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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA and CATTLE PRODUCERS OF WASHINGTON,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE and SONNY PERDUE, in his official capacity as Secretary of Agriculture,

Defendants.

NO. 2:17-cv-00223-RMP

PLAINTIFFS' RESPONSE/REPLY ON SUMMARY JUDGMENT

Hearing Date: Mar. 13, 2018
Time: 2:30 PM
Courtroom: 840

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I. INTRODUCTION.

The Government argues USDA can write out a clause from the Federal Meat Inspection Act ("FMIA") that mandates imports bear all necessary labels. The agency's incomplete FMIA regulations have allowed multinational meat packers to sell imported beef and pork as "Products of the U.S.A.," in a direct conflict with the Tariff Act's labeling requirements. *See* Plfs.' Opening Br. (ECF No. 14) at 1-10. The impropriety of the Government's position and USDA's action is clear.

Indeed, the Government concedes that 21 U.S.C. § 620(a) of the FMIA provides imported meat must be properly labeled. Gov. MSJ (ECF No. 24) at 5. The Government further agrees that § 620(a) establishes properly labeled imports are those that comply with the FMIA, the Food, Drug, and Cosmetic Act, <u>and also</u> the "'mark[s] and label[s] [] required by such regulations for imported articles.'" *Id.* (quoting 21 U.S.C. § 620(a)). Finally, it acknowledges that USDA's FMIA regulations treat the last clause as meaningless, only subjecting imported meat "'to the applicable provisions of the'" FMIA and the Federal Food, Drug, and Cosmetic Act. *Id.* at 6 (quoting 9 C.F.R. § 327.18(a)). Thus, while the Government states its FMIA regulations "track[]" the statute, Gov. MSJ at 3, 18, 28, in reality, its argument is the regulations can abandon a statutory command. Not so.

The Government claims USDA's failure to capture the statutory text is acceptable because the FMIA regulations "reflect Congress's intent." *See* Gov.

MSJ at 28. This requires one to assume Congress is self-defeatingly myopic. The Government contends USDA can ignore the statutory labeling requirement because the FMIA is singularly concerned with "food safety and inspection." *Id.* at 4; *see also id.* at 28. As a result, the FMIA intends to remove import labeling requirements, since they were not part of the FMIA's food safety regime. Gov. MSJ at 4-5. This policy is shown through the FMIA stating imports should bear all labels and Congress declining to alter the Tariff Act's labeling requirements. Explaining the Government's argument demonstrates its fallacy.

For these reasons, the Government's Opposition and Cross Motion focuses not on the FMIA and its meaning, but on the contention that Plaintiffs seek to "invalidat[e]" Congress' 2016 repeal of the 2002 Country-of-Origin Labeling ("the 2002 COOL law"). Gov. MSJ at 1. That repeal, the Government states, resolves this matter, including by undermining Plaintiffs' standing. *Id.* at 13-15. Again, not so.

Plaintiffs do not seek to reinstate the 2002 COOL law. *See* Gov. MSJ at 26. Plaintiffs merely want USDA to effectuate the requirements of the FMIA, which incorporates the Tariff Act's labeling requirements—that country-of-origin labels must appear on imported meat until it undergoes a substantial transformation in the United States. Plfs.' Opening Br. at 5-9.

1 Nothing in the 2016 repeal of the 2002 COOL law spoke to, let alone
2 resolved, the FMIA's or the Tariff Act's requirements. Consolidated
3 Appropriations Act of 2016, Pub. L. No. 114-113, § 759, 129 Stat. 2242, 2284-85
4 (2015). The 2002 COOL law covered distinct products and applied much more
5 stringent standards. Unlike the Tariff Act, the 2002 COOL law required country-
6 of-origin labels on *all* meat products (imports and domestic, derived from meat and
7 livestock) *and* provided beef and pork could only be called a "Product of the
8 U.S.A." if the animals were "exclusively born, raised, and slaughtered in the
9 United States." Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-
10 171, §§ 281-82, 116 Stat. 134, 534 (2002). For these reasons, the World Trade
11 Organization ("WTO") ruling that led to the 2016 repeal distinguished the 2002
12 COOL law from the Tariff Act, explaining the Tariff Act's requirements, unlike
13 those of the 2002 COOL law, are lawful and need not be altered. Panel Report,
14 *United States – Certain Country of Origin Labeling (COOL) Requirements*, ¶¶
15 7.695-7.700, WTO Doc. WT/DS384/RW (adopted Oct. 20, 2014) (ECF No. 14-2).
16 As a result, the Government's standing argument falls. Relying on the
17 fiction that Plaintiffs challenge Congress's 2016 repeal of the 2002 COOL law, the
18 Government claims Plaintiffs' injuries are not "fairly traceable to Defendants," but
19 rather to Congress. Gov. MSJ at 12. Yet Plaintiffs do not contest that the 2002
20 COOL law no longer applies to beef and pork products; rather, they challenge
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USDA's post-repeal decision to apply an FMIA rule that fails to enforce the statute's text and thereby the Tariff Act's requirements—a decision USDA can and must revoke.

The Government's alternative standing claim, that Plaintiffs have failed to establish an injury-in-fact, is also wrong. The Government fails to acknowledge Plaintiffs' evidence that they have diverted resources to respond to USDA's failure to enforce the Tariff Act. This alone is an actionable injury-in-fact. Moreover, Plaintiffs' members declare that USDA's failure to enforce the FMIA's labeling requirements decreases their income—statements corroborated by additional testimony and evidence. This is more than sufficient to establish the members' injuries, and Plaintiffs have standing on their behalf. *See* Gov. MSJ at 11-12.

The Government's final gambit to avoid the merits, its statute of limitations argument, fairs no better. The Government failed to raise it as a defense in its Answer (ECF No. 10) at 28. Therefore, the claim is waived. *Cedars-Sinai Med. Ctr. v. Shalala,* 125 F.3d 765, 769-71 (9th Cir. 1997).

Further, because Plaintiffs challenge a 2016 final agency action, Plaintiffs' claims are timely. The FMIA labeling rule at issue here was originally promulgated outside the statute of limitations. However, when USDA implemented the 2002 COOL law, those regulations determined the labeling for *all* beef and pork products, superseding the unlawful FMIA rule Plaintiffs seek to

correct here. In 2016, through final agency action, USDA revoked its regulations under the 2002 COOL law for beef and pork products, without making any changes to its other rules. In other words, the agency decided that its earlier, incomplete FMIA regulations should be applied to imported beef and pork and determine their labeling. It is that unlawful final agency action, to re-apply the unlawful FMIA labeling rule that Plaintiffs challenge. It occurred approximately one year before Plaintiffs' Complaint, well within the six-year statute of limitations. *See* Gov. MSJ at 16 (stating statute of limitations period is six years).

Therefore, this case comes down to the Government's claim that in stating imported meat "shall be marked and labeled as required by such regulations for imported articles," 21 U.S.C. § 620(a), the FMIA does not obligate USDA to enforce the country-of-origin labeling mandated by the Tariff Act. Instead, under the FMIA, USDA can ignore the Tariff Act and thereby allow imported beef and pork to be sold as "Products of the USA." Plfs.' Opening Br. at 1-2. This counterintuitive reading of the law is inconsistent with standard rules of statutory construction. As a result, USDA's FMIA regulations should be declared unlawful, vacated, and enjoined to the extent they allow imported beef and pork to be sold in the United States without complying with the Tariff Act (as the FMIA demands).

II. USDA CAN AND SHOULD REQUIRE IMPORTED BEEF AND PORK TO BE LABELED CONSISTENT WITH THE TARIFF ACT.

The Government wants Congress' 2016 repeal of its 2002 COOL law for

1 beef and pork products to "be the end of the case," contending the 2016
2 "legislative direction" prevents the relief Plaintiffs seek. Gov. MSJ at 14. In fact,
3 the commentary surrounding the 2002 COOL law, its regulations, and their repeal
4 demonstrate that USDA's 2016 final agency action—providing that imported beef
5 and pork labeling should once again be determined by USDA's FMIA labeling
6 rule, and thus freed from the Tariff Act's requirements—is inconsistent with
7 Congress' labeling regime, even as the Government articulates it.

8 When developing regulations to implement the 2002 COOL law, USDA
9 identified that the agency's FMIA rules were in conflict with the Tariff Act. The
10 agency explained that the Tariff Act regulates the marking of imported "food
11 items" and requires they bear country-of-origin labels unless the items undergo a
12 "substantial transformation" in the United States. Mandatory Country of Origin
13 Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and
14 Peanuts, 68 Fed. Reg. 61944, 61948-49 (Oct. 30, 2003). However, USDA's FMIA
15 regulations allowed (and presently allow) imported "meat and meat products that
16 are further processed in the United States" in any manner—whether or not this
17 amounts to a "substantial transformation"—to remove their "country of origin
18 declarations" before they are sold at retail. *Id.*; *see also* 9 C.F.R. § 327.18(a)
19 (regulation promulgated under FMIA's 21 U.S.C. § 620(a)).
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Nonetheless, USDA explained it did not need to address this conflict because its new regulations under the 2002 COOL law would determine imported meat labeling going forward and were more stringent than what the Tariff Act required, eliminating the problem. The new regulations would demand that imported meat "shall retain [its] origin, as determined by [U.S. Customs and Border Protection] at the time the product entered the United States, through retail," regardless of whether the meat undergoes a transformation in the United States. Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. at 61949. The new regulations took the place of USDA's other import labeling rules, filling the gap between the Tariff Act and what USDA required under its FMIA rules.

In fact, part of how the Government defended the 2002 COOL law when it was challenged before the WTO was that the United States needed to remedy the tension between the Tariff Act and USDA's FMIA regulations. The WTO allows countries to enact trade barriers if they have a "clear connection" to "earlier," pre-WTO "measures." Panel Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, ¶ 7.695. In responding to the challenge to the 2002 COOL law brought on behalf of foreign beef and pork producers, the United States argued that "imported meat … has been required to be labelled at the retail level with its country of origin since 1930" with the Tariff Act. *Id.* ¶¶ 7.695-7.697.

The 2002 COOL law merely reiterated a rule the United States' pre-WTO law "clearly contemplated." *Id.* ¶ 7.695 (quotation marks omitted).

The WTO rejected the United States' argument, explaining that "there are notable differences in the nature and extent of the obligations imposed by the Tariff Act" and the 2002 COOL law. *Id.* ¶ 7.698. The Tariff Act only requires labeling "'at the consumer level … in certain circumstances,'" but the 2002 COOL law required labeling even if meat undergoes substantial transformation in the United States. *Id.* ¶ 7.698 (quoting Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658, 2693 (Jan. 15 2009)). In fact, the United States had stated to the WTO that the "primary" purpose of the 2002 COOL law was that it would require labeling of "'meat derived from animals slaughtered in the United States,'" which do not require labels under the Tariff Act. *Id.* ¶ 7.700 (quoting United States' response to WTO Panel question No. 82, ¶191).

But, the WTO explained that were the United States to merely enforce the Tariff Act, that would be lawful, as the Tariff Act's import labeling requirements are "equivalent" to what is allowed by the WTO. *Id.* ¶ 7.700. The Tariff Act only requires what was referred to as "Label D," which the WTO plaintiffs did not challenge, and has been shown to have "no detrimental impact" on trade, so it

1 cannot be subject to trade sanctions. *Id.* ¶¶ 6.21, 7.204, 7.700.

2 As a result, contrary to the Government's assertions, Gov. MSJ at 13-15,
3 when Congress repealed the 2002 COOL law for beef and pork products, it had no
4 need to, and did not address the Tariff Act's (or FMIA's) requirements.
5 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 759, 129 Stat.
6 2242, 2284-85 (2016). The view that the Tariff Act should apply to imported beef
7 and pork had been declared lawful. There was no reason for Congress to state
8 otherwise. Removal of Mandatory Country of Origin Labeling Requirements for
9 Beef and Pork Muscle Cuts, Ground Beef, and Ground Pork, 81 Fed. Reg. 10755,
10 10755 (Mar. 2, 2016) (explaining Congress only sought to "bring the United States
11 into compliance with its international trade obligations").

12 Yet, rather than implement the 2016 repeal in a way that reflected this
13 history—*i.e.*, by repealing the 2002 COOL law regulations that covered beef and
14 pork, but making clear the Tariff Act applies to those imports—USDA decided to
15 once again apply its old FMIA labeling rule to imported beef and pork. USDA had
16 acknowledged and corrected the conflict between its FMIA rules and the Tariff Act
17 when it promulgated new regulations under the 2002 COOL law. However, with
18 the 2016 repeal, USDA simply removed beef and pork products from the new
19 regulations. *Id.* It made no changes to its other rules. Thus, imported beef and
20 pork labels reverted to being set by USDA's pre-existing FMIA rule, which

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conflicts with the Tariff Act.

In sum, the 2002 COOL law crystalizes, rather than resolves the central issue in this suit. As part of implementing the 2002 COOL law, USDA recognized and corrected the conflict between the Tariff Act and the agency's FMIA's labeling rule. Yet, the agency has once again decided that imported beef and pork labels will be governed by its old FMIA rule. While USDA was obligated to stop regulating beef and pork products under the 2002 COOL law, nothing prevented USDA from requiring imported beef and pork to bear country of origin labels until the meat undergoes a substantial transformation in the United States, as the Tariff Act mandates. Thus, the 2016 repeal and final agency action beg the question: Did USDA act lawfully in deciding to regulate imported beef and pork labeling under an old FMIA rule it had concluded is inconsistent with the Tariff Act?

III. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIM.

Plaintiffs have introduced evidence demonstrating USDA's failure to mandate that imported beef and pork comply with the Tariff Act's labeling requirements—as Plaintiffs claim the FMIA demands—produces a financial harm to Plaintiffs' members and causes the Plaintiff organizations to divert resources to work on country-of-origin labeling. The Government does not challenge the latter basis for Plaintiffs' standing, and its case law does not truly call into question the sufficiency of Plaintiffs' evidence supporting the former. Therefore, Plaintiffs

have twice established their standing to bring this claim.[1]

A. Injury-in-fact.

Plaintiffs have established they are suffering two different forms of injury, either of which is sufficient for Plaintiffs to proceed. The heads of the Plaintiff organizations submitted declarations detailing that their groups have used their resources to challenge the absence of country-of-origin labels on beef, and that they would divert fewer resources to that issue if USDA required imported beef to bear country-of-origin labels consistent with the Tariff Act—allowing the organizations to work on other pressing concerns. Bullard Decl. ¶¶ 5, 8-11 (ECF No. 15); Nielsen Decl. ¶¶ 4, 8-11 (ECF No. 16). Although the Government fixates on whether Plaintiffs' members have sufficiently established their financial injury, Gov. MSJ at 11-12, where "Defendant[s'] acts have frustrated Plaintiff[s'] mission by causing them to divert resources to combat Defendants' allegedly unlawful acts" that creates an actionable "Article III injury-in-fact." *United Poultry Concerns v. Chabad of Irvine*, No. CV 16-01810-AB(GJSX), 2017 WL 2903263, at *5 (C.D. Cal. May 12, 2017); *see also Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1018 (9th Cir. 2013) (establishing standing through declarations by organizations' heads).

[1] Plaintiffs' Opening Brief, at 17-21, details how they have established each component of standing, including those the Government does not contest.

While unnecessary in light of Plaintiffs' organizational injuries, Plaintiffs' evidence also establishes their domestic producer members are suffering an economic injury because USDA fails to require the country-of-origin labeling that should be on meat. This provides Plaintiffs standing on their behalf. *See Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1109 (9th Cir. 2003).

Plaintiffs' members submitted declarations stating they received substantially higher prices from meat packers, and experienced more robust sales to consumers when beef products bore the labels required by the 2002 COOL law. Bonds Decl. ¶¶ 6-7, 9-10 (ECF No. 17); Niemi Decl. ¶¶ 6-7, 9-10 (ECF No. 18); Schmidt Decl. ¶¶ 6-7 (ECF No. 19). They further stated they have been informed by beef packers that if country-of-origin labels return, the packers' purchase price for domestic cattle would increase. Bonds Decl. ¶ 8; Niemi Decl. ¶ 8.

Plaintiffs' statements that country-of-origin labeling would increase their sales is corroborated by Plaintiffs' other declarations and evidence. Bill Bullard, who, since 2001, has served as the CEO of the largest association for independent, domestic cattle producers, explained that consumers are willing to pay more for domestically produced beef, but if they cannot tell the difference between domestic and foreign meat, that removes domestic producers' competitive advantage and depresses their sales prices. Bullard Decl. ¶ 7; *see also* Second Bullard Decl. ¶¶ 2-3. Bullard's statements are supported by studies not only demonstrating that

consumers prefer domestic meat products, but also that they will pay a premium for beef they are led to believe is domestically produced. Complaint (ECF No. 1) ¶¶ 28-30, 48 n.2 (citing public studies); Second Bullard Decl. ¶¶ 5-9 (providing public studies). Further still, public records establish that if USDA were to enforce the Tariff Act, that would require a substantial volume of imported meat (hundreds of millions of pounds) that currently can be sold as "Products of the USA" to bear country-of-origin labels, turning market forces in favor of true domestic producers. Complaint ¶¶ 101-04 (citing USDA records); Second Bullard Decl. ¶¶ 10-11 (discussing USDA records).

Entirely ignoring Plaintiffs' corroborating evidence, the Government critiques Plaintiffs for relying on their members' "assertions" (also known as testimony). Gov. MSJ at 12. But, even that testimony was not required. The Supreme Court has explained that when the government removes a "bargaining chip" so that a party loses leverage in "negotiations," that "inflict[s] a sufficient likelihood of economic injury to establish standing." *Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998). Therefore, "'[t]he Court routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III].'" *Id.* (additions in original) (quoting 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994)). The fact that the Government is failing to require allegedly mandatory

1 country-of-origin labeling establishes an injury-in-fact because the Government
2 has undermined Plaintiffs' members "bargaining chip"—their ability to distinguish
3 their true domestic beef—as Plaintiffs' evidence confirms.

4 The single case the Government cites does nothing to suggest the multiple
5 types of evidence Plaintiffs produced is insufficient. In the Government's case, the
6 court dismissed a complaint because it did "*not* allege" any facts establishing the
7 plaintiffs had "suffered *any* economic injury." *Pietzak v. Microsoft Corp.*, No. CV
8 15-5527-R, 2015 WL 7888408, at *2 (C.D. Cal. Nov. 17, 2015) (emphasis added).
9 The plaintiffs alleged that they had suffered "embarrassment and emotional harm,"
10 and asserted that this also produced a financial harm, without alleging that they had
11 suffered any "lost money or property." *Id.*

12 Plaintiffs' declarations detailing that their domestic producer members lose
13 (and have lost) money when foreign meat is portrayed as a domestic good—
14 statements that are both logical and supported by multiple forms of industry
15 analysis—is obviously distinct. It is entirely irrelevant that Plaintiffs do not argue
16 their members should be restored to the same position they were in under the 2002
17 COOL law. "Even if an agency's inaction is a small, incremental source of
18 plaintiff's injury" it produces an injury. *Nat. Res. Def. Council v. United States*
19 *Consumer Prod. Safety Comm'n,* No. 16-CV-9401 (PKC), 2017 WL 3738464, at
20 *5 (S.D.N.Y. Aug. 18, 2017) (quotation marks omitted). Plaintiffs have
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established through declarations and evidence that USDA's failure to enforce the FMIA as they claim is required produces a cost through flooding the market with mislabeled foreign meat and thereby decreasing their members' market leverage and income. This is a classic injury-in-fact.

B. Traceability.

Plaintiffs' uncontested organizational injuries make the traceability of their injury indisputable. The Plaintiff organizations state they would divert fewer resources to work on country-of-origin labeling if USDA enforced the Tariff Act, allowing the organizations to expend additional resources on other pressing matters. Bullard Decl. ¶¶ 5, 8-11; Nielsen Decl. ¶¶ 4, 8-11. Thus, their injuries certainly stem from USDA's alleged failure to enforce the act. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29-30 (D.C. Cir. 1990) (Ruth Bader Ginsburg, J.) (where plaintiffs produce evidence that the contended violation "caused them to expend resources," their organization injury is traceable to that conduct).

Plaintiffs' members' financial injuries are also traceable to USDA. Where an agency's "challenged inaction" helps generate the market, an injury stemming from the market conditions is traceable to the agency. *Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013). Thus, a plaintiff's injury due to a chemical exposure was traceable to FDA's failure to regulate that chemical "because [the chemical] would not be available on the market but for

1 FDA's failure to finalize its regulation." *Id.*

2 Domestic producers' diminished competitive advantage from USDA
3 allowing the sale of mislabeled foreign meat, decreasing their income, is traceable
4 to the agency. Were USDA to enforce the country-of-origin labels Plaintiffs allege
5 are required, Plaintiffs' members' more desirable products would no longer need to
6 compete with the same volume of other products, increasing the demand for and
7 therefore sales of their goods. *See Ocean Advocates v. U.S. Army Corps of*
8 *Engineers*, 402 F.3d 846, 860 (9th Cir. 2005) (that "other factors may also cause"
9 the claimed outcome is of no moment, the "link between" the defendant's conduct
10 and the injury need only be "not tenuous or abstract").

11 The Government's claim to the contrary depends on it prevailing on its
12 erroneous merits argument, that the repeal of the 2002 COOL law revoked all
13 "country of origin labeling for beef and pork." Gov. MSJ at 12. The sole case the
14 Government cites explains the court there declined to find standing because the
15 plaintiffs challenged one statute, but that was not "the only relevant piece of
16 legislation." *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th
17 Cir. 1996). There was another statute, which the plaintiffs did not challenge, that
18 regulated the same conduct. Thus it was impossible to say that the injury resulted
19 from the challenged law, rather than the overlapping, unchallenged one. *Id.*

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Here, however, the Government has pointed to *no* law that either frees imported beef and pork from the requirements of the Tariff Act or prevents USDA from enforcing the Tariff Act under the FMIA. *See* Section II, *supra*. If, as Plaintiffs contend, the FMIA requires USDA to enforce the Tariff Act, nothing stands in the way of USDA carrying out the statute and the injuries resulting from USDA's decision not to do so—and instead to apply its old FMIA labeling rule—are traceable to USDA's unlawful inaction.

C. Redressability

Although the Government does not contest that Plaintiffs' injuries are redressable, because traceability and redressability are "two facets of a single causation requirement" Plaintiffs briefly address this component of standing. *Ctr. For Biological Diversity v. U.S. E.P.A.,* 90 F. Supp. 3d 1177, 1189 (W.D. Wash. 2015) (citations and quotation marks omitted).

The Ninth Circuit has explained that when "additional expenses" are "a direct result" of the defendant's contested conduct, then the "injury is thus likely to be redressed" through an injunction of that conduct, which would prevent additional costs. *El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1122 (9th Cir. 2014). Because Plaintiffs have introduced evidence that they would divert fewer resources to work on country-of-origin labels if USDA enforced the Tariff Act, and thereby they would be able to better address their members' other

1 pressing needs, their injury is redressable through this action. Bullard Decl. ¶¶ 5,
2 8-11; Nielsen Decl. ¶¶ 4, 8-11.

3 Turning to Plaintiffs' members' injuries, the Supreme Court has explained
4 that if a "regulatory action" would produce an "incremental step" toward
5 remedying the plaintiff's injury, then the injury is redressable through litigation
6 demanding that action. *Massachusetts v. E.P.A.*, 549 U.S. 497, 524 (2007). As a
7 result, plaintiffs could sue the EPA for failing to limit "automobile emissions,"
8 because EPA's failure to act allowed the flow of "greenhouse gases," which in turn
9 increased the plaintiffs' likely expenses from rising sea levels. *Id.* It did not
10 matter that there are other contributors to greenhouse gasses because the plaintiffs
11 showed that "motor-vehicle emissions make a meaningful contribution," and thus
12 EPA's failure to act, logically, brought about at least some of the plaintiffs'
13 expected financial harm. *Id.* at 525. Similarly, it did not matter that regulating
14 vehicle emissions would not "*reverse* global warming," eliminating the financial
15 injury, as long as it could "*slow* or reduce it." *Id.* (emphasis in original).

16 Likewise, Plaintiffs here have shown that imported beef, particularly
17 imported beef that the Tariff Act requires bear country-of-origin labels at retail, is
18 a meaningful portion of the market. Complaint ¶¶ 101-04 (citing USDA records
19 evincing these facts); Second Bullard Decl. ¶¶ 10-11 (discussing USDA records).
20 Thus, if USDA mandated that imported beef comply with the Tariff Act, that
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1 would be a step toward redressing the financial injury Plaintiffs document, and
2 logic establishes occurs, when USDA allows imports to be passed off as domestic
3 goods. Their injury is redressable through this action.

4 **IV. PLAINTIFFS' CLAIM IS TIMELY.**

5 The Government's statute of limitations argument is an unnecessary
6 distraction. The Government failed to raise it as a defense in its Answer. ECF No.
7 10, at 28. Therefore, the argument is waived. *Cedars-Sinai Med. Ctr. v. Shalala*,
8 177 F.3d 1126, 1128 (9th Cir. 1999) (APA statute of limitations arguments must be
9 "raised in motions to dismiss filed before the first responsive pleading" or in "a
10 responsive pleading"); *see also id.* at 1128 n.1 (rejecting request that the Ninth
11 Circuit reverse its case law and hold APA statute of limitations jurisdictional).[2]

12 Nonetheless, in 2016, USDA determined through final agency action that it
13 would apply its old FMIA's labeling rule to determine beef and pork labeling,
14 thereby undermining the Tariff Act. *See* Removal of Mandatory Country of Origin
15 Labeling Requirements for Beef and Pork Muscle Cuts, Ground Beef, and Ground
16 Pork, 81 Fed. Reg. at 10755. That 2016 decision, allowing beef and pork
17 processed in the United States in any manner to be sold without country-of-origin

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18 [2] Seemingly recognizing as much, the Government portrays Plaintiffs' challenge as
19 outside their Complaint. Gov. MSJ at 15. The Complaint disproves the
20 Government. Complaint ¶¶ 2-5, 8-26, 64-84, 98-99, 109-10.

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1 labeling brings this case well within the statute of limitations.

2 As the D.C. Circuit has explained, "[i]f for any reason the agency reopens a
3 matter and … issues a new and final order, that order is reviewable on its merits,
4 even though the agency merely reaffirms its original decision." *Sendra Corp. v.*
5 *Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997) (citing *I.C.C. v. Bhd. of Locomotive*
6 *Engineers*, 482 U.S. 270, 277 (1987)). As a result, the D.C. Circuit recently held
7 that when an agency "reinstate[s]" a rule "a new right of action necessarily accrued
8 upon the rule's reinstatement." *Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899, 900
9 (D.C. Cir. 2014). Indeed, there, the agency "concede[d]" that if it "act[s] on its
10 own" to reinstate a rule, a new six-year window opens to challenge that decision—
11 the only dispute was what to do when a court orders the agency to reinstate a rule,
12 which the D.C. Circuit held is no different. *Id.*

13 Consistent with this, in *California Sea Urchin Commission v. Bean*, 828
14 F.3d 1046 (9th Cir. 2016), the Ninth Circuit held that while the original issuance of
15 an unlawful rule is a final agency action that can be challenged within six-years,
16 "so too" can a subsequent final agency action that makes the original rule "salient"
17 to the plaintiffs. *Id.* at 1049. Put another way, where an agency takes a final
18 "action that cause[s] the[plaintiff's] injury" that begins the statute of limitations
19 anew, even if the final agency action is based on an old rule. *Id.*

20 Holding that the statute of limitations period can be renewed through a

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1 subsequent final agency action is consistent with the well-accepted principle that a
2 plaintiff can tee-up a challenge by "petitioning the agency for amendment or
3 rescission of the rule and then appealing the agency's decision." *Oksner v. Blakey*,
4 No. C 07-2273 SBA, 2007 WL 3238659, at *6 (N.D. Cal. Oct. 31, 2007), *aff'd*,
5 347 F. App'x 290 (9th Cir. 2009) (unpublished). Even if an agency merely affirms
6 its earlier decision to promulgate a rule, the final agency action in response to the
7 petition is subject to judicial review. *Id.*

8 *California Sea Urchin Commission* examined the earlier Ninth Circuit
9 authority on which the Government relies, *Wind River Mining Corp. v. United*
10 *States*, 946 F.2d 710 (9th Cir. 1991), and concluded it too supports the view that a
11 later agency action can revive the statute of limitations. It explained *Wind River*
12 stands for the proposition that if a "1979 rule … violated [the agency's] statutory
13 authority" that "subsequent final agency actions applying the 1979 rule would also
14 allegedly exceed the agency's statutory authority" and "'a substantive challenge to
15 an agency decision alleging lack of agency authority may be brought within six
16 years of the agency's application of that decision to the specific challenger.'" *Cal.*
17 *Sea Urchin Comm'n*, 828 F.3d at 1051 (quoting *Wind River Mining Corp.*, 946
18 F.2d at 715-16). It is only where the plaintiff attempts to challenge the later
19 enforcement of a regulation, when there has been no recent, intervening final
20 agency action that the challenge could be untimely. *Id.* at 1050 (citing *Shiny Rock*
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1 *Mining Corp. v. United States*, 906 F.2d 1362, 1363 (9th Cir. 1990)).

2 *California Sea Urchin Commission* also rejects the Government's
3 insinuation that by labeling Plaintiffs' claim a "facial" challenge to original FMIA
4 regulations that somehow alters the statute of limitations analysis. *See* Gov. MSJ
5 at 16-18. Whether the plaintiffs can succeed on a "facial" challenge to a regulation
6 "goes to the merits of [the] Plaintiffs' underlying action." *California Sea Urchin*
7 *Commission*, 828 F.3d at 1050. Just because the plaintiffs argue the regulation
8 being applied should never have been issued in the first place "does not make [the]
9 Plaintiffs' [current] challenge to [the recent final] agency action untimely." *Id.*

10 As the Fifth Circuit explained, any other holding would be illogical.
11 "[A]dministrative rules and regulations are capable of continuing application."
12 *State of Tex. v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985) (quotation
13 marks omitted). Therefore the right to review "the underlying rule" should not
14 forever expire with the initial statute of limitations period. *Id.* (quotation marks
15 omitted). When an agency later chooses to apply a rule through final agency
16 action a plaintiff can raise "an attack on the validity of the rules themselves." *Id.*
17 (challenge to agency under the Hobbs Act); *see* also *Dunn-McCampbell Royalty*
18 *Interest, Inc. v. Nat'l Park Serv.,* 112 F.3d 1283, 1287-88 (5th Cir. 1997) (same
19 under APA).

20 The facts here not only fall cleanly within the holding of *Alaska*, 772 F.3d
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899 (D.C. Cir. 2014), but demonstrate why it is necessary to permit a challenge to a previously issued rule that is being applied due to a recent final agency action. When USDA issued its regulations under the 2002 COOL law, it explained its FMIA labeling rule conflicts with the Tariff Act; but that its new regulations would exceed the Tariff Act's demands, so no changes to the FMIA rules were necessary. *See* Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. at 61948-49. Now, through final agency action, USDA decided to again apply its FMIA's rule to beef and pork. *See* Removal of Mandatory Country of Origin Labeling Requirements for Beef and Pork Muscle Cuts, Ground Beef, and Ground Pork, 81 Fed. Reg. at 10755. USDA was well aware of all of the issues presented here and acted on its own to ignore them and reinstate its old rule.

A petition to overturn that decision would be an unwarranted formality. Indeed, USDA prohibited Plaintiffs from developing their claims before the agency. The agency refused to put out its 2016 action for notice and comment, expressly waiving any exhaustion requirements. *Id.* at 10760. Stating that Plaintiffs can only bring their claim if they first present their arguments to USDA—something the law certainly allows—would be tantamount to requiring them to exhaust.

The statute of limitations is meant to be a "shield against stale claims," not a

"sword to vanquish a challenge" to a final agency position that is ripe for review. *California Sea Urchin Commission*, 828 F.3d at 1051. Beside that this issue has been waived, Plaintiffs should not be barred from challenging a final agency action that reflects the agency's recently affirmed decision to apply a rule.

V. USDA'S FMIA RULE GOVERNING IMPORTED BEEF AND PORK LABELING CONFLICTS WITH THE STATUTE.

The FMIA rule USDA has determined now controls imported beef and pork labeling conflicts with the authorizing statute. The FMIA requires that imported meat "shall be marked and labeled as required by such regulations for imported articles." 21 U.S.C. § 620(a). The Government does not contest that this language appears *nowhere* in USDA's FMIA regulations. *See* Gov. MSJ at 27-28. As a result, USDA's meat labeling rules are narrower in "scope" than what is required by the Tariff Act, Gov. MSJ at 25, enabling imported meat that the Tariff Act requires to bear country-of-origin labels to, instead, be sold as "Products of the USA," Plfs.' Opening Br. at 1-10. USDA has taken a directive that it must enforce labeling "regulations for imported articles" (which includes the Tariff Act) and undermined Congress' labeling scheme. This contradicts "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2446 (2014). It certainly cannot be reconciled with the Government's interpretive principle, that Congress acts with "common sense" to produce a

1 "coherent" regulatory whole. *Food & Drug Admin. v. Brown & Williamson*
2 *Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also* Gov. MSJ at 19.
3 The Government's arguments to the contrary stretch imagination. The
4 Government claims that because 9 C.F.R. § 327.18(a)—the regulation promulgated
5 under 21 U.S.C. § 620(a)—reproduces § 620(a)'s *preceding* language, the FMIA
6 regulations carry out the law. Gov. MSJ at 27-28. This argument does not merely
7 violate the "presumption against superfluities," *see*, *e.g.*, *Birdman v. Office of the*
8 *Governor*, 677 F.3d 167, 176 (3d Cir. 2012), but basic tenets of the English
9 language. Section 620(a) states:

10 All such imported articles shall, upon entry into the United States, be
11 deemed and treated as domestic articles subject to the other provisions
of this chapter and the Federal Food, Drug, and Cosmetic Act [21
12 U.S.C.A. § 301 et seq.]: *Provided*, That they shall be marked and
labeled as required by such regulations for imported articles[.]

13 21 U.S.C. § 620(a) (first brackets in original). The final clause, which the
14 Government claims the regulation can excise because it reproduces the other
15 words, is a limitation on the preceding language. By the regulation merely
16 reproducing the preceding terms it generates an incomplete and overly lenient rule.
17 Indeed, the Government's argument that 9 C.F.R. § 327.18(a) is carrying out
18 Congress' "intent" because it provides imported meat can "be deemed and treated
19 as domestic articles" demonstrates how dangerous the Government's interpretive
20 approach can be. Gov. MSJ at 28. The Government has turned Congress' actual,
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narrow statement—that imports can be treated like domestic articles *if* they continue to comply with FMIA, Food, Drug and Cosmetic Act, *and* other labeling rules—into a bold declaration that imported meat should be treated entirely like a domestic goods, and thus exempted from labeling laws that apply to other imports.

The Government's attempts to parse the omitted language to reduce the impact of its exclusion equally fail. The Government claims that because the omitted requirement says imports must comply with labeling "regulations" that merely means imports need to comply with USDA's rules, so the language's omission is of no consequence. Gov. MSJ at 21. This argument proves too much. It renders the statutory language meaningless. *See Birdman*, 677 F.3d at 176 (presumption against surplusage). The Government is claiming the statute only requires USDA enforce the rules USDA *chooses* to promulgate.

Moreover, the Government errs in claiming "regulations" must refer to agency regulations. Gov. MSJ at 21. For instance, the Ninth Circuit has explained "*regulation* of labor" can mean "laws, ordinances, rules" "other legislative and administration measures" or "judicial actions." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996) (emphasis in original).

Unsurprisingly, the Government quickly pivots to arguing that requiring imports to comply with labeling "regulations" only mandates imports comply with the labeling rules in the "statutes that are expressly identified in" § 620(a), *i.e.*, the

labeling rules in the FMIA and Food, Drug, and Cosmetic Act. Gov. MSJ at 21. But, this argument suffers from the same deficiency. Section 620(a) separately requires imports to comply with those statutes, stating imports are "subject to the other provisions of this chapter [the FMIA] and the Federal Food, Drug, and Cosmetic Act," in addition to those statutes' food safety requirements described earlier in § 620(a). 21 U.S.C. § 620(a). Section 620(a) *already* subjects imports to the full scope of the FMIA and Food, Drug, and Cosmetic Act. The distinct statutory command that imports must *also* "be marked and labeled as required by such regulations for imported articles" must mean imports need to comply with *other* labeling rules. To read the second clause as only subjecting imports to the FMIA and the Federal Food, Drug, and Cosmetic Act would render it entirely redundant.

The Government claims it is "bizarre" to think Congress would require USDA to enforce all labeling laws because those statutes are typically "enforced by [] separate agencies." Gov. MSJ at 21-22. However, Congress not only can, but regularly does incorporate a statutory scheme enforced by one entity into the scheme of another. *See*, *e.g.*, *United States v. Sacco*, 491 F.2d 995, 1003 (9th Cir. 1974) (en banc) (Congress can incorporate states' "present and future" laws into its federal schemes).

Moreover, the "bizarre" result would be to read the FMIA as failing to

incorporate the Tariff Act's requirements. Under the Government's view, Congress would have established an entire labeling regime for imports in the Tariff Act, and then effectively gutted that regime for imported meat through the FMIA allowing imports to remove the Tariff Act labels. Congress would have done this not by stating that intent, nor by amending the Tariff Act to achieve that end, but by failing to explicitly reference the Tariff Act as one of the "mark[ing] and label[ing]" laws USDA must enforce under the FMIA. To quote the Government, Congress "does not hide elephants in mouseholes." Gov. MSJ at 14 (quotation marks omitted).[3]

Finally, the Government's reading of the legislative history as supporting its analysis is unsustainable. While the Government is correct that the "supplemental views" Plaintiffs cited in their motion concerned an amendment to the FMIA that was first passed and later rejected, this does nothing to undermine Plaintiffs' claim. *See* Gov. MSJ at 23-24. The proposed amendment would have required an entirely distinct type of labeling from what is required by the Tariff Act. The Tariff Act

[3] For these reasons, if the Court proceeds to *Chevron* step two and examines whether USDA's FMIA labeling rule is reasonable, it should still conclude the regulations are unlawful. Regulations that "frustrate the policy Congress sought to implement" are unreasonable. *Pac. Nw. Generating Co-op. v. Dep't of Energy*, 580 F.3d 792, 806 (9th Cir. 2009) (quotation marks omitted).

1 requires imports to identify the "name" of the country of origin on all products
2 until they undergo a substantial transformation. 19 U.S.C. § 1304(a); 19 C.F.R.
3 § 134.1(d). The proposed amendment would have required *"all* imported meat and
4 meat products" to declare that "product contains meat … produced in" *a* foreign
5 country, without specifying that country. H.R. Rep. No. 90-653 at 69 (ECF No.
6 14-1) (emphasis added). That Congress rejected the latter does not suggest it also
7 rejected the former.

8 In fact, the reason the amendment was defeated was that the Executive
9 Branch assured Congress the other language in the FMIA—requiring imports to
10 "be marked and labeled as required by such regulations for imported articles"—
11 would largely accomplish the legislators' objectives because it would enforce the
12 Tariff Act. The Bureau of the Budget—the predecessor to the current Office of
13 Management and Budget, which oversees all agency regulations—stated that
14 although the "Department of Agriculture" had previously indicated an interest in
15 "reducing international trade barriers," legislators need not be concerned by that
16 declaration because "[t]he Tariff Act of 1930, as amended, already provides for the
17 labeling of imported meats." *Id.* at 70. In other words, in order to correct USDA's
18 "existing laws and regulations" that had allowed imported meat to go
19 "[un]identified," all Congress needed to do in the FMIA was make clear USDA
20 has to enforce the "mark[s] and label[s] as required by such regulations for
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imported articles," which would require the agency to carry out the Tariff Act. *Id.* at 69-70. This is exactly what Congress did and its language should be effectuated.

The logical and necessary reading of the FMIA is that it requires USDA to enforce the Tariff Act. USDA's regulations fail to carry out this requirement. This should not stand.

VI. CONCLUSION.

In 2016, through final agency action, USDA undid its regulations that had corrected the conflict between the agency's FMIA's labeling rule and the Tariff Act's requirements. It once again declared that its old FMIA rule applies to beef and pork, enabling processors to remove country-of-origin labels on imports if they simply repackaged the meat. Yet, this is patently inconsistent with its authorizing statute, 21 U.S.C. § 620(a), which requires enforcement of all import labeling rules, including the Tariff Act. USDA's failure to enforce the FMIA's labeling requirements harms both the Plaintiff organizations and their members. In this circumstance the Court should: (a) grant Plaintiffs summary judgment; (b) declare USDA's failure to require the country-of-origin labeling mandated by the Tariff Act as part of the FMIA unlawful and vacate 9 C.F.R. § 327.18(a) to the extent it allows as much; and (c) enjoin imported beef and pork from being sold without the FMIA's and Tariff Act's mandated country-of-origin labels.

1 RESPECTFULLY SUBMITTED AND DATED this 12th day of January,
2 2018.
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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on January 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of that filing to the following:

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