ORAL ARGUMENT NOT YET SCHEDULED
No. 13-5281

IN THE
United States Court of Appeals for the District of Columbia Circuit

AMERICAN MEAT INSTITUTE, *ET AL.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, *ET AL.*,

Defendants-Appellees,

and

UNITED STATES CATTLEMEN'S ASSOCIATION, *ET AL.*,

Intervenor-Defendants-Appellees.

On Appeal from the
United States District Court for the District of Columbia
Case No. 1:13-cv-1033 (Hon. Ketanji Brown Jackson)

OPENING BRIEF FOR APPELLANTS

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September 23, 2013

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1(a)(1), the undersigned counsel for Appellants in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

(A) Parties and Amici.

Plaintiffs in the court below and Appellants in this Court are the American Meat Institute, American Association of Meat Processors, Canadian Cattlemen's Association, Canadian Pork Council, Confederación Nacional de Organizaciónes Ganaderas, National Cattlemen's Beef Association, National Pork Producers Council, North American Meat Association, and Southwest Meat Association.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel further submits that:

- American Meat Institute (AMI) is a trade association representing packers, processors, and suppliers that process 95 percent of the red meat in the United States. AMI has no parent company and no publicly owned corporation owns 10% or more of its stock.

- American Association of Meat Processors (AAMP) is a trade association representing small and mid-sized meat, poultry, and seafood processors located in the United States, Canada, and other countries. AAMP has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Canadian Cattlemen's Association (CCA) is a federation of eight provincial beef industry associations representing Canadian beef producers. CCA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Canadian Pork Council (CPC) is a federation of nine provincial pork industry associations representing Canadian hog producers. CPC has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Confederación Nacional de Organizaciones Ganaderas (CNOG) is a confederation of 46 regional cattle unions representing Mexican beef producers. CNOG has no parent company and no publicly owned corporation owns 10% or more of its stock.

- National Cattlemen's Beef Association (NCBA) is a trade association representing cattle producers and feedyards in the United States. NCBA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- National Pork Producers Council (NPPC) is a trade association representing pork producers in the United States. NPPC has no parent company and no publicly owned corporation owns 10% or more of its stock.

- North American Meat Association (NAMA) is a trade association representing small, medium, and large-sized meat-industry companies in the

United States, Canada, and Mexico. NAMA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Southwest Meat Association (SMA) is a trade association primarily representing small and medium-sized meat packers, processors, suppliers and producers in the Southwestern United States. SMA has no parent company and no publicly owned corporation owns 10% or more of its stock.

Defendants in the court below and Appellees in this Court are the United States Department of Agriculture, Agricultural Marketing Service, Tom Vilsack in his official capacity as Secretary of the United States Department of Agriculture, and Anne L. Alonzo in her official capacity as Administrator of the Agricultural Marketing Service.

Intervenor-Defendants in the court below and Appellees in this Court are the United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America.

(B) Rulings Under Review. Appellants seek review of the District Court's Order of September 11, 2013 (Docket 49), denying Plaintiffs' Motion for a Preliminary Injunction, which was accompanied by a Memorandum Opinion (Docket 48) issued the same day. The Order is reproduced in the Joint Appendix (JA) at JA1219, and the Memorandum Opinion is reproduced at JA1139-JA1218. The ruling under review pertains to the Final Rule *Mandatory Country of Origin*

Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367 (May 24, 2013), which is reproduced at JA508-JA527.

(C) Related Cases. The case on review has not been previously before this Court or any other court. To the best of counsel's knowledge, no other related cases currently are pending in this Court or in any other federal court of appeals, nor in any other court in the District of Columbia.

/s/ Catherine E. Stetson
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Counsel for Appellants

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GLOSSARY

AMS: Agricultural Marketing Service

COOL: Country of origin labeling

FSIS: Food Safety and Inspection Service

TBT: Agreement on Technical Barriers to Trade

WTO: World Trade Organization

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OPENING BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from the District Court's September 11, 2013 Order denying Appellants' motion for a preliminary injunction enjoining Appellees from implementing and enforcing the Final Rule published at 78 Fed. Reg. 31,367 (May 24, 2013) (Final Rule). Appellants filed a timely notice of appeal on September 12, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

INTRODUCTION

This is a case about meat, the First Amendment, and the limits of an agency's statutory authority to impose vast operational changes on a major North American food industry. Beginning on November 24, 2013, at the direction of Appellee Agricultural Marketing Service (AMS), muscle cuts of meat sold at the grocery store must be labeled with the country where the source animal was "born," and the country where it was "raised," and the country where it was "slaughtered."

It was not ever thus: Before the new regulations, a package containing pork chops from U.S. hogs could simply read "Product of the USA." Now that same package must be labeled "Born, Raised, and Slaughtered in the USA." And the labels are even lengthier in parts of the country that rely on meat from imported livestock. In Seattle, for example, a pack of steaks might be labeled "Born and Raised in Canada, Slaughtered in the United States." And in Texas, a tray of T-bones might be labeled "Born in Mexico, Raised and Slaughtered in the United States." In service of these detailed new labeling requirements, AMS also imposed a radical new production rule: where previously meat producers could (and regularly did) "commingle" livestock raised in, say, Canada with those raised in the United States, AMS prohibited that concededly safe practice in order to further its new production-step labeling regime.

Appellants reasonably asked AMS during the rulemaking proceeding what governmental interest these new detailed labels serve. AMS responded with the agency equivalent of a shrug, citing only its statutory authority to promulgate regulations. *See* JA512. That non-response should have made this an easy case for the District Court. After all, AMS did not even try to *justify* compelling the speech it has compelled.

Until Appellants filed this suit. And then AMS came up with a reason. Now, AMS proclaims, the governmental interest in requiring this new commercial speech "is to correct misleading speech and prevent consumer deception." JA999. The "deception" being "prevent[ed]"? The "irregularities" apparently contained within the "Product Of" designations that AMS itself mandated, and which have appeared on meat labels since 2009. JA1000. Even putting aside the absurdity of a government agency referring to itself as an agent of "deception," the District Court should have rejected AMS's belated declaration because it was a plainly impermissible post hoc rationalization. Yet the District Court accepted it anyway.

That original APA sin in turn led to error upon error. Rather than apply heightened scrutiny to the disclosures compelled by the Final Rule, *see RJ Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (*RJR*), the District Court applied a less rigorous standard that is relevant only when a compelled disclosure is intended to prevent consumers from being misled by deceptive

advertising. *See Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1986); *Spirit Airlines, Inc.* v. *DOT*, 687 F.3d 403, 412 (D.C. Cir. 2012). But this Court has made it very clear that this more accommodating standard applies only when correcting deception is the purpose of the compelled disclosure *and* there is a real risk of consumer deception absent that disclosure. Further still, this standard applies when the compelled disclosures are designed to "make *voluntary* advertisements nonmisleading for consumers." *United States* v. *United Foods, Inc.* 533 U.S. 405, 416 (2001) (emphasis added). There is no such misleading—or voluntary—advertisement here; *AMS* is the source of the alleged "deception." No court has ever before applied lesser scrutiny for compelled speech in such circumstances.

The District Court further erred by concluding that AMS had the statutory authority to promulgate the Final Rule in the first place. To begin with, the labeling requirement itself directly violated the plain language of the authorizing statute, particularly with respect to the designation of so-called "Category B" and "Category C" meats. For another thing, AMS—the Agricultural *Marketing* Service—is authorized only to promulgate *labeling* regulations, and has no authority over meat production practices. AMS thus exceeded its limited statutory mandate when it banned commingling of livestock born or raised in different

countries. Yet the District Court rejected all of these contentions, bringing us to this pass.

In this appeal, Appellants challenge the District Court's denial of their motion for a preliminary injunction. Appellants' members are being irreparably injured, right now. They will be injured to an even greater extent once AMS begins enforcing the Final Rule on November 24, 2013. Some may even face enforcement penalties of $1,000 per violating product. This Final Rule should never have issued. Now it should be enjoined.

ISSUE PRESENTED FOR REVIEW

Whether the District Court committed legal error, and thus abused its discretion, when it denied Appellants' Motion for a Preliminary Injunction.

PERTINENT STATUTES

The pertinent statutes are reprinted in the Addendum to this Brief.

STATEMENT OF THE CASE AND THE FACTS

I. BACKGROUND

A. North American Trade in Livestock.

Processors and packers in the United States rely on access to cattle and hogs produced in Canada and Mexico to provide U.S. consumers with a year-round supply of meat that is safe, nutritious, and affordable.

Livestock is a commodity unique in its sensitivity to environmental and economic conditions, such that highly integrated trading relationships have

developed around seasonal and regional fluctuations in supply and demand. In the beef industry, for example, processors and packers in the Northwestern United States have consistent (and in some seasons acute) demand for Canadian cattle; while there are limited regional herds in the Northwest, the larger Midwestern herds are on the other side of the Rocky Mountains. *See* JA555-JA561; JA1022. Businesses in the Southwestern United States turn to imported Mexican cattle because historic drought conditions have sharply reduced the size of regional herds there. *See* JA127-JA130; JA535; JA564; JA569; JA572-JA576. The pork industry relies on imports, mostly from Canada, for similar reasons. *See* JA123-JA124, JA552-553.[1]

The United States is also a critical export market for Canadian and Mexican ranchers. Canadian ranchers typically export cattle that have been born and raised ("fed") on that country's prairies for one year or more. JA577-JA578. Mexican ranchers, by contrast, typically export young ("feeder") cattle to the United States because they cannot be sustained cost-effectively on the land in Mexico. *See* JA534; JA1033-JA1035. These animals are raised for months—or even years—in the United States before they are ready for slaughter. *Id.*; JA130.

In 2012, the United States imported over 2.25 million of head of cattle and 5.5 million hogs. JA129; JA37. Regardless of their country of origin, the health

[1] For diagrams showing the segments of the beef and pork industries, see JA82 and JA92, respectively.

and safety regulations administered by the United States Department of Agriculture (USDA), through its Food Safety and Inspection Service (FSIS), treat all animals the same. That is, *all* animals processed at federally inspected plants, whether originating from Canada, Mexico, or the United States, are subject to the same health and safety standards. *See* Federal Meat Inspection Act, 7 U.S.C. §§ 601 *et seq.*; Poultry Products Inspection Act, 7 U.S.C. §§ 451 *et seq*.

Nothing in any of the applicable USDA rules or regulations prohibits retailers from disclosing as much as they want about the meat production chain to consumers. That means if retailers believe their customers value knowing that the meat they are eating comes from born-and-bred United States animals, retailers can provide that information and capture that value.

B. Country of Origin Labeling Legislation.

Retailers have always had the ability to designate U.S.-origin meat voluntarily. But in 2002, Congress decided to make that designation a mandatory requirement. That year it amended the Agricultural Marketing Act of 1946 (AMA) to require retailers of covered meat products to inform consumers of the product's "country of origin." Pub. L. No. 107-171 § 282, 116 Stat. 134, 533 (2002) (JA153-JA157). The primary aim of this legislation was to limit "United States" country of origin designations to meat from animals that were exclusively born, raised, and

slaughtered in the United States. JA156. The statute charged AMS with promulgating regulations accordingly. JA157.

AMS did so in 2003. But its proposed implementing regulations went much further than the statute. AMS's proposed rule would have required that all meat labels affirmatively identify the country where the source animal was *born*, the country where it was *raised*, *and* the country where it was *slaughtered*. 68 Fed. Reg. 61,944, 61,983 (Oct. 20, 2003), JA198. That proposed rule never made it to a final printing: In its wake, Congress suspended implementation of the statute it had just passed two years before. Pub. L. No. 108-199 § 749, 118 Stat. 3, 37 (2004).

Congress returned to country of origin labeling in 2008, when it approved certain amendments as part of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). Pub. L. No. 110-234 § 11002, 122 Stat. 923, 1351 (2008). This time, rather than leave it to AMS, Congress defined the term "country of origin" for each conceivable category of meat. *See* 7 U.S.C. § 1638a(2). *See also* JA141-142.

As relevant here, the statute provides:

> **(A) United States country of origin.** A retailer * * * may designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was * * * exclusively born, raised, and slaughtered in the United States;

> **(B) Multiple countries of origin.** A retailer of a covered commodity that is * * * derived from an animal that [was] * * * not exclusively born, raised, *and* slaughtered in the United States [but was] born, raised, *or*, slaughtered in the United States, and [was] not imported * * * for immediate slaughter, may designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered;
>
> **(C) Imported for immediate slaughter**. A retailer of a covered commodity * * * that is derived from an animal that [was] imported into the United States for immediate slaughter shall designate the origin * * * as * * * the country from which the animal was imported[,] and * * * the United States;
>
> **(D) Foreign country of origin**. A retailer of a covered commodity that is * * * derived from animal that is not born, raised, or slaughtered in the United States shall designate a country other than the United States as the country of origin * * * . [7 U.S.C. § 1638a(2)(A)-(D) (emphasis added).]

Meat labeled in accordance with these provisions is called "Category A meat," "Category B meat," and so on, as applicable.

The four categories above correspond only to muscle cuts sold at retail, namely, the steaks, pork loins, chicken breasts, and lamb chops stocked in supermarket meat cases. Congress exempted food-service establishments from the country of origin requirements, and it exempted processed-food items sold at retail as well—such as bacon, jerky, or pre-marinated meats. *Id.* §§ 1638(2)(B), 1638a(b). Ground meats are treated separately; they can be labeled with "a list of all countries of origin" or "all reasonably possible countries of origin." *Id.* § 1638a(a)(2)(E).

These country of origin labeling requirements are backed by recordkeeping and verification requirements. *See id.* § 1638a(d). The statute authorizes USDA to take enforcement measures against any meat-industry participant who fails to comply with these requirements, with potential civil penalties of $1,000 per violation. *Id.* § 1638b.

C. The 2009 Rule.

In a 2009 final rule, AMS approved regulations implementing the 2008 statute. *See* 74 Fed. Reg. 2658 (Jan. 15, 2009) (2009 Rule), JA222. AMS adopted a labeling system using a "Product of ___" scheme, such as "Product of the United States" (for Category A meat) and "Product of the United States and X" (for Category B meat). JA251. *See infra* at 13 (table of permissible labels).

The 2009 Rule also provided guidance for the labeling of meat products that resulted from "commingling," which occurs when (i) a processor processes meat from animals with different countries of origin in a single production day, or (ii) a retailer offers meat products with different countries of origin in the same retail case. JA215. As AMS recognized, "[c]ommingling like products is a commercially viable practice that has been historically utilized." *Id.* AMS's guidance for designating commingled products on labels was thus intended to afford regulated entities the "needed flexibility" "to operate in a manner that does not disrupt the normal conduct of business." *Id.*

Under the 2009 Rule, retailers would designate the country of origin for commingled products as all possible countries of origin. *Id.* For example, when "Product of the United States" meat was commingled with "Product of United States and X" meat, the signage for the resulting product would say "Product of United States and X."

D. The World Trade Organization Dispute.

After AMS published the 2009 Rule, Canada and Mexico filed a complaint with the Dispute Settlement Body of the World Trade Organization (WTO) alleging that both the 2009 Rule and the applicable provisions of the 2008 Farm Bill—jointly referred to as "the COOL measure"—violated the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and other international obligations.

A WTO panel found that the COOL measure impermissibly discriminated against imported livestock, and the WTO Appellate Body affirmed that finding. *See* JA253-JA507. The Appellate Body concluded that the COOL measure contravened the TBT Agreement because the recordkeeping and verification requirements necessary to process imported livestock created an "incentive in favour of processing exclusively domestic livestock" that did not arise "exclusively from a legitimate regulatory distinction." JA400, JA425-JA426. The Appellate Body specifically found problematic that under the COOL measure "information

regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers * * *, even though a considerable proportion of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements" because it falls into the food-service or processed-food exemptions. JA423-JA424. Thus both the limited information conveyed—as well as "the exemptions therefrom"—were "of central importance" to the ruling. JA425.

The Dispute Settlement Body adopted the Appellate Body's ruling on July 23, 2012. Subsequently, a WTO arbitrator gave the United States until May 23, 2013 to bring the COOL measure into compliance. JA1060, JA1063.

E. The 2013 Rule.

AMS cut it close. On March 12, 2013, AMS issued a Proposed Rule introducing a new regime of mandatory labeling and production practices. *See* 78 Fed. Reg. 15,654. The Proposed Rule required retailers to designate, separately, the country where the source animal was "born," the country where it was "raised," and the country where it was "slaughtered." *Id.* at 15,646. Thus, the meat from feeder cattle imported from Mexico will be designated "Born in Mexico, Raised and Slaughtered in the United States," whereas meat from "fed" cattle imported from Canada for immediate slaughter will be designated "Born and Raised in Canada, Slaughtered in the United States." The only exception is for meat with a

"foreign country of origin" under "Category D," which will continue to be labeled "Product of X." *Id.* at 15,647.

In order to facilitate this new, highly detailed labeling requirement, AMS ventured upstream: it banned commingling. *Id.* at 15,646. That ban requires retailers and their suppliers to segregate meats according to their respective "Born, Raised, and Slaughtered" designations. JA34-35; JA139.

The changes from the Final Rule can be summarized as follows:

Category	2009 Label	2013 Label
A (U.S.)	Product of the United States	Born, Raised, and Slaughtered in the United States
B (Multiple)	Product of the United States and X; or, Product of the United States, X, and Y	Born in X, Raised and Slaughtered in the United States; or, Born in X, Raised in Y, Slaughtered in the United States.
C (Imm. Slaughter)	Product of X and the United States	Born and Raised in X, Slaughtered in the United States
D (Foreign)	Product of X	Product of X
Commingled (A) + (B)	Product of the United States and X	Prohibited
Commingled (B) + (C)	Product of the United States and X; or Product of X and the United States	Prohibited

On May 23, 2013, without a moment to spare, AMS issued its Final Rule, which did not differ in any relevant particular from the Proposed Rule. *See* JA509.[2] AMS made the new requirements effective immediately, supposedly to further "the public interest." *Id*. Nevertheless, AMS announced that for the first six months it would "allocat[e] [its] resources" to "industry education and outreach." *Id*. This "outreach" period expires on November 23 of this year.

II. PROCEDURAL BACKGROUND

Appellants are trade associations that represent every segment of the meat industry. They represent livestock producers in the United States, Canada, and Mexico. They represent feedlots who play a vital intermediary role. And they represent packers and processors who source animals from all over North America to satisfy this country's high demand for meat. Together, Appellants filed a Complaint in the District Court seeking to set aside the Final Rule on the grounds that it compels speech in violation of the First Amendment, exceeds the authority granted in the AMA, and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

Shortly thereafter, Appellants sought a preliminary injunction, explaining that their members were suffering (and would continue to suffer) irreparable harm

[2] The Final Rule authorizes abbreviations and certain substitutions, such as the use of the word "harvested" instead of "slaughtered." JA511.

if the Final Rule were not enjoined pending judicial review.[3] The District Court held a hearing on Appellants' Motion in late August. It issued a memorandum opinion and order denying the Motion two weeks later. Appellants filed their notice of appeal the next day.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *NRDC*, 555 U.S. 7, 20 (2008). This Court "review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion." *Chaplaincy of Full Gospel Churches* v. *England*, 454 F.3d 290, 297 (D.C. Cir. 2006). "[A]ny legal conclusions upon which the district court relies," however, "including whether Appellants have demonstrated irreparable injury, are reviewed de novo." *Id.*

SUMMARY OF ARGUMENT

Each of the four *Winter* factors favors an injunction in this case.

[3] The day the government's response to the Motion was due, four organizations—United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America—moved to intervene on behalf of AMS. The District Court granted the motion.

Appellants are likely to succeed on the merits of their First Amendment claim. The Final Rule compels speech that does not advance a substantial governmental interest and is more extensive than necessary to serve any government interest. *See RJR*, 696 F.3d at 1217. The District Court erred in reviewing—and affirming—the Final Rule under the less rigorous standard set forth in *Zauderer*, 471 U.S. at 651-652. The *Zauderer* standard applies only to disclosure requirements "designed to correct misleading commercial speech." *RJR*, 696 F.3d at 1213. *Zauderer* does not apply when a rule, like the Final Rule, is not so "designed"; the Final Rule never purported to address or correct misleading speech. Nor does *Zauderer* apply when the government amends existing disclosure requirements that have nothing to do with misleading speech. *See RJR*, 696 F.3d at 1214. Even under *Zauderer*, moreover, the Final Rule falls short.

Appellants also are likely to succeed on the merits of their claim that the Final Rule violates the AMA because AMS exceeded its statutory authority when it (i) purported to ban the practice of commingling and (ii) promulgated labeling rules that contradict the statutory scheme. The labeling statute does not authorize AMS to regulate production practices. Nor does it give AMS authority to require retailers to designate on their labels each country where the animal was "born," "raised," and "slaughtered." The legal holding on which the District Court

premised its approval of the Final Rule—that AMS's regulations are permissible because Congress did not specifically *prohibit* them—is precisely the opposite of what the law actually is. *See Railway Labor Executives' Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (*RLEA*). The Final Rule, in any event, constitutes a patently unreasonable construction of the statute.

Appellants' members also are irreparably injured in the absence of a preliminary injunction. They are harmed, as a matter of law, because the Final Rule violates their First Amendment rights. *Elrod* v. *Burns*, 427 U.S. 347 (1976). The Final Rule also causes devastating harm to their businesses, and that harm is irreparable. Appellants' members at each stage of the production chain are already suffering and will continue to suffer losses for which no redress is available, even in the event of a favorable ruling on the merits.

Finally, the remaining *Winter* factors favor an injunction. The harm to Appellants' members exceeds any potential harm to the government while this case is litigated on the merits, and there is no public interest in the enforcement of an unconstitutional, irrational regulation that is conceded to have no connection whatsoever to public health or safety. The Final Rule should be enjoined.

ARGUMENT

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Final Rule Violates the First Amendment.

The Final Rule compels Appellants' members to speak. It mandates that labels for covered muscle cuts of meat separately state the country where the animal was "born," the country where it was "raised," and the country where it was "slaughtered." JA510-JA511. And this information must be conveyed from supplier to purchaser, at each step from ranch to retailer. 7 U.S.C. § 1638a(d).

"It is, however, a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (internal quotation marks omitted). And in the field of commercial speech, a law compelling speech is consistent with the First Amendment only when it advances a substantial governmental interest to a material degree and is no more extensive than necessary. *See RJR*, 696 F.3d at 1217. Because the Final Rule does not come close to meeting that high bar, it is unconstitutional.

1. The Final Rule is Subject to Heightened Scrutiny.

Compelled commercial disclosures are subject to heightened scrutiny under the standard established in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). *See RJR*, 696 F.3d at 1217. There is only

one exception to this rule, and it is a narrow one: compelled disclosures of fact that are "directed at misleading commercial speech" survive First Amendment scrutiny if they are "reasonably related to the [government's] interest in preventing deception of consumers." *Spirit Airlines*, 687 F.3d at 412 (internal quotation marks and citations omitted).

This narrow exception derives from *Zauderer*, 471 U.S. 626, and from *Milavetz, Gallop, & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), two decisions in which the Supreme Court upheld disclosure requirements designed specifically to cure potentially misleading advertisements in the professional services fields. *See Zauderer*, 471 U.S. at 651-653 (attorney may be required to include a disclaimer in advertisements that "contingent-fee" services are not free of cost); *Milavetz*, 559 U.S. at 253 ("debt-relief" companies may be required to disclose in advertisements that services might include filing for bankruptcy). *See also, e.g.*, *Spirit Airlines*, 687 F.3d at 413 (upholding requirement that airfare advertisements prominently disclose total cost where excluding taxes and fees was deemed misleading).

With respect to the applicability of the *Zauderer* standard, this Court has been unequivocal: *Zauderer* applies to laws "designed to correct misleading commercial speech." *RJR*, 696 F.3d at 1213. It does *not* apply to laws that are *not* so "designed." *See id.* *Accord Nat'l Ass'n of Mfrs.* v. *NLRB*, 717 F.3d 947, 959

n.18 (D.C. Cir. 2013). And affirmance for "reasonableness" under *Zauderer* is "only appropriate if the government shows that, absent a warning, there is a self-evident—or at least potentially real—danger that an advertisement will mislead consumers." *Id.* at 1214 (internal quotation marks and citation omitted).

The District Court's decision to affirm the Final Rule under *Zauderer* was error twice over. First, in order to invoke *Zauderer*, the Court read an anti-deception rationale into the Final Rule that AMS had not articulated in it, thereby violating the cardinal principle that "a reviewing court * * * must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Second, the District Court applied *Zauderer* when by its terms that decision addresses disclosure requirements intended to correct misleading *voluntary* commercial messages.

a. The Final Rule Does Not Articulate an Anti-Deception Rationale.

This Court has explained that the *Zauderer* standard applies to laws "designed to correct misleading commercial speech." *RJR*, 696 F.3d at 1213. *Compare, e.g.*, *Milavetz*, 559 U.S. at 253 (disclosure was "directed at" potential misleading use of term "debt-relief"); *Spirit Airlines*, 687 F.3d at 412 (fare-advertising rule "target[ed]" misleading advertising of fare prior to taxes and fees) The Final Rule is not so "designed," *RJR*, 696 F.3d at 1215, and 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." *Federal Power Comm'n* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974) (internal quotation marks and citation omitted). It was error for the District Court to apply *Zauderer* on the basis of a rationale contrived for litigation, but found nowhere in the Final Rule.

In the Final Rule, AMS explained that it initiated the rulemaking process in response to the WTO Ruling. It did not explain why, or how, that process led it to adopt a "Born, Raised, and Slaughtered" labeling requirement. In fact, AMS was conspicuously agnostic about the value of "Born, Raised, and Slaughtered" labels to consumers. In the "Statement of Need," for example, AMS admitted that there "does not appear to be a compelling market failure argument" to support the need for government-mandated labeling. JA519. And it went further: "evidence suggests market mechanisms could ensure that the optimal level of country of origin information would be provided to the degree valued by consumers." *Id.* (The Statement of Need was thus, and curiously, a statement of *no* need.)

Then, in its "Analysis of Benefits and Costs," AMS came up with only this as a putative benefit: "certain U.S. consumers value the designation of the countries of birth, raising and slaughter on meat product labels" and may "base their purchasing decisions" on this information. *Id.* But AMS offered no further detail. It instead rested on the armchair hypothesis that "information on the production steps in each country may embody latent (hidden or unobservable)

attributes, which may be important to individual consumers." *Id*. AMS did not validate the "interest" of those "certain U.S. consumers," nor did it appear to agree that production-step information actually conveys relevant "attributes" that consumers *should* find "important," nor did it identify what exactly those "attributes" were, nor did it articulate an independent, let alone substantial, government interest in advancing them. After all, AMS has repeatedly stated that country of origin information has nothing to do with health or safety. JA224.[4]

AMS's failure to provide a rationale supporting its new compelled-speech regime was not an oversight. It was aware of its obligation. After AMS issued its Proposed Rule, commenters objected that the Proposed Rule posed significant First Amendment issues. *See, e.g.*, JA53. In the Final Rule, AMS responded only that it "disagree[d]," and that "[it] believes that the [COOL statute] provides the authority to amend the COOL regulations to require the labeling of specific production steps." JA512. This was a non-answer to the critical question the commenters raised. The authority to regulate in a particular way is not a justification for compelling speech.

[4] *See also, e.g.*, FSIS, Country of Origin Labeling for Meat and Chicken, http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/country-of-origin-labeling-for-meat-and-chicken/country-of-origin-labeling-for-meat-and-chicken (last visited Sept. 20, 2013).

What AMS did *not* say is as important as what little it did say. The Final Rule does not say, or reflect, that AMS "directed," "designed," or "framed" the new labeling requirement to "counteract specific deceptive claims." *RJR*, 696 F.3d at 1213, 1213, 1215. AMS never invoked the notion that its old regulations led to consumer "deception," or "misled" any consumer; with respect to consumer interest, all AMS said is that the comments on the proposed rule had "demonstrate[d] that there is interest by certain U.S. consumers in information disclosing the countries of birth, raising, and slaughter." JA518. *See also* JA513 (similar).

Because "*Zauderer*'s holding is limited to cases in which disclosure requirements are 'reasonably related to the [government's] interest in preventing deception of consumers,' " *RJR*, 696 F.3d at 1214, and the government demonstrated no such "interest in preventing deception of consumers," *Zauderer*'s standard was simply not in play. To be sure, the Final Rule twice states the new labels will "more accurately reflect" country of origin. *See* JA517 (cols. 1 and 2). But the Final Rule nowhere suggests the prior labels were *inaccurate*. All AMS can be saying in these two instances—which appear in its response to industry comments about cost burdens and not in a discussion of the rule's purpose—is exactly what AMS said in the summary and in two dozen other places in the Final

Rule: that the labels provide information that is "more specific." JA509.[5] The agency's response to commenters' First Amendment objections thus says it all: AMS (ostensibly) has the authority to require the disclosure of "specific" production steps, therefore, the regulation satisfies the First Amendment: QED.

The agency's *ipse dixit* demonstrates nothing. And what AMS did or did not say in the Final Rule matters. "[T]he law does not allow [a court] to affirm an agency decision on a ground other than that relied upon by the agency." *Manin* v. *NTSB*, 627 F.3d 1239, 1243 (D.C. Cir. 2011). And *Zauderer* applies only to measures that are "*designed to* counteract specific deceptive claims." *RJR*, 696 F.3d at 1215 (emphasis added). Accordingly, in *RJR*, this Court applied *Central Hudson*, not *Zauderer*, to FDA's graphic-warning requirement for cigarette packages because the only interest FDA had "explicitly asserted" in its rule was its interest in dissuading consumers from smoking; the agency had not "fram[ed] th[e] rule as a remedial measure." *Id.* at 1218, 1215. In AMS's Final Rule, the only interest "explicitly asserted" is the interest of "certain U.S. consumers." JA519. Accordingly, that was the interest on which the District Court should have conducted its analysis of the Final Rule, and that analysis should have proceeded under *Central Hudson*.

[5] *See also* JA510, JA511 (3 times), JA512, JA513 (2x), JA514, JA516 (2x), JA518 (2x), JA519 (4x), JA522, JA523 (2x), JA526, JA527.

That is not what happened. Seeking refuge in *Zauderer*'s more lenient standard, AMS announced in this litigation, for the first time, that "the governmental interest is to correct misleading speech and prevent consumer deception." JA999. That was a classic "post hoc rationalization" that the District Court "[could] not accept." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). But the court did anyway.

The District Court concluded, first, based on its own "common sense" and "experience," that the labels required by AMS's 2009 Rule created "a likelihood of consumer confusion." JA1154. Then, the Court rooted around in the Final Rule for any verbal crumbs that could indicate AMS might have had the same view, and concluded that that the few it found—statements that the labels will provide "more specific information" and would "more accurately reflect" country of origin—indeed "sufficiently establishe[d]" AMS's intent to prevent consumer deception. JA1154-JA1155.

The District Court's cart-before-the-horse approach is exactly what the APA forbids. Administrative law puts the burden on agencies to explain and justify their actions precisely so that courts do not have to root around for possible rationales, as the District Court did here. *See Chenery*, 332 U.S. at 196-197 ("It will not do for a court to be compelled to guess at the theory underlying the agency's action[.]") And because the District Court commenced its analysis by

articulating its *own* beliefs, not the agency's, it shoehorned the Final Rule within *Zauderer*, even though AMS had not "frame[d] [its] rule as a remedial measure designed to counteract specific deceptive claims." *See RJR*, 696 F.3d at 1215. The District Court's inversion of the APA standard thus led it to cast aside this Court's First Amendment standards as well.

To be clear, nothing in the Final Rule—nothing—suggests that AMS saw itself as correcting prior misleading or untruthful speech. The Final Rule does not contain the words "deception" or "misleading." It mentions consumer confusion only to *refute* a commenter's observation that the new labels will create consumer confusion. *See* JA514. As even the District Court had to acknowledge, "[AMS] may not have used the specific words 'deceive' or 'mislead' when explaining the purpose of the production-step disclosure requirement." JA1154-JA1155.

What the Final Rule *does* say is also flatly inconsistent with an interest in preventing consumer deception. The Final Rule says that "certain" consumers may benefit from the increased level of detail in meat labeling, JA519, but if AMS had actually believed it was curing deceptive food labeling, it surely would have proclaimed that the new labels benefit *all* consumers. And, if AMS had actually believed what it was doing was necessary to prevent potential harm to consumers, it would not have responded to a constitutional attack on the regulation with the meek assertion that "the [AMA] provides the authority" to require "Born, Raised,

and Slaughtered" labels. JA512. To put it plainly, the agency did not adopt an anti-deception rationale despite having ample opportunity to do so.

The District Court misperceived its judicial task under the APA, and that misperception led it, in turn, to violate this Court's guidance in *RJR* about when *Zauderer* properly applies. AMS's litigation-stage decision to recast the Final Rule as a measure to combat deception was a classic "post hoc rationalization" that should have been rejected as "entirely unavailing." *Hearth, Patio, & Barbecue Ass'n* v. *DOE*, 706 F.3d 499, 509 (D.C. Cir. 2013). *See also, e.g.*, *Florida Power & Light Co.* v. *FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996) ("parties are entitled to the agency's analysis of its proposal, not post hoc salvage operations of counsel.").

b. *Zauderer* Does Not Apply To Disclosure Requirements That Merely Revise Prior Disclosure Requirements.

It was also error for the District Court to apply *Zauderer* because *Zauderer* has no relevance when the "deception" alleged stems from the government's own labeling regime.

Zauderer affirmed a decision by the Ohio Supreme Court that upheld a disciplinary ruling against an attorney for engaging in fraudulent advertising. 471 U.S. at 633-635. The attorney had advertised his services on a contingent-fee basis without disclosing that a client would still have to pay certain litigation costs if the suit failed, and the disciplinary board concluded that the advertisements should

have contained such a disclosure. In reviewing this ruling for consistency with the First Amendment, the Supreme Court acknowledged that compelled disclosures "implicate the advertiser's First Amendment rights" and that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment," but it held 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." *Id.* at 651-652.

Since it published *Zauderer* in 1986, the Supreme Court has consistently held that its rule applies when the government compels speech to address the possibility for deception in an advertiser's *voluntary* advertising. Thus, in *United States* v. *United Foods*, the Court declined to apply *Zauderer* to review mandatory assessments under a federal agricultural marketing program because "there [was] no suggestion * * * that the mandatory assessments * * * [were] somehow necessary to make *voluntary* advertisements nonmisleading for consumers." 533 U.S. at 416 (emphasis added). And in *Milavetz*, the Supreme Court explained that an "essential feature[ ]" of the rule upheld in *Zauderer* was that it was "intended to combat the problem of inherently misleading *commercial advertisements*." 559 U.S. at 250 (emphasis added). The Supreme Court has never extended *Zauderer*'s reach to a governmental entity's revision of its own requirements.

This Court's *RJR* decision confirms *Zauderer* has no such reach. In *RJR*, this Court held that *Zauderer* was not the appropriate standard for judging the constitutionality of FDA's graphic-warning requirement because it was not targeted at "specific deceptive claims *made by the [plaintiff] Companies*." 696 F.3d at 1215 (emphasis added). The Court specifically rejected the suggestion that *Zauderer* should apply to the disclosures simply because FDA's old labeling requirements *should have* contained them. *See id.* To find a risk of consumer deception on that ground, the Court explained, would be to "blame the industry for playing by the government's rules." *Id.*

The District Court's opinion in this case is the first in this Circuit, and to Appellants' knowledge, the first in history to apply *Zauderer* when the speech alleged to be "misleading" is that mandated by the government itself. Nothing in *Zauderer*, or the subsequent decisions of the Supreme Court and this Court applying *Zauderer*, authorizes the government to shield its own regulatory revisions from heightened scrutiny simply by designating them as measures to prevent consumer deception. Because this Court was explicit in *RJR* that *Zauderer* applies only to requirements "frame[d] * * * to counteract specific deceptive statements made by the [regulated] [c]ompanies," the District Court's decision to apply *Zauderer* to the Final Rule was straightforward legal error.

This Court should take AMS at its word: the new labels are intended to provide "more specific information." JA509, *see also* JA510, JA511, JA512, JA513, JA514, JA516, JA518, JA519, JA522, JA523, JA526, JA527. That is all they do, and because that is all they do, *Zauderer* is inapplicable.

2. The Final Rule Fails Any Standard of First Amendment Scrutiny.

No matter which standard this Court applies—*Central Hudson*, as it should, or *Zauderer*, as the District Court did—the Final Rule fails.

a. The Final Rule Is Invalid Under *Central Hudson*.

Central Hudson requires the government to "affirmatively prove that (1) its asserted interest is substantial, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored." *RJR*, 696 F.3d at 1212 (citing *Central Hudson*, 447 U.S. at 566). The government's burden to "affirmatively prove" these elements is "not light." *Id*. at 1212, 1218. And here that burden is insurmountable for AMS. Indeed, that much has been implicitly confirmed by the agency, which relegated its *Central Hudson* argument to a footnote in its briefing below, *see* JA1003 n.18.

AMS's kitchen-sink *Central Hudson* footnote alleged that "the government has a substantial interest [1] in providing consumers with additional, more accurate information about the origins of their food, and [2] in complying with the WTO

ruling." JA1003 n.18. Neither vague assertion comes close to satisfying the government's burden under *Central Hudson*.

AMS's apparent interest in providing consumers with "additional, more accurate" information is neither sufficiently substantial, nor sufficiently substantiated, to justify compelled speech. Recall that under *Central Hudson* the government must show that the harms it seeks to avoid are "real." *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993). Therefore, AMS's obligation was to "find and present data supporting its claims *prior* to enacting a burden on speech," *RJR*, 696 F.3d at 1221 (emphasis in original). That obligation cannot be satisfied through the incantation of a few magic words in a litigation brief. *See Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (a court "cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden [under *Central Hudson*]"). So while the government may have a substantial interest in "ensuring the accuracy of commercial information in the marketplace," *Spirit Airlines*, 687 F.3d at 415, to prevail under *Central Hudson*, AMS must show that its regulation serves that interest by eliminating a potential threat of "harm." *Edenfield*, 507 U.S. at 771. Providing gratuitous information to sate some consumers' curiosity is not a substantial governmental interest. *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 & n.1 (2d Cir. 1996) (invalidating mandated disclosures

about bovine hormone rBST because state had not taken position on "whether rBST is beneficial or detrimental" and state does not have substantial interest in gratifying "consumer curiosity").[6]

And, even if providing gratuitous informational "benefit" alone were a sufficient interest under *Central Hudson*, the Final Rule still would fail because AMS has not identified any material benefit from "Born, Raised, and Slaughtered" labels. It offers only that providing this information may convey "latent (hidden or unobservable) attributes" that "may" have significance to "individual consumers." JA519. Such "mere speculation" does not suffice. *Edenfield*, 507 U.S. at 770. Furthermore, AMS has not shown that the Final Rule directly advances or has a "reasonable fit" with any purported interest, as *Central Hudson* requires, *see Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 561 (2001). Nor can it, because the agency cannot even describe the alleged consumer interest that the labels "advance" or "fit."

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[6] The government will likely retort that the Second Circuit, after *Amestoy*, has upheld disclosures unrelated to consumer deception. That is true. And in both instances the regulations were addressed to health and safety risks. *See N.Y. State Restaurant Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (calorie disclosures designed to address obesity epidemic); *National Elecs. Mfrs' Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d. Cir. 2001) (disclosures on mercury-containing products that served"[state's] interest in protecting human health and the environment"). Neither health nor safety is implicated in country of origin labeling. *See* JA215 & *supra* n.4.

The second interest AMS's footnote identified is "fulfilling [the government's] international trade obligations." JA1003 n.18. By this AMS appears to suggest that the mere existence of a treaty gives it license to ignore the First Amendment. Not so. "[I]t is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos* v. *Barry*, 485 U.S. 312, 324 (1988) (internal quotation marks and citation omitted).

And even if complying with a WTO ruling *interpreting* a trade treaty is a substantial governmental interest—a proposition for which AMS has cited no legal authority at all—the *Central Hudson* analysis still comes down against the Final Rule on the direct-advancement and tailoring requirements. The WTO did not mandate "Born, Raised, and Slaughtered" labels. It issued a recommendation and ruling to the United States to bring itself into compliance with its obligations. The WTO did not advise the United States how to achieve compliance. And, as Canada has since explained, the "Born, Raised, and Slaughtered" labels are in fact "diametrically opposed to what is necessary to bring the United States into compliance" with those obligations. JA1056.[7]

[7] The first objective of the WTO's dispute settlement mechanism is the withdrawal—*not* the mere modification—of measures, like COOL, found to be inconsistent with WTO agreements. *See* Dispute Settlement Understanding, art. 3.7, *at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Such a result here could be achieved only by statutory amendment.

Moreover, the WTO made clear that a "central" problem with the COOL program as a whole was that it contained broad exemptions for restaurant food and processed food. *See* JA424-JA425. Because these two exemptions appear in the statute itself, *see* 7 U.S.C. § 1638(2)(B); § 1638a(b), AMS could never on its own bring the Final Rule into compliance with the WTO Ruling. The Final Rule therefore cannot be said either to directly advance the government's interest in complying with the WTO Ruling or to be sufficiently tailored to that interest. *See, e.g.*, *Boos*, 485 U.S. at 329 (invalidating ban on displays outside embassies because even if furthering diplomatic "dignity" under Vienna Convention were compelling interest, ban was unnecessary to satisfy treaty and law was not tailored).

No matter which interest AMS chooses to invoke in its *Central Hudson* defense (if it pursues such a defense at all), AMS cannot meet its burden.

b. The Final Rule Also Fails Under *Zauderer*.

We already have explained why the District Court erred in applying *Zauderer* to the Final Rule. But even if there were some justification for applying that more accommodating standard, *Zauderer* is not an automatic win for the government. It still requires scrutiny of the Final Rule to ensure it is "reasonably related to [the government's] interest in preventing deception of consumers." *Spirit Airlines*, 687 F.3d at 412. To satisfy this standard, AMS must show that without "Born, Raised, and Slaughtered" labels that risk of deception is "self-

evident" or "at least potentially real." *RJR*, 696 F.3d at 1214 (internal quotation marks omitted). It cannot.

There is no self-evident risk of deception associated with the "Product Of" labels required by the 2009 Rule. This regime has been in place for several years. If the risk of deception from this system were truly "self-evident," AMS would not have adopted it in the first place—or would have retracted it sooner. After all, this court must presume that the agency acts rationally, even if, as this case demonstrates, it sometimes does not.

Because the 2009 labels are not self-evidently deceptive, AMS would then have the burden of demonstrating under *Zauderer* "at least [a] 'potentially real' [ ] danger that [labels] will mislead consumers." *RJR*, 696 F.3d at 1214. AMS has not made this required showing either. The Final Rule does not even allude to deception. Nor has AMS pointed to anything showing such a risk to be even "potentially real."

There is one scenario—just one—in which AMS has claimed (again, in its litigation brief) that the labels under the 2009 Rule are inaccurate. The District Court described that scenario with the following example:

> [I]f ninety-nine cows that were born, raised, and slaughtered in the U.S. were commingled with one cow that was born in Mexico and raised and slaughtered in the U.S., all resulting muscle cuts would be labeled 'Product of the United States and Mexico." [JA1153 (citing JA1000).]

In other words, beef from an animal that had spent its entire life in the United States could end up being designated "Product of the United States and Mexico."

It is not self-evident, however, or even reasonable to believe that consumers would find such a designation to be deceptive or misleading. When confronted with a supermarket shelf labeled "Product of U.S. and Mexico" and holding numerous packages of steaks, a consumer might reasonably infer that some of the steaks might be of "Mexican" origin and some might not. And in 2009 AMS specifically rejected the claim that that this type of signage would be misleading. *See* JA217. In fact, the agency continues to permit mixed-origin labeling for bulk bins of fruits and vegetables. *See* 7 C.F.R. § 65.400(d). AMS has not suggested that these other allowances for labeling flexibility lead to consumer deception.

Nor is there any particular risk arising from the *processor's* commingling of different-origin animals during the production day. After all, Congress has decided that ground meats may be labeled with a list of "all reasonably possible countries of origin," 7 U.S.C. § 1638a(a)(2)(E). AMS continues to implement that guidance. *See* 7 C.F.R. § 65.300(h). That means a package of hamburger that says "Product of U.S. and Mexico" might in fact be of exclusively U.S. origin. Yet, this is exactly the type of labeling AMS now appears—in its litigation brief—to characterize as misleading in the context of muscle cuts. Because all-reasonably-possible-countries labeling flexibility for ground beef and other commodities

continues to be the norm, AMS's suggestion that this type of labeling is misleading simply cannot be countenanced.

AMS's District Court brief also suggested one other "discrepancy" potentially arising under the 2009 labeling regime, but it, too, does not present any self-evident or substantiated risk of deception. Here it is: "When commingling Category B and C cows on the same production day, * * * the resulting meat could be labeled either B or C[.]" JA1000. That is, under the 2009 Rule, if ninety-nine animals whose meat would otherwise be labeled "Product of U.S. and Canada" (Category B) were commingled with one animal whose meat would otherwise be labeled "Product of Canada and U.S." (Category C), a retailer could label all of the resulting muscle cuts under one label or the other. This, however, is not an example of inaccuracy; the correct countries of origin (the United States and Canada) would still be listed on the label.

AMS's suggestion that labels for commingled meats were misleading under the 2009 Rule also is at loggerheads with its finding that the market is likely to provide the level of detail about country of origin that consumers actually value. *See* JA519. That finding means that if consumers find the "Product of U.S. and Mexico" or "Product of U.S. and Canada" labels described above to be insufficiently precise, retailers will respond with the level of detail that matters to their customers. The evidence, however, shows that most consumers do not care

about country of origin labeling for muscle cuts; indeed, less than one-quarter of consumer respondents in an academic survey were even aware of the labels. *See* JA113. And for those few consumers—i.e., those "individual consumers" for whom country of origin labels convey information about important (but unidentified) "attributes," JA519—there are other options: A consumer eager to avoid even the *chance* of consuming meat tied to Mexico or Canada (and AMS has never suggested that there is a legitimate basis for such a preference) could simply take her dollars elsewhere and buy meat designated "Product of the USA."

Because the alleged "irregularities" arising from commingling do not present any risk of deception, self-evident or otherwise, all that remains of AMS's interest in providing "more *accurate* information" is just an interest in providing "more" information. But, in this Circuit, *Zauderer* applies only to laws intended to "counteract specific deceptive statements." *RJR*, 696 F.3d at 1215. Nothing in the Final Rule indicates that AMS viewed the additional information conveyed by "Born, Raised, and Slaughtered" labels to serve that purpose. All AMS has offered to date is a conclusory allegation—again, its litigation brief—that "origin designations [under the 2009 Rule] were often misleading because lacked specificity as to the details of which production steps occurred in the countries cited on the label." JA986. The page cited in support of this proposition—78 Fed. Reg. at 31,382 (JA524)—does not contain any finding about the prior labels being

misleading. All it yields is the unremarkable statement that the "Born, Raised, and Slaughtered" labels will "provide consumers with information on the country in which production steps occurred." This summary of what the labels *do* does not say anything about whether there is a risk of consumer deception without them.

It would also be particularly preposterous for AMS to suggest that a label is misleading simply because it is general. After all, under the Final Rule, AMS has retained the "Product Of" label for "Category D" meats, i.e., those finished in a country other than the United States. *See* JA511. These meats will continue to be labeled "Product of [That Country]," even though, by AMS's logic in this litigation, those labels are likely to cause confusion because they do no itemize where the animal was "born," "raised," and "slaughtered." Thus, for example, a "Product of Canada" label omits information about where the animal was born and raised, and no one has alleged that "Product of Canada" labels are deceptive. *See* JA605-606.

Because there is nothing in the record, nothing in the Final Rule, and nothing in the agency's brief showing a risk of deception that is "self-evident" or "real," *RJR*, 696 F.3d at 1214, the Final Rule fails under *Zauderer*. And because there is no standard of scrutiny under which the Final Rule would pass muster, Appellants are likely to succeed on the merits of their First Amendment claim.

B. The Final Rule Violates the Agricultural Marketing Act.

Appellants are also likely to succeed on the merits of their statutory claims. The District Court's holding to the contrary was based on a flawed reading of the statute—which this Court reviews *de novo*. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. Under established principles of statutory interpretation and administrative law, neither the purported ban on commingling nor the "Born, Raised, and Slaughtered" labeling requirements are within AMS's statutory authority to mandate.

1. The COOL Statute is a Labeling Statute; It Does Not Authorize AMS to Regulate Production Practices.

The District Court's conclusion that the Agricultural *Marketing* Service has authority to regulate *production* practices under the Agricultural *Marketing* Act is dubious on its face. And the District Court's opinion shows that doubt to be justified. As the District Court put it, "Congress was not addressing commingling in the text of the COOL statute at all." JA1175. Quite so. And how can a statute that does "not address[ ]" a subject "at all" authorize an agency to issue regulations on that very subject? The answer: It cannot.

a. The absence of an express ban on regulating production practices is not an "ambiguity" warranting deference.

The COOL statute provides that "a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to

consumers, of the country of origin of the covered commodity." 7 U.S.C. § 1638a(a)(1). And it explains how the country of origin is determined based on various production practices. *Id.* § 1638a(a)(2). But the statute does not purport to regulate those production practices. Instead, it takes these practices as it finds them and—as one would expect in a labeling statute—identifies how they should be described on labels.

The government thus was hard pressed in the District Court to come up with any statutory authorization for AMS's prohibition of commingling. It landed on two justifications, neither of which supports AMS's power grab.

First, the government asserted that "Congress granted the Secretary broad authority to effectuate its goal in enacting the statute; *i.e.*, to provide consumers accurate information about the commodities they purchase." JA985. The COOL statute does no such thing. It grants the Secretary authority to "promulgate such regulations as are necessary to implement this subchapter," 7 U.S.C. § 1638c(b)—a far cry from the adopt-anything-consistent-with-general-Congressional-policy language that the government presumes to operate under. But the distinction matters.

In *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court explained that legislative language granting an agency power to issue regulations "necessary to carry out" a statute is *not* a delegation of authority

to promulgate regulations "necessary to carry out *the purposes* of the statute." *See id.* at 86, 92 (brackets and internal quotation marks omitted) (emphasis added). The Department of Labor regulation struck down in *Ragsdale* had provided that "if an employee takes medical leave 'and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.' " 535 U.S. at 85 (quoting 29 C.F.R. § 825.700(a) (2001)). The Court found that this individualized notice requirement—which went beyond the notice required by the statute and significantly expanded the statutory cause of action afforded to employees—was "incompatible" with the existing scheme. *Id.* at 89. This regulation "subvert[ed] the careful balance" reflected in the statute. *Id.* at 94. It therefore was beyond the agency's authority to promulgate.

The same reasoning applies here. Just as in *Ragsdale*, AMS's purported ban on commingling "effects an impermissible alteration of the statutory framework and cannot be within the Secretary's power to issue regulations 'necessary to carry out' the Act." *Id.* at 96.[8] It subverts the careful balance in place in the COOL statute between the information a retailer is required to provide with respect to the products it sells and that retailer's interest in efficient production. Indeed, USDA

[8] *See also, e.g.*, *Financial Planning Ass'n* v. *SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (holding that an agency's "invocation of its general rulemaking authority * * * [is] to no avail because [the statute] suggests no intention by Congress that [the agency] could ignore" statutory limitations on its authority).

recognized this very point in 2008, observing that "[i]t would be inconsistent" with the COOL statute's "overall purpose to read into the statute additional mandates that would impose economic inefficiencies and disrupt the orderly production, processing, and retailing of covered commodities." Letter to Sen. Bob Goodlatte from USDA Gen. Counsel Mark Kesselman (May 9, 2008), JA532. AMS did, too, in a 2008 interim rule: "[T]he 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." 73 Fed. Reg. 45,106, 45,118 (Aug. 1, 2008). That is exactly right. The alleged commingling ban is "disproportionate and inconsistent with Congress' intent" to provide *information*. *Ragsdale*, 535 U.S. at 95. Congress believed information about the origin of meat commodities could be provided by establishing a scheme to *define* the country of origin of these commodities. The regulation, in contrast, goes well beyond that limited purpose and (according to AMS) bans certain *practices*. That is "an impermissible alteration of the statutory framework," *id.* at 96, which cannot stand.

Second, the government argued that its commingling ban is a permissible interpretation in the face of legislative ambiguity because "Congress did not proscribe the manner in which the Secretary implements the Act." JA985. The

District Court accepted this explanation. JA1181-JA1182. But AMS's reasoning runs directly counter to established law. "To suggest * * * 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." *RLEA*, 29 F.3d at 671.[9] This limitation serves a critical purpose in maintaining separation of powers: "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.*

The Supreme Court has also long admonished that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 600 (1951). Congress indicated that the COOL statute should stop at labeling—i.e., providing information to the public. The statute ventures no further into the practices underlying the production process, and for good reason: Those practices are governed by entirely different statutory regimes,

[9] *Accord, e.g., American Petroleum Inst.* v. *EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013); *American Bar Ass'n* v. *FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005).

such as the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq.*, the Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*, and the Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1907, among others. And these statutory regimes are in large part implemented by FSIS, a separate agency. *See, e.g.*, Brief of United States as *Amicus Curiae*, *National Meat Ass'n* v. *Harris*, 132 S. Ct. 965 (2012) (No. 10-224), 2011 WL 2066591 (filed May 26, 2011) (explaining regulatory regime).

Under binding precedent, then, AMS is limited to exercising *labeling* authority under the statute. As the Supreme Court has held, "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks and citation omitted).[10] An "agency may not simply disregard the

[10] *See, e.g.*, *American Library Ass'n*, 406 F.3d 689, 698, 703 (D.C. Cir. 2005) (rejecting FCC's argument that it has the broad "authority to promulgate regulations to effectuate the goals and provisions of the Act even in the absence of an explicit grant of regulatory authority" and declining to construe the FCC's statutory authorization to regulate products "engaged in 'communication by wire or radio' " to extend to regulating devices that received communications); *Michigan* v. *EPA*, 268 F.3d 1075, 1083-84 (D.C. Cir. 2001) (rejecting EPA's contention that it "has some default authority to operate an implementation plan except as specified in * * * the Clean Air Act" based on its "authority to issue regulations necessary to implement the Act"); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("Once EPA has taken the [statutory] factors into consideration * * *, the statute does not authorize it to use these factors as a

specific scheme Congress has created for the regulation of [here, labels] in order to follow a broad purpose statement." *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995). AMS here was charged with regulating a particular subject—food labels—not the underlying processing practices. Its authority is therefore limited to labels, and the purported commingling ban plainly exceeds that authority under *Chevron*.

b. Past agency practice demonstrates that the COOL labeling statute does not govern production practices.

From 2008 through 2012, AMS recognized that 7 U.S.C. § 1638a, which is titled "Notice of Country of Origin," was, true to that title, a requirement for "notice" only.[11] This is of particular import because the agency's "contemporaneous construction" of the 2008 Farm Bill "carries persuasive weight," whereas its "current interpretation, being in conflict with its initial position, is entitled to considerably less deference." *Watt* v. *Alaska*, 451 U.S. 259, 272-273 (1981). In its 2009 Rule, for example, AMS described the COOL statute this way: "[T]he intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions. COOL is a retail labeling program and as such does not provide a basis for addressing food

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basis for imposing any additional restrictions * * *, even if the additional restrictions would yield some benefit[.]").

[11] In addition, the subchapter where this provision appears is titled "Country of Origin Labeling." *See* ADD-1.

safety." JA222. And again, when addressing broadly the commingling practices used across industries, AMS emphasized: "The COOL program is not a food safety program. Commingling like products is a commercially viable practice that has been historically utilized by retailers and any decision to continue this practice has to be determined by the retailer." JA215. At least previously, then, AMS recognized the distinction between the practice and its attendant label.

AMS's parent agency USDA did as well in an analysis contemporaneous with the 2008 amendments to the AMA. *See* JA528-JA532. USDA there recognized—properly—that "[t]here is no indication anywhere in the [COOL] statute that it is designed to govern the handling of livestock" or to "force the segregated handling of animals with varying geographical histories." JA532.

The history of the COOL regulatory program further reflects this understanding and demonstrates that the commingling practice is neither dependent on AMS for its authorization nor subject to prohibition under COOL regulations. In 2009, AMS explained the impetus for its regulations addressing commingling: "[w]ith regard to the commingling of meat of different origin categories, the Agency has received comments requesting that the Agency provide additional clarification on *how commingled meat products can be labeled*." JA207 (emphasis added). And that is precisely what AMS did in 2009: it explained how retailers should *label* meat commodities that are products of commingling. *See* JA251.

AMS now purports to change course by "eliminating the allowance for commingling of muscle cut covered commodities of different origins." JA509. But there was never any "allowance" for commingling in the regulations; there was simply an explanation for how commingled products should be labeled. By now attempting to "eliminat[e] . . . comminging flexibility," *id.*, AMS has disregarded that it lacks the statutory authority to promulgate such a rule.

2. AMS's Point-of-Processing Labeling Requirements Impermissibly Contradict Plain Statutory Language.

The "Born, Raised, and Slaughtered" labeling requirements in the Final Rule are similarly flawed because they too "subvert[ ] the careful balance" reflected in the statute between information and efficiency. *Ragsdale*, 535 U.S. at 81. The AMA first provides that "a retailer of a covered commodity shall inform consumers" of the country of origin for that product. 7 U.S.C. § 1638a(a)(1). Then, through five carefully calibrated subparts, the statute defines the country of origin that retailers at some times "may" designate, and other times "shall" designate, for covered meat commodities. *Id.* § 1638a(a)(2). So in some circumstances, the statute directs that country of origin "shall" be designated as two countries: for instance, for meats in Category C (imported for immediate slaughter), it is both "the country from which the animal was imported" *and* "the United States." *Id.* § 1638a(a)(2)(C). Other times, the retailer has some discretion in designating the country of origin, such as for meats in Category B (multiple

countries of origin). There, the retailer "*may* designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, *or* slaughtered." *Id.* § 1638a(a)(2)(B) (emphasis added).

Those statutory categories define the scope of retailers' labeling requirements. The Final Rule, however, ignores the careful categories establishing the permissible "country of origin" for covered meat commodities. Instead, it mandates that in all cases a retailer designate the country where the animal was "born," "raised," and "slaughtered." The District Court found no problem with this requirement, concluding that it owed AMS deference under *Chevron*. But in so holding, the District Court made two basic errors.

First, the District Court concluded that Appellants lacked sufficiently "good reason" to "assume[ ]" that "a retailer's duty to 'inform consumers * * * of the country of origin' in subsection (a)(1) of the statute is equivalent to subsection (a)(2)'s duty to 'designate' the country of origin." JA1165. But the "good reason" is, of course, that Congress used the same term in both subsections. Under the "normal rule of statutory interpretation," the country of origin that the retailer designates under (a)(2) *is* the same country of origin the retailer informs the consumer about under (a)(1). *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). The District Court's ruling that this was a "conflati[on] of "distinct" requirements is

misplaced and instead interprets the same term *differently* in (a)(1) and (a)(2). That violates established interpretive principles.

Second, to justify its departure from the statutory text, the District Court once again relied on what it believed to be—but in fact is not—the legal standard for reaching *Chevron* Step Two: "Plaintiffs can point to no statutory provision that expressly *prohibits* the AMS from enacting regulations that mandate the disclosure of 'born, raised, and slaughtered' information." JA1159 (emphasis added). But again, it is established that *Chevron* Step Two is not "implicated any time a statute does not expressly negate the existence of a claimed administrative power." *RLEA*, 29 F.3d at 671.

Congress did not need to legislate in "thou shalt not" terms because the statutory language itself establishes the boundary for retailers' labeling requirements. The AMA establishes what retailers "shall inform consumers" of—namely, the "country of origin of the covered commodity." True, Congress did not include the word "only" in (a)(1)—a point that the District Court found dispositive: "if Congress truly had intended that a retailer * * * could *only* be required to inform consumers of the covered commodity's statutorily-established country of origin designation—and nothing more—surely it would have found a clearer way to express that intention." JA1163. But that conclusion runs headlong into this Court's precedent. Congress does not need to use a word like "only" when the

specificity of its command makes that restriction apparent. In *Aid Ass'n for Lutherans* v. *U.S. Postal Service*, 321 F.3d 1166 (D.C. Cir. 2003), for example, this Court held that a statute authorizing USPS to regulate mailings relating to particular types of insurance "coverage" permitted USPS to regulate "solely" according to coverage, not according to "type of insurance." *Id.* at 1167-68. It reached this conclusion even though the statute itself did not use the word "solely." *Id.* The same reasoning applies here. AMS cannot create phantom statutory gaps where none exist. The "Born, Raised, and Slaughtered" labeling requirements are inconsistent with the designation requirements in (a)(2) and therefore cannot stand.

Because the Final Rule thus violates the AMA as well as the First Amendment, Appellants are likely to succeed on the merits of their claims.

II. APPELLANTS' MEMBERS ARE IRREPARBLY HARMED IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

Appellants also have demonstrated irreparable harm warranting a preliminary injunction.

A. First Amendment Harm is Irreparable Harm.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. *Accord* JA1200 (observing that "there is no doubt" about this rule). The Final Rule compels Appellants' members to engage in speech that serves no discernible, let alone substantial, governmental interest. That First Amendment violation is

irreparable harm under *Elrod* and suffices in itself to justify preliminary relief. *See, e.g.*, *Amestoy*, 92 F.3d at 72 (dairy manufacturers would be irreparably harmed by milk-labeling law that "require[d] them to speak when they would rather not").

B. Appellants' Declarants Demonstrated Irreparable Harm to their Businesses.

Even if this Court concludes that the Final Rule does not infringe Appellants' members' First Amendment rights, Appellants' members' businesses are being irreparably injured in the absence of an injunction. The Final Rule picked winners and losers in the marketplace. The winners: domestic livestock producers (i.e., Intervenors), who will receive higher prices for what they sell, as the burdens associated with handling imported livestock drive demand toward the limited U.S. supply. The losers: the Canadian and Mexican livestock producers and everyone who relies on trading with them (i.e., Appellants' members). Their losses are immediate and irreparable—and Appellants have supplied ample evidence to demonstrate that this harm is occurring and will continue to occur.[12]

[12] With their Motion, Appellants filed the Declarations of Ed Attebury, Bryan Karwal, Brad McDowell, Jim Peters, Andy Rogers, Alan Rubin, and Martin Unrau. *See* JA533-580. Appellants also submitted the Declaration of Jerry Holbrook to demonstrate that retailers and their suppliers have been demanding conformity with the Final Rule even during the so-called "outreach" period. JA538. When Intervenors subsequently attacked the credibility of these declarants, Appellants filed the Supplemental Declarations of Ed Attebury, Brad McDowell, Jim Peters; Andy Rogers, Alan Rubin, and Martin Unrau. JA1008-JA1032. Appellants also

1. Appellants Met The *Winter* and *Wisconsin Gas* Requirements.

a. Appellants' Members Are Suffering Irreparable Harm.

"A plaintiff seeking a preliminary injunction must establish that * * * he is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. "The key word in this consideration is 'irreparable.'" *Virginia Jobbers Ass'n* v. *Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). And that is why the decisive factor in this Court's cases on irreparable harm is whether the monetary loss caused by a government order is "recoverable." *See, e.g.*, *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (rejecting application for stay where petitioners could likely recover their losses through contract or rate filings); *Davis* v. *Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009) (retired pilots' claims of monetary loss not "irreparable" where they could be compensated by a favorable ruling).

Appellants' members will suffer harm that is by definition "irreparable" because it is unrecoverable. Appellant' members will never recover the millions of dollars of compliance costs that the District Court held that "there is *no doubt*" that

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filed with their Reply the Declaration of Rolando Pena Hinojosa. JA1033. Appellants moved for permission to file these declarations *nunc pro tunc* at the motion hearing, JA1127. Neither AMS nor the Intervenors opposed the motion, but the District Court ultimately did not rule on it because the declarations "ha[d] not influenced the Court to rule in Plaintiffs' favor." JA1202.

they will have to spend. JA1211 (emphasis added). That alone should be sufficient. *See Smoking Everywhere, Inc.* v. *FDA*, 680 F. Supp. 2d 62, 77 (D.D.C. 2010) ("It is also worth noting that even if the claimed economic injury did not threaten plaintiffs' viability, it is still irreparable because plaintiffs cannot recover money damages against [the agency]."), *aff'd sub nom. Sottera, Inc.* v. *FDA*, 627 F.3d 891, 899 (D.C. Cir. 2010) (holding that finding of irreparable harm in these circumstances was "entirely reasonable"). Nor can Appellants' members recover their losses through the market. Livestock producers in Canada and Mexico like Mr. Unrau and Mr. Pena are currently raising cattle they procured on the assumption of having a market for those cattle. The Final Rule makes handling and stocking meat from Canadian and Mexican cattle more costly and complicated, and disincentivizes companies from dealing in it, JA1019, damaging Mr. Unrau and Mr. Pena in the form of discounts and lost contracts. *See* JA578-JA579, JA1030-JA1032; JA 1033-1035. And because their existing cattle cannot be un-"born" or un-"raised" in Canada and Mexico, they are stuck with devalued inventory. Those losses are irreparable; they cannot be recovered in the event of a favorable ruling in this case.

The same principle applies to the feedyards in the Southwest. They have built their businesses on purchasing Mexican feeder cattle, raising them, and selling them to packers. *See* JA535, JA1009; JA564-JA566, JA1023-JA1024;

JA570, JA1025-JA1026. These cattle do not disappear overnight—but the market for them does under the Final Rule. Those declarants are already reporting difficulties in securing contracts as result of the Final Rule. *See* JA1024. The losses on those cattle are similarly unrecoverable. The same principle applies to BK Pork, which raises Canadian hogs. *See* JA553.

And then there are the packers. AMS has acknowledged that packers must invest millions of dollars in capital expenditures to accommodate the new system. JA515. That starts immediately. There would only be one way to avoid those costs: to purchase exclusively from one category of animal. But there is not enough supply of any one category of animal in the Northwest to meet, for example, Agri Beef's needs. *See* JA555-JA562, JA1011-JA1022. And Dallas City Packing has built its business on purchasing Mexican-origin cattle that retailers will likely no longer be able to accommodate. *See* JA575. These consequences are irreversible once they begin, and a favorable ruling on the merits would not restore the status quo.

b. The Harm to Appellants' Members is Likely.

To "establish" that irreparable harm is "likely," the plaintiff "must provide proof that the harm has occurred in the past and is likely to occur again," or the plaintiff must provide "proof indicating that the harm is certain to occur in the near future." *Wisconsin Gas*, 758 F.2d at 674. Appellants' member declarations

demonstrated that this harm is at the very least "*likely*" to occur; indeed it already is occurring.

The harm to Appellants' packer and processor members is "certain to occur in the near future." *Id.* That harm to packers engaged in commingling was confirmed by AMS itself in the Final Rule. *See* JA524 ("the companies most likely to be affected" include "packers and processors"); JA515 (estimating ban on commingling would cost packers and processors $19 million to $76.3 million). AMS predicted that these costs would impose disproportionate burdens on businesses "that currently commingl[e] domestic and foreign-origin cattle or hogs," JA526, and within this subset, the companies likely to bear the highest costs were those "located nearer to sources of imported cattle and hogs," and thus "likely to be commingling to a greater extent than others," JA524.

The declarations for Agri Beef and Dallas City Packing confirm that prediction. *See* JA555-JA562, JA1011-JA1022; JA572-JA576, JA1027-JA1029. They must either immediately invest in building and implementing segregated production lines—costs that will be for naught if the Final Rule is later vacated on the merits—or switch to a single category of meat, which will make it impossible for them to cover their costs and at a minimum put them at a severe competitive disadvantage. JA1017; JA1028-JA1029. The shift in retailer demand will effectively make this latter course the only option. This Court has held just this

type of showing suffices to justify a preliminary injunction. *See Sottera*, 627 F.3d at 899 (affirming finding that manufacturer would be irreparably harmed because "FDA's refusal to admit [its supplier's] products into the United States obviously destroyed [manufacturer's] ability in the United States to cover its costs for purchase or production.").

The harm to Appellants' supplier and feedyard members is just as "likely." These declarants explained the harm that "has occurred in the past," *Wisconsin Gas*, 758 F.2d at 674, by discussing the effects of the 2009 Rule, and the declarants showed that these harms would not only recur, but would *worsen* under the Final Rule. *See* JA553; JA579; JA1008-JA1010; JA1025-JA1026; JA1034-JA1035. Indeed, Appellants' declarants attested that they have already lost customers for their foreign-origin livestock as a result of the Final Rule. *See, e.g.*, JA579, JA1031; JA1024; JA1035.

2. The District Court Applied a Standard That Departs from *Wisconsin Gas* and Will Be Impossible for Movants to Satisfy.

No more was required of Appellants to meet their burden under this Court's prior decisions. But the District Court required more. To begin with, it held Appellants to the higher burden applicable to *recoverable* monetary losses, requiring declarants to have alleged losses so devastating as to threaten the existence of their businesses. *See Wisconsin Gas*, 758 F.2d at 674; *see also Davis*,

571 F.3d at 1295. Although Appellants in fact satisfied that requirement, *see, e.g.*, JA575-JA576, the District Court invoked it as a basis to set an inappropriately high bar for all of Appellants' evidence.[13]

Next, ignoring that *Winter* and *Wisconsin Gas* speak of irreparable harm that is "*likely*," the District Court faulted Appellants' declarants for failing to provide—in declarations, in a fast-moving preliminary-injunction proceeding—a forensic accounting of how the 2009 Rule affected their respective "bottom-lines." *See* JA1203. The District Court's expectation for the degree of evidentiary support was beyond anything this Court has ever required, or should endorse. If the District Court's approach were the rule in this Circuit, it would make Rule 65 a nullity. It is unreasonable to hold movants to a summary-judgment burden at a preliminary-relief stage.

The District Court purported to find support for its draconian approach in a single remark in *Wisconsin Gas*—and in other district court decisions broadly extrapolating from that remark—which said that "[b]are allegations of what is likely to occur are of no value," 758 F.2d at 674 (quoted at JA1204). But the

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[13] At the same time, the District Court uncritically accepted the conclusory allegations in Intervenors' filings. *See, e.g.*, JA1203 (characterizing Agri Beef as a "meat processing giant," when it is a family-owned company with a single processing plant and 830 employees, *see* JA555, JA941); JA1207 (quoting assertions in declarations submitted by feedyards located in Midwestern states—including a declarant, Mr. Symens, who does not purchase foreign-origin cattle—to refute assertions about harm to import-reliant Southwestern feedyards).

allegations criticized as "bare" in *Wisconsin Gas* were the petitioners' allegations *in their stay motion*—allegations that did not appear to have any support in declarations or other submitted evidence, and that had been *contradicted* in the petitioners' own filings with the agency. *See id.* Moreover, the allegations in question had to do with whether the harm would be "irreparable"—not whether it would be certain or great. *See id.* at 675. There is no mandate in *Wisconsin Gas* for companies to file the equivalent of a detailed bankruptcy petition in order to demonstrate their entitlement to preliminary relief.

Preliminary injunctive relief is an extraordinary remedy—but it must be available. Appellants' members are certain, not just likely, to be irreparably harmed by the Final Rule. The District Court abused its discretion in denying them a remedy.

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION.

At the third step of the preliminary-injunction test, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation marks omitted). This balancing, too, favors Appellants. Their members' loss of First Amendment protections and other irreparable injuries easily outweigh any harm to AMS, which faces only a brief delay in implementing the new requirements. On this point, the District Court ruled correctly. *See* JA1212.

The public interest also favors an injunction. "[E]nforcement of a potentially unconstitutional law that would also have severe economic effects is not in the public interest." *Gordon* v. *Holder*, 826 F. Supp. 2d 279, 297 (D.D.C. 2011), *aff'd* 721 F.3d 638 (D.C. Cir. 2013). In addition, "[t]he public has an interest in federal agency compliance with its governing statute." *Bayer Healthcare LLC* v. *FDA*, 2013 WL 1777481, at *8 (D.D.C. Apr. 17, 2013). Because the Final Rule violates the First Amendment and exceeds statutory authority, the public interest weighs strongly in favor of an injunction against the Final Rule. And because AMS has not articulated any justifiable public interest in immediate enforcement, the public-interest factor weighs in Appellants' favor.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed and the case remanded with instructions to the District Court to enter an order enjoining Appellees from implementing and enforcing the Final Rule pending resolution of Appellants' claims on the merits.

Dated: September 23, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that this Opening Brief for Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 13,763 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of September 2013, I filed the foregoing Opening Brief for Appellants through this Court's CM/ECF system, which will send an electronic notice of filing to the following:

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ADDENDUM

PERTINENT STATUTES

2008—Subsec. (c)(3). Pub. L. 110–246, §1510(b), added par. (3) and struck out former par. (3). Prior to amendment, text read as follows: ''The Secretary shall take such actions as the Secretary considers necessary to verify the accuracy of the information submitted or reported under this subchapter.''

Subsecs. (d), (e). Pub. L. 110–246, §1510(a), added subsec. (d) and redesignated former subsec. (d) as (e).

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

IMPLEMENTATION OF ELECTRONIC REPORTING SYSTEM

Pub. L. 111–239, §3(b), Sept. 27, 2010, 124 Stat. 2502, provided that: ''Not later than one year after the date of enactment of this Act [Sept. 27, 2010], the Secretary of Agriculture shall implement the electronic reporting system required by subsection (d) of section 273 of the Agricultural Marketing Act of 1946 (7 U.S.C. 1637b), as amended by subsection (a). Until the electronic reporting system is implemented, the Secretary shall continue to conduct mandatory dairy product information reporting under the authority of such section, as in effect on the day before the date of enactment of this Act.''

SUBCHAPTER IV—COUNTRY OF ORIGIN LABELING

§ 1638. Definitions

In this subchapter:

(1) Beef

The term ''beef'' means meat produced from cattle (including veal).

(2) Covered commodity

(A) In general

The term ''covered commodity'' means—
(i) muscle cuts of beef, lamb, and pork;
(ii) ground beef, ground lamb, and ground pork;
(iii) farm-raised fish;
(iv) wild fish;
(v) a perishable agricultural commodity;
(vi) peanuts; and[1]
(vii) meat produced from goats;
(viii) chicken, in whole and in part;
(ix) ginseng;
(x) pecans; and
(xi) macadamia nuts.

(B) Exclusions

The term ''covered commodity'' does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item.

(3) Farm-raised fish

The term ''farm-raised fish'' includes—
(A) farm-raised shellfish; and
(B) fillets, steaks, nuggets, and any other flesh from a farm-raised fish or shellfish.

(4) Food service establishment

The term ''food service establishment'' means a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public.

(5) Lamb

The term ''lamb'' means meat, other than mutton, produced from sheep.

(6) Perishable agricultural commodity; retailer

The terms ''perishable agricultural commodity'' and ''retailer'' have the meanings given the terms in section 499a(b) of this title.

(7) Pork

The term ''pork'' means meat produced from hogs.

(8) Secretary

The term ''Secretary'' means the Secretary of Agriculture, acting through the Agricultural Marketing Service.

(9) Wild fish

(A) In general

The term ''wild fish'' means naturally-born or hatchery-raised fish and shellfish harvested in the wild.

(B) Inclusions

The term ''wild fish'' includes a fillet, steak, nugget, and any other flesh from wild fish or shellfish.

(C) Exclusions

The term ''wild fish'' excludes net-pen aquacultural or other farm-raised fish.

(Aug. 14, 1946, ch. 966, title II, §281, as added Pub. L. 107–171, title X, §10816, May 13, 2002, 116 Stat. 533; amended Pub. L. 110–234, title XI, §11002(1), May 22, 2008, 112 Stat. 1351; Pub. L. 110–246, §4(a), title XI, §11002(1), June 18, 2008, 122 Stat. 1664, 2113.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

AMENDMENTS

2008—Par. (2)(A)(vii) to (xi). Pub. L. 110–246, §11002(1), added cls. (vii) to (xi).

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

§ 1638a. Notice of country of origin

(a) In general

(1) Requirement

Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.

(2) Designation of country of origin for beef, lamb, pork, chicken, and goat meat

(A) United States country of origin

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat may

[1] So in original. The word ''and'' probably should not appear.

designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was—

(i) exclusively born, raised, and slaughtered in the United States;

(ii) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or

(iii) present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.

(B) Multiple countries of origin

(i) In general

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is—

(I) not exclusively born, raised, and slaughtered in the United States,

(II) born, raised, or slaughtered in the United States, and

(III) not imported into the United States for immediate slaughter,

may designate the country of origin of such covered commodity as all of the countries in which the animal may have been born, raised, or slaughtered.

(ii) Relation to general requirement

Nothing in this subparagraph alters the mandatory requirement to inform consumers of the country of origin of covered commodities under paragraph (1).

(C) Imported for immediate slaughter

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is imported into the United States for immediate slaughter shall designate the origin of such covered commodity as—

(i) the country from which the animal was imported; and

(ii) the United States.

(D) Foreign country of origin

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is not born, raised, or slaughtered in the United States shall designate a country other than the United States as the country of origin of such commodity.

(E) Ground beef, pork, lamb, chicken, and goat

The notice of country of origin for ground beef, ground pork, ground lamb, ground chicken, or ground goat shall include—

(i) a list of all countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat; or

(ii) a list of all reasonably possible countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat.

(3) Designation of country of origin for fish

(A) In general

A retailer of a covered commodity that is farm-raised fish or wild fish may designate the covered commodity as having a United States country of origin only if the covered commodity—

(i) in the case of farm-raised fish, is hatched, raised, harvested, and processed in the United States; and

(ii) in the case of wild fish, is—

(I) harvested in the United States, a territory of the United States, or a State, or by a vessel that is documented under chapter 121 of title 46 or registered in the United States; and

(II) processed in the United States, a territory of the United States, or a State, including the waters thereof, or aboard a vessel that is documented under chapter 121 of title 46 or registered in the United States.

(B) Designation of wild fish and farm-raised fish

The notice of country of origin for wild fish and farm-raised fish shall distinguish between wild fish and farm-raised fish.

(4) Designation of country of origin for perishable agricultural commodities, ginseng, peanuts, pecans, and macadamia nuts

(A) In general

A retailer of a covered commodity that is a perishable agricultural commodity, ginseng, peanut, pecan, or macadamia nut may designate the covered commodity as having a United States country of origin only if the covered commodity is exclusively produced in the United States.

(B) State, region, locality of the United States

With respect to a covered commodity that is a perishable agricultural commodity, ginseng, peanut, pecan, or macadamia nut produced exclusively in the United States, designation by a retailer of the State, region, or locality of the United States where such commodity was produced shall be sufficient to identify the United States as the country of origin.

(b) Exemption for food service establishments

Subsection (a) of this section shall not apply to a covered commodity if the covered commodity is—

(1) prepared or served in a food service establishment; and

(2)(A) offered for sale or sold at the food service establishment in normal retail quantities; or

(B) served to consumers at the food service establishment.

(c) Method of notification

(1) In general

The information required by subsection (a) of this section may be provided to consumers by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers.

(2) Labeled commodities

If the covered commodity is already individually labeled for retail sale regarding country

of origin, the retailer shall not be required to provide any additional information to comply with this section.

(d) Audit verification system

(1) In general

The Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance with this subchapter (including the regulations promulgated under section 1638c(b) of this title).

(2) Record requirements

(A) In general

A person subject to an audit under paragraph (1) shall provide the Secretary with verification of the country of origin of covered commodities. Records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification.

(B) Prohibition on requirement of additional records

The Secretary may not require a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of the country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person.

(e) Information

Any person engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity.

(f) Certification of origin

(1) Mandatory identification

The Secretary shall not use a mandatory identification system to verify the country of origin of a covered commodity.

(2) Existing certification programs

To certify the country of origin of a covered commodity, the Secretary may use as a model certification programs in existence on May 13, 2002, including—

(A) the carcass grading and certification system carried out under this Act;

(B) the voluntary country of origin beef labeling system carried out under this Act;

(C) voluntary programs established to certify certain premium beef cuts;

(D) the origin verification system established to carry out the child and adult care food program established under section 1766 of title 42; or

(E) the origin verification system established to carry out the market access program under section 5623 of this title.

(Aug. 14, 1946, ch. 966, title II, § 282, as added Pub. L. 107–171, title X, § 10816, May 13, 2002, 116 Stat. 533; amended Pub. L. 107–206, title I, § 208, Aug. 2, 2002, 116 Stat. 833; Pub. L. 110–234, title XI, § 11002(2), May 22, 2008, 122 Stat. 1352; Pub. L. 110–246, § 4(a), title XI, § 11002(2), June 18, 2008, 122 Stat. 1664, 2113.)

REFERENCES IN TEXT

This Act, referred to in subsec. (f)(2)(A), (B), is act Aug. 14, 1946, ch. 966, 60 Stat. 1082, which enacted this chapter and sections 427h to 427j of this title and amended section 427 of this title. For complete classification of this Act to the Code, see Tables.

CODIFICATION

May 13, 2002, referred to in subsec. (f)(2), was in the original ''the date of enactment of this Act'', which was translated as meaning the date of enactment of Pub. L. 107–171, which enacted this subchapter, to reflect the probable intent of Congress.

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

AMENDMENTS

2008—Subsec. (a)(2) to (4). Pub. L. 110–246, § 11002(2)(A), added pars. (2) to (4) and struck out former pars. (2) and (3) which related to designation of United States as country of origin for beef, lamb, pork, fish, perishable agricultural commodities, and peanuts, and requirement that notice of country of origin for fish shall distinguish between wild and farm-raised fish.

Subsec. (d). Pub. L. 110–246, § 11002(2)(B), added subsec. (d) and struck out former subsec. (d). Prior to amendment, text read as follows: ''The Secretary may require that any person that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail that will permit the Secretary to verify compliance with this subchapter (including the regulations promulgated under section 1638c(b) of this title).''

2002—Subsec. (a)(2)(D). Pub. L. 107–206 amended subpar. (D) generally. Prior to amendment, subpar. (D) read as follows: ''in the case of wild fish, is—

''(i) harvested in waters of the United States, a territory of the United States, or a State; and

''(ii) processed in the United States, a territory of the United States, or a State, including the waters thereof; and''.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

§ 1638b. Enforcement

(a) Warnings

If the Secretary determines that a retailer or person engaged in the business of supplying a covered commodity to a retailer is in violation of section 1638a of this title, the Secretary shall—

(1) notify the retailer[1] of the determination of the Secretary; and

(2) provide the retailer[1] a 30-day period, beginning on the date on which the retailer[1] receives the notice under paragraph (1) from the Secretary, during which the retailer[1] may take necessary steps to comply with section 1638a of this title.

(b) Fines

If, on completion of the 30-day period described in subsection (a)(2), the Secretary determines that the retailer or person engaged in the business of supplying a covered commodity to a retailer has—

[1] So in original. Probably should be ''retailer or person''.

(1) not made a good faith effort to comply with section 1638a of this title, and

(2) continues to willfully violate section 1638a of this title with respect to the violation about which the retailer or person received notification under subsection (a)(1),

after providing notice and an opportunity for a hearing before the Secretary with respect to the violation, the Secretary may fine the retailer or person in an amount of not more than $1,000 for each violation.

(Aug. 14, 1946, ch. 966, title II, § 283, as added Pub. L. 107–171, title X, § 10816, May 13, 2002, 116 Stat. 535; amended Pub. L. 110–234, title XI, § 11002(3), May 22, 2008, 122 Stat. 1354; Pub. L. 110–246, § 4(a), title XI, § 11002(3), June 18, 2008, 122 Stat. 1664, 2116.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

AMENDMENTS

2008—Pub. L. 110–246, § 11002(3), redesignated subsec. (b) as (a) and substituted ''retailer or person engaged in the business of supplying a covered commodity to a retailer'' for ''retailer'' in introductory provisions, added subsec. (b), and struck out former subsecs. (a) and (c) which related to applicability of section 1636b of this title to a violation of this subchapter and fine for violation of section 1638a of this title. The substitution in subsec. (a) was made for ''retailer'' the first time appearing to reflect the probable intent of Congress.

EFFECTIVE DATE OF 2008 AMENDMENT

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of this title.

§ 1638c. Regulations

(a) Guidelines

Not later than September 30, 2002, the Secretary shall issue guidelines for the voluntary country of origin labeling of covered commodities based on the requirements of section 1638a of this title.

(b) Regulations

Not later than September 30, 2004, the Secretary shall promulgate such regulations as are necessary to implement this subchapter.

(c) Partnerships with States

In promulgating the regulations, the Secretary shall, to the maximum extent practicable, enter into partnerships with States with enforcement infrastructure to assist in the administration of this subchapter.

(Aug. 14, 1946, ch. 966, title II, § 284, as added Pub. L. 107–171, title X, § 10816, May 13, 2002, 116 Stat. 535.)

§ 1638d. Applicability

This subchapter shall apply to the retail sale of a covered commodity beginning September 30, 2008, except for ''farm-raised fish'' and ''wild fish'' which shall be September 30, 2004.

(Aug. 14, 1946, ch. 966, title II, § 285, as added Pub. L. 107–171, title X, § 10816, May 13, 2002, 116 Stat. 535; amended Pub. L. 108–199, div. A, title VII, § 749, Jan. 23, 2004, 118 Stat. 37; Pub. L. 109–97, title VII, § 792, Nov. 10, 2005, 119 Stat. 2164.)

AMENDMENTS

2005—Pub. L. 109–97 substituted ''2008'' for ''2006''.

2004—Pub. L. 108–199 substituted ''2006, except for 'farm-raised fish' and 'wild fish' which shall be September 30, 2004'' for ''2004''.

CHAPTER 39—STABILIZATION OF INTERNATIONAL WHEAT MARKET

Sec.
1641. Availability of wheat for export; utilization of funds and facilities; prices; authorization of appropriations.
1642. Enforcement by President.

§ 1641. Availability of wheat for export; utilization of funds and facilities; prices; authorization of appropriations

The President is authorized, acting through the Commodity Credit Corporation, to make available or cause to be made available, notwithstanding the provisions of any other law, such quantities of wheat and wheat-flour and at such prices as are necessary to exercise the rights, obtain the benefits, and fulfill the obligations of the United States under the International Wheat Agreement of 1949 signed by Australia, Canada, France, the United States, Uruguay, and certain wheat importing countries, along with the agreements signed by the United States and certain other countries revising and renewing such agreement of 1949 for periods through July 31, 1965 (hereinafter collectively called the ''International Wheat Agreement''). Nothing in this chapter shall be construed to preclude the Secretary of Agriculture, in carrying out programs to encourage the exportation of agricultural commodities and products thereof pursuant to section 612c of this title, from utilizing funds available for such programs in such manner as, either separately or jointly with the Commodity Credit Corporation, to exercise the rights, obtain the benefits, and fulfill all or any part of the obligations of the United States under the International Wheat Agreement or to preclude the Commodity Credit Corporation in otherwise carrying out wheat and wheat-flour export programs as authorized by law. Nothing contained in this chapter shall limit the duty of the Commodity Credit Corporation to the maximum extent practicable consistent with the fulfillment of the Corporation's purposes and the effective and efficient conduct of its business to utilize the usual and customary channels, facilities, and arrangements of trade and commerce in making available or causing to be made available wheat and wheat-flour under this chapter. The pricing provisions of section 1510(e)[1] of title 22 and section 713a–9 of title 15, shall not be applicable to domestic wheat and wheat-flour supplied to countries which are parties to the International Wheat Agreement and credited to their guaranteed purchases thereunder on and after August

[1] See References in Text note below.