IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; SOUTH DAKOTA STOCKGROWERS ASSOCIATION; FARM AND RANCH FREEDOM ALLIANCE; KENNY and ROXIE FOX; and RICK and THERESA FOX,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; BROOKE L. ROLLINS, in her official capacity as Secretary of Agriculture; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; MICHAEL WATSON, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,

Defendants.

Case No. 5:24-cv-05085-ECS

ORAL ARGUMENT REQUESTED

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Contrary to its arguments, the United States Department of Agriculture ("USDA") and the Animal and Plant Health Inspection Service ("APHIS") (collectively the "Agency") do not have the authority to mandate that ranchers apply visually readable Electronic Identification ("EID") eartags to some 11 million cattle and bison each year. This case turns on several questions, including what limits were placed on the Agency's purported authority, and whether the Agency, in changing its position from permitting visual-only non-EID eartags, ran afoul of the Administrative Procedure Act ("APA"). The Agency's final rule mandating that "all official eartags sold for or applied to cattle and bison must be readable both visually and electronically[,]"[1] is just the most recent action in the Agency's decades-long attempts to electronically tag and track all cattle without Congressional authorization. Those efforts have occurred in fits and starts, with the Agency proposing broad mandates, then pulling back when faced with public criticism, and legal and economic realities.

The EID Final Rule places significant financial burdens on Plaintiffs and other American ranchers and farmers, but achieves little, if any, of the benefits claimed. Critically, the EID Final Rule, including the Secretary's determination that changing from visual-only eartags to visual EID eartags is necessary, is not substantially justified. In defending the Rule, the Agency makes critical errors in alleging that the Plaintiffs, Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF USA"), South Dakota Stockgrowers Association ("SDSGA"), Farm and Ranch Freedom Alliance ("FARFA") (collectively the "Organizational Plaintiffs"), Kenny and Roxie Fox, and Rick and Theresa Fox (collectively the "Individual Plaintiffs"), lack standing to pursue this challenge. For example, the Agency appears to not understand that the alternative

[1] *Use of Electronic Identification Eartags as Official Identification in Cattle and Bison*, 89 Fed. Reg. 39,540, 39,565 (May 9, 2024) ("EID Final Rule").

official identification methods in 9 C.F.R. § 86.4 are not available to the Individual Plaintiffs or the Organizational Plaintiffs' identified members. The Agency also argues that, despite the Final Rule's language, veterinarians and ranchers are not required to apply visually readable EID eartags when they vaccinate cattle for brucellosis (also called "bangs vaccination"). These arguments evince a fundamental lack of knowledge about how cattle producers identify their cattle, conduct basic herd management practices, and comply with official identification requirements for vaccination and interstate movement. This misapprehension is inexplicable in the agency tasked with regulation of the industry.

The Plaintiffs have sufficiently alleged their standing to maintain this suit and because the Plaintiffs have standing and have stated claims for which this Court may grant relief, the Agency's motion should be denied.

BACKGROUND

A. The Animal Health Protection Act

Enacted in 2002, the Animal Health Protection Act ("AHPA"), aims to prevent, detect, control, and eradicate animal diseases and pests. 7 U.S.C. § 8301. It permits the Secretary to "prohibit or restrict" the interstate movement of animals "if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock[.]" 7 U.S.C. § 8305(1).

Under the AHPA, "[t]he Secretary may promulgate such regulations, and issue such orders, as the Secretary determines necessary to carry out [the Act]." 7 U.S.C. § 8315. Violations of the AHPA are enforced through its penalty provision, which provides for civil penalties, and criminal fines and imprisonment. 7 U.S.C. § 8313.

B. Animal Disease Traceability

Animal disease traceability ("ADT") helps to determine "where diseased and at-risk animals are, where they have been, and when[.]" Am. Compl. ¶ 99. In 2005, APHIS published plans for a National Animal Identification System ("NAIS") that would have required electronic tagging and tracking of all cattle in the country, from birth to death. *Id.* ¶ 3. APHIS did not formally propose or finalize any regulatory requirement under NAIS and, in 2010, after widespread opposition, then-Secretary Vilsack withdrew the plan. *Id.* Since 2010, the Agency operated an ADT framework to further ADT efforts. *Id.* ¶¶ 101–06. In support of the ADT program and its goals, APHIS has proposed and promulgated a series of regulations, guidance, and policy documents. *Id.* ¶ 107.

1. The 2013 ADT Rule

On January 9, 2013, APHIS promulgated the 2013 ADT Rule regulating the traceability of livestock moving interstate. *Traceability for Livestock Moving Interstate*, 78 Fed. Reg. 2,040 (Jan. 9, 2013); Am. Compl. ¶ 108. The 2013 ADT Rule established requirements for the official identification and documentation necessary for the interstate movement of certain cattle and bison, as well as specific regulations for management of tuberculosis and brucellosis. 78 Fed. Reg. at 2,064–75. The rule defined "official Identification Devices and Methods" to include an "official eartag," properly registered brands accompanied by an official brand inspection certificate, tattoos, and other identification methods acceptable to breed associations (accompanied by a breed registration certificate), "group/lot" identification, backtags, or other forms of identification as agreed to by the shipping and receiving states. Am. Compl. ¶ 110 (quoting 78 Fed. Reg. at 2,072–73).

The 2013 ADT Rule "[did] not prohibit the use of RFID technology and electronic records." Am. Compl. ¶ 111 (quoting 78 Fed. Reg. at 2,062). However, the 2013 ADT Rule did

bar States and Tribes "from mandating the use of RFID or electronic records, or any other specific technology, for animals moving into their jurisdiction." *Id.* In 2014, USDA began enforcing the rule, including issuing penalties. Am. Compl. ¶ 112.

2. APHIS Attempts to Mandate RFID Tracking

In April of 2019, APHIS issued a "Factsheet" that purported to require the use of RFID eartags for certain cattle and bison moving interstate.[2] Am. Compl. ¶¶ 6, 119. Without following notice-and-comment procedures, the Factsheet effectively rewrote the 2013 ADT Rule by discontinuing the use of metal eartags and requiring RFID eartags for certain "beef and dairy cattle and bison moving interstate." *Id.* ¶ 120. It also suggested, contrary to the 2013 ADT Rule's exclusion for feeder cattle, that the RFID "tags should be applied at the time of birth or before the animal moves off the farm in interstate commerce." *Id.* ¶ 121. Plaintiffs Kenny and Roxie Fox and R-CALF USA filed suit and within weeks APHIS retracted the Factsheet and mooted the related claims. *Id.* ¶ 123.

In July 2020, APHIS published a notice that it was considering "a proposal wherein APHIS would only approve RFID tags as the official eartag for use in interstate movement of cattle and bison that are covered under [9 C.F.R. part 86]" and sought public comments regarding the proposal. *Use of Radio Frequency Identification Tags as Official Identification in Cattle and Bison*, 85 Fed. Reg. 40,184, 40,185 (July 6, 2020); Am. Compl. ¶ 124. The July 2020 Notice included a nearly identical implementation timeline as the 2019 Factsheet and would have made RFID eartags the only official eartag available, but it would have continued to permit the use of other official identification forms as outlined in the 2013 Final Rule. *Id.* ¶¶ 125, 126. APHIS

[2] Defendants make no mention of the "Factsheet" in their Brief. *See* Mot. Br. at 6–8.

received over 935 comments in response to the Notice and ultimately determined that it would not finalize the July 2020 Notice. *Id.* ¶¶ 127–29.

3. The EID Proposed Rule and EID Final Rule

APHIS published a proposed rule on January 19, 2023. *Use of Electronic Identification Eartags as Official Identification in Cattle and Bison*, 88 Fed. Reg. 3,320, 3,323 (Jan. 19, 2023); Am. Compl. ¶ 130. As with the July 2020 Notice, the Proposed Rule required that "all official eartags sold for or applied to cattle and bison must be readable both visually and electronically." Am. Compl. ¶¶ 131, 135. Visual-only metal eartags "applied to cattle and bison before [the implementation date] would continue to be recognized as official identification for the life of the animals." *Id.* ¶ 138. The Proposed Rule was initially open for a 60-day comment period, which was extended for an additional 30 days ending on April 19, 2023. *Id.* ¶ 139. APHIS received 2,006 comments by the end of the extended comment period. *Id.* As with the July 2020 Notice, commentors included "industry groups, producers, veterinarians, State departments of agriculture, and individuals." *Id.* Plaintiffs submitted comments opposing the Rule. *Id.* ¶¶ 29, 53, 68, 85.

On May 4, 2024, APHIS and USDA adopted the EID Final Rule requiring that "all official eartags sold for or applied to cattle and bison must be readable both visually and electronically (EID)[.]" Am. Compl. ¶ 148 (quoting 89 Fed. Reg. at 39,550). The Rule's official identification requirement applies to "[a]ll sexually intact cattle and bison 18 months of age or over," "[a]ll dairy cattle," "[c]attle and bison of any age used for rodeo or recreational events;" and "[c]attle and bison of any age used for shows or exhibitions." Am. Compl. ¶ 149 (quoting 9 C.F.R. § 86.4(b)(1)(iii)). As a result of the EID Final Rule, APHIS and USDA ended the use of non-EID brucellosis eartags. *See* APHIS, *Official Eartags – Criteria and Options*, at 2–3 & n.4 (Jan. 31, 2025), https://www.aphis.usda.gov/sites/default/files/adt-eartags-criteria.pdf (metal eartags may

only be used if applied before the Rule's effective date). [3] Thus, any cattle bangs vaccinated after November 5, 2024 must be tagged with a visually readable EID eartag. *See* Am. Compl. ¶ 150 (citing 9 C.F.R. § 78.1 and 89 Fed. Reg. at 39,554).[4] The EID Final Rule went into effect on November 5, 2024. 89 Fed. Reg. at 39,540.

C. Procedural Background

Plaintiffs filed their initial Complaint on October 20, 2024, seeking declaratory and injunctive relief under the Administrative Procedure Act ("APA"). ECF No. 1. On January 28, 2025, Defendants moved to dismiss the Complaint for lack of standing. ECF Nos. 18, 19. In the alternative, Defendants sought dismissal of Count One (alleging violations under 5 U.S.C. § 706(2)(C)) and Count Three (alleging violation of the Regulatory Flexibility Act). *Id.*

On February 18, 2025, Plaintiffs filed an Amended Complaint that removed Tracy and Donna Hunt as Plaintiffs; included additional allegations regarding the Fox Plaintiffs, Am. Compl. ¶¶ 69–84; added information regarding the Organizational Plaintiffs' members impacted by the EID Final Rule, *id.* ¶¶ 16–28, 33–52, 57–67; added factual information, *id.* ¶¶ 149–51; moved certain claims from Count One (alleging violations under 5 U.S.C. § 706(2)(C)) to Count Two (alleging violations under 5 U.S.C. § 706(2)(A)), *id.* ¶¶ 207–10; and dropped Count Three.

STANDARD OF REVIEW

The Agency makes a facial challenge to Plaintiffs' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). Under Rule 12(b)(1), "the party asserting jurisdiction holds the burden of proof to show that this Court is vested with jurisdiction to hear the underlying

[3] This Court may take judicial notice of public records, as well as websites. *See United States v. Fink*, 393 F. Supp. 2d 935, 939 (D.S.D. 2005); *see also Bauer v. AGA Serv. Co.*, 25 F.4th 587, 591 (8th Cir. 2022) (taking judicial notice of information on the World Health Organization's website).

[4] The Agency incorrectly claims that the EID Final Rule did not modify the brucellosis eartag requirements. Mot. Br. 12–13; *see infra* I.A.2.

claims." *Freeman v. Clay Cnty. Bd. of Cnty. Comm'rs*, 706 F. Supp. 3d 873, 880 (D.S.D. 2023). "In a facial attack, 'the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)).

The Agency moves in the alternative to dismiss Count One and partially dismiss Count Two under Rule 12(b)(6). Under that Rule, courts "assume the truth of all factual allegations in the complaint and make all reasonable inferences in favor of the nonmoving party[.]" *Delker v. MasterCard Int'l, Inc.*, 21 F.4th 1019, 1024 (8th Cir. 2022). Detailed facts are not required, "a plaintiff need only allege sufficient facts to provide 'fair notice' of the claim and its basis." *Id.* A court should deny a motion to dismiss if the complaint includes "sufficient factual matter" that, if "accepted as true," states a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). Under Rule 12(b)(6), "[t]he key issue is threshold plausibility, to determine whether a plaintiff is entitled to present evidence in support of his claim and not whether it is likely that he will ultimately prevail." *Delker*, 21 F.4th at 1024.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING

Plaintiffs establish Article III standing when they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). An injury in fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "Where, as here, the compliance with the law is coerced by

threat of civil or criminal enforcement penalties, plaintiffs' injury is actual or imminent." *SD Voice v. Noem*, 380 F. Supp. 3d 939, 954 (D.S.D. 2019) (citing *Keller v. City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013)). An "[i]njury is 'fairly traceable' to the government conduct or regulation in question when there is an alleged causal connection between the government's conduct or regulation and the plaintiff's injury." *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 687 (N.D. Iowa 2010) (citing *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009)).

"'The standing inquiry is merely a threshold inquiry'; it does not present the 'higher hurdles' of pleading a claim to relief on the merits under Federal Rule of Civil Procedure 12(b)(6)." *Huizenga v. Indep. Sch. Dist. No. 11*, 44 F.4th 806, 811 (8th Cir. 2022) (quoting *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010)). As such, "pleading Article III standing requires only 'general allegations of injury, causation, and redressability.'" *Id.* (quoting *In re SuperValu, Inc.*, 870 F.3d 763, 769, 773 (8th Cir. 2017)). And "[f]or standing purposes, [courts] accept as valid the merits of [Plaintiffs'] legal claims[.]" *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022).

A. The Individual Plaintiffs Have Standing

Kenny and Roxie Fox and Rick and Theresa Fox have plausibly alleged that—as a direct result of the EID Final Rule—they are now required to tag their cattle with visually readable and EID eartags or risk civil or criminal enforcement penalties. Am. Compl. ¶¶ 76, 80–83, 98, 191 197–99. That is a legally cognizable injury that is directly traceable to the Defendants. The Amended Complaint pleaded factual allegations supporting standing and this Court has jurisdiction to resolve the Individual Plaintiffs' claims.

The Agency's arguments show that it lacks a fundamental understanding about how cattle producers identify their cattle, conduct basic herd management, and comply with official

identification requirements for vaccination and interstate movement. Because of its misunderstandings, or lack of knowledge, the Agency also fails to recognize how the EID Final Rule interacts with these practices and processes, and how it has placed mandatory EID obligations on the Individual Plaintiffs for which there are no alternatives.

The Agency makes three arguments in support of its motion: (1) that the Individual Plaintiffs are not impacted by the EID Final Rule because they can rely on "brands and tattoos[,]" and their use of EID eartags is "voluntary[,]" *see* Mot. Br. at 16–17, 18–21; (2) that there is no Article III injury or redressability because the Individual Plaintiffs do not challenge the brucellosis regulation, *see id.* at 18; and, (3) that the costs the Individual Plaintiffs claim are speculative and not cognizable under Article III, *see id.* at 21–22. Each of these arguments is wrong and Individual Plaintiffs have made sufficient plausible allegations to establish jurisdiction.

1. Individual Plaintiffs Do Not and Cannot Only Rely on Brands and Breed Tattoos; Their Use of EID Eartags Is Not Voluntary

The Individual Plaintiffs cannot solely rely on brands and breed tattoos as evidenced by the regulatory text. Because of the EID Final Rule, 9 C.F.R. § 86.4(a)(1)(i) was amended to now require that "all official eartags sold for or applied to cattle and bison must be readable both visually and electronically (EID)" as of November 5, 2024. *See also* Am. Compl. ¶ 148 (quoting 89 Fed. Reg. at 39,550); Am. Compl. ¶ 190 (citing 89 Fed. Reg. at 39,540 and quoting *id.* at 39,546). The EID Final Rule leaves in place alternative forms of official identification, including the use of "brands" and "tattoos and other identification methods acceptable to a breed association[.]" 9 C.F.R. § 86.4(a)(1)(ii), (iii); *see also* Am. Compl. ¶ 110. The tattoos identified in the regulation are not just any tattoos, they are breed tattoos. *See* 9 C.F.R. § 86.4(a)(1)(iii) (tattoos must be "acceptable to a breed association for registration purposes" and must be "accompanied by a breed registration certificate"). These alternative methods may only be used if they are "agreed

to by the shipping and receiving State or Tribal animal health authorities[.]" 9 C.F.R. § 86.4(a)(1)(ii), (iii). Thus, it is not enough for cattle and bison to be branded or have a breed tattoo, the shipping and receiving States or Tribes must also have an agreement in place recognizing those methods for animal disease traceability.

As Plaintiffs have alleged, there is no agreement pursuant to § 86.4(a)(1)(ii) or (iii) between South Dakota and Nebraska for the types of cattle that they ship. *See* Am. Compl. ¶¶ 73–74. Nor does the Agency contest that fact. Instead, it argues that the statement is conclusory and directly contradicted by the pleadings, *see* Mot. Br. at 18–19. Not so. It is a simple matter of fact and public record that there is no agreement between South Dakota and Nebraska that would permit them to rely on brands or breed tattoos. *See also* Nebraska Department of Agriculture, *Livestock Import Requirements* (last visited Apr. 17, 2025), https://nda.nebraska.gov/animal/imports/import-requirements.html (select "South Dakota" and "Cattle – Feeder/Slaughter Beef"); Nebraska Department of Agriculture, *Feeder/Slaughter Beef Cattle* (last visited Apr. 17, 2025), https://nda.nebraska.gov/animal/imports/feeder-beef-cattle.html (providing requirements for importing feeder and slaughter beef cattle as requiring "EID" or "NUES Tag if applied before November 5, 2024"). Plaintiffs alleged as much and for standing purposes, this Court must accept the merits of their legal claims as valid.

The contradiction the Agency perceives in the Amended Complaint, *see* Mot. Br. at 18–19, is a direct result of the fact that the Agency does not understand how producers use brands, breed tattoos, and other tattoos in identifying their cattle or moving them interstate. The Agency's lack of knowledge about ranching practices is not a pleading failure, especially not when the Defendants are supposedly expert government agencies charged with overseeing the nation's livestock. For example, the Agency claims that Plaintiffs failed to plead a change in Nebraska law

that impacted the methods Kenny and Roxie Fox rely on, *see* Mot. Br. at 18–19, but they pleaded that there was no shipping and receiving agreement between South Dakota and Nebraska that would allow them to move their cattle and that they can no longer use metal eartags as they had in the past. Am. Compl. ¶¶ 70–71. The change in the law that created the issue for the Foxes was the EID Final Rule, which eliminated their ability to rely on non-EID eartags when moving their cattle interstate. *Id.*

The Agency pulled the word "exclusively" out of Individual Plaintiffs' statements that they "exclusively on branding, as well as the metal eartags and tattoos, to comply with the identification and traceability requirements for the interstate movement of their cattle" as some sort of standing trump card. *See* Mot. Br. at 19 (quoting Am. Compl. ¶¶ 70, 79). But that argument is again predicated on the Agency's lack of knowledge of ranching practices and its failure to understand that the Individual Plaintiffs can no longer rely on non-EID eartags, as they have in the past. The Agency also fails to recognize that it is the EID Final Rule that ended Individual Plaintiffs' reliance on such eartags. The Agency's reading further ignores the statements in ¶¶ 70, 71, and 79 that generally convey the Individual Plaintiffs' methods of identification, including that they do not and have not relied on "[g]roup/lot identification[,]" which is another alternative method of identification under 9 C.F.R. § 86.4.

While the fact that there is no shipping and receiving agreement between South Dakota and Nebraska that permits reliance on brands or breed tattoos should end this challenge, the Agency's argument fails for other reasons. *First*, in South Dakota, brands are not used for animal disease traceability purposes. Brand registration and use is highly regulated in South Dakota. *See generally* S.D.C.L. ch. 40-18 (establishing the South Dakota Brand Board), ch. 40-19 (governing brand registration and use), ch. 40-20 (establishing a livestock ownership and inspection area

covering the Individual Plaintiffs), ch. 40-21 (governing brand inspection and theft protection). *See also* A.R.S.D. ch. 12:10:01, ch. 12:10:02, ch. 12:10:03. And registered brands, like those owned by the Individual Plaintiffs, *see* Am. Compl. ¶¶ 71–72, 79, are prima facie evidence of ownership.[5] S.D.C.L. § 40-19-24. For example, under South Dakota law, when Kenny and Roxie Fox move their cattle from their ranch near Belvidere to the open market sale barn in Valentine, Nebraska, they must leave South Dakota's livestock ownership and inspection area and are required to provide proof that they own their cattle, which is accomplished through their registered brands. *See, e.g.,* S.D.C.L. §§ 40-20-4, 40-20-7, 40-20-10 (providing requirements for shipping livestock out of the livestock ownership area). Thus, as the Amended Complaint alleges, they rely on their brands "to comply with the identification … requirements for the interstate movement of their cattle." Am. Compl. ¶ 70; *see also id.* ¶ 71. They were under no obligation to explain this process in detail, as their general allegations about their practices "embrace those specific facts that are necessary to support the claim." *In re SuperValu, Inc.*, 870 F.3d at 769.

Second, the metal eartags and tattoos referenced in the Amended Complaint relate to the metal eartags and tattoos that were applied to indicate brucellosis vaccination before the EID Final Rule became effective. *See* Am. Compl. ¶¶ 71–72, 75, 79–80; *see also* APHIS, *NVAP Reference Guide: Brucellosis* (*Control and Eradication*) (last modified Feb. 4, 2025), https://www.aphis.usda.gov/nvap/reference-guide/control-eradication/brucellosis (explaining tattooing process administered after brucellosis vaccination). But since November 5, 2024, as required by the EID Final Rule, the orange metal eartags may not be applied during brucellosis vaccination. *See* Am. Compl. ¶¶ 148–50; *see also* APHIS, *Official Eartags – Criteria and Options*,

[5] Registered brands can be searched by owner on the South Dakota State Brand Board's website. South Dakota State Brand Board, *Brand Search* (last visited Apr. 17, 2025), https://brands.sd.gov/brand_search.aspx.

at 2–3 & n.4 (noting that the orange metal eartag is "[o]nly valid as official identification if applied prior to November 5, 2024"). Thus, each year, when Kenny and Roxie Fox bangs vaccinate their cattle, which they do as part of their regular herd management practices, *see* Am. Compl. ¶ 75, they must now apply a visually readable EID eartag by operation of the EID Final Rule in addition to a bangs tattoo. *See* Am. Compl. ¶¶ 148–50, 75; *see also* 9 C.F.R. § 78.1 (defining "official calfhood vaccinate" and "official vaccinate"); Am. Compl. ¶ 151 (noting that "[b]angs vaccination should, and is typically done before cattle turn 12 months of age"). That EID eartag placed during the bangs vaccination process also fulfills the official identification requirement for interstate movement purposes, just as the metal brucellosis tag fulfilled that requirement before the EID Final Rule changed the requirements. *See* 9 C.F.R. § 86.4(c) (generally "no more than one official eartag may be applied to an animal"); *see also* 9 C.F.R. § 78.5 ("Cattle may not be moved interstate except in compliance with this subpart and with 9 CFR part 86."); 9 C.F.R. § 78.20 ("Bison may not be moved interstate except in compliance with this subpart and with 9 CFR part 86.").

The Agency also includes a lengthy footnote arguing that "[i]t is not even apparent from their pled allegations that the Individual Plaintiffs are subject to the ADT requirements in the first place." Mot. Br. at 17 n.4. This footnote argument should not be considered. *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 848 n.2 (8th Cir. 2002) (courts in this Circuit do "not consider … claim[s] improperly presented in a footnote"). Even if it is, the Agency is wrong based on the text of the regulation. Under 9 C.F.R. § 86.4(b)(1)(i)(C), cattle moving interstate do not need to be tagged prior to shipping if they

> are moved interstate directly to an approved tagging site and are officially identified before commingling with cattle and bison from other premises or identified by the use of backtags or other methods that will ensure that the identity of the animal is accurately maintained until tagging so that the official eartag can be correlated to the person responsible for shipping the animal to the approved tagging site.

But as the regulation states the animal is still tagged with an "official eartag," meaning a visually readable EID tag. *Id.* Indeed, the definition of "approved tagging site" contemplates that cattle transferred to such sites then "have official identification applied *on behalf of their owner* or the person in possession, care, or control of the animals when they are brought to the premises." 9 C.F.R. § 86.1 (emphasis added). Someone must pay for those official tags that are placed on the cattle on behalf of their owner. As the Individual Plaintiffs pleaded, based on their decades of ranching experience, the EID Final Rule increases the costs of their ranching operations. Am. Compl. ¶ 86. That is because the Individual Plaintiffs foot the bill regardless of whether they tag their animals when they are vaccinated, or before loading them on a hauler to ship out of state, or upon arrival to an approved tagging site, like a sale barn.

The Agency's arguments are all predicated on its mistaken view that the Individual Plaintiffs have alternative identification methods available to them under 9 C.F.R. § 86.4. As a result of its own misunderstanding, the Agency incorrectly argues that Individual Plaintiffs have made a "voluntary choice" that defeats both Article III injury and traceability concerns. *See* Mot. Br. at 18–21. But the fact is that the choice is not voluntary. As alleged, Kenny and Roxie Fox move their cattle across state lines multiple times each year to sell them in Valentine, Nebraska. Am. Compl. ¶¶ 71, 72. South Dakota and Nebraska do not have an agreement in place that permits them to ship their cattle into Nebraska using the alternative identification methods contemplated by § 86.4(a)(1)(ii)–(iii). Am. Compl. ¶¶ 73, 74. Thus, their only option to be able to keep selling their cattle in Valentine is to comply with the EID Final Rule's official eartag requirement. Am. Compl. ¶¶ 74, 76. When the Individual Plaintiffs bangs vaccinate their cattle, which they do each year, they must apply visually readable EID eartags because of the Rule. Am. Compl. ¶¶ 75, 76, 148–51. Those EID eartags serve as the official identification for both brucellosis vaccination and

interstate movement purposes as animals cannot have "more than one official eartag" applied, except in circumstances not relevant here. 9 C.F.R. § 86.4(c). Thus, as a direct result of the EID Final Rule, the Individual Plaintiffs' only option is to tag their cattle with visually readable EID eartags as required by the Rule. They have been injured by the EID Final Rule and those injuries are fairly traceable to the Agency.

The Agency's cases do not counsel otherwise, *see* Mot. Br. at 19–21. The facts in this case are substantially different than those that were at issue in Defendants' cases. For example, unlike the students in *E.T. v. Paxton*, 19 F.4th 760 (5th Cir. 2021), Individual Plaintiffs have established that they face "an 'either/or' choice as a result of [the EID Final Rule]." *Id.* at 765. Either Individual Plaintiffs tag their cattle with visually readable EID eartags or they risk violating the law and bear the potential civil and criminal consequences of that violation. *See* Am. Compl. ¶¶ 98, 191. The current matter is not akin to climbers voluntarily refraining from climbing. *See* Mot. Br. at 20 (citing *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999)). Nor is it like a dentist challenging a Food and Drug Administration decision when alternatives are "readily available[.]" *Id.* (citing *Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 264–65 (D.D.C. 2016)). Individual Plaintiffs' decisions to use EID eartags are neither voluntary nor are there a readily available alternative that satisfies the Rule's official identification requirements.

As the decision to use EID eartags is not voluntary, it is also not, as the Government argues, self-inflicted harm. *See* Mot. Br. at 20–21. The cases the Government relies on are thus inapplicable. For example, the alleged harm in *Clapper v. Amnesty Int'l USA*, was found lacking because respondents inflicted it "on themselves based on their fears of hypothetical future harm[.]" 568 U.S. 398, 416 (2013). Not so here. As a direct result of the Rule, Plaintiffs must tag their cattle with visually readable EID eartags and bear the cost of doing so. There is nothing hypothetical or

voluntary about that. Rather, it is an obligation put on them by the EID Final Rule and punishable by civil penalties, criminal fines, and imprisonment. 7 U.S.C. § 8313. Because the EID eartag requirement is not voluntary for the Individual Plaintiffs, the Government's traceability arguments also fail. *See* Mot. Br. at 21.

Contrary to the Government's arguments, there are no nonharmful alternatives to tagging their cattle with rule-complaint EID eartags. For example, the Government seems to suggest that the Individual Plaintiffs could stop vaccinating their cattle for brucellosis. *See* Mot. Br. at 18 (noting that vaccination is "entirely voluntary"); *id.* at 13. But that would harm Individual Plaintiffs because, in their decades of experience, they have come to understand that non-vaccinated cattle sell at lower prices. Am. Compl. ¶ 83. And while bangs vaccination is voluntary, that does not mean it is also not good herd management. It is not for the Agency to second-guess Plaintiffs' management practices, which they have developed over decades and are consistent with the Agency's recommendation to consider bangs vaccination. USDA, *Bovine Brucellosis* (last visited Apr. 17, 2025), https://www.aphis.usda.gov/livestock-poultry-disease/cattle/bovine-brucellosis (select "How To Prevent This Dease" tab) ("All cattle or domestic bison owners, regardless of location, should discuss the advantages and disadvantages of vaccination with their veterinarian."). There is also something odd about the Agency's suggestion that Plaintiffs can avoid the Rule's costly mandate by stopping vaccination when the Rule itself is justified in part because the Agency believes it will aid brucellosis management. 89 Fed. Reg. at 39,543.

As alleged, Individual Plaintiffs must use visually readable EID eartags when selling their cattle across state lines or vaccinating them for brucellosis. That obligation is a direct result of the EID Final Rule. Because there is no alternative method of official identification for brucellosis vaccination and because they cannot rely on alternative methods of official identification when

shipping their cattle out of state, Individual Plaintiffs' decisions to use EID eartags are not voluntary. They have sufficiently established both injury and traceability under Article III's standing requirements.

2. The EID Final Rule Mandates That the Only Official Eartags for Purposes of Brucellosis Vaccination Are Visually Readable EID Eartags

The Agency is wrong in its assertion that there is no Article III injury "because Plaintiffs do not challenge the separate requirements for participation in APHIS's program for brucellosis eradication" and voluntarily vaccinate their cattle. Mot. Br. at 18. And it is mistaken about how the EID Final Rule interacts with the brucellosis regulations, 9 C.F.R. Part 78. *See* Mot. Br. at 13. The Agency's argument is wrong as a matter of law.

Section 78.1 defines "official eartag" as "[a]n identification tag approved by APHIS that bears an official identification number for individual animals." After the EID Final Rule came into effect on November 5, 2024, the *only* type of official eartags available are visually readable EID eartags. That fact is clear on the face of the Rule, which unequivocally states that "all official eartags sold for or applied to cattle and bison must be readable both visually and electronically (EID)[.]" *See* Am. Compl. ¶ 148 (quoting 89 Fed. Reg. at 39,550); *see also* 9 C.F.R. § 86.4(a)(1)(i). Contrary to the Agency's argument, *see* Mot. Br. at 13, the EID Final Rule requires any cattle that are bangs vaccinated on or after November 5, 2024 to be tagged with visually readable EID eartags. *See* Am. Compl. ¶ 150 (quoting 89 Fed. Reg. at 39,554).

The Agency also incorrectly claims that the EID Final Rule "does not alter the vaccination program's eartag requirement in 9 C.F.R. part 78, and it thus does not deprive producers the ability to satisfy that requirement with metal eartags." *See* Mot. Br. at 13. It further incorrectly suggests that metal eartags may still be applied after November 5, 2024 as official eartags. *Id.* But that is simply wrong, as evidenced by the documents the Agency relies on to support its arguments. *See*

id. (citing APHIS, *Official Eartags – Criteria and Options*, at 2–3). As USDA's Official Eartags document states, brucellosis metal eartags are "[o]nly valid as official identification if applied *prior to* November 5, 2024." APHIS, *Official Eartags – Criteria and Options*, at 2–3 (emphasis added). That is because the EID Final Rule eliminated visual-only tags, like the metal brucellosis vaccination tags, as a valid form of official identification for all purposes. *See id.* at 2, n.4; *see also, e.g.,* Wisconsin Dep't of Agric., Trade and Consumer Protection, Press Release, *New USDA Rule: Electronic ID Tags Required for Cattle and Bison Effective November 5, 2024* (Oct. 4, 2024), https://datcp.wi.gov/Pages/NewUSDARuleElectronicIDRequiredCattleBisonNovember52024.aspx (noting that the EID Final Rule "requirement applies to official identification placed for any reason, including interstate movement, brucellosis vaccination, and tuberculosis testing").

Plaintiffs' interpretation is consistent with how the Agency determined the number of cattle and bison impacted by the EID Final Rule each year, which the Agency did by calculating the number of non-EID tags it provided to the States and combining it with the number of non-EID visual official tags purchased by veterinarians and livestock producers. *See* APHIS, *Regulatory Impact Analysis & Final Regulatory Flexibility Analysis*, at 10–11 (Apr. 2024), https://www.regulations.gov/document/APHIS-2021-0020-2012 ("*RIA & FRFA*"); *see also* Am. Compl. ¶ 179 (citing same). Of the 11 million affected cattle and bison requiring eartags each year, 4 million are impacted because they receive the brucellosis vaccination. *See RIA & FRFA* at 10; *see also id.* at 25. This total is also consistent with Part 78's general restriction that cattle and bison being shipped—regardless of where they are shipped from—must comply with 9 C.F.R. part 86. *See* 9 C.F.R. §§ 78.5, 78.20. The Agency also incorrectly suggests that the EID Final Rule makes it so that "producers can no longer double count metal brucellosis eartags for the ADT program." Mot. Br. at 13. But that makes no sense. Under the prior rule, official metal brucellosis vaccination

tags also served as an official identification method for purposes of interstate movement of cattle. As discussed above, the metal tags and tattoos Kenny and Roxie Fox previously relied on to move their cattle interstate were their brucellosis tags and tattoos. *See supra* I.A.1.; *see also* Am. Compl. ¶¶ 70–71.

The EID Final Rule modified the official identification requirements for brucellosis vaccination. Am. Compl. ¶¶ 148–51. Individual Plaintiffs, as well as members of the Organizational Plaintiffs, vaccinate their cattle or bison for brucellosis as part of their regular herd management practices. *Id.* ¶¶ 19–21, 26–28, 36–38, 41–43, 45–47, 75–76, 80–83. Prior to the EID Final Rule they were permitted to use visual brucellosis tags but "[a]s a result of [the] rulemaking, the visual, i.e., non-EID, brucellosis NUES tag would no longer be allowed as official identification under part 86[.]" Am. Compl. ¶ 150 (quoting 89 Fed. Reg. at 39,554). Thus, the increased costs they are now paying when they bangs vaccinate their cattle is a direct result of the EID Final Rule.

Plaintiffs are under no obligation to challenge the brucellosis regulations because it is the EID Final Rule that modified the brucellosis identification requirements. Contrary to the Agency's argument, Mot. Br. at 14–15, Platiniffs are not bootstrapping standing, they are directly challenging the Rule that is harming them. Moreover, they are seeking full vacatur of the Rule. *See* Am. Compl. Prayer for Relief. Thus, if they prevail, they will no longer be forced to apply and pay for visually readable EID eartags when they vaccinate their cattle.

The Agency's cases do not counsel otherwise. As recognized in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), the relief Plaintiffs are seeking remedies the injuries they have suffered. Likewise, *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816 (5th Cir. 2022), does not advance the Agency's position. In that case, the plaintiff brought a claim under a

statutory anti-fraud provision but attempted to establish her injury based on consumer privacy concerns. *Id.* at 826. But the court determined that such concerns were addressed in "the statute's prohibition on harassment and abuse" provision, not that she was defrauded. *Id.* Here, the EID Final Rule modifies the requirements for official identification when cattle are bangs vaccinated. Thus, the provision being challenged and the provision injuring Plaintiffs is one and the same. Texas's "pocketbook" injuries in *Haaland v. Brackeen*, 599 U.S. 255 (2023), are likewise distinguishable. There the Supreme Court determined that Texas "would continue to incur" those costs even if its constitutional challenge to placement preferences succeeded. *Id.* at 296. Not so here; if Plaintiffs succeed on the merits of their claims and the Rule is vacated, then it is as if it never existed. *Cf. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 830 (2024) (Kavanaugh, J., concurring) ("to 'set aside' a rule is to vacate it."). They would no longer be required to apply visually readable EID eartags when they vaccinate their cattle. The Agency's remaining cases are similarly irrelevant.

3. The Costs of Complying with the EID Final Rule Are Not Speculative

The costs that the Individual Plaintiffs claim are not speculative. The Agency's argument relies on three premises, all of which are incorrect. *First*, the Agency claims that Individual Plaintiffs "vaguely claim" injury by selectively citing to a single paragraph in the Amended Complaint. *See* Mot. Br. at 22 (citing Am. Compl. ¶ 86).[6] But that ignores all the proceeding paragraphs where the Individual Plaintiffs explain their general ranching operations and practices, and why they are subject to the EID Final Rule's eartag mandate. Am. Compl. ¶¶ 69–85. The Plaintiffs also provided significant allegations regarding the costs of the EID Final Rule to ranching operations. *Id.* ¶¶ 187–89 (citing *RIA & FRFA*). What clearly emerges from the Amended

[6] Defendants make a similar argument on page 16 but appear to cite to paragraphs in the original Complaint.

Complaint, when read as a whole, is that ranchers bear the cost of the Rule. The Individual Plaintiffs have alleged that: (1) they vaccinate their cattle for brucellosis each year before they turn 12 months old, *Id.* ¶¶ 75, 81–82, 121, 151; (2) the EID Final Rule requires them to now apply a visually readable EID eartag when they do so, *id.* ¶ 150; (3) they must pay for that EID eartag, *id.* ¶ 86; *see also id.* ¶¶ 28, 38, 43, 47; (4) the EID eartag placed when the animal is bangs vaccinated also serves as their official identification for interstate movement, *id.* ¶ 150; and (5)even if they did not bangs vaccinate their cattle, they would still be required to apply a visually readable EID eartags when shipping their cattle out of South Dakota, *id.* ¶¶ 71–74, 148–49. These are not conclusory statements; these are either explicitly alleged in the Amended Complaint or they are the reasoned inferences drawn from the facts alleged. *See Stathis v. Marty Indian Sch. Bd. Inc.*, 560 F. Supp. 3d 1283, 1290–91 (D.S.D. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) ("A claim is plausible on its face 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged[.]'").

Second, the Agency's arguments regarding prior funding of EID eartags do not defeat Plaintiffs' claims. Mot. Br. at 22. The Agency seems to suggest that Plaintiffs were obligated to plead a negative, *i.e.*, that "funding will not be available in the foreseeable future." *Id.* But Plaintiffs are not obligated to provide "detailed factual allegations" only those that are "enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555. Plaintiffs pleaded that the tag allocation was not enough to meet demand and that by November 1, 2024 it was understood "that South Dakota, Minnesota, [and] Montana had already used their 2024 tag allocation[.]"[7] Am. Compl. ¶ 192. They also pleaded that "there are shortages of free EID eartags and Congress has not allocated additional funds to provide EID eartags in 2025." Am. Compl. ¶ 193; *see also* South

[7] This statement was attributed to Dr. Ethan Andress, the North Dakota state veterinarian.

Dakota Animal Industry Board, *USDA Reminder* (undated), https://aib.sd.gov/pdfs/RFID%20Announcement.pdf ("All fiscal year 2024 tags have been assigned. Current tag orders have a backorder that is expected to gradually fill through December."); *see also id.* ("We have a waitlist for fiscal year 2025 EID tags contingent upon budget approval."). That is all that is required to establish standing.

The Agency counters that "APHIS historically has funded these eartags" and that it "will continue to do so as long as congressional appropriations and agency budgetary priorities make funding available." Mot. Br. at 22. But the Agency's speculative statement cannot survive scrutiny as a matter of basic math. The Agency has estimated "conservatively" that 11 million tags are required each year under the EID Final Rule and that the Rule will cost $26.1 million per year, if no federal funding was provided. Am. Compl. ¶¶ 179, 184–85 (citing 89 Fed. Reg. at 39,556). The one-time $15 million allocation covered only about 60% of the cost of the Rule for a single year. Stated another way, "that allocation was not sufficient to meet the increased demand for such tags as a result of the EID Final Rule[.]" Am. Compl. ¶ 192.

Finally, the Court should not credit the Agency's arguments that are only made in a footnote. But even if it does, the 22 million EID eartags referenced in Defendants' footnote 4 do not solve the Agency's math problem. As the underlying source of that data indicates, "[i]n 2023, APHIS distributed 6.6 million official RFID eartags to States as an optional alternative to metal ear tags[.]" USDA, *2025 USDA Explanatory Notes – APHIS* at 22–28, https://www.usda.gov/sites/default/files/documents/22-APHIS-2025-ExNotes.pdf. It also stated that the 22.5 million EID eartags were distributed over a three-year period. *Id.* at 22–29. The 2023 allocation of free EID eartags fell short of the estimated 11 million EID eartags required each year under the Rule by about 4.4 million tags. Likewise, over a three-year period the Rule's estimate

suggests 33 million EID eartags would be required, and the free EID eartag allotment during that time fell short of the estimate by about 10.5 million EID eartags. There is no reason to think that if the Agency did not have full funding to cover the estimated number of eartags required under the EID Final Rule in the past that it would suddenly have such funding in the future. *See* 89 Fed. Reg. at 39,557 ("We intend to continue to provide assistance as long as funding is available. However, in the absence of Federal funding, producers would have to assume costs associated with purchasing EID tags."). The Agency's arguments are clearly foreclosed by the Amended Complaint's allegations that establish Article III standing.

B. The Organizations Have Associational Standing

R-CALF USA, SDSGA, and FARFA have plausibly alleged that they have associational standing to maintain this case.[8] As courts have long recognized,

> an association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Kuehl v. Sellner, 887 F.3d 845, 851 (8th Cir. 2018) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Of those requirements, the Agency only contests the first regarding members' standing. *See* Mot. Br. at 23–24.

As discussed above, Kenny and Roxie Fox and Rick and Theresa Fox have satisfied Article III's standing requirements. Kenny and Roxie Fox are members of all three organizations, Am. Compl. ¶ 77, and Rick and Theresa Fox are members of R-CALF USA and SDSGA, Am. Compl. ¶ 84. Each Organizational Plaintiff has identified additional members that have been harmed by the EID Final Rule.

[8] Organizational Plaintiffs have not relied on organizational standing in either their Complaint or their Amended Complaint.

The Agency tries to wholesale reject the identified member allegations, on its mistaken understanding of the Rule's impact. *See* Mot. Br. at 23–24 (arguing no standing because five of identified members bangs vaccinate). But as discussed above, *see supra* I.A., it is because of the EID Final Rule that these identified members are required to now apply EID eartags when they move cattle or bison across state lines or each year when they bangs vaccinate their yearlings. As alleged, several of the identified members had to pay for rule-complaint EID eartags when they vaccinated their cattle after the Rule came into effect. Am. Compl. ¶¶ 23–28 (Mr. Dickinson, R-CALF USA member); 34–38 (Mr. Tines, SDSGA member); 39–43 (Mr. Grubl, SDSGA member); 44–47 (Mr. Lamphere, SDSGA member). And the Agency's footnote-only argument about self-inflicted harm should be rejected. *See* Mot. Br. at 24, n.6. The Amended Complaint plausibly alleges that there were insufficient quantities of free tags available in South Dakota, Am. Compl. ¶¶ 192–93, and none of the ranchers was under any obligation to take time away from their operations calling veterinarians across West River to find some. Mr. Wheeler alleged that while his veterinarian was able to get free eartags this year, he faces direct costs from the Rule when he vaccinates his cattle in the future, *i.e.*, in the next 12 months when he vaccinates his yearlings. Am. Compl. ¶¶ 20–21. Additionally, Mr. Dickinson alleged that his operation, which raises Texas Longhorns in Ohio, "regularly, if not exclusively" sells out of state. Am. Compl. ¶¶ 23–28. The EID eartags his Longhorns were tagged with when they were bangs vaccinated also serve as their official identification when he sells and moves them out of state. *See supra* I.A.2.

The Agency also claims that Dr. Stangle lacks standing to challenge the regulation. Mot. Br. at 24. However, the visually readable EID eartags he applies to his client's animals were purchased in bulk. Thus, he had to pay for the eartags upfront in the hope that he may eventually recover the costs of doing so. The Agency's argument against the Pogues, *see* Mot. Br. at 24,

should also be rejected. The Agency argues that "they fail[ed] to explain why applying EID eartags requires more 'time and manpower' than the identical process for applying the eartags they presumably used in the past." Mot. Br. at 24 (citing Am. Compl. ¶¶ 65, 67). But they did. They alleged that they tagged some of their bison to comply with the Rule and that "the process of tagging the animals incurred additional costs on their operation as well as stress on their animals." Am. Compl. ¶ 67. Stated another way, they pleaded that they incurred actual additional costs to comply with the Rule that they otherwise would not have paid. *See* Am. Compl. ¶¶ 64–67.

The Amended Complaint sufficiently pleaded factual allegations supporting the claim that the identified members have standing to sue in their own right and the Organizational Plaintiffs have standing to maintain this suit on behalf of their members.

II. THE COMPLAINT SHOULD NOT BE DISMISSED BECAUSE PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED

A. The Court Should Not Dismiss Count One

The Agency's arguments in support of dismissing Count One raises a clear separation of powers issue. As the Agency argues, AHPA grants the Secretary broad powers to promulgate rules, like the EID Final Rule, and to enforce those regulations through civil and criminal penalties. Mot. Br. at 25–26. The Agency also suggests that 7 U.S.C. § 8305, provides "the Secretary broad discretionary authority" and the statue's language "exudes sweeping agency authority and discretion." Mot. Br. at 29. But the Agency identifies no limitation to its authority to regulate and it bristles at the possibility that it is required to provide justification for the Secretary's necessity determination. *See infra* II.B.

The basic principle—that Congress must determine what is a crime—stems from the legislative nature of the action because defining what actions are crimes necessarily has "the purpose and effect of altering the legal rights, duties and relations of persons … outside the

legislative branch." *I.N.S. v. Chadha*, 462 U.S. 919, 952 (1983). The creation of binding policy lies at the core of legislative power. *Cf. Tigner v. Texas*, 310 U.S. 141, 148 (1940) ("How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems."). The grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative"—such as the power to write criminal laws. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). In our tripartite system, the legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, and the judiciary sentences defendants within the applicable statutory framework. *See United States v. Bass*, 404 U.S. 336, 348 (1971). But under the Agency's interpretation of 7 U.S.C. § 8305, the details of what constitutes a crime are left wholly, to the discretion of the Executive Branch which also enforces the law. This is not permissible. Whether the Agency exceeded its statutory authority or acted under a statute that exceeded constitutional limitations, the EID Final Rule violates the APA.

B. The Court Should Not Partially Dismiss Count Two

Contrary to the Agency's arguments, Plaintiffs are not smuggling anything into Count Two that is not cognizable under 5 U.S.C. § 706(2)(A). *See* Mot. Br. at 26, n.7. The Agency alleges that Plaintiffs "conflat[e]" their claims under 5 U.S.C. § 706(2)(A) and (C). *See* Mot. Br. 27; *id.* at 26–30. Discretionary acts, like those claimed by the Agency, are typically reviewed under 5 U.S.C. § 706(2)(A).[9] Questions about whether the Agency acted "in accordance with law" are likewise

[9] Defendants maintain the exact same position in support of the present motion. Mot. Br. at 29–30.

cognizable under that same APA provision. While the Secretary enjoys some discretion to "prohibit or restrict" the interstate movement of livestock, the Secretary can only exercise that discretion "if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock[.]" 7 U.S.C. § 8305(1). The inquiry into the question of whether the method of restriction is "necessary" is not, as the Agency suggests, a pure question of law. *See* Mot. Br. at 28. Rather, it is a mixed question of law and fact. Such mixed questions are cognizable under § 706(2)(A), which permits this Court to consider whether the Agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[,]" here the AHPA.

Section 8305 requires restrictions, like visually readable EID eartags, to be "necessary to prevent the introduction or dissemination of any pest or disease of livestock[.]" Thus, whether the Secretary abused her discretion, or the APHIS acted contrary to law turns on what "necessary" means. Courts interpret a statute "in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). "Necessary" means "absolutely needed[.]" *Necessary*, Merriam-Webster.com (last visited Apr. 16, 2025), https://www.merriam-webster.com/dictionary/necessary; *see also Necessary*, Oxford English Dictionary (Mar. 2025), https://doi.org/10.1093/OED/3183166397 ("Indispensable, vital, essential; requisite."). The Agency's interpretation of the statute ignores any discussion of what it means for an action to be "necessary." *See* Mot. Br. 28–29. "[T]he adjective[] *necessary* … limit[s] the authorization contained in [the statue]." *Mexican Gulf Fishing Co. v. Dep't of Com.*, 60 F.4th 956, 965 (5th Cir. 2023). Courts must independently review whether a regulation is necessary. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 615 (5th Cir. 2021) (rejecting agency's assertion that vaccine mandate was "necessary"). The Agency's interpretation also treats the fact that the

Secretary decided to end the use of visual-only eartags and require the use of visually readable EID eartags as determinative of the fact that the decision is necessary. But Plaintiffs have alleged that the Rule's EID eartag requirement is not necessary and that the Agency failed throughout the process, which led to the Secretary's determination that it is. Am. Compl. ¶¶ 141–43, 171–76.

The Agency also fails to recognize how this analysis dovetails with Plaintiffs' claims that it failed to sufficiently justify its change in position between the 2013 ADT Rule and the EID Final Rule. Am. Compl. ¶ 213 (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). As the Supreme Court recognized in *Fox Television Stations*, when an agency changes its position, it must establish as part of its analysis "that the new policy is permissible under the statute." 556 U.S. at 515. Plaintiffs allege that the EID Final Rule's eartag requirement is not permissible because, on the facts before the Agency, it is not necessary. Am. Compl. ¶¶ 141–43, 171–76.

The Agency's second argument, seeking partial dismissal of Count Two, is based on its misunderstanding of its obligations under the APA. As the language of the statute shows, the Secretary "may prohibit or restrict" interstate movement "*if* the Secretary determines that the prohibition or restriction is necessary to prevent the introduction or dissemination of any pest or disease of livestock[.]" 7 U.S.C. § 8305 (emphasis added). Thus, the necessity determination is required before the agency's discretionary authority kicks in. The Agency seems to argue that such a determination need not be substantiated. *See* Mot. Br. at 29–28 (challenging Am. Compl. ¶ 209). But that is counter to the APA's review provisions requiring an "agency to examine all relevant factors and record evidence, and to articulate a reasoned explanation for its decision." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017).

This is particularly true when, as here, the agency has changed its position. The "change-in-position doctrine" is the "answer" to the "problem" that occurs when an agency articulates a policy or promulgates a regulation doing one thing and then turns around and does something different later. *Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 917 (2025). Here the Agency previously determined that visual-only eartags were sufficient for animal disease traceability purposes, and now it has determined that they are not. Such a change requires "more than a cursory explanation of why the findings underlying its [early position] no longer apply." *Ctr. for Biological Diversity v. Haaland*, 998 F.3d 1061, 1068 (9th Cir. 2021).

> [T]he APA requires an agency to provide more substantial justification when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 106 (2015) (quoting *Fox Television Stations*, 556 U.S. at 515); *see also Ctr. for Biological Diversity v. Haaland*, 998 F.3d at 1068 (noting that "a sufficiently detailed justification is required"). Failing to provide a substantial justification for an agency's change in position is arbitrary and capricious. *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 810–11 (5th Cir. 2024); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966–67 (9th Cir. 2015).

Plaintiffs have alleged that the Agency did not reasonably explain why it changed its position that visual-only eartags were sufficient for animal disease traceability purposes. That determination directly contradicts the agency's prior policy under the 2013 ADT Rule. The Plaintiffs plausibly alleged that the Agency was required to provide substantial justification for this change, which should include findings or support for the Secretary's necessity determination, but the Agency did not do so and thus acted arbitrarily. Am. Compl. ¶ ¶ 209–14.

CONCLUSION

For the foregoing reasons, this Court should deny the Defendants' Motion to Dismiss.

STATEMENT RESPECTING ORAL ARGUMENT

Pursuant to D.S.D. Civ. LR 7.1(C), Plaintiffs respectfully request oral argument on this motion.

Dated this 17th day of April, 2025.

Respectfully,

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Jack H. Hieb
Attorneys for Plaintiffs

Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No: (605) 225-6310
E-mail: JHieb@rwwsh.com

~and~

Kara M. Rollins*
John J. Vecchione*
Sheng Li*
New Civil Liberties Alliance
4250 N. Fairfax Drive
Suite 300
Arlington, VA 22203
Tel: (202) 869-5210
Fax: (202) 869-5238
kara.rollins@ncla.legal
john.vecchione@ncla.legal
sheng.li@ncla.legal
*Admitted *Pro Hac Vice*