

# STILL IN THE JUNGLE: POULTRY SLAUGHTER AND THE USDA

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*Chickens and turkeys represent more than 98 percent of slaughtered land animals in the United States, and yet they have no legal protection from inhumane slaughter. This paper argues that the USDA must use its statutory authority to protect poultry from inhumane slaughter under both the Human Methods of Slaughter Act of 1958 (HMSA) and the Federal Meat Inspection Act of 1907 (FMIA). After an introduction to the central themes in this area of law, Part II discusses the treatment of poultry in slaughterhouses and the need for reform. Part III describes the current state of humane slaughter laws and regulations in the United States. Part IV offers a detailed analysis of *Levine v. Vilsack*, in which animal protection and workers' rights organizations tried to force the USDA to regulate poultry under the HMSA. Finally, Part V suggests a new path to federal legal protection for poultry at slaughter, building on an understanding of the legal and factual arguments adduced by both sides in *Levine*.*

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*So, as the wheel turned, a hog was suddenly jerked off his feet and borne aloft. At the same instant the ear was assailed by a most*

*terrifying shriek. . . . And meantime another was swung up, and then another, and another, until there was a double line of them, each dangling by a foot and kicking in frenzy—and squealing.*

Upton Sinclair, *The Jungle*, 1906<sup>1</sup>

*[Workers] are literally throwing the birds into the shackles, often breaking their legs as they do it. . . . They are working so fast, they sometimes get just one leg in the shackles. When that happens, the chickens aren't hanging right. . . . They don't get killed, and they go into the scald tank alive.*

Federal poultry inspector, *The Washington Post*, 2013<sup>2</sup>

#### INTRODUCTION

On December 10, 2007, Atlanta Falcons quarterback Michael Vick pled guilty to one count of conspiracy to engage in dogfighting; he was sentenced to twenty-three months in federal prison and three years of supervised probation.<sup>3</sup> When Vick was arrested, he was hounded by activists, who demanded his suspension from the NFL and flooded Nike's offices with calls until the company dropped Vick as a spokesperson; this occurred before Vick had even been convicted of anything.<sup>4</sup> Perhaps the most gruesome story told by Vick's prosecutors involves the fate of dogs that Vick and his co-defendants felt were too weak to fight; those animals would be killed, including by hanging and drowning.<sup>5</sup>

Did the publicity and almost universal revulsion following

<sup>1</sup> UPTON SINCLAIR, *THE JUNGLE* 28–29 (1964).

<sup>2</sup> Kimberly Kindy, *USDA Plan to Speed Up Poultry-Processing Lines Could Increase Risk of Bird Abuse*, WASH. POST, Oct. 29, 2013, [http://www.washingtonpost.com/politics/usda-plan-to-speed-up-poultry-processing-lines-could-increase-risk-of-bird-abuse/2013/10/29/aeeffe1e-3b2e-11e3-b6a9-da62c264f40e\\_story.html](http://www.washingtonpost.com/politics/usda-plan-to-speed-up-poultry-processing-lines-could-increase-risk-of-bird-abuse/2013/10/29/aeeffe1e-3b2e-11e3-b6a9-da62c264f40e_story.html) (quoting Dr. Stan Painter, USDA Slaughterhouse Inspector).

<sup>3</sup> *United States of America v. Vick*, Plea Agreement, No. 3:07CR00274-004, 2007 WL 4305442, at \*1 (E.D. Va. Dec. 10, 2007).

<sup>4</sup> *Nike Ices Vick's Pact; Reebok Halts Sale of No. 7 Jersey*, ESPN.COM (July 28, 2007, 10:17 PM), <http://sports.espn.go.com/nfl/news/story?id=2951789>; *NFL Responds to Vick; Nike Needs to Do More*, PETA.ORG (July 24, 2007), <http://www.peta.org/blog/nfl-responds-vick-nike-needs/>; *Nike Suspends Michael Vick Over Dogfighting Charges*, PETA.ORG (July 2007), <http://www.peta.org/about-peta/victories/nike-suspends-michael-vick-dogfighting-charges/>.

<sup>5</sup> Indictment at 17, *United States of America v. Vick*, 2007 WL 4305442 (E.D. Va. July 17, 2007) (No. 3:07CR00274), 2007 WL 2066075.

Vick's criminal charges accurately reflect our national hostility toward animal abuse more generally? Dogfighting is justifiably illegal in all fifty states and under federal law,<sup>6</sup> but it is not the worst abuse of animals happening in the United States. For the sheer scale of suffering caused at human hands, few activities compete with the poultry industry.<sup>7</sup> Compare Vick's crime to the opening line of a front page story in the *Washington Post*: "Nearly 1 million chickens and turkeys are unintentionally boiled alive each year in U.S. slaughterhouses, often because fast-moving lines fail to kill the birds before they are dropped into scalding water, Agriculture Department records show."<sup>8</sup> In other words, one million birds are drowned every year—in boiling hot water. Dr. Stan Painter, a veterinarian who serves as chairman of the National Joint Council of Food Inspection Locals and has worked as a slaughterhouse inspector for the United States Department of Agriculture (USDA) for more than two decades,<sup>9</sup> depicted this treatment in the vivid terms quoted above, evoking an obvious comparison to Upton Sinclair's classic 1906 novel, *The Jungle*.<sup>10</sup>

Most people have not spent time with chickens or turkeys, and so it may be difficult to think about cruelty to poultry in the same way we think about cruelty to dogs or cats. However, scientists report that chickens outperform dogs in ethological tests of intellectual and behavioral complexity.<sup>11</sup> For example, researchers

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<sup>6</sup> See *United States v. Berry*, 09-CR-30101-MJR, 2010 WL 1882057, at \*1 (S.D. Ill. May 11, 2010), for a court sentencing memorandum that discusses the legal history of dogfighting.

<sup>7</sup> See *infra* Section II.

<sup>8</sup> Kindy, *supra* note 2.

<sup>9</sup> *Continuing Problems in USDA's Enforcement of the Humane Methods of Slaughter Act: Hearing Before the H. Oversight and Gov't Reform Comm.*, March 4, 2010 (testimony of Stan Painter, Chairman, National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO), available at <http://oversight.house.gov/wp-content/uploads/2012/01/20100304Painter.pdf>.

<sup>10</sup> See Kindy, *supra* note 2.

<sup>11</sup> SeeCarolynn L. Smith & Sarah L. Zielinski, *The Startling Intelligence of the Common Chicken*, SCI. AM., Feb. 2014, <http://www.scientificamerican.com/article/the-startling-intelligence-of-the-common-chicken/> ("The chicken's list of cognitive skills continues to grow with each scientific discovery. Giorgio Vallortigara of the University of Trento in Italy has shown that young chicks have the ability to distinguish numbers and use geometry. Given a half-completed triangle, for example, chicks can identify what the shape should look like with all its parts. And research published in 2011 by Joanne Edgar of the University of Bristol in England and her colleagues revealed a softer side of these sometimes Machiavellian birds, demonstrating that they are capable of

from England showed that “[c]hickens don’t just live in the present, but can anticipate the future and demonstrate self-control, *something previously attributed only to humans and other primates. . .*”<sup>12</sup> Additionally, chickens “understand that an object, when taken away and hidden, nevertheless continues to exist,” a capacity that “is *beyond the capacity of small [human] children.*”<sup>13</sup> And *Scientific American* reported in February 2014 that “chickens can take the perspective of other birds—an ability previously seen in only a handful of species . . .”<sup>14</sup> Australian ethologist Chris Evans explained to the *New York Times*, “[a]s a trick at conferences, I sometimes list these attributes, without mentioning chickens, and people think I’m talking about monkeys.”<sup>15</sup>

So how can it be that, even as our country recoils as one when it learns about a covert dogfighting operation that was run by a star sports figure, almost one million animals with similar or even superior capacities are literally boiled alive each year, every single one in a plant that is inspected by the USDA?<sup>16</sup> The problem is that although chickens and turkeys represent more than 98 percent of slaughtered land animals in the United States, the USDA has thus far not promulgated regulations that would protect poultry from inhumane slaughter.

This paper argues that the USDA must use its statutory authority to protect poultry from inhumane slaughter under both the Human Methods of Slaughter Act of 1958 (HMSA) and the Federal Meat Inspection Act of 1907 (FMIA). Part II discusses the treatment of poultry in slaughterhouses and the need for reform. Part III describes the current state of humane slaughter laws and

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feeling empathy . . . chickens can take the perspective of other birds—an ability previously seen in only a handful of species. . .”). See generally *Meet the Animals: Chickens*, FARM SANCTUARY, <http://www.farmsanctuary.org/learn/someone-not-something/chickens/> (last visited Apr. 6, 2015).

<sup>12</sup> Jennifer Viegas, *Chickens Worry About the Future*, ABC SCIENCE, July 15, 2005, <http://www.abc.net.au/science/articles/2005/07/15/1415178.htm> (emphasis added).

<sup>13</sup> William Grimes, *If Chickens Are So Smart, Why Aren’t They Eating Us?*, NY TIMES, Jan. 12, 2003, <http://www.nytimes.com/2003/01/12/weekinreview/if-chickens-are-so-smart-why-aren-t-they-eating-us.html> (emphasis added).

<sup>14</sup> Smith & Zielinski, *supra* note 11.

<sup>15</sup> Grimes, *supra* note 13.

<sup>16</sup> See also CASS R. SUNSTEIN, *Introduction to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 3 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004) (“[T]hrough their daily behavior, people who love those pets, and greatly care about their welfare, help ensure short and painful lives for millions, even billions of animals that cannot easily be distinguished from dogs and cats”).

regulations in the United States. Part IV offers a detailed analysis of *Levine v. Vilsack*,<sup>17</sup> in which animal protection and workers' rights organizations tried to force the USDA to regulate poultry under the HMSA. Finally, Part V suggests a new path to federal legal protection for poultry at slaughter, building on an understanding of the legal and factual arguments adduced by both sides in *Levine*.

## I. POULTRY SLAUGHTER IN THE UNITED STATES: FACTUAL BACKGROUND

In 2013, approximately 8.9 billion birds were slaughtered in roughly 300 federally inspected slaughterhouses.<sup>18</sup> In the same year, almost 148 million cattle, pigs, and other mammals were killed in approximately 800 federally inspected plants.<sup>19</sup> Thus, an average poultry slaughter plant will kill almost 30 million animals in a year, while an average plant slaughtering mammals will kill 186,000 animals per year. Every one of the slaughtered mammals has legal protection under the FMIA,<sup>20</sup> but it is the position of the USDA that federal law does not give it authority to protect birds,<sup>21</sup> meaning that almost 98.5 percent of land animals slaughtered in U.S. slaughterhouses<sup>22</sup> do not have federal legal protection from

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<sup>17</sup> *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009), *rev'g* *Levine v. Connor*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008).

<sup>18</sup> U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., POULTRY SLAUGHTER: 2014 SUMMARY (Feb. 2015), *available at* [http://www.nass.usda.gov/Publications/Todays\\_Reports/reports/pslaan15.pdf](http://www.nass.usda.gov/Publications/Todays_Reports/reports/pslaan15.pdf). More than 99 percent of poultry slaughter occurs under federal inspection, at approximately 300 slaughter plants. *Id.* at 35.

<sup>19</sup> U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., LIVESTOCK SLAUGHTER – 2013 SUMMARY 6 (April 2014), *available at* <http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-04-21-2014.pdf> (32.5 million cattle, 762,000 calves, 112.1 million pigs, 2.32 million sheep and lambs). According to the USDA, approximately ninety-nine percent of slaughtered mammals are killed in USDA-inspected plants. *Id.*

<sup>20</sup> 21 U.S.C. §§ 603, 601(b) (2012).

<sup>21</sup> Notice of Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624 (Sept. 28, 2005) (“[T]here is no specific federal humane handling and slaughter statute for poultry. . . . The [Humane Slaughter Act] requires that humane methods be used for handling and slaughtering livestock but does not include comparable provisions concerning the handling and slaughter of poultry”). *See also* U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS 17(2009). (“NOTE: There is no regulatory requirement for stunning during poultry slaughter”).

<sup>22</sup> Approximately 9.048 billion animals are slaughtered each year, 8.9 billion

slaughterhouse cruelty.

There is no scientific reason to exclude birds from protection. Poultry feel pain in the same way and to the same degree as mammals.<sup>23</sup> They are also cognitively, behaviorally, and emotionally at least as complex.<sup>24</sup> Reprising a scientific meta-review of chicken ethology, *New York Times* columnist Nicholas Kristof explains:

[Chickens] can do basic arithmetic, so that if you shuffle five items in a shell game, they mentally keep track of additions and subtractions and choose the area with the higher number of items. In a number of such tests, chicks do better than toddlers. A lengthy study this year from the University of Bristol in Britain, ‘The Intelligent Hen,’ lays out the evidence for the chicken as an intellectual. The study also notes that hens are willing to delay gratification if the reward is right. . . . Their brains are good at multitasking, for the right eye looks out for food, while the left watches for predators and potential mates. Poultry watch television, and, in one experiment, learned from watching birds on TV how to find food in particular bowls.<sup>25</sup>

But the meat industry in the United States treats birds as though they were automatons.

Recent reports from the American Society for the Prevention of Cruelty to Animals,<sup>26</sup> the Humane Society of the United States

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of which are poultry. See U.S. Dep’t of Agric., *supra* note 18.

<sup>23</sup> See generally, LESLEY J. ROGERS, *THE DEVELOPMENT OF BRAIN AND BEHAVIOUR IN THE CHICKEN* (1995).

<sup>24</sup> *Id.*

<sup>25</sup> Nicholas Kristof, *Are Chickens Brighter Than Babies*, NY TIMES, Oct. 20, 2013, <http://www.nytimes.com/2013/10/20/opinion/sunday/are-chicks-brighter-than-babies.html>; see also Bruce Friedrich, *Chickens: Smarter Than a Four-Year-Old*, NY DAILY NEWS, Aug. 16, 2013, <http://www.nydailynews.com/opinion/chickens-smarter-four-year-old-article-1.1428277> (“[R]esearch from the University of Bristol has proven scientifically . . . that chickens may well be the smartest animals in the barnyard. In some scientific tests, they outperform human toddlers. That’s right: In multiple tests of cognitive and behavioral sophistication, chickens outperform not just dogs and cats but four-year-old human children”); Smith & Zielinski, *supra* note 11.

<sup>26</sup> AM. SOC’Y FOR THE PREVENTION OF CRUELTY OF ANIMALS, *A GROWING PROBLEM, SELECTIVE BREEDING IN THE CHICKEN INDUSTRY: THE CASE FOR SLOWER GROWTH*, (2014), available at [http://www.aspc.org/sites/default/files/upload/files/chix\\_white\\_paper\\_lores.pdf](http://www.aspc.org/sites/default/files/upload/files/chix_white_paper_lores.pdf) (“Hidden behind the closed doors of factory farms, most of the nearly nine billion chickens raised in the U.S. each year are selectively bred to grow so large, so fast that many struggle to move or even stand up. With disproportionately large “white meat” breasts, and bones and organs that often can’t support their huge and distorted bodies, many of these birds spend much of their lives lying down in their own

(“HSUS”),<sup>27</sup> and the *Journal of Applied Animal Welfare Science*<sup>28</sup> document the squalid conditions on poultry factory farms.

Likewise, the animal protection organizations Farm Sanctuary and the Animal Welfare Institute detail myriad problems with modern poultry slaughter in a Petition for Rulemaking<sup>29</sup> filed with the USDA in December 2013:

During the receiving process, the birds arrive at the slaughter establishment and sit in transportation crates. In the crates, birds are sometimes subjected to extreme temperatures, causing them to suffer and sometimes die from heat exhaustion or freezing temperatures. After sitting in the crates, workers remove birds by various methods, such as tipping over crates, dumping out birds, or using metal poles. These methods can cause serious bruising and lacerations, as birds fall out of the crates, are piled on top of each other, and struggle violently. . . While the birds are still alive and conscious, workers grab and slam their legs into metal shackles and hang them upside down. Because shackles do not always match the size of the birds’ legs, workers are sometimes forced to break their legs to fit the shackles. Additionally, birds often struggle violently in shackles, resulting in bruising, lacerations, and dislocations. . . When the birds’ necks are not slit or are inadequately slit, they remain alive when they enter the hot water scalding bath and, consequently, die by drowning in scalding hot water.<sup>30</sup>

And it is not solely the standard practices that are abusive of

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waste, with open sores and wounds that act as gateways to infection”); *see also* Michael Specter, *The Extremist*, NEW YORKER, Apr. 4, 2003, *available at* <http://www.michaelspecter.com/2003/04/the-extremist/> (“I was almost knocked to the ground by the overpowering smell of feces and ammonia. My eyes burned and so did my lungs, and I could neither see nor breathe. . . There must have been 30,000 chickens sitting silently on the floor in front of me. They didn’t move, didn’t cluck. They were almost like statues of chickens, living in nearly total darkness, and they would spend every minute of their six-week lives that way”).

<sup>27</sup> THE HUMANE SOC. OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE CHICKEN INDUSTRY, *available at* [http://www.humanesociety.org/assets/pdfs/farm/welfare\\_broiler.pdf](http://www.humanesociety.org/assets/pdfs/farm/welfare_broiler.pdf).

<sup>28</sup> Sara J. Shields & A. B. M. Raj, *A Critical Review of Electrical Water-Bath Stun Systems for Poultry Slaughter and Recent Developments in Alternative Technologies*, 13 J. OF APPLIED ANIMAL WELFARE SCI., 281–99 (2010).

<sup>29</sup> The author of this paper was a co-author of the petition. Animal Welfare Institute & Farm Sanctuary, Petition of United States Department of Agriculture Food Safety & Inspection Service for Rulemaking (2013), *available at* <http://www.fsis.usda.gov/wps/wcm/connect/e138fe1a-d380-42b2-88b7-f24a11ed7d7f/Petition-AWI-PPIA-121713.pdf?MOD=AJPERES> (internal citations omitted).

<sup>30</sup> *Id.* at 9–15.



animals. In fact, poultry slaughter investigations by animal protection groups have documented consistent and apparently sadistic abuse of animals in our nation's slaughterhouses.<sup>31</sup> At a KFC "supplier of the year" plant operated by the second-largest poultry company in the United States,

workers were caught on video stomping on chickens, kicking them, and violently slamming them against floors and walls. Workers also ripped the animals' beaks off, twisted their heads off, spat tobacco into their eyes and mouths, spray-painted their faces, and squeezed their bodies so hard that the birds expelled feces—all while the chickens were still alive. Dan Rather [explained] on the CBS Evening News, "[T]here's no mistaking what [the video] depicts: cruelty to animals, chickens horribly mistreated before they're slaughtered for a fast-food chain."<sup>32</sup>

In the words of Alec Baldwin, who appeared in a popular online video titled "Meet Your Meat," "chickens are probably the most abused animals on the face of the planet."<sup>33</sup>

Everything detailed by Farm Sanctuary and the Animal Welfare Institute, as well as the gratuitous abuse documented in undercover investigations and the nonstop cruelty testified to by the USDA inspector, would be illegal if birds were protected by either the HMSA or the FMIA, both of which prohibit cruel handling and require that animals be rendered insensible to pain before they are shackled.<sup>34</sup> Yet the abuse goes unchecked because

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<sup>31</sup> *Undercover Investigations*, PETA, <http://www.kentuckyfriedcruelty.com/u-undercover.asp> (last visited Apr. 6, 2015); *Undercover Investigations*, COMPASSION OVER KILLING, <http://www.cok.net/inv/#> (last visited Apr. 16, 2015); *Undercover Investigations*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Apr. 6, 2015) ("MFA's investigator secretly filmed workers throwing, punching, kicking and ripping the heads off of live birds. The investigation also revealed conscious and thrashing turkeys having their throats slit - spotlighting the disturbing reality that birds are exempt from the federal Humane Slaughter Act"). For a chronology of undercover investigations through the end of 2010, see Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011).

<sup>32</sup> *Thousands of Chickens Tortured by KFC Supplier*, PETA, <http://www.kentuckyfriedcruelty.com/u-pilgrimspride.asp> (last visited Apr. 6, 2015) (brackets in original).

<sup>33</sup> See *Meet Your Meat*, [http://www.youtube.com/watch?v=ykTH\\_b-cXyE](http://www.youtube.com/watch?v=ykTH_b-cXyE), at 33 sec. (last visited Apr. 6, 2015) (narrated by Alec Baldwin). The author of this paper produced the video.

<sup>34</sup> Although beyond the scope of this paper, there is at least one method of poultry slaughter that would be compliant with HMSA 1958; known as Controlled Atmosphere Killing, it is advocated in the Shields & Raj paper, *supra* note 28, and discussed by the Levine plaintiffs, in the opening brief of their

the USDA has thus far refused to grant birds statutory protection against inhumane slaughter under either the HMSA or the FMIA. The rest of this Article is dedicated to rebutting the USDA's interpretation of the HMSA's scope as not applying to poultry, and arguing that the USDA has ignored its statutory authority and mandate to regulate poultry under the FMIA following 2005 amendments to the statute.

## II. HUMANE SLAUGHTER IN THE UNITED STATES: LEGAL AND REGULATORY BACKGROUND

This Section offers a historical overview of the statutory and regulatory landscape of humane slaughter in the United States. This background will create a backdrop for Sections IV and V, which review the efforts by HSUS to secure legal protection for poultry and argue that the USDA can and must promulgate humane slaughter regulations for poultry under both the HMSA and the FMIA, as amended in 2005.

### A. *The Humane Methods of Slaughter Act of 1958*

In 1958, after three years of fighting and much debate,<sup>35</sup> Congress passed the first federal law designed to protect farm animals from abuse, the HMSA.<sup>36</sup> In passing the law, Congress declared that

the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits . . . . It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.<sup>37</sup>

The HMSA has three key provisions. First, it dictates that “[n]o method of slaughtering or handling in connection with

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appeal to the Ninth Circuit. Brief for Apellant, *Levine v. Schafer*, 587 F.3d 986 (2009) (No. 08-16441), 2008 WL 4678835; see also *The Case for Controlled-Atmosphere Killing*, PETA, [www.peta.org/cak](http://www.peta.org/cak) (last visited Apr. 6, 2015).

<sup>35</sup> For an excellent and detailed treatment of the debate in Congress from 1956–1958, see Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 184–86 (2007).

<sup>36</sup> Pub. L. No. 87-765, 72 Stat. 862 (1958).

<sup>37</sup> *Id.*; see also 7 U.S.C. § 1901 (2012) (findings and declaration of policy).

slaughtering shall be deemed to comply with the public policy of the United States unless it is humane.”<sup>38</sup> Thus, “[i]n the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals [must be] rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut . . . .”<sup>39</sup> Second, it directs the USDA to designate humane methods of slaughter “with respect to each species of livestock.”<sup>40</sup> Third, in a provision that was repealed in 1978 and replaced with a more broadly applicable enforcement mechanism,<sup>41</sup> it required that any plant supplying meat to the federal government comply with the law.<sup>42</sup>

Following passage of the HMSA, the USDA promulgated regulations to designate acceptable methods of slaughter under the Act.<sup>43</sup> The regulations discussed gas, captive bolt, gunshot, and electrical stunning methods, and they also prescribed pre-stun handling methods for animals.<sup>44</sup> Notably, there was no discussion at all of enforcement in the regulations. Additionally, no comments were solicited or incorporated. Because the regulations were promulgated with the use of a committee and on a tight congressionally imposed deadline, the agency felt that accepting comments was “impracticable, unnecessary, and contrary to the public interest.”<sup>45</sup>

#### B. *The Federal Meat Inspection Act of 1907*

In 1978, Congress inserted humane slaughter directly into the FMIA<sup>46</sup> by passing the Humane Methods of Slaughter Act of 1978.<sup>47</sup> Notably, the 1978 law did not repeal or replace the HMSA of twenty years earlier; they are two distinct laws, and both the HMSA of 1958 and the HMSA of 1978, as integrated into the

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<sup>38</sup> 7 U.S.C. § 1901 (findings and declaration of policy).

<sup>39</sup> 7 U.S.C. § 1902(a) (2012); *see also* § 1902(b) (discussing kosher slaughter).

<sup>40</sup> 7 U.S.C. § 1904 (2012).

<sup>41</sup> *See infra* Section III B.

<sup>42</sup> 7 U.S.C. § 1903 (2012).

<sup>43</sup> Humane Slaughter of Livestock, 24 Fed. Reg. 1549, 1551–53 (Mar. 3, 1959).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1553.

<sup>46</sup> 21 U.S.C. §§ 603(b), 610(b) (2012).

<sup>47</sup> Pub. L. 95-445, § 5, 92 Stat. 1069 (1978) (codified as amended at 7 U.S.C. §§ 1902–1905).

FMIA, are still operative. The sole legislative purpose of the 1978 Act is “to require that meat inspected and approved under [the FMIA] be produced only from livestock slaughtered in accordance with humane methods.”<sup>48</sup>

However, the 1978 Act removed the reference to “other livestock” (which remains a functional part of the HMSA of 1958) in its inclusion of humane slaughter in the FMIA and instead included a specific list of protected animals:

For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which cattle, sheep, swine, goats, horses, mules, and other equines are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this Act.<sup>49</sup>

Beyond removal of “other livestock” from coverage, the 1978 Act’s only effect on the HMSA of 1958 was rescinding the prohibition on the federal government from purchasing meat slaughtered in violation of the Act and replacing the provision with a markedly stronger means of enforcement.<sup>50</sup> First, the USDA can suspend inspection at a plant that is slaughtering animals inhumanely, which effectively shuts the plant down, since inspections are required for operation.<sup>51</sup> Second, through inclusion of humane slaughter in the FMIA, criminal enforcement became available under Section 676 of the FMIA, which allows for either imprisonment of up to one year or a fine of up to \$1,000.<sup>52</sup> Criminal sanctions are heightened if the violation involves “intent to defraud” or adulterated products,<sup>53</sup> allowing for imprisonment of up to three years, a fine of up to \$10,000, or both.<sup>54</sup>

The USDA promulgated regulations pursuant to the agency’s authority under the HMSA of 1978, with the final rule published several months after the proposed rule and a year after the law’s

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Compare* Human Methods of Slaughter Act, 7 U.S.C. § 1903 (repealed 1978), *with* Federal Meat Inspection Act, 21 U.S.C. § 676 (2011).

<sup>51</sup> 9 C.F.R. §§ 335.30, 500.3 (2012); Humane Slaughter Regulations, 44 Fed. Reg. 68,809, 68,811 (Nov. 30, 1979) (to be codified at 9 C.F.R. 301, 304–05, 313, 327, 335, 390–91).

<sup>52</sup> 21 U.S.C. § 676 (2012).

<sup>53</sup> Adulteration has to do with meat quality; there are a dozen different statutory ways in which meat can be adulterated. *See* 21 U.S.C. § 601(m) (2010).

<sup>54</sup> 21 U.S.C. § 676.

passage.<sup>55</sup> The final rule, which incorporated the comments of sixteen individuals and organizations, established humane protections under the law at both the handling and slaughter stages, and it provided a proper enforcement regime for the first time.<sup>56</sup>

C. *USDA Notice: “Treatment of Live Poultry before Slaughter”*

In September 2005, the USDA issued its first and only notice in the Federal Register related to the treatment of poultry at slaughter. In the Notice, titled “Treatment of Live Poultry before Slaughter,”<sup>57</sup> the Agency explained its position on humane poultry slaughter, stating that “there is no specific federal humane handling and slaughter statute for poultry. . . . The [Humane Slaughter Act] of 1978 (7 U.S.C. §§1901 et seq.) requires that humane methods be used for handling and slaughtering livestock but does not include comparable provisions concerning the handling and slaughter of poultry.”<sup>58</sup> Thus, the agency held in the Notice that the vast majority of animals slaughtered in USDA-inspected slaughterhouses have no statutory protection from cruelty.

Despite the agency’s claim that it had no authority to require humane poultry slaughter, the Agency nevertheless noted that “under the [Poultry Products Inspection Act], poultry products are more likely to be adulterated if, among other circumstances, they are produced from birds that have not been treated humanely, because such birds are more likely to be bruised or to die other than by slaughter.”<sup>59</sup> But despite the agency’s statement that cruelty increases the risk of adulteration, it has not promulgated a single regulation focused on decreasing adulteration by decreasing abusive treatment of poultry.<sup>60</sup> In fact, the agency vigorously

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<sup>55</sup> See Federal Meat Inspection Regulations and Humane Slaughter Regulations, 44 Fed. Reg. 37,954 (proposed Jun. 29, 1979) (to be codified at 9 C.F.R. 301, 304–05, 327, 335, 390–91); Humane Slaughter Regulations, 44 Fed. Reg. at 68,809.

<sup>56</sup> See 44 Fed. Reg. at 68,809–10.

<sup>57</sup> Notice of Treatment of Live Poultry Before Slaughter, *supra* note 21.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> As noted previously, animal protection organizations Farm Sanctuary and the Animal Welfare Institute filed a rulemaking petition with the USDA on December 17, 2013, calling on the Agency to promulgate humane poultry slaughter regulations based on the theory that inhumane treatment leads to adulteration, and the agency is charged under the Poultry Products Inspection Act with promulgating regulations aimed at decreasing adulteration. See *supra* note 26.

defended its refusal to promulgate humane poultry slaughter regulations in a lawsuit that was filed by humane and worker protection organizations.<sup>61</sup>

D. *The 2005 Amendment to the Federal Meat Inspection Act*

In November 2005, Congress included an amendment to the humane slaughter portion of the FMIA<sup>62</sup> in the agricultural appropriations bill.<sup>63</sup> The amendment replaces each iteration of “cattle, sheep, swine, goats, horses, mules, and other equines” with the phrase “amenable species.”<sup>64</sup> Additionally, the definitions section of FMIA was changed so that “amenable species” means both those animals already covered under the FMIA (i.e., cattle, sheep, swine, goats, horses, mules, and other equines)<sup>65</sup> and “any

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61 See generally *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008); *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009), *rev'g* *Levine v. Conner*, 540 F. Supp. 2d 1113. See *infra* Sections III.A & III.B.

62 21 U.S.C. § 603(b) (2012).

63 Pub. L. 109-97, 119 Stat. 2120 (2005).

64 There appears to have been a scrivener's error in the drafting of the amendment: Congress only removed the listed species where the list included the phrase “and other equines,” even though it intended to remove all references to the listed species. In some places, including the second sentence of 21 U.S.C. § 603(b), the statute actually stated “or other equines,” and the 2005 amendment did not replace this reference to the listed species with “amenable species.” Since the second sentence provides the primary enforcement mechanism (the USDA suspension of inspection) for the first list, clearly Congress intended that both lists be changed. Absent the second change, the only penalties for violation of the HMSA for any new species are criminal under § 676, which would be an absurd result. See 21 U.S.C. § 676 (2012). Two settled principles of statutory interpretation are that congressional intent is one of the most important considerations when undertaking judicial review of agency action, and that courts should correct for absurd results. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (“[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.”). Notably, the Ninth Circuit assumed the proper interpretation in *Levine*: “In 2005, Congress deleted the specific list of animals from the FMIA and replaced it with the term ‘amenable species.’” *Levine*, 587 F.3d at 990. The government also assumed the change applied to all lists of species, as noted in, e.g., Combined Reply Brief in Support of Motion to Dismiss at 18, *Levine v. Connor*, No. 3:05-cv-04764-MHP (N.D. Cal. May 26, 2006) [hereinafter Gov't CRB].

65 Gov't CRB, *supra* note 64, at 18; see also 21 U.S.C. § 601(w)(1) (2012) (“[T]hose species subject to the provisions of this Act on the day before the date of the enactment of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006.”).

additional species of livestock that the Secretary considers appropriate.”<sup>66</sup> Thus, the USDA has the explicit authority to regulate any additional species of livestock under the FMIA, thereby granting that species legal protection from inhumane slaughter. To date, the USDA has not added a single species under this authority.

### III. THE USDA CAN AND MUST PROMULGATE HUMANE POULTRY SLAUGHTER REGULATIONS

This Section argues that a rulemaking petition would enable and require the USDA to promulgate humane poultry slaughter regulations using its current statutory authority under the HMSA and FMIA. First, this Section discusses *Levine v. Johanns*, in which the Humane Society of the United States (HSUS) was unsuccessful in its efforts to secure protection for poultry under the HMSA.<sup>67</sup> Second, this Section argues that the USDA can and must promulgate humane poultry regulations under the HMSA.<sup>68</sup> Third, this Section argues that the USDA can and must promulgate humane poultry regulations under the FMIA.

#### A. *HSUS’s Lawsuit Seeks Protection for Poultry under the HMSA.*

In 2006, HSUS sued the USDA over its 2005 Federal Register Notice,<sup>69</sup> arguing that the agency, by

informing slaughterhouses and the public that [HMSA’s] protections . . . do not extend to chickens, turkeys, and other poultry species . . . has violated the HMSA of 1958, abused its discretion, and acted arbitrarily and capriciously and not in accordance with law, in violation of the [Administrative Procedure Act].<sup>70</sup>

HSUS asked that the court: 1) declare that the USDA’s decision to exclude poultry from the HMSA was arbitrary and capricious in violation of the APA; 2) declare unlawful and set aside the USDA’s finding that the HMSA does not cover poultry; and 3)

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<sup>66</sup> 21 U.S.C. § 601(w)(3).

<sup>67</sup> 540 F. Supp. 2d 1113 (N.D. Cal. 2008), *rev’d sub nom.* *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009).

<sup>68</sup> *Levine*, 587 F.3d.

<sup>69</sup> *See infra* Section III.C.

<sup>70</sup> Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief at 26, *Levine v. Johanns*, No. 05-4764 MHP (N.D. Cal. Mar. 9, 2006).

enjoin the USDA from excluding poultry from the HMSA.<sup>71</sup>

The government moved to dismiss, claiming that “[t]he plaintiffs’ challenge misunderstands USDA’s position, as expressed in the September 2005 Notice,” and thereby undermining the plaintiffs’ redressability claim.<sup>72</sup> According to the agency, the Notice made no statement at all about whether the protections of the HMSA of 1958 extend to poultry. Instead, the USDA claimed that its only position regarding poultry slaughter was that it did not have the authority to enforce the original HMSA after the 1978 Act repealed the enforcement provisions in Section 3.<sup>73</sup> The agency argued that the original HMSA is “no longer relevant” to the agency’s authority to inspect slaughterhouses or enforce humane methods.<sup>74</sup> The government repeated this basic argument eight times in its opening brief,<sup>75</sup> relegating the question of whether poultry should be included among “other livestock” (i.e., the crux of HSUS’s argument) to one sentence in its final paragraph, plus a footnote.<sup>76</sup>

After the court ruled against the government’s motion to

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<sup>71</sup> *Id.*

<sup>72</sup> Combined Brief in Support of Motion to Dismiss at 3, *Levine v. Johanns*, No. 05-4764 MHP (N.D.Cal. Apr. 6, 2006) [hereinafter Gov’t CBS].

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *Id.* at 2; *see also* Gov’t CRB, *supra* note 64, at 22–23. (“[T]he USDA’s only current position with respect to the Act is that, regardless of what species of animals are covered by the Act, the Act gives the agency no authority to enforce, inspect for, or regulate compliance with humane slaughter requirements. . . . [T]he 2005 Notice nowhere purports to interpret [other livestock] . . . . Instead, the Notice expresses the policy that the 1958 HMSA does not provide the agency with authority to require processors of poultry to slaughter humanely, as the 1978 HMSA provided such authority only under the FMIA.”) (emphasis added).

<sup>75</sup> *See, e.g.*, Gov’t CBS, *supra* note 72, at 30 (“[S]ince 1978, the agency’s position with respect to the 1958 HMSA has been only that the Act contains no enforcement or inspection mechanism for any food product and is therefore irrelevant to the question of humane slaughter inspection or enforcement authority.”) (emphasis added); *see also id.* at 8–10.

<sup>76</sup> Gov’t CBS, *supra* note 72, at 32 n.15. The footnote does not directly answer HSUS’s argument, instead simply discussing the legislative history of HMSA 1958 in order to suggest that “it would not be unreasonable for the agency to have adopted a position that the HMSA does not cover poultry.” *Id.* at n.15. But it also claims that USDA did not adopt that position. In the Defendant’s Combined Reply Brief in Support of Motion to Dismiss, it does not give the argument even a word in the body of the brief, though it concludes with a footnote that briefly replies to the plaintiffs’ “plain meaning” argument, suggesting that “other livestock” might or might not include poultry. *See generally* Gov’t CRB, *supra* note 64.



dismiss,<sup>77</sup> the USDA was forced to engage with the question of poultry as “other livestock,” and defend the Agency’s discretion in determining that the HMSA did not extend to poultry. The government argued that both the statutory text and the legislative history were ambiguous as to the meaning of “other livestock,” and that the Agency should be granted deference under a *Chevron* analysis.<sup>78</sup> The government cited other examples of USDA and congressional use of the term “livestock” circa 1958 that dealt with mammals and poultry separately, and it reprised a contentious legislative history that could easily have been construed to exclude poultry.<sup>79</sup> Thus, the government concluded, *Chevron* step-two deference was warranted: “The USDA’s interpretation need not be the most natural or the best one; it need simply be permitted by the language of the statute.”<sup>80</sup>

HSUS, on the other hand, argued that the plain language of the Act should be construed to include poultry, based on contemporaneous dictionary definitions of “livestock” as “domestic animals used or raised on a farm.”<sup>81</sup> Thus, according to HSUS, the government “has violated the HMSA of 1958, abused its discretion, and acted arbitrarily and capriciously and not in

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<sup>77</sup> Memorandum & Order Re: Motion to Dismiss, *Levine v. Johanns*, No. C 05-05346 MHP (N.D.Cal. Sept. 5, 2006).

<sup>78</sup> Brief in Support of the Defendant’s Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment at 24, *Levine v. Johanns*, 540 F. Supp. 2d 1113 (2008) (No. 3:05-cv-04764-MHP) [hereinafter *Govt. SJM*] (“As previously explained, the agency’s interpretation of the statutory language need not be the only possible one, or even the best one; it simply must be permissible in light of the language of the statute.”). The Court’s seminal opinion in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), established the legal test for determining whether to grant deference to an executive agency’s interpretation of a statute that it administers. The two-step *Chevron* analysis asks first whether the statute is ambiguous on its face; if so, “that is the end of the matter . . . for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43. If, however, the statute is deemed silent or ambiguous, the court may review whether the agency’s interpretation is based on a “permissible construction” of the statute. *Id.*

<sup>79</sup> Brief in Support of Motion for Summary Judgment, *supra* note 78, at 17–21.

<sup>80</sup> *Id.* at 1.

<sup>81</sup> Plaintiffs’ Second Amended Complaint for Declaratory and Injunctive Relief at 3, *Levine v. Johanns*, 540 F. Supp. 2d 1113 (2008) (No. 3:05-cv-04764-MHP). Plaintiffs also argued that the government’s exclusion of poultry from the HMSA of 1958 was arbitrary and capricious in violation of the Administrative Procedure Act. *Id.*

accordance with law, in violation of the APA.”<sup>82</sup> The district court agreed with the USDA that the term “livestock” was ambiguous on its face, but determined that legislative history unambiguously proved Congress’ intent to exclude poultry from the scope of the HMSA.<sup>83</sup> In reviewing the legislative history, the court made much of the fact that, of the eight humane slaughter bills considered by the House, the only one that did not explicitly mention poultry was the one that became the HMSA.<sup>84</sup> The court took this to mean that Congress had distinguished between “livestock” and “poultry,” and “ultimately decided on a bill that included livestock only.”<sup>85</sup> The district court, therefore, not only upheld the USDA’s interpretation of its authority under the HMSA, but actually foreclosed the possibility that the USDA could ever reconsider its HMSA interpretation and exercise its discretion to regulate poultry.

In vacating the district court’s holding on standing grounds, however, the Ninth Circuit explicitly disclaimed the district court’s analysis of the legislative history. The opinion underscored the fact that “Congressional debate revealed views favoring both interpretations advanced here—one that would include chickens, turkeys and other domestic fowl within its expanse and one that would preclude such inclusiveness.”<sup>86</sup> Thus, the Ninth Circuit seemed to indicate that the USDA could include poultry under the law if it so chose.<sup>87</sup>

This statement by the Ninth Circuit is backed by the record, which points convincingly toward ambiguity. First, congressional history indicates a wide understanding among members of Congress that at the very least, poultry could be included. For example, during floor debate on the adopted bill, Rep. Clare Hoffman “read into the record . . . Webster’s dictionary definition [of livestock] and then declared, ‘now, chickens and turkeys are livestock.’”<sup>88</sup> Second and more critically, Senator Hubert

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<sup>82</sup> *Id.* at 28.

<sup>83</sup> *See infra* Sections IV.A & B.

<sup>84</sup> *See* *Levine v. Conner*, 540 F. Supp. 2d 1113, 1119 (N.D. Cal. 2008).

<sup>85</sup> *Id.*

<sup>86</sup> *Levine v. Vilsack*, 587 F.3d 986, 989 (9th Cir. 2009).

<sup>87</sup> *See* *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

<sup>88</sup> 104 Cong. Rec. H1659 (daily ed. Feb. 4, 1958) *cited in* *Levine*, 540 F. Supp. 2d at 1118.

Humphrey—who sat on the Senate Agriculture Committee, introduced the bill originally, and fought for it for three years—explained on the record that the bill can include poultry “under section 4, if the Secretary of Agriculture so designates.”<sup>89</sup> Finally, if Congress wanted to ensure that birds were excluded, it would have said so, since some members thought they were included and others thought they could be included at the USDA’s discretion.<sup>90</sup> Thus, exclusion of poultry is not “the only possible interpretation”<sup>91</sup> of the statute, as is required for a court to rule at *Chevron* stage one, and the district court was incorrect to hold otherwise.<sup>92</sup>

Although the Ninth Circuit’s opinion cast doubt on the district court’s merits holding, it agreed with the government’s original argument that the plaintiffs lacked standing.<sup>93</sup> According to the court, the lack of any enforcement mechanism in the HMSA meant that the plaintiffs’ “alleged injuries are not redressable by way of this lawsuit.”<sup>94</sup> Because the Ninth Circuit reversed the district court on standing, it did not reach the question of whether the government’s interpretation of “other livestock” as excluding poultry would violate a *Chevron* step-two analysis of the Agency’s reasonability.<sup>95</sup>

It is noteworthy that no humane group (or anyone else) has asked the USDA to consider promulgating a regulation under the HMSA of 1958 that would include poultry, other than in the midst of this one contentious lawsuit, which took place under a notoriously anti-regulatory administration.<sup>96</sup> Since the Ninth

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<sup>89</sup> 104 Cong. Rec. S15,376 (daily ed. July 29, 1958) cited in *Levine*, 587 F.3d at 1118.

<sup>90</sup> In its opening appellate brief before the Ninth Circuit, HSUS argued that perhaps Congress saw inclusion of birds as redundant, but that would be difficult to reconcile with the clear confusion on the floor of Congress. Appellants’ Opening Brief at 30, *Levine v. Schafer*, 587 F.3d 986 (9th Cir. 2009) (No. 08-16441), 2008 WL 4678835 [hereinafter AOB].

<sup>91</sup> *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990).

<sup>92</sup> Of course, although *Chevron* deference is only supposed to be triggered at *Chevron* step two, practicality dictates the possibility that had it been the USDA, rather than plaintiffs, arguing for inclusion of poultry, the court would have been more deferential in its analysis.

<sup>93</sup> See *Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009).

<sup>94</sup> *Id.* See discussion, *infra*, Section V.

<sup>95</sup> See *Levine*, 587 F.3d at 997.

<sup>96</sup> See, e.g., Osha Gray Davidson, et al., *The Bush Legacy: An Assault on Public Protections*, OMB Watch (2009), available at <http://www.foreffectivegov.org/files/bushlegacy.pdf>.

Circuit vacated the district court's holding (albeit on alternate grounds) and questioned its analysis of Congressional intent in the HMSA's legislative history, there is nothing to stop the USDA from reversing its position if presented with a strong argument in favor of doing so.<sup>97</sup>

B. *The USDA Can and Must Use Its Discretion to Include Birds in the HMSA of 1958.*

Of course, the goal of asking the USDA to reverse its position would be to convince the agency to do so—on the merits of both the ethical and policy arguments that poultry deserve greater protection, and the legal arguments that the USDA is obligated to interpret the HMSA as extending to poultry—rather than return to another legal battle. Here, I explore the legal arguments: first, that the refusal to protect birds would be “manifestly contrary to statute” in violation of *Chevron* step two,<sup>98</sup> and second, that it would represent an arbitrary and capricious policy choice in violation of the Administrative Procedure Act (APA).<sup>99</sup>

The two analyses are similar but not identical. Courts have noted that *Chevron* step-two analysis will often approximate analysis under Section 706(2)(A) of the APA. For example, in *Judulang v. Holder*,<sup>100</sup> the Court held that the Board of Immigration Appeals acted arbitrarily and capriciously under the APA.<sup>101</sup> In response to the government's argument that the Court should have applied the test laid out in *Chevron* instead of

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<sup>97</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (“This Court has rejected the argument that an agency's interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations’ of the statute in question. In *Chevron*, we held that a revised interpretation deserves deference because . . . ‘the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.’”).

<sup>98</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (internal citation omitted); see also *Judulang v. Holder*, 132 S.Ct. 476, 484 (2011) (“[U]nder *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance’” (internal citation omitted)); *Mayo Foundation for Medical Ed. & Research v. United States*, 562 U.S. 44, 59 (2011) (finding that the Treasury Department's interpretation of who was a student under the Social Security Act “further[ed] the purpose of the [Act]” and thus not invalid under *Chevron* step two); *Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (finding in favor of the EPA because “the plantwide definition is fully consistent with one of [the policy] concerns [of the statute].”).

<sup>99</sup> 5 U.S.C. § 706 (2)(A).

<sup>100</sup> See *Judulang*, 132 S. Ct.

<sup>101</sup> See *Id.* at 483.

reviewing the government action under the APA, the Court held: “[w]ere we to [apply the *Chevron* test], our analysis would be the same, because under *Chevron* step two, we ask whether an agency’s interpretation is ‘arbitrary or capricious in substance.’”<sup>102</sup> Moreover, courts do not always agree on when to analyze agency action under *Chevron* or the APA. For example, in the D.C. Circuit decision *Arent v. Shalala*,<sup>103</sup> two judges analyzed a challenge to the FDA’s interpretation of its statutory authority under the APA, and another judge analyzed the argument under *Chevron*; all three came to the same conclusion, despite their inability to agree which form of arbitrary and capricious review was apposite.<sup>104</sup>

Thus, where agency refusal to regulate is concerned, it will be important to determine both whether the decision violates the statutory mandate (*Chevron*) and whether it represents an arbitrary and capricious policy choice, thereby violating the APA—although there is likely to be some overlap in analysis. If the USDA were to refuse to include birds in the HMSA, a court would be justified in vacating the agency’s decision under either framework.

#### 1. *The USDA is Statutorily Obligated to Protect Birds under the HMSA: Chevron Analysis*

As noted, the *Chevron* analysis dictates how courts assess agency decisions with reference to the agencies’ statutory mandates. Assuming the USDA were to proceed to rulemaking and decide to exclude poultry from the HMSA, a court challenge would be strong, because the agency’s decision would be arbitrary and capricious in substance, in violation of *Chevron* step two.

At step one of *Chevron*, a court asks “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”<sup>105</sup> If, on the other hand, “the statute is silent or ambiguous with respect to the specific issue,”<sup>106</sup> courts will move to *Chevron* step two and will

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<sup>102</sup> *Id.* at 484, n. 7 (internal citation omitted).

<sup>103</sup> 70 F.3d 610 (D.C. Cir. 1995).

<sup>104</sup> “We might invalidate an agency’s decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary police choice. . . . Conversely, we might determine that although not barred by statute, an agency’s action is arbitrary and capricious because the agency has not considered certain relevant factors or articulated any rationale for its choice.” 70 F.3d at 620 (Wald, J., concurring).

<sup>105</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>106</sup> *Id.* at 843.

ask simply “whether the agency’s answer is based on a permissible construction of the statute.”<sup>107</sup> As discussed in the previous section, there is clear ambiguity on the question of whether poultry are “livestock” and thus warrant statutory protection in the HMSA. Therefore, the Agency’s actions should be evaluated by a court under step two of *Chevron*. Courts will vacate agency statutory interpretations as impermissible under *Chevron* step two if they find them to be “arbitrary or capricious in substance, or manifestly contrary to the statute.”

In determining whether an agency interpretation is arbitrary and capricious in substance or manifestly contrary to the statute, courts ask whether that interpretation is “reasonable and consistent with the language and purposes of the statute.”<sup>108</sup> For example, in *Chevron* itself, key to the Court’s decision upholding the Environmental Protection Agency’s (EPA) statutory interpretation was the fact that “history plainly identifies the policy concerns that motivated the enactment [and that EPA’s interpretation] is fully consistent with one of those concerns.”<sup>109</sup>

*Chevron* itself notes that deference to an agency is most common where the “decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . . .”<sup>110</sup> Here, there are no conflicting policies to reconcile; if a court assesses the USDA’s decision to exclude poultry in light of Congress’s purposes in passing the HMSA, it should find such a decision to be substantively arbitrary and capricious and “manifestly contrary to the statute.”<sup>111</sup>

As discussed in Section III, the HMSA charged the USDA with preventing needless suffering, improving conditions for

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<sup>107</sup> *Id.*

<sup>108</sup> *Arent*, 70 F.3d at 620.

<sup>109</sup> *Chevron*, 467 U.S. at 863; *see also* *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 59 (2011) (holding that *Chevron* step two warranted agency deference because the Treasury Department “reasonably determined that taxing residents under FICA would further the purpose of the Social Security Act”); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (finding that “[a]n agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and *not in conflict with the expressed intent of Congress*”).

<sup>110</sup> *Chevron*, 467 U.S. at 844 (internal citation omitted).

<sup>111</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *see also Mayo Found. for Med. Educ. & Research*, 562 U.S. at 52 (“In the typical case, such an ambiguity would lead us inexorably to *Chevron* step two, under which we may not disturb an agency rule unless it is ‘arbitrary or capricious in substance, or manifestly contrary to the statute.’” (internal citation omitted)).

workers, and improving product quality.<sup>112</sup> As HSUS noted with regard to workers and animals, “[t]he language does not suggest that only certain farm animals or only workers at certain slaughterhouses deserve protection.”<sup>113</sup> The statement is equally true vis-à-vis the Act’s other goals,<sup>114</sup> and so it would be difficult to imagine a statutorily-acceptable justification for continuing to exclude poultry from protection.

a. *Changed Circumstances in the Poultry Industry Since 1958*

As the *Chevron* court noted, changed circumstances will require changes in agency regulations in order to keep up with statutory goals.<sup>115</sup> The *Chevron* court explained that the “agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”<sup>116</sup> Thus, a decision that was not contrary to statute in 1958 could become contrary to statute by 2015, based on changing circumstances.<sup>117</sup>

Indeed, since 1957, poultry production has skyrocketed by almost 800 percent in the United States,<sup>118</sup> compared to an increase in red meat production of less than 70 percent.<sup>119</sup> As a percentage of the American meat supply, poultry has risen from 16 percent in 1957 to almost 50 percent today.<sup>120</sup> The changed circumstances in

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<sup>112</sup> See *supra* Section III.

<sup>113</sup> AOB, *supra* note 90, at 40.

<sup>114</sup> See *supra* Section III.A.

<sup>115</sup> *Chevron*, 467 U.S. at 863–64.

<sup>116</sup> *Id.*; see also *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>117</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“While the Congresses that drafted [the Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the . . . Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.”); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493–97 (1989).

<sup>118</sup> See USDA ECON. RESEARCH SERV., USDA, POULTRY SUPPLY AND DISAPPEARANCE, available at [www.ers.usda.gov/datafiles/Food\\_Availabilty\\_Per\\_Capita\\_Data\\_System/Food\\_Availability/mtpoulsu.xls](http://www.ers.usda.gov/datafiles/Food_Availabilty_Per_Capita_Data_System/Food_Availability/mtpoulsu.xls) (1957 to 2011 production, 5,438 to 43,038.5 million pounds).

<sup>119</sup> See USDA ECON. RESEARCH SERV., USDA, TOTAL RED MEAT SUPPLY AND DISAPPEARANCE, available at [www.ers.usda.gov/datafiles/Food\\_Availabilty\\_Per\\_Capita\\_Data\\_System/Food\\_Availability/mtredsus.xls](http://www.ers.usda.gov/datafiles/Food_Availabilty_Per_Capita_Data_System/Food_Availability/mtredsus.xls) (1957 to 2011 production, 29,257 to 49,358.3 million pounds).

<sup>120</sup> See *supra* notes 118–119.

the magnitude and industrialization of the poultry sector mean that the poultry sector merits the same attention today as any other livestock raised for meat.

As discussed in Part II, the HMSA significantly improved mammal slaughter methods after 1958, yet methods of poultry slaughter continue to promote egregious and constant abuse.<sup>121</sup> Moreover, advances in scientific understanding indicate that poultry are no different ethologically from mammals.<sup>122</sup> It is no longer tenable to deny poultry protection under the law, especially in light of these changed circumstances with regard to one of the key goals of the law.

b. *Worker Protection*

A second goal of the HMSA is worker protection,<sup>123</sup> and once again changes since 1958 point toward a need to include poultry in the Act in order to promote this statutory purpose. In a 184-page report, the nonprofit organization Human Rights Watch details its finding that meat and poultry processing today is “the most dangerous factory job in America, with injury rates more than twice the national average.”<sup>124</sup> The report specifically compares worker treatment at slaughterhouses over the decades, noting that worker safety improved from the 1930s to the 1970s, but that, beginning in the late 1970s, pay and conditions for workers began to deteriorate.<sup>125</sup> Now, according to the report, the situation is so bad that “the United States is failing to meet its obligations under international human rights standards to protect the human rights of

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<sup>121</sup> See, *supra* Section II.

<sup>122</sup> See *Id.*

<sup>123</sup> See 7 U.S.C. § 1901 (2012) (finding that “the use of humane methods in the slaughter of livestock . . . results in safer and better working conditions for persons engaged in the slaughtering industry . . .”).

<sup>124</sup> HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 14 (2005), available at <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>; see also *id.* at 30 (“Despite the hardhats, goggles, earplugs, stainless-steel mesh gloves, plastic forearm guards, chain-mail aprons and chaps, leather weightlifting belts, even baseball catcher’s shin guards and hockey masks . . . the reported injury and illness rate for meatpacking was a staggering 20 per hundred full-time workers in 2001. This is two-and-a-half times greater than the average manufacturing rate of 8.1 and almost four times more than the overall rate for private industry of 7.4.”); Donald D. Stull & Michael J. Broadway, SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA (2012).

<sup>125</sup> See HUMAN RIGHTS WATCH, *supra* note 124.



meat and poultry industry workers.”<sup>126</sup>

With regard to poultry slaughter specifically, the report notes that “[u]ntil the second half of the century, killing and cutting up chickens for human consumption was undertaken primarily by small enterprises operating locally,”<sup>127</sup> and that poultry industry consolidation resulted in massive increases in slaughter line speeds: “What were thousands are now tens of thousands per day.”<sup>128</sup> After discussing the link between line speed and injury in cattle and pig slaughter plants, the report moves to poultry:

Poultry processing is even more frenzied. Line workers make more than 20,000 repetitive hard cuts in a day’s work. . . . It’s difficult, dirty and dangerous. Tasks involve repetitive movements (workers sometimes perform the same motion 30,000 times a shift), and knife-wielding employees work perilously close together as they struggle to keep up with the production line. OSHA statistics for 2000 reveal that one out of every seven poultry workers was injured on the job, more than double the average for all private industries. Poultry workers are also 14 times more likely to suffer debilitating injuries stemming from repetitive trauma—like ‘claw hand’ (in which the injured fingers lock in a curled position) and ganglionic cysts (fluid deposits under the skin).<sup>129</sup>

Considering the massive rise in the number of poultry

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<sup>126</sup> *Id.* at 2. In a separate part of the report, the authors found: “Nearly every worker interviewed for this report bore physical signs of a serious injury suffered from working in a meat or poultry plant. Their accounts of life in the factories graphically explain those injuries. Automated lines carrying dead animals and their parts for disassembly move too fast for worker safety. Repeating thousands of cutting motions during each work shift puts enormous traumatic stress on workers’ hands, wrists, arms, shoulders and backs. They often work in close quarters creating additional dangers for themselves and coworkers. They often receive little training and are not always given the safety equipment they need. They are often forced to work long overtime hours under pain of dismissal if they refuse.” *Id.* at 24.

<sup>127</sup> *Id.* at 14.

<sup>128</sup> *Id.* at 1.

<sup>129</sup> *Id.* at 36 (quoting Nicholas Stein, *Son of a Chicken Man: As He Struggles to Remake His Family’s Poultry Business into a \$24 Billion Meat Behemoth, John Tyson Must Prove He Has More to Offer than the Family Name*, FORTUNE, May 13, 2002, [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2002/05/13/322904/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2002/05/13/322904/index.htm)) (internal quotation marks omitted); *see also* Human Rights Watch, *supra* note 124, at 39 (“The birds, weighing approximately five pounds each, fight back by pecking, biting, and scratching the hangers, who wear plastic cones around their forearms to shield off chicken attacks. Then, as workers finally hoist the birds onto the hooks, the chickens urinate and defecate out of desperation, often hitting the workers below.”).

slaughterhouses relative to all other slaughterhouses covered by the HMSA, and the fact that the statutory purpose of protecting workers is being sorely neglected, it seems unlikely that the USDA could come up with a permissible statutory analysis that would allow it to continue to exclude poultry and poultry workers from the HMSA.

*c. Product Quality & Economics*

Finally, Congress intended that the HMSA would improve slaughterhouse efficiency and produce “other benefits.”<sup>130</sup> As with animal welfare and worker safety, covering poultry in the HMSA would improve product quality, as has been repeatedly acknowledged by the USDA itself,<sup>131</sup> including in the 2005 Federal Register Notice that was the subject of HSUS’s lawsuit.<sup>132</sup>

In addition to adulteration, current poultry slaughter practices also lead to widespread bacterial contamination.<sup>133</sup> A Consumers Union study released in January 2014 found that 97 percent of chicken breasts sold at stores across the United States contained potentially harmful bacteria, including organic brands, and that “[m]ore than half of the samples contained fecal contaminants.”<sup>134</sup> In distilling the report, the authors note that, “[t]hrough 48 million people fall sick every year from eating food tainted with salmonella, campylobacter, E. coli, and other contaminants, ‘more deaths were attributed to poultry than to any other commodity,’ according to an analysis of outbreaks from 1998 through 2008 by the National Centers for Disease Control and Prevention (CDC).”<sup>135</sup>

Notably, the USDA understands the link: the Food Safety and Inspection Service Deputy Administrator Phil Derfler told the

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<sup>130</sup> See 7 U.S.C. § 1901 (findings and declaration of policy).

<sup>131</sup> See Notice of Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56,624 (Sept. 28, 2005); FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC., FSIS DIRECTIVE 6100.3 (REV.1): ANTE-MORTEM AND POST-MORTEM POULTRY INSPECTION (2009); U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS (2009).

<sup>132</sup> See, *supra* Section III.C.

<sup>133</sup> See, *The High Cost of Cheap Chicken: 97% of the Breasts We Tested Harbored Bacteria that Could Make You Sick. Learn How to Protect Yourself*, CONSUMER REPORTS, January 2014, <http://www.consumerreports.org/cro/magazine/2014/02/the-high-cost-of-cheap-chicken/index.htm>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (emphasis added).

Associated Press in March 2014 that “poorly treated birds can present a food safety concern . . . .”<sup>136</sup> Again, it is hard to imagine a statutorily acceptable justification that the USDA might proffer for continuing to exclude poultry from the HMSA, especially now that contaminated poultry is the number one cause of death by bacterial contamination of food.

d. *Conclusion*

Considering the HMSA’s tripartite goals of animal welfare, worker health and safety, and better products and economies in slaughtering, along with the massive expansion of the poultry industry and the deteriorating conditions for animals, workers, and product quality, it would be “arbitrary [and] capricious in substance, [and] manifestly contrary to the statute”<sup>137</sup> for the USDA to continue to deny protection to poultry under the Act.<sup>138</sup> Even if it may have made sense in 1957 for the USDA to exclude poultry at least preliminarily as it developed its humane inspection scheme, exclusion can no longer be reconciled with the USDA’s statutory policy goals related to worker safety and the humane treatment of animals. Or in explicitly *Chevron* terms, “the policy concerns that motivated the enactment”<sup>139</sup> cannot be reconciled with continued exclusion of poultry from the HMSA of 1958.

2. *The USDA is Obligated Based on Policy Considerations to Protect Birds under the HMSA of 1958 (APA Analysis)*

It would also be arbitrary and capricious in violation of the APA for the Agency to refuse a request that it promulgate regulations to protect birds. Under the APA, a court will “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>140</sup> In determining whether

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<sup>136</sup> Fred Frommer, *Groups Push for More Humane Slaughter of Chickens*, ASSOCIATED PRESS, March 29, 2014, [http://www.washingtonpost.com/national/groups-push-for-more-humane-slaughter-of-chickens/2014/03/29/e33b4f80-b756-11e3-9eb3-c254bdb4414d\\_story.html](http://www.washingtonpost.com/national/groups-push-for-more-humane-slaughter-of-chickens/2014/03/29/e33b4f80-b756-11e3-9eb3-c254bdb4414d_story.html).

<sup>137</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

<sup>138</sup> *See id.* (“Tom Super, a spokesman for the National Chicken Council, said there’s an economic . . . incentive to reduce the number of cadavers. He said that when birds miss the automatic knife, an employee is used as backup to keep live birds out of the scalders.”).

<sup>139</sup> *Chevron*, 467 U.S. at 863.

<sup>140</sup> 5 U.S.C. § 706 (2)(A) (2012); *see also* Motor Vehicle Mfrs. Ass’n of

action runs afoul of the APA, courts require that an agency “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>141</sup> The explanation must demonstrate a “rational connection between the facts found and the choice made.”<sup>142</sup> An agency decision will violate the APA if the agency:

“[1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>143</sup>

In the Court’s seminal case laying out the above APA analysis, *State Farm*, the Court found an agency action to be arbitrary and capricious where the agency rescinded a rule without considering alternative forms of action or providing sufficient evidence to support their conclusion; thus, the agency had “failed to consider an important aspect of the problem.”<sup>144</sup>

As a preliminary matter, it is worth noting that had the district court or Ninth Circuit in *Levine* moved past *Chevron* step one and standing, respectively, those courts would have been required to either vacate the agency’s decision to exclude poultry, or else remand the issue of whether poultry should be included in the HMSA to the agency for proper deliberations. The government admitted that it had not so much as taken a position on whether “other livestock” included poultry until the summary judgment phase of the litigation at the district court level.<sup>145</sup> Consequently, the USDA failed the *State Farm* test about as thoroughly as that test can be failed.<sup>146</sup>

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U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

<sup>141</sup> *State Farm*, 463 U.S. at 43.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 56.

<sup>145</sup> See sources cited *supra* note 74.

<sup>146</sup> As framed in the AOB, *supra* note 90 at 17–18: “Even if the HMSA of 1958’s mandate for humane ‘livestock’ slaughter were ambiguous, USDA’s interpretive rule provides absolutely no explanation for the agency’s decision to exempt nine billion farm animals from a statute intended to ‘prevent needless suffering’ of animals slaughtered in the United States. The APA requires that an agency ‘engage in considered analysis and explain its chosen interpretation’ of statutory language. . . .” (internal citation omitted).

A merits analysis of HSUS's argument under the APA has never been done; the Agency has not done it and no court has considered it. Once the USDA, or a court considers the issue, either will find a strong argument that the USDA must use its discretion to include birds among "other livestock" in the HMSA. In explicit *State Farm* terms: under factor one, the USDA will have to consider only issues intended by Congress as spelled out explicitly in the Act. The key issues discussed in the Act are worker safety, animal protection, and better products. As discussed in the previous Section, all three of these statutory goals would be seriously harmed by an agency decision to deny poultry protection;<sup>147</sup> thus, it is hard to imagine how the agency could justify continuing to exclude poultry from protection while considering only relevant factors, as required by the APA.

Similarly, the second *State Farm* factor requires invalidation of a decision if it "entirely failed to consider an important aspect of the problem."<sup>148</sup> It seems likely that the only way the Agency could come to a decision to continue to exclude birds from the HMSA would be to refuse to consider the massively increased volume of poultry slaughter since 1958 and the concomitant harm to workers, animals, and product quality. Once these factors are considered, it becomes clear that the USDA's continuing refusal to include birds within the HMSA would be arbitrary and capricious in violation of the APA.<sup>149</sup>

C. *The USDA Can and Must Use Its Discretion  
to Include Birds in the FMIA.*

In *Levine*, the Ninth Circuit agreed with the government that, because the HMSA originally included no enforcement mechanism, the only path to redress for the plaintiffs—even if the court held that poultry qualified as "other livestock" under the HMSA of 1958—would come from the USDA's "independent decision to accord chickens, turkeys and other domestic birds 'amenable species' status under the 2005 amendments to the

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<sup>147</sup> See, *supra* Section IV.B.

<sup>148</sup> *State Farm*, 463 U.S. at 43.

<sup>149</sup> See *Judulang v. Holder*, 132 S.Ct. 476 (2011) (finding that the Board of Immigration Appeals had "failed to exercise its discretion in a reasoned manner . . . Rather than considering factors that might be thought germane to the deportation decision, that policy hinges . . . eligibility on an irrelevant comparison between statutory provisions").

FMIA.”<sup>150</sup> However, because “that decision is not at issue in this lawsuit,”<sup>151</sup> HSUS could not prove redressability. Of course, the merits of including poultry in FMIA based on the 2005 amendment were not before the court and so were not discussed, although the government consistently assumed its own ability to do so.<sup>152</sup>

“Amenable species” must be interpreted to include poultry under *Chevron* at step two, and refusal to include poultry would be difficult for the USDA to justify without violating its obligations under the APA. Once again, the first order of business would be to raise the merits with the USDA and encourage it to use its power to promulgate regulations to protect poultry from inhumane slaughter. However, if it refused to do so, a legal challenge would be likely to succeed, under both *Chevron* (at step two) and the APA.

1. *The USDA is Statutorily Obligated to Protect Birds Under FMIA: Chevron Analysis.*

The USDA is statutorily obligated to include birds under the

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<sup>150</sup> *Levine v. Vilsack*, 587 F.3d 986, 995 (9th Cir. 2009).

<sup>151</sup> *Id.*

<sup>152</sup> The government agreed that it has the power to add poultry to FMIA in at least four of its filings over more than three years. *See* Gov’t CRB, *supra* note 64, at 11. (“[T]he Levine Complaint does not challenge the fact that the Secretary has not designated poultry as an ‘amenable species’ under the FMIA. If the plaintiffs wish to litigate whether poultry must be defined as an ‘amenable species,’ there must first be ‘final agency action’ with regard to that issue. The USDA has not yet acted on this issue. . . . This is a decision that would ultimately be in the Secretary’s discretion, as Congress allowed the Secretary to include within the definition of ‘amenable species’ ‘any additional species of livestock that the Secretary considers appropriate’” (internal citations omitted); Govt. SJM, *supra* note 78 (“The agency has not yet decided whether to exercise its discretion to include other animals within the definition of amenable species in the Act. Accordingly, the FMIA currently covers only the animals listed in the Act as of the date that the Complaints were filed”); Brief of the Appellee at 20, *Levine v. Schafer*, 587 F.3d 986 (9th Cir. 2009) (No. 08-16441), 2008 WL 5186944 [hereinafter BOA] (“[T]he Secretary has broad, unreviewable discretion to decide pursuant to that amendment whether to regulate additional species of livestock under the Meat Inspection Act. The amendment gives the USDA authority to regulate ‘any additional species of livestock that the Secretary considers appropriate.’ 21 U.S.C. § 601(w)(3). Neither plaintiffs nor anyone else has asked the Secretary to exercise that discretion to add poultry, and whether he would do so even if asked is entirely speculative”); Supplemental Filing of Henry Whitaker at 2, *Levine v. Schafer*, 587 F.3d 986 (9th Cir. 2009) (No. 08-16441). (“The Secretary may, in his discretion, enforce the humane slaughter laws against ‘livestock.’ *See* Appellee Br. 19. But whether he would choose to do so is speculative . . .”).

FMIA, based on a *Chevron* analysis. A *Chevron* analysis takes place in two parts. First, the court asks if Congressional intent is clear; if not, then it asks at step two if the agency's interpretation is permissible.<sup>153</sup> Thus, at *Chevron* step one, the question is whether the USDA could define poultry as an "amenable species" and promulgate humane slaughter regulations to protect them. The answer is yes; with the FMIA amendment, Congress granted the USDA authority to include "amenable species" in FMIA.<sup>154</sup> Amenable species were defined as previously protected animals (i.e., "cattle, sheep, swine, goats, horses, mules, and other equines"), plus "any additional species of livestock that the Secretary considers appropriate."<sup>155</sup> So, if poultry are "livestock," the USDA can include them in the FMIA protection.

Although none of the three congressional reports—one from the House,<sup>156</sup> one from the Senate,<sup>157</sup> and one from the Conference Committee<sup>158</sup>—shed light on whether Congress intended to include poultry, the plain language points to the USDA's power to do so, which should be determinative for statutory analysis.<sup>159</sup> In particular, the term "livestock" universally included poultry as used by Congress circa 2005; for example, the Farm Bills of 2002, 2008, and 2014 explicitly defined "livestock" seven times, and every single time the term included poultry.<sup>160</sup> Additionally,

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<sup>153</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>154</sup> See *supra* Section III.B.

<sup>155</sup> See 21 U.S.C. § 601(w)(3) (2012); *supra* Section III.B.

<sup>156</sup> H.R. Rep. No. 109-102, 2005 WL 6406119 (2005).

<sup>157</sup> S. Rep. 109-92, 2005 WL 6407430 (Leg.Hist.) (June 27, 2005).

<sup>158</sup> H.R. Conf. Rep. No. 109-255, 2005 WL 2850835 (Conf. Rep.) (2005).

<sup>159</sup> See *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters'") (internal citation and brackets omitted); see also *MCI v. AT&T*, 512 U.S. 218 (1994) (holding that an agency cannot ignore the plain meaning of a word in a statute).

<sup>160</sup> Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 133, 254, 4954 (defining "'livestock' [as] dairy cattle, beef cattle, laying hens, broilers, turkeys. . . ." and "all farm-raised animals"); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 1742, 1754, 2155-56, 2248 (defining "livestock" as "cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry. . . ."; as "all animals raised on farms, as determined by the Secretary"; and as "cattle, poultry, sheep, swine, horses . . . ."); Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, 697, 974 (defining "livestock" as "(A) cattle (including dairy cattle); (B) bison; (C) poultry; (D) sheep. . . ."); and as "cattle, sheep, swine, goats, and poultry . . . .").

Congress added catfish to the list of “amenable species” of “livestock” as a part of the 2008 Farm Bill.<sup>161</sup> If catfish can be considered an amenable species, surely poultry can be given such consideration also. And, although not based on detailed analysis, the district court, Ninth Circuit, and government in *Levine* all assumed that the USDA has the power to include poultry among amenable species.<sup>162</sup>

At *Chevron* step two, the question becomes whether the USDA can reasonably deny poultry the protection accorded to “amendable species” without its decision being “arbitrary or capricious in substance, or manifestly contrary to the statute.”<sup>163</sup> As discussed, the HMSA of 1958 and the HMSA of 1978 are two distinct laws, both still on the books.<sup>164</sup> The HMSA of 1978 amended the FMIA to include humane slaughter, so it is the statutory intent of the HMSA of 1978 against which agency action in furtherance of its statutory mandate should be measured. This is important, because the only statutory purpose ascribed by Congress to the HMSA of 1978 is to “prevent[] the inhumane slaughtering of livestock.”<sup>165</sup> Thus, humane treatment is the only statutorily relevant consideration for the USDA when it decides whether or not to protect poultry.

The FMIA states that the USDA can protect “any additional species of livestock that the Secretary considers appropriate.”<sup>166</sup> In order to deny poultry protection, the USDA would have to argue that including them is not “appropriate.” When a court reviews the USDA’s decision, it will likely apply a definition of “appropriate” that is close to “right or suited for some purpose or situation.”<sup>167</sup> Here, the *purpose* is the statutory purpose of the HMSA of 1978—to prevent inhumane slaughter—and the *situation* is inhumane slaughter.<sup>168</sup> As discussed, there are now more than sixty times as many poultry slaughtered as species protected by the USDA under

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<sup>161</sup> Food, Conservation, and Energy Act of 2008, 21 U.S.C. §§ 606, 625 (2012).

<sup>162</sup> See *supra* Section IV.C.

<sup>163</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

<sup>164</sup> See *generally, supra* Section III.

<sup>165</sup> Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 2, 92 Stat. 1069, 1069.

<sup>166</sup> 21 U.S.C. § 601(w)(3) (2012).

<sup>167</sup> *Appropriate definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/appropriate> (last visited Apr. 6, 2015).

<sup>168</sup> See *supra* Section III.B.



the HMSA, and birds are treated horribly, relative to how protected animals are treated.<sup>169</sup> It is hard to imagine a justification from the USDA for finding that poultry should not be protected that aligns with statutory purpose, and it seems likely that a court would find such a decision to be statutorily indefensible under *Chevron* step two, since there is no way to reconcile denial of protection with the “the policy concerns that motivated the enactment” of the humane slaughter provisions of FMIA.<sup>170</sup>

As additional support for this statutory analysis, it is worth considering the chronology from Section III: in September 2005, the USDA’s Poultry Slaughter Notice explained that the Agency received letters from members of Congress and nearly 13,000 e-mail messages supporting proposed the HMSA provisions for the humane treatment of poultry.<sup>171</sup> In November 2005, Congress amended the FMIA to extend humane slaughter protection to all species deemed “amenable” by the USDA. Although there is nothing in the Congressional Record that draws a direct link, it is reasonable to surmise that Congress passed the FMIA amendment at least in part as a response to the USDA’s Notice that the HMSA did not allow the USDA to protect poultry.<sup>172</sup> If so, Congress would certainly have expected that “amenable species” would be interpreted by the USDA to include poultry.

## 2. *The USDA is Obligated Based on Policy Considerations to Protect Birds Under FMIA (APA Analysis)*

The USDA would also be required to include poultry in the FMIA based on its duty under the APA to act rationally.<sup>173</sup> In order to satisfy the APA, an agency must offer a “rational connection between the facts found and the choice made.”<sup>174</sup> As with the HMSA, it is hard to imagine how the USDA would justify a refusal to promulgate humane poultry regulations under the FMIA without coming into conflict with the APA’s rationality mandate,

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<sup>169</sup> See *supra* Section II.

<sup>170</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

<sup>171</sup> Notice of Treatment of Live Poultry Before Slaughter, *supra* note 21.

<sup>172</sup> See *id.*

<sup>173</sup> See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (discussing the duty to act rationally under the APA).

<sup>174</sup> *Id.*

which requires that the agency rely only on factors intended by Congress and fully consider all important aspects of the problem.<sup>175</sup> The argument in favor of including poultry among “amenable species” is at least as strong as the argument in favor of including them as “other livestock” under the HMSA, since the congressional purpose of the FMIA’s slaughter provision is solely “preventing the inhumane slaughtering of livestock,”<sup>176</sup> the congressional meaning livestock in 2005 clearly includes poultry.<sup>177</sup> Thus, once Congress redefined protected species to include all “additional species of livestock that the Secretary considers appropriate,” there is no tenable policy justification for refusing to extend this protection to more than 98 percent of slaughtered land animals, especially considering the horrid manner in which birds are currently treated as a result of the failure to regulate slaughter methods.<sup>178</sup>

#### IV. RELITIGATING *LEVINE*

The merits of regulating poultry slaughter under the HMSA and the FMIA will be key to convincing the USDA to use its discretion to regulate on behalf of humane poultry slaughter. However, if the request is refused and reaches litigation, new plaintiffs are likely to succeed where the *Levine* plaintiffs did not. In this Section, I discuss the most likely vehicles to protection for poultry and procedural issues that may come up in litigation.

##### A. *Most Likely Vehicles: A Petition for Rulemaking or Call for Prosecution*

In asking the USDA to protect poultry from inhumane slaughter, the two vehicles with the highest probability of success will be (1) a petition for rulemaking, and (2) a request that the agency prosecute a particular slaughterhouse. A request that the agency prosecute a particular slaughterhouse may be based either on the USDA “Noncompliance Records” (NRs) and “Memorandums of Interview” (MOIs) that detail inhumane treatment,<sup>179</sup> or on an undercover investigation by an animal

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<sup>175</sup> See *id.* (describing agencies’ responsibilities under the APA).

<sup>176</sup> See *supra* Section III.B.

<sup>177</sup> See *supra* Section IV.C.

<sup>178</sup> See *supra* Section II.

<sup>179</sup> See FN 254 and accompanying text. The USDA is presently monitoring slaughterhouses for violations of the 2005 Notice. It issues Noncompliance

protection organization.<sup>180</sup> While a petition for rulemaking would be the simpler course and would have the higher likelihood of ensuring full consideration from the agency, it would also most likely take years to receive a response.<sup>181</sup> Of course, both avenues may be pursued simultaneously, which could be the best option for animal protection advocates.

In pursuing a request for prosecution of an individual poultry slaughterhouse that is slaughtering animals inhumanely, petitioners would have to contend with the well-settled rule that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”<sup>182</sup> Because agencies usually enjoy absolute discretion, their enforcement choices are presumptively

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Records, which Farm Sanctuary receives periodically via requests under the Freedom of Information Act (FOIA). See *infra* Section V for a breakdown of eighteen months of agency action.

<sup>180</sup> See FN 31-34 and accompanying text, *supra*.

<sup>181</sup> For example, the most recent humane petitions to the agency came from the Humane Society of the United States (HSUS) and Farm Sanctuary. See HUMAN SOCIETY OF THE UNITED STATES, PETITION OF THE USDA (2009), available at [http://www.fsis.usda.gov/wps/wcm/connect/9ddd8b7c-983f-4cb1-83e8-9e545e9345d0/Petition\\_HSUS\\_Humane\\_Handling.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/9ddd8b7c-983f-4cb1-83e8-9e545e9345d0/Petition_HSUS_Humane_Handling.pdf?MOD=AJPERES). HSUS’s petition asked for a ban on the slaughter of calves that arrive at slaughter too sick or injured to walk off the transport truck, called “downers.” *Id.* at 1–2. The petition was filed with the USDA on November 2, 2009. *Petitions*, USDA, <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/petitions> (last visited Apr. 6, 2015). A Federal Register Notice was issued on February 7, 2011. Non-Ambulatory Disabled Veal Calves and Other Non-Ambulatory Disabled Livestock at Slaughter; Petitions for Rulemaking, 76 Fed. Reg. 6572 (Feb. 7, 2011) (to be codified at 9 C.F.R. pt. 309). HSUS received word that the Agency would be granting its petition on March 13, 2013. To date, however, USDA has not promulgated any regulations or done anything substantive to act on HSUS’s petition. Farm Sanctuary’s petition asked for a ban on the slaughter of all downer mammals; the group’s petition was filed on March 15, 2010 and was the subject of the same Federal Register Notice on Feb. 7, 2011. Petition by Farm Sanctuary to the Food Safety and Inspection Service (Mar. 15, 2010); Non-Ambulatory Disabled Veal Calves and Other Non-Ambulatory Disabled Livestock at Slaughter: Petitions for Rulemaking, 76 Fed. Reg. 6572. It was denied on the same day that HSUS’s was accepted, March 13, 2013. Response to Petition from Alfred V. Almanza, Food Safety Inspection Service, to Gina Tomaselli and Peter A. Brandt, Human Society of the United States (Mar. 13, 2013), available at [http://www.fsis.usda.gov/wps/wcm/connect/afba5c43-19de-4e58-918f-5fd64b577dae/Petition\\_FSYS\\_Resp\\_HSUS\\_031313.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/afba5c43-19de-4e58-918f-5fd64b577dae/Petition_FSYS_Resp_HSUS_031313.pdf?MOD=AJPERES); Response to Petition from Alfred V. Almanza, Food Safety Inspection Service, to Kathy Hessler, Farm Sanctuary (Mar. 13, 2013), available at [http://www.fsis.usda.gov/wps/wcm/connect/11e2996a-a496-49f4-b096e9b99232cab6/Petition\\_FSYS\\_Resp\\_Farm\\_Sanctuary\\_031313.pdf?MOD=AJPERES](http://www.fsis.usda.gov/wps/wcm/connect/11e2996a-a496-49f4-b096e9b99232cab6/Petition_FSYS_Resp_Farm_Sanctuary_031313.pdf?MOD=AJPERES).

<sup>182</sup> Heckler v. Chaney, 470 U.S. 821, 831 (1985).

unreviewable.<sup>183</sup> However, the *Heckler* Court “emphasize[d] that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”<sup>184</sup>

So, where a law exists but is ignored, the *Heckler* Court’s presumption would not apply, as the Court implied in a footnote:

We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.<sup>185</sup>

Here, if a humane group called on the USDA to promulgate regulations, or to enforce the HMSA or the FMIA against a slaughterhouse that was cruelly slaughtering poultry, the humane group would have a very strong argument that the Agency refusal to act was not discretionary. The humane group could show that the Agency’s refusal was instead “based solely on the belief that it lacks jurisdiction” in other words, that it was “‘consciously and expressly adopt[ing] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”

B. *Refusal to Prosecute or Promulgate Regulations Would Constitute Final Agency Action.*

In order for an agency decision to be reviewable under the APA, it must constitute a final agency action.<sup>186</sup> Two things are required for a court to find that an agency action is “final”: first, the action must “mark the consummation of the agency’s decision

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<sup>183</sup> *Id.* at 832.

<sup>184</sup> *Id.* at 832–33.

<sup>185</sup> *Id.* at 833 (internal citation omitted); *see also id.* at 839 (Justice Brennan, concurring) (“Thus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct; (2) an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams v. Richardson*; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights”) (internal citations omitted).

<sup>186</sup> *See* 5 U.S.C. § 704 (2012).

making process—it must not be of a merely tentative or interlocutory nature; and second, the action must ‘be one by which rights or obligations have been determined, or from which legal consequences will flow.’<sup>187</sup> At the district court level in *Levine*, the government argued that the USDA “has not yet decided whether to exercise its discretion to include other animals within the definition of amenable species in the Act,” and so there was literally no decision to challenge.<sup>188</sup> In the event of a rulemaking petition denial, however, there would be a proper and definitive decision from the agency, and legal consequences would ensue—poultry slaughterhouses would be on notice that they had no legal obligation to treat animals humanely. In fact, in its brief before the Ninth Circuit, the government agreed that a proper denial would constitute final agency action: “[p]laintiffs are free to challenge the USDA’s position by petitioning the agency to exercise its supposed authority to regulate the inhumane slaughter of poultry, and the agency’s response to that petition would be subject to judicial review.”<sup>189</sup>

C. *Standing: Analyzing the Ninth Circuit’s Holding in Levine and Plotting a Way Forward.*

1. *Injury in Fact*

In *Levine*, the district court held that the meat-eating plaintiffs had standing based on increased likelihood of physical harm due to the link between inhumane slaughter and food poisoning.<sup>190</sup> The government argued that such harms are both speculative and generalized, and thus did not constitute injury-in-fact sufficient for constitutional standing.<sup>191</sup> The plaintiffs replied that an increased risk of harm constitutes injury-in-fact<sup>192</sup> and that a generalized harm can still constitute injury-in-fact as long as it is

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<sup>187</sup> *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted).

<sup>188</sup> Gov’t CBS, *supra* note 72, at 5.

<sup>189</sup> Brief of the Appellee, *supra* note 152, at 20.

<sup>190</sup> See Memorandum & Order, *supra* note 77, at 14–15.

<sup>191</sup> See Gov’t CRB, *supra* note 64, at 3–4.

<sup>192</sup> See Plaintiffs’ Memorandum in Opposition to Defendant’s Motion to Dismiss at 10 n.5, *Levine v. Johanns*, 540 F.Supp.2d 1113 (N.D. Cal. 2008) (No. 3:05-cv-04764) (“Nearly every circuit has recognized that even a ‘small probability of injury is sufficient to create a case or controversy.’”).

particularized.<sup>193</sup> The district court agreed with plaintiffs on both points,<sup>194</sup> and the government did not appeal that aspect of the court's holding. The district court also found injury-in-fact for plaintiff poultry workers, who claimed both physical and emotional injuries—the former due to inhumane slaughter that leads to injuries, and the latter due to the emotional injury of watching the inhumane slaughter of birds.<sup>195</sup>

The government won at the district court level with their claim that the humane groups lacked associational standing,<sup>196</sup> based on the three-prong test developed by the Supreme Court.<sup>197</sup> The government pointed out that the humane group members were seeking standing based on harm to their health, which did not align with the group's organizational purpose to protect animals.<sup>198</sup> Since the interests the lawsuit sought to protect—the consumer health interest—were not germane to the mission of the organizations, the government argued that HSUS failed the test of associational standing.<sup>199</sup>

The district court agreed, holding that because the mission of the animal protection groups “is distinct from the consumer health interest [asserted] in this action . . . [the groups] therefore fail[] to allege facts sufficient to establish associational standing. . . .”<sup>200</sup> This holding, presented without case analysis, is suspect. As the Supreme Court has explained, “an association has standing to sue on behalf of its members when those members would have standing to bring the same suit. It does not matter what specific analysis is necessary to determine that the members could bring the same suit, for the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases. . . .”<sup>201</sup> Thus, the nature of standing for the individual plaintiffs is not relevant to

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193 See Memorandum & Order at 8–16, *supra* note 77.

194 See *id.*

195 See *id.* at 7–18.

196 See *id.* at 18–22.

197 See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). The three-pronged *Hunt* test inquires whether: (1) an association's “members would otherwise have standing to sue in their own right;” (2) “the interests [the association] seeks to protect are germane to the organization's purpose;” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.*

198 See Memorandum & Order at 19, *supra* note 77.

199 See *id.*

200 Memorandum & Order, *supra* note 77.

201 *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 9 (1988).

the second prong of associational standing, which requires alignment between the goals of the suit (not the standing injury) and the organization's mission,<sup>202</sup> which was clearly satisfied by the *Levine* plaintiffs.<sup>203</sup> Regardless, when the HSUS appealed the district court's decision, the government did not challenge the associational standing of the humane groups and instead focused specifically the redressability prong of standing and the HSUS's substantive legal claims.<sup>204</sup>

Whether the district court was correct in its standing analysis or not, a future suit based on the same issues could get past the government's standing argument in two ways. First, plaintiff organizations could plead direct harm from the USDA's refusal to promulgate regulations. While an organization cannot accrue standing based on "a mere 'interest in a problem,'"<sup>205</sup> humane groups would have a strong argument of organizational harm from the USDA's inaction. In *Havens Realty Corp. v. Coleman*, the Supreme Court granted standing to an organization that helped low income citizens secure housing where an apartment complex was operating in violation of the Fair Housing Act, because the complex's actions had "perceptively impaired [the organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers . . . ."<sup>206</sup> The Court found that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."<sup>207</sup>

Similarly here, organizations that are dedicated to ensuring

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<sup>202</sup> Of the two cases cited by defendants in their argument about organizational standing, *see* Gov't CBS, *supra* note 72, at 21, one has no applicability to this fact pattern and the other supports standing for plaintiffs. In *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. USDA*, 415 F.3d 1078, 1104 (9th Cir. 2005), the problem was that the Ranchers were suing under the National Environmental Protection Act, but their organization did not focus on the environment. In that case, even though the harm to their members was environmental, they were ruled out organizationally based on their focus solely on the economic interests of their members. In the present case, the mission of the humane groups aligns with statutory purpose, thus satisfying organizational standing under the analysis of the court.

<sup>203</sup> *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, *supra* note 192, at 10–11 n.6.

<sup>204</sup> *See* *Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009).

<sup>205</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

<sup>206</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

<sup>207</sup> *Id.*

that birds are not gratuitously abused at slaughter are forced to expend significant organizational resources on the process. For example, undercover investigations require significant organizational staff and monetary resources, and monitoring of USDA inspection reports requires extensive time and energy for FOIA requests and follow-ups, distillation and analysis of results, and communications resources for publicity. These commitments require sufficient organizational resources for proof of direct organizational injury-in-fact resulting from an agency refusal to prosecute or promulgate.

An animal protection organizational plaintiff could also satisfy the district court's draconian associational standing requirement by including, in addition to consumers worried about food safety, a member plaintiff with a humane injury. This could be either an undercover investigator who will continue to investigate poultry slaughterhouses and suffers due to the USDA's unwillingness to promulgate humane poultry slaughter regulations, or an employee or volunteer for an animal protection organization who monitors NRs and MOIs from poultry slaughterhouses and who suffers emotionally from the rampant abuse that goes unpunished.<sup>208</sup>

Either of these plaintiffs would have a strong claim of injury-in-fact. In *Lujan v. Defenders of Wildlife*, the Supreme Court considered a claim by plaintiffs distressed over a Department of the Interior rule interpreting "the Endangered Species Act . . . in such fashion as to render it applicable only to actions within the United States or on the high seas."<sup>209</sup> Plaintiffs argued that such an interpretation would lead to more extinctions overseas, thus creating an aesthetic injury to them, as they intended to travel abroad to see species who might go extinct.<sup>210</sup> The Court noted that "[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."<sup>211</sup> However, because plaintiffs had no "concrete plans, or indeed even any specification of when the some day will be," they lacked standing because their injury

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<sup>208</sup> See AWI/FS petition to USDA, *supra* note 30, at 8–9, documenting many instances of animals boiled alive, workers using excessive force, and the live animals thrown to die into bins of dead animals—all with no meaningful sanction of the plants or workers in question.

<sup>209</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557–58 (1992).

<sup>210</sup> *See id.* at 562–63.

<sup>211</sup> *Id.*



was not “actual or imminent.”<sup>212</sup> Of course, with a claim based on the Humane Slaughter Act and protection of poultry, the key holding of *Lujan* would be that an aesthetic injury is cognizable for standing, since the harm would be both actual and imminent.

Two subsequent Circuit Court decisions allowed standing where organizational plaintiffs demonstrated aesthetic and psychological injury. In *ALDF v. Glickman*, the D.C. Circuit considered accusations by a humane group and individual plaintiffs that the USDA had promulgated regulations under the Animal Welfare Act that allowed inhumane conditions at roadside zoos, in violation of its statutory mandate.<sup>213</sup> The en banc court found that the plaintiffs in that case “suffered direct, concrete, and particularized injury to this aesthetic interest in observing animals living under humane conditions.”<sup>214</sup> Similarly, in *Fund for Animals v. Lujan*, the Ninth Circuit considered a case where various state and federal agencies had approved a plan to shoot buffalo that left Yellowstone, without preparing an Environmental Impact Statement.<sup>215</sup> The court granted standing to the individual members based on “the psychological injury [plaintiffs] suffered from viewing the killing of . . . bison,”<sup>216</sup> thereby granting standing to the membership-based organizations.

Animal protection advocates with concrete plans to go back into slaughterhouses in an undercover capacity, or who are consistently monitoring USDA reports of cruelty in slaughterhouses, would have a strong and immediate claim of injury-in-fact that is substantially similar to the plaintiffs in *ALDF* and *Fund for Animals*: their distress would stem directly from the lack of agency action, and it would be both current and ongoing.<sup>217</sup> Of course, this is the opposite of the *Lujan* plaintiffs, who could not point to any particular future plans that would indicate any harm to them, specifically, from the DOI’s decision. With either of the suggested plaintiffs, the injury-in-fact of the humane group’s member or members would align with the associational interests such that the district court’s holding in *Levine I* would be

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<sup>212</sup> *Id.* at 564.

<sup>213</sup> *See* *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998).

<sup>214</sup> *Id.* at 431.

<sup>215</sup> *See* *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992).

<sup>216</sup> *Id.* at 1396–97 (9th Cir. 1992).

<sup>217</sup> Note that this injury would also align the harm with the humane organizations’ missions.

overcome.

## 2. Redressability

In order to prove standing, a plaintiff must prove injury in fact, causation, and redressability.<sup>218</sup> The only aspect of the standing determination challenged by the government in response to HSUS's appeal under the HMSA of 1958 was redressability.<sup>219</sup> Although the Ninth Circuit held in *Levine* that the plaintiffs could not prove redressability and thus lacked standing under the HMSA,<sup>220</sup> I argue that the Ninth Circuit's holding would flip based on new facts that prove their dispositive assumptions wrong,<sup>221</sup> and also that the new path to protection for poultry—though a petition for rulemaking or request for prosecution—will change the controlling redressability bar to one that can easily be cleared. Then, I briefly explain why redressability under the FMIA would not be contested.

### a. *Reevaluating the Ninth Circuit Holding in Levine with New Facts*

The issue of redressability puts the burden on plaintiffs to prove that a favorable decision from the court is “likely to redress [their] injury, not that a favorable decision will inevitably redress [their] injury.”<sup>222</sup> Citing *Defenders of Wildlife*,<sup>223</sup> the Ninth Circuit held that since the injury to HSUS was caused by third-party poultry companies' inhumane treatment of birds, rather than by the government directly, HSUS's burden was to show that a favorable holding from the court would be likely to cause poultry companies to improve their treatment of birds at slaughter.<sup>224</sup>

The district court had previously held at the motions stage in favor of HSUS on redressability, because if plaintiffs prevailed, “[i]t is reasonable to assume that the Secretary of Agriculture would then enforce this interpretation through the FMIA, which

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218 See *Levine v. Vilsack*, 587 F.3d 986, 991–92 (9th Cir. 2009).

219 See *id.* at 992.

220 See *id.* at 997.

221 I do not dispute the court's holding based on the facts before it. For the argument that the court decided incorrectly, see Bruce Wagman & Lisa McCurdy, *Levine v. Vilsack: When “Likely” Actually Means “Definitely,”* 37 *ECOLOGY L. CURRENTS* 10 (2010).

222 *Levine v. Vilsack*, 587 F.3d at 992 (citing *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir.1994) (emphasis in *Beno*)).

223 See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

224 See *id.*

gives the Secretary the authority to apply humane slaughter requirements to appropriate species.”<sup>225</sup> As discussed in Section IV, the district court assumed that based on the 2005 amendment, the “FMIA grants the USDA authority to refuse inspection to processors which do not comply with the humane slaughter requirements of the HMSA of 1958.”<sup>226</sup> The Ninth Circuit agreed with the lower court’s analysis that the most likely path to protection for poultry would come from the USDA using its FMIA authority to protect poultry as “amenable species,” but did not find it likely that the USDA would do so, because “a decision from this court . . . would not mandate or otherwise compel the Secretary to conclude that poultry should be added as an ‘amenable species’ . . . .”<sup>227</sup>

The Ninth Circuit began its analysis of redressability by citing *Fernandez*, a Ninth Circuit case that “the district court and the parties appear to have overlooked,”<sup>228</sup> but that the court found to be “arguably determinative.”<sup>229</sup> In that case, the court refused to compel federal agencies to promulgate regulations under the Employee Retirement Income Security Act of 1974 (ERISA), because it held that the nature of such regulations would be so uncertain that it would be “speculative at best” whether farmworker benefits would increase.<sup>230</sup> The court concluded that it simply did not know what the eligibility thresholds would be under a new regulatory regime, whether employers would maintain their pension plans under the new regulatory environment, and whether farmworkers would qualify under whatever new employer requirements were set up.<sup>231</sup>

The court believed that a similarly uncertain chain of events

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<sup>225</sup> Memorandum & Order, *supra* note 77, at 33.

<sup>226</sup> *Id.* at 32.

<sup>227</sup> *Levine v. Vilsack*, 587 F.3d at 994; *see also id.* at 997 (holding that plaintiffs “did not plead any facts demonstrating that the Secretary of Agriculture would act to include chickens, turkeys and other birds as ‘amenable species’ under the FMIA.”).

<sup>228</sup> *Id.* at 993.

<sup>229</sup> *Id.* Based on its analysis, it is clear that the Ninth Circuit found it more than *arguably* determinative.

<sup>230</sup> *Id.*

<sup>231</sup> *See id.* (“[B]ecause any increase in the benefits for which plaintiffs would be eligible was entirely contingent upon the actual content of the regulations the Secretary would ultimately establish, as well as the actions of plaintiffs’ private employer, the court could not say with any degree of confidence that granting the plaintiffs their requested relief would benefit them” (internal quotations omitted) (citing *Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 985 (9th Cir.1994))).

would be required for the *Levine* plaintiffs: “First, the Secretary would have to make the independent policy determination . . . that he should deem chickens, turkeys and birds to be ‘amenable species’ [under the FMIA] . . . . Second . . . the Secretary would then have to issue regulations of uncertain content. . . . Third, the [poultry industry] would then have to abide by those regulations . . . .”<sup>232</sup> Thus, it found that the chain of causality between a positive holding and improved conditions for birds was too speculative to clear the *Lujan* bar.<sup>233</sup>

But two facts not cited by the *Levine* plaintiffs would change the Ninth Circuit’s analysis: first, the HMSA achieved substantial compliance even among plants that were in no way compelled to comply; and second, the USDA has methods of compulsion beyond those explicitly granted by statute. Thus, the court’s assumption that FMIA enforcement would be required to achieve slaughterhouse compliance is belied by the facts.

On the first point, the Ninth Circuit in *Levine* acknowledged that the HMSA “mandated (and continues to mandate) that ‘the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.’”<sup>234</sup> Nevertheless, the court felt that poultry slaughterhouses would ignore federal law and that it was purely speculative whether the USDA would attempt to enforce it. This prediction cannot be reconciled with the history of industry compliance with the HMSA, as detailed by the USDA.<sup>235</sup> As noted in Section III, the HMSA applied only to plants with government contracts, and the USDA did not promulgate a single regulation aimed at enforcement.<sup>236</sup> Nonetheless, by the time humane slaughter was incorporated into the FMIA, the USDA was able to note that the effect of requiring universal compliance would be minimal, because although “the only authorized method of

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<sup>232</sup> *Id.* at 993–94.

<sup>233</sup> *See id.* at 995.

<sup>234</sup> *Id.* at 988 (internal citations omitted).

<sup>235</sup> *See* Humane Slaughter Regulations, 44 Fed. Reg. 68,809, 68,809–10 (Nov. 30, 1979) (to be codified at 9 C.F.R. pts. 301, 304, 305, 313, 327, 335, 390, 391).

<sup>236</sup> *See, supra* section III.A; *see also* Letter from Paula M. Cohen, Director, Regulatory Development, USDA, to Valerie J. Stanley, Staff Attorney, Animal Legal Defense Fund (May 31, 1996) (on file with the author) (“Only after the FMIA was amended by the Humane Methods of Slaughter Act 1978 did the Agency develop regulations requiring humane handling and slaughter of livestock.”).

enforcement [in the HMSA] . . . was to require that humane slaughter and handling policies be adhered to in plants of any packer desiring to sell meat to the Federal government,”<sup>237</sup> the impact of the Act, despite no regulatory oversight at all, was that “the vast majority of meat slaughterers in the United States and those in foreign countries who export meat to the United States have adopted humane methods of slaughter and handling.”<sup>238</sup> This history indicates that companies are unlikely to risk violating clear statutory directives, even if the strength of the enforcement mechanism is unclear.

The experience of the HMSA implementation between 1958 and 1978 indicates a very strong likelihood that poultry regulations under the original HMSA would secure compliance from some significant portion of plants, thus reversing the *Levine* court’s analysis, since it creates a markedly different fact pattern from that offered in *Fernandez* and removes the entire speculative process essential to the court’s redressability analysis.<sup>239</sup> The *Fernandez* court felt that any promulgated regulations would be of an uncertain nature and that it could not predict the response of employers.<sup>240</sup> In contrast, humane poultry slaughter regulations would require that birds be rendered insensible to pain before being live-shackled,<sup>241</sup> strong evidence shows that such regulations would be adopted by some significant proportion of poultry slaughter plants (and there is no evidence at all to the contrary),<sup>242</sup> and such regulations would decrease adulteration and cruelty.<sup>243</sup> The USDA cannot reasonably argue that plants would disregard completely and totally the law and policy of the United States on humane poultry slaughter, where it specifically noted that plants almost uniformly complied with humane slaughter regulations for

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<sup>237</sup> Humane Slaughter Regulations, 44 Fed. Reg. 68,809 (Nov. 30, 1979) (to be codified at 9 C.F.R. pt. 301, 304, 305, 313, 327, 335, 390, 391).

<sup>238</sup> *Id.* at 68,810.

<sup>239</sup> See *Levine v. Vilsack*, 587 F.3d 986, 993–94 (9th Cir. 2009). (“First, the Secretary would have to make the independent policy determination . . . that he should deem chickens, turkeys and birds to be ‘amenable species’ . . . . Second . . . the Secretary would then have to issue regulations of uncertain content . . . . Third, the [poultry industry] would then have to abide by those regulations . . . .”).

<sup>240</sup> See *Fernandez v. Brock*, 840 F.2d 622 (9th Cir. 1988).

<sup>241</sup> See 7 U.S.C. § 1902(a) (2012) (“all animals [must be] rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”).

<sup>242</sup> See Humane Slaughter Regulations, 44 Fed. Reg. 68,809.

<sup>243</sup> See, e.g., Plaintiffs’ Motion, *supra* note 192, at 11–17.

mammals from 1958 to 1978, despite no requisite regulatory obligations at all.<sup>244</sup>

The second redressability argument that would have flipped the Ninth Circuit's holding under *Fernandez* involves the USDA's significant powers of compulsion beyond those explicitly laid out in the statute. The Agency's coercive influence in this regard has become clear only in recent years, as the USDA has made some attempt to improve poultry slaughter under its Poultry Products Inspection Act (PPIA) authority without promulgating a single compulsory regulation.<sup>245</sup> The USDA has achieved some degree of compliance by: 1) issuing the 2005 Notice,<sup>246</sup> and 2) issuing two follow-up directives to its inspectors in 2009,<sup>247</sup> which led to Noncompliance Records and Memorandums of Interview documenting cruel treatment.<sup>248</sup> The USDA has also broached the topic of referring egregious abuse to state authorities,<sup>249</sup> which would increase compliance further still. Of course, it has done all this while claiming that it has no direct statutory authority to censure plants that are abusing birds.

The way that the government discussed the 2005 Notice offers preliminary evidence of the agency's belief in its hortatory powers beyond a statutory enforcement mandate. Throughout the *Levine* litigation before the district court and Ninth Circuit, the government suggested that the Notice "urges poultry processors to implement humane slaughter practices"<sup>250</sup> and was intended to make poultry slaughter more humane<sup>251</sup>—despite having no legal force. Even before the Notice was issued, the USDA stated in a

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<sup>244</sup> See Humane Slaughter Regulations, 44 Fed. Reg. at 68,810.

<sup>245</sup> See Notice of Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624 (Sept. 28, 2005); U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6100.3 (REV.1): ANTE-MORTEM AND POST-MORTEM POULTRY INSPECTION (2009); U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS (2009).

<sup>246</sup> See Notice of Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624 (Sept. 28, 2005).

<sup>247</sup> See U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6100.3 (REV.1): ANTE-MORTEM AND POST-MORTEM POULTRY INSPECTION (2009); U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS (2009).

<sup>248</sup> See AWI/FS petition, *supra* note 30.

<sup>249</sup> See *infra* text accompanying note 259.

<sup>250</sup> Govt. SJM, *supra* note 78, at 8.

<sup>251</sup> See Gov't CRB, *supra* note 64, at n. 10.

letter to the National Humane Education Society that, while it does not have the power to enforce humane slaughter requirements, it “plans to develop a Federal Register Notice concerning the handling and slaughter of poultry. . . . We believe that this initiative along with other proactive initiatives and education, in conjunction with ongoing continuous inspection, will produce positive changes.”<sup>252</sup> Of course, this is evidence that the agency can secure and expects compliance with a policy, regardless of whether it is backed by statutory enforcement powers.

Additionally, the agency has issued two directives to its inspectors regarding humane poultry slaughter.<sup>253</sup> Although the directives explicitly note a lack of direct enforcement powers, they still encourage inspectors to issue Noncompliance Records (NRs) and Memorandums of Interview (MOIs) when those inspectors see especially egregious abuse. The animal protection groups Animal Welfare Institute and Farm Sanctuary have been filing FOIA requests for all new NRs and MOIs on a rolling basis, month-by-month, and publicizing their findings.<sup>254</sup> Although the groups found that “inspectors at more than half of plants were doing nothing at all on the issue,”<sup>255</sup> inspectors at some plants filed at least 421 NRs or MOIs, as captured in this chart from the groups’ rulemaking petition:<sup>256</sup>

**Figure 1**

Violations of “Good Commercial Practices” at Federal Poultry

<sup>252</sup> Letter from Lynn Dickey, Dir., Regulations and Petitions Policy Staff, to Maria Beth Keith, The National Humane Education Society (November 4, 2004) (on file with author).

<sup>253</sup> See U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6100.3 (REV.1): ANTE-MORTEM AND POST-MORTEM POULTRY INSPECTION (2009); U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS (2009).

<sup>254</sup> See, e.g., Jackie Taurianen, *Petition: Poultry plants need rules*, CNN-HLN (Jan. 16, 2014, 12:13 PM), <http://www.hlntv.com/video/2014/01/16/jvm-poultry-plants-chicken-turkey>; Bruce Friedrich, *USDA: Time to Stop the Chicken Industry From Boiling Birds Alive*, THE HUFFINGTON POST (Mar. 3, 2014, 9:13 AM), [http://www.huffingtonpost.com/bruce-friedrich/usda-time-to-stop-the-chi\\_b\\_4855990.html](http://www.huffingtonpost.com/bruce-friedrich/usda-time-to-stop-the-chi_b_4855990.html) (last visited Apr. 4, 2015). See also Kindy, *supra* note 2.

<sup>255</sup> Friedrich, *supra* note 254; see also Animal Welfare Institute & Farm Sanctuary, *supra* note 30. Notably, only 40 percent of slaughter plant inspectors filed even a single NR or MOI over the eighteen months of records obtained by Farm Sanctuary, and only 21 percent of plants had been visited by a DVMS. In their petition, AWI and FS argue that while such enforcement is a positive sign, regulations would—of course—improve compliance.

<sup>256</sup> See Animal Welfare Institute & Farm Sanctuary, *supra* note 30.

| Plants<br>(January 2011 – June 2012)  |     |       |
|---|-----|-------|
| Violation   | #   | %     |
| <b>Bird(s) drowning in scald tank</b> (various causes, usually inadequate cutting)  | 149 | 35.4  |
| <b>Improper handling</b> (live birds in DOA bin, loose birds, improper carrying, unacceptable euthanasia method, or use of excessive force) | 117 | 27.8  |
| <b>Inadequate cutting</b> (bird removed from line before scald tank)  | 44  | 10.4  |
| <b>Cages or equipment in state of disrepair</b> (with potential to injure birds)  | 36  | 8.5   |
| <b>Excessive number of dead-on-arrival birds</b>  | 18  | 4.3   |
| <b>Improper functioning of live hang belt</b> (resulting in suffocation of birds)   | 18  | 4.3   |
| <b>Improper shackling</b> (by 1 leg or wing, or excessive hang time resulting in injury)  | 12  | 2.9   |
| <b>Inadequate holding procedures</b> (excessive holding time, lack of protection from heat & cold, or inadequate ventilation)               | 10  | 2.4   |
| <b>Excessive number of broken wings/legs</b>  | 10  | 2.4   |
| <b>Inadequate stunning</b> (bird removed from line before scald tank)   | 7   | 1.7   |
| <b>TOTAL</b>  | 421 | 100.0 |

Source: FOIA documents on file with the author

Additionally, the USDA has promised to post all NRs online, as it already does for suspension notices under the HMSA and FMIA.<sup>257</sup> This added publicity for bad treatment will provide even more motivation for poultry companies to improve chicken slaughter.<sup>258</sup> Of course, the Agency's only reason for doing this is to attempt to stop some of the worst abuses in plants, and it is acting without statutory authority to compel improved conditions—or so it claims.

Finally, although it appears that the USDA has not actually referred a plant to state authorities, the USDA could do so and explicitly notes this possibility in its 2009 Notice to District Veterinary Medical Specialists (DVMSs):

<sup>257</sup> See Kindy, *supra* note 2.

<sup>258</sup> See *supra* note 245.



[T]here is no specific regulation or Federal humane handling and slaughter statute for poultry. Therefore, when situations exist that may warrant taking further enforcement because poultry is not being handled in a manner consistent with good commercial practice . . . [t]he DVMS, in collaboration with [the Office of Program Evaluation, Enforcement and Review (OPEER)], may notify appropriate State officials of findings that could be in violation of State and local animal welfare codes.<sup>259</sup>

The USDA states in the same Notice that, “[f]or situations involving mistreatment of poultry . . . the DVMS is to correlate with the District Manager and OPEER regarding providing notification to the appropriate State or local officials for proper handling.”<sup>260</sup> Of course, the threat of prosecution under state law would certainly secure improved humane standards from poultry companies that were otherwise thinking of flouting their obligations under the HMSA.

In summary, the USDA has a variety of indirect methods not considered by the Ninth Circuit in *Levine* to encourage poultry slaughterhouses to decrease slaughterhouse cruelty. It is clear that were a court to require the USDA to include birds in the HMSA and promulgate regulations pursuant to that authority, it is more than “likely”—the required redressability bar to satisfy the Ninth Circuit—that the USDA would be able to ensure at least some degree of improved compliance. All of the ambiguity essential to the court’s holding in *Fernandez*, as applied to the facts by the *Levine* court, is gone, since what humane regulations would look like, and we know that they would reduce slaughterhouse cruelty, has been made clear.<sup>261</sup>

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<sup>259</sup> U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 (REV. 1), DISTRICT VETERINARY MEDICAL SPECIALIST – WORK METHODS 19–20 (2009)

<sup>260</sup> *Id.*; see also U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6100.3 (REV. 1): ANTE-MORTEM AND POST-MORTEM POULTRY INSPECTION 6 (2009).

<sup>261</sup> It is worth stressing that while there has been some reduction in cruelty as a result of USDA’s 2005 and 2009 policy documents, abuse of animals remains rampant, as discussed in Section II. Additionally, because inspectors have no legal authority to sanction plants, more than half of inspectors are not issuing NRs or MOIs for inhumane poultry slaughter. See Kindy, *supra* note 2. So while there has been some improvement, proper regulations are required to bring poultry protection to the level achieved by the HMSA of 1958 for mammals.

b. *Analysis under Massachusetts v. EPA*

In *Levine*, the Ninth Circuit considered agency action based on a Federal Register Notice that was not issued in response to a request from the plaintiffs.<sup>262</sup> However, in our new scenario, a court would be evaluating a refusal by the USDA to promulgate a regulation or prosecute an alleged lawbreaker, which would require evaluation under the Supreme Court's redressability bar as described in *Massachusetts v. EPA*.<sup>263</sup> Adopting dicta from a *Defenders of Wildlife* footnote,<sup>264</sup> the Court in *Massachusetts v. EPA* held that:

... a litigant to whom Congress has "accorded a procedural right to protect his concrete interests"—here, the right to challenge agency action unlawfully withheld, § 7607(b)(1)—"can assert that right without meeting all the normal standards for redressability and immediacy." When a litigant is vested with a procedural right, that litigant has standing *if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant*. "A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result."<sup>265</sup>

The *Levine* plaintiffs might have presented their complaint in a similar light, arguing that the USDA was refusing to promulgate regulations as per its legal obligation under statute; however, applicability would have been a question in *Levine*, since they were challenging an interpretive rule, rather than a direct refusal of a request that the plaintiffs had a procedural right to make.<sup>266</sup> Regardless, the Court's redressability analysis in *Massachusetts v. EPA* would certainly apply to denial of a rulemaking petition properly filed under the APA, which is the precise scenario the Court dealt with in that case and which constitutes the quintessential "agency action unlawfully withheld."<sup>267</sup> From there,

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<sup>262</sup> See *Levine v. Vilsack*, 587 F.3d 986, 993–94 (9th Cir. 2009); see *supra* Part IV.A.

<sup>263</sup> See 549 U.S. 497, 517–18 (2007).

<sup>264</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

<sup>265</sup> *Massachusetts*, 549 U.S. at 517–18 (emphasis added) (internal citations omitted) (citing *Lujan*, 504 U.S. at 573).

<sup>266</sup> See *supra* Part IV.A.

<sup>267</sup> Although if so, it is curious that the court was considering the issue at all.

it is clear that the bar, “some possibility of relief,” is easily cleared, based on the analysis offered above.<sup>268</sup>

c. *Redressability and the FMIA*

Detailed redressability analysis is unnecessary with regard to a request under the FMIA’s “amenable species” authority, since the FMIA explicitly includes both administrative and criminal penalties for violating its humane slaughter provisions.<sup>269</sup> Additionally, the Ninth Circuit’s analysis explicitly states that the USDA would be able to improve poultry slaughter through its FMIA authority.<sup>270</sup> As the district court noted, “[t]he FMIA grants the USDA authority to refuse inspection to processors which do not comply with the humane slaughter requirements of the HMSA of 1958.”<sup>271</sup>

#### CONCLUSION

Most readers will agree that Michael Vick’s decision to hang and electrocute dogs was morally reprehensible, and yet anyone who continues to eat meat is complicit in a system that treats billions of birds annually with equivalent cruelty. As Professor Sunstein has noted, “through their daily behavior, people who love [their] pets, and greatly care about their welfare, help ensure short and painful lives for billions of animals who cannot easily be distinguished from dogs and cats.”<sup>272</sup> I contend that, we should both withdraw our support for this barbarity as individuals and demand improved conditions from oversight agencies.

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*See, supra* note 152.

<sup>268</sup> In addition to redressability of the actual cruelty, it is also true that if plaintiffs pleaded emotional harm resulting from reviewing NR reports documenting egregious cruelty, that harm likewise would be redressed to some degree by the simple act of promulgating regulations that could be cited in the NRs. *Massachusetts v. EPA* makes clear that any redress of harms is enough to satisfy the redressability requirement of standing. *See*, 549 U.S. at 517–18.

<sup>269</sup> 21 U.S.C. §§ 603, 676.

<sup>270</sup> *See* *Levine v. Vilsack*, 587 F.3d 986, 994 (9th Cir. 2009); *see also supra* Section IV.C.

<sup>271</sup> Memorandum & Order, *supra* note 77, at 32.

<sup>272</sup> Cass R. Sunstein, *Introduction: What are Animal Rights?*, in *INTRODUCTION TO ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 3 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); *see also* Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003) (“[I]n the long run, our willingness to subject animals to unjustified suffering will be seen as a form of unconscionable barbarity—not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings.”).

Every second, almost 300 animals are killed in the United States,<sup>273</sup> and every single one is treated in ways that would shock the conscience of any person, and that would be illegal if poultry were granted legal protection under existing federal law. Although the USDA has the authority and the resources to prevent this—including the discretion to protect birds under either of two distinct federal humane slaughter laws, an obligation to do so if asked in order to fulfill its statutory mandate, and the already-existing network of inspectors in every poultry slaughterhouse—the Agency has thus far not been officially asked to do so, and so its only consideration of the issue has been amidst the turmoil of contentious litigation.

Once the USDA is asked to protect birds, if the Agency mistakenly claims that it has no authority to act or it refuses to do so, a lawsuit would be likely to succeed for the reasons discussed above. The USDA has both a legal and ethical responsibility to regulate the billions of chickens slaughtered in the United States each year for food, and it is past time for the Agency to do it.

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<sup>273</sup> This assumes a constant state of slaughter; since slaughterhouses do not run 24 hours per day, the actual number would be higher than this during daylight hours, and lower during the wee hours of the morning.