[ORAL ARGUMENT HEARD APRIL 20, 2022]

No. 20-5291

IN THE

United States Court of Appeals for the District of Columbia Circuit

HUMANE SOCIETY OF THE UNITED STATES, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia,
No. 1:19-cv-02458-ESH

MOTION TO INTERVENE OF THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION

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GLOSSARY

APHIS	Animal and Plant Health Inspection Service
OFR	Office of the Federal Register
USDA	U.S. Department of Agriculture

INTRODUCTION

The Tennessee Walking Horse National Celebration Association (Association) respectfully moves to intervene to seek further review of the panel decision issued on July 22, 2022. That decision suddenly revived—and declared to be "final"—a proposed rule from the United States Department of Agriculture (USDA) that had been pulled back before it was ever published in the Federal Register and that the entire Tennessee Walking Horse industry had believed to be dead for over five and a half years. Even the USDA later took further action to abandon the proposed rule, declaring that it is not supported by science. *See* 86 Fed. Reg. 70,755 (Dec. 13, 2021). The Association would be directly subject to regulation under the resurrected rule because it operates the oldest and largest show for Tennessee Walking Horses—the National Celebration, which crowns the World Grand Champion. The rule, moreover, would effectively ban from competition 70% of the horses shown at the National Celebration and similar shows, thereby making it impossible for the Association to carry on a tradition that dates back to 1939.

The Association readily satisfies all requirements for intervention. The Association has Article III standing because it would be directly subject to regulation under the resurrected rule. Standing in such a case is "self-evident." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)).

In addition, the Association satisfies all requirements of Federal Rule of Civil Procedure 24(a)(2) for intervention as of right. The motion is timely because the Association sought intervention as soon as it became apparent that its interests might not be adequately represented. Following the panel decision, it is now uncertain whether the existing defendants will seek further review. The Association has acted promptly, within 14 days of the decision and well within the period for seeking rehearing. The Supreme Court recently made clear that intervention after a court of appeals has issued its decision is timely in exactly parallel circumstances. *See Cameron v. EMW Women's Surg. Ctr.*, 142 S. Ct. 1002, 1010 (2022).

The Association has an interest in the transaction at issue, and its interests would be impaired by a final decision because the entire issue in this case is whether a rule regulating the Association will spring to life or not.

Finally, the Association's interests would not be adequately represented absent intervention. It is unclear whether the government defendants will seek further review. Even if they do, government agencies cannot adequately represent the interests of the private industry entities they regulate. *See, e.g., Fund for Animals*, 322 F.3d at 736.

The panel decision is a significant ruling that will have devastating effects on the Tennessee Walking Horse industry and far-reaching implications for

administrative law more broadly. It should not go without adversarial testing by the private parties who will most directly suffer under its effects.

BACKGROUND

A. Tennessee Walking Horse National Celebration Association

The Association is a nonprofit entity that runs the Nation's oldest and most prestigious show for Tennessee Walking Horses. Established in 1939, the National Celebration is now an eleven-day event drawing more than 100,000 spectators. *See* Declaration of Warren Wells ¶ 3 (Ex. 1). The Association also operates two other shows—the Fun Show and the Celebration Fall Classic. *Id.*

Tennessee Walking Horses are known for a running-walk gait and elegant, high-stepping strut that comes from careful breeding and patient training. Unfortunately, some disreputable trainers have attempted to avoid the careful training process by using an abusive practice called "soring" to exaggerate a horse's gait, 53 Fed. Reg. 14,778, 14,778 (April 26, 1988). Congress has rightly banned horse soring in shows and exhibitions through the Horse Protection Act (Act), 15 U.S.C. § 1821 *et seq.*, and tasked the USDA with enforcing that ban through regulations, *id.* at § 1828. The Association condemns the practice of horse soring. At the same time, ill-considered regulations that have no rational connection to preventing soring would have devastating effects on its ability to present shows like the National Celebration.

B. The 2017 Proposed Rule

In 2016, under then-Secretary Tom Vilsack, the USDA issued a notice of proposed rulemaking with a draft proposing many changes to the regulations under the Act. 81 Fed. Reg. 49,112 (July 26, 2016). The Association filed 125 pages of comments on the proposed rule. Wells Decl. ¶ 6. On January 11, 2017, the head of the USDA's Animal and Plant Health Inspection Service (APHIS)—under delegated authority from the Secretary, *see* 7 C.F.R. §§ 2.22(a)(2)(vii), 2.80(a)(7)—signed a document summarizing the results of the notice-and-comment process and providing amended text for the rules under the Act. RE1-1 (Compl., Ex. A) (JA56–204) (2017 Proposed Rule).[1] He subsequently transmitted that document to the Office of the Federal Register (OFR).

Among other things, the 2017 Proposed Rule would (1) ban all action devices and pads,[2] *see id.* § 11.2 (JA181); (2) impose a host of obligations on the "management" that runs a horse show (like the Association), including enforcing the new ban on equipment, *id.* § 11.9 (JA191); (3) transfer the authority to license and set standards for horse inspectors from industry organizations to APHIS, *see id.*

[1] Because only portions of the signed document are reproduced in the appendix (JA206–12), citations are given to the electronic version.

[2] To train and show Tennessee Walking Horses, several pieces of equipment are typically used, including small weights of six ounces or less placed on the horse's legs (action devices) and pads between the hoof and shoe. *See* Wells Decl. ¶ 12. These are permitted under current regulations. *See* 9 C.F.R. §§ 11.2(b)(1), (12).

§ 11.14 (JA195); and (4) impose procedures and standards on the inspection of horses to detect soring at shows (like the National Celebration), *see id.* § 11.15 (JA200); *see also id.* at 5–6 (JA60–61) (summarizing changes).

On January 19, 2017, under a directive from the new Trump administration, the USDA withdrew the 2017 Proposed Rule from OFR before it had been published in the Federal Register. The USDA later withdrew the entire proposal to amend the rules from 2016 after concluding that it was not supported by the current scientific record. *See* 86 Fed. Reg. 70,755 (Dec. 13, 2021).

C. The Current Litigation

Plaintiffs sued the USDA, Secretary Vilsack, and other federal officials (Federal Defendants) to challenge the withdrawal of the 2017 Proposed Rule before publication. RE1 (Compl.) (JA9–54). Plaintiffs claimed that the withdrawal unlawfully bypassed notice-and-comment procedures. *Id.* ¶¶ 106–09 (JA49). The district court rejected that claim, holding that the proposed rule was not final because it had not been published in the Federal Register. RE28 (Mem. Op.) (JA350–76).

A divided panel of this Court reversed, holding that the proposed rule became final when OFR made it available for public inspection in January 2017. *See Humane Soc'y v. USDA*, No. 20-5291, 2022 WL 2898893, at *8 (D.C. Cir. July 22, 2022). Although the exact effects of the decision will be determined on remand, *see id.* at *9; *cf. id.* at *16–*17 (Rao, J., dissenting), this much is clear: (i) the panel held

that the rule was final, and (ii) by indicating that the withdrawal should be set aside, it revived a rule that the entire industry—and the USDA—believed was dead more than five years ago.

The Department of Justice has told the Association that no decision has been made yet on whether the Federal Defendants will seek further review.

ARGUMENT

The Association meets all the requirements for intervention as of right. Although "[n]o statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed," *Cameron v. EMW Women's Surg. Ctr.*, 142 S. Ct. 1002, 1010 (2022), this Court has required an intervenor to demonstrate Article III standing, *see Fund for Animals*, 322 F.3d at 732, and to satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2)—namely: "(1) the motion for intervention must be timely; (2) intervenors must have an interest in the subject of the action; (3) their interest must be impaired or impeded as a practical matter absent intervention; and (4) the would-be intervenor's interest must not be adequately represented by any other party." *In re Brewer*, 863 F.3d 861, 872 (D.C. Cir. 2017). The Association readily satisfies all of these requirements.

A. The Association Has Article III Standing.

The Association has Article III standing because, if the USDA's withdrawal of the 2017 Proposed Rule is set aside and the rule comes back to life, the

Association would be subject to new regulations under it. Indeed, because the Association itself would be an object of the regulations, its standing is "self-evident." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). As set out below, the Association satisfies all three requirements for standing: "(1) injury-in-fact, (2) causation [or traceability], and (3) redressability." *Id.* at 898. As a result, it could pursue further review as an intervenor even if the Federal Defendants do not.

1. The Association Would Suffer Injury-in-Fact If the Withdrawal of the 2017 Proposed Rule Is Set Aside.

If the 2017 Proposed Rule is revived as a result of this litigation, the Association would suffer injury-in-fact that is "concrete and particularized" and "actual or imminent," *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016) (citation omitted), because it would become subject to regulations under the rule. The Association stages the largest Tennessee Walking Horse show in the country—the National Celebration. It thus would be subject to a host of obligations that the rule imposes on the "management" of a horse show.[3] Among other things, management would be required: (i) to retain a Horse Protection Inspector trained and licensed by APHIS or become responsible itself for "identifying all horses that are sore or otherwise in violation of the Act or regulations," 2017 Proposed Rule

[3] The rule defines "management" as "any person who organizes, exercises control over, or administers . . . any horse show" or "exhibition . . . and specifically includes . . . the sponsoring organization." 2017 Proposed Rule § 11.1 (JA176).

§ 11.9(a) (JA189);[4] (ii) to enforce other aspects of the rule related to prohibited equipment, *id.* § 11.9(c) (JA191); and (iii) to comply with detailed requirements on records, permitting inspection of records, and reporting to APHIS, *id.* §§11.10–11.12 (JA192–95).

In particular, the rule requiring the Association to enforce prohibitions on a list of equipment (and the prohibition on that equipment, *see* § 11.2 (JA178–81)) would have devastating effects on the Association. Approximately 70% of the horses exhibited in a show like the National Celebration are shown using equipment such as action devices and pads. *See* Wells Decl. ¶ 14. Prohibiting these items would make it impossible to show these horses and thus eliminate roughly 70% of the entrants in a show. *Id.* ¶ 15. The prohibitions would be devastating for the Association and for the entire Tennessee Walking Horse industry. They would effectively make it impossible to stage a show like the National Celebration. *Id.*

The Association would also suffer injury from the new inspection regime. The new rule would eliminate the ability of private Horse Industry Organizations to retain and license inspectors to inspect horses for signs of soring. The Association

[4] The 2017 Proposed Rule and the Act effectively force management to hire Horse Protection Inspectors because, if management conducts inspections itself and fails to detect and remove a horse that is sore, it can be subject to severe penalties. *See* 15 U.S.C. §§ 1824(3), 1825. Hiring an APHIS-licensed Horse Protection Inspector limits liability as long as management disqualifies all horses found to be sore by that inspector.

has a wholly owned subsidiary (SHOW, Inc.) that is a Horse Industry Organization, and under the current rules the Association can work through SHOW to retain and license the inspectors at the Association's shows. *See* Wells Decl. ¶ 16. That system has allowed for a rational and efficient inspection regime. Under the 2017 Proposed Rule, however, that system would be eliminated. Instead, the rule creates a new type of inspector—a Horse Protection Inspector—who must be trained and licensed by APHIS. *See* 2017 Proposed Rule § 11.14 (JA195); *id.* at 5 (JA60) (the rule "remov[es]" all responsibilities for Horse Industry Organizations). This new system would render useless the investment of time and money that the Association poured into SHOW and the training and licensing of its sizeable body of inspectors. *See* Wells Decl. ¶¶ 16–17. And it also virtually guarantees a more expensive inspection regime, because Horse Protection Inspectors (unlike inspectors under the old regime) must typically be licensed veterinarians. *Id.* ¶ 18; *see also* 2017 Proposed Rule § 11.14(a) (JA196).

The standards for inspections in the 2017 Proposed Rule also would injure the Association. *See id.* § 11.15 (JA200–04). When horses are unexpectedly disqualified by an inspection immediately before competing, it disrupts the progress of a show. And excessive disqualifications can significantly affect the quality of the show. Neither exhibitors nor spectators would attend a show where half the horses are suddenly and unpredictably disqualified. The Association believes that the

standards under the 2017 Proposed Rule are both unsupported by scientific evidence[5] and overly subjective. As a result, they will lead to excessive and unpredictable disqualifications, thereby disrupting the Association's ability to effectively operate horse shows. *See* Wells Decl. ¶ 14.

All of these regulations directly burden the Association. That makes clear that the Association is the quintessential type of entity that has standing on review of an agency action. Where an entity is itself "an object of the [agency] action (or forgone action) at issue," "there is ordinarily little question that the action or inaction has caused him injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). That is why this Court has repeatedly explained that standing for the entities subject to an agency's action is "self-evident." *Sierra Club*, 292 F.3d at 900; *see also Fund for Animals*, 322 F.3d at 733.

2. Setting Aside the Withdrawal of the 2017 Proposed Rule Would Cause the Association's Injuries.

The causation requirement is plainly satisfied because the injuries described above would all be caused by setting aside the withdrawal of the 2017 Proposed Rule

[5] Indeed, in 2021 the USDA itself acknowledged that the amendments proposed in 2016—which developed into the 2017 Proposed Rule—"d[o] not sufficiently address" findings and "science-based recommendations" released in a 2021 report from the National Academy of Sciences concerning the methods used for identifying horse soring and that the "underlying data and analyses" on which the 2017 Proposed Rule was based should be updated. 86 Fed. Reg. 70,755, 70,755 (withdrawing proposed rule).

and bringing the rule back to life. The Association's injuries need only be "fairly traceable to the challenged action." *Lujan*, 504 U.S. at 560 (alterations omitted). Or, more precisely, where (as here) the Association is *defending* an agency action, the Association must show that the "injury would be fairly traceable to the setting aside of the agency action." *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 280 (D.D.C. 2018). That test is satisfied. Setting aside the withdrawal of the proposed rule would resurrect a rule that regulates the Association, producing the injuries described above. As this Court has explained, "[w]hen a [party] itself is the object of the challenged agency action, there usually is little doubt of causation." *Exhaustless Inc. v. FAA*, 931 F.3d 1209, 1212 (D.C. Cir. 2019). Causation is plainly satisfied.

3. A Ruling Upholding the Withdrawal of the 2017 Proposed Rule Would Redress the Association's Injuries.

The redressability element is also readily satisfied. Redressability focuses on the "connection between the alleged injury and the judicial relief requested." *West v. Lynch*, 845 F.3d 1228, 1236 (D.C. Cir. 2017). Here, the Association seeks a ruling that the USDA's withdrawal of the 2017 Proposed Rule was effective. By ensuring that the rule is not suddenly revived, that relief would eliminate the injuries that would otherwise arise from the rule springing back to life. Thus, in this case traceability and redressability "overlap as two sides of a causation coin." *Exhaustless Inc.*, 931 F.3d at 1212 (quotation marks and citation omitted). An order

reviving the rule would cause the Association's injuries, and an order upholding the withdrawal of the rule would prevent them.

4. The Association Could Seek Further Review Even If the Federal Defendants Do Not.

Because the Association has Article III standing, if it is granted intervention it could seek further review of the panel decision even if the Federal Defendants do not. The Association is injured by the panel decision (which revives the rule), and that injury is sufficient to ensure that an Article III case or controversy exists even if the Federal Defendants do not seek further review. In similar situations, intervenors have frequently been permitted to defend an agency action on appeal against an adverse judgment even where the agency itself does not appeal. *See, e.g.*, *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 963–66 (9th Cir. 2015) (*en banc*); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011) ("[I]t is well established that the government is not the only party who has standing to defend the validity of regulations."); *Mausolf v. Babbitt*, 125 F.3d 661, 666–67 (8th Cir. 1997); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456 n.2 (D.C. Cir. 1991).

B. The Association's Motion To Intervene Is Timely.

This motion is timely because the Association sought intervention as soon as it became apparent that its interests might not be adequately represented in the case.[6]

[6] The time limit in Federal Rule of Appellate Procedure 15(d) does not apply because this case is not before the Court on a petition for review from an agency order but

As explained below, in the wake of the panel's decision there is now uncertainty as to whether the Federal Defendants will seek further review. The Association has acted promptly by filing this motion within 14 days of the panel decision—and long before the deadline for seeking rehearing or rehearing *en banc*. That fully satisfies the timeliness requirement.

Indeed, the Supreme Court recently held that intervention was timely on exactly parallel facts. *See Cameron v. EMW Women's Surg. Ctr.*, 142 S. Ct. 1002 (2022). *Cameron* made clear that a motion to intervene *after* the court of appeals issues a panel decision is timely where the need to intervene becomes apparent only when the existing parties decline to pursue further review of the panel decision. *See id.* at 1012–13. In *Cameron*, after years of litigation, a Sixth Circuit panel struck down a Kentucky statute. *Id.* at 1008. The agency head who had been defending the statute then announced that he would not seek further review. *Id.* In response, the Kentucky Attorney General promptly sought to intervene to defend the statute through rehearing and potentially a petition for certiorari. *Id.* After the Sixth Circuit denied intervention, the Supreme Court reversed and made clear that intervention in those circumstances was timely.

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rather on appeal from a district court judgment. *See* Fed. R. App. P. 15(d) (providing time limit for "a proceeding under this rule").

As the Supreme Court explained, "the most important circumstance relating to timeliness is that the [intervenor] sought to intervene as soon as it became clear that [its] interests would no longer be protected by the parties in the case." *Cameron*, 142 S. Ct. at 1012 (quotation marks omitted); *accord Brewer*, 863 F.3d at 872 ("A nonparty must timely move for intervention once it becomes clear that failure to intervene would jeopardize her interest in the action."); *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (holding that the proper "gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties"). In *Cameron*, the "need to seek intervention" did not arise until after the Sixth Circuit had issued its decision and the existing party announced that he would not pursue further review. *Cameron*, 142 S. Ct. at 1012. The Court emphasized that "the timeliness of [the] motion [to intervene] should be assessed in relation to that point in time." *Id.*

This case is on all fours with *Cameron*, and this motion is timely under the *Cameron* analysis. Before the panel issued its decision, the Association had no need to take part in this case because the Federal Defendants were defending the pre-publication withdrawal of the 2017 Proposed Rule. Now, however, it is uncertain whether the Federal Defendants will continue defending that withdrawal by seeking further review. The Association acted promptly as soon as any uncertainty arose that created the "need to seek intervention." *Cameron*, 142 S. Ct. at 1012. It filed

this motion within 14 days of the panel decision and well within the time for filing a petition for rehearing or rehearing *en banc*.[7] *Cf. id.* (noting that intervenor moved within time for seeking rehearing).

The timeliness of this motion is further confirmed by the analysis applied when an intervenor learns only after entry of judgment in the district court that its interests will not be adequately represented by the parties and moves to intervene to pursue an appeal. *See, e.g.*, *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly *after the entry of final judgment*." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977) (emphasis added). Indeed, *Cameron* invoked exactly that principle to address the analogous situation of post-panel-decision intervention in the court of appeals. *See Cameron*, 142 S. Ct. at 1012. As explained above, the Association acted quickly after the panel decision, as soon as there was any uncertainty about the existing parties pursuing further review and well within the time for seeking review.[8]

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[7] The Court has extended the deadline for any petition for rehearing to October 6, 2022. *See* Order of July 29, 2022. Under Rule 27, this motion will be under submission by August 22, 2022, at the latest. That allows ample time for the Court to act on this motion and for the Association to file a petition for rehearing or rehearing *en banc*, or for the Association to tender a petition if this motion is still pending. *See Cameron*, 142 S. Ct. at 1008.

[8] This Court's statement nearly forty years ago in *Amalgamated Transit Union International v. Donovan*, 771 F.2d 1551, 1552–53 (D.C. Cir. 1985) (per curiam), that a motion to intervene for the first time on appeal (and after a panel decision) is

Finally, the timeliness requirement is "aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014); *see also Natural Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977). Here, intervention would not prejudice any party. It would not require repeating any steps in the litigation or disrupting its progress at all. *Cf. Roane*, 741 F.3d at 152 (noting that intervenor would not disrupt litigation by reopening discovery). Instead, it would simply mean that the Association would be able to carry the case forward by petitioning for the next stage of judicial review. And merely requiring the existing parties to defend the panel decision against any further review sought by the Association is not cognizable as a form of "prejudice." *See, e.g.*, *Cameron*, 142 S. Ct. at 1013. To the contrary, that merely allows the adversarial system to play out

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"belated" and comes at such a "late stage" that it will be granted "only in an exceptional case for imperative reasons" is contrary to the analysis in *Cameron*. Under *Cameron*, timeliness turns on prompt action once "the need to seek intervention" arises, not on the stage of the litigation. *Cameron*, 142 S. Ct. at 1012. Indeed, the Sixth Circuit in *Cameron* quoted and relied on *Donovan* for its timeliness analysis, *see EMW Surg. Ctr. v. Friedlander*, 831 F. App'x 748, 750 (6th Cir. 2020), and the Supreme Court expressly held that the Sixth Circuit's "assessment of timeliness was mistaken." *Cameron*, 142 S. Ct. at 1012; *see also Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014) (mere fact that a party "*could* have intervened earlier" does not mean that "he *should* have intervened earlier") (emphases in original). In any event, the prospect that the Federal Defendants may suddenly drop their defense of the agency action they have defended for over three years presents an exceptional circumstance warranting intervention.

as intended. *See, e.g.*, *McDonald*, 432 U.S. at 394 (party cannot complain that an intervenor, rather than another existing party, would pursue an appeal).

As the Fifth Circuit has put it, "[f]ederal courts should allow intervention where no one would be hurt and greater justice could be attained." *Espy*, 18 F.3d at 1205 (quotation marks and citation omitted). That principle applies here. No one would be prejudiced by intervention. And the panel decision is a significant ruling that should be subject to further adversarial testing. Not only will the decision have a devastating impact on the Tennessee Walking Horse industry, but it also has far-reaching implications for administrative law. The decision should not go without any further review merely because none of the existing parties is willing to proceed.

C. The Association Has an Interest in the Property or Transaction At Issue.

The Association obviously has an interest in the property or transaction at issue. Indeed, the fact that a party has "constitutional standing is alone sufficient to establish that [it] has 'an interest relating to the property or transaction which is the subject of the action.'" *Fund for Animals*, 322 F.3d at 735 (quoting Fed. R. Civ. P. 24(a)(2)). Here, the Association's interest is clear because the transaction at issue is the withdrawal of the 2017 Proposed Rule. If that withdrawal is held ineffective and the rule is revived, the Association would be regulated under the rule.

D. Disposition of This Action May Impair the Association's Ability to Protect Its Interests.

There can also be no question that the disposition of this case may, as a practical matter, impair the Association's ability to protect its interests. If the panel decision stands, it will impair the Association's interests not only as a practical matter, but also as a direct legal matter by reviving a proposed rule regulating the Association.

It is no answer to suggest that the Association may seek judicial review of the 2017 Proposed Rule when and if it is published in the Federal Register. This Court has repeatedly recognized that "[j]udicial review of regulations after promulgation may, 'as a practical matter,' afford much less protection than the opportunity to participate" earlier in the process. *Costle*, 561 F.2d at 909. The mere ability to sue later under the Administrative Procedures Act is not comparable to the ability the Association would have to protect its interests in *this* case—which could ensure that the 2017 Proposed Rule is not revived at all. *See Fund for Animals*, 322 F.3d at 735 ("It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.") (quotation marks and citation omitted).

E. The Association's Interests Will Not Be Adequately Represented Absent Intervention.

The Association also readily satisfies the final requirement that its interests will not be adequately represented by the existing parties. This requirement is "not onerous." *Fund For Animals*, 322 F.3d at 735. Indeed, "this 'requirement is . . . satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.'" *Id.* (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Thus, an intervenor "need not prove that representation *is* inadequate but need show merely that it *may* be." *Brewer*, 863 F.3d at 873 (alteration, quotation marks, and citation omitted) (emphases in original).

Here, the Federal Defendants clearly may not adequately represent the Association's interests because they may choose not to pursue further review. The Department of Justice has told the Association that no decisions about further review have been made yet. The uncertainty is only increased by the history of the 2017 Proposed Rule. The current Secretary of Agriculture (Secretary Vilsack) was also the Secretary when the 2017 Proposed Rule was signed under his authority on January 11, 2017. Although the Federal Defendants have defended the withdrawal of the rule up to this point, Secretary Vilsack and the current Administration may now decide to endorse the rule that the Secretary previously endorsed and abandon

further efforts at judicial review. That uncertainty alone justifies finding that the Association's interests *may not* be adequately represented by the current parties.

The Association certainly cannot wait until the time for filing a petition for rehearing has expired to find out how the Federal Defendants will proceed. It must act promptly to protect its rights.

In addition, even if the Federal Defendants pursue further review, they cannot adequately represent the Association's particular interests so as to preclude intervention. The panel decision has suddenly breathed potential life into a rule that has been in the grave for five and a half years. As explained above, that rule would injure the Association in many ways. The Association believes that, under this rule, it would face the extinction of the sport it showcases at the National Celebration. The Association is thus in a unique position to inform this Court or the Supreme Court about the effects that reviving the rule would have on those subject to regulation and has a particular interest in defending the withdrawal of this specific proposed rule.

By contrast, the Federal Defendants do not and cannot represent the same interest. As this Court has frequently observed, government entities are obligated to represent "the public interest of [their] citizens." *Dimond v. D.C.*, 792 F.2d 179, 193 (D.C. Cir. 1986); *accord Fund for Animals*, 322 F.3d at 736 (federal agency must "represent the interests of the American people"). Precisely because the public

interest cannot align completely with the private interests of a particular group, this Court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals*, 322 F.3d at 736; *accord Dimond*, 792 F.2d at 192 (noting "the relatively large class of cases in this circuit recognizing the inadequacy of governmental representation of the interests of private parties"). Indeed, the Association is a member of an industry group that has previously been permitted to intervene as of right to defend aspects of the rules under the Horse Protection Act precisely on the ground that the USDA cannot represent the interests of industry members. *See Am. Horse Protection Ass'n v. Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). Thus, wholly apart from whether the Federal Defendants seek further review, the Association's interests will not be adequately represented by the Federal Defendants. The Association satisfies the requirements for intervention.

CONCLUSION

For the foregoing reasons, the motion to intervene should be granted.

Date: August 5, 2022

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5197 words. This motion also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)–(2) and 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

/s/
Patrick F. Philbin

CERTIFICATE OF SERVICE

I hereby certify, in accordance with Federal Rule of Appellate Procedure Rule 25(c) and Circuit Rule 25(c), that on August 5, 2022, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: August 5, 2022

/s/
Patrick F. Philbin

ADDENDUM

CORPORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Tennessee Walking Horse National Celebration Association certifies that it does not have a parent corporation, and no publicly held corporation has a 10% or greater ownership interest in the Association.

Date: August 5, 2022

Respectfully submitted,

/s/

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CERTIFICATE AS TO PARTIES

In accordance with Circuit Rules 27(a)(4) and 28(a)(1), undersigned counsel certifies that, except for the proposed Intervenor the Tennessee Walking Horse National Celebration Association, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

Date: August 5, 2022

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUMANE SOCIETY OF THE UNITED STATES, et al., Plaintiffs-Appellants v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al. Defendants-Appellees.	Case No. 20-5291

DECLARATION OF WARREN WELLS

I, **Warren Wells**, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am the Chief Executive Officer of the Tennessee Walking Horse National Celebration Association (the "Association").

2. I make this declaration in support of the Association's Motion to Intervene in this case.

3. The Association is a nonprofit corporation established in 1939 in Shelbyville, Tennessee. The Association is best known for staging the annual Tennessee Walking Horse National Celebration, America's largest event featuring the Tennessee Walking Horse breed. The Tennessee Walking Horse National Celebration takes place over 11 days and attracts over 100,000 spectators. The

Association also operates two other horse shows—the Fun Show and the Celebration Fall Classic.

4. The Association's horse shows are held at the historic Tennessee Walking Horse Celebration Grounds in Shelbyville, Tennessee, a 100-plus-acre equestrian complex including a 30,000 seat outdoor stadium, a 4500 seat indoor arena, permanent stalls for over 1000 horses, and recreational vehicle campgrounds.

5. The Association condemns the practice of "soring" horses and supports efforts to establish reasonable regulations under the Horse Protection Act (the "Act"), 15 U.S.C. § 1821 *et seq.*, to prevent that practice. At the same time, regulations that are arbitrary and not properly based on objective standards supported by scientific evidence can have a devastating effect on the Tennessee Walking Horse industry.

6. In 2016, the United States Department of Agriculture (USDA) issued a notice of proposed rulemaking and a draft proposed rule that would make many changes to the regulations under the Act. 81 Fed. Reg. 49,112 (July 26, 2016). The Association filed 125 pages of comments outlining defects in the proposed rule. *See* Tennessee Walking Horse Nat'l Celebration Ass'n, Comment Letter on Proposed Rule to Amend Horse Protection Regs. (October 25, 2016), https://www.regulations.gov/comment/APHIS-2011-0009-11184.

7. On January 11, 2017, the head of the Animal and Plant Health Inspection Service (APHIS) signed a document with text that would amend the rules under the Horse Protection Act (the "2017 Proposed Rule"). (JA56–204).

8. If the 2017 Proposed Rule were to go into effect, it would directly regulate the Association and the way the Association runs its horse shows in numerous ways.

9. Because the Association owns and operates the Tennessee Walking Horse National Celebration and other horse shows, it qualifies (and has been treated by the USDA) as "management" under current rules. *See* 9 C.F.R. § 11.1. The 2017 Proposed Rule uses a materially identical definition that defines "management" as "any person who organizes, exercises control over, or administers . . . any horse show [or] exhibition . . . and specifically includes . . . the sponsoring organization." 2017 Proposed Rule § 11.1.

10. The 2017 Proposed Rule would impose a number of obligations on management. Among other things, management would be required: (i) to retain a Horse Protection Inspector approved by APHIS or else become responsible itself for "identifying all horses that are sore or otherwise in violation of the Act or regulations" (§ 11.9(a)); (ii) to enforce a ban on certain equipment announced elsewhere in the new rule (§ 11.9(c)(1)); and (iii) to comply with detailed

requirements on records, inspection of records, and reporting to APHIS (§§ 11.10–11.12).

11. The ban on certain equipment and the requirement that the Association must enforce that ban would have a particularly devastating effect on the Association.

12. Several pieces of equipment are typically used in training and showing Tennessee Walking Horses. That equipment includes, in particular, "action devices" (small weights weighing six ounces or less that are placed on the horse's legs) and pads, which are leather or similar material placed between the horse's hoof and shoes. These are permitted under current regulations. *See* 9 C.F.R. §§ 11.2(b)(1), (8).

13. The 2017 Proposed Rule, however, would ban action devices and pads. *See* 2017 Proposed Rule § 11.2. As noted above, moreover, the rule would make management of horse shows (like the Association) responsible for enforcing that ban at its shows. *See id.* § 11.9(c)(1).

14. Those rules would have a devasting effect on the Association and its ability to stage shows. At a show like the Tennessee Walking Horse National Celebration, approximately 70% of the horses are historically shown using action devices and pads.

15. By banning action devices and pads (and requiring the Association to enforce the ban), the 2017 Proposed Rule would eliminate approximately 70 percent of the horses shown at the Tennessee Walking Horse National Celebration, which, as a practical matter, would make it impossible for the Association to stage the show.

16. The 2017 Proposed Rule also establishes a new regime for inspections to detect soring in horses that would directly impact the Association and the operation of its shows. Under current regulations, private Horse Industry Organizations are authorized to license inspectors known as Designated Qualified Persons. *See* 9 C.F.R. § 11.7. The Association has a wholly owned subsidiary known as SHOW, Inc.[1] that the USDA has certified as a Horse Industry Organization. SHOW licenses Designated Qualified Persons to inspect horses at the Association's events. As of July 1, 2022, SHOW licensed 13 Designated Qualified Persons to inspect horses for potential soring at the 84th Annual Tennessee Walking Horse National Celebration. In addition to establishing standards for Designated Qualified Persons, SHOW has published a rulebook setting out the standards that horse shows and sales must meet in order to affiliate with SHOW. The Association believes that the current system allowing Horse Industry Organizations like SHOW

[1] SHOW stands for **S**ound Horses, **H**onest Judging, **O**bjective Inspections, and **W**inning Fairly.

to qualify Designated Qualified Persons has produced a workable and effective inspection regime.

17. The 2017 Proposed Rule, however, would wipe out that regime entirely. Instead, it would create new Horse Protection Inspectors who must be licensed by APHIS under new detailed requirements for training and qualifications. *See* 2017 Proposed Rule § 11.14. That change in itself would eliminate a system that the Association has invested time and money to implement through the creation of SHOW, Inc. and that provides an efficient, effective, and reasonable inspection process.

18. The Horse Protection Inspector regime will also almost certainly be more expensive for the Association. The Association is required to "retain" the inspectors. And Horse Protection Inspectors under the 2017 Proposed Rule will likely charge more because, absent special circumstances, they are required to be licensed veterinarians. *See* 2017 Proposed Rule § 11.14.

19. In addition, the 2017 Proposed Rule uses standards for inspections that are overly subjective and that the Association believes will lead to arbitrary and unpredictable disqualifications of horses.

20. Imposing a "look and feel" inspection protocol to detect whether a horse is in pain is too subjective. Because it is susceptible to human error and bias, it is likely to produce excessive and unpredictable disqualifications.

21. Excessive and unpredictable disqualifications, in turn, impinge on the Association's ability to present horse shows. Horse inspections are conducted at the event and immediately before showing. Unpredictable and unexpected disqualifications thus disrupt the event and excessive disqualifications can affect the quality of an event by taking too many competitors out of the field.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 4, 2022

Warren Wells
Chief Executive Officer, The Tennessee Walking Horse National Celebration Association