

September 3, 2013

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Secretary of Labor

Honorable David Michaels
Assistant Secretary of Labor for Occupational Safety and Health

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Occupational Safety and Health Administration
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U.S. Department of Agriculture
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Esteemed Secretaries Perez and Vilsack and Doctors Michaels and Hagen:

The Southern Poverty Law Center, a nonprofit civil rights organization dedicated to seeking justice for the most vulnerable members of society; Nebraska Appleseed Center for Law in the Public Interest, a nonprofit, nonpartisan law project dedicated to equal justice and full opportunity for all Nebraskans; Alabama Appleseed Center for Law and Justice, a nonprofit dedicated to systemic policy reforms that achieves justice and fairness for low-income and unrepresented and other vulnerable populations; the Coalition of Poultry Workers, a community-based organization whose mission

is to engage, inform, and empower poultry workers for the purpose of improving their work environment and quality of life; the Coalition of Black Trade Unionists, made up of members from seventy-seven international and national unions with forty two chapters across the country, which seeks to fulfill the dream of those Black trade unionists, both living and deceased, who have courageously and unremittingly struggled to build a national movement that would bring all our strengths and varied talents to bear in the unending effort to achieve economic, political and social justice for every American; the Farmworker Advocacy Network, a statewide network of organizations that work to improve living and working conditions of farmworkers and poultry workers in North Carolina; Heartland Workers Center, an immigrant and worker organization that aims to improve the quality of life of Latino/a immigrant workers by promoting leadership development, workers' rights, and civic engagement; Interfaith Worker Justice, a nonprofit, nonpartisan religious organization dedicated to advancing the rights of workers by engaging diverse faith communities into grassroots organizing, and shaping policy at the local, state, and national level; the Midwest Coalition for Human Rights, a network of 56 organizations, service providers, and university centers that work to promote and protect human rights in the Midwest region; the National Council for Occupational Safety and Health (National COSH), a federation of local and statewide "COSH" groups, who are private, non-profit coalitions of labor unions, health and technical professionals, and

others who promote and advocate for worker safety and health; the North Carolina Justice Center, a research and advocacy organization whose mission is to eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services and fair treatment it needs to achieve economic security; the Northwest Arkansas Worker Justice Center, a nonprofit organization dedicated to improving conditions of employment for low-wage workers in northwest Arkansas by educating, organizing, and mobilizing them, and calling on people of faith and the wider region to publicly support the workers' efforts; the Refugee Women's Network, a nonprofit organization created by women for women, that focuses on enhancing refugee and immigrant women's strengths, skills, and courage through leadership training, education and advocacy to promote independence, self-sufficiency and networking among its participants; Student Action with Farmworkers, a nonprofit organization whose mission is to bring students and farmworkers together to learn about each other's lives, share resources and skills, improve conditions for farmworkers, and build diverse coalitions working for social change; and the Western North Carolina Workers' Center, works regionally in the state to educate and activate allies, partners and leaders in the defense of worker rights, and participating in networks to address local, regional and national issues that impact workers (collectively, "Petitioners") hereby petition the U.S. Occupational Safety and Health Administration ("OSHA") and U.S. Department of Agriculture

(“USDA”), pursuant to 5 U.S.C. § 553(e)¹ to issue a mandatory occupational safety and health standard regulating work speeds on production lines in meatpacking and poultry industries and to ensure that worker safety is protected in any rulemaking related to line and work speeds in these industries. The standard requested herein would reduce the speed of the processing line to minimize the severe and systemic risks faced by workers in the meatpacking and poultry industries, particularly the prevalence of serious and crippling musculoskeletal disorders (“MSDs”). USDA is requested to incorporate these protections as part of any rulemaking it undertakes that will affect line and work speeds in these industries. A mandatory standard is necessary because it has been well documented – through surveys, interviews, medical literature, and government reports – that excessive line speed causes severe and crippling MSDs and other injuries such as cuts and amputations, all of which affect meatpacking and poultry workers at alarming rates.

There are currently 6,278 federally inspected meat and poultry slaughtering and processing plants in the United States, according to the American Meat Institute.² The American Meat Institute reports that in 2010, more than 487,600 workers were employed in the meat and poultry packing and processing industries.³ The National Council of La Raza

¹ 5 U.S.C. § 553(e) states, “each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

² American Meat Institute, *The United States Meat Industry at a Glance* (March 2011), available at <http://www.meatami.com/ht/d/sp/i/47465/pid/47465>.

³ *Id.*

calculated that about 532,000 people were employed in these industries each year between 2008 and 2010.⁴ Because of high annual turnover, often near or exceeding 100%, with several cycles of turnover in a given year,⁵ more than a half-million people have been or will be meat and poultry workers. The hundreds of thousands of workers in these establishments face ongoing risk of disabling injuries and urgently need an enforceable work speed standard to protect them.

Under the OSH Act of 1970, OSHA has a legal obligation to regulate line-processing speeds in the meatpacking and poultry industry to effectuate its mandate to ensure safe and healthy working conditions are established and maintained for workers. Furthermore, promulgation of a work speed standard is not prevented by a 2001 joint resolution by Congress which dissolved the then newly instituted OSHA ergonomics standard. A rule regulating line speed is not “substantially similar” to OSHA’s 2000 ergonomics rule and would be narrowly targeted to address only the deleterious effects caused by excessive work speed. Because the 2001 joint resolution did not preclude OSHA from creating safeguards against any ergonomic hazards, a rule regulating work speed would not conflict with the joint resolution.

⁴ National Council of La Raza, *Latinos in the Poultry Processing Industry* (May 4, 2012), available at <http://www.nclr.org/images/uploads/publications/PIRM2012.pdf>.

⁵ U.S. Government Accountability Office, *Workplace Safety and Health: Safety in the Meat and Poultry Industry, while Improving, Could Be Further Strengthened*, GAO-05-96, at 7, 31, 56 (2005), available at <http://www.gao.gov/products/GAO-05-96> [hereinafter *GAO Meat & Poultry Report 2005*].

OSHA has known about MSDs and other work speed-related injuries in meat and poultry plants for decades but has been unable to improve safety for line speed workers under existing standards. Enforcement mechanisms such as company-wide settlements and citations achieved pursuant to the General Duty Clause have been inadequate for confronting the persistent threat that work speed poses to the safety and health of meat and poultry workers. Although OSHA's guidelines for meatpacking and poultry plants contain useful recommendations, they are non-enforceable and cannot substitute for a clear and enforceable work speed standard.

A proposed new USDA rule that would authorize an increase in poultry plant line speeds to even more unsafe levels makes it imperative that OSHA act now to regulate work speed. Under the USDA's proposed plan, a single federal inspector would oversee lines processing as many as 175 birds per minute. The pressure to keep up with current speeds imposes a tremendous toll on workers' health and safety; the impending speed-up makes the need for a clear OSHA work speed standard all the more urgent. USDA is also obligated to engage with OSHA to ensure that any rules it adopts will not further harm worker health and safety.

This petition will (1) describe the magnitude of the problem of crippling injuries suffered by workers as a direct consequence of work speed; (2) outline OSHA's legal authority to address these kinds of workplace hazards and the resulting injuries by promulgating protective standards and

USDA’s legal obligation to protect workers in any line speed rule it promulgates; (3) describe the limitations of OSHA’s currently-available mechanisms to address dangerous work speeds within these industries; and (4) propose a standard to better protect poultry and meatpacking workers from crippling fast work speeds. Petitioners will also suggest some supplemental approaches to reducing workplace injuries resulting from excessive line speeds.

Part I. Meatpacking and Poultry Workers Suffer Debilitating Injuries at a High Rate Due to Dangerously Excessive Work Speeds on Slaughtering and Processing Lines.

Meatpacking and poultry processing line jobs are among the most notoriously dangerous jobs in the United States.⁶ The danger that this type of work poses to workers is rooted in the excessive speed of the processing line.⁷ Because production lines require workers to endure long intervals of work in which they perform uniform motions repeatedly, meat and poultry plants pose threats to worker safety and health that are unique compared to

⁶ See, e.g., Lance Compa & Jamie Fellner, *Meatpacking’s Human Toll*, Wash. Post (Aug. 3, 2005) (“But meatpacking and poultry workers face more than hard work in tough settings. They perform the most dangerous factory jobs in the country.”); Eric Schlosser, *The Most Dangerous Job in America*, Mother Jones (July/Aug. 2001) (“According to the Bureau of Labor Statistics, meatpacking is the nation’s most dangerous occupation.”); Midwest Coalition for Human Rights, *Always Working Beyond the Capacity of Our Bodies: Meat and Poultry Processing Work Conditions and Human Rights in the Midwest* at 3 (Oct. 2012) (“Meatpacking continues to be one of the most dangerous jobs in America.”).

⁷ GAO *Meat & Poultry Report 2005*, *supra* note 5, at 31–32 (“The speed at which production employees are expected to work, often determined by the speed of the production line, or line speed, may also be an important factor influencing their safety and health. The faster the pace at which the production line moves, the less able workers may be to perform tasks needed for safety. For example, according to industry research, at certain line speeds workers may be unable to take the seconds required to perform certain critical tasks, such as frequent sharpening of knives, to ensure that their jobs can be conducted safely. Some respondents to our survey also noted that line speed is an important factor affecting worker safety and health.”).

other manufacturing industries.⁸ Comprehensive surveys and interviews with meatpacking and poultry workers, medical literature,⁹ and reports prepared by and for the federal government¹⁰ have all demonstrated that hazardous work speed is inextricably linked to the severe and crippling injuries that plague these workers.

A. Work speed is a leading cause of injury in poultry and meatpacking plants.

Excessive line speed is a leading cause of severe injuries in meatpacking and poultry plants. To keep up with the line, workers must make many repetitive and identical motions¹¹ every day while standing for an extended period of time. As has been repeatedly documented, this



precarious work environment results in long-term pain and devastating injuries to the hands, wrists,

⁸ See *id.* at 19–20.

⁹ See *infra* Parts I-B, and I-C.

¹⁰ See, e.g., Kristin Musolin, et al., Nat'l Inst. for Occupational Safety & Health, *Musculoskeletal Disorders and Traumatic Injuries Among Employees at a Poultry Processing Plant*, Interim Report, HHE No. 2012-0125 (Apr. 2013) [hereinafter *NIOSH Poultry Report*]; *GAO Meat & Poultry Report 2005*, *supra* note 5; Nat'l Research Council and Inst. of Medicine, *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities*, Panel on Musculoskeletal Disorders and the Workplace, Commission on Behavioral and Social Sciences and Education, Washington, DC: National Academy Press (2001).

¹¹ See *GAO Meat & Poultry Report 2005*, *supra* note 5, at 7–8.

arms, and shoulders of meat and poultry workers.¹²

Extensive surveys undertaken by a variety of organizations over the past decade confirm that meat and poultry workers themselves believe that excessive line speed makes their workplaces significantly more dangerous. Surveys done by the Southern Poverty Law Center (SPLC) and Alabama Appleseed, the Midwest Coalition for Human Rights (MCHR), Nebraska Appleseed, and Human Rights Watch (HRW) demonstrate that excessive line speed creates dangerous conditions in the poultry and meatpacking industry. In 2012, SPLC and Alabama Appleseed surveyed 302 current and former poultry workers in Alabama, and released a report on their findings entitled *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers*.¹³

Unsafe at These Speeds detailed how line speed impacts the daily health and safety of workers. An overwhelming majority of workers surveyed, 78 percent, asserted that “line speed makes them feel less safe, makes their work more painful and causes more injuries.”¹⁴ Workers recalled a wide range of troubling incidents that related to line speed. For instance, 8 percent of workers pointed to other workers being fired or threatened for suggesting that supervisors curb the speed of the line, while 12 percent said supervisors would speed up the line when asked to slow it down.¹⁵ One poultry worker

¹² See *id.* at 3.

¹³ Southern Poverty Law Center and Alabama Appleseed, *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers* (2013) [hereinafter *Unsafe at These Speeds*].

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 10.

named Carlos was so tormented by agonizing pain that he stopped the processing line. His supervisor promptly warned him that he would be fired if he did it again.¹⁶ Another worker described how co-workers had jammed chicken bones into the machinery of the processing line because “it was the only way they could get some relief from the frantic pace.”¹⁷ Overall, when asked if “they had any opportunity to influence line speed”, nearly all of the respondents – 99 percent – answered with “a resounding no.”¹⁸

Unsafe at These Speeds also recounted a revealing conversation with a worker about the processing line:

The processing line never slowed or stopped for them [workers], she said. It didn’t matter if they were cut, hurt, or sick. It didn’t matter if a worker’s muscles stiffened and locked from standing and repeating the same motions for hours. The machinery kept churning – even when Natasha [the worker] was so sick that she had to be picked up and carried off . . . “[n]o line shut down for a human, but it’d shut down for a bird,” she said.¹⁹

In a similar vein, in 2010 and 2011 the MCHR coordinated six focus group interviews with 36 Latino meatpacking workers in Minnesota and Iowa.²⁰ MCHR’s report called attention to the fact that “the speed of the production line was the most notable complaint of workers participating in this study.”²¹ These workers explained how they had to stand for lengthy

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ The Midwest Coalition for Human Rights, *Always Working Beyond the Capacity of Our Bodies: Meat and Poultry Processing Work Conditions and Human Rights in the Midwest* (2012) [hereinafter MCHR].

²¹ *Id.* at 10.

periods of time on production lines that “move unrelentingly fast.”²² One worker was quoted as stating “[t]he pieces come one after the other, if the line turns faster, workers cutting with knives get harmed.”²³ Another said, “Many workers are harmed, there is [not] enough time to do our tasks, the speed is so fast and we have to stretch ourselves to do the pieces. We are always working beyond the capacity of our bodies.”²⁴

Nebraska Appleseed’s 2009 report on Nebraska’s meatpacking industry, *The Speed Kills You: The Voice of Nebraska’s Meatpacking Workers*²⁵ recounted the results of surveys of 455 meatpacking workers across five communities in Nebraska in which meatpacking is a prominent industry.²⁶ The meatpacking workers who answered Nebraska Appleseed’s open-ended questions implored plants to slow the speed of the line and maintain an appropriate number of workers on the processing line; indeed, excessive line speed was the Nebraska workers’ most commonly expressed concern about the safety of their workplace.²⁷ Additionally, an astounding 73 percent of workers observed that the line speed at their respective plants actually increased in the previous year.²⁸ Of the 52% of workers who reported that the workplace had become less safe in some way in the past year, “the

²² *Id.* at 11.

²³ *Id.*

²⁴ *Id.* at 13.

²⁵ Nebraska Appleseed Center for Law in the Public Interest, *The Speed Kills You: The Voice of Nebraska’s Meatpacking Workers* (2009) [hereinafter *The Speed Kills You*].

²⁶ *See id.* at 1.

²⁷ *See id.* at 30.

²⁸ *Id.*

vast majority of these workers referenced the speed of the line.”²⁹ *The Speed*

Kills You quoted workers’ observations about line speed, such as:

- “With the speed of the line you will always be unsafe.”
- “This line sometimes kills you.”
- “More work, the line is faster, and there are fewer people on the line.”
- “The line is too fast.”
- “Slow down the line.”
- “Don’t reduce personnel from the line.”³⁰

Human Rights Watch (HRW), which interviewed dozens of beef, pork, and poultry workers in Nebraska, North Carolina, and Arkansas in 2003 and 2004,³¹ found that line speed “creates enormous danger” for meat and poultry workers.³² HRW documented how line speeds have caused numerous severe injuries³³ and workers interviewed consistently pointed to “the speed of the line as the main source of danger.”³⁴ One worker observed that the speed of the line was so swift that “the speed is for machines, not people.”³⁵

Journalists have also documented that the harsh dangers arising from fast work speeds are common everywhere meatpacking and poultry workers toil. After reviewing 750 pages of USDA documents from 6 meatpacking plants in Nebraska, and speaking to workers, safety experts, academics, and industry spokespersons, the Lincoln Journal Star observed that line speed “is

²⁹ *Id.* at 30–31.

³⁰ *Id.* at 30.

³¹ Human Rights Watch, *Blood, Sweat, and Fear: Workers Rights in U.S. Meat and Poultry Plants*, (2005) [hereinafter *Blood, Sweat, and Fear*], available at <http://www.hrw.org/reports/2005/usa0105/index.htm>.

³² *See id.* at 33.

³³ *See id.* at 33–38 (detailing stories from workers and news reports on how work speed has negatively affected meatpacking and poultry workers’ safety and health).

³⁴ *Id.* at 33.

³⁵ *Id.* at 36.

the alpha and omega at meatpacking plants.”³⁶ The speed of the line “determines job numbers and workloads . . . [and] affects injury rates.” The Journal Star quoted a professor who described line speed as “uncompromising It’s permanent. It’s inherent. And it’s non-negotiable.”³⁷ Regarding factors that affect safety in the plants, the Journal Star reported that workers themselves “contend line speed is one of the primary factors in that equation.”³⁸

Likewise, the Charlotte Observer examined North Carolina’s poultry plants in its exhaustive series, *The Cruellest Cuts*,³⁹ and noted that the safety of workers is a

significant concern at plants. For instance, one former processing line manager told Observer reporters



that “the production line rarely stopped” because his department demanded

³⁶ Don Walton, *Line Speed is Non-Negotiable*, Lincoln Journal Star, June 1, 2003.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Series by Peter St. Onge, Franco Ordoñez, Kerry Hall, and Ames Alexander, *The Cruellest Cuts: The Human Cost of Bringing Your Poultry to Your Table*, The Charlotte Observer (2008), available at <http://www.charlotteobserver.com/poultry>. The Observer “interviewed more than 200 poultry workers across the Southeast”, talked to regulators, workplace safety experts, lawyers, and company officials”, examined “thousands of pages of OSHA documents, academic studies, workers’ compensation cases, and rarely-examined injury logs”, reviewed “government data that contained information on workplace safety enforcement and injury rates, toured three poultry plants “in the Carolinas and Virginia”, and inspected underreporting by interviewing workers at a specific plant and compared that amount to the company’s injury records within the same timeframe as the injuries.

an astronomical production level of 150 to 160 birds per minute, “about 70,000 a day.”⁴⁰ The Observer also noted that an increase in line speeds forced workers to “do more than 20,000 repetitive hand movements per shift.”⁴¹ In addition to maintaining extreme levels of production, the company directed another former supervisor to “not let people off the line” and to keep the line at full speed by telling workers to wait for a chance to rest or stop “until after work.”⁴² Unfortunately, as the supervisor stated, “[t]he pain doesn’t wait.”

B. Severe and crippling injuries, particularly musculoskeletal disorders (MSDs), pervade the meatpacking and poultry industry because of the relationship between fast line speeds and thousands of repetitive motions workers must perform every day.

The relentless “volume and speed of slaughtering operations” and the “hard to imagine velocity”⁴³ of animals moving through a processing line is deeply intertwined with the number, severity and types of injuries meat and poultry workers suffer. The startling variety of injuries related to excessive work speed include carpal tunnel syndrome, tendonitis, pachydermodactyly, epicondylitis, rotator cuff syndrome, lower back pain, and other serious ailments that may be generally characterized as musculoskeletal disorders

⁴⁰ Franco Ordoñez, Kerry Hall, Ames Alexander, *The Cruellest Cuts, A Boss’s View: Keep Them Working*, June 25, 2010.

⁴¹ Peter St. Onge, Franco Ordoñez, Kerry Hall, Ames Alexander, *The Cruellest Cuts, An epidemic of pain*, September 30, 2008. See also *Blood, Sweat, and Fear*, *supra* note 31 at 36 (“Line workers make more than 20,000 repetitive hard cuts in a day’s work.”).

⁴² See Ordoñez, Hall, and Alexander, *A Boss’s View*, *supra* note 40.

⁴³ See *Blood, Sweat, and Fear*, *supra* note 31 at 33.

(“MSDs”) or as cumulative trauma injuries.⁴⁴ By far, the most common types of injuries that workers are exposed to in the meat and poultry industry are MSDs and “can become crippling”⁴⁵ where “muscles or tendons develop chronic pain, swelling, and numbness from overuse and the repetition of strenuous cutting, hanging, and other motions.”⁴⁶ Medical researchers have summarized the risk factors for MSDs:

The physical job features that are frequently cited as risk factors for MSDs, based on both experimental science and epidemiologic investigations, include rapid work pace and repetitive motion patterns; insufficient recovery time; heavy lifting and forceful manual exertions; non-neutral body postures (either dynamic or static); mechanical pressure concentrations; segmental or whole-body vibration; local or whole-body exposure to cold; and any of these in combination with each other or with undesirable features of the psychosocial work environment like high demands and low degree of control over one’s own work.⁴⁷

Health and safety research has shown that line speed – as measured in animals per minute together with staffing levels – is a central factor that contributes to injuries because it strongly influences or determines the number of repetitions each worker must perform per minute or per shift. The

⁴⁴ See *GAO Meat & Poultry Report 2005*, *supra* note 5, at 21 n.22 (“[Cumulative trauma injuries] can be caused by forceful exertions, repetitive finger or wrist motions, tool vibrations, awkward wrist positions, or specific repeated motions, and it can be exacerbated by extreme cold or humidity.”). OSHA defines cumulative trauma disorders or “CTDs” as disorders that arise from repetitive biomechanical stress; they are a class of MSDs characterized by damage to tendons, tendon sheaths, the related bones, muscles, and nerves of the hands, wrists, elbows, shoulders, neck, and back. The most common ailments are carpal tunnel syndrome, epicondylitis, tendonitis, and low back pain. See OSHA, *Ergonomics Program Management Guidelines for Meatpacking Plants* (1993) [hereinafter *OSHA Meatpacking Guidelines*], available at <http://www.osha.gov/Publications/OSHA3123/3123.html>.

⁴⁵ See *GAO Meat & Poultry Report 2005*, *supra* note 5, at 21.

⁴⁶ See *Unsafe at These Speeds*, *supra* note 13, at 8.

⁴⁷ Laura Punnett and David Wegman, *Work-Related musculoskeletal disorders: the epidemiological evidence and the debate*, *Journal of Electromyography and Kinesiology* 14, 14 (2004).

National Institute for Occupational Safety and Health⁴⁸ (“NIOSH”) and the Centers for Disease Control and Prevention have concluded “[t]here is evidence for a causal relationship between highly repetitive work and neck and neck/shoulder musculoskeletal disorders (MSDs).⁴⁹ Moreover, intensifying line speed has a substantial effect on the frequency of cumulative trauma disorder by:

(1) increasing the number of repetitions (*citing* Robert Arndt, *Work Pace, Stress, and Cumulative Trauma Disorders*, 12 *Journal of Hand Surgery* 866, 868 (1987), (2) requiring greater accelerations and decelerations and thus producing larger peaks of muscular activity, and 3) increasing the “resting level of muscular tension,” thus causing higher overall levels of muscular activity. ((*citing* Willis Goldsmith, *Workplace Ergonomics: A Safety and Health Issue for the 90s*, 15 *Employee Rel. L.J.* 291, 291 (1989)). In one study, a 10% increase in speed produced a 38% increase in the worker’s pinch force; a 17% increase almost doubled it ((*citing* Asa Kilbom, *Repetitive Work of the Upper Extremity: Part I – Guidelines for the Practitioner*, 14 *International Journal of Industrial Economics* 51, 53 (1994)).⁵⁰

Indeed, an array of medical and academic literature underscores the reality that devastating musculoskeletal injuries are the product of highly repetitive, forceful movements due to the swift pace of work.⁵¹ For example,

⁴⁸ NIOSH is tasked with conducting research and making recommendations for the prevention of work-related injury and illness. To accomplish its mission, NIOSH conducts scientific research, develops guidance and authoritative recommendations, disseminates information, and responds to requests for workplace health hazard evaluations. See About NIOSH, <http://www.cdc.gov/niosh/about.html>.

⁴⁹ Bruce P. Bernard (ed.), *Musculoskeletal Disorders and Workplace Factors: A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Lower Back*, Department of Health and Human Services, National Institute of Occupational Safety and Health, and Center for Disease Control and Prevention, NIOSH Publication No. 97-141 (July 1997) at 2-1.

⁵⁰ See *The Speed Kills You*, *supra* note 25 at 22.

⁵¹ See e.g., *NIOSH Poultry Report*, *supra* note 10; Mark R. Schulz, et al., *Upper Body Musculoskeletal Symptoms of Latino Poultry Processing Workers and a Comparison Group of Latino Manual Workers*, 56 *Am. J. Indus. Med.* 197, 200 (July 2012); RM van Rijn et al., *Associations between work-related factors and specific disorders of the shoulder – A systematic review of the literature*, *Scand. J. Work Environ Health* 36(3):189-201 (2010); GAO *Meat & Poultry Report 2005*, *supra* note 5; Punnett and Wegman, *supra* note 47; Nat’l Research Council and Inst. of Medicine, *supra* note 10; Wendi Latko, et al., *Cross-Sectional Study of the Relationship Between Repetitive Work and the Prevalence of Upper*

a sweeping report commissioned by Congress and conducted by National Research Council (NRC) and Institute of Medicine (IOM) closely scrutinized the literature on the relationship between work and MSDs of the low back and upper extremities.⁵² The panel of experts concluded, among other things, that “repetition, force, and vibration are particularly important work-related factors” that contribute to MSDs of the upper extremities.⁵³ These basic features, particularly force and repetitive motion, are all unavoidable hallmarks of meatpacking and poultry work.

The daily experience of meatpacking and poultry workers is consistent with the broad academic consensus on the connection between sustained

repetitive motion and MSDs. For instance, meatpacking workers surveyed by Nebraska Appleseed detailed injuries they sustained



Limb Musculoskeletal Disorders, 36 *Am. J. Indus. Med.* 248–59 (1999); Paul Frost, et al., *Occurrence of Carpal Tunnel Syndrome among Slaughterhouse Workers* 24 *Scand. J. Work Environ. Health* 285 (1998); R.A. Werner, et al., *Median Mononeuropathy Among Active Workers: Are There Differences between Symptomatic and Asymptomatic Workers?*, 33(4) *Am. J. Indus. Med.* 374 (1998); HC Chiang et al., *Prevalence of shoulder and upper-limb disorders among workers in the fish processing industry*, *Scand. J. Work Environ. Health* 1993;19(2):126-131; M. Hagberg and M. Kelsh, *Impact of occupations and job tasks on the prevalence of carpal tunnel syndrome*, *Scand. J. Work. Environ. Health* 1992;18(6):337-345; HC Chiang et al., *The Occurrence of Carpal Tunnel Syndrome in Frozen Food Factory Employees*, *Kaohsiung J. Med. Sci.* 6:73-80 (1990); Barbara Silverstein et al., *Occupational Factors and Carpal Tunnel Syndrome*, *American Journal of Industrial Medicine* 11:343-358(1987).

⁵² See Nat'l Research Council and Inst. of Medicine, *supra* note 10.

⁵³ See *id.* at 364–65.

while working on the processing line, the most common being “swollen hands, pain in the shoulders, back, arms, hands, and fingers.”⁵⁴ A majority of workers surveyed in *Unsafe at These Speeds* – 66 percent – described similar injuries such as “hand or wrist pain, swelling, numbness, or inability to close their hands” while one-third pointed to “pain or injuries in their back, shoulder, or arm.”⁵⁵

These symptoms and injuries are all clear indicators of MSDs, and are particularly insidious because they initially seem innocuous to workers – many of whom don’t consider them as “injuries” – or are dismissed by employers as mere “soreness.” As a result, many workers are compelled to ignore and work through the pain, which, in the long run, exacerbates the severity of the injury and leads to disabling, permanent changes in workers’ bodies. Workers who disregard these symptoms as minor or temporary, whether due to economic necessity or because their employers do not recognize early symptoms of crippling MDSs as “injuries” worthy of treatment or rest, continue to do so until the “muscles, tendons, and bones are beyond repair.”⁵⁶ According to *The Speed Kills You*, “many workers who responded that they had not been injured in the past year went on to describe serious pain and worrisome symptoms in answers to later questions.”⁵⁷

⁵⁴ See *The Speed Kills You*, *supra* note 25, at 29.

⁵⁵ See *Unsafe at These Speeds*, *supra* note 13, at 8.

⁵⁶ See *The Speed Kills You*, *supra* note 25, at 22.

⁵⁷ See *Unsafe at These Speeds*, *supra* note 13, at 27.

Meatpacking and poultry workers also suffer wounds from cuts and deep gashes during the butchering and cutting activity.⁵⁸ These cuts are either self-inflicted or due to co-worker accident. Workers who sustain cut injuries often do so because the speed of the line is either too fast for them to keep up – resulting in a serious cut – or because of an unsharpened knife. OSHA has recognized that a sharp knife is essential to conducting the job safely.⁵⁹ Despite this, workers are often not allowed adequate time to sharpen their knives, which results in injuries that could be easily avoided.

Cuts by co-workers, often referred to as “neighbor cuts”, arise due to the close, overcrowded setting on the processing line



where workers “often stand virtually shoulder-to-shoulder.”⁶⁰

SPLC’s survey found that 17 percent of workers whose jobs encompassed deboning, cutting, and trimming had “suffered a cut serious

⁵⁸ See GAO Meat & Poultry Report 2005, *supra* note 5, at 21; See also Chunbo Cai et al., *Laceration Injuries Among Workers at Meat Packing Plants*, *Am. J. Indus. Medicine* 47:402-410 (2005); Richard Szabo et al., *The Influence of Knife Dullness on Poultry Processing Operator Exertions and the Effectiveness of Periodic Knife Steeling*, *AIHAJ* 62:428-433 (2001).

⁵⁹ See OSHA Meatpacking Guidelines, *supra* note 44; OSHA, *Guidelines for Poultry Processing: Ergonomics for the Prevention of Musculoskeletal Disorders*, OSHA 3213-09N (2004), [hereinafter *OSHA Poultry Guidelines*], available at <http://www.osha.gov/ergonomics/guidelines/poultryprocessing/poultryprocessing.html>; see also Raymond W. McGorry, Peter C. Dowd, Patrick G. Dempsey, *Cutting moments and grip forces in meat cutting operations and the effect of knife sharpness*, *Applied Ergonomics* 34 (2003), 375–382; Nicole Vézina, et al., *Development of a training and sharpening program in six pork slaughtering and processing factories: an ergonomic study* (in French), University of Québec at Montréal (May 2000).

⁶⁰ See GAO Meat & Poultry Report 2005, *supra* note 5, at 21–22; *Unsafe at These Speeds*, *supra* note 13, at 11.

enough to require some medical attention.”⁶¹ Meatpacking workers also described similar cut-related injuries to Nebraska Appleseed.⁶²

Excessive work speeds have other serious health consequences as well. For instance, common policies at these processing plants place harsh restrictions on workers’ ability to leave the line to take restroom breaks, which often result in urinary tract and similar infections. Of the workers responding to SPLC’s surveys, 79 percent said they are not allowed to take breaks when needed. The long term health consequences of being unable to use the bathroom when the body needs this relief are well documented and serious.⁶³

C. The extraordinary number of repetitive motions performed by meatpacking and poultry workers results in an epidemic of injuries.

For years, the meatpacking and poultry industry has been plagued by injury rates that are disproportionately high. In 2011, official data from the BLS lists reported nonfatal workplace injuries and illness in all of private industry occurred at an incidence rate of 3.5 workers per 100.⁶⁴ The same BLS data revealed a significantly higher incidence rate for poultry and meatpacking plants (5.8 and 7.8, respectively).⁶⁵

⁶¹ See *Unsafe at These Speeds*, *supra* note 13, at 11–12.

⁶² See *The Speed Kills You*, *supra* note 25, at 29 (providing worker stories and quotes about knife cuts).

⁶³ See, e.g., Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks & the Right to Urinate on Company Time*, 47–54 (1998).

⁶⁴ Bureau of Labor Statistics, *Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types*, (2012), available at <http://www.bls.gov/iif/oshwc/osh/os/ostb3191.pdf>.

⁶⁵ See *id.*

Even these figures, however, likely significantly undercount the actual frequency of injuries in these plants. Extensive survey data markedly dwarfs official injury rates, and substantive medical research on the prevalence of injuries among meatpacking and poultry workers eclipse BLS figures. Moreover, problems inherent in recordkeeping and data gathering, along with employer retaliation and other practices that undermine safety, strongly suggest that these BLS figures are unreliably low.

Extensive surveys of meatpacking and poultry workers make plain that meatpacking and poultry workers experience an epidemic of injuries. Surveys conducted by SPLC and Alabama Appleseed found that out of 302 current and former poultry workers, 72 percent “described suffering a significant work-related injury or illness” during their time in the industry.⁶⁶ Nearly two-thirds (66 percent) of workers surveyed stated that they had suffered from “hand or wrist pain, swelling, numbness or an inability to close their hands”, all leading indicators of musculoskeletal disorders, rooted in continual repetitive motion.⁶⁷ This hefty number increases dramatically for workers whose jobs are heavily impacted by line speed and where thousands of cutting, pulling, tearing, hanging and other motions per day are required. The workers who reported pain associated with these jobs included:

- 86 percent of workers cutting wings;
- 80 percent of workers deboning chicken carcasses;

⁶⁶ See *Unsafe at These Speeds*, *supra* note 13, at 7.

⁶⁷ *Id.* at 8.

- 76 percent of workers doing deboning, cutting and trimming jobs; and
- 74 percent of workers doing hanging jobs.⁶⁸

Unsafe at These Speeds also documented numerous statistics and stories that highlight the excessive rates of repetitive motion-related MSDs in poultry plants. Its survey showed that 66 percent of all workers, and even higher proportions of the workers most affected by line speeds (discussed more in detail below) described suffering symptoms of MSDs, like “hand or wrist pain, swelling, numbness, or an inability to close their hands...”⁶⁹ The report also chronicled the unfortunate and life-altering burdens of particular poultry workers who are now afflicted with long-term injuries that stem directly from poultry plants. One former poultry worker, Oscar, related his story of working at a plant folding chicken wings, requiring him to twist 40 wings per minute – around 18,000 wings per day – into a predetermined position. He noted that although “I did my job well . . . little did I know I was harming myself in the process.” Indeed, after a mere month of work, Oscar developed significant pain in his hands and wrists – something he had not felt before – and was

subsequently diagnosed with tendinitis and carpal tunnel syndrome.⁷⁰ The company eventually fired him because



⁶⁸ *Id.*

⁶⁹ *Id.* at 7.

⁷⁰ *Id.*

he was asking for medical treatment and a transfer to other positions.

Strikingly similar statistics existed in Nebraska's meatpacking industry. Nebraska Appleseed found that 62 percent of the over 400 workers surveyed described having an injury in the previous year, far surpassing the official industry-reported figures collected that year.⁷¹ The fact that MSDs and analogous injuries are not visible at the moment of injury fosters underreporting. When Nebraska meatpacking workers were asked about the overall injury rate, 93% of workers maintained that it stayed the same or increased (59% stated it stayed the same, 30% said it increased somewhat, and 4% believed injuries increased a lot).⁷²

The injury rates found in these surveys – and in other studies that relied on direct contact with workers – dwarf the official reported rates compiled by the OSHA using company-recorded data, partly because of OSHA's narrow standard for recording injuries,⁷³ and partly because of rampant undercounting of injuries by employers in these industries. But even company-recorded data shows that meatpacking and poultry workers are still more likely to suffer injuries than workers in the private workforce: 7.8 and 5.8 percent, respectively, versus 3.5 percent in 2011.⁷⁴

Extensive academic and government research has also documented exceedingly high rates of injuries, especially MSDs and related repetitive

⁷¹ See *The Speed Kills You*, *supra* note 25, at 28.

⁷² *Id.* at 31.

⁷³ See 29 C.F.R. § 1904.7.

⁷⁴ Bureau of Labor Statistics, *supra* note 64.

motion injuries, among meatpacking and poultry workers.⁷⁵ One recent study of poultry workers in North Carolina found that 40.4% of poultry workers had experienced symptoms of musculoskeletal disorders in their hands and wrists lasting longer than a day within the previous 12 months.⁷⁶ Another recent study found that 8.7% of Latino poultry workers had definite carpal tunnel syndrome, compared to 4.0% of Latinos working in manual labor occupations outside of the poultry industry, and that 59.2% of the poultry workers had possible or definite carpal tunnel syndrome, compared to 35.0% of the non-poultry workers.⁷⁷

One of the most recent studies – a Health Hazard Evaluation (HHE) – released by NIOSH in 2013 is particularly instructive.⁷⁸ During its visit to a poultry plant in South Carolina, NIOSH conducted an extensive review of 67 job tasks to scrutinize for any ergonomic risk factors. NIOSH reviewed medical records, interviewed workers, provided questionnaires, and employed

⁷⁵ See e.g., Schulz et al., *supra* note 51; Michael S. Cartwright, et al., The Prevalence of Carpal Tunnel Syndrome in Latino-Poultry Processing Workers & Other Latino Manual Workers, 54(2) J. of Occupational & Environmental Med. 198, 199 (Feb. 2012); Antonio J. Marin et al., *Evidence of Organizational Injustice in Poultry Processing Plants: Possible Effects on Occupational Health and Safety Among Latino Workers in North Carolina*, American Journal of Industrial Medicine 52:37-48 (2009); H.J. Lipscomb, et al., *Musculoskeletal Symptoms Among Poultry Processing Workers and a Community Comparison Group: Black Women in Low-Wage Jobs in the Rural South*, 50 Am. J. Indus. Med. 327–38 (2007); Sara A. Quandt et al., *Illnesses and Injuries Reported by Latino Poultry Workers in Western North Carolina*, 49 Am. J. Indus. Med. 343-351 (2006); GAO Meat & Poultry Report 2005, *supra* note 5; Kim et al., *Prevalence of Carpal Tunnel Syndrome in Meat and Fish Processing Plants*, 46 J. Occup. Health 230-34 (2004); Latko et al., *supra* note 51; Ron G Gorsche et al., *Prevalence and Incidence of Carpal Tunnel Syndrome In a Meat Packing Plant*, Occup. Environ. Med. 1999;56:417-422; M.L. Finkel, et al., *The Effects of Repeated Mechanical Trauma in the Meat Industry*, Am. J. Indus. Med. 8:375-379 (1994); Eric Bates, “The Kill Line,” Southern Exposure, at 225 (Fall 1991); K. Ohlsson et al., *Self-reported symptoms in the neck and upper limbs of female assembly workers. Impact of length of employment, work pace, and selection*, Scand. J. Work Environ. Health 1989;15(1):75-80; Thomas Armstrong, et al., *Investigation of Cumulative Trauma Disorders in a Poultry Processing Plant*, 43(2) Am. Indus. Hygiene Ass’n J. 103–16 (Feb. 1982).

⁷⁶ See Schulz, et al., *supra* note 51, at 6.

⁷⁷ See Cartwright, et al., *supra* note 75, at 199.

⁷⁸ See NIOSH Poultry Report, *supra* note 10.

nerve conduction tests to “evaluate their median nerve function in the hands and wrists.”⁷⁹

Overall, musculoskeletal disorder symptoms were quite common among those participating poultry workers.⁸⁰ Out of all the participants (317), 56 percent described “aching or stiffness in their hands or wrists and classic symptoms for carpal tunnel syndrome of pain, burning, numbness, or tingling in hands or wrists.”⁸¹ The data also revealed that 42 percent (126 out of 301 participants) met the

“case definition for carpal tunnel syndrome.”⁸²

Moreover, of the 212

participants who in the



previous 12 months reported “pain, burning, numbness, or tingling in their hands or wrists,” 67 percent stated they awoke from sleeping because of these symptoms.⁸³

Because of the troublesome issue of underreporting in the meat and poultry industry, injury rates recorded by companies are often grossly inaccurate and have come under scrutiny. In 2005, the GAO found that, despite a slow decline in officially reported rates “meat and poultry workers

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 14, table 7 (showing the prevalence of musculoskeletal symptoms for each participating worker’s body part, such as the hands or wrists, back, shoulders, ankles or feet, neck, knees, elbows, and hips).

⁸¹ *Id.* at 13 (emphasis omitted).

⁸² *Id.* at 12.

⁸³ *Id.* at 13.

still have one of the highest rate of injuries in any industry.”⁸⁴ The GAO maintained that BLS data may underestimate the actual incidence of injury because the inherent risks and type of work associated with meat and poultry plants “raised a question about the validity of the data” that exhibited a decrease in injuries over the previous years.⁸⁵ Because OSHA does not examine trends in the worksites that it randomly audits to ensure accurate injury recordkeeping, “OSHA may not detect dramatic decreases in these rates that could raise questions as to the accuracy of the figures.”⁸⁶ OSHA itself “continues to find some measure of underreporting” via its audits every year.⁸⁷ A follow up examination of underreporting by the GAO in 2009 found that OSHA’s audits of employers’ records, one way it authenticates some injury and illness data, “may not be adequate,” and therefore, accurate.⁸⁸

Since then, OSHA studied company-controlled injury logs⁸⁹ at over 550 establishments in various industries that were considered at high risk for undercounting actual injury rates. It found that meat and poultry processing

⁸⁴ See *GAO Meat & Poultry Report 2005*, *supra* note 5, at “What GAO Found”.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 29.

⁸⁸ U.S. Government Accountability Office, *Workplace Safety and Health: Enhancing OSHA’s Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*, GAO-10-10 at “What GAO Found” (Oct. 2009), *available at* <http://www.gao.gov/new.items/d1010.pdf>.

⁸⁹ The OSHA Form 300 is used to classify work-related injuries and illnesses and to note the extent and severity of each case. When an incident occurs, companies are supposed to use the form to record specific details about what happened and how it happened. See OSHA Forms for Recording Work Related Injuries and Illnesses, *available at* <https://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>

industries had either not recorded or under-recorded “notably” more recordable injuries than all other industries included in the study.⁹⁰

The Charlotte Observer’s close scrutiny of a poultry plant in North Carolina revealed that the company obscured the true number of injuries that it reported to OSHA.⁹¹ The Observer found, after enlisting the assistance of an OSHA record-keeping expert, that over half of a series of 41 confirmed injuries had not been recorded by company officials in the required OSHA logs. A South Carolina plant with a workforce of 800 workers owned by the same company claimed it went five years without recording a single MSD, a patently unbelievable contention in a worksite where employees routinely perform more than 20,000 motions each shift.⁹²

Surveys of meatpacking and poultry workers also demonstrate how employer intimidation, retaliation, and “incentive” programs cause underreporting. SPLC and Alabama Appleseed found that 40 percent of injuries sustained by workers went unreported and nearly one quarter of those were afraid to report injuries because of “the worker’s fear of being fired or disciplined for reporting the injury, missing work to heal, or seeking medical treatment.”⁹³ Moreover, SPLC found significant evidence of employer retaliation to discourage injury reporting. Their surveys found that “66

⁹⁰ Dep’t of Labor, *Report on the findings of the Occupational Safety and Health Administration’s National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data* at 5 (May 7, 2012).

⁹¹ Kerry Hall, et al., *The Cruellest Cuts: the Human Cost of Bringing Poultry to Your Table*, Charlotte Observer (June 25, 2010), available at <http://www.charlotteobserver.com/2008/09/30/223415/the-cruellest-cuts.html>.

⁹² *Id.*

⁹³ See *Unsafe at These Speeds*, *supra* note 13, at 16.

percent of participants believed that workers were scared or reluctant to report injuries, and that 78 percent of respondents attributed this reluctance to fear of being fired.”⁹⁴

Employer policies and programs – measures that in theory aim to promote worker safety but in reality are devices to encourage underreporting– further drive injury reporting downward. Nebraska Appleseed’s surveys of meatpacking workers found that many were troubled by incentives and bonuses to employees and supervisors who maintained artificially low injury rates.⁹⁵ These types of programs discourage workers from reporting injuries or seeking medical treatment. Over 60 percent of respondents stated “such incentives do not make the workplace safer.”⁹⁶ In Alabama, the presence of a “points” system that records absences for any reasons is virtually ubiquitous.⁹⁷ Once a worker reaches a specific number of points, that employee is fired. It’s easy to see how such a system, ostensibly aimed at promoting work attendance, deters workers from seeking medical treatment or reporting any injuries in the first place.⁹⁸

The GAO also highlighted and summarized a report that found some plants offer incentives, such as money or other prizes, for maintaining low

⁹⁴ *Id.* at 13.

⁹⁵ See *The Speed Kills You*, *supra* note 25, at 36.

⁹⁶ *Id.*

⁹⁷ See *Unsafe at These Speeds*, *supra* note 13, at 17.

⁹⁸ *Id.* at 17–18.

injury and illness rates.⁹⁹ As summed up by the GAO, “while these incentives may improve safety, they also may discourage workers from reporting injuries that could result in their not winning the incentive prize or preventing an entire group of workers from obtaining the prize.”¹⁰⁰

Additionally, supervisors are judged in part by the number of days workers go without reporting an injury, placing another incentive on supervisors to suppress worker reports or encourage them not to report in the first place.¹⁰¹ Several interviews done by GAO reinforced the report.¹⁰²

Other independent studies echo the widespread concern about the lack of accurate accounting of injuries in meatpacking and poultry plants. One study estimates that BLS data on workplace injuries, which is predicated on reports from OSHA, missed between 33 and 69 percent of all injuries across all industries in 1999.¹⁰³ Moreover, the study’s author suggested that the undercounting of injuries is a problem that has not been remedied by either OSHA or the BLS.¹⁰⁴ Other studies also find BLS data dubious because its methodology relies on employer-provided information instead of medical data based on various sources.¹⁰⁵

⁹⁹ See *GAO Meat & Poultry Report 2005*, *supra* note 5, at 29–30 (citing Hugh Conway and Jens Svenson, *Occupational Injury and Illness Rates, 1992-96: Why They Fell*, Monthly Labor Review, BLS, November 1998.).

¹⁰⁰ See *id.* at 30.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Paul Leigh, et al., *An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries* 46 *Journal of Occupational & Environmental Medicine* 1, 16 (Jan. 2004).

¹⁰⁴ *Id.* at 11; See also Bruce Rolfsen, *Two-Thirds of Michigan Burn Cases Not Counted in BLS Survey, Study Finds*, 42 O.S.H. Rep. 512 (BNA), June 7, 2012.

¹⁰⁵ *Id.* See also Lance Azaroff, et al., *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, *American Journal of Public Health*, 92(9):1421-1429 (Sep. 2002).

Part II. OSHA and USDA are Obligated to Engage in Responsible Rulemaking to Protect Worker Health and Safety.

OSHA has a legal obligation to regulate work speeds in poultry and meatpacking plants. USDA is obligated to protect worker health and safety in any line speed rulemaking it conducts. There are no Congressional impediments to either agency's mandate to ensure adequate protection of workers' health and safety through rulemaking.

A. OSHA must regulate work speeds in order to fulfill its mandate to ensure safe and healthful working conditions for workers.

The OSH Act requires that OSHA promulgate mandatory occupational safety and health standards to achieve safe and healthful working conditions for the country's workers.¹⁰⁶ An occupational safety and health standard "requires conditions, or the adoption of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment."¹⁰⁷ The OSH Act prioritizes the safety of the worker and the prevention of occupational accidents and illnesses.¹⁰⁸ In order to fulfill the congressional purpose underlying the Act, all OSHA standards must be highly protective.¹⁰⁹ "In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety

¹⁰⁶ 29 U.S.C. § 651(b)(3), (b)(9) (1970).

¹⁰⁷ 29 U.S.C. § 652(8) (1970).

¹⁰⁸ 29 U.S.C. § 651 (1970).

¹⁰⁹ *See, e.g., Int'l Union, United Auto Workers v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) ("the Act's overriding purpose is to provide a high degree of employee protection.") (internal quotation marks omitted); Control of Hazardous Energy Sources (Lockout/Tagout), 58 Fed. Reg. 16612-02, 16614 (Final Rule, supplemental statement of reasons, Mar. 30, 1993) (codified at 29 C.F.R. § 1910).

or health of the affected employees.”¹¹⁰ Excessive work speeds pose serious health and safety threats to workers, and must be regulated.

If OSHA were to delay rulemaking efforts indefinitely, workers could suffer irreparable harms in the interim. OSHA therefore must act based on its reasonable predictions using credible information.¹¹¹

Excessive work speeds cause multiple types of safety hazards for meatpacking and poultry plant workers.¹¹² The high rate of cumulative trauma disorders (CTDs)¹¹³ and other injuries resulting from excessive work speed, such as amputations, lacerations,¹¹⁴ burns, urinary tract and other infections from the lack of breaks or bathroom access,¹¹⁵ and death¹¹⁶ must be

¹¹⁰ 29 U.S.C. § 655(a).

¹¹¹ *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 655–56 (1980) (“OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty”); *see also United Steelworkers v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980) (OSHA “can and must make reasonable predictions on the basis of credible sources of information, whether data from existing plants or expert testimony”) (internal quotations and citation omitted). Of note, when the USDA offered poultry employers a chance to increase line speeds if they invited NIOSH to conduct an HHE, only one plant allowed NIOSH to visit. Tony Corbo, *Will That Be Original Recipe or Crunchy?*, Food Safety News (May 8, 2013), available at <http://www.foodsafetynews.com/2013/05/will-that-be-original-recipe-or-crunchy/>. OSHA must address these hazards using the best available evidence. “[I]n promulgating standards dealing with ... harmful physical agents..., [the Secretary] shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.” 29 U.S.C. § 655(b)(5). The requirement to act on the “best available evidence” does not permit OSHA to delay worker protection based on new studies not yet conducted. Courts have stated that “OSHA cannot let workers suffer while it awaits the Godot of scientific certainty.” *United Steelworkers*, 647 F.2d at 1266; *see also Asarco v. OSHA*, 746 F.2d 483 (9th Cir. 1984); *Synthetic Organic Chem. Mfrs. Ass’n v. Brennan*, 503 F.2d 1155 (3d Cir. 1974).

¹¹² *See generally, supra* note 7 and accompanying text (detailing safety risks of excessive line speed).

¹¹³ For an extensive collection of research regarding CTDs, *see* Nat’l Inst. of Occupational Safety & Health, U.S. Dep’t of Health & Human Servs., *Cumulative Trauma Disorders in the Workplace: Bibliography* (Sept. 1995), available at <http://www.cdc.gov/niosh/docs/95-119/pdfs/95-119.pdf>.

¹¹⁴ Lina Lander, et al., *A Case-Crossover Study of Laceration Injuries in Pork Processing*, 69 Occupational & Enviro. Med. 410, 412–15 (2012) (finding that rushing attributed primarily to line speed was the most often self-reported reason for laceration injuries reported by workers); Chunbo Cai, et al., *Laceration Injuries among Workers at Meat Packing Plants*, 47 Am. J. of Indus. Med. 403 (2005) (finding high rates of laceration injuries in two large meat packing plants, and that finger injuries from a handheld non-powered tool were the most frequent laceration injury).

¹¹⁵ *See* Linder & Nygaard, *supra* note 63, at 47–54.

addressed by safety standards. In setting safety standards, OSHA has interpreted the OSH Act to require the agency to act consistently with the Act's overriding purpose, which is to provide a high degree of employee protection.¹¹⁷ The current regulatory vacuum in the area of work speed undermines OSHA's mandate to ensure worker health and contravenes the agency's imperative to act when there is significant risk to worker safety. The results of OSHA's current inaction are high levels of disabling CTDs and other significant, life-threatening work speed-related injuries among meatpacking and poultry workers.¹¹⁸

Excessive work speed is not just a safety hazard but is also a grave health threat for meatpacking and poultry workers, requiring health standards.¹¹⁹ Under Section 6(b)(5) of the Act, OSHA is authorized to issue health standards to protect workers from long-term risks to toxic materials or harmful physical agents.¹²⁰ Congress directed that these standards ensure that no employee suffer material impairment of health or functional capacity if that employee should have regular exposure to a certain hazard for the period of his working life.¹²¹

¹¹⁶ *The Perils of Processing*, The Charlotte Observer (June 25, 2010), available at <http://www.charlotteobserver.com/2008/09/30/223426/the-perils-of-processing.html> (over 100 poultry workers had died on the job over the preceding decade).

¹¹⁷ Control of Hazardous Energy Sources (Lockout/Tagout), 58 Fed. Reg. 16612-02, 16614-15, *supra* note 109 ("In setting safety standards, OSHA must act consistently with the Act's overriding purpose, which is to provide a high degree of employee protection.").

¹¹⁸ See *Blood Sweat, and Fear*, *supra* note 31, at 28-31.

¹¹⁹ See Part I-B regarding worker injuries that derive from work speed.

¹²⁰ See *id.*

¹²¹ 29 U.S.C. § 655(b)(5).

OSHA has considered several factors in determining whether a standard fits within section 6(b)(5). These include whether the hazard is likely to cause harm promptly or after a short period of exposure, or whether harm occurs only after a lengthy period of exposure, as well as whether there is a latency period with injury manifesting itself long after exposure has ended.¹²² OSHA has noted Congress' particular interest in Section 6(b)(5) in accounting for long-term risks and the cumulative effect they have on worker health.¹²³ CTDs and other MSDs are illnesses that in some cases are not immediately apparent, but exact a crippling effect on worker health over time.¹²⁴ As such, OSHA has the legal obligation to ensure that workers do not suffer these disorders due to regular exposure to work speed hazards.

B. OSHA's Current Failure to Regulate Poultry and Meat Processing Plant Work Speed Puts Plant Workers at Significant Risk of Cumulative Trauma Disorders.

1. Cumulative trauma disorders plague workers in meatpacking and poultry processing plants but are not addressed by existing OSHA standards.

OSHA's lack of standards for work speed and repetitive motions in meatpacking and poultry processing plants allows untenable cumulative trauma and other hazards to occur unabated and undermines worker safety in these plants. Standards represent clear, achievable requirements based on research, past experience, and scientific evidence and should ensure, as far as

¹²² Ergonomics Program, 65 Fed. Reg. 68262-01, 68270 (Final Rule, Nov. 14, 2000) (to be codified at 29 C.F.R. § 1910).

¹²³ *Id.* at 68270 (Remarks of Senator Dominick in colloquy with Senator Williams, Leg. Hist. at 503).

¹²⁴ *See generally* Part I-B, *supra*.

possible, that no employee suffers impaired health from exposure to the hazard involved.¹²⁵ Such standards are integral to ensuring safe conditions for workers and providing consistent and specific direction to employers on how to achieve such conditions without guesswork.¹²⁶

2. OSHA has long acknowledged fast work speeds as a CTD-causing hazard, and has unsuccessfully attempted to address these hazards using existing inadequate tools.

In 1989, members of Congress held a hearing in which CTDs were discussed as a national epidemic comparable to lung cancer in that CTDs develop quietly over time and are not easily visible.¹²⁷ At this hearing, poultry workers testified about the risks posed by working on rapid lines.¹²⁸

Job-related CTD stressors and the need for employers to respond by adapting the workplace has been a recognized area of concern and investigation for OSHA for close to thirty years.¹²⁹ Beginning in the late 1980s, the prevalence of CTDs among workers was the focus of multiple corporate-wide settlements made between OSHA and different poultry companies.¹³⁰ These settlements included the hiring of ergonomics

¹²⁵ S. REP. NO. 1282, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5183-84.

¹²⁶ *See* 116 Cong. Rec. 42,206 (1970).

¹²⁷ Dramatic Rise in Repetitive Motion Injuries and OSHA's response: Hearing before the Employment and Housing Subcommittee of the Committee on Government Operations, House of Representatives, 101st Cong., first session, June 6, 1989.

¹²⁸ *See id.*

¹²⁹ U.S. DEPT. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OSHA 3108, SAFETY AND HEALTH GUIDE FOR THE MEATPACKING INDUSTRY (1988), *available at* <https://www.osha.gov/Publications/OSHA3108/osha3108.html>. *See generally* *Sec'y of Labor v. Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993, 1995-1997 O.S.H.D. (CCH) P 31301 (Apr. 26, 1997); *see also* Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 693 (2007).

¹³⁰ *See, e.g., See Sec'y of Labor v. Conagra Poultry Co.*, OSHRC Nos. 89-2138, 89-2139, 89-2140, Stipulation & Settlement Agreement (Jan. 29, 1992), *available at* http://www.osha.gov/pls/osha/web/owadisp.show_document?p_table=CWSA&p_id=821; *Martin v.*

consultants,¹³¹ consideration of administrative controls such as “reducing the number of repetitive motions per employee per shift,”¹³² and job rotation and job enlargement to alleviate physical fatigue,¹³³ among other things. In a formal settlement entered into as early as 1988, CTDs were acknowledged to be an occupational illness in the meat packing industry,¹³⁴ followed soon by the same finding in the poultry industry.¹³⁵ The high occurrences of CTD-causing hazards underlying these settlements contributed to the groundwork for OSHA’s subsequent work on ergonomics programs and the effort to promulgate a general ergonomics program standard in 2001.

OSHA classified line speed as a hazard in its 1993 Ergonomics Program Management Guidelines for Meatpacking Plants.¹³⁶ These voluntary guidelines provide examples of work station design adjustments to reduce the rate of highly repetitive motions, including conveyor belt modifications to allow some activities to be performed at a slower rate.¹³⁷ They provide that employers may need to consider adjustments to line speed

Cargill, Inc., OSHRC Nos. 82-3426, 89-3513, 89-3514, 90-1257, Stipulation & Settlement Agreement (Sept. 4, 1991), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=CWSA&p_id=817; *Dole v. Empire Kosher Poultry, Inc.*, OSHRC No. 89-1060, Stipulation & Settlement Agreement (May 12, 1989), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=CWSA&p_id=785; *McLaughlin v. IBP, Inc., Dakota City Plant*, OSHRC Nos. 87-1242, 88-1291, 88-1292, Stipulation & Settlement Agreement (Nov. 23, 1988), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=CWSA&p_id=784.

¹³¹ See, e.g., *id.*

¹³² See *Conagra Poultry*, *supra* note 130; *Cargill*, *supra* note 130; *IBP*, *supra* note 130.

¹³³ See *Conagra Poultry*, *supra* note 130; *Cargill*, *supra* note 130.

¹³⁴ See *IBP, Inc.*, *supra* note 130.

¹³⁵ See *Cargill*, *supra* note 130.

¹³⁶ *OSHA Meatpacking Guidelines*, *supra* note 44. Although these guidelines cover facilities in SIC code 2011 (Meat packing plants large and small), in its Question and Answer portion of the Guidelines, OSHA stated that much of the specific guidance should also be applied to other plants, particularly poultry processing and fish. *Id.*

¹³⁷ See *id.*

as a work practice control of ergonomic hazards.¹³⁸ OSHA instituted a separate set of voluntary guidelines for poultry processing in 2004.¹³⁹

In its voluntary guidelines, OSHA identifies administrative solutions¹⁴⁰ that may reduce the severity and frequency of exposure to ergonomic hazards. One such proposed solution is to reduce the total number of repetitions per employee by lowering production rates in a workplace.¹⁴¹ OSHA identifies rest pauses and job rotation as other possible administrative controls to be implemented.¹⁴² OSHA considers these and additional factors in guiding employers on how to prevent CTDs.¹⁴³

C. Existing general OSHA standards do not address CTDs at meatpacking and poultry plants and the General Duty Clause is an insufficient enforcement mechanism to address CTDs caused by excessive work speeds and repetitive motions.

Fast work speeds causing high rates of repetitive motions and leading to CTDs continue to put poultry and meat processing workers in grave danger and may have even worsened in recent years.¹⁴⁴ There are no specific health or safety standards for meatpacking or poultry processing workplace hazards and there are no specific standards regarding work speeds.¹⁴⁵

Without a precise standard on point, OSHA's only enforcement mechanism to

¹³⁸ *Id.*

¹³⁹ See *OSHA Poultry Guidelines*, *supra* note 59.

¹⁴⁰ Administrative controls are changes in work practices designed to limit workers' exposure to particular hazards.

¹⁴¹ *OSHA Meatpacking Guidelines*, *supra* note 44; *OSHA Poultry Guidelines*, *supra* note 59.

¹⁴² See *id.*

¹⁴³ See *Pepperidge Farm, Inc.*, 17 O.S.H. Cas. P 31301 at 49.

¹⁴⁴ See, e.g., *The Speed Kills You*, *supra* note 25, at 30 (73% of workers reported that line speeds had increased within the previous year); Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408, 4423 (proposed Jan. 27, 2012) (to be codified at 9 C.F.R. §§ 381, 500) (proposing to increase maximum poultry line speeds to 175 birds per minute).

¹⁴⁵ OSHA, *Poultry Processing*, <http://www.osha.gov/SLTC/poultryprocessing/index.html> ("There are currently no specific OSHA standards for poultry processing.").

address work speed hazards is section 5(a)(1) of the OSH Act, known as the General Duty Clause (GDC).¹⁴⁶ The GDC establishes broad obligations that employers owe their employees to provide a work environment free of recognized hazards likely to cause serious harm or death.¹⁴⁷

In 1997, the Occupational Safety and Health Review Commission ruled that the GDC *may* be used to address repetitive motion hazards.¹⁴⁸ But the General Duty Clause's generality still leaves undefined the scope of the Clause as it applies to the specific workplace conditions that cause CTDs in different working environments. To prove a GDC violation, OSHA must show that the employer failed to "free its workplace of a hazard, that the hazard is recognized, that the hazard could be materially reduced by a feasible form of abatement, and the hazard is causing or likely to cause serious death or physical harm."¹⁴⁹

While the Clause is important, its parameters can be difficult to enforce consistently in the absence of more precise standards.¹⁵⁰ Congress intended the Secretary of Labor to rely primarily on specific standards instead of the broad General Duty Clause.¹⁵¹ Indeed, a primary advantage of

¹⁴⁶ 29 U.S.C. § 654(a).

¹⁴⁷ 29 U.S.C. § 654 (a)(1).

¹⁴⁸ *Pepperidge Farm*, 17 O.S.H. Cas. P 31301 at 2.

¹⁴⁹ *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973). *National Realty*, articulating elements one, two, and four, represents the first attempt by a circuit court to interpret the general duty clause. The OSHRC adopted these elements and subsequently added the "feasibility" requirement, *see, e.g.*, *Pelron Corp.*, 1986-1987 O.S.H. Dec. (CCH) ¶ 27,605, at 35,871 (June 2, 1986), which *National Realty* left unstated but implied.

¹⁵⁰ Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard at 2090.

¹⁵¹ *Kastalon, Inc.*, 12 O.S.H. Cas. (BNA) ¶ 1928 (O.S.H.R.C. July 23, 1986); *see* S.Rept. No. 91-1282, 91st Cong., 2d Sess. (1970) at 9-10, reprinted in Senate Committee on Labor and Public Welfare, 92 Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 149-50

standards is the clear and consistent notice they provide to employers regarding their obligations.¹⁵² Without a standard, it is also more difficult for employees to speak out with confidence regarding violations and for OSHA to accurately identify worker safety threats.

Over the last five years, OSHA has only invoked the GDC 12 times in its inspections of poultry processing and slaughtering worksites and 21 times in its inspections of meat packing plants.¹⁵³ These citations using the GDC have only addressed hazards that do not directly arise from work speeds, such as workers' risk of being struck by vehicles or falling objects, of being crushed by unsecured hoppers, or of falling from heights.¹⁵⁴ OSHA has not issued a GDC-based citation for an ergonomic, repetitive motion, carpal tunnel, or cumulative trauma hazard in a poultry plant since December 18, 1997, and in a meat packing plant since December 14, 1998.¹⁵⁵ The number of citations issued is largely dependent on the number of complaints, referrals, emphasis programs, and other factors, such as OSHA's enforcement priorities. Given the demonstrated pervasiveness of CTDs in poultry and

(Comm.Print, 1971); remarks of Rep. Steiger on conference bill, Id. at 1217 ("general duty requirement should not be used set ad hoc standards)."

¹⁵² See *id.*

¹⁵³ OSHA, Data & Statistics, Results for General Duty Standard Searches using SIC 2015, Poultry Slaughtering and Processing, and using SIC 2011, Meat Packing Plants, for OSHA inspections between August 21, 2008 and August 21, 2013, search functions *available at* <https://www.osha.gov/oshstats/index.html>.

¹⁵⁴ See *id.*

¹⁵⁵ OSHA, Data & Statistics, Results for General Duty Standard Searches using SIC 2015, Poultry Slaughtering and Processing, and using SIC 2011, Meat Packing Plants, for OSHA inspections between January 1, 1972 and August 21, 2013, divided into ten-year increments per search engine instructions, and limiting results to Ergonomic categories, search functions *available at* <https://www.osha.gov/oshstats/index.html>.

meatpacking plants,¹⁵⁶ OSHA's occasional use of the GDC, and only with regard to non-CTD-related hazards, has not effectively addressed the extent of injuries arising from fast work speeds. The broad provisions of the GDC combined with OSHA's sparse enforcement in these industries also fails to provide meatpacking and poultry industry employers with consistent and clear notice of their obligations to prevent work speed related hazards.

1. There is a declining trend of OSHA citations issued under the GDC.

Prior to November 14, 2000, OSHA had issued over 550 ergonomics citations under the General Duty Clause.¹⁵⁷ In the more than ten years since the congressional veto of the comprehensive ergonomics rule, OSHA has issued fewer than 80 of these citations nationwide.¹⁵⁸ In Fiscal Year 2011, only three GDC citations were issued for both poultry processing and meatpacking plants nationwide, none of them for CTD-related hazards.¹⁵⁹ By contrast, between January 1, 1993 and April 26, 1997 (the day before OSHRC issued its decision that certain ergonomic stressors were covered under the GDC), 125 ergonomic violations were reported nationwide. This may have been a result of momentum behind the guidelines issued in the

¹⁵⁶ See generally Part I.

¹⁵⁷ Ergonomics Program, *supra* note 122, 65 Fed. Reg. at 68267. Since no starting date is indicated, this apparently refers to the total number of citations issued under the General Duty Clause since OSHA began issuing citations under the Clause.

¹⁵⁸ See OSHA, Results from General Duty Standard Search for all OSHA citations in the ergonomic category in any SIC from Jan. 1, 2001 to Aug. 21, 2013, divided into ten-year increments per search engine instructions, search tool *available at* www.osha.gov/pls/imis/generalsearch.html (finding 74 ergonomic GDC citations).

¹⁵⁹ See OSHA, Results from Most Frequently Cited Standards Search for SIC 2015, Poultry Slaughtering and Processing, and for SIC 2011, Meat Packing Plants, for the period Oct. 2011 through Sept. 2012, search tool *available at* <https://www.osha.gov/pls/imis/citedstandard.html>.

early 1990s and increased confidence among workers in reporting and OSHA in citing ergonomic hazards as violations of the General Duty Clause.

Whatever the reason, enforcement targeting MSD-related hazards has declined to a stop, while the incidence of CTDs among workers in poultry and meatpacking plants remains frighteningly high.¹⁶⁰ The General Duty Clause has proven inadequate to protect workers from the hazards of fast work speeds alone. It is time to implement a clear and specific standard.

2. Systemic underreporting of injuries and illnesses also undermines meaningful enforcement of workers' rights to a safe workplace using the General Duty Clause.

A major and persistent contributing factor to the lack of general duty clause citations is the underreporting of worker injuries.¹⁶¹ In the late 1980s, chronic underreporting of worker injuries spurred OSHA to begin focusing inspections on the meatpacking industry.¹⁶² This resulted in the assessment of penalties for record-keeping violations at meat and poultry plants throughout the late 1980s and 1990s.¹⁶³ In its 2012 *Report on the findings of the OSHA's National Emphasis Program on Recordkeeping*, OSHA found that “[t]he number of not recorded or under-recorded [days away, restricted, transfer] DART cases found per inspection at meat and poultry processing establishments was notably higher than at inspection establishments in the

¹⁶⁰ See, e.g., *NIOSH Poultry Report*, *supra* note 10, at 2; *Unsafe at These Speeds*, *supra* note 13, at 8; Cartwright, et al., *supra* note 75; *The Speed Kills You*, *supra* note 25.

¹⁶¹ *Unsafe at These Speeds*, *supra* note 13, at 12–13.

¹⁶² *GAO Meat & Poultry Report 2005*, *supra* note 5, at 28.

¹⁶³ *Id.* at 29.

other sectors included” in the program.¹⁶⁴ Unfortunately, underreporting continues to plague these industries for a number of reasons. Employers are supposed to use OSHA logs to record worker injuries that result in death, loss of consciousness, days away from work, restricted activity, or medical treatment beyond first aid.¹⁶⁵ However, employers have many incentives to underreport injuries,¹⁶⁶ and industry practices often fail to give workers the opportunity to properly tend to injuries sustained on the processing line, therefore these incidents are not captured in the logs.¹⁶⁷ This seriously jeopardizes the availability of accurate independent evidence to confirm CTDs as a “recognized hazard” in the workplace and substantially dilutes the potential of the GDC to ensure meaningful minimum safety for workers.

The prevalence of underreporting also influences OSHA’s use of “Ergonomic Hazard Alert Letters” and the ‘Ergonomic Hazard Alert Letter Follow up Policy.’ OSHA uses these consultative, non-binding letters when compliance officers in the field identify workplace hazards but the agency cannot sufficiently document the serious harms that result. From fiscal year 1997 through October 3, 2000, OSHA sent approximately 498 such letters to

¹⁶⁴ Dep’t of Labor, *Report on the findings of the Occupational Safety and Health Administration’s National Emphasis Program on Recordkeeping and Other Department of Labor Activities Related to the Accuracy of Employer Reporting of Injury and Illness Data* at 5 (May 7, 2012).

¹⁶⁵ 29 C.F.R. § 1904.7.

¹⁶⁶ See *Unsafe at These Speeds*, *supra* note 13, at 12–13; *GAO Meat & Poultry Report 2005*, *supra* note 5, at 29–30. Some plants may judge the performance of line supervisors based on the number of days their workers go without an injury or illnesses. This performance incentive may result in plant supervisors underreporting or encouraging workers not to report injuries or illnesses.

¹⁶⁷ See *Unsafe at These Speeds*, *supra* note 13. Workers interviewed in the SPLC survey said they were required to work when seriously hurt. 40 percent of injuries went unreported to the company, and of those who did report their injuries, 82 percent were never sent to a doctor, and 45 percent were sent right back to their same job without access to treatment or time to recover. *Id.* at 16.

public and private sector employers, including in approximately 50% of OSHA’s ergonomic inspections.¹⁶⁸ Ergonomic hazards are widespread enough to frequently call the attention of OSHA officers in the field, but workers themselves have not been able to file specific complaints about these dangers.

OSHA’s “Ergonomic Hazard Alert Follow up Policy” provides guidance on communication with an employer subject to an Ergonomic Hazard Alert letter. This policy does not provide true accountability mechanisms by which OSHA can review an employer’s steps to improve ergonomic conditions.¹⁶⁹ An employer must provide a written response describing the measures that have been implemented to address the hazard.¹⁷⁰ Where an employer provides no response or an inadequate response, follow up inspection is only discretionary.¹⁷¹ This ergonomic hazard follow-up policy relies partially on information in the employer-recorded log discussed above,¹⁷² which permits a cycle of underreporting and insufficient enforcement. OSHA has acknowledged the problem of widespread underreporting of MSD injuries in data gathered by the Bureau of Labor Statistics.¹⁷³ As discussed above,

¹⁶⁸ Ergonomics Program, *supra* note 122, 65 Fed. Reg. 68262-01, 68268.

¹⁶⁹ OSHA Instruction, *Ergonomic Hazard Alert Letter Follow-up Policy*, Directive No. CPL 02-00-144 (Apr. 11, 2007, as extended, available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-144.pdf (setting employer response categories of none, inadequate, on-the-right-track, and successful, but not including strong penalties for inadequate or non-responses).

¹⁷⁰ *Id.* at VIII(D).

¹⁷¹ *See id.* at IX(A)(1).

¹⁷² *See id.* at VIII(C), Appendix A.

¹⁷³ “...the data only capture those MSD injuries reported by employers as lost workday injuries. MSDs that force an employee to be temporarily assigned to alternate duty, as well as those MSDs not reported to employers by employees or not recorded by employers, are not included in those risk estimates...The actual risks attributable to occupational exposure to ergonomic risk factors may be much higher than is indicated by BLS statistics. Many peer-reviewed studies have been published in the scientific literature in the last 18 years that document the underreporting of MSDs on OSHA Logs...These

another, and even more concerning reason for underreporting is that workers in poultry and meatpacking plants are afraid to report injuries because it puts them at risk for termination or retaliation by their employers.¹⁷⁴ Because many of the workers in these plants are undocumented immigrants or have undocumented family members, fear of termination as well as immigration consequences deters many from seeking protection.¹⁷⁵ State anti-immigrant laws have exacerbated this fear and further enabled meatpacking and poultry employers to avoid accountability for dangerous workplace conditions.¹⁷⁶

D. Plants are not obligated to comply with OSHA’s meatpacking and poultry guidelines, which makes OSHA’s MSD and CTD prevention recommendations particularly unlikely to be implemented.

The Ergonomics Program Management Guidelines for Meatpacking and Poultry Processing Plants contain non-enforceable suggestions regarding training, engineering, and work station solutions designed to mitigate ergonomic hazards in the workplace.¹⁷⁷ The Guidelines do not directly address work speed. The Guidelines recommend that training be provided to employees on “recognizing and addressing musculoskeletal disorders from their early indications before serious injury has developed.”¹⁷⁸ In a recent

studies document extensive and widespread underreporting on the OSHA Log of occupational injuries and illnesses in general.” Ergonomics Program, *supra* note 122, at 68752–68760.

¹⁷⁴ See *Unsafe at These Speeds*, *supra* note 13, at 13; *GAO Meat & Poultry Report 2005*, *supra* note 5, at 29.

¹⁷⁵ Human Rights Watch, *Blood, Sweat and Fear*, *supra* note 31, at 3–4.

¹⁷⁶ *Unsafe at These Speeds*, *supra* note 13, at 38.

¹⁷⁷ *OSHA Meatpacking Guidelines*, *supra* note 44.

¹⁷⁸ *OSHA Poultry Guidelines*, *supra* note 59.

survey of poultry workers, only 33 percent reported receiving training. Workers who did receive training demonstrated a greater likelihood of asking employers about safety conditions than those not trained, but even among trained workers, less than half (42 percent) felt comfortable discussing safety conditions with their employers.¹⁷⁹ While potentially useful if observed, OSHA's voluntary guidelines are no substitute for enforceable work speed regulations. Plants are not obligated to comply with the guidelines and do not face any penalty or legal action for failing to do so.¹⁸⁰ Nonbinding guidelines do not ensure compliance with recognized abatement measures to address CTDs, MSDs, cuts, and other work speed-related dangers that workers describe as largely unregulated in poultry and meatpacking plants.¹⁸¹

E. Enforceable standards promulgated in other industries have made important strides for workers' safety and health and have been feasible for the regulated industries to follow.

When OSHA implements enforceable standards, such standards, when enforced, tend to reduce the incidence of injuries resulting from the regulated hazard. Enforceable, precise standards offer effective protection from targeted hazards for workers in other specific industries. One report by

¹⁷⁹ *Unsafe at These Speeds*, *supra* note 13, at 27.

¹⁸⁰ OSHA makes it clear that employers who disregard the guidelines will not be cited or fined for doing so: "These guidelines are advisory in nature and informational in content. They are not a new standard or regulation and do not create any new OSHA duties. Under the OSH Act, the extent of an employer's obligation to address ergonomic hazards is governed by the general duty clause. 29 U.S.C. § 654(a)(1). An employer's failure to implement the guidelines is not a violation, or evidence of a violation of the general duty clause. Furthermore, the fact that OSHA has developed this document is not evidence of an employer's obligations under the general duty clause; the fact that a measure is recommended in this document but not adopted by the employer is not evidence of a violation of the general duty clause." *OSHA Poultry Guidelines*, *supra* note 59.

¹⁸¹ Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 Admin. L. Rev. 187, 209.

Public Citizen identifies “five worker-safety regulations that were tremendously successful in reducing employee injuries, illnesses and fatalities.”¹⁸² These five regulations are:

- [1] A rule requiring the cotton industry to reduce dust in textile factories lowered the prevalence of brown lung among industry employees by 97 percent;
- [2] A rule requiring employers to place locks and warning labels on powered equipment is credited with preventing 50,000 injuries and 120 fatalities per year;
- [3] A rule on excavations at construction sites has reduced the fatality rate from cave-ins by 40 percent;
- [4] A grain-handling facilities standard has reduced the number of fatalities caused by dust-related explosions by 95 percent;
- [5] And a 1969 mine safety law led to a rapid 50 percent decrease in coal mine fatality rate.¹⁸³

As yet another example, in February 1991, Washington State OSHA promulgated a standard for vertical fall protection in the construction industry (Washington is a state plan state). One study found that “[f]or the 784 construction employers cited for violating the fall protection standard in the 1991-1992 period, the workers’ compensation claim rate for fall injuries resulting in four or more days of lost time from work decreased from 1.78 to 1.39 per 200,000 hours worked for the one-year periods before and after inspection.”¹⁸⁴ This study concluded that “the rate for workers’ compensation claims for fall injuries decreased after construction employers were cited for violating the fall protection standard.” Another study of the same issue

¹⁸² Public Citizen, *Regulations at Work: Five Rules that Save Workers’ Lives and Protect their Health*, July 2011, pg 3.

¹⁸³ *Id.*

¹⁸⁴ Nelson, et al., Falls in Construction: Injury Rates for OSHA-Inspected Employers Before and After Citation for Violating the Washington State Fall Protection Standard. *American Journal of Industrial Medicine* 31:296-302 (1997).

concluded “[t]here was a significant decrease in the rate of falls from height after the standard went into effect[,]...[t]he greatest decrease was seen 3 and 3/12 years after the standard went into effect.”¹⁸⁵

Standards that issue permissible exposure limits have also proved successful. OSHA issued an amended final Cotton Dust standard in 1985 to reduce the risk of byssinosis, or “brown lung disease” suffered by cotton textile workers.¹⁸⁶ Immediately prior to OSHA’s issuance of the first Cotton Dust standard in 1975, the prevalence rate of byssinosis among cotton textile workers was 12 percent. As of 2000, the standard’s provisions requiring medical surveillance, transfer to lower exposure areas, and adjusted work practices had reduced the byssinosis prevalence rate to 0.68 percent.¹⁸⁷

These examples demonstrate that industry specific, enforceable rules are effective and critically needed to address industry wide, pervasive safety concerns.

F. A proposed USDA rule threatens to increase line speed to even more unsafe levels, making it critical that OSHA and USDA protect worker safety in poultry and meatpacking plants.

1. Current USDA regulations and a new regulation proposed by USDA in the poultry processing industry do not protect workers.

In U.S. poultry processing plants, the two most prevalent USDA inspection systems are the Streamlined Inspection System (SIS) and the New

¹⁸⁵ Lipscomb, et al., *Work Related Falls Among Union Carpenters in Washington State Before and After the Vertical Fall Arrest Standard*, American Journal of Industrial Medicine 44:157-165 (2003).

¹⁸⁶ See Occupational Exposure to Cotton Dust: Notice of the Availability of a Lookback Review Pursuant to the Regulatory Flexibility Act and Executive Order 12866, 65 Fed. Reg. 76667-01, 76667 (Dec. 7, 2000) (pertaining to rule codified at 29 C.F.R. § 1910.1043).

¹⁸⁷ *Id.* at 76668.

Line Speed (NELS) Inspection System. In the SIS system, lines currently run at 70 birds per minute with two inspectors on each line.¹⁸⁸ In the NELS system, lines move at 91 birds per minute, requiring three inspectors on each line.¹⁸⁹ USDA-FSIS inspectors visually inspect the inside of carcasses.

In 1997, USDA initiated a third inspection system known as HACCP-based Inspection Models Project (HIMP).¹⁹⁰ Under the HIMP system,

inspectors

conduct three

activities:

carcass

inspection,

verification

inspection and



systems inspection.¹⁹¹

A proposed rule by USDA would authorize an increase in line speed to a maximum speed of 175 birds per minute at poultry plants.¹⁹² By dramatically increasing the maximum speed at which poultry processing lines can run, the proposed rule will significantly increase the risk of crippling MSDs and other injuries to workers. USDA's rule also removes

¹⁸⁸ Streamlined Inspection System for Broilers and Cornish Game Hens (Interim Rule with Request for Comments), 51 Fed. Reg. 3569-02, 3573 (Jan. 29, 1986) (codified at 9 C.F.R. § 381).

¹⁸⁹ New Line Speed Inspection System for Broilers and Cornish Game Hens (Final Rule), 49 Fed. Reg. 42,550-01, 42552 (Oct. 23, 1984) (codified at 9 C.F.R. § 381).

¹⁹⁰ Notice: HACCP-Based Meat and Poultry Inspection Concepts, 62 Fed. Reg. 31553-02 (June 10, 1997).

¹⁹¹ *Id.* at 31555.

¹⁹² Modernization of Poultry Slaughter Inspection, *supra* note 144, at 4413, 4423, 4454.

inspectors from the slaughter line and turns over inspection activities, previously conducted by federal inspectors, to plant employees who are not required to be trained in their new duties. The lone remaining inspector on the slaughter line will have 1/3 of a second to examine each chicken carcass for problems, leading to potential food safety and worker health and safety problems.¹⁹³

2. USDA must adequately engage with OSHA in interagency review of the impact of its new proposed line speed rule as required by Executive Order 12866.

Executive Order 12866 establishes mandatory principles to guide agencies in both the process and substance of their rulemaking. Among these is the requirement that “[e]ach agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities, consistent with obtaining the regulatory objectives.”¹⁹⁴ Executive Order 12866 established an interagency forum to address and deal with cross-cutting, interagency issues to “[a]ssist agencies in identifying and analyzing important regulatory issues (including, among others 1) the development of innovative regulatory techniques, and 2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making . . .).”¹⁹⁵ This mechanism is consistent with Executive Order 12866’s stated purpose, which is to enhance planning with respect to

¹⁹³ *Id.*

¹⁹⁴ Regulatory Planning and Review, Exec. Order No. 12866 § 1(b)(11), 58 Fed. Reg. 51735 (Sept. 30, 1993).

¹⁹⁵ *Id.*

both new and existing regulations and to restore the integrity and legitimacy of regulatory review and oversight.¹⁹⁶

USDA states that the purpose of its proposed line speed rule is to modernize the poultry inspection system, make better use of the Agency's resources, and remove unnecessary regulatory obstacles to innovation.¹⁹⁷ Other than briefly acknowledging that an evaluation of line speed effects on food safety should include effects on employee safety, USDA has not indicated that it has not fully considered how its proposed rule will burden workers impacted by the rule change or how it will affect OSHA's mandate. The rule contemplates that NIOSH will assess short, intermediate, and long-term effects from the proposed modifications in one plant and that FSIS will consider whatever data comes from this assessment.¹⁹⁸ Any final rule must adequately protect workers from the hazards of fast line speeds. Otherwise, excessive line speeds will lead to increased incidence of worker injury, which in turn will have far-reaching burdens on society by interfering with workers' ability to provide economically for themselves and their families,¹⁹⁹ by increasing workers' compensation costs, by increasing healthcare costs, by increasing resort by workers to disability payments and other publicly funded support systems, by increasing health care costs, by producing even higher industry turn over, requiring constant training and incorporation of new

¹⁹⁶ *See id.*

¹⁹⁷ Modernization of Poultry Slaughter Inspection, *supra* note 144, at 4408.

¹⁹⁸ *See id.* at 4423-24.

¹⁹⁹ *See* Episode 490: Trends With Benefits, This American Life, (audio and transcript) *available at* <http://www.thisamericanlife.org/radio-archives/episode/490/trends-with-benefits> (Discussion about Hale County, Alabama — a place where one fourth of working age adults are on disability).

staff, and by additionally burdening OSHA’s mandate to ensure workplace safety. USDA’s proposed line speed rule would allow the industry to shift overwhelming and severe costs of doing business on workers, the government, and society at large. The interagency planning required to address a cross-cutting matter such as worker health and safety ensure that any changes in line speeds provide adequate worker protection.

3. The USDA must properly address worker protection in its proposed poultry modernization rule.

The USDA has to date focused on food safety and increasing the productivity of the poultry plants and not on worker health and safety considerations.²⁰⁰ Although “FSIS recognizes that evaluation of the effects of line speed on food safety should include the effects of line speed on establishment employee safety,”²⁰¹ USDA has failed to seriously consider the severe impacts that a line speed increase would have on worker health and safety. The proposed rule discusses the limited involvement of the National Institute for Occupational Safety and Health (“NIOSH”)²⁰² that will be sought

²⁰⁰ The legislative history of the Poultry Products Inspection Act suggests that when it was first proposed, legislators, unions and other proponents intended for the legislation to consider worker safety issues. This, however, was never included in the actual text of the Act and was instead left solely as a statute that deals with the agency’s authority over poultry inspection for food safety purposes. Marc Linder, who has written important articles on this issue, notes, “[a]s several of the chief legislative sponsors of the bills that ultimately became the Poultry Products Inspection Act repeatedly stressed, the federal government’s intervention, sparked in part by deaths among poultry processing workers who had handled diseased birds, 103 CONG. REC. 2744 (1957) (Rep. Leonor Sullivan), was also designed ‘[t]o protect the health of persons engaged in the processing and distribution of poultry and poultry products.’” *Id.* at 2745. See Marc Linder, I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries, 46 Case W. Res. L. Rev. 33 (1995). Unfortunately, none of these concerns is actually reflected in the statute itself and is not noted as part of the statute’s intent.

²⁰¹ *Id.*

²⁰² NIOSH is tasked with conducting research and making recommendations for the prevention of work-related injury and illness. To accomplish its mission, NIOSH conducts scientific research, develops guidance and authoritative recommendations, disseminates information, and responds to

to analyze the impact of the rule on workers on a set number of five non-HIMP²⁰³ plants, with the express purpose of “gather[ing] additional data on the effects of line speeds on the worker safety and the ability of establishments to maintain process control.”²⁰⁴ The proposed rule does not indicate that it will wait for NIOSH’s analysis to be completed or implement measures to protect worker safety in light of NIOSH’s findings. FSIS leadership has publicly stated that this responsibility falls on OSHA. “As I think the subcommittee probably well knows, our statutory authority does not -- does not extend to rulemaking for -- for worker protection. So we’re happy to be working with the entities within the executive branch that have the ability to do that and have the expertise to study”²⁰⁵ Accordingly, as part of any rulemaking that affects line speeds, USDA must address the worker health and safety issues documented through the NIOSH Health Hazard Evaluation and identified in public comments.

4. The USDA’s regulation of line speeds are no obstacle to an OSHA standard governing work speeds.

requests for workplace health hazard evaluations. See About NIOSH, available at: <http://www.cdc.gov/niosh/about.html>

²⁰³ HIMP stands for HACCP (Hazard Analysis and Critical Control Point Systems) Based Inspection Models Project. According to the USDA website, “[t]he HACCP-Based Inspection Models Project (HIMP) was developed by the Food Safety and Inspection Service (FSIS) to produce a flexible, more efficient, fully integrated meat and poultry inspection system. The HIMP system, in contrast with the traditional inspection system, focuses more control for food safety and other consumer protection activities on the establishment with Agency personnel focusing on carcass and verification system activities. FSIS expects this system to yield increased food-safety and other benefits to consumers, and will permit FSIS to deploy its in-plant resources more effectively.”

http://www.fsis.usda.gov/science/HIMP_History/index.asp. For a list of plants participating in the HIMP pilot, see http://www.fsis.usda.gov/science/Himp_Plant_List/index.asp.

²⁰⁴ Modernization of Poultry Slaughter Inspection, *supra* note 144, at 4423.

²⁰⁵ Oversight of Food Safety and Inspection Service: Hearing Before the Subcomm. on Agriculture, Rural Development, Food and Drug Admin. and Related Agencies of the H. Comm. on Appropriations, 113th Cong. (Mar. 13, 2013) (testimony of Elisabeth Hagen, Undersec’y for Food Safety, U.S. Dep’t of Ag.).

The Poultry Products Inspection Act (PPIA) does not require the USDA to regulate line speed, but it also does not prohibit USDA from doing so. It does permit USDA to set parameters for line speed as part of its food safety inspection mandate. The USDA's regulation of line speeds does not preclude OSHA from setting speed-related standards to protect workers' health and safety. The USDA has not considered worker health and safety while promulgating prior or current food safety rules that govern line speeds. USDA articulates its reasons for the proposed rule as follows:

The Agency is taking this action to improve food safety and the effectiveness of poultry slaughter inspection systems, remove unnecessary regulatory obstacles to innovation, and make better use of the Agency's resources.²⁰⁶

Among these "obstacles," the agency seeks to reduce the presence and number of USDA inspectors in the plants. The increase in line speeds would not contribute to the agency's stated goals of improving poultry slaughter inspection systems.

5. The USDA's proposed line speed increase would subject poultry workers to imminent danger, making protection especially urgent.

As discussed above, line speed increases would undermine, rather than further, USDA's mandate to protect consumers from foodborne illness. Moreover, line speed increases will create substantial inefficiencies because of more worker injuries which will contribute to stopped lines, more workers' compensation claims, and higher employee turnover.

²⁰⁶ Modernization of Poultry Slaughter Inspection, *supra* note 144, at 4408.

The possibility of NIOSH evaluations alone is not enough to address risks that increased line speeds pose to workers. A letter from the Chief of Staff of NIOSH, Frank Hearl, P.E., dated November 1, 2012, explains the narrowly limited scope of NIOSH’s review of effects of increased line speed, especially as related to the Modernization Rule.²⁰⁷ While the USDA’s proposed rule states that USDA would request that NIOSH study “five non-HIMP plants that have been granted waivers from line speed restrictions under the [Salmonella Initiative Program],”²⁰⁸ currently, “NIOSH is conducting a [Health Hazard Evaluation] (“HHE”) at [only] one poultry facility at the management’s request. The plan is to gather baseline data at the facility to evaluate musculoskeletal disorders and traumatic injuries.”²⁰⁹ The NIOSH report²¹⁰ which this letter identifies is an evaluation of hazards affecting workers at a plant under current line speeds and not the increased speed the USDA proposes. The alarming rate of carpal tunnel syndrome workers exhibit (42% in the plant NIOSH visited) at the current speed cautions against exposing workers to the risk of increased line speed. NIOSH has not yet studied the consequences of permitting higher speeds at that plant. USDA has not stated an intent to delay or alter its rule permitting faster line speeds based on NIOSH’s work. The imminent danger facing poultry workers from faster speeds urgently demands protection.

²⁰⁷ See Letter from Frank Hearl, Chief of Staff, Nat’l Inst. of Occupational Safety & Health, to Celeste Monforton, Professional Lecturer, George Washington Univ. School of Pub. Health & Health Servs. (Nov. 1, 2012).

²⁰⁸ Modernization of Poultry Slaughter Inspection, *supra* note 144, at 4423.

²⁰⁹ See Letter from Frank Hearl, *supra* note 208.

²¹⁰ See *NIOSH Poultry Report*, *supra* note 10.

G. Congress’s joint 2001 resolution disapproving of OSHA’s final ergonomics program rule and enjoining its implementation does not preclude OSHA from promulgating a work speed standard to protect meatpacking and poultry workers now.

1. OSHA’s final ergonomics program rule published in 2001 addressed CTD hazards by requiring the implementation of sweeping ergonomics programs across most industries.

On January 16, 2001, OSHA published a broad ergonomics program standard to reduce MSDs in most U.S. industries in furtherance of Section 6(b) of the OSH Act, which authorizes the Secretary of Labor to promulgate and enforce occupational health standards.²¹¹ This standard incorporated an “action trigger” that would determine whether an employer needed to provide an ergonomics program for a particular job.²¹² If an employee reported an MSD, the employer was first required to determine whether it was an MSD incident, defined as an MSD resulting from days away from work, restricted work, medical treatment aside from first aid, or MSD signs and symptoms that persist for more than 7 days.²¹³ If this was established, the employer would then assess whether the employee’s job had risk factors that met the standard’s trigger, such as repetition, awkward posture, force, etc. If such risk factors were found to meet the threshold of the trigger, the employer would have to establish an ergonomics program for that job.

The final rule required ergonomics programs to contain the following elements: hazard information and reporting, management leadership and

²¹¹ 29 U.S.C. § 655(b).

²¹² Ergonomics Program, *supra* note 122, 65 Fed. Reg. 68262-01, 68262.

²¹³ *See id.*

employee participation, job hazard analysis and control, training, MSD management, and program evaluation.²¹⁴ The standard provided the employer with options for evaluating and controlling risk factors for jobs covered by the ergonomics program, and it gave objective criteria for identifying MSD hazards in those jobs. This comprehensive, multi-dimensional approach was designed to address a broad spectrum of MSDs across many different industries.²¹⁵

2. A rule regulating work speed in the poultry and meatpacking industry is not substantially similar to the proposed ergonomics rule, and is within OSHA's ability and mandate to protect workers.

On March 20, 2001, Congress submitted a joint resolution expressing congressional disapproval of the ergonomics program rule pursuant to the 1996 Congressional Review Act [hereinafter CRA].²¹⁶ The CRA establishes that, following a successful veto, an agency rule that does not take effect “may not be reissued in substantially the same form.”²¹⁷ Congress did not define, and has not subsequently defined, the meaning or scope of “substantially the same form,” and there is no authoritative interpretation of the CRA to guide agency rulemaking following a congressional veto.²¹⁸ However, an analysis of possible interpretations of “substantially the same

²¹⁴ *Id.*

²¹⁵ *Id.* at 68274–75.

²¹⁶ See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001), invalidating Ergonomics Program, 65 Fed. Reg. 68,262 (proposed Nov. 14, 2000).

²¹⁷ 5 U.S.C. § 801(b)(2).

²¹⁸ See Adam M. Finkel and Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, *Faculty Scholarship*, Paper 348, at 32 and n.112 (“It is emphatically the province and duty of the judicial department to say what the law is”) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)), available at http://scholarship.law.upenn.edu/faculty_scholarship/348 and at 63 Admin. L. Rev. 707.

form,” the distinctive characteristics of a rule regulating work speed, and the evidence of congressional intent after passing the CRA indicate that the standard Petitioners propose here is not substantially similar to the 2001 Ergonomics Program standard. Congress did not intend to forbid OSHA from promulgating any standard that in any way protected any workers from any MSD-related hazards, which would be the most extreme and only possible interpretation of “substantially the same” that could conceivably preclude any regulation in the broadly-defined field.

Adam Finkel and Jason Sullivan discuss seven possible interpretations of “substantially similar” that Congress could have intended when it wrote the CRA and created the standard.²¹⁹ A work speed standard in enumerated industries would not be substantially similar under any of the seven plausible interpretation. The sixth interpretation may be the most relevant to assessing the 2001 ergonomics standard and the work speed rule proposed here: that the agency “must devise a wholly different regulatory approach if it wishes to regulate in an area” regarding which Congress has cautioned it.²²⁰ Finkel and Sullivan suggest, as an example, that if Congress repealed a “you

²¹⁹ See *id.* at 33-38. The interpretations, ranging from least to most restrictive of future agency action, are that (1) “An identical rule can be reissued if the agency asserts that external conditions have changed;” (2) “An identical rule can be reissued if external conditions truly *have* changed;” (3) “The reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule;” (4) “In addition to changing the overall costs and benefits of the rule, the agency must fix all of the specific problems Congress identified when it vetoed the rule;” (5) “In addition to changing the costs and benefits and fixing specific problems, the agency must do more to show it has ‘learned its lesson.’;” (6) “In addition to the above, the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about;” and (7) “An agency simply cannot attempt to regulate (in any way) in an area where Congress has disapproved of a specific regulation.” *Id.* (emphasis original).

²²⁰ See *id.* at 37.

must” standard, then the agency would have to devise a “you may” alternative to avoid the “substantially similar” bar.²²¹

The rule proposed here would address particular machinery and work practices in the meatpacking and poultry processing industries and, unlike the final proposed Ergonomics Program rule, would not impose a general program standard or trigger changes in numerous practices across industries. The proposed work speed standard also employs a distinct regulatory approach because it establishes a clear ceiling for worker exposure to a specific hazard above which exposure is unacceptably risky.²²² The proposed work speed rule is similar to OSHA’s existing health standards for chemicals because it sets a threshold for exposure to a hazard, in this case, a number of repetitions above which severe CTDs are likely to occur.²²³ A standard for work speeds in meatpacking and poultry processing industries is therefore not substantially similar to the repealed Ergonomics Program standard.

The most extreme possible interpretation of “substantially the same form” is that an agency cannot attempt to regulate at all in an area where Congress has disapproved of a specific regulation. However, available authority shows that this extreme result was not Congress’ intent.²²⁴ The CRA was part of legislation negotiated between the Senate and the House, so it did not go through the committee process and detailed legislative history is

²²¹ *See id.*

²²² *Id.*

²²³ *Id.* at 85.

²²⁴ *Id.* at 38.

lacking.²²⁵ The only explicit commentary Congress has provided is in identical joint explanatory statements submitted by the joint sponsors of the CRA in the Senate and House.²²⁶ The statement notes that disapprovals may have different impacts on promulgating agencies depending on the nature and scope of rulemaking authority that the agency used.²²⁷ If an agency's authorizing legislation gives it broad discretion and did not mandate the promulgation of the disapproved rule, the agency has discretion in deciding whether to issue a new rule.²²⁸ The OSH Act gives OSHA broad discretion in exercising its authority to set occupational safety and health standards²²⁹ and does not require the precise Ergonomics Program standard which Congress repealed. The statement thus strongly suggests that Congress intended OSHA to keep the discretion to promulgate a rule that is not substantially the same.²³⁰ The statement also provides that it is Congress' obligation during debate on a disapproval resolution to "make congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval."²³¹

²²⁵ Martin Rosenberg, Congressional Research Service Report for Congress, *Congressional Review of Agency Rulemaking: An Update and Assessment of The Congressional Review Act After a Decade* (Updated March 8, 2008).

²²⁶ 142 Cong. Rec. E571-01 WL 188651 (1996). Although this is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous and in-depth statement of purpose and intent by the principal sponsors of the law. *See North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530 (1982).

²²⁷ *See id.*

²²⁸ *See id.*; Rosenberg, *supra* note 225.

²²⁹ 29 U.S.C. § 651(b)(3).

²³⁰ *See* Rosenberg, *supra* note 225, at 38.

²³¹ *See* 142 Cong. Rec. E571-01, *supra* note 226.

While Congress did not specify OSHA's options, it provided substantive clues regarding its intent during the ergonomics floor debate. Notably, Senator Jeffords, the principal sponsor of the resolution of disapproval, discussed the Joint Statement and OSHA's broad rulemaking authority in concluding that he did not believe the CRA would act as an impediment if OSHA were to decide to engage in future ergonomics rulemaking.²³² In addition, the legislative history of the joint resolution of disapproval evinces congressional dissatisfaction with the particular characteristics of the Ergonomics Program standard. Members of Congress were unhappy that the rule did not specify impermissible levels of repetitive stress that would give employers notice of what constituted compliance with the regulations.²³³ Some opponents also expressed concerns that the rule was too vague and would not benefit, and could in fact hurt, workers.²³⁴

The core concept of OSHA regulating MSD or CTD-causing hazards, however, was not opposed by members of Congress, and the joint resolution did not repeal or modify any part of the agency's statutory mandate to protect workers.²³⁵ It simply repealed the particular rule in question at the time. A broad reading of "substantially similar" to preclude narrow, industry-specific worker protections related in any way to MSDs would repeal OSHA's

²³² 147 Cong. Rec. S 1832-33 (daily ed. March 6, 2001).

²³³ 147 Cong. Rec. 3074-75 (2001) (statement of Rep. Sweeney). "My vote of no confidence on the ergonomics regulations does not mean I oppose an ergonomics standard, I just oppose this one." *See id.*

²³⁴ 147 Cong. Rec. 3056 (2001) (statement of Rep. Norwood).

²³⁵ Finkel, *supra* note 218, at 77-82.

authority in ways that Congress did not intend the CRA to do.²³⁶ Moreover, it would be a perverse result if the USDA or other agencies were permitted to control work speed without considering worker safety while the agency charged with protecting workers were forbidden from using its own clear statutory rulemaking power to protect workers from work speed hazards.

Part III: Essential Elements of a Work Speed Standard for Meatpacking and Poultry Plants.

A. An OSHA standard should limit work speeds and address MSDs.

As Part I of this petition establishes in detail, one of the primary factors contributing to the high incidence of injuries suffered by poultry and meat processing workers is the speed at which the lines are permitted to run. OSHA has a statutory mandate to rectify workplace hazards such as work speed.²³⁷ Therefore, Petitioners request that OSHA engage in rulemaking to promulgate a standard that limits work speeds in the industries of meat and poultry processing based on the documented impact these speeds have on workers' health and safety. In order to adequately protect workers from injuries, OSHA must implement a standard that is concretely enforceable and that sets maximum line speeds and numbers of repetitive motions substantially lower than those currently prevalent in the industries.

A clear and enforceable standard is the only way that the agency may ensure that employers are in compliance and for employers to have clarity

²³⁶ Martin Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1066 (1999).

²³⁷ See Part II, *supra*.

about what is required of them. The General Duty Clause alone does not provide sufficient guidance to employers as to how to ameliorate the particular problem of repetitive motion injuries.

At minimum, the standard should:

- Apply to all meat and poultry processing plants that use slaughtering or processing lines in their production and output.
- Require a work speed limit that seeks to prevent or minimize CTDs and other MSDs among workers in the meat and poultry processing industries, whether the speed is measured in motions per minute or in other terms. This standard should account for not only total birds per minute, but also for motions per worker per minute to reduce the number of motions each worker is required to do. This may require a set of coordinated standards addressing different positions on the line. One approach to limit exposure to repetitive motion hazards could be to align line speeds to varying staffing levels.
- Account for sufficient recovery times for workers during each motion cycle before repeating the same motion.
- Require adequate full rest periods during a shift.

B. OSHA should set work speeds at substantially slower rates than those currently prevalent in the poultry and meatpacking industries.

Petitioners ask that OSHA promulgate a standard that would reduce current speeds by substantial margins. Prevailing speeds are currently as high as 325 cattle per hour in meatpacking plants and 175 birds per minute in poultry plants, the latter of which is likely to soon become more widespread. Individual workers make varying numbers of motions per minute depending on their job assignment. Some job assignments involve repeating tasks that consist of multiple motions.

As summarized in Part I, substantial research – including surveys with many hundreds of meat and poultry workers in multiple states across the country – has repeatedly highlighted workers’ deep and urgent concern with work speed as one of the most critical safety risks in their work. Academic studies have also documented the high true injury rates that result from current work speeds. It is clear that a substantial reduction in work speed is required to make these jobs safe.

In preparation for submission of this rulemaking petition, several petitioners²³⁸ conducted additional work speed interviews and focus groups to identify workers’ recommendations with greater precision about what work speed would be safer. More than 55 workers in at least 16 communities (and 17 workplaces) across 4 states were interviewed to survey current work speeds, motions per piece, pieces per minute, pause times between individual motions and between pieces processed, and initial recommendations for safe speeds. When asked what would be a safe work speed, a majority (approximately 75%) described what would constitute a 20% to 50% reduction in speed from current rates. Interestingly, this often correlated with the speed they said they were asked to work when OSHA, USDA, or an outside group was present or touring the plant. Several workers with years of experience also noted that production levels had increased from between 25% to 200% since they had first started.

²³⁸ Petitioners who participated in this process of compiling data were the Northwest Arkansas Workers’ Justice Center, the Coalition of Poultry Workers (based in Mississippi), Nebraska Appleseed, and the Southern Poverty Law Center.

Current work speeds have workers conducting unimaginable numbers of repetitive motions – often including significant force, weight, bending and twisting motions – on a daily basis: Workers commonly described 15,000 to 20,000 motions per shift on the low end, up to 40,000 to 100,000 or more motions per shift on the high end. Not one worker reported having any pause time between motions or between pieces processed; in fact, laughter commonly accompanied the response to those questions. It is also worth noting that the vast majority had only two breaks during the day (usually one

10- or 15-minute paid break and one 30-minute unpaid break), and only 20% described rotating job



positions during the day. A few examples of the repetitive motions performed in various positions follow:

- Poultry plants: Workers at various deboning stations have to grab the carcass with one hand, slice with the other hand, and then pull the first hand again to remove a cut of meat, such as breast meat. At other

stations, workers may have to make two or three slices before removing a particular bone, such as a thigh bone, from the carcass. At some of these deboning stations, workers may have to perform these tasks on 30 or more carcasses per minute.

- Poultry plants: Rehang workers are typically required to grab carcasses of chickens arriving on a conveyor belt from the chiller or other storage and to lift them and either hang them on shackles overhead or impale them on cones in front. The task requires about three motions, first grabbing a chicken carcass, then quickly lifting the carcass, often weighing about five pounds, and then securing the carcass onto a cone or shackles which requires significant force. Rehang workers often repeat this task between 45 and 60 times each minute, or nearly once per second, involving upwards of 150 motions per minute.
- Poultry plants: Wing folding workers are typically asked to grab, twist, fold, and tie two chicken wings every three seconds. This requires a worker to perform a quick series of four or more motions simultaneously with both hands. Workers perform this task twenty times per minute with each hand, or forty times total in a minute. Over the course of an eight-hour shift, wing folding workers may perform this series of motions more than 18,000 times (more than 9,000 times with each hand).

- Meatpacking plants: Each cutting worker often has to cut, slice, lift or separate a square of ham every twelve seconds, or five times a minute. A worker interviewed by the Lincoln Journal Star reported that keeping up with this fast line speed for five years caused him to have shoulder surgery and to suffer from chronic, possibly permanent injuries causing hand, wrist, and elbow pain.²³⁹
- Meatpacking plants: A beef processing worker, who uses a vibrating electric knife to do trimming on the kill floor, described making 5 movements per piece at 6-8 pieces per minute. The vibrating knife (which causes discomfort) needs to be pressed harder as it loses its sharpness. At this rate of more than two movements per second for eight working hours without any pauses except the workers' 15-minute and 30-minute break (on top of the 8 hours), this worker would make 16,800 repetitive movements every work day.
- Meatpacking plants: Another pork plant worker described the position of "pulling paddle" to separate the leg joint – a job requiring movements of greater force: 5-6 motions per hog at approximately 5 hogs per minute, including hooking the tool, locking it against the joint, peeling it open and pulling it back (sometimes requiring brute force as the knife dulls).
- Meatpacking plants: A worker packing hams described packing 40 hams per minute with 5 motions per ham, including: reaching back

²³⁹ Walton, *supra* note 36.

with the right shoulder, grabbing the ham and moving it forward, dropping it in a bag opened with the left hand, and then pushing the ham along with the right hand. During an 8-hour shift, this worker makes approximately 96,000 movements.

These responses represent the beginning of a process to identify workers' recommendations – based on their direct experience – for safe work speeds and will require further work by position, but the responses taken together provide yet another view into the current breakneck, unsustainable work speeds currently required across the industry, and the need for substantial reduction to recognize the human beings – with human limbs, cartilage, tendons, and nerves – doing the work.

Substantial medical and epidemiological research has concluded that rate of repetition is a major factor in disabling injuries. Poultry and meat processing workers who have been interviewed about line speeds believe that the current speeds are hazardously fast, and severe CTDs and other injuries attributable to work speed are far too common in these industries.²⁴⁰

Petitioners request that OSHA promulgate standards that substantially reduce currently prevalent rates of repetition such as those described above and set a speed or range of speeds to minimize susceptibility to CTDs and other speed-related injuries based on the best available information

²⁴⁰ See, e.g., *The Speed Kills You*, *supra* note 25, at 27–29; *Unsafe at These Speeds*, *supra* note 13, at 8–10; *Blood, Sweat, and Fear*, *supra* note 31, at 33–38.

accessible to the agency.²⁴¹ These standards may reflect different types of motions used by workers in different job assignments and may take staffing levels into account. OSHA, using existing credible studies, can determine appropriate work speeds necessary to safeguard worker health and safety.

C. A work speed standard should measure maximum work speeds in pieces per minute per worker or in other terms that will sufficiently reduce risk of cumulative trauma disorders.

OSHA may take multiple approaches to developing a standard limiting work speeds. For example, the agency should develop a standard setting:

- a. A work speed that should not exceed x pieces per minute, aligned to staffing levels, and varying among different job assignments;
- b. A work speed that should not exceed x motions per minute, per 24 hours, or per other time period; and/or
- c. A work speed above which pace may not be sustained without requiring frequent complete and total rest breaks lasting at least fifteen minutes.

The standard may provide varying numerical standards for different job assignments, such as for live hang workers, for workers operating wing-cutting saws, and for workers performing manual deboning and cutting.

OSHA must substantially reduce currently prevalent speeds. Some workers believe that OSHA could set a safe standard by reducing all currently prevalent rates of repetition of tasks by at least half.

The standard should also specify some or all of the following as supplemental steps to be taken in addition to reducing rates of repetition:

- Implementation of enforceable posture, and force standards and materials of best ergonomic practices for these industries.

²⁴¹ 29 U.S.C. § 655(b)(5).

- Meaningful job rotation between positions between high-repetition departments, such as deboning, and non-repetitious departments to prevent the onset of repetitive motion injuries, such as carpal tunnel syndrome.
- Ergonomically sound tools, including requiring at minimum that these industries incorporate regular tool sharpening to reduce strain for the workers to accomplish their work.
- Mandatory rest breaks of a length of time sufficient to permit recovery time.
- Develop a protocol for transferring injured workers to other job functions at no loss of pay or set further restrictions on motion or work when a worker reports an injury.

D. USDA must work with OSHA to ensure its rulemaking does not further harm workers.

USDA is obligated to engage in substantive interagency review of its proposed Modernization Rule with OSHA and to assess the impact of this proposed rule on workers and society at large. Petitioners request that USDA therefore address its proposed rule's worker safety implications, accounting for the burdens such a rule would place on individuals and society as a result of increased injury rates and incidence of chronic, disabling MSDs. USDA could invite OSHA to assist in crafting protection standards to incorporate into the proposed rule. Any line speed rule should address both food safety, which is USDA's original impetus for intervention in this area, and worker safety, which is primarily OSHA's mandate.

E. OSHA's meatpacking and poultry processing safety guidelines: OSHA should make existing guidelines enforceable.

Recognizing the prevalence and seriousness of CTDs, OSHA has already developed voluntary guidelines for the poultry and meatpacking

industries which set forth recommended ergonomic safeguards, as discussed in Part II.²⁴² In addition to formulating a standard with work speed limits, petitioners request that OSHA also adapt its currently voluntary ergonomic guidelines relevant to these two industries into standards.

While acknowledging the impact of cumulative and repetitive motions, these guidelines do not specifically



discuss or address the issue of work speed, which is a serious yet unregulated hazard. Moreover, while these guidelines are meant to address the injuries that are of primary concern in this petition, industries are not required to implement the recommendations set out in these guidelines. In fact, OSHA has emphasized that such guidelines are not enforceable and that failure by an employer to implement them cannot be used against the employer as “evidence of a violation of the general duty clause.” Without any means for enforcement, these guidelines have failed to stem the tide of CTDs epidemic in the poultry and meatpacking industries.

OSHA action to regulate work speed and to convert these safety guidelines into enforceable standards is urgently needed given the proposed

²⁴² See *OSHA Meatpacking Guidelines*, *supra* note 44; *OSHA Poultry Guidelines*, *supra* note 59.

USDA regulation which will imminently increase line speeds in that industry. Given the industries' ongoing efforts to increase the speed at which lines run,²⁴³ OSHA must ensure implementation of its guidelines to protect workers in these industries.

Conclusion

This petition has demonstrated that there is a compelling need for a standard that properly regulates the dangerously high work speeds in meatpacking and poultry plants. The close relationship among the relentless speed of work, repetitive motions, and the prevalence of crippling and debilitating injuries establishes that OSHA and USDA have an obligation to regulate work speeds in these industries.

Sincerely,

Southern Poverty Law Center
Nebraska Appleseed Center for Law in the Public Interest
Alabama Appleseed Center for Law and Justice
Coalition of Poultry Workers
Coalition of Black Trade Unionists
Farmworker Advocacy Network
Heartland Workers Center
Interfaith Worker Justice
Midwest Coalition for Human Rights
National Council for Occupational Safety and Health
North Carolina Justice Center
Northwest Arkansas Worker Justice Center

²⁴³ The industry has consistently sought to increase line speeds without attention to worker safety. *See, generally, Methods and Equipment for Eviscerating Chickens*, U.S. Department of Agriculture, Agricultural Marketing Service, Transportation and Facilities Research Division, Marketing Research Report No. 549; *Efficiency in Poultry Evisceration and Inspection Operations*, U.S. Department of Agriculture, Agricultural Research Service, The University of Georgia College of Agriculture Experiment Stations (June 1968).

Refugee Women's Network
Student Action with Farmworkers
Western North Carolina Workers' Center

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Photo at page 19, Worker with Missing Part of Finger, Charlotte Observer

Photo at page 22, Poultry Worker Cutting Chicken, Charlotte Observer

Photo at page 25, Claw Fingers, Charlotte Observer

Photo at page 47, Chickens Hanging on Poultry Line, Charlotte Observer

Photo at page 63, Workers Inside Plant, "Inside a Poultry Plant," available at <http://www.youtube.com/watch?v=0XzKP8ctxrc>

Photo at page 69, Injured Hands of Meatpacking Worker, Nebraska
Appleseed