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Office of Policy and Program Development
Food Safety and Inspection Service
U.S. Department of Agriculture
1400 Independence Avenue SW, Mailstop 3758
Washington, D.C. 20250-3700

RE: Comment on Proposed Rule | Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims | Docket No. FSIS-2022-0015 (RIN 0583-AD87)

Dear Ms. Edelstein:

Farm Action, together with the additional undersigned organizations (collectively, “**Commenters**”), submit this comment¹ in response to the Food Safety and Inspection Service’s (“**FSIS**” or the “**Agency**”) notice of proposed rule on the voluntary labeling of FSIS-regulated products with U.S.-origin claims published in the Federal Register (88 FR 15290) on March 13, 2023 (the “**Proposed Rule**”). The interests of Commenters in this rulemaking are provided in [Appendix A](#).

In 2000, a few years after the North American Free Trade Agreement took effect, Congress directed FSIS to protect the integrity of our national brand by promulgating regulations defining which cattle and fresh beef products are “Products of the U.S.A.”² FSIS, however, never even proposed one.³

Instead, FSIS embarked on a highly permissive “Product of U.S.A” enforcement policy that all but abandoned policing the abuse of U.S-origin claims — not just on beef, but across its portfolio of regulated products. In 2005, it adopted a standard for “Product of U.S.A.” claims in its Food Standards and Labeling Book that allowed all imported meat, poultry, egg, and other FSIS-regulated products to receive a “Product of U.S.A” label if they undergo minimal further processing in a domestic USDA-inspected establishment.⁴ In 2013, FSIS made all country-of-origin claims on meat and poultry products eligible for “generic approval” without even being submitted for evaluation.⁵ And, in 2020, it extended such generic

¹ Farm Action thanks Basel Musharbash of Basel PLLC for his assistance in preparing this comment.

² The Conference Committee report that accompanied the Agriculture Appropriations Act of 2000, Public Law 106-78 (October 23, 1999), directed the Secretary of Agriculture to promulgate regulations to define which cattle and fresh beef products are “Products of the U.S.A.”

³ FSIS published an “advance notice of proposed rulemaking” in 2001 that requested comments “on the need for [such] regulations” but did not contain a proposed rule. *See* Food Safety and Inspection Service, “Product Labeling: Defining U.S. Cattle and U.S. Fresh Beef Products”: Advance Notice of Proposed Rulemaking, 66 FR 41160 (August 7, 2001). To Commenters knowledge, FSIS never proposed or finalized regulations in response to the Conference Report that accompanied the Agriculture Appropriations Act of 2000.

⁴ *See* Food Safety and Inspection Service, Food Standards and Labeling Policy Book (August 2005).

⁵ *See* Food Safety and Inspection Service, “Prior Label Approval System: Generic Label Approval”: Final Rule, 78 FR 66826 (October 7, 2013).

approval to country-of-origin claims on egg products.⁶ To the knowledge of Commenters, in the last quarter century, FSIS has not instituted a single proceeding to enforce the law against false or misleading “Product of U.S.A.” label claims.

Commenters support the Proposed Rule and commend FSIS and the Biden administration for turning the page on this misguided policy. As Part I of this comment explains, FSIS’s current “Product of U.S.A.” policy contravenes the Agency’s statutory mandate by sanctioning the use of deceptive labels. For that reason alone, it must be rescinded. If that were not enough, however, Part II details how the the Agency’s failure to protect the public from misleading “Product of U.S.A.” claims has enabled dominant meatpackers to deceive consumers, undermine the competitive position of independent ranchers and processors, and ultimately, entrench their dominance in the industry. Part III then makes the affirmative case for the Proposed Rule — its legality, administrability, and economic justification — and rebuts arguments propounded against it by agribusiness trade groups and foreign governments. Finally, Part IV concludes by urging FSIS to move decisively and issue a strong final rule establishing that meat, poultry, egg, and other FSIS-regulated products must be derived from animals born, raised, slaughtered, and processed in America to bear a “Product of U.S.A.” label.

I. The Current “Product of U.S.A.” Labeling Policy Is Unlawful and Must Be Rescinded

The current “Product of U.S.A.” labeling policy contravenes FSIS’s statutory mandate by systematically sanctioning the use of misleading labels. For that reason alone, it must be rescinded.⁷ The Administrative Procedure Act prohibits federal agencies from taking actions that are “not in accordance with law“ or “in excess of statutory jurisdiction, authority, or limitations.”⁸ A court may determine whether agency action is unsupported by statutory authority by “delineating . . . the scope of the [agency’s] authority and discretion” and conducting a “first-hand judicial comparison of the claimed excessive action with the pertinent statutory authority.”⁹ If it determines that an action is inconsistent with the agency’s statutory mandate, or frustrates the congressional policy underlying the statute, the court is “not obliged to stand aside and

⁶ See Food Safety and Inspection Service, “Egg Products Inspection Regulation”: Final Rule, 85 FR 68640 (Dec. 28, 2020).

⁷ FSIS’s implementation of the current “Product of U.S.A.” labeling policy in the generic approval of each such label constitutes “agency action” within the scope of the APA and is subject to judicial review. See 5 U.S.C. § 551(13) (defining “agency action” subject to review under the APA to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”). FSIS’s initial adoption of the current policy in 2003 is also reviewable under the APA, because it represents the adoption of a general enforcement policy regarding a category of labels based on the agency’s application of the federal inspection laws. See *Casa De Maryland v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 699 (4th Cir. 2019) ([A]s courts have recognized, an agency’s expression of a broad or general enforcement policy based on the agency’s legal interpretation [of the underlying statute] is subject to review [as ‘agency action’ under the APA].”).

⁸ See 5 U.S.C. §§ 706(2)(A), (C). See also *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (“If a party believes [an agency] has engaged in shenanigans by exceeding its statutory bounds, judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action ‘not in accordance with law’ or ‘in excess of statutory jurisdiction, authority, or limitations.’”) (quoting 5 U.S.C. §§ 706(2)(A), (C)) (internal quotation marks and citations omitted).

⁹ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971) (explaining that, in reviewing agency action under “[t]he generally applicable standards” of paragraphs (A), (B), and (C) of 5 U.S.C. 706, the court “is first required to decide whether the [agency] acted within the scope of [its] authority,” and “[t]his determination naturally begins with a delineation of the scope of the [agency’s] authority and discretion”) (internal citations omitted); *W. Union Tel. Co. v. F. C. C.*, 541 F.2d 346, 354 (3d Cir. 1976) (citing *FPC v. Moss*, 424 U.S. 494 (1976)) (“A claim that agency action is ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right’ [under 5 U.S.C. § 706(2)(C)] necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority.”).

rubber-stamp [its] affirmance.”¹⁰ For the reasons detailed more fully below, Commenters submit that continuing to administer FSIS’s current “Product of U.S.A.” policy would be precisely such an unlawful agency action.¹¹

A. The Federal Inspection Laws Do Not Authorize FSIS To Approve Labels that Mislead Consumers

FSIS derives its authority to review and approve product labels on meat, poultry, and egg products from three interlacing statutes: the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), and the Egg Products Inspection Act (EPIA). Enacted “to protect the health and welfare of consumers” by “assuring” that covered products are “wholesome, not adulterated, and properly marked, labeled, and packaged,”¹² each of these laws prohibits the sale of “misbranded” products that bear “false or misleading” labels, names, or other markings.¹³ To help effectuate this prohibition and the other provisions of the federal inspection laws, Congress delegated to FSIS the authority: (1) to enforce these laws through administrative proceedings; (2) to prescribe “definitions and standards of identity or composition,” as well as “styles and sizes of type to be used [in labeling],” when “necessary for the protection of the public”; and (3) to

¹⁰ See *S.E.C. v. Sloan*, 436 U.S. 103, 118 (1978) (“[Courts] are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”).

¹¹ Commenters note that FSIS’s current “Product of U.S.A.” labeling policy — unlike the Proposed Rule will be if and when finalized — is not entitled to *Chevron* deference, as it was adopted through a policy statement instead of rulemaking and without the benefit of notice-and-comment procedures. See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (holding that “[agency] interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” are generally not to be accorded *Chevron* deference).

¹² For the relevant provisions of the Federal Meat Inspection Act, see 21 U.S.C. § 602 (“It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.”) For the relevant provision of the Poultry Products Inspection Act, see 21 U.S.C. § 451 (“It is essential in the public interest that the health and welfare of consumers be protected by assuring that poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.”). For the relevant provision of Egg Product Inspection Act, see 21 U.S.C. § 1031 (“It is essential, in the public interest, that the health and welfare of consumers be protected by the adoption of measures prescribed herein for assuring that eggs and egg products distributed to them and used in products consumed by them are wholesome, otherwise not adulterated, and properly labeled and packaged.”).

¹³ For the relevant provisions of the Federal Meat Inspection Act, see 21 U.S.C. § 610(c-d) (prohibiting the sale of “adulterated or misbranded” meat or meat products); 21 U.S.C. § 601(n) (defining the term “misbranded” to apply to meat and meat products “if its labeling is false or misleading in any particular”). For the relevant provisions of the Poultry Products Inspection Act, see 21 U.S.C. § 458(a)(2) (prohibiting the sale of “adulterated or misbranded” meat or meat products); 21 U.S.C. § 453(h) (“The term ‘misbranded’ shall apply to any poultry product . . . if its labeling is false or misleading in any particular”). For the relevant provisions of Egg Product Inspection Act, see 21 U.S.C. § 1036(b) (“No labeling or contained shall be used for egg products at official plants if it is false or misleading or has not been approved as required by the regulations of the Secretary.”); 21 U.S.C. § 1037(b)(4) (“No operator of any official plant shall allow any egg products to be moved from such plant if they are adulterated or misbranded and capable of use as human food.”); 21 U.S.C. § 1033(l) (“The term ‘misbranded’ shall apply to egg products which are not labeled and packaged in accordance with the requirements prescribed by regulations of the Secretary under Section 1036 of this title [see above].”).

promulgate interstitial regulations that are reasonably necessary to “carry out” or “efficiently execute” the inspection laws’ provisions.¹⁴

Within this statutory framework, FSIS has no authority to sanction the use of product labels that are deceptive to ordinary consumers.¹⁵ To begin with, the federal inspection laws require FSIS to exercise its authority prophylactically. Each of the underlying statutes provides that “it is the policy of the Congress” to “protect the consuming public from,” and “prevent the movement and sale of,” covered products that are “adulterated or misbranded.”¹⁶ This statutory policy sets the outer limit of FSIS’s authority under the federal inspection laws and would clearly be transgressed if FSIS were to approve, require, or otherwise sanction the use of false or misleading labels. Moreover, since the courts have long recognized that “the proper measure” of whether a label is misleading “is the meaning its words impart on the ordinary consumer,”¹⁷ it follows

¹⁴ For the relevant provisions of the Federal Meat Inspection Act, *see* 21 U.S.C. 607(c) (authority to prescribe definitions, standards of identity, and styles and sizes of type); 21 U.S.C. 607(e) (authority to issue withholding orders and condemn misbranded products through administrative proceedings); 21 U.S.C. § 621 (authority to issue rules and regulations as necessary “for the efficient execution” of FMIA). For the relevant provision of the Poultry Products Inspection Act, *see* 21 U.S.C. § 457 (b) (authority to prescribe definitions, standards of identity, and styles and sizes of type); 21 U.S.C. § 457(d) (authority to issue withholding orders and condemn misbranded products through administrative proceedings); 21 U.S.C. § 463 (authority to issue rules and regulations as are necessary to “carry out” provisions of PPIA). For the relevant provisions of Egg Product Inspection Act, *see* 21 U.S.C. § 1036 (authority to promulgate regulations regarding the labeling of eggs, to issue withholding orders and to condemn misbranded products through administrative proceedings); 21 U.S.C. § 1043 (authority to issue rules and regulations as necessary to “carry out the purposes and provisions” of EPIA).

¹⁵ *See Federation of Homemakers v. Butz*, 466 F.2d 462, 464 (D.C. Cir. 1972) (citing *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 483 (1919)) (holding that, if a challenged USDA regulation prescribes a definition or standard of identity that is “false or misleading” to “an ordinary consumer,” it “must be invalidated, for the [USDA’s] action in promulgating such a regulation would be in excess of [its] authority and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”) (internal quotation marks omitted); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 920 (1962) (holding USDA regulation was “capricious and arbitrary on its face in requiring a packer to label a genuine ham as IMITATION HAM, thus forcing him into violating the statute which forbids misbranding”). *See also id.* at 414 (Prettyman, Circuit Judge, concurring), (“[T]he [USDA’s] regulation is illegal on its face as a matter of law. [Its] authority under the statute is to prescribe labels which are not deceptive to consumers. [It] has no power to require a label which is deceptive in its use of words of common U.S.A.ge and meaning.”).

¹⁶ For the relevant provisions of the Federal Meat Inspection Act, *see* 21 U.S.C. 661(a) (“It is the policy of the Congress to protect the consuming public from meat and meat products that are adulterated or misbranded . . .”). For the relevant provision of the Poultry Products Inspection Act, *see* 21 U.S.C. § 452 (“It is hereby declared to be the policy of the Congress to . . . regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded.”). For the relevant provisions of Egg Product Inspection Act, *see* 21 U.S.C. § 1032 (It is hereby declared to be the policy of the Congress to . . . regulate the processing and distribution of eggs and egg products as hereinafter prescribed to prevent the movement or sale for human food, of eggs and egg products which are adulterated or misbranded or otherwise in violation of this chapter.”).

¹⁷ *See Am. Pub. Health Ass’n v. Butz*, 511 F.2d 331, 336–37 (D.C. Cir. 1974) (Spottswood, Circuit Judge, dissenting) (collecting cases). *See also United States v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar*, 265 U.S. 438 (1924) (finding labels that designated as “Apple Cider Vinegar” a product made from dried apples were misleading when both Department of Agriculture definition and popular understanding defined Apple Cider Vinegar as vinegar made from the juice of apples); *Federation of Homemakers v. Butz*, 466 F.2d. 462, 465 (D.C. Cir. 1972) (invalidating USDA-prescribed label after concluding it was misleading because of the meaning its words impart to “an ordinary consumer”); *Armour & Co. v. Freeman*, 304 F.2d 404, 410 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 920 (1962) (Prettyman, Circuit Judge, concurring) (“To measure whether a label employing ordinary words of common usage is false or not, the words must be taken in their ordinary meaning.”). *Cf. Wawzskiewicz v. Department of the Treasury*, 480 F. Supp. 739 (1979) (“In determining this question [of whether a standard or definition is misleading], the Court will rely to the extent possible on the ordinary meaning of the words used, as it is the understanding of the ordinary consumer which must control. An agency may of course assign specific meaning to certain words, even if the meaning departs slightly from what would otherwise be common usage. But if words are not assigned their ordinary meaning, false and deceptive communication can be avoided only by requiring labels which give notice of the agency’s underlying definitional determinations.”).

that FSIS cannot ignore the “factual meaning [of words] in ordinary usage” when evaluating or approving labels¹⁸ — and certainly not when prescribing definitions and standards of identity “for the protection of the public.”¹⁹

The authority to promulgate definitions and standards of identity — under which the current “Product of U.S.A.” policy has been administered — was specifically conferred to FSIS so the Agency could “effectively maintain” the “integrity” of food against “erosion” at the hands of “the chiseling operations of [a] small minority of manufacturers.”²⁰ In this context, while FSIS may exercise reasonable judgment in determining what meaning a given term conveys to consumers, its final prescriptions must ultimately give consumers “a correct understanding of, and confidence in,” the products they are buying.²¹ Accordingly, if a label’s wording is likely to deceive a significant number of reasonable consumers into buying products that are “inferior to those which [they would] expect to receive,”²² it would manifestly be “in excess of [FSIS’s] authority” to sanction its use on covered products.²³

B. Under Current Policy, FSIS Is Systematically Approving Labels That Mislead Consumers

FSIS’s current “Product of U.S.A.” labeling policy systematically enables the adoption of false or misleading U.S.-origin claims on meat, poultry, egg, and other FSIS-regulated products. The Agency’s regulatory scheme not only allows “Product of U.S.A.” claims to bypass the prior-submission requirement through generic approval — which, on its own, might not preempt state-law actions against deceptive U.S.-origin claims²⁴ — it also prescribes a maximally permissive definition for

¹⁸ See *Armour & Co. v. Freeman*, 304 F.2d 404, 413 (D.C. Cir. 1962), cert. denied, 370 U.S. 920 (1962) (Prettyman, Circuit Judge, concurring).

¹⁹ For the relevant provisions of the Federal Meat Inspection Act, see 21 U.S.C. 607(c) (authority to prescribe definitions, standards of identity, and styles and sizes of type). For the relevant provision of the Poultry Products Inspection Act, see 21 U.S.C. § 457 (b) (authority to prescribe definitions, standards of identity, and styles and sizes of type).

²⁰ See *Armour & Co. v. Ball*, 468 F.2d 76, 80 (6th Cir. 1972) (quoting *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 221-222 (1943)) (concluding that “one purpose of the Wholesome Meat Act is to empower the Secretary to adopt definitions and standards of identity or composition so that the ‘integrity’ of meat food products could be ‘effectively maintained.’”); *Tennessee Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1011 (W.D. Tenn. 1980) (quoting H.R. Rep. 2139, 75th Cong., 3d Sess. (1938)) (“The government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar . . . By authorizing the establishment of definitions and standards of identity this bill meets the demands of legitimate industry and will effectively prevent the chiseling operations of the small minority of manufacturers . . .”).

²¹ See *Federation of Homemakers v. Hardin*, 328 F. Supp. 181, 184 (D.D.C. 1971) (“The primary purpose of the Wholesome Meat Act is to benefit the consumer and to enable him to have a correct understanding of and confidence in meat products purchased. Prohibitions against mislabeling are an integral part of this purpose. Clearly, any rule-making procedure conducted under this Act which fails to primarily emphasize the understanding of the consumer is a procedure not conducted ‘in accordance with (the applicable) law’ [under the APA].”).

²² See *Armour & Co. v. Ball*, 468 F.2d 76, 81 (6th Cir. 1972) (quoting *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 221-222 (1943)).

²³ See *Federation of Homemakers v. Butz*, 466 F.2d. 462, 464 (D.C. Cir. 1972) (citing *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 483 (1919)).

²⁴ See *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1289 (9th Cir. 2021) (finding that [1] state law claims against poultry processor for deceptive labeling are only preempted by the federal Poultry Products Inspection Act where FSIS has, in fact, reviewed and approved the challenged label; and [2] that “mere existence of the label [claiming that frozen chicken products are ‘natural and preservative-free’] is

the term “Product of U.S.A.” that *does* preempt state-law actions.²⁵ Even worse, it prescribes a definition that is itself deceptive. It purports that any product which is “minimally processed in the United States” may be called a “Product of the U.S.A.” when, as detailed below, the majority of consumers believe that term to mean something altogether different — that the product was derived from an animal born, raised, slaughtered, and processed in the United States. Because of the Agency’s *ipse dixit* definition, however, at present consumers who are deceived by misleading “Product of U.S.A.” labels are entirely preempted from seeking recourse under state or federal law against the packers and vendors who use such labels to mask the true quality of their products. This is a grotesque perversion of the laws Congress passed. FSIS has no authority to continue perpetrating this “enforced distortion of the truth” on the public it is supposed to protect.²⁶

Ample evidence demonstrates that FSIS’s current definition does not comport with what consumers believe a “Product of U.S.A.” label means when applied to food products. Indeed, every consumer survey on this subject since the 1990s has suggested that, to a majority of consumers, “Product of U.S.A.” and similar unqualified claims (*e.g.*, “Made in the U.S.A.”) imply that a food product’s ingredients originated and were grown, processed, and packaged in the United States. In a 1991 study by the FTC, 77 percent of respondents stated that a “Made in the U.S.A.” label meant “all or almost all of the product so labeled was made in the United States.”²⁷ Asked whether the “making” of a product included only the “labor” that goes into the finished product or also the sourcing of its constituent “parts,” 77 percent of respondents to the 1991 survey said it included “both parts and labor.”²⁸ A pair of follow-up studies conducted by the FTC in 1995 (referred to as the “1995 Copy Test” and “1995 Attitude Survey,” respectively) confirmed these results.²⁹ Notably, the majority of respondents to the 1995 Attitude Survey indicated that, *even if* a product were finally assembled in the United States, they would still consider the use of a “Made in the U.S.A.” label on that product misleading if it contained 50 percent or less U.S. content — and a full quarter of respondents indicated it would be misleading if the product contained 90 percent or less U.S. content.³⁰ In contrast, only 34 percent of respondents to the 1995 Copy Test stated that a “Made in the U.S.A.” claim did not imply anything to them about a product’s origin.³¹

insufficient to establish that it was reviewed and approved by FSIS” where “[defendant meatpacker] used the generic approval process for its labels”).

²⁵ See *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1028 (10th Cir.), *cert. denied*, 214 L. Ed. 2d 31, 143 S. Ct. 118 (2022).

²⁶ See *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (“The Secretary’s amendatory regulation which is under attack, is capricious and arbitrary on its face in requiring a packer to label a genuine ham as IMITATION HAM, thus forcing him into violating the statute which forbids misbranding; and nothing in the record as presently constituted supports or justifies such an enforced distortion of the truth.”). Cf. *Nat’l Grocers v. Vilsack*, 2022 WL 4227248, at *10 (N.D. Cal. Sept. 13, 2022) (“In addition, nothing in the statute permitted AMS to expand the disclosure options for manufacturers beyond the ‘text, symbol, or electronic or digital link’ choices. It may be that many retailers and manufacturers supported the standalone text message disclosure option, as the government notes. But that did not relieve AMS of the obligation to comply with Congress’s express direction to ‘provide additional and comparable options to access the bioengineering disclosure.’”).

²⁷ See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63764 (1997).

²⁸ See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63764 (1997).

²⁹ As part of a comprehensive review of U.S.-origin claims, the FTC commissioned a two-part study in 1995 “to look at consumer perception of such claims.” See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63763 (1997).

³⁰ See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63764 (1997).

³¹ See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63764 (1997).

There is no evidence that consumer understandings of unqualified U.S.-origin claims have changed since the FTC conducted these comprehensive studies in the 1990s.³² To the contrary, a consumer survey conducted by the Richline Group in 2013 — and presented to the FTC in connection with its Made in U.S.A. Labeling Rule — suggested that consumer perceptions have remained stable.³³ Specifically, 57 percent of respondents in that survey indicated that “Made in America” means that “all parts of a product, including any natural resources it contains, originated in the United States.”³⁴ Additionally, the 2013 survey found that “33 percent of consumers thought 100-percent of a product must originate in a country for that product to be labeled as ‘Made’ in that country.”³⁵ As the FTC noted in finalizing its Made in U.S.A. Labeling Rule recently, “these findings [in the 2013 survey] are consistent with the FTC’s 1995 survey, which found roughly 30 percent of consumers would be deceived by an unqualified [Made in U.S.A.] claim for a product where [only] 70 percent of the cost was incurred in the United States.”³⁶

These surveys lend significant support to the credibility of the findings reported in the FSIS-commissioned survey, conducted by RTI International in 2022, on consumer perceptions of “Product of U.S.A.” claims (the “**RTI Survey**”).³⁷ The RTI Survey found that, in the context of meat products, 56 percent of respondents thought a “Product of U.S.A.” label meant that the animal was at least raised, slaughtered, and processed in the United States — and 47 percent believed the animal was also born in the United States.³⁸ These latest findings are consistent with those of the prior surveys, all of which showed that a majority of consumers interpret unqualified U.S.-origin claims to mean that a product was derived entirely, or almost entirely, from U.S.-origin raw materials and processing chains. While the FTC and Richline Group surveys all focused on “Made in U.S.A.” rather than “Product of U.S.A.” claims, these general, unqualified U.S.-origin claims are — as the FTC has long recognized in its Enforcement Policy Statement on U.S. Origin Claims — “likely to be

³² See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021) (“Although some commenters speculated consumer perception may have shifted over time, or argued the Commission should adopt a new standard for unqualified claims, there is no evidence on the record disputing the Commission’s past findings that at least a significant minority of consumers expect a MU.S.A.-advertised product to be ‘all or virtually all’ made in the United States. Nor is there evidence suggesting new perception testing would find otherwise.”).

³³ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021) (“Indeed, the limited survey evidence submitted in conjunction with the 2019 workshop on MU.S.A. claims suggested consumer perception has remained stable since the 1990s. Specifically, one panelist, Mark Hanna of Richline Group, Inc. submitted a survey, conducted in 2013, which found almost 3 in 5 Americans (57 percent) agree ‘Made in America’ means all parts of a product, including any natural resources it contains, originated in the United States.”).

³⁴ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021).

³⁵ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021).

³⁶ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021).

³⁷ See Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims”: Notice of Proposed Rule, 88 FR 15290, 15294 (2023).

³⁸ See Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims”: Notice of Proposed Rule, 88 FR 15290, 15294 (2023) (“From the RTI survey, about 56 percent of survey participants answering the multiple choice question ‘To your knowledge, what does the Product of U.S.A. label claim on meat products mean?’ thought a “Product of U.S.A.” claim meant the animal was at least raised and slaughtered and the meat then processed in the United States. Of these participants, 47 percent also believed that the “Product of U.S.A.” claim indicates that the animal must also be born in the United States[.]”).

understood by consumers as synonymous.”³⁹ Taking all of the available survey data on consumer understandings of such claims holistically, this much is clear: When a “Product of U.S.A.” label is applied to food products with more than *de minimis* foreign content, it deceives a significant portion, and likely a majority, of ordinary consumers into believing those products have a valuable attribute — all-American composition — they do not have.⁴⁰ FSIS has no authority to continue administering a “Product of U.S.A.” policy that shields such deceptive labeling from liability.

II. Deceptive “Product of U.S.A.” Labeling Enables Dominant Meatpackers to Cheat American Consumers and Destroy Markets for Honest Producers of U.S.-Origin Beef

The beef products sector provides a powerful illustration of the predatory conduct and harmful effects that FSIS’s “Product of U.S.A.” labeling policy has enabled over the past two decades. In enacting the federal inspection laws, Congress recognized that “unwholesome, adulterated, or misbranded” products cause a cascade of harms to consumers, processors, and farmers — injuring “the health and welfare” of consumers, “destroy[ing] markets for wholesome, not adulterated, and properly labeled and packaged” products, and “result[ing] in sundry losses” to honest “producers and processors.”⁴¹ Today,

³⁹ See Federal Trade Commission, “Enforcement Policy Statement on U.S. Origin Claims”, 62 FR 63756, 63770 (1997) (“More general [U.S.-origin claims] such as that a product is, for example, ‘produced’ or ‘manufactured’ in the United States, are likely to require further qualification where they are used to describe a product that is not all or virtually all made in the United States. Such terms are unlikely to convey to consumers a message limited to a particular process performed, or part manufactured, in the United States. Rather, they are likely to be understood by consumers as synonymous with “Made in U.S.A.” and therefore as unqualified U.S. origin claims.”).

⁴⁰ Cf. Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37022 n.1 (2021) (citing Federal Trade Commission, Policy Statement on Deception, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 177 n.20 (1984)) (“An act or practice is deceptive [under Section 5 of the FTC Act] if it is likely to mislead consumers acting reasonably under the circumstances and is material—that is, likely to affect a consumer’s decision to purchase or use the advertised product or service. A claim need not mislead all—or even most—consumers to be deceptive under the FTC Act. Rather, it need only be likely to deceive some consumers acting reasonably.”). Commenters note that, while courts have not elaborated on the standard that the USDA must follow in promulgating rules related to misbranding under the federal inspection laws with much depth, they have made two things clear. The first is that such determinations must be guided by the ordinary consumer’s understanding. See *supra* n.14-17 and accompanying text. The second is that a label claim on meat or poultry products is prohibited if it is false or misleading “in any particular,” that is, without any requirement of materiality. See, e.g., *United States v. Jorgensen*, 144 F.3d 550, 559 (8th Cir. 1998) (“The relevant language [of the Federal Meat Inspection Act] provides that meat is misbranded ‘if its labeling is false or misleading in any particular.’ The statutory language does not require that the false or misleading statements be ‘material,’ and we decline to judicially rewrite the statute to add such a requirement.”) (emphasis in original).

⁴¹ For the relevant provisions of the Federal Meat Inspection Act, see 21 U.S.C. § 602 (“Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally.”). For the relevant provision of the Poultry Products Inspection Act, see 21 U.S.C. § 451 (“Unwholesome, adulterated, or misbranded poultry products . . . destroy markets for wholesome, not adulterated, and properly labeled and packaged poultry products, and result in sundry losses to poultry producers and processors of poultry and poultry products, as well as injury to consumers.”). For the relevant provisions of Egg Product Inspection Act, see 21 U.S.C. § 1031 (“Lack of effective regulation for the handling or disposition of unwholesome, otherwise adulterated, or improperly labeled or packaged egg products and certain qualities of eggs is injurious to the public welfare and destroys markets for wholesome, not adulterated, and properly labeled and packaged eggs and egg products and results in sundry losses to producers and processors, as well as injury to consumers. Unwholesome, otherwise adulterated, or improperly labeled or packaged products can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged products, to the detriment of consumers and the public generally.”).

because of the proliferation of deceptive “Product of U.S.A.” labels facilitated by FSIS policy, each of the harms that Congress sought to prevent are evident in the nation’s beef markets.

A. The Industry Context Surrounding FSIS’s “Product of U.S.A.” Labeling Policy

FSIS’s current “Product of U.S.A.” policy took effect during a period of growing concentration and polarization in the beef sector, with dominant meatpackers and corporate feedlots aggregating on one end, and independent ranchers and processors on the other.

Between 1980 and 2020, the four-firm concentration ratio in beefpacking grew from 36 percent to 81 percent.⁴² The move towards heightened concentration among beefpackers has been accompanied by growing packer control over cattle production and marketing channels. For most of the mid-20th century, ranchers sold fed cattle primarily through public markets where prices were established transparently through open auctions attended by many buyers and many sellers.⁴³ Since beefpackers began consolidating in the 1980s, however, the pool of buyers available to cattle producers has dwindled. Today, as the Agricultural Marketing Service (AMS) recently observed, “there are commonly only one or two buyers in [many] local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers.”⁴⁴ As a result of this concentration, open, spot-negotiated cash markets for cattle have largely dried up.⁴⁵ Bilateral, long-term production and marketing contracts between large packers and large feedlots have taken their place as the primary distribution channel for fed cattle in every part of the country.⁴⁶ Specifically, the Big Four beefpackers (and their predecessor entities) began shifting away from sourcing live cattle through cash market purchases and toward sourcing through contractual arrangements with select feedlots in the 1990s.⁴⁷ Today, that shift is almost complete. Between 1995 and 2022,

⁴² See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Notice of Proposed Rule, 87 Fed. Reg. 60010, 60011 (2022).

⁴³ See Lina Khan, *Obama’s Game of Chicken*, Wash. Monthly (Nov. 9, 2012), available at: <https://washingtonmonthly.com> (“For the most part, [in the mid-twentieth century] farmers were able to sell their products relatively freely on the open market, and prices were established transparently through open bidding, in public auctions attended by many buyers and many sellers.”); Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Notice of Proposed Rule, 87 Fed. Reg. 60010, 60011 (2022) (“[In 1921,] the Department of Justice (DOJ) brought enforcement cases under the Sherman Act against the packing industry, which resulted in a series of consent decrees (judicially overseen agreements) that restructured the market. The consent decrees, together with the adoption of the P&S Act, reformed market practices by eliminating packer ownership of cattle and their means of transporting it, and reinforced market structures that — for a period of time in the 20th century — secured open, fair marketplaces for all, such as terminal auction yards regulated as stockyards by the Packers and Stockyards Administration of USDA.”).

⁴⁴ See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60011 (Oct. 3, 2022).

⁴⁵ See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60012 (Oct. 3, 2022).

⁴⁶ See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60011 (Oct. 3, 2022).

⁴⁷ See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60011 (Oct. 3, 2022).

the percentage of cattle sold through forward marketing contracts rose from 18.1 percent to 73 percent.⁴⁸ Additionally, the latest data suggests that around a third of U.S. cattle are being raised under dedicated production contracts with packers.⁴⁹

This transformation of cattle markets over the past four decades has dramatically undermined the viability of ranching operations with less than 1,000-head capacity. Between 1980 and 2011, nearly 36,000 small fed-cattle operations — out of a total of 110,000 feedlots of all sizes — exited the market.⁵⁰ Since then, small operations have only disappeared faster; just between 2011 and 2019, the country lost over 49,000 of them.⁵¹ The mass disappearance of these ranchers has led to a dramatic bifurcation within the fed-cattle segment of the live cattle industry between “small” producers with less than 1,000-head capacity and “large” producers with more than 1,000-head capacity. Compared to large producers, AMS and industry analysts have observed, small producers generally do not receive forward contracting arrangements from packers; are denied the favorable bonus, financing, and risk-sharing terms that have often attended such arrangements; and are required to sell their cattle to packers on at-will cash markets for lower aggregate compensation.⁵²

This differential procurement channeling by the dominant meatpackers has structurally restricted the ability of small, independent ranchers to access conventional markets. Through forward contracting, the largest packers have given large feedlots guaranteed market access in exchange for a dedicated cattle supply they can use to meet “high probability demand for beef.”⁵³ The institutionalization of these captive-supply relationships over the past two decades has, in effect, partially integrated the largest feedlots with the largest packers.⁵⁴ As a result, the regional cash markets — and the small producers who sell on them without a forward contract — have been relegated into an “insurance” or “residual” source of cattle for the largest packers, to which they resort only to satisfy “low probability demand” for beef.⁵⁵ By controlling a full or near-full supply of cattle through forward contracts at all times, the largest packers are increasingly wielding, not just significant buyer power, but also the power to deprive small producers of access to markets entirely. Unsurprisingly, as dominant meatpackers have consolidated this gatekeeping power over the past three decades, the profitability of

⁴⁸ See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60010-12 (Oct. 3, 2022). See also Bill Bullard, CEO, R-CALF U.S.A., *Chronically Besieged: The U.S. Live Cattle Industry*, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021).

⁴⁹ Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60010-12 (Oct. 3, 2022).

⁵⁰ See Bill Bullard, CEO, R-CALF U.S.A., *Chronically Besieged: The U.S. Live Cattle Industry*, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021).

⁵¹ See Bill Bullard, CEO, R-CALF U.S.A., *Chronically Besieged: The U.S. Live Cattle Industry*, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021).

⁵² See Agricultural Marketing Service, “Inclusive Competition and Market Integrity Under the Packers and Stockyards Act”: Proposed Rule, 87 Fed. Reg. 60010, 60023-24 (Oct. 3, 2022). See also Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 Wis. L. Rev. 337, 351-52 (2014); C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 2, 3, 27-30, 27 n. 59 (2022); Bill Bullard, CEO, R-CALF U.S.A., *Chronically Besieged: The U.S. Live Cattle Industry*, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021); Letter from Bill Bullard, CEO, R-CALF U.S.A., to William P. Barr, U.S. Att’y Gen. 3-5 (Mar. 28, 2019).

⁵³ See C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 25-28, 34-36, SSRN 4094924 (2022).

⁵⁴ See C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 25-28, 34-36, SSRN 4094924 (2022).

⁵⁵ See C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 25-28, 34-36, SSRN 4094924 (2022).

independent fed-cattle producers has trended downward — going from an average profit of about \$50 per head in 1990 to an average loss of about \$50 per head in 2021.⁵⁶

Facing inhibited market access and depressed profitability in the conventional supply chain, independent ranchers have increasingly turned to smaller processing facilities⁵⁷ — including ones they open themselves — and to niche, value-added markets for local, grassfed, and organic beef in order to generate sustainable returns. Smaller processors, in turn, have increasingly relied on the ability of independent ranchers to access premiums in these niche markets in order to profitably slaughter and process cattle at relatively low volumes. These symbiotic relationships between small-to-midsize ranchers and processors have contributed to a revitalization of America’s local food systems since the mid-2000s.⁵⁸

Over the same period, however, the Big Four meatpackers have cultivated a new tool to undermine the competitive position of independent ranchers and processors — imports. Over the past 30 years, the U.S. has consistently imported more beef and cattle than it exports, causing a 30-year cumulative trade deficit of more than 20 million metric tons or about 44 billion pounds of beef and cattle, according to R-CALF U.S.A., a trade association representing independent ranchers.⁵⁹ As we detail below, lower-cost imports of cattle and beef have allowed the Big Four to structurally undercut independent ranchers and processors in the niche markets on which they increasingly depend. Without truthful “Product of U.S.A.” labeling, the Big Four have been able to deceive consumers about the origin of their lower-cost products and dilute the primary competitive advantage of independent producers — their relationship to consumers as neighbors and stewards of the land instead of nameless industrial operations halfway around the world.

B. Deceiving Consumers Who Seek U.S.-Origin Beef Into Buying Imported Beef

Americans prefer beef products of U.S. origin and are willing to pay a premium for them. Under FSIS’s current policy, however, consumers who seek U.S.-origin beef by looking for a “Product of U.S.A.” label are likely to be misled. Foreign

⁵⁶ See C. Robert Taylor, *Harvested Cattle, Slaughtered Markets?* 2, SSRN 4094924 (2022).

⁵⁷ See Sarah A. Low et al., ERS, USDA, Trends in U.S. Local and Regional Food Systems: A Report to Congress at 23 (January 2015) (“Access to meat processors with required inspection processes and the ability to customize orders is key to providing customers with locally produced meat products. While large processors typically produce standardized products, allowing for greater economies of scale, many small processors gain comparative advantage by providing customized products like special cuts, sausages, cured meats, and custom packaging/labeling. Difficulty aggregating animals of similar size and biosafety concerns limit the ability of large meat processors to serve small meat producers. Small producers and processors alike are faced with the need to manage costs without the benefit of economies of scale, requiring meat producers to identify small processors that can match their size and unique needs.”).

⁵⁸ Sales of local food in the United States nearly doubled between 2008 and 2014, going from \$5 billion to \$11.7 billion. See Tom Vilsack, “Tapping into the Economic Potential of Local Food Through Loods, Local Places,” White House Rural Council Blog (July 1, 2015). Around the same time, between 2002 and 2012, the number of farms selling direct-to-consumer increased by nearly 24 percent and total direct-to-consumer farm sales grew by over 60 percent. See Sarah A. Low et al., ERS, USDA, Trends in U.S. Local and Regional Food Systems: A Report to Congress at 5 (January 2015). By 2012, an estimated 163,675 farms were making an estimated \$6.1 billion in local sales through both direct-to-consumer and intermediated channels. See *id.* at 9. Livestock operations accounted for 119,520 of local-selling farms, and they generated nearly half of all direct-to-consumer sales reported to USDA in 2012. See *id.* at 22. Local food marketing channels themselves experienced dramatic growth during this period beginning in the mid-2000s. Between 2006 and 2014, the number of farmers’ markets in the United States increased by 180 percent, reaching 8,268 in 2014, and the number of regional food hubs (enterprises that aggregate locally sourced foods to meet wholesale, retail, institutional, or individual demand) increased by 288 percent. See *id.* at 2.

⁵⁹ See Bill Bullard, R-CALF U.S.A., “Imports of cattle and beef hit historical high in 2020”, www.r-calfusa.com (Feb. 11, 2021).

cattle, carcasses, and cuts can be imported from other countries and — after minimal further processing in a domestic plant — receive a “Product of U.S.A.” label. Taking advantage of this origin-laundering system, dominant meatpackers have used their access to global supply chains to flood domestic markets (particularly high-margin niches like grassfed) with counterfeit “Product of U.S.A.” beef products derived from lower-cost foreign cattle.

A substantial body of academic research — stretching over 3 decades and using a variety of methodologies — suggests that, at a minimum, a significant percentage of American consumers make beef purchasing decisions based on whether beef products were derived from cattle born, raised, slaughtered, and processed in the United States. For example, one study (2011) found that one-third of consumers considered U.S. origin a “deciding factor” when purchasing beef products, and more than one-quarter “would purchase *only* domestic beef when given the choice.”⁶⁰ Another study (2007) found that consumer demand for “U.S. grain-fed beef” was less elastic to price increases in the domestic market than demand for beef imported from Australia, Canada, and New Zealand — giving it a “competitive advantage” over foreign substitutes.⁶¹ Mennecke et al. (2007) and Franken, Parcell, and Tonsor (2011) each separately confirmed these results, finding that a beef product’s domestic origin was the most important “decision characteristic” and “value-added meat attribute” to consumers, respectively.⁶²

In expressing this preference for “domestic,” “U.S. produced,” “Certified U.S.,” “U.S.A Guaranteed,” or similarly described beef, the available evidence suggests that consumers are referring to beef products that satisfy the layman definition of a “Product of the U.S.A.” For example, in a study by Umberger et al. (2003),⁶³ 75 percent of respondents said they preferred a steak labeled “U.S.A Guaranteed” to an unlabeled steak, even after they were told that both were USDA-inspected for safety. When asked their motivations for preferring the “U.S.A Guaranteed” steak, consumers cited a strong desire to support U.S. ranchers, a belief that U.S. beef tasted better or was otherwise of higher quality, and concerns about bovine disease and other food safety concerns. All of these motivations relate to beef attributes that are primarily determined by how the animal is bred and raised, not simply by how it is slaughtered or processed into cuts. It stands to reason, then, that the well-documented preference for domestic beef among American consumers refers not to beef that underwent its final stage of production (processing) in the United States, but to beef produced entirely, or almost entirely, in the United States.

⁶⁰ See Kar H. Lim, et al., *U.S. Consumers’ Preference and Willingness to Pay for Country-of-Origin-Labeled Beef Steak and Food Safety Enhancements*, Selected Paper prepared for presentation at the Agricultural & Applied Economics Association’s 2011 AAEA & NAREA Joint Annual Meeting (2011).

⁶¹ See Joao E. Mutondo & Shida Rastegari Hennebery, *A Source-Differentiated Analysis of U.S. Meat Demand*, 32(3) J. Agri. & Resource Econ. 515 (2007). See also Kar H. Lim, et al., *U.S. Consumers’ Preference and Willingness to Pay for Country-of-Origin-Labeled Beef Steak and Food Safety Enhancement*, 61(1) Canadian J. Agri. Econ. 93 (2012) (finding that “discount needed for [U.S.] consumers to switch from U.S. to Canadian steak” ranged from \$1.09 to \$35.12 per pound,” which “strongly suggested that U.S. consumers prefer domestic-originated beef to imported beef”).

⁶² See B.E. Mennecke, et al., *A Study of the Factors That Influence Consumer Attitudes toward Beef Products Using the Conjoint Market Analysis Tool*, 85(10) Journal of Animal Science 2639 (2007); J.R. Franken, J.L. Parcell, & G.T. Tonsor, *Consumers’ Willingness-to-Pay for Retail Branded Beef Products with Bundled Attributes*, Paper presented at the Agricultural and Applied Economics Association’s 2011 AAEA and NAREA Joint Annual Meeting (2011).

⁶³ See Wendy J. Umberger, et al., *Country-of-Origin Labeling of Beef Products: U.S. Consumers’ Perceptions*, 34 Journal of Food Distribution Research 103, 107 (2003).

Finally, studies show Americans are willing to put their money where their preferences are. A 2016 meta-analysis of 20 primary studies, for example, found that American consumers were willing to pay \$3.57/lb. more for domestic beef compared to non-domestic beef.⁶⁴ This was consistent with the results of two broader meta-analyses, published in 2006 and 2023, of studies on consumer preferences regarding food product origin in general, which similarly found that consumers were willing to pay a premium for food products with a domestic country-of-origin label.⁶⁵ All in all, the research literature provides substantial evidence that a significant number of consumers choose beef products based on their (claimed) U.S.-origin and are willing to pay a premium for U.S.-origin products.⁶⁶

In this context, FSIS’s permissive “Product of U.S.A.” labeling policy has likely allowed dominant meatpackers to leverage their global supply chains to exploit American consumers in two important ways. In the niche markets for grassfed, organic, and local beef, where consumers may be willing to pay the greatest premiums for U.S.-origin products,⁶⁷ the largest packers have been able to utilize lower-cost cattle from Australia, New Zealand, and elsewhere to satisfy growing demand while withholding the true provenance of their products. As a result, they have likely been able to deceive consumers who would have preferred U.S.-origin beef into buying their foreign-origin products — and potentially induced many to pay higher prices for those products than they would have knowingly paid.

More broadly, in the mass beef market, deceptive “Product of U.S.A.” labeling is potentially helping multinational packers avoid the greater elasticity of demand among consumers for foreign-origin beef. Research suggests that Americans are not only willing to pay a premium for domestic beef, but are also less sensitive to changes in the price of domestic beef.⁶⁸ If that is the case, then the profusion of deceptive “Product of U.S.A.” labels in the marketplace may well be enabling packers and vendors to sustain higher average price levels for beef than would otherwise prevail.

C. Depriving Independent Ranchers & Small Processors of Markets For U.S.-Origin Beef

⁶⁴ See Yu, X., Gao, Z. & Shimokawa, S., *Consumer preferences for US beef products: a meta-analysis*, 71(2) *Italian Review of Agricultural Economics* 177 (2016).

⁶⁵ See Ching-Hua Yeh, Stefan Hirsch, *A meta-regression analysis on the willingness-to-pay for country-of-origin labelling*, 2023 *Journal of Agricultural Economics* 1 (2023); Mariah Tanner Ehmke, *International Differences in Consumer Preferences for Food Country-of-Origin: A Meta-Analysis*, Selected Paper prepared for presentation at the American Agricultural Economics Association Annual Meeting, Long Beach, California, 23-26 (2006).

⁶⁶ See B.E. Mennecke, et al., *A Study of the Factors That Influence Consumer Attitudes toward Beef Products Using the Conjoint Market Analysis Tool*, 85(10) *J. Animal Sci.* 2639 (2007) (summarizing the results in the relevant literature as show that consumers generally prefer beef products “that come from local producers or from the country or region in which the consumer resides”); Ching-Hua Yeh, Stefan Hirsch, *A meta-regression analysis on the willingness-to-pay for country-of-origin labelling*, 2023 *J. of Agricultural Economics* 1 (2023).

⁶⁷ See J.R. Evans et al., *Determining Consumer Perceptions Of And Willingness To Pay For Grass-Fed Beef: An Experimental Economics Approach*, 40(2) *Agri. Resource Econ. Rev.* 233 (2011) (finding that, for U.S. consumers with a preference for local products, a grass fed steak was significantly more appealing than a grain-fed one). Cf. William Ridley et al., *Estimations of Consumer Demand for Local Beef*, 26(4) *J. Int’l Food & Agribus. Marketing* 316 (2014) (finding that U.S. consumer demand was least elastic to price increases for beef products that are locally produced and organic, compared to products that are locally produced and conventional as well as products that are only locally produced or organic).

⁶⁸ See Joao E. Mutondo & Shida Rastegari Hennebery, *A Source-Differentiated Analysis of U.S. Meat Demand*, 32(3) *J. Agri. & Resource Econ.* 515 (2007).

The preference of American consumers for beef derived from cattle born, raised, slaughtered and processed in the United States is a critical competitive factor for independent ranchers and processors, particularly in niche, high-margin segments of the beef market. In the grassfed segment, for example, dominant meatpackers tend to import cattle and beef from large foreign producers in Australia that have structural cost advantages over grassfed ranchers in the United States.⁶⁹ Because of favorable weather conditions, Australian grassfed cattle operations have access to grassland pastures that grow year-round without irrigation or fertilizers.⁷⁰ This environmental advantage means that a large Australian grassfed operation can spend as little as 30-40 percent of what a large American grassfed operation spends on each pound of weight their cattle gains — and just 10-15 percent of what a small American grassfed rancher spends.⁷¹ As a result, dominant meatpackers can buy cheap Australian grassfed cattle, slaughter it in overseas plants (some of which they own), ship the carcasses or primal cuts for further processing in the United States — and still ultimately undercut the price of domestic grassfed beef.⁷² Under these conditions, American grassfed producers have historically relied on the preference of consumers for U.S.-origin products to stay competitive by delivering a premium product: Fresh beef from a grassfed cow, born on an American family farm, raised using sustainable methods, and slaughtered in the United States.

Because of FSIS's "Product of U.S.A." policy, however, American grassfed producers have struggled to differentiate their domestically produced beef from low-cost foreign beef that is merely processed in a domestic plant.⁷³ Until the repeal of mandatory country of origin labeling (MCOOL) in 2015, U.S. producers enjoyed 60 percent of the American grassfed market despite selling their beef at a higher price point. By 2017, just two years after repeal, that share had fallen to 20-25 percent, according to the Stone Barns Center.⁷⁴ Ranchers, journalists, and market analysts alike have attributed the shift to

⁶⁹ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016). See also Deena Shanker, "Most Grass-Fed Beef Labeled 'Product of U.S.A.' Is Imported," *Bloomberg* (May 23, 2019); Dan Charles, "Why Lots of Grass-Fed Beef in U.S. Comes From Down Under," *NPR* (Oct. 2, (2013).

⁷⁰ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016). See also Deena Shanker, "Most Grass-Fed Beef Labeled 'Product of U.S.A.' Is Imported," *Bloomberg* (May 23, 2019); Dan Charles, "Why Lots of Grass-Fed Beef in U.S. Comes From Down Under," *NPR* (Oct. 2, (2013).

⁷¹ See Deena Shanker, "Most Grass-Fed Beef Labeled 'Product of U.S.A.' Is Imported," *Bloomberg* (May 23, 2019) (citing Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016)) ("At the finishing' phase of a cow's life, raising grass-fed beef in Australia cost 59 cents for every pound gained, according to an April 2017 report on the market from Stone Barns Center for Food & Agriculture. For a large U.S. grass-fed producer, that cost rises to \$1.55 per pound. For a small U.S. producer, it can be as high as \$4.26.").

⁷² See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016). See also Deena Shanker, "Most Grass-Fed Beef Labeled 'Product of U.S.A.' Is Imported," *Bloomberg* (May 23, 2019); Dan Charles, "Why Lots of Grass-Fed Beef in U.S. Comes From Down Under," *NPR* (Oct. 2, (2013) (telling story of large grassfed beef operation in the United States losing a contract to supply a large meat broker after the broker located an importer that "was bringing in grass-fed ground beef from Australia" and selling it for \$0.75–1.00 cheaper per pound than the U.S. operation could).

⁷³ See Federal Trade Commission, "Made in U.S.A. Labeling Rule": Notice of Final Rule, 86 FR 37022, 37029 (2021) (quoting administrative comment by North Dakota Farmers Union) ("These commenters argued such labels deceive consumers, and 'put U.S. family farmers and ranchers at an unfair disadvantage in the marketplace, because they are not able to differentiate their domestically produced meat and meat products from foreign produced meat and meat products.'").

⁷⁴ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016). See also Western Organization of Resource Centers, "WORK Network Demands USDA Close Its 'Product of the U.S.A.' Loophole" (2018), available at: <https://www.worc.org/worc-network-demands-usda-close-its-product-of-the-u-s-a-loophole/>

the “rampant mislabeling” of cheaper foreign beef.⁷⁵ As Joe Fassler explained in *The Counter*: “If we can’t tell the difference between Australian and American [grassfed] beef — if both are labeled ‘Product of U.S.A.’ — even a locally minded shopper is more likely to go with the cheaper product.”⁷⁶

As dominant meatpackers have passed their lower-cost grassfed imports as premium U.S.-origin products over the past few years, the effect of their deceptive practices has not been limited to depriving independent ranchers of sales. The American grassfed movement was built on an alternative vision for beef production. It grew out of the efforts of individual innovators rooted in local economies. The premium margins that a grassfed model enabled a rancher to earn were intended to help — and did help — thousands of ranchers transition from industrial agriculture methods to regenerative and humane ones. Over the past few years, however, cheap imports masquerading as domestic products have undermined the price structure for genuinely American grassfed beef, collapsing profit margins for small ranchers. In the words of grassfed rancher Will Harris, the unfair competition facilitated by lax enforcement against misbranding of all kinds — from origin-laundering to green-washing — has made a “fair return” on a “regenerative, compassionate, and fair” ranching operation “elusive.” Harris is a member of the board of the American Grassfed Association and the owner of White Oak Pastures, a 25-year-old regenerative ranch producing grassfed beef in Bluffton, Georgia.⁷⁷ “I don’t begrudge importers or producers from other countries selling to knowing consumers that want to buy that imported product,” Harris told *The Counter* in 2019.⁷⁸ “But I’m appalled at what the deception has done to the economies of our membership,” he continued. “It has moved the needle from [grassfed] beef producers being profitable, to being a very break-even — or, if you’re not careful, a losing — proposition.”⁷⁹

D. The Proposed Rule Would Rectify These Harms and Support the Growth of Local Food Systems

The Proposed Rule would finally make the “Product of U.S.A.” label a reliable guide for consumers seeking meat, poultry, egg, and other FSIS-regulated products made entirely, or almost entirely, of U.S.-origin ingredients. As discussed in Section II.B above, the available survey data and academic literature indicate, at a minimum, (1) that a majority of Americans prefer to buy such U.S.-origin products, (2) that they are willing to pay a price premium for them, and (2) that at least a quarter of Americans would buy them exclusively if given the choice. Under the status quo, many of these consumers are either misled by “Product of U.S.A.” labels into buying foreign-origin products, or confused by the proliferation of “voluntary labels of

⁷⁵ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

⁷⁶ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

⁷⁷ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018); Will Harris, “Greenwashing Is Destroying The Regenerative Farming Movement,” *White Oak Pastures Blog* (Dec. 9, 2019).

⁷⁸ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

⁷⁹ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

different sorts claiming [U.S.-origin]⁸⁰ without consistency or standardization. If the Proposed Rule is finalized, consumers who prefer domestic products would be able to make informed purchasing decisions and allocate their spending according to their preferences — toward honestly marketed U.S.-origin beef. This redirection of purchasing power would, in turn, have a cascade of benefits for independent ranchers and processors, the networks of independent suppliers, distributors, and vendors they rely upon, and the rejuvenation of local food systems more generally.

The Proposed Rule would enable consumers to confidently locate meat products derived from animals bred and raised by American ranchers, slaughtered in American processing facilities, and prepared for wholesale distribution and retail consumption by American workers. A conservative estimate of the total size of the retail at-home consumer market for such products can be roughly derived by multiplying the percentage of consumers who, according to surveys, would purchase U.S.-origin meat products exclusively if given the choice (around 25 percent)⁸¹ by the total amount Americans spend on at-home meat consumption every year (around \$86 billion in 2022).⁸² For the 52-week period ending in July 2022, this amount comes out to approximately \$21.5 billion. How much of total U.S.-origin-preferred spending is currently misdirected by inaccurate “Product of U.S.A.” labeling may be difficult to calculate with precision, but another rough estimate can be derived from multiplying the total amount by: (1) first, the percentage of respondents in the RTI Survey who believed a “Product of U.S.A.” label indicates beef products derived from animals born, raised, slaughtered, and processed in the United States (47 percent); and, (2) second, by the percentage of respondents who recalled (unaided) seeing the “Product of U.S.A.” label (between nine percent and 31 percent depending on the label’s format). Following this conservative calculation, the amount of currently misdirected spending, in the grocery retail channel alone, may range from a little under \$1 billion to a little over \$3 billion every year.⁸³

A \$1-3 billion shift in consumer spending might not be significant to dominant meatpackers and corporate feedlots, but it could substantially enhance market opportunities for independent ranchers and processors. An outsized share of redirected spending is likely to occur in certain niche markets, such as grassfed, where a stronger-than-typical preference for U.S. beef is currently blunted by deceptive labeling.⁸⁴ Although sales of labeled grassfed beef totaled just over \$1 billion in 2016 —

⁸⁰ See U.S. Cattlemen’s Association, *Petition For The Imposition Of Beef Labeling Requirements: To Address “Made In U.S.A.” Or “Product Of U.S.A.” Claim 9* (Oct. 23, 2019) (citing Emily Broad Leib, et al., Harvard Food Law and Policy Clinic, et al., *Consumer Perceptions of Date Labels: National Survey 2, 4* (May 2016)) (“[P]rior studies have highlighted the importance of consistency and standardization in product labeling for retail sale. Food labels are intended to help consumers make educated purchasing decisions, but purchasers cannot make those decisions without a clear understanding of what labels mean. Id. Because of the apparent widespread use of voluntary labels of different sorts claiming beef is ‘US’ or ‘American’, the FSIS can ensure that those choosing to label their beef do so in a way that prevents consumer confusion.”) (internal citations omitted).

⁸¹ See, e.g., Kar H. Lim, et al., *U.S. Consumers’ Preference and Willingness to Pay for Country-of-Origin-Labeled Beef Steak and Food Safety Enhancements*, Selected Paper prepared for presentation at the Agricultural & Applied Economics Association’s 2011 AAEA & NAREA Joint Annual Meeting (2011).

⁸² See “Meat department retail sales in the United States from 2017 to 2022,” *statista.com* (Nov. 21, 2022), available at: [U.S. meat department sales, 2022 | Statista](https://www.statista.com/statistics/1111111/meat-department-sales-2022/)

⁸³ Notably, this calculation does not account for the fact that, at present, many consumers may not look for, or rely upon, a “Product of U.S.A.” label *because* they (correctly) believe it does not mean a product was derived from an animal born, raised, slaughtered, and processed in the United States. It also does not account for the potential impact of consumer education campaigns, undertaken after the Proposed Rule is finalized, to encourage consumers to notice and make purchasing decisions based on the “Product of U.S.A.” label as a way of supporting domestic farmers, ranchers, and processors. For these reasons, this calculation may well under-estimate the potential of the Proposed Rule to facilitate a shift in consumer spending toward U.S.-origin products.

⁸⁴ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

and only 20-25 percent of those sales were captured by U.S.-origin products — the segment still kept nearly 4,000 American ranchers in business that year.⁸⁵ Since then, sales of fresh grassfed beef products alone have gone from \$274 million⁸⁶ to \$776 million.⁸⁷ If accurate “Product of U.S.A.” labels under the Proposed Rule enable consumers to act on their preferences for U.S.-origin grassfed beef more reliably (as the RTI Survey suggests they would), the independent ranchers and processors who produce the vast majority of U.S. grassfed beef would likely recapture significant market share in this rapidly expanding niche — “send[ing] hundreds of millions of dollars into local communities each year.”⁸⁸

This “would be a major boon not just to ranchers, but to local processors, and cold storage, and everyone who has a finger in this pie,” according to Allen Williams, a 6th-generation rancher and founding partner of Grass Fed Insights, a leading consulting group on the grassfed beef market.⁸⁹ Unlike the consolidated, vertically integrated supply chain for conventional beef, which channels revenue flows toward a handful of metro-headquartered corporations, the grassfed beef supply chain is local and decentralized.⁹⁰ “Nearly all grassfed finishers work with local and regional processors” to process their cattle into carcasses and cuts, pay independent truckers and cold storage facilities to transport and hold their goods, use third-party specialty meat distributors, and sell a significant portion of their fresh beef products directly to local or regional grocers, foodservice providers, or individual consumers.⁹¹ By enabling grassfed consumers to find the American beef products they prefer, the Proposed Rule would channel spending flows not just toward American ranchers, but also toward these local food ecosystems — generating substantial “multiplier effects” for local economies across the country.⁹²

⁸⁵ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016).

⁸⁶ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016).

⁸⁷ See Keith Loria, “The expansion of grass-fed beef,” *Meat + Poultry* (March 10, 2022).

⁸⁸ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

⁸⁹ See Joe Fassler, “How rampant mislabeling puts America’s grass-fed beef producers out of business,” *The Counter* (July 16, 2018).

⁹⁰ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016).

⁹¹ See Stone Barns Center for Food & Agriculture, *Back to Grass: The Market Potential for U.S. Grassfed Beef* (2016).

⁹² See Dara Bloom, Joanna Lelekacs, & Rebecca Dunning, North Carolina State Extension, *LOCAL FOOD SYSTEMS: CLARIFYING CURRENT RESEARCH* (Nov. 14, 2018) (available at: https://content.ces.ncsu.edu/show_ep3_pdf/1685032355/23329):

Local food systems are often promoted because of their contribution to the local economy. The “multiplier effect” is the concept that money spent on local food is more likely to be re-spent within the local economy. This occurs when farmers and other local businesses buy inputs locally, employ local people, and otherwise work with other local businesses (Jablonski and Schmit, 2016; Hardesty, Christensen, McGuire et al., 2016). The economic analyses estimating the multiplier effect are complicated and depend on a variety of contextual factors. Studies estimate multiplier effects for spending on locally produced foods to be between \$1.32 and \$1.90, meaning that for every dollar spent on local products, between \$.32 and \$.90 worth of additional local economic activity takes place (Meter, 2010; Jablonski, Schmit, and Kay, 2015; Martinez et al., 2010). Research shows that the localization of food supply chains (for example, localizing a crop’s production) can result in positive economic impacts — lowering production and transportation costs and thus benefiting consumers via lower prices—but these benefits vary by region and product (Atallah, Gómez, and Björkman, 2014; Nicholson, Gómez, and Gao, 2011). Recent studies also suggest that local businesses, including small and midscale farms, are more likely than their larger-scale counterparts to buy supplies from local businesses, and farms that sell locally spend more on labor regardless of their size (Bauman, McFadden, and Jablonski, 2018; Tropp and Malini, 2017). Local farmers markets also generate spillover effects when consumers attend the market and then go on to shop at other nearby businesses (Lev, Brewer, and Stephenson, 2003). In addition, local food systems and direct markets can serve as incubators that help to support

III. The Proposed Rule is Lawful, Administrable, and Economically Justified

Unlike the current “Product of U.S.A.” labeling policy, the Proposed Rule would be a proper exercise of FSIS’s statutory mandate; enable FSIS to efficiently prevent, rather than sanction, the use of misleading U.S.-origin claims; and generate cognizable economic benefits by protecting consumers and markets from deceptive practices. Arguments to the contrary by agribusiness trade associations and foreign governments are, as we demonstrate below, meritless.

A. Legal Authority

FSIS plainly has the statutory authority to prescribe a new definition and standard of identity for the “Product of U.S.A.” label claim that is reasonably consistent with common usage and the understanding of ordinary consumers. Moreover, its exercise of that authority in the Proposed Rule does not conflict with any trade provisions of the federal inspection laws or with other provisions of federal trade law.

The federal inspection laws expressly authorize FSIS to prescribe definitions and standards of identity for terms used in product labeling “when [it] determines such action is necessary for the protection of the public.”⁹³ Further, these laws provide that FSIS must protect the public in at least one “essential” way: “By assuring that [the meat, poultry, and egg products] distributed to [the public] are . . . properly marked, labeled, and packaged.”⁹⁴ Since the distribution of “misbranded” products with “false or misleading” labels is prohibited under the federal inspection laws,⁹⁵ it follows that FSIS has not only the authority, but the duty, to prescribe a new standard of identity when — as here — substantial evidence suggests an existing one is misleading to the public.⁹⁶

In making such a prophylactic revision, FSIS is not required to substantiate either the existing definition’s deceptiveness or the proposed definition’s fidelity with mathematical precision.⁹⁷ Where an agency’s regulation is within its statutory

new food and farming businesses, thus fostering entrepreneurship and small business development (Hinrichs, Gulespie, and Feenstra, 2004; Gwin and Thiboumery, 2014; Flora, Bregendahl, and Renting, 2012).

⁹³ See 21 U.S.C. 607(c) (authority to prescribe definitions, standards of identity, and styles and sizes of type under the Federal Meat Inspection Act); 21 U.S.C. § 457 (b) (authority to prescribe definitions, standards of identity, and styles and sizes of type under the Poultry Products Inspection Act); 21 U.S.C. § 1036 (authority to promulgate regulations regarding the labeling of eggs, to issue withholding orders and to condemn misbranded products through administrative proceedings under the Egg Products Inspection Act).

⁹⁴ See 21 U.S.C. § 602 (Congressional statement of findings in Federal Meat Inspection Act); 21 U.S.C. § 451 (Congressional statement of findings in Poultry Products Inspection Act); 21 U.S.C. § 1031 (Congressional statement of findings in Egg Products Inspection Act).

⁹⁵ See Federal Meat Inspection Act, 21 U.S.C. § 610(c-d), 21 U.S.C. § 601(n); Poultry Products Inspection Act, 21 U.S.C. § 458(a)(2), 21 U.S.C. § 453(h); Egg Product Inspection Act, 21 U.S.C. § 1036(b), 21 U.S.C. § 1037(b)(4), 21 U.S.C. § 1033(l).

⁹⁶ See, e.g., *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 646 F.2d 125, 127 (4th Cir. 1981); *Federation of Homemakers v. Butz*, 466 F.2d 462, 464 (D.C. Cir. 1972) (citing *Houston v. St. Louis Independent Packing Co.*, 249 U.S. 479, 483 (1919)).

⁹⁷ Cf. *Wauszkiewicz v. Dep’t of Treasury*, 670 F.2d 296, 302 (D.C. Cir. 1981) (explaining that provision of Federal Alcohol Administration Act authorizing Secretary of Treasury to “prohibit statements on the label that are . . . false or misleading” give the Secretary reasonable discretion to “determine what is misleading” and “prohibit[,] irrespective of falsity, statements likely to mislead the consumer”) (cleaned up).

authority, the proper “standard of review is ‘only reasonableness, not perfection.’”⁹⁸ To the extent that the Proposed Rule is challenged on the adequacy of the RTI Survey or the sufficiency of FSIS’s other factual determinations — as preliminary comments submitted by the North American Meat Institute (NAMI) and the Canadian Cattle Association (CCA) suggest it might be⁹⁹ — we emphasize that FSIS is only required to demonstrate that its determinations “have a rational basis in the [entire] administrative record.”¹⁰⁰ Indeed, the Fourth Circuit has already held once (in a case brought by the American Meat Institute, coincidentally) that the USDA did not have to conduct a survey at all to determine that an existing standard was “misleading” or that a revised one “would avoid [the existing standard’s] misleading character.”¹⁰¹

Here, as explained in Section I of this comment, there is ample evidence beyond the RTI Survey, including thousands of comments by ordinary Americans and a substantial body of government and academic research, that: (1) the current “Product of U.S.A.” standard is misleading to a significant number of ordinary consumers; and (2) the proposed standard would not be so misleading. Accordingly, the fact that NAMI or other agribusiness groups might be able to “dream up scenarios” in which, after the Proposed Rule is finalized, some consumers would not notice “Product of U.S.A.” labels, would not care about “Product of U.S.A.” labels, would expect “Product of U.S.A.” labels to indicate *less* U.S. content than they do, or would still experience difficulty finding U.S.-origin products, should be “of no moment” to FSIS.¹⁰² In the end, the relevant question is not whether any number of “anomalous situations” exist, but whether the Proposed Rule “is generally designed to achieve its stated purpose and therefore has some rational connection to the agency’s goal.”¹⁰³ That, the Proposed Rule clearly has.

⁹⁸ See *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 955 (D.C. Cir. 2007) (quoting *Kennecot Greens Creek Min. Co. v. MSHA*, 476 F.3d 1064, 1071 (D.C. Cir. 2001) (“The Secretary’s regulations need not perfectly accommodate all anomalous situations in order to be reasonable under the statute.”)).

⁹⁹ See North American Meat Institute, Request for Extension of the Comment Period, Voluntary labeling of FSIS-Regulated Products With U.S.-Origin Claims, Docket No. FSIS-2022-0015 (March 14, 2023); Canadian Cattle Association, Request for Information, Voluntary labeling of FSIS-Regulated Products With U.S.-Origin Claims, Docket No. FSIS-2022-0015 (May 2, 2023).

¹⁰⁰ See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 646 F.2d 125, 127 (4th Cir. 1981). See also *Indep. Meat Packers Ass’n v. Butz*, 526 F.2d 228, 238 (8th Cir. 1975) (“To have the regulations promulgated pursuant to . . . notice and comment procedure . . . set aside, the opponents must prove that the regulations are without rational support in the record.”).

¹⁰¹ See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 646 F.2d 125, 127 (4th Cir. 1981).

¹⁰² See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 69 (D.D.C. 2013), *aff’d*, 746 F.3d 1065 (D.C. Cir. 2014) (“Plaintiffs’ recitation of various possible factual scenarios in which the Final Rule purportedly mandates inaccurate or misleading labels is offered apparently to press the point that a regulation that may in some circumstances enable the exact outcome an agency is attempting to avoid (in this case, consumer confusion) must be arbitrary and capricious. But this is not the law. In fact, it is of no moment that Plaintiffs can dream up scenarios in which, under the Final Rule, labels will in many cases be inaccurate or will sometimes omit relevant production step information, because the relevant APA question is not whether such scenarios exist, but whether the Final Rule is generally designed to achieve its stated purpose and therefore has some rational connection to the agency’s goal.”).

¹⁰³ See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 69 (D.D.C. 2013), *aff’d*, 746 F.3d 1065 (D.C. Cir. 2014) (citing *Investment Co. Inst. v. Commodity Futures Trading Comm’n*, 720 F.3d 370, 376-77 (D.C. Cir. 2013)).

Finally, contrary to what NAMI has suggested in press releases and comments responding to the petitions that precipitated this action,¹⁰⁴ the Proposed Rule would not conflict with the trade-related provisions of the federal inspection laws or with other provisions of federal trade law. Nor do these laws require FSIS to modify the Proposed Rule to reflect standards for country-of-origin labeling used in trade and customs regulation (*e.g.*, the “Substantial Transformation” standard). Specifically, NAMI has claimed that Section 20 of the FMIA (codified in 21 U.S.C. § 620) — which deals with the USDA’s authority over meat imports and is paralleled in the PPIA and EPIA — entirely prohibits FSIS from distinguishing between foreign and domestic meat products after they have been imported.¹⁰⁵ Alternatively, NAMI has suggested that Section 20 requires FSIS to adopt the “Substantial Transformation” standard for country-of-origin determinations used by tariff administrators.¹⁰⁶ NAMI is wrong on both counts.

Enacted in its current form as part of the The Wholesome Meat Act of 1967, Section 20 consolidated and strengthened the authorities of the Secretary of Agriculture with respect to foreign meat imports.¹⁰⁷ Responding to concerns expressed by consumers and domestic producers about a rising tide of cheap, often unwholesome meat imports from Australia and New Zealand, three years earlier Congress had passed the Meat Import Law of 1964 to establish a quota restriction on meat imports for the first time in the nation’s history.¹⁰⁸ In the Wholesome Meat Act, Congress went even further to protect the public and prevent unfair competition from meat imports. On the one hand, to ensure that foreign plants were safe and had to meet the same standards as domestic plants *before* exporting meat into the United States, Congress amended Section 20 to give the Secretary of Agriculture the power to license, regulate, and inspect foreign processing plants.¹⁰⁹ Congress also repealed the prohibition on meat imports that are “unhealthful, unwholesome, or unfit for human food”

¹⁰⁴ See North American Meat Institute, Frequently Asked Questions on “Product of U.S.A.” Labels for Meat and Poultry Products (2023), available at: <https://www.meatinstitute.org/ht/a/GetDocumentAction/i/231720>; North American Meat Institute, Comment Submitted to FSIS on Petition 18-05 by Organization for Competitive Markets and American Grassfed Association for change to the Food Safety and Inspection Services Standards and Labeling Policy Book on “Product of U.S.A.” (Aug. 17, 2018).

¹⁰⁵ See North American Meat Institute, Frequently Asked Questions on “Product of U.S.A.” Labels for Meat and Poultry Products (2023), available at: <https://www.meatinstitute.org/ht/a/GetDocumentAction/i/231720>; North American Meat Institute, Comment Submitted to FSIS on Petition 18-05 by Organization for Competitive Markets and American Grassfed Association for change to the Food Safety and Inspection Services Standards and Labeling Policy Book on “Product of U.S.A.” (Aug. 17, 2018).

¹⁰⁶ See North American Meat Institute, Frequently Asked Questions on “Product of U.S.A.” Labels for Meat and Poultry Products (2023), available at: <https://www.meatinstitute.org/ht/a/GetDocumentAction/i/231720>; North American Meat Institute, Comment Submitted to FSIS on Petition 18-05 by Organization for Competitive Markets and American Grassfed Association for change to the Food Safety and Inspection Services Standards and Labeling Policy Book on “Product of U.S.A.” (Aug. 17, 2018).

¹⁰⁷ See Wholesome Meat Act of 1967, Public Law 90-201, 81 Stat. 584 (Dec. 15, 1967).

¹⁰⁸ See Louis A. Kouts, The International Beef Situation and Its Impact on the United States Meat Import Program, Graduate Thesis, University of Montana (1973), available at: <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=6923&context=etd>

¹⁰⁹ See Wholesome Meat Act of 1967 § 10(f), Public Law 90-201, 81 Stat. 584, 590 (Dec. 15, 1967). See also generally Note, *The Wholesome Meat Act of 1967*, 2 Suffolk U. L. Rev. 256 (1968).

from the Tariff Act of 1930,¹¹⁰ and replaced it with a broader prohibition in the Meat Inspection Act. Specifically, the new Section 20 prohibited the import of “carcasses, parts of carcasses, meat or meat food products,” not only if they were “adulterated or misbranded,” but also if the foreign plants in which they were processed had failed to “comply with all the inspection, building, construction standards, and all other provisions of this chapter and regulations issued thereunder.”¹¹¹

On the other hand, to ensure fairness and honesty in the marketplace *after* meat products were imported into the United States, Congress gave the Secretary of Agriculture not only the same regulatory authority over imported meat the Secretary had over domestic meat — which the Tariff Act had given to the Secretary as early as 1930¹¹² — but also a duty to specially “mark and label” imported products. Once again replacing an existing provision of the Tariff Act with a broader one in the Meat Inspection Act, Congress specifically provided that:

[Imported] carcasses, parts of carcasses, meat or meat food products of cattle [and other animals covered by FMIA] . . . shall, upon entry into the United States, be deemed and treated as domestic articles subject to the other provisions of this [Act] and the Federal Food, Drug, and Cosmetic Act: *Provided*, That they shall be marked and labeled by such regulations for imported articles.¹¹³

The plain import of the main clause in this provision — which NAMI has made much of in the past — is simply that foreign meats, after entry into the United States, are to be subject to regulation under the FMIA and FDCA in the same way domestic products are subject to regulation under those laws. But even if that were not the case, the proviso — which did not exist in the Tariff Act — makes clear that FSIS has no obligation to be “import-blind” when it comes to labeling regulation. In fact, the proviso expressly directs that imported meat products “*shall* be marked and labeled” in accordance with “[specific] regulations for imported articles.” The fact that Congress authorized the Secretary of Agriculture to promulgate import-specific labeling rules for products that have *already* been imported; took that authority *out* of the

¹¹⁰ See Wholesome Meat Act of 1967 §§ 7, 10, 18, Public Law 90-201, 81 Stat. 584, 590, 600 (Dec. 15, 1967). Before Congress passed the Wholesome Meat Act of 1967, Sections 306(b) of the Tariff Act of 1930 provided as follows:

Sec. 306. Cattle, Sheep Swine, and Meats—Importation Prohibited in Certain Cases.

...

(b) Meats Unfit For Human Food.—No meat of any kind shall be imported into the United States unless such meat is healthful, wholesome, and fit for human food and contains no dye, chemical, preservative, or ingredient which renders such meat unhealthful, unwholesome, or unfit for human food, and unless such meat also complies with the rules and regulations made by the Secretary of Agriculture. All imported meats shall, after entry into the United States in compliance with such rules and regulations, be deemed and treated as domestic meats within the meaning of and subject to the provisions of [the Meat Inspection Act] and the [The Food and Drugs Act].

See Tariff Act of 1930, Ch. 497, Title III, § 306(b), 46 Stat. 689 (June 17, 1930), as amended by Pub. L. 85-867, 72 Stat. 1685 (Sept. 2, 1958).

¹¹¹ See Wholesome Meat Act of 1967 §§ 10(a), 18, Public Law 90-201, 81 Stat. 584, 590, 600 (Dec. 15, 1967).

¹¹² See Tariff Act of 1930, Ch. 497, Title III, § 306(b-c), 46 Stat. 689 (June 17, 1930), as amended by Pub. L. 85-867, 72 Stat. 1685 (Sept. 2, 1958).

¹¹³ See Wholesome Meat Act of 1967 § 10(a), 18, Public Law 90-201, 81 Stat. 584, 590 (Dec. 15, 1967); Tariff Act of 1930, Ch. 497, Title III, § 306(b), 46 Stat. 689 (June 17, 1930), as amended by Pub. L. 85-867, 72 Stat. 1685 (Sept. 2, 1958).

Tariff Act; and placed it in the Federal Meat Inspection Act, where it would be governed by a clear congressional policy to “protect the consuming public” from adulterated or misbranded products is — needless to say — indicative.

It shows that Congress believed imported products raise distinct consumer-protection and unfair-competition concerns from those addressed by tariffs and quotas — and that those concerns require distinct regulations from the Secretary of Agriculture to remedy. The FTC recently explained why Congress had good reason for so believing. Some commenters on the FTC’s “Made in U.S.A.” Labeling Rule suggested the FTC should adopt the U.S. Customs and Border Protection’s (CBP) “Substantial Transformation” standard for determining a product’s country of origin.¹¹⁴ “Based on its enforcement experience,” the FTC responded, it did not believe “standards adopted by CBP for purposes of calculating tariffs” were “an appropriate fit for the Commission’s regulation of [‘Made in U.S.A.’] claims on product labels for purposes of consumer disclosure.”¹¹⁵

To give an example of this lack of fit, the FTC turned to its enforcement experience in the drywall industry. “There is ample evidence consumers care deeply about the source of the components used to manufacture drywall for construction projects,” the FTC explained.¹¹⁶ Under a substantial transformation analysis, however, “drywall made wholly of materials from one nation, but substantially transformed in a different country, would be labeled as originating from the country where those materials were ultimately transformed into a final product.”¹¹⁷ In essence, a substantial transformation standard would allow marketers to avoid disclosing the origin of any product inputs — such as food ingredients — other than labor. As amply demonstrated by the research on consumer preference recounted in Section II.B. above, however, that information is often highly material to consumers, particularly with respect to food products.

Since the country-of-origin standards developed by customs administrators under the Tariff Act can obscure information that consumers need in order to make informed purchasing decisions, it would conflict with the consumer protection policies of the FMIA, PPIA, and EPIA for the Agency to use them. By developing its own standard for “Product of U.S.A.” claims based on how consumers understand that term in a food-product context, FSIS stayed true to its statutory mandate. The Proposed Rule is lawful.

B. Administrability

The Proposed Rule creates an administrable framework for FSIS to efficiently “protect the consuming public” and “prevent the movement and sale of” FSIS-regulated products with misleading “Product of U.S.A.” labels.¹¹⁸ Contrary to what agribusiness trade groups might suggest, the Proposed Rule’s bright-line standards for the proper use of authorized U.S.-origin claims will not “overburden” the Agency’s enforcement capacity.

¹¹⁴ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37025-26 (2021).

¹¹⁵ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37027 (2021).

¹¹⁶ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37027 (2021).

¹¹⁷ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37027 (2021)

¹¹⁸ See 21 U.S.C. 661(a); See 21 U.S.C. § 452; See 21 U.S.C. § 1032.

The Proposed Rule creates a practical, bright-line standard — essentially, that a “Product of U.S.A.” label cannot be used on an FSIS-regulated product unless all of its ingredients were derived from an animal born, raised, slaughtered, and processed in the United States, or were otherwise of U.S. origin. This is a rule everyone can understand. No rancher, farmer, processor, or vendor needs to hire an expert to know what a “[food] product derived from an animal that was born, raised, slaughtered, and processed in the United States” is. By providing a clear standard against which the legality of a “Product of U.S.A.” label claim can be tested, the Proposed Rule makes compliance a straightforward task for the vast majority of market participants while streamlining enforcement for FSIS. This is exactly how Congress anticipated the authority to “prescribe definitions and standards of identity” would enable regulators to “meet the demands of legitimate industry” and “effectively maintain” the integrity of food against “the chiseling operations of the small minority of manufacturers.”¹¹⁹

Given the administrability benefits of the Proposed Rule’s bright-line standards, FSIS should not dilute or attenuate these standards in its final rule. Specifically, in its notice accompanying the Proposed Rule, FSIS requested comment on “whether the Agency should adopt an alternative requirement for multi-ingredient products that bear the authorized claims ‘Product of U.S.A.’ or ‘Made in the U.S.A.’”¹²⁰ The Agency should not.

Under the Proposed Rule, multi-ingredient products would be allowed to bear “Product of U.S.A.” or “Made in the U.S.A.” label claims if: “(1) All FSIS-regulated components of the product are derived from animals born, raised, slaughtered, and processed in the United States; and (2) all additional ingredients, other than spices and flavorings, are of domestic origin (*i.e.*, all preparation and processing steps of the ingredients are completed in the United States).” In essence, the Proposed Rule requires all of the “food” in a multi-ingredient food product that is labeled “Product of U.S.A.” to be of U.S. origin. This requirement is consistent with consumer expectations,¹²¹ does not require more than layman expertise for producers or processors to follow, and would be readily enforceable if enforcement is required.

However, if this categorical requirement is diluted — through, for example, the introduction of an accounting test based on production costs incurred in the United States, or an exception for foreign content not reasonably available in the United States — it would introduce complexity that undermines both the administrability of the Proposed Rule and its efficacy in protecting consumers. To begin with, a percentage-based test would make enforcement depend on cost-accounting information that is manipulable, contestable, and difficult to verify without extensive investigation (if then). Moreover, a percentage-based test would “allow deceptive unqualified claims in circumstances where the low cost of the foreign input

¹¹⁹ See *Tennessee Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1011 (W.D. Tenn. 1980) (quoting H.R. Rep. 2139, 75th Cong., 3d Sess. (1938)) (“Early legislation proved inadequate to combat economic adulteration, primarily because of the problem of proving the standard against which a food product was to be judged. . . . [T]he authority to promulgate standards of identity was conferred to prevent economic adulteration, the erosion of food ‘integrity,’ and the sale of products inferior to those which the consumer expected to receive. This Congressional purpose underlies the provisions authorizing promulgation of standards of identity under the Federal Meat Inspection Act.”). See also *Armour & Co. v. Ball*, 468 F.2d 76, 80 (6th Cir. 1972) (“[O]ne purpose of the Wholesome Meat Act is to empower the Secretary to adopt definitions and standards of identity or composition so that the ‘integrity’ of meat food products could be ‘effectively maintained.’”).

¹²⁰ Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims”: Notice of Proposed Rule, 88 FR 15290, 15296 (2023).

¹²¹ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37027 (2021) (“[C]onsumer perception testing has consistently shown consumers expect products labeled as MU.S.A. to contain no more than a *de minimis* amount of foreign content.”).

does not correlate to the importance of that input to consumers.”¹²² An exception for domestically unavailable ingredients would likewise create additional enforcement burdens while allowing deceptive U.S.-origin claims to be made. There is no evidence that consumers know what ingredients are domestically available at any given time or that consumers would expect a food product with an unqualified “Product of U.S.A.” label to contain such foreign ingredients without notice.¹²³ Moreover, it is unclear that FSIS itself could positively determine that an ingredient was or was not domestically available as of the time any given U.S.-origin label claim is made. Given this, an exception for ingredients that are not reasonably available domestically could potentially devolve many enforcement actions into dueling claims about such availability that are difficult for the Agency to resolve.

For these reasons, Commenters believe the Proposed Rule is well-crafted to prevent the use of misleading U.S.-origin claims on FSIS-regulated products while facilitating administrative implementation. If the Agency nonetheless determines that FSIS inspection program personnel (IPP) may encounter difficulty verifying that generically approved “Product of U.S.A.” label claims are compliant with the Proposed Rule from their spot checks at official establishments, the Agency should consider requiring third-party certification for the use of authorized and qualified voluntary U.S.-origin claims.¹²⁴ This requirement, however, should only be imposed on marketers of size or revenue above a substantial threshold.

C. Economic Justification

The Proposed Rule would deliver substantial benefits to the public by protecting ranchers and processors from losing sales to dishonest competitors, and by protecting consumers seeking to purchase American products. It would impose no cognizable costs on the public beyond relatively minimal compliance requirements for marketers of covered products who decide to use a “Product of U.S.A.” label. Further, contrary to claims from its opponents, the Proposed Rule will not result in trade disruptions. No credible argument can be made that the Proposed Rule is economically unjustified.

As discussed more fully in Section II.D. above, the Proposed Rule will enhance consumer utility, improve market access for independent ranchers and processors, and thereby redirect purchasing power and investment toward local food economies and supply chains. These are cognizable benefits because they are consistent with the underlying policies of the federal

¹²² See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026 (2021) (“[P]ercentage-based . . . rules could allow deceptive unqualified claims in circumstances where the low cost of the foreign input does not correlate to the importance of that input to consumers. For example, the Commission’s enforcement experience has established unqualified U.S.-origin claims for watches that incorporate imported movements may mislead consumers because, although the cost of an imported movement is often low relative to the overall cost to manufacture a watch, consumers may place a premium on the origin and quality of a watch movement and consider the failure to disclose the foreign origin of this component to be material to their purchasing decision. Under those circumstances, the foreign movement likely is not a *de minimis* consideration for consumers, and an unqualified U.S.-origin claim for a watch containing an imported movement would likely deceive consumers. . . . Accordingly, the Commission declines to adopt a percentage-based standard because the ‘all or virtually all’ standard is better tailored to prevent unqualified U.S.-origin claims that will mislead consumers in making purchasing decisions.”).

¹²³ See Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37026-27 (2021) (“[C]onsumer perception testing has consistently shown consumers expect products labeled as M.U.S.A. to contain no more than a *de minimis* amount of foreign content. There is no evidence this takeaway varies in scenarios where some parts or inputs are not available in the United States. Indeed, the Policy Statement explains unqualified claims for such products could be deceptive, [e.g.,] ‘if the [nonindigenous] imported material constitutes the whole or essence of the finished product (e.g., the rubber in a rubber ball or the coffee beans in ground coffee).’”).

¹²⁴ See Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims”: Notice of Proposed Rule, 88 FR 15290, 15297 (2023).

inspection laws to protect “producers and processors” from the “destruction of markets” and “sundry losses” that misbranded products cause.¹²⁵ In contrast, cognizable costs flowing from the Proposed Rule are minimal. By and large, the harms that opponents of the Proposed Rule have suggested it will cause are not only illusory, but are “factors which Congress did not intend [FSIS] to consider”¹²⁶ in rulemaking under the federal inspection laws at all.

First, NAMI has claimed that the Proposed Rule would impose “new” recordkeeping, product segregation, and other requirements on “companies making [multi-ingredient] processed products” that currently use “Product of U.S.A.” labels.¹²⁷ But the reality is that the Proposed Rule’s requirements merely reflect what the FMIA, PPIA, and EPIA have always demanded of these companies. Each of these statutes contains its own prohibition on the sale of misbranded products, imposing an “affirmative duty” on “the companies and people engaged in the food business” to “insure that the food they sell to the public is safe and properly labeled.”¹²⁸ While FSIS’s promulgation of standards and prior-approval of labels might operate to preempt all other enforcement mechanisms for these statutory obligations, courts have long recognized that errant FSIS regulations do not excuse regulated entities from having to follow the law.¹²⁹ And the law in the case of processed-meat and -poultry manufacturers has always prohibited them from marketing any product “if its labeling is false or misleading” to the ordinary consumer “in *any* particular.”¹³⁰ Since the Proposed Rule merely aligns FSIS’s standard for “Product of U.S.A.” claims with the meaning of such claims to ordinary consumers, companies that must relabel their products or retool their operations as a result of the Rule were likely misbranding their products before the Rule was ever proposed.¹³¹ While these companies might incur some expenses to correct their disregard for federal law if the

¹²⁵ See *supra* n.40 and accompanying text.

¹²⁶ See *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983) (vacating agency action under “arbitrary and capricious” standard because it “relied on factors which Congress did not intend it to consider”).

¹²⁷ See North American Meat Institute, Frequently Asked Questions on “Product of U.S.A.” Labels for Meat and Poultry Products (2023), available at: <https://www.meatinstitute.org/ht/a/GetDocumentAction/i/231720>; North American Meat Institute, Comment Submitted to FSIS on Petition 18-05 by Organization for Competitive Markets and American Grassfed Association for change to the Food Safety and Inspection Services Standards and Labeling Policy Book on “Product of U.S.A.” (Aug. 17, 2018).

¹²⁸ See *United States v. Jorgensen*, 144 F.3d 550, 559 (8th Cir. 1998) (citing *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986)).

¹²⁹ See *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (finding that USDA regulation was “capricious and arbitrary on its face in requiring a packer to label a genuine ham as IMITATION HAM,” which “forc[ed] [the packer] into violating the statute which forbids misbranding”); *Fed’n of Homemakers v. Hardin*, 328 F. Supp. 181, 184 (D.D.C. 1971), *aff’d* (finding that “use of the ‘All Meat’ label to frankfurters that are 15 percent nonmeat is a contradiction in terms and is misleading within the meaning of 21 U.S.C. § 607(d) regardless of arbitrary and capricious USDA standard to the contrary).

¹³⁰ See Federal Meat Inspection Act, 21 U.S.C. § 610(c-d), 21 U.S.C. § 601(n); Poultry Products Inspection Act, 21 U.S.C. § 458(a)(2), 21 U.S.C. § 453(h). These provisions impose an “affirmative duty” on “the companies and people engaged in the food business” to “insure that the food they sell to the public is safe and properly labeled.” *United States v. Jorgensen*, 144 F.3d 550, 559 (8th Cir. 1998) (citing *United States v. Park*, 421 U.S. 658, 670-73 (1975); *United States v. Cattle King Packing Co.*, 793 F.2d 232, 240 (10th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986)). Importantly, courts have uniformly interpreted that “affirmative duty” to include avoiding the use of labels that are false or misleading in any respect regardless of whether it is “material,” even in criminal cases. See *id.* (“The relevant language [of the Federal Meat Inspection Act] provides that meat is misbranded ‘if its labeling is false or misleading in *any* particular.’ The statutory language does not require that the false or misleading statements be ‘material,’ and we decline to judicially rewrite the statute to add such a requirement.”).

¹³¹ Cf. Federal Trade Commission, “Made in U.S.A. Labeling Rule”: Notice of Final Rule, 86 FR 37022, 37032 (2021) (declining to recognize claim by trade association that Made in U.S.A. Labeling Rule would impose relabeling costs because “the Rule imposes no new

Proposed Rule is adopted, those are not expenses FSIS is free to consider in its cost-benefit analysis. To state the obvious: The expenses that companies must incur to stop using a voluntary label to deceive consumers in violation of their “affirmative duty” under the laws Congress passed are not a “permissible factor” for the Agency to weigh *against* the adoption of a rule that would finally bring their deceptive practices to an end.¹³²

Second, NAMI and CCA have claimed that the Proposed Rule would either: (1) “disrupt” the “integrated” meat and livestock industries of the United States, Canada, and Mexico;¹³³ or (2) “trigger international trade retaliation” by Canada and Mexico under a 2012 decision by the World Trade Organization (WTO), which found that FSIS’s 2009 mandatory country-of-origin labeling (MCOOL) rule violated the WTO Agreement on Technical Barriers to Trade (TBT).¹³⁴ These chicken-little warnings deserve no credence.

To begin with, the Canadian Embassy has already acknowledged that the Proposed Rule is not a “trade barrier” and would not justify retaliatory action under the 2012 WTO decision.¹³⁵ If the Proposed Rule is not a barrier to trade, then it is unlikely to “disrupt” cross-border supply chains so much as spur voluntary adjustments by market participants “based on the value consumers place on products fully raised and processed in the United States.”¹³⁶ In all events, if the livestock and meat industries are as “integrated” across Canada, the United States, and Mexico as NAMI and CCA suggest — and if that

requirements” beyond existing law and “products requiring relabeling as a result of the [Rule] were likely deceptively labeled prior to the Rule’s publication”).

¹³² Considering that Congress enacted the federal inspection laws to “prevent the sale or movement” of misbranded products, and delegated standard-setting authority to FSIS “for the protection of the public” from such products, *see* 21 U.S.C. 661(a); 21 U.S.C. 607(c); 21 U.S.C. § 452; 21 U.S.C. § 457 (b); 21 U.S.C. § 1032; 21 U.S.C. § 1036, the costs to be incurred by companies in order to stop misbranding their products are plainly an “impermissible factor” for FSIS to consider. *Cf. American Trucking Ass’n v. Whitman*, 531 U.S. 457, 464, 71 (2001) (vacating agency rule upon holding that costs to polluters were an “impermissible factor” for EPA to consider in promulgating regulations under Clean Air Act provision instructing EPA to set ambient air quality standards that “are requisite to protect the public health” and “allow[] an adequate margin of safety”). More broadly, there is substantial evidence in the legislative history of the Wholesome Meat Act of 1967 that Congress sought, not only to prohibit companies from misbranding and adulterating products, but also to obviate any competitive advantage that then-unregulated or violative food companies derived from such misbranding and adulterating. *See generally* Comment, *The Wholesome Meat Act and Intrastate Meat Plants*, 4 Creighton L. Rev. 86 (1970-1971). Requiring such companies to incur expenses in order to end their violations of the law is a means to accomplishing that Congressional purpose, not a societal cost for the Agency to weigh against compelling such companies to end their violations of the law. *Cf. Office of Management & Budget, Proposed Circular A-4: Regulatory Analysis 3* (April 6, 2023) (“Regulatory analysis . . . does not supplant any analytic requirements or other requirements set out in the statutes that authorize or require agency action[.]”).

¹³³ *See* North American Meat Institute, Request for Extension of the Comment Period, Voluntary labeling of FSIS-Regulated Products With U.S.-Origin Claims, Docket No. FSIS-2022-0015 (March 14, 2023); Canadian Cattle Association, Request for Information, Voluntary labeling of FSIS-Regulated Products With U.S.-Origin Claims, Docket No. FSIS-2022-0015 (May 2, 2023).

¹³⁴ *See* North American Meat Institute, Frequently Asked Questions on “Product of U.S.A.” Labels for Meat and Poultry Products (2023), available at: <https://www.meat institute.org/ht/a/GetDocumentAction/i/231720>

¹³⁵ *See* Jim Eadie, “Canadian official: ‘Product of U.S.A.’ label concerning, but not trade barrier,” SwineWeb (May 9, 2023).

¹³⁶ *Cf. Food Safety and Inspection Service, “Voluntary Labeling of FSIS-Regulated Products With U.S.-Origin Claims”: Notice of Proposed Rule, 88 FR 15290, 15295 (2023)* (“[A]dopting the proposed definition of the ‘Product of U.S.A.’ claim to mean the product was derived from an animal born, raised, slaughtered, and processed in the United States would enhance consumer purchasing decisions, result in truthful, less misleading “Product of U.S.A.” labels, decrease false impressions about the origin of FSIS-regulated products in the marketplace . . . [and] allow consumers to better comparison shop between products based on the value that consumers place on products fully raised and processed in the United States.”).

integration is so economically significant — then the fact that some market participants would (allegedly) prefer to attenuate their cross-border ties rather than drop their voluntary “Product of U.S.A.” labels shows the value of that label as a consumer signal. And, if the “Product of U.S.A.” label *is* such a valuable signal to consumers — the majority of whom, again, believe it indicates a food product derived entirely, or almost entirely, from U.S.-origin animals and other ingredients — then FSIS should ensure it directs consumers to the products they expect it would. In the end, the Agency’s statutory mandate is to prescribe standards of identity that protect consumers from being deceived into buying products “inferior to those which [they] expect to receive.”¹³⁷ It is not at liberty “to disregard [that statutory mandate] in favor of a rule that conform[s] to every aspect of the WTO decision” — let alone in favor of a rule designed to mitigate risks of retaliatory tariffs that Canada has already made clear are illusory.¹³⁸

IV. Conclusion

In light of the foregoing, Commenters urge FSIS to move decisively and issue a strong final rule establishing that meat, poultry, egg, and other FSIS-regulated products must be derived from animals born, raised, slaughtered, and processed in the United States to bear a “Product of U.S.A.” label. In doing so, the Agency would take a significant step toward giving consumers the information about where their food comes from that, in survey after survey, consumers have indicated they want to have.¹³⁹ Commenters thank FSIS for its efforts and urge the Agency to proceed quickly toward a final rule that effectively protects the nation’s brand.

Sincerely,

Farm Action
American Grassfed Association
Rural Coalition

¹³⁷ See *Armour & Co. v. Ball*, 468 F.2d 76, 81 (6th Cir. 1972) (quoting *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 221-222 (1943)).

¹³⁸ Cf. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 968 F. Supp. 2d 38, 73 (D.D.C. 2013), *aff’d*, 746 F.3d 1065 (D.C. Cir. 2014) (finding that “[t]he [Agricultural Marketing Service] was not free to disregard the [MCOOL] statute in favor of a rule that conformed to every aspect of the WTO decision.”).

¹³⁹ In 2010, a Consumers Reports poll found that 93 percent of consumers want country-of-origin labeling on meat products, and 95 percent agree that country-of-origin labeling for products should always be available at the point of purchase. See Consumer Reports Nat’l Res. Center, Country of Origin labeling Poll (Oct. 2010). In 2016, a more comprehensive Consumer Reports study found that 87 percent of consumers want labels on meat to reflect the country of origin, with the majority of consumers (60 percent) further confirming that they want the label to include information on where the animal was born, raised, and slaughtered. See Consumer Reports Nat’l Res. Center, *Food Labels Survey: 2016 Nationally-Representative Phone Survey* 3, 9 (Apr. 6, 2016).

Appendix A. Interests of Commenters

Farm Action is a farmer-led advocacy organization dedicated to building a food and agriculture system that works for all Americans instead of a handful of powerful corporations. Headquartered in Missouri, Farm Action conducts research, develops policy, and undertakes advocacy efforts informed by the experience and priorities of its Local Leader network, which includes farmers, ranchers, food chain workers, consumers, and rural community leaders across the country. The Proposed Rule will affect Farm Action's mission and the interests of many of its Local Leaders in the ways described in the Comment.

The **American Grassfed Association (AGA)** is a producer-led trade organization whose membership includes hundreds of American grassfed ranchers as well as allied processors, consumers, and other stakeholders. AGA operates the country's leading grassfed certification program to maintain a credible, transparent national standard for grassfed animal production, undertakes marketing and educational programs to expand markets for grassfed products, and advocates for public policies that support grassfed producers, regenerative agriculture, and rural economies. As described in the Comment, the Proposed Rule will have a significant impact on AGA's members who are grassfed ranchers, processors, and consumers.

Rural Coalition is an alliance of organizations representing farmers, farm workers, and indigenous, migrant, and working people in rural communities across North America. Formed in 1978 by members rooted in the rural civil rights and anti-poverty movements, Rural Coalition provides capacity-building and technical-assistance services to marginalized or underserved farmers and farmworkers, conducts participatory research with served communities, and advocates for federal policies that will improve conditions for the rural poor, the rural underprivileged, and rural victims of discrimination. As described in the Comment, the Proposed Rule will affect economic opportunities for many of the farmers and rural communities Rural Coalition represents.