IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 13-cv-1033-KBJ

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

PRELIMINARY STATEMENT

The new regulations governing country-of-origin labeling (COOL) violate the First Amendment because they compel commercial speech without sufficient governmental justification. The regulations violate their animating statute because they exceed the authority granted to the Agricultural Marketing Service (AMS) under it. And the regulations violate the Administrative Procedure Act (APA) because they are arbitrary and capricious both in formulation and in application.

This three-layered deficiency in the regulations leaves AMS in a difficult spot. As does this black-letter principle: AMS must rely on the administrative record—not subsequently minted ideas or arguments—to justify the COOL regulations. And based on that administrative record, AMS cannot defend the new COOL scheme. That is why, in its opposition to Plaintiffs' preliminary-injunction motion, AMS is forced to justify the regulations by devising a rationale not relied on by the agency. The Final Rule states that it will provide consumers with "more specific information" but does not once articulate the government's interest in doing so. The most the Final Rule offers in that vein is that additional information might be of "interest" to "certain" consumers—a justification so insufficient under the First Amendment that AMS does not bother to defend it. Instead, we are now told that the regulations correct "misleading and deceptive" speech. That is a post-hoc rationalization that finds no basis in the administrative record. Under *any* standard of review, whether intermediate scrutiny or the government's preferred lesser standard, the new regulations violate the First Amendment, and AMS cannot now revise the administrative record to shore up deficiencies in its reasoning.

AMS fares no better with its response to Plaintiffs' statutory and APA arguments. AMS ignores the text and structure of the COOL statute to contend that it may require "Born, Raised, and Slaughtered" labels that contradict Congress's *own definition* of an animal's country of

origin. And the agency ignores the limits Congress placed on its authority by insisting it may regulate meat production, and not just meat labeling, through the Final Rule's bar on commingling. Because the Final Rule exceeds AMS's statutory authority and constitutes arbitrary and capricious agency action, it will likely be invalidated.

Nor can AMS rebut Plaintiffs' demonstration of irreparable harm. AMS forthrightly acknowledges that if the regulations run afoul of the First Amendment, the irreparable-harm element is satisfied. And Plaintiffs also have offered concrete, detailed, and non-speculative accounts of the Final Rule's imminent and devastating effect on their members' business operations. AMS's comment that Plaintiffs "inexplicabl[y] delay[ed]" in seeking preliminary relief, Opp. 36, neglects to mention that Plaintiffs and Defendants spent two weeks in good-faith negotiations to obviate the need for a preliminary injunction. When those negotiations ultimately failed, Plaintiffs immediately sought recourse in this Court.

For these reasons, Plaintiffs' request for a preliminary injunction should be granted.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE FINAL RULE.

A. The Final Rule Violates the First Amendment.

The Final Rule did not articulate a governmental interest in requiring "Born, Raised, and Slaughtered labels." *See* Plaintiffs' Memorandum in Support of Prelim. Inj. (Pltfs. Mem.) 13-15. At most, the Final Rule explained that requiring detailed point-of-processing labels will serve the "interest [of] certain U.S. consumers in information disclosing the countries of birth, raising, and slaughter on muscle cut product labels." 78 Fed. Reg. 31,376. As Plaintiffs explained in their opening memorandum, under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of*

N.Y., 447 U.S. 557 (1980), satisfying "consumer curiosity" is not a sufficient government interest justifying compelled commercial speech. Pltfs. Mem. 15-19 (citing cases).

AMS concedes that the Final Rule implicates Plaintiffs' First Amendment rights. *See* Defendants' Opp. to Plaintiffs' Motion (Opp.) 27-28. AMS also confirms that "Born, Raised, and Slaughtered" labels have nothing to do with health or safety. *See id.* at 32. And in apparent acknowledgment that satisfying consumer curiosity is not a sufficiently substantial government interest, AMS avoids asserting that as the rationale for the new labels. Instead, in an attempt to exempt the agency from the rigors of *Central Hudson*, AMS now claims that the new labels were designed to "correct misleading speech and prevent consumer deception." Opp. 32. But they were not. And even if they had been, to qualify for the limited exemption from *Central Hudson* described in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the agency must do more than incant a few magic words about deception in a litigation brief. It must have "*explicitly asserted*" that rationale in the Final Rule and shown a "*real*" risk that consumers would be misled absent a change in its regulations. *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1218, 1214 (D.C. Cir. 2012) (*RJR*) (emphasis added). Because the Final Rule does neither of those things, *Central Hudson* remains the benchmark, and the Final Rule is indefensible under that standard.

1. AMS's Rationale Was To Provide "More Specific Information" of Interest to "Certain" Consumers, Not To Correct Misleading Speech.

It is textbook administrative law that "an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (internal quotation marks and citation omitted). Although the Final Rule leaves no room for dispute about the *function* of the new "Born, Raised, and Slaughtered" labels—AMS said more than a dozen times that the labels "provide consumers with more

specific information on which to base their purchasing decisions," *see, e.g.*, 78 Fed. Reg. 31,368—AMS was silent about how that function in turn serves a government interest. Indeed, it offered no reason for requiring more detailed labels even *in the face of commenters' First Amendment objections*. *See id.* at 31,370 (noting only that "the Act provides the authority . . . to require the labeling of specific production steps in order to inform consumers about the origin of muscle cuts of meat at retail."). Thus, the only basis for the point-of-processing labels articulated by the agency in the Final Rule is that they provide "more specific information."

AMS's new claim that the "Born, Raised, and Slaughtered" labels are intended to prevent consumer deception is a classic "post hoc rationalization" and is therefore "entirely unavailing." *Hearth, Patio & Barbecue Ass'n v. DOE*, 706 F.3d 499, 509 (D.C. Cir. 2013). The agency never mentioned the possibility of deception in promulgating the Final Rule, nor did it describe the "Product of Country X" labels required by the agency's 2009 Rule as misleading. The Final Rule is inconsistent with the portrayal in AMS's brief in numerous other ways, too. If AMS had really thought it was preventing deceptive food labeling, it surely would have proclaimed that the new labels benefit *all* consumers—not just "certain" consumers. 78 Fed. Reg. 31,377. If AMS had intended to "correct" its prior labels, it surely would have explained how its prior regulations were deficient and how its new labels addressed those problems (as the APA would have required it to do)—rather than speculating that the new labels might reveal "latent attributes." *Id.* And if AMS had actually believed that the 2009 labels were misleading, it surely would not have characterized the benefits of the new labels as "comparatively small relative to those already afforded by the 2009 COOL Final Rule." *Id.* The counterfactuals could go on. The point is that the Final Rule described in AMS's brief is not the one the agency issued.

To further its attempt to wring a consumer-protection rationale out of the Final Rule, the government now suggests that the 2009 labels "were often misleading because they lacked specificity" and contained "inaccuracies." Opp. 19. But nothing in the Final Rule reflects such a finding. And the government in any event fails to explain how a lack of detail about various production steps could mislead anyone. To be *misleading*, a label must state or imply facts that are *false*. *See e.g.*, *Zauderer*, 471 U.S. at 652 (holding that advertising attorney fees as "contingent" could convey false impression that there would no cost to the client). The comparative generality of the 2009 labels does not on its own mean consumers were deceived or misled. If a consumer is told that the oranges in her orange juice come from Florida, the consumer is not "misled" by not being *further* informed that the oranges are from the Indian River Citrus District, and were harvested in June at a farm owned by a man named Steve.[1]

Nor do the occasional references to "more accura[cy]" in the Final Rule show that AMS found the 2009 labels to be misleading. *See, e.g.*, 78 Fed. Reg. 31,375 (describing how labels "more accurately reflect[] the origin" of covered commodities). The Final Rule does not identify anything inaccurate about the prior labels; rather, the reference to "more accurate" information appears to refer, once again, to the agency's goal of providing more *specific* information. Furthermore, although AMS now claims the agency was concerned that commingling could lead to some Category A meats being labeled under Category B or C, the agency does not hold that out as the reason for the labeling requirement. *See* Opp. 33. According to AMS's brief, "[t]he Final Rule resolves these [purported] irregularities by eliminating the practicing of commingling." *Id.*

---

[1] Indeed, Category D meats continue to be labeled "Product of Country X" even if the animal was born or raised elsewhere prior to slaughter, and AMS has not suggested that *those* labels are misleading. *See* 78 Fed. Reg. 31,369.

AMS did not devise the Final Rule to be a prophylactic against consumer deception. The Court should not treat it as such. *See, e.g.*, *RJR*, 696 F.3d at 1215 (declining to characterize cigarette warnings as a measure to combat deception because "FDA [did] not frame this rule as a remedial measure designed to counteract specific deceptive claims . . . , nor did it offer a remedial justification for the graphic warnings during the rulemaking proceeding").

2. The *Zauderer* Exception Does Not Apply Here.

Because the Final Rule is not related to preventing consumer deception, *Zauderer* does not apply.

Zauderer exempts from *Central Hudson* review disclosures "reasonably related to . . . preventing deception of consumers." 471 U.S. at 652. *See, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Spirit Airlines v. DOT*, 687 F.3d 403, 412 (D.C. Cir. 2012). By the same token, *Zauderer* does *not* exempt rules that are *un*related to preventing deception. *See RJR*, 696 F.3d at 1214 ("*Zauderer* should be construed to apply *only* when the government affirmatively demonstrates that an advertisement threatens to deceive consumers"); *see also, e.g.*, *id.* at 1218 (declining to apply *Zauderer* to cigarette-labeling rule because it did not target deceptive advertising); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013) (criticizing NLRB for citing *Zauderer* to defend mandatory-poster rule in absence of evidence of deception), *pet'n for reh'g on other grounds pending*, D.C. Cir. No. 12-5068 (filed Jul. 22, 2013); *Nat'l Ass'n of Mfrs. v. SEC*, ___ F. Supp. 2d ___, No. 13-635, 2013 WL 3803918, at *27 (D.D.C. Jul. 23, 2013) (applying *Central Hudson* where agency "conceded at oral argument that the [required] disclosures are not aimed at preventing misleading or deceptive speech—a concession that . . . removes this case from the *Zauderer* framework").

AMS nonetheless suggests, in the face of this precedent, that *Zauderer* applies whenever the government compels commercial disclosures that are accurate and factual, regardless of the

government interest. *See, e.g.*, Opp. 28. *Zauderer* and *RJR* say otherwise. In fact, the Court in *Zauderer* made certain to "recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment," and held *only* that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651. *See also RJR*, 696 F.3d at 1214. The disclosures required by the Final Rule were not adopted to prevent deception. *See supra* at 4-6. It follows that this case does not fall into the exception *Zauderer* described.

Moreover, even if the Court were to credit AMS's claim that the Final Rule was intended to avert potential consumer deception, the government cannot seek review under *Zauderer* "absent *a showing* that the advertisement at issue would likely mislead consumers." *RJR*, 696 F.3d at 1214 (emphasis added). That means AMS must show "that, absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers." *Id.* (citation omitted). That requirement is a critical component of the agency's burden. As Justice Thomas explained in his concurrence in *Milavetz*:

> *Zauderer* does not stand for the proposition that the government can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake. . . . Instead, our precedents make clear that regulations aimed at false or misleading advertisements are permissible only where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. 559 U.S. at 257 (citations omitted).

See also RJR, 696 F.3d at 1214 (quoting this discussion with approval). Without the independent requirement that the agency validate the possibility of deception, there would be no end to the detailed disclosures the government could require.

The administrative record for this rule contains no evidence indicating that the "particular form or method of advertising"—here, the 2009 labeling—"has in fact been deceptive."

Milavetz, 559 U.S. at 257. That provides an independent reason for the Court to reject AMS's *Zauderer* argument. Although the D.C. Circuit has made clear that an agency must show "a self-evident" or "potentially real" risk that consumers will be misled without the new disclosure, *RJR*, 696 F.3d at 1214 (citation omitted), neither the Final Rule nor the agency's brief describes a risk of deception that is "self-evident," and neither cites record evidence to that effect. *See* 78 Fed. Reg. 31,371, 31,377 (concluding only that comment letters show "certain" consumers are interested in "Born, Raised, and Slaughtered" labels). Because AMS has not shown that the rule has the potential to mislead, it cannot use *Zauderer* to exempt its actions from the careful review *Central Hudson* requires. *See, e.g.*, *RJR*, 696 F.3d at 1214 (declining to apply *Zauderer* in light of existing restrictions on cigarette advertising and "the absence of any congressional findings on the misleading nature of cigarette packaging itself").[2]

The rule at issue in *Spirit Airlines v. DOT* provides a vivid point of contrast. There, the court of appeals reviewed a regulation—*Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110 (Apr. 25, 2011)—requiring airlines and other travel companies to make the total price for a trip, including fees and taxes, the most prominent price displayed in print advertisements and on web sites. *See Spirit Airlines*, 687 F.3d at 408. The court held that the disclosure requirement fell into the *Zauderer* exception because the rule was unquestionably intended to prevent consumer deception, the risk of deception was self-evident, *and* the agency had shown that consumers did, in fact, feel deceived. *See id.* at 412-413; *see also Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,142-43 ("[Comments] show consumers feel deceived . . . . Many

[2] AMS suggests that *RJR* is inapplicable because it involved compelled graphical disclosures. *See* Opp. 32 n.16. That is not correct. *RJR* applied *Central Hudson* "[b]ecause this case . . . involves a compelled commercial disclosure," and relied on *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009), which involved "compelled corrective statements." *RJR*, 696 F.3d at 1217.

consumers feel that advertising fares that exclude mandatory charges is a 'bait and switch' tactic . . . The Department has also received complaints . . . which specifically mention feeling deceived . . . ."). There is no similar rationale or record before the Court here.

Because the labeling requirements in the Final Rule were not intended to target misleading speech and the record does not contain evidence of actual or potential consumer deception, *Zauderer* does not apply.

3. The Final Rule Fails Under Any First Amendment Standard.

No matter how this Court resolves the question of the appropriate standard of constitutional scrutiny, the Final Rule must still be vacated because it is invalid under both *Central Hudson* and *Zauderer*.

a. AMS Has Not Met Its Burden Under *Central Hudson*.

Because AMS confines its defense of the Final Rule under *Central Hudson* to a footnote, Opp. 35-36 n.18, the Court would be within its rights to disregard it. *See Hutchins v. District of Columbia*, 188 F.3d 531, 539, n.3 (D.C. Cir. 1999) (a court "need not consider cursory arguments made only in a footnote"). In any event, it is the government's burden to justify a compelled commercial disclosure, and this brief sketch of an argument is clearly not equal to the task. *See RJR*, 696 F.3d at 1218 (government's burden under *Central Hudson* is "not light").

AMS claims in its footnote that "the government has a substantial interest in providing consumers with additional, more accurate information about the origins of their food, and in complying with the WTO ruling." Opp. 35-36 n.18. There are three potential government "interests" identified in this sentence. Running the *Central Hudson* analysis for each yields the same result: the Final Rule fails.

First, there are the two possible informational interests. One is that the labels provide consumers with additional, accurate information. The Final Rule cannot be defended on that

ground, for the reasons Plaintiffs previously identified. *See* Pltfs. Mem. 12-24. The second interest that might be inferred from the footnote is the agency's interest in "correcting" the 2009 labels. As noted above, that argument is unavailable to the agency because it was not the interest AMS "explicitly asserted" in the Final Rule. *See supra* at 4. Moreover, it is well established under *Central Hudson* that the government must show that the harms it seeks to avoid are "real." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993), and, critically, an agency must "find and present data supporting its claims *prior* to enacting a burden on speech," *RJR*, 696 F.3d at 1221 (emphasis in original). AMS has satisfied neither of these requirements. *See supra* at 7-8. Furthermore, AMS has not shown that the Final Rule has a "reasonable fit" with any purported remedial interest, as *Central Hudson* requires, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001), because the Final Rule does not identify any way in which the prior "Product of Country X" labels were misleading, and the agency has not shown that "Born, Raised, and Slaughtered" labels have anything to do with a concern about commingling. *See supra* at 5.

The third interest the agency identifies is the government's interest in "fulfilling its international trade obligations." Opp. 36 n.18. AMS cannot seriously be heard to contend that a WTO ruling, standing alone, gives the agency license to ignore the First Amendment—which may explain why the agency neither elaborates on this argument nor supports it with citations. *See United States v. Saani*, 650 F.3d 761, 763 n.* (D.C. Cir. 2011) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.") (quoting *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007)). But even a quick review of the *Central Hudson* factors would show that this argument is a non-starter in any event. For one, the WTO Appellate Body ruling did not mandate "Born, Raised, and Slaughtered" labels. The Appellate Body made clear that it wanted the United States to correct

the imbalance between the limited information conveyed under the prior COOL scheme and the extensive burdens imposed. *See* WTO Appellate Body Report, United States—Certain Country of Origin Labeling (COOL) Requirements, WT/DS384/AB/R, WT/DC386/AB/R ¶ 344 (adopted July 23, 2012), Pltfs. Mem. Ex. 10 (AB Report) ¶¶ 347-348. By choosing to require more detailed disclosures on the relatively few meat products that will ultimately bear a COOL label while simultaneously ratcheting up the burden on upstream producers, AMS has perpetuated the imbalance.[3] Indeed, the agency admits that the informational benefits of the new disclosures will be "comparatively small." 78 Fed. Reg. 31,377. In any event, because *Central Hudson* teaches that regulating speech must be a "last—not first—resort," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002), and AMS took exactly the opposite approach here, its compliance argument falls short.

Accordingly, even if the Court addresses the agency's defense under *Central Hudson*, all of AMS's arguments will fail.

b. The Rule Is Also Invalid Under *Zauderer*.

Zauderer authorizes a court to uphold a disclosure requirement if the required disclosures are "reasonably related" to the government's interest in preventing consumer deception. 471 U.S. at 252. But the government must have "explicitly asserted" that rationale in the Final Rule and shown a "real" risk that consumers would be misled absent without the disclosures. *RJR*, 696 F.3d at 1218, 1214. The government did no such thing here, as we have explained. In addition, because the disclosures required by the Final Rule would in many cases be inaccurate, *see* Pltfs. Mem. 20; *infra* at 19-20, and because they are far too burdensome to be "reasonably"

[3] The Final Rule thus cannot be said to advance the government's interest in complying with its international trade obligations; the Final Rule *increases* the discriminatory effect of the COOL program and renders the program non-compliant with the WTO ruling and the principles underlying it. *See* Pltfs. Mem. 33-36; *infra* at 21-23.

related to the limited interest described by AMS here, the Final Rule would also fail under *Zauderer*. Perhaps most critically, the Final Rule implements a sweeping change to the labeling of all covered meats without identifying or limiting its reach to the relevant subset of labels where there is (allegedly) a risk that consumers will be misled. The rule therefore cannot be characterized as "reasonably related" to any remedial interest.

Because the Final Rule does not pass muster under any standard of review, Plaintiffs are likely to succeed on their claims that the Final Rule violates the First Amendment.

B. The Final Rule Exceeds the Agency's Statutory Authority.

Plaintiffs have also demonstrated a likelihood of success on their claim that AMS exceeded the COOL statute's grant of authority by (1) adopting a "Born, Raised, and Slaughtered" labeling regime in conflict with the statute's text and (2) attempting to regulate meat production and packaging through the bar on commingling.

1. AMS's "Born, Raised, and Slaughtered" Labels Conflict With the Statute.

AMS may not mandate "Born, Raised, and Slaughtered" labels because that scheme violates Congress's definition of the relevant country of origin for several categories of covered meat products. In resisting this conclusion, AMS notes that Congress *sorted* meat products into four separate categories based in part (but not entirely) on where the various production steps for the source animals occurred. Opp. 10-11. But AMS ignores that Congress further directed how to *designate* the country of origin for each category—and the definitions Congress provided foreclose "Born, Raised, and Slaughtered" labels.

Consider the definition Congress provided for Category C meat, which is imported for immediate slaughter: The country of origin for that meat "shall" be "the country from which the animal was imported" and "the United States." 7 U.S.C. § 1638a(a)(2)(C). Because Congress

did not include the countries where the animal was born and raised within that definition, AMS is constrained to defend the Final Rule by contending that it is free to expand the statutory definition to include "additional information" about where production steps occurred; after all, AMS reasons, Congress "did not state that retailers 'shall *only*' designate the country of origin as both the importing country and the United States." Opp. 12 (emphasis added). But that claim flies in the face of the settled rule that "a statutory definition which declares what a term means . . . excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (internal quotation marks omitted); *see also, e.g.*, *Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term."). Congress did not need to specify that the country of origin for Category C meat shall "only" be designated as Congress directed, without supplementation by the agency: "'A statute which provides that a thing *shall* be done in a certain way carries with it an implied prohibition against doing that thing in any other way.'" *Beverly Enterprises, Inc. v. Herman*, 119 F. Supp. 2d 1, 5 n.5 (D.D.C. 2000) (quoting 2A Sutherland, *Statutes and Statutory Construction* § 47.23 (Norman J. Singer ed., 6th ed. 2000)) (emphasis added); *see also Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.").

AMS's attempt to expand Congress's definition of the country of origin for Category C meat to include where an animal was born is all the more impermissible given that Congress knew how to designate an animal's birthplace as relevant when it wanted to do so. As AMS itself points out, Congress specified that retailers "may designate the country of origin" for *Category B* meat as "all of the countries in which the animal may have been born, raised, or slaughtered." 7 U.S.C. § 1638a(a)(2)(B); *see* Opp. 10. This language stands in stark contrast to

Congress's directive regarding Category C meat, which instead "shall" be designated as originating from "the country from which the animal was imported" and "the United States." § 1638a(a)(2)(C). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Had Congress intended to permit a Category C animal's birthplace to factor into its country of origin, "it presumably would have [said] so expressly as it did in the immediately [preceding] subsection." *Id.* This Court "can assume, therefore, that Congress knew how to" define country of origin by reference to countries of birth, raising, and slaughter "and intentionally chose not to do so" for Category C meat. *Alabama Power Co. v. FERC*, 160 F.3d 7, 14 (D.C. Cir. 1998). Because AMS has no authority to rewrite the statute to erase this distinction, the Final Rule exceeds the statute's limitations.

And that conclusion applies not just to Category C meat, but to all covered meat products: AMS's "Born, Raised, and Slaughtered" labeling scheme contravenes the statute as a whole. Indeed, AMS concedes that the statute does not permit production-step labeling for Category A meat designated as U.S. country of origin because the animals were "present in the United States on or before July 15, 2008" (but may have been born and raised elsewhere).[4] And AMS also acknowledges that Congress unambiguously forbade production-step designations for Category D meat, which is labeled with a single foreign country of origin, rather than all the

[4] AMS contends that this Category A provision "has no practical significance today." Opp. 13 n.6. But its significance comes from recognizing that Congress, when it enacted the statute in 2008, did not intend to permit "Born, Raised, and Slaughtered" labels given that these animals may have been born and raised outside the United States.

countries where the animal was born, raised, and slaughtered. Opp. 13-14.[5] AMS insists that these statutory provisions do not render point-of-processing labels impermissible "in their entirety," Opp. 14, but "[i]t is well established that [a court's] task in interpreting separate provisions of a single Act is to give the Act the most harmonious . . . meaning possible in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) (internal quotation marks omitted). Because it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act," *Richards v. United States*, 369 U.S. 1, 11 (1962), Congress's decision to prohibit "Born, Raised, and Slaughtered" labels for some Category A meat and all Category C and D meat indicates that those labels are inappropriate for *all* meat. That, after all, is the only interpretation that ensures the "statutory scheme is coherent and consistent," as Congress surely intended the labeling regime to be. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989). Because the Final Rule conflicts with Congress's directives concerning how to designate an animal's country of origin, it will likely be invalidated.

---

[5] AMS characterizes Category D meat as "an entirely separate product" that Congress decided to subject to "an entirely separate labeling scheme" because the animal was slaughtered outside the United States. Opp. 14-15. But that characterization contradicts the statute. AMS offers no reason why Congress would have wanted the degree of origin specificity on product labels to turn on whether the animal was slaughtered in or outside the United States. Indeed, Category B also includes meat from animals slaughtered outside the United States so long as the animals were born or raised here, *see* 7 U.S.C. § 1638a(a)(2)(B), yet AMS does not deem Category B meat an entirely separate product or explain why Congress would have intended to permit "Born, Raised, and Slaughtered" labels for Category B animals slaughtered outside the United States, while simultaneously prohibiting those labels for Category D animals slaughtered outside the United States. Nor is Category D meat part of "an entirely separate labeling scheme." It appears in 7 U.S.C. § 1638a(a)(2) alongside all the other categories of covered meat products, as their sequential shorthand titles—A, B, C, and D—suggest. In short, AMS's claim that Congress's treatment of Category D meat provides no insight into its companion provisions runs headlong into "the cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

2. AMS Has No Authority Under the Statute To Bar Commingling.

In enacting the Agricultural Marketing Act, Congress did not delegate to AMS the authority to restructure the meat industry: The statute governs meat *labeling*, not meat *production*. Yet AMS contends that it has the power to regulate how meat is produced and packaged—and not just how it is ultimately labeled—because there is no "provision in the AMA that mentions commingling." Opp. 16. The D.C. Circuit thinks otherwise: "To suggest, as the [agency] effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to . . . principles of administrative law . . . and refuted by precedent." *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). Because "it is beyond cavil that an agency's power is no greater than that delegated to it by Congress," the question is not "whether the Act expressly precludes [AMS] from choosing" to bar commingling, but whether AMS's asserted authority to do so "is rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* at 670 (internal quotation marks omitted) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986), and *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979)).

It is not. As AMS itself observes, the statute focuses solely on "inform[ing] consumers . . . of the country of origin of the covered commodity," Opp. 16 (quoting 7 U.S.C. § 1638a(a)(1)); in this sense, the statute takes meat production and packaging processes at it finds them and authorizes AMS to regulate only the labels placed on those packages at retail. Indeed, AMS has recognized as much by conceding it lacks the power to bar commingling of ground beef, which can be produced by combining trimmings from source animals of different countries of origin. Opp. 31-32. As AMS acknowledges, Congress drafted the statutory COOL provision for ground beef to preserve this normal production process by

giving retailers the flexibility to "list . . . all *reasonably possible* countries of origin," 7 U.S.C. § 1638a(a)(2)(E) (emphasis added). The same is true of the statutory provisions governing muscle cuts of meats, which expressly preserve commingling flexibility by providing that retailers "may" use a multiple-country-of-origin label that designates all of the countries in which the source animals for commingled meat "*may have been* born, raised, or slaughtered." *Id.* § 1638a(a)(2)(B)(emphasis added); *see* S. Rep. No. 110-220, at 198 (2007) ("[T]he 'may' used in subsection (B) is to provide flexibility to packers when working with livestock from multiple countries of origin.").

That is presumably why USDA's former General Counsel previously interpreted the AMA to affirmatively authorize commingling, given that the statute "contains no mention whatsoever that it is intended [to] force the segregated handling of animals with varying geographical histories" and that "disrupt[ing] the orderly production, processing, and retailing of covered commodities" would conflict with the statutory purpose to create a "country of origin labeling program" rather than a program "designed to govern the handling of livestock." Letter to Bob Goodlatte from USDA General Counsel Mark Kesselman 4 (May 9, 2008), Pltfs. Mem. Ex. 12. As AMS itself explained in the 2008 Interim COOL Rule, "the statutory language makes clear that the purpose of the COOL law is to provide for a retail labeling program for covered commodities—not to impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities." *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 73 Fed. Reg. 45,106, 45,118 (Aug. 1, 2008).[6]

---

[6] In asserting that "there is no textual support for th[e] argument that Congress clearly intended to permit commingling," Opp. 16, AMS inexplicably fails to acknowledge its previous

Against all this, AMS now suggests that it has authority to bar commingling because Congress granted it the power to "promulgate rules necessary to implement" the statutory labeling scheme. Opp. 18 (internal quotation marks omitted). But the commingling bar regulates meat production and packaging, not labeling—and the agency's "invocation of its general rulemaking authority . . . suggests no intention by Congress that [the agency] could ignore" that statutory limit on its authority. *Financial Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007). Nor may AMS unilaterally expand its regulatory domain to the upstream conduct of producing meat on the theory that barring commingling will enable the agency to provide downstream consumers with more accurate information on labels. Opp. 16-18. That claimed power has no stopping point: If AMS can bar commingling on this basis, then presumably it can also bar U.S. producers from processing *any* animals born or raised outside the United States, or bar the importation of all Category D meat, since those regulations would ensure that all meat is exclusively of U.S. origin and so prevent any possible mislabeling. AMS's authority does not extend so far, and this Court should reject the agency's efforts to twist its limited power over labeling into the power to make fundamental changes to the meat-production industry.

C. The Final Rule Is Arbitrary and Capricious.

1. AMS's Justifications for the Final Rule Do Not Withstand Scrutiny.

Even if AMS's new regulations passed First Amendment muster, and even if the statute authorized AMS's action, the Final Rule would still fail as arbitrary and capricious. The

---

position that the statute expressly authorized that industry practice. That sort of "failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process." *PG&E Gas Transmission, N.W. Corp. v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003).

evidence before the agency flatly contradicts AMS's claim that the Final Rule "provide[s] consumers with more specific information on which to base their purchasing decisions" and brings the United States into "compl[iance] with [its] international obligations under the WTO Agreement on Technical Barriers to Trade Agreement" (TBT Agreement). Opp. 19-20 (internal quotation marks omitted).

a. AMS's "Born, Raised, and Slaughtered" Labels Convey Inaccurate Information.

To support the Final Rule, AMS now attacks the agency's own prior regulations, claiming that "origin designations were often misleading" under them "because they lacked specificity as to the details of which production steps occurred in the countries cited on the label." Opp. 19. But—again—that argument erroneously conflates the provision of less information with affirmative deception. In fact, the opposite is true: The "Product of Country X" labels prescribed by the 2009 regulations did not affirmatively *misinform* consumers about production steps, but many of the new "Born, Raised, and Slaughtered" labels will.

AMS does not dispute that the new labels will (1) erroneously state that an animal has been "Raised" in the country from which it is imported for immediate slaughter, even if it was actually raised elsewhere, 78 Fed. Reg. 31,369; (2) misleadingly imply that an animal has been "Raised" exclusively in the United States so long as it spent more than two weeks here before being slaughtered, even if the animal was actually primarily raised in a third country, *id.* at 31,368; and (3) deceptively suggest that an animal was born, raised, and slaughtered in a single foreign country when it is imported as a finished meat product, even if those production steps occurred in several different countries, *id.* at 31,385. Instead, AMS dismisses the misleading labels adopted in the Final Rule as a "red herring" because an agency "may proceed incrementally" without "resolv[ing] massive problems in one fell regulatory swoop." Opp. 22 &

n.10 (internal quotation marks omitted). But because AMS now attempts to defend point-of-processing labels on grounds of accuracy it is surely relevant that the new regulatory scheme produces so many inaccuracies. Put differently, AMS is creating massive regulatory problems, not incrementally resolving them.

Indeed, AMS appears to fundamentally misunderstand its own regulations when it assures the Court that "[n]ow all meat that is labeled Category A, B, C, or D will actually be Category A, B, C, or D meat." Opp. 33. In fact, the Final Rule misleadingly requires some Category B meat to instead be labeled as Category D. Recall that Category B covers animals with some but not all production steps occurring in the United States, whereas Category D applies to animals with no production steps occurring here. *Compare* 7 U.S.C. § 1638a(a)(2)(B) (meat is derived from an animal that is "born, raised, *or* slaughtered in the United States," but "not exclusively born, raised, *and* slaughtered in the United States") (emphasis added), *with id.* § 1638a(a)(2)(D) (meat is derived from an animal "that is not born, raised, or slaughtered in the United States"). Notwithstanding Congress's "careful[] demarcat[ion] [of] the qualifications necessary to satisfy each country of origin labeling requirement," Opp. 16, the Final Rule treats meat from all animals slaughtered outside the United States as Category D meat labeled with a single foreign country of origin, even if the meat is "derived from an animal that was born and/or raised in the United States" and so qualifies as Category B. *See* 78 Fed. Reg. 31,385.[7] For example, an animal that is born and raised in the United States and then slaughtered in Canada

[7] By AMS's own admission, the Final Rule's mandate that some Category B meat be labeled as Category D violates the statute, which "*requires* retailers to use the multiple countries of origin designation [*i.e.*, Category B] if the covered commodity derives from an animal" with some, but not all, production steps occurring in the United States. Opp. 3 (emphasis added). This additional conflict between the statute and the Final Rule provides yet another reason why the Final Rule must be set aside.

before being imported back here as a finished meat product will erroneously be labeled with the Category D designation "Product of Canada." *See id.* As this and the examples above illustrate, the Final Rule will affirmatively mislead consumers about meat origin and so cannot be justified on the ground that it will aid consumers in their purchasing decisions.

b. The Final Rule Does Not Cure the United States' WTO Violation.

AMS's only other justification for the Final Rule—that it cures the United States' WTO violation—likewise collapses under scrutiny.[8] The Final Rule itself offers no explanation of how the new labeling scheme is consistent with the TBT Agreement; it merely states AMS's unsupported conclusion that "[t]he Agency considers that this rule brings the United States into compliance with its international trade obligations." 78 Fed. Reg. 31,370. And while AMS contends that the Final Rule "directly addresses the concerns raised by the WTO Appellate Body," Opp. 23, the agency's brief outright ignores most of the Appellate Body's reasons for concluding that the 2009 COOL program violated the TBT Agreement. Thus, while AMS latches on to the Appellate Body's comments regarding point-of-processing designations and commingling, Opp. 24, it does not and cannot explain how the Final Rule addresses the WTO's concern that detailed origin records must be kept for all animals even though the vast majority of meat products "will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all." AB Report ¶ 344; *see also* Pltfs. Mem. 24 n.6 (demonstrating that less than

[8] Although AMS initially contends that the Court should not "determine whether the 2013 Final Rule complies with the WTO ruling," the agency concedes that this Court may consider the WTO justification in assessing whether the agency's action was arbitrary and capricious. Opp. 23. That is clearly correct. *See, e.g.*, *Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004) (court may "address[] the implementation of adverse WTO decisions" when case is "brought . . . under domestic law"); *Allegheny Ludlum Corp. v. United States*, 358 F. Supp. 2d 1334, 1348 (CIT 2005) (considering a WTO Appellate Body ruling because "[the agency's] methodology . . . and determination are intended to implement WTO rulings").

20% of beef products and less than 7% of pork products will qualify as covered muscle cuts under the COOL program).

Nor does AMS explain how the Final Rule ensures that origin information will be "accurate," as the WTO deemed important, AB Report ¶ 343, given the various ways "Born, Raised, and Slaughtered" labels will actually *misinform* consumers about the countries where these production steps occurred, *see supra* at 19-20. And AMS further ignores the Appellate Body's concern that "[f]or Category D meat, the COOL measure requires only that the customs designation of origin be indicated," *id.*, likely because the Final Rule does nothing to address this problem and in fact compounds it by misleadingly labeling some Category B meat as Category D, thereby hiding from consumers that production steps occurred in the United States, *see supra* at 20. Finally, AMS fails to acknowledge the Appellate Body's criticism that "the least costly way of complying with the COOL measure is to rely exclusively on domestic livestock," AB Report ¶ 345, which is even more true under the Final Rule given that the bar on commingling increases segregation and packaging costs for producers who handle imported livestock. AMS's highly selective approach to these aspects of the Appellate Body's ruling fatally undermines its claim that the "Final Rule addresses the precise problems that the WTO Appellate Body raised in its decision." Opp. 24.[9]

In the end, AMS cannot reconcile the Final Rule with the Appellate Body's central concern that the burden on upstream producers is "disproportionate as compared to the level of

[9] In a passing attempt to downplay the many ways the Final Rule fails to address the WTO's concerns, AMS observes that "the United States was under no obligation to alter the [COOL] requirements as they apply to imported meat or the exemption of processed products." Opp. 25 n.12. But neither was the United States "under [an] obligation" to bar commingling or to mandate point-of-processing labels. However, AMS *is* obliged to ensure the stated reasons for its actions accord with the evidence before the agency—and the WTO justification for the Final Rule flunks this test.

information communicated to consumers." AB Report ¶ 347. The Final Rule focuses exclusively on the disclosure side of the equation by mandating more detailed labels—although, as noted above, the various loopholes and exemptions render the agency's approach inadequate. But in addition, rather than reducing the burden upstream, the agency simultaneously ratcheted up the costs imposed on the producer side, thereby perpetuating the imbalance identified by the Appellate Body and exacerbating the discriminatory impact on imported goods. The Final Rule cannot be justified as a reasonable response to the WTO violation because the new scheme assures that the WTO will again conclude that AMS's "regulatory distinctions [are] arbitrary, and the disproportionate burden imposed on upstream producers and processors [is] unjustifiable." *Id.* ¶ 347.

2. AMS Did Not Reasonably Respond to Commenters' Request for Delayed Implementation of the Final Rule.

In defending its refusal to delay implementation of the Final Rule until the WTO reviews it, AMS proves that it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). After all, AMS focuses exclusively on steps it took to assess the costs of compliance with the new regulations and to provide transition time to comply. Opp. 26-27. But that does not respond to commenters' concerns that they will face *two separate rounds* of compliance costs when (not if) the WTO deems the new COOL regulations deficient under the TBT Agreement (assuming this Court does not first find the regulations violate the Constitution, the AMA, and the APA). That concern plainly is significant; after all, AMS undertook the rulemaking in direct response to the WTO ruling. *See* 78 Fed. Reg. 31,367 (AMS is "issuing this rule" as "a result of th[e] [WTO] action"). The agency should have justified its decision to implement the rule now, in advance of the next round of WTO proceedings, with the attendant risk that regulated entities will incur nearly $200

million or more in compliance costs that cannot be recouped when the WTO invalidates the new regulations. The agency's failure to reasonably respond to this concern provides yet another reason why the Final Rule will likely be set aside as arbitrary and capricious.

II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM AND SATISFIED THE OTHER PREREQUISITES FOR PRELIMINARY RELIEF.

AMS does not dispute that the element of irreparable harm will be satisfied if the Court agrees that Plaintiffs are likely to succeed on the merits of their First Amendment claim. *See* Opp. 36. Because Plaintiffs are indeed likely to succeed on that claim, all of AMS's other arguments about irreparable harm can be disregarded.

Some of these arguments do, however, require a response. AMS's only answer to Plaintiffs' declarants, several of whom represent packers and processors the agency *concedes* will be harmed by the new requirements, *see* Pltfs. Mem. 39-40, is to contend that the declarants have only made "bare allegations about what *may* happen in the future." Opp. 37 (emphasis in original). Of course, in any motion for a preliminary injunction, Plaintiffs can and must address "what may happen in the future." And Plaintiffs' declarants provided ample detail about how the new labeling requirements have immediately placed packers, processors, and feedyards in the Northwest and Southwest at a severe disadvantage to competitors in the Midwest who can rely on a steady supply of Category A animals exclusively born, raised, and slaughtered in the United States. *See* Pltfs. Mem. 40-42 (and declarations discussed therein). Plaintiffs also showed that the Final Rule has had devastating consequences for Canadian cattlemen, which will only grow worse as the labeling requirements drive demand away from their animals. *Id.* at 43-44.

Although AMS has given the Court little reason to doubt Plaintiffs' allegations of irreparable harm, Plaintiffs, mindful of their burden, have submitted several supplemental affidavits from their original declarants that provide even more detail about the harm they are

currently suffering and are likely to suffer in the immediate future. *See* Supplemental Declarations of Alan Rubin, Brad McDowell; Ed Attebury; Martin Unrau; Andy Rogers; and Jim Peters, filed herewith. Plaintiffs have also submitted a declaration from Rolando Pena Hinojosa, a Mexican cattleman, who attests to the irreparable harm that his business is facing as a result of the new requirements.

AMS also faults Plaintiffs for giving the agency only "anecdotal evidence" about commingling during the rulemaking process. Opp. 38. In addition to being incorrect, *see, e.g.*, AMI Letter, Pltfs. Mem. Ex. 1, at 6 (specifying numbers of plants known to process mixed-origin livestock), that contention is irrelevant to whether Plaintiffs have demonstrated irreparable harm. The agency's dismissive treatment of Plaintiffs' comments, then and now, only confirms that the agency issued the sweeping changes in this rule without full awareness of the real-word consequences of its actions.

Finally, a word about AMS's contention that Plaintiffs had "no reasonable explanation for their delay" in seeking a preliminary injunction. Opp. 36. AMS knows the "explanation": After the filing of the complaint—which explicitly noted that Plaintiffs intended to file a preliminary-injunction motion, *see* Complt. ¶ 9—Plaintiffs and agency counsel engaged in more than two weeks of good-faith discussions about steps that could obviate the need for Plaintiffs to seek preliminary relief. Ultimately, the parties did not reach an agreement on an alternative solution, so Plaintiffs filed their Motion and supporting papers.

Because Plaintiffs have amply satisfied their burden of demonstrating irreparable harm, and AMS has not supplied any reason for the Court to believe its institutional interest or the public interest will suffer as the result of an injunction, Plaintiffs' Motion should be granted.

DATE: August 16, 2013

Respectfully submitted,

/s/ Catherine E. Stetson
Jonathan L. Abram (DC # 389896)
Catherine E. Stetson (DC Bar # 453221)
Judith E. Coleman (DC Bar # 980382)
Elizabeth B. Prelogar (DC Bar #1011890)
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: 202-637-5600
Fax: 202-637-5910
jonathan.abram@hoganlovells.com
cate.stetson@hoganlovells.com
judith.coleman@hoganlovells.com
elizabeth.prelogar@hoganlovells.com

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	No. 13-cv-1033-KBJ

DECLARATION OF ALPHA 3 CATTLE COMPANY IN SUPPORT OF PLAINTIFFS' PARTIAL OPPOSITION TO PROPOSED DEFENDANT-INTERVERNORS' MOTION TO INTERVENE

I, Ed Attebury, hereby declare:

1. The final COOL rule from May of 2013 revises the rule from 2009. Therefore, my experience with the costs associated with the 2009 rule is a very relevant basis for the economic impact I expect to incur under the May 2013 rule. I believe the May 2013 rule is more onerous than the 2009 rule, so my concerns are well-founded and relevant to this situation.

2. I am a cattle feeder, not an owner of a feedlot. I buy lots of feeder cattle, contract their feeding with a feedlot, and then sell the finished cattle to a packer. Because of that, I own all of the cattle I feed. The losses of $1,347,500 I incurred under the 2009 rule where all borne by me and are based off of my financial records. When I marketed my fed cattle to the packer, I received a discount of $35 per head just because my cattle were of Mexican origin. Since I owned the cattle, I incurred the entire $35 loss.

3. Cattle of Mexican origin can have the same quality and yield as northern cattle. Cattle of Mexican origin are not a separate breed, but are the same breeds of cattle we see domestically. Mexican ranchers routinely purchase cows, bred heifers, and bulls from the United

States for breeding purposes. There are cattle of varying quality in both the United States and in Mexico. To put it another way, there are cattle of both excellent and inferior quality in both the United States and Mexico. Prior to mandatory country-of-origin labeling, cattle of Mexican origin were not discounted simply because they were from Mexico. It has been my experience that cattle of Mexican origin can meet and exceed the quality grade and yield of beef compared to native cattle. I also find that their health is exceptionally good with very little sickness or death loss.

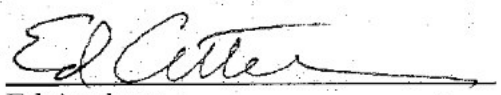
4. With the lowest cow herd in nearly 60 years, finding enough feeder cattle to fill my needs means that I have to bid a price high enough to encourage the producer to sell. Therefore, we do not have a cattle market that simply allows me to "pass on" the $35 per head discount. It is cost solely borne by me and is a result of my use of cattle of Mexican origin and the actions packers have taken as a result of implementing mandatory country-of-origin labeling.

5. Through marketing and business relationships, I have found a business model that gives me the best opportunity to be profitable. Cattle of Mexican origin work well in the unique environment that I operate in. Cattle of Mexican origin are close to me geographically, federally inspected by United States Department of Agriculture (USDA) veterinarians, and represent an excellent source of cattle that meet my business model needs in terms of their weight. I routinely get premiums paid to me based on the quality of the beef and the total yield of beef from my cattle. The cattle of Mexican origin that I use in my operation spend most of the production cycle in the United States. The cattle are bought weighing between 300 and 500 pounds and spend approximately 12 to 14 months (out of an 18 month production cycle) here in the United States. The majority of their value comes from the work I do in order to make them marketable. As I described in my first declaration, if the 2013 rule is not enjoined, my business will be

immediately harmed because I have current inventory of cattle of Mexican origin and have contracted for future delivery of cattle of Mexican origin. The implementation of the rule puts my business model in jeopardy and could force my business to cease operating the way I do now.

Dated: August 16, 2013

Respectfully submitted,



Ed Attebury

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 13-cv-1033

DECLARATION OF BRAD MCDOWELL IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Brad McDowell, hereby declare:

1. I am the President of AB Foods, a wholly owned subsidiary of Agri Beef Co., which is a member of the North American Meat Association, a Plaintiff in this suit.

2. Agri Beef is a 45-year-old, family-owned company headquartered in Boise, Idaho. Agri Beef's packing plant, Washington Beef, in Toppenish, Washington, processes approximately 1% of the United States' annual production of beef.

3. I previously submitted a declaration in this matter on July 25, 2013. *See* Docket #24-18, Declaration of Brad McDowell. I am submitting this declaration to provide additional clarity and detail about Agri Beef and the effect of the 2013 COOL Rule.

4. I have personal knowledge of the following facts or knowledge of such facts based upon review of relevant business documents and my general familiarity with our business. If called as a witness, I could competently testify thereto.

Agri Beef's Operations

5. Agri Beef is a privately-held family concern. Agri Beef's sole processing plant, Washington Beef, is capable of processing approximately 1,500 fed cattle per day. Agri Beef owns and operates one working cow-calf ranch in Loomis, Washington, which typically produces approximately 1,200 feeder cattle per year. The number of cattle produced annually by our cow-calf ranch is less than one day's demand from our processing plant.

6. Agri Beef owns cattle feedlots in Kansas, Washington, and Idaho. Agri Beef does not slaughter and process cattle that are fed in its Kansas feedlot. Twelve hundred miles and the Rocky Mountains separate Toppenish, Washington from Agri Beef's Kansas feedlot. It would be cost-prohibitive to ship these fed cattle from Agri Beef's Kansas feedlot to the Washington Beef processing facility. Transportation freight costs, DOT regulations, animal welfare considerations and cattle shrinkage resulting from transport weigh against transcontinental shipments of fed cattle.

7. Agri Beef sources approximately 30 to 40% of the cattle it processes from its Washington and Idaho feedlots. Thus, the majority of the cattle that Agri Beef processes are sourced from feedlots that are not owned by Agri Beef. These other feedlots are in the Northwest and Canada. As noted above, it is cost-prohibitive to ship cattle from outside the immediate region.

Necessity of Sourcing Canadian-Origin Cattle

8. There are two large-scale, commercial beef processing plants in the Pacific Northwest. One is operated by Tyson Foods, Inc. in Pasco, Washington. The second is Agri Beef's Washington Beef plant. According to Cattle Fax, a reliable market news publisher for our

industry, the combined processing capacity for the State of Washington is approximately 3,800 head per day or 950,000 head annually on a 250 day operating year. (See Exhibit A).

9. According to publications produced by USDA's National Agricultural Statistics Service, an agency relied upon in the beef industry, the average number of cattle on feed in Washington and Oregon is approximately 286,000 head (Exhibit B). These feedlots tend to turn their livestock inventory 2-2.5 times each year, which equates to approximately 572,000-680,000 fed cattle annually. That is several hundred thousand less than the regional demand of 950,000 head just noted.

10. This shortfall in supply means that Agri Beef's processing plant must acquire fed cattle for processing from areas outside Washington and Oregon that are economically and geographically feasible. Agri Beef must source some of its cattle from Canada because the Northwest is isolated from the bulk of the U.S. cattle supply. Shipping fed cattle beyond 250 miles is expensive and is only undertaken as a last resort if necessary to ensure adequate supplies.

11. The importance of Canadian-born cattle is evident from data supplied by Cattle Fax, USDA's National Agricultural Statistics Service and USDA's Agricultural Marketing Service, which reports weekly volumes of imported livestock into USDA's Region 10, which covers the Pacific Northwest and Alaska. These figures show that during the past 6 years, Canada has exported approximately 235,000 head of fed cattle and 71,000 head of feeder cattle to the region. These figures are attached as Exhibit C.

12. Subtracting the number of imported cattle from the estimated processing-plant volume shows that 67.7% of cattle slaughtered in the Pacific Northwest would qualify as Category A (Born, Raised, and Slaughtered in the US) under the 2013 COOL Rule; while 7.5%

would qualify as Category B (Born in Canada, Raised in Canada and US, Slaughtered in the US), and 24.8% would qualify as Category C (Born and Raised in Canada, Slaughtered in the US). These figures clearly demonstrate the critical role that Canadian-born cattle play in making up the deficit in Washington's cattle supply.

13. Canadian cattle play a particularly important role during certain times of the year. Cattle supply is seasonal but demand is constant. Most Pacific Northwest calves are born in the spring and are ready for slaughter in May to August of the following year. Canadian cattle play an important role in meeting demand when regional suppliers cannot.

14. To illustrate the importance of Canadian cattle in meeting seasonal demands, I have attached a graph that we have compiled based on data provided by USDA AMS, the agency that issued the 2013 Rule. (Exhibit D).

Impacts of Prior Border Trade Disruptions

15. The importance of Canadian-origin cattle was also made clear in 2003, when Canadian cattle exports to the United States were banned due to the discovery of a cow infected with *Bovine spongiform encepalathopy* (BSE) in Alberta. Agri Beef acquired its Washington Beef processing facility in May 2003, just five days before the ban.

16. During the ban, the lack of access to Canadian cattle, as well as a temporary halt in US beef exports due to a domestic case of BSE, was devastating to the industry. Northwest beef processors, including Washington Beef, struggled to remain financially viable in the wake of these border trade disruptions. Three major Northwestern beef processing plants in Nampa, Idaho (JBS Swift & Co.), Caldwell, Idaho (JR Simplot Co.), and Boise, Idaho (Tyson, Inc.) were shuttered due to the trade disruptions and have not resumed operations.

Effect of the 2013 Rule

17. Given its dependence on a combination of Canadian born, Canadian fed, and US born cattle, Agri Beef has labeled its products as Category B (Product of US and Canada) consistent with the 2009 COOL Rule.

18. In reliance on that categorization, Agri Beef structured its production runs and carcass segregation to optimize efficiency and reduce the total production downtime created by production segregation and changeovers. Even so, Agri Beef still has approximately 20 different and unique carcass segregations and production runs specific to these segregations during any given week. After grading for quality (USDA Prime, USDA Choice, etc.), Agri Beef segregates its supply by brands, such as custom, third-party brands, proprietary brands, and breed-specific programs, such as Premium Angus Beef. The individual cuts of meat are then commingled according to their quality grade and above listed attributes and packaged. For instance, a three-pack of Choice Angus ribeyes could include cuts from Category A, B, and C cattle. This package would be labeled "Product of US and Canada."

19. Under the 2013 COOL Rule, the product must identify where cattle were born, raised and slaughtered, and commingling will not be allowed. Consequently, each of the above carcass and production segregations at Agri Beef's facility increases proportionately by the number of origins. Specifically, within each of the three distinct categories that are currently supplied to the facility, the carcass segregation and production changeovers required for each segregation will increase from approximately 20 to 60 different and unique changeovers.

20. Using the example of the three-pack stated above, Agri Beef's facility would be required to have up to three distinct segregations and production runs to produce and package the exact same item – Choice Angus ribeyes – because they have different origin categorizations.

Given the inconsistency in numbers from day to day, this will result in smaller runs, partial boxes (based upon standard packing specifications) and ultimately downgrading or discontinuing the segregations and marketing of some items because the smaller numbers do not offset the costs of segregation and plant changeover.

21. Production downtime will also double. The average changeover time is 3 minutes when comingling of products is allowed. Under the 2013 Rule, this changeover time will increase to an estimated 6 minutes to ensure that no comingling and mislabeling of different origin cattle will occur.

22. The increase in the number of changeovers (20 to 60) and additional time (3 additional minutes) will result in a total estimated increase in lost production time from approximately 60 minutes per week to 360 minutes per week. This total incremental increase of an estimated 300 minutes in downtime results in a loss of production of almost 1,000 head per week. This amounts to a loss of $1.7 million dollars per week in lost sales and also increases Agri Beef's average operating costs $25 per head.

23. Agri Beef cannot offset this lost production (nor can the region withstand the throughput loss of 52,000 head per year, which would adversely impact all Northwest producers). The plant is at its maximum boxed-storage and carcass cooler capacity as well as USDA's limitations for the plant's current size. Absent a physical plant expansion, any increase in Agri Beef's production can only be accomplished through overtime production, which negatively impacts our workforce, employee health and safety, and turnover.

Agri Beef's Ability to Absorb Increased Costs

24. As noted above, Agri Beef owns one, single-shift processing facility. Agri Beef markets its highest-quality beef to the premium niche market. However, this niche market only

accounts for 3% of Agri Beef's meat sales. The remaining 97% of Agri Beef's sales are in direct competition with the entire beef industry.

25. Many of our competitors operate multiple plants that run multiple shifts. Multiple plant/multiple shift beef processing entities have a more competitive cost structure and can more easily handle additional segregation by origin because they can designate certain plants to process certain categories of beef.

26. As a single plant/single shift operation, Agri Beef is at a competitive disadvantage to these competitors because it does not have the resources, capacity or available supplies to dedicate plant operations to a single category of product. Furthermore, it does not have the physical structure to support and manage handling and storage of partial boxes and an increase in the number of product SKUs.

27. Because Agri-Beef competes with several multiple plant/multiple shift entities that have the resources to accommodate compliance with the 2013 Rule, Agri Beef will not be able to pass along the added segregation, labeling, and inventory costs associated with the 2013 Rule to its customers. Our customers are cost-conscious and would seek beef supplies from our competitors if we raised our prices.

28. Agri Beef's only option will be to discriminate against Canadian cattle by demanding discounts on Category B and C Cattle. However, these suppliers seek to maximize the price they receive for their cattle, and competition from multiple plant/multiple shift entities that can better afford the segregation costs necessary under the 2013 COOL Rule will not allow Agri Beef to obtain discounts large enough to offset or mitigate its compliance costs.

Effect on Customers

29. Agri Beef's retail customers and consumers have broadly accepted and embraced the commingling of Canadian and US beef marketed at retail locations. Agri Beef has invested substantial resources into the marketing and promotions of its proprietary brands in the Pacific Northwest and Canada. Our retail customers and end-consumers have become accustomed to the quality of our product and the fact that Agri Beef sources its cattle from both the US and Canada.

30. Agri Beef's customers demand quality, consistency, and simplicity, which we could deliver upon under the 2009 COOL Rule. If the 2013 COOL Rule is implemented, our year-round consistency of supply and simplicity of product and labeling will be jeopardized.

31. Our retail customers, many of which are small, independently-owned regional stores, are not in a position to handle multi-origin product and will likely demand a single source-origin product (Category A, B, or C) to avoid the additional costs that 2013 COOL will impose on their businesses. Implementation of the 2013 COOL Rule will disrupt and irreparably damage the marketing investment we have made up to this point.

32. Agri Beef's export market, like its domestic customer base, is subject to the laws of supply and demand. Agri Beef cannot compensate for the additional costs that will be imposed by complying with the 2013 COOL Rule by simply increasing the share of its product line that enters premium export markets. The share of Agri Beef's product line sold to premium export markets is determined by the demand in those markets.

I declare under penalty of perjury that the foregoing is true and correct.

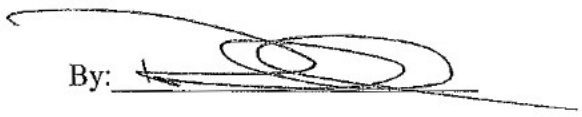
Dated: August 15, 2013 By: 

EXHIBIT A

Pacific Northwest Beef Cattle Slaughter Capacity in 2013

State	Daily Capacity (head)	Average Days of Operation	Annual Capacity (head)
Washington	3,800	250	950,000
Oregon	0	0	0
Idaho	0	0	0
Total	3,800	0	950,000

Source: Cattle Fax™

EXHIBIT B

Estimated Number of Cattle in Feedlots in Washington and Oregon, as of January 1st.

Source: USDA National Agricultural Statistics Service

EXHIBIT C

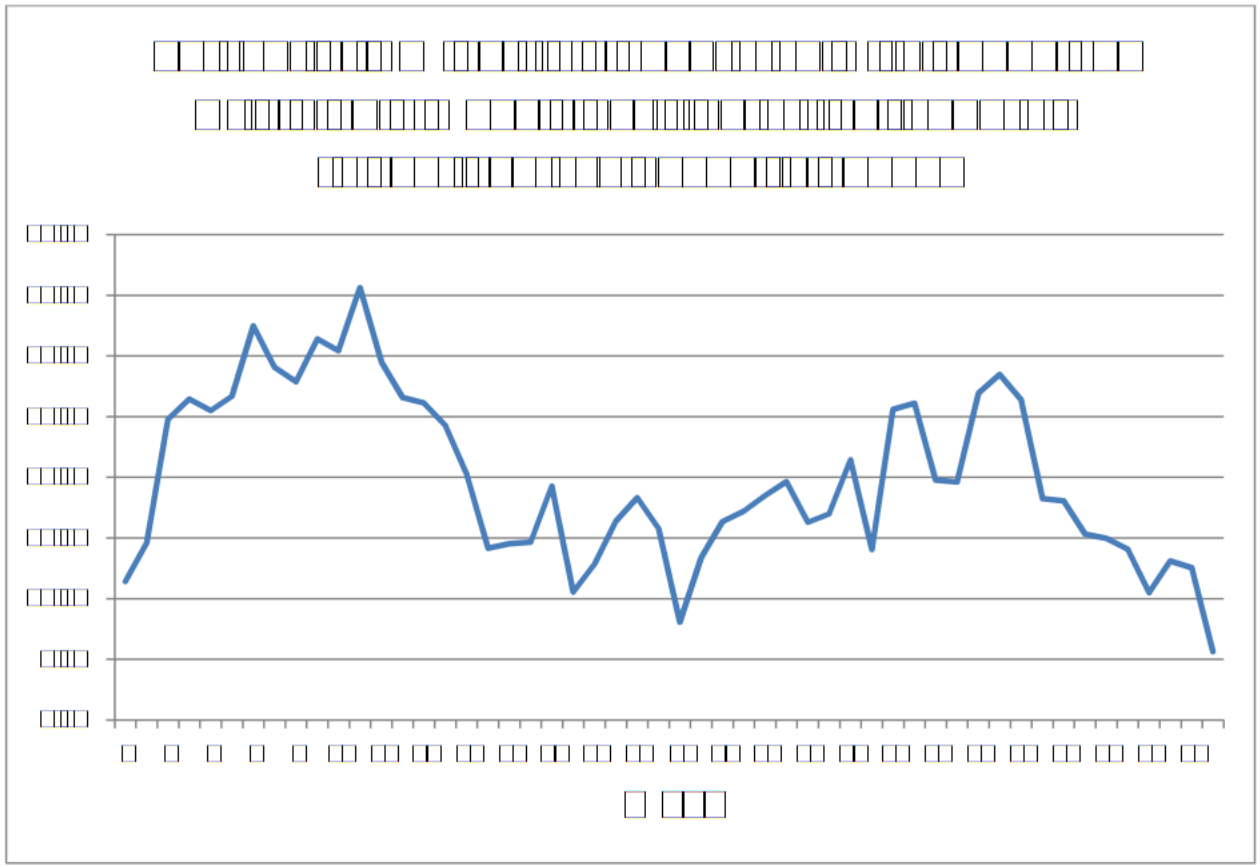
Estimate of Cattle Slaughtered and Processed in Pacific Northwest (WA, OR, ID) by Origin Categorization

Supply Sources	Volume (head)	Percent of Total Volume
Canadian Fed Imports (Category C)	**235,306**	**24.77%**
Canadian Feeder Cattle US Fed (Category B)	**71,497**	**7.53%**
US Fed Cattle (Category A)	**643,197**	**67.70%**
Total Processed	**950,000**	**100%**

Source: Estimations derived from data provided by Cattle Fax™, USDA's Agricultural Marketing Service and USDA's National Agricultural Statistics Service

EXHIBIT D

Percentage of Pacific Northwest Slaughter Cattle Originating from Canada by Week, 3- year average.



Source: USDA Agricultural Marketing Service
* 3 year average (2011, 2012, 2013) up to Week 25, 2 year average (2011, 2012) from Week 26 to 52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	No. 13-cv-1033-KBJ

DECLARATION OF RUNNELLS PETERS FEEDYARD LLC IN SUPPORT OF PLAINTIFFS' PARTIAL OPPOSITION TO PROPOSED DEFENDANT-INTERVERNORS' MOTION TO INTERVENE

I, Jim Peters, hereby declare:

1. The final COOL rule from May of 2013 revises the rule from 2009. Therefore, my experience with the costs associated with the 2009 rule is a very relevant basis for the economic impact I expect to incur under the May 2013 rule. I believe the May 2013 rule is more onerous than the 2009 rule, so my concerns are well-founded and relevant to this situation.

2. The owners of Runnells Peters Feedyard LLC own and feed 75 percent of the cattle in our feedyard. The losses of $1,237,415 incurred under the 2009 rule include $928,061 borne by the feedyard owners and are based off of the business' financial records. When these fed cattle were marketed to the packer, they received a discount of $25 to $45 per head just because they were of Mexican origin. The remaining 25 percent of the losses were borne directly by the customers who had retained ownership of their cattle through the feeding process.

3. Cattle of Mexican origin can have the same quality and yield as northern cattle. Cattle of Mexican origin are not a separate breed. In many cases, they are the same breeds of cattle we see domestically. Prior to mandatory country-of-origin labeling, cattle of Mexican

origin were not discounted simply because they were from Mexico. In fact, my packer customer has told me that the cattle of Mexican origin that I feed are some of the best cattle they process.

4. Cattle feeding is not a "pass through" type of operation where I simply pass on the costs. With the lowest cow herd in nearly 60 years, finding enough feeder cattle to fill my needs means that I have to bid a price high enough to encourage the producer to sell. Therefore, we do not have a cattle market that simply allows me to "pass on" the $25 to $45 per head discount. It is cost solely borne by the feedyard owners and my customers who retain the ownership of the cattle through the feeding process, and is a result of the use of cattle of Mexican origin and the actions packers have taken as a result of implementing mandatory country-of-origin labeling. There are many factors that influence the price of cattle. The overhead costs of operating my feedlot are the same whether I feed 10,000 head or 15,000 head. That loss of efficiency also impacts my bottom line.

5. My packer customer (whom I historically send 90 percent or more of my fed cattle to) has told me that some of their retail customers have stated that starting this fall they will no longer accept beef from cattle of Mexican origin because of the May 2013 rule. This decision will have a negative impact on my packer given the predominance of cattle of Mexican origin in our geographic area. This negative impact will trickle down to me and restrict my selling options. Since I am currently sending 100 percent of my cattle to this packer, my feedyard will lose our primary market. With the closure of another packer customer of mine earlier this year, I quickly run out of options on where to send my cattle. This could force my feedlot to close.

Dated: August 16, 2013

Respectfully submitted,

Jim Peters

Jim Peters

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	No. 13-cv-1033-KBJ

DECLARATION OF ROGERS & SONS, LTD. IN SUPPORT OF PLAINTIFFS' PARTIAL OPPOSITION TO PROPOSED DEFENDANT-INTERVERNORS' MOTION TO INTERVENE

I, Andy Rogers, hereby declare:

1. The final COOL rule from May of 2013 revises the rule from 2009. Therefore, my experience with the costs associated with the 2009 rule is a very relevant basis for the economic impact I expect to incur under the May 2013 rule. I believe the May 2013 rule is more onerous than the 2009 rule, so my concerns are well-founded and relevant to this situation.

2. Rogers & Sons, Ltd. and our family members own 80 percent of the cattle I feed. Of the $2,500,000 in losses incurred under the 2009 rule, my family and I directly incurred $2,000,000 of that. The remaining losses were incurred by the customers who retained ownership of their cattle through the feeding process. These numbers are all based off of my financial records. When I marketed my fed cattle to the packer, I received a discount of $25 to $45 per head just because my cattle were of Mexican origin.

3. Recent conversations with a cattle buyer from my packer customer indicated that the 2013 rule could see discounts paid on cattle of Mexican origin increase to $80 or $90 per head. This increase would devastate my business.

4. Cattle of Mexican origin can have the same quality and yield as northern cattle. Cattle of Mexican origin are not a separate breed. In many cases, they are the same breeds of cattle we see domestically. Prior to mandatory country-of-origin labeling, cattle of Mexican origin were not discounted simply because they were from Mexico.

5. With the lowest cow herd in nearly 60 years, finding enough feeder cattle to fill my needs means that I have to bid a price high enough to encourage the producer to sell. Therefore, we do not have a cattle market that simply allows me to "pass on" the $25 to $45 per head discount. It is cost solely borne by me and is a result of my use of cattle of Mexican origin and the actions packers have taken as a result of implementing mandatory country-of-origin labeling.

Dated: August 16, 2013

Respectfully submitted,

Andy Rogers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 13-cv-1033-KBJ

DECLARATION OF ALAN RUBIN IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Alan Rubin, hereby declare:

1. I am the President of Dallas City Packing, Inc., a meat-packing company located in Dallas, Texas. Dallas City Packing is a member of the American Meat Institute, the lead Plaintiff in this suit.

2. I previously submitted a declaration in support of Plaintiffs' Motion for a Preliminary Injunction. I submit this supplemental declaration to provide additional detail about my business and the effect of the new COOL rule. I have personal knowledge of the following facts. If called as a witness, I could competently testify thereto.

3. Dallas City Packing operates a single packing plant in Dallas, Texas. Our plant processes approximately 150 cattle per day and we operate five days per week. We source our cattle from feedlots and gatherers in the United States that in turn buy feeder cattle from the United States and Mexico.

4. A large portion of the cattle that we purchase for slaughter are underperforming cattle (called "slow gainers") that feedlots want to sell quickly rather than hold for further

feeding. Our business model is based on specializing in slow gainers, which typically are smaller in size and often preferred by our customers because they afford the grocery stores greater flexibility when offering products to consumers. The slow gainers are less expensive than other fed cattle, and we have good relationships with our suppliers because we can pay them a fair price for the cattle they want to move off the lots. In addition, without packers like us, feedlots would incur further losses discounting the slower gaining cattle they would sell to the big packers.

5. We are different from larger packers who can demand discounts from their suppliers. If we were to try to reduce the prices we pay to our suppliers, they would most likely send that supply elsewhere. Our business model has to work for our suppliers, our customers, and ourselves in order for it to remain viable in the long run.

6. Our customers supplement their supply of beef from the large packers with beef that they purchase from us. With the new COOL rule, we believe that some of our retail customers (grocery stores) will elect to limit their purchases to beef from cattle of a single origin, most likely meat from animals of U.S. origin (Category A under the COOL rule). In addition, if any of the big packers go to supplying solely U.S. born cattle, many of our customers will very likely demand only U.S. born cattle from us because the retailer will not want to handle more than one category of product.

7. Limiting ourselves to only U.S. born cattle would mean that we could not fill all of our demand from the available supply of slow gainers. Limiting cattle purchases to a single origin would also make it more difficult for gatherers and feedlots to sell to us. If they cannot combine different birth origin cattle in a shipment, they would not have enough cattle at one time

to send a complete load to us, which is necessary for cost efficiency. That means we could also lose our supplier relationships.

8. Furthermore, if a large number of retailers demand U.S. born cattle only, there will be a huge impact on both supply and prices because there will not be enough cattle to fill demand.

9. For these reasons, Dallas City Packing cannot financially afford to switch to Category A meat. We would not be able to obtain enough cattle to operate our business in an efficient manner. As stated in my previous declaration, we think it is highly likely the shift in retailer demand to Category A could eliminate 40-50% or our business. We think this shift will begin to happen immediately and cause irreparable damage to our business unless the new COOL rule is enjoined.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 8-15-13 By: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 1:13-cv-1033-KBJ

SUPPLEMENTAL DECLARATION OF MARTIN D. UNRAU IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Martin D. Unrau, hereby declare:

1. I am the sole proprietor of the Martin Unrau Farming and Ranching Operation, based in MacGregor, Manitoba, Canada. I am a member of the Manitoba Beef Producers Association, which is a member of the Canadian Cattlemen's Association, a Plaintiff in this suit. I am currently serving as President of the Canadian Cattlemen's Association.

2. On July 25, 2013, I executed the document titled "Declaration of Martin Unrau in Support of Plaintiffs' Motion for a Preliminary Injunction" which to my knowledge was filed with this court as an attachment to Plaintiffs' Motion for a Preliminary Injunction on July 25, 2013. I make this Supplemental Declaration to clarify the record before this court.

3. I have personal knowledge of the following facts or knowledge of such facts based upon review of relevant business documents and my general familiarity with our business. If called as a witness, I could competently testify thereto.

4. First, as noted in paragraph 10 of my July 25 declaration, as part of the new COOL regulations the United States Department of Agriculture established a six-month

"education and outreach" period, acknowledging the fact that "AMS understands that it may not be feasible for all of the affected entities to achieve 100% compliance immediately . . ." (78 Federal Register 31369). Given this acceptance by the Department of Agriculture of the difficulties inherent in implementing the new COOL regulations, it might be assumed that implementation, and thus the effects of implementation, would not be immediate.

5. A central point of my July 25 declaration was that, to the contrary, the effect on the trade in live cattle has been immediate because cattle sold now for backgrounding and/or feeding will not be processed into meat until after the expiration of the education and outreach period.

6. Thus, the outreach period provides no benefit with respect to phasing in the implementation of the new COOL regulations with respect to the meat from these animals. The fact is that these costs are being born currently in the sale or contracting for sale of the source cattle for meat processed after the education period ends. Consequently, these are costs flowing from the implementation of the regulation.

7. Second, discounting is occurring as a result of customers' need to cover the costs imposed by the COOL regulation. This is the market's response to the imposition of a governmental measure.

8. To repeat and reaffirm my July 25 declaration, the new COOL regulations directly and immediately harm our business. U.S. customers have already been refusing to contract for Canadian-origin cattle or demanding steep discounts. Others have purchased fewer cattle from us than they have in the past. As a result, we will have to offer significant discounts to our Canadian customers in order to sell all of the remaining available cattle.

9. None of these impacts can ever be recovered or remedied in the event the new COOL regulations are found to be unlawful. The losses we are incurring, and will continue to incur, under the new COOL regulations are immediate, substantial, and irreparable.

Dated: 8/16/13

Martin D. Unrau

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEAT INSTITUTE, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, Defendants.	Case No. 13-cv-1033-KBJ

DECLARATION OF ROLANDO PENA HINOJOSA IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Rolando Pena Hinojosa, hereby declare:

1. I am Rolando Pena Hinojosa, a cattle producer located in Guerrero, Tamaulipas Mexico. I am a member of Asociacion Ganadera Local de Guerrero, Tamaulipas y Union Ganadera Regional de Tamaulipas, which is a member of the Confederacion Nacional de Organaziones Ganderas (CNOG), a Plaintiff in this suit.

2. I have personal knowledge of the following facts. If called as a witness, I could competently testify thereto.

3. I own and along my family and other personnel operate a cattle ranch in Guerrero, Tamaulipas Mexico . We have approximately 250 breeding cows and produce approximately 215 head of feeder cattle annually, which we sell primarily to US-export brokers whom would either keep them as their property to be raised (finished) in the United States, or sell them to downstream participants in the cattle-to-beef chain in the following states in the United States, Texas, New Mexico, Colorado, Oklahoma, Kansas. Our cattle are typically sold at seven months of age to stockyards to be fed in grasslands; they remain at such grasslands for another four to

of age to stockyards to be fed in grasslands; they remain at such grasslands for another four to five months, and then are transferred to feedlots to be fed with grains for an extra six to seven months. When they are finished, they are sold to packing plants for processing.

4. When mandatory country-of-origin labeling (COOL) went into effect in 2009 the US-export brokers, the American stockyards, feedlots and packing plants, began discounting our cattle because of COOL-compliance costs associated with handling Mexican born cattle; in addition, some packers elected to process only one category of cattle, generally cattle born in the United States, to avoid segregating mixed-origin cattle from cattle born in the United States. In other cases, stockyards and feedlots had to segregate cattle based on origin, imposing added costs throughout the supply chain. Those discounts, still present nowadays, range from $25-40 per head, depending on market conditions.

5. Based on my experience with the 2009 version of the COOL rule, I expect that the new COOL regulations will make the discounts even greater, likely between $80-100 per head, or will cause the Mexican cattle to simply no longer be accepted in the United States. The discounts will be larger because any stockyards and feedlots that handle Mexican born cattle will need to engage in additional segregation costs because the new rule prohibits commingling. Whereas before, depending on feedlot's customer needs there could be commingling, now animals born in Mexico will have to be separated from cattle born in the United States throughout the entire raising-to-slaughtering process, and they will also have to be segregated from animals born in Canada if they are also at a stockyard or feedlot.

6. Further, even if penalized with greater discounts, Mexican-born cattle will no longer be accepted in the United States, as stockyards and feedlots will not be willing to purchase cattle of Mexican origin, either because they do not wish to incur the additional costs of

segregation, or because their customers elect no longer to accept cattle other than those born and raised in the United States. Because the packer, and the packer's retail customer, also cannot commingle, more packers and retailers will elect not to accept more than one type of cattle. Due to the new rule, retailers will not be willing to inform more than one origin in their mandated "born, raised and slaughtered in place" beef labels.

7. As a result of the COOL rule published in May 2013, we are already experiencing difficulty in selling cattle to stockyards and feedlots in the United States, as the cattle will not be ready for slaughter until the middle part of 2014.

8. The new COOL rule is directly and immediately harming our business, as well as the American stockyards, feedlots and packers that rely in our cattle for optimum operation numbers. American stockyards and feedlots are refusing to purchase Mexican-origin cattle or demanding steep discounts, while others are purchasing fewer cattle from us than they did previously. None of these losses can be recovered or remedied if the new rule is found to be unlawful.

9. In addition, as cattle inventory in the United States is at its lowest numbers for the last 50 years, the new COOL rule threatens to drive some of our smaller stockyards and feedlot customers out of business, irreparably harming the market for our cattle in the United States.

10. The losses we are incurring, and will continue to incur, under the May 2013 COOL rule are immediate, substantial and irreparable.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 15, 2013 By: Rafael Perea