IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION; KIMBERLY LEWIS; and TOM GOULD,

Plaintiffs,

v.

U.S. DEPARTMENT OF AGRICULTURE; THOMAS VILSACK, in his official capacity as Secretary of Agriculture; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; MICHAEL WATSON, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,

Defendants.

Civil Action No.: 2:24-cv-143

District Judge Matthew J. Kacsmaryk

ORAL ARGUMENT REQUESTED

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a case about administrative overreach. The Department of Agriculture ("USDA" or "Agency") has promulgated a new rule that could wipe out the Tennessee Walking Horse industry, and at a minimum—without any rational justification—it radically restructures the industry by eliminating the most popular division of competition at Tennessee Walking Horse Shows. *See* Horse Protection Amendments, 89 Fed. Reg. 39,194 (May 8, 2024) (the "2024 Rule"). The rule purports to implement the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* ("HPA"), which prohibits "soring"—that is, the practice of intentionally injuring a horse's legs to enhance the horse's gait and its performance in a show. Plaintiffs fully endorse the laudable goal of eradicating soring, but USDA's new rule makes sweeping changes that bear no rational connection to that goal. For example, USDA bans equipment that has been permitted for over half a century without pointing to any evidence that it causes soring. At the same time, USDA arbitrarily failed to consider evidence of the economic impact that its ban would have on horse shows by effectively prohibiting the most popular division of competition. The new rule will have a devastating effect on an industry that provides jobs and enjoyment for tens of thousands of people. Neither the HPA nor the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA"), permits such results.

Numerous errors require that key provisions in the new rule must be set aside.

First, USDA rested multiple decisions on patently unreliable data about soring violations. USDA claimed that its data showed a high rate of soring violations among Tennessee Walking Horses and, in particular, a high violation rate in the division of competition (the Performance Division) where horses compete wearing equipment known as action devices and pads.[1] The problem is that, in order to establish a genuine measure of the rate of violations in the Performance Division, USDA would need to examine data drawn from a random sample of horses in that division. But USDA did not have data like that, because its data was not based on a random sample. Instead, its data reflects the

[1] Action devices are small weights weighing six ounces or less that are placed on the horse's legs. Pads consist of leather or similar material between the horse's hoof and shoes. Tennessee Walking Horses in the Performance Division train and perform using this equipment to accentuate their natural gait.

number of violations USDA inspectors found *on horses selected for inspection because they were already suspected of being sore*. In other words, the higher soring "rate" that became a critical input for many of USDA's decisions actually showed only the percentage of horses found to be sore *among horses that were already suspected of being sore*. It provided no accurate measure of the rate of soring overall, as USDA wrongly claimed. All of USDA's data was infected with that fundamental selection bias. As a result, all the provisions of the 2024 Rule that rely on the irretrievably skewed data should be set aside as arbitrary and capricious.

Second, the marquee provision in the new rule is USDA's decision to ban action devices and pads and thereby to eliminate the Performance Division of competition. That decision exceeded USDA's statutory authority because the HPA gives USDA authority to ban only practices that cause soring. But USDA concedes (and the evidence in the record shows) that action devices and pads in themselves do *not* cause soring. Instead, USDA's rationale for the ban is that there is supposedly a higher incidence of violations among horses that compete using the equipment. Even if that data were accurate (it is not—it is the same flawed data discussed above), it would show only that a higher percentage of owners and trainers in the Performance Division did *something else*—not merely using action devices and pads—that caused horses to be sore. That provides no rational basis for banning action devices and pads for everyone, including the vast majority of owners and trainers who have done nothing to make their horses sore.

Third, USDA's ban on the use of *any* substance on the legs of a Tennessee Walking Horse during competition also exceeds the Agency's statutory authority and is arbitrary and capricious. This ban includes lubricants, which USDA acknowledges are used to *prevent* soring. USDA tries to justify the ban by pointing (again) to purported data showing that owners and trainers have used *other* substances that are prohibited under *existing* rules. Even if the data were accurate, the fact that some participants in shows have done *something else* that violates the rules provides neither statutory authority nor a logical rationale for banning a substance that does *not* cause soring. Once again, USDA's decision to ban something that does not cause soring (lubricants) because some owners and trainers used *other* substances in violation of current rules is wholly irrational. USDA fares no better in claiming that

lubricants may be mixed with other substances to "mask" soring because the Agency failed to point to any instance of that actually occurring.

Fourth, USDA's new rule purporting to provide criteria for determining whether a horse is sore—the "Dermatologic Conditions Indicative of Soring" or "DCIS Rule"—is utterly arbitrary. This rule replaced the long-discredited Scar Rule, which the National Academy of Sciences, Engineering, and Medicine ("NAS") long ago determined could not be consistently applied by inspectors. NAS recommended that USDA should conduct more research and base any revisions to the Scar Rule on objective criteria grounded in studies showing what observable skin conditions on a horse's legs could provide evidence of soring. Rejecting that approach, USDA instead created a rule that provides even *less* guidance to inspectors and effectively leaves it to each inspector's unfettered discretion to decide what skin conditions can be treated as evidence of soring. The rule simply tells inspectors to find a horse sore if they "find[] that any limb of a horse displays one or more dermatologic conditions *that they determine* are indicative of soring." 89 Fed. Reg. at 39,247 (9 C.F.R. § 11.7) (emphasis added). It then provides a non-exclusive list of some conditions that inspectors may (in their discretion) "evaluate." That rule will produce even *more* arbitrary results than the Scar Rule. It is also unconstitutionally vague, because it effectively provides no guidance at all to cabin inspectors' discretion. It is an open invitation to arbitrary decisions and abuse.

Fifth, USDA's inspection process under the 2024 Rule does not provide horse owners and trainers with due process. Eight years ago, a federal district court held that, when USDA disqualifies a horse and prevents it from competing and potentially winning a prize at a show, that decision infringes on the liberty and property interests of the horse's owner and trainer—and, as a result, due process requires a mechanism to review the disqualification decision *before* the horse is excluded from the show. *See McSwain v. Vilsack*, No. 1:16-cv-01234, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016). USDA failed to address that glaring due process problem in the new rule. The 2024 Rule provides no pre-deprivation review mechanism and instead permits owners and trainers to appeal within 21 days *after* a disqualification. That process is effectively useless. Even if the owner or trainer wins such an appeal, there is no way to retroactively remedy the fact that the horse was not permitted

to compete at the show and denied any chance to win a prize.

Sixth, the new rule eliminates any role for the industry in the inspection process, which is contrary to Congress's vision of the industry taking a role in policing itself. In response to amendments to the HPA making this congressional vision clear, USDA delegated inspection authority to private inspectors known as Designated Qualified Persons ("DQPs"), in addition to employing its own Veterinary Medical Officers ("VMOs"). DQPs are licensed by private Horse Industry Organizations ("HIOs"). The new rule eliminates HIOs and the role of DQPs and requires heightened licensing requirements for new "Horse Protection Inspectors" (or "HPIs"), who must be licensed directly by USDA and who must be veterinarians to qualify. USDA shifts the increased cost of retaining those HPIs to horse show management. The result is that the rule forces a show to opt for inspectors provided by USDA—which it can select at no cost—by making the alternative cost-prohibitive. In effect, this system forces the industry out of the picture, which contradicts Congress's vision of an industry that helps police itself. The rule is also arbitrary and capricious because USDA's rationale for eliminating DQPs—that they are not finding enough soring violations—is grounded in the Agency's faulty data that distorts the violation rate found by USDA inspectors.

Seventh, the 2024 Rule is arbitrary and capricious because USDA failed to consider the devastating economic effects of the rule on the Tennessee Walking Horse industry. To the extent it conducted any economic analysis, USDA impermissibly relied on data that is over a decade old. Worse, USDA failed to consider the consequences of banning action devices and pads, which eliminates the Performance Division of competition. That division is the main draw bringing paying spectators to shows, and USDA had no rational basis for ignoring evidence that many shows will not be economically viable without it.

Eighth, the 2024 Rule also fails to comply with the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. ("RFA"). USDA concedes that the 2024 Rule largely affects small entities, but it insists—without support—that it will not have significant adverse effects on them. Once again, that approach arbitrarily ignores and fails even to address unrebutted record evidence.

The challenged provisions in the 2024 Rule should be declared unlawful and vacated.

BACKGROUND

A. The Tennessee Walking Horse Industry.

Tennessee Walking Horses ("TWHs") are known for their running-walk and proud, high-stepping strut. Since 1939, thousands of TWHs have competed at horse shows across the country for fame and prizes. These shows, both small and large, attract spectators of all ages who come to cheer for their favorite horses and enjoy wholesome fun with their families and friends.

TWHs are generally shown in two major divisions of competition: the Performance Division and the Flat Shod or Pleasure Division. *See* AR-00001107. Horses in the Performance Division display a more pronounced high-stepping gait. They are carefully trained (and compete at shows) wearing small weights of six ounces or less placed on the horse's legs (known as action devices) and pads between the hoof and shoe. Exhibit A, Declaration of Warren Wells ("Wells Decl.") ¶ 7. Plaintiff Tom Gould owns a TWH that continues to compete in the Performance Division and Plaintiff Kimberly Lewis owns several TWHs that have been bred to compete in the Performance Division and that she is training with action devices and pads to compete in the Performance Division. *See* Exhibit B, Declaration of Kimberly Lewis ¶ 3; Exhibit C, Declaration of Tom Gould ¶ 3. When horses win prizes at shows, the value of those horses for future sale (and for breeding) increases. AR-00004011. Top horses in the Performance Division are generally worth more (and can win higher prize money) than horses in the Pleasure Division. AR-00000098, TWHNCA Comment App. Ex. 27 (David Williams Declaration) ¶¶ 3-4.[2]

Horses in the Performance Division account for 70% of the entrants at major horse shows like the National Celebration. TWHNCA Comment App. Ex. 24 (Warren Wells Declaration) ¶ 12. The National Celebration is the largest and most prestigious TWH show each year, and it is run by Plaintiff The Tennessee Walking Horse National Celebration Association ("TWHNCA" or "Association"). *Id.* ¶ 3. Each year, the Celebration crowns the World Grand Champion—that is, the

[2] AR-00000098 contains a hyperlink to all of the public comments submitted in connection with the Proposed Rule, including the Association's Comments. References to the Association's comments will be cited as "TWHNCA Comment" throughout.

horse deemed to best exemplify the iconic gait of the Tennessee Walker. All horses that compete to be World Grand Champion at the Celebration are trained and shown in action devices and pads in the Performance Division. *Id.* ¶ 10. The evidence in the record showed that the Performance Division is the primary attraction for spectators at major shows, *id.* ¶ 12, and that many shows would not be economically viable without the attraction of the Performance Division, *id.* ¶ 13; *see also* TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 16.

B. The Horse Protection Act.

As in any sport, fair competition is essential. To ensure fair competition and to protect horses, over 50 years ago Congress passed the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* ("HPA"), to punish a practice called "soring" that was (then) a significant problem in the industry. The gait of a TWH is properly developed through careful training. Disreputable trainers, however, would "sore" horses by deliberately making their legs sore to exaggerate the horses' gait. Soring is an abhorrent practice, and those who do it should be punished. At the same time, those who compete fairly should not be subjected to collective punishment based on the bad acts of others.

In enacting the HPA, Congress made clear that it had twin goals—preventing soring while simultaneously protecting and enhancing fair competition. The Act declares that "the soring of horses is cruel and inhumane" and also highlights that "horses shown or exhibited which are sore . . . compete unfairly with horses which are not sore." 15 U.S.C. § 1822(1)-(2); *see also, e.g.*, Horse Protection 88 Fed. Reg. 56,924, 56,927 (Aug. 21, 2023) (proposed rule) ("[T]he goal of the USDA . . . Horse Protection program and regulations is to eliminate the inhumane practice of soring and by so doing promote fair competition in horse shows and exhibitions.").

The HPA makes it unlawful to (among other things) show or exhibit any horse that is sore or to sell, auction, or offer for sale, in any horse sale or auction, any horse that is sore. *See id.* § 1824(2). Depending on the circumstances, the HPA also makes it unlawful for the management of a horse show, exhibition, or auction to fail to disqualify any horse that is sore from an event. *See id.* § 1824(3)-(6). The HPA expressly defines the term "sore" to mean:

> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3).

To combat soring, USDA requires inspections at shows. All horses are inspected shortly before they compete. If a horse is disqualified pre-show, it is not allowed to compete at all and any chance of winning a prize (which benefits both the owner and the trainer[3]) is foreclosed. Some horses are also selected by USDA for "post-show inspection" immediately after leaving the ring. A horse disqualified post-show may also lose the ability to win a prize. Ex. A, Wells Decl. ¶ 28.

Under the HPA as originally enacted in 1970, these inspections were carried out by USDA employees. *See* Pub. L. 91-540 § 5, 84 Stat. 1404, 1405. Due to limited USDA resources, *see* H. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976), Congress amended the HPA in 1976 to give show management a significant role in the inspection process. *See* Pub. L. 94-360, 90 Stat. 915, 915-921. Congress made it the responsibility of the "management of any horse show or horse exhibition" to ensure that any horse that has been deemed sore by an inspector would not be shown in competition. *Id.* at § 5. Congress also tasked the Secretary with prescribing regulations to allow "the appointment

[3] Under industry practice, 100% of any prize money goes to a horse's trainer. *See* Ex. A, Wells Decl. ¶ 9. A horse owner benefits when his horse is successful in competition because the horse gains in value, both to breed and sell. *Id.* That is particularly true for horses that have repeated success. Under industry practice, a horse trainer will typically receive 10% from the sale of any horse he has trained, with the rest of the money going to the owner. *Id.*

by the management of any horse show . . . of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses." *Id.* (codified at 15 U.S.C. § 1823). While the USDA could continue to appoint inspectors, Congress envisioned that horse inspections would be conducted primarily by private inspectors engaged by horse show management, not USDA.

C. The U.S. Department Of Agriculture And The Horse Protection Program.

The HPA gives the Secretary of Agriculture rulemaking authority to "carry out" the Act. 15 U.S.C. § 1828. To implement the 1976 amendments, USDA delegated inspection authority to private inspectors known as Designated Qualified Persons ("DQPs"), in addition to employing its own Veterinary Medical Officers ("VMOs"), who are part of the Animal and Plant Health Inspection Service ("APHIS"), a federal agency within USDA. DQPs are licensed by private Horse Industry Organizations ("HIOs"). USDA regulations provide that HIOs are certified by the Agency to train and license DQPs. Under current rules, both VMOs and DQPs inspect horses at shows.

USDA has also issued regulations governing inspections and criteria for disqualifying horses. Some of those rules ran afoul of the Constitution or exceeded USDA's statutory authority. As USDA's notice of proposed rulemaking acknowledges, the 2024 Rule was intended, in part, to address defects in the existing rules. *See, e.g.*, 88 Fed. Reg. at 56,933 (noting that the new rule "[r]eplac[es] the scar rule with language that more accurately describes visible dermatologic changes indicative of soring").

1. The Scar Rule (9 C.F.R. § 11.3).

Decades ago, before passage of the HPA in 1970, when soring was a significant problem, "lesions in sore horses were grossly evident." AR-00001190. In 1979, USDA promulgated the so-called Scar Rule to set some standards for visual inspections of horses for signs of soring. The Scar Rule specifies conditions that, if found upon visual inspection (and palpation) of a horse's legs, would require an inspector to deem a horse sore. Among other things, the rule requires inspectors to look

for "bilateral granulomas, other bilateral pathological evidence of inflammation, and other bilateral evidence of abuse." 9 C.F.R. § 11.3.[4]

The Scar Rule has long been criticized—including by USDA's own ALJs—for lacking sufficiently objective criteria and leaving it to the subjective discretion of inspectors to decide whether a horse exhibits some skin condition that counts as a violation. *See, e.g.*, TWHNCA Comment App. Ex. 10 (ALJ Clifton Statement) at 82:10-24 ("[T]he reason I don't like scar rule cases is I think the determination of whether there is a scar is such an unquantified process that there is too much variety in the result, it's not predictable, it's not knowable how people are going to judge it."). In fact, when USDA implemented a requirement in late 2016 that a horse found in violation of the HPA must be re-inspected by a second VMO, only three Scar Rule violations were found by the Agency during the 2017, 2018, 2019, and 2020 TWH National Celebrations combined out of the 485 horses the Agency's VMOs inspected—a violation rate of 0.6%. *See* TWHNCA Comment App. Exs. 3-6 (FY 2017-2020 Activity Reports). In other words, when there was a requirement that two inspectors had to *agree* in order to find that a horse violated the Scar Rule, there were essentially zero findings at the Celebration four years in a row. Plaintiffs believe that the Scar Rule routinely led to arbitrary and unjustified disqualifications.

In 2017, responding to a joint invitation from the USDA and the TWH industry, the National Academy of Sciences, Engineering, and Medicine ("NAS") oversaw an independent study to analyze whether the Scar Rule was "based on sound scientific principles" and "can be applied with consistency and objectivity." National Academies of Sciences, Engineering, and Medicine, *A Review of Methods for Detecting Soreness in Horses* 2, 17 (2021), AR-00001092-1222 ("NAS Report"). NAS concluded that the rule was not based on sound science and that it could not be consistently applied. In particular, NAS found that the instruction for inspectors to look for "granulomas" was scientifically inaccurate and

[4] Because USDA recognized that action devices could rub on a horse's legs and cause thickened skin like "callous[es] on a workman's hands," Horse Protection Regulations, 43 Fed. Reg. 18,514, 18,519 (Apr. 28, 1978), the Scar Rule made it clear that the posterior surfaces of the pasterns "may show bilateral areas of uniformly thickened epithelial tissue" and that such tissue could not be treated as evidence of soring. 9 C.F.R. § 11.3.

incoherent. Granulomas are a type of tissue that can be discerned only through a "microscopic evaluation." AR-00001189. As a result, the rule instructs inspectors to look for something that cannot not be seen with the naked eye. NAS concluded that the Scar Rule could not be consistently applied and, indeed, that "the rule as written is not enforceable." AR-00001191.

The NAS Report called for any new rule to be based on sound science and, accordingly, called for studies to determine whether visually observable conditions on a horse's skin—such as lichenification (a distinctive form of irregular thickening of the skin)—are evidence of soring or whether they can also be attributed to other non-soring practices. *See, e.g.*, AR-00001116 ("More studies are needed to determine if training practices that can cause soreness in TWHs also result in lichenification . . . .). Studies were needed for USDA rules to be based on sound science and to establish evidence that observable skin conditions are actually the result of soring.

2. Disqualification Of Horses Without Due Process.

For decades, USDA's rules have failed to provide owners or trainers any mechanism to challenge a disqualification before a horse is prevented from showing (or prevented from winning a prize after a post-show disqualification). *See* 9 C.F.R. § 11.4 ("Inspection and detention of horses") and § 11.21 ("Inspection procedures for designated qualified persons"). In fact, the current rules do not provide *any* appeal mechanism at all—even after the fact.[5] Instead, a trainer or owner may challenge a disqualification only if the USDA decides—in its discretion—to bring an administrative complaint for a civil penalty. *See* 15 U.S.C. § 1825(b). In the vast majority of cases where USDA does not pursue an administrative complaint, the owner and trainer have no recourse whatsoever to challenge a disqualification.

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[5] The rules permit an owner or trainer to request "reexamination" by another VMO, 9 C.F.R. § 11.4(h), but that is possible only where there is more than one VMO present at the show. The VMO can also refuse reinspection, meaning it is not a guaranteed review mechanism.

Eight years ago, a federal district court held that USDA's failure to provide any pre-deprivation review mechanism for disqualifications violates the Due Process Clause. *See McSwain v. Vilsack*, No. 1:16-cv-01234, 2016 WL 4150036 (N.D. Ga. May 25, 2016).[6]

D. The 2024 Final Rule.

On May 8, 2024, USDA issued a final rule announcing changes that are the subject of this suit. *See* Horse Protection Amendments, 89 Fed. Reg. 39,194 (May 8, 2024) (to be codified at 9 C.F.R. pt. 11) (the "2024 Rule").[7] Several major decisions in the 2024 Rule are challenged here.

First, the 2024 Rule bans action devices and pads entirely during shows, which effectively eliminates the Performance Division of competition. *See* 89 Fed. Reg. at 39,246 (9 C.F.R. § 11.6(c)(1), (c)(3)). USDA did not base that ban on new evidence showing that action devices or pads *cause* soring. To the contrary, USDA concedes that, in themselves, they do *not* cause soring. *See* 89 Fed. Reg. at 39,212. Instead, USDA pointed to data supposedly showing that its inspectors continued to find a "disproportionate" rate of soring violations in horses wearing action devices and pads. The Agency decided that the way to address whatever else was being done to make the horses sore was to ban the Performance Division of competition.[8] The Agency applied this new ban on equipment only to TWHs and continued to allow other breeds subject to the HPA to use the same equipment.

Second, the 2024 Rule bans the application of any substance to a TWH's legs above the hoof during a horse show. *See* 89 Fed. Reg. at 39,246 (9 C.F.R. § 11.6(c)(4)). This total ban includes substances, like lubricants, that USDA concedes do not cause soring.

Third, the 2024 Rule eliminates the Scar Rule and replaces it with a rule addressing "Dermatologic Conditions Indicative of Soring" or "DCIS." *See* 89 Fed. Reg. at 39,247 (9 C.F.R. § 11.7). Rejecting the calls by NAS to conduct studies and to ground any new rule in science, USDA

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[6] USDA's failure to provide any review mechanism under existing rules is currently the subject of a separate lawsuit. *See Wright et al. v. Vilsack, et al.*, 2:24-cv-02156 (W.D. Tenn., filed March 11, 2024).

[7] The current rules permit action devices weighing six ounces or less. 9 C.F.R. § 11.2(b)(2).

[8] At the same time, USDA continued to allow other horse breeds to use action devices and pads, thus confirming that action devices and pads do not, in themselves, cause soring. *See* 89 Fed. Reg. at 39,212.

decided to go in the opposite direction. Rather than identifying skin conditions that had been proven to provide evidence of soring, the new rule simply instructs inspectors to disqualify a horse if they decide that the horse shows "one or more dermatologic conditions that *they determine* are indicative of soring." *See id.* (emphasis added). The rule thus leaves it entirely to the discretion of each inspector to decide what skin conditions are indicative of soring. And it places no real constraint on inspectors' subjective discretion as it provides only a non-exhaustive list of conditions that the inspector may (in his or her discretion) "evaluate"—none of which has been shown in any study to provide evidence of soring. 89 Fed. Reg. at 39,247 (9 C.F.R. § 11.7).

Fourth, the 2024 Rule still fails to provide any meaningful ability to appeal a disqualification decision. Ignoring *McSwain*—which held that due process demands a pre-deprivation review mechanism in this context—USDA created a mechanism permitting owners or trainers to seek review for up to 21 days *after* a disqualification, with no clear timeline for a ruling. *See* 89 Fed. Reg. at 39,245 (9 C.F.R. § 11.5). That mechanism provides no ability to challenge a disqualification *before* the horse has been excluded from a show and permanently deprived of any chance to win prize money.

Fifth, the 2024 Rule eliminates the DQP Program under which the industry licensed inspectors and replaces it with a set of heightened licensing requirements for new "Horse Protection Inspectors" (or "HPIs"), who must be licensed by USDA and who must be veterinarians. 89 Fed. Reg. at 39,251 (9 C.F.R. § 11.19(a)(1)). The cost of retaining these HPIs is placed on show management (entities like the Association). And the HPIs will necessarily be more expensive than DQPs because they must be veterinarians. As a result, USDA will effectively force those who cannot afford an HPI to use an APHIS inspector, who will be provided at no cost. 89 Fed. Reg. at 39,250 (9 C.F.R. § 11.18). In so doing, the 2024 Rule flouts Congress's vision under the HPA of an industry that will police itself.

LEGAL STANDARD

The APA states that a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, . . . not in accordance with law" or "in excess of statutory . . . authority[ ] or limitations." 5 U.S.C. § 706(2)(A), (C). Summary judgment "is the proper mechanism for deciding, as a matter of law, whether an agency's action is supported by the administrative record

and consistent with the APA standard of review." *National Ass'n of Manufacturers v. SEC*, 631 F. Supp. 3d 423, 427 (W.D. Tex. 2022) (citation omitted). "When assessing a summary judgment motion in an APA case, 'the district judge sits as an appellate tribunal.'" *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, 127 F. Supp. 3d 700, 706 (W.D. Tex. 2015) (quoting *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). "'The entire case on review is a question of law, and only a question of law.'" *Id.* (quoting *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)).

ARGUMENT

I. The 2024 Rule Suffers From An Overarching Defect Because The USDA Rested Many Of Its Decisions On Data Concerning Violations That Is Demonstrably Unreliable.

The 2024 Rule is fundamentally flawed because the data that provided the primary basis for many of USDA's decisions is itself fundamentally flawed. It is well settled that "it is an agency's duty to establish the statistical validity of the evidence before it prior to reaching conclusions based upon that evidence." *See St. James Hosp. v. Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985); *see also Desoto Gen. Hosp. v. Heckler*, 766 F.2d 182, 185 (5th Cir. 1985) ("[U]nrefined data is of little relevance and grossly insufficient to ground a nationwide rule."); *Chemical Mfrs. Ass'n v. EPA*, 885 F.2d 253, 264 (5th Cir. 1989) (agency arbitrarily used data regarding end-of-pipe treatment of waterborne pollutants outside the plant to justify a rule concerning in-plant treatment of similar pollutants).

The USDA failed in that basic duty. Many of USDA's decisions, including its decision to ban action devices and pads and to eliminate the DQP program, were based on data supposedly showing the rate of violations among horses at TWH shows. That data, however, was unreliable for at least three reasons: (i) it was not derived from a random sample and it overstates the disqualification rate; (ii) it was gathered using a subjective inspection process that does not yield reproducible results; and (iii) USDA failed to compare the data about violations at TWH events to any data about violations in other breeds so as to justify differential treatment of TWHs.

A. USDA's Data Is Not The Product Of A Random Sample And Overstates The Rate Of Violations.

USDA's data is flawed first and foremost because it is not based on a random sample. Indeed, in the Proposed Rule, USDA itself acknowledged that its data was based on a sample of horses that USDA officials had "chosen on suspicion of soring." Horse Protection, 88 Fed. Reg. at 56,928 n.14 (Aug. 21, 2023). As the Association explained in its Comments:

> [T]o an unspecified (and apparently unknown) extent, the horses inspected by USDA officials are 'chosen on suspicion of soring.' 88 Fed. Reg. at 56,928 n.14; *see also id.* at 56,928 (USDA officials 'cho[ose] to inspect some horses for which a suspicion of soring was warranted'). In other words, USDA officials inspect the horses that they already think show signs of soring. As USDA acknowledges, such horses 'are more likely to be diagnosed [as sore], as that sample presented indications of soring prior to inspection.' *Id.* at n.14. As a result, the USDA's data purportedly showing 'consistently reported higher rates of noncompliance,' 88 Fed. Reg. at 56,928, cannot properly be treated as reliably showing the violation rate at TWH events because it is based on inspections of a subset of horses that were already suspected of soring.

TWHNCA Comment 11-12. As the Association noted, USDA concedes that the horses in its sample set "are more likely to be diagnosed" as sore than horses selected at random because the horses were selected for inspection precisely because they showed signs of soring. *Cf. Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 35 (D.D.C. 2021), *aff'd*, 35 F.4th 904 (D.C. Cir. 2022) (observing that the sample at issue was "not randomly selected . . . which undermines any straight arithmetical extrapolation"). But that wholly undermines the legitimacy of drawing any general conclusions from that data. As the Association explained, "it is an elementary precept of statistics (and common sense) that conclusions cannot be based on examination of a sample drawn from a larger body of data if the sample is not truly random. Where the sample has not been drawn randomly, selection bias interferes with the reliability of any conclusion based on the sample." TWHNCA Comment 12 (citing Sharon L. Lohr, *Sampling: Design and Analysis* 6-10 (3d ed. 2022)).[9]

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[9] *See also, e.g.*, *Certified Eng'g Copier Sys., Inc. v. Nat'l City Com. Cap. Co.*, No. 2:07-cv-293, 2009 WL 1324047, at *5 (D. Utah May 11, 2009) ("Using the conditions of a small sample to draw conclusions about a much larger group is statistically reliable only if the small sample is chosen at random."); *Santos v. United Parcel Serv. Inc. (Ohio)*, No. 18-cv-03177, 2020 WL 6784220, at *4 (N.D. Cal. Nov. 18, 2020) ("Further, a sample must be truly random and avoid certain biases, e.g., selection bias (which occurs when members of the sample population are selectively included or excluded based on a nonrandom criterion)."); *In re Sonic Corp. Customer Data Sec. Breach Litig.*, No. 1:17-md-2807, 2021 WL 5916743, at

To give just one example, USDA based its decision to ban action devices and pads largely on its assertion that its inspectors found a 25% violation rate among horses in the Performance Division of competition. 89 Fed. Reg. at 39,213 n.37. But the data the USDA cites did not (as USDA claimed) show that 25% of horses entered in Performance Divisions were found to be sore. Instead, all that the data showed was that there was a violation rate of 25% among the horses *that VMOs selected for further screening because they already were suspected of being sore*—which is a meaningless statistic. It sheds no light at all on the overall rate of soring violations in the Performance Division and cannot rationally provide any justification for taking any action whatsoever with respect to horses in the Performance Division.

USDA's data is further flawed because it is based on the number of *violations* found among horses inspected, not the number of horses *disqualified*. *See* 89 Fed. Reg. at 39,198 (Tables 1 and 2). Given that a single horse may be found to have two or more violations (*e.g.*, sensitivity and Scar Rule), looking at the number of violations necessarily overstates the rate of non-compliance, because a single horse disqualified with two violations still signifies only one horse that was found to be non-compliant and only one set of owners/trainers who potentially did something in violation of the Act.

USDA has no coherent response on these elementary points. The Agency admitted the basic flaw in its data sample—namely, that horses in its non-random sample "are *more likely* to be diagnosed [as sore], [because] that sample presented indications of soring prior to inspection." 89 Fed. Reg. at 39,197-98 (emphasis added). It simply ignored that glaring flaw while simultaneously insisting that it has *other* data (withheld from public view and not disclosed in either the Proposed Rule or the Final Rule) that backs up its position. Thus, USDA baldly asserts that, "[a]fter 50 years of enforcing the HPA, APHIS has amassed an aggregate body of data indicating the Tennessee Walking Horse and racking horse industry is disproportionately likely to sore their horses, and DQPs in the industry are disproportionately unlikely to detect the soring." *Id.* at 39,198. USDA's insistence, in effect, that

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*9 (N.D. Ohio Dec. 15, 2021) (excluding expert testimony where expert's "methodology also does not address the selection bias resulting from the failure to use a random selection process").

everyone should "trust us"—based on vague references to a secret "aggregate body of data" that remains undisclosed and is supposedly derived from "experience"—is not sufficient to justify rules imposing new obligations on regulated parties and (with respect to action devices and pads) changing course from the Agency's prior decisions and wiping out an entire area of TWH competition. *See, e.g.*, *Banner Health v. Price*, 867 F.3d 1323, 1336 (D.C. Cir. 2017) ("Under APA notice and comment requirements, 'among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies in its rulemaking.'") (citation omitted).[10] And, because the data USDA cited is unreliable, USDA's regulatory decisions relying on that data are inherently arbitrary. *See Desoto Gen. Hosp.*, 766 F.2d at 185 (finding rule invalid based on "unrefined data [that] is of little relevance and grossly insufficient to ground a nationwide rule"); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295-96 (8th Cir. 1985) (failure to address criticisms that a survey was untrustworthy makes reliance upon the survey arbitrary and capricious). Each of USDA's rule changes relying on that data (including, at a minimum, the ban on action devices and pads, the ban on foreign substances, and the elimination of the DQP program) should be vacated for this reason alone. *See also infra* Parts II, III, and VI.

B. USDA's Data Was Obtained By A Subjective Inspection Protocol.

USDA's data is also unreliable because it was obtained by a subjective inspection protocol that does not yield reproducible results. As recognized by the NAS Report, AR-00001138, (and as the Association has warned USDA for years), USDA's inspection protocol is so subjective that two inspectors inspecting the same horse can come to widely divergent conclusions on whether, for

[10] *See also District of Columbia v. United States Dep't of Agric.*, 496 F. Supp. 3d 213, 233-34 (D.D.C. 2020) ("USDA's vague invocations of 'operational experience' reference no 'technical studies [or] data that [the agency] employed in reaching the decision[ ] to propose' the rule at issue here. Such evidence is necessary 'to allow for useful criticism,' because 'in order to have a 'meaningful' opportunity to comment, [the public] must be aware of the information the agency finally decides to rely on in taking agency action.'") (citations omitted).

example, the horse shows sensitivity or violates the Scar Rule. Because the protocol cannot produce repeatable results, USDA cannot use data *obtained* from that protocol as evidence that soring persists.

As the USDA's own administrative law judges have repeatedly noted, findings by inspectors are so inconsistent that "[i]t is not unusual for a horse not to be found sore at one examination but found to be sore at a later examination during the same show." *In re Timothy Fields and Lori Fields*, 54 Agric. Dec. 215, 219 (USDA 1995). *See also In re Justin Jenne*, No. 13-0080, 2014 WL 4948794, at *7 (USDA Jul. 29, 2014). In one case, where three different examiners came to different conclusions upon examining the same horse, the presiding ALJ remarked, "I am skeptical about the reliability of the method used to determine whether a horse is sore in general, and whether this particular horse was sore on April 16, 2009, as three examiners found inconsistent result [sic], a thermography examination is of little value, and [USDA's] primary witness testified inconsistently with the evidence." *Jenne*, 2014 WL 4948794 at *7. Similarly, in a 2016 enforcement proceeding an ALJ remarked:

> [T]he reason I don't like scar rule cases is I think the determination of whether there is a scar is such an unquantified process that there is too much variety in the result, it's not predictable, it's not knowable how people are going to judge it. It's just very, very, very damaging to the industry, it's damaging to the riders . . . . At any rate, I wish there were a better way to have an objective, verifiable measurement of whether there's a scar rule violation. I don't think it exists yet. I don't think it's practiced yet.

TWHNCA Comment App. Ex. 10 (ALJ Clifton Statement) at 82:10-24.

Data from inspections backs up these ALJ findings. For example, at the 2016 Celebration, when a second USDA VMO re-inspected horses after an initial VMO finding of a violation, the second VMO disagreed with the decision that there was any violation in 22.67% of cases. *See* TWHNCA Comment p. 16. And the second VMO made different and inconsistent findings from those of the first VMO in 52% of cases. *Id.*

The 2016 Celebration findings are bolstered by the NAS Report. As the NAS Report explains, USDA implemented a requirement in late 2016 that a horse found in violation of the HPA must be re-inspected by a second VMO, if one were available. *See* AR-00001138. When this requirement was introduced, "the number of horses found to be unilaterally or bilaterally sore *dramatically declined*." *Id.* (emphasis added). Indeed, as noted by NAS, only a single unilateral soring violation was made by a

VMO during pre-show inspections at the 2017, 2018, and 2019 TWH National Celebrations combined, with no bilateral findings of soreness over the same period. *Id.* By contrast, over the prior three years, VMOs found 172 unilateral and bilateral soring violations. *Id.* In other words, when two VMOs had to *agree* on a finding, violations went from 172 to essentially zero.

A so-called "test" that cannot generate reproducible results—that cannot yield a consistent result when two examiners inspect the same horse—cannot be credited as a reliable way to identify soring or to establish a particular rate of soring violations. *See, e.g.*, *Elcock v. Kmart Corp.*, 233 F.3d 734, 747 (3d Cir. 2000) ("If such testing did not generate consistent results, [an expert's] method would be exposed as unreliable because it is subjective and unreproducible."); *Chrysler Corp. v. Dep't of Transp.*, 472 F.2d 659, 677-78 (6th Cir. 1972) ("[I]t seems to us axiomatic that a manufacturer cannot be required to develop an effective restraint device in the absence of an effective testing device which will assure uniform, repeatable and consistent test results."); *Samuel v. Ford Motor Co.*, 96 F. Supp. 2d 491, 502 (D. Md. 2000), *aff'd sub nom. Berger v. Ford Motor Co.*, 95 F. App'x 520 (4th Cir. 2004) (finding that a "test is not reliable [where] it does not 'provide for repeatable, reproducible results'"); *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 644 F. Supp. 3d 1075, 1130 (S.D. Fla. 2022) ("Reproducibility is one of the hallmarks of reliable scientific testing and is pertinent to an analysis under *Daubert.*"); *United States v. Hebshie*, 754 F. Supp. 2d 89, 125 (D. Mass. 2010) ("reproducibility is the sine qua non of 'science.'").

USDA's reliance on purported soring rates derived from inspections by VMOs cannot be credited as reasoned decisionmaking when the inspection process that generated that data has not been shown to yield reproducible (and thus reliable) results. To the contrary, the evidence in the record shows that the inspection process *cannot* yield reproducible results.

USDA's response to these concerns is that NAS "considered the current practice for detecting soreness to be the 'gold standard' for doing so." 89 Fed. Reg. at 39,199 (quoting NAS Report, AR-00001140). But that distorts what NAS actually said. NAS did not provide such an endorsement of USDA's "current practice," which includes the Scar Rule. Instead, NAS stated that "observation of the horse's movement and posture and palpation of the limbs" was the "gold standard for detecting

local pain and inflammation." AR-00001139. That limited endorsement excluded the Scar Rule. In fact, to the contrary, NAS's primary conclusion about the existing inspection process was that the Scar Rule cannot "be interpreted and applied in a consistent manner by VMOs" and that it was "not enforceable." NAS never suggested that inspections under that rule produced reliable data. NAS determined the exact opposite. In addition, when the NAS Report stated that "observation of the horse's movement and posture and palpation of the limbs" was the "gold standard for detecting local pain and inflammation," it qualified that statement by pointing out that those methods are "valid and reliable *when performed by veterinarians who are trained and highly experienced in detecting lameness and pain*." AR-00001139 (emphasis added); *see also* TWHNCA Comment 18-19. That means that these methods are *not* valid and reliable where they are not performed by a veterinarian who has equine experience. *See also id.* at 18 ("The reliability of the USDA's data is further called into question when considering how many VMOs lack equine experience.").

Because USDA's data was obtained from an inspection protocol that has been shown to be incapable of yielding reproducible results, it is inherently unreliable.

C. USDA Fails To Cite Any Data Regarding Soring (Or The Absence Of Soring) In Other Breeds To Warrant Differential Treatment Of TWHs.

USDA's decision to treat TWHs and Racking Horses differently from other breeds covered by the HPA is also fatally flawed by reliance on faulty data—or, rather, the absence of data. USDA claimed that TWHs require special rules because violation rates are much higher at TWH events than at competitions for other HPA Breeds. 89 Fed. Reg. at 39,200. But USDA concedes that it has only a "small sample of data from events attended by APHIS where other breeds were inspected," data that it does not disclose. *Id.* But USDA may not justify its rule based on data extrapolated on an unidentified but admittedly small sample size. *See, e.g.*, *Thompson v. Fresh Prod., LLC*, 985 F.3d 509, 526 (6th Cir. 2021) (noting the "importance of sample size" and "finding relatively small sample sizes to be suspect and incapable of supporting an inference of discrimination").

USDA blithely suggests that it has no need for data concerning other breeds because "USDA has 50 years of data showing a documented record of soring in [TWHs and Racking Horses] that

simply does not exist for other breeds." 89 Fed. Reg. at 39,200. That misses the point. The USDA cannot base decisions on the relative violation rates for other breeds without having and disclosing data to establish that soring does not occur in those other breeds.[11] "Trust us, we don't need data" is not reasoned decisionmaking. USDA additionally argues it does not need to provide proof of the lack of soring in other breeds because "[e]quine veterinarians on the NAS committee noted that skin changes seen on the pasterns of Tennessee Walking Horses are not observed on the pasterns of other breeds of horses (Arabians, American Saddlebreds, Morgan horses), which also train with action devices such as chains and rollers but do not wear them when shown at competitions." *Id.* at 39,200 (quoting AR-00001187). Once again, USDA mischaracterizes the NAS Report. Contrary to USDA's implication, NAS expressly stated that it *could not determine* whether the noted skin changes (or "lichenification") bore any connection to actual soring.[12] In other words, contrary to its suggestion, USDA has no data or evidence that soring "simply does not exist for other breeds." 89 Fed. Reg. at 39,200.

II. The Ban On All Action Devices And Pads Is Unlawful.

A. The Ban On Action Devices And Pads Exceeds USDA's Statutory Authority Because There Is No Evidence That Such Equipment Causes Soring.

It is elementary that "[a] regulator's authority is constrained by the authority that Congress delegated it by statute." *Chamber of Com. of U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018). Here, Congress prohibited only devices that would cause a horse to be sore and, by granting USDA rulemaking authority to implement the Act, similarly limited USDA's rulemaking authority to address

[11] USDA's assertion that "the distinctive 2-inch-high stacked pads worn by Tennessee Walking Horses and racking horses are not used at shows by any other breed" is also irrelevant. *Id.* USDA itself has acknowledged that pads do not cause soring, *see id.* at 39,212, thus, whether other breeds use the same pads or not is beside the point. USDA still lacked any actual data on the incidence of soring among other breeds.

[12] *See* AR-00001188 ("The primary injury to the pastern of horses from which skin samples were collected or of any of the TWHs presenting with lichenification of the skin of the palmar aspect of the pastern is not known."); *see also id.* ("More studies are needed to determine if training practices that can cause soreness in TWHs also result in lichenification.").

only equipment that causes soring. The ban on action devices and pads exceeds that statutory authority because USDA had no evidence that action devices (weighing six ounces or less) and pads, as permitted under the prior rule, cause soring.

The plain terms of the HPA make it clear that the statute prohibits only devices and practices that *cause* a horse to be sore. The Act's central prohibition on soring turns on the statutory definition of "sore," which primarily lists a series of actions that are banned when, as a result of those actions, a "horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3)(D). The banned acts include things like applying "an irritating or blistering agent" to the horse's limbs, or a "inflict[ing]" a "burn, cut, or laceration" on the horse's limbs. 15 U.S.C. § 1821(3)(A)-(B). The Act also includes a catch-all provision stating that a horse is also "sore" if "any other substance or device has been used . . . or a person has engaged in a practice involving a horse, and, as a result of such . . . use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation or lameness." *Id.* § 1821(3)(D). In other words, the Act bans solely "devices" and "practices" that can reasonably be expected to cause a horse to be sore. By giving USDA general authority to make rules "necessary to carry out this chapter," *id.* § 1828, Congress similarly limited USDA's authority to banning devices that meet the statutory criteria—*i.e.*, that use of the devices can reasonably be expected to cause a horse to be sore.

Contrary to USDA's assertions, *see, e.g.*, 89 Fed. Reg. at 39,213, 39,214, 39,216, section § 1824(7) does not expand the substantive reach of USDA's rulemaking authority to allow it to prohibit devices that do not cause soring. Section 1824(7) does not grant the Agency any additional authority at all. It merely refers back to the general grant of rulemaking authority in section 1828 as it bans the showing of a horse "which is wearing or bearing any equipment [or] device . . . which the Secretary by regulation under section 1828 of this title prohibits to prevent the soring of horses." 15 U.S.C. § 1824(7). USDA cannot use that section to bootstrap itself into new authority to ban any devices on the grounds that the devices have some tenuous connection to *other* practices that cause soring. In short, the Act does not prohibit practices or items that do not cause soring, and it does not

give the USDA authority to prohibit practices or items that do not cause soring. Indeed, until now, USDA seemed to acknowledge that limitation. *See, e.g.*, *American Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 597 (D.C. Cir. 1990) (noting that USDA rules "implicitly rest on an agency construction of the Act as only requiring the elimination of practices that can reasonably be expected to directly cause soring").

The ban on action devices and pads exceeds USDA's statutory authority because the Agency had no evidence that such equipment causes soring. To the contrary, USDA conceded that action devices and pads, in themselves, do ***not*** cause soring and can be used appropriately in training horses. *See* 89 Fed. Reg. at 39,212 ("We did not state in the proposed rule that pads, wedges, action devices, and toe extensions are always necessarily and *per se* associated with soring."). Indeed, there is abundant evidence in the record that action devices and pads, in themselves, do not cause soring. Even USDA's own experts and studies confirm that point. USDA primarily relies on a 1982 study known as the Auburn Study, which was prepared by Dr. Ram C. Purohit at Auburn University.[13] 89 Fed. Reg. at 39,215-16. But that study unequivocally concluded that action devices weighing six ounces or less *do not* cause soring:

> [u]se of 2, 4, and 6 oz. chains did not cause any detectable pain, [or] tissue damage. Thermographic and pressure evaluation did not change significantly. Thus, it was concluded that the use of 2, 4, and 6 oz. chains for the duration of 2 to 3 weeks did not produce any harmful effects to the horses' legs, with exception to some loss of hair from 6 oz. chains in the pastern areas.

AR-00001488. The author of the study even confirmed that the study provided no evidence that action devices caused soring:

> Regarding action devices, the data provided ***no evidence that chains of eight ounces or less*** used from three to five weeks in a normal, non-scarred horse ***produced inflammation or soreness***. Neither the Auburn study nor the Ames study provided any evidence to support the claim that chains of eight ounces or less or pads of three to four inches were the cause of soring.

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[13] *See Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors: Summary of the Research from September 1978 to December 1982*, (the "Auburn Study"), AR-00001480.

TWHNCA Comment App. Ex. 21 (Ram C. Purohit Affidavit) (emphasis added).[14]

The NAS Report came to the same conclusion as it found no evidence of soring from action devices that are six ounces or less. As USDA itself noted in the Proposed Rule, the NAS committee commented that TWHs may be trained "with action devices weighing ***in excess*** of the 6-ounce action devices currently allowed for competition" and "concluded that the use of ***heavier or more cumbersome devices*** in training ***may*** be more likely to contribute to the formation of skin lesions." 88 Fed. Reg. at 56,937 (citing AR-00001187) (emphases added). But NAS points to no evidence that action devices weighing six ounces or less can cause soring.

USDA's support for the ban on pads is equally lacking. In the Proposed Rule, it cited the Auburn Study to suggest that raising a horse's heels through pads alone can result in signs of inflammation. 88 Fed. Reg. at 56,938. But the author of that study has expressly rejected that interpretation and explained that the study does not support that conclusion. He explained that the study was not designed to examine the "effects of pads" and that, as to pads, "no conclusions were drawn." TWHNCA Comment App. Ex. 21 (Ram C. Purohit Affidavit). He even emphasized:

> ***Any other construction of our data would be a misinterpretation. Horses with normal shoeing and padding that were examined by these evaluation procedures did not provide any evidence of soreness or induced inflammation.***

Id. (emphasis added). Although the Association highlighted that the Auburn study does not support a ban on pads, USDA never directly responds to this criticism in the Final Rule.

USDA's former Chief Staff Veterinarian for Horse Protection matters from 1973 to 1978, Dr. Lois Hinson, also confirmed that "[t]hese clinics definitively proved that pads per se do not cause inflammation or soring in the hooves of horses nor do they cause inflammation in the tendons of a horse." TWHNCA Comment App. Ex. 22 (Lois E. Hinson Affidavit) at 3. *Cf.* H. Rep. No. 91-1597,

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[14] The "Ames" study referred to by Dr. Purohit was also highlighted in the TWHNCA's comments. TWHNCA Comment 23 (citing *Soring in Tennessee Walking Horses: Detection By Thermography*, August 1975, prepared by Dr. H.A. Nelson, *et al.,* then of APHIS's Veterinary Lab Services in Ames, Iowa). That study indicated that "[n]o lesions were produced by chains [*i.e.*, action devices] under 8 ounces." TWHNCA Comment App. Ex. 20 at 10. While USDA acknowledges the study's existence in the Final Rule, 89 Fed. Reg. at 39,214 n.41, it does not address the study's results in any meaningful way.

91st Cong., 2d Sess. 3 (1970) (explaining that reference to the use of wedges was deleted from the definition of "soring" in the Act because wedges "are a normal adjunct to training and do not involve cruel or inhumane treatment"). To Plaintiffs' knowledge, the clinics referenced by Dr. Hinson are the only studies regarding whether pads in themselves (that is, without the combination of other practices) cause soring, and, therefore, they are the best scientific evidence on the topic. There are no published scientific studies concluding that pads themselves cause soring. *See* TWHNCA Comment App. Ex. 18 (2016 Paul Stromberg Statement) at ¶¶ 9-13.

USDA's rationales to support its ban despite the total lack of evidence showing that action devices or pads cause soring are unavailing. USDA asserted that ***the combined*** use of action devices ***along with*** "irritating substances" ***may*** cause soring and that the Auburn Study "reported that '***[t]he combined*** use of detergent, chains, and mustard oil on the pasterns of horses causes lesions and tissue damage visible to the naked eye." 89 Fed. Reg. at 39,215 (emphasis added). But for the reasons explained above, the fact that action devices and pads may be used with some *other* practice that is already prohibited (like the use of "irritating substances") does not give USDA authority to ban them. And nothing in section 1824(7), *see* 89 Fed. Reg. at 39,213-14, expands USDA's authority to permit it to ban equipment that does not itself cause soring.

USDA points to the fact that the American Veterinary Medical Association and the American Association of Equine Practitioners supported a ban on pads and devices. 89 Fed. Reg. at 39,216. But those entities acknowledged that "there is little scientific evidence to indicate that the use of action devices below a certain weight are detrimental to the health and welfare of the horse," AR-00001500, and supported a ban only because banning those devices reduces the incentive to engage in *other* practices that are separately prohibited—that is, it "reduces the motivation ***to apply a chemical irritant to the pastern***." *Id.* (emphasis added). And, as for pads, these entities noted that they can cause a horse's foot to strike the ground at an unnatural angle and with more force. *Id.* But these entities do not distinguish between pads that do or do not meet the requirements of 9 C.F.R. § 11.2(b)(10), which was promulgated to address the very problem they identify. *See* 53 Fed. Reg. 28,366, 28,368 (July 28, 1988) (explaining the regulation was designed to "prevent soring due to

excessive pad heights, while allowing the legitimate use of pads in excess of 1-inch."). In other words, USDA already has a rule in place that was specifically designed to limit the size of pads to ensure that pads would not cause the sort of inflammation the veterinary groups mention, and USDA had no evidence whatsoever to suggest that the current rule was not working. Similarly, while these veterinary groups explain that pads may "facilitate the concealment of items that apply pressure to the sole of the horse's hoof," and that "[p]ressure from these hidden items produces pain in the hoof," 89 Fed. Reg. at 39,214, an existing regulation also prohibits this practice. *See* 9 C.F.R. § 11.2(b)(13) (prohibiting "[a]ny object or material inserted between the pad and the hoof other than acceptable hoof packing").

Ultimately, USDA abandoned any effort to justify its ban on the ground that action devices or pads cause soring and instead shifted to a different rationale, arguing that "[s]oring is so disproportionately likely in Tennessee Walking Horses and racking horses wearing pads that the prohibition is necessary in order to prevent soring." 89 Fed. Reg. at 39,216.[15] In other words, USDA's rationale is that, because a higher percentage of the owners or trainers in the Performance Division are engaged in some *other* practice that involves soring, the way to address soring is to prohibit all action devices and pads—and eliminate the Performance Division completely. In effect, USDA announced that, because it believed that 25% of owners and trainers in the Performance Division were doing something *else* that was prohibited,[16] it had authority to eliminate the Performance Division itself. But that approach obviously exceeds the USDA's limited statutory authority. It rests on the erroneous legal premise that the Secretary has authority to eliminate any practice, safe in itself, that may be associated in some loose statistical way with the members in the industry who engage in *other* practices (practices that are already separately prohibited) that perpetuate soring. USDA's approach is akin to a regulator assigned the task of regulating and prohibiting doping in Alpine skiing

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[15] *See also id.* at 39,213 (asserting that noncompliance is "more likely in the . . . division that uses pads and action devices"); *id.* at 39,216 ("[W]e are prohibiting the use of pads . . . because the Performance [D]ivision . . . has a disproportionately high incidence of soring . . . .").

[16] *See* 89 Fed. Reg. at 39,213 n.37 (stating that USDA's data for FY2017 to FY2022 indicated that "noncompliance rates" in the Performance Division "averaged 25.1%").

competitions looking at data suggesting that 25% of competitors in Giant Slalom have engaged in doping and deciding that all Giant Slalom events should be banned to eliminate doping. Nothing about the authority to prohibit doping would give such a regulator the authority to re-define the categories of permitted competition for the sport.

USDA's overreach is particularly glaring because it would eliminate an entire division of competition at TWH shows. Nothing in the Act suggests that Congress gave USDA the authority to re-define areas of competition in that fashion. To the contrary, the legislative history of the Act makes it express that USDA's authority does not extend that far. Congress's goal was to promote legitimate competition and ensure that "[USDA's] efforts to eliminate intentional injuring of horses should not be expanded to affect their competitive position within the walking horse class." *See* S. Rep. No. 94-418, 94th Cong., 1st Sess. 3 (1975), https://perma.cc/F539-RJXP.

The ban on action devices and pads exceeds USDA's authority and should be vacated.

B. The Ban On Action Devices And Pads Is Arbitrary and Capricious.

The ban on action devices and pads is also arbitrary and capricious. As explained below, USDA has failed to provide "a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and has "offered an explanation for its decision that runs counter to the evidence before the agency" by ignoring evidence that action devices and pads do not cause soring. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). USDA also entirely "failed to consider an important aspect of the problem," *Restaurant L. Ctr. v. U.S. Dep't of Lab.*, 115 F.4th 396, 408 (5th Cir. 2024) (quoting *State Farm*, 463 U.S. at 43), by failing to give any serious consideration to the economic costs of its ban. *See also Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019) ("[W]e must also ensure that the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action,' and assess 'whether the [agency's] decision was based on a consideration of the relevant factors[.]'") (quotation omitted). Multiple aspects of the new ban show arbitrary and capricious decisionmaking.

First, the ban is arbitrary and capricious because (as discussed above) USDA cannot point to any evidence showing that action devices or pads cause soring. USDA's failure to conduct any studies

or produce any evidence establishing a causal link between soring and action devices or pads is a failure to engage in reasoned decisionmaking. *See O'Reilly v. All State Fin. Co.*, No. 22-30608, 2023 WL 6635070, at *5-6 (5th Cir. Oct. 12, 2023) (agency acted arbitrarily where it failed to conduct a study to support its action). Where the only evidence in the record shows that action devices and pads *do not* cause soring, USDA has failed to provide any rational basis for banning the equipment.

USDA's failure is particularly glaring given that the new ban reverses the Agency's prior position. It is settled law that "unexplained inconsistency in agency policy is a reason for holding an [action] to be an arbitrary and capricious change from agency practice." *R.J. Reynolds Vapor Co. v. Food & Drug Admin.*, 65 F.4th 182, 189 (5th Cir. 2023) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016)); *see also BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 911 n.7 (5th Cir. 2023) ("An agency must 'provide a reasoned explanation for the change,' 'at least 'display awareness that it is changing position[,]' and 'show that there are good reasons for the new policy.'") (quoting *Encino*, 579 U.S. at 221). Here, USDA failed to give any adequate rationale for its about-face on action devices and pads. In 1988, USDA not only approved of action devices weighing less than six ounces and pads, it did so by relying on the same Auburn Study it now purports to use in support of the ban. In 1988, USDA explained that "[t]he best evidence available to us, ***including the Auburn University Study*** and a Department study conducted at the National Veterinary Services Laboratories in Ames, Iowa[17] in 1975, shows that while chains and other action devices weighing more than 6 ounces can sore horses, ***those weighing 6 ounces or less are not themselves likely to cause soring***." 53 Fed. Reg. 28,366, 28,370 (Jul. 28, 1988) (emphasis added). In other words, not only was the same evidence USDA relies on today also in front of the Agency when it adopted rules permitting pads and action devices, but the Agency also relied on that evidence to decide specifically that action devices weighing six ounces or less ***do not cause soring***. That conclusion is completely at odds with the ban the

[17] As previously noted, *see supra* note 14, the Ames study indicated that "[n]o lesions were produced by chains [*i.e.*, action devices] under 8 ounces." TWHNCA Comment App. Ex. 20 at 10.

Agency has now adopted, but the Agency has not pointed to any new evidence to justify its about-face.

Second, USDA's new-found rationale based on the rate of violations in the Performance Division is arbitrary and capricious in several respects. To start, USDA's basic rationale for the ban is flawed. USDA premised the ban on its conclusion that "noncompliance" with the Act was "more likely" in the Performance Division (where horses show wearing action devices and pads)—specifically, that the "noncompliance rate" from FY 2017 to FY 2022 was 25.1%. 89 Fed. Reg. at 39,213 & n.37; *see also id.* at 39,214 ("[T]here is a statistically elevated incidence of soring in the Performance Division . . . ."). Even if USDA's data were accurate, *but see supra* Part I, that data means that at least 75% of owners and trainers in the Performance Division are *not* doing anything to cause soring. By eliminating the entire Performance Division, however, USDA punishes the entire group for the actions of a few. This form of collective punishment is fundamentally irrational and runs counter to the purposes of the Act. Instead of promoting fair competition, it wipes out a whole area of competition for the 75% of participants who were not engaged in any violations. *See Ergon-W. Virginia, Inc. v. EPA*, 896 F.3d 600, 611 & n.12 (4th Cir. 2018) (describing agency action as "plainly arbitrary" when it unfairly regulates one party based on the actions of others).

Beyond that, the data USDA used for this decision is also fundamentally flawed. As explained above, *see supra* Part I.A, the data was not derived from a random sample. As a result, it does not show, as USDA claimed, the "noncompliance rates" in the Performance Division. 89 Fed. Reg. at 39,213 n.37. Instead, it shows only the noncompliance rate *among horses that were selected for inspection because they were already suspected of being sore*. USDA could not rationally draw any conclusions about the overall noncompliance rate based on that biased data. *See, e.g.*, *Oceana, Inc.*, 530 F. Supp. 3d at 35. In addition, the data is further flawed because it shows the number of *violations* found among horses inspected, not the number of horses *disqualified*. *See* 89 Fed. Reg. at 39,198 (Tables 1 and 2). But given that a single horse may be found to have two or more violations (*e.g.*, sensitivity and Scar Rule), looking at the number of violations necessarily overstates the rate of non-compliance, because a single horse disqualified with two violations still signifies only one instance of a trainer or owner violating the rules.

Given these two flaws, USDA's purported 25% noncompliance rate is necessarily substantially overstated.[18] The extent to which USDA's figures are skewed is unknowable because the Agency failed to collect proper data, but an accurate measure of the violation rate would surely be less than 20%. The critical point here is that USDA may not prohibit an entire division of competition even though over 80% of participants were doing nothing to violate the Act.

Third, USDA's decision to treat TWHs differently than other breeds subject to the HPA is also arbitrary and capricious. The "law does not permit an agency to grant one person the right to do that which it denies to another similarly situated." *Sharron Motor Lines, Inc. v. United States*, 633 F.2d 1115, 1117 (5th Cir. 1981) (quotation omitted). Here, USDA banned action devices and pads solely for TWHs and Racking Horses but not for other breeds based on the bare assertion that "because USDA has 50 years of data showing a documented record of soring in these breeds that simply does not exist for other breeds." 89 Fed. Reg. at 39,200.

But, as explained above, *see supra* Part I.C, USDA offers no evidence for its assertion that soring does not occur in other breeds. USDA both (i) lacks evidence showing an absence of soring in other breeds (because USDA does not regularly inspect them), and (ii) has *itself* acknowledged that soring *does occur* in other breeds. *See* 89 Fed. Reg. at 39,200 (noting an incident of soring for a Spotted Saddle Horse); *see also* TWHNCA Comment 29 (documenting other instances showing APHIS awareness of soring in other breeds). Indeed, other breeds have protocols in place to prevent soring, which would be unnecessary if soring did not occur. *See* TWHNCA Comment 29 (citing American Quarter Horse Association ("AQHA") protocols to prevent soring). The AQHA also maintains a publicly available list identifying individuals who have been disciplined for animal welfare violations. See TWHNCA Comment App. Ex. 25. Yet USDA has not conducted any study to gather accurate data about the incidence of soring in other breeds. Instead, USDA simply asserts its evidence-free

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[18] For example, if ten horses were inspected and three were disqualified, the correct measure of the non-compliance rate would be 30%. But under USDA's approach, if two of those horses had two violations each, the data would be recorded as *five* violations for ten horses inspected, and USDA's figures would give a violation rate of 50%—even though only 30% of the horses were disqualified.

belief that "soring imparts little to no advantage to competitors," at other shows and "the infrequency of soring in [other] breed[s] does not warrant the targeted enforcement that we consider necessary to address the dramatically higher incidence of soring detected among Tennessee Walking Horses and racking horses." 89 Fed. Reg. at 39,212.

Fourth, as explained more fully below, *see infra* Part VII.B, USDA failed to conduct a proper cost-benefit analysis for the ban on action devices and pads. That ban is equivalent to prohibiting the entire Performance Division of competition. That division, however, accounts for roughly 70% of entrants at a major show like the Celebration and drives attendance (and therefore revenues) at many shows with Performance Divisions. *See, e.g.*, TWHNCA Comment App. Ex. 24 (Warren Wells Declaration) ¶¶ 12-13; TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 16 ("In short, the ban on action devices and pads will have a significant impact on all . . . TWH shows with Performance Divisions."). USDA's complete failure to consider the impact on the industry of eliminating this category of competition demonstrates that the Agency "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

A proper cost-benefit analysis would also take into account the fact that the ban would amount to a regulatory taking, thus requiring compensation for TWH owners (like Plaintiffs Lewis and Gould) whose horses are deprived of value. A taking occurs when government regulation deprives an owner of all economically beneficial use of his or her property, or where the regulation unduly interferes with investment-backed expectations.[19] Here, the ban would effect a taking because it would destroy essentially all the value in TWHs trained to compete in the Performance Division by banning the sport in which they compete. The Association introduced abundant evidence in the record from trainers explaining that, as a practical matter, horses that have been bred and trained to compete with action devices and pads cannot simply be re-trained to compete as flat-shod horses. *See* TWHNCA

[19] *See, e.g.*, *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536-37 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[A] regulation which denies all economically beneficial or productive use of [property] will require compensation under the Takings Clause.") (quotations omitted); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (noting that a law "that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

Comment 32 (citing trainer affidavits). As one trainer explained: "it likely would take more than six months to train a performance horse to show flat shod – and in many cases it could take well over a year; and, in the end, very few of the horses would adjust to re-training enough to be successful in flat shod shows." TWHNCA Comment App. Ex. 29 (Chad Williams Statement) ¶ 9.

USDA effectively ignored that uncontroverted evidence with a series of irrational diversions. To start, the Agency asserted that it was fine if its rule would "render some horses less valuable" because that "foregone value was derived from an illicit and illegal activity, soring." 89 Fed. Reg. at 39,217. But the Agency cannot justify a taking by cavalierly tarring all the owners and trainers in the Performance Division with complicity in "illicit and illegal activity" when even its own flawed data confirmed that at least 75% of them were doing nothing wrong.

Next, USDA dismissed multiple affidavits from trainers with the irrational assertion that commenters "provided no specific evidence that Performance division horses trained to perform with the use of pads and action devices cannot perform well without them." 89 Fed. Reg. at 39,217. The trainers' affidavits provided precisely that evidence.[20] More importantly, it is USDA's obligation to justify its rule. But it cannot point to any evidence that horses trained for the Performance Division *can* be retrained to perform without pads and action devices. Instead, USDA points to *other* breeds of horses that it says "can transition successfully from one sport to another." 89 Fed. Reg. at 39,217 (discussing the ability of "racehorses" to retrain "to practice dressage and jumping," as well as "other breeds" who "have switched easily from English- to Western-style riding"). But that information is irrelevant. And USDA is also wrong in claiming that "the industry itself indicates that the horses can easily be retrained to different purposes." *Id.* at 39,217 (citing the Tennessee Walking Horse Breeders' and Exhibitors' Association website, https://twhbea.com/the-breed/disciplines/). The website USDA cites says nothing of the sort. It simply says that horses in the Performance Division and the

[20] *See, e.g.*, TWHNCA Comment App. Ex. 30 (Hannah Pulvers-Myatt Statement) ¶ 7 ("[O]nly a few TWH performance show horses can flat shod with any level of success. In my opinion, only about one out of every 20 TWH performance horses can successfully transition to becoming a good flat shod TWH show horse.").

flat-shod division both employ the same basic gaits—the flatfoot walk, the running walk, and the canter—and that Performance Division horses perform these gaits "with more animation and accentuated brilliance." 89 Fed. Reg. at 39,217 (citing https://twhbea.com/the-breed/disciplines/). But that does not mean that Performance Division horses can be retrained to compete flat-shod. The "more animation and accentuated brilliance" of the Performance Division horses is developed over years of training with action devices and pads, and—contrary to USDA's evidence-free assertions—the horses accustomed to that equipment cannot readily be retrained to compete without it. In short, USDA had no basis whatsoever for ignoring the fact that its ban on action devices and pads would effect a regulatory taking.

III. The Ban On All Substances Is Contrary To The HPA And Arbitrary And Capricious.

USDA's ban on all substances on a horse's limbs—including lubricants—suffers from multiple defects. To start, the Agency acknowledged that lubricants play a legitimate role in reducing friction from action devices and *preventing* a horse from becoming sore—and that part of the Agency's core rationale for banning lubricants was that the new ban on action devices eliminated the legitimate need for lubricants. *See* 89 Fed. Reg. at 39,221 ("With the prohibition of action devices . . . the need for lubricants becomes unnecessary."). Accordingly, if the Court vacates the ban on action devices, the rationale for banning lubricants falls away and that ban should also be vacated. In any event, the ban also independently exceeds the Agency's statutory authority and is arbitrary and capricious.

A. The Ban On All Substances Is Contrary To The HPA.

As explained above, the Act prohibits—and gives USDA authority to prohibit by rule—only practices, devices, and substances that *cause* a horse to be sore. *See supra* Part II.A. USDA's new ban on all foreign substances exceeds the Agency's statutory authority because it prohibits *all* substances on a horse's legs without regard to whether they cause soring.

USDA's existing rules already exceeded the Agency's authority by prohibiting all substances other than lubricants furnished by show management. *See* 9 C.F.R. § 11.2(c).[21] The rules thus banned

[21] Section 11.2(c) of the existing rules provides that "[a]ll substances are prohibited on the extremities above the hoof of any [TWH]" being "exhibited . . . except lubricants such as glycerine, petrolatum,

substances without regard for whether they cause soring, including: shampoos, conditioners, polishes, and insect repellants. 89 Fed. Reg. at 39,220. USDA has long admitted that these substances do not cause soring. *Id.* at 39,220.[22] Nevertheless, members of the industry have acquiesced in USDA's unlawful overreaching due to the cost involved in challenging the Agency. Now, however, the new 2024 Rule extends the ban to include even lubricants, which not only have no connection to soring but are also important for owners and trainers to *prevent* soring. Indeed, USDA acknowledges that lubricants "reduce friction and soring from the movement of action devices," 89 Fed. Reg. at 39,221, and concedes that "lubricants *do not* cause soring." *Id.*. (emphasis original). The statute gives the Agency no authority to ban such a substance.

USDA's efforts to reconcile the ban with the statute are meritless. USDA simply asserts that it "disagree[s] . . . that a substance must cause or be expected to cause soring in order to be prohibited." 89 Fed. Reg. at 39,220. But the statute by its terms prohibits the "use" of "any other substance" only where, "as a result of such . . . use, . . . [a] horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3)(D). USDA points to the simple grant of rulemaking authority in section 1828 of the Act, *see* 89 Fed. Reg. at 39,220, but that provision does not give the USDA free license to expand the statutory prohibition and ban things Congress chose not to ban. USDA's position would allow the Agency to rewrite the statute. Nor can USDA justify its expansive theory of its authority by pointing to 15 U.S.C. § 1824(7) and arguing that it may prohibit any substance if the Agency declares it "is necessary to prevent soring," regardless of whether that substance itself contributes to making horses

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and mineral oil, or mixtures thereof," provided that they are (1) "furnish[ed]" by management; (2) "applied only after the horse has been inspected" and "under the supervision of" management; and (3) such lubricant was made available to "Department personnel for inspection." *Id.*

[22] *See also, e.g.*, 88 Fed. Reg. at 56,934 ("Most substances applied to horses at shows and exhibitions, such as skin and hair conditioners, are not implicated in soring[.]"); *id.* at 56,939 ("Numerous substances are used on horses at shows, exhibitions, and sales events for legitimate purposes, among them shampoos, polishes, conditioners, oils, and insect repellents[.]").

sore. *See* 89 Fed. Reg. at 39,220. As explained above, *see supra* Part II.A, section 1824(7) adds nothing to USDA's substantive rulemaking authority.

USDA also does not advance the ball with its bare assertion that lubricants can supposedly "mask soring by carrying anesthetizing agents." 89 Fed. Reg. 39,221. The Association noted in its comments that USDA cited no evidence for that claim. *See* TWHNCA Comment at 34. But despite that demand for evidence, USDA *still* fails in the final rule to cite a single instance in which it found lubricants being used to hide anesthetics. Indeed, it would be especially difficult for that to occur under the current rules—and easy for USDA to detect—because lubricants must be provided by show management (not individual trainers), kept under management's control, applied under management's supervision, and provided upon request to USDA personnel for testing. 9 C.F.R. § 11.2(c).

Finally, USDA cannot bring its ban within the terms of the statute by pointing to statistics supposedly showing that horses in the Performance Division were "disproportionately more likely to test positive for prohibited substances." 89 Fed. Reg. at 39,220. Even if that data were accurate, *but see supra* Part I.A, the fact that some percentage of owners and trainers may be violating the current substance rule does not give USDA some new statutory authority to ban *other* substances that do *not* cause soring. Pointing to current violations based on other substances to justify a new ban is a complete non sequitur.

B. A Ban On All Substances Is Arbitrary And Capricious.

USDA's ban on all substances is also arbitrary and capricious because its justification for the rule "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Southwestern Elec. Power Co.*, 920 F.3d at 1013-14.

First, to the extent USDA points to data showing that there continue to be violations of the existing rule prohibiting foreign substances, *see* 89 Fed. Reg. at 39,220, that data provides no rational basis for *expanding* the prohibition to include currently legal substances that the USDA itself concedes do not cause soring. The fact that some owners and trainers may have violated the existing foreign substance rule provides no justification for a new ban on *other* substances. Instead, that rationale

smacks of a punitive measure imposed for no purpose other than to impose collective punishment on the industry for the past violations of a few.

Second, the data USDA invokes is fundamentally flawed, and it was arbitrary and capricious for the Agency to draw any conclusions from that data. As explained above, *see supra* Part I.A, USDA's data showing the supposed rate of violations of the foreign substance rule (which USDA puts at 40%, *see* 89 Fed. Reg. at 39,220) is skewed by selection bias because it is not based on a random sample. *See* TWHNCA Comment at 35-36. USDA cannot dismiss that fundamental error by asserting that this is not "an environment in which a random sample is warranted." 89 Fed. Reg. at 39,220. If USDA wants to support a rule based on the assertion that the *rate* of foreign substance violations has reached a particular level (or is "disproportionate" in the Performance Division), then USDA must have data that provides a genuine measure of that rate—and that requires a random sample. The data USDA relied on does not show the rate at which all horses are found to have foreign substance violations. Instead, it shows how many horses *that were already suspected of some violation* were found to violate the foreign substance rule. USDA cannot rationally base any decisions on that skewed data as if it provided a genuine measure of the overall rate of violations.

Third, as noted above, USDA's assertion that lubricants can be used to mask anesthetizing agents is not supported by evidence of even a single instance of such an occurrence.

Fourth, USDA's application of the ban only to TWHs and not other HPA breeds is also arbitrary and capricious. *Cf. supra* Part I.C. The "law does not permit an agency to grant one person the right to do that which it denies to another similarly situated." *Sharron Motor Lines*, 633 F.2d at 1117 (5th Cir. 1981) (quotation omitted). USDA cannot ban lubricants on TWHs while allowing them on other breeds without specific evidence that lubricants have been used on TWHs to violate the HPA.

IV. The Modifications To The Scar Rule Fail To Correct Defects In The Current Rule, Are Unconstitutionally Vague, And Will Continue To Permit Arbitrary Disqualifications.

In replacing the indefensible Scar Rule with a new rule addressing "Dermatologic Conditions Indicative of Soring" or "DCIS," USDA irrationally failed to correct the central defects that required

replacing the Scar Rule in the first place. The new DCIS Rule states that a horse is deemed sore if an inspector finds that any limb displays "one or more dermatologic conditions *that they determine* are indicative of soring," and then provides a non-exclusive list of conditions that inspectors may evaluate. 89 Fed. Reg. at 39,248 (9 C.F.R. § 11.7) (emphasis added). USDA lacked any scientific evidence that the conditions listed in the new DCIS Rule provide evidence of soring. In fact, it was that lack of evidence reliably linking those conditions to soring that prompted USDA to make the rule vague and to leave it to the discretion of each inspector to "determine" whether a condition was "indicative of soring." But by leaving it entirely to the subjective discretion of every inspector to decide whether those conditions constitute evidence of soring or not, USDA created a rule that is even more subjective and more certain to lead to arbitrary results than the Scar Rule. It is also unconstitutionally vague, because it fails to provide any objective standard whatsoever to guide inspectors' unfettered discretion.

A. The DCIS Rule Is Arbitrary And Capricious.

The DCIS Rule is arbitrary and capricious because it fails to fix the defects in the Scar Rule that yielded arbitrary results and, if anything, makes them worse. The new DCIS Rule is completely standardless and is guaranteed to produce arbitrary and inconsistent results.

In concluding that the Scar Rule "as written is not enforceable," the NAS Report explained that, among other problems with the rule, there was no scientific evidence that the conditions listed in the Scar Rule provided evidence of soring. AR-00001187, AR-00001191. Accordingly, the NAS Report repeatedly recommended that additional studies must be done to determine whether any visually observable conditions on a horse's skin—such as lichenification—are evidence of soring or whether they result from other, non-soring practices.[23] There was also abundant evidence that,

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[23] *See, e.g.*, AR-00001116 ("More studies are needed to determine if training practices that can cause soreness in TWHs also result in lichenification . . . These studies might elucidate at what point, if at all, during training epidermal hyperplasia and lichenification would develop and what particular training practices would cause these conditions."); *id.* ("Studies are also needed to determine if epidermal thickening (hyperplasia) and lichenification are solely caused by the action devices worn by TWHs.").

because the Scar Rule was so subjective, it yielded inconsistent and arbitrary results. The NAS Report expressly concluded that the Rule could not "be interpreted and applied in a consistent manner," AR-00001191 (Conclusion 4-4), and USDA's own ALJs criticized the rule for generating inconsistent and arbitrary results. *See, e.g.*, TWHNCA Comment App. Ex. 10 (Statement of ALJ Clifton) at 82:10-24. When USDA implemented a requirement in late 2016 that a horse found in violation of the HPA must be re-inspected by a second VMO, only two Scar Rule violations were found by the Agency during the 2017, 2018, 2019, and 2020 TWH National Celebrations combined out of the 485 horses the Agency's VMOs inspected—a violation rate of 0.4%. *See* TWHNCA Comment App. Exs. 3-6 (FY 2017-2020 Activity Reports). In other words, when there was a requirement that two inspectors had to *agree* in order to find that a horse violated the Scar Rule, there were essentially zero findings at the Celebration four years in a row. As stated by Dr. Stromberg, a renowned veterinarian and professor at the Ohio State University College of Veterinary Medicine whose work was relied on in the NAS Report, "the current scar rule is so vague in describing what qualifies as a violation that it has led to . . . arbitrary results." TWHNCA Comment App. Ex. 13 (Paul Stromberg Declaration) ¶ 18.[24]

The new DCIS Rule only exacerbates the same defects and will lead to even more arbitrary results. To start, the new DCIS Rule is also completely free of any grounding in science. Even though USDA has had three years to implement NAS's recommendations to conduct studies, the Agency ignored those recommendations and refused to commission any studies to establish whether certain skin conditions are reliable evidence of soring—including, for example, whether lichenification can be caused by soring. Without any such evidence, USDA had no basis—and certainly no basis in scientific evidence—for treating any conditions listed in the new DCIS Rule as if they provide reliable evidence of soring.

In fact, when commenters pointed out that the conditions listed in the proposed rule had multiple causes unrelated to soring, USDA *agreed*. *See* 89 Fed. Reg. at 39,222 ("[W]e agree with

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[24] There was no evidence in the record suggesting that the Scar Rule could be consistently applied.

commenters that the dermatological conditions listed in the proposed rule can have other causes . . . ."). USDA conceded that "the dermatologic conditions listed in the protocol are not, in and of themselves, always necessarily indicative of soring." *Id.* For example, pastern dermatitis is a condition marked by many of the same symptoms listed in the DCIS Rule. *See* TWHNCA Comment 40 (citing Danny W. Scott, DVM & William H. Miller, Jr., VMD, EQUINE DERMATOLOGY 460-61 (Elsevier Science 2011)). And it has many potential causes, including bacterial infection, worm or mite infection, and irritation from exposure to alkaline soil. *See id.*

But after conceding that it had no basis to treat the conditions listed in the rule as proof of soring, USDA did not go back to the drawing board to gather scientific evidence that could support a rule defining observable conditions that do provide proof of soring. Instead, USDA decided that the solution for its lack of evidence was to make the rule more vague and to leave it up to the discretion of each individual inspector to decide whether the conditions listed in the rule should be treated as "indicative" of soring or not.[25] The rule thus states that, if an inspector "finds that any limb of a horse displays one or more dermatologic conditions *that they determine* are indicative of soring . . . the horse shall be presumed to be sore." 89 Fed. Reg. at 39,247 (9 C.F.R. § 11.7). In other words, the rule literally tells inspectors: "A horse will be deemed sore if it has a skin condition that you determine indicates that it is sore." That rule fails to provide any objective guidance at all. It fails to give inspectors any objective criteria by which to differentiate a case of soring from a horse presenting accidental injuries, skin conditions with other causes (*e.g.*, dermatitis), or even sweat caused by competition ("moisture" is a "condition" under the rule). And because it provides no limiting guidance, it is guaranteed that it cannot yield reproducible results and instead will yield even more arbitrary decisions than the Scar Rule.

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[25] USDA's original, proposed rule had treated the same dermatologic conditions as definitive proof of soring. *See* 88 Fed. Reg. at 56,957 ("Any horse found to have one or more of the dermatologic conditions set forth herein *shall be presumed* to be 'sore' and be subject to all prohibitions of section 6 (15 U.S.C. § 1825) of the Act.") (emphasis added).

For example, under the new rule, an inspector could disqualify as sore a horse displaying mild dryness in its anterior pasterns if that inspector thought dryness was indicative of soring. That same inspector may declare another horse presumptively sore because it displays a mild amount of "moisture" on one leg. But the DCIS Rule offers no guidance as to when a horse's skin is "too dry" or "too wet." Instead, the new rule vests in horse inspectors a completely standardless, we-trust-you-to-know-it-when-you-see-it authority to designate a horse as sore.

USDA's failure to provide any genuine guidance is particularly egregious given that it amounts to a complete abandonment of the Agency's stated objective in revising the Scar Rule. In its Notice of Proposed Rule, USDA announced that it was going to replace the Scar Rule "with language that more accurately describes visible dermatologic changes indicative of soring." 88 Fed. Reg. at 56,933. Instead, USDA came up with a list of conditions that it concedes can just as readily have causes other than soring and left it entirely to the discretion of individual inspectors to decide whether a given condition amounts to evidence of soring or not. There is nothing more "accurate" about that rule.

USDA's only justification for this standardless approach is the assertion that "[p]roperly qualified persons with specific veterinary training and equine experience" can supposedly make a "differential diagnosis," 89 Fed. Reg. at 39,222, and determine whether the same skin condition on a horse resulted from illicit soring or some other cause. But that assertion also has no support in any evidence in the record. USDA cannot point to any study in which horses were presented to two or more inspectors and the inspectors consistently came to the same conclusions as to whether or not conditions exhibited by the horses were "indicative" of soring. And the suggestion that they could do so is contradicted by the NAS Report. That report explained that the sort of irregular epidermal thickening found on horses that had been found in violation of the Scar Rule "do[es] not provide clear evidence of the initial injury to the skin leading to these changes." AR-00001188. NAS explained that studies were needed to establish whether the type of skin conditions USDA inspectors had been observing and using to disqualify horses resulted from illicit soring. *See id.* To make matters worse, while the central premise for vesting unfettered discretion in inspectors rests

on their supposed special equine expertise, USDA rejected the recommendation from NAS and the Association that inspectors must be veterinarians with equine experience. *See, e.g.*, AR-00001190 ("examination should be performed only by an experienced equine practitioner"), TWHNCA Comment at 18-19 ("As the NAS Report explained, to ensure reliability, examinations should be performed not only by a veterinarian, but by a veterinarian who has equine experience.").

Finally, the DCIS Rule is also arbitrary and capricious because USDA failed to provide any adequate justification for eliminating its longstanding exemption under which "uniform thickening of epithelial tissue" on the "posterior surface of the pasterns," 9 C.F.R. § 11.3(b), cannot be treated as evidence of soring. *Cf. State Farm*, 463 U.S. at 42-43 (agency must provide reasoned explanation when it changes course); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 189 (D.D.C. 2008) (same). When it first promulgated the Scar Rule, USDA explained that the rule "allows for normal changes in the skin that are due to friction" from action devices. Horse Protection Regulations, 43 Fed. Reg. 18,514, 18,519 (April 28, 1978). USDA correctly compared uniformly thickened tissue to "callous[es] on a workman's hands." *Id.* at 18,519. USDA has now abandoned that carve-out, but its only justification cannot bear scrutiny. USDA points to the NAS Report as support, *see* 88 Fed. Reg. at 56,941, but for at least two reasons the NAS Report cannot justify USDA's action. First, when the NAS Report described dermatologic changes that had been found in biopsies of horses that had been disqualified under the Scar Rule, the report did not confirm that those skin conditions resulted from soring. To the contrary, the whole thrust of the NAS Report was that the cause of the observable conditions *was not known* and that studies were required to establish whether such observable changes could reliably be connected to soring. AR-00001188. Second, what the NAS Report described in the biopsies was "*irregular* epidermal thickening known as lichenification." *Id.* (emphasis added). Indeed, USDA itself acknowledged that, *see, e.g.*, 88 Fed. Reg. at 56,942, and repeatedly asserted that a sign of soring in a horse is "thickening [of the skin] that usually is in a ridge pattern"—not *uniform* thickening of the skin. *See also* 88 Fed. Reg. at 56,940-42 (referring to "irregular epidermal thickening"); 89 Fed. Reg. at 39,223 (same). Thus, the

NAS Report provided no basis for eliminating USDA's longstanding recognition that uniform thickening of a horse's skin cannot be treated as evidence of soring.

A. The DCIS Rule Is Unconstitutionally Vague.

The DCIS Rule is also unconstitutionally vague. A regulation "is unconstitutionally vague if it (1) fails to provide those targeted by the [law] a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (a vague law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application").

As an initial matter, the DCIS Rule deprives horse owners, trainers, and show management of a constitutionally protected interest. For a regulation to violate the Due Process Clause as unconstitutionally vague, it must also impinge on liberty or property interest. *See, e.g.*, *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 667 (S.D. Tex. 1997). As discussed more fully below in Section V, horse owners (like Plaintiffs Lewis and Gould) have a constitutionally protected interest in showing their horses without undue government interference. *See McSwain*, 2016 WL 4150036 at *4. Similarly, the Association has an interest in being able to host horse shows without undue government interference.

The DCIS Rule interferes with Plaintiffs' interests by flunking both prongs of the void for vagueness test. *First*, the language of the DCIS Rule does not give owners and trainers fair notice of the skin conditions that will result in a horse being deemed sore. The rule does not specify any criteria that must be present for a horse to be found sore, nor does it even limit the types of dermatologic conditions that an inspector can deem relevant. Instead, it leaves it entirely up to the discretion of each inspector to decide whether "they determine" that there is some dermatologic condition on the horse that is indicative of soring. Nothing in that standardless approach provides notice as to whether a horse will pass or fail inspection. Instead, owners and trainers are left to speculate as to what will be sufficient to disqualify their horse. Due process demands more. *See FCC v. Fox Television Stations,*

Inc., 567 U.S. 239, 253 (2012) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law[.]") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

Second, because the rule is completely standardless, it invites arbitrary enforcement. The DCIS Rule lacks any limiting criteria that distinguish a sore horse from a healthy horse. Under the existing Scar Rule, which at least provides some objective criteria, two horse inspectors cannot agree as to what is or is not a sore horse. *See supra* Part I.B. But the DCIS Rule makes things worse by removing *any* objective metrics on which inspectors can rely. As a result, the rule inevitably invites discriminatory and arbitrary enforcement and allows horses to compete only on the whim of horse inspectors. The rule cannot be squared with the Due Process Clause.

USDA's only response is that inspectors cannot disqualify a horse for "any conditions whatsoever" but only those "indicative of soring as that term is defined in the statute." 89 Fed. Reg. at 39,205. But that is circular reasoning. To say that the rule allows inspectors to call a horse sore only if "they determine" it has conditions indicative of soring just repeats the problem. USDA failed to provide any objective criteria whatsoever to limit or guide the discretion of inspectors.

And the threat of arbitrary enforcement of the Act is all too real. After several horse trainers sued USDA earlier this year to challenge disqualifications of their horses,[26] two VMOs employed by USDA suddenly began finding violations of the Act at rates that are more than two and three times the average for all of their peers, Ex. A, Wells Decl. ¶ 19.[27] As a result, the U.S. House Committee on Oversight and Accountability has launched an investigation into USDA's enforcement of the Act and asked the USDA Inspector General to do the same.[28] The Inspector General responded by opening

[26] *See Wright et al., v. Vilsack et al.*, No. 2:24-cv-2156 (W.D. Tenn.).

[27] Indeed, one of these VMOs disqualified 70% of the horses that the VMO inspected at the National Celebration. *Id.*

[28] *See* Ltr. from Rep. James Comer, U.S. House of Representatives, Comm. on Oversight and Accountability, to Phyllis K. Fong, Inspector General, U.S. Dep't of Agriculture (Aug. 9, 2024), https://perma.cc/DD3J-T5WQ; Ltr. from Rep. James Comer, U.S. House of Representatives,

her own investigation, with which the Association is cooperating. Ex. A, Wells Decl. ¶ 19.

V. USDA's Inspection Process Fails To Provide Owners And Trainers Due Process.

The 2024 Rule fails to remedy—and instead re-adopts and perpetuates—a due process violation that USDA has known about for years. When an inspector enforcing USDA's inspection protocols disqualifies a horse for an HPA violation, that decision deprives the owners and trainers of the horse of liberty and property interests in having the horse compete. A TWH trainer's primary source of revenue is dependent on having the horses he or she trains actually compete. Those trainers may also earn prize money from a horse that places in a show, which can be substantial. Disqualified horses lose the ability to compete and win prize money and lose the opportunity to gain the attention and notoriety that make them attractive to sell and breed, causing further economic harm to their owners and trainers. *See McSwain*, 2016 WL 4150036 at *4 (recognizing a constitutional right to show a horse and "reap the financial gains"). Where such interests are at stake, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). In the context of a horse disqualification, the only meaningful time to be heard is *before* the deprivation becomes complete and the horse is disqualified. A horse disqualified at a pre-show inspection is prohibited from competing *at all*. Any review mechanism long after the fact cannot go back in time and restore the horse's chance to compete (and win prize money). Similarly, a horse disqualified at a post-show inspection may also be barred from receiving a prize. And at a multi-day event like the Celebration, a post-show disqualification after the horse's first performance will preclude him from coming back to compete on later days of the same show. Any review mechanism that is not immediate cannot go back in time to restore the ability to compete or earn a prize that the horse (and its trainer) rightfully should have won. Not surprisingly, the only court that has ever addressed the issue held eight years ago that the

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Comm. on Oversight and Accountability, to Thomas Vilsack, Secretary, U.S. Dep't of Agriculture (Aug. 9, 2024), https://perma.cc/5BL2-P2RT; Ltr. from Rep. James Comer, U.S. House of Representatives, Comm. on Oversight and Accountability, to Thomas Vilsack, Secretary, U.S. Dep't of Agriculture (Oct. 8, 2024), https://perma.cc/4SZ2-4RQR.

USDA violated owners' and trainers' due process rights by failing to provide any pre-deprivation review mechanism for disqualification decisions. *See McSwain*, 2016 WL 4150036, at *3; *cf. United States v. McKown,* 930 F.3d 721, 731 (5th Cir. 2019) ("Generally, before effecting a deprivation, the government must provide notice and an opportunity to be heard.").

The 2024 Rule fails to remedy that glaring due process violation and instead perpetuates a system that deprives owners and trainers of basic due process. USDA recognized that it needed to address the due process problem with its existing procedures,[29] but it failed to adopt any change that addresses the fundamental due process issue. The new rule does not provide any mechanism for a pre-deprivation review of either a pre-show disqualification (which precludes a horse from competing at all) or a post-show disqualification (which may bar the horse from winning a prize it earned based on its performance in the ring). Instead, the new rule creates an opportunity for an owner or trainer to file an appeal within 21 days after the disqualification. 89 Fed. Reg. at 39,245 (9 C.F.R. § 11.5).

But that process is effectively useless. Even if an owner or trainer wins an appeal, there is no way to retroactively change the fact that the horse was not permitted to compete or to win a prize. A review mechanism that comes too late to provide any effective remedy cannot satisfy the demands of due process. As the *McSwain* court explained, where "the nature of the interest—[a horse trainer's or owner's] ability to show [a horse]—is such that post-deprivation process cannot serve to fully make [the horse trainer or owner] whole," pre-deprivation process is required. *McSwain*, 2016 WL 4150036 at *6. *See also Zinermon v. Burch*, 494 U.S. 113, 132 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.").[30] The post-deprivation

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[29] USDA acknowledged that it received comments warning it again about the "due process concerns" raised by its refusal to provide any appeal mechanism and requested comments on how it could provide such an appeal. 88 Fed. Reg. at 56,935-36.

[30] The new 21-day appeal mechanism would also make the situation *worse* for owners and trainers if USDA were to take the position that a failure to appeal a disqualification could somehow affect the issues that are open for dispute if the USDA were later to initiate an administrative proceeding for penalties. USDA has not suggested that it will make such an argument (yet), and it would be foreclosed by the HPA, which expressly protects those accused of violations in a penalty proceeding by

process created by the 2024 Rule not only fails to ensure any adequate remedy if a disqualification is reversed, it also suffers from a further flaw. It cannot provide a meaningful review of the disqualification decision because USDA VMOs do not maintain sufficient records of an inspection to permit a decisionmaker to check their work weeks or months after the fact. Even the Humane Society of the United States has acknowledged that "[t]here will be no reliable way to determine long after the inspection that the horse was not actually sore or otherwise in violation." AR-00000098, Comment of the Humane Society of the United States 7.

And the need for a pre-deprivation review mechanism is particularly acute here given abundant evidence that disqualification decisions under the USDA's rules are highly subjective and open to errors and dispute. As noted above, when USDA required two inspectors to examine a horse before a disqualification, there were only three Scar Rule violations found at the Celebration over a combined four years and 485 horses inspected. *See* TWHNCA Comment App. Exs. 3-6. In other words, when there was a requirement that two inspectors had to *agree* in order to find a horse to violate the Scar Rule, there were essentially zero findings at the Celebration four years in a row. Due process requirements for a review mechanism are heightened in situations (like this) where initial determinations are especially prone to error. *See Mathews*, 424 U.S. at 335 (instructing courts to consider "the risk of an erroneous deprivation of such interest through the procedures used"); *Meza v. Livingston*, No. 09-50367, 2010 WL 6511727, at *17 (5th Cir. Oct. 19, 2010) ("[Considering] the high risk of error that may occur based on the State's current due process protections, we find that the State's procedures do not satisfy constitutional due process.").

USDA's various theories for waving away due process concerns and justifying its failure to provide any meaningful review mechanism are meritless. USDA cannot blame its failure to provide due process on commenters. *See, e.g.*, 89 Fed. Reg. at 39,206 ("[W]e did not receive comments that

guaranteeing that "[n]o penalty shall be assessed unless such person is given notice and an opportunity for a hearing before the Secretary with respect to such violation." 15 U.S.C. § 1825(b). Whether or not USDA creates a mechanism for an owner or trainer to appeal a disqualification, the statute guarantees the subject of a penalty proceeding the opportunity to contest the claimed violation in the proceeding before the Secretary.

suggested alternative show practices that would make a pre-show review process practicable."). It is USDA's duty to comply with constitutional requirements and provide adequate process. And USDA fares no better by pointing out that the HPA requires the Agency to "prohibit[] showing or exhibiting horses determined as sore." 89 Fed. Reg. at 39,206. The statutory command to prohibit the showing of sore horses does not give the Agency license to accomplish that goal by means that ignore the due process rights of horse owners and trainers.

Finally, USDA tries to justify the new rule by pointing to "re-inspection" procedures, by which a horse owner or trainer whose horse is disqualified may ask to have a second VMO inspect his horse. *Id.* at 39,206. But those procedures do not provide due process, because it remains wholly discretionary with a VMO to permit a re-inspection or not. *See* 89 Fed. Reg. at 39,248 (9 C.F.R. § 11.8(h) (conditioning re-inspection on whether "[a]n APHIS representative determines that sufficient cause for re-inspection and testing exists"). Indeed, USDA acknowledges that point, as it explains that this procedure "giv[es] an alleged violator an opportunity to appeal a disqualification resulting from inspection in the field *provided sufficient cause for doing so is determined by an APHIS representative*." *Id.* at 206 (emphasis added). The Constitution does not promise the mere *possibility* of due process, particularly where the ability to determine whether or not to provide it sits in the hands of the same government agency responsible for the deprivation in the first place. Indeed, the *McSwain* court already rejected the argument that the possibility of reinspection could satisfy the government's due process obligations. *McSwain*, 2016 WL 4150036, at *5. This Court should reach the same conclusion.

VI. Abolition Of The DQP Program Is Contrary To The HPA And Is Arbitrary And Capricious.

A. Eliminating the DQP Program Violates the HPA.

By eliminating the DQP Program and forcing show managers to rely on USDA inspectors, the 2024 Rule undermines Congress's clear intent for the industry to play a significant role in policing itself. The rule makes it functionally impossible for show management to appoint private horse inspectors as Congress intended and instead forces shows to rely on USDA-employed inspectors.

Because the challenged provisions in the rule conflict with the purposes Congress embedded in the Act, they should be set aside. *See, e.g.*, *National Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1114 (5th Cir. 2024). Where "[t]he structure of the [statute] indicates a congressional preference . . . '[d]isagreeing with Congress's expressly codified policy choices isn't a luxury administrative agencies enjoy." *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (quotation omitted).

Here, Congress made its policy choice clear. Recognizing the government's limited resources and personnel for conducting inspections, Congress amended the HPA in 1976 to give the industry itself a major role in policing compliance with the Act. *See* H. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976) ("This limited budget and low manpower level is understandably inadequate for USDA to carry out its horse protection responsibilities."). As amended, the Act squarely places the obligation for disqualifying sore horses on "[t]he management of any horse show or exhibition." 15 U.S.C. § 1823(a). It also specifies that inspectors should be appointed "by the management of any horse show," subject to "requirements" set by USDA. *Id.* § 1823(c). Although Congress preserved the ability of USDA to send its own inspectors to shows, *see id.* § 1823(e), its primary objective was to ensure that most horse inspections would be conducted by inspectors privately hired by show management, not the Agency. As USDA itself has acknowledged, the "intent of Congress and the purpose of" the amendments was "to encourage horse industry *self-regulatory* activity." 43 Fed. Reg. at 18,514 (emphasis added). USDA established the DQP Program to meet that purpose. *See id.* at 18,521 ("In summary, the Department would certify designated qualified person programs developed and maintained by a horse industry organization or association if such organization or association meets the minimum standards designated by the Department.").[31]

President Ford's signing statement underscored the legislation's prime focus—"compelling th[e] industry to police itself." Statement on Signing the Horse Protection Act Amendments of 1976,

[31] *See also id.* at 18,514 ("The intent of Congress and the purpose of this provision is to encourage horse industry self-regulatory activity and to allow the management of any horse show, horse exhibition, horse sale, or horse auction to have the benefit of certain limits upon their liability under the Act if they employ any such 'Designated Qualified Person' to detect and diagnose soring and to otherwise inspect horses for the purpose of enforcing the Act.").

3 Pub. Papers 1999, 2013 (July 14, 1976). His administration pledged to "work with [the] Agriculture [Department] to gain greater support from within the industry for self-policing and compliance." *See* Memorandum for the President from James M. Frey 5, Office of Management and Budget (July 8, 1976) (recommending President Ford approve the HPA amendments because "the key to a successful program centers around industry involvement"), https://perma.cc/F539-RJXP.

The changes in the 2024 Rule eliminating DQPs fly in the face of clear congressional intent. Indeed, even though the USDA acknowledged that the Act prohibits it from removing "any element of choice for event management" with respect to choosing inspectors, 88 Fed. Reg. at 56,953, the final rule essentially does just that. It forces event managers to use USDA inspectors, because the only remaining alternative would be prohibitively expensive. Under the new rules, the choice for show management is either (i) lose any role in self-policing by asking for an APHIS-employed inspector who will be provided for free, 89 Fed. Reg. at 39,242, or (ii) pay to hire an inspector who meets the new qualification and licensing requirements as a USDA-approved HPI—who must be a veterinarian and who will charge a fee accordingly. Even USDA concedes that the requirement for HPIs to be veterinarians may be "cost-prohibitive for smaller shows," 88 Fed. Reg. at 56,949, forcing many to use APHIS inspectors.[32]

The squeeze placed on show management forcing them to use APHIS inspectors is compounded by a well-documented shortage of licensed veterinarians available to serve as HPIs to inspect the large number of horses that compete annually.[33] In 2022, for example, 3,449 individual

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[32] As discussed, both the current rules and the proposed DCIS Rule are inherently subjective and lead to arbitrary results. *See supra* Parts I.B and IV. The failure to require that those inspections be conducted by licensed veterinarians with equine experience only exacerbates the problems with these rules. Should USDA issue rules that are grounded in science and provide objective guideposts for inspectors, however, veterinary credentials may not be needed for proper enforcement.

[33] The American Veterinary Medical Association ("AVMA") recently established a commission to address the shortage of veterinarians in equine practice and has noted concern that it could compromise the welfare of horses if corrective measures are not implemented. *See* TWHNCA Comment 45 (citing R. Scott Nolen, *Labor shortage prompts AAEP to form workforce commission*, Am. Veterinary Med. Assoc. (Aug. 17, 2022), https://perma.cc/ZCS9-K8BE).

horses competed in the 52 TWH events managed by the SHOW HIO, alone. *See* TWHNCA Comment App. Ex. 34 (SHOW Records). Furthermore, there is no evidence that veterinarians will have any incentive to seek USDA certification as HPIs. Taken together, the prohibitive cost of HPIs and shortage of qualified individuals to serve as HPIs makes it overwhelmingly likely that USDA's new regulations will compel show managers to appoint APHIS inspectors rather than private inspectors of their own choosing.

Such an approach "frustrates the policy Congress sought to implement" in the governing statute and cannot survive scrutiny. *Southwestern Elec. Power Co.*, 920 F.3d at 1030 (citation and quotations omitted). Instead of enabling the TWH industry to self-regulate as Congress intended, the 2024 Rule robs private industry of its ability to meaningfully participate in the horse inspection process, thereby vitiating the HPA's goal of "encourag[ing] horse industry self-regulatory activity." 44 Fed. Reg. 1558, 1560 (Jan. 5, 1979). At bottom, the Rule would read the HPA's requirement that appointments of inspectors be made "*by the management* of any horse show, horse exhibition, or horse sale or auction," 15 U.S.C. § 1823(c), out of the statute. Such an interpretation that "render[s] part of [the statute] a nullity" cannot be accepted. *Calumet Shreveport Refin., LLC v. EPA*, 86 F.4th 1121, 1138 (5th Cir. 2023); *see also Chamber of Com.* 885 F.3d at 379.[34]

B. Eliminating The DQP Program Is Arbitrary And Capricious.

USDA's decision to eliminate the DQP Program is also arbitrary and capricious because it is not rationally supported by evidence before the Agency.

First, USDA's decision to eliminate the DQP Program was primarily based on data that supposedly showed that USDA VMOs consistently find violations at a much higher rate than DQPs,

[34] Even if the court were to conclude post-*Loper Bright* that 15 U.S.C § 1823 is ambiguous, it must still reject Defendants' assertion that the statute authorizes USDA to replace the DQP Program with a system that functionally compels reliance on Agency inspectors. The weight, if any, to be afforded to an agency's interpretation "depend[s] upon . . . it[s] power to persuade." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2247 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Where, as here, "[a]n agency construction . . . is manifestly contrary to a statutory scheme," it "[can]not be persuasive under the [*Skidmore*] test." *Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

which (according to USDA) must mean that DQPs are failing to find all the violations. 89 Fed. Reg. at 39,197. But, as explained above, *see supra* Part I.A, that data is inherently unreliable and cannot provide the basis for a reasoned decision. The higher violation rate found by VMOs is explained by the fact that the horses they inspect are not a random sample, but instead are chosen *because they are already suspected of being sore*. The data thus provides no sound basis for drawing conclusions about the efficacy of DQP inspections relative to VMO inspections, and USDA's reliance on the data reflects a fundamental error in logic.

Second, the Rule is arbitrary because, by requiring HPIs to have veterinary credentials, it limits the ability of professional horse trainers or farriers to apply. At the same time, USDA has said that, when veterinarians are in short supply, it will also license veterinary technicians and local animal welfare officials as HPIs. 89 Fed. Reg. at 39,235. But neither vet techs nor local animal welfare personnel have a greater claim to being able to accurately detect soring than professional horse trainers and farriers (many of whom are current DQPs). In many instances, vet techs and animal welfare officials (*e.g.*, the town animal safety officer) will have far *less* equine or even large-animal experience. There is no rational basis for believing that these individuals will consistently outperform professional horse trainers and farriers at inspecting horses for soring.

In short, USDA's inconsistent reasoning for the 2024 Rule is both irrational and contrary to the evidence. *See State Farm*, 463 U.S. at 43. Where, as here, nothing more than "[agency] fiat supports treating" the regulated industry a certain way, it is a hallmark of an arbitrary and capricious action. *Chamber of Com.*, 885 F.3d at 382. Indeed, "[i]llogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *Id.* And agency action should be vacated as arbitrary and capricious where, as here, the agency's disparate treatment bears no relation to the governing statute's policy goals. *See, e.g.*, *Restaurant L. Ctr.*, 115 F.4th at 409 (vacating agency rule due to its "inconsistent treatment of supporting work based only on the work's duration").

VII. USDA's Economic Analysis Is Deficient And Fails To Consider The Devastating Effect Of The Proposed Rule On The Industry, Including Small Entities.

USDA's rules are also arbitrary and capricious because the Agency relied on stale data and failed to adequately consider the economic effects of the rules on the TWH industry and the broader economy. Under the APA, courts must reject "agency decisionmaking premised on evidence . . . of poor quality—irrelevant, immaterial, unreliable, and nonprobative—and of insufficient quantity." *Steadman v. SEC*, 450 U.S. 91, 102 (1981). And a court must vacate a rule where an agency fails to adequately "justify the costs the rule would impose on the [regulated] industry." *Mexican Gulf Fishing Co. v. United States Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023).

A. USDA's Cost-Benefit Analysis Is Wholly Unreliable Because It Is Based on Data that Is Over A Decade Old.

It is a cardinal rule of administrative law that agencies "do *not* have free rein to use inaccurate data" in exercising their rulemaking authority. *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015) (emphasis original). An agency must "examine *the relevant data* and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (emphasis original) (quoting *State Farm*, 463 U.S. at 243). Where, as here, an agency relies on outdated, attenuated, and unreliable data to support a rule, it flunks the arbitrary and capricious test.

Before issuing its final Rule, USDA failed to obtain, solicit, or review any timely cost-benefit data to support its radical decision to rewrite the rules of competition for the TWH industry by banning pads and action devices and thereby banning the Performance Division of competition. Instead, USDA relies on economic data from a 2012 "expert elicitation by RTI International" that is over twelve years old. *See Regulatory Impact Analysis & Final Regulatory Flexibility Analysis of the Final Rule, Horse Protection Amendments*, RIN 0579-AE70, APHIS-2022-0004 (April 2024), AR-00004007-08; *see also NRDC v. Herrington*, 768 F.2d 1355, 1418 (D.C. Cir. 1985) (agency's reliance on "half a decade old" data was "patently unreasonable"). USDA's failure to obtain new data means that it has not "sufficiently support[ed] its conclusion" with reliable "empirical evidence," *Business Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011). Where an agency bases its decision on data several years

removed from present conditions, that is a sufficient departure from reasoned decisionmaking to warrant vacatur. *See Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (overturning an agency decision that rested on "stale scientific evidence"). Even data that is five to six years old has been held sufficiently "stale" to warrant reversing an agency. *See, e.g.*, *Herrington*, 768 F.2d at 1408; *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005). Here, USDA relied on data *twice* as old.

USDA cannot justify its use of stale data by claiming that "more recent information on the Tennessee Walking Horse and racking horse industry is not readily available." AR-00004007-08. An "agency cannot simply plead a lack of data to justify its decision[s]," especially where the agency itself has "failed to investigate in light of . . . new information." *Southwestern Elec. Power Co.*, 920 F.3d at 1020 (cleaned up). While USDA asserts—without evidence—that more recent economic data is not available, the Association has offered to partner with USDA and provide current, accurate data upon request. *See* TWHNCA Comment 48 n.19. USDA has never asked for it.

At the same time, USDA failed to adequately address or respond to the Association's concerns about the accuracy and reliability of the Agency's outdated economic figures. TWHNCA Comment 48-49. This failure is the hallmark of arbitrary agency action. USDA cannot "duck[] the hard questions" or "bury its head in the sand. The Administrative Procedure Act demands more than this." *Mexican Gulf Fishing Co.*, 60 F.4th at 973.

B. USDA's Cost-Benefit Analysis Fails to Account For The Devastating Effect That The Ban On Pads And Action Devices Would Have On The TWH Industry.

USDA also failed to adequately consider the devastating impact the 2024 Rule will have on the TWH industry and failed to provide any rational response to the economic concerns raised by commenters. The ban on action devices and pads will decimate the industry by effectively ending the Performance Division—the single most popular and profitable part of TWH shows. *See* TWHNCA Comment App. Ex. 24 (Warren Wells Declaration) ¶ 13. As the Association explained in its Comments, approximately 70 percent of horses appearing in the annual National Celebration—the signature TWH event—compete in the Performance Division and use action devices and pads. *Id.* If

the 2024 Rule takes effect, thousands of carefully-trained horses will be instantly banned from the most lucrative and popular form of competition. As a result, the Celebration and other shows like it would no longer be able to function as they currently do. *See id.* ¶ 13 ("As a practical matter, this [ban] would make it impossible for the Association to stage the Celebration"); *see also* TWHNCA Comment App. Ex. 35 (Joan Kemp Declaration) ¶ 5 ("As a practical matter, this [ban] would make it impossible for the WHAA's Alabama Jubilee Charity Horse Show to continue.").[35]

The consequences from the ban would not be limited to shows. Horse owners will lose their considerable investments of time and money spent training their horses with pads and action devices. *See*, e.g., TWHNCA Comment App. Ex. 31 (Dan Waddell Declaration) ¶ 6 ("Horses that compete in the Pleasure division are significantly less profitable for their owners than horses that compete in the Performance division. I suspect that most owners would not want to go through the time and expense of having their horses re-trained."). Breeding values will plummet. *See* TWHNCA Comment App. Ex. 27 (David W. Williams Declaration) ¶¶ 3-4 (noting that Performance Division horses sell for around $40,000-$80,000, whereas flat-shod horses sell for around $12,000-$17,000). Horse trainers whose primary revenue streams are based off of training TWHs will lose their jobs. As one trainer explained, because she generally earns about $10,000 in income per horse for her most successful TWHs, "[i]f [she] had to switch [her] business to recreational riding, such a process would eliminate the large majority of [her] income" and she "would struggle to pay the rent at [her] barn." *See* TWHNCA Comment App. Ex. 28 (Carrie Martin Statement) ¶ 10; *see also* TWHNCA Comment App. Ex. 29 (Chad Williams Statement) ¶ 9 ("I would be out of work and forced to look for a new job in a new line of work, and I believe that many other trainers of performance TWH show horses would also be put out of work and have to find a new line of work."); TWHNCA Comment App. Ex. 30 (Hannah Pulvers-Myatt Statement) ¶ 9 ("I would be forced to switch my business to offering horses for trail riding and barrel racing, both of which are considerably less profitable.").

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[35] *See also* TWHNCA Comment App. Exs. 36-45 (containing similar statements).

Show managers will see interest, sponsorships, and attendance evaporate, *see* TWHNCA Comment App. Ex. 24 (Warren Wells Declaration) ¶ 13; TWHNCA Comment 50. Local communities that host shows will also suffer from the loss of jobs, tourism, and tax revenue. For instance, as a result of the ban, the National Celebration and the millions of dollars it generates every year will be significantly diminished, if not shuttered entirely. As the former Mayor of Shelbyville, TN has noted, "The Celebration is the single biggest economic driver to the City of Shelbyville." *See* TWHNCA Comment App. Ex. 46; *see also id.* (noting that the Celebration generates approximately $40 million dollars annually for the city of Shelbyville).

USDA failed to address any of this evidence. In part, the Agency tried to minimize the economic impact of its rules by claiming that horses can be retrained to perform flat shod. 89 Fed. Reg. at 39,242. But it points to no evidence in the record to support that bare assertion. To the contrary, the only evidence on that point came from the declarations from trainers submitted by the Association explaining that horses *cannot* simply be retrained. As one horse trainer explained: "[o]nly a few TWH performance show horses can show flat shod with any level of success" and "[i]n [her] opinion, only about one out of every 20 TWH performance horses can successfully transition to becoming a good flat shod TWH show horse." TWHNCA Comment App. Ex. 30 (Hannah Pulvers-Myatt Statement) ¶ 7; *see also* TWHNCA Comment App. Exs. 28-33 (similar statements by other horse trainers).

USDA also suggests that, over the last seven years, seventy-four percent of horses competed in classes that do not allow pads or action devices, and argued that this data indicates that "shows could go on without [this equipment.]" AR-00004023. But that assertion draws faulty conclusions from a single, unexplained piece of data. It is true that there are more horses entered in the Pleasure Division, but that is because those horses take less time to train and are typically shown—as the name "Pleasure Division" suggests—for the fun of their owners. The Performance Division, by contrast, is the main economic driver in the Industry. As Dr. Robert Fenili indicated in his unrebutted expert economic analysis:

> The 'most common revenue per show' reported in the [2012] Elicitation Report does not differentiate between Performance division shows and Pleasure division shows. Attendance at Pleasure division shows is primarily composed of show participants and participants' families and friends. Performance division attendance includes participants, etc. but also includes attendance by fans, *i.e.*, paying customers. Thus, *ceteris paribus*, Performance division shows draw more revenues than Pleasure division shows.

See TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 13. *See also* NAS Report, AR-00001107 (noting that Performance Division horses are what "draws people to horse shows"). USDA fails to address this distinction.

In addition, for organizations like the Association that put on major horse shows, the average number of horses who participate in the Performance Division is greater than 60%, TWHNCA Comment App. Ex. 34. That number increases to 70% and higher for major events like the Celebration, TWHNCA Comment App. Ex. 24 (Warren Wells Declaration) ¶ 12. *See also* TWHNCA Comment App. Ex. 35 (Joan Kemp Declaration) ¶ 4 (70% of horses at the Alabama Jubilee Charity Horse Show compete in the Performance Division); TWHNCA Comment App. Ex. 41 (Vicki Benjamin Declaration) ¶ 4 (85% of horses at the Mid-South Horse Show Association Show compete in the Performance Division); TWHNCA Comment App. Exs. 35-45 (similar). These horse show owners indicate that their shows will likely be forced to cease operations with the ban on action devices and pads in effect. *See, e.g.*, TWHNCA Comment App. Ex. 35 (Joan Kemp Declaration) ¶ 4 ("As a practical matter, [the ban] would make it impossible for the WHAA's Alabama Jubilee Charity Horse Show to continue."); TWHNCA Comment App Exs. 24, 36-45 (similar).

Dr. Fenili summed up the economic impact on the industry of banning action devices and pads.[36] He noted that (i) fifty percent of the TWH shows that have Performance Divisions will shut down; (ii) the remaining shows that currently have a Performance Division will have revenue reductions exceeding 75%; (iii) that the one-year revenue loss to those shows would be $4.6 million; (iv) that the discounted losses over ten years would be $37 million; (v) that the impact on cities and

[36] Although drafted in 2016, Dr. Fenili's analysis was based on USDA's prior attempt to ban action devices and pads based on the same 2012 Expert Elicitation data USDA now uses to support its current ban.

local regions that host the 16 largest Performance Division shows would be approximately $30 million per year; and (vi) that the present value (in 2016) of the losses to those communities over a ten-year period would be approximately $240 million. TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 16.

USDA never responds to Dr. Fenili's analysis or these figures. It does not address the numerous affidavits submitted by horse show managers indicating that they would likely be unable to continue operating. It does not address the affidavits submitted by trainers indicating the difficulty—if not impossibility—of retraining Performance Division horses to compete flat shod. The complete absence of any response to the unrebutted evidence submitted by the Association again shows a lack of reasoned decisionmaking. After all, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). And where USDA has failed even to address the evidence before it, the Agency cannot show a rational connection between the facts found and the choice made. *State Farm*, 463 U.S. at 243.

Because USDA failed to accurately "consider[] the costs and benefits associated with the regulation," it has not established that the purported "benefits" of the Rule "bear a rational relationship to the serious financial . . . costs imposed" on the industry. *Mexican Gulf Fishing Co.*, 60 F.4th at 973; *see also Chamber of Com. of U.S. v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023) ("The SEC acted arbitrarily and capriciously, in violation of the APA, when it . . . failed to conduct a proper cost-benefit analysis."). The Court should vacate the ban.

C. USDA's Cost-Benefit Analysis Fails To Account For The Substantial Impact The Proposed Rule Would Have On The Greater U.S. Economy.

USDA also failed adequately to consider the economic impact of its rules beyond the TWH industry itself. As a report from The Chesapeake Group ("TCG") explained, TWHs play a significant role in the broader U.S. economy. TCG emphasizes that disruptions to the TWH industry can create downstream economic effects across multiple business sectors. *See* TWHNCA Comment App. Ex. 47 (TCG Economic Analysis) at 2. TCG's conservative estimates suggest that the total economic

contribution of the TWH industry to the U.S. economy is $1.84 billion. *Id.* at 12. More specifically, TCG estimates that the national and local economic impact of the TWH show segment adds between $718 million and $902 million to Gross Domestic Product annually. *Id.* USDA's economic assessment, however, failed to account for that broader impact on the economy. *Id.* at 13. That is an elementary failure of reasoned decisionmaking, as USDA "failed to consider an important aspect of the problem." *Mexican Gulf Fishing Co.*, 60 F.4th at 973 (quotation omitted).

USDA dismisses TCG's concerns in a single sentence, asserting that "[t]he rule is not expected to adversely impact communities in which HPA-covered events involving TWHs and racking horses [occur] because such events are expected to continue." AR-00004023. That cursory response to TCG's detailed analysis is insufficient, and it wholly ignores the evidence in the record. As explained above, the Association submitted (i) evidence from horse show managers indicating that their shows will be unable to continue, *see* TWHNCA Comment App. Exs. 24, 35-45, (ii) declarations from horse trainers explaining the difficulty in re-training Performance Division horses to compete flat shod, *see* TWHNCA Comment App. Exs. 28-33, and (iii) economic analysis indicating that there would be a significant economic impact on local communities who rely on these shows, *see* TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 13-14. USDA cannot dismiss these concerns with an unsupported assertion that horse shows will continue.

VIII. USDA Failed To Comply With The Regulatory Flexibility Act.

USDA also failed to comply with the requirements of the Regulatory Flexibility Act ("RFA"), which provides yet another ground for vacating the rules. The RFA requires an agency to consider whether a rule will significantly affect small businesses and entities and, if it will, to document steps to minimize adverse impacts. *See* 5 U.S.C. § 601 *et seq.* An agency meets these requirements by publishing a final regulatory flexibility analysis ("FRFA") when it issues the final rule. *Id.* § 604. If an agency fails to make a reasonable, good-faith effort to meet these obligations, then under the RFA, a court can remand the rule to the agency, 5 U.S.C. § 611(a)(4), and a court may also strike down the rule entirely as arbitrary and capricious under the APA. *Associated Gen. Contractors of Am. v. U.S. Dep't of Lab.*, No.

5:23-cv-0272, 2024 WL 3635540, at *15 (N.D. Tex. June 24, 2024) ("The RFA requires a court to consider 'the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable,' and a court 'may, in an appropriate case, strike down a rule because of a defect in the flexibility analysis.'") (quoting *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 737-38 (D.C. Cir. 2000)); *see also National Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("A regulatory flexibility analysis is, for APA purposes, part of an agency's explanation for its rule.").

Here, although USDA admits in its FRFA that "the entities affected by this final rule are likely small by SBA standards," AR-00004003, it completely fails to address the significant impact the 2024 Rule will have on those entities (including the Association).[37] USDA admits that "[w]e cannot certify that this rule would have no disproportionate impact on small entities," AR-00004020, but it goes on simply to assert that it "does not expect the rule to have a significant economic impact on a substantial number of small entities." AR-00004029. USDA's only support for that conclusion is the assertion that "[t]he prohibition of pads, toe extensions, and action devices does not impose costs on show management or participants." AR-00004000. But USDA could not point to any evidence to support that assertion. Instead, the Agency apparently proceeded entirely on its transparently mistaken conclusions (i) that shows will continue on as entirely flat-shod events and that this radical restructuring of the competitions will magically not have any significant effects on revenue or spectator interest, and (ii) that "[t]he ban . . . does not preclude the owners from training and showing their horses" because "[t]he same horses can be trained without the pads." AR-00004023.

Once again, USDA is wrong on both counts and lacks any evidence in the record to support its bare assertions. As explained above, *see supra* Part VII.B, the elimination of the Performance Division will have a devastating effect on the Association and other horse shows. Shows like the National Celebration put on by the Association will likely be forced to cease operations as a result of the ban, given that more than 70% of horses at major shows compete in the Performance Division.

[37] The Association meets the definition of a "small organization" under the RFA because it is a "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. § 601(4); *see also* Ex. A (Wells Decl.) ¶ 4.

See TWHNCA Comment App. Exs. 29, 35-45 (affidavits of horse show managers). USDA provides no data or analysis indicating that these shows can continue. And even those shows that could continue as flat-shod only shows would see their revenues cut by more than 75%, according to Dr. Fenili. TWHNCA Comment App. Ex. 49 (Robert Fenili Report) at 16. USDA never addresses this data or these costs.

As for retraining, USDA's dismissal of these concerns by suggesting horses can be retrained, AR-00004023, ignores the extensive evidence submitted by the Association showing that the opposite is true. *See, e.g.*, TWHNCA Comment App. Ex. 30 (Hannah Pulvers-Myatt Statement) ¶ 7 ("[O]nly a few TWH performance show horses can show flat shod with any level of success. In my opinion, only about one out of every 20 TWH performance horses can successfully transition to becoming a good flat shod TWH show horse."); *see also* TWHNCA Comment 32 (citing declarations of other horse trainers). USDA fails to point to any evidence in the record to the contrary. It acknowledges that it "does not have specific data regarding the time it takes to retrain a horse to show without pads and action devices," but simply asserts that "based on the comments received, it is estimated that it would take approximately two to six months to retrain the horses." AR-00004015. USDA does not identify any of those comments, which are at odds with the declarations submitted by the Association establishing that it would take significantly longer (if it is possible at all). *See, e.g.*, TWHNCA Comment App. Ex. 29 (Chad Williams Statement) at ¶ 7 ("[I]t likely would take more than six months to train a performance horse to show flat shod – and in many cases it could take well over a year; and, in the end, very few of the horses would adjust to the re-training enough to be successful in flat shod shows.").

That alone is an error that makes USDA's analysis inadequate. The Agency cannot vaguely invoke "comments" without citing some specific submission in the record to support its assertions. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."). And the Agency's failure meaningfully to address the costs the Association identified is fatal for its RFA analysis. *See, e.g.*, *NFIB v. Perez*, No.

5:16-cv-00066, 2016 WL 3766121, at *39 (N.D. Tex. June 27, 2016) (preliminarily enjoining rule after finding that "uncontroverted evidence presented at the hearing demonstrates that the costs to be incurred . . . to comply with the New Rule will be substantial" but it did "not appear that [the agency] considered such costs").

At bottom, USDA had no sound basis for disputing the evidence the Association submitted showing that the ban on action devices and pads would cripple the industry. The Agency failed to make any genuine effort to grapple with the impact of its decision, which makes its RFA analysis wholly inadequate. *See NFIB*, 2016 WL 3766121, at *38 (agency violated RFA by failing to "provid[e] an adequate factual basis for its cost estimates" and "fail[ing] to meaningfully consider and address the weight of the comments and cost estimates submitted in response to proposed rulemaking"); *Associated Gen. Contractors of Am.*, 2024 WL 3635540 at *16 (agency violated RFA by "fail[ing] to perform the required compliance cost analysis pertaining to" expanded scope of new rule). The Court should vacate the challenged provision of the 2024 Rule or, at the very least, remand to USDA to conduct a proper analysis.

CONCLUSION

The Court should enter final judgment for Plaintiffs and declare unlawful and vacate the challenged provisions in the 2024 Rule.

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Respectfully submitted.

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