IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

MICHAEL WRIGHT, CASEY WRIGHT, and JOSH WRIGHT, *Plaintiffs*, v. U.S. DEPARTMENT OF AGRICULTURE; THOMAS VILSACK, in his 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*.	**Civil Action No.: 2:24-cv-02156-TLP-cgc**

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VACATUR

1. Plaintiffs Michael Wright, Casey Wright, and Josh Wright bring this complaint for declaratory and injunctive relief, alleging as follows:

INTRODUCTION

2. This lawsuit challenges multiple decisions of the U.S. Department of Agriculture ("USDA" or "Agency") disqualifying horses trained by Plaintiffs from competing in Tennessee Walking Horse shows and challenges the unlawful and arbitrary rules used by the Agency in making those decisions. Through its Horse Protection Program, the USDA purports to enforce the Horse Protection Act ("HPA" or "Act") to prevent soring of horses. But, instead of preventing soring, the Agency instead enforces rules and policies that are untethered from the terms of the Act and exceed the Agency's authority, have no grounding in objective evidence or science, and

are so vaguely worded that the Agency cannot apply them consistently and can change their meaning on a whim. The rules create arbitrary results and fail to provide Plaintiffs and other horse trainers with adequate notice as to whether a USDA inspector will deem a particular horse to be "sore." Worst of all, USDA offers no mechanism for trainers to appeal any disqualification, which is a fundamental violation of those trainers' due process rights. Plaintiffs in this lawsuit were harmed as a direct result of USDA applying these unlawful rules and policies to disqualify their horses and by the regulatory structure that denies Plaintiffs and other trainers any opportunity to seek review of disqualification decisions.

3. Tennessee Walking Horses are known for their running-walk and proud, high-stepping strut. Since 1939, thousands of Tennessee Walking Horses have competed at horse shows for fame and prizes. These shows, both small and large, attract spectators of all ages who come to cheer for their favorite horses and enjoy wholesome fun with their families and friends.

4. As in any sport, fair competition is necessary to preserve that fun. To ensure fair competition in horse shows and protect the horses that compete, over 50 years ago Congress passed laws to punish an abusive practice called "soring" that was at that time a significant problem in the industry. Soring is a practice used by disreputable trainers who would deliberately make their horses' legs sore in order to exaggerate the horses' gait.

5. Soring of horses is an abhorrent practice that should be eradicated. Those who engage in the practice should be punished. At the same time, those who compete fairly and do not engage in soring should not be collaterally punished because of those who do.

6. Congress recognized that both goals—preventing soring and ensuring fair competition—can and should be met. In 1970, it passed the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* to address soring, explaining that "horses shown or exhibited which are sore, where

such soreness improves the performance of such horse, compete unfairly with horses which are not sore." 15 U.S.C. § 1822(2). Congress delegated authority to the USDA to enforce the provisions of the HPA to meet the twin objectives of preventing soring and preserving fair competition.

7. Unfortunately, some of the rules that the USDA has promulgated for purposes of determining whether a horse is "sore" have no basis in science and are untethered from the definition of "sore" in the HPA. Because the Agency's rules are based on subjective criteria that are not grounded in science, USDA's Horse Protection Program cannot reliably identify soring. USDA's own course of conduct shows that the Agency cannot decide what is or is not a sore horse. Just recently, after this lawsuit was filed, USDA announced via e-mail a fundamental rewriting of the meaning of the Scar Rule, one of the primary regulations used by USDA to purportedly identify sore horses. In that e-mail, the USDA informed the Tennessee Walking Horse Industry that it was changing the rule so that "hair loss" would no longer be required before a horse was deemed sore. This and other sweeping changes announced in the e-mail were not subject to the legally required notice-and-comment process. Instead, they took effect "immediately," mere hours before at least one horse show was set to commence. The USDA could attempt to make such a sweeping change by email solely because the language of the Scar Rule is so vague and indefinite that it is infinitely malleable—it fails to provide constitutionally adequate notice of what characteristics may cause the USDA to deem a horse to be sore and it permits the USDA to disqualify a horse as sore on changeable and inconsistent criteria.

8. The impact of this change cannot be overstated. For years, Tennessee Walking Horse owners and trainers have operated under the commonsense understanding that hair would not grow on a scar. With one e-mail—issued without notice and comment—those owners and

trainers who have been able to have their horses compete without worry now must be concerned that those same horses might be considered "sore" and may not be shown.

9. Worse, the trainers whose horses are disqualified as a result of USDA's inspections are not afforded any opportunity to challenge those disqualifications. USDA's rules provide no hearing or other mechanism—formal or informal—by which a trainer whose horse has been disqualified can plead his case or argue why the inspector's decision was wrong. Instead, the inspector makes a decision to disqualify a horse, the trainer's opportunity for earning prize money in that competition is instantly wiped out, and the trainer has no mechanism to seek review. Making matters worse, trainers are generally not provided with any documentation indicating the basis for the disqualification. Instead, a horse inspector will simply tell a trainer orally that his horse is disqualified and the reason for his decision, often without any detail or elaboration.

10. Nearly a decade ago, a federal court found that the Agency's practice of disqualifying horses without providing any ability to challenge the disqualification violates the Due Process Clause. *See McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016). USDA nevertheless has failed to alter its rules to provide for a review mechanism consistent with due process and instead has continued with the same unlawful practice of denying trainers any opportunity to seek review of a disqualification decision. More recently, USDA even acknowledged in a proposed rulemaking that the current regulatory structure raises due process concerns and sought public input on how to fix it.

11. Plaintiffs bring suit to secure redress for USDA's repeated unlawful disqualifications of their horses on twelve separate occasions and to enjoin USDA from future unlawful action. Three specific issues form the basis of this Complaint.

12. *First*, USDA's regulatory scheme provides no opportunity for review of a decision disqualifying a horse. The Agency's regulations do not provide any type of hearing prior to a horse being disqualified from competition, nor do they provide any mechanism by which an affected party (an owner or trainer) can contest a disqualification after the fact. A disqualified horse's trainer or owner may challenge a disqualification only if the disqualification becomes the subject of an administrative complaint initiated by the USDA. But that will occur only if the USDA decides in its discretion to bring such a complaint—and historically it rarely does so. Even when it does, such a complaint is typically brought years later, after witnesses' memories have faded and the opportunity for a contemporaneous expert opinion has been lost. In most—if not all—cases, horse owners and trainers have no recourse whatsoever to challenge a disqualification. And those disqualifications prevent trainers from earning prize money from competition and devalue the very horses upon which their livelihoods depend.

13. For those reasons, at least one court has recognized that the lack of any ability to be heard following such disqualifications deprives horse owners and trainers of their due process rights. *See McSwain*, 2016 WL 4150036, at *3. Despite this ruling, and the fact that USDA itself has sought public comment on how to fix its due process problem, the agency continues to enforce its unlawful rules foreclosing any opportunity for review of disqualification decisions.

14. *Second*, USDA continues to enforce the "Scar Rule," a regulation that sets forth certain conditions which, if found on a horse following a visual inspection and palpation of the horse's legs, requires that the horse *must* be deemed sore. *See* 9 C.F.R. § 11.3. But the criteria listed in the Scar Rule that require a finding that a horse is "sore" bear no relation to the HPA's definition of sore. Under the HPA, a horse may be considered sore if (i) certain specified actions are taken by a person, ***and*** (ii) as a result of that person's actions, the horse "suffers, or can be

reasonably expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving." 15 U.S.C. § 1821(3). The Scar Rule casts aside these requirements and requires inspectors to find a horse is "sore" based on different, fundamentally vague criteria set by the USDA.

15. For example, a horse may be disqualified as sore under the Scar Rule if it shows an "excessive loss of hair." But loss of hair is not found in the statutory definition of "sore," and there are many reasons—including use of approved training equipment (or "action devices")—that may cause hair loss and have no relation to soring as defined in the Act. In other words, by enforcing the Scar Rule, USDA disqualifies horses as "sore" even though they are ***not*** sore under the HPA definition.

16. USDA's continued application of a rule that departs from the statutory definition of soring is particularly concerning given that USDA's own commissioned experts have told the agency that the criteria set out in the Scar Rule cannot be consistently applied and are unsupported by science. Worse, the language of the Rule is so vague that USDA is able to change the Rule's meaning on the fly. As noted above, USDA recently announced a new change to the rule via e-mail mere hours before a show, explaining that it "will no longer require hair loss … in order to disqualify a horse." *See* Exhibit A. USDA's ability to condition whether a horse may compete on "hair loss" (a symptom that is absent from the statutory definition and which may or may not be a symptom of soring in an individual case), simply demonstrates that the Scar Rule as written has no grounding in the statute.

17. *Third*, USDA has adopted a policy under which inspectors must disqualify a horse as sore following a post-show inspection if that horse shows any signs of inflammation, without regard to whether that inflammation has a natural cause or was caused by legitimate in-show

activity. The policy thus requires disqualification even if the observed inflammation was not caused by a person taking one of the actions described in the HPA's definition of "sore." Following a performance, a Tennessee Walking Horse may have minor sensitivity or inflammation that results from normal activity during a show, just as a human athlete may have inflammation and minor sensitivity following a game or match. Under its Post-Show Inflammation Policy, USDA disqualifies horses showing *any* inflammation. It does so even though a pre-show inspection (which is required of every horse) did not find any evidence of inflammation. Like the Scar Rule, this policy is untethered from the statute because it departs from the HPA's definition of "sore" and requires disqualification based on inflammation that has a natural cause. Once again, USDA is applying a definition of "sore" that is contrary to the definition in the Act.

18. The application of these rules and policies to Plaintiffs' horses has led to their disqualification from competition. But the harm is greater than that. Because USDA has shown a willingness to change the rules of the game on the fly—a willingness that is aided by the inherently vague language in the Scar Rule—Plaintiffs have no ability to know what will or will not disqualify their horses and prepare appropriately. Nor are Plaintiffs able to challenge any disqualification after the fact.

19. Plaintiffs are entitled to declaratory and injunctive relief to (i) set aside the specific disqualifications USDA imposed on them and (ii) vacate and set aside the unlawful regulations and policies at issue in this suit. USDA should not be permitted to continue to threaten Plaintiffs' livelihoods or the livelihoods of the thousands of other horse owners and trainers subject to the same unlawful regulations and policies.

PARTIES

20. Plaintiff Michael Wright resides in Henderson County, Tennessee. He has trained Tennessee Walking Horses for 40 years.

21. Plaintiff Casey Wright resides in Henderson County, Tennessee. He has trained Tennessee Walking Horses for 25 years.

22. Plaintiff Josh Wright resides in Henderson County, Tennessee. He has trained Tennessee Walking Horses for 15 years.

23. Defendant U.S. Department of Agriculture is an agency of the United States government headquartered in Washington, D.C.

24. Defendant Tom Vilsack is the Secretary of Agriculture. His office is located at 1400 Independence Avenue SW, Washington, D.C. 20250. He is sued in his official capacity.

25. Defendant Animal and Plant Health Inspection Service (APHIS) is a federal government agency housed within the U.S. Department of Agriculture. It is headquartered in Riverdale, Maryland.

26. Defendant Michael Watson is the Administrator of the Animal and Plant Health Inspection Service. His office is located at 4700 River Road, Riverdale, MD 20737. He is sued in his official capacity.

JURISDICTION AND VENUE

27. This action arises under the Constitution and laws of the United States. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 2201; 5 U.S.C. § 702; and 15 U.S.C. § 1825(d)(6).

28. Venue is proper under 28 U.S.C. § 1391(e)(1) because at least one Plaintiff resides in this judicial district.

FACTUAL BACKGROUND

A. The Tennessee Walking Horse Industry

29. Tennessee Walking Horses are prized for their high-stepping gait, a distinctive walk that is the fruit of careful breeding and patient training. At exhibitions, Tennessee Walking Horse owners and trainers compete for prize money—sometimes hundreds of thousands of dollars—that is awarded to the horse with the most elegant, high-stepping strut. These horse shows have continued for nearly a century and attract spectators of all ages who come from near and far to cheer for their favorite horses and enjoy wholesome fun with their families and friends.

30. Horse shows benefit not only those spectators who come to enjoy the fun, but local communities as well. Spectators, horse owners, and trainers who come in from out of town provide revenue boosts to the local hotel and restaurant industries. This additional business generates tax revenue for local governments. Indeed, the former Mayor of Shelbyville, TN where the Tennessee Walking Horse National Celebration is held every year, stated that "[t]he Celebration is the single biggest economic driver to the City of Shelbyville." *See* The Walking Horse Report, "TWHNC Continues 75 Year Tradition," (Aug. 21, 2013), https://perma.cc/R2A5-79XC.

31. Many individuals earn their living based on the success of horse shows. Chief among them are horse trainers, like Plaintiffs, who devote their professional careers to teaching Tennessee Walking Horses the prized, high-stepping gait that will earn them the top spot in competition at horse shows.

32. A horse trainer's livelihood depends on his ability to have the horses he trains actually show and compete. Under industry practice, when a horse places at a horse show, the trainer (not the owner) receives 100% of any prize money. Where a horse that a trainer brings to a show is disqualified before competition, the trainer loses the potential to earn any prize money.

If the trainer's horse places at the show but is disqualified post-competition, he may lose the right to the prize money to which he would otherwise be entitled.

33. When a horse has been trained well and performs successfully, particularly if it has repeated successes, the value of the horse increases. Under industry practice, a horse trainer will receive 10% from the sale of any horse he has trained. Because horses that are repeatedly disqualified from competition are worth less than those who are not, the ability to compete at a horse show affects the compensation a trainer may receive from future sales.

34. A horse's successful performance also affects a trainer's ability to attract work in the first place. Owners may not entrust their prized horses to a trainer if the horses that trainer has handled are repeatedly disqualified and removed from competition. Thus, a trainer's primary revenue stream is entirely dependent on his ability to have the horses he or she trains actually compete.

35. For all of these reasons, courts have found that horse trainers have both a liberty and property interest in being able to have their horses compete without unreasonable government interference. That interest is protected by the Due Process Clause of the Fifth Amendment. *See McSwain*, 2016 WL 4150036 at *4 ("The Court finds that Plaintiffs have a constitutionally protected interest in showing Honors without unreasonable government interference."); *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 183 (6th Cir. 1983) ("It is axiomatic that the due process clause of the fifth amendment protects individuals against arbitrary deprivations of liberty or property by the federal government . . . In the present case the [horse trainer] appellants clearly face governmental intrusion upon such rights and, therefore, may properly assert the application of due process considerations.").

B. The Horse Protection Act

36. Unfortunately, some disreputable trainers have historically avoided the careful training process by using an abusive practice called "soring" to exaggerate a horse's gait. Soring is an abhorrent process that should be eradicated, and those who engage in the practice should be punished. At the same time, trainers and owners who do not engage in soring should not be collaterally punished because of those who do.

37. In 1970, at a time when soring was much more prevalent in the industry, Congress passed the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* ("HPA" or "Act") to combat the practice. In passing the HPA, Congress made clear that the twin goals of the Act were to prohibit the practice of soring horses and simultaneously to protect fair competition. The text of the Act makes this clear by stating that "Congress finds and declares that . . . the soring of horses is cruel and inhumane," and "horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore." 15 U.S.C. § 1822(1)-(2); *see also Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511 (11th Cir. 1983) ("The Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry.").

38. Pursuant to 15 U.S.C. § 1824, it is unlawful to (among other things): show or exhibit, in any horse show or horse exhibition, any horse which is sore; enter, for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore; or, sell, auction, or offer for sale, in any horse sale or auction, any horse which is sore. *See id.* § 1824(2). Depending on the circumstances, the HPA also makes it unlawful for the management of a horse

show, horse exhibition, horse sale, or horse auction to fail to disqualify any horse that is sore from an event. *See id.* § 1824(3)-(6).

39. The HPA expressly defines the term "sore." Specifically, when used to describe a horse, "sore" means:

> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

15 U.S.C. § 1821(3) (formatting modified).

40. As this definition makes clear, a horse is "sore" under the HPA only if (i) certain specified actions are taken by a person, *and* (ii) because of that person's actions, a horse either "suffers, or can be reasonably expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving." 15 U.S.C. § 1821(3).

41. Embedded in the terms of the statutory definition is the commonsense principle that an owner or trainer cannot be punished for any injury that was *not* inflicted by a person. Thus, a horse cannot be considered "sore" if it injures itself by stumbling or tripping while performing during a competition. Even though such an injury may cause a horse to suffer inflammation or distress, it would not have been caused "by a person."

42. Put differently, Congress ensured that only the actions of responsible individuals—those who engage in the intentional practice of soring—are punishable. In so doing, Congress made sure that those who do not engage in such practices are not punished because of those who do. Congress envisioned a regime to promote both of the HPA's goals—eradicating soring and preserving legitimate competition.

43. The HPA imposes civil and criminal penalties on those who engage in soring. *See generally* 15 U.S.C. § 1825(a)-(b). The HPA also ensures that those who are subject to civil and criminal penalties may be prevented from showing or exhibiting a horse. 15 U.S.C. § 1825(c). Before those penalties are imposed, and consistent with the Fifth Amendment's Due Process Clause, such an individual must have had "notice and an opportunity for a hearing before the Secretary." *Id.*

C. The U.S. Department of Agriculture And The Horse Protection Program

44. The HPA gives the Secretary of Agriculture rulemaking authority to "carry out" the Act. *Id.* at § 1828.

45. Pursuant to this authority, USDA has promulgated regulations to determine when a horse is sore and disqualify that horse from competition.

46. In addition, USDA has adopted a number of policies and procedures that are not formalized as regulations but are still used by USDA personnel to determine when a horse is sore and to disqualify a horse.

47. The USDA has delegated HPA enforcement to APHIS. In turn, APHIS employs its own Veterinary Medical Officers ("VMOs") and also delegates its authority to private inspectors known as Designated Qualified Persons ("DQPs"). DQPs are licensed by private Horse Industry Organizations ("HIOs"). USDA regulations provide that HIOs are certified by the USDA

to train and license DQPs. Both VMOs and DQPs examine horses at competitions in pre- and post-show inspections.

48. Some of the regulations and policies put in place by USDA either run afoul of the U.S. Constitution or exceed the scope of the authority granted to USDA by the statute. Worse, USDA's regulatory scheme provides no mechanism to challenge a disqualification once the decision is made. The Plaintiffs in this case have been repeatedly subject to USDA's administrative overreach in the following ways.

49. **Disqualifications Of Horses Without Due Process**. Pursuant to 15 U.S.C. § 1823, horse show managers are required to disqualify a horse from competition if it is sore or "if the management has been notified by a person appointed in accordance with [USDA] regulations … or by the Secretary that the horse is sore." *Id.* at § 1823(a). Accordingly, once a horse show manager is informed by a USDA appointee that a horse is sore—whether that determination is made pre-show or post-show—he or she must disqualify that horse.

50. Through regulation, USDA controls the inspection process by which its appointees examine a horse to determine whether it is sore. Those regulations are set forth in 9 C.F.R. §§ 11.4 ("Inspection and detention of horses") and 11.21 ("Inspection procedures for designated qualified persons").

51. Critically, these regulations do not provide any type of hearing prior to a horse being disqualified from competition, nor do they provide any mechanism by which an owner or trainer of a disqualified horse can contest the disqualification after the fact. A disqualified horse's trainer or owner may challenge a disqualification only if the disqualification becomes the subject of an administrative complaint, which occurs only if USDA decides in its discretion to bring one. *See* 15 U.S.C. § 1825(b).

52. In the many cases where USDA disqualifies a horse but does not pursue an administrative complaint, a horse owner and trainer have no recourse whatsoever to challenge that disqualification. And, in many instances, horses are disqualified pre-show, depriving an owner and trainer of *the right to compete at all*.

53. At least one court has recognized that the lack of any ability to be heard before or after such disqualifications deprives horse owners and trainers of their due process rights. In *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016), the court first cited Sixth Circuit precedent recognizing that horse owners and trainers have a liberty and property interest in showing a horse in competition without unreasonable government interference. *Id.* at *4 (citing *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983)). Second, the court recognized that the USDA's inspection process violates those owner and trainers' property interests without adequate protection. *Id.* at *5.

54. The *McSwain* Court held that the owner and trainer plaintiffs there did "not have the opportunity to appeal or otherwise be heard prior to their horse's disqualification." *Id.* Although regulations permit USDA to seek a civil or criminal penalty after a violation, the decision whether to pursue a penalty is entirely within USDA's discretion—and USDA historically has rarely sought such penalties. Thus, the court found that any post-deprivation process provided in connection with a penalty proceeding could not cure the due process violation, because "there is no guarantee of post-deprivation process." *Id.* The court concluded, that "[t]he disqualification of [Plaintiffs' horse] marks the point of deprivation and Plaintiffs have no guarantee of either pre- or post-deprivation process." *Id.*

55. USDA has acknowledged that there is a due process problem with its current rules governing disqualifications. In a recent proposed rule that sought to amend the existing regulatory

scheme, USDA noted that it had previously "received some comments raising due process concerns," requests that it "develop and implement a pre-show process whereby owners and trainers may contest and seek immediate review of a finding that a horse is sore from a decision-maker," and "suggestion[s] that when USDA finds that a horse is sore after being passed by a DQP, the horse should be allowed to be shown until there is a final decision in the matter." Horse Protection, 88 Fed. Reg. 56924, 56935 (Aug. 21, 2023).

56. In seeking public comment on its revisions to the regulations, USDA specifically sought input on how to solve the obvious due process problem in the current rules. It explained that, "[g]iven this nexus between management's decision and an inspector's findings, and in light of the due process concerns raised in comments on the 2016 proposed rule, we seek additional public comment on potential ways to resolve disputes arising from a determination of soring following inspection, including possible options for resolving such disputes before a show takes place." *Id.* Although it is good that the USDA is now at least acknowledging this due process problem, the fact the Agency might receive some comments and consider how to fix the problem in the future in no way affects Plaintiffs' present rights in this lawsuit. Their rights were violated and continue to be violated and they are entitled to judgment.

57. While *McSwain* and USDA have highlighted the significant deprivation of due process that occurs when a horse is disqualified pre-show and prevented from competing, horse owners and trainers are deprived of the same due process rights when their horses are permitted to compete but are disqualified post-show. In either case, USDA does not provide horse owners and trainers with the ability to contest those disqualifications.

58. Yet, despite (i) the court in *McSwain* highlighting the due process violation embedded in the current regulatory system and (ii) USDA's own acknowledgement that it has a

due process problem that must be resolved, USDA continues to enforce the inspection regulations in 9 C.F.R. §§ 11.4 and 11.21. In so doing, USDA disqualifies horses without giving the owner or trainer any opportunity to be heard, which violates the Due Process Clause.

59. **The Scar Rule**. To implement the Act's soring prohibition, USDA promulgated regulations in 1979 setting out criteria which, if found on a horse following a visual inspection and palpation of the horse's legs, would require an inspector to deem the horse to be sore. *See* 9 C.F.R. § 11.3. The rule provides in relevant part:

> Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:
>
> (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

60. The Scar Rule does not state that the specifically identified characteristics can be treated as "evidence" of soring. Instead, the rule states that a horse found with any such characteristics "***shall*** be considered to be 'sore.'" *Id.*

61. The Scar Rule is legally flawed and it was impermissible for the USDA to use it as the basis for disqualifying Plaintiffs' horses for at least three reasons.

62. *First*, the Scar Rule exceeds the USDA's authority under the HPA and is contrary to the terms of the HPA because it sets new criteria for what it means for a horse to be "sore." It redefines—and exceeds the scope of—the statutory definition.

63. Pursuant to the Scar Rule, horses can be deemed sore even where the observed characteristics on the horse's legs provide no actual basis for concluding either (i) that the horse is reasonably expected to suffer pain or (ii) that the observed characteristics on the horse's skin were caused by a person.

64. Such a finding could occur, for example, where a horse has a loss of hair or inflammation that may have been caused by a skin condition or was the result of legitimate training methods. For example, hair loss and slight inflammation could occur from the use of an "action device," an approved training device that helps teach a horse to accentuate its gait.

65. Hair loss and inflammation may also be caused by skin conditions that have non-human causes. For example, pastern dermatitis is a condition marked by many of the same symptoms that would cause a horse to be disqualified under the Scar Rule. *See* Danny W. Scott, DVM & William H. Miller, Jr., VMD, *Equine Dermatology*, 460-61 (Elsevier Science 2011). Specifically, this condition can be marked by hair loss and inflammation. *Id.* And it has many potential causes, including bacterial infection, worm or mite infection, and irritation from exposure to alkaline soil. *See id.* at 460. None of those causes are related to soring, but they require a horse inspector to disqualify a horse under the Scar Rule.

66. *Second*, the Scar Rule cannot be consistently applied and necessarily produces arbitrary results. As explained below, the USDA's own commissioned experts have explained to the agency that the Scar Rule calls for inspectors to look for characteristics in a horse's skin that (i) have never been shown to be connected to soring and (ii) cannot reliably be identified by a visual inspection in any event. As a result, the rule necessarily produces arbitrary results.

67. In 2017, responding to a joint invitation from the USDA and Tennessee Walking Horse industry, the National Academy of Sciences, Engineering, and Medicine ("NAS") oversaw

an independent study to analyze whether the USDA's regulations were "based on sound scientific principles" and "can be applied with consistency and objectivity." *See* National Academies of Sciences, Engineering, and Medicine, A Review of Methods for Detecting Soreness in Horses 2, 17 (2021), https://doi.org/10.17226/25949 ("NAS Report").

68. NAS concluded that the Scar Rule cannot reliably identify soring. For example, NAS noted that the rule required inspectors to identify granulomas, a particular type of inflammatory lesion composed of certain cells, through a gross inspection. *Id.* at 83. But, as NAS concluded: (i) there is no evidence that granulomas are present in horses that are "sore" within the meaning of the Act, and (ii) granulomas "cannot be determined to be present by gross examination alone." *Id.* Instead, a "microscopic examination" is "absolutely necessary." *Id.*

69. In other words, according to NAS, the Scar Rule rests on telling inspectors to determine visually whether the tissue shows something (granulomas) that (i) has never been shown by data to be connected with "sore" horses and (ii) cannot be detected visually in any event.

70. As a result, NAS concluded that the rule was based on a "fallacy" and that it cannot "be interpreted and applied in a consistent manner" by inspectors—that is, it necessarily produces arbitrary results. *Id.* The NAS Report thus concluded that "the rule as written is not enforceable." *Id.*

71. NAS is not the only scientific authority to identify significant problems with the Scar Rule. Dr. Paul Stromberg, a renowned veterinarian and professor at the Ohio State University College of Veterinary Medicine reached the same conclusions. Data from his own study—on which NAS relied—demonstrated that horses that had been disqualified for violations of the Scar Rule should not have been disqualified because their tissue showed no actual evidence of scarring. Dr. Stromberg took 136 tissue samples from 68 Tennessee Walking Horses that had been found in

violation of the Scar Rule, and he found that "no scar formation or granulomatous inflammation was present in any of the tissue samples." *Id.* at 78. Dr. Stromberg thus determined that there was no evidence of soring in any of the samples. In other words, the tissue samples showed that ***not a single one*** of the horses that had been found in violation of the Scar Rule actually exhibited any scar tissue or any scientific evidence indicating that the horse had been sored.

72. As the NAS Report explained, "many exogenous and endogenous factors can affect the integrity of the [horse's] skin." *Id.* at 75. And, to date, the only reliable study of skin tissue in horses disqualified on suspicion of being sored is Dr. Stromberg's study, which indicated that there was no scar tissue in those horses and the "primary injuries to the pastern of the horses in the Stromberg study … are not known." *Id.* at 80. Accordingly, in order to ensure that any future regulations seeking to prevent soring were based on reliable science, the NAS Report recommended that additional studies be done to see if soring produced different observable changes in a horse's skin that could be used as a basis for identifying sored horses.

73. Specifically, the NAS Report called for studies to determine whether any visually observable changes in a horse's skin (like lichenification or thickening of the skin) provide reliable evidence of soring. *See, e.g.*, *id.* at 10 ("More studies are needed to determine if training practices that can cause soreness in TWHs [*i.e.*, Tennessee Walking Horses] also result in lichenification . . . These studies might elucidate at what point, if at all, during training epidermal hyperplasia and lichenification would develop and what particular training practices would cause these conditions."); *id.* ("Studies are also needed to determine if epidermal thickening (hyperplasia) and lichenification are solely caused by the action devices worn by TWHs."). In other words, NAS recognized that lichenification could simply be caused by training with action devices (certain approved items used to accentuate a horse's gait) without the horse actually being sore. But the

salient point is that NAS called for more research, given that there is currently no definitive link between lichenification (which can be visually observed) and soring.

74. *Third,* the language of the Scar Rule is so fundamentally vague that individual trainers cannot know or predict what USDA will or will not consider to be sore. Specifically, the Rule indicates that a horse "shall" be deemed sore based on "bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair." 11 C.F.R. § 11.3. But "bilateral evidence indicative of soring" is undefined. Thus, what is or is not sore will frequently depend on the subjective opinions of individual inspectors.

75. This concern is borne out by evidence. As the USDA's administrative law judges have repeatedly noted, "[i]t is not unusual for a horse not to be found sore at one examination but found to be sore at a later examination during the same show." *In re Timothy Fields and Lori Fields*, 54 Agric. Dec. 215, 219 (1995); *see also In re Justin Jenne*, 73 Agric. Dec. 501, 508 (2014); *In re: Jackie McConnell, et al.*, 44 Agric. Dec. 712, 725-26 (1985).

76. Similarly, in a 2016 hearing in an HPA enforcement proceeding the ALJ remarked:

> [T]he reason I don't like scar rule cases is I think the determination of whether there is a scar is such an unquantified process that there is too much variety in the result, it's not predictable, it's not knowable how people are going to judge it. It's just very, very, very damaging to the industry, it's damaging to the riders, can you imagine the dismay of a rider who had nothing to do with the condition of the horse, finding out that his performance doesn't count? At any rate, I wish there were a better way to have an objective, verifiable measurement of whether there's a scar rule violation. I don't think it exists yet. I don't think it's practiced yet.

Exhibit B (Statement of ALJ Clifton) at 82:10-24.

77. NAS agrees. In its report, it noted that USDA implemented a requirement in late 2016 that a horse found in violation of the HPA must be re-inspected by a second VMO, if present. *See* NAS Report at 32. As NAS observed, when this requirement was introduced, "the number of horses found to be unilaterally or bilaterally sore *dramatically declined*." *Id.* (emphasis added).

78. USDA recently highlighted the malleability of the Scar Rule by changing the fundamental meaning of the rule on a whim. On March 15, 2024—a week after this lawsuit was filed—USDA sent an e-mail to HIOs alerting them that, effective immediately, USDA "will no longer require hair loss associated with non-compliant tissue (i.e., non-uniformly thickened epithelial tissue or evidence of inflammation) in order to disqualify a horse." In other words, before March 15, hair loss was a required criterion for a horse to be found sore under the Scar Rule and a horse that did not exhibit hair loss could not be found sore under the Scar Rule, because the USDA recognized that hair does not grow on a scar. As of March 15, however, the very same horse that would have passed inspection the day before could be deemed sore and disqualified under the very same rule.

79. This substantive change to the Scar Rule's meaning was made without notice-and-comment rulemaking. It was made in the middle of the Tennessee Walking Horse show season, after multiple horse shows had already been conducted under the prior Scar Rule. It was made only hours before a new show was set to commence. And the change was possible because of the inherently vague language of the rule.

80. USDA tacitly recognizes that there is a problem with the Scar Rule. Noting that "the obvious bilateral soring lesions and scars seen prior to passage of the [Horse Protection] Act in 1970 [are] only rarely observed today," 88 Fed. Reg. at 56940, it has sought to update the existing Scar Rule via newly proposed regulation. Yet it continues to apply the rule despite the total lack of any scientific evidence indicating that the rule identifies soring as defined by the statute. By continuing to apply the rule, USDA exceeds the scope of its statutory authority. And any disqualification based on a rule that is unsupported by science is inherently arbitrary.

81. **Post-Show Inflammation**. As recently as 2018, USDA's training manual acknowledged that when a horse suffers inflammation as a result of a natural injury, the horse is ***not*** sore within the meaning of the HPA. This commonsense approach recognized that there are numerous reasons a horse may show inflammation that is not caused by a human, as required for a horse to be sore under the definition in the HPA.

82. Beginning in 2019, however, USDA adopted a new policy requiring its inspectors to disqualify horses upon *any* showing of post-show inflammation, without regard to whether such inflammation could have been caused by natural circumstances or be the result of natural in-show activity. This policy is reflected in the 2019 training manual, which removed the explanation that inflammation caused by a natural injury should not be considered evidence of soring.

83. The USDA's new Post-Show Inflammation Policy had a significant impact on trainers like Plaintiffs because it meant that horses would be disqualified under circumstances in which they previously had been allowed to compete. Nevertheless, USDA's change in policy did not go through notice-and-comment or any other formalized rulemaking. In 2019, USDA VMOs began informing DQPs inspectors that horses should be disqualified as sore upon any showing of post-show inflammation.

84. Following implementation of the Post-Show Inflammation policy, USDA inspectors began disqualifying horses when they showed inflammation arising from natural causes. For example, following a performance, a Tennessee Walking Horse may have minor sensitivity or inflammation that results from normal activity that occurs during a show, much like a human athlete may have minor sensitivity following a game or match. In addition, while showing, a Tennessee Walking Horse often will elevate its front legs, which may cause the horse to rub its back pasterns against the gravel or dirt in the show ring, thereby causing inflammation.

85. Under its Post-Show Inflammation Policy, USDA has and continues to disqualify these horses. USDA inspectors do so even though a pre-show inspection (which is required of every horse) did not find any evidence of inflammation.

86. This policy is wholly untethered from the statute. It exceeds USDA's authority under the HPA and violates the HPA by requiring disqualification of horses based on factors that have nothing to do with human intervention causing soring as defined in the Act.

D. Specific Application of the Unlawful Regulations and Policy to Plaintiffs

87. USDA has repeatedly disqualified Plaintiffs' horses from competition pursuant to the above unlawful rules and policies and prevented Plaintiffs from having any way to challenge those disqualifications.

88. **Plaintiff Michael Wright**. From August 23 to September 2, 2023, the Tennessee Walking Horse National Celebration ("National Celebration") took place at the Celebration Arena in Shelbyville, Tennessee. A horse trained by Mr. Michael Wright named "QB1" was disqualified by a USDA VMO for violating the Scar Rule. Under the applicable rules, Mr. Michael Wright was not permitted to challenge this determination through any review mechanism within the agency.

89. On July 22, 2023, the Red Carpet Horse Show of the South took place at Giles County Agriculture Park in Pulaski, Tennessee. A horse trained by Mr. Michael Wright named "I'm A Proud American" passed a pre-show inspection, but it was disqualified post-show by a USDA VMO for post-show inflammation. Under the applicable rules, Mr. Michael Wright was not permitted to challenge this determination through any review mechanism within the agency.

90. From June 1-3, 2023, the 72nd Annual Columbia Spring Jubilee took place at Maury County Park in Columbia, Tennessee. A horse trained by Mr. Michael Wright named "Come Back

George" passed a pre-show inspection, but it was disqualified post-show by a USDA VMO for post-show inflammation and for violating the Scar Rule. Under the applicable rules, Mr. Michael Wright was not permitted to challenge this determination through any review mechanism within the agency.

91. **Plaintiff Josh Wright**. At the 2023 National Celebration, a horse trained by Mr. Josh Wright named "Jura THF" was determined to be "sore" by a USDA representative following a pre-show inspection and was disqualified, preventing it from competing at all. Under the applicable rules, Mr. Josh Wright was not permitted to challenge this determination through any review mechanism within the agency.

92. From November 10-12, 2022, the 2022 United Walking Horse Fall Finale took place at the Paul Battle Arena in Tunica, Mississippi. A horse trained by Mr. Josh Wright named "Good Samaritan" was determined to be "sore" by a USDA representative following a pre-show inspection and was disqualified, preventing it from competing at all. Under the applicable rules, Mr. Josh Wright was not permitted to challenge this determination through any review mechanism within the agency.

93. From May 25-27, 2023, the 2023 Spring Fun Show took place at the Celebration Arena in Shelbyville, Tennessee. A horse trained by Mr. Josh Wright named "Wired and Lined" passed a pre-show inspection, but it was disqualified post-show by a USDA VMO for post-show inflammation. Under the applicable rules, Mr. Josh Wright was not permitted to challenge this determination through any review mechanism within the agency.

94. **Plaintiff Casey Wright**. At the 2023 National Celebration, a horse trained by Mr. Casey Wright named "Here I Am CL" was disqualified by a USDA VMO for violating the Scar

Rule. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

95. At the 2023 National Celebration, a horse trained by Mr. Casey Wright named "8 Mile SNF" passed a pre-show inspection, but it was disqualified post-show by a USDA VMO for post-show inflammation. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

96. At the 2023 National Celebration, a horse trained by Mr. Casey Wright named "Jose's Revival" passed a pre-show inspection, but it was disqualified post-show by a USDA VMO for post-show inflammation. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

97. At the 2022 United Walking Horse Fall Finale, a horse trained by Mr. Casey Wright named "I Am Wood's Stock" was determined to be "sore" by a USDA representative following a pre-show inspection and was disqualified, preventing it from competing at all. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

98. At the 2023 Red Carpet Show of the South, a horse trained by Mr. Casey Wright named "The Greatest Showman" was determined to be "sore" by a USDA representative following a pre-show inspection and was disqualified, preventing it from competing at all. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

99. From November 16-18, 2023, the 2023 United Walking Horse Fall Finale took place at the Paul Battle Arena in Tunica, Mississippi. A horse trained by Mr. Casey Wright named "8 Mile SNF" was determined to be "sore" by a USDA representative following a pre-show

inspection and was disqualified, preventing it from competing at all. Under the applicable rules, Mr. Casey Wright was not permitted to challenge this determination through any review mechanism within the agency.

COUNT ONE

Violation of 5 U.S.C. § 706

Disqualification Of Horses Without Review In Violation Of The Fifth Amendment's Due Process Clause

100. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

101. USDA's regulations and policies violate the Due Process Clause of the Fifth Amendment because they deprive trainers and owners of their "constitutionally protected interest in showing [horses] without unreasonable government interference." *McSwain*, 2016 WL 4150036 at *4. USDA does not provide horse owners and trainers with any way to challenge a decision to disqualify their horses.

102. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation omitted). By disqualifying horses without providing any opportunity for a hearing before or after a disqualification to contest a finding of soreness, USDA deprives horse owners and trainers of their due process rights.

103. Plaintiffs Michael, Casey, and Josh Wright each suffered injury in that their horses were disqualified and they were denied any opportunity to challenge those disqualifications either pre-deprivation or post-deprivation. In instances described above, Plaintiffs Josh Wright and Casey Wright were precluded from even showing their horses in the first place.

104. Absent action by this Court, Plaintiffs will continue to suffer injury. Each and every time Plaintiffs wish to show their horses, they will be subject to a regulatory scheme that provides no guaranteed mechanism to challenge a decision to disqualify a horse—either before or after the horse is prevented from competing. Every horse owner or trainer who competes is subject to the same unconstitutional scheme.

COUNT TWO

Violation of 5 U.S.C. § 706

Disqualification Of Horses Pursuant To The Scar Rule In Excess Of Statutory Authority

105. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

106. USDA continues to apply the Scar Rule despite the rule exceeding the scope of USDA's statutory authority.

107. Under the HPA, a horse may be considered "sore" only if (i) certain specified actions are taken by a person, and (ii) as a result of that person's actions, a horse either "suffers, or can be reasonably expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting or otherwise moving." 15 U.S.C. § 1821(3).

108. The Scar Rule exceeds the USDA's authority under the statute and is contrary to the statute and the APA because it redefines what it means for a horse to be sore in a manner that is inconsistent with the statutory definition. It directs that horses meeting certain criteria "***shall be considered to be 'sore'***" despite the fact that many of the specified criteria in the rule are nowhere to be found in the statutory definition of "sore" and are, in fact, inconsistent with that definition. Pursuant to the Scar Rule, horses can be deemed sore even where the observed characteristics on the horse's legs provide no actual basis for concluding either (i) that the horse is reasonably

expected to suffer pain or (ii) that the observed characteristics on the horse's skin were caused by a person, as required to meet the statutory definition of sore. By calling for inspectors to look for characteristics such as granulomas that cannot actually be perceived with the naked eye, the Scar Rule also violates the statute by using criteria that bear no connection to the statutory criteria, cannot be consistently applied, and necessarily produce arbitrary results.

109. Plaintiffs Michael Wright and Casey Wright suffered injury by having their horses disqualified under the unlawful Scar Rule.

110. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Each and every time Plaintiffs wish to show their horses, they will be subject to an unlawful rule that USDA continues to apply in excess of its statutory authority. Every horse owner or trainer who competes is subject to the same unlawful rule.

COUNT THREE

Violation of 5 U.S.C. § 706

Disqualification Of Horses Pursuant To The Scar Rule As Arbitrary And Capricious Agency Action

111. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

112. Agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

113. USDA's continued application of the Scar Rule is arbitrary and capricious. As USDA's own commissioned experts have shown, the rule is unenforceable as written. It is

predicated on inspectors identifying something they cannot see with the naked eye. And there are no scientifically established studies connecting what the rule asks the inspectors to look for and soring. By calling for inspectors to look for characteristics such as granulomas that cannot actually be perceived with the naked eye and that have no scientifically established connection to soring, the Scar Rule requires inspectors to use criteria that cannot be consistently applied and necessarily produce arbitrary results.

114. Plaintiffs Michael Wright and Casey Wright suffered injury by having their horses disqualified under the unlawful Scar Rule.

115. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Each and every time Plaintiffs wish to show their horses, they will be subject to an arbitrary and capricious rule that USDA continues to apply. They are not alone. Every horse owner or trainer who competes is subject to the same unlawful rule.

COUNT FOUR

Violation of 5 U.S.C. § 706

Disqualification Of Horses Pursuant To The Scar Rule In Violation Of The Fifth Amendment Due Process Clause (Void for Vagueness)

116. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

117. The language of the Scar Rule fails to define with sufficient clarity what will or will not lead USDA to find that a horse is sore. Horse trainers and owners are forced to guess as to whether their horses will pass inspection. Because it fails to provide the necessary clarity, the Scar Rule is unconstitutionally vague and thus void under the Fifth Amendment's Due Process Clause.

118. The unconstitutionally vague language of the Scar Rule leads USDA's inspectors to reach inconsistent results. Indeed, sometimes a horse will be found to be both sore and not sore in the same show.

119. The vague language of the Scar Rule has also permitted the USDA to unlawfully attempt to alter the basic meaning of the rule on the fly. USDA's decision to change the meaning of the Scar Rule via e-mail on March 15, 2024 (without notice and comment) underscores that the rule does not provide those governed by it with the necessary notice of prohibited conduct.

120. Plaintiffs Michael Wright and Casey Wright suffered injury by having their horses disqualified under the unlawful and unconstitutionally vague Scar Rule.

121. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Each and every time Plaintiffs wish to show their horses, they will be subject to an unconstitutionally vague rule. They are not alone. Every horse owner or trainer who competes is subject to the same unlawful rule.

COUNT FIVE

Violation of 5 U.S.C. § 553

Changes To The Scar Rule Made Without Notice-and-Comment Rulemaking

122. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

123. Under the Administrative Procedure Act, courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

124. Agencies are required to publish notice of all "proposed rule making" in the Federal Register, *id.* § 553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c).

125. The change made to the Scar Rule via USDA's March 15, 2024 e-mail was a rule that was required to go through the notice-and-comment process, given that it creates new obligations and duties for horse trainers that previously did not exist. Prior to the change in the rule, horses who did not suffer from hair loss were not disqualified pursuant to the Scar Rule. After the March 15, 2024 change, those same horses could be disqualified.

126. USDA failed to go through notice-and-comment procedures before implementing this change to the Scar Rule, as required by law. 5 U.S.C. § 553(b). No statutory exceptions permitted the agency to forego the notice-and-comment process.

127. Plaintiffs Michael Wright, Josh Wright, and Casey Wright suffer injury by having their horses subject to an unlawful rule.

128. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Every time Plaintiffs show their horses, they will be subject to an unlawful rule. They are not alone. Every horse owner or trainer who competes is subject to the same unlawful rule. The March 15, 2024 change to the Scar Rule should be held unlawful and set aside under section 706 of the APA.

COUNT SIX

Violation of 5 U.S.C. § 706

Disqualification Of Horses Pursuant To USDA's Post-Show Inflammation Policy In Excess Of Statutory Authority

129. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

130. USDA's policy of disqualifying horses solely for exhibiting post-show inflammation exceeds the scope of its statutory authority.

131. Under the HPA, a horse may be considered "sore" only if (i) certain specified actions are taken by a person, and (ii) as a result of that person's actions, a horse either suffers or can be reasonably expected to suffer pain or if other specific symptoms suggesting such pain appear. *See* 15 U.S.C. § 1821(3).

132. USDA's Post-Show Inflammation Policy requires inspectors to disqualify horses who show inflammation even where that inflammation was caused by natural causes, such as the horse's performance in the ring. This policy plainly exceeds the agency's statutory authority.

133. Plaintiffs Michael, Casey, and Josh Wright suffered injury by having their horses disqualified pursuant to USDA's Post-Show Inflammation Policy.

134. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Each and every time Plaintiffs wish to show their horses, they will be subject to an unlawful policy that USDA continues to apply in excess of its statutory mandate. Every horse owner or trainer who competes is subject to the same unlawful policy.

COUNT SEVEN

Violation of 5 U.S.C. § 553

Disqualification Of Horses Pursuant To USDA's Post-Show Inflammation Policy Issued Without Notice-and-Comment Rulemaking

135. Plaintiffs restate and incorporate by reference each and every allegation of the preceding paragraphs.

136. Under the Administrative Procedure Act, courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

137. Agencies are required to publish notice of all "proposed rule making" in the Federal Register, *id.* § 553(b), and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," *id.* § 553(c).

138. USDA's Post-Show Inflammation Policy, which requires disqualifying horses solely for exhibiting post-show inflammation, is actually a rule that was required to go through the notice-and-comment process given that it creates new obligations and duties for horse trainers that previously did not exist. The Post-Show Inflammation Policy also constrains agency discretion and is treated like a binding order that must be applied at all horse shows. Prior to the adoption of the policy, horses were not disqualified when they exhibited inflammation caused by show activity or other natural causes. Following the adoption of the policy, those same horses are now deemed sore and are disqualified.

139. USDA failed to go through notice-and-comment procedures before implementing the Post-Show Inflammation Policy, as required by law. 5 U.S.C. § 553(b). No statutory exceptions permitted the agency to forego the notice-and-comment process.

140. Plaintiffs Michael Wright, Josh Wright, and Casey Wright suffered injury by having their horses disqualified pursuant to USDA's Post-Show Inflammation Policy.

141. Absent action by this Court, each of the Plaintiffs will continue to suffer injury. Every time Plaintiffs show their horses, they will be subject to a post-show inspection under a policy that is invalid unless and until it undergoes notice-and-comment procedures. The Post-Show Inflammation Policy should be held unlawful and set aside under section 706 of the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court order the following relief:

a. Declaratory relief finding that Defendants' practice of disqualifying horses (including Plaintiffs' horses) without affording the horse's owner or trainer an opportunity for meaningful review of the determination, including a pre-deprivation hearing, is in violation of the Due Process Clause of the U.S. Constitution's Fifth Amendment.

b. An injunction permanently enjoining Defendants from disqualifying horses (including Plaintiffs' horses) without affording the horse's owner or trainer an opportunity for meaningful review of the determination, including a pre-deprivation hearing.

c. Vacate and set aside 9 C.F.R. §§ 11.4, 11.21, and any other rules or policies used by Defendants to the extent they are used to determine that a horse is sore without providing an opportunity for meaningful review.

d. Declaratory relief finding that (i) the Scar Rule as written exceeds the USDA's statutory authority; (ii) continued application of the Scar Rule is arbitrary and capricious, (iii) the Scar Rule as written is unconstitutionally vague and thus void, and (iv) the March 15, 2024 change to the Scar Rule announced via e-mail is unlawful given USDA's failure to comply with the notice-and-comment rulemaking process before implementing it.

e. An injunction permanently enjoining Defendants from enforcing the Scar Rule to disqualify horses (including Plaintiffs' horses).

f. Vacate and set aside 9 C.F.R. § 11.3.

g. Declaratory relief finding that Defendants' Post-Show Inflammation Policy (i) exceeds USDA's statutory authority because it does not permit inspectors any discretion to take into account natural occurrences that might cause inflammation; and (ii) is unlawful given USDA's failure to comply with the notice-and-comment rulemaking process before implementing it.

h. An injunction permanently enjoining Defendants from applying their Post-Show Inflammation Policy to disqualify horses solely upon identification of post-show inflammation.

i. Vacate and set aside Defendants' Post-Show Inflammation Policy.

j. Any other relief which this Court may deem just and proper.

April 3, 2023

Respectfully submitted.

s/ *Robert E. Hayes Jr.*

PATRICK F. PHILBIN*
JOHN V. COGHLAN*
CHASE HARRINGTON*
Torridon Law PLLC
1155 F Street, NW, Suite 750
Washington, DC 20004
(202) 249-6900
pphilbin@torridonlaw.com

**Motion for admission pro hac vice forthcoming*

ROBERT E. HAYES JR.
Tennessee Bar No. 027730
Hayes Law Firm PLLC
5740 Getwell Road
Building 12, Suite C
Southaven, MS 38672
(662) 503-8409
robbie@rhayeslaw.com