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ATTORNEYS FOR PETITIONERS/PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA; TRACY and DONNA HUNT, d/b/a THE MW CATTLE COMPANY, LLC; and KENNY and ROXY FOX,	)	No.: 19-CV-205-F
Petitioners/Plaintiffs,	)	
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE; ANIMAL AND PLANT HEALTH INSPECTION SERVICE; SONNY PERDUE, in his official capacity as the Secretary of Agriculture; and KEVIN SHEA, in his official capacity as Administrator of the Animal and Plant Health Inspection Service,	)	
Respondents/Defendants.	)	

PETITIONERS/PLAINTIFFS' BRIEF IN RESPONSE TO MOTION TO DISMISS

INTRODUCTION

The Respondents/Defendants in this case, including the United States Department of Agriculture ("USDA") and the Animal and Plant Health Inspection Service ("APHIS") (collectively, the "agencies"), have done what federal agencies often do: pursue an illegal course

of action and, when caught, resort to an "Emily Litella" *Saturday Night Live* routine of "never mind." By doing so they not only seek to avoid accountability for their wrongful acts but also to deprive the judicial branch of its ability to clarify the legal framework within which federal agencies must operate. This approach allows agencies that have exceeded their authority to reset their plausible deniability argument: "What do you mean we can't overturn a properly adopted rule using a guidance document? The Courts have never said such a thing!" Here, the agencies' "mootness" claim exposes the well-worn tactic of seeking to deprive an Article III Court of jurisdiction once they realized that the "jig was up" and that they risked being reined in by a jurist who will not tolerate illegal administrative overreach.

The rationale for the agencies' motion to dismiss can largely be summed up thusly: "trust us, next time we try to fundamentally change the way that livestock producers identify their cattle and bison we will provide an opportunity for public comment." They make this one narrow concession only after seeking to impress upon this Court how really, really important it is for livestock producers to use radio frequency identification ("RFID") eartags (which is irrelevant and unsupported by the record). Conspicuously absent from the agencies' filings is either an admission of wrongdoing; or any substantive or enforceable assurance that they will follow the law—not just with regard to accepting comments, but the entirety of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, and other relevant statutory and regulatory requirements. They do not aver that "we won't do it again." That they will accede to nothing more than "accepting comments" at some point in the future belies the nature of what they tried to do in the first place. This acquiescence also ignores several realities: their destabilizing impact on the livestock industry by trying to force universal compliance with an RFID mandate; the scope, substance, and import of the Petition/Complaint that was filed; and the agencies' own arguments for dismissal.

STANDARD OF REVIEW

The "meat" of the agencies' argument is found in their claim that this case is now moot, and that a challenge to future regulatory action is not yet ripe for review. The foundation for their argument is that, having removed the illegal Factsheet from their website, they have successfully and unilaterally "mooted" all of Petitioners' claims. They seek dismissal of Counts I (Violation of the 2013 Final Rule, 9 C.F.R. Part 86), II (Violation of the APA), III (Violation of the Congressional Review Act), and V (Violation of the Regulatory Flexibility Act) of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). These defenses are reliant upon "case or controversy" considerations. According to the court in *Doe v. Carter*, 2011WL4962060 *3 (N.D. Tx. 2011), "[t]he case or controversy doctrine informs the legal doctrines of… mootness."

They seek dismissal of Count IV of the Complaint—the FACA Claim—under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Rule 12(b)(6) motions to dismiss are "designed to test 'the sufficiency of the allegations within the four corners of the complaint.'" *Northern Arapaho Tribe v. Burwell*, 118 F.Supp.3d. 1264, 1273 (D. Wyo. 2015) (quoting *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994)). The federal pleading requirements "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Foreman v. Elam*, 2019 WL 6652005, at *1 (10th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

> "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (brackets, citation, and internal quotation marks omitted). Instead, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). To establish facial plausibility, the plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has ... not shown

> ... that the pleader is entitled to relief." *Id.* at 679. (brackets and internal quotation marks omitted).

Foreman v. Elam, No. 19-7020, 2019 WL 6652005, at *1 (10th Cir. Dec. 6, 2019) (quoting *Iqbal*, 556 U.S. at 678-9). "To withstand a 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, taken as true, to state a claim for relief that is plausible on its face." *Estate of Monaco v. Morrell*, 2014WL11498234 (D. Wyo. 2014) (citations and quotations omitted). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (citations and quotations omitted).

Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) … matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *See also, Montez v. Lampert*, 2013WL12066963 (D. Wyo. 2013) (having the opportunity to reply to a motion to dismiss does not represent such "reasonable opportunity"). When courts consider material outside of the complaint it converts a motion to dismiss into a motion for summary judgment and must provide the parties an opportunity to present countervailing evidence. *Lamb v. Rizzo*, 39 F.3d 1133, 1136 (10th Cir. 2004).[2]

STATEMENT OF RELEVANT FACTS

On October 4, 2019 Petitioners filed a 48-page "Petition for Review of Agency Action and Complaint for Declaratory Judgment and Injunctive Relief" ("Petition"). ECF 1. There were 105 pages attached to the Petition, including Exhibit 1, the April 2019 Factsheet at issue; and Exhibit 2, the January 9, 2013 Federal Register Notice and Final Rule governing "Traceability for

[2] Respondents have provided links to several documents that are extraneous to the record before this Court. *See* section ECF 11 at 4-5, fn 1-4. Their only relevance lies in the fact that they exist, having been generated in violation of FACA. They confirm that Petitioners must be allowed to conduct discovery to obtain additional information about their genesis.

Livestock Moving Interstate," 78 Fed. Reg. 2040-2075 ("2013 Final Rule"). The Petition, including the Exhibits, must be considered not only true and correct, but construed in the light most favorable to the Petitioners in assessing the agencies' motion to dismiss.

The Petition comprehensively lays out the historical and regulatory framework for animal identification and disease traceability and describes in detail how the agencies violated the law when they published and sought to implement their Factsheet in 2019. The agencies' motion to dismiss, in contrast, is narrowly focused, distilling the current dispute down to a few select "facts" that they apparently believe support their theory. These facts are insufficient however, to force dismissal of this case. These facts instead show that the agencies have not corrected course, but instead intend to pursue exactly the same policy once this particular case—and this Court—no longer stand in the way of their ultimate goal.

I. THE AGENCIES "FACTS" DO NOT JUSTIFY DISMISSAL OF THIS ACTION

The success or failure of the agencies' motion to dismiss depends upon the extent to which they can objectively demonstrate that they have corrected and will not return to their errant ways. Their credibility is front and center. It is therefore appropriate to test the accuracy of *their assertions* against the relevant facts as laid out by the Petitioners.

The agencies have attempted to downplay the foundation and the importance of this lawsuit by stating in the first sentence of their introductory paragraph that this action represents nothing more than a "procedural challenge to agency action." ECF 11 at 2. They then note that the specific agency action at issue (*e.g.*, issuance of the April 2019 "Factsheet") was merely the announcement of a "policy change" in "what the Administrator would approve as 'official identification' for livestock." *Id.* They report that *such* "policy change" (*e.g.*, the policy requiring RFID eartags) "has since been withdrawn by the agency." *Id.* It is upon this basis that they argue that the Petition "should be dismissed as moot and/or not ripe." *Id.*

When describing the illegal "Factsheet," the agencies again seek to downplay its origin, controversy, significance and impact, asserting that the Factsheet was merely an "announced … policy change in what the Administrator would approve as 'official eartags' in the future and a plan to phase out the use of metal identification tags." *Id*. at 5. The agencies use their timeline discussion to offhandedly assert that this mere "policy change" was limited to requiring livestock producers to replace the official metal eartags with the RFID eartags, claiming that livestock producers could continue to use "brands and tattoos, *if* both the shipping and receiving State and Tribal animal health authorities agree to accept the markings in place of RFID." *Id*. (Emphasis added).[4] The agencies neglect to mention that the Factsheet also prohibited the use of group identification numbers and backtags, both of which are considered "official" forms of identification pursuant to the 2013 Final Rule.

The agencies' inconsistencies are also important in the context of their request that the Court dismiss this case. As noted above, they first contend that this is nothing but a "procedural challenge," but they later concede that this case is about more than that: "In their Complaint, Plaintiffs allege that the change announced in the April 2019 Factsheet—the plan to phase out the approval of metal RFID eartags—*caused them substantive and procedural injuries*." ECF-11 at 13. (Emphasis added). While they concede the substance of Petitioners' claims, they also inaccurately portray what they did and why Petitioners sued. The agencies did not use the 2019 Factsheet to merely "phase out" the approval of "metal RFID eartags" (it was not in fact designed to phase out RFID tags at all). *Id*. They *mandated the use* of RFID eartags and sought to *force*

[4] We emphasized the word "if" to highlight the disingenuousness of this assertion. As explained in the Petition, the 2013 Final Rule *prohibited* States and Tribes from imposing an RFID-only rule. This language shows the agencies intended for the 2019 Factsheet to nullify this protection to *allow* States and Tribes to mandate use of RFID eartags.

livestock producers to comply with that unlawful rule by *prohibiting* manufacturers from producing anything *other than* RFID eartags. If the agencies cannot even candidly acknowledge what they did, we cannot be sure that they have any intention of correcting the problem.

The agencies note that on October 25, 2019, three weeks after Petitioners filed this lawsuit, APHIS "posted a statement on its website[5] announcing that it had removed the April 2019 Factsheet from its website, 'as it is no longer representative of current agency policy.'" *Id*. at 7. "The effect" of this statement, according to the agencies, "is that APHIS has withdrawn the April 2019 Factsheet." *Id*. at 8. Relying upon APHIS Administrator Kevin Shea's Declaration, the agencies claim that they withdrew the Factsheet for two reasons: "(a) industry feedback, and (b) changes in executive branch policy, *in the form of Executive Orders 13891 and 13892, which were issued on October 9, 2019*." *Id*. (Emphasis added).

First, it is reasonable to deduce that the current lawsuit represents at least part of the referenced "industry feedback." To put it bluntly, the agencies were caught attempting to impose an illegal rule and were sued. Recognizing that a declaratory judgment and injunction against them were imminent, they sought to contain the potential damage to their long-term plans by withdrawing the offending document at this time. Director Shea admits as much: "While the need to advance a robust joint Federal-State-Industry ADT capability *remains an important USDA-APHIS and State Animal Health Official objective*, we will take time to reconsider the path forward." ECF 11-1 at 4. (Emphasis added).

Second, and as for the alleged "change in policy," the agencies point to two Executive Orders, both of which are directed at stopping agencies from abusing "guidance." While it is clear

[5] This "statement" is devoid of any official USDA or APHIS letterhead, logo, or other markings identifying where it came from; does not contain a date, identify an author, and is ambiguous. This sheet simply appeared on the APHIS website one day. To our knowledge the agencies have done nothing further to inform the livestock industry that they are not required to use RFID eartags.

that the 2019 Factsheet represents a classic example of such abuse—an effort to circumvent the rulemaking and other requirements of the APA—the agencies conflate a general Presidentially-mandated "policy change" that applies to all agencies, with their specific illegal efforts to force livestock producers to use RFID eartags. While the EOs represent a "change in policy," they are not the same "policy" challenged here (the agencies' legal authority to force producers to adopt RFID eartags to be able to move or sell their livestock across state lines).

The agencies' alleged "policy change" thus does not represent a move away from their illegal efforts to impose RFID requirements on livestock producers; it instead relates solely to the agencies' decision to use a two-page guidance document posted to their website to go about doing so. The agencies could not be clearer: they have every intention of moving forward in their quest to mandate RFID use. Their only concession to this Court in seeking dismissal is that next time they will "publish[] a notice in the Federal Register with an opportunity for public comment." *Id.* at 8. It is critical to understand that this concession is confined to these legal proceedings as the website"statement" removing the Factsheet from the website does not make the same commitment.

The agencies posted the Factsheet to their websites to avoid undertaking a formal rulemaking (thereby sidestepping issues such as cost (billions of dollars according to the 2013 Final Rule (*see* ECF-1 at 20)), feasibility, and enforcement). They are now trying to figure out how to get the same result, while pretending that they are doing otherwise. They know that the 2013 Final Rule and industry opposition stand in their way. They are therefore being cagey by refusing to commit to following all constitutional, statutory and regulatory requirements, whether that be the Fifth Amendment (takings clause), APA, FACA, the Regulatory Flexibility Act ("RFA") or the CRA. Their limited concession to this Court regarding how they intend to proceed with an RFID mandate in the future is insufficient, if not disingenuous, and it exposes their ploy.

II. A DECLARATORY JUDGMENT AND INJUNCTION ARE NECESSARY TO PREVENT THE AGENCIES FROM ENGAGING IN ILLEGAL CONDUCT IN THE FUTURE

Petitioners have laid out in great detail in their Petition not only the reasons why the Factsheet was illegal in the procedural sense, but also why the policy announced in that document violated their substantive rights, economic interests, business operations, and other protections as afforded by the 2013 Final Rule (9 C.F.R. Part 86). *See* ECF-1. Petitioners urge this Court to review that Petition in its entirety as it provides the all-important history leading up to the current dispute, explains why the 2013 Final Rule was adopted, and shows why this issue is so important to livestock producers, all of which must be considered to be true for purposes of this motion. *See* ECF-1 at 5-6 (¶¶ 3-13 providing a partial summary of key facts).

Respondents would have this Court believe that the only relief that Petitioners requested was removal of the Factsheet from their website. That is simply untrue. *See* ECF-1 at 46-47 (Prayer for Relief). Not one of these requests involves requiring the agencies to simply remove the Factsheet from the website while continuing to move forward with a plan to mandate RFID use. The Petition as a whole and these remedies in particular are instead directed at the agencies' illegal efforts to completely change the definition of "official identification" to mandate RFID eartags, a policy that they clearly intend to pursue as soon as this lawsuit is in their rearview mirror.

By describing Petitioners' claims and remedies as nothing more than a complaint about "procedure" related to an innocuous "policy change" the Respondents seek to color this Court's view of what they actually did. They hope that such an approach encourages this Court to ignore their egregious regulatory overreach and decide that it is appropriate to close and lock the courthouse doors, thereby leaving the Petitioners at their mercy as the agencies pursue the exact same policy that they attempted to implement through the illegal 2019 Factsheet.

LEGAL ANALYSIS

I. THERE REMAINS A CASE OR CONTROVERSY AMONG THE PARTIES

The agencies claim that by removing the Factsheet from their website and posting a generic "statement" about it, that "there is no longer a live controversy for this Court to adjudicate." ECF 11 at 13. They rely in large part on the Tenth Circuit's decision in *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010), to support that contention, asserting that "[a]n agency's '[w]ithdrawal or alteration of administrative policies can moot an attack on those policies.'" ECF 11 at 13. The "statement" that they rely upon, however, does not represent such a "withdrawal or alteration of administrative policy," but instead doubles down on it. While their "statement" references a "factsheet" that it posted "[l]ast April," for example, it does so using not only obscure but downright opaque language, providing essentially no substantive information about what the agencies tried to do. One thing is made abundantly clear from this statement, however, and that is that the agencies absolutely intend to proceed with requiring RFID eartags and to prohibit the use of other forms of identification. More than half of their "statement" is devoted to making that point, with the only passing reference to the 2013 Final Rule, actually misstating the fact that "official identification" is legally defined to include not only brands and tattoos, but group identification numbers and backtags as well. These shenanigans do not reflect a "withdrawal or alteration of administrative policies"; they signal that it is "full steam ahead" just as soon as they can get rid of this lawsuit.

The Supreme Court in *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013), described the case-or-controversy standard as follows:

> Article III of the Constitution restricts the power of federal courts to 'cases' and 'Controversies.' Accordingly, '[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.' … The 'case-or-controversy requirement subsists through all stages of federal judicial

> proceedings, trial and appellate.' '[I]t is not enough that a dispute was very much alive when suit was filed'; the parties must 'continue to have a "personal stake" in the ultimate disposition of the lawsuit.

Id. (all internal citations and parentheticals omitted). Further,

> There is thus no case or controversy, and a suit becomes moot, when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. But a case becomes moot *only when it is impossible* for a court to grant any effectual relief whatever to the prevailing party. … 'As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.

Id. (all internal citations and parentheticals omitted) (Emphasis added).

> The crucial question is whether granting a present determination of the issues offered will have some effect in the real world. (Citations and internal quotation marks omitted). Put another way, a case becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision. (Citations and internal quotation marks omitted).

Ghailani v. Sessions, 859 F.3d 1295, 1300-1301 (10th Cir. 2017).

The agencies' withdrawal of the 2019 RFID Plan should be seen for what it is—a naked attempt to moot this case and deprive the Court of jurisdiction. Situations like the current one are exactly why the Courts have refused to dismiss cases even when a defendant claims to have "voluntarily ceased" the objectionable behavior. The agencies' actions, post hoc rationalizations, and statements ignore the significance of their violations and the relief that Petitioners seek. The agencies' own filings show that their "self-correction" is no correction at all, but a sham designed to stop this litigation. The agencies' own admissions show that there is every reason to expect that they will continue to engage in violative conduct and pursue an RFID mandate by any means necessary. This is the exact circumstance under which "voluntary cessation" should not moot a case. Considering their ultimate goal of pursing a "path forward" that involves requiring livestock producers to use RFID eartags there is no assurance that they will not repeat exactly what they did here. Stated another way: the agencies' "policy change" allegedly related to their decision to

withdraw the 2019 Factsheet is anchored in the President's Executive Orders disapproving of the use of guidance to impose substantive ("legislative") obligations on the regulated community. The transience of those Executive Orders, coupled with the agencies' insistence on pursuing an RFID mandate, substantially increases the likelihood that they will resume the illegal conduct unless this Court enters a declaratory judgment and injunction telling them that they cannot. That is what the Petitioners have asked for here—an order telling the agencies that they acted illegally when they used a guidance document to force livestock producers to use RFID eartags and they cannot do that again. What is mystifying is why the agencies would oppose such a ruling.

The Supreme Court has pronounced that "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The Tenth Circuit Court of Appeals has announced a similar sentiment, having entered one of its most recent pronouncements on "voluntary cessation" within the last six weeks: "Under the 'voluntary-cessation exception' to mootness, 'a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.'" *Prison Legal News v. Federal Bureau of Prisons*, 944 F.3d 868, 880 (10th Cir. 2019) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). "The exception 'exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resum[e] the illegal conduct, (citation omitted), or 'evade judicial review … by temporarily altering questionable behavior[.]' (citation omitted). *Id*. 880-881. In *Knox v. Service Employees International Union, Local 1000*, 567 U.S 298 (2012), for example, the union class members sued the union, challenging its increased fees. After certiorari was granted the union changed course, offered the class members a full refund, and moved for summary judgment on mootness grounds. The Supreme Court concluded that the case was not moot, explaining that "since the union continues to defend the legality of the … fees, it is not clear why the union would

necessarily refrain from collecting similar fees in the future."[7] *Id*. at 307. *See also New Mexico Health Connections v. United States Dep't of Health & Human Servs.*, 946 F.3d 1138, 1139 (10th Cir. 2019) ("This exception is designed to counteract gamesmanship, such as 'a defendant ceasing illegal action long enough to render a lawsuit moot' before 'resuming the illegal conduct.'") (Quoting *Ind v. Colo. Dep't of Corrs.*, 801 F.3d 1209, 1214 (10th Cir. 2015)).

> The voluntary cessation exception does not apply, and a case is moot, if the defendant carries the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. This burden is 'stringent' and 'heavy.' The inquiry is fact-specific.
>
> To carry its burden, a defendant must do more than offer a mere informal promise or assurance ... that the challenged practice will cease or announce[ ] ... an intention to change. A defendant's corrective actions that do[ ] not fully comport with the relief sought are also insufficient. Instead, a defendant must undertake changes that are permanent in nature and 'foreclose a reasonable chance of recurrence of the challenged conduct.' Such changes could include 'withdrawal or alteration of administrative policies' through a formal process, or a declaration under penalty of perjury, so that plaintiffs 'face no credible threat of prosecution.'

Prison Legal News, 944 F.3d at 881 (all internal citations and parentheticals omitted).

This exception is based on the principle that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d at 1115 (cleaned up) (citations omitted). Furthermore, "[t]he mootness of a plaintiff's claim for *injunctive relief* is not necessarily dispositive regarding the mootness of his claim for a *declaratory judgment*." *Prison Legal News*, 944 F.3d at 880. (Emphasis in original). The fact that the agencies have removed the Factsheet from the website does not preclude this Court from granting the declaratory judgment petitioners have requested. That is especially true here where the agencies did not change course because they admit wrongdoing, but because they got caught, while announcing that they are

[7] We are confronted with the same situation here. USDA/APHIS continue to defend the legality of the RFID mandate, with the only question being the process for imposing it.

"reconsider[ing] the path forward" for mandating RFID.

Under only limited circumstances may a defendant's voluntary actions moot a case. *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016). The voluntary cessation exception to mootness is "highly sensitive" to the facts of a given case. *Id*. at 1170 (*citing Am. Civil Liberties Union of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 56 (1st Cir. 2013)). The failure of a government agency to acknowledge the impropriety of its former challenged course of conduct, while not dispositive, is relevant to the analysis of whether such agency has in fact corrected course. *Id.* at 1176. Defendants fail to carry their burden when they offer nothing more than "a mere informal promise or assurance ... that the challenged practice will cease" or they "announce[] ... an intention to change." *Rio Grande Silvery Minnow*, 601 F.3d at 1118 (quotations omitted). "[W]hen a defendant retains the *authority and capacity* to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 219 (4th Cir. 2017) (citation omitted, emphasis added). "[B]ald assertions of a defendant—whether governmental or private—that it will not resume *a challenged policy* fail to satisfy any burden of showing that a claim is moot." *Id*. (citation omitted, emphasis added.

The Court in *EEOC v. CollegeAmerica Denver, Inc.*, 869 F3d 1171, 1173-1174 (10th Cir. 2017) (with emphasis added), summarized the rule as follows:

> A special rule applies when the defendant voluntarily stops the challenged conduct. When the conduct stops, the claim will be deemed moot only if two conditions exist:
> 1. [I]t is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur. (Citations and quotation marks omitted).
> 2. [I]nterim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation. (Citations and quotation marks omitted).

As noted by the Court in *Prison Legal News*, 944 F.3d at 881: "Courts may accord 'more solicitude to government officials' claims that their voluntary conduct moots a case. *Rio Grande Silvery Minnow*, 601 F.3d at 1116 n.15 (quotations omitted)." Importantly, "[t]his solicitude is

'not ... invoked automatically.' 13C Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 3533.7 (3d ed. Aug. 2019). *Id.* This "'government self-correction provides a secure foundation for mootness so long as it seems genuine.' *Brown*, 822 F.3d at 1167-68." *Id.* (Alterations and quotation marks omitted).

The agencies here have quoted extensively from footnote 15 of *Rio Grande Silvery Minnow* arguing that the Courts should treat the government's voluntary conduct with more solicitude. ECF-11 at 14. The agencies, however, failed to quote the entirety of footnote 15, excluding that portion where the Court in *Rio Grande Silvery Minnow* declined to adopt an approach of "we will always believe the government," instead stating that "[w]e need not definitively opine here on what explicit measure—if any—of greater solicitude is due administrative agencies in the application of the voluntary-cessation exception." 601 F.3d at n. 15. The Court then found that "under *the general practice* of courts in applying *Laidlaw's* heavy-burden standard in the government context," *ibid*, the agencies had met their burden showing mootness in that particular situation. That is not the case here.[8]

Governmental defendants' seemingly "genuine" self-correction may "provide[] a secure foundation for mootness." *Brown*, 822 F.3d at 1167-68 (quotations omitted). Regarding agency actions, and as noted above, permanent changes that moot a case may include "withdrawal or alteration of administrative policies' through a formal process." *Prison Legal News*, 944 F.3d at 881 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1117) (quotations and brackets omitted);

[8] In addition, Petitioners agree with a recent essay: "There is not a shred of evidence that the Supreme Court has ever endorsed this relaxed approach [of granting more solicitude to government officials' claims that their voluntary conduct moots a case] and, returning to first principles, the theoretical justifications for such a policy do not hold up either." *See* "The Point *Isn't* Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine" Yale Law Journal Forum, Nov. 26, 2019. We do not believe that the agencies are entitled to any such "solicitude," but even if applied, the agencies have not met their burden of showing that the "voluntary cessation" exception to mootness applies.

see also Brown, 822 F.3d at 1170-72 (declarations made under penalty of perjury that remove any credible threat of future prosecution may moot a case).

"In this governmental context, 'most cases that deny mootness rely on *clear showings* of reluctant submission [by governmental actors] and a desire to return to the old ways.'" *Rio Grande Silvery Minnow*, 601 F.3d at 1117 (citation omitted) (emphasis and brackets in original). Thus, the voluntary-cessation exception still applies where there is evidence indicating that the government "'intends to reenact the prior version of the disputed [legislative rule].'" *Id.* at 1117 (quoting *Camfield v. City of Okla. City,* 248 F.3d 1214, 1223-24 (10th Cir. 2001)); *see also The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1175 (10th Cir. 2011) (Gorsuch, J., concurring). This is especially true when "the [agency] has openly expressed its intent to reenact the challenged law." *Rio Grande Silvery Minnow*, 601 F.3d at 1117 (quoting *Camfield*, 248 F.3d at 1223-24).

The agencies have openly announced to this Court, to these Petitioners, and to the industry as a whole, that they intend to proceed with imposing an RFID mandate. They have pointed to the President's Executive Orders as the current roadblock. Their tactic appears at this point to be to do the bare minimum to convince the Court to block the Petitioners from obtaining any relief here so that they can regroup and find yet another "path forward." Petitioners' do not believe that this approach reflects a "genuine correction," but should instead be seen for the sham that it is. They have thus failed to carry their burden of showing that "there is no reasonable expectation that the alleged violation will recur," or that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Rio Grande Silvery Minnow*, 601 F.3d at 1115.

The facts here are clear and support a finding that the voluntary-cessation exception to mootness should apply. For example, the 2019 Factsheet was published on the agencies' website as a blatant attempt to modify a final "legislative rule" in violation of the requirements of the APA

(such as following the required notice-and-comment rulemaking) and failed to disclose the costs and benefits as required by the RFA. The 2019 RFID Plan, in other words, was a mere guidance document being used to nullify an existing legislative rule (the 2013 Final Rule). The purpose of such guidance was to revoke all of the protections provided for in the Final Rule. This approach clearly violated the APA.

Legislative rules are rules that have "the force of law, and create[] new law or imposes new rights or duties." *FDIC v. Schuchmann,* 235 F.3d 1217, 1222 (10th Cir. 2000) (quotation marks omitted). "Interpretative rules, by contrast, advise the public of the agency's construction of the statutes and rules which it administers." *Sorenson Commc'ns, Inc. v. F.C.C.*, 567 F.3d 1215, 1222–23 (10th Cir. 2009) (quotation marks omitted). A legislative rule may only be promulgated after following the APA's notice-and-comment procedures. *Id.*; *see also United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1139 n.10 (10th Cir. 2010) (noting that it is a "hornbook maxim that substantive (or legislative) rules stake out new territory and thus require notice and comment, while interpretive rules merely explain existing legislative rules and thus do not.").

The agencies are obligated "to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) (citation omitted). Thus, "[a]n agency must provide a rational explanation when it departs from an existing regulation or position." *Sorenson Commc'ns*, 567 F.3d at 1223. The agencies have never sought to reconcile the clear conflict between the properly adopted 2013 Final Rule with the 2019 RFID Plan. They have never explained the clear change in policy that is exposed when comparing the properly adopted 2013 Final Rule and their ongoing effort to force producers to use RFID eartags.

Only after this suit was filed did the agencies quietly remove the 2019 Factsheet from their

website (again without any official public notice, even to the Petitioners here). The agencies at some unknown point then posted the generic "statement" announcing that removal, while also stating that they still intend to pursue the RFID policy described in that Factsheet. Similar to Administrator Shea's Declaration, that website statement never acknowledges that the 2019 Factsheet was issued in violation of the 2013 Final Rule, was issued in violation of the APA, failed to comport with their obligations under the CRA or RFA, or that it represented a substantive change in policy. That statement and Administrator Shea's Declaration show that the transition to RFID, contrary to the 2013 Final Rule, remains the agencies' policy. The agencies' assertion that the Factsheet was removed because of Executive Orders 13891 and 13892 might be true, but not because they recognized on their own that the Factsheet violated the Executive Orders. Rather, Petitioners' lawsuit demonstrated that the Factsheet constituted precisely the kind of illegal guidance that those Orders soon thereafter derided. Such guidance documents were already forbidden from binding anyone's conduct outside the government before the President issued his Executive Orders. The 2019 RFID Plan, in other words, was designed to be a legislative rule masquerading as mere "guidance" and imposed without complying with the APA.

Finally, the agencies' removal of the 2019 RFID Plan from their website was not undertaken pursuant to a formal APA process. It just disappeared, with the "statement" eventually being posted. That approach itself lacks any indicia of either transparency or permanence, instead showing the fluidity of the Agencies' policy and approach, and the ease with which they can act to impose literally billions of dollars of additional costs and operational changes on the livestock industry, all with just a few clicks on a keyboard.

The Court in *Rio Grande Silvery Minnow* recognized that "in the governmental context" it is wrong to moot a case when there is a "clear showing" of reluctance in withdrawing the offending act "and a desire to return to the old ways." 601 F.3d at 1117. The best that can be said for the

current state of affairs is that the agencies have informally and reluctantly temporarily removed the 2019 RFID Factsheet from their website. More important, however, is the fact that clearly intend to "return to their old ways." There is simply no other way to interpret or understand their vociferous defense of RFID requirements in their Brief and Declaration, and why they insist on claiming that it was such a good idea in the first place. They have made those admissions while ignoring entirely the impact that their approach has had and will continue to have on the substantive rights of the Petitioners, and the uncertainty that they have interjected into the livestock industry. Their approach ignores the requirements, protections and stability inherent in the 2013 Final Rule.

The foregoing facts, taken together with the agencies' efforts to downplay the import of the claims, their misstatements regarding the framework of this lawsuit, and their effort to deflect the Court's attention away from their wrongful acts by holding up their bright and shiny claim that "RFID is a really, really good thing" should give this Court great pause when considering what they are asking for—to throw the Petitions out of the courtroom before any facts can be developed. Everything about this case counsels in favor of allowing the parties to proceed to the next phase of this litigation (the lodging of the administrative record and discovery on the FACA claim).

There will be plenty of other opportunities for the agencies to make their case as to why a declaratory judgment or injunction should not issue. Their own conduct shows that their arguments at this time, however, are premature. Their motion to dismiss should be denied.

II. THIS CASE IS RIPE FOR REVIEW BY THIS COURT

The agencies' ripeness argument is simply another version of their claim that this matter is moot. Such an argument fails for the same reasons. Petitioners are not challenging future actions; they have challenged agencies' prior illegal actions related to adoption of the Factsheet. They seek a declaratory judgment from this Court that the agencies have acted unlawfully in relation thereto

(including in violating FACA as discussed below). They also seek an injunction requiring them to comply with the APA and the 2013 Final Rule. They seek to enjoin the agencies from continuing to create instability and uncertainty in the livestock industry in relation to animal identification.

> In order for a claim to be justiciable under Article III, it must present a live controversy, ripe for determination, advanced in a 'clean-cut and concrete form.' Our ripeness inquiry 'focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention.' In short, '[r]ipeness doctrine addresses a *timing* question: *when* in time is it appropriate for a court to take up the asserted claim.'

Kansas Judicial Review v. Stout, 519 F.3d 1107, 1116–17 (10th Cir. 2008), *certified question answered*, 287 Kan. 450, 196 P.3d 1162 (2008), *opinion after certified question answered*, 562 F.3d 1240 (10th Cir. 2009) (internal citations and parentheticals omitted). The Courts apply a two-factor test: (1) the fitness of the issue for judicial resolution; and (2) the hardship to the parties of withholding judicial consideration. *Id*. The arguable vagueness of a particular statute may also militate in favor of finding a controversy to be ripe for review. *Id*.

As discussed above, the agencies' "statement" about removing the Factsheet from the website is less than a model of clarity, especially when one recognizes that it was intended to extol the virtues of RFID as much as to explain why the Factsheet disappeared. The following are additional examples of problems with the "statement," all of which confirm that this matter remains ripe for review in order to fully address Petitioners' claims and allegations:

- It contains no official markings to identify who issued it, when or why and was not designed to successfully broadcast far and wide that the RFID mandate had been withdrawn, instead creating confusion as to what the identification requirements are now and what they will be in the future.
- It misstates the types of identification allowed by the 2013 Final Rule (leaving out any reference to group identification numbers and backtags). It implies that states and tribes may have the authority to impose RFID-only requirements.
- It describes several agency "goals" and "aims" that are not included within and are contrary to the 2013 Final Rule.

- It is silent on the need for "premises identification numbers."
- It makes no mention whatsoever about metal eartags, whether they can still be manufactured, how they will be distributed, for how long, and at what cost.
- The Factsheet was not strictly directed to livestock producers, having a much broader reach by prohibiting manufacturers from producing metal eartags and barring veterinarians from applying them after January 1, 2021. The statement is silent on these collateral issues.
- It undercuts and contradicts the 2013 Final Rule in several important respects. For example, the agencies reported in 2013 that *"[r]equiring there to be individual identification on each animal that moved through the preharvest production chain would not improve the traceability of those animals*. Thus, group/lot identification is a justified option in those situations, regardless of the size of the group." 78 Fed. Reg. at 2055. The agencies' "statement" says the opposite
- The uncertainty created by the agencies impacts livestock producers' ability to engage in long-term budgeting or planning. The statement—being almost entirely focused on pushing RFID—utterly failed to resolve that ongoing problem. Mr. Shea's Declaration exacerbates this problem as it is clear that agencies have "doubled down" on forcing RFID eartags on the industry, apparently "for its own good."

In short, and in their haste to try to avoid having this Court review their actions, the agencies have actually created even more uncertainty in the livestock industry. That uncertainty and the associated injury can only be addressed by entry of a declaratory judgment and injunction as requested by Petitioners. Such judicial action will ensure that the agencies comply with the 2013 Final Rule, as well as the APA, the CRA, the RFA and the FACA.

III. PETITIONERS' FACA CLAIM SHOULD BE ALLOWED TO PROCEED

The agencies claim that the Petitioners' FACA claim is both "moot" and subject to dismissal pursuant to Fed.R.Civ.P. 12(b)(6). Petitioners' FACA claim is set forth in Paragraphs 190-213 and incorporates all the factual information set forth in the previous 189 paragraphs. Petitioners have included more than sufficient information and factual allegations to proceed with this claim; it is neither mooted by the agencies' removal of the Factsheet from their website, nor subject to being summarily dismissed without allowing Petitioners to obtain the administrative record and conduct discovery.

We have discussed in great detail above why the foundation for their claim of mootness is

simply insupportable, in large part because they have not changed their errant ways. That analysis applies equally with regard to Petitioners' FACA claim and so will not be repeated here. We will instead focus on the agencies' claim that Petitioners have failed to state a claim under FACA upon which relief can be granted.

Enacted in 1972 to combat secrecy, wastefulness, and unbalanced representation, the Federal Advisory Committee Act (5 U.S.C. App. 2 (1972)) imposes formal requirements on how an agency must involve the public in the rule making process. ECF 1 at 41. Section 2 of FACA provides that "standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees[,]" and "the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees[.]" 5 U.S.C. App. 2 §§ (2)(b)(4) and (5). *Id.* According to the definitions section of FACA, "[t]he term 'advisory committee' means any committee, board, commission, council, conference, task force, or other similar group, or any subcommittee or other subgroup thereof which is … (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. … " 5 U.S.C. App. 2 §3 (2)(C). *Id.* FACA requires any agency that establishes an advisory committee to file a formal charter; publish notice of all meetings in the Federal Register; ensure that all meetings are open to the public; keep minutes of each meeting; make publicly available records, drafts, studies, and other documents; designate a Federal officer to attend each meeting; and ensure that membership of the committee is balanced and represents a cross-section of groups interested in the subject. *Id.*

Petitioners have alleged that the agencies violated FACA by establishing several "advisory committees." *Id.* at 41-42. The agencies formed these Advisory Committees to assist them in formulating and developing the 2019 Factsheet. *Id.* The agencies held a number of meetings and

conference calls with the members of the RFID Advisory Committees. *Id*. These Advisory Committees provided the agencies with written materials that they prepared, as well as advice and recommendations with regard to the Factsheet. *Id.* They acted upon the written materials, advice and recommendations and adopted the Factsheet. *Id*. The agencies did not notify Petitioners or other interested parties that the purpose of the meetings, calls and written materials was to help the agencies develop the Factsheet in violation of the 2013 Final Rule. *Id*. They did not involve other groups or interested parties, including Petitioners, who are opposed to their efforts to mandate RFID eartags. *Id*. They did not properly and legally advise the Petitioners or other interested parties that such meetings or conference calls with these Advisory Committees were occurring. *Id*. They failed and refused to include any groups or individuals on these RFID Advisory Committees who did not support the RFID mandate. In relying upon these groups for the purpose of obtaining advice or recommendations the agencies were required to comply with FACA. *Id*. at 43. They failed to do so. *Id*. They instead developed the Factsheet in meetings and calls with one or more small, focused, insular group or groups who represented only one limited interest and perspective. *Id*. Those meetings and calls were conducted in violation of the requirements of the FACA. *Id*. The agencies conducted business in this manner for the sole purpose of precluding any other viewpoint, including that of the Petitioners, from being heard. *Id*.

The agencies have based their motion to dismiss solely on the "Unfunded Mandates Reform Act, codified at 2 U.S.C. § 1534," which allegedly provides that "FACA does not apply where 'meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments …' and where 'such meetings are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.' 2 U.S.C. § 1534(b)." ECF 11 at 18. The agencies then claim

that Petitioners "do not identify the membership of the 'advisory committee(s)' of which they complain, nor do they allege that the meetings were held for any purposes other than those identified in 2 U.S.C. § 1534(b)(2)." *Id*. Both of these claims are untrue.

The Petition refutes the agencies' arguments. Nowhere in that document does it say that the subject advisory committee meetings were held "exclusively" between federal officials and elected officials of state, local and tribal governments (or their designated employees).[9] In fact, while the allegations use language often found in a complaint ("upon information and belief") having not yet received the administrative record or conducted discovery, Petitioners are certain that a substantial percentage of the members of these committees did not work for any federal, state, or tribal government. Such individuals instead hailed from the meat packing and eartag manufacturing industries—which was one of the main problems with these advisory committees in the first place. Importantly, the agencies themselves have admitted that these unlawful advisory committees were made up of participants outside of governmental employment, and that the culmination of their work was the Factsheet. According to APHIS Administrator Shea: "The transition to RFID has generated wide support *based on multiple interactions with* State *and industry groups* over the last several years. This was announced through a Factsheet posted on the APHIS website." ECF 11-1 at 3. (Emphasis added). It could nor be more definitive than that.

It is also significant that the Petition focuses upon the fact that the Factsheet (which was the culmination of the advisory committee meetings) does not *merely "relat[e] to the management or implementation of Federal programs established pursuant to public law*" (as required by the

[9] The Respondents are perhaps relying upon the names of the "working groups" referenced in Paragraph 195 of the Petition to assume that only government actors were involved. That assumption is wrong. The membership of and participation in those "working groups" is not limited to public employees, and nowhere in the Petition does it say that they are. Petitioners have instead alleged that these committees and others like them were formed in violation of FACA, a fact that must be taken as true at this stage of the proceedings.

Unfunded Mandates Reform Act). The Factsheet actually reflects the development of the policy itself, not merely "management or implementation" of an existing policy. It was actually adopted *in violation* of the 2013 Final Rule, not for the purpose of "implementing" it.

The livestock producers bear the brunt and expense of any RFID mandate. They suffer the economic, budgetary, and operational consequences associated with RFID requirements. They are the targets of the Factsheet. They have suffered an "injury in fact" by the agencies' failure to follow specific procedural requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 7 (1992) ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.") . They have every right to find out what the agencies did, why they did it, when they did it, who was involved, and who stands to benefit. They enjoy these rights regardless of whether the agencies ultimately withdrew the Factsheet after it was challenged as being unlawful. This sordid history in fact underscores the reason as to why it is imperative that they proceed with discovery—so that they don't wake up in just a few short months with yet another heart-stopping unlawful federal mandate requiring them to fundamentally alter how they handle their livestock and manage their operations or be denied access to the interstate markets. The FACA claim is designed to uncover the genesis and background of the Factsheet. It is imperative that Petitioners be allowed to proceed with prosecuting this claim and conducting discovery to find out what in the heck happened here.

Petitioners' FACA claim serves another purpose as well—to prevent the agencies from relying upon the "fruit of the poisonous tree." While recognizing that this concept is most often applied in the criminal context to ensure the protection of our 4th Amendment rights, it applies equally here, especially when the agencies have repeated that they intend to force livestock producers to use RFID eartags. In short, the agencies should be enjoined from using the materials

generated by these advisory committees as it moves forward in its quest to impose RFID mandates. According to the Court in *Alabama-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106–07 (11th Cir. 1994), "allow[ing] the government to use the product of a tainted procedure would circumvent the very policy that serves as the foundation of the Act." *Id*. (finding "injunctive relief as the only vehicle that carries the sufficient remedial effect to ensure future compliance with FACA's clear requirements. Anything less would be tantamount to nothing.").

Petitioners must be allowed to proceed with discovery, and the agencies must be enjoined from using or relying upon any of the work product, reports, and materials generated by the unlawful advisory committees. The agencies' motion to dismiss the FACA claim should be denied.

CONCLUSION

The agencies targeted the Petitioners with an RFID mandate that has created substantial uncertainty in the industry and that has had the potential of wreaking havoc on their livestock operations and finances. The agencies chose to impose that policy by posting a two-page "Factsheet" on their website without regard to the impact that it would have on millions of livestock producers (and related industries) around the Country. Having now been "called on the carpet," the agencies are seeking to block the Petitioners from moving forward in this case and prevent them from doing discovery or obtaining the underlying administrative record (e.g. the materials and documents that formed the basis for that "Factsheet"). The agencies are seeking to deprive this Article III Court of reviewing their regulatory overreach and entering an order declaring that they violated the law. They are also seeking to prevent entry of an injunction prohibiting them from doing it again. This Court should decline their invitation and allow this matter to proceed to expose what happened here.

Dated this 5th day of February, 2020

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on February 5, 2020, a copy of this Response Brief was filed with the Court's ECF system, which will send a notice of electronic filing to counsel of record.

/s/ *Harriet M. Hageman*

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