Comments of the Tennessee Walking Horse National Celebration Association

2023 HORSE PROTECTION RULE

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

The Tennessee Walking Horse National Celebration Association ("TWHNCA" or the "Association") respectfully submits these comments ("Comments") to the proposed amendments to the current horse protection regulations, 9 C.F.R. §§ 11.1-11.41 (2023) (the "current regulations" or "current Horse Protection Regulations"). The Animal Plant and Health Inspection Service ("APHIS") of the United States Department of Agriculture ("USDA")[1] announced the proposed amendments (collectively, the "Proposed Rule") in an August 21, 2023 notice, 88 Fed. Reg. 56924 (the "NPRM"). USDA has purportedly promulgated the Proposed Rule pursuant to the federal Horse Protection Act of 1970, *codified as amended at* 15 U.S.C. §§ 1821-1831 (the "HPA" or "Act").

INTRODUCTION

When 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 and enhance 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.").

Congress made clear its belief that these goals can both be achieved and that they need not be at odds with each other. That is also the view of the TWHNCA. Soring of horses is an abhorrent practice that should be eradicated. Those who engage in the practice should be severely 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.

USDA purports to understand these twin goals, explaining that "the goal of the USDA-APHIS Horse Protection program and regulations is to eliminate the inhumane practice of soring and by so doing promote fair competition in horse shows and exhibitions." 88 Fed. Reg. at 56927. But the reality is that the Proposed Rule wholly ignores the statutory goal of preserving and promoting fair competition in Tennessee Walking Horses ("TWHs"). Instead, the Proposed Rule pursues solely the elimination of soring without regard to preserving fair competition and does so through irrational steps that (i) have no demonstrated causal relationship to soring, (ii) exceed the USDA's statutory authority, and (iii) will simply wipe out entire areas of legitimate competition for TWHs. The HPA does not permit such an approach. Nor does the Administrative Procedure Act, which requires USDA to engage in "reasoned decisionmaking." *See Dep't of Com. v. New*

[1] As used in these Comments, "APHIS," "USDA," "the Secretary of Agriculture," and "Secretary" are used interchangeably, unless specifically indicated by the context or other reason.

York, 139 S. Ct. 2551, 2569 (2019) ("We … must confine ourselves to ensuring that [the Agency] remained 'within the bounds of reasoned decisionmaking.'") (citation omitted).

The TWHNCA submits these comments to address specific failures in the Proposed Rule. The Association's Specific Comments as discussed below relate to the following seven topic areas.

Section I discusses a fundamental, overarching defect that undermines the entire Proposed Rule: the USDA is relying on unreliable data. The centerpiece of the USDA's rationale for the entire Proposed Rule is data supposedly showing that there continues to be a high rate of soring in the Performance division for TWHs. The problem is that data suffers from multiple fatal flaws that make it wholly unreliable as the basis for USDA's conclusions. *First*, the USDA's data purporting to show the number of violations found by USDA inspectors does not match USDA's own prior publicly reported data showing such violations. *Second*, by USDA's own admission, the data that purports to show evidence of soring is not based on a random sample. Instead, USDA acknowledges that its data reflects inspections on an indeterminate number of horses that were selected for inspection precisely because they were already suspected of being sore. *Third*, the data is overinflated, as USDA includes in its data violations that have nothing to do with soring. *Fourth*, the data was obtained by means of a wholly subjective inspection protocol, which the National Academy of Sciences, Engineering and Medicine ("NAS") and other equine experts have found to be unreliable. Because the inspection protocol has been shown to produce results that are not repeatable, subjective findings of soring cannot be treated as reliable evidence of *actual* soring. *Fifth*, USDA's decision to ban certain practices only as to TWHs is improper because USDA does not support its differential treatment of TWHs with any data about soring (or the lack of soring) in other HPA Breeds.

Section II discusses the Proposed Rule's ban on all action devices and pads as to TWHs. This ban exceeds the Agency's statutory authority under the HPA and is arbitrary and capricious because there is no evidence that action devices and pads cause soring. Indeed, the USDA acknowledges that action devices and pads do not *cause* soring, because the agency permits other breeds (other than TWHs) to continue using the exact same equipment. The USDA has advanced no sound reason for banning these devices solely on TWHs. Indeed, as the USDA itself has acknowledged in the past, the primary study the Agency relies on in support of the ban actually indicates that action devices and pads do *not* cause soring. And the Agency provides no adequate explanation for its course reversal, now banning equipment that it has expressly acknowledged does *not* cause soring. USDA's ban would also amount to an unconstitutional taking of property, given that its actions would effectively eliminate the sport in which all Performance division horses compete and destroy the value of horses that have been trained to show in that division.

Section III discusses the Proposed Rule's radical extension of the existing ban on prohibited substances—an extension that would ban *all* substances, whether they have any connection to soring or not. This ban also exceeds the Agency's authority under the HPA and is arbitrary and capricious because USDA does not provide evidence supporting the ban. In fact, the Proposed Rule would irrationally prohibit the use of substances that are currently permitted and that are used precisely to reduce friction and thereby *prevent* soring, as well as substances that are prescribed by equine veterinarians for the welfare of the horse. Once again, the USDA has failed

to provide any reasoned explanation for its 180-degree course reversal, now banning substances that it previously acknowledged were actually beneficial for horses.

Section IV discusses the Proposed Rule's modifications to the existing Scar Rule, a rule that NAS has found to be unenforceable as written because research has shown that the methods used during visual inspections to identify evidence of soring are not reliable. The Proposed Rule's modifications exacerbate the existing rule's deficiencies by replacing it with a rule that is even more vague, unsupported by scientific evidence, and that provides no objective guidance to inspectors as to what should or should not be a violation.

Section V discusses the proposal in the Proposed Rule to abolish the DQP Program. That proposal is unlawful because it is both contrary to the HPA and arbitrary and capricious. The HPA envisions an enforcement program in which USDA will work hand-in-hand with the TWH Industry to prevent soring while preserving legitimate competition. In the Proposed Rule, USDA allocates management and oversight of the program solely to itself.

Section VI explains that the economic analysis in the Proposed Rule is incomplete and deficient. The economic analysis completely fails to take into account the fact that a blanket ban on action devices and pads effectively eliminates the entire "Performance" division of competition for TWHs, which will have a devastating effect on the TWH industry. That ban would have ripple effects that threaten the livelihoods of industry employees and the economies of local communities. USDA fails to accurately assess any of these effects, as well as the impact the Proposed Rule would have on small businesses.

Section VII discusses due process concerns that have arisen out of the current inspection procedures mandated by USDA and the lack of any adequate appeals process for violations. The due process problems with the existing system largely originate with the vague and subjective inspection process currently put in place by USDA. The TWHNCA recommends that USDA require any disqualification to be supported by documentary evidence, including photographs supporting the finding. In addition, the TWHNCA recommends that USDA replace the current inspection system with one based on objective measures, similar to what is done for other breeds subject to the HPA.

The shortcomings identified in these sections are significant and demonstrate why USDA should reconsider issuing the rule at all. One concern bears extra emphasis: the Proposed Rule's fundamental failure to take into account the devastating impact it would have on the Tennessee Walking Horse Industry and the many who rely on that Industry. In particular, the Rule proposes to eliminate the Performance division of competition within the industry by eliminating the very tools which are essential to the division to compete. But, as the TWHNCA has repeatedly told USDA, the Performance division is essential to the continued operation of not just the TWHNCA but TWH competitions in general. Shows would cease to exist were that division eliminated and the TWH Industry itself would be threatened. The ripple effects on local communities are enormous. And, given the foreseeable impact on the desirability of owning a TWH without a place to show them, there is a real chance that the Proposed Rule would even threaten the existence of the TWH as a breed.

A rule having such a monumental impact should not be issued lightly, even if it were based on incontrovertible evidence. *See West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) ("[T]here are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.") (quotations omitted). Especially where the history of the HPA shows that one of Congress's goals in the Act was *preserving* competition and preserving the viability of the TWH Industry, it makes no sense for USDA to claim the authority to outlaw the entire category of competition that is the main economic driver of the Industry. The impropriety of a rule when it is based on demonstrably flawed evidence and unreliable data is even more clear.

For all of these reasons, the Association requests that the USDA withdraw the Proposed Rule and work with the Association to develop rules and procedures that will achieve the HPA's twin goals of eliminating soring while preserving and ensuring fair competition within the Industry. The USDA could have developed a set of rules that complied with the Act to achieve those goals if it had consulted the Association and worked with members of the Industry to secure their input from the start. It is still not too late for the USDA to reverse course and ensure that its rules comply with the Act and take into account the actual impact the regulations will have on the Tennessee Walking Horse Industry. The TWHCA stands ready to work with USDA to ensure that the goals of the HPA are achieved while, at the same time, the rights of Industry participants under the law are respected.

BACKGROUND AND LEGAL AUTHORITY

The Secretary of USDA has rulemaking authority "to carry out the provisions" of the HPA, 15 U.S.C. § 1828, which makes it 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 (collectively "Horse Event") to fail to disqualify any horse that is sore from an event. *See id.* §§ 1824(3)-(6).

Under the HPA, the term "sore," when used to describe a horse, means:

> (A) that 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).

The USDA justifies the Proposed Rule by explaining that "soring persists despite the Agency's efforts to regulate and work with the Tennessee Walking Horse and racking horse industries to eliminate the practice." 88 Fed. Reg. at 56927. Thus, it claims that the Proposed Rule would "strengthen regulatory requirements intended to protect horses from soring and eliminate unfair competition." *See* 88 Fed. Reg. at 56924. The amendments in the Proposed Rule fall roughly into three categories:

(1) Amendments that would impose blanket bans on using pads (supplemental weight on the underside of a horseshoe) and action devices, hoof bands, and substances—but only for Tennessee Walking Horses or Racking Horses at Horse Events. Other breeds of horses that are covered by the HPA are exempt from these bans. USDA justifies the differential treatment because, "based on [its] informed knowledge about the practices of all breeds performing or exhibiting in the United States, [it] know[s] that soring in breeds other than Tennessee Walking Horses and Racking Horses confers no significant performance advantage and is therefore rarely if ever practiced." 88 Fed. Reg. at 56937.

(2) Amendments to the current inspection program, which is largely reliant on "Designated Qualified Persons" (or "DQPs"), for Horse Events. These DQPs are currently appointed by Horse industry organizations ("HIOs"), who are largely responsible for administering this program now. The Proposed Rule would eliminate DQPs and the role of HIOs in administering the inspection program, and it would require all horse inspectors (now dubbed "HPIs") to either be private veterinarians certified by USDA or USDA's own inspectors. The Proposed Rule would place administration of the HPA enforcement program solely in USDA's hands.

(3) Amendments that would impose new or different obligations on the management of certain Horse Events with respect to, *inter alia*: record-keeping; the identification of horses; security matters; the checking of identification of persons entering horses in Horse Events; the number of HPIs to conduct inspections; and the requirement to have a farrier at Horse Events. Many of these tasks are currently handled by HIOs that would no longer exist.

In addition to these proposed amendments, USDA has sought input on other issues, including recommendations for addressing the due process concerns that have been raised concerning the current inspection and disqualification process.

USDA purports to base much of its rule on the recommendations of NAS. In July 2017, the USDA and Tennessee Walking Horse industry representatives jointly invited NAS to oversee 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), APHIS-2022-0004-0007, https://perma.cc/3MZV-WN4S ("NAS Report"). The NAS Report identified a number of deficiencies in USDA's current program, including the enforcement of the Scar Rule, 9 C.F.R. § 11.3. Specifically, the NAS Report concluded that the Scar Rule "as written is not enforceable." *See* NAS Report at 85. NAS's conclusions were based on research demonstrating that methods used during visual inspections to identify evidence of soring were not reliable. *Id.* at 83-86. To address its concerns, NAS recommended new research be conducted to assess the impact of certain methods of training and identify objective criteria by which soring may be identified. *Id.* at 82. The Proposed Rule invokes the recommendations of the NAS Report on some points, but it arbitrarily ignores NAS's recommendations for additional studies and the extensive concerns NAS raised with regard to the current Scar Rule.

THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION'S INTERESTS IN THE PROPOSED RULE

The TWHNCA owns and operates the largest Tennessee Walking Horse show in the country—the Celebration. The Celebration takes place in Shelbyville, Tennessee each year over eleven days in late summer. The Celebration has taken place every year since 1939 and each year it crowns the World Grand Champion. The Association also owns and operates the Fun Show, which occurs every year in Shelbyville in the spring, and the Celebration Fall Classic, which occurs every year in autumn in Shelbyville. The Association's ownership and production of these shows make it the most significant participant in the Tennessee Walking Horse show industry (the "Industry").

The Association has at least six overarching interests in the Proposed Rule:

(1) First and foremost, the TWH Industry has requested and continues to request that it be treated on an equal footing with other breeds governed by the HPA, including but not limited to the American Standardbred, Saddlebred, Morgans, Friesians, Quarter, Painted, and Hunter Jumper breeds ("HPA Breeds"). The language and legislative history of the HPA make clear that it applies equally to *all* breeds. It was not legislation limited to a particular breed of horses, and it does not single out any breed for disfavored treatment. Nevertheless, the Proposed Rule perpetuates—and exacerbates—an approach under which the USDA has singled out the TWH Industry for restrictive rules without adequate justification for such differential treatment. The TWH Industry seeks to be on equal footing with other breeds such that the same rules about equipment and the same objective standards for inspection protocols apply to all breeds.

(2) The Association's members cherish TWHs. Indeed, their love of the breed is why they and other participants in the Industry train TWHs, show TWHs, and put on TWH shows and exhibitions. The Association and Industry are committed to assuring the welfare of TWHs, and of horses in general. That includes a commitment to trying to eliminate the practice of soring completely. But that commitment also means ensuring that regulations under the HPA are fair to those who do not engage in soring.

(3) The Proposed Rule would impose several new regulations that would devastate, if not

entirely destroy, the Industry. The destruction of the Industry may also very well lead to the elimination of the TWH breed itself, as the desire to obtain horses for competition and breeding falls.

(4) At a minimum, the Proposed Rule will impose significant costs on the Association and others who participate in or benefit from the Industry, most if not all of whom are, like the Association, small business entities or owned by charities and civic organizations. And it will impose those costs without any adequate justification.

(5) The Proposed Rule would implement (or keep in place) inspection methods that are inherently vague and subjective and that have been shown to be incapable of yielding reproducible results. Such rules deprive trainers and owners of necessary notice as to what will constitute a violation or disqualification from competition. These methods violate due process, particularly given the inability to challenge disqualifications when they occur pre-show.

(6) The Proposed Rule would eliminate the Industry's role in enforcing the HPA, a role envisioned by Congress in enacting the HPA. USDA should introduce a governing body similar to that used with other HPA Breeds, which could implement an inspection process that uses objective measures based in sound science. Such an approach would solve most, if not all, of the USDA's due process issues.

The TWHNCA believes that the twin goals of the HPA can be achieved as Congress envisioned—with the Industry and USDA working together. TWHNCA stands ready to partner with USDA to do so.

SPECIFIC COMMENTS

I. The Proposed Rule Suffers From An Overarching Defect Because It Relies On USDA Data Concerning Violations That Is Demonstrably Unreliable.

The Agency's rationale for promulgating the Proposed Rule is fundamentally flawed because the data on which the Agency relies is fundamentally flawed. The Agency argues that the Proposed Rule is needed because "soring persists despite the Agency's efforts to regulate and work with the Tennessee Walking Horse and racking horse industries to eliminate the practice." 88 Fed. Reg. at 56927. The Agency bases this conclusion largely on data from 2017 to 2022 purportedly showing "that inconsistencies persist in the number of violations detected by APHIS officials and those issued by DQPs inspecting horses." *See id.* at 56928.[2] Specifically, USDA claims that its

[2] To the extent the Agency also cites an OIG Report issued in 2010—which itself relied on data collected from 34 shows in in 2008—that report cannot support a change in regulations now. *See* 88 Fed. Reg. 56297. The Agency cannot base a change in the regulatory regime, especially a change as radical as banning all action devices and pads entirely, on data that is fifteen years old. *See, e.g., Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985) ("Whether or not DOE acted reasonably in issuing rules in 1982 and 1983 based on 1980

own VMO inspectors identified higher rates of soring than DQP inspectors. According to USDA, that discrepancy and the high rate of soring detected by APHIS inspectors suggest both (i) that soring continues to be a significant problem calling out for some regulatory changes and (ii) that DQP inspectors are unwilling to "correctly palpate and observe other actions necessary to making a proper diagnosis." *Id.* at 56929. The data on which USDA relies is reflected in Tables 1 and 2 of the Proposed Rule. *See id*.

The basic problem at the heart of the Proposed Rule, however, is that this data is fatally flawed for multiple reasons.

First, the data reproduced in the tables in the Proposed Rule does not match up with the publicly available Activity Reports provided on the USDA's website.[3] USDA has failed to provide any explanation for the discrepancy, and the tables in the Proposed Rule appear to inflate the number of violations found by USDA inspectors.

Second, the data supposedly showing a higher rate of soring detected by USDA inspectors is invalid because it was not based on a random sample of horses. To the contrary, the USDA admits that, in some unknown number of cases, the horses inspected by APHIS inspectors after an inspection by a DQP were selected for inspection "on suspicion of soring," *id.* at 56928 n.14—that is, they were chosen *precisely because they showed signs of being sore*. If that was part of the selection process, of course the APHIS inspectors found a higher rate of soreness: the sample was biased to yield that result.

Third, the data cited in the Proposed Rule reflects rates for *all* HPA non-compliance violations, not *soring* violations. But the Proposed Rule erroneously treats the data as if it exclusively demonstrated soring violations.

Fourth, USDA's data resulted from a subjective inspection process that has been shown to be incapable of producing repeatable results. When it has been shown that the inspection process is so subjective that two inspectors will reach different results on the same horse up to 52% of the time, USDA cannot draw any valid conclusions from the mere fact that Agency inspectors tended to find a higher rate of violations.

Fifth, USDA critically based its decisions on the view that rates of soring were higher for Tennessee Walking Horses than for other breeds, but it lacked any objective data whatsoever about soring in other breeds.

---

information, we think it would be patently unreasonable for DOE to begin further proceedings in the last half of 1985 based on data half a decade old.").

[3] *See, e.g.*, USDA Horse Protection Program Activity Rep., FY 2022, https://perma.cc/286B-W7YC (2022 Report); USDA Horse Protection Program Activity Rep., FY 2021, https://perma.cc/5SN8-QREC (2021 Report). These and other activity reports that were previously made available on the USDA website are collected as Exhibits 1 to 6 in the Appendix of Exhibits ("App.") submitted with these Comments.

If the Agency is serious about ending soring, it should follow the NAS Report's recommendation and conduct new studies to identify objective and reliable means for detecting evidence of soring, which can then be used to determine the actual rate of soring in all horses. The Association remains ready and able to assist the Agency in doing so.

A. The Rate Of HPA Violations Reflected In USDA's Activity Reports Is Significantly Lower Than The Rate Reported In The Proposed Rule.

USDA's conclusion that its own inspectors "consistently reported higher rates of noncompliance at these events based on its VMO inspection findings," 88 Fed. Reg. at 56928, is predicated on the data included in Tables 1 and 2. *See id.* at 56929. But the data reported in those tables does not match the violation data reported in USDA's own Activity Reports, which have been made publicly available on the Agency's website to provide the public with a detailed breakdown of USDA's inspections.

For example, Tables 1 and 2 indicate that DQPs inspected 8,176 horses in FY-2022 at events in which USDA was present. USDA's FY-2022 Activity Report indicates that there were 8,173 such inspections. *See* FY-2022 Report. Similarly, Tables 1 and 2 indicate that 1,287 horses were inspected by USDA, while the Activity Report puts that number at 1,300. These minor discrepancies are not meaningful and are not the focus of TWHNCA's comments.

The reported violations, however, are significantly different. According to the Proposed Rule, USDA inspectors detected a total of 323 instances of non-compliance in FY-2022. But USDA's activity reports indicate that number is only 117. It strains credulity to believe that there were 206 violations that USDA chose not include in its Activity Reports.

The glaring discrepancy between the number of violations reported on USDA's Activity Reports and the number stated in the Proposed Rule requires an explanation from USDA and calls into question the "consistently reported higher rates of noncompliance at these events based on its VMO inspection findings." 88 Fed. Reg. at 56928. For example, if the rate of violations for both performance and flat-shod horses in Tables 1 and 2 in FY-2022 are combined, USDA's data indicates a non-compliance rate of 25.1%. But, if the same violation rate is calculated using USDA's Activity Report for FY-2022, that rate drops to 9%.[4]

These discrepancies repeat themselves across each of the years of data included in Tables 1 and 2. Comparing that data to the Activity Reports, which are included as Exhibits 1 to 6 in the Appendix of Exhibits submitted with this Comment, leads to the following results:

[4] The Activity Reports do not break down inspections by performance events and flat-shod events. Thus, an apples-to-apples comparison between the data on the Activity Reports and the data in the Proposed Rule must include both performance and flat-shod figures.

FY-2022

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	8,176	1,287	323	25.1%
Activity Report	8,173	1,300	117	9%

FY-2021

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	2,997	541	159	29.4%
Activity Report	2,994	541	21	3.9%

FY-2020

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	1,865	326	80	24.5%
Activity Report	1,865	328	2	0.6%

FY-2019

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	7,023	1,198	249	20.8%
Activity Report	7,023	1,210	5	0.4%

FY-2018

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	9,595	1,556	105	6.8%
Activity Report	9,540	1,638	31	1.9%

FY-2017

	Entries Inspected by DQPs (APHIS present)	Entries Inspected by APHIS	HPA Non-compliances detected by APHIS	Non-compliance rate detected by APHIS
Proposed Rule	7,930	1,488	129	8.7%
Activity Report	6,707	1,536	129	8.4%

Other than FY-2017, which is the only year in which the number of violations in Tables 1 and 2 match what is shown in USDA's Activity Reports, the number of violations detected by USDA and the resulting non-compliance rates are consistently and significantly higher in the Proposed Rule. The average violation rate reflected in the data in the Proposed Rule over fiscal years 2017-2022 is 19.2%. But the average violation rate reflected in the publicly available Activity Reports is only 4%. That discrepancy is hugely significant, because the USDA almost certainly would not have attempted to base its radical rewriting of the HPA rules on data showing only a 4% violation rate at TWH events.

Given the central importance USDA places on this data in supporting the Proposed Rule, the TWHNCA and public are entitled to know how USDA is calculating violation rates and why the rates do not match the data previously publicly reported by USDA in its Activity Reports.

After USDA explains this discrepancy and explains what data it was actually relying on—which currently remains entirely hidden from public view—TWHNCA and the public should be permitted a further opportunity to respond to USDA's explanations and whatever data the USDA reveals. The USDA cannot fail to disclose the details of the data on which it is relying, stymie the efforts of interested parties like TWHNCA to understand (and comment on) the USDA's purported basis for its decisions, and then claim that it has given an opportunity for public comment that complies with the APA.

B. USDA's Data Is Wholly Unreliable Because It Is Not Based On A Random Sample.

USDA's data purporting to show the rate of HPA violations at TWH events is also unreliable because—by USDA's own admission—it is not based on a random sample. USDA relies on the data about violation rates presented in the Proposed Rule for two critical conclusions that are central to the rationale for its proposed changes: (i) violation rates for Tennessee Walking Horses are supposedly high as an absolute matter (purporting to be as high as 40% in recent years), and (ii) DQPs find violations at such a low rate compared to APHIS inspectors that they must not be doing the job right. 88 Fed. Reg. at 56929, Tbl. 1. The problem is that the data cannot remotely support those conclusions because the APHIS inspectors finding this supposedly high violation rate were admittedly not inspecting a random sample of all horses.

USDA acknowledges that its data showing "higher rates of noncompliance … based on its VMO inspection findings," 88 Fed. Reg. at 56928, is undermined by the fact that the sample of horses inspected by APHIS is not selected at random. To the contrary, to an unspecified (and

apparently unknown) extent, the horses inspected by USDA officials are "chosen on suspicion of soring." 88 Fed. Reg. at 56928 n.14; *see also id.* at 56928 (USDA officials "cho[ose] to inspect some horses for which a suspicion of soring was warranted"). In other words, USDA officials inspect the horses that they already think show signs of soring. As USDA acknowledges, such horses "are more likely to be diagnosed [as sore], as that sample presented indications of soring prior to inspection." *Id.* at n.14. As a result, the USDA's data purportedly showing "consistently reported higher rates of noncompliance," 88 Fed. Reg. at 56928, cannot properly be treated as reliably showing the violation rate at TWH events because it is based on inspections of a subset of horses that were already suspected of soring.

USDA attempts to soft-pedal *how much* selection bias was involved in creating the invalid sample underlying its data as it asserts that "[m]ost horses inspected by APHIS officials ... were chosen at random" and only "some" were selected based on "a suspicion of soring." 88 Fed. Reg. at 56928. But even that assertion is belied by a further admission that USDA buries in a footnote. In the footnote, USDA acknowledges that "APHIS records of inspection conducted by VMOs *do not differentiate* between horses chosen at random and those chosen on suspicion of soring." *Id.* n.14 (emphasis added). In other words, there is no data whatsoever indicating what percentage of the sample of horses inspected by APHIS was selected based on suspicion of soring; USDA actually has no basis for claiming that "most" were selected at random; and as far as any objective data presented in the Proposed Rule shows, up to 80 or 90 percent of the horses inspected by APHIS at TWH events may have been selected precisely "on suspicion of soring."

Of course, it is an elementary precept of statistics (and common sense) that conclusions cannot be based on examination of a sample drawn from a larger body of data if the sample is not truly random. Where the sample has not been drawn randomly, selection bias interferes with the reliability of any conclusion based on the sample. *See* Sharon L. Lohr, *Sampling: Design and Analysis* 6-10 (3d ed. 2022); *see also id.* at 6 ("Selection bias is of concern when it is desired to use estimates from a sample to describe the population."). By admission, USDA's data about the rate of violations found by APHIS inspectors is infected with an incurable selection bias, because some unknown percentage of the horses APHIS inspected were actually "chosen on suspicion of soring." Specifically, USDA cannot maintain that the "higher rates of noncompliance" found by APHIS inspectors provide a neutral baseline against which to compare findings by DQPs when the USDA acknowledges that an unidentified number of horses it inspects "are more likely to be diagnosed" as sore. *Cf. Oceana, Inc. v. Raimondo*, 530 F. Supp. 3d 16, 35 (D.D.C. 2021), *aff'd*, 35 F.4th 904 (D.C. Cir. 2022) (observing that the sample at issue was "not randomly selected … which undermines any straight arithmetical extrapolation").

C. USDA Overinflates Its Data By Including Non-Soring Violations.

Setting aside the discrepancies noted above, the data in Tables 1 and 2 is also fundamentally unsound because it includes violations for horses where there is no finding of a *soring* violation. That is, USDA relies on data showing *all* HPA violations—including non-soring violations—to support its conclusion that "soring persists." By failing to distinguish between types of violations, USDA improperly overinflates the data supposedly showing soring violations.

Horse trainers may violate USDA's regulations even where the horse is not deemed sore. For example, a horse owner may be cited for using a chain weighing 6.1 ounces, which would be in violation of 9 C.F.R. § 11.2(b)(2) (prohibiting the use of "[c]hains weighing more than 6 ounces each, including the weight of the fastener"). Under this system, a horse may be found to "violate" the USDA's regulations where the owner simply forgot to account for the weight of a fastener. But this kind of absent-mindedness is not evidence of soring, and USDA has never claimed that it was. For data to support any conclusions about a continuing high rate of *soring* violations, USDA would need to segregate out those violations that were based on a finding of soring from those that were not.

Worse, the data in the Proposed Rule actually incorporates evidence of efforts taken to *prevent* soring. For example, a horse may be found to violate USDA's "prohibited substance" regulation after a trainer applied a substance such as a lubricant to prevent a horse from becoming sore. *See* 9 C.F.R. § 11.2(c) (prohibiting "[a]ll substances … on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction," *other than* "lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof"). Although the current rule expressly allows the use of specified lubricants to help prevent soring, the reality is that horses may be (and often are) disqualified due to the use of permitted substances. For example, a horse was recently disqualified at a show in Pulaski, Tennessee because the USDA's inspection detected a "hydro-carbon violation" under the prohibited substance rule. *See* App. Ex. 7 (Groover Decl.) at ¶ 4. The cause of the violation was the trainer's use of Vaseline to help minimize the friction caused by an action device. *Id.* ¶ 6. While Vaseline is a lubricant and is specifically permitted under the current substances rule, the Vaseline combined with the horse's sweat, and the resulting substance was found by USDA to be a violation of the rule. *Id.* ¶ 8.

The incident in Pulaski is not an isolated one. As discussed further in Section III, the existing prohibited substance rules are fundamentally unsound, because USDA does not identify with any specificity which substances are banned or provide the *level* at which a substance would cause a violation. USDA's failure to provide minimum levels at which a horse may be disqualified means a horse may be disqualified for reasons beyond an owner or trainer's control. Without a minimum threshold at which a substance will disqualify a horse, individuals may be cited for substance violations where (i) the horse picked up the substance through the environment (which was not applied by a person); (ii) the substance appears on a horse in an amount that does not cause it to suffer or cannot reasonably be expected to cause it to suffer, (iii) the substance occurs from natural changes that occur to a horse during a performance, and/or (iv) the substance appears on a horse in connection with its therapeutic treatment by or under the supervision of a licensed veterinarian. Not only does this program leave trainers guessing as to how to best provide for the welfare of their horses, but it may also ultimately punish them for doing so. Here, USDA uses the violations resulting from these trainers' good intentions as evidence of soring to support its Proposed Rule.[5]

[5] As discussed in Section III, the USDA's prohibited substance program is also beyond the scope of authority granted to the Agency under the HPA.

USDA's use of this erroneous data is particularly inexplicable here, because USDA collects data on violations that should allow it to isolate data on actual soring violations. The Agency's Activity Reports show the "Type of Noncompliance" found for each violation, and distinguishes between violations that, according to USDA, are indicative of actual soring (*e.g.*, a "Scar Rule" violation) and those that are not (*e.g.*, a "refusal to provide information" violation). *See* App. Exs. 1-6. Based on the information in the Activity Reports, VMO findings that would indicate evidence of soring are significantly lower than USDA suggests in the Proposed Rule. Specifically, when looking at Scar Rule violations or Sensitivity Violations, the Activity Reports show the following:

USDA Horse Protection Program Activity Report	**Entries VMOs Inspected**	**Scar rule Violations VMOs Found**	**VMO Scar rule Violation Rate**	**Sensitivity Violations VMOs Found**	**VMO Sensitivity Violation Rate**
FY17 (10/1/16 - 9/30/17)	1,536	34	2.21%	77	5%
FY18 (10/1/17 - 9/30/18)	1,638	2	0.1%	21	1.3%
FY19 (10/1/18 - 9/30/19)	1,210	0	0%	3	0.25%
FY20 (10/1/19- 9/30/20)	328	1	0.3%	1	0.3%
FY 21 (10/1/20- 9/30/21)	541	0	0%	19	3.5%
FY22 (10/1/21- 9/30/22)	1,300	19	1.5%	63	4.8%

Contrary to USDA's suggestion that "soring persists," 88 Fed. Reg. at 56927, and that there was "close to a 40% rate of noncompliance for performance horses," 88 Fed. Reg. at 56928, this data shows that actual evidence of soring in the Industry is low. *See also* App. Ex. 8 (Statement of Dr. John Bennett DVM on H.R. 1518) at 40 (noting that "[w]hile 100% compliance is of course the goal, a 98+% rate of compliance based on the subjective inspections performed on these animals as part of a competitive event indicates that the industry takes this issue very seriously and has made great strides in eliminating soring").

The number of violations reported in FY 2017, FY 2021, and FY 2022 is likely even lower than what is reported in this table. As discussed below in Section D, 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. USDA removed that requirement in 2021, holding that a single VMO's findings were sufficient without the need for additional confirmation. *See* App. Ex. 9 (USDA 2021 HIO & DQP Training) at 21. The data shows that, when the second inspection rule was in effect, the number of violations found by inspectors dramatically decreased. In other words, when two VMO inspectors had to agree on a finding of a violation, the number of violations found dropped significantly. As a result, if the entries for calendar year 2016 are excluded from the FY 2017 report (before a second VMO was required to confirm the initial findings), VMOs found 19 Scar Rule violations for the 1,220 entries they inspected, for a Scar

Rule violation rate of 1.56%. Similarly, of the 77 sensitivity violations found by VMOs listed on that report, 33 were in calendar year 2016. If one excludes the 2016 entries from the report, VMOs found 55 sensitivity violations for the 1,220 entries they inspected, for a sensitivity violation rate of 4.51%.

When considering the unreliability of the inspection methods and the rate of false positives are taken into account, as discussed below in Section D, the actual rate of soring is likely even lower than that reported.

D. USDA's Data Was Obtained By A Subjective Inspection Protocol That Does Not Yield Reproducible Results.

As recognized by the NAS Report (and as the Association has warned the Agency for years), USDA's current inspection protocol is predominantly subjective and does not yield reproducible and consistent results. In other words, the inspection process is so subjective that two inspectors inspecting the same horse can come to widely divergent conclusions on whether, for example, the horse shows sensitivity or violates the Scar Rule. Because the protocol cannot produce repeatable results and is unreliable, USDA cannot use data *obtained* from that protocol as evidence that "soring persists."[6]

The unreliability of USDA's current inspection process is demonstrated first and foremost by the fact that USDA's own inspectors cannot agree on whether an individual horse is sore. 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). In one case, where three different examiners came to different conclusions upon examining the same horse, the presiding ALJ remarked, "I am skeptical about the reliability of the method used to determine whether a horse is sore in general, and whether this particular horse was sore on April 16, 2009, as three examiners found inconsistent result [sic], a thermography examination is of little value, and [USDA's] primary witness testified inconsistently with the evidence." *Jenne*, No. 13-0080, 2014 WL 4948794, *7 (USDA Jul. 29, 2014). 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,

[6] The currently used USDA examination protocol requires an inspector (be it a VMO or DQP) to observe the horse as it walks to determine if it exhibits signs of soreness, to visually examine the horse's limbs, and to digitally palpate the pasterns, in order to check for compliance with the HPA, including the Scar Rule. *See* 9 C.F.R. § 11.21(a). Under the protocol, when digitally palpating the pasterns, inspectors are instructed to "use the flat part of your thumb to apply enough pressure to flatten the flesh of the thumb, thus blanching the thumbnail." NAS Report at 32.

> 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.

App. Ex. 10 (Statement of ALJ Clifton) at 82:10-24.

Data from inspections backs up these ALJ findings. For example, at the 2016 Celebration, when a second USDA VMO re-inspected horses after an initial VMO finding of a violation, that second VMO disagreed with the initial decision at a staggering rate. Specifically, the second VMO disagreed that there was an HPA violation in 22.67% of cases. And the second VMO made inconsistent findings from those of the first VMO in 52% of cases. The table below summarizes the rate of these contradictory and inconsistent VMO findings:

A	B	C	D	E	F
Number of VMO Re-Exams	**Horses Found Compliant On Re-Exam**	**Percentage Found Compliant On Re-Exam (Col. B / Col. A)**	**Instances Of Other Inconsistent VMO Findings (Excludes Those in Col. B)**	**Total VMO Inconsistencies (Col. B + Col. D)**	**Total VMO Inconsistencies as a Percentage of Re-Exams (Col. E/Col. A)**
75	17	22.67%	22	39	52%

App. Ex. 11 (Statement of Rachel Reed).

These already high rates of inconsistent findings do not take into account the inherent bias in the VMO re-examination process by which a second VMO would be inclined to adopt the initial conclusions of his colleague. For example, at the North Carolina Championship Walking Horse Show held in October 2023, a VMO supervisor acknowledged that the inspections conducted by a colleague were not procedurally sound or correct. *See* App. Ex. 12 (Hatfield Aff.). Despite this acknowledgement, the supervisor failed to overturn the VMO's decision to disqualify a horse. *Id.*

The 2016 Celebration findings are bolstered by those made in the NAS Report. As the NAS Report explains, 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). Indeed, as noted by NAS, not a single finding of bilateral soreness was made by a VMO at the 2017, 2018, or 2019 TWH National Celebration, and only one finding of unilateral soreness was made over the same period. *Id.* In other words, when there was a requirement that two inspectors had to *agree* in order to find a horse sore, there were essentially zero findings at the Celebration three years in a row.[7]

What the data in the table above and the description in the NAS Report shows is that, when two different inspectors examine the same horse, they cannot agree on the same conclusion a

[7] According to Activity Reports for those years, USDA inspected 103 horses in 2017, 96 horses in 2018, and 166 horses in 2019 at the Celebration. *See* App. Exs. 4-6.

remarkable percentage of the time—up to 52% of the time based on 2016 data. Of course, a so-called "test" that cannot generate reproducible results—that cannot yield a consistent result when two examiners inspect—cannot be credited as a reliable way to identify evidence of soring. And USDA's rationale for supporting the Proposed Rule—that "APHIS consistently reported higher rates of noncompliance [than DQPs]," 88 Fed. Reg. at 56928—is completely undermined when USDA's *own* VMOs cannot agree as to what is or is not a violation.

The unreliability of these methods is addressed by Dr. Paul Stromberg, a renowned veterinarian and professor at the Ohio State University College of Veterinary Medicine whose work was relied on in the NAS Report. Dr. Stromberg evaluated 136 biopsies from 68 Tennessee Walking Horses that were disqualified for violations of the Scar Rule at the 2015 and 2016 National Celebration to determine whether the tissue from horses that had been disqualified under the Scar Rule actually showed any medical evidence that would support the violations. His answer was no. His findings, as reported by NAS, were that "no scar formation or granulomatous inflammation was present in any of the tissue samples." NAS Report at 78. As a result, NAS concluded that "[t]he primary injuries to the pastern of the horses in the Stromberg study or any of the TWHs presenting with lichenification of the skin or the palmar aspect of the pastern are not known." *Id.* at 80.[8] In other words, none of the horses in Dr. Stromberg's study met the criteria for a Scar Rule violation. Based on this sample, USDA's testing protocol had an accuracy rate of zero percent.[9]

Indeed, NAS itself acknowledged that the Scar Rule (the primary vehicle through which USDA inspectors disqualify horses) is "not enforceable" because it was not written in a way that can be "applied in a consistent manner by VMOs and DQPs tasked with examination of horses for scar rule violations." *Id.* at 85. NAS recommended additional studies be done to ensure violations were based on evidence that objectively showed soring. *See, e.g.*, NAS Report at 10 ("More studies are needed to determine if training practices that can cause soreness in TWHs also result

[8] The inadequacy of the current Scar Rule—and the USDA's misguided attempt to remedy it—are discussed in Section IV.

[9] Dr. Stromberg reached similar conclusions based on a review of horses disqualified from the 2014 Celebration. Dr. Stromberg observed:

> All I found was some minor folding in the skin of the flexor surface and sulcus of both pasterns. These folds could be smoothed with mild pressure applied by my fingers. A minimal to mild variable degree of alopecia [hair loss] was noted on most of the horses examined. The anterior aspect of all pasterns was normal. The skin did not feel thick nor was there any clinical evidence of granulomatous inflammation, granulation tissue (scar tissue or proud flesh) or anything else that could be interpreted to be a scar. The mild degree of alopecia on some horses likely correlates with the telogen phase follicles I observed in some of the biopsy material. This could be caused by mild chronic irritation. If these were disqualified horses based on scar rule violations, they must be considered false positives because there is no histopathological evidence to substantiate the ruling.

App. Ex. 13 (Stromberg Decl.) Ex. A at 6.

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.").

Dr. Stromberg agreed with NAS that the current methods used to identify soreness do not yield reproducible or reliable results. In his opinion:

> Inspectors are attempting to detect the presence of a pathologic process far below the level of clinical significance **based on what <u>they think they see and feel</u>** without independent verification. They conclude from this it is proof of a scar rule violation. The result, not unexpectedly, is inconsistency in passing or disqualifying a horse for competition and many false positives.

App. Ex. 13 (Stromberg Decl.) Ex. A at 10 (emphasis original). Dr. Stromberg's concerns were echoed by Dr. Joseph Bertone, a professor of equine medicine. He observed:

> I believe the examination protocol is highly subjective and unlikely to be applied consistently. My observations of the VMOs applying this examination protocol at the Celebration lead me to be skeptical that results from this examination protocol can be accurately interpreted to identify horses that are sore and those that are not sore. I am not aware of any peer reviewed study to identify the reliability of the palpation techniques to generate similar pressures across and within horses and inspectors. I am unaware of any peer reviewed study that has identified if these techniques can accurately identify horses that are sore, versus those that are not sore.

App. Ex. 14 (Statement of Joseph Bertone) at 3.

The reliability of the USDA's data is further called into question when considering how many VMOs lack equine experience. As the NAS Report explained, to ensure reliability, examinations should be performed not only by a veterinarian, but by a veterinarian who has equine experience. *See* NAS Report at 4 ("[T]he committee strongly recommends that use of DQPs for inspections be discontinued and that only veterinarians, preferably with equine experience, be allowed to examine horses, as is done in other equine competitions."); *see also id.* at 67 ("The result is that the identification and diagnosis of pain in horses—and in TWHs in particular—is challenging and, as pointed out in Chapter 2, requires extensive training, ideally by experienced equine veterinarians."). For the same reason, USDA's suggestion that the NAS Report approved the current inspection process as the "gold standard for detecting local pain and inflammation" is inaccurate. 88 Fed. Reg. at 56931 (citing NAS Report at 3). The NAS Report made clear, in context, that the methods it was approving were reliable only when they were "performed by

veterinarians who are trained and highly experienced in detecting lameness and pain." NAS Report at 33.[10]

The need for VMOs to have equine expertise is all the more acute in light of the weight accorded to VMO findings by the USDA's Office of the Judicial Officer ("OJO"). The USDA OJO has long held that when a VMO finds that a horse is sore, it creates a "presumption of soreness" that is extremely difficult to overcome, no matter how credible the respondent. *See, e.g.*, *In re Jenne*, 73 Agric. Dec. at 12-13. In the 21 reported OJO cases since 2013 involving findings that a horse had been sored, not a single respondent was able to overcome the presumption of soreness. In fact, it is unclear whether a single challenge to a VMO's finding of soreness has ever been successful. *See, e.g.*, *Lacy v. USDA*, 278 F. App'x 616 (6th Cir. 2008) (refusing to overrule the presumption of soreness despite a horse testing positive for West Nile virus). Only one horse owner appears to have even been able to successfully challenge an HPA violation at all, though in that case there was no VMO decision to overturn. Rather, the owner refused to allow a VMO to inspect his horse in the first place because the VMO appeared to be examining horses in a way that was "abusive and calculated to elicit a reaction from a horse that was not sore." *In re Kim Bennett*, 64 Agric. Dec. 1447, 1450-51 (2005). The ALJ found that the owner's refusal was reasonable under the circumstances. *Id.* at 1450.

Finally, the USDA's methods fail to account for injuries or sensitivity that may occur from perfectly legal activity that occurs during a show. Following a performance, a Tennessee Walking Horse may have minor sensitivity that results from normal activity that occurs during a show, much like a human athlete may have minor sensitivity following a game or match. Yet USDA will often disqualify horses *post-show* for such sensitivity when there is no evidence of actual soring. USDA disregards that there is an equally plausible explanation for that sensitivity that would not involve soring. *See also* App. Ex. 13 (Stromberg Decl.) Ex. A at 10-11 ("The presumption that thickened skin must equal chronic inflammation and scar formation (and therefore proof of soring) ignores other possible causes and betrays a lack of understanding of basic pathologic principles.").

In short, as this evidence shows, the data obtained from USDA's inspection process is highly subjective, unscientific, unreliable, and results in a high number of false positives. This is not a surprising result, given that the process is literally a "look and feel" procedure. *See generally* 9 C.F.R. § 11.21. A federal court of appeals captured the subjective and imprecise nature of the examination protocol in describing it as being "far more art than science." *Contender Farms v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015). *See also id.* ("In many cases, inspectors, veterinarians, and other professionals will disagree as to whether a horse is actually sore.").

[10] As discussed below in Section V, the TWHNCA does not believe that it is financially feasible for the Industry to have an equine veterinarian available at each show to inspect every horse. In order to balance these concerns with those identified by the NAS Report, the TWHNCA recommends that USDA adopt a revised inspection system based on objective measures akin to those used with other HPA breeds. The TWHNCA's proposal as to how this system would work is discussed below in Section VII.

The unreliability of USDA's data is not a new problem, nor can USDA claim it was unaware of it before issuing the Proposed Rule. In addition to NAS raising these concerns (in the very study relied on by USDA to support its rule), the TWHNCA informed USDA of these same problems in its comments on USDA's proposed 2017 rule. In those comments, TWHNCA pointed to evidence of inconsistent findings by VMOs dating back as far as 2007. *See* App. Ex. 16 (2016 TWHNCA Comment) at 57.[11] As the Association explained, these "inconsistencies … demonstrate that the examination protocol leads inspectors—here APHIS's own inspectors—to reach different conclusions and that the examination protocol does not produce repeatable results." *Id.* at 57-58. TWHNCA also pointed to the conclusions of Dr. Bertone and Dr. Stromberg—years before NAS relied on and adopted the conclusions of Dr. Stromberg in its own recommendations. *Id.* at 58-60.

E. USDA Points To No Data Regarding Soring (Or The Absence Of Soring) In Other Breeds To Warrant Differential Treatment.

USDA's decision to treat Tennessee Walking Horses and Racking Horses differently from other breeds covered by the HPA also raises concerns based on faulty use of data. USDA ostensibly based its decision that Tennessee Walking Horses require special rules on the conclusion that violation rates are much higher at TWH events than competitions with other HPA Breeds. But the USDA does not point to (and does not appear to have) any data showing violation rates for other breeds to use as a basis for comparison. As discussed below in Section II, APHIS considered prohibiting all pads, action devices, and substances for all breeds (in addition to TWHs) but explained that "doing so … would unfairly conflate those breeds that do not sore for competitive advantage with those that do." 88 Fed. Reg. at 56937. USDA offers no evidentiary support for its conclusion that other breeds do not engage in soring. Instead, USDA simply asserts—without evidence—that, in its "informed knowledge," soring is "rarely if ever practiced." See 88 Fed. Reg. at 56937 ("However, based on our informed knowledge about the practices of all breeds performing or exhibiting in the United States, we know that soring in breeds other than Tennessee Walking Horses and racking horses confers no significant performance advantage and is therefore rarely if ever practiced.").

USDA's conclusions lack support for two reasons. *First*, USDA does not have data for the vast majority of HPA breeds because it does not inspect those breeds the same way it inspects TWHs. Rather, as USDA explains, "APHIS monitors the activities of other breeds and investigates credible evidence of soring as warranted." 88 Fed. Reg. at 56924 n.2. But USDA's assurance that it "investigates credible evidence of soring as warranted" is not evidence that soring does or does not occur in those breeds. *See Flyers Rts. Educ. Fund, Inc. v. Fed. Aviation Admin.*, 864 F.3d 738, 741 (D.C. Cir. 2017) ("[T]he Administrative Procedure Act requires reasoned decisionmaking grounded in actual evidence.").

Second, USDA itself has acknowledged that other breeds do engage in soring. In its 2017 final rule, USDA explained that it "is aware of substantive reports and instances of soring at events involving breeds of horses other than Tennessee Walking Horses and Racking Horses. For

[11] The Association's Comments on USDA's 2017 Final Rule are attached as Exhibit 16 and incorporated by reference in their entirety.

example, APHIS has found evidence of soring during inspections conducted at Spotted Saddle Horse and Missouri Fox Trotter events. In addition, APHIS is aware of concerns and incidents of show jumpers bearing signs of abuse on their legs." App. Ex. 15 (2017 Final Rule) at 37. Yet, in the 2017 rule (as in the current Proposed Rule), USDA points to no data or evidence for its conclusion that soring is more prevalent in Tennessee Walking Horses, simply noting that the reports of soring in other breeds are "not as widespread." *Id*. The Agency should not single out and place more onerous restrictions on Tennessee Walking Horses without evidence to support that action.

* * *

For all of these reasons, the data on which USDA relied on in the Proposed Rule is unreliable, and the Agency should not base any rulemaking on it. *See, e.g., Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 530 (D.C. Cir. 1963) ("The Secretary, however, offered nothing tending to substantiate the accuracy and reliability of the underlying data. For these reasons the Secretary's determination must be set aside for the further reason that it is not supported by 'reliable, probative, and substantial evidence.'"). Instead, USDA should follow the recommendation from the NAS Report and conduct additional research to identify objective criteria that can be used for detecting soreness. Then the USDA can begin a rulemaking that will actually address soring. TWHNCA stands ready to work with and assist USDA in this regard.

II. The Ban On All Action Devices And Pads Would Be Contrary To The HPA And Arbitrary And Capricious.

The USDA should not issue its proposed ban on action devices and pads. The proposed ban (i) falls outside the USDA's statutory authority under the HPA, and (ii) is arbitrary and capricious based on USDA's failure to support it with substantial evidence or any rational justification connected with stopping soring. In addition, as discussed further in Section VI, the ban would have a devastating economic impact on the Tennessee Walking Horse industry, an impact that the USDA has wholly ignored in its superficial cost-benefit analysis.

In its 2017 Final Rule, USDA also proposed to ban the use of action pads and devices using much of the same rationale offered in support of the Proposed Rule. The TWHNCA's Comments in response to the proposed 2017 Rule, attached as Exhibit 16, are incorporated by reference. *See* App. Ex. 16 (2016 TWHNCA Comment) at 8-29.

A. A Ban On All Action Devices And Pads Is Contrary To The HPA.

USDA's proposed ban on all action devices and pads is unlawful because it completely bans the use of equipment that has not been shown to cause soring. Because the HPA prohibits only practices and devices that cause soring, USDA's proposed ban exceeds the scope of statutory authority delegated to it by Congress.

"It is a well-established rule of law that the rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the

statute.'" *United States ex rel. Chase v. Wald*, 557 F.2d 157, 161 (8th Cir. 1977) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976)).

The language of the HPA explains in clear terms that it is intended to prohibit the *soring* of horses. The HPA explains that "[t]he term 'sore' when used to describe a horse means that—

> (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).

The Act further prohibits "the showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." *Id.* at § 1824(2).

Thus, the HPA grants USDA authority only to prohibit the use of items or practices that cause a horse to suffer—or that can reasonably be expected to cause a horse to suffer—pain, distress, inflammation or lameness when walking, trotting or otherwise moving. The Act does *not* prohibit practices or items that do not cause soring, and it does not provide the USDA authority to prohibit practices or items that do not cause soring.

The proposed ban on action devices and pads exceeds the USDA statutory authority because the use of action devices and pads does not, in itself, *cause* soring. USDA points to no evidence indicating that they do. This is not surprising. The scientific evidence actually points to the contrary conclusion—action devices and pads do *not* cause soring.

As to action devices, in 2012, the American Veterinary Medical Association ("AVMA") and the American Association of Equine Practitioners ("AAEP") explained in a joint statement that "there is little scientific evidence to indicate that the use of action devices below a certain weight are detrimental to the health and welfare of the horse ...." App. Ex. 17 (Joint Statement of the Am. Med. Veterinary Assoc. and Am. Assoc. of Equine Practitioners) at 1 . Dr. Stromberg noted in 2016 that there are no known published scientific studies that establish that using action devices as permitted under the current regulations cause a horse to be sore. *See* App. Ex. 18 (2016

Statement of Dr. Paul Stromberg) at 3. The only known published scientific studies that concern the use of action devices, as permitted under the current regulations, and soring are (i) a study entitled *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors: Summary of the Research from September 1978 to December 1982*, prepared by Dr. Ram C. Purohit, Associate Professor of Veterinary Medicine at Auburn University (the "Auburn Study"), *see* App. Ex. 19, and (ii) a study entitled *Soring in Tennessee Walking Horses: Detection By Thermography*, August 1975, prepared by Dr. H.A. Nelson, *et al.*, then of APHIS's Veterinary Lab Services in Ames, Iowa (the "Nelson Study"), *see* App. Ex. 20. Both of these studies were prepared for USDA.

The Auburn and Nelson Studies establish that using action devices, as permitted under the current regulations, does not cause a horse to be sore. In Phase XI of the Auburn Study, two, four, and six ounce chains (which are a type of action device) were used on TWHs, without using any other chemical or mechanical technique, to try to induce inflammation. *See* App. Ex. 19 at 9 (Auburn Study). The Auburn Study concluded that:

> [u]se of 2, 4, and 6 oz. chains did not cause any detectable pain, [or] tissue damage. Thermographic and pressure evaluation did not change significantly. Thus, it was concluded that the use of 2, 4, and 6 oz. chains for the duration of 2 to 3 weeks did not produce any harmful effects to the horses' legs, with exception to some loss of hair from 6 oz. chains in the pastern areas.

Id. As part of the Nelson Study, various action devices were tested on horses. *See* App. Ex. 20 (Nelson Study) at 7-10. The Nelson Study found that "[n]o lesions were produced by chains under 8 ounces ...." *Id.* at 10. From that finding, it follows *a fortiori* that the use of chains, if not all action devices, weighing six ounces or less do not create lesions.

USDA has previously relied on these studies in concluding that "[t]he best evidence available to us, including the Auburn University Study and [the Nelson Study] shows that while chains and other action devices weighing more than 6 ounces can sore horses, ***those weighing 6 ounces or less are not themselves likely to cause soring***." Horse Protection Regulations; Interim Rule and Request for Comments, 53 Fed. Reg. 28366, 28370 (Jul. 28, 1988) (emphasis added). In other words, not only was the evidence USDA relies on today in front of it at the time it adopted the current regulations permitting the use of pads and action devices in 1989, but it relied on that evidence to reach a conclusion—action devices weighing 6 ounces or less are permissible because they do not cause soring—that is completely at odds with the ban the Agency now proposes.

USDA does not explain its about-face. Instead, it purports to *rely* on the Auburn study as its principal evidence, which it refers to as "an older but still relevant study," to suggest there is a correlation between "action devices and their role in soring." 88 Fed. Reg. at 56937. But the Proposed Rule itself undercuts USDA's change in position. The Proposed Rule acknowledges that the Auburn study found that the use of action devices "did not produce any harmful effects to the horses' legs, with exceptions to some loss of hair from 6-ounce chains in the pastern areas." *Id.* Indeed, as the Proposed Rule acknowledges, the study found only that "the ***combined*** use of prohibited substances ***and*** chains on the pasterns of horses caused lesions, tissue damage, and visible alterations of behavior consistent with soring." *Id.* (emphasis added). In addition, USDA

recognizes that the study found such results only when it looked at horses trained using 10-ounce chains, which is "4 ounces heavier than what is currently allowed." *Id.*

USDA may not change course and ban action devices by relying on a study that *undermines* the rationale for a complete ban on action devices and pads. And that is especially true where the USDA previously cited the *same study* to support the current rule allowing action devices and pads. USDA has given no rationale to explain how a study that previously supported *allowing* devices and pads can somehow now support the exact opposite result. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42 (1983) ("In addition, it is unlawful for any agency to rescind or modify a current regulation without providing "a reasoned analysis for the change."); *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp.2d 183, 189 (D.D.C. 2008) ("Review of an agency action is more demanding where the challenged decision stems from an administrative about-face.").

Any lingering doubt about the failure of the Auburn study to support the ban on action devices is erased by the author of the study. In describing the study's conclusions, Dr. Ram Purohit explained:

> Regarding action devices, ***the data provided no evidence that chains of eight ounces or less used from three to five weeks in a normal, non-scarred horse produced inflammation or soreness. Neither the Auburn study nor the [Nelson] study provided any evidence to support the claim that chains of eight ounces or less or pads of three to four inches were the cause of soring***.

App. Ex. 21 (Purohit Aff.) (emphasis added).

The findings in the Auburn study relied on by USDA are consistent with those made in the NAS Report, the only other study USDA cites in support of its ban. The NAS committee found no evidence of soring from training using devices that are 6 ounces or less. As USDA itself notes in the Proposed Rule, the NAS committee commented that Tennessee Walking Horses may be trained "with action devices weighing ***in excess*** of the 6-ounce action devices currently allowed for competition" and "concluded that the use of ***heavier or more cumbersome devices*** in training ***may*** be more likely to contribute to the formation of skin lesions." 88 Fed. Reg. at 56937 (citing NAS Report at 81).

USDA's support for the ban on pads is equally lacking. It cites the Auburn report to suggest that raising a horse's heels through pads alone can result in signs of inflammation. 88 Fed. Reg. at 56938. Of course, if raising a horse's heel through pads could cause soring by itself, then USDA would necessarily need to ban the use of pads in all HPA Breeds. And USDA admits, when pointing to its own data, that the data does not "imply that pads were directly responsible for soring … horses." *Id.* Instead, it claims that the ban is justified because "the performance classes in which soring confers the greatest benefit (an unnatural high-stepping gait) require that the horse wear pads." *Id.* But USDA offers no support for this conclusion and, as discussed above in Section I, offers no data to justify its conclusion that soring does not occur in other breeds.

Most importantly, USDA's reliance on the Auburn study to support its ban on pads is once again fatally undercut by statements of the study's author, Dr. Purohit, who explained:

> The USDA has issued an interim rule and proposed final rule restricting the use of pads on horses to three inches initially, to be phased down periodically to one inch. It is my understanding that the USDA proposes ultimately to have a permanent rule of one inch pads on show horses. ***To the extent that this interim rule and the proposed permanent rule are based upon the Auburn study which I authored, I feel compelled to point out that the principal objectives of our experiment were the study of chemical soring and action devices. Only preliminary observations were made on the effects of pads per se, and no conclusions were drawn. Any other construction of our data would be a misinterpretation. Horses with normal shoeing and padding that were examined by these evaluation procedures did not provide any evidence of soreness of induced inflammation.***

App. Ex. 21 (Purohit Aff.) (emphasis added).

USDA's former Chief Staff Veterinarian for Horse Protection matters from 1973 to 1978, Dr. Lois Hinson, professed unequivocally in an affidavit that:

> ***These clinics definitively proved that pads per se do not cause inflammation or soring in the hooves of horses nor do they cause inflammation in the tendons of a horse.*** However, the studies did prove that extreme angulation of the hoof will cause soring and inflammation of the tendons of the foreleg. Consequently, I authored, and the Department promulgated the regulation governing the heel/toe ratio of horses.

App. Ex. 22 (Hinson App.) at 3 (emphasis added). *See also* H. Rep. No. 91-1597, 91st Cong., 2d Sess. 2-2 (1970), at 3 (explaining that reference to the use of wedges was deleted from the definition of "soring" because wedges "are a normal adjunct to training and do not involve cruel or inhumane treatment.').

To the Association's knowledge, USDA's clinics are the only studies regarding whether the use of pads *per se* causes soring, and, therefore, they are the best scientific evidence on the topic. There are no published scientific studies concluding that the use of pads *per se* causes horses to be sore. *See* App. Ex. 18 (2016 Statement of Dr. Paul Stromberg) at ¶¶ 9-13. USDA cites none, much less any that would support its change of position on this issue. *State Farm*, 463 U.S. at 43; *Kempthorne*, 577 F. Supp.2d at 189.

Finally, even USDA's own data demonstrates that the majority of horses in the Performance division have been deemed *not* sore. *See* 88 Fed. Reg. at 56929, Table I. As discussed in Section I, that data is inherently unreliable. But, even if it were not, USDA cannot justify its ban by pointing to data that supposedly shows higher violation rates for horses in Performance categories. All that data would show is that there is *potentially* a higher incidence of soring among horses shown with action devices and pads. If action devices and pads were a *cause* of soring (or even a significant contributing factor), then the inspection results in Table 1 would

have shown a violation rate of near 100%. All horses in the Performance division compete using these items. *See also American Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 598 (D.C. Cir. 1990) ("Other material in the record undermines the AHPA's contention that the ability to use action devices in the ring encourages illegal chemical soring. The Department's inspection reports show soring violations involving horses that compete in classes where action devices are not used in the ring.").

USDA at least tacitly acknowledges that action pads and devices do not cause soring by choosing not to ban their use in other HPA breeds. *See* 88 Fed. Reg. at 56937 ("We considered prohibiting all non-therapeutic pads, action devices, substances, and other practices for all breeds at all covered events, but in doing so we would unfairly conflate those breeds that do not sore for competitive advantage with those that do."); *id.* at 56936 ("APHIS recognizes that action devices and pads are sometimes used for purposes that do not cause soring during training of Morgans, American Saddlebreds, and many other gaited breeds."). Of course the pads used by these other breeds during training are no different from those used by Tennessee Walking Horses.[12] USDA is also wrong to suggest that "the gaits on which most breeds are evaluated are noticeably distinct from the exaggerated 'big lick' step featured at many Tennessee Walking horses and racking horse events." 88 Fed. Register 56936. *See* App. Ex. 23 (displaying photos of accentuated gait in Friesian, Hackney, American Saddlebred, and other horse breeds). If these devices actually caused soring, no breed would be permitted to use them without violating the HPA.

Given this tacit acknowledgement that action devices and pads do not *cause* soring, USDA's rationale for the proposed ban appears to be its (unsupported) assertion that there is a continuing high rate of soring in the Performance division of competition for Tennessee Walking Horses[13]—the category of competition in which action devices and pads are used. 88 Fed. Reg. at 56937 ("However, based on our informed knowledge about the practices of all breeds performing or exhibiting in the United States, we know that soring in breeds other than Tennessee Walking Horses and racking horses confers no significant performance advantage and is therefore rarely if ever practiced."). So, the USDA's rationale is that, because some percentage of the owners and/or trainers who show horses in the Performance division of competition seem to be involved in soring, the way to address soring is to prohibit action devices and pads—and thereby effectively ban the entire Performance division of competition. But that approach exceeds the USDA's limited statutory authority. It rests on the erroneous legal premise that the Secretary has authority to eliminate any practice, however safe in itself, that seems to be associated in some loose statistical way with the members in the industry who engage in *other* practices that are already separately

[12] Other HPA Breeds compete in horse events in pads and action devices. For some examples, Arabian, Anglo-Arabian, Andalusian, Friesian, Saddlebred and Morgan horses may all be shown in pads under rules published by the United State Equestrian Federation ("USEF"). *See. e.g.*, USEF Rule AR 106(5) (Arabian and Anglo-Arabian horses); USEF Rule AL 103(3) (Andalusian horses); USEF Rule RF 103(4) (Friesian horses); USEF Rule SB103(3) (American Saddlebred and Half American Saddlebred); USEF Rule MO 103 (Morgan horses). The full USEF rulebook is incorporated into this Comment by reference and may be found at https://perma.cc/6KZH-P5M9.

[13] For the reasons explained above, of course, that data is unreliable and cannot provide a permissible basis for the USDA's conclusions.

prohibited and that perpetuate soring. Congress did not intend a mere "relationship" between a practice and soring to serve as a basis under the HPA for prohibiting the use of that practice. If that were the case, the Secretary "could eliminate horse shows entirely," because any horse show could indirectly continue the practice of soring. *Yeutter*, 917 F.2d at 597.

It is particularly clear that such an approach exceeds USDA's statutory authority, because the ban on action devices and pads is effectively a ban on the entire Performance division of competition at Tennessee Walking Horse events. But Congress made clear that the goal of the Act was to prohibit soring while simultaneously protecting and enhancing fair competition. The Act was designed both to eliminate soring and to "eliminat[e] unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry." *Thornton v. USDA*, 715 F.2d 1508, 1511 (11th Cir. 1983). It was not designed to give USDA the authority to redefine the sport of showing Tennessee Walking Horses by banning entire areas of competition if a minority of those involved engaged in other prohibited acts.

As stated in the legislative history, the Act's provisions "do not grant carte blanche authority to the Department of Agriculture. Its efforts to eliminate intentional injuring of horses should not be expanded to affect their competitive position within the walking horse class." S. Rep. No. 418, 94th Cong., 1st Sess. 3 (1975), U.S. Code Cong. & Admin. News 1976, 1696 (quoted in *Yeutter*). USDA's actions here would do just that, however. Indeed, USDA's ban would not only affect the competition of Tennessee Walking Horses, it would effectively eliminate it. *See* App. Ex. 24 (Wells Decl.) at ¶¶ 12-13.

USDA's own actions demonstrate that, in the past, it recognized that it lacks authority to implement the ban on action devices and pads announced in the Proposed Rule. In 1973, the APHIS Administrator asked Congress to legislate a ban on pads, tacitly acknowledging that only Congress had authority to decree such a ban:

> We would suggest, however, that additions be made to these unlawful acts [in Section 4 of the HPA of 1970]. As long as boots, pads, and built-up heels are worn by horses, there cannot be a complete and proper inspection for soring. These devices can hide evidence of soring, or they may even be the cause of physical distress that alters the horse's gait. Therefore, we would like to see this law include a provision that it shall be unlawful for any person to conduct a horse show in which the horses wear action boots, pads, and built-up heels.

Sen. Comm. Hearing on Horse Protection Act of 1970, 1st Sess., 93rd Cong. (May 2, 1973), at 24. Congress declined the invitation to add these restrictions. By the same token, additional efforts to codify restrictions similar to those in the Proposed Rule have repeatedly failed to become law. *See, e.g.*, H.R. 1518, 113th Cong. (2013) (Prevent All Soring Tactics "PAST" Act); S. 1121, 114th Cong. (PAST Act of 2015); H.R. 693, 116th Cong. (PAST Act of 2019); H.R. 5441, 117th Cong. (PAST Act of 2021); H.R. 3090, 118th Cong. (PAST Act of 2023).

Nor can USDA's efforts reasonably be understood as appropriate agency action. In effect, USDA's approach would be like a regulator assigned the task of regulating and prohibiting doping in Alpine skiing competitions looking at data suggesting that 25% of competitors in Giant Slalom

have engaged in doping and deciding to ban the entire Giant Slalom event in order to prohibit doping. Nothing about the authority to prohibit doping would give such a regulator the authority to redefine the categories of permitted competition for the sport.

Yeutter is particularly instructive. In that case, the U.S. Court of Appeals for the D.C. Circuit rejected an argument that USDA could not issue a rule *permitting* the use of action devices that weigh 6 ounces or less. In rejecting the argument, the Court explained that "The Secretary was not under an express duty to prohibit any practice, however safe by itself, that might indirectly cause or perpetuate abuses already separately prohibited by the regulations. If such were the duty, the Secretary might have to eliminate horse shows entirely because they perpetuate the practice of soring." *Yeutter*, 917 F.2d at 597. The Court found that conclusion would run counter to the purpose of the HPA, however, which was not only to prevent soring but "was also motivated by a countervailing concern of preventing unfair competition against legitimate trainers of show horses." *Id.* While the court's holding was couched in terms of whether USDA had the authority to permit action devices as opposed to ban them, the court's reasoning on the limits of the agency's authority applies equally here.

In sum, because there is no evidence that action devices and pads *cause* soring (a fact that USDA appears to concede), there is no viable basis under the statute for USDA to ban those items.

B. A Ban On All Action Devices And Pads Is Arbitrary and Capricious.

In addition to exceeding USDA's authority under the HPA, the proposed ban on action devices and pads would be arbitrary and capricious. USDA "offer[s] an explanation for its decision that runs counter to the evidence before the agency" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *National Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1110 (D.C. Cir. 2019).

First and foremost, the ban is arbitrary and capricious because (as discussed above) the agency has failed to support its decision with any evidence or reasoned explanation. The failure of USDA to conduct any studies or point to evidence indicating that soring is *caused* by action devices and pads is a failure to engage in reasoned decisionmaking. *See State Farm,* 463 U.S. at 57 (ordering remand of NHTSA's decision to revoke a standard requiring cars to be equipped with passive restraints because the agency had not adequately considered whether revocation would impact the number of drivers wearing seatbelts). The USDA has fundamentally failed to provide a satisfactory explanation for its actions, including a "rational connection between the facts found and the choice made." *Id.* at 43. Where the only evidence available to the Agency shows that action devices and pads do *not* cause soring, the Agency has failed to provide any rational basis for banning the equipment.

If anything, USDA's rationale—that action devices and pads are used by a large percentage of trainers and/or owners who are also engaged in *separate* practices that cause soring—is undermined by its own data. USDA suggests that its own inspectors reported a 40% rate of noncompliance within the Performance division of competition at shows in FY-2021. 88 Fed. Reg. at 56928. But even if that rate accurately reflected a finding of sore horses (and, as discussed

in Section I, it does not), USDA has shown only that this proves 40% of horse trainers or owners in the Performance division did something *other* than using action devices or pads to cause soring.

Of course, USDA does not account for the 60% of horse trainers in FY-2021 who (according to this data) *were not* involved in soring. By eliminating the entire Performance division, however, USDA punishes the entire group for the actions of a minority. This form of collective punishment is fundamentally irrational and runs counter to the purposes of the statute. *See Ergon-W. Virginia, Inc. v. U.S. Env't Prot. Agency*, 896 F.3d 600, 611 (4th Cir. 2018) ("The DOE's treatment of these two factors—Sections 1(c) and 2(b)—is plainly arbitrary as it treats unfairly those facilities where diesel makes up a substantial percentage of their transportation fuel production."); s*ee also* S. Rep. No. 418, 94th Cong., 1st Sess. 3 (1975), U.S. Code Cong. & Admin. News 1976, 1696 ("[USDA's] efforts to eliminate intentional injuring of horses should not be expanded to affect their competitive position within the walking horse class.").

Second, USDA's differential treatment of Tennessee Walking Horses and other HPA breeds is also arbitrary and capricious. Indeed, the "law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated." *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971). *See also United States v. DiaPulse Corp.*, 748 F.2d 56, 62 (2d Cir. 1984) ("Deference to administrative discretion or expertise is not a license to a regulatory agency to treat like cases differently."). Here, the USDA proposes to ban action devices and pads only on Tennessee Walking Horses and Racking Horses, but not other breeds. According to USDA, extending the ban across all breeds "would unfairly conflate those breeds that do not sore for competitive advantage with those that do." 88 Fed. Reg. at 56937. But USDA offers no evidence for its conclusion that other HPA breeds do not sore their horses.

As noted in Section I, USDA both (i) lacks evidence showing an absence of soring in other breeds, and (ii) has *itself* acknowledged that other breeds *do* engage in soring. *See* App. Ex. 15 (2017 Final Rule) at 37 ("[USDA] is aware of substantive reports and instances of soring at events involving breeds of horses other than Tennessee Walking Horses and racking horses. For example, APHIS has found evidence of soring during inspections conducted at Spotted Saddle Horse and Missouri Fox Trotter events. In addition, APHIS is aware of concerns and incidents of show jumpers bearing signs of abuse on their legs."); *see also* Kimberly Loushin, USEF Suspends Devin Ryan After Hampton Classic Horse Welfare Concerns, THE CHRONICLE OF THE HORSE (Mar. 11, 2016), https://perma.cc/PG85-CWN2 (noting that a USEF trainer of young jumper horses was "expelled from the show grounds on Aug. 28, 2015, after USEF stewards and veterinarians found marks on the legs of five horses under [the trainer's] care").

Indeed, other breeds also have protocols in place to ensure their horses are not sored, protocols that would be unnecessary if soring did not occur in other breeds. *See Performance Alteration Testing Procedures*, AMERICAN QUARTER HORSE ASSOCIATION (Oct. 13, 2022), https://perma.cc/G4WS-QB6U ("[I]n an effort to continue protecting the welfare of the American Quarter Horse … [a]ll exhibitors qualified for finals in designated classes will be required to have thermographic images taken of both sides of their horses' neck prior to competing in the finals."). The American Quarter Horse Association ("AQHA") also maintains a publicly available list identifying individuals who have been disciplined for animal welfare violations. *See* App. Ex. 25 (AQHA Disciplinary Actions List) (identifying numerous probations and suspensions due to

inhumane treatment of a horse). And USDA has not conducted any form of study to gather accurate data about the incidence of soring in other breeds. Instead, ignoring AQHA's own self-policing protocols and reports of individuals banned for causing injury to their horses, USDA simply argues that "based on our informed knowledge about the practices of all breeds performing or exhibiting in the United States, we know that soring in breeds other than Tennessee Walking Horses and racking horses confers no significant performance advantage and is therefore rarely if ever practiced." 88 Fed. Reg. at 56937.

The TWHNCA does not suggest that soring is rampant in other breeds or that the trainers and governing bodies associated with other HPA breeds do not place paramount importance on horse welfare, as do trainers and HIOs in the Tennessee Walking Horse industry. Rather, the TWHNCA merely points out that USDA has not supported its unequal treatment of Tennessee Walking Horses with any data about incidences of soring or comparable practices in other breeds to use as a point of comparison.

Third, as discussed more fully in Section VI, USDA has completely failed to conduct a proper cost-benefit analysis for the proposed ban on action devices and pads. That ban is tantamount to prohibiting the entire Performance division of competition at Tennessee Walking Horse events. The Performance division, however, accounts for roughly 70% of entrants at a major show like the Celebration and drives attendance (and therefore revenues) at most shows. *See* App. Ex. 24 (Wells Decl.) at ¶¶ 12-13. The USDA's complete failure to consider the impact on the industry of eliminating this entire category of competition demonstrates that the agency "failed to consider an important aspect of the problem" before it. *State Farm*, 463 U.S. at 43.

Fourth, USDA at times suggests that the ban on and pads is necessary because they can mask signs of soring. *See* 88 Fed. Reg. at 56938 (noting that "APHIS' experience at Tennessee Walking Horse and racking horse events indicates that soring continues to occur through the use of performance packages that can … hide signs of pressure shoeing."). But USDA has not pointed to any *evidence* showing pressure shoeing has been hidden through the use of pads. In addition, as recognized by NAS, such violations can be found using x-rays and radiographs, which USDA already uses in its inspections. *See* NAS Report at 40 (showing radiographs of illegal substances inside hoof packages between the sole and pad). Where there is an inspection method already in use that is fully sufficient to identify the sort of violations the USDA is speculating about, the Agency has failed to provide any adequate rationale for a complete prophylactic ban. Such a complete ban could be contemplated only if USDA provided overwhelming evidence that violations are otherwise impossible to detect and that they occur with such frequency that a ban is warranted. USDA has shown neither. In fact, despite the use of x-rays for inspections, pressure shoeing violations are virtually non-existent. For example, the Association's Veterinary Advisory Committee caused the horseshoes to be pulled on the ten World Grand Champion winners at the 2014 Celebration to determine if there was any type of pressure shoeing present, and found none. *See* App. Ex. 26 (Veterinary Advisory Comm., History and Accomplishments) at 2. And USDA has not demonstrated why a ban on these devices is needed as a prophylactic measure. Indeed, by relying on statistics identifying soring, USDA acknowledges just the opposite—it can and does

identify soring, even where these devices are used. Its ability to do so is further evidence that a ban is unnecessary.[14]

Finally, USDA's suggestion that "[p]ads that cause a horse's foot to strike the ground at an unnatural angle can also induce pain and soring over time, as can heavy pads and horseshoes" is not a rational ground for imposing a blanket ban. *See* 88 Fed. Reg. at 56936. The practice described by USDA is already banned by the current regulations' provisions regarding shoeing. Those provisions prohibit pressure shoeing and other shoeing practices that cause a horse to be sore, without imposing a complete prohibition on the use of pads. *See* 9 C.F.R. 11.2(b)(18) (prohibiting "[s]hoeing a horse, or trimming a horse's hoof in a manner that will cause such horse to suffer, or can reasonably be expected to cause such horse to suffer pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.").[15]

C. A Ban On All Action Devices And Pads Would Be A Regulatory Taking.

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that when the federal government takes private property for a public use, it must provide just compensation. Under the Supreme Court's Takings jurisprudence, a taking occurs not only when the government physically invades or takes hold of real or personal property. It can also occur when government regulation deprives an owner of economically beneficial use of the property. *See, e.g.*, *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 536-37 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[A] regulation which denies all economically beneficial or productive use of [property] will require compensation under the Takings Clause.") (quotation marks omitted); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 104, 124-136 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Here, if USDA proceeds with the ban, its actions would amount to such a taking because it would destroy all the value in TWHs trained to compete in the Performance division by essentially banning the sport in which they compete. Top-notch horses competing in the Performance division will sell for as much as $350,000 to $500,000, with a few selling for over $1,000,000. *See* App. Ex. 27 (Williams Decl.) at ¶ 3. But, as a practical matter, horses that have been specifically bred and trained to compete with action devices and pads cannot simply be re-trained to compete as a flat-shod horse. Thus, by banning action devices and pads and eliminating

[14] The practice is also regulated and prohibited in other HPA Breeds by their own governing entities. *See, e.g.*, USEF Rule AR 106(6)(h) (prohibiting "any forbidden foreign material found within, attached to, ***or between the pad and the shoe, between the pad and hoof, or in conjunction with the pad or shoe***" in Arabian horses) (emphasis added).

[15] USDA proposed what would become this shoeing restriction because "[USDA] officials believe this prohibition is necessary to protect horses from unscrupulous horsemen and farriers who engage in practices such as, but not limited to, placing a pressure wedge between the shoe pad and the frog; deliberately trimming the hoof without properly trimming the sole, thereby causing the sole to act as a pressure plate; placing a tack or screw in the shoe pad in such a manner that it will slightly penetrate the frog of the horse's foot; and, deliberately 'quicking' the hoof of a horse with the horseshoe nails." Horse Protection Regulations, 43 Fed. Reg. 18514, 18519 (Apr. 28, 1978).

the Performance division entirely, USDA would be eliminating the sport in which horses shown in the Performance division have been bred and trained to compete and would thereby wipe out the value of such horses. It is no answer to say that horses could compete in the flat-shod division. That would be like asking a professional athlete to drop one sport and train for another. Although some may be successful by virtue of their athleticism, most would not. As one trainer explained it, "[t]here is no guarantee that a TWH performance show horse will react successfully to such retraining [as a flat-shod horse]. I tell horse owners who inquire about re-training that a TWH grand champion performance horse may not achieve close to that level of success as a flat shod horse." App. Ex. 28 (Statement of Carrie Martin) at ¶ 7. Another trainer agreed, explaining that "[i]t would be time-consuming and expensive to re-train a performance TWH horse to show as a flat shod horse." App. Ex. 29 (Statement of Chad Williams) at ¶ 7 . That trainer noted, "it likely would take more than six months to train a performance horse to show flat shod – and in many cases it could take well over a year; and, in the end, very few of the horses would adjust to the re-training enough to be successful in flat shod shows." *Id.* *See also* App. Ex. 30 (Statement of Hannah Pulvers-Myatt) at ¶ 7 ("[O]nly a few TWH performance show horses can flat shod with any level of success. In my opinion, only about one out of every 20 TWH performance horses can successfully transition to becoming a good flat shod TWH show horse."); App. Ex. 27 (Williams Decl.) at ¶ 5 ("In my opinion, horses that compete in the Performance division and those that compete in the flat-shod division are entirely different. They are bred for different reasons, as the sales estimates above demonstrate.").[16] Faced with this reality, the Association expects that at least some owners of TWHs that perform in shows, particularly those that perform in the Performance division, would file suit against the federal government on the grounds that the Proposed Rule constitutes a regulatory taking under the Fifth Amendment because it will have eliminated virtually all of the value of their horses due to their inability to compete, win shows, and breed performance horses. Thus, the federal government would have to pay compensation to the horse owners for this taking.

Not only would the federal government be forced to incur costs to defend the Proposed Rule from regulatory takings claims in court, but it would also be exposed to claims for legal fees, as Plaintiffs may seek attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, to cover the costs of bringing their challenges to the Proposed Rule.

* * *

For all of the reasons discussed, USDA should not proceed with the proposed ban on action devices and pads. If it nevertheless decides to move forward, it should permit horses that have been trained and shown with action devices and pads prior to adoption of the rule to continue to use that equipment. As noted above, horses that have been trained to show in pads and action devices cannot simply transition to showing flat-shod. In other words, the new ban, if implemented

[16] *See also* App. Ex. 31 (Waddell Decl.) at ¶ 7 ("Even if a horse owner did want his or her horse re-trained to compete in the Pleasure division, it would be a time-consuming process with no guarantee of success … I suspect many horses would not be able to be re-trained at all"); App. Ex. 32 (Martin Decl.) at ¶ 7 (same); App. Ex. 33 (Toone Decl.) at ¶ 6 (same).

at all, should come into effect only as a new generation of horses is introduced, while existing horses (who have been bred and trained using action devices and pads) could continue to compete.

At the very least, USDA should stay implementation of the ban until at least January 1 of the year after the Proposed Rule becomes final. The current proposal, in which the ban would become effective 270 days following the Proposed Rule being finalized, has the potential to disrupt the industry should it take effect in the middle of a show season. For this reason, the 2017 final rule set an effective date of January 1 of the year following promulgation of the rule. *See* App. Ex. 15 (2017 Rule) at 69.

III. The Ban On All Substances Would Be Contrary To The Statute And Arbitrary and Capricious.

The USDA's proposed ban on all substances is unlawful for many of the same reasons as the proposed ban on action devices and pads. The proposed ban (i) falls outside the USDA's statutory authority under the HPA, and (ii) is arbitrary and capricious based on USDA's failure to provide a reasoned basis for the rule or to support it with substantial evidence.

In its 2017 Final Rule, USDA also proposed to extend the prohibitions on foreign substances using much of the same rationale offered in support of the Proposed Rule. The TWHNCA's Comments in response to the proposed 2017, attached as Exhibit 16, are incorporated in full by reference here. *See* App. Ex. 16 (2016 TWHNCA Comment) at 45-54.

A. A Ban On All Substances Is Contrary To The HPA.

The Act provides USDA with rulemaking authority to proscribe "irritating or blistering agent[s]" and expressly allows substances to be used for "therapeutic treatment" by a veterinarian. USDA's Proposed Rule exceeds its authority because it bans ***all*** substances regardless of whether or not an individual substance contributes to soring. In so doing, USDA also ignores the express carve-out in the statutory definition of "sore" for the "application" of "any substance" for therapeutic reasons under directions of a licensed veterinarian. 15 U.S.C. § 1821(3).

As noted above in Section II, the HPA empowers APHIS to ban substances, devices, and conduct reasonably expected to cause soring. *See, e.g.*, 15 U.S.C. § 1824(2) (prohibiting the "showing or exhibiting, in any horse show or horse exhibition, of any horse ***which is sore***") (emphasis added); *id.* § 1823(a) (requiring the management of a horse show or horse exhibition to disqualify any horse "***which is sore***") (emphasis added).

Current regulations prohibit all substances being applied to a horse during the competition other than lubricants on the extremities of horses above the hoof. *See* 9 C.F.R. § 11.2(c). Specifically, 11.2(c) provides that "[a]ll substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse" being "exhibited ... except lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof," provided that they are (1) "furnish[ed]" by management; "applied only after the horse has been inspected" and "under the supervision of" management; and (3) such lubricant was made available to "Department personnel for inspection." *Id.* Because the current regulations prohibit substances regardless of whether or not they may have

a connection to soring, those regulations go beyond the scope of authority granted to USDA by the Act.

The current exception for lubricants is important for horses. Lubricants are used routinely with action devices to reduce friction from the action device. Reducing friction, of course, helps prevent a horse from becoming sore from any rubbing of the action device. The current regulations recognize this purpose, as they define a permitted "lubricant" as "mineral oil, glycerin or petrolatum, or mixtures exclusively thereof, that is applied to the limbs of a horse ***solely for protective and lubricating purposes*** while the horse is being shown or exhibited at a [Horse Event]." Id. § 11.1 (emphasis added).

By extending the prohibition to include the use of lubricants at all times during competition, USDA now seeks to ban substances that not only have no connection to soring but are actually used to reduce friction and thereby *prevent* a horse from becoming sore. The Proposed Rule also fails to provide exceptions by substances approved by veterinarians, therapeutic substances, cosmetic substances that are currently allowed in other breeds, and other substances that have no connection to soring. By any measure, this is beyond the scope of what is permitted by the HPA.

As with the proposed ban on action devices and pads, USDA's proposal rests on the false premise that it has been granted the authority to eliminate any practice that could *theoretically* have some connection to soring. But, as the *Yeutter* court recognized, if that were the case, the Secretary could "eliminate horse shows entirely" because any horse show could indirectly continue the practice of soring. 917 F.2d at 597. Again, that is not what Congress intended with the HPA. Rather, the HPA was intended to address soring while protecting competition among those who did not sore their horses. *See, e.g.*, 15 U.S.C. § 1822 ("The Congress finds and declares 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."). *See also Thorton*, 715 F.2d at 1511 ("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.").

Even if USDA were able to engage in sweeping bans without regard for the effects on legitimate competition, it still has no authority to ban the use of substances that have no demonstrable connection to soring. Extending the ban to cover lubricants (as well as other substances unrelated to soring) is clearly such an impermissible step. In the Proposed Rule, USDA points to no evidence that lubricants cause soring or even mask soring. Instead, USDA simply states that "[l]ubricants would no longer be allowed to be used with action devices as we also propose to prohibit such devices on these breeds." 88 Fed. Reg. at 56939. In other words, USDA claims that lubricants should be banned not because they cause soring, but because they prevent soring occurring through the use of other items it is proposing to ban. In fact, USDA concedes that lubricants are used to "allow action devices to slide on the leg *with less friction*." 88 Fed. Reg. at 56939 (emphasis added). This rationale makes no sense and cannot be squared with USDA's authority under the HPA. Of course, the HPA does not provide USDA any authority to ban the use of substances that are designed to *prevent* a horse from becoming sore—nor is there any rational reason for such a ban.

Nor does USDA even purport to justify its rule by suggesting that all substances—including those that help prevent soring—contribute to soring. Instead, USDA principally justifies the extension of the existing ban on prohibited substances by arguing that its *existing* prohibition on substances has not eliminated Tennessee Walking Horses from testing positive for those substances. *See* 88 Fed. Reg. at 56939 ("However, data collected by APHIS from 2017 through 2022 indicates that, in each of those years, substantial numbers of horses tested by APHIS were positive for prohibited substances, with nearly all of them being Tennessee Walking horses and racking horses."). But this rationale makes no sense. There is no reason to think that extending the existing ban to cover substances that help prevent a horse from becoming sore will dissuade any bad actors who already violate the prohibited substances rule from continuing to do so.

B. The Ban On All Substances Is Arbitrary And Capricious.

The proposed ban on all substances is arbitrary and capricious for several reasons. *First*, the Proposed Rule acknowledges that lubricants are used to prevent horses from becoming sore by "allow[ing] action devices to slide on the leg *with less friction*," 88 Fed. Reg. at 56939 (emphasis added). Eliminating the use of such lubricants is arbitrary and capricious because there is no rational reason to ban the use of substances that are designed to prevent a horse from becoming sore. Indeed, a ban on substances that are designed to ***prevent*** soring makes no sense whatsoever. *See National Lifeline Ass'n*, 921 F.3d at 1110 (agency action is arbitrary and capricious when it "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Once again, the Agency has failed to provide a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. To the extent the USDA points to data showing that there continue to be violations of the existing rule prohibiting substances, that provides no basis for *expanding* the prohibition to include substances that the USDA itself concedes are used to reduce friction and *prevent* soring. The mere fact that USDA has stated that it thinks there is some vague "association" between the "application" of *other* substances and soring, 88 Fed. Reg. at 56934, provides no basis for banning lubricants that *prevent* soring. And *preventing* soring is obviously entirely different from using a substance (like a topical anesthetic) to *mask* soring. So concerns about masking soring also provide no basis for this new rule.

Second, USDA's ban is arbitrary and capricious because it is based on flawed data and irrational conclusions drawn from that data. USDA supports its proposed ban by pointing to data ostensibly showing that prohibited substances were found on a significant percentage of Tennessee Walking Horses wearing action devices and pads. But, as with the rest of the data USDA purports to rely on, the data supporting the substance ban is flawed and does not show widespread use of prohibited substances.

USDA supports its ban on prohibited substances through the data reported on Table 3, reflecting substance testing for HPA-covered events from FY 2017-2022. Once again, it appears that this data was collected from a pre-selected sample based on USDA's decision to inspect "some horses for which a suspicion of soring was warranted." 88 Fed. Reg. at 56928. But by choosing to test horses for prohibited substances where there is already a suspicion of soring, USDA engages in selection bias and corrupts any extrapolation of data to the larger population of Tennessee

Walking Horses. *See* Sharon L. Lohr, Sampling: Design and Analysis 6-10 (3d ed. 2022); *see also id.* at 6 ("Selection bias is of concern when it is desired to use estimates from a sample to describe the population."); Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 Am. Sociological Rev. 386, 390 (1983) ("When sample selection bias is present, one is essentially flying blind."). By biasing its sample towards violators, USDA effectively ensures that the data will show a higher rate of violations.

More fundamentally, USDA's protocol for testing for prohibited substances is fundamentally flawed. As mentioned in Section I, USDA has not provided a definitive list of which substances are banned or provided the level at which a substance would cause a violation or the levels at which a substance may trigger a violation. Of course, a violation for an amount of a substance that is insufficient to cause a horse to be sore is not rationally connected to the relevant statutory language in the HPA regarding soring. That is, the HPA would at most prohibit an application of something by a person from which the horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving as a result of such application.

Worse, USDA has failed to acknowledge that there are instances in which a *permitted* substance might nevertheless be flagged as a violation (thereby skewing USDA's data). As mentioned, in Pulaski, TN, a horse trainer was found to be in violation of the prohibited substance regulation for using Vaseline, a lubricant that is permitted under the existing rules. App. Ex. 7 (Groover Decl.) at ¶¶ 4-7.

Even if this data were reliable, it would not support expanding the existing prohibition. Rather, the ability of USDA to reliably detect prohibited substances counsels against a broader ban to sweep in *all* substances. There is no reason to ban *all* substances, including lubricants and veterinary-approved substances, when USDA can reliably detect violations of its current rules. That is particularly true when the majority of owners and trainers do *not* use prohibited substances and instead use lubricants to the benefit of their horses. USDA's extended ban once again results in collective punishment of all for the actions of some. *See Ergon-W. Virginia Inc.*, 896 F.3d at 611 ("The DOE's treatment of these two factors—Sections 1(c) and 2(b)—is plainly arbitrary as it treats unfairly those facilities where diesel makes up a substantial percentage of their transportation fuel production.").

Third, limiting the expanded substance ban to Tennessee Walking Horses and Racking Horses is arbitrary. As noted in Section II, treating Tennessee Walking Horses differently from other HPA breeds is unlawful, particularly in the absence of any evidence demonstrating how often trainers of other breeds are using substances to their horses' detriment. *See DiaPulse Corp.*, 748 F.2d at 62 ("Deference to administrative discretion or expertise is not a license to a regulatory agency to treat like cases differently."). In fact, in one HPA Breed there have been several instances where the governing organization suspended trainers for "use of a prohibited drug or substance that is a stimulant, depressant, tranquilizer or sedative which could affect the performance of a horse," which would constitute a violation of the HPA. *See* App. Ex. 25 (AQHA Disciplinary Actions) at 2.

As explained in Section I, the Act applies to all breeds equally. APHIS, however, narrows the substance ban to only a subset of horses, while offering no evidentiary support for its conclusion that other breeds are not sored. Given that APHIS acknowledges that soring is not limited to Tennessee Walking Horses and Racking Horses, the disparate treatment of Tennessee Walking Horses in the Proposed Rule reflects irrational discrimination unsupported by any sound justification. *See Hagelin v. Fed. Election Comm'n*, 411 F.3d 237, 243 (D.C. Cir. 2005) ("the arbitrary and capricious and substantial evidence standards seem to us fully adequate to capture partisan or discriminatory [agency] behavior").

To be clear, the TWHNCA strongly opposes the use of substances to sore horses or to mask evidence of soring. But the existing prohibited substance protocol does not provide an adequate or fair way to objectively identify such substances, and the proposed expansion of the rule solves none of the existing problems while eliminating the use of lubricants or other substances as prescribed by equine veterinarians for the welfare of the horse and that actually help *prevent* a horse from becoming sore. The USDA should not enact the proposed ban.

IV. The Modifications To The Scar Rule Fail To Correct The Defects In The Current Rule And Will Continue To Permit Arbitrary Disqualifications Of Horses.

As noted in Section I, the NAS Report concluded that the current Scar Rule "as written is not enforceable," because research has showed that the methods used during visual inspections to identify evidence of soring are unreliable and, based on available science, do not detect evidence of soring. NAS Report at 85. While USDA is right to re-examine the rule, its proposed revisions exacerbate the existing problems with the rule by supplanting it with an even more vague and subjective standard that (i) is untethered to any actual evidence of prohibited soring; and (ii) provides no objective guidance to inspectors that can yield reproducible results or provide trainers and owners with adequate notice as to what will be disqualifying.

A. The Existing Scar Rule Is Arbitrary And Unenforceable As Written.

Decades ago, prior to the enactment of the HPA in 1970 and the promulgation of the Scar Rule in 1979, "lesions in sore horses were grossly evident and located primarily on the anterior skin of the dorsal and palmar (caudal) pastern regions." NAS Report at 84. In other words, "[s]cars were very likely present in the lesions seen on sore TWHs before the enactment of the HPA." *Id.* The Scar Rule was premised on the idea that evidence of soring would be observable to the naked eye, given that horses that had been sored would have scars showing evidence of soring, even if the horse was not currently sore. Because such violations could be identified by a visual inspection, testing for soring could be done in a consistent and reproducible way.

As the NAS Report pointed out, however, times have changed since the HPA was enacted more than half a century ago and since the Scar Rule was issued more than 40 years ago. Scars and lesions like those previously found are rare or non-existent today. As the NAS Report observed in 2021, "[l]esions present today are more subtle, and the limited microscopic studies that have been done have not documented scars in horses determined to be in violation of the scar rule, which renders the usage of the term 'scar' inappropriate." NAS Report at 84. When biopsies

were taken from horses found in violation of the Scar Rule, those biopsies did not show any scar tissue or other evidence supporting a violation. *Id.* at 78.

In addition, NAS found the instruction in the existing Scar Rule that inspectors should identify "granulomas" to be scientifically inaccurate and misplaced. *See* 9 C.F.R. § 11.3 (" The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas."); *id.* ("Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents."). As NAS explained, a granuloma is a particular type of inflammatory lesion composed of certain cells. *Id.* at 83. In NAS's view, not only is there no evidence that granulomas were present in horses that are "sore" within the meaning of the Act, but the Rule asks inspectors to identify a granuloma through a gross examination when granulomas "cannot be determined to be present by gross examination alone." *Id.* Because NAS concluded that a "microscopic examination" is "absolutely necessary" to identify granulomas, it found the existing Scar Rule to be unenforceable as written. *Id.*

NAS is not the only scientific authority to identify significant problems with the Scar Rule As noted above in Section I, Dr. Stromberg reached the same conclusions. Data from his own study—which was relied on by NAS—demonstrated that horses that had been disqualified for violations of the Scar Rule should not have been disqualified. Dr. Stromberg took 136 tissue samples from 68 TWHs 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." NAS Report at 78. Dr. Stromberg thus determined that there was *no* evidence of soring in *any* of the samples. Specifically, as reported by NAS, Dr. Stromberg found that "no scar formation or granulomatous inflammation was present in any of the tissue samples." NAS Report at 78. 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.

As the NAS Report explained, "many exogenous and endogenous factors can affect the integrity of the [horse's] skin." NAS at 75. And, to date, the only reliable study of skin tissue in horses disqualified on suspicion of being sored is the Stromberg 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.

Specifically, the NAS Report called for studies to determine whether any visually observable criteria from a horse's skin (like lichenification) are evidence of soring, versus other non-soring practices. *See, e.g.*, NAS Report at 10 ("More studies are needed to determine if training practices that can cause soreness in TWHs 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 a horse's training using action devices *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.

Simply put, the NAS Report identified several critical flaws in the current Scar Rule. First, the rule tells inspectors to look for something they cannot actually see with the naked eye. That is necessarily a recipe for arbitrary and wholly inconsistent results. Second, there is no scientifically established (e.g. through studies) connection between what the rule asks inspectors to look for and soring.

Finally, at the very least, NAS suggests new language for a Scar Rule that provides specific measures that should be taken during an examination which "should be performed only by an experienced equine practitioner." NAS Report 84.[17]

B. The Revisions To The Scar Rule Compound The Problems Of The Existing Rule.

While USDA recognizes 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 rejects all of NAS's recommendations as to the existing Scar Rule. Instead of following NAS's recommendation and conducting studies to obtain data to identify what sort of observable changes in a horse's skin are actually related to soring, USDA has decided to go in the opposite direction. The Proposed Rule creates a new standard characterized by even more vague guidance to inspectors that invites inspectors to make even more subjective (and therefore inconsistent) judgments about what sort of visible characteristics on a horse's skin can be deemed evidence of soring.

Specifically, the newly proposed revision to the Scar Rule tasks inspectors with ensuring the following:

> The forelimbs and hindlimbs of the horse must be free of dermatologic conditions that are indicative of soring. Examples of such dermatologic conditions include, but are not limited to, irritation, moisture, edema, swelling, redness, epidermal thickening, loss of hair (patchy or diffuse) or other evidence of inflammation. Any horse found to have one or more of the dermatologic conditions set forth herein shall be presumed to be ''sore'' and be subject to all prohibitions of section 6 (15 U.S.C. 1825) of the Act.

Proposed § 11.6(b)(22).

The new rule is flawed for at least two reasons. *First*, the new rule fails to connect the standards inspectors will apply with any actual evidence of prohibited soring. Nowhere does the

[17] Given the absence of an evidentiary link between lichenification and soring, however, the TWHNCA believes that the studies called for by NAS must precede an adoption of any rule basing a finding of soreness on a gross examination.

Proposed Rule provide any evidence to establish that the listed "dermatologic conditions" are actually reliable evidence of soring. Nor could it. Under this rewritten Scar Rule, a horse could be disqualified solely on the basis that it has "patchy" "hair loss" on one leg—even though such hair loss could be the result of many different causes, including the mere friction from an action device without any actual soring. Indeed, in the Notice of Proposed Rulemaking for the existing Scar Rule, USDA explained that the existing rule is designed to allow for just such changes:

> The proposed "scar rule" allows for normal changes in the skin that are due to friction. These changes would allow … the moderate loss of hair in the pastern area caused by the friction generated by an action device.

Horse Protection Regulations, 43 Fed. Reg. 18514, 18519 (April 28, 1978). USDA fails to justify this change. *State Farm*, 463 U.S. at 42-43; *Kempthorne*, 577 F. Supp. 2d at 189. Because USDA previously recognized that it was entirely permissible for a horse's leg to show some signs of friction, it must provide a clear explanation as to why that is now impermissible. USDA fails to do so. Disqualifying a horse under the revised Scar Rule for having "patchy hair" when that horse would be permitted to compete under the existing rule is arbitrary and fundamentally unfair to the horse's owners and trainers. While USDA should cease its enforcement of the existing Scar Rule because of the many problems identified above, at the very least it should allow the existing population of horses to continue to compete if they would be permitted to do so under the existing rule.

Compounding this problem, all of these dermatologic conditions that USDA lists as triggers for its inspectors to disqualify horses may appear on the pasterns of horses for reasons having nothing to do with human interaction or soring. For example, pastern dermatitis is a condition marked by many of the same symptoms listed in the Proposed 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 pain, hair loss, inflammation, edema, lameness, and skin that may exhibit 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 may be determined as such by an inspector under the Proposed Rule.

The Proposed Rule does assert that, "[w]hen horses are repeatedly sored, the skin on their pasterns will develop thickening that usually is in a ridge pattern and diffuse around the posterior and/or anterior pasterns." *Id.* But USDA cites no authority whatsoever for that assertion. It appears to be based wholly on the agency's ipse dixit. It is also directly at odds with the NAS Report, which explained that more studies were required to determine what sort of changes in horses' skin were associated with soring because currently there are no studies establishing such a correlation. USDA offers no other scientific support for its conclusion about skin thickening around the posterior and anterior pasterns. And, even if it had, the rule does not limit inspectors to looking for this "thickening" in a "ridge pattern" that USDA claims is the tell-tale sign of soring.

The new rule also proposes to eliminate the existing requirement that evidence of soring be equally present bilaterally. But that change further increases the risk that horses with accidental injuries may wrongly be disqualified as "sore." Since 1978, USDA has maintained that the

bilateral evidence requirement was the "safeguard" against misapplying the Scar Rule and disqualifying horses who have an "accidental injury." 43 Fed. Reg. at 18519. As USDA explained, "[t]he chances are extremely remote that any horse would ever injure both forelegs in an identical manner with resulting identical scars in the anterior or posterior pastern area of each foreleg." *Id.*

Nothing in the Proposed Rule provides any new explanation to "cast doubt" on APHIS's prior judgment that the bilateral evidence requirement is a necessary safeguard against erroneous findings of soring where a horse has merely suffered an accidental injury. *See State Farm*, 463 U.S. at 47. Rather, USDA argues that the requirement that lesions be bilateral has made the regulation "less effective"—specifically because "violators" have used different tools like lasers to artificially smooth thickened skin "leaving only one leg with obvious signs of soring." 88 Fed. Reg. at 56940. USDA points to no specific evidence or any citation to a study to support that assertion—or even a citation to a case where a violator was found to have hidden the signs of soring by such methods. And if the premise is that violators are able to get rid of visible signs of soring, then the rational conclusion should be that a visual inspection is not a good way to detect soring.[18] Indeed, it is particularly irrational to abandon the requirement for bilateral evidence of a Scar Rule violation based on the theory that violators can effectively eliminate the visual evidence of soring. If violators are that good at erasing visible signs that would trigger a Scar Rule violation, then the purpose of eliminating the bilateral requirement appears to be catching those violators who choose to eliminate the evidence of soring on only one of a horse's legs.

USDA also provides no adequate explanation for reversing course and eliminating the carve-out in the prior Scar Rule that permitted uniform thickening of epithelial tissue on the posterior surface of pasterns. *See* 43 Fed. Reg. at 18519. The USDA previously, and correctly, compared such tissue to "callous[es] on a workman's hands." Such uniform thickening was not regarded as indicative of soring, but simply reflected normal changes in a horse's skin due to friction from action devices. By removing the allowance for uniform, non-traumatic epidermal thickening, USDA now opens the door even more to allow disqualifications that are not based on actual soring. And its unexplained rescission of a commonsense exception to the Agency's rules is at odds with the methods that have been used to lawfully train horses for decades.

Second, because the new rule does not rely on objective scientific criteria or other evidence, it fails to provide a test that can yield reproducible results by different inspectors. The Proposed Rule fails to give inspectors any objective criteria by which to differentiate a true case of soring from a horse presenting accidental injuries, skin conditions, or even sweat caused by competition. The rule does not limit inspectors to the enumerated conditions or address whether a condition must cross a certain threshold of severity to qualify as evidence of soring. In short, the Proposed Rule is neither reasonable nor reasonably explained. *See State Farm,* 463 U.S. at 48. It will lead to arbitrary and irrational disqualifications that have no connection whatsoever to actual soring of horses.

[18] As discussed in Section VII, the TWHNCA recommends an objective method of inspection to address these very concerns.

Inspectors are instructed to disqualify a horse if there are "dermatologic conditions that are indicative of soring." But such "conditions" are not well defined and are left to the individual inspector to decide. Although the new rule provides a non-exhaustive list of examples, those examples only add to the subjective nature of the rule.

For example, under the Proposed Rule, an inspector could disqualify as sore a horse displaying mild dryness in its anterior pasterns if that inspector thought dryness was indicative of soring. That same inspector may later deem another horse presumptively sore because it displays a mild amount of "moisture" on one leg, thus triggering the automatic soring presumption. But the Proposed Rule offers no guidance as to when a horse's skin is "too dry" or "too wet." Instead, the Proposed Rule vests in horse inspectors a completely standard-less, you-know-it-when-you-see-it authority to designate a horse as sore. And these determinations are to be made by inspectors who do not even have the training and experience of equine veterinarians (as the NAS Report recommended).

Nor does any scientific literature support the Agency's belief that visually inspecting a horse for "dermatologic conditions" can reliably detect soring. Indeed, Dr. Stromberg and Dr. Bertone both explained that gross inspections *cannot* reliably identify soring. As Dr. Stromberg wrote:

> Inspectors are attempting to detect the presence of a pathologic process far below the level of clinical significance based on what they think they see and feel without independent verification. They conclude from this it is proof of a scar rule violation. The result, not unexpectedly, is inconsistency in passing or disqualifying a horse for competition and many false positives.

App. Ex. 13 (Stromberg Decl.) Ex. A at 10.

Dr. Bertone agreed:

> I believe the examination protocol is highly subjective and unlikely to be applied consistently. My observations of the VMOs applying this examination protocol at the Celebration lead me to be skeptical that results from this examination protocol can be accurately interpreted to identify horses that are sore and those that are not sore. I am not aware of any peer reviewed study to identify the reliability of the palpation techniques to generate similar pressures across and within horses and inspectors. I am unaware of any peer reviewed study that has identified if these techniques can accurately identify horses that are sore, versus those that are not sore.

App. Ex. 14 (Statement of Joseph Bertone) at 3.

Nor does USDA explain how a gross inspection of a horse's pasterns can identify evidence of soring. USDA itself tacitly recognizes that the vague language in its rule may create a risk that "accidental abrasions and other skin irregularities" will be "confused for soring," but contends that "changes in the skin due to soring are fairly distinctive when compared to accidental injuries." 88

Fed. Reg. at 56941. But if it were true that changes in the skin caused by soring are "fairly distinctive," USDA would be able to point to some scientific paper or study establishing what these "distinctive" changes are—or at least be able to describe these "distinctive" changes and direct inspectors to look *only* for those limited, tell-tale signs of soring. USDA does neither.

Of course, the natural consequence of a standard-less rule is that there is no adequate notice given to those affected by it. Because what is disqualifying to one inspector may not be disqualifying to another, horse trainers and owners have no guidelines by which they can expect to know whether or not their horse will be able to compete. What level of "irritation," "moisture," or "patchy" hair will lead to a disqualification is left in the eye of the beholder.

Dr. Stromberg aptly summarizes the problems with the new Proposed Rule:

> In short, the vague and subjective nature of the new rule makes it even worse and more arbitrary than the existing Scar Rule. It will inevitably lead to more inconsistent application and disqualification of horses that are not sore, particularly given that the examiners applying the rule would not be experienced equine veterinarians.

App. Ex. 13 (Stromberg Decl.) at ¶ 20.

Instead of moving forward with its proposed revisions to the Scar Rule, USDA should heed the call of Dr. Stromberg, NAS and other scientists to obtain the data necessary to draft a rule that will actually identify and combat soring. The TWHNCA stands willing to work with USDA to provide data and help obtain the necessary studies called for by the NAS Report to ensure that soring can be objectively tested and prevented.

V. Abolition Of The DQP Program Is Contrary To The HPA And Is Arbitrary And Capricious.

The USDA's attempt to eliminate the DQP program is at odds with the HPA because it effectively eliminates the Tennessee Walking Horse Industry's participation in the HPA's enforcement.

The HPA establishes a self-regulatory scheme in which the management of horse shows appoint individuals to inspect horses before they are shown in competition. For decades, USDA has followed Congress's mandate by prescribing regulations for management to select and train horse inspectors through the DQP program. By replacing DQPs with USDA-licensed and trained veterinarians, the Proposed Rule gives horse show management the choice of either bankrupting their events or acquiescing to government inspectors for their shows. That Hobson's choice effectively eliminates the self-regulatory scheme that Congress enacted and is therefore "not in accordance with law." 5 U.S.C. § 706. In addition, eliminating the DQP Program is arbitrary and capricious insofar as it is based on flawed data.

In its 2017 Final Rule, USDA also proposed to eliminate the DQP Program using much of the same rationale offered in support of the Proposed Rule. The TWHNCA's Comments in

response to the proposed 2017 Rule, attached as Exhibit 16, are incorporated in full by reference. *See* App. Ex. 16 (2016 TWHNCA Comment) at 70-83.

A. Eliminating the DQP Program Would Violate The HPA.

Under the Horse Protection Act of 1970, as originally enacted, horse inspections were carried out by representatives of the Secretary of Agriculture, not horse owners or members of horse show management. *See* Pub. L. 91-540 § 5, 84 Stat. 1405. The only persons permitted to "make such inspections of any horses ... at any horse show or exhibition" were the duly "authorized" "representative[s] of the Secretary." *Id.* Private horse owners were required to "afford such representative access to and opportunity to so inspect such horse." *Id.* Those "in charge of any horse show or exhibition" were tasked only with "keep[ing] such records as the Secretary may by regulation prescribe" and allowing government personnel "access to and opportunity to inspect and copy such records." *Id.* at § 5, 84 Stat. 1406. Horse show management had no role in selecting or training horse inspectors.

Due to limited personnel and resources, government officials could inspect only a small fraction of the Tennessee Walking Horses shown each year at competitions. H.R. Rep. No. 1174, at 5 (1976). Congress therefore amended the HPA in 1976 to give show management a significant role in the inspection process. *See* Pub. L. 94-360, 90 Stat. 915. For any horse that is sore or which has been deemed sore by a duly appointed inspector, it would be the responsibility of the "management of any horse show or horse exhibition" to ensure that horse is not sold, auctioned, exhibited, or shown in competition. *Id.* at § 5. Congress also tasked the Secretary with prescribing regulations to allow "the appointment by the management of any horse show ... persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this act." *Id.* (codified at 15 U.S.C. § 1823). While the Secretary could continue to appoint inspectors, many horse inspections would now be conducted by private persons representing horse show management, not the Secretary.

In his signing statement, President Ford stated that real reform could be achieved only by "compelling this industry to police itself." Statement on Signing the Horse Protection Act Amendments of 1976, 3 PUB. PAPERS 1999, 2013 (July 14, 1976). Although he wished Congress had done more to place the "onus on the industry," *id.*, he signed the law and his administration pledged to "work with [the] Agriculture [Department] to gain greater support from within the industry for self-policing and compliance." *See* Memorandum for the President from James M. Frey at 5, Office of Management and Budget (July 8, 1976) (recommending President Ford approve the HPA amendments because "the key to a successful program centers around industry involvement"). Thus, the HPA amendments were understood to give private industry a key role in enforcing the Act in coordination with USDA. *See* 43 Fed. Reg. at 18514 ("The Horse Protection Amendments of 1976 ... significantly increased the responsibilities of management of all horse shows.").

USDA implemented the 1976 amendments by establishing the DQP program. As amended, the HPA "requires the Secretary to ... establish[] the qualifications and certification requirements" for DQPs, "who are appointed by the management of any horse show." *Id.* The agency made clear that its role was limited to setting inspector standards. The task of selecting and appointing

individuals meeting those standards was the task of management. The "intent of Congress and the purpose of this provision [15 U.S.C. 1823] is to encourage horse industry self-regulatory activity." *Id.*; *accord* Definition of Terms and Certification and Licensing of Designated Qualified Persons, 44 Fed. Reg. 1558, 1560 (Jan. 5, 1979); Horse Protection Act; Requiring Horse Industry Organizations to Assess and Enforce Minimum Penalties for Violations, 77 Fed. Reg. 33607, 33608 (June 7, 2012). In response to comments that the DQP program was "unworkable, unnecessary, expensive, and should be dropped," USDA explained that the program was necessary because, otherwise, "the intent and purpose of the Act would not be satisfied." 44 Fed. Reg. at 1560.

The Proposed Rule is contrary to the Act because it is contrary to the HPA's vision of an Industry that will work with USDA to police itself. The rule eliminates DQPs and requires a heightened approval process for USDA inspectors, requiring individuals to be veterinarians to qualify. Show management is then permitted to choose to retain its own inspectors (as it currently can choose its own DQPs), though a show will have to front the increased cost that the new inspectors will charge given their experience. A show manager may instead opt to choose an USDA appointed inspector at no cost.

While the Proposed Rule acknowledges that the Act "precludes" USDA from "eliminating any element of choice for event management," 88 Fed. Reg 56924, 56953, the rule effectively achieves that very result by coercing management to accept USDA inspectors at all horse shows by making the alternative cost prohibitive. The cost of hiring a privately employed veterinarian of a show's choice (which would still force the show to pick from a pre-approved list of certified USDA HPIs) versus accepting a free inspector hand-picked by USDA effectively forces shows to choose the latter. Indeed, USDA even admits that the veterinarian requirement could be "cost-prohibitive for smaller shows," *id.*, who will then have no choice but to "opt[] to appoint an APHIS representative" instead for free, *id.* at 56949. In addition, there were 3,449 total individual horses who competed in 52 TWHNCA events in 2022. *See* App. Ex. 34 (SHOW Records). Besides the cost, there simply are not enough veterinarians to inspect the number of horses competing each season. Nor is there any indication that veterinarians will seek to become USDA-approved HPIs. Indeed, the American Veterinary Medical Association has recently formed a commission tasked with developing strategies for recruiting and retaining veterinarians in equine practice. As the AVMA noted, "[m]any areas of the United States already are experiencing a shortage of equine veterinarians, which the association warned may jeopardize the health and welfare of horses and other equids if corrective actions aren't taken." *See* R. Scott Nolen, "Labor shortage prompts AAEP to form workforce commission," Am. Veterinary Med. Assoc. (Aug. 17, 2022), https://perma.cc/ZCS9-K8BE. Due to the cost and likely shortages of private persons meeting USDA's qualification standards, horse show management will always be induced to appoint USDA representatives instead of private individuals.

In addition, the Proposed Rule would make new HPIs *de facto* USDA agents because USDA would have the ability to direct and control the HPIs. Specifically, USDA would have the following authority:

- HPIs would have to apply to USDA for a license and have to be approved by APHIS to obtain a license. 88 Fed. Reg. at 56961.

- USDA would be able to revoke the licenses of any HPI who fails to follow the inspection procedures in the regulations—inspection procedures which USDA establishes—or "who otherwise fails to perform duties necessary for APHIS to enforce the Act and regulations." 88 Fed. Reg. at 56962.

- USDA would establish the training program for HPIs and train them, including instructing them on how to apply the examination protocol established by USDA. *Id.*

Thus, rather than establishing a means for the industry to police itself as Congress intended, USDA is proposing to eliminate self-regulatory activity. That scheme turns the Act on its head. The Proposed Rule undermines the "intent and purpose of the Act"—namely, to "encourage horse industry self-regulatory activity." 44 Fed. Reg. at 1560.

B. Eliminating The DQP Program Is Arbitrary And Capricious.

Besides being contrary to the Act, the Proposed Rule's elimination of the DQP Program is arbitrary and capricious.

For starters, the rationale for getting rid of the existing DQP program is that USDA's data shows that VMO inspections find a higher violation rate than DQP inspections. But that data is unreliable and cannot supply a reasoned basis for USDA's decision. *See* Section I; *American Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (holding that, under the arbitrary and capricious standard, "[a]n agency must nevertheless 'examine the relevant data and articulate a satisfactory explanation for its action.'" (citation omitted)). It is arbitrary to rely on unreliable data as the primary basis for a sweeping change in the way inspections are conducted. Even the NAS Report acknowledged that, for the inspection methods in place to be reliable, they must be applied by "veterinarians who are trained and highly experienced in detecting lameness and pain." NAS Report at 33.

Insofar as the Proposed Rule demands that private inspectors have veterinary credentials but USDA inspectors do not, the Proposed Rule displays inconsistent reasoning. "A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) (holding Treasury Department acted arbitrarily when it concluded that "only a financial agent may actually administer the EBT program"). It is inconsistent—and therefore arbitrary—for the agency to insist that private horse inspectors must have doctoral training in veterinary medicine while its own representatives do not need any credential besides agency employment to inspect horses for soring. Any credential or qualification imposed on private persons seeking to serve as horse inspectors must equally apply to USDA representatives.

Relatedly, the Proposed Rule lacks a principled basis by which to exclude professional horse trainers and farriers from its new licensing regime. The Proposed Rule explicitly states that, when veterinarians are in short supply, it will license veterinary technicians and local animal welfare officials. Neither vet techs nor local animal welfare personnel have greater claim to

accurately detect soring in horses than professional horse trainers and farriers. In many instances, vet techs and animal welfare officials (say, for instance, the town dogcatcher) will have far *less* equine or even large-animal experience. There is no reason to suspect that these individuals will consistently outperform professional horse trainers and farriers at inspecting horses for soring—especially if both receive the same USDA training. And it may well be illegal for a veterinary technician to diagnose whether a horse is lame or has some other physical affliction, versus being considered sore. *See, e.g.*, Tenn. Comp. R. & Regs. 1730-03-.02 ("The scope of practice for veterinary technicians is limited to procedures that are assigned or delegated to the veterinary technician by the supervising veterinarian and do not involve diagnosing, prescribing, or performing surgical procedures.").

The USDA also justifies the elimination of DQPs by stating that decisions of the USDA's OJO "include accounts of exhibitors showing sored horses that had been inspected and cleared by DQPs, cursory inspections or use of incorrect methods by DQPs, and exhibitors attempting to avoid violations by having another person acknowledge responsibility." 88 Fed. Reg. at 56928. However, the USDA does not cite any cases containing such accounts. Three of the cases cited are unsuccessful challenges to default judgments that contain no discussion of the underlying examinations. 88 Fed. Reg. at 56928 at n.12 (citing In *re Rocky Roy McCoy*, 75 Agric. Dec. 193 (2016); *In re Tracy Essary*, 75 Agric. Dec. 204 (2016); *In re Randall Jones*, 74 Agric. Dec. 133 (2015). In the fourth, the presiding ALJ expressed significant concerns about the credibility of the VMO but nevertheless found herself "bound by legal precedent" to uphold the VMO's findings, concluding: "In so finding, I am mindful of the words of Fulton J. Sheen: 'the big print giveth, and the fine print taketh away." *In re Justin Jenne*, 73 Agric. Dec. at 14.

Finally, by having "APHIS assume the training and authorization of inspectors," 88 Fed. Reg. at 56948, USDA eliminates the role of HIOs in the industry. *See also* 88 Fed. Reg. at 56951 ("The proposed rule would remove all regulatory responsibilities and requirements for horse industry organizations and associations (HIOs)."). In so doing, the Proposed Rule imposes significant new requirements (such as record-keeping and reporting requirements or controlling crowds at a show) on local show managers. Under the existing system, USDA deals with HIOs who typically manage these tasks and have adequate staff to do so. When there is no longer an HIO, those duties will fall to local show managers, who must shoulder the burden of these requirements (which they have never had to previously manage) or face being found in violation and potentially have their shows shut down. USDA's failure to consider this effect of the Proposed Rule is further evidence of its arbitrary decisionmaking.

VI. USDA's Economic Analysis Is Deficient And Fails To Consider The Devastating Effect Of The Proposed Rule On The Industry, Including Small Businesses.

As the Agency acknowledges, pursuant to Executive Orders 12866 and 13563, it is required to prepare an economic analysis with a cost-benefit analysis, weighing the purported benefits of the rule with the effect the rule would have on the $3.2 billion industry, the 20,000 jobs it creates, and the economy at large. *See, e.g.*, Legislative Hearing to Protect Consumers and Strengthen the Economy before the Subcomm. on Consumer Protection and Commerce, H. Comm. Energy and Comm., 117th Cong. (May 26, 2022) (Statement from the Tennessee Walking Horse Breeders' & Exhibitors' Association Regarding H.R. 5441), https://perma.cc/Q99A-WNB5. Although USDA

purports to have conducted such an analysis, that analysis is incomplete and unsound. Indeed, with respect to the impact of the Proposed Rule on small businesses, the analysis is wholly insufficient.

A. The USDA's Cost-Benefit Analysis Is Wholly Unreliable Because It Is Based On Data That Is Over A Decade Old.

As an initial matter, USDA failed to obtain or collect any new data to support its analysis. Instead, it relies on a 2012 Expert Elicitation that was previously used (and commented on) in support of the 2017 Rule. USDA justifies its reliance on data that is more than a decade old because "detailed, more recent information on the Tennessee Walking Horse and racking horse industry is not readily available." *Regulatory Impact Analysis & Initial Regulatory Flexibility Analysis of the Proposed Rule, Horse Protection Amendments*, RIN 0579-AE70, APHIS-2022-0004 at 3-4 (Aug. 2023) [hereinafter *2023 Regulatory Impact Analysis*]. But there is no indication that the data in the 2012 Elicitation, which is over a decade old, accurately reflects the state of the industry. *See Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985) ("Whether or not DOE acted reasonably in issuing rules in 1982 and 1983 based on 1980 information, we think it would be patently unreasonable for DOE to begin further proceedings in the last half of 1985 based on data half a decade old.").[19]

Nevertheless, because the supporting data is the same as that considered in the 2017 rule, USDA's economic analysis largely repeats the analysis from the prior rule. *Compare 2023 Regulatory Impact Analysis* at 10:

> The proposed rule is not expected to adversely impact communities in which shows are held because Tennessee Walking Horse and racking horse shows are expected to continue. Owners are motivated to show their prized horses and are thus likely to continue participating in shows. … Better enforcement of the HPA is expected to also benefit participating entities by improving the reputation of the Tennessee Walking Horse and racking horse industry. Participation in HIO-affiliated events may increase if the proposed rule were to result in increased confidence by owners that individuals who intentionally sore horses to gain a competitive advantage are likely to be prevented from participating. The affected HIOs would also benefit more financially if they choose to have an APHIS inspector rather than an HPI.

with App. Ex. 48 (2016 Regulatory Impact Analysis) at 7:

> The proposed rule is not expected to adversely impact communities in which shows are held since walking and racking horse shows are expected to continue. Owners are motivated to show their prized horses and are likely to continue participating in shows. … Better enforcement of the HPA is expected to also benefit participating HIOs and HIO-affiliated shows by improving the reputation of the walking and

[19] USDA did not ask the TWHNCA to assist it in preparing data to support its new rule. The TWHNCA is happy to work with USDA in obtaining this information to support a new, reasoned rulemaking.

racking horse industry. Participation in HIO-affiliated events may increase if the proposed rule were to result in increased confidence by owners that individuals who intentionally sore horses to gain a competitive advantage are likely to be prevented from participating. The affected HIOs would also benefit from no longer having to bear the costs of training and licensing the HPIs.

Because the current economic analysis largely repeats the analysis done in 2017 and relies upon the same data, the TWHNCA attaches and incorporates by reference its comments in response to the 2017 Proposed Rule, *see* App. Ex. 16 (2016 TWHNCA Comment) at 95-104, as well as the Economic Impact Report of Dr. Robert N. Fenili submitted with the Association's Comment, *see* App. Ex. 49.

B. USDA's Cost-Benefit Analysis Fails To Account For The Devastating Effect That The Ban On Pads And Action Devices Would Have On The TWH Industry.

Critically, as with the 2017 rule, the Proposed Rule fails to account for the devastating effect that the total ban on pads and action devices would have on the Industry. Indeed, the ban could end up destroying the Industry all together because it would eliminate the Performance division of the Industry. Horses competing in the Performance division are trained with and exhibited while using action devices and pads. App. Ex. 24 (Wells Decl.) at ¶ 13. At a show like the National Celebration, approximately 70% of the horses are historically shown using action devices and pads. *Id*. ¶ 12. And the Performance categories at shows are also the most popular and the categories that draw the most spectator interest, as members of the public are drawn to shows to see the most athletic horses. A number of individuals have indicated that this is so:

- "The TWH show circuit is primarily driven by attendees' interest in performance show horses. If performance show horses are no longer able to compete, many shows would shut down, which means that the flat-shod divisions in those shows would also shut down, leaving no room for flat shod TWHs to compete." App. Ex. 28 (Statement of Carrie Martin) at ¶ 9.

- "At TWH shows, the performance divisions are the biggest draw and attract a high level of interest from the audience." App. Ex. 29 (Statement of Chad Williams) at ¶ 5.

- "At TWH horse shows, the performance divisions are the biggest draws because members of the public attend horse shows to watch the most athletic horses. Those of us who show TWHs in the pleasure divisions rely on the performance horse divisions to bring in fans and sponsors to the shows to keep the shows going." App. Ex. 30 (Hannah Pulvers-Myatt Statement) at ¶ 5.

Indeed, the horses that compete to be World Grand Champion at the Celebration are all horses trained and shown with action devices and pads. App. Ex. 24 (Wells Decl.) at ¶ 10.

The ban on pads and action devices would effectively eliminate the biggest draw to these shows. Many shows would not be economically viable and would cease to function if the Performance division were eliminated. *Id.* at ¶ 13 ("By banning action devices and pads (and requiring the Association to enforce the ban), the 2023 Proposed Rule would eliminate the Performance division at all horse shows. As a practical matter, this would make it impossible for the Association to stage the Celebration.").

Managers of the following shows have stated their belief that the Proposed Rule would make it impossible for their shows to continue:

- The Celebration. *See* App. Ex. 24 (Wells Decl.) at ¶ 13.
- The Alabama Jubilee Charity Horse Show. *See* App. Ex. 35 (Kemp Decl.) at ¶ 5.
- The Alabama Walking Horse Ladies Auxiliary Horse Show. *See* App. Ex. 36 (Kemp Decl.) at ¶ 6.
- The Roger Latham Memorial Horse Show. *See* App. Ex. 37 (Kemp Decl.) at ¶ 5.
- The Arab Summer Classic. *See* App. Ex. 38 (Bradshaw Decl.) at ¶ 6.
- The North Carolina Championship Walking Horse Show. *See* App. Ex. 39 (Dickerson Decl.) at ¶ 6.
- The West Tennessee Strawberry Festival Horse Show. *See* App. Ex. 40 (Benjamin Decl.) at ¶ 6.
- The Mid-South Horse Show Association Show. *See* App. Ex. 41 (Benjamin Decl.) at ¶ 6.
- The Money Tree Classic. *See* App. Ex. 42 (Tisma Decl.) at ¶ 6.
- The FAST Spring Showcase. *See* App. Ex. 43 (Smith Decl.) at ¶ 6.
- The Green River Classic. *See* App. Ex. 44 (Rouse Decl.) at ¶ 6.
- Walking For Youth. *See* App. Ex. 45 (Rouse Decl.) at ¶ 6.

See also App. Ex. 29 (Statement of Chad Williams) at ¶ 9 ("If the provisions in the Proposed Rule banning the use of pads and action devices are adopted in a final rule, that would be the end of the TWH performance division at horse shows, and thus the end of the TWH performance show horse.").

Those impacted by the elimination of the division would include:

- Trainers of Tennessee Walking Horses. The elimination of the Performance division would eliminate the primary source of revenue for these trainers. As one trainer put it:

> If the provisions in the proposed rule banning the use of pads and action devices are adopted in a final rule … I would no longer be able to generate a sufficient amount of income for the facility at which I currently work to keep my job, as I would not be able to train and show performance TWH horses for the facility. I would be out of work and forced to look for a new job in a new line of work, and I believe that many other trainers of performance TWH show horses would also be put out of work and have to find a new line of work.

  Id. *See also* App. Ex. 28 at ¶ 10 (Statement of Carrie Martin) ("The Proposed Rule, if adopted as a final rule, would likely cause me to lose my job as a horse trainer or at least negatively impact my business such that I would have to restructure it to focus only on training horses for recreational riding … [which] would eliminate the large majority of my income.").

- Owners of Tennessee Walking Horses. The data relied on by USDA indicates that the median revenue for owners per show ranges from $8,600 to $9,800, depending on region. *2023 Regulatory Impact Analysis* at 8.

- And the lifetime revenue solely from breeding per horse ranges from $5,800 to $9,200 across region. *Id.* The elimination of the Performance division would not only eliminate the potential for horses to win prizes, it would also greatly diminish their value as sires or dams to breed other horses.

- Show management. USDA's data demonstrates that shows generate substantial revenue, particularly premier shows. For example, the Celebration has generated $24,036,785 since 2017. *See* App. Ex. 24 (Wells Decl.) at ¶ 14. That money, in turn, goes to pay for the salaries of employees who work to produce the Celebration. *Id*. In addition, show managers will necessarily need to hire new staff to satisfy all reporting requirements under the regulations, as those responsibilities were previously handled by HIOs. *See* 88 Fed. Reg. at 56951 ("The proposed rule would remove all regulatory responsibilities and requirements for horse industry organizations and associations (HIOs).").

- Local governments and communities. Horse shows can generate substantial revenue for local communities. Shows bring in both spectators and horse owners and trainers from out of town, which in turn provide revenue boosts to the local hotel and restaurant industries. The additional business generates tax revenue for local governments. For example, the former Mayor of Shelbyville, TN stated that

"[t]he Celebration is the single biggest economic driver to the City of Shelbyville." App. Ex. 46 (Statement of Wallace Cartwright).

- Charities. In many instances, charities raise money during TWH shows. For example, eight local charities with missions for disabled veterans, youth sports, low-income families, and troubled youth all raised funds during the 2023 Celebration. *See* App. Ex. 24 (Wells Decl.) at ¶ 16. Many of these are able to fund their organization for an entire year based on the funds raised during the 11 days of The Celebration. *Id.*

This is not news to the USDA. In its comments to the 2017 Rule, the TWHNCA also explained in detail the economic impacts that would result from eliminating the Performance division of competition. App. Ex. 16 (2016 TWHNCA Comment) at 96-100; *see also* App. Ex. 49 (Economic Impact Report of Dr. Robert N. Fenili submitted with the Association's Comment). Yet the Agency has failed to provide any response—or even to consider—the actual economic impacts of its Proposed Rule.

The elimination of the Performance division would also hurt the viability of the Tennessee Walking Horse as a breed, itself. To the extent horses become less viable to show, they become less valuable to own. An economic value cannot be placed on the breed itself.

USDA fails to genuinely consider any of these impacts. Instead, USDA dismisses the economic effect of the ban on action pads and devices through a single sentence: "The prohibition of pads and action devices does not impose costs on show management or participants." 88 Fed. Reg at 56952. But that misses the entire point. The prohibition may not impose new costs on shows or participants, but it will *eliminate* the shows themselves. *See* App. Ex. 24 (Wells Decl.); Ex. 29 (Statement of Chad Williams).

The separate economic analysis provided by the Agency adds little more. It asserts in conclusory fashion that "most horse shows contain numerous classes in which large numbers of horses participate as flat-shod horses (those that do not use the pads and action devices that this proposed rule would prohibit on Tennessee Walking Horses and Racking Horses)," and notes that "[s]ome shows are entirely flat-shod and already prohibit pads and action devices" and "[t]he proposed rule would not have any impact on those shows as existing and new classes already prohibit pads and action devices." *2023 Regulatory Impact Analysis* at 10. Of course, the fact that "some" shows are entirely flat-shod is irrelevant. The primary driver of the industry is the Performance division. *See* App. Ex. 30 (Statement of Hannah Pulvers-Myatt) at ¶ 5 ("At TWH shows, the performance divisions are the biggest draws because members of the public attend horse shows to watch the most athletic horses. Those of us who show TWHs in the pleasure divisions rely on the performance horse divisions to bring in fans and sponsors to the shows to keep the shows going."). And flat-shod shows would likely be eliminated by the increased costs they would face due to new reporting requirements and the need to pay for veterinarian inspectors if they do not want to accept a USDA inspector.

Despite proposing a ban that would effectively eliminate the Performance class of competition, USDA now *asks* for public comments providing it with data on "how many flat-shod

horses there are versus how many are entered into performance classes at HPA-covered events." *2023 Regulatory Impact Analysis* at 10. This gets things backwards. USDA must promulgate its rule based on reliable data, not promulgate the rule and then ask for the data to support it, particularly where it is relying on old data because it contends more recent data "is not readily available." USDA also appears to already have this data, at least as to its own inspection reports that form the basis of its rule. To the extent it was missing data, USDA could have requested it before promulgating the rule, instead of simply noting that "detailed, more recent information on the Tennessee Walking Horse and racking horse industry is not readily available." *Id.* at 3-4.

C. USDA's Cost-Benefit Analysis Fails To Account For The Substantial Impact The Proposed Rule Would Have On The Greater U.S. Economy.

The economic impact of the Proposed Rule extends beyond the Industry itself. As explained by The Chesapeak Group ("TCG"), the TWHs have an impact on the greater U.S. economy. As the TCG Group explains, impacts to one industry have ripple effects on other business sectors within the economy. *See* App. Ex. 47 (TCG Economic Analysis) at 2. Based on its calculations, the TCG Group estimates (conservatively) that "the total economic impact on the U.S. economy of the Tennessee Walking Horses is $1.84 billion." *Id.* at 12. And, more specifically, "TCG estimates that the national and local impacts of the show TWH segment contribute between $718 million and $902 million annually to the economy." *Id.*

As TCG notes, USDA's economic analysis fails to take account of these greater impacts. *Id.* at 13 ("The work upon which APHIS suggestions are made did not consider anything other than the direct impacts."). And TCG concludes that "[w]hen coupled with the suggested regulatory changes, the existing challenges ***will likely destroy the TWH segment of the horse industry as we know it***." *Id.* (emphasis added). *See also id.* ("Simply eliminating the economic impact of the show horses is only the first level of impact. For those not participating in show and event activity, the supply of 'premier' stock would diminish, and demand would decline for TWH in general in a short time."). *Id.* The impact of these actions—potentially up to $1.84 billion—should not be taken lightly. At the very least, USDA should justify its actions with additional analysis.

D. USDA Admits That It Does Not Know Whether The Proposed Rule Would Have A Disproportionate Effect On Small Entities.

The Regulatory Flexibility Act ("RFA") requires an agency promulgating a rule to consider the effect of the Proposed Rule on small businesses and entities, and to design mechanisms to minimize any adverse consequences. *See* 5 U.S.C. § 601 *et seq.* The Agency must either certify that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities, or must issue an initial regulatory flexibility analysis ("IRFA") at the same time that it publishes the notice of the proposed rulemaking. 5 U.S.C. §§ 603, 605. USDA admits that "[t]he entities affected by this rule are likely small by Small Business Administration standards." 88 Fed. Reg. at 56953. Under the RFA, the term "small entity" means a "small business," "small organization," or "small governmental jurisdiction." 5 U.S.C. § 601(6). The RFA defines a "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field" and "small governmental jurisdiction" means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less

than 50,000." *Id.* § 601(4)-(5). In pertinent part, "small business" meets the elements of the definition of "small business concern" under 5 U.S.C. § 632. *See also* 5 U.S.C. § 601(3). Among other things, to be a "small business concern," and thus a "small business," the entity must not exceed the size standards set by the Secretary of the Small Business administration. "Table of Small Business Size Standards," https://perma.cc/N5EF-FTB3.

In 2016, the APHIS Administrator certified that the 2017 Proposed Rule would not have a significant economic impact on small entities but did not conduct an economic analysis or submit an IRFA. *See* App. Ex. 16 (2016 TWHNCA Comment) at 102. This time, USDA attempts to cure that defect by issuing an IRFA based on data that is, by its own admission, incomplete. It relies on the Small Business Administration's Agricultural Census of 2017 in finding that 98% of all farms with horse inventories fall well below the SBA threshold for small entities. *2023 Regulatory Impact Analysis* at 18. But that data does not distinguish between farms owning TWHs and other breeds. Nor does it account for other equestrian recreational facilities or riding stables—or, for that matter, private owners of TWHs. *Id.* With such incomplete evidence, APHIS can do little more than conclude: "We cannot certify that this rule would have no disproportionate impact on small entities, but at this time have found no evidence that it would have such impacts." *Id.* at 20. But a head-shrug does not qualify as "reasoned decision-making" under the APA.

VII. USDA Must Establish an Inspection And Appeals Process that Comports with Due Process.

In the Proposed Rule, USDA seeks public comment on how pre-show inspections may comport with due process, given the concern expressed in numerous comments to the 2017 rule. 88 Fed. Reg. at 56935. USDA is right to do so.

"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). USDA's current regulations do not provide for meaningful review of a disqualification, as recognized by at least one federal court. In *McSwain v. Vilsack*, No. 1:16-CV-01234-RWS, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016), the court found that the current system employed by USDA violates the due process rights of horse owners. First, the court recognized that horse owners have a property interest in showing a horse in competition without unreasonable government interference. *Id.* at *4. Second, the court recognized that the USDA's inspection process violates an owner's property interest without adequate protection. *Id.* at *5. Under the existing regulations, there is no appeal mechanism that would allow a horse owner to contest that pre-show disqualification. The lack of such a mechanism means that horse owners are powerless to contest any pre-show disqualification. *See id.* ("Plaintiffs contend, and Defendants concede, that this inspection is the only pre-disqualification process afforded to Plaintiffs under the current scheme.").

Accordingly, the court concluded that the plaintiffs in *McSwain* 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 rarely seeks 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.*

The *McSwain* decision is sound. Under the current system, horse owners have no right to raise a challenge and have their horses shown if they are disqualified before a show. Indeed, the TWHNCA has been raising these same concerns to USDA for a long time. *See, e.g.*, App. Ex. 50 (2016 Letter to Administrator Shea) at 4 ("Accordingly, in light of the McSwain Order, the Association respectfully demands, and fully expects, that APHIS and its officials will refrain from making any finding … that would result in a horse being disqualified for non-compliance with any provision of the HPA, unless APHIS provides sufficient notice and opportunity for the owner(s) of the horse to be heard (including an appeal) on that finding before the horse is disqualified.").

The Proposed Rule recognizes but offers no solution to this problem. Instead, it seeks "additional public comments 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." 88 Fed. Reg. at 56935. However USDA chooses to address the problem, one thing is clear: as a matter of law under the Due Process Clause, the Agency may not continue to operate a system that deprives owners and trainers of their right to have a horse compete without a meaningful ability to challenge that decision.

The due process concerns with the current appeal system are not limited to pre-show disqualifications. Owners and trainers whose horses compete and are disqualified (whether pre-show or post-show) have no ability to be heard in a "meaningful manner" because USDA does not provide them with sufficient information about their disqualification. *Mathews*, 424 U.S. at 333. The current regulations provide that USDA must inform the owner or custodian of "any horse allegedly found to be in violation of the Act or the regulations of such alleged violation or violations before the horse is released by an APHIS representative." 9 C.F.R. § 11.4(f). But the regulations do not require USDA to provide any specific detail about the violation or the reasons for the determination. In practice, USDA will not allow any recording (including videotaping) of its inspections. Nor will it provide any information as to the specifics of an alleged violation, such as the location of an alleged "scar" or "sensitivity," or the type of prohibited substance that was identified.

Having a meaningful record is essential to providing the meaningful review required by due process. *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 335 (3d Cir. 2021) ("*Mathews* balancing dictates that the Government make 'a record … of sufficient completeness' for 'adequate and effective ... appellate review.'") (quotation omitted). Here, because USDA is not required to provide detail about its findings (and routinely fails to do so), owners and trainers of a horse that is are disqualified have no meaningful way to challenge that disqualification.

The Proposed Rule does not solve this problem. Instead, it simply proposes that those who feel they have been unfairly subject to a violation should submit an appeal in writing within 21 business days after receiving "the inspection report." 88 Fed. Reg. at 56935. But "inspection report" is not a defined term in the Proposed Rule. Thus, there is no requirement in the Proposed Rule that such reports contain the detail that would be necessary for an owner or trainer to

challenge a disqualification, nor any indication as to how long after an inspection such a "report" must be provided. Instead, the Proposed Rule leaves in place a system in which owners and trainers often do not learn the grounds for an alleged violation until they are served with a formal complaint by the APHIS Administrator months, if not years, after the alleged violation occurred. Indeed, the first-time owners and trainers may see a VMO's "inspection report" is when APHIS introduces it into evidence during an enforcement proceeding. Such reports are of limited probative value when they are prepared after the fact and in consultation with USDA attorneys. *See Young v. U.S. Dep't of Agric.*, 53 F.3d 728, 730-31 (5th Cir. 1995) ("[A]s a general practice VMOs prepare summary reports and affidavits only when administrative proceedings are anticipated.").

The lack of an evidentiary record is compounded by the Proposed Rule's new requirement that that horse owners or trainers submit an appeal within 21 days of receiving an inspection report. As recognized in *McSwain*, there is currently no mechanism allowing an automatic appeal. At the same time, the USDA rarely seeks penalties. Under the new rule, however, if an owner or trainer fails to appeal within 21 days, he or she will be deemed to have waived any challenge in a subsequent penalty proceedings—which the USDA might initiate a year or more after the alleged violation. As a result, to avoid being trapped in a later penalty proceeding with a finding of waiver, the owner or trainer will have to appeal *every* disqualification. In other words, by imposing a 21-day deadline, USDA would now require owners and trainers to challenge *every* disqualification or risk having USDA later argue that any such challenge was waived. In so doing, USDA effectively seeks to shift its burden of proof to ultimately prove a violation of the HPA (if it decides to seek a penalty) onto the owners and trainers. The effect of the Proposed Rule would effectively insulate USDA's arbitrary decisions on when to disqualify a horse from meaningful review because it would force owners and trainers to challenge every disqualification on an inadequate record. This does not comport with due process. USDA should not attempt to set up a system that makes it easier for the Agency to pursue penalty proceedings by forcing owners and trainers to bring appeals or be deemed to have waived all challenges. Instead, all challenges should remain open to a defendant in a later penalty proceeding without regard to whether the defendant brought a prior appeal.

In addition, to satisfy the demands of due process and provide for meaningful review, USDA must require any disqualification to be supported by adequate evidence and documentation, including photographs and detailed findings to support that disqualification. Especially for any disqualification based on an alleged Scar Rule violation, USDA must require the inspector to fully document and provide photographical evidence of the "dermatologic conditions" giving rise to the finding of a violation. USDA should also permit an owner or trainer to take pictures of or film an inspection in order to raise challenges to that inspection at a later date. As explained above, the proposed Scar Rule is wholly subjective and will lead to arbitrary and irrational disqualifications. But if photographic evidence of what a horse's legs actually looked like at the time of inspection are not memorialized, an owner whose horse was wrongfully disqualified would have no meaningful way to challenge that action. The documentation establishing the record for the disqualification must be provided promptly after a disqualification to allow for review at a "meaningful time." *Mathews*, 424 U.S. at 333. And, should USDA decide to bring a complaint and seek civil or criminal penalties, it should be required to justify its actions at that time based on

the record it has established. Anything less than this constitutionally required minimum would continue to deprive owners and trainers of their right to meaningful review.

There is yet another due process problem with the current system and the Proposed Rule. It is a fundamental tenet of due process that a party must be able to identify "with ascertainable certainty" the standards by which he will be judged before he is deprived of any property interest. *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("Because '[d]ue process requires that parties receive fair notice before being deprived of property,' we have repeatedly held that '[i]n the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.'") (citation omitted). The standards for what constitutes an HPA violation under the existing regulations and in the Proposed Rule are so vague that they do not provide adequate notice, particularly the revised Scar Rule's reference to amorphous "dermatologic conditions." 88 Fed. Reg. at 56957.

In addition to the lack of proper notice of what will or will not constitute a violation, the government violates a person's rights under the Due Process Clause of the Fifth Amendment by depriving the person of a liberty or property interest through the use of a procedure that is unreliable, like the current inspection protocol and the proposed revisions to it. *See, e.g.*, *Feliciano v. City of Cleveland*, 988 F.2d 649, 647-50 (6th Cir. 1993) (explaining that a test procedure could violate the aggrieved person's right to substantive due process if the procedure were so unreliable that it was irrational or led to arbitrary or capricious results); *Higgs v. Wilson*, 616 F. Supp. 226, 231-32 (W.D. Ky. 1985) (finding that the plaintiffs had shown a likelihood of success on their claim that a urine test was sufficiently unreliable so that use of its results against them would violate their right to due process). *See also Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (finding high rate of error in state's process central to the holding that the state had denied the plaintiff of her right to due process).

For the reasons outlined in Sections I and IV, continued application of the existing inspection protocol would violate the due process rights of horse owners and trainers.[20] The USDA has repeatedly been provided data and testimony from experts like Dr. Stromberg and Dr. Bertone explaining that the current examination protocol (and particularly the Scar Rule and methods by which inspectors palpate horses to check for sensitivity) cannot and does not yield consistent results. As Dr. Stromberg explained, the protocol results in "inconsistency in passing or disqualifying a horse for competition and many false positives." App. Ex. 13 (Stromberg Decl.) Ex. A at 5. Dr. Bertone agreed, noting that he "believe[d] the examination protocol is highly subjective and unlikely to be applied consistently." App. Ex. 14 (Statement of Joseph Bertone) at 3. Indeed, the inspection protocol has never been shown by *any* study to reliably identify any indications of actual soring. Instead, the protocol produces arbitrary results that cannot be

[20] Such due process violations would occur even if an inspection were performed by a privately-employed HPI, as opposed to one employed by USDA. *See, e.g.*, *Brentwood Academy v. Tenn. Secondary School Athl. Ass'n*, 531 U.S. 288, 295 (2001) ("[T]he deed of an ostensibly private ... individual is to be treated sometimes as if [the federal government] had caused it to be performed.") (citation omitted).

reproduced. In the face of that evidence, USDA has no sound reason for continuing to use such wholly subjective examinations.

Thus, if USDA is to seriously address the due process concerns with its enforcement efforts, it must begin by rethinking its approach to inspecting horses. To that end, USDA should begin by looking at other HPA breeds, which are equally governed by the requirements of the HPA. Many of these breeds use a combination of tests involving objective measures to identify horse discomfort or sensitivity. For example, as the NAS Report highlights, the following method is used by the International Federation for Equine Sports ("FEI") to identify limb sensitivity:

> The horse's front limbs are first imaged by thermography by veterinarian 1, then palpated by veterinarian 2. Any horse that is questionable or deemed hypersensitive will be palpated again by veterinarian 1; all palpating is recorded and videoed carefully. Both veterinarians and a member of the ground jury must agree that the horse is sensitive, prior to informing the horse custodian of their findings. (The principal duty of the ground jury is the technical judging of all competitions and the determination of their final results; it is responsible for solving all the problems that could arise during its jurisdiction period). Once a determination of sensitivity has been made, the custodian can choose to withdraw the horse from the competition with no further consequences. If the custodian elects not to withdraw, the veterinary delegate is informed and reviews the video footage and possibly palpates the horse prior to making a final decision. All veterinarians and the ground jury must agree that the horse shows altered sensitivity, although they do not have to agree on precisely where the horse is sensitive; such agreement results in a disqualification and the initiation of a welfare case. The custodian of a horse that is disqualified has no recourse and can be subject to serious penalties depending on what is found as the cause for hypersensitivity.

NAS Report at 30.

By relying on objective tests, the FEI's methodology provides "ascertainable certainty" to owners of the standards by which they will be judged.

TWHNCA proposes that USDA implement an objective inspection system similar to that adopted by FEI, which uses objective measures used by other HPA breeds to detect evidence of horse sensitivity and soreness. To that end, the USDA should use an inspection system that utilizes (i) blood testing; (ii) urinalysis; (iii) thermography; (iv) x-rays/radiology; and (v) gas-chromatography-mass spectrometry. Each of these systems is used by other HPA breeds to test for and prevent soring or other HPA violations, and or to determine if a horse is lame or otherwise unfit to compete.

Blood testing. As the NAS Report observes, "[b]lood sampling to test for prohibited medications and medications conditionally permitted but given above therapeutic levels is common in equestrian competitions around the world to protect horse welfare and to ensure fairness in competition." NAS Report at 42. USEF relies on blood testing as part of its Drugs and Medications Program. *See* https://perma.cc/S48Z-ZUEB. The medications given to Tennessee

Walking Horses are no different than those given to other HPA breeds. NAS Report at 42. As a result, NAS concludes:

> Serious consideration should be given to testing blood of TWHs, using USEF's rules and guidelines as a model, to detect medications administered to alter TWH response to palpation and for overall protection of TWH welfare and ensuring fair competitions. This would include random selection of horses, which are identified by microchip, at shows or sales. Championship shows should require the testing of winning horses as well as randomly selected competing horses.

NAS Report at 43.

Urinalysis. Urinalysis can also be used to identify medications that mask pain and soring. USEF uses a combination of blood testing and urinalysis to identify whether drugs are being used improperly. *See* https://perma.cc/9G7W-4FJ2. USDA should adopt a similar approach here.

Thermography. Thermography is a non-invasive technique that measures heat emitting from a horse's body. *See* NAS Report at 36. While thermography will not identify soreness by itself, it may be used to identify inflammation in a horse that, in conjunction with other tools, may be used to identify evidence of soring. *Id.* at 37. Accordingly, NAS concludes:

> Thermographic cameras are an objective tool for recognizing alterations in blood flow to the limbs of horses, which is indicative of inflammation. Thermography can be a screening tool in the inspection process and can provide supporting evidence of soreness, which may increase the efficiency and reliability of the inspection process.

Id. at 38. Thermography has recently been used by the American Quarter Horse Association to determine if a horse's neck has abnormal characteristics or functioning. *See* https://perma.cc/VQJ2-XZH8. The International Federation for Equestrian Sports has also adopted the use of thermography to identify hypersensitivity of a horse's legs. *See* https://perma.cc/5HMW-NTEE.

NAS also recommends that "[t]hermography should be reinstituted in the inspection of TWHs." *Id.* at 43. While thermography is a valuable tool it must be used appropriately and by an experienced equine veterinarian to help distinguish between a possibility of soring or a possible lame horse. To be clear, a lame horse is not a sore horse per se.

Radiology/X-Rays. USDA already uses radiology and x-rays to supplement their existing inspection system, as NAS recognizes. *See* NAS Report at 39 ("The USDA Horse Protection regional or national coordinator requests VMOs who may attend competitions and exhibits to work with veterinary consultants to include digital radiography in the inspection process when needed."). Data from this process can show where horses have evidence damages or changes to bony tissue, *id.* at 38, and may show where horses have "evidence of excessive trimming of the sole and excessive dressing of the dorsal hoof capsule, as well as the presence of laminitis or other hoof abnormalities that would cause pain to the horse." *Id.* at 39.

Gas Chromatography-Mass Spectrometry. Gas chromatography-mass spectrometry ("GC-MS") is a tool to gather information on prohibited substances that have been applied topically on horses' limbs, either to cause or mask soring. NAS Report at 34. Many horse federations currently use GC-MS to confirm the use of drugs, including USEF and FEI. Indeed, USDA previously utilized GC-MS in a pilot program to identify prohibited substances applied to horses' limbs. *Id.*

A combination of these methods—all of which are used by other equine associations to ensure the welfare of other HPA breeds—would provide an objective way to detect soring or evidence of soring.

To ensure objectivity, TWHNCA recommends that the program be overseen by an independent inspection entity, established either under the Horse Industry Organization Structure set out in USDA's current regulations or through some other new structure, as is currently allowed in other HPA Breeds. To ensure objectivity, this entity would be independent of both USDA and the owners and management of Horse Events, though USDA would still need to certify the organization (as current HIOs are now certified by APHIS). The establishment of this organization would not only ensure objectivity in the inspection process, but it would lead to increased trust and confidence between horse owners, show owners and management, and the USDA. A more detailed proposal for this structure is attached to this comment as Exhibit 51.

CONCLUSION

Soring is an abhorrent practice that has no place in the Tennessee Walking Horse industry. The TWHNCA and USDA agree on the goal of eliminating all soring and agree that effective steps should be taken to ensure that soring is eradicated as a practice and that violators who actually engage in soring horses are punished to the full extent of the law.

For the reasons discussed in this Comment, USDA's Proposed Rule will not achieve these goals. The Proposed Rule ignores the recommendations of NAS and others to ground enforcement of the HPA in objective, empirical science. The TWHNCA believes that an enforcement regime properly grounded in objective standards can be achieved and stands ready to work with USDA to ensure that the twin goals of Congress in enacting the HPA—preventing soring while preserving and ensuring fair competition in the Industry—are achieved.

October 20, 2023

Respectfully submitted,

/s/ *Patrick F. Philbin*
Patrick F. Philbin
John V. Coghlan
Tara Helfman
Chase Harrington
ELLIS GEORGE CIPOLLONE
O'BRIEN LLP
1155 F Street, N.W.
Suite 750
Washington, DC 20004
(202) 249-6900
pphilbin@egcfirm.com
jcoghlan@egcfirm.com
thelfman@egcfirm.com
charrington@egcfirm.com

Counsel for the Tennessee Walking Horse National Celebration Association