UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Meat Institute, *et al.*	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Civil Action No. 13-cv-1033 (KBJ)
United States Department of Agriculture, *et al.*	§	
	§	
Defendants.	§	
	§	

Prospective Defendant-Intervenors' Motion for Intervention

For the reasons stated in its accompanying Memorandum of Points and Authorities ("Memo"), declarations, and exhibits, Food & Water Watch, Inc.; Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America; the South Dakota Stockgrowers Association; and the Western Organization of Resource Councils (collectively, the "Prospective Defendant-Intervenors") – organizations that represent consumers, as well as cattle, hog, and sheep producers – respectfully move this Court to allow them to intervene as Defendant-Intervenors in the above-captioned case. Each of these organizations meets the qualifications for intervention as of right under Fed. R. Civ. P. 24(a)(2). Moreover, in terms of the timeliness, while the Prospective Defendant-Intervenors seek intervention prior to the Court's ruling on Plaintiffs' motion for a preliminary injunction, the prospective Defendant-Intervenors do not seek to brief the Court or argue that matter, since they do not believe that Plaintiffs have met their particularly heavy burden to secure a preliminary injunction.

Further, as more fully provided in the memo, the Prospective Defendant-Intervenors' interests are not adequately represented by any of the existing parties, as their interests are narrower and more specific than the Government Defendants,' and they will best be able to advance arguments about COOL's underlying consumer protection, safety, and market-

concentration purposes. In the alternative, and for the same reasons, the Prospective Defendant-Intervenors ask that they be granted permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

Through counsel, the Prospective-Intervenors conferred with all parties.

The Plaintiffs take no position on the motion and reserve their right to respond after it has been filed.

The Defendants also take no position on the motion and reserve their right to respond after it has been filed.

The existing Defendants-Intervenors consent to this motion.

DATED: August 23, 2013

Respectfully submitted,

/s/

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I. INTRODUCTION

The prospective Defendants-Intervenors respectfully request that they be allowed to intervene in this action as a matter of right under Fed. R. Civ. P. (2013)(a)(2) (2013), or, in the alternative, ask the Court to grant them permissive intervention under Fed. R. Civ. P. 24(b)(1)(B) (2013).

II. FACTS

A. Procedural Posture

On July 8, 2013, Plaintiffs, a group of trade associations claiming to represent American meatpackers, feedlots, cattlemen, and pork producers, and their foreign suppliers, sued the federal government agencies (collectively, "USDA" or "Government Defendants"), which are charged with administering the United States' Mandatory Country of Origin Labeling ("COOL") program, for violating their First Amendment Rights under the U.S. Constitution and for exceeding their authority and being arbitrary and capricious in contravening the Administrative Procedure Act. (Pls.' Am. Compl. ¶¶ 10, 72-91 (as amended on July 23, 2013) (Doc. 15)). Among other things, Plaintiffs contend that the rules, in effect since May 23, 2013, but not to be enforced for six months afterward, unconstitutionally "compel[] speech." This they argue is because the rules require meat-product labels that list the countries from where the source animal was derived was born, raised, and slaughtered. (*See* Pls.' Memo. Law Supp. Pls.' Mot. Prelim. Inj. at 12 (Doc. 24).) They also contend that this provision and the rules' ban on combining meats of different origin is *ultra vires* and arbitrary and capricious. (*Id.* at 25-38.)

On July 25, 2013, Plaintiffs moved for a preliminary injunction. (*Id.*) On August 9, 2013, four organizations sought to intervene to defend the rule and oppose the preliminary

injunction motion. (*See* Memo. of Points and Authorities United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America Supp. Mot. Intervention (Doc. 28).) Plaintiffs partially opposed the motion, but the Court granted it over their objections. (Minute Order, Aug. 19, 2013.) A hearing on the preliminary injunction is scheduled for August 27, 2013. (Minute Order, Aug. 3, 2013.)

The following groups (collectively, the "prospective Defendant-Intervenors") now seek leave of this Court to join as Defendants in this action.

B. The Prospective Defendant-Intervenors

Food & Water Watch ("FWW") is a national, non-profit, public interest consumer advocacy organization with its headquarters in Washington, DC, with over 52,896 members from 50 states. (Lovera Decl. at ¶¶ 3-4.) One of the organization's primary missions is to educate the public regarding food systems that guarantee safe, wholesome food produced in a sustainable manner. The organization works to promote the practices and policies that will result in sustainable and secure food systems that provide healthy food for consumers and an economically viable living for family farmers and rural communities. (*Id.* at ¶ 4.)

Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America ("R-CALF USA") is a national, nonprofit trade association incorporated in the state of Montana that exclusively represents the interests of independent cattle producers within the multi-segmented U.S. beef supply chain. (Bullard Decl. at ¶ 3). With 4,625 voluntary dues-paying members in 42 states, R-CALF USA is the largest producer-only cattle trade association in the United States. (*Id.*) It also represents 19 dues-paying affiliated organizations that represent state and county livestock-producer associations from 10 states. (*Id.* at ¶ 4.) Included among these numerous associations are such statewide associations as the Colorado Independent CattleGrowers

Association, a cattle-producer association incorporated in the state of Colorado with a mission to actively promote policy that will benefit the live cattle industry, thus securing and preserving a viable livelihood for present and future generations of cattle producers. (*Id.*)

The South Dakota Stockgrowers Association ("SDSGA"), R-CALF USA's largest affiliate, operates as a grassroots organization of independent livestock producers dedicated to promoting and protecting the South Dakota livestock industry. (Christen Decl. at ¶ 3). It currently represents approximately 1,300 independent ranch families in the state of South Dakota, making it the largest trade association representing cattle and sheep producers in South Dakota. (*Id.*)

The Western Organization of Resource Councils ("WORC") is a regional organization of grassroots community membership-based organizations with 10,000 members and 36 local chapters in seven states. (Tope Decl. at ¶ 1). Its mission is to advance the vision of a democratic, sustainable, and just society through community action. (*Id.*) WORC and its member groups have historically addressed issues of importance to a primarily rural constituency, including the impacts of agribusiness consolidation and international trade policy. (*Id.*) WORC's interest in country-of-origin labeling is an outgrowth of its effort to reduce concentration in the domestic livestock industry. (*Id.*)

Each of the above-mentioned groups also brings forward declarations from their individual dues-paying members. (*See* Corbo Decl.; Pongratz Decl.; Deering Decl.; and Tope Decl.)

C. Background on the Challenged Country of Origin Labeling Provisions

In 2002, Congress amended the Agricultural Marketing Act of 1946 (now codified as amended at 7 U.S.C.S. §§ 1621-1638d (2013), to require retailers to notify their customers of

covered commodities' country of origin at the final point of sale. *See* Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, 10816, 116 Stat. 134, 534-36. Among other things, the amended act directed retailers to designate covered commodities that are meat, such as beef, as "United States country of origin" only if the animals from which they were derived were "exclusively born, raised, and slaughtered in the United States." *Id.* The amendment did not speak to covered products derived from animals born, raised, or slaughtered outside of the United States. *Id.*

The USDA did not meet the deadline that Congress established for the implementation of the 2002 COOL law. *See* Publ. L, 107-171, 10816, 116 Stat. 134, 536. Instead, USDA repeatedly delayed the rule.[1] It was not until Oct. 30, 2003, that AMS published a proposed rule to implement COOL ("2003 Proposed Rule"). *See* 68 Fed. Reg. 61,944 (Oct. 30, 2003). Two provisions of the proposed rules are most relevant to the instant lawsuit. USDA proposed rules that required labels for meat from animals with multiple origins to list the country where the animal was imported and the production steps occurring in the United States (*e.g.*, meat from a Canadian animal imported for immediate slaughter would be labeled "Imported from Canada, Slaughtered in the United States").[2] *See id.* at 61,949, 61,983. The provisions that Plaintiffs are now challenging (*see* 78 Fed. Reg. 31,367 ("Final COOL Rule" or 2013 Final COOL Rule)) require retailers to disclose the country from where the source-animal of the meat product was born, raised, and slaughtered. So, for example,

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[1] USDA published guidelines for an interim voluntary country of origin labeling program on Oct. 11, 2002, providing the public with 180 days to comment. *See* 67 Fed. Reg. 63,367 (Oct. 11, 2002). It also provided 120 days for comment on a collection of information request to estimate the burden associated with recordkeeping requirements for COOL. *See* 67 Fed. Reg. 70,205 (Nov. 21, 2002); 68 Fed. Reg. 3,006 (Jan. 22, 2003). The 2003 proposed rule was accompanied by a 60-day comment period that was later extended to 120 days. *See* 68 Fed. Reg. 71,039 (Dec. 23, 2003); 72 Fed. Reg. 33,917 (June 20, 2007).

[2] The Plaintiffs misapprehend the requirements of the 2003 Proposed Rule when they assert that it contains the same provision they are now challenging.

products derived from an animal born and raised in another country, but slaughtered in the United States, would be labeled "Born and Raised in country X, Slaughtered in the United States." *Id.* at 31, 385.

The other provision most relevant to the instant lawsuit is "commingling" or when product comprises components that fall into different categories (*e.g.*, products with exclusively U.S. origins mixed with products derived from animals from other countries or those imported for immediate slaughter). The 2003 Proposed rule did not appear to allow commingling for muscle cuts of beef or pork. To the extent it allowed commingling for other covered commodities, it proposed requiring a label individually identifying the country of origin for each component of such a product, listed alphabetically.

After a Congressionally imposed delay,[3] in 2008, Congress again amended the Agricultural Marketing Act by amending one and adding three additional country-of-origin designations: multiple countries of origin, imported for immediate slaughter, and foreign countries of origin. *See* Food, Conservation, and Energy Act of 2008, sec. 11002, § 282(a)(2)(B)-(D), Pub. L. 110-234, 11002 (codified at 7 U.S.C.S. § 1638a (2013)). The amended designation was for meat from animals of United States country of origin. *Id.*. The amendments also detailed criteria for designating a covered commodity in each of four country-of-origin categories. *Id.*

In order for the country of origin to be designated as from the United States, the product

[3] Parallel in time with USDA's publication of its 2003 Proposed Rule, the U.S. House of Representatives' Committee on Appropriations (not the House Committee on Agriculture) sought to delay COOL. The committee's efforts culminated in the FY 2004 Consolidated Appropriations Act that delayed the implementation of COOL for all covered commodities except fish and shellfish until Sept. 30, 2006. Consolidated Appropriations Act, 2004, Pub. L. 108-99, sec. 749 (Jan. 23, 2004). The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. 109-97, sec. 792 (Nov. 11, 2005), further delayed the implementation of mandatory COOL for meat and all other commodities except fish and shellfish until Sept. 30, 2008.

must be from an animal that is (i) exclusively born, raised, and slaughtered in the United States; (ii) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or (iii) present in the United States on or before July 15, 2008, and then remain there continuously after. *See* 7 U.S.C.S. § 1638a(a)(2)(A). This exclusively U.S. product is known as "Category A" product.

Retailers are required to use multiple-countries-of-origin labels when the animal from which the meat was derived is (i) not *exclusively* born, raised, and slaughtered in the United States; (ii) born, raised, or slaughtered in the United States, and (iii) not imported into the United States for immediate slaughter. *Id.*, § 1638a(a)(2)(B) (emphasis added). This product, which is from animals born in other countries but raised and slaughtered in the United States, is known as "Category B" product.

The 2008 amendments also required retailers to designate the country of origin as (i) the country from which the animal was imported, and (ii) the United States, if the animal is imported into the United States for immediate slaughter. *Id.*, § 1638a(a)(2)(C). This imported-for-immediate-slaughter product is known as "Category C" product.

If the product is imported from another country and derived from an animal that is not born, raised, or slaughtered in the United States, the retailer must designate a country other than the United States as the country of origin. *Id.*, § 1638a(a)(2)(D). This is known as "Category D" product.

Finally, the 2008 amendments addressed ground meats differently. Retailers must designate these products by listing either (i) "all countries of origin" of such products or (ii) "all reasonably possible countries of origin." *Id.*, § 1638a(a)(2)(E).

On Aug. 1, 2008, USDA published an interim final rule ("2008 Interim Final Rule") for meat and all other covered commodities except for fish and shellfish, which were already being labeled. *See* 73 Fed. Reg. 45,106 (Aug. 1, 2008).

The 2008 Interim Final Rule and the subsequent final rule published Jan. 15, 2009 ("2009 Final Rule") marked a serious deviation from the 2003 Proposed Rule, and, as at least one prospective Defendant-Intervenor would assert in a federal lawsuit against the USDA (*see* Bullard Decl. at ¶ 21), the rules were contrary to the 2008 statute. In the 2008 Interim Final Rule, the USDA eliminated the provisions in its 2003 Proposed Rule that required the labeling of the country from which the meat was imported and each production step that took place in the United States, seemingly making them voluntary. 73 Fed. Reg. at 45,110, 45,112 ("[T]he origin declaration *may* include more specific information related to production steps." (emphasis added)).

In terms of commingling of product, the 2008 Interim Rule did not expressly allow commingling of muscle cuts, though meatpackers and retailers interpreted the rule to allow a multiple-country label on virtually all meat slaughtered in U.S. packing plants, and USDA later acknowledged that the outcome of the rule was not what Congress intended. 74 Fed. Reg. 2,658, 2,659 (Jan. 15, 2009). USDA also deleted the requirement that countries be listed alphabetically for other commodities and allowed companies to choose how they list the product's origin.[4]

A subsequent, September 26, 2008 question-and-answer document would, for the first time, expressly state that the USDA was authorizing commingling for muscle cuts of meat mixed during a production day, allowing meat derived exclusively from animals born, raised, and slaughtered in the United States to be labeled with a mixed-origin label:

[4] *Compare* 73 Fed. Reg. at 45,150 *with* 68 Fed. Reg. at 61,984.

> If meat covered commodities derived from U.S. and mixed origin animals are commingled during a production day, the resulting product may carry the mixed origin claim (e.g., Product of U.S., Canada, and Mexico). Thus, it is not permissible to label meat derived from livestock of U.S. origin with a mixed origin label if solely U.S. origin meat was produced during the production day.

Country of Origin Labeling (COOL) Frequently Asked Questions, AMS, at 7-8 (Sept. 26, 2008) (attached as Bullard Exh. B-7-8).

Just days before the 2009 presidential inauguration, USDA published its 2009 Final Rule. *See* 74 Fed. Reg. 2,658. The 2009 Final Rule expressly confirmed that it would allow commingling of muscle cuts of meat. For example, the label for a Category-B product (derived from animals from multiple countries) could be used on an A-category product (derived from animals that are entirely born, raised, and slaughtered in the United States) during a meatpackers' entire production day, if the Category-A product is commingled during a production day with any amount of a Category-B product. *See id.* In addition, the 2009 Final Rule inexplicably allowed all Category-B products to bear a label listing the countries from which the product was derived, in any order. *See id.* Prospective Defendant-Intervenor R-CALF USA would later detail how this change in the regulations was in response to Canada's agreement to delay the filing of a complaint before the World Trade Organization ("WTO"). (Bullard Decl. at ¶ 18; Bullard Exh. A-75-83)

Notwithstanding these apparent concessions, on May 7, 2009, Canada and Mexico both followed through with their December 2008 requests for consultations, *see* 74 Fed. Reg. 7,497, and filed actions before the WTO against the United States, alleging that the United States' country of origin statutory and regulatory scheme was inconsistent with the United States' obligations under various WTO Agreements. *See* 74 Fed. Reg. 24,060 (May 22, 2009). Ultimately, on June 29, 2012, the WTO Appellate Body ("Appellate Body") affirmed a previous WTO Panel ("Panel")'s finding that the COOL requirements for muscle-cut meat commodities

were inconsistent with U.S. obligations under the WTO Agreement on Technical Barriers to Trade. *See* 78 Fed. Reg. 31,367 (May 24, 2013). And, while the Appellate Body agreed with the Panel's conclusion that COOL modifies the conditions of competition in the U.S. market and has a detrimental impact on imported livestock,[5] the Appellate Body found that the Panel did not find discrimination in order to establish a violation of the agreement.[6] The Appellate Body then found that the detrimental impact of COOL on imported livestock did not stem exclusively from COOL's legitimate regulatory objective to provide information to consumers, but instead reflected discrimination because COOL's recordkeeping and verification requirements, which are the source of detrimental impact on imported livestock, imposed a disproportionate burden on upstream producers and processors relative to the quality, transparency, and level of origin information conveyed to consumers.[7]

The Appellate Body identified at least three ways in which the 2009 Final Rule failed to fully convey the origin information tracked by producers to consumers. First, the prescribed labels did not expressly identify specific production steps.[8] Second, Category-B and -C labels contained confusing or inaccurate origin information. They did not require identification of the production steps in each country. Category-B labels allowed countries to be listed in any order, and they could not be used to identify where certain production steps took place, and its commingling provisions allowed the labeling of meat that was mixed origin when in fact it was of exclusively U.S. origin.[9] Finally, upstream producers are required to track the origin of the cattle, hogs, and sheep and the meat they produce regardless of its end use, yet COOL exempts

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[5] Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R, WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Report WT/DS384/AB/R, WT/DS386/AB/R ("Appellate Body Report"), located at http://www.wto.org/english/news_e/news12_e/384_386abr_e.htm, at ¶ 292.
[6] *Id.* at ¶ 327.
[7] *Id.* at ¶ 349.
[8] *Id.* at ¶ 343.
[9] *Id.*

processed food items and items sold in food service establishments.[10]

Compelled by the adverse WTO action, on March 12, 2013 the USDA issued a proposed rule to modify the 2009 Final Rule. *See* 78 Fed. Reg. 15,645. It was aimed at addressing all the concerns delineated in the ruling of the WTO Appellate Body.

Principally, the proposed rule (i) eliminated the comingling allowances discussed above that allowed meat from animals exclusively born, raised, and slaughtered in the United States to be labeled as if it were a product of multiple origins, and (ii) required labels to list the country where each of the three productions steps – born, raised, and slaughtered – had occurred for the animal from which the meat was derived. *Id.*

The USDA then issued a final rule on May 24, 2013, which essentially incorporated the modifications in the proposed rule. *See* 78 Fed. Reg. 31,367.

This Final COOL Rule is the subject of this dispute, as Plaintiffs contend that the scheme unconstitutionally compels their speech because retailers must provide meat-product labels that list the country where the animal from which the meat was derived, was born, raised, and slaughtered. (*See* Pls.' Memo. Law Supp. Pls.' Mot. Prelim. Inj. at 12 (Doc. 24).) They also contend that this provision and the rules' ban on combining meats of different origin are not allowed by the 2008 amended statute and otherwise are arbitrary and capricious. (*Id.* at 25-38.) The prospective Defendant-Intervenors strongly dispute the merits of these arguments and have strong grounds for intervening to do so.

III. SUMMARY OF ARGUMENT

R-CALF USA, FWW, SDSGA, and WORC are entitled to intervene as of right. Their motion is timely, coming long before the Government Defendants' Answer is due on the

[10] *Id.* at ¶ 344.

Plaintiffs' amended complaint. Intervention will cause no prejudice, and the prospective Defendant-Intervenors do not seek to argue or brief the Court on Plaintiffs' motion for a preliminary injunction. Prospective Defendant-Intervenors also should be allowed to intervene because they have a sufficient interest in the 2013 Final COOL Rule that is the subject of the action. As demonstrated in the attached declarations accompanying their motion, each of the organizations has Article III and prudential standing to defend the rule both as an organization and on behalf of their members. The disposition of this action would impair or impede the organizations' interests in protecting producers of U.S. cattle, hogs, and sheep and U.S. consumers of beef, pork, and lamb. Were the rule to be vacated or delayed, it would drastically affect the ability of consumers to make well-informed decisions when purchasing food and would harm the interests of U.S. producers in differentiating their animals from their imported competition. Finally, the prospective Defendant-Intervenors are not adequately represented by any of the existing parties. Not only are their interests decidedly narrower and more specific than the interests of the Government Defendants, the prospective Defendant-Intervenors will best advance arguments about COOL's underlying purposes of preventing consumer deception, limiting meatpacker concentration, and protecting consumer safety – arguments which the Government Defendants and the other Defendant-Intervenors have not made. In the alternative, the prospective Defendant-Intervenors ask that this Court grant them permissive intervention.

IV. ARGUMENT

A. The Prospective Defendant-Intervenors Are Entitled to Intervention of Right.

The prospective Defendant-Intervenors are entitled to intervene in this action of right under Fed. R. Civ. P. 24(a) (2013), which provides that:

> On timely motion, the court must permit anyone to intervene who:
> . . .

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In the D.C. Circuit, intervention of right carries four requirements: (1) the motion must be timely; (2) intervenors must have an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) the intervenors' interest may not be adequately represented by the parties in the action. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quotation marks and citations omitted). Moreover, even prospective intervenor defendants must demonstrate Article III and prudential standing. *See Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013) (citing *Fund for Animals*, 322 F.3d at 732-33).

1. <u>The Prospective Defendant-Intervenors' Motion to Intervene Is Timely.</u>

Plaintiffs filed their complaint on July 8, 2013, and the answer by the Governmental Defendants is not due until September 6, 2013. This is more than timely enough to permit intervention. *See United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235 (D.C. Cir. 2006); *Fund for Animals*, 322 F.3d at 735 (finding that intervention was timely when motion filed less than two months after complaint and before the filing of an answer).

Also, prospective Defendant-Intervenors filed their motion 46 days after learning their protectable rights were threatened by Plaintiffs' July 8, 2013 complaint. Thus, they responded as quickly to Plaintiffs' complaint as the Plaintiffs responded to the May 23, 2013 notice by USDA and its accompanying pre-published Final COOL Rule that is the subject of Plaintiffs' complaint.

Moreover, as mentioned in its motion, while they seek intervention prior to the Court's ruling on Plaintiffs' motion for a preliminary injunction, the prospective Defendant-Intervenors

do not seek to brief the Court or argue this matter, since they do not believe that Plaintiffs have met their particularly heavy burden to secure a preliminary injunction. Thus, the prospective Defendant-Intervenors' motion will neither affect the timing of the briefing nor the argument on that motion.

Given that this case is still in the earliest stages of the litigation, and intervention would cause no prejudice to the existing parties, the prospective Defendant-Intervenors' motion to intervene is timely.

2. The Prospective Defendant-Intervenors Have Demonstrated Article III and Prudential Standing And, Therefore, Have Demonstrated A Sufficient Interest in the Subject of this Litigation.

Prospective Defendant-Intervenors also have an interest relating to the property or transaction that is the subject of the action. "Constitutional standing is alone sufficient to establish that the [applicant] has 'an interest relating to the property or transaction which is the subject of the action,'" under Fed. R. Civ. P. 24(a)(2). *Fund for Animals*, 322 F.3d at 735.

Article III standing contains three elements: (1) the demonstration of injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection, where the injury is fairly traceable to this challenged action and not the result of the independent action of some third party not before the court; (3) where it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

a. The prospective Defendant-Intervenors demonstrate Article III standing, in their own right, and as membership organizations.

In the present matter, all prospective Defendant-Intervenors have standing both in their own right and as associations representing their individual members.

To sue in its own right, an association "must demonstrate that [it] has suffered injury in

fact, including such concrete and demonstrable injury to [its] activities-with [a] consequent drain on [its] resources-constituting . . . more than simply a setback to [its] abstract social interests." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (quotations and citations omitted). "The organization must allege that discrete programmatic concerns are being directly and adversely affected . . . ." *American Legal Found. v. FCC*, 808 F.2d 84, 92 (D.C. Cir. 1987).

All prospective Defendant-Intervenors were intimately involved in advocating both for the passage of COOL as well as the development of one or more sets of regulations in 2002, 2008, 2009, and 2013. (Lovera Decl. at ¶¶ 7-9; Bullard Decl. at ¶¶ 13-21; Christen Decl. at ¶¶ 6-14; Tope Decl. at ¶ 3.) They have spent a considerable amount of their resources on these efforts. (*Id.*) Particularly, the organizations worked extensively to persuade the USDA to end the commingling and the multiple-country labeling scheme that are the subject of this lawsuit because of the way in which these provisions would increase consumer confusion. (Lovera Decl. at ¶ 8; Bullard Decl. at ¶¶ 17, 21; Christen Decl. at ¶ 10; Tope Decl. at ¶ 6.) They supported the Final COOL Rule for eliminating these loopholes on the grounds that it would significantly improve the quality and clarity of the COOL labels and redress the information disparity identified by the WTO between the informational recordkeeping requirements on producers, processors, distributors, and retailers, and the information that is provided to consumers. (Lovera Decl. at ¶ 13; Bullard Decl. at ¶ 22; Christen Decl. at ¶ 12; Tope Decl. at ¶ 6.)

In addition to these benefits shared by all organizations, prospective Defendant-Intervenor SDSGA believes that the 2013 Final COOL Rule will have another specific benefit for the organization. The organization has been urging consumers to ask for beef that is born and raised in the United States for many years and has been distributing signage at meetings, trade

shows, and other events in an effort to promote and market beef that is born, raised, and slaughtered in the United States. (Christen Decl. at ¶¶ 9, 12, 14.) Because of the Final COOL Rule, most, if not all, of its members' cattle and sheep will be eligible for the born, raised, and slaughtered (harvested) in the U.S. label, and, because consumers will now know which beef and lamb is exclusively from the United States, the organization's spending on its ongoing marketing and promotion efforts should have more of an effect, as it will actually begin increasing the demand for its members' calves and lambs. (*Id.*; *see also* Bullard Decl. at ¶ 16.)

Losing the 2013 Final COOL Rule, on the other hand, would be anything but simply a setback to the organizations' "abstract" social interests. Rather, was the Final COOL Rule to be vacated or delayed by this Court, all of the organizations' time and resources spent towards passing and implementing a strong COOL law will be wasted, since what will remain is the 2009 rulemaking scheme that did not accurately convey information to consumers. (Lovera Decl. at ¶¶ 14-15; Bullard Decl. at ¶ 23; Christen Decl. at ¶ 24; Tope Decl. at ¶ 6.) The organizations would be forced to increase the resources that they already spend on advocating for tough measures to prevent the import of meat products and educating consumers about the dangers that some of these pose, since, without the Final COOL Rule, consumers will be left unable to determine the true origin of some of the meat products that they consume. (*See, e.g.*, Lovera Decl. at ¶¶ 13-14.) They will also be forced to spend more resources attempting to educate consumers about what the confusing labels actually mean. (*See id.*)

The organizations will also have to spend even more resources than they already do on measures that would limit the consolidation on the meatpacking sector of the U.S. economy, since without the 2013 rules, meatpackers will continue paying less for imported animals than local cattle, hogs, and sheep, but be able to commingle products and prey on consumer confusion

regarding labels to sell meat from imported animals at higher prices than they would otherwise warrant. (Lovera Decl. at ¶14) Such unjust enrichment should not be allowed.

Further, several of the prospective Defendant-Intervenors believe that any weakening or delay of the Final COOL Rule will harm them by limiting their ability to continue receiving membership renewals, generating new members, and generating contributions. (Bullard Decl. at ¶ 23; Christen Decl. at ¶ 14.)

All of these harms to the organizations are more than enough to demonstrate that each prospective Defendant-Intervenor has suffered the concrete non-abstract interest required for standing. *See, e.g., Pilsen Neighbors Community Council v. Netsch,* 960 F.2d 676, 682, n.6 (7th Cir. 1992) (finding that an organization may be harmed if defendant's activity reduces membership dues or other contributions that the organization would otherwise collect); *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) ("Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. . . . Furthermore, the consumers' interest in [the regulation] may properly be represented by a membership association with an organizational interest in the problem[;]") *Scientists' Institute for Public Information, Inc. v. Atomic Energy Com.*, 481 F.2d 1079, 1086 (D.C. Cir. 1973) (finding a sufficiently concrete harm in an agency action limiting the organization's work informing the public); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 274 (E.D.N.Y. 2002) ("[H]aving to divert scarce resources away from other organization activities as a result of the challenged conduct may qualify as an injury that confers standing[;]"), *aff'd on other grounds*, 60 Fed. Appx. 861 (2d Cir. 2003).

Not only do the prospective Defendant-Intervenors have standing as organizations in their own right, but also on behalf of their members. "An association, . . . 'has standing to bring

suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (quoting *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996)).

First, the prospective Defendant-Intervenors' members would have standing to sue in their own right. For example, consumers, including FWW's dues-paying members, rely on COOL when making their purchasing decisions. (Lovera Decl. at ¶ 5.) For example, Anthony Corbo, one of FWW's dues-paying members, always reads the COOL labels in order to find out the origin of the product and seeks to purchase product born, raised, and slaughtered in the United States by buying pork and beef products that are labeled "Product of the U.S." (Corbo Decl. at ¶ 3.) When this is not available, he avoids product that, under the 2009 Final Rule, lists multiple products of origin, since this product comes from multiple countries and the order of the countries listed is not indicative of where the various production steps have taken place. (*Id.*) When his only option is beef and pork with this type of label, he forgoes purchasing such product, meaning he forgoes the purchase of product he otherwise seeks out, a product that is born, raised, and slaughtered in the United States. (*Id.*) Therefore, he, like many other FWW members, very much benefit from the 2013 Final COOL Rule that prevents this multiple-country labeling and commingling, as it allows him to purchase, and not forgo, the U.S. product that he desires. (*Id.* at ¶ 4.) He and other FWW members would be harmed were the 2013 Final COOL Rule to be vacated by this Court as part of this lawsuit, as it would force him to avoid commingled product labeled from multiple countries. (*Id.* at ¶ 5.)

R-CALF USA members also have standing based in its members. R-CALF USA's members are involved in all stages of the cattle production process and they include seed-stock producers, cow/calf producers, stockers and backgrounders, as well as feedlot owners. (Bullard Decl. at ¶ 3.) R-CALF USA's voting members are members who own cattle. Some members also raise sheep and raise hogs, as well. (*Id.*) Its members have a fundamental interest in preserving their reputation as honest, transparent and reliable producers of wholesome, safe meat. (*Id.* at ¶ 8.) The organization does not believe that this can be achieved if consumers are kept in the dark regarding where the animal was born, raised, and slaughtered from which their beef was derived. (*Id.*) R-CALF USA's representative member, for example, believes that COOL labels allow him to distinguish his U.S. cattle and get a better price for it. (Pongratz Decl. at ¶ 6). Under the 2009 Final Rule, however, when meatpackers were allowed to commingle and label the meat if it came from two or more countries, such benefits were not obtained because consumers could not pay such a premium for his product. (*Id.* at ¶ 8.) He was also hurt under the 2009 Final Rule because he was required to fill out affidavits that packers were not required to use when they commingled product, which is essentially the same harm that the WTO found Canada and Mexico were suffering under the prior scheme. The 2013 Final COOL Rules eliminated these harms, and R-CALF USA's members will be once again injured if these rules were vacated or delayed. (*Id.* at ¶ 9.)

The same is true for SDSGA and WORC members. Most of SDSGA members' cattle and sheep are shipped out of the state for feeding because South Dakota does not have a large enough feeding industry to accommodate the state's production. (Christen Decl. at ¶ 8.) Its members believe that imports are contributing to depressed prices and that the only way they would be able to promote their product is if they could differentiate it at the grocery store and

then encourage U.S. consumers to buy beef and lamb that is from animals born, raised, and slaughtered in the United States. (*Id.*) SDSGA's members, were harmed under the 2009 Final Rule because the beef and lamb produced from their U.S.-born and -raised cattle and sheep was labeled as if it were partially produced in a foreign country, which, in turn, reduced the demand and price for South Dakota calves and lambs. (*Id.* at ¶¶ 10-11.) SDSGA member Gary Deering believes that without the Final COOL Rule, he will receive less for his product than he otherwise would because of consumer confusion. (Deering Decl. at ¶ 9) WORC member Wilma Tope suffers the same harms and believes that while the 2009 Final Rule may increase profits for meatpackers, it negatively affects the price received by U.S. producers like herself and her husband. (Tope Decl. at ¶ 6.) Were Plaintiffs to prevail in challenging the 2013 Final Rule, all of these members would sustain direct injuries from returning to the 2009 Final Rule.

Therefore, the prospective Defendant-Intervenors' members have the requisite injury-in-fact for standing in this case. *See County of San Miguel v. MacDonald*, 244 F.R.D. 36 (D.D.C. 2007) (finding that Defendant-Intervenors had standing when the EPA refused to classify the Gunnison sage-grouse as an endangered species because they demonstrated that they would sustain direct injuries if the plaintiffs prevailed because the proposed changes to the regulations would harm their businesses and interests).

It goes without saying that the prospective Defendant-Intervenors also satisfy the causation and redressability prongs for standing. The direct cause of these injuries would be the Plaintiffs' present lawsuit seeking to vacate USDA's Final COOL Rule. Were the court to rule in Defendants' favor, however, the Final COOL Rule would be preserved, redressing the prospective Defendant-Intervenors' injuries in full.

Second, the lawsuit is germane to the organizations' interests. COOL provides consumers with vital information that they need to make informed and intelligent choices about where their food is from, as well as gives producers an opportunity to distinguish their products in the increasingly international marketplace. Having strong COOL labeling laws axiomatically aligns with FWW's mission to educate the public about their food systems (Lovera Decl. at ¶¶ 4-5), because COOL educates the public about where their food is from. Strong COOL labels also align with FWW's mission of promoting policies that result in secure food systems that provide healthy food for consumers and an economically viable living for family farmers (*Id.* at ¶¶ 4-6), as such laws allow consumers to base their purchasing decisions on the safety and quality of the food system of the country where the product is born raised, or slaughtered.

Likewise, strong COOL rules align with the missions of R-CALF USA and its affiliates, which are statewide producer associations and include the prospective-intervenor SDSGA and R-CALF USA affiliate Colorado Independent CattleGrowers Association (Bullard. Decl. at ¶ 4; Christen Decl. at ¶6), as well as WORC. (Tope Decl. at ¶ 1) These groups seek to protect and preserve competition for U.S. cattle producers and ranchers. Ensuring that COOL labels are meaningful in differentiating imported and U.S. product does exactly that.

Finally, there is no need for participation of prospective Defendant-Intervenors' members, as the organizations only seek to preserve the Final COOL Rule. This relief will neither be based on the evidence that the organizations' members can offer, nor their personal appearances in the matter. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (finding that the test for associational standing may be met "where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members.")

b. The prospective Defendant-Intervenors demonstrate prudential standing.

"[P]rudential standing requirements. . . could be thought similar to the concept embodied in Rule 24 that a proposed intervenor must have an interest 'relating to' the property or transaction at issue in the litigation." *Deutsche Bank Nat'l Trust Co.*, 717 F.3d at 194. The "grievance must arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). "This 'test is not meant to be especially demanding.'" *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (quoting *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "Indeed, a petitioner is outside the statute's 'zone of interests only if petitioner's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quotation marks and citations omitted). The courts "'do not look at specific provisions said in complete isolation[,]' but rather in combination with other provisions to which it bears an 'integral relationship.'" *Id.* (quoting *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996).

With COOL, the statutory language that has existed since its inception in 2002 makes clear that it is aimed at ensuring that product that is derived from animals born, raised, and slaughtered in the United States is accurately labeled as a product of the United States. R-CALF USA, SDSGA, and WORC represent members that sell this product, as they include cow-calf producers and independent stockers, backgrounders, and feeders from across the United States. (*See* Bullard Decl. at ¶ 3; Christen Decl. at ¶ 3; Tope Decl. at ¶¶ 1,6-7; Pongratz Decl. at ¶ 1; Deering Decl. at ¶2).

The other COOL provisions at dispute in this case address commingling and product derived from animals that are born, raised, or slaughtered in other countries. All of R-CALF USA and SDSGA members and all of WORC's livestock producer-members have a strong

interest in ensuring their product is not commingled and labeled with multiple country labels because it lessens their product's value. (*See* Bullard Decl. at ¶ 6; Christen Decl. at ¶ 8; Tope Decl. at ¶ 6; Pongratz Decl. at ¶¶ 5-6; Deering at ¶¶ 4, 9.)

Further, as discussed below, COOL's other underlying aims of preventing consumer deception, limiting concentration amongst meatpackers, and enhancing consumer safety are all goals that benefit R-CALF USA, SDSGA, and many of WORC's members. (*See* Bullard Decl. at ¶¶ 6, 7, 14; Christen Decl. at ¶¶ 6, 8, 10-12; Tope Decl. at ¶ 6; Pongratz Decl. at ¶¶ 7-10; Deering at ¶¶ 4, 7.) So it cannot be in dispute that these organization and their members' interests in desiring strong COOL provisions are within the zone of interests protected by the statute.[11]

FWW's interests in protecting and educating consumers with the COOL provisions challenged in this case are likewise in the zone of interests that Congress sought to protect with COOL. If nothing else, the statute, is, after all, aimed at informing consumers, such as FWW's members that rely upon COOL for their purchasing decisions. (*See* Corbo Decl. at ¶ 3.) And, like with R-CALF USA, SDSGA and WORC, FWW's goals of ensuring strong COOL provisions because they will limit consumer deception and enhance safety, while limiting meatpacker concentration, are shared with the underlying legislative scheme that Plaintiffs seek to undermine by challenging USDA's Final COOL Rule.

Clearly, the prospective Defendant-Intervenors have a "substantial and direct" interest in the Plaintiffs' litigation, which seeks to set aside USDA's Final COOL Rule that ends commingling and requires the disclosure of the countries where the animals from which meat

[11] *See also* 7 U.S.C. § 1621 (2006) (stating Congress's purpose was "to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end . . . *that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed*, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner." (emphasis added)).

products are derived were born, raised, and slaughtered. Therefore, they have a sufficient interest to intervene. *See Natural Res. Def. Council, Inc. v. EPA*, 99 F.R.D. 607 (D.D.C. 1983) (finding that an intervenor's interest in a challenge to an agency's decisions is "substantial and direct" and thus sufficient for intervention when "regulatory decisions, which are obviously in the intervenors' interests, will be set aside").

The interests of the prospective Defendant-Intervenors and their members are enmeshed in this litigation and provide a compelling reason to recognize the right of the prospective Defendant-Intervenors to intervene. And, because the prospective Defendant-Intervenors have demonstrated constitutional and prudential standing to intervene in this lawsuit, they also have demonstrated that they have an interest relating to the property or transaction, which is the subject of the action under Fed. R. Civ. P. 24(a)(2). *See Fund for Animals*, 322 F.3d at 735.

3. Disposition of this Action Would Impair or Impede the Prospective Defendant-Intervenors and Their Members' Ability to Protect These Interests.

Whether the movant's ability to protect its interests will be impaired is a question of "the 'practical consequences' of denying intervention . . . ." *Fund for Animals*, 322 F.3d at 735.

It is unquestioned that the Plaintiffs' request to vacate the 2013 Final COOL Rule directly affects the interests of the prospective Defendant-Intervenors. The practical consequences of a denial of intervention would be that the prospective Defendant-Intervenors would be denied their right to defend the regulations that are vital to protecting their interests. The abandonment of the Final COOL Rule would drastically affect the ability of consumers to make well-informed decisions when purchasing food. The lack of such information would act as a detriment to the interests of U.S. producers. Intervention by right is warranted when the prospective Defendant-Intervenors and their members have so much at stake, as is clearly the case here.

4. The Prospective Defendant-Intervenors' Interests Are Not Adequately Represented by the Government Defendants or by the Other Defendant-Intervenors.

The fourth prong of the test for intervention as of right is whether "'the applicant's interest is adequately represented by existing parties.'" *Fund for Animals*, 322 F.3d at 731 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)). This requirement is not onerous. *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). It is "minimal" and satisfied if "the applicant shows that representation of his interest 'may be' inadequate . . . ." *Trbovich v. UMW*, 404 U.S. 528, n.10 (1972) (quoting 3B J. Moore, Federal Practice para. 24.09-1 [4] (1969)). The fact that the interests of the prospective Defendant-Intervenors and the Government converge in some areas is no basis to deny intervention. *See Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009). The D.C. Circuit has expressed skepticism that U.S. governmental entities, with their unique obligations to serve the general public, can be found to adequately represent the interests of potential intervenors. *Cal. Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43, 47 (D.D.C. 2012) (citing *Fund For Animals*, 322 F.3d at 736 and n.9).

In the instant matter, as detailed below, the Government Defendants have historically, fundamentally, and inherently different interests than FWW, R-CALF USA, SDSGA, or WORC. Likewise, the existing Defendant-Intervenors will not likely adequately represent the prospective Defendant-Intervenors.

The interests of R-CALF USA, FWW, SDSGA, and WORC and their respective members are decidedly narrower and more specific than the Government Defendants, which, on this issue, has historically been aimed at not only implementing COOL rules to the benefit of consumers and the public at large, but also accommodating and minimizing the cost of compliance for regulated entities, including the meatpacker Plaintiffs in this case.

Perhaps there is no better example of this than with the flexibility provisions that USDA implemented in 2009 – *i.e.*, commingling and the more general, multiple-country labeling scheme – the elimination of which Plaintiffs now complain violates their First Amendment rights and violates the Administrative Procedure Act. The USDA's incremental adoption of these provisions, starting with its 2003 Proposed Rule and ending with its 2009 Final Rule, demonstrates the agency's prior willingness to capitulate with the meatpackers' claims that COOL rules were too onerous and that they needed additional flexibility. The 2008 Interim Rule provoked considerable outcry from consumers and others who argued that product derived from "animals born, raised, and slaughtered in the U.S. should be labeled as 'Product of the U.S.' and not be diluted or commingled with a multiple country of origin label such as, 'Product of the U.S., Canada, and Mexico[.]'[] These commenters stated that . . . this . . . directly contradicts the statute and diminished consumer choice and producer benefits that could have resulted from this program." 74 Fed. Reg. at 2,669. Moreover, several members of Congress commented that it did not intend U.S. products to be combined with the multiple countries, nor was it provided for by the statute, as the purpose of COOL was to clearly identify the origin of meat products and provide consumers the most precise information available. *Id.*

USDA's 2009 Final Rule rejected these comments on the basis that it "recogniz[ed] that regulated entities must still be allowed to operate in a manner that does not disrupt the normal conduct of business more than is necessary." *Id.* at 2,670. The agency reaffirmed that commingling would be allowed and clarified that the countries of origin did not need to be listed in any particular order.

Thus, historically at least, with the very COOL provisions at issue in this case, the Government Defendants' have often sought to add flexibility for regulated entities, particularly

the Plaintiff meatpackers, even if it comes at the expense of consumers and producers.

This stands in stark contrast to the interests of the prospective Defendant-Intervenors, whose interests are far narrower than the Government Defendants' and have always been diametrically opposed to the Plaintiff meatpackers because of their power in the market-place and its impacts on producers and consumers. (*See e.g.*, Bullard Decl. at ¶ 7, Lovera Decl. at ¶ 14.)

Further, the prospective Defendant-Intervenors have pressed for strong COOL labeling laws. Accordingly, they have vehemently opposed, and some have even litigated over USDA's adoption of its comingling provisions and more general multiple-country labeling scheme. (*See* Lovera Decl. at ¶ 8; Bullard Decl. at ¶ 21.) For example, not only did R-CALF USA petition USDA to conduct a rulemaking in 2009 to close the commingling loophole, it ended up suing the agency claiming that USDA's commingling provisions were improperly adopted and contrary to the COOL statute. (Bullard Decl. at ¶ 21.) USDA disagreed and only promulgated rules after directed to do so by the WTO.

Therefore, FWW, R-CALF USA, SDSGA, and WORC and their respective members' interests, while both very much aligned with the government Defendants' current interests in preserving their Final COOL Rule, have historically not shared specific regulatory approaches much beyond the ultimate goal of a COOL regulation.

These different interests will also likely be reflected in the arguments presented to the Court. FWW, R-CALF USA, SDSGA, and WORC's interests in preserving strong COOL rules stem from their desire to protect what they believe was Congress's intent with COOL. One of the main impetuses for the law was to prevent consumers from being deceived into believing that the USDA inspection and grade label meant that the product is from the United States. *See, e.g.,*

148 Cong. Rec. S3979 (May 8, 2002) (statement of Sen. sponsor Tim Johnson) ("Well-funded opponents of country-of-origin labeling . . . like to import cheap meat and other products into the United States and camouflage those products as "Made in the USA". . .); 145 Cong. Rec. S2038 (Feb. 25, 1999) (statement of Sen. Feingold) (stating that the only guidance consumers have without COOL "is misleading at best-since many of us would assume that a steak that carries a USDA inspection and grade label is U.S. produced. But in many cases, this couldn't be farther from the truth.")

Another major purpose of COOL is to prevent consolidation. Originally, it was part of the farm bill's "Competition Title." *See, e.g.,* 147 Cong. Rec. S3245, 13272 (Dec. 14, 2001) (statement of Sen. sponsor Tim Johnson) ("Country of origin labeling and quality grade certification were integral components in the proposed 'Competition Title' which Chairman Harkin included in his farm bill proposal."); 148 Cong. Rec. H2022, 2035 (statement of Rep. Thune) (May 2, 2002) ("This farm bill will enhance producer competition by requiring mandatory country of origin labeling for agricultural competition.")

Finally, COOL's purpose is aimed at consumer safety. *See, e.g.,* 150 Cong Rec S614, 634 (Feb. 4, 2004) (statement of Sen. Daschle) ("Wouldn't it be nice to know we have that additional confidence that we are eating beef where downer cattle have been expressly prohibited? That is what we are talking about, improving upon an already good meat safety system. That, too, is a good reason why country-of-origin labeling ought to be law today.") Indeed, Senator Daschle introduced a bill in 2004 aimed at lifting a Congressionally imposed two-year delay in the implementation of COOL after a revelation that USDA had secretly allowed U.S. meatpackers to resume imports of ground and processed beef from Canada, after

USDA Secretary Veneman publicly reaffirmed the agency's ban on such imports due to mad cow disease. *See* 150 Cong. Rec. S5951 (May 20, 2004) (statement of Sen. Daschle).

This latter, public-health purpose of COOL clearly demonstrates how the USDA's interests diverge from the prospective Defendant-Intervenors and their members. USDA has repeatedly asserted that the COOL program is not a safety program. *See* 68 Fed. Reg. at 61,945; 74 Fed. Reg. at 2670, 2677, 2679. Nor is this particularly surprising, since COOL is a labeling program aimed at allowing consumers to protect themselves through their own market-based choices Such a USDA admission might be perceived as a tacit admission that its other regulatory programs aimed at protecting consumers are inadequate. *See* 68 Fed. Reg. at 61,945 ("COOL is a retail labeling program and as such does not address food safety or animal health concerns. Food products, both imported and domestic, must meet the food safety standards of [USDA's Food Safety Inspection Service ("FSIS")] and/or the Food and Drug Administration (FDA), as applicable.") The Plaintiffs' complaint asserts that this concession strengthens its case. *See* Pls.' Am. Compl. ¶ 5 (Doc. 15) ("Defendants concede that there is no health or safety reason to distinguish among meat from animals born or raised in Canada, or the United States, or Mexico[;]") *see also* ¶ 7.

But consumers rely on COOL both as a proxy for safety and quality, just as Congress intended. *See* 68 Fed. Reg.at 61,953 ("[C]onsumer surveys also indicate that consumers may desire COOL not out of any intrinsic value they place knowing the country of origin, but because it represents to them a proxy for product safety or quality, serves as an indicator of desirable environmental or labor practices, or represents a means for them to support U.S. or another country's producers.")

Therefore, in evaluating the government's interest in the implementation of the COOL provisions that the Plaintiffs challenge, including ascertaining whether the government has a sufficient interest in its regulation for First-Amendment purposes, this Court should take these vital purposes underlying the statute into account. These are arguments that Defendant-Intervenors are better able to press than the Government Defendants.[12] (*See* Bullard Decl. at ¶ 20 (discussing how the importation of tainted beef from Canada provided a clear example of how COOL labels can be used by U.S. citizens to ensure food safety by enabling them to avoid food from countries known to export tainted beef); Lovera Decl. at ¶ 13). This is in addition to the prospective Defendant-Intervenors' experience, influence and "grass roots know-how" while dealing with the COOL regulations, which can only serve as a vital addition to the Defendants' defense of the rule.

Finally, the differences in the likely arguments regarding the purposes of COOL also distinguish prospective Defendant-Intervenors from the organizations that the Court has already allowed to intervene. While it is hard to determine what they will argue when they brief how Plaintiffs' case lacks any merit, and preliminary injunction motions and oppositions thereto are done under extreme time pressures and are often just as their name suggests – preliminary – none of the existing Defendant-Intervenors have fully articulated the above-stated underlying purposes of COOL in any of their papers thus far filed with the Court. This is enough of a reason to find that both sets of proposed Defendant-Intervenors should be allowed in. *See, e.g., One Beacon Ins. Co. v. T. Wade Welch & Assocs.*, No._________, 2012 U.S. Dist. LEXIS 51476, at *14 (S.D.

[12] Plaintiffs and Defendants also allude to the existence of a "North American meat industry." The prospective Defendants-Intervenors would challenge its existence. Plaintiffs also say that "Defendants have also conceded that the new COOL requirements will impose greater costs – although they downplay the severity of the costs the requirements will impose." (Pls.' Am. Compl. ¶ 7) The prospective Defendants-Intervenors dispute these concessions. (*See* Bullard Decl. at ¶ 7)

Tex. Apr. 12, 2012) (allowing intervention as of right solely because Defendants would not advance the same arguments); *Stevens Cnty. v. U.S. DOI*, No._________, 2006 U.S. Dist. LEXIS 74730, at *10 (E.D. Wash. Oct. 3, 2006) (same).

The prospective Defendant-Intervenors bring unique, battle-tested experience and knowledge to the table that can only benefit the Defendants and the Defendant-Intervenors. In particular, R-CALF USA and its affiliates are the only entities that promote and sell commercial merchandise exhibiting "Not Just Any Beef: USA-Raised Beef. Ask for it" and "Demand USA Beef." (Bullard Decl. at ¶ 16.) Finally, the prospective Defendant-Intervenors may also present somewhat different perspectives regarding the intent and interpretation of the previous regulations than the existing Defendant-Intervenors.

For these reasons, the prospective Defendant-Intervenors have fulfilled the "minimal" requirements to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2), demonstrating that representation of these organizations may be inadequate by the Defendants and other Defendant-Intervenors. *See Trbovich v. UMW*, 404 U.S. at 538.

B. In the Alternative, Prospective Defendant-Intervenors Should Be Granted Permissive Intervention.

If this Court does not allow the prospective Defendant-Intervenors to join in this action by right, the prospective Defendant-Intervenors request that the Court allow permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

Rule 24(b) provides that:

> (1) . . . On timely motion, the court may permit anyone to intervene who:
>
> . . .
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

. . .

> (3). . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

"Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact." *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967). "[W]e have eschewed strict readings of the phrase 'claim or defense,' allowing intervention even in 'situations where the existence of any nominate 'claim' or 'defense' is difficult to find." The force of precedent therefore compels a flexible reading of Rule 24(b) . *EEOC v. National Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (internal citations omitted).

The reasons discussed above also support permissive intervention. The prospective Defendant-Intervenors request to intervene so they can oppose Plaintiffs' entire complaint and defend the regulations that are under attack. Where Plaintiffs seek to invalidate agency rulemaking and prospective Defendants-Intervenors' "interests lie in supporting" the agency, "[t]he same issues, both of law and fact, would be involved." *Textile Workers Union of Am., CIO v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955).

V. CONCLUSION

As demonstrated above, the prospective Defendant-Intervenors are entitled to intervene as of right because their motion is timely and will cause no prejudice. They have a sufficient interest in the 2013 Final COOL Rule that is the subject of the action. Each of the organizations has constitutional and prudential standing to defend the rule on their own right and on behalf of their members. The disposition of this action would impair or impede their ability to protect the rule and their members and organizations' interests in protecting producers of U.S. cattle, hogs,

and sheep and U.S. consumers of beef, pork, and lamb. Finally, the prospective Defendant-Intervenors are not represented by any of the existing parties as (i) their interests are narrower and more specific than the Government Defendants and they will best be able to advance arguments about COOL's underlying purposes, and (ii) their interests manifestly differ from the existing Defendant-Intervenors that have not advanced many of the important arguments raised herein by prospective Defendant-Intervenors. In the alternative, and for the same reasons, the prospective Defendant-Intervenors ask that they be granted intervention on a permissive basis.

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Respectfully submitted,
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