TO BE ARGUED BEFORE THE COURT *EN BANC* MAY 19, 2014
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)

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

AMS: Agricultural Marketing Service

COOL: Country of origin labeling

WTO: World Trade Organization

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INTRODUCTION

In its brief, the Agricultural Marketing Service (AMS) goes to considerable lengths to avoid confronting Appellants' arguments. AMS recharacterizes the law of this Circuit and the very regulations it has just enacted. It introduces arguments not raised below and discards arguments that were. And most important of all, AMS hardly stirs itself to dispute several critical points: the "anti-deception"

rationale for "Born, Raised, and Slaughtered" labels is an impermissible post hoc rationalization; the Final Rule will fail if it is reviewed under *Central Hudson* scrutiny; banning commingling is outside the scope of the agency's authority under the Agricultural Marketing Act; and Appellants' members will be irreparably harmed by the enforcement of the Final Rule.

Because AMS's arguments (or lack thereof) confirm that each of the four preliminary-injunction factors favored Appellants, the District Court's Order denying preliminary relief should be reversed.

ARGUMENT

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

A. The Final Rule Violates the First Amendment.

AMS did not identify a legitimate governmental interest in "Born, Raised, and Slaughtered" labeling; its only response to commenters' First Amendment concerns was an irrelevant tautology. *See* Appellants' Br. 21-22. The Final Rule thus fails under *Central Hudson* review. Even if this Court were to credit AMS's after-the-fact justification—and even under the standard AMS urges the Court to apply—the Final Rule would still fail to pass constitutional muster.

1. *Central Hudson* Applies To The Final Rule, And The Final Rule Fails Under *Central Hudson*.

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), supplies the standard of review for all compelled commercial

disclosures except those in the "narrow enclave carved out by *Zauderer* [v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985)]" for requirements related to preventing deception. *See R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (*RJR*). Under the *Central Hudson* standard, "the government must 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." *Id.* at 1212.

AMS argues for the first time on appeal, however, that *Central Hudson* does not apply to *any* compelled commercial disclosure—in other words, compelled commercial speech is subject to a "relaxed" standard of review so long as that compelled speech is "factual." AMS Br. 22-23. In support of this late-breaking argument, AMS cites just two cases: *Milavetz, Gallop, & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), and *UAW-Labor Employment & Training Corp.* v. *Chao*, 325 F.3d 360 (D.C. Cir. 2003). Neither proves AMS's theory. *Milavetz* involved misleading advertisements. And *UAW* applied a standard specific to the field of labor law.[1] More to the point, AMS's position is squarely foreclosed by

[1] AMS elsewhere cites a dictum from *SEC* v. *Wall Street Publishing Institute, Inc.*, 851 F.2d 365 (D.C. Cir. 1988), observing that "disclosure requirements have been upheld * * * even when the government has not shown * * * [the speech would be false or deceptive] or that the disclosure requirement serves some [other] substantial government interest." *Id.* at 373 (citation omitted) (first set of brackets in original). But to illustrate this point, the court cited *Meese* v. *Keene*, 481 U.S.

RJR. *See* 696 F.3d at 1213. This Court explained there that "*Zauderer* should be construed to apply only when the government affirmatively demonstrates that an advertisement threatens to deceive consumers." *Id.*

AMS thus is left to distinguish *RJR* on the ground that the rule at issue in that case compelled the display of certain graphical images (themselves arguably factual) rather than "purely" factual disclosures. AMS Br. 28. But *RJR* does not recognize that distinction as one that makes a difference: The Court's conclusion applied to "disclosure requirements" without qualification, and it was only after reaching this conclusion that the Court identified the particular character of the warnings as an *additional* reason to apply *Central Hudson*. *Id.* at 1213, 1216.

Even if *RJR* could be distinguished on the basis proposed by AMS, moreover, *Spirit Airlines, Inc.* v. *Department of Transportation* cannot be. *See* 687 F.3d 403 (D.C. Cir. 2012). The Court was absolutely clear in that decision, as in *RJR*, that the *Zauderer* exception to *Central Hudson* applies only when a disclosure is *both* factual *and* directed at misleading speech. 687 F.3d at 411. Indeed, the government presented the same argument in that case that it is presenting now—that all compelled factual disclosures should be reviewed only for reasonableness—and the Court declined to adopt it. *Compare* Brief of

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465 (1987), which upheld a disclosure requirement that had, in fact, been premised on averting a risk of deception. *See id.* at 480 & n.15.

Respondent, *Spirit Airlines*, Nos. 11-1219, 11-1222, at 37-38 (D.C. Cir. filed Dec. 29, 2011), *with* 687 F.3d at 411-413.

The agency also offers no response to Appellants' observation that *Zauderer* review is appropriate only in the context of *voluntary* commercial advertisements, where the government compels further speech that "counteract[s] specific deceptive claims made by the [affected] companies." *RJR*, 696 F.3d at 1215; *see* Appellants' Br. 27-30. Only the Intervenors argue the point, and only briefly, contending that *Spirit Airlines* involved a revised disclosure requirement. Intervenors' Br. 10-11. Intervenors miss the critical distinction: the underlying risk of deception in *Spirit Airlines* came from the airlines' *voluntary* speech. The airlines were voluntarily advertising in a manner that, although permitted by DOT's original regulation, was later found to be misleading. 687 F.3d at 408-409. The agency did not compel the speech in the first instance, and it was not the source of the alleged deception; the airlines were.

AMS's next argument against *Central Hudson* review takes the form of a threat: *Central Hudson* review may undo "thousands" of "routine" mandatory disclosures. AMS Br. 23-24 (internal quotation marks and citation omitted). The flaws with this argument are many. For one, AMS cannot defend *this* disclosure requirement on the ground that *other* disclosure requirements are "routine": "Because I said so" is not a favored First Amendment justification. The painfully

detailed "Born, Raised, and Slaughtered" labels also hardly qualify as "routine." And the government is (one hopes) not in the business of "routinely" enacting disclosure requirements on the basis of interests the government itself refuses to endorse. *See* Appellants' Br. 22 (explaining that AMS refused to validate the "interest" of the "certain U.S. customers" alleged to be interested in "Born, Raised, and Slaughtered" designations).

Last but not least, *Central Hudson* is hardly a death-knell for "routine" disclosure requirements. The disclosures most consumers would consider "routine" (drug labeling, nutrition information, and so on) pertain to health and safety interests, and the responsible agency justifies those disclosures on those grounds. Indeed, other than the Final Rule, AMS does not point to a single disclosure requirement that may be placed in jeopardy merely because *Central Hudson* requires that the government establish a substantial interest before compelling speech.

Central Hudson applies to the Final Rule. What justification, then, does AMS offer? Not much. Abandoning its argument that the Final Rule serves a governmental interest in complying with international trade obligations, AMS argues only that the Final Rule is "justified by the government's interest in providing consumers the benefit of accurate country-of-origin labels." AMS Br. 25. But tautology is not justification. The government must show an interest

served by the compelled disclosure, and that interest cannot simply be compelling the disclosure.

The account of the supposed "benefit" of "Born, Raised, and Slaughtered" labels also has been, and continues to be, conspicuously absent from AMS's defense of the Final Rule. All AMS can muster in its brief about its governmental interest is the Final Rule's observation that markets sometimes fail to provide information about "credence attributes" that consumers value. *See* AMS Br. 26 (quoting JA519). Problematically for AMS, however, on the same page of the Final Rule, AMS concluded that the retail meat case is *not* such a market: "there does not appear to be a compelling market failure argument regarding the provision of country of origin information." JA519 (col. 2). AMS does not explain how this Court can hold that providing information about "credence attributes" is a substantial governmental interest when AMS has not even bothered to identify what those attributes are—and instead has disclaimed their value outright.

Rather than join issue under *Central Hudson*, AMS twice detours into an argument (at 24 & 30) that Appellants are not really suffering an injury. That contention is flatly belied by the law and the facts. To start with the law: "[T]he First Amendment freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' " *Nat'l Ass'n of Mfrs.* v. *NLRB*, 717 F.3d

947, 957 (D.C. Cir. 2013) (quoting *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977)). That means it is the government's burden to justify compelling speech, not Appellants' burden to justify their silence. Even if *Zauderer* speaks of the intrusion being "minimal" in the context of compelled commercial speech, 471 U.S. at 651, it is an intrusion nonetheless, and one that requires a constitutionally sufficient justification.

Ignoring these principles, AMS offers up two untenable constitutional claims. *First*, it suggests that the First Amendment applies only when the entity compelled to speak has a viewpoint-based objection to the speech that is being compelled. *See* AMS Br. 30-31. Not so. The First Amendment protection extends to compelled disclosures of fact as to which there can be no difference in viewpoint. *See Riley* v. *Nat'l Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988). That is because the First Amendment presumes that "speakers, not the government, know best both what they want to say and how to say it." *Id.* at 790-791.[2] *Second*, AMS suggests that Appellants' objections arise from an interest in avoiding economic injury, and thus are disfavored. *See* AMS Br. 24-25. Wrong

[2] And Appellants' members do object to the specific content of the labels. *See, e.g.*, JA47 ("[R]equiring labels to declare 'Born, Raised, and Slaughtered in the U.S.' could adversely affect demand by bringing front and center the issue of slaughtering livestock."); JA562 (the word "slaughtering" is "not accurate" and "offensive"); JA576 ("Consumers will have to think about slaughter every time they buy or prepare meat[.]").

again: that "the advertiser's interest is a purely economic one * * * hardly disqualifies him from protection under the First Amendment." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). *Central Hudson* itself takes into account that commercial speech is accorded "lesser protection" under the Constitution, 447 U.S. at 563; AMS is not entitled to further strip away the modest protections that case offers by pointing out that a speaker is engaged in commerce.

There is one last misdirectional play in AMS's playbook: the agency says it is "unclear" how the change in labeling regime could have "constitutional significance." AMS Br. 26. But again, it is not Appellants' burden to establish that its First Amendment harm rises to a level AMS would deem "significant"; it is AMS's burden to justify compelling speech. And whatever the dubious interests served by the prior, more accommodating labeling regime,[3] there is *no* governmental interest—substantial or otherwise—advanced by a requirement that the labels on covered cuts of meat contain a detailed passport of the animal from which those cuts are derived.

[3] The statute itself has First Amendment infirmities, as Appellants pointed out in their complaint. *See* JA26, ¶¶ 79-80 ("the COOL statute as so interpreted and applied [in the Final Rule] violates the First Amendment" and "should be declared invalid and permanently enjoined"). Appellants moved for a preliminary injunction against the Final Rule because the Final Rule is the government's immediate means of enforcing the statute. *See* JA1077:4-16.

2. The Final Rule Fails Under *Zauderer*.

The government urged below and again here that the "Born, Raised, and Slaughtered" labeling regime announced in the Final Rule falls into *Zauderer*'s "narrow enclave," *RJR*, 696 F.3d at 1217, where a more accommodating standard applies to compelled disclosures "related to the [government's] interest in preventing the deception of consumers," *Zauderer*, 471 U.S. at 651. AMS now suggests that mandatory disclosures satisfy *Zauderer* "so long as they are reasonably related to *an[y]* identified governmental interest"—not just the prevention of deception. AMS Br. 21 (emphasis added; internal quotation marks and citation omitted). That is wrong. *Zauderer* by its terms addresses only "the [government's] interest in preventing deception[.]" 471 U.S. at 651. *See also RJR*, 696 F.3d at 1213. It applies only when a rule is "framed as a remedial measure to counteract specific deceptive statements by" regulated companies. *Id.* at 1215. The Final Rule was not so framed. And a disclosure requirement may be upheld under *Zauderer* only when the government has shown 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 omitted). AMS has not made that showing.

AMS does not contend there is a "self-evident" risk of deception in the absence of "Born, Raised, and Slaughtered" designations. Nor has it has "show[n]

* * * [a] potentially real danger" that consumers are being misled without them. *Id.* (internal punctuation omitted). The District Court concluded, however, that AMS met its burden because "experience and common sense dictate[d]" as much. JA1154. That ruling was reversible error,[4] for three reasons.

First, to the extent judicial "common sense" and "experience" have any role to play, they compel the conclusion that "deception" was not on AMS's radar when it promulgated the Final Rule. Compare, for example, AMS's wishy-washy account of "certain" consumers' interest in "Born, Raised, and Slaughtered" designations (JA512-513, JA519) with the agency's rationale for mandating full-fare advertising in *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110, 23,142-143 (Apr. 25, 2011), the rule upheld in *Spirit Airlines*. As the rule's preamble explained, DOT was "prohibiting the presentation of any 'total' fares in advertising that exclude taxes, fees or other charges since the major impact of such presentations is to confuse and deceive consumers." 76 Fed. Reg. at 23,143. *That* is what an agency sounds like when it is targeting consumer deception. In stark contrast, AMS not only avoided any mention of "deception" and its variants anywhere in the Final Rule; it effectively determined that there was no *need* for a

[4] Intervenors' suggestion that the District Court was making a finding of fact akin to the findings in *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985), is misplaced. *See* Br. 12. The district court there made findings based on evidence produced by the parties; it was not reviewing the legal sufficiency of agency action based on an administrative record.

"Born, Raised, and Slaughtering" labeling regime at all. *See* JA519; *see also* Appellants' Br. 21. This is not a question of "magic words," Intervenors' Br. 8; it is one of an agency recasting a rule as a consumer-protection measure at the litigation stage, when the administrative record shows the rule has nothing to do with consumer protection at all.

Second, the District Court's decision to invoke its own "common sense" to supply a rationale the agency itself failed to provide was premised upon a mistaken reading of *Spirit Airlines*. As this Court explained in *Spirit Airlines*, the DOT had determined that advertising airfare exclusive of taxes and fees was deceptive—a determination based on comment letters, complaints, and *the agency's* own common sense. *See* 687 F.3d at 413 ("Based on common sense and over three decades of experience, DOT concluded that" excluding taxes and fees was "deceitful and misleading"). *Spirit Airlines* does not hold that *a court* may substitute its own judgment when the agency is silent. Nor does *Spirit Airlines* hold that an agency "need only" cite its experience and common sense to show a risk of deception. JA1153. This Court's ultimate holding in *Spirit Airlines* was that DOT's showing of deception was "sufficiently support[ed]" by comments from an earlier rulemaking and "roughly 500 comments from [a] 2006 hearing explaining how consumers were being confused." 687 F.3d at 411, 410. An agency does not satisfy *Zauderer* simply by imagining a potential for confusion

and calling that act of imagination "common sense." The agency must point to a "self-evident" or "potentially real danger" that consumers will be misled. *RJR*, 696 F.3d at 1214.

Third, AMS also has not pointed to any "potentially real danger" that the 2009 labels are misleading consumers. *Id*. The account repeatedly provided in the Final Rule—that the new labeling requirements provide information that is "more specific" than the information on the 2009 labels, *e.g.*, JA509—does not suffice. Every food label (even a "Born, Raised, and Slaughtered" label) could be made more specific. That does not mean every food label is deceptive. Nor do the two examples AMS belatedly concocted at the litigation stage (*see* AMS Br. 5-6) fill the gap: AMS cannot claim that the generalities and omissions in these examples amount to "deception" when the same generalities and omissions are *not* misleading with respect to Category D and ground meat products. *See* Appellants' Br. 35-39. It is unsurprising, then, that AMS does not return to these examples in any detail in its First Amendment argument on appeal.

This Court should not extend *Zauderer* to meet this case for another important reason: the hypothetical "confusion" to which AMS has alluded throughout this litigation would not qualify as "deception" under any established understanding of that concept. For a label to be deceptive, it must misrepresent facts material to a reasonable consumer—the standard that "undergird[s] all

deception cases." *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (appending Fed. Trade Comm'n, Policy Statement on Deception). The advertising at issue in *Zauderer*, *Milavetz*, and *Spirit Airlines*, for example, misrepresented how much certain services would cost—an indisputably material concern to ordinary consumers. *See, e.g.*, *Zauderer*, 471 U.S. at 652 (finding that "*substantial numbers* of potential clients" were likely to be misled by attorney's advertising) (emphasis added).

AMS's interest in providing information that is "more specific," and its post hoc examples, are of a different nature entirely. Historically, this Court has applied an "ordinary consumer" test when assessing whether meat labeling is false or misleading, *see, e.g.*, *Federation of Homemakers* v. *Butz*, 466 F.2d 462 (D.C. Cir. 1972), but AMS has not shown that the labels it identified would strike the ordinary consumer as confusing or misleading in any regard, material or otherwise. *See* Appellants' Br. 35-39. For example, AMS has yet to explain why an ordinary consumer would base a purchasing decision on whether a cut of meat is "Category B" as opposed to "Category C," when these categories reflect the same basic information (that an animal spent part of its life in, say, Canada), *and* that information has no bearing on health or safety, *and* it is undisputed that the ordinary consumer has no idea that these arcane regulatory categories even exist. *See* JA113. Thus, allowing Category B and Category C animals to be commingled

under the same label ("Product of U.S. and Canada" or "Product of Canada and U.S.," e.g.) is not to sanction "deception." And no further confirmation of the point is necessary because AMS has essentially admitted that "Born, Raised, and Slaughtered" labels cater only to "certain" consumers—not "ordinary" ones. JA513.

* * *

To be sure, the 2009 labels—like all food labels—could be more specific in a nearly infinite number of ways. But that does not mean adding required disclosures to these labels is "reasonably related" to "preventing the deception of consumers." Because that is all AMS's argument amounts to in this case, the Final Rule fails even under *Zauderer*.

B. The Final Rule Violates the Agricultural Marketing Act.

Appellants are also likely to succeed on the merits of their claim that the Final Rule exceeds the authority granted to the agency in the Agricultural Marketing Act.

1. AMS Lacks Authority to Ban a Production Practice.

AMS (the Agricultural *Marketing* Service) is charged with implementing a statute (the Agricultural *Marketing* Act), which contains a subchapter (Country of Origin *Labeling*), which contains the provision at issue here (*Notice* of Country of Origin), which specifies Congress's directives on the ways labels "shall inform"

consumers of the origin of the meat in packages purchased at retail. 7 U.S.C. § 1638a. This provision does not authorize AMS to regulate upstream production practices—let alone ban particular practices, such as commingling, which have been used by the industry as part of the "normal conduct of business." JA215.

AMS apparently recognizes as much. And so, in its argument before this Court, AMS contends that the Final Rule does not ban commingling. AMS Br. 19. That is wrong. The preamble to the Final Rule states that the amendments to the regulation include "the elimination of commingling," JA510; they "preclude the use of commingling flexibility," JA520; and "retailers * * * no longer can market commingled meat cuts," JA522. And the agency represented below that the Final Rule "eliminates the practice of commingling," JA985, both in writing and at the hearing on Appellants' preliminary-injunction motion, *see* JA1098:12-19; JA1099:11-14. The agency should not now be heard to change its view of the regulation and defend the regulation from statutory challenge on that basis.[5]

Setting aside AMS's inconsistent arguments, there is nothing left in the agency's brief to defend the commingling ban under the statute. The government

[5] Indeed, the agency's about-face raises another problem: if the agency now believes—contrary to its official position in the Final Rule—that the regulation does not ban commingling, Appellants are entitled to an opportunity to comment on that development. For "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

nowhere identifies any statutory authority to regulate production practices. It abandons its argument before the District Court that the agency's "necessary to carry out" power is the source of its authority to ban commingling—no doubt because that argument was deeply flawed. *See Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002) (agency may not promulgate regulations that "alter[ed]" the existing regime "in a fundamental way"). AMS's ban on commingling improperly attempts to "bootstrap itself into an area in which it has no jurisdiction"—namely, production practices. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks and citation omitted)). But that is beyond what the statute allows.

The government also does not identify any aspect of the statutory text that creates an ambiguity warranting deference under *Chevron* Step Two. It does not attempt to defend the District Court's indefensible view that the lack of any express prohibition against regulation of production practices in the statute created such an ambiguity. *Compare* JA1181-82 *with Railway Labor Executives' Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). What we are left with, then, is a "clear line" establishing the limits of the agency's authority: the agency may regulate the content of labels as set forth in the statute. *City of Arlington, Tex.* v. *FCC*, 133 S. Ct. 1863, 1874 (2013). The "agency cannot go

beyond" that scope of authority. *Id.* AMS did so when it promulgated a regulation that reaches beyond labeling content and extends to production practices.

2. The Agency's Commingling Ban Conflicts With Its Contemporaneous Statutory Interpretations.

AMS stated in 2009 that "[c]ommingling 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 (emphasis added). That is why the 2009 rule provided only "clarification on how commingled meat products can be labeled"—not authorization for the practice itself. JA207.

The USDA, AMS's parent agency, said much the same. In an official agency response to a request from Representative Bob Goodlatte (one of the primary drafters of the 2008 Farm Bill) for the agency's views on how the proposed amendments would impact the COOL program, the USDA's General Counsel stated that "it is our view that the draft legislation delineates four categories of country of origin labels in language that affords retailers marketing flexibility in the first two categories." JA532. By contrast, the language *could not be read* "as mandating segregation at the producer level." *Id.* n.2. USDA's General Counsel concluded by noting that "[i]f our interpretation is not consistent with the intent of the drafters, we stand ready to provide technical drafting

assistance to the conferees to ensure that the language achieves its intended effects." JA531.

The government claims that USDA's letter only "indicates the view * * * that the agency had the authority to implement the statute in the manner reflected in the 2009 regulations." AMS Br. 20. The letter does no such thing; it predates the 2009 regulations, as shown by the letter's acknowledgment that "the conferees [we]re in the process of finalizing the language" of the statute. JA529. An agency's "representations to Congress" matter; they "provide[] important context to Congress' enactment of its [COOL] legislation." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156-157, 159 (2000). And as Appellants explained in their opening brief (at 46), 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). The agency cannot merely wipe away its contemporaneous understanding of clearly expressed congressional intent, and the fact that the agency has now changed its mind years after the statute was passed belies its claim to deference here. That claim, and the government's contradictory statutory interpretation, should both be rejected.

3. The Point-Of-Processing Labeling Requirements Are Contrary to the Statute.

AMS's point-of-processing labeling requirements are flawed for another reason as well: they run directly contrary to statutory language. The government's defense of these requirements fails for two reasons.

The first is that Congress elected to define exactly what "country of origin" a retailer "shall inform customers" of in five different circumstances. 7 U.S.C. § 1638a(a)(1), (a)(2). As relevant here, the country of origin for Category A meats is the "United States," for Category B meats is "all of the countries in which the animal may have been born, raised, or slaughtered," and for Category C meats is "the country from which the animal was imported" and "the United States." *Id.* § 1638a(a)(2)(A)-(C). The amended regulations, however, change the "country of origin" notice requirement to a "production steps" notice requirement, mandating that retailers include *all three* production steps for Category A, B, and C meats. That textual revision exceeds the agency's authority. The agency "cannot trump specific portions of the [COOL statute]" by "adding new factors to a list of statutorily specified ones." *American Petroleum Inst.* v. *EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

The agency's statutory revisions do not end there; AMS also imposes requirements that squarely *conflict* with the statute. Take, for example, the labeling requirements for Category B (multiple countries of origin) meat. Under

the statute, 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." 7 U.S.C. § 1638a(a)(2)(B) (emphases added). But the regulation departs from the text of the statute: the Final Rule provides that a retailer *must* designate where the animal *was* born, raised, *and* slaughtered. 7 C.F.R. § 65.300(e) (2013). The agency takes away the retailer's discretion and rewrites the statute, changing "may" to "must," "may have been" to "was" and "or" to "and." But "neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes." *Landstar Exp. Am., Inc.* v. *Federal Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009).

The government counters that the import of these textual distinctions is "unclear." AMS Br. 21. It contends that if Congress had intended to allow retailers flexibility to label meat from animals that may have origins in multiple countries "without keeping track of exactly which meat came from which country," it would have done so explicitly—as it did in § 1638a(a)(2)(E) for ground meat. AMS Br. 19. The problem for the government is that Congress did just that. Section 1638a(a)(2)(B) uses language analogous to § 1638a(a)(2)(E). Congress permits retailers of ground meat to provide notice of "all reasonably possible countries of origin." § 1638a(a)(2)(E). And Congress similarly permits retailers of multiple-country-of-origin commodities to provide notice of "all of the

countries in which the animal *may have been* born, raised, *or* slaughtered." § 1638a(a)(2)(B). Where the government suggests difference, the language instead shows similarity.

The government's argument also appears to dismiss a plain-language reading of Congress' chosen language as not "plausibl[e]" because it "give[s] retailers a right to decline to provide the appropriate information." AMS Br. 21. But the government's argument misses the point: the language in the statute *defines* the "appropriate information" that the retailer must provide. To conclude otherwise would be to adopt the District Court's view, defended only by Intervenors here, that "country of origin" in § 1638a(a)(1) (requiring a retailer to "inform" customers of the country of origin) means something *different* than "country of origin" in § 1638a(a)(2) (explaining what country of origin a retailer may or must "designate"). *See* Intervenors' Br. 22. The case that Intervenors cite for this proposition shows why it is wholly misplaced. A court may conclude that the same term in a statute has different meanings where "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). No such showing has been made here, by anyone; accordingly, all that remains is the "natural presumption that identical words used in different parts of the same act are

intended to have the same meaning." *Id.* The agency erroneously departed from this "normal rule of statutory interpretation," *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005), and because of this the Final Rule should be vacated.

* * *

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

II. APPELLANTS' MEMBERS WILL BE, AND ARE BEING, IRREPARABLY HARMED ABSENT A PRELIMINARY INJUNCTION.

A. AMS Does Not Dispute That Appellants Will Be Irreparably Injured if the Final Rule is Enforced.

Neither AMS nor Intervenors dispute that if Appellants have demonstrated likelihood of success on the merits of their First Amendment claim, they have demonstrated irreparable harm. *See Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). *See* AMS Br. 32; Intervenors' Br. 27.

Even if this Court concludes Appellants are likely to succeed only on their statutory claim, moreover, preliminary relief is warranted because *AMS does not dispute* that Appellants' members have shown their businesses are likely to be irreparably harmed by the enforcement of the Final Rule while this case is pending on the merits. *See* AMS Br. 32. "Even appellees waive arguments by failing to brief them." *Roth* v. *Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011) (holding

government forfeited responses to appellant's arguments by failing to present them in its brief) (quoting *United States* v. *Ford*, 184 F.3d 566, 578 n. 3 (6th Cir.1999)).

B. Intervenors' Challenges To Appellants' Declarations Are Without Merit.

Because AMS has conceded Appellants' irreparable injury by not contesting it, Intervenors should not be permitted to do so on their own. But their arguments fail in any event to undermine Appellants' ample evidence of harm.

1. Canadian and Mexican Ranchers

It is undisputed that Mr. Unrau and Mr. Pena will be severely, immediately, and irreparably injured by the Final Rule, which has already reduced the demand for cattle of Canadian and Mexican origin. Appellants' Br. 52-54. This harm is not speculative: Tyson Foods, one of the largest purchasers of Canadian cattle, has just announced it has stopped buying Canadian cattle for processing at its U.S. plants. *See* J. Skerrit, Tyson Stops Buying Canadian Cattle Shipped to U.S. Plants, at http://www.bloomberg.com/news/2013-10-24/tyson-stops-buying-canadian-cattle-shipped-to-u-s-plants.html (Oct. 24, 2013). As a result of just this one decision, Canada's exports will decline more than 150,000 head per year. *Id*.

Intervenors' only objection to Mr. Unrau's and Mr. Pena's testimony pertains to their statements about the discounting that occurred in response to the 2009 Rule. Intervenors maintain that this testimony is "contradicted by government data," but the only "data" they cite is a table showing that, nationwide,

prices for cattle increased between 2007 and 2012, as well as the unsupported allegation of their counsel at the preliminary-injunction hearing. Intervenors' Br. 33 (citing JA955, JA1137). As far as "data" goes, the table says nothing about the prices paid to Canadian or Mexican producers; in fact, it is not even clear that the table includes pricing data for producers outside the United States. The irreparable injury to Mr. Unrau and Mr. Pena is undisputed and indisputable.

2. Texas Cattle Feedlots

Appellants have also shown that three member feedlots in Texas (Alpha 3, Runnells Peters, and Rogers & Sons) are irreparably injured because they are losing contracts and facing steep discounts on the thousands of Mexican-origin cattle in their inventory. *See, e.g.*, JA536 ("The value of the cattle inventory my company already has on hand is in great jeopardy due to the immediate implementation of [the Final Rule]."); JA566; JA571. *See* Appellants' Br. 54-55.

In response to this testimony, Intervenors cite the conclusory statements of their *own* declarants—each of whom is based in the Midwest, where there is ample access to U.S.-origin cattle, and none of whom refutes the testimony that the 2009 Rule forced additional discounts on Mexican-origin cattle. *See* Intervenors' Br. 34. Intervenors also strain to find something "contradictory" between Mr. Pena's testimony about discounting and the feedlots' testimony that they could not use discounts to recoup their losses from the 2009 Rule. *Id.* at 32. This objection

misses the mark. The feedlot declarants are irreparably injured by the immediate devaluation of cattle inventory *for which they have already paid*. Whether they can obtain sufficient discounts on future purchases is irrelevant.

3. BK Pork

Intervenors have never seriously disputed the irreparable injury to BK Pork, a feeding business that sources hogs from Canada because U.S. hogs are in short supply and thus prohibitively expensive. *See* JA552-553. Now that the Final Rule is driving retailer and packer demand toward U.S.-origin hogs, BK Pork has to struggle to find sources of U.S. hogs and then pay more to buy them, completely disrupting its business model. *Id*. Intervenors weakly suggest that BK Pork's injury will be "temporary" because there might be an oversupply of cheap U.S. and Canadian hogs in the future. Intervenors' Br. 33. But what might happen in the distant future is irrelevant to the certain (and undisputed) injury BK Pork faces *today*.

4. Dallas City Packing and Agri Beef

Appellants showed that two packers, Agri Beef and Dallas City Packing, will be irreparably injured in the absence of an injunction because the Final Rule requires them to incur crippling compliance costs in the near-term and ultimately to shift to exclusively U.S.-origin cattle when their businesses are built upon access to foreign-origin cattle. *See* Appellants' Br. 55-57. Intervenors have essentially

nothing to say about the declaration for Dallas City Packing; therefore the irreparable harm to this business should be treated as conceded. Likewise, with Agri Beef, Intervenors have no objection of substance. All of the objections in their brief are more than sufficiently addressed in the two declarations submitted by Mr. McDowell. *See* JA555, JA1011.

C. Intervenors' Remaining Arguments Are Without Merit.

A few final comments about Intervenors' brief are necessary before proceeding to the remaining injunction factors.

1. Intervenors mischaracterize Appellants as arguing that unrecoverable economic losses of any amount warrant preliminary relief; indeed, Intervenors devote considerable space in their brief to knocking down that straw-man claim. *See* Intervenors' Br. 29-31. Appellants well know that their burden is to prove not only that the harm to their members is "irreparable" but also that it is "certain," "great," and "actual." *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Appellants have satisfied that burden by showing that their members' losses are non-recoverable (i.e., irreparable), non-speculative (i.e., certain and actual), and significant, to the point of jeopardizing the existence of their businesses (although this is a requirement that applies only to *recoverable* monetary losses, as we showed, Appellants' Br. 53-54).

2. Intervenors insist that Appellants have not provided the Court with sufficient information about their declarants' "overall operations." Intervenors' Br. 35. Although Intervenors' "overall-operations" requirement has no legal basis, even the most cursory review of Appellants' submissions show that they have satisfied it. Each of Appellants' declarants has described the nature and scope of its business, how its business depends for its survival upon demand for livestock born outside the United States, and how the Final Rule, by impermissibly shifting that demand to U.S.-origin livestock, threatens that business.

3. Here is the reality: Intervenors represent U.S. ranchers who compete against Canadian and Mexican exporters. *See* Intervenors' Corp. Disclosure Statement, Br. i-ii. The interest driving Intervenors' participation in this lawsuit is the flip side of the irreparable injury to Appellants' members. It is inconsistent (at best) for Intervenors to argue that the Final Rule will not wreak the consequences that spurred their participation in the first place.

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

As against Appellants' irreparable injuries, there is very little "on the other side of the ledger," as AMS puts it (at 32). The new labeling requirements concededly have nothing to do with health and safety, offer only marginal if any economic benefit, and cater solely to the informational "interest" of "certain U.S. consumers." JA513. AMS has already suspended the enforcement of the Final

Rule for a period of months without claiming prejudice to its interests, and it does not explain its conclusory assertion that an injunction "could also compromise the United States' position in further proceedings for the [WTO]." *Id.* The District Court considered and rejected AMS's claims of hardship and found them so lacking that *even without a finding of irreparable harm*, the court found that the balance of the equities tipped in Appellants' favor. JA1212. AMS has offered no reason to disturb that ruling on appeal.

Because AMS has not identified a public interest served by the Final Rule, and because Appellants have shown the Final Rule to be unconstitutional and *ultra vires*, the public-interest factor also favors the entry of a preliminary injunction. Appellants' Br. 60.

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief, the District Court's decision should be reversed.

Dated: November 1, 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 Reply Brief for Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 6,522 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 1st day of November 2013, I filed the foregoing Reply 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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I hereby certify on this 18th day of April 2014, that I filed the foregoing Reply Brief for Appellants through this Court's CM/ECF system, which will send an electronic notice of filing to each of the parties and *amicus curiae* participants in the case. I further certify that the foregoing brief is identical to the brief originally filed in this case on November 1, 2013, with the exception of the alterations to the cover so ordered by the Court, and the inclusion of this certification.

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