the state and country.

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

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

35. 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.⁶

36. Nolechek's USDA Mark of Inspection number is 48256.

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

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

39. 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.

⁶ 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 (updated Aug. 29, 2012).

40. 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.

We're The Wurst

41. Owner Matthew Fidler started We're the Wurst in 2016 with only a personal loan to outfit a food cart, and a dream.

42. His scratch made bratwurst was slowly joined by a full menu of other premium sausages, from British Bangers to Hungarian Kielbasa.

43. In 2019, We're the Wurst began the process to acquire the USDA Mark of Inspection, to expand its business beyond the simple and unassuming foot cart, and in late 2019 achieved its Grant of Conditional Inspection.

44. In the Spring of 2020, We're the Wurst completed the extensive process to obtain its full FSIS Grant of Inspection for its meat establishment. This process included developing written Sanitation Standard Operating Procedures, conducting a hazard analysis, developing and validating a HACCP plan, and implementing these procedures in accordance with regulatory requirements.

45. We're the Wurst's USDA Mark of Inspection number is 46769.

46. Becoming an FSIS-inspected establishment opened up a much larger market for We're the Wurst products by allowing it to wholesale its products within Oregon and out-of-state. Growth was exponential, with We're the Wurst purchased new equipment, signing up numerous new accounts, and ultimately had to change production facilities three different times to keep up with constantly expanding demand.

47. We're the Wurst's current facility is capable of producing as much as 16,000 pounds of sausage per day, equivalent to about \$84,000 per day in gross sales.

48. FSIS inspectors and fellow meat product specialists alike have repeatedly praised We're the Wurst's HACCP program. To We're the Wurst's owner and employees, their HACCP program demonstrates its commitment to food safety and helps educate its customers.

49. We're the Wurst considers the quality and safety of its products to be a cornerstone of their business. Just prior to the events involved here and unrelated to this lawsuit, the company voluntarily decided to dispose of thousands of pounds of product because it discovered bone fragments in its source meat that USDA inspectors had missed during

inspection. We're the Wurst went above and beyond its legal responsibilities in promptly taking the offending meat out of production and notifying USDA of its own inspection oversight.

50. During the global pandemic, We're the Wurst 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.

51. Consistent with We're the Wurst owner's commitment to honoring people's personal morals, values, autonomy, and convictions, We're the Wurst leaves the decision to wear masks to each employee's individual discretion.

Golden City

52. Golden City is a full-service slaughterhouse and retail establishment, servicing customers and family farmers across the Midwest. Golden City has been in continuous operation since 1972, with its current owner, Robert Long, overseeing Golden City since 2008.

53. In 1972, Golden City received its command-and-control authority; in 1999 it completed its HACCP plan; and in 2008 it received its Grant, completing the extensive process to obtain an FSIS Grant of

Inspection for its meat establishment. This process included developing written Sanitation Standard Operating Procedures, conducting a hazard analysis, developing and validating an HACCP plan, and implementing these procedures in accordance with regulatory requirements.

54. Golden City's USDA Mark of Inspection number is 8725.

55. Becoming an FSIS-inspected establishment opened up a much larger market for Golden City's products by allowing it to provide full-service slaughtering services to family farmers and ranchers within Missouri and out-of-state. Since 2008, Golden City has expanded its in-state and out-of-state slaughtering operations into a significant component of its business.

56. FSIS inspectors and fellow meat product specialists alike have repeatedly praised Golden City's HACCP program. To Golden City's owner and employees, Golden City's HACCP program demonstrates its commitment to food safety and helps educate its customers.

57. During the global pandemic, Golden City practiced social distancing and followed all FSIS-required procedures with the exception of mandatory masking for its employees. To assist their employees with

not having to be exposed to the virus while out in public, Golden City elected to provide free lunch to employees on site.

FSIS

58. 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.

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

60. That Act is designed to protect "the health and welfare of consumers . . . by assuring that meat and meat products distributed to them are wholesome, unadulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602.

61. The Federal Meat Inspection Act and the regulations promulgated under it prohibit Plaintiffs' establishments from selling their meat products wholesale, or from operating slaughterhouses, without a USDA label or mark. 21 U.S.C. § 610.

62. Meat product-producing establishments and slaughterhouses may not affix the USDA label to their food products unless they have

obtained a Grant of Inspection, been inspected by FSIS inspectors, and been deemed in compliance with applicable regulations.

63. 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).

64. 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

65. On August 4, 2021, FSIS distributed a first notice, Notice 30-21, without going through the notice-and-comment procedure.

66. This notice described in general terms 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.

67. On August 23, 2021, FSIS issued a second notice, FSIS Notice 34-21 that is the subject of this lawsuit, also without notice-and-comment, that replaced the first notice.

68. 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.

69. 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.

70. In both notices, FSIS stated and conceded that “[f]or FSIS employees working in privately owned establishments, [it] does not have authority to abate hazardous conditions directly.” *See* Exhibit A.

71. Despite this candid acknowledgment of its lack of legal authority to impose mask requirements upon meat establishments in a direct manner, FSIS proceeded to try to accomplish indirectly in a “workaround” fashion what it could not legally and directly require.

72. In attempting to impose a mask requirement, FSIS has strayed far from its directive to ensure safe and properly-labeled and packaged food. The CDC, FDA, and USDA have all stated that there is no credible

evidence of COVID-19 spreading from humans through food or food packaging.

73. 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 last year while vaccination rates were much lower but COVID-19 rates remained high.

74. 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 and workaround, for which it has no legal authority.

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

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

77. The American Civil Liberties Union filed lawsuits, the trial lawyers started filing USDA complaints, the Hispanic advocacy groups started highlighting the disproportionate racial impact, and the major

union, the United Food & Commercial Workers, demanded action from USDA.

78. Democrats in Congress leveled criticism at OSHA, the USDA, and the CDC over their supposedly lackluster response to COVID-19 outbreaks. Shortly after taking the majority, the Democratic House empaneled a new Select Subcommittee on the Coronavirus Crisis, whose chairman sent a “scathing letter” “suggesting that OSHA has failed utterly in its duty to protect the health of workers in U.S. meatpacking plants during the Covid-19 pandemic.”

79. A press release from Senators Elizabeth Warren and Cory Booker summed up the sentiment: “Senators Warren and Booker to OSHA: Your Persistent Failure to Protect Workers at Meatpacking Facilities From Escalating, Deadly COVID-19 Outbreaks is Disgraceful” (Dec. 22, 2020).

80. In the Summer of 2020, a congressional committee acted specific to FSIS inspectors. The House Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Subcommittee of the Committee on Appropriations produced a report to accompany the 2021 USDA appropriations bill.

81. The report slammed FSIS: “During the COVID-19 outbreak, FSIS has tragically failed to protect its workforce. At least four FSIS inspectors have died from COVID-19. USDA failed to promptly provide Personal Protective Equipment to inspectors. Additional mitigation measures to protect inspectors from COVID-19 risks should have been implemented much more quickly, including mandatory social distancing and increased screening measures in establishments to reduce the spread of COVID-19.”

82. The Committee directed FSIS to “to publish on its website the number of confirmed COVID-19 cases and deaths among FSIS inspectors and to update those numbers within five business days of receiving any updated numbers.” When the agency did not promptly comply, Congressional Democrats again slammed USDA over safety in meatpacking plants.

83. This pressure campaign kicked into high gear in Summer 2021. First, these groups lobbied OSHA to issue an emergency temporary standard (ETS) specific to meatpacking. When OSHA refused to do so in June 2021, the United Food & Commercial Workers, which represents 1.3 million food workers, “condemned the move by the Occupational

Health & Safety Administration (OSHA) to exclude frontline grocery and meatpacking workers from its long-delayed Emergency Temporary Standard (ETS) on COVID workplace safety.”

84. Just weeks later, the initial Notice was issued, and then the amended Notice that is the subject of this lawsuit came out with the enforcement hammer: comply or lose your Mark.

85. 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 and slaughterhouses like the Plaintiffs.

86. It joins the late eviction moratorium attempted by the CDC and later over-turned by the United States Supreme Court, as well as the Supreme Court’s recent opinion staying OSHA’s ETS vaccine-or-test mandate upon private employers, as yet another one of the 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 blatant misuse of various agencies’ long-standing and historical purposes.

Adverse actions taken by FSIS against Nolechek's

87. 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.

88. 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]." This Addendum from 08.20.21 is attached hereto as Exhibit B.

89. 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.

90. 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.

91. 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.

92. 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 is attached hereto as Exhibit C.

93. 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." See Exhibit C. This 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

94. 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.

95. 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 is attached hereto as Exhibit D.

96. 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.

97. 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 is attached hereto as Exhibit E.

98. 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, not because it represents a legitimate and lawful action by FSIS.

99. 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.

Adverse actions taken by FSIS against We're the Wurst

100. As indicated above, following the first notice by FSIS, We're the Wurst's owners informed the assigned inspector of We're the Wurst's COVID-19 and Mask-Wearing Policy.

101. On August 24, FSIS sent We're the Wurst an email to confirm their decision regarding the FSIS mask mandate. We're the Wurst's

owner Matthew Fidler informed FSIS that yes, it did not intend to adhere to FSIS's unlawful mask mandate.

102. On August 25, a FSIS inspector stopped by We're the Wurst, determined that its employees were not wearing masks, and left, subsequently filing MOI # SNN1115083325G, which is attached as Exhibit F.

103. FSIS then issued We're the Wurst the Notice to Withhold the Marks of Inspection. Notice to Withhold the Marks of Inspection letter is attached as Exhibit G.

We're the Wurst's response

104. The Withholding Action immediately prevented We're the Worst from selling its products wholesale within Oregon 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 We're the Wurst's reputation and standing in the community and throughout Oregon and the country.

105. Despite these challenges, We're the Wurst has continued to maintain that the FSIS policy is illegal and beyond the agency's legitimate and lawful authority.

106. Despite their objection to FSIS's withdrawal of We're the Wurst's Mark, We're the Wurst has abided by the law in not participating in Oregon wholesale or out-of-state business, as it believes that this is the responsible action to take under the circumstances.

107. On September 16, 2022, We're the Wurst cooperated with an FSIS inspection of its inventory, the purpose of which was to ensure that they were not selling product without the necessary Mark. The inspection demonstrated that We're the Wurst is in compliance with the restrictions imposed by the denial of their Mark.

108. The denial of We're the Wurst's Mark has already costs it hundreds of thousands of dollars in lost business and revenue, in the course of just a few months.

Adverse actions taken by FSIS against Golden City

109. On August 5, 2021, Golden City received a copy of FSIS' initial notice informing them of the impending mask policy.

110. On August 18, 2021, Golden City participated in a conference call with representatives from USDA to discuss the masking policy.

111. On August 23, 2021, Golden City officially received copies of Notices 34-21 and 30-21 from their assigned FSIS inspector.

112. On August 26, 2021, FSIS inspectors arrived at Gold City's facility but refused to perform the necessary inspection due to Gold City employees not being masked, and left without performing an inspection.

113. The refusal to perform the inspection harmed Golden City, as it had animal carcasses on the slaughterhouse floor waiting to be processed and could not proceed without an inspection performed by FSIS.

114. On September 10, 2021, Golden City participated in a Zoom video conference with USDA officials organized by the United States Cattleman's Association, in which Golden City officials relayed their concerns to USDA, but to no avail.

115. Between August 26 and November 8, 2021, and despite Golden City's repeated requests, FSIS declined to perform an inspection.

116. On November 8, 2021, an official from FSIS met with Golden City at their facility and informed them that, because at that time Barton

County, MO, had levels of community transmission below the “moderate” threshold set by the CDC, Notice 34-12 did not apply and they would be inspected, but the Notice would apply in the future if levels of community transmission increased. The USDA official filed an official report to this effect the following day.

117. On November 12, 2021, the CDC downgraded Barton County because of increased measurement of community transmission, and FSIS again refused to inspect Golden City’s facility.

118. FSIS then issued Golden City its Notice to Withhold the Marks of Inspection. Notice to Withhold the Marks of Inspection letter is attached as Exhibit H.

Golden City’s response

119. The Withholding Action immediately prevented Golden City from selling its products within Missouri or out of state and prevented Golden City from providing its slaughterhouse services to a number of family farmers in the Midwest.

120. 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 Golden City's reputation and standing in the community, particularly with Midwest family farmers and ranchers, and throughout Missouri and the country.

121. Despite these challenges, Golden City has continued to maintain that the FSIS policy is illegal and beyond the agency's authority.

122. Despite their objection to FSIS's withdrawal of Golden City's Mark, Golden City has abided by the law in not participating in selling products in or out of state and not providing slaughterhouse services to its family farmer clients and customers, as it believes that this is the responsible action to take under the circumstances.

123. The denial of Golden City's Mark has already cost it hundreds of thousands of dollars in lost business, in the course of just a few months.

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

124. Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

125. FSIS’s first and most basic failure was to impose a legislative rule through an informal guidance notice, thereby evading the notice-and-comment requirements of the APA.

126. 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).

127. 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).

128. 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).

129. 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.

130. 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). The standard is similar in the Seventh Circuit. *Hoctor v. United States Dep’t of Agric.*, 82 F.3d 165 (7th Cir. 1996).

131. 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).

132. 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.

133. 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.

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

135. In those instances where speed is necessary, the agency must still publish a rule in the Federal Register, but can include a judicially-reviewable finding of good cause to skip notice-and-comment. *See* 5 U.S.C. § 553(b)(3)(B).

136. Notice-and-comment rulemaking is important because it allows the regulated community to weigh in on and prepare for regulatory changes. It also forces the agency to provide a factual, scientific, and legal basis for its rulemaking which can then be reviewed in court.

137. 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 II—Violation of Administrative Procedure Act
(FSIS Notice 34-21 is not in accordance with law
because FSIS refused to follow its own
regulations for withdrawing a mark)**

138. Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

139. 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 Plaintiffs’ legal rights and obligations because it forces them to choose between submitting to a burdensome requirement or losing a significant portion of their business revenue.

140. 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).

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

142. The Supreme Court has ruled on numerous occasions that agencies must follow their own regulations. *See, e.g., Fort Stewart Sch. v. Fed. Lab. Rel. Auth.*, 495 U.S. 641, 654 (1990) (“It is a familiar rule of administrative law that an agency must abide by its own regulations.”).

143. 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).

144. 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.

145. 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, (2) allowing slaughterhouse operations to fully-service product from family farmers, and (3) enhancing their reputation for quality and safety in their food products and packaging.

146. FSIS took a Withholding Action against Plaintiffs pursuant to FSIS Notice 34-21 even though the establishments 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.

147. 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 facilities owned and operated by Plaintiffs.

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

149. Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

150. 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. FSIS has no statutory authority to enforce public health measures unrelated to food safety.

151. FSIS is charged as a federal agency by Section 19 of the OSH Act to ensure its employees have a work environment that is consistent

with the safety and health standards set by OSHA under Section 6 of the Act.

152. OSHA has expressly declined—twice—to use its Section 6 authority to mandate masking or other safety measures in the meatpacking industry.

153. 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).

154. 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”).

155. Even if there is no pretext, and FSIS were authentically acting out of a health-and-safety concern for its employees, Notice 34-21 would be illegal because it exceeds FSIS’s authority, which is limited to health-and-safety measures necessary to maintain consistency with OSHA’s Section 6 requirements.

156. Courts should be especially 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).

157. FSIS now claims to have discovered in the OSH Act the affirmative legal authority to impose on third parties, such as meat establishments like Plaintiffs, a controversial public health measure unrelated to its food safety mission and purpose narrowly prescribed by Congress.

158. 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 Notice 34-21 is arbitrary and capricious because
FSIS’s explanation for its decision is pretextual)**

159. Plaintiffs reallege and incorporate by reference the allegations contained in all of the preceding paragraphs as though set forth fully herein.

160. 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).

161. Similarly, “[a]n agency decision is arbitrary and capricious when the agency ‘has relied on factors which Congress had not intended it to consider.’” *Zero Zone, Inc. v. United States DOE*, 832 F.3d 654, 677 (7th Cir. 2016) (quoting *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)).

162. Put differently, courts should reject pretextual and “contrived reasons” for agency decision-making as arbitrary and capricious. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

163. 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.

164. FSIS informal notices fail to provide any factual or scientific basis for its rule, as would have been necessary under formal notice-and-comment rulemaking.

165. FSIS would be hard pressed to do so, given that it conducted inspections during the pandemic for months without a mask requirement when vaccination rates were much lower and COVID-19 rates remained high.

166. 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.

167. 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.

168. Further, FSIS inspectors must be present at all times during animal carcass slaughter operations, which means that FSIS Notice 34-

21 requires anyone working in a facility that slaughters carcasses like Golden City to mask at virtually all times for the entire day.

169. 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 respond to interest-group and congressional political pressure to "do something" about COVID-19 transmission in the meatpacking industry.

170. The story here is simple: the agency waited more than a year after a congressional subcommittee made a finding about FSIS inspector safety, and only acted to protect inspector safety weeks after OSHA declined to regulate meatpacking companies, sparking howls of outrage from political interest groups and Congress.

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

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 Plaintiffs and all applicable meat establishments 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 Plaintiffs' records;

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 and to further remove any negative actions taken against Nolechek's, We're the Wurst and Golden City regarding their Grants of Inspection;

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

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

Dated: January 25, 2022

Respectfully Submitted,

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

By: */s/ Daniel R. Suhr*

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