[*EN BANC* ORAL ARGUMENT SCHEDULED FOR 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.

U.S. DEPARTMENT OF AGRICULTURE, et al.,

Defendants-Appellees,

UNITED STATES CATTLEMEN'S ASSOCIATION, et al.,

Intervenor-Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The plaintiffs in the district court, who are appellants in this Court, are the American Meat Institute, American Association of Meat Processors, Canadian Cattlemen's Association, Canadian Pork Council, National Cattlemen's Beef Association, National Pork Producers Council, North American Meat Association, Southwest Meat Association, and Confederación Nacional de Organizaciones Ganaderas.

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

The United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America intervened as defendants in the district court and are appellees in this Court.

Food & Water Watch, Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America, South Dakota Stockgrowers Association, and Western Organization of Resource Councils intervened as defendants in the district court.

These same entities have moved to file an amicus brief in this Court, but this Court has not yet acted on the motion.

There were no amici in the district court.

B. Rulings Under Review.

The ruling under review is the opinion issued on September 11, 2013, by Judge Ketanji Brown Jackson, docket number 48 [JA 1139], denying plaintiffs' motion for a preliminary injunction, and the accompanying order, docket number 49 [JA 1219]. The opinion is not yet published.

C. Related Cases.

This case has not previously been before this Court or any other court. We are not aware of any related cases.

s/ Daniel Tenny
Daniel Tenny

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GLOSSARY

TBT Agreement	Agreement on Technical Barriers to Trade
WTO	World Trade Organization

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JURISDICTIONAL STATEMENT

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court denied plaintiffs' motion for a preliminary injunction on September 11, 2013, and plaintiffs timely appealed on September 12, 2013. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the Agricultural Marketing Service's regulations specifying the content of labels that designate the country of origin of certain meat are consistent with the governing statute and with the First Amendment.

PERTINENT STATUTES AND REGULATIONS

The pertinent statute is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This is a challenge to the U.S. Department of Agriculture's implementation of a statutory requirement that retailers "inform consumers . . . of the country of origin" of certain meat products. 7 U.S.C. § 1638a(a)(1). Two features of the labeling regulations are at issue. First, the new rule requires country-of-origin labels to specify the countries in which the animal was born, raised, and slaughtered, as opposed to listing countries without specifying which production steps occurred in those countries. Second, the agency required each label to reflect the country of origin of the animal from which the meat in question was derived, ending the agency's previous practice of allowing retailers to label all meat processed on a single day with the same country-of-origin label even if that label did not accurately describe the origin of each individual cut of meat.

Plaintiffs are various organizations whose members participate in the meat industry in the United States, Canada, and Mexico. Other participants in the meat industry have intervened as defendants in support of the new rule. Plaintiffs challenged the new rule as both inconsistent with the governing statute and contrary to the First Amendment. The district court denied plaintiffs' motion for a preliminary injunction, and plaintiffs appeal.

STATEMENT

A. Statutory and Regulatory Background

1. The Farm Security and Rural Investment Act of 2002, as amended, requires sellers of certain commodities, including meat and fish, to inform purchasers of the commodity's country of origin.[1] The statute provides generally that "a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity," 7 U.S.C. § 1638a(a)(1), and contains additional specific requirements for different types of commodities.

At issue here is section 1638a(a)(2), titled "Designation of country of origin for beef, lamb, pork, chicken, and goat meat," which sets out four categories of "muscle-cut meat," *i.e.*, meat other than ground meat.[2]

Section 1638a(a)(2)(A) ("Category A"), titled "United States country of origin," provides that retailers may designate meat "as exclusively having a United States

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[1] *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 281–84, 116 Stat. 134, 533–35; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1351–54.

[2] The statute separately addresses ground meat, providing that for ground meat, the notice of country of origin "shall include--(i) a list of all countries of origin . . . ; or (ii) a list of all reasonably possible countries of origin." 7 U.S.C. § 1638a(a)(2)(E).

country of origin only if the covered commodity is derived from an animal that was . . . exclusively born, raised, and slaughtered in the United States."[3]

Section 1638a(a)(2)(B) ("Category B"), titled "Multiple countries of origin," provides that a retailer of meat derived from an animal that was "(I) not exclusively born, raised, and slaughtered in the United States, (II), born, raised, or slaughtered in the United States, and (III) not imported into the United States for immediate slaughter, may designate the country of origin of such [meat] as all of the countries in which the animal may have been born, raised, or slaughtered."

Section 1638a(a)(2)(C) ("Category C"), titled "Imported for immediate slaughter," provides that a retailer of "meat that is derived from an animal that is imported into the United States for immediate slaughter shall designate the origin of such covered commodity as--(i) the country from which the animal was imported; and (ii) the United States."

Section 1638a(a)(2)(D) ("Category D"), titled "Foreign country of origin," provides that a retailer of "meat that is derived from an animal that is not born, raised, or slaughtered in the United States shall designate a country other than the United States as the country of origin of such commodity."

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[3] Animals raised in Alaska or Hawaii that are briefly transported through Canada are also eligible for this designation, as were animals that were present in the United States shortly after the current version of the statute was enacted in 2008. *See* 7 U.S.C. § 1638a(a)(2)(A).

2. The statute directs the Secretary of Agriculture to "promulgate such regulations as are necessary to implement" the labeling scheme, *id.* § 1638c(b), and the Agricultural Marketing Service first issued implementing regulations in January 2009, *see* 2009 Final Rule, 74 Fed. Reg. 2658 (Jan. 15, 2009) [JA 202].

As relevant to plaintiffs' claims, the 2009 regulations differed from the current scheme in two respects. First, the content of the prior labels supplied a list of countries of origin, but did not provide specific information sufficient to glean which of the statutory categories applied. For example, with regard to meat from imported animals that were not imported for immediate slaughter, retailers were allowed to label the meat as "Product of the United States [and] Country X" or, if the animal was raised in more than one country other than the United States, "Product of the United States, Country X, and . . . Country Y." 7 C.F.R. § 65.300(e)(1) (2009) [JA 251]. The countries, including the United States, could be listed in any order. *Id.* § 65.300(e)(4) [JA 251]. Meat derived from animals that were imported into the United States for immediate slaughter was to bear the label "Product of Country X and the United States." *Id.* § 65.300(e)(3) [JA 251]. The regulations authorized, but did not require, labels that "include more specific information related to production steps" of birth, raising, and slaughter. *Id.* § 65.300(e)(4) [JA 251]. Thus, meat derived from animals imported for immediate slaughter (Category C) could be labeled in the same way as meat derived from animals imported to be raised and slaughtered in the United States (Category B).

Second, the 2009 regulations made special provision for meat that was "commingled during a production day" with meat of a different country of origin. *Id.* § 65.300(e)(2), (4) [JA 251]. Meat was treated as "commingled" if it was processed on the same day at the same production facility. *See id.* If the commingling allowance was relied upon, meat could be labeled based on the country of origin of animals other than the one from which it was derived. For example, meat derived from an animal that was born, raised, and slaughtered in the United States could be labeled as if it were derived from an animal with multiple countries of origin if the meat was processed on the same day as animals born outside the United States. *Id.* § 65.300(e)(2) [JA 251]. This flexibility made it unnecessary for retailers and processors to keep track of the country of origin of particular cuts of meat, and instead allowed them to place the same label on large quantities of meat, identifying all possible countries of origin.[4]

3. Canada and Mexico challenged the country-of-origin-labeling regime in the World Trade Organization (WTO), urging, as relevant here, that the labeling scheme

[4] Although plaintiffs suggest that the "commingling" allowance also applied in circumstances where "a retailer offers meat products with different countries of origin in the same retailer case," Appellants' Br. 10, the agency has never authorized retailers to apply a single country-of-origin designation to multiple packages of meat with discrete countries of origin. *See* 2009 Final Rule, 74 Fed. Reg. at 2670 [JA 215] ("[I]f a retailer wants to mix product from multiple categories, it can only be done in multi-product packages and then only when product from the different categories is represented in each package in order to correctly label the product."); *see also* 7 C.F.R. § 65.300(e)(2), (4) (2009) [JA 251] (discussing only animals "that are commingled during a production day").

was inconsistent with the WTO's *Agreement on Technical Barriers to Trade* ("TBT Agreement"). *See* Final Rule, 78 Fed. Reg. 31367, 31367 (May 24, 2013) [JA 509]. Among other claims, Canada and Mexico argued that the scheme was inconsistent with "the TBT Agreement's national treatment obligation to accord imported products treatment no less favorable than that accorded to domestic products." *Id.*

The WTO Appellate Body concluded that the labeling scheme impermissibly discriminated against Canadian and Mexican livestock, and was thus inconsistent with the national treatment obligation. The Appellate Body reasoned, in part, that the scheme "does not impose labelling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit." Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements* (June 2012) ("WTO Appellate Body Reports"), WT/DS384/AB/R, WT/DS386/AB/R, ¶ 343 [JA 423] (emphasis in original).

The Appellate Body noted, for example, that the regulatory scheme did "not require the labels to mention production steps at all," and thus did not permit customers to ascertain where the various production steps took place. *Id.* It observed that "due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two." *Id.*

Concluding that "the disproportionate burden imposed on upstream producers and processors [was] unjustifiable," *id.* ¶ 347 [JA 425], the Report "emphasize[d] that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, [was] of central importance to [the] overall analysis," *id.* ¶ 348 [JA 425].

The WTO's Dispute Settlement Body adopted the Appellate Body's recommendations and rulings in July 2012. *See* Final Rule, 78 Fed. Reg. at 31367 [JA 509]. In December 2012, a WTO arbitrator determined that the United States must bring its labeling program into compliance with the Agreement by May 23, 2013. *See* PI Op. 6 [JA 1144] (citing WTO Arbitrator's Report).

4. After the WTO's decisions, the Agricultural Marketing Service "reviewed the overall regulatory program" and, in March 2013, issued a proposed rule designed to "improve the overall operation of the [country-of-origin-labeling] program and also bring the current mandatory [country-of-origin-labeling] requirements into compliance with U.S. international trade obligations." Proposed Rules, 78 Fed. Reg. 15645 (Mar. 12, 2013). After a comment period, the agency issued the final rule at issue in this case, effective on May 23, 2013.[5]

[5] Although the regulations were in effect on May 23, 2013, they were not published in the Federal Register until the following day.

The final rule made two changes that are at issue here. First, country-of-origin labels for muscle-cut meat slaughtered in the United States "must specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed." Final Rule, 78 Fed. Reg. 31367 at 31368 [JA 510]. If all production steps occurred in the United States, the meat will bear the label "Born, Raised, and Slaughtered in the United States." 7 C.F.R. § 65.300(d) [JA 527]. If production steps took place in multiple countries, the label must specify which step took place in each country, *e.g.*, "Born in Country X, Raised and Slaughtered in the United States." *Id.* § 65.300(e) [JA 527].[6]

Second, the rule "eliminates the allowance for commingling of [meat] of different origins." Final Rule, 78 Fed. Reg. at 31369 [JA 511]. Under the new rule, labels "are required to include specific information as to the place of birth, raising, and slaughter of the animal from which the meat is derived." *Id.* *Compare* 7 C.F.R. § 65.300(e)(2), (4) (2009) [JA 251] (allowance for commingled meat), *with* 7 C.F.R. § 65.300(e) (2013) [JA 527] (no such allowance).

The rule was effective on May 23, 2013. The agency recognized, however, "that it may not be feasible for all of the affected entities to achieve 100% compliance immediately," and therefore provided that "during the six month period following the

[6] If animals are raised for some time in another country, and then raised for additional time in the United States (in other words, not imported for immediate slaughter), the United States may be designated as the sole country in which the animal was raised. *See* 7 C.F.R. § 65.300(e) [JA 527].

effective date of the regulation," it would "conduct an industry education and outreach program concerning the provisions and requirements of [the] rule." Final Rule, 78 Fed. Reg. at 31369 [JA 511].

B. Prior Proceedings

Plaintiffs, a group of meat industry participants, challenged the final rule in district court as inconsistent with the governing statute and the First Amendment, and sought a preliminary injunction.

The court denied the injunction, explaining that plaintiffs had failed to demonstrate a likelihood of success on the merits. The court found no merit in plaintiffs' assertion that Congress had prohibited the agency from requiring labels that indicate where the animal was born, raised, and slaughtered. The court explained that while Congress had specified "which geographic location qualifies as the 'country of origin' for designation purposes in any given case," Congress did not prescribe "the *content* of the required disclosure." PI Op. 23–24 [JA 1161–62] (emphasis in original). The statutory text "certainly does not preclude the [agency] from determining that, in order to best inform consumers about the origins of a Category A muscle cut commodity pursuant to the statute, the label affixed to any such muscle cuts package must convey something to the effect of 'Born, Raised, and Slaughtered in the USA.'" *Id.* at 24 [JA 1162].

The district court also found unpersuasive plaintiffs' contention that the agency was required to allow retailers to affix the same label to all cuts of meat that had been

processed the same day, even if the cuts of meat had different countries of origin. The court noted that the statute does not discuss the practice of "commingling," and makes no provision for a labeling scheme for "commingled" meat. *Id.* at 32–33 [JA 1170–71]. The court concluded that "the much-heralded practice of commingling animals for slaughter and then affixing a multiple-country label to identify all of the applicable countries of origin is likely a creature of *regulation* from its inception, not a product of the statute." *Id.* at 34 [JA 1172] (emphasis in original).

The district court also rejected plaintiffs' claim that the Final Rule violates the First Amendment. The court noted that it was "undisputed" that "the Final Rule mandates 'purely factual and uncontroversial' disclosures about where an animal was born, raised, and slaughtered." *Id.* at 14 [JA 1152] (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The court then concluded that the rule was amply justified on the ground that it "provide[s] consumers with 'more specific information on which to base their purchasing decisions,'" and also ensures that "'label information more accurately reflects the origin of muscle cut [meats].'" *Id.* at 16 [JA 1154] (quoting Final Rule, 78 Fed. Reg. at 31375 [JA 517]).

The court held that plaintiffs' contention that the "disclosure requirement is too 'burdensome'" was not constitutionally significant because "Plaintiffs appear to conflate the burden that they claim the Final Rule places on their *finances* with the burden it places on their speech." *Id.* at 18 [JA 1156] (emphasis in original). "In the

First Amendment context, it is the burden on speech, not pocketbook, that matters." *Id.*[7]

The court further concluded that plaintiffs had not made a sufficient showing of irreparable harm. The court rejected plaintiffs' assertion of First Amendment injury because their constitutional claim was likely to fail on the merits. *Id.* at 62 [JA 1200]. And it dismissed as speculative many of plaintiffs' allegations regarding the degree to which the Final Rule would affect their businesses. *Id.* at 63–72 [JA 1201–10]. The court acknowledged that plaintiffs would incur compliance costs, and ultimately concluded that the balance of harms tipped slightly in plaintiffs' favor. *Id.* at 72–74 [JA 1210–12]. But because the government was likely to prevail on the merits, the court concluded that the public interest favored denying the request for an injunction. *Id.* at 74–75 [JA 1212–13].

SUMMARY OF ARGUMENT

1. Congress mandated country-of-origin labeling for muscle-cut meat and directed the Secretary of Agriculture to develop labeling consistent with four statutory categories. The rule at issue in this case carries out the statutory directive by describing the content of the label that must be applied to each of the four categories of meat. Meat of exclusively U.S. origin is to be labeled "Born, Raised, and

[7] The district court also concluded that plaintiffs were unlikely to prevail on their claim that the rule was arbitrary and capricious. *See* PI Op. 47–59 [JA 1185–97]. Plaintiffs have not renewed that argument on appeal.

Slaughtered in the United States"; meat derived from animals that were imported into the United States and then raised for some period prior to slaughter is to be labeled "Born in Country X, Raised and Slaughtered in the United States"; meat that is derived from animals imported into the United States for immediate slaughter is to be labeled "Born and Raised in Country X, Slaughtered in the United States"; and meat of entirely foreign origin is to be labeled "Product of Country X." *See* 7 U.S.C. § 1638a(a)(2)(A)–(D) (setting out these four categories); 7 C.F.R. § 65.300(e) [JA 527] (describing labeling rules). The regulation closely tracks the statutory categories and implements the statutory requirement that consumers be informed of the country from which their meat was derived.

The agency acted well within its discretion in eliminating a prior regulatory allowance that permitted retailers to label all meat processed on a single day with the same country-of-origin label even if that label did not accurately describe the origin of each individual cut of meat. This "commingling" allowance was in no way compelled by the statute, and the agency permissibly required retailers to use country-of-origin labels that correspond to the country of origin of the particular animal from which the meat was derived.

Plaintiffs mistakenly characterize the labeling requirement as a "ban" on processing animals from different countries on the same day. The regulations do not purport to alter the range of permissible production practices and simply implement

the requirement that meat, however processed, bear the appropriate label reflecting its country of origin.

2. Plaintiffs are on no firmer ground in asserting that the regulations violate the First Amendment. Requirements that retailers disclose factual and uncontroversial information in connection with commercial transactions are reviewed under a relaxed standard of review that this regulation readily satisfies. Congress and the agency reasonably determined that consumers have a valid interest in knowing where their food is coming from, and the regulation at issue here reasonably vindicates that interest while placing little, if any, burden on plaintiffs' protected speech.

Plaintiffs miss the mark when they attempt to analogize this case to compelled-speech cases that gave rise to more searching First Amendment scrutiny. In those cases, the regulated entity objected to the content of the message, or asserted that the regulation at issue would chill protected speech. Here, plaintiffs make no effort to demonstrate any intrusion on their expressive rights. Instead, they confuse the potential financial burdens of complying with the regulation with burdens on their First Amendment rights. The First Amendment does not protect plaintiffs' production practices, and plaintiffs' constitutional challenge is insubstantial.

STANDARD OF REVIEW

"This Court reviews a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of

discretion," although "[l]egal conclusions . . . are reviewed *de novo*." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal quotation marks and brackets omitted). Like the district court, this Court accords deference to the agency's interpretation of the statute it is charged with administering. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

ARGUMENT

I. Plaintiffs have not demonstrated a likelihood of success on the merits.

A. The Final Rule reasonably implements the statutory directive.

The country-of-origin-labeling statute requires retailers of muscle-cut meat to "inform consumers, at the final point of sale . . . , of the country of origin" of the meat. 7 U.S.C. § 1638a(a)(1). The statute sets out four categories of muscle-cut meat and describes the countries that should be listed on the label for each of the four categories. *See id.* § 1638a(a)(2)(A)–(D).

The Secretary's regulations closely track the statutory categories. The first statutory category (Category A) includes meat from animals that were "exclusively born, raised, and slaughtered in the United States." *Id.* § 1638a(a)(2)(A).[8] Category A

[8] Category A also includes meat derived from certain animals born and raised in Alaska or Hawaii and briefly transported through Canada for slaughter in the United States, and also included meat derived from certain animals that were in the United States on July 15, 2008, shortly after the statute was most recently amended. 7 U.S.C. § 1638a(2)(A).

meat is to be designated "as exclusively having a United States country of origin." *Id.* Consistent with that directive, the implementing regulations require that meat from animals born, raised, and slaughtered in the United States bear the label "Born, Raised, and Slaughtered in the United States." 7 C.F.R. § 65.300(d) [JA 527].

The second statutory category (Category B), includes meat from animals that were "not exclusively born, raised, and slaughtered in the United States," but were "born, raised, or slaughtered in the United States" and were "not imported into the United States for immediate slaughter." 7 U.S.C. § 1638a(2)(B). Category B meat is to be designated "as all of the countries in which the animal may have been born, raised, or slaughtered." *Id.* Reflecting that directive, the regulations provide that Category B meat bear the label "Born in Country X, Raised and Slaughtered in the United States. *See* 7 C.F.R. § 65.300(e) [JA 527].[9]

The third category (Category C) includes meat from animals that were "imported into the United States for immediate slaughter." 7 U.S.C. § 1638a(2)(C). Category C meat is to be designated as originated in "the country from which the animal was imported" and "the United States." *Id.* The implementing regulations accordingly provide that Category C meat bear the label "Born and Raised in Country X, Slaughtered in the United States." *See* 7 C.F.R. § 65.300(e) [JA 527].

[9] The one exception to this general rule is the unusual case in which animals are born in the United States, raised abroad, and then reimported; in such cases the label must be adapted to reflect the actual circumstances. *See* 7 C.F.R. § 65.300(e) [JA 527].

The fourth category (Category D) includes meat from animals that were "not born, raised, or slaughtered in the United States." 7 U.S.C. § 1638a(a)(2)(D). Category D meat is to be designated so as to indicate "a country other than the United States as the country of origin." *Id.* The implementing regulations accordingly require that Category D meat be labeled as "Product of Country X," and authorize retailers to provide more detail about the location of the various production steps if they wish. 7 C.F.R. § 65.300(f) [JA 527].

The labels permit consumers to ascertain which of the four statutory categories applies to the meat to be purchased and identifies the country or countries of origin. Their form and content are entirely consonant with the statute, which itself relies extensively on where animals were born, raised, and slaughtered. *See* PI Op. 45 [JA 1183]. The labeling requirements reasonably reflect the statutory distinctions and are well within the agency's delegated authority. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

Plaintiffs offer no basis for their assertions that the regulations "ignore[] the careful categories establishing the permissible 'country of origin' for covered meat commodities," Appellants' Br. 49, and "are inconsistent with the [statutory] designation requirements," *id.* at 51. Rather, as discussed above, the regulations carefully track the statute. And unlike the prior regulations, the current regulations permit consumers to distinguish between Category B and Category C meat, consistent with the four separate categories established by Congress. Labels on meat derived

from animals that are raised in the United States and then slaughtered (Category B) will indicate that the animal was raised in the United States. Labels on meat imported into the United States for immediate slaughter (Category C) will indicate that the animal was raised elsewhere. The prior regulations authorized both Category B and Category C meat to be labeled "Product of Country X and the United States." *See* 7 C.F.R. § 65.300(e) (2009) [JA 251].

In addition, unlike the prior rule, the current regulations require that all meat be labeled to reflect the country of origin of the animal from which it was derived, and do not make exceptions for meat that was processed on the same day as the meat of animals from other countries. *Compare* 7 C.F.R. § 65.300(e)(2), (4) (2009) [JA 251] (providing exception), *with* 7 C.F.R. § 65.300(e) (2013) [JA 527] (no longer including exception). The regulations thus eliminate the possibility that, for example, meat that is of exclusively United States origin is labeled as if it were of mixed origin, simply because it was processed on the same production day as other meat.

The elimination of this "commingling" exception is entirely consistent with the statute. As the district court explained, "the term 'commingling' does not appear anywhere in the text of the . . . statute," which "in and of itself renders doubtful Plaintiffs' assertion that Congress clearly intended to address, and to protect, the practice." PI Op. 32 [JA 1170]. Each of the statutory categories discusses meat "derived from an animal" with certain characteristics, not meat processed on the same day as an animal with those characteristics. *See* 7 U.S.C. § 1638a(a)(2)(A), (B), (C),

(D). The previous treatment of "commingled" meat was an agency-created allowance that was in no sense required by the statute. *See* 7 C.F.R. § 65.300(e)(2), (4) (2009) [JA 251]; *see also* 2013 Final Rule, 78 Fed. Reg. at 31369 [JA 511] ("This final rule eliminates the allowance for commingling of muscle cut covered commodities of different origins."). The agency was not compelled to develop a scheme in which labels would include phrases like "Born Either in Country X or Country Y."

When Congress wished to ensure that retailers would have flexibility to label animals without keeping track of exactly which meat came from which country, it did so explicitly. In the provision specifying the appropriate country of origin for ground meat, Congress expressly authorized retailers to provide "a list of *all reasonably possible* countries of origin." 7 U.S.C. § 1638a(a)(2)(E) (emphasis added). Congress did not provide similar flexibility for muscle-cut meat, which is at issue here. The statutory scheme thus provides ample justification for the agency's determination that retailers must label muscle-cut meat based on its actual country of origin, rather than the countries of origin that are reasonably possible based on the group of animals that were processed on a given day.

Plaintiffs repeatedly mischaracterize the regulations as imposing a "commingling ban," Appellants' Br. 43–46, as if the regulations purported to regulate meat processing activities. Plaintiffs presumably mean to suggest that some processors may choose to alter their production practices to ensure that they can keep track of which meat is derived from which animal. If so, the possible changes in their

operations cast no doubt on the validity of the regulations, which, like the statute, address only labeling.

Plaintiffs do not advance their argument by relying on a letter sent to a Member of Congress by the General Counsel of the Department of Agriculture while amendments to the statute were being considered. *See* Appellants' Br. 43, 47 (citing Letter to Rep. Bob Goodlatte from Mark Kesselman (May 9, 2008) ("Kesselman Letter") [JA 529]). That letter suggested that the statute allowed meat with an exclusive United States country of origin (Category A) to be labeled as if it had multiple countries of origin (Category B), *see* Kesselman Letter 3 [JA 531]. That view was reflected in the agency's 2009 regulations in the limited circumstance in which animals with different countries of origin are processed on the same production day. The letter indicates the view of the then General Counsel that the agency had the authority to implement the statute in the manner reflected in the 2009 regulations. It does not state that the agency would be required to implement the statute in this way. In any event, the letter to a Member of Congress is of limited significance and cannot vary the statute's text or foreclose the agency's reasonable exercise of discretion. *See* PI Op. 42–43 [JA 1180–81]. *See also* 2009 Final Rule, 74 Fed. Reg. at 2669 [JA 214] (noting that Members of Congress had submitted comments suggesting that the statute prohibited the agency's commingling allowance); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298–99 (D.C. Cir. 2003) (refusing to constrain agency discretion based solely on legislative history).

Finally, plaintiffs point out that "the statute defines the country of origin that retailers at some times 'may' designate, and other times 'shall' designate, for covered meat commodities." Appellants' Br. 48 (quoting 7 U.S.C. § 1638a(a)(2)). *See, e.g.*, 7 U.S.C. § 1638a(a)(2)(B) (retailers "may designate the country of origin of [Category B meat] as all of the countries in which the animal may have been born, raised, or slaughtered"). It is unclear what conclusion plaintiffs seek to draw from this observation. The statute unambiguously states that retailers "*shall* inform consumers . . . of the country of origin." 7 U.S.C. § 1638a(a)(1) (emphasis added). The use of the word "may" in describing one of the statutory categories cannot plausibly be read to give retailers a right to decline to provide the appropriate information. And it certainly does not foreclose the agency's discretion to require disclosures consistent with the statutory designations.

B. The regulations raise no First Amendment concern.

1. Plaintiffs fare no better in urging that the labeling requirement violates the First Amendment. In the context of commercial speech, required disclosures are sustained as long as they are "'reasonably related'" to an identified governmental interest, and are not so "[u]njustified or unduly burdensome" as to "chill[] protected speech." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

This relatively relaxed standard of review reflects the "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. Unlike restrictions on commercial speech, disclosure requirements do not prevent sellers "from conveying information to the public"; they require sellers only to provide "more information than they might otherwise be inclined to present." *Id.* "[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) (footnote and internal quotation marks omitted); *see also SEC v. Wall Street Pub. Inst., Inc.*, 851 F.2d 365, 374 (D.C. Cir. 1988) (concluding that it would be "impermissibly 'paternalistic' for courts to challenge . . . disclosure requirements because 'zeal to protect the public from "too much information" could not withstand First Amendment scrutiny'" (quoting *Meese v. Keene*, 481 U.S. 465, 482 (1987), in turn quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976))).

Disclosure requirements may become constitutionally problematic if they "compel[] a speaker to endorse a position contrary to his beliefs, or to affirm a belief and an attitude of mind he opposes," *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108 (D.C. Cir. 2011) (internal quotation marks and brackets omitted), or if they

"pose[] the danger that speech deserving of greater constitutional protection will be inadvertently suppressed," *Wall Street Pub. Inst.*, 851 F.2d at 374 (internal quotation marks and brackets omitted). But absent such concerns, disclosure requirements do not intrude on any significant First Amendment interest: the Supreme Court has recognized that a commercial actor's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal." *Zauderer*, 471 U.S. at 651.

Mandated disclosures are thus regularly upheld under the relaxed standard of review. Applying the *Zauderer* standard, the Supreme Court in *Milavetz* rejected the contention that it should subject to intermediate scrutiny a requirement that attorneys providing consumer bankruptcy services "'clearly and conspicuously disclose in any advertisement'" the statement: "'We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.'" *Milavetz*, 559 U.S. at 233 (quoting 11 U.S.C. § 528(a)(3)–(4)). *See also UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (noting that "an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks," and citing with approval First Amendment cases upholding required disclosures).

2. Disclosure requirements are commonplace in the context of commercial speech, and their validity has seldom been called into doubt. There are "literally thousands" of regulations requiring "routine disclosure" of information in the commercial context, and "[t]he idea that these thousands of routine regulations

require an extensive First Amendment analysis is mistaken." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (joint opinion of Boudin and Dyk, JJ., which represents the opinion of the court on this point); *see also Sorrell*, 272 F.3d at 116 (noting that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information," and concluding that "expos[ing] these long-established programs to searching scrutiny by unelected courts" would be "neither wise nor constitutionally required").

The regulations at issue in this case concern precisely the type of routine factual disclosure that is not properly subject to searching constitutional review. The district court properly concluded, and plaintiffs do not dispute on appeal, that the labels at issue here are "'purely factual and uncontroversial' disclosures." PI Op. 14 [JA 1152] (quoting *Zauderer*, 471 U.S. at 651). Plaintiffs do not even attempt to demonstrate that the challenged regulations chill or burden any protected speech. Nor do plaintiffs suggest that they have a legitimate interest in preventing customers from knowing the country of origin of their products, that their disclosure of this information reflects any viewpoint with which they disagree, or that they do not wish to have this factual information attributed to them. In short, plaintiffs do not articulate any cognizable First Amendment interest in declining to provide this factual information.

Instead, plaintiffs urge that the labeling regime would cause them to incur costs in the form of changing production processes or obtaining livestock from different sources. These costs would be no different if plaintiffs were merely required to keep

track of the country of origin without divulging the information, a requirement that plainly would not implicate the First Amendment. The district court thus properly recognized that "Plaintiffs appear to conflate the burden that they claim the Final Rule places on their *finances* with the burden it places on their speech." PI Op. 18 [JA 1156] (emphasis in original). Absent some reason to believe that the regulations burden plaintiffs' right to free expression, their First Amendment claim must fail.

3. Any minimal intrusion on plaintiffs' right to free expression is amply justified by the government's interest in providing consumers the benefit of accurate country-of-origin labels. There is no dispute that the country-of-origin-labeling statute was passed to provide such information, and numerous members of Congress discussed the importance of such information to consumers. *See, e.g.*, 148 Cong. Rec. H1539 (daily ed. Apr. 24, 2002) (statement of Rep. Earl Pomeroy) ("Country of origin labeling is necessary to give U.S. consumers important information."); *see also* PI Op. 46 n.25 [JA 1184 n.25] (collecting similar statements from Representatives and Senators). In the 2009 rulemaking, the Department of Agriculture confirmed Congress's conclusion that consumers valued this information, describing "[n]umerous comments . . . indicat[ing] that there clearly is interest by some consumers in the country of origin of food." 2009 Final Rule, 74 Fed. Reg. at 2683 [JA 228].

In this rulemaking, once again, the agency observed that "[n]umerous comments supported the proposed rule and confirmed that certain U.S. consumers

value the designation of the countries of birth, raising, and slaughter on meat product labels." 2013 Final Rule, 78 Fed. Reg. at 31377 [JA 519]. "Economic theory shows that unregulated markets may undersupply information" about "credence attributes" like country of origin, about which consumers cannot obtain information by inspecting the product. *Id.* The government's interest in allowing interested consumers to know the origin of the food they eat should be beyond dispute.

Plaintiffs cannot and do not provide any basis for second-guessing the considered judgment of Congress, repeatedly corroborated by evidence presented to the administering agency, that country-of-origin labeling is warranted. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (noting, in the First Amendment context, deference owed to congressional judgments). Thus, for good reason, plaintiffs do not challenge the constitutionality of the country-of-origin statute. Instead, plaintiffs seek to ascribe constitutional significance to the change from the 2009 rule to the present rule. *See, e.g.*, Appellants' Br. 35–39.

It is unclear how the requirement to specify the countries in which animals were born, raised, and slaughtered or the elimination of the "commingling" allowance has constitutional significance, and, in any case, the changes were amply justified. The requirement in the new rule that retailers specify the location in which the three production steps occurred "will provide consumers with more specific information on which to base their purchasing decisions without imposing additional recordkeeping requirements on industry." Final Rule, 78 Fed. Reg. at 31368 [JA 510]. Similarly,

"[r]emoving the commingling allowance lets consumers benefit from more specific labels." *Id.* at 31369 [JA 511].

The district court properly recognized that "the 'likelihood of deception is hardly . . . speculative'" in this case. PI Op. 15 [JA 1153] (quoting *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 413 (D.C. Cir. 2012) (omission in original)). "Prior to the enactment of the Final Rule, the allowance for commingling all but ensured that certain muscle cut commodities would carry misleading labels" because meat could be labeled based on the country of origin of animals other than the one from which the meat was derived. *Id.* The likelihood of consumer confusion was enhanced by the fact that "retailers had no obligation to provide any of the details regarding which steps of the production process happened where," and by retailers' ability "to list the countries in any order." *Id.* at 16 [JA 1154].

The new labeling scheme provides greater specificity and accuracy for consumers than the prior scheme, and plaintiffs have identified no respect in which it imposes a greater burden on their right to expression. Thus, under the appropriate standard of review for disclosures—and, indeed, even if the balancing test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), were thought to apply—the limited imposition on plaintiffs' expression is amply justified by the interest in ensuring that information provided to consumers is accurate and meaningful.

4. Plaintiffs do not advance their argument by relying on cases in which commercial actors were forced to engage in speech with which they disagreed, or speech that would undermine their own protected speech. Those cases have no application to routine commercial disclosures of the sort at issue here.

In *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), upon which plaintiffs principally rely, this Court considered a regulation requiring cigarette manufacturers to print on their cigarette packages and advertisements a set of textual warnings about the dangers of cigarette use, accompanied by graphic images selected by the Food and Drug Administration. This Court characterized the warning scheme as an attempt by the government to force cigarette manufacturers "to go beyond making purely factual and accurate commercial disclosures and undermine [their] own economic interest—in this case, by making 'every single pack of cigarettes in the country [a] mini billboard' for the government's anti-smoking message." *Id.* at 1212 (quoting *FDA*, Tobacco Strategy Announcement (Nov. 10, 2010)) (second alteration in original). The Court described the case as involving the question of "how much leeway should this Court grant the government when it seeks to compel a product's manufacturer to convey the state's subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product?" *Id.*

In that context, the Court concluded that the warnings at issue could not be justified under the *Zauderer* standard in the absence of evidence that advertisements would otherwise be misleading or incomplete. *Id.* at 1213–14. The Court noted,

however, that the tobacco companies "never argued that *no* disclosure requirements are warranted," and "concede[d] in their brief that they would be amenable to a number of new disclosure requirements, including putting the Act's new text on the side of packages, the bottom front of packages and advertisements, or using less shocking graphics." *Id.* at 1215 (emphasis in original).

The disclosure of the country of origin of certain meat products cannot plausibly be compared even to the textual warnings to which the plaintiffs in *R.J. Reynolds* did not object (one of which read "Smoking can kill you," *see id.* at 1225 n.2 (Rogers, J. dissenting)). There is no basis for plaintiffs' apparent suggestion that *R.J. Reynolds* invalidated, *sub silentio*, all manner of requirements for routine disclosure of factual and uncontroversial information on product packaging, unless the government could demonstrate that the requirements are designed "to 'counteract specific deceptive claims.'" *See* Appellants' Br. 23 (quoting *R.J. Reynolds*, 696 F.3d at 1213, 1215). As this Court has observed in another context, "disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that 'absent the required disclosure, [the speech would be false or deceptive] or that the disclosure requirement serves some substantial government interest other than preventing deception.'" *Wall Street Pub. Inst.*, 851 F.2d at 373–74 (quoting *Zauderer*, 471 U.S. at 650) (alteration in original).

Even plaintiffs do not seem to suggest that their understanding of *R.J. Reynolds* applies to all types of disclosure requirements. Plaintiffs acknowledge that some

disclosure requirements have been upheld on grounds other than avoiding deception, such as promoting health and safety. *See* Appellants' Br. 32 n.6. This concession underscores the error in plaintiffs' attempt to analyze every disclosure requirement as if it were a graphic warning about the dangers of cigarette use. Each disclosure requirement must be assessed based on the extent of the intrusion, if any, on the plaintiff's right to free expression, and the government interest involved. As discussed above, the regulations at issue here have little if any effect on plaintiffs' right to expression, and the regulatory changes were amply justified to ensure that consumers received accurate and complete information.

The other cases on which plaintiffs rely similarly involved far more significant intrusions on First Amendment rights. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), the Supreme Court invalidated a requirement that recipients of certain government funds "'have a policy explicitly opposing prostitution and sex trafficking.'" *Id.* at 2324 (quoting 22 U.S.C. § 7631(f)). In *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), this Court considered a requirement that employers post a notification of employee rights under the National Labor Relations Act and noted that the plaintiffs, "like those in other compelled-speech cases, object to the message the government has ordered them to publish on their premises" because "[t]hey see the poster as one-sided, as favoring unionization." *Id.* at 958. And in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Supreme Court considered "whether the government may underwrite

and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, *some of whom object to the idea being advanced*." *Id.* at 410 (emphasis added). The regulation at issue here does not require plaintiffs to espouse any particular viewpoint.

Plaintiffs mistakenly attempt to analogize their challenge to *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), in which a divided panel of the Second Circuit invalidated a Vermont statute that required dairy manufacturers to disclose that their milk came from cows treated with recombinant Bovine Somatotropin, even though the U.S. Food and Drug Administration had determined that there was no significant difference between milk from treated and untreated cows. The disclosure at issue in *Amestoy* could reasonably be seen as a concession that the treatment might affect the quality of the milk. Here, plaintiffs do not urge that the labels will cause consumers to unfairly malign their products, asserting instead—despite the evidence to the contrary before Congress and the agency—that "most consumers do not care about country of origin labeling for muscle cuts," Appellants' Br. 37–38. In addition, unlike in *Amestoy*, the rule at issue here prevents consumer confusion by ensuring that labels contain specific and accurate information pertaining to the particular animal from which the meat was derived. The Second Circuit has declined to expand the *Amestoy* decision beyond the specific facts presented, squarely rejecting, for example, plaintiffs' assertion in this case that *Zauderer* applies only to

compelled commercial disclosures that combat deception. *See N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009).

In this case, Plaintiffs have no basis for objecting to the content of the information they are required to provide, nor have they presented any evidence that it chills or burdens any protected speech. The regulation readily satisfies any plausibly relevant First Amendment standard.

II. The remaining factors support the denial of a preliminary injunction.

The district court's decision may be affirmed based solely on the deficiencies in plaintiffs' argument on the merits. In any event, the court's analysis of the remaining preliminary-injunction factors further supports its denial of the request for a preliminary injunction.

As discussed above, plaintiffs articulate no cognizable First Amendment injury, so their claim of irreparable harm on that basis must be rejected. Plaintiffs note that the rule will entail compliance costs. But on the other side of the ledger, an injunction would not only deprive consumers of the more specific and accurate information required by the regulations, but could also compromise the United States' position in further proceedings before the World Trade Organization, which has already ruled that the prior regulatory scheme was unlawful and required the United States to take corrective action by May 23, 2013, the effective date of this rule.

Plaintiffs at times suggest that the new regulation will not bring the United States into compliance with the WTO ruling. *See* Appellants' Br. 33. That issue is not before this Court, and will be resolved if raised by the appropriate parties in the proper forum. For present purposes, it suffices to note that the new rule addresses issues raised by the WTO Appellate Body regarding the disproportionate burdens placed on importers in tracking country-of-origin data, as compared to the information provided to consumers under the labeling regime. *See* WTO Appellate Body Reports, ¶ 343 [JA 423]. Preventing those changes from taking effect would cause harm to the government and to the public interest, and weighs against a preliminary injunction.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Respectfully submitted,

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APRIL 2014

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 8,067 words.

s/ Daniel Tenny
Daniel Tenny

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Pursuant to the Court's order of April 4, 2014, I will also cause 30 paper copies of this brief to be hand-delivered to the Court today. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Daniel Tenny
Daniel Tenny

ADDENDUM

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7 U.S.C. § 1638a

§ 1638a. Notice of country of origin

(a) In general

(1) Requirement

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

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

(A) United States country of origin

A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat may designate the covered commodity as exclusively having a United States country of origin only if the covered commodity is derived from an animal that was--

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

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

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

(B) Multiple countries of origin

(i) In general

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

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

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

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

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

(ii) Relation to general requirement

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

(C) Imported for immediate slaughter

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

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

(ii) the United States.

(D) Foreign country of origin

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

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

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

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

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

. . .

(b) Exemption for food service establishments

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

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

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

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

(c) Method of notification

(1) In general

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

(2) Labeled commodities

If the covered commodity is already individually labeled for retail sale regarding country of origin, the retailer shall not be required to provide any additional information to comply with this section.

(d) Audit verification system

(1) In general

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

(2) Record requirements

(A) In general

A person subject to an audit under paragraph (1) shall provide the Secretary with verification of the country of origin of covered

commodities. Records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification.

(B) Prohibition on requirement of additional records

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

(e) Information

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

(f) Certification of origin

(1) Mandatory identification

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

(2) Existing certification programs

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

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

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

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

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

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