[NO ORAL ARGUMENT CURRENTLY SCHEDULED]

No. 13-5281

In The U.S. Court of Appeals for the D.C. Circuit

American Meat Institute, *et al.*,
Plaintiff-Appellants,
v.
U.S. Department of Agriculture, *et al.*,
Defendant-Appellees.

On Appeal From the Order
Denying Plaintiffs' Motion for a Preliminary Injunction in
the U.S. District Court
for the District of Columbia
The Honorable Ketanji Brown Jackson
1:13-cv-1033 (KBJ)

BRIEF OF *AMICUS CURIAE* FOOD & WATER WATCH, INC.; THE RANCHERS CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA; THE SOUTH DAKOTA STOCKGROWERS ASSOCIATION; AND THE WESTERN ORGANIZATION OF RESOURCE COUNCILS

J. Dudley Butler, (Admitted *Pro Hac Vice* to the District Court on Oct 2, 2013, MS Bar # 7626)
Butler Farm and Ranch Law Group PLLC, 499A Breakwater Drive
Benton, MS 39039
(p) (662) 673-0091
jdb@farmandranchlaw.com

Zachary B. Corrigan
(DC Bar # 497557)
Food & Water Watch, Inc.
1616 P Street, NW, Suite 300
Washington, DC 20036
(p) 202-683-2451
(f) 202-683-2452
zcorrigan@fwwatch.org

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Food & Water Watch, Inc. ("FWW") is a national, nonprofit, public interest consumer advocacy organization. It has no parent company, and no publicly owned corporation owns 10% or more of its stock.

The Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF USA") is a national, nonprofit trade association that exclusively represents the interests of independent cattle producers within the multi-segmented U.S. beef supply chain. It has no parent company, and no publicly owned corporation owns 10% or more of its stock.

The South Dakota Stockgrowers Association ("SDSGA") is a grassroots organization of independent livestock producers dedicated to promoting and protecting the South Dakota livestock industry. It has no parent company, and no publicly owned corporation owns 10% or more of its stock.

The Western Organization of Resource Councils ("WORC") is a regional organization of grassroots community membership-based organizations with the mission to advance a democratic, sustainable, and just society through community action. It has no parent company, and no publicly owned corporation owns 10% or more of its stock.

Table of Contents

Table of Authorities

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

* Sources Primarily Relied Upon

Introduction

This challenge is brought by trade associations representing certain domestic and foreign producers and meatpackers that for years have maximized profits by concealing where their meat products are from. Congress sought to stop this deception in 2002 and again in 2008 with its Country of Origin Labeling ("COOL") law, but loopholes created at the expense of accurate consumer information thwarted much of this goal.

Ironically, even these loopholes were not enough for the Plaintiff-Appellants who supported the Mexican and Canadian governments in challenging COOL before the World Trade Organization ("WTO"). These efforts, however, were only partially successful. WTO's Appellate Body did find that the COOL requirements for muscle-cut meat commodities were inconsistent with U.S. trade obligations. But it found that the prior 2009 COOL rules created a disproportionate regulatory burden on foreign producers that was not justified by the lack of consumer information the program's labels conveyed – *i.e.*, the source of confusion under COOL was Plaintiff-Appellants' treasured loopholes.

And, now, with the 2013 Final COOL Rule (*see* 78 Fed. Reg. 31,367-

85 (May 24, 2013) (JA509-27)), the Defendant-Appellees (collectively, the "USDA") have followed WTO's precise recommendations by closing these loopholes to increase the accuracy of information conveyed to consumers.

Plaintiff-Appellants all but admit that their primary gripe is with the underlying COOL statute, not simply the Final COOL Rule. And, ostensibly, they do not think it relevant that the rule imposes labeling disclosures on retailers, and none of them are retailers. They now challenge the rule saying that it violates their First Amendment rights and is contrary to the Administrative Procedure Act ("APA").

But Plaintiff-Appellants failed at the District Court to demonstrate that their claims would likely succeed or that the court should otherwise delay the rule.

Indeed, they are unlikely to succeed. Mainly, the Plaintiff-Appellants' First Amendment claims improperly rely on USDA inadequately demonstrating a sufficient government interest – not on the absence of one. Regardless, the District Court record shows that the government has a sufficient interest to compel accurate labeling information. Moreover, the District Court properly found that USDA has the statutory authority to promulgate the Final COOL Rule. Finally, the District Court was correct

that Plaintiff-Appellants' claims of irreparable harm are too speculative and not directly caused by the Final COOL Rule.

For these reasons, the District Court properly denied Plaintiff-Appellants' preliminary injunction motion, and this Court should affirm this decision.

Interest of *Amici*

Pursuant to Fed. R. App. 29(a), and as discussed more thoroughly in their motion for leave to file this brief, the following *Amici* have spent considerable resources advocating for the COOL statute's passage and the development of its regulations:

- FWW is a consumer advocacy organization that has a primary mission to educate the public regarding food systems that guarantee safe, wholesome food produced in a sustainable manner.
- R-CALF USA is the largest producer-only cattle trade association in the United States.
- SDSGA is a grassroots organization of independent livestock producers dedicated to promoting and protecting the South Dakota livestock industry.

- WORC and its member groups have historically addressed issues important to their rural constituency, including the impacts of agribusiness consolidation and international trade.

These organizations worked extensively to persuade the USDA to end so-called "commingling" and the agency's prior multiple-country-labeling scheme because they increased consumer confusion.

Fed. R. App. P. 29(c)(5) Statement

No parties' counsel have authored any part of this brief. Nor have they or their clients contributed money in any way related to this brief. No persons other than the *Amici* and their members and counsel have contributed money in any way related to this brief.

Argument

A preliminary injunction requires the plaintiff to establish that he or she is likely to succeed on the merits, is likely to suffer irreparable harm without such relief, the balance of the equities tips in his or her favor, and that such relief is in the public interest. *Chaplaincy of Full Gospel Churches v. U.S. Navy (In re Navy Chaplaincy)*, 697 F.3d 1171, 1178 (2012) (citations omitted).

Plaintiff-Appellants did not meet this burden before the District Court.[1]

I. The District Court Properly Decided That the Plaintiff-Appellants Would Not Likely Succeed on the Merits of Any of Their Claims.

Based on the record before it, the District Court properly found that the Plaintiff-Appellants would not likely succeed with their claims. Their arguments for reversal suffer from a fundamental misunderstanding of the standard of review, among other problems. Further, Plaintiff-Appellants' *ultra vires* arguments not only ignore the confusion inherent in the prior labeling scheme, but the very language of the COOL statute.

[1] Plaintiff-Appellants do not contend that the District Court erred with their APA arbitrary and capricious claim, so this argument is waived.

A. The Plaintiff-Appellants Failed to Demonstrate That the Final COOL Rule Violated Any of Their First Amendment Rights.

1. The District Court did not improperly rely on *post hoc* assertions.

The District Court properly measured Plaintiff-Appellants' First Amendment claims against the standard established in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985). Based on common sense and experience, it found that the Final COOL Rule required disclosure of truthful and factual commercial speech to remediate the possibility of deceptive or confusing claims from commingling and the lack of production-step labeling. (Slip Op. at 15-16; JA1153-54.)

Plaintiff-Appellants say this standard was inappropriate. But, their main challenge is to the manner in which USDA asserted its interest, arguing that the Final COOL Rule's preamble insufficiently demonstrates USDA's intent to correct misleading speech, and this rationale is an improper *post hoc* rationalization. (Opening Br. Appellants ("Pl.-Appellants' Br.") at 21.)

Plaintiff-Appellants' argument, however, is anything but the "textbook administrative law," they claim. (*Id.* at 20.) Instead, it is improperly premised on importing the standard of review for APA *non-constitutional* claims into the review of First Amendment claims,

misunderstanding that when courts review administrative claims under the APA, 5 U.S.C. § 706(2)(A) (2012), they look at "*the full administrative record* . . . at the time challenged action was taken . . . ." *See Cmty for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (emphasis added) (quotation marks and citations omitted). But, *constitutional* challenges, on the other hand, require an independent assessment of the facts and the law. *See, e.g.*, *Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990) (citing *Pickering v. Bd. of Educ. of Township*, 391 U.S. 563, 578-79 n.2 (1968)). And, thus, with constitutional claims, courts are entitled to look beyond the administrative record. *See id.; McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (finding that the statutorily provided abuse-of-discretion standard for review does not apply to constitutional claims, which are reviewed *de novo*).

This is because while under the APA courts are typically reviewing "a determination or judgment which an administrative agency alone is authorized to make . . .[,]" *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), it is textbook constitutional law that such a premise does not extend to alleged constitutional violations, since, "in general, courts, not agencies, are expert on the First Amendment." *Porter v. Califano*, 592 F.2d 770, 780

n.15 (5th Cir. 1979).

Thus, the standards of review for constitutional and APA claims are different. And, tellingly, Plaintiff-Appellants have identified no court decisions applying the cited APA standard of review under *SEC v Chenery* to First Amendment or any other constitutional claims.

Moreover, the Final COOL Rule's preamble is not the full administrative record.[2] Therefore, it matters little for Plaintiff-Appellants' First Amendment claims whether the Final COOL Rule's preamble "explain[s] why, or how," the USDA adopted production-step labeling. (Pl.-Appellants' Br. at 22.) First Amendment scrutiny does not require as much.

Zauderer's applicability is warranted when "the government shows that, absent a warning, there is a self-evident – or at least 'potentially real' – danger that an advertisement will mislead consumers." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (citations omitted). And no more is needed when the possibility of deception is self-

[2] Plaintiff-Appellants arguably waived their rights to have a more fulsome record prior to the District Court's decision by failing to argue that one should be produced. *Cf. Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 444 (7th Cir. 1990). The preferred course for an inadequate record is to order the agency to develop one. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

evident.[3] *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010); *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 413 (D.C. Cir. 2012).

2. The District Court correctly applied the *Zauderer* standard because the record demonstrates that the Final COOL Rule was self-evidently aimed at deception.

Even if Plaintiff-Appellants are correct about the standard of review, generally courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

Here, the partial record before the District Court demonstrated the Final COOL Rule is self-evidently aimed at consumer confusion. As the District Court indicates, the Final COOL Rule's purpose is to "ensure label information *more accurately* reflects the origin of muscle cut covered

[3] Unlike *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 145 (1994), in which the Supreme Court could not find sufficient record evidence demonstrating an adequate government interest, the present case involves a facial challenge, so the government need only demonstrate an abstract interest served by the scheme. *See*, *e.g*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 711 (D.C. Cir. 2011) (mentioning the difference between the as-applied challenge and prior facial challenge); *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (stating that the government's burden is met for a facial challenge where it appears, "based on data, studies, history, or common sense," that the measure directly advances the government's interest).

commodities in accordance with the intent of the statute while complying with U.S. WTO obligations." (JA517) (emphasis added). (*See also* Slip Op. at 16; JA1154.) The COOL statute was intended to prevent consumer confusion engendered by not only the lack of information about where an animal was born, but also the interrelated information about where it was raised and slaughtered, as demonstrated by the statute's language and history. The failure to prevent this confusion was a central reason the WTO found the USDA's prior label scheme inadequate. Accordingly, the Final COOL Rule's production-step labeling eliminated precisely this confusion.[4]

After all, the COOL statutory language, largely unaltered since its inception, requires retailers to designate covered meat commodities as from the United States only if they are derived from animals "exclusively born, raised, and slaughtered in the United States." *See* Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, 10816, 116 Stat. 134, 534-36.

This explicit listing of different production steps demonstrates that Congress found each integral to defining a product's origin.[5] Indeed, one of

[4] As discussed below, the agency's ban on commingling also prevents consumer deception by eliminating another layer of deception overlaying the already confusion-inducing scheme.

[5] And, the WTO found that the definition of U.S. origin "involve[d]

the statute's key goals was to prevent consumers from erroneously believing that meat from imported animals, but slaughtered on U.S. soil, was from the United States. *See, e.g.,* 148 Cong. Rec. S3979 (May 8, 2002) (statement of Sen. sponsor Tim Johnson) ("[O]pponents of country-of-origin labeling . . . like to import cheap meat . . . into the United States and camouflage those products as "Made in the USA". . .); 145 Cong. Rec. S2038 (Feb. 25, 1999) (statement of Sen. Feingold) (stating that, without COOL, many are "mislead[,] assum[ing] that a steak that carries a USDA inspection and grade label is U.S. produced.")[6]

The United States argued before the WTO that preventing this exact type of confusion was its main interest with COOL.[7] (*See* Slip Op. at 16

---

information on the places where animals from which the meat is derived were born, raised, and slaughtered," indicating that production-step labeling has remained integral to the implementation of COOL since its enactment. (JA420/¶ 338 and n. 657.)

[6] USDA inspection and grade labels are affixed to beef derived from imported cattle slaughtered in the United States. Prior to COOL, USDA's voluntary "Product of the U.S.A." labels were applicable to meat products that only had minimal processing in the United States. (JA253/¶ 253.)

[7] It is perhaps unsurprising that years later Plaintiff-Appellants would indicate that what they really want is a scheme that would return consumers to the days prior to any COOL labels, where all products processed in the United States would be designated as U.S. products. *See* AMI comments (Jan. 8. 2010) available at http://www.meatami.com/ht/a/GetDocumentAction/i/56354 at 5. (*See also*

n.14; JA1154 (citing Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R, WT/DS386/R, adopted 18 November 2011 ("Panel Reports"), located at http://www.wto.org/english/news_e/news11_e/384_386r_e.htm, at ¶ 7.665.)

Even after the 2002 COOL statute was passed, USDA proposed COOL rules in 2003 that recognized the importance of production steps. They mandated the labeling of each U.S. production step for imported livestock. 68 Fed. Reg. 61,944, 61,949 (Oct. 30, 2003) (JA164 ("[T]o label products . . . only born in country X, but raised and slaughtered in the United States solely as 'Product of country X' does not reference . . . significant production steps . . . in the United States.")))

However, when the 2008 COOL amendments created three additional country-of-origin designations – multiple countries of origin (B-category), imported for immediate slaughter (C-category), and imported meat products (D-category), and USDA did not mandate production-step labels, it caused manifest consumer confusion. As the WTO recognized, these B- and C-labels permitted meat case placards to bear a "Product of X, Y" label, which, when placed on a single piece of meat, vexingly suggest that the meat is

---

JA542 n.1.)

from two countries. (JA420-21/¶ 338 and n. 657; *see also* Panel Reports at ¶ 7.700.) Consumers were further misled because the prior rules allowed retailers to list the countries of origin for all B-labeled product in any order. So, product labeled "Product of Mexico, United States," for example, could be either B- or C-category product. (*See* JA376-77/¶246.)

Additionally, the 2009 rules allowed so-called "commingling," where A- and C-category product can receive a B-category label, if it has even a scintilla of meat derived from B-category animals. (*See* JA376-77/n.400-01.) This further dilutes the clarity of the labels.

USDA's failure to address this confusion was a major reason that the WTO found such rules to be defective. And the 2013 Final COOL Rule self-evidently sought to address the WTO-found deficiencies by addressing this confusion.

Plaintiff-Appellants counter this by arguing that the Final COOL Rule only addresses government-imposed misleading speech. (Pl.-Appellants' Br. at 29.) But this simply misunderstands that the prior rules did not dictate whether or not retailers were to label production steps. They were certainly allowed to disclose them. 74 Fed. Reg. 2,658, 2,706 (Jan. 15, 2009); (JA251 ("[T]he origin declaration *may* include more specific information related to

production steps." (emphasis added))). But since retailers did not do so voluntarily, the Final COOL Rule sought to address the resulting confusion.[8]

Thus, the District Court's decision to apply the *Zauderer* standard was both well-grounded and commonsensical, as there was more than enough evidence to conclude that the USDA's interest in requiring production-step labeling was to prevent manifest consumer confusion.

3. The Final COOL Rule easily survives rational basis review because it was reasonably related to preventing confusion, and it is irrelevant that the rule is underbroad.

To survive *Zauderer* muster, the Final COOL Rule need only be "reasonably related" to the government's interest in preventing consumer deception. *Spirit Airlines, Inc*, 687 F.3d at 411 (citing *Milavetz*, 559 U.S. at 250; *Zauderer*, 471 U.S. at 651).

For the same reasons that it passes the *Central Hudson* test, as discussed below, the Final COOL rule is more than reasonably related to

[8] This is just one of the myriad ways that this case is different from *R.J. Reynolds Tobacco Co*., where the prior labeling on cigarette packages was mandated and strictly prescribed by the FDA, prompting the majority to dismiss the dissent as "blam[ing] the industry for playing by the government's rules." 696 F.3d at 1215. Unlike cigarette warning labels, with COOL, retailers have never been prohibited from listing production steps. Moreover, the Final COOL Rule does not compel anyone to place warnings with graphic images on packages of beef or pork.

preventing deception. Indeed, Plaintiff-Appellants almost admit as much stating, "[w]hen 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." (Pl.-Appellants' Br. at 36.) This concedes that a consumer must infer or guess what the label actually means under the prior rules. Moreover, with this example, a consumer who wants a U.S.-origin steak would be just as likely to select a Mexican-origin steak.

Plaintiff-Appellants also contend that the Final COOL Rule does not pass *Zauderer* because Category-D product and ground-beef labels also result in confusion. (Pl.-Appellants' Br. at 36, 39.) But the *Zauderer* Court was "unpersuaded . . . that a disclosure requirement is subject to attack if it is 'under-inclusive[,]'" 471 U.S. at 651 n.14, since "[g]overnments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information . . . is not such a fundamental right." *Id.* (citation omitted).

Likewise, any Plaintiff-Appellant right to continue concealing certain meat products' production steps does not preclude USDA from requiring its

disclosure on some covered commodities.

4. Alternatively, the Final COOL Rule survives intermediate scrutiny.

Even if the District Court erred in applying *Zauderer*, the Final COOL Rule is still constitutional under *Central Hudson.*

a. The Final COOL Rule serves a substantial government interest of remediating past deceptive labeling, not solely satisfying consumer curiosity; and common sense ordains that the rule directly and materially advances this interest.

The Final COOL Rule's purpose of avoiding misleading and deceptive advertising by remediating the misleading prior labeling is also a substantial interest under *Central Hudson*'s first prong.[9] *See Novartis Corp. v. FTC*, 223 F.3d 783, 789 (D.C. Cir. 2000). This is different from satisfying mere consumer curiosity, distinguishing this case from *Int'l Dairy Foods*

[9] This is not the only substantial government interest, although it was the only one discussed by the District Court. One of the main impetuses was to prevent consolidation. *See, e.g.,* 148 Cong. Rec. H2022, 2035 (May 2, 2002) (statement of Rep. Thune) ("This farm bill will enhance producer competition . . . .") It is also aimed at consumer safety. *See, e.g.,* 150 Cong Rec. S614, 634 (Feb. 4, 2004) (statement of Sen. Daschle) (". . . [I]mproving upon an already good meat safety system . . . is a good reason why country-of-origin labeling ought to be law today.") While USDA has repeatedly asserted that COOL is not a safety program, consumers rely on COOL both as a proxy for safety and quality, just as Congress intended. (*See* JA168 ("[C]onsumer surveys also indicate that consumers may desire COOL . . . because it represents to them a proxy for product safety or quality . . . .")

Ass'n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996).

Next, *Central Hudson*'s second prong requires that the "restriction directly and materially advance the asserted governmental interest." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quotation marks and citations omitted). While this is not satisfied by mere conjecture, restrictions can be "based solely on history, consensus, and 'simple common sense.'" *Id.* (quoting *Florida Bar* v. *Went For It, Inc.,* 515 U.S. 618 (1995)).

Notwithstanding Plaintiff-Appellants' derision aimed at the District Court's use of "common sense," this was enough to see that the Final COOL Rule mitigated the deception that was exacerbated, if not created, by retailers' refusal to label production steps and their indiscriminate commingling.

The Plaintiff-Appellants contend the Final COOL Rule does not meet the direct-advancement and tailoring requirements because the WTO did not mandate production-step labeling. (Pl.-Appellants' Br. at 33.) But USDA's belief that it acted in accordance with the WTO ruling is *more* of a reason to find that the rule directly advances the government's interest. The District Court was wisely deferential to such a decision within the foreign-relations context. As Judge Wilkins recently penned persuasively in finding that

country of origin labeling regulations for diamonds met the *Central Hudson*'s second prong:

> As the Supreme Court recently made clear, in this context, conclusions must often be based on informed judgment . . . . [W]hile concerns of national security and foreign relations do not warrant abdication of the judicial role, and while the Court does not defer to the Government's reading of the First Amendment, even when such interests are at stake, the Court must nevertheless recognize that when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of courts is marked. Indeed, judicial review is particularly deferential in areas at the intersection of national security, foreign policy, and administrative law.

Nat'l Ass'n of Mfrs. v. SEC, 2013 U.S. Dist. LEXIS 102616, 107-08 (D.D.C. 2013) (quotation marks and citations omitted). Thus, the District Court was well within its discretion to defer to the informed judgment of the executive branch to comply with the WTO ruling.

b. The Final COOL Rule is a reasonable fit to advance the government's interest; indeed, Plaintiff-Appellants suggest no other legitimate options.

The final requirement under *Central Hudson* is that the restriction is "no more broad or no more expansive than necessary . . . ." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1002 (D.C. Cir. 2009) (quotation marks and citations omitted). "The government does not have to show that it has adopted the least restrictive means . . . ." *Id.* The regulation must

solely be proportionate to the advanced interest. *Id.* The absence of "'numerous and obvious less-burdensome alternatives' is a relevant consideration[.]" *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1242 (10th Cir. 2004) (quoting *Went For It*, 515 U.S. at 632).

Plaintiff-Appellants advance two arguments for why the Final COOL Rule is insufficiently tailored, and their attempts to suggest other viable alternatives fall flat. First, they cryptically suggest the existence of other WTO-compliance alternatives. But they cannot name any. Indeed, they implied at the District Court hearing and elsewhere that the only viable alternative was complete congressional repeal of the statute. (JA48, 53, 1090; *see also* Pl.-Appellants' Br. at 33 n.7.) Without viable regulatory alternatives, the rule is very likely narrowly tailored. *See, e.g.*, *Sciarrino v. City of Key West*, 83 F.3d 364, 370 (11th Cir. 1996) (finding restrictions narrowly tailored in the absence of "'numerous and obvious less-burdensome alternatives'" (quoting *Cincinnati v. Discovery Network*, 507 U.S. 410, 417 n.13 (1993)).

Relatedly, the Plaintiff-Appellants suggest that eliminating the COOL program's exemptions for restaurants and for ingredients in processed food is an alternative. (Pl.-Appellants' Br. at 45.) The Plaintiff-Appellants

concede that USDA is statutorily prohibited from making such changes, however, and courts have routinely rejected such underbreadth arguments under *Central Hudson*. *See Mainstream Mktg. Servs*, 358 F.3d at 1238 (saying that First Amendment challenges based on underinclusiveness "face an uphill battle" in the commercial speech context as the government is not required to "regulate all aspects of a problem before it can make progress on any front").

Indeed, underinclusiveness is relevant "only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further." *Id.* at 1238-39 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). Here, Plaintiff-Appellants cannot demonstrate such irrationality, and the WTO rejected these exact arguments when advanced by Mexico and Canada. (JA448-451/¶¶ 409-416 ("Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue . . . .")).[10]

[10] The Plaintiffs reliance on *Boos v. Barry*, 485 U.S. 312, 329 (1988), is unavailing. There, the Supreme Court subjected a non-content-neutral city ordinance that restricted political speech to strict scrutiny and found it not narrowly tailored.

Therefore, whether under *Zauderer* or *Central Hudson*, the Final COOL Rule passes First Amendment scrutiny because it demonstrates a sufficient government interest of preventing consumer deception and because it is sufficiently tailored to do so.

B. The Plaintiff-Appellants Failed to Demonstrate That the Final COOL Rule Is *Ultra Vires*.

The Plaintiff-Appellants also fail to demonstrate that USDA acted outside of its authority.

1. USDA has the authority to ban commingling.

Plaintiff-Appellants first argue that USDA's authority to ban commingling is limited, notwithstanding the statute's broad delegation to the agency to "promulgate such regulations as are necessary to implement this subchapter," 7 U.S.C. § 1638c(b) (2012). They suggest that there is an implicit, yet supposedly impermeable wall between impermissible regulations that affect "processing," and those that fulfill Congress' supposed true intent of "providing information." (Pl.-Appellants' Br. at 44.)

But the rule's ban on commingling is, at best, a *de facto* ban that is silent about how an animal or product is to be handled or processed. The Final COOL Rule only prescribes how meat is to be labeled. Plaintiff-

Appellants can continue to commingle so long as the product is labeled in accordance with the rule when sold by a retailer. That is, they cannot use commingling to qualify for a mixed-origin label that obscures the production steps of A-, B-, and C-category product.[11]

On the other hand, if Plaintiff-Appellants' interpretation is accurate and USDA is prohibited from promulgating rules that could affect processing, even to prevent confusion, then it would mean that Congress was most concerned about consumers receiving any information, irrespective of whether the information was accurate.

Moreover, the Plaintiff-Appellants' interpretation effectively reads non-existing language into the statute, exalting the "retailer's interest in efficient production" (Pl.-Appellants' Br. at 42), over any statutory goal of providing accurate information. In this way, Plaintiff-Appellants' cited *Ragsdale v. Wolverine World Wide, Inc.* decision is completely inapposite. 535 U.S. 81, 94 (2002). There, the Supreme Court found that the agency lacked authority to promulgate a regulation because it conflicted with the

[11] Indeed, the prior unchallenged COOL rules also affected processing since they expressly authorized commingling, but with strict limitations, allowing mixed-origin labels on A-category meat *only* if it was commingled with B-category meat. (*See* JA250.) As discussed below, this is a limitation that some meatpackers have apparently ignored.

statutory cause of action, notwithstanding the agency's broad grant of authority. *Id.* In this case, on the other hand, the only "careful balance" subverted by the Final COOL Rule is invented by Plaintiff-Appellants to maintain their confusing labeling practices.

Next, Plaintiff-Appellants argue that the USDA impermissibly extended its authority to ban commingling based solely upon a lack of language proscribing such authority. (Pl.-Appellants' Br. at 43.) But the District Court found that no statutory authorization existed to permit commingling, and the language that Plaintiff-Appellants claimed mandated this agency authority (in 7 U.S.C. § 1638a(a)(2) (2012)) actually addressed a separate issue of how to designate individual animals from multiple potential countries of origin.[12] (Slip Op. at 33-34; 1171-72.) The District Court's inability to find a commingling *mandate* in the statute is not the same as saying that the agency derived its authority to *ban* commingling from the same statutory language. *See NRA of Am., Inc. v. Reno*, 216 F.3d 122, 136 (D.C. Cir. 2000) (finding that the agency's refutation of statute's limitation of authority is not the same as reliance on the same provisions for the

[12] Plaintiff-Appellants make no attempt to refute this statutory interpretation, further evidencing that it is not unreasonable.

affirmative grant of such authority).

Moreover, since Plaintiff-Appellants cannot identify anything in the statute that authorizes the agency to allow commingling, it would be strange for this Court to find that the agency has no authority to reconsider such a rule – even under its general powers. Indeed, most courts have found that agencies need no express authority to reconsider prior decisions, as they have the inherent power to do so. *See, e.g.*, *Gun S., Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (collecting cases); *Jackson v. Richards Med. Co.*, 961 F.2d 575, 582 n.6 (6th Cir. 1992)).

2. USDA has the authority to require production-step labeling.

Plaintiff-Appellants' argument that the USDA lacks authority to require retailers to label production steps is also unconvincing.

The District Court found the statute does not preclude labels delineating production steps, finding that it was perfectly reasonable to read its instructions on designating animals within categories as not excluding other labeling information that could be disclosed to achieve those instructions. The court found this reading plausible based on the statute's text, which creates two distinct obligations: the retailer's first obligation to "designate" the country from which the product was derived, under 7 U.S.C.

§ 1638a(a)(2), and the retailer's second and distinct duty to "inform consumers" of the country of origin under § 1638a(a)(1). If not dispositive, the court found that this alternative reading at least demonstrates ambiguity, meaning that production-step labeling was within the USDA's discretion.

Plaintiff-Appellants contend this interpretation ignores the statute's use of the same term "country of origin" in both 7 U.S.C. § 1638a(a)(1) and (a)(2). (Pl.-Appellants Br. at 49-50.) But, Plaintiff-Appellants' interpretation does far more damage, rendering much of the statutory scheme inoperative. Under the Plaintiff-Appellants' theory, the only labeling information retailers can be required to include (regardless of whether it is A-, B-, C-, or D-category product) is the vague designations of the product under § 1638a(a)(2). But, this suggests that Congress designed a labeling scheme where both B- and C-category product could bear identical "Product of X, U.S." labels.[13] It is nonsensical that Congress would create different designation instructions, but intend that the resulting end-product under these designations be labeled *exactly the same way*. Plaintiff-Appellants'

[13] While this is partially a product of the prior regulatory scheme that enabled B-category product to be labeled in whatever order the retailer wanted, Plaintiff-Appellants will be hard-pressed to argue that this is solely a product of regulatory language given the language of 7 U.S.C. § 1638a(a)(2)(b)(III).

interpretation thus violates a cardinal principle by rendering language superfluous. *Cf. Davis Cnty. Solid Waste Mgmt. v. U.S. EPA*, 101 F.3d 1395, 1404 (D.C. Cir. 1996), *amended by*, 108 F.3d 1454 (D.C. Cir. 1997).

Nothing in COOL's legislative history suggests that Congress intended this absurdity. Rather, it is far more plausible that it created its 2008 criteria for how retailers were to designate product from multiple countries of origin in § 1638a(a)(2) with an accepting eye towards USDA's 2003 interpretation of its authority under (a)(1) that it could mandate production-step labels. After all, USDA's 2003 rules, which required labeling of all domestic production steps for meat from imported animals, did not result in having identical B- and C-category product labels. Thus, Congress was much more likely affirming the agency's interpretation of its 2003 authority than adopting a meaningless labeling scheme. If Congress had actually disapproved of USDA's approach, on the other hand, it certainly could have prohibited production-step labeling in 2008, but it did not.

Plaintiff-Appellants' last resort is to argue that the District Court inappropriately deferred to the agency's assertion of authority based on the statute's lack of prohibitive language. But, the court did not defer to USDA

solely on these grounds. It additionally found that the agency was generally empowered to make such regulations necessary to carry out the statute. (Slip. Op at 21; JA1159.) This is a basic underpinning for *Chevron* deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (stating that "the preconditions to deference under *Chevron* are satisfied" where Congress has unambiguously vested the agency with general authority to administer the statute through rulemaking, and the agency interpretation was promulgated in the exercise of that authority).

Moreover, the District Court found that it was at least ambiguous, if not completely reasonable, that § 1638a(a)(1) includes a separate duty to inform consumers of these production steps to preserve the four distinct meat-labeling categories. (Slip Op. at 27-29, 31; JA1165-67, 1169 (quoting 78 Fed. Reg. at 31,370).) This is sufficient to warrant deference under this Court's precedents. *See, e.g., NRA of Am., Inc. v. Reno*, 216 F.3d 122, 136 (D.C. Cir. 2000).

For these reasons, the District Court appropriately found that the Plaintiff-Appellants would not likely succeed on their claims' merits.

II. The Plaintiff-Appellants Failed to Demonstrate Irreparable Harm in the Absence of Preliminary Relief.

Nor have Plaintiff-Appellants demonstrated that they would likely suffer from irreparable harm.

Demonstrating irreparable harm requires injury that is "both certain and great," and "actual and not theoretical." *Wisconsin Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). It must be so imminent "that there is a clear and present need for equitable relief . . . ." *Id.* (quotation marks and citations omitted). The alleged harm must "directly result" from the action sought to be enjoined. *Id.*

The Plaintiff-Appellants offer no specific evidence of such harm. They claim that their supposed lost First-Amendment freedoms would be irreparable. (Pl.-Appellants' Br. at 51.) But while such a loss "may constitute irreparable injury, the moving party must demonstrate some likelihood of a chilling effect on *their* rights. . . . [T]he plaintiff must establish a causal link between the injunction sought and the alleged injury. . . ." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (emphasis added) (quotation marks and citations omitted) (citing *Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989)). As the Third Circuit stated in *Hohe*, "it is the direct penalization, as opposed to incidental

inhibition, of First Amendment rights [which] constitutes irreparable injury." 868 F.2d at 73 (quotation marks and citations omitted).

In the present case, Plaintiff-Appellants cannot establish that the Final COOL Rule directly penalizes *their* First Amendment rights since neither the statute nor the rule compels their speech. Only *retailers* are required to label certain products.[14] *See* 7 U.S.C. § 1638a(a)(1) ("[A] retailer . . . shall inform consumers . . . of the country of origin . . . .") Plaintiff-Appellants are not "retailers," and the word is conspicuously absent from their self-description. (*See* Pl.-Appellants Br. at 14.) Accordingly, any meatpacker labeling of consumer-ready meat is done voluntarily, as a service to retail customers. (*See* JA556/¶5, JA564/¶5, JA569/¶5, JA534/¶5, JA559/¶ 16.) Meatpackers are only required to "provide information to the retailer indicating the country of origin[,]" 7 U.S.C. § 1638a(e), and they can choose to pass on origin information in numerous ways. (*See, e.g.*, JA252.)

Plaintiff-Appellants' alleged economic harms are likewise dubious. First, much of their purported economic injury seems to be from their refusal to follow the prior rules. As mentioned above, the prior rules only allowed

[14] *See* 7 C.F.R. § 65.240 (2013) ("*Retailer* means any person subject to be licensed as a retailer under the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(b)).")

comingling of A- and B-category product and B- and C-category product. Commingling of A- and C-category meat was *not* permitted. But Plaintiff-Appellants' declarant Brad McDowell attested that Agri Beef Co. ("Agri Beef") slaughters both A- and C-category cattle (*see* JA556/¶7), without distinguishing between domestic and Canadian cattle. (*See* JA557/¶10.) It "typically label[s] each box . . . as 'Product of US and Canada' because it . . . was . . . 'commingled.'" (*Id*.; *see also* JA1015/¶17.) Declarant Jerry Holbrook indicated that the 2013 commingling ban would force Tyson Foods, Inc. ("Tyson") to start "process[ing] meat according to . . . whether the animal was imported for immediate slaughter or not[]" (JA539/¶4) and cease applying a mixed-origin label to A-category meat commingled with product from animals "born and raised in Canada, slaughtered in the United States," which is a C-category meat.[15]

Given this impermissible commingling, the "unclean hands" doctrine precludes a preliminary injunction. *See Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies*, 970 F.2d 273, 281 (7th Cir. 1992)

[15] This improper commingling also helps explain the anomalous findings that Plaintiff-Appellants attribute to a Kansas State University study. (*See* JA566-567/¶¶14-16.) The meatpackers' violation of the 2009 COOL rules deprives both consumers and producers of its benefits.

("Unclean hands is a traditional defense to an action for equitable relief[,] . . . relevant to preliminary as to final relief.") Moreover, Plaintiff-Appellants grossly overstate the Final COOL Rule's potential harms, since, without their illegal commingling, Agri Beef and Tyson would have already borne much of what they estimate the Final COOL Rule's costs will be.

Equally speculative are Plaintiff-Appellants' claimed costs from segregation and foreign-cattle discounts. (*See, e.g.*, Pl.-Appellants' Br. at 54.) The purported segregation harms are undercut by meatpackers' voluntary livestock segregation before and after slaughter.[16] Most meatpackers also require segregation infrastructure in order to pay producers for livestock.[17] Nor do Plaintiff-Appellants allege that they are compelled to keep or pass on information they do not already maintain. And their failure

[16] (*See* JA557/¶9 ("At our plant, cattle carcasses are sorted and processed in a variety of ways. First, based on content and other characteristics, they are sorted into five categories: Private Brand, Natural, Angus, Export, or Commodity. Then, within these categories, they are sorted according to their quality grade (USDA Prime, USDA Choice, USDA Select, and ungraded, known as 'No Roll'). Each subcategory is processed separately through our system.")))

[17] *See* 2012 Annual Report, Packers and Stockyards Program, U.S. Department of Agriculture Grain Inspection, Packers and Stockyards Administration, at 36 ("In a 'carcass-based' purchase, . . . final payment is determined . . . after [] [the animal] has been slaughtered and eviscerated." Approximately 60% of cattle are purchased this way). Available at http://www.gipsa.usda.gov/Publications/psp/ar/2012_psp_annual_report.pdf.

to disclose the extensive ownership-based segregation suggests that USDA's prediction is correct that they will implement a mix of solutions to meet the rule's requirements. (*See* JA515.)

Additionally, since meatpackers already have very sophisticated and computerized tracking systems that allow them to track meat throughout their plants, freezers, and shipping facilities and ensure proper payment, customer satisfaction, quality control, and proper delivery of goods and services, any additional segregation costs related to COOL alone are likely to be minimal.

Last, any alleged injuries from discounted imported livestock are uncertain. First, as Intervenor-Appellees' brief demonstrates, Plaintiff-Appellants' claimed harms to feeders are contradicted by the statements of their own foreign producers. (Br. Intervenors Def.-Appellees U.S. Cattlemen's Association, National Farmers Union, American Sheep, Industry Association, and Consumer Federation of America, at 32.)

Second, declarant Bryan Karwal attests that U.S. pigs are more expensive than Canadian pigs (*see* JA553-554), and declarant Ed Attebury claims meatpackers pay less for his imported cattle (*see* JA533) even though beef from Mexican-origin cattle receives "the same price at the retail level"

(JA535), suggesting that meatpackers, retailers, or both, are discounting the price on foreign-origin animals without comparably discounting retail prices. A 2010 USDA Grain Inspection, Packers and Stockyards Administration study found that consumers are willing to pay more for "beef produced entirely within the United States"[18] and the WTO panel noted that Canadian affidavits reported "price discounts for imported animal and *meat* as a result of the COOL requirements[.]" Panel Reports at ¶7.488 (emphasis added).

These facts refute the assertion that retail prices are the same for foreign- and domestic-origin meat products. Moreover, some of the purported costs of COOL are mitigated by lower input costs for meatpackers and higher revenues from consumer demand for all-domestic meat through higher retail prices.

This evidence suggests that any harm from discounts and segregation simply reflect competitive market forces.[19] As the District Court rightly pointed out, Plaintiff-Appellants' alleged injuries are therefore not the requisite "direct result" of the action sought to be enjoined. (Slip Op. at 71;

[18] USDA-GIPSA Investigative Report on COOL, at 1, 347, available at http://www.r-calfusa.com/COOL/090205File3COOLstudy.pdf.

[19] This is just as true for foreign-origin livestock, since consumers of such livestock, *e.g.*, packers and feedlots, are unwilling to pay the same price for them as they would for domestic livestock.

JA1209 (quoting *Wisconsin Gas Co.*, 758 F.2d at 674).) Moreover, they are not the type that usually merits an injunction. *See Nat'l Hand Tool Corp. v. United States*, 14 C.I.T. 61, 66 (Ct. Int'l Trade 1990) (finding injunctive relief unavailable where the "plaintiff is subjected [to] the usual harm of a competitive market . . . ."); *Mylan Pharms. v. Thompson*, 139 F. Supp. 2d 1, 27 (D.D.C. 2001) (collecting cases and stating "[t]he D.C. Circuit is hesitant to award injunctive relief based purely on lost opportunities and market share"), *rev'd on other grounds*, 68 F.3d 1323 (Fed. Cir. 2001).

III. The Balance of Equities Tips in Defendants' Favor, And an Injunction Is Not in the Public Interest.

The District Court determined that the balance of the equities tipped in favor of the Plaintiff-Appellants. But it failed to account for consumer deception. Just because Plaintiff-Appellants dismiss the importance of consumers knowing the origin of meat products does not mean Congress agreed. A preliminary injunction subverts congressional intent and prolongs the deception under the prior rules, which cannot be outweighed by the speculative harms that are at least partially a product of Plaintiff-Appellants' unclean hands.

For the same reasons, a preliminary injunction is not in the public

interest, as it would sanctify Plaintiff-Appellants' arguments that the First Amendment and COOL statute embody a right to deceive.

Thus, the balance of equities and public interest clearly favors the disclosure of truthful information to consumers and not enjoining the Final COOL Rule.

Conclusion

For the foregoing reasons, this Court should affirm the District Court's decision denying Plaintiff-Appellants' preliminary-injunction motion.

Respectfully submitted,

DATED: October 25, 2013

FOOD & WATER WATCH, INC.; THE RANCHERS CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA; THE SOUTH DAKOTA STOCKGROWERS ASSOCIATION; AND THE WESTERN ORGANIZATION OF RESOURCE COUNCILS**,**

By its attorneys,

J. Dudley Butler,
(Admitted *Pro Hac Vice* to the District Court on Oct 2, 2013, MS Bar # 7626)
Butler Farm and Ranch Law Group PLLC

s/ Zachary B. Corrigan
Zachary B. Corrigan (DC Bar # 497557)
1616 P Street, NW, Suite 300
Washington, DC 20036

499A Breakwater Drive
Benton, MS 39039
(p) (662) 673-0091
jdb@farmandranchlaw.com

(p) 202-683-2451
(f) 202-683-2452
zcorrigan@fwwatch.org

Rule 32(a)(7) CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because it contains 6,966 words (maximum 7,000 words).

2. 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 it has been prepared in a proportionally spaced typeface of 14 point, Times New Roman, using Microsoft Word for Mac 2011.

DATED: October 25, 2013

s/ Zachary B. Corrigan
Zachary B. Corrigan (DC Bar # 497557)
1616 P Street, NW, Suite 300
Washington, DC 20036
(p) 202-683-2451
(f) 202-683-2452
zcorrigan@fwwatch.org