

No. 05-35264

---

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED  
STOCKGROWERS OF AMERICA

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,  
Animal and Plant Health Inspection Service; et al.,

Defendants-Appellants.

---

**BRIEF OF AMICI CURIAE STATES OF MONTANA, CONNECTICUT,  
SOUTH DAKOTA, NORTH DAKOTA, NEW MEXICO AND  
WEST VIRGINIA, IN SUPPORT OF PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING EN BANC**

On Appeal from the United States District Court for the District of Montana,  
Billings Division, The Honorable Richard F. Cebull, Presiding

---

MIKE McGRATH  
Montana Attorney General  
CHRISTIAN D. TWEETEN\*  
Chief Civil Counsel  
P.O. Box 201401  
Helena, MT 59620-1401  
Tel. (406) 444-2026

RICHARD BLUMENTHAL  
Connecticut Attorney General  
55 Elm Street  
Hartford, CT 06106  
Tel. (860) 808-5318

DARRELL V. McGRAW, JR  
West Virginia Attorney General  
State Capital, Room 26-E  
Charleston, WV 25305  
Tel. (304) 558-2021

PATRICIA A. MADRID  
New Mexico Attorney General  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508  
Tel. (505) 827-6000

WAYNE STENEHJEM  
North Dakota Attorney General  
600 East. Boulevard Avenue.  
Bismarck, ND 58505-0040  
Tel. (701) 328-2210

LAWRENCE E. LONG  
South Dakota Attorney General  
500 E. Capitol Avenue.  
Pierre, SD 57501  
Tel. (605) 773-3215

ATTORNEYS FOR  
AMICI CURIAE STATES  
\*Counsel of Record for  
Amici Curiae States

RUSSELL S. FRYE  
Frye Law Firm, P.L.L.C.  
3050 K Street N.W., Suite 400  
Washington, DC 20007-5108  
Tel. (202) 342-8878

WILLIAM L. MILLER  
The William L. Miller Group, P.L.L.C.  
3050 K Street N.W., Suite 400  
Washington, DC 20007-5108  
Tel. (202) 342-8416

A. CLIFFORD EDWARDS  
TAYLOR S. COOK  
Edwards, Frickle, Anner-Hughes,  
& Culver  
1601 Lewis Avenue, Suite 206  
Billings, MT 59104  
Tel. (406) 256-8155

ATTORNEYS FOR  
PLAINTIFF-APPELLEE

ROBERT N. HOCHMAN  
CHAD W. PEKRON  
Sidley, Austin, Brown & Wood L.L.P  
Bank One Plaza  
10 South Dearborn Street  
Chicago, IL 60603  
Tel. (312) 853-7000

CARTER G. PHILLIPS  
ALAN CHARLES RAUL  
MARK D. HOPSON  
JAY T. JORGENSEN  
Sidley, Austin, Brown & Wood L.L.P  
1501 K Street, N.W.  
Washington, DC 20005  
Tel. (202) 736-8000

ATTORNEYS FOR AMICUS  
CURIAE TYSONS FOODS, INC.

JOSHUA WALDMAN  
Appellate Litigation Counsel  
United States Department of Justice  
950 Pennsylvania Avenue N.W.  
Room 7256  
Washington, D.C. 20530-0001

LANE M. McFADDEN  
JENNIFER L. SCHELLER  
United States Department of Justice  
Environment and Natural Resources  
Division, Appellate Section  
PHB Mail Room 2121  
601 D Street N.W.  
Washington, DC 20004

MARK STEGER SMITH  
Assistant United States Attorney  
Office of the United States Attorney  
2829 Third Avenue North, Suite 400  
Billings, MT 59101-1478  
Tel. (406) 657-6101

ATTORNEYS FOR  
DEFENDANTS-APPELLANTS

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI.....	1
ARGUMENT.....	5
REHEARING IS APPROPRIATE BECAUSE THE ISSUES PRESENTED IN THIS CASE ARE OF EXTRAORDINARY NATIONAL IMPORTANCE. ....	5
CONCLUSION .....	9
STATEMENT OF RELATED CASES.....	10
CERTIFICATE OF SERVICE.....	11
CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 05-3526 .....	12

**TABLE OF AUTHORITIES**

**CASES**

Federation of Homemakers v. Hardin,  
328 F. Supp. 181 (D.D.C. 1971)..... 8

Jacobson v. Massachusetts,  
197 U.S. 11 (1905)..... 2

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v.  
United States Department of Agriculture,  
2005 U.S. App. Lexis 17360 ..... 1, 7

United States v. Cruikshank,  
92 U.S. 542 (1876)..... 2

United States v. Mullens, 583 F.2d 134 (5th Cir. 1978)..... 8

**OTHER AUTHORITIES**

**Federal Rules of Appellate Procedure**

Rule 29(a) ..... 1

Rule 35(a) ..... 5

Rule 40(2)..... 5

**OTHER CONSTITUTIONS AND STATUTES**

**United States Code**

21 U.S.C. § 602 ..... 8

7 U.S.C. § 8301(1)..... 8

**PUBLICATIONS**

FDA Center for Veterinary Medicine, *Environmental Assessment for Prohibition of Protein Derived from Ruminant and Mink Tissues in Ruminant Feeds 2* (Oct. 1996) ..... 6

Thor Hertsgaard, F. Larry Leistritz, Arlen Leholm and Randal Coon, *The North Dakota Input-Output Model: A Tool for Measuring Economic Linkages*, 42 North Dakota Farm Research 36 (Oct. 1984) ..... 4

## INTEREST OF AMICI

The States of Montana, Connecticut, South Dakota, North Dakota, New Mexico and West Virginia, through their respective Attorneys General, submit this brief pursuant to Fed. R. App. P. 29(a) in support of petition for rehearing and suggestion for rehearing en banc.

As a result of eating food contaminated with BSE, by December 31, 2003, 139 British citizens had died of variant Creutzfeldt-Jakob Disease (“vCJD”), or “Mad Cow disease.” Nat’l CJD Surveillance Unit & Dep’t of Infectious & Tropical Diseases, *Creutzfeldt-Jakob Disease Surveillance in the UK: Twelfth Annual Report 2003* at § 2.2 (undated).<sup>1</sup> “To date approximately 170 probable and confirmed cases of vCJD have been identified worldwide.” 70 Fed. Reg. 48494, 48495 (Aug. 18, 2005). The U.S. government acknowledges, and the panel found, that the vCJD disease “has been linked via scientific and epidemiological studies” to BSE. Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities, 70 Fed. Reg. 460, 462 (Jan. 4, 2005) (hereafter “APHIS BSE Supp. Info.”); Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture, 2005 U.S. App. Lexis 17360, \*8

---

<sup>1</sup> The Report is at [www.cjd.ed.ac.uk/twelfth/rep2003.htm](http://www.cjd.ed.ac.uk/twelfth/rep2003.htm).

(9th Cir. August 17, 2005) (amended opinion) (hereafter “R-CALF II”). The disease is invariably fatal.

The BSE that struck the UK’s cattle herds spread to Canadian cattle. The introduction of BSE into Canada created a substantial threat for beef consumers and cattle producers in the United States.<sup>2</sup> The United States Department of Agriculture (“USDA”) recognized that importation of cattle and beef products from countries in which the disease was found posed an unacceptable risk of introducing BSE into the United States. The agency took prompt, forceful action. By closing the border to importation of Canadian cattle and beef products in May, 2003, the USDA protected the Nation’s cattle from BSE and substantially reduced the risk that infected Canadian beef would find its way into America’s food supply. 68 Fed. Reg. 31939 (May 29, 2003).

USDA’s commendable action in 2003 satisfied the foremost responsibility of government, both state and federal: to safeguard the health and welfare of its citizens. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905); United States v. Cruikshank, 92 U.S. 542, 549 (1876). The amici states submit this brief because the federal government, with its premature

---

<sup>2</sup> As the panel’s opinion notes, the Canadian and American cattle markets have traditionally been “highly integrated,” with thousands of cattle shipped from Canada to the United States each year. R-CALF II at \*17.

decision to reopen the border, and the panel's decision, with its abdication of any form of effective review of the legality of USDA's actions since May 29, 2003, have failed to protect the interests of the public the Attorneys General serve.

Along with their public health interest, the amici states have a substantial economic interest in USDA's proposed rule. Many of the amici are cattle producing states. Cattle production is an integral, if not vital, part of their economies.

In North Dakota, for example, there are about 11,000 cattle operations managing 1.7 million animals with a value of \$1.5 billion. N.D. Agricultural Statistics Service, North Dakota Agricultural Statistics 2004, at 136-38 (Aug. 2004) (hereafter "ND Ag. Stats.>"). In Montana, 13,000 ranchers run 2.4 million head of cattle valued at \$2.3 billion.<sup>3</sup> In 2003, these producers generated gross receipts of \$960 million, making cattle production the largest part of the Montana's farm economy.<sup>4</sup> North Dakota cattle producers earned \$690 million in cash receipts in 2003, making cattle production, after wheat

---

<sup>3</sup> This information is found at [www.nass.usda.gov/mt/livestock/catloper.htm](http://www.nass.usda.gov/mt/livestock/catloper.htm) and [www.nass.usda.gov/mt/livestock/cattle&c.htm](http://www.nass.usda.gov/mt/livestock/cattle&c.htm).

<sup>4</sup> This information is found at [ww.nass.usda.gov/mt/livestock/c&cpdi.htm](http://ww.nass.usda.gov/mt/livestock/c&cpdi.htm).

production, the second largest component of the state's farm income. ND Ag. Stats. at 150. And these earnings have significant links to other parts of the economy. Each dollar received from exporting "livestock from the state 'turns over' about four and a half times within the state." Thor Hertsgaard, F. Larry Leistritz, Arlen Leholm and Randal Coon, *The North Dakota Input-Output Model: A Tool for Measuring Economic Linkages*, 42 North Dakota Farm Research 36, 37 (Oct. 1984). The beef cattle industry plays a similarly important role in the economies of other amici states. And in some of these states ranches and cattle helped form and are an enduring part of the amici states' history, culture and identity.<sup>5</sup>

Federal law obligates the USDA to protect the public health from unsafe foods supplies and to protect the agricultural economies in the United States from the threat posed by importation of unsafe farm products. The USDA's proposed rule failed that task, and the panel's decision in effect allows the USDA to fail without meaningful court review. The consequences of the panel's erroneous decision could be catastrophic, and they are not

---

<sup>5</sup> State legislatures have recognized the importance of the BSE issue. The Montana Legislature recently adopted H.J.R. 7, urging Congress to reject the USDA rules that are the subject of this case. The 2005 South Dakota Legislature adopted House Concurrent Resolution No. 1001 requesting that the border remain closed until USDA takes a number of specific steps. Copies of these resolutions are attached to the brief of the amici curiae states previously filed. See also H.C.R. 3009 59th N.D. Leg. Ass.

limited to the states in the Ninth Circuit. For the reasons stated in the petition and for the reasons that follow, the amici states urge the Court to grant rehearing en banc and to vacate the panel opinion and reinstate the district court's preliminary injunction order.

## **ARGUMENT**

### **REHEARING IS APPROPRIATE BECAUSE THE ISSUES PRESENTED IN THIS CASE ARE OF EXTRAORDINARY NATIONAL IMPORTANCE.**

The petition sets forth in detail the points of law and factual matters on which the panel erred in overturning the preliminary injunction entered by the district court, and the amici states will not belabor those points. Amici submit, however, that the importance of the issues presented with respect to the national health and economic policies that have been brushed aside by the USDA, and the failure of the panel to provide for meaningful judicial review of the USDA's action, merit rehearing in this matter. Fed. R. App. P. 40(2) (rehearing governed by showing that "point[s] of law or fact [were] overlooked or misapprehended"); Fed. R. App. P. 35(a) (rehearing en banc appropriate where, *inter alia*, "the proceeding involves a question of exceptional importance.").

It is important to bear in mind that the case is here on review of a preliminary injunction. The district court acted with due dispatch to enter its

preliminary injunction order preserving the status quo pending resolution of the merits. Despite the pendency of this appeal, the district court then concluded pretrial proceedings and set the case for hearing on the merits on July 25, 2005, the same day that the panel released its decision. It thus appears likely that without the appellate intervention of the panel, this case would have been tried on its merits, decided and on its way to this Court for full appellate review on its merits by now.<sup>6</sup>

No one argues that the issues presented in this case are insignificant. If the USDA is wrong in its analysis of the efficacy of its measures to prevent the spread of BSE, the consequences for public health and the economic interests of domestic cattle producers will likely be catastrophic.<sup>7</sup> As the district court found:

Allowing the import of Canadian cattle into the U.S. increases the potential for human exposure to material containing the agent for BSE in this higher-risk meat. This has substantial, irreparable consequences for cattle growers and also for all

---

<sup>6</sup> The district court vacated the merits hearing after the panel announced its determination to vacate the preliminary injunction, and has held the matter in abeyance pending issuance of the mandate.

<sup>7</sup> The government has acknowledged the risk to the domestic cattle industry from introduction of BSE: “The introduction and spread of BSE in the US cattle population would have major adverse consequences for that industry. In addition to the loss of cattle to the disease and the expense of controlling it, major overseas markets for US cattle products might be closed.” FDA Center for Veterinary Medicine, *Environmental Assessment for Prohibition of Protein Derived from Ruminant and Mink Tissues in Ruminant Feeds 2* (Oct. 1996).

consumers of beef in or from the U.S. If consumption of beef products from Canadian cattle that the Final Rule will allow to enter the U.S. food supply were to result in cases of vCJD in humans, there is no known cure, and it is invariably fatal. Prohibiting the importation of Canadian cattle and beef through the imposition of a preliminary injunction enjoining the implementation and enforcement of the Final Rule published January 4, 2005, titled “Bovine Spongiform Encephalopathy, Minimal Risk Regions and Importations of Commodities” will maintain the status quo, preventing the possibility of quintessential irreparable harm to the citizens of the United States.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v.

United States Department of Agriculture, 359 F. Supp. 2d 1058, 1073

(D. Mont. 2005) (“R-CALF I”). Moreover, the issues are national in scope.

The district court’s order delayed implementation of the rule nationwide, and the adverse consequences of the USDA’s hasty action will be felt throughout the country.

The panel acknowledged that analysis of a preliminary injunction is a “sliding scale” in which the strength of the showing required on the merits decreases as the degree of potential injury to the plaintiffs increases, R-CALF II, at \*29. However, the panel’s opinion shows that it applied a much different analysis, first reviewing the merits of plaintiffs’ legal arguments in violation of this Court’s prior en banc holding that a court reviewing a preliminary injunction should avoid reviewing “the underlying merits of the case,” Southwest Voter Registration Educ. Fund Project v. Shelley, 344 F. 3d

914, 918 (9th Cir. 2003) (en banc), and then discounting the plaintiffs' position in the balancing of hardships based on its conclusion that the USDA was right all along in adopting the rule.

If this were a dispute among private litigants, the amici states would likely not be filing this brief. But this case is pregnant with public interest of a national character. An error in the USDA's analysis will cause devastating consequences to important national interests, interests that are at the core of the USDA's functions with respect to the safety of the food supply and the farm economies of the states.

Congress has expressed a national policy to protect the nation's food supply. It is "essential" to protect the people's health and welfare "by assuring that meat and meat food products . . . are wholesome." 1907 Federal Meat Inspection Act, 21 U.S.C. § 602. See also United States v. Mullens, 583 F.2d 134, 139 (5th Cir. 1978) (the Act "is to ensure a high level" of safety in meat products); Federation of Homemakers v. Hardin, 328 F. Supp. 181, 184 (D.D.C. 1971) (the Act is to benefit consumers and give them confidence in meat products). Congress has also stated that controlling animal diseases is "essential to protect animal health, the health and welfare of the people . . . [and] the economic interests of the livestock and related industries of the United States." 2002 Animal Health Protection Act, 7 U.S.C. § 8301(1).

In a case like this one, it is insufficient to state, as the panel does, that assuming the efficacy of the rule, the devastating consequences foreseen by the district court will likely not occur. R-CALF II, at \*66-68. Rather, given the serious questions raised, the nature of the injuries if the plaintiffs are right, and the complete absence of any showing of injury from the entry of the preliminary injunction, irreparable or otherwise, to interests the USDA is obligated by law to protect, the panel should have deferred to the district court and left the status quo in place until a full hearing on the merits could be held.

### **CONCLUSION**

The USDA's proposed rule puts the citizens of the amici states at risk of eating food contaminated with BSE and contracting, and dying from, vCJD. The rule also jeopardizes important economic interests in the domestic cattle industry. The panel's decision, departing from well-established Ninth Circuit law, has permitted the USDA to take this action free from any meaningful review under pertinent provisions of the Administrative Procedure Act, the Regulatory Flexibility Act, and the National Environmental Policy Act. The amici states respectfully urge the Court to grant the petition.

Respectfully submitted this 15th day of September, 2005.

MIKE McGRATH  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: \_\_\_\_\_  
CHRISTIAN D. TWEETEN  
Chief Civil Counsel

**STATEMENT OF RELATED CASES**

The Amici Curiae are unaware of any related cases pending before this Court.

## CERTIFICATE OF SERVICE

I hereby certify that I caused two true and accurate copies of the foregoing Brief of Amici Curiae to be mailed to:

Mr. Russell S. Frye  
Frye Law Firm, P.L.L.C.  
3050 K Street N.W., Suite 400  
Washington, DC 20007-5108

Mr. William L. Miller  
The William L. Miller  
Group., P.L.L.C.  
3050 K Street N.W., Suite 400  
Washington, DC 20007-5108

Mr. A. Clifford Edwards  
Mr. Taylor S. Cook  
Edwards, Frickle, Anner-Hughes,  
& Culver  
1601 Lewis Avenue, Suite 206  
P.O. Box 20039  
Billings, MT 59104-20039

Mr. Joshua Waldman  
Appellate Litigation Counsel  
United States Department of Justice  
950 Pennsylvania Avenue N.W.  
Room 7256  
Washington, D.C. 20530-0001

Mr. Lane M. McFadden  
Ms. Jennifer L. Scheller  
United States Department of Justice  
Environment and Natural Resources  
Division, Appellate Section  
PHB Mail Room 2121  
601 D Street N.W.  
Washington, DC 20004

Mr. Mark Steger Smith  
Assistant United States Attorney  
Office of the United States Attorney  
P.O. Box 1478  
2829 Third Avenue North, Suite 400  
Billings, MT 59101

Mr. Robert N. Hochman  
Mr. Chad W. Pekron  
Sidley Austin Brown & Wood L.L.P.  
Bank One Plaza  
10 South Dearborn Street  
Chicago, IL 60603

Mr. Carter G. Phillips  
Mr. Alan Charles Raul  
Mr. Mark D. Hopson  
Mr. Jay T. Jorgensen  
Sidley Austin Brown & Wood L.L.P.  
1501 K Street, N.W.  
Washington, DC 20005

DATED: \_\_\_\_\_

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 05-35264**

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1,  
the attached answering brief is

- Proportionately spaced, has a typeface of 14 points or more and  
contains 2,066 words.
- Monospaced, has 10.5 characters per inch and  
contains \_\_\_ words or \_\_\_ lines of text.

---

Date

---

Signature