



animals raised in both the United States and Canada as well as other meat processors, equipment manufacturers and suppliers throughout the United States. When these packers and processors are unable to obtain healthy live cattle from Canada, some of them are unable to run at or near full capacity, which they need to do in order to stay in business. NMA is a well-recognized voice on the important issues of meat policy, processing, and safety in the United States. NMA provides regulatory assistance to its members, participates in the legislative process and administrative rulemakings, and represents member interests in judicial proceedings affecting the health and well-being of consumers and the meat industry.

American Meat Institute (AMI) is a non-profit national trade association headquartered in Washington, D.C. AMI represents its members, the producers, packers, and processors of meat and poultry products marketed in the United States, for purposes of furthering and protecting their interests, general welfare, and prosperity, and to foster improvements in the production of meat and allied products. AMI member companies account for more than 75 percent of the United States output of beef products. AMI's members include meat packers and meat processors that slaughter and process beef from animals raised in both the United States and Canada. When these packers and processors are unable to obtain healthy live cattle from Canada, some of them are unable to run at or near full capacity, which they need to do in order to stay in business.

United Food and Commercial Workers Union (UFCW) is a non-profit labor union that represents meat industry and other commercial workers throughout North America. Members of UFCW work in packing plants in the United States, which slaughter and process beef from animals raised in both the United States and Canada. When these plants are unable to obtain healthy live cattle from Canada, there are fewer packing plant jobs for UFCW members in the United States.

North American Meat Processors Association (NAMP) is a non-profit corporation with its offices in Reston, Virginia. Its members are meat processing companies and associates who share a continuing commitment to providing their customers with safe, reliable, consistent meat, poultry, seafood, game, and other products. The members of NAMP process beef raised and slaughtered in both the United States and Canada.

Southwest Meat Association (SMA) is a non-profit organization whose members are meat processors, packers and purveyors, meat and meat product suppliers and service providers, livestock producers, financial institutions, and retail establishments. The primary focus of SMA's member companies is to produce products that meet or exceed consumer expectations with regard to product safety, nutrition and value. On behalf of its members, SMA initiates opportunities and resolves problems, thus helping its member companies earn a reasonable return on investment. SMA's members include meat packers and meat processors which slaughter and process beef from animals raised in both the United States and Canada. When these packers and processors are unable to obtain healthy live cattle from Canada, some of them are unable to run at or near full capacity, which they need to do in order to stay in business.

Eastern Meat Packers Association (EMPA) is a non-profit organization that has represented the interests of its members since 1927. Its membership consists primarily of small to medium-sized meat and poultry processing firms located in the northeastern United States. EMPA represents its members on a wide variety of public policy issues at the state and federal level and conducts various educational programs. Virtually all of its processing members utilize beef as a major ingredient in their processing operations. The members of EMPA process beef raised and slaughtered in both the United States and Canada.

Collectively, *amici* represent a substantial percentage of United States packers and processors of beef for domestic consumption and for export and their employees. No one has a greater stake in the safety and integrity of the United States beef supply than the members of these *amici*, whose success and survival in their businesses and employment depends each day on providing the safest possible product to consumers in the United States and overseas.

## II. STATEMENT OF THE CASE

Plaintiffs seek a preliminary injunction against the final rule issued by USDA's Animal and Plant Health Inspection Service (APHIS) allowing the importation of certain live bovines and products derived from live bovines from Canada, 72 Fed. Reg. 53314, September 18, 2007. This regulation removes the restrictions against importing from Canada bovines older than 30 months (OTM) and born after January 1, 1999 and certain bovine products. Those restrictions have been in effect since May 29, 2003. Almost three years ago, on January 4, 2005, USDA published a final regulation removing its restriction against importing bovines younger than 30 months from Canada. When that rule was published, R-CALF, the lead plaintiff here, obtained a preliminary injunction in Montana against its implementation, which was overturned by a unanimous United States Court of Appeals for the Ninth Circuit panel on July 14, 2005. *Ranchers Cattlemen Action Legal Fund United, Stockgrowers of America v. U.S. Dept. of Agriculture*, 415 F.3d 1078 (July 25, 2005) (hereinafter "*R-CALF I*"). The panel's decision faulted the United States District Court for the District of Montana for failing to accord adequate and necessary deference to the APHIS's thorough and expert rulemaking. Upon remand, the Montana District Court granted the government's motion for summary judgment and denied R-CALF's motion for summary judgment. R-CALF appealed this decision to the Ninth Circuit, whereupon a new three-judge panel sustained the grant of summary judgment to the government. *Ranchers Cattlemen Action Legal Fund United, Stockgrowers of*

*America v. U.S. Dept. of Agriculture*, 499 F.3d 1108 (Aug. 28, 2007) (hereinafter “*R-CALF II*”).<sup>1</sup>

The final rule challenged here is based on a proposed rule published on January 9, 2007. 72 Fed. Reg. 1101. That final rule allows the importation from Canada of live cattle born after January 1, 1999 as well as specified bovine products determined to present a negligible risk of introducing bovine spongiform encephalopathy (BSE) into the United States. This rule is based on an extensive new peer-reviewed risk assessment, a comprehensive evaluation of issues and consideration of voluminous public comments, including those submitted by R-CALF which are described in R-CALF’s pleadings as follows: “R-CALF USA submitted two sets of comments to USDA on the proposed OTM rule supplemented with hundreds of pages of documentary evidence.” Plaintiffs’ Exhibit 3, Declaration of William T. Bullard, Jr. Para. 10.

The Complaint here raises the same set of issues of risk assessment, rulemaking procedure, regulatory flexibility and compliance with the National Environmental Policy Act, which were raised in plaintiffs’ 2005 Complaint as challenges to USDA’s first rule allowing the entry of cattle under 30 months of age. In *R-CALF I* and *R-CALF II*, these arguments were strongly rejected by the Ninth Circuit. The *Federal Register* document promulgating this new rule shows that all of these issues were appropriately weighed and considered in the context of this second rulemaking, just as they were in the first.

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<sup>1</sup> In 2006, a separate three-judge panel from the Ninth Circuit ruled that appropriate deference must be paid to USDA's APHIS agency in connection with its exercise of its plant protection responsibilities, favorably citing *R-CALF I* as precedent, *Cactus Corner, LLC v. U.S. Department of Agriculture*, 450 F. 3d 428, 433 (9th Cir. 2006.) Thus, in a 25-month period of time, nine judges of the Ninth Circuit joined in decisions upholding the deference which is appropriately paid to rulemaking decisions of USDA's APHIS.

The plaintiffs ask this Court to issue a preliminary injunction and to conduct an intensive review of APHIS's risk assessment, evaluation of issues and review of comments.<sup>2</sup> In seeking a preliminary injunction, plaintiffs agreed that the court must examine "the adverse effects that granting or denying the injunction would have on the parties to the dispute and upon other interested parties, including the public. *Dataphase*, 640 F.2d at 114." Plaintiffs' Motion for Preliminary Injunction at 23. In their discussion of the "public" interest, plaintiffs have ignored the substantial harm and cost that a preliminary injunction would cause to the *amici* here. Considering the balance of harms and the potential for injury to producers, packers and packing house workers, this Court should find that there is no basis for granting a preliminary injunction.

### **III. PLAINTIFFS FAIL TO MEET THE REQUIREMENTS FOR GRANTING A PRELIMINARY INJUNCTION**

As defendants have succinctly pointed out, a court evaluating a request for a preliminary injunction must consider (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the harm to other parties if the injunction is granted; (3) the movant's probability of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). Although "in each case all of the factors must be considered to determine whether on balance, they weigh towards granting the injunction," *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), the movant in all events "is required to show the threat of irreparable harm," *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994), the absence of which "is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The movant bears the burden of establishing the propriety of this extraordinary remedy. *Baker Elec. Co-op.*, 28 F.3d at

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<sup>2</sup> The plaintiffs specifically request that consideration of the present motion and their complaint not be consolidated, a request which if granted would have the effect of doubling the burden on the time and docket of this Court.

1472; *see also North Dakota v. U.S. Army Corps of Engineers*, 270 F. Supp. 2d 1115, 1119 (D.N.D. 2003). Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, at 2.

Plaintiffs' Motion for Preliminary Injunction seeks the immediate suspension of the rule during the pendency of this litigation, which is the principal relief that plaintiffs seek in the main case. This preliminary relief should not be granted because there is a negligible risk of immediate harm to human health, animal health, the environment or the economy. As is fully documented in the *Federal Register* notice promulgating the new rule, APHIS has, after exhaustive rulemaking, determined that the importation of live cattle born after March 1, 1999 presents, at most, a negligible risk to either human or animal health. That determination is neither arbitrary nor capricious. Live cattle imported from Canada will either go directly to slaughterhouses or be tracked through feedlots directly to slaughterhouses, which are under continuous inspection by USDA's Food Safety and Inspection Service (FSIS). At these USDA-inspected slaughterhouses, Specified Risk Materials (SRMs) from both Canadian and U.S. cattle are excluded from the human food supply, and these materials are subsequently excluded from ruminant feed by the ruminant-to-ruminant feeding ban which was established by APHIS and the Food and Drug Administration (FDA). 72 Fed. Reg. 38,726, col. 1, *see also* Def. Stmt. Of Facts at ¶ 37. Thus, in the present case it is highly improbable that the plaintiffs will succeed on the merits.

The injury caused to packing plants and their employees by the grant of an injunction would far outweigh any harm likely to befall the plaintiffs. The government demonstrates quite persuasively that plaintiffs' predictions of irreparable harm are alarmist and speculative and fail to show any risk whatsoever of imminent harm during the next few weeks or even months, when briefing in this case would reasonably occur. Defendants' Opposition to Plaintiffs' Motion to Shorten Time to Respond to Preliminary Injunction Motion at 1. Where APHIS has carefully,

rationally, and scientifically promulgated the new regulation, public policy weighs against suspending its implementation unless plaintiffs can show that they are likely to succeed on the merits and that plaintiffs will suffer irreparable harm absent an injunction. In the present case, plaintiffs have not made these showings. In comparison, an injunction would cause substantial and ongoing injury to the businesses and employment of the *amici* here.

**A. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS**

The rule that plaintiffs challenge is closely related to the rule that plaintiffs challenged in *R-CALF I* and *R-CALF II*, and the appellate court's decisions in those cases show that plaintiffs are highly unlikely to succeed on the merits here. Because the arguments the plaintiffs present here did not succeed in their original, virtually identical form before the Ninth Circuit, there is no basis for concluding that plaintiffs are likely to succeed in this case. The deficiencies of plaintiffs' arguments are not cured by the addition of more plaintiffs or the selection of a new forum.

The unlikelihood that the plaintiffs will succeed on the merits here has already been persuasively argued in Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 2-19. *Amici* respectfully adopt by reference the arguments made by the defendants in this regard.

As with its prior regulation which was the subject of *R-CALF I*, APHIS's rulemaking here is supported by ample evidence that the resumption of imports of cattle over 30 months of age and born after January 1, 1999, "would not significantly increase the risk of BSE in the American population," 415 F.3d at 1095. This court should accord appropriate deference to this agency conclusion and decide that plaintiffs are not likely to succeed on the merits.

**B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION, AND IT IS THE *AMICI* HERE WHO HAVE SUFFERED AND WOULD SUFFER IRREPARABLE HARM IF THE BORDER IS AGAIN CLOSED TO THE ENTRY OF OTM CATTLE.**

For more than a century prior to May 29, 2003, live cattle moved back and forth across the border between the United States and Canada, subject to the same general regulatory controls that would typically apply to the movement of cattle between two states within the United States. Such movement was part of a North American livestock economy where the United States and its largest trading partner coordinated their animal health programs and controls, for example, simultaneously implementing ruminant-to-ruminant feeding bans as concerns regarding BSE arose. Prior to 2003, the U.S. beef industry had built new packing plants and modernized old plants to accommodate changing markets for U.S. beef, and in the process created packing capacity in the U.S., which was used in part to slaughter and process Canadian cattle.

Since the closure of the U.S.- Canadian border in May, 2003, a number of new Canadian beef slaughter plants have been built and the capacity of existing plants has been expanded. At the same time, several U.S. beef slaughter plants shut down in response to under-utilization of capacity, including Tyson's plant in Boise, Idaho and Smithfield's plant in Gering, Nebraska. There has been a continuing consolidation in the cow/bull packing sector resulting in the loss of at least four previously independent buyers. The APHIS regulation which was challenged in *R-CALF I* and *R-CALF II* restored the ability of U.S. packing plants to acquire Canadian cattle less than 30 months of age, principally grain-finished cattle marketed out of feed lots. The regulation challenged here will restore that traditional relationship for older cattle, principally cull cows from beef and dairy herds. Many U.S. plants slaughtering cull cows and bulls are dependent upon these Canadian cattle in order to utilize capacity.

As described in the attached Declaration and Report of John Nalivka (Exhibit 1), a prominent livestock analyst, much U.S. packing capacity has been lost in the past decade and if the new rule is enjoined, that loss of U.S. packing capacity and jobs will continue. Currently, the annual slaughter capacity of U. S. cow plants is 6.1 million head, a substantial reduction from the annual capacity of 8.5 million head which existed in 1997.<sup>3</sup> Much damage has already been incurred by U.S. packers and packing house workers, particularly those dependent upon supplies of OTM cattle. Mr. Nalivka's Report documents the extent to which U.S. packing plants handling older cattle have closed and the jobs associated with those packing plants already lost, and the extent to which Canada has expanded its capacity for the slaughter and processing of both older and younger cattle. The Nalivka Report demonstrates the importance of maintaining a balance between up-to-date slaughter capacity in both fed cattle and cow plants.

There are likely to be additional closures of U.S. packing plants, with related job losses as supplies of U.S. slaughter cattle decline in the face of reduced cattle herds, unless Canadian cattle are available to keep these plants running at a breakeven level or better. Reducing the number of U.S. packing plants will cause significant injury not only to packers and processors, but also to U.S. cattlemen, including members of R-CALF, because they will have fewer buyers competing for their animals.

By way of contrast, the harm described in the plaintiffs' brief is highly speculative, while the harm that has occurred and will continue to occur to the *amici* is tangible and substantial. The harm alleged by plaintiffs here is of the same nature alleged in *R-CALF I* where the Ninth Circuit determined that R-CALF "failed to make the requisite showing of irreparable harm." 415 F.3d at 1105.

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<sup>3</sup> See Exhibit 1 at chart 2.

**C. THE RULE SERVES THE PUBLIC INTEREST AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN DEFENDANTS' FAVOR**

The relief that plaintiffs seek here will be injurious to all sectors of the beef industry in the United States, including ranchers, feeders, packers and processors. The limitation on movement of live cattle from Canada has already caused a significant loss of U.S. packing capacity and a corresponding increase in Canadian capacity. In the immediate future this will mean that there will be fewer places where cattle producers can market their cattle and, in the long run, it is not unlikely that U.S. cattlemen will need to send their cattle north to be slaughtered and processed in the state-of-the-art, up-to-date Canadian facilities will be an unintended but altogether likely consequence of the relief that plaintiffs seek. Certainly, APHIS must take all reasonable precautions to assure that imported animals are healthy and do not present a significant risk to either animal or human health. However, that is precisely what USDA has done in promulgating the current rule. The plaintiffs would establish an ultimately self-defeating presumption against imports of any animals. That is not the law and it would not be good public policy. Public policy here requires that due deference be accorded to the reasonable and scientific judgment of APHIS in these matters of animal and human health.

**IV. CONCLUSION**

*Amici* respectfully request that this Court deny plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on November 30, 2007, I caused the foregoing Brief of *Amici Curiae* to be served on all parties by sending a copy via electronic mail and by mailing a copy via U.S. Mail to the following:

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