PANEL DECISION ENTERED MARCH 28, 2014,
ABROGATED IN PART, EN BANC DECISION ENTERED JULY 29, 2014

No. 13-5281

IN THE

United States Court of Appeals
for the District of Columbia Circuit

AMERICAN MEAT INSTITUTE, ET AL.,

Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Appellees,

UNITED STATES CATTLEMEN'S ASSOCIATION, ET AL.,

Intervenors.

On Appeal from the United States District Court for the District of Columbia, Hon. Ketanji B. Jackson

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PETITION FOR PANEL REHEARING AND REHEARING EN BANC AND FOR MISCELLAENOUS RELIEF

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September 12, 2014

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1(a)(1), the undersigned counsel for Appellants in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

(A) Parties and Amici.

Plaintiffs in the court below and Appellants in this Court are the American Meat Institute, American Association of Meat Processors, Canadian Cattlemen's Association, Canadian Pork Council, Confederación Nacional de Organizaciónes Ganaderas, National Cattlemen's Beef Association, National Pork Producers Council, North American Meat Association, and Southwest Meat Association.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the undersigned counsel further submits that:

- American Meat Institute (AMI) is a trade association representing packers, processors, and suppliers that process 95 percent of the red meat in the United States. AMI has no parent company and no publicly owned corporation owns 10% or more of its stock.

- American Association of Meat Processors (AAMP) is a trade association representing small and mid-sized meat, poultry, and seafood processors located in the United States, Canada, and other countries. AAMP has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Canadian Cattlemen's Association (CCA) is a federation of eight provincial beef industry associations representing Canadian beef producers. CCA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Canadian Pork Council (CPC) is a federation of nine provincial pork industry associations representing Canadian hog producers. CPC has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Confederación Nacional de Organizaciones Ganaderas (CNOG) is a confederation of 46 regional cattle unions representing Mexican beef producers. CNOG has no parent company and no publicly owned corporation owns 10% or more of its stock. (CNOG does not take part in this Petition.)

- National Cattlemen's Beef Association (NCBA) is a trade association representing cattle producers and feedyards in the United States. NCBA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- National Pork Producers Council (NPPC) is a trade association representing pork producers in the United States. NPPC has no parent company and no publicly owned corporation owns 10% or more of its stock.

- North American Meat Association (NAMA) is a trade association representing small, medium, and large-sized meat-industry companies in the

United States, Canada, and Mexico. NAMA has no parent company and no publicly owned corporation owns 10% or more of its stock.

- Southwest Meat Association (SMA) is a trade association primarily representing small and medium-sized meat packers, processors, suppliers and producers in the Southwestern United States. SMA has no parent company and no publicly owned corporation owns 10% or more of its stock.

Defendants in the court below and Appellees in this Court are the United States Department of Agriculture, Agricultural Marketing Service, Tom Vilsack in his official capacity as Secretary of the United States Department of Agriculture, and Anne L. Alonzo in her official capacity as Administrator of the Agricultural Marketing Service.

Intervenor-Defendants in the court below and Appellees in this Court are the United States Cattlemen's Association, National Farmers Union, American Sheep Industry Association, and Consumer Federation of America.

Amici in Support of Plaintiffs in this Court were the National Association of Manufacturers, the United States Chamber of Commerce, Business Roundtable, and Grocery Manufacturers Association.

Amici in Support of Defendants in the court below and/or this Court are Food and Water Watch; the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America; the South Dakota Stockgrowers Association, the

Western Organization of Resource Councils; the Humane Society of the United State; Organization for Competitive Markets; United Farm Workers of America; American Grassfed Association; Fulton Farms; Fox Hollow Farm; Marshy Meadows Farm; the Center for Food Safety; the Animal Legal Defense Fund; Tobacco Control Legal Consortium; Campaign for Tobacco-Free Kids; Advocates for Environmental Human Rights, American Cancer Society; Cancer Action Network; American Lung Association; American Public Health Association; Americans for Nonsmokers' Rights; Center for Health, Environment & Justice; the Center for Science in the Public Interest; Essential Information; National Association of Consumer Advocates; National Association of County and City Health Officials; National Association of Local Boards of Health; Public Good Law Center; and Public Health Law Center.

Amici Neutral as to the Parties and the Disposition in this Court were the Government of Canada and the United Mexican States.

(B) Rulings Under Review. Appellants seek review of the District Court's Order of September 11, 2013 (Docket 49), denying Plaintiffs' Motion for a Preliminary Injunction, which was accompanied by a Memorandum Opinion (Docket 48) issued the same day. The Order is reproduced in the Joint Appendix (JA) at JA1219, and the Memorandum Opinion is reproduced at JA1139-JA1218. The ruling under review pertains to the Final Rule *Mandatory Country of Origin*

Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31,367 (May 24, 2013), which is reproduced at JA508-JA527.

(C) Related Cases. Other than the prior panel and en banc proceedings, the case on review has not been previously before this Court or any other court. To the best of counsel's knowledge, no other related cases currently are pending in this Court or in any other federal court of appeals, nor in any other court in the District of Columbia.

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GLOSSARY

AMI: American Meat Institute (or Appellants, collectively)

AMS: Agricultural Marketing Service

COOL: Country of Origin Labeling

FSIS: Food Safety and Inspection Service

USDA: U.S. Department of Agriculture

WTO: World Trade Organization

INTRODUCTION AND RULE 35 STATEMENT

Petitioners American Meat Institute, *et al.*, (collectively, "AMI") seek rehearing of a panel decision that has the effect of vastly expanding the jurisdiction of a federal agency beyond the authority Congress delegated, in direct conflict with Circuit and Supreme Court precedent.

Congress passed the Agricultural Marketing Act of 1946 to establish research and marketing programs "making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner." 7 U.S.C. § 1621. In 2002 and 2008, Congress established a mandatory "country of origin" labeling scheme and delegated the Agricultural Marketing Service (AMS) authority to enforce it, primarily through recordkeeping audits. *Id.* § 1638a(d). But when this scheme was found to violate U.S. treaty obligations as to meat products, AMS asserted new regulatory powers. Those powers were announced in a mandate requiring—for the first time in history—that every head of U.S. livestock be segregated at all times according to the country where each was born or raised. And thus it was that AMS, a "marketing" agency, assumed authority to regulate the day-to-day operations of the U.S. meat industry.

The Panel gave its blessing to this regulatory power-grab. It concluded that AMS had plenary authority to regulate production practices because Congress had not expressly *prohibited* it from doing so. But that is just the opposite of this

Circuit's standard. *See, e.g.*, *Natural Res. Defense Council* v. *EPA*, 749 F.3d 1055 (D.C. Cir. 2014). Further, in the months since the Panel issued its decision, the Supreme Court has clarified what qualifies an agency regulation as "reasonable," rather than merely permissible. *See Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427 (2014). That analysis begs to be applied here, where AMS has "claim[ed] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* at 2444.

AMI respectfully seeks panel and en banc rehearing to ensure this Circuit's compliance with prior precedents and Supreme Court instruction. Faithful application of those authorities to AMS's rule is of exceptional importance to the livestock and meat industries, to U.S. farmers in other agricultural sectors facing the risk of $2 billion in retaliatory tariffs, and for the U.S. consumer, who gains nothing from this regulatory morass, and will in fact bear added costs because of it. In addition, AMI requests amendments or clarifications of the Court's opinions to ensure AMI can fully and fairly litigate this case, wherever it might lead.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a decision by AMS to require businesses at every stage of the meat industry to segregate U.S. livestock according to the country where the animal was born or raised.

The statute at the center of this dispute is the Agricultural Marketing Act. Through its provisions, Congress delegated to the U.S. Department of Agriculture (USDA), and later to AMS, the authority to run certain research and marketing programs to promote U.S. agricultural products. At the time of enactment, the Marketing Act did not contain a country-of-origin labeling (or "COOL") provision for meat products, which were subject to the country-of-origin marking requirements of the Tariff Act of 1930, 19 U.S.C. § 340; 19 C.F.R. § 134. As such, origin designations were, and still are, required on all imported meat products through to the ultimate purchaser (e.g., canned ham from Denmark must be labeled "Product of Denmark" and a lamb chop from New Zealand labeled "Product of New Zealand").

With respect to meat products, Congress also provided authority for labeling under the Federal Meat Inspection Act and Poultry Products Inspection Act—not the Marketing Act. *See* 21 U.S.C. §§ 607, 457. Those statutes were administered, accordingly, by the Food Safety and Inspection Service (FSIS)—not the Agricultural Marketing Service—with FSIS treating any meat product produced at an FSIS-inspected U.S. facility to be a product of the United States.

Mandatory "COOL." This changed in 2002 when Congress amended the Marketing Act to require retailers to provide COOL for certain "covered commodities," including meat. JA153. Unlike the Tariff Act, however, the 2002

COOL statute required *U.S. products* to bear origin-marking as well. JA153. It was a marketing statute, which is why it was placed within the Marketing Act.

In 2008, Congress amended the statute again, this time because AMS had "mercilessly botched the rulemaking" under the 2002 statute. JA62-63. The AMS proposal that "botched" the rulemaking? A requirement that retailers identify the country for each "point of processing" of a covered meat product—i.e., an implicit requirement that the U.S. animals be segregated throughout the supply chain according to where the animal had been born and raised. JA198.

To preclude that rule from becoming law, Congress amended the statute to say otherwise:

> A retailer of a covered [meat] * * * derived from an animal that is— (I) not exclusively born, raised, and slaughtered in the United States, (II) born, raised, or slaughtered in the United States, and (III) not imported into the United States for immediate slaughter, may designate the country of origin * * * as all of the countries in which the animal *may have been* born, raised, or slaughtered. 7 U.S.C. § 1638a(2)(B) (emphasis added).[1]

AMS thereafter issued regulations requiring the retailer to use "Product of" designations, such that a retailer could use the same "Product of Canada, U.S." label on a pork chop taken from a U.S hog that had been born in Canada *or* that

[1] If the animal was imported for "immediate" slaughter (i.e., within three weeks), the statute mandated that "the retailer * * * shall designate the origin as the country from which the animal was imported and the United States." *Id.* § 1638a(a)(2)(C).

had been slaughtered on a day when the plant had processed hogs of either U.S. or Canadian birth.[2] JA222. Because of that flexibility in the labeling, processors were "willing to live with" AMS's rule. JA1089.

But Canada and Mexico could not. They brought complaints before the World Trade Organization, and those complaints succeeded. JA253. The WTO determined that the COOL scheme was flawed, down to the statute itself. JA423-JA425. Specifically, the WTO found that COOL's statutory requirements imposed discriminatory burdens on Canadian and Mexican producers. JA425.

AMS Reacts. The WTO gave the U.S. six months to come into compliance with its treaty obligations. JA1060, JA1063.[3] In March 2013, with just two months to go before the deadline, AMS issued a proposed rule amending its COOL regulations to require point-of-processing labeling: "Born, Raised, and Slaughtered in the U.S.," "Born in Mexico, Raised, and Slaughtered in the U.S.," or in the case of an animal imported for immediate slaughter, "Born and Raised in Canada, Slaughtered in the U.S." 78 Fed. Reg. 15645, 15647 (Mar. 12, 2013).

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[2] On any given day, processors typically commingle cattle and swine from multiple farms and ranches located in several states. Now they will be required to segregate (i.e. not commingle) cuts of meat—and therefore may not commingle the animals—if the animals are born or raised on farms and ranches in Canada or Mexico.

[3] Usual WTO practice is to order compliance with the agreement at issue, rather than compliance with the particulars of the ruling. WTO Dispute Settlement Understanding, art. 19, *at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

AMS acknowledged it lacked the data needed to assess the economic impact of the segregation required by this labeling regime. *Id.* So it issued cost estimates that simply denied there would be any impact. *Id.* at 15648. In fact, despite its 2009 finding that commingling is a "commercially viable practice that has been historically utilized," JA215, AMS was now refusing to acknowledge that commingling was even happening, 78 Fed. Reg. at 15648. AMS gave commenters 30 days to demonstrate otherwise—the shortest period permissible under federal law—and it denied a request to extend that period. JA46. AMI and others nonetheless hastened to use what data they had to explain the colossal upstream financial and operational impact of a labeling regime that banned commingling. *See* JA37-38 (estimating over $572 million in losses to cattle and hog industries); *see also, e.g.*, JA71, JA139.

AMS promulgated the rule largely as-is on May 23, 2013, the deadline set by the WTO arbitrator. JA509. As for the prohibition on commingling, AMS recognized that costs to industry could exceed, perhaps, $100 million. JA523. But the agency was unapologetic: "The Agency anticipates that * * * a mix of solutions will be implemented by industry participants to effectively meet the requirements of the rule," and "[o]ver the long run, * * * firms will continue to seek methods for efficient production and marketing of the affected products." JA515. In other words, the agency whose congressional mandate is to ensure that U.S.

commodities "may be marketed in an orderly manner and efficiently distributed," 7 U.S.C. § 1621, told those "market[ers]" and "distribut[ors]" to fend for themselves.

This Litigation. AMI brought this suit to challenge the agency's decision as a violation of the First Amendment and the Marketing Act, and also as arbitrary and capricious. JA1. As relevant here, AMI argued that Congress had not authorized AMS to ban commonly used industry practices, and AMI sought a preliminary injunction to prevent the agency from doing so. The District Court denied the request, concluding that AMI had not shown a likelihood of success on the merits, even though the balance of hardships tipped in its favor. JA1139.

A Panel of this Court affirmed. Ex. 1. The Panel concluded that AMI's argument "failed at the first step" because "the 2013 Rule does not actually ban any element of the production process." *Id.* at 7. Rather, "[i]t simply requires that meat cuts be accurately labeled with the three phases of production named in the statute," and "meat packers cannot achieve that degree of accuracy with commingled [i.e., non-segregated] production." *Id.* But that sidewise commentary is just another way of describing a commingling ban—which is why, elsewhere in the Panel's opinion, the Panel specifically interpreted the Rule to "eliminate[ ] the prior rule's allowance for commingling." *Id.* at 1. *See also id.* at 5 (rule "eliminated the special allowance" for commingling). And it is what AMS

specifically stated in the preamble to its rule and represented over and over again before the District Court. *E.g.*, JA985, 1098, JA1099.

The Panel went on to explain that AMS's assertion of authority over production practices was merely incident to the agency's authority over marketing. The Panel found that AMS was not "forc[ing] the segregated handling of animals" —"except in the sense that compliance with any regulation may induce changes in unregulated production techniques * * * ." Ex. 1, at 7. Though the Panel acknowledged that the "practical burden" of segregating animals "would be problematic" if Congress had *required* AMS to make "an exception" for commingling, the Panel found it more relevant that Congress had not expressly *prohibited* AMS from banning it. *Id.* Thus, in the Panel's view, the agency could do as it pleased, without regard to the incidental economic effects of its regulation, however monumental they might turn out to be. *Id.* at 7-8.

Shortly after the opinion, the Court *sua sponte* ordered rehearing en banc and briefing on the First Amendment issues in the case. Ex. 2. The Court again rejected that challenge, grousing in an aside that it would not allow a statute to be "doomed by agency fumbling." Ex. 3, at 13.

In an order issued the same day, the Court confirmed that AMI could seek rehearing on its Marketing Act claims. Ex. 4.

REASONS FOR GRANTING REHEARING

I. THE PANEL'S DECISION CONFLICTS WITH CIRCUIT AND SUPREME COURT PRECEDENT.

The Panel's ruling affirming AMS's authority to regulate handling and production practices conflicts with Circuit precedent about *Chevron* Step One,[4] and it conflicts with Supreme Court precedent about *Chevron* Step Two. Each conflict is an independently sufficient ground for rehearing.

1. This Court's precedent is clear: a federal agency may not infer that it has authority to regulate from the fact that Congress has not expressly prohibited it from doing so. "To suggest * * * that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power" is "flatly unfaithful to * * * principles of administrative law." *Railway Labor Execs. Ass'n* v. *National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (emphasis added). *Accord Natural Res. Defense Council* v. *EPA*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) ("the suggestion implicit in EPA's argument—that we should *presume* a delegation of power absent an express *withholding* of such power—is plainly out of keeping with *Chevron*") (quotation marks omitted; quoting *Railway Labor Execs. Ass'n*, 29 F.3d at 671).[5]

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[4] *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] *See also, e.g.*, *American Petroleum Inst.* v. *EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013); *American Bar Ass'n* v. *FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (and cases cited therein).

The Panel Opinion is squarely in conflict with this long-established rule. It concludes from the absence of express Congressional prohibition that there is implicit Congressional consent. *See* Ex. 1, at 7. But nothing in the COOL statute suggests Congress intended to upset the traditional division of authority between AMS (marketing) and FSIS (operations). The COOL statute is a requirement for "notice" of the possible countries of origin for certain cuts of meat. 7 U.S.C. § 1638a (title). Retailers must label the cuts of meat as they are, declaring all of the countries in which the animals "may have been" present. *Id.* § 1638a(a)(2)(B). As for upstream suppliers, the statute imposes recordkeeping requirements; that is all. *Id.* And Congress's instruction to AMS in that context is a limiting one: the agency "may not" require a person to keep records other than those maintained in "the normal conduct of the business." *Id.* § 1638a(d)(2)(B). In short, Congress did not authorize AMS to insert itself into operational matters; to the contrary, the textual indicators show that Congress presumed the "normal conduct of the business" would continue, *id*.

AMS's rule, and the Panel's Opinion, crams an elephant of industry-wide regulation into this tiniest of mouseholes. Nothing in the text, structure, or history of the Marketing Act permits that result.

2. The Panel's Step Two analysis also conflicts with the recent Step Two guidance set out in the Supreme Court's decision in *Utility Air Regulatory Group*,

134 S. Ct. 2427. As the Court explained there, a "reasonable statutory interpretation must account for both the specific context in which * * * language is used" as well as "the broader context of the statute as a whole." *Id.* at 2442 (quotation marks and citation omitted). A provision that "may seem ambiguous in isolation * * * is often clarified by the remainder of the statutory scheme." *Id.* When "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law," that meaning is the reasonable one the agency should select. *Id.* (quotation marks and citation omitted). The Panel should have, but did not, apply this approach to AMS's rule.

Utility Air Regulatory Group illustrates what that application would look like. There, the Court held that EPA had acted unreasonably in using greenhouse gas emissions to calculate the threshold for certain permitting requirements under the Clean Air Act. 134 S. Ct. at 2444. EPA's interpretation of that statute, the Court remarked, would "bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization," and a court must "greet * * * with skepticism" an agency's claim to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* (citation omitted). It is not reasonable to infer such authority from statutory silence because courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political

significance." *Id.* (quotation marks and citation omitted).

Just as it was unreasonable for EPA to interpret the Clean Air Act to radically expand its jurisdiction, it was unreasonable here for AMS to use a mere labeling requirement to undo the integrated North American market in livestock. "Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints." *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006). But that is the consequence of the agency's reading here, with respect to AMS and its sibling agency FSIS. The daily work of the former is compiling market data and overseeing voluntary certification programs, whereas the daily work of the latter is supervising processing facilities. AMS's reading of the 2008 statute to allow it to ban commingling blurs this line of demarcation and is thus unreasonable. That is to say, AMS's reading "produces a substantive effect" that is *not* "compatible with the rest of the law," *Util. Air Reg. Grp.*, 134 S. Ct. at 2442. *See Gonzales*, 546 U.S. at 274 (holding Attorney General lacked authority to ban assisted suicide because he was "an unlikely recipient of such broad authority" compared to other agencies).

For its interpretation to receive deference, "[an] agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington, Tex.* v. *FCC*, 133 S. Ct. 1863, 1874 (2013). Congress gave AMS no such authority here.

II. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE.

This case is one of exceptional importance not only because of its economic significance—a marketing agency has appropriated to itself the on-and-off switch for a half-billion dollars in industry costs—but because it goes to the heart of this Court's docket.[6] Consistency in the Court's *Chevron* precedents—with each other and with Supreme Court guidance—could not be more important. The Court appeared to recognize as much in granting en banc rehearing in *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir. Sept. 4, 2014). Rehearing is warranted here as well.

III. AMENDMENT AND/OR CLARIFICATION WOULD ENSURE AMI RECEIVES A FAIR HEARING AND BENEFIT THE PUBLIC.

AMI additionally requests limited en banc rehearing for amendment or clarification in the following respects:

(a) An amendment to correct the representation (Ex. 3 at 12) that AMI did not challenge, for First Amendment purposes, the agency's specific manner of implementing the 2008 Statute. *See, e.g.*, AMI Blue Br. 38 ("Nothing in the Final Rule indicates that AMS viewed the *additional information* conveyed [by the new

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[6] As of March 31, 2013, administrative appeals and original proceedings accounted for more than half of the cases pending on the Court's docket. Administrative Office of the United States Courts, *Caseload Statistics 2013, Table B-1. U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2013*, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/B01Mar13.pdf

labels] to serve" the articulated purpose) (emphasis added); Reply Br. 9 (distinguishing the "prior, more accommodating labeling regime" under 2009 rule in response to AMS's claim that "it is 'unclear' how the change in labeling regime could have 'constitutional significance"); Pls.' Mem. In Support, No. 13-1033, ECF No. 24-1, at 22 (D.D.C Jul. 25, 2013) (asserting a "mismatch between the ends and the "means"). *See National Cable & Telecommc'ns Ass'n* v. *FCC*, 555 F.3d 996, 1001 (D.C. Cir. 2005) (petitioner may object to tailoring of rule even when government's interest in underlying statute has been conceded). *See also Graceba Total Commcn's, Inc.* v. *FCC*, 115 F.3d 1038, 1041-1042 (D.C. Cir. 1997) (remanding for review of constitutional claims agency failed to address).

(b) Clarification of the preliminary posture of the case to ensure AMI has the opportunity on remand—when the agency has produced the administrative record—to offer briefing relating to the sufficiency of the multi-aspect governmental interest identified for the first time in the en banc opinion. *See* Ex. 3, at 9-12. *But see* JA1003 n.18 (claiming, in district court, that government had interest in providing more accurate information and complying with WTO order; argument in footnote); AMS Br. 27 (claiming, on appeal, that government had interest in providing accurate information; avoiding term "substantial interest"); AMS Supp. Br. (claiming, on rehearing, that government had interest in providing information; no "substantial interest" argument); Ex. 1, at 14 (identifying only

non-"trivial" interests in catering to patriotic or other consumer beliefs); Ex. 2 (ordering briefing on single question presented).

(c) Consolidation and publication of the En Banc Opinion, Panel Opinion (to the extent reinstated), and any further amendment as a single decision, to provide clarity to the public and to litigators arguing future cases.

CONCLUSION

For the foregoing reasons, the petition for rehearing and Appellants' requests for amendment and/or clarification should be granted.

Dated: September 12, 2014

Respectfully submitted,

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