IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHOW, INC., et al.	§	
	§	
VS.	§	CIVIL ACTION NO. 4:12-CV-429-Y
	§	
UNITED STATES DEPARTMENT OF AGRICULTURE	§	

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

Before the Court are the cross-motions for summary judgment filed by defendant United States Department of Agriculture ("the Department") (doc. 67) and plaintiffs SHOW, Inc. ("SHOW"); Contender Farms, L.L.P. ("Contender Farms"); and Mike McGartland (doc. 56). After review, the Court will grant the Department's motion and deny Plaintiffs' motion.

I. Background

A. The Practice of Soring

As a backdrop to the legal issues in this case, a brief mention of the Tennessee-walking-horse industry is appropriate. A distinctive characteristic of the Tennessee walking horse is its gait, which is marked by a high step of the horse's front legs. Horses with superior gaits win competitions and, therefore, are highly valuable. Notable gaits can be achieved by effective breeding, training, and practice.

Superior gaits may also be achieved, unfortunately, by a process known as "soring." See 15 U.S.C.A. § 1821(3) (West 2013).

Soring occurs when a horse's front legs are deliberately injured to artificially enhance the horse's gait. *See id.* Usually this is done by cutting or burning the horse's legs, placing a chemical on the horse's skin to irritate or blister the horse's legs, or by inserting a nail or tack into the horse's foot. *See id.* § 1821(3)(A)-(D). A sored horse will quickly lift its legs high after every step to alleviate the pain caused by contact with the ground. *See id.*

B. The Horse Protection Act and Accompanying Regulations

To combat this practice, in 1970 Congress passed the Horse Protection Act ("HPA"), 15 U.S.C.A. §§ 1821-1831 (West 2013). In enacting the statute, Congress found that "the soring of horses is cruel and inhumane" and that sored horses "compete unfairly with horses which are not sore." *Id.* § 1822(1)-(2). Congress further found that "regulation under [the HPA] by the Secretary [of the Department] [was] appropriate to prevent and eliminate [the] burdens upon commerce" caused by moving, showing, exhibiting, and selling sore horses "and to effectively regulate commerce." *Id.* § 1822(3)-(5). In accordance with this latter finding, § 1828 of the HPA authorizes the Secretary "to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter." *Id.* § 1828.

Section 1824 identifies the conduct that is prohibited under the HPA. *Id.* § 1824(1)-(11). In relevant part, § 1824 prohibits

"the showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." *Id.* § 1824(2) In addition, § 1824 prohibits "[t]he failure by the management of any horse show or horse exhibition, which does **not** appoint and retain a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse which is sore." *Id.* § 1824(3) (emphasis added). By contrast, where the management of a horse show or exhibition "**has** appointed and retained a person in accordance with section 1823(c)," the management's failure to disqualify a sore horse is grounds for liability only "after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore." *Id.* § 1824(5) (emphasis added).

Section 1823(c), in turn, directs "[t]he Secretary [to] prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter."[1] *Id.* § 1823(c). Acting pursuant to this directive, the Department issued regulations in 1979 that, among other things, impose requirements for organizations seeking certification as horse industry organizations ("HIOs"). These

[1] Section 1823(c) was added by amendment in 1976. *See* Horse Protection Act Amendments of 1976, Pub. L. No. 94-360, § 5, 90 Stat. 915 (1976).

regulations contemplate that certified HIOs will carry out the licensing of horse inspectors called designated qualified persons ("DQPs"), who, once licensed, may be appointed by horse-show management to conduct inspections and diagnose soring at horse shows and other events. Among these regulations is 9 C.F.R. § 11.7, which regulates the basic qualifications of DQP applicants, the certification requirements for HIOs' DQP programs, and the issuance of licenses to DQPs, *inter alia*. *See* 9 C.F.R. § 11.7 (West 2013).

Returning briefly to the text of the HPA, the Court notes that § 1825 of the HPA sets out the penalties for violations of § 1824. *See* 15 U.S.C.A. § 1825(a)-(e). Subsection (a) provides for the imposition of certain criminal penalties against "any person who knowingly violates section 1824." *Id.* § 1825(a). Subsection (b) provides that "[a]ny person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation." *Id.* § 1825(b)(1). That subsection indicates, however, that "[n]o penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation." *Id.* Moreover, § 1825(b)(2) guarantees that "[a]ny person against whom a civil penalty is assessed under paragraph (1) of this subsection may obtain review in [a] court of appeals of the United States." *Id.* § 1825(b)(2).

Subsection 1825(c) further provides that "[i]n addition to any fine, imprisonment, or civil penalty authorized under this section," a person who is found to have violated "any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary . . . from showing or exhibiting any horse . . . for a period of not less than one year for the first violation and not less than five years for any subsequent violation." *Id.* § 1825(c). The Secretary may only enter an order disqualifying a person, however, "after notice and an opportunity for a hearing before the Secretary."[2] *Id.*

C. Development of the DQP System

Through the creation of HIOs and DQPs, a practice developed whereby horse-show management would hire an HIO to provide DQPs at its shows and, in turn, require its entrants to submit to the HIO's rulebook as a condition of participating in the show. Under a typical arrangement, if a DQP identified an entrant's horse as sore, management would disqualify the horse to avoid liability under the HPA, the DQP would issue a citation to the entrant, and the HIO would assess a penalty against the entrant according to the penalty matrix set out in the HIO's rulebook.[3]

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[2] In addition, § 1827 instructs "[t]he Secretary, in carrying out the provisions of [the HPA], [to] utilize, to the maximum extent practicable, the existing personnel and facilities of the Department." 15 U.S.C.A. § 1827(a) (West 2013).

[3] Each HIO has its own Department-approved rulebook.

In 1999, the Animal and Plant Health Inspection Service ("APHIS"), the agency within the USDA charged with administering the HPA, entered into an operating plan with eight HIOs by which the HIOs undertook "initial enforcement responsibility of the HPA . . . through the DQP program." (Pl.'s App. Ex. 5, at 104.) APHIS and the HIOs then continued to operate under various agreed horse-protection plans for about a decade. (*Id.*) In 2010, APHIS developed a protocol suggesting that the HIOs agree to incorporate mandatory minimum suspensions as penalties in their rulebooks. *See* 76 Fed. Reg. 30,864, 30,865 (May. 27, 2011). A number of the HIOs declined, however, and no operating plan was agreed upon. *See id.*

In September 2010, the Department's Office of Inspector General ("OIG") released an audit report, which made a number of findings concerning the effectiveness of the DQP system at preventing soring. (Admin. R. 3424-3452.) Among other things, the OIG report found that "APHIS need[ed] to improve its program for inspecting show horses for abuse and penalizing violators." (*Id.* at 3437.) This finding was accompanied by a number of subsidiary findings, including that (1) DQPs were not always inspecting horses in accordance with HPA and its regulations, (2) DQPs were not always issuing violations to the responsible individuals but instead often avoided penalizing exhibitors, and (3) APHIS needed to strengthen its direct control over the inspection process. (*Id.* at 3439-3441.)

In this regard, the OIG report further stated:

> Because these DQPs are primarily hired from show industry participants, they have an inherent conflict of interest--they are reluctant to issue violations since excluding horses from the show inconveniences their employers, and makes it less likely they will be hired for other shows. They are also subject to a conflict of interest because, while they are acting as a DQP at one show, they may be an exhibitor at another show, and the exhibitor of the horse they are examining might later act as the DQP.

(*Id.* at 3437.) In addition, the OIG report made a number of recommendations based on its findings, namely, that APHIS (1) abolish the current DQP system, (2) seek additional funding from Congress to help oversee the HPA, and (3) develop and implement protocols to more consistently negotiate penalties with individuals who are found to have violated the HPA. (*Id.* at 3444-3445, 3447, 3450.)

D. The New Rule

In May 2011, the Department solicited public comments for a proposed new rule that would make minimum suspension penalties uniform and mandatory for HIO certification. *See* 76 Fed. Reg. at 30,864-30,867. On June 7, 2012, the Department adopted this proposed rule, and it became effective on July 9, 2012 ("the new rule"). *See* 77 Fed. Reg. 33,607, 33,607-33,608 (June 7, 2012). The new rule, which is located at 9 C.F.R. § 11.25, provides in relevant part that "[e]ach HIO that licenses DQPs in accordance with § 11.7 must include in its rulebook, and enforce, penalties for the violations listed in this section that equal or exceed the

penalties listed in paragraph (c) of this section." 9 C.F.R. § 11.25(a) (West 2013). Paragraph (c)'s minimum penalties, in turn, include suspensions of various lengths depending on the type of violation. *See id.* § 11.25(c). For example, a first-time offender found to have sored a horse "in both its forelimbs and hindlimbs" must be suspended for no less than one year, and a first-time offender found to have sored a horse in only "one of its forelimbs or hindlimbs" must be suspended for no less than sixty days. *Id.* § 11.25(c)(1),(2).

The new rule further provides that an "HIO must provide a process in its rulebook for alleged violators to appeal penalties" and that "[t]he process must be approved by the Department." *Id.* § 11.25(e). Additionally, "[f]or all appeals, the appeal must be granted and the case heard and decided by the HIO or the violator must begin serving the penalty within 60 days of the date of the violation." *Id.* The HIO is required to "submit to the Department all decisions on penalty appeals within 30 days of the completion of the appeal" and, "[w]hen a penalty is overturned on appeal, the HIO must also submit evidence composing the record of the HIO's decision on the appeal." *Id.*

E. The Instant Lawsuit

Opponents of the new rule include SHOW, a certified HIO since 2009; Contender Farms, an owner and exhibitor of show horses; and Mike McGartland, a horse owner and exhibitor, member of Contender

Farms, and volunteer prosecutor for SHOW.[4] Plaintiffs have filed the instant suit against the Department challenging the new rule under the HPA, the Administrative Procedure Act ("APA"), and the United States Constitution.[5]

The parties have stipulated to a somewhat customized procedure for resolving the issues in this case (doc. 53), and they now move for what they term "summary judgment." But given that the parties agree that this order will resolve the entire case and that there are no issues for trial, the procedural posture of this case is not the precise one contemplated by Federal Rule of Civil Procedure 56. Instead, the parties' agreed summary-judgment procedure is, in effect, a bench trial on the written briefs.[6] In making its ruling on the issues presented in this case, the Court will honor the evidentiary stipulations of the parties (doc. 55) and limit its review of the new rule to the administrative record (doc. 35).[7]

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[4] SHOW is not in compliance with the new rule and is in the process of decertification proceedings. (Pls.' App. Ex. 95, at 1323.)

[5] Prior to the new rule's effective date, Plaintiffs moved for a temporary restraining order to enjoin the new rule from taking effect (doc. 1). The Court denied the motion, but advanced the trial on the merits and set a consolidated bench trial and preliminary-injunction hearing (doc. 17). Shortly thereafter, the parties filed a stipulation to cancel the hearing and set a customized schedule to resolve the case on the papers (doc. 22, 23). The parties refined the procedure even further by a subsequent stipulation (docs. 53, 55).

[6] In addition to the parties' briefing, the Court has considered the amicus briefs of the Humane Society of the United States (doc. 79) and the American Horse Protection Association, Friends of Sound Horses, International Walking Horse Association, and National Walking Horse Association (doc. 77).

[7] The parties' briefing spans hundreds of pages. As a practical matter, then, the Court simply cannot address every argument raised in the briefing. The Court assures the parties, nonetheless, that the Court read and

II. Standing

The Department contends, initially, that Contender Farms and McGartland lack Article III standing because they have not identified any injury in fact caused by the new rule. "Article III of the United States Constitution grants jurisdiction to the federal courts only over claims that constitute 'cases' or 'controversies.'" *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (citing U.S. Const. art. III, § 2, cl. 1). A prerequisite of Article III standing is "an injury in fact which is a concrete and particularized invasion of a legally protected interest." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 190-91 (5th Cir. 2012) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted).[8]

Plaintiffs contend that Contender Farms and McGartland have standing because they have experienced a "loss of regulatory protection." (Pls.' Resp. & Reply Br. (doc. 76) 17.) Plaintiffs further contend that the new rule impermissibly affects the rights of Contender Farms and McGartland "to engage in their business of

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considered all of the arguments advanced.

[8] The second requirement of standing is that there "be a causal connection between the injury and the conduct complained of; the injury has to be fairly traceable to the challenged action of the defendant." *Nat'l Rifle Ass'n*, 700 F.3d at 191 (quoting *Lujan*, 504 U.S. at 560). The third requirement is that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Lujan*, 504 U.S. at 560).

owning and selling walking horses and entering those horses in shows, as well as the interests of improving the walking horse industry's reputation, protecting the value and quality of walking horses, and protecting horses in general." (*Id.* at 19.) Plaintiffs contend, moreover, that Contender Farms and McGartland "have a statutory right to participate in shows employing DQPs and providing 100% inspection rates to protect their interests as the HPA provides" and that the new rule impedes this right. (*Id.*)

At the outset, the Court observes that the new rule purports to regulate only HIOs--not owners and exhibitors of horses like Contender Farms and McGartland. And "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

Nevertheless, the new rule undoubtedly has meaningful implications for Contender Farms and McGartland. Each of these plaintiffs, for example, has a financial interest in showing horses that is affected by the new rule's prescribed minimum suspensions and the resulting changes in the industry. The Department contends that because participation in HIO-affiliated shows is voluntary, Contender Farms and McGartland can simply enter non-affiliated shows. But Plaintiffs have introduced evidence that this option would cause them financial harm because non-HIO-affiliated shows

lack prestige, proper horse-protection, and fair competition. (Pls.' App. Ex. A., at 35-36, 43-44.) This, in the Court's view, is a sufficient injury to confer standing.[9]

Contender Farms and McGartland, moreover, are challenging the appeals procedures offered by the new rule on the ground that those procedures fall short of the statutory due-process protections guaranteed under the HPA. Although the Department may dispute the merit of this claim, "a plaintiff need not prevail on the merits before he can establish his standing to sue." *Prison Legal News v. Livingston*, 683 F.3d 201, 212 (5th Cir. 2012); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." (citation omitted) (internal quotation marks omitted)). And while it is not certain that Contender Farms and McGartland will ever be accused of soring, it is certain that they will be required to

[9] Although the Department does not appear to be challenging the "causation" or "redressibility" prongs of the *Lujan* standing test, the Court nevertheless notes that "Plaintiffs' ability to show causation and redressibility hinges on the response of [HIOs] to the [Department's] enforcement of the [new rule]." *McClure v. Ashcroft*, 335 F.3d 404, 410 (5th Cir. 2003). In *Lujan*, "[t]he Supreme Court denied standing, in part, because the Secretary's regulations were not binding on the agencies; the environmental organizations could not show a likelihood the injury would be redressed; and the agencies might choose not to comply with the regulation." *Id.* (citing *Lujan*, 504 U.S. at 568-72). Here, by contrast, an order setting aside the new rule would redress Plaintiffs' alleged injuries, and, although HIOs are technically able to decline to comply with the new rule, they have little incentive to do so given that they risk decertification in that event. Thus, unlike *Lujan*, the regulations in this case are sufficiently likely to be enforced against Plaintiffs to support standing.

accept the risk of the new rule's prescribed suspensions and appeals procedures before they can enter any HIO-affiliated shows. Consequently, their current plans and budgets are immediately affected by the potential risks imposed by the new rule. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) ("[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act . . . must be permitted.").

In short, Contender Farms and McGartland, as active participants in the industry regulated by the new rule, have raised more than a "generalized grievance" and, in so doing, have rested on their "own legal rights and interests," as opposed to "the legal rights or interest of third parties." *Warth*, 422 U.S. at 499 (citations omitted).[10] The Court therefore concludes that those plaintiffs have standing to assert their claims in this case.

[10] The Department also contends that SHOW lacks standing to raise due-process challenges to the new rule. The Court is inclined to agree, given that the HPA rights allegedly violated by the new rule are those afforded to entrants, and not to HIOs (e.g., right to appeal to a federal appellate court). The Court need not decide this issue, however, because Contender Farms and McGartland have standing to raise the statutory due-process challenges and, thus, the Court will address the due-process issues regardless of whether SHOW has standing to raise them.

III. Analysis of the Merits

A. HPA

"Where Congress has delegated authority to an agency to make rules carrying the force of law and the agency's interpretation of its governing statute was promulgated in the exercise of that authority, [courts] apply the familiar two-step inquiry established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Pub. Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449, 455 (5th Cir. 2003) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Under step one, "[i]f Congress has directly spoken to the precise question at issue, the agency and the court must give effect to the unambiguously expressed intent of Congress." *Luminant Generation Co. v. U.S. E.P.A.*, No. 10–60934, 2013 WL 1195649, at *6 (5th Cir. Mar. 25, 2013) (slip opinion) (quoting *Chevron*, 467 U.S. at 842-43). Courts "use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue." *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 749 (5th Cir. 2011) (citation omitted).

"Step two of *Chevron* applies when the statute is either silent or ambiguous. Under these circumstances, the court determines whether the agency interpretation is a 'permissible construction of the statute.'" *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d

434, 441 (5th Cir. 2001) (quoting *Chevron*, 467 U.S. at 843). "If the agency's interpretation is reasonable, it will be upheld." *Luminant*, 2013 WL 1195649, at *6 (quoting *Smiley v. Citibank, N.A.*, 517 U.S. 735, 744–45 (1996)).[11]

1. *Chevron* Step One: Whether the HPA Directly Speaks to the Precise Question at Issue

The new rule, by its terms, applies to "HIO[s] that license[] DQPs in accordance with § 11.7." 9 C.F.R. § 11.25(a). The rule does not directly compel unwilling HIOs to act; it merely places additional requirements on HIOs wishing to become or remain certified as DQP-program providers under the HPA. *See id.* These requirements, as recited above, are that the HIOs enforce and include in their rulebooks the prescribed minimum suspension penalties and that they provide appeals processes that meet the Department's approval. *See id.* § 11.25(a),(c),(e).

The precise question at issue, then, is whether the HPA authorizes the Department to impose these requirements on HIOs as a condition of certification. And under step one of *Chevron*, the Court must decide if the text of the HPA directly speaks to, and

[11] The United States Supreme Court recently "consider[ed] whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*" and held that it is. *City of Arlington, Tex. v. FCC*, Nos. 11–1545, 11–1547, 2013 WL 2149789, at *3 (S. Ct. Mar. 25, 2013) (slip opinion). In so holding, the Supreme Court determined that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage" and that "the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *Id.* at *5.

answers, this question. *See Chevron*, 467 U.S. at 842-43. After consideration, the Court concludes that it does not.

To begin with, § 1822 sets out Congress's findings under the HPA, including its finding that regulation by the Department is appropriate to prevent and eliminate the burdens upon commerce caused by moving, showing, exhibiting, and selling sore horses. *See* 15 U.S.C.A. § 1822(3)-(5). Acting on this finding, § 1828 delegates to the Secretary of the Department the authority "to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter." *Id.* § 1828. Section 1824, the bedrock provision of the HPA, identifies the types of practices that constitute substantive violations of the HPA. *See id.* § 1824(1)-(11). Section 1825, in turn, sets out the criminal and civil penalties for violations of § 1824, as well as the procedural protections afforded to those facing potential liability to the United States. *Id.* § 1825(a)-(e). Continuing on, § 1823 deals specifically with horse shows and exhibitions. *See id.* § 1823(a)-(e). In particular, § 1823(c) requires the Department to "prescribe by regulation requirements for the appointment by the management of any horse show . . . of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses

for the purposes of enforcing [the HPA]."[12] *Id.* § 1823(c).

Absent from these provisions is a direct answer to the precise question at issue, namely, whether the Department may condition an HIO's certification on its willingness to enforce specified minimum penalties and provide a Department-approved appeals process. On the one hand, the text of the HPA does not directly **authorize** the Department's imposition of these conditions. The HPA's most specific grant of authority to the Department is found in § 1823(c), and it merely calls upon the Department to prescribe requirements for the appointment by management of horse inspectors. *See id.* § 1823(c). This grant would seem to carry with it the authority to regulate matters such as who may be appointed as a DQP, what those persons must do to be appointed, and how management can go about appointing them. It is less clear whether this grant includes the authority to require organizations wishing to enter the business of licensing DQPs to include specified minimum penalties and appeals processes in their rulebooks as a condition of certification.

But on the other hand, the text of the HPA does not directly **forbid** the new rule either. Section 1828 gives the Department

[12] Section 1823(a)-(b) expresses in prescriptive language what is impliedly communicated in § 1824(3)-(6). *See id.* §§ 1823(a)-(b), 1824(3)-(6). That is, § 1823(a)-(b) informs management of what it must do to avoid liability under the HPA, whereas § 1824(3)-(6) advises management that its failure to do what it is supposed to do under § 1823(a)-(b) amounts to a violation of the HPA. *See id.*

broad authority to issue such regulations as it deems necessary to carry out the provisions of the HPA. *See id.* § 1823(c). This grant gives teeth to Congress's finding in § 1822 that regulation by the Department is appropriate to prevent and eliminate the moving, showing, exhibiting, and selling of sore horses. *See id.* § 1822(3)-(5). Given this broad grant of regulatory authority, and considering that neither § 1823(c) nor any other provision of the HPA explicitly prohibits the types of requirements imposed by the new rule, the Court cannot conclude that Congress has directly answered--in the negative--the precise question of whether the HPA authorizes the Department to impose the certification requirements set out in the new rule. *See City of Arlington*, 2013 WL 2149789, at *3 (concluding that *Chevron* deference should be given to the Federal Communications Commission's interpretation of the scope of its authority under § 201(b) of the Communications Act of 1934, which authorizes the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out its provisions").

Plaintiffs contend that the HPA veritably does speak to the precise question at issue and that § 1823(c), not § 1828, is the relevant source of statutory authority.[13] More specifically,

[13] Even more fundamentally, Plaintiffs differ in their characterization of the precise question at issue. Plaintiffs contend that "Congress, in HPA § 1825, has spoken directly to the precise questions concerning how those engaging in prohibited conduct should be punished, who should decide whether punishment is warranted, and what the penalty should be." (Pls.' Summ. J. Br. 22.) But

Plaintiffs posit that any regulation concerning the inspection and disqualification of show horses must come from § 1823(c) and that the new rule clearly falls outside the scope of authority granted to the Department under that subsection. According to Plaintiffs, to construe § 1828 broadly enough to authorize the new rule would render the specific grant of authority in § 1823(c) mere surplusage.

The Court disagrees. Section 1828 is the provision under which Congress has granted to the Department the general authority to prescribe regulations necessary to carry out the provisions of the HPA. *See id.* § 1828. Section 1823(c), by contrast, is a specific directive that Congress has given to the Department (i.e., to prescribe regulations for the appointment of inspectors), accompanied by the necessary authorization to carry out that directive. *See id.* § 1823(c); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112-15 (2012) (observing that mandatory words impose a duty while permissive words grant discretion). That the new rule arguably falls outside the scope of § 1823(c)'s directive does not mean that the new rule is not authorized elsewhere in the act.[14] Therefore, construing §

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these questions are by no means precise, and they fail to provide a helpful framework for analyzing whether the Department exceeded its rulemaking authority under the HPA in issuing the new rule.

[14] In this regard, the Court rejects Plaintiffs' contention that application of the negative-implication canon to § 1823(c) compels the conclusion that the new rule is outside the scope of authority granted to the Department

1828 as authorizing the new rule does not render § 1823(c) superfluous. *See* Scalia & Garner, *supra*, at 174-79 (explaining the surplusage canon).[15]

Plaintiffs also contend that the new rule fails to carry out the provisions of the HPA and therefore does not receive authorization from § 1828. *See* 15 U.S.C.A. § 1828 (authorizing the Secretary to issue regulations that are "necessary to carry out the provisions" of the HPA). More precisely, Plaintiffs assert that the new rule creates a regulatory enforcement scheme that differs

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under the HPA. First of all, Plaintiffs' contention operates on the premise that § 1823(c) is the relevant statutory provision here, to the exclusion of § 1828, a premise that this Court rejects. Secondly, as will be explained below in more detail, the Court is of the view that the new rule is at least arguably within the scope of § 1823(c)'s directive to the Department, especially considering that the negative-implication canon "must be applied with great caution" and based "on context." Scalia & Garner, *supra*, at 107.

Moreover, in the event that Plaintiffs are contending that the negative-implication canon applies to § 1828 and that the new rule is excluded from the that subsection's grant of authority, the Court must once again disagree. The doctrine of *expressio unius* "properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of all that shares in the grant or prohibition involved." Scalia & Garner, *supra*, at 107. There is no "thing specified" in § 1828, which leads the Court to believe that the canon does not apply. Scalia & Garner, *supra*, at 107. But even assuming the canon applies, the *unum* expressed in § 1828 is broad enough to encompass the new rule.

[15] Plaintiffs point to § 1824(7) and (11) and contend that "[t]hose are the areas where the Secretary can issue regulations under the authority of § 1828." (Pls.' Summ. J. Br. 28.) Subsection 1824(7) makes it unlawful to show a horse that "is wearing or bearing any equipment, device, paraphernalia, or substance [that] the Secretary by regulation under Section 1828 of this title prohibits." 15 U.S.C.A. § 1824(7). Subsection 1824(11) makes it unlawful to fail or refuse "to provide the Secretary with adequate space or facilities, as the Secretary may by regulation under section 1828 of this title prescribe." *Id.* § 1824(11). Nothing in these provisions, however, suggests that the Department's rulemaking authority under § 1828 is limited to these two contexts. Indeed, such a suggestion would conflict with the plain language of § 1828, which confers upon the Secretary the authority "to issue such rules and regulations **as he deems necessary** to carry out the provisions of this chapter." *Id.* § 1828 (emphasis added).

from the one required by § 1825.[16]

Once again, the Court disagrees. Section 1825 sets out the criminal and civil penalties that may be imposed **by the United States** against a person who has violated § 1824. *See* 15 U.S.C.A. § 1825(a)-(c) (addressing its provisions to any person "liable to the United States"). That section also guarantees that the Department will provide certain procedural protections to the accused violator before imposing those penalties. *See id.* To be sure, § 1828 does not authorize the Department to create penalties or procedural protections that conflict with § 1825's scheme. *See id.* § 1828. For that reason, the new rule would be problematic if it purported to impose the prescribed minimum suspension penalties on entrants directly, or if it subjected entrants to criminal or civil liability to the United States without offering the protections of § 1825.

But the new rule does not do this. The new rule applies only to HIOs that wish to license DQPs in accordance with 9 C.F.R. § 11.7. *See id.* § 11.25(a). It requires, as a prerequisite to

[16] Plaintiffs point out that "[w]hile § 1828 was enacted in 1970, Congress did not authorize 'appointment of inspectors' until the 1976 amendment." (Pls.' Summ. J. Br. 27.) Because of this, argue Plaintiffs, "[n]o claim can be made that when Congress adopted § 1828, the provision meant that the [Department] was authorized to regulate DQPs and HIOs, because there were no DQPs provided for in the 1970 Act." (*Id.*) But "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citation omitted). The Department's "rulemaking authority [under § 1828] extends to the subsequently added portions of the Act." *City of Arlington*, 2013 WL 2149789, at *3 (citing *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-78 (1999)).

certification, that those HIOs include certain minimum penalties in their rulebooks, enforce those penalties, and provide an appeals process upon imposition of those penalties. *See id.* § 11.25(a)-(c),(e). But ultimately, it is the HIOs that decide whether to include the prescribed minimum penalties in their rulebooks and to provide Department-approved appeals processes.[17] *See id.*

Consequently, in the wake of the new rule, the authority for enforcing a suspension against a horse-show entrant is his contract with the HIO (just as it was prior to the new rule). That is, the entrant owes any suspension or other rulebook penalty he receives to the HIO--not the United States--and even then under the terms he agreed to when he chose to enter his horse in the show. Such an entrant will not face liability to the United States under § 1824 without first being afforded the protections of § 1825. *See* 15 U.S.C.A. § 1825(a)-(e). Thus, the new rule does not create a method of regulatory enforcement that conflicts with § 1825.

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[17] Plaintiffs assert that HIOs do not have a meaningful choice here because they risk being either decertified or denied certification if they reject the new rule's conditions of certification. But this does not make the HIOs' conduct any less private. *See NCAA v. Tarkanian*, 488 U.S. 179, 198-99 (1988) (determining, albeit in a different context, that just because the subject entity's "options were unpalatable [did] not mean that they were nonexistent"). Certification is the Department's to give, and it may place reasonable conditions on that certification. A certification program, by definition, involves a certifying entity's determination of who may be certified and what they need to do to obtain such certification. Plaintiffs have not shown how the Department's placing conditions on HIO certification so differs from the typical certification scenario that it transforms the HIOs' otherwise private conduct into government conduct.

2. *Chevron* Step Two: Permissible Construction

Because Congress has not spoken to the precise question at issue, the inquiry becomes whether the new rule reflects a "permissible construction" of the HPA. *Sierra Club*, 245 F.3d at 441. The Department's position is that both § 1823(c) and § 1828 authorize the new rule. First, the Department posits that its directive under § 1823(c) to prescribe requirements for the appointment of persons qualified to detect soring is broad enough to implicitly carry with it the authority to place certification requirements on HIOs such as those prescribed by the new rule. *See* 15 U.S.C. § 1823(c). Second, the Department contends that its authority under § 1828 "to issue such rules and regulations as [it] deems necessary to carry out the provisions of [the HPA]" is an alternative basis for promulgating the new rule. *Id.* § 1828.

After review, the Court concludes that the Department's interpretation of its rulemaking authority under the HPA, as manifested in the new rule, is a permissible construction of that statute. In § 1822 of the HPA, Congress states that "regulation under [the HPA] by the Secretary is appropriate to prevent and eliminate [the] burdens upon commerce" caused by moving, showing, exhibiting, and selling sore horses "and to effectively regulate commerce." *Id.* § 1822(3),(5). Acting on this finding, Congress, through § 1828, grants the Secretary the authority to "to issue such rules and regulations as he deems necessary to carry out the

provisions of this chapter." *Id.* § 1828.

It is not unreasonable for the Department to conclude that the new rule is a proper exercise of this broad authority to carry out the HPA's provisions. One provision that is carried out by the new rule, for example, is that of § 1824(2)(A), which prohibits the "showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore." *Id.* § 1824(2)(A). That provision is furthered (or at least is reasonably thought to be furthered) by the new rule's requirement that HIOs enforce minimum suspension penalties against entrants found to have engaged in soring. *See* 9 C.F.R. § 11.25(a)-(c).

Likewise, it is not unreasonable for the Department to conclude that the new rule fits within its authority under § 1823(c) to prescribe requirements for the appointment of persons qualified to inspect horses for soring. *See* 15 U.S.C.A. § 1823(c). After all, in 9 C.F.R. § 11.7, which Plaintiffs do not challenge, the Department acted according to its instruction under § 1823(c) by promulgating regulations concerning matters such as the basic qualifications of DQP applicants, the certification requirements for HIOs, and the issuance of licenses to DQPs. *See* 9 C.F.R. § 11.7. The new rule builds on these regulations by placing additional certification requirements on "[e]ach HIO that licenses DQPs in accordance with § 11.7." *Id.* § 11.25(a). Although these additional requirements are not unequivocally and explicitly

supported by § 1823(c)'s text, they do relate to the process of appointing DQPs and have a rational connection to § 1823(c)'s core directive. *See* 15 U.S.C.A. § 1823(c).

The new rule, in short, is a reasonable interpretation of the Department's rulemaking authority under the HPA and is therefore entitled to deference from this Court. *See City of Arlington*, 2013 WL 2149789, at *3; *see also Luminant*, 2013 WL 1195649, at *6 (noting that, where the statute is silent or ambiguous as to the precise question at issue, the agency's interpretation need only be reasonable to be upheld).

Plaintiffs argue that the Department's interpretation of the HPA is unreasonable because it deprives entrants and other potential violators of the statutory due process that § 1825 guarantees them.[18] But as noted above, an entrant is not entitled to the protections of § 1825 unless the Department is attempting to hold him criminally or civilly liable **to the United States** for violations of § 1824. *See* 15 U.S.C.A. § 1825(a)-(e). The new rule notwithstanding, an entrant will not face liability to the United States under § 1824 without first being afforded the protections of

[18] Among those protections are "notice and opportunity for a hearing" and "review in the court of appeals of the United States." 15 U.S.C.A. § 1825(b)(2),(3). In addition, "[t]he Secretary may require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding." *Id.* § 1825(d)(1). The Secretary may also "order testimony to be taken by deposition under oath in any proceeding or investigation pending before him." *Id.* § 1825(d)(3).

§ 1825. *See id.* Plaintiffs' statutory-due-process argument is therefore unavailing.

B. APA

"In addition to [the Court's] power to review agency interpretations under *Chevron*, [the Court] may review the reasonableness of an agency's decision-making process under the Administrative Procedure Act (APA)."[19] *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001). Under the APA, the Court must "hold unlawful and set aside agency action, findings, and conclusions" that are "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C.A. § 706(2)(A)-(D).

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[19] It is not entirely clear what the relationship is between *Chevron* analysis and the APA. It has been said that *Chevron* is an APA case that merely failed to cite to the APA. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 241-42 (2001) (Scalia, J., dissenting) ("[T]here is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite."); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 24 (1996) ("Whatever may be the merits of [the *Chevron*] doctrine, the Court irresponsibly made no effort to explain how its decision could stand alongside § 706. Indeed, it made no mention of § 706 whatsoever."). But the Fifth Circuit has expressed the view that a court's authority to review agency action under the APA is "[i]n addition to [its] power to review agency interpretations under *Chevron*." *Sierra Club*, 245 F.3d at 444. In particular, the Fifth Circuit has explained, "'arbitrary and capricious review' under the APA differs from *Chevron* review in that the former focuses on the reasonableness of the agency's decision-making process rather than the reasonableness of its interpretation." *Id.* at 441 n.37 (citing *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999)). Therefore, because the Fifth Circuit appears to analyze *Chevron* challenges and APA claims under discrete frameworks, this Court will, too.

"Courts start from 'a presumption that the agency's decision is valid, and the plaintiff has the burden to overcome that presumption by showing that the decision was erroneous.'" *Amrollah v. Napolitano*, 710 F.3d 568, 571 (5th Cir. 2013) (quoting *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012)). "An agency's decision 'need not be ideal or even, perhaps, correct so long as not arbitrary or capricious and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record.'" *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (quoting *Am. Petroleum Inst. v. E.P.A.*, 661 F.2d 340, 349 (5th Cir. 1999)). "Review is 'highly deferential to the administrative agency whose final decision is being reviewed.'" *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 753 (5th Cir. 2011) (quoting *Tex. Clinical Labs*, 612 F.3d at 775). "The 'agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Texas v. U.S. E.P.A.*, 690 F.3d 670, 682 (5th Cir. 2012) (quoting *United States v. Garner*, 767 F.2d 104, 116–17 (5th Cir. 1985)).

Plaintiffs contend that the Department, in promulgating the new rule, failed to examine the relevant data and establish a rational connection between the facts and the new rule.[20] *See Texas*

[20] Plaintiffs also contend that the Department's economic analysis under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 604, does not support its determination that the new rule will not have a significant impact on small entities. *See* 5 U.S.C. §§ 603-604 (West 2013). The Court's inquiry here is

v. U.S. E.P.A., 690 F.3d 670, 677 (5th Cir. 2012) (noting that in applying the arbitrary-or-capricious standard, courts "look to whether the [agency] examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (citations omitted) (internal quotation marks omitted)). In particular, Plaintiffs complain that the new rule does not take into account the OIG report's findings concerning conflicts of interests, such as its finding that DQPs "are reluctant to issue violations since excluding horses from the show inconveniences their employers, and makes it less likely they will be hired for other shows." (Admin. R. 3437.)

But the APA does not require that the new rule offer a solution to every problem found to have existed in the industry. *See Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 92 (2d Cir. 2000) (noting that agencies "need not deal in one fell swoop" with all of the problems in the industry it is charged with regulating). The new rule must simply reflect that "the agency gave at least minimal consideration to the relevant facts as contained in the

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merely "whether [the Departent] has made a 'reasonable, good-faith effort' to carry out the mandate of the RFA." *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000) (quoting *Associated Fisheries, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997)). With this in mind, and after consideration of the Department's economic findings, the Court is satisfied that the Department, in promulgating the new rule, "reasonably complied with the requirements of the RFA" and sufficiently considered the potential burden of the new rule on small entities. *Id.*; 77 Fed. Reg. at 33,617.

record." *City of Arlington, Texas v. F.C.C.*, 668 F.3d 229, 261 (5th Cir. 2012) (citation omitted) (internal quotation marks omitted); *see also Delta Foundation, Inc. v. United States*, 303 F.3d 551, 567 (5th Cir. 2002) ("To pass the 'arbitrary and capricious' test, the agency must give at least minimal consideration to relevant facts contained in the record. An agency need not respond to every stray comment in the record, however, in order to pass the 'arbitrary and capricious' test.").

The OIG Report found that APHIS needed to improve its programs for inspecting horses and penalizing violators as well as strengthen its control over the inspection process. (Admin. R. 3437, 3439-3441.) The OIG report also made a number of recommendations based on its findings, including that APHIS develop and implement protocols to more consistently negotiate penalties with individuals who are found to have violated the HPA. (*Id.* at 3444-3445, 47, 50.) There is a "rational connection" between these findings and recommendations, the HPA's provisions, and the new rule. *Pension Ben. Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004).

As the Department points out, for example, the new rule's minimum-suspension requirement is rationally connected to the OIG report's recommendation "that the [Department] develop and implement protocols to more consistently negotiate penalties with individuals who are found to be in violation of the Horse

Protection Act." (Def.'s Summ. J. Br. 40.) The Department also aptly notes that the new rule "removes one way (low penalties) that [HIOs] can work to undermine the [HPA's] goal of eliminating soring." (*Id.* at 39.)

The new rule "need not be ideal or even, perhaps, correct." *Tex. Clinical Labs*, 612 F.3d at 775. That the new rule does not address all of the findings and recommendations in the OIG report is not problematic so long as the Department has not "entirely failed to consider an important aspect of the problem," and it has not. *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998) (citation omitted) (internal quotation marks omitted); *see also Deaf Smith Cnty. Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1214 (D.C. Cir. 1998) (observing that the National Appeals Division of the Department "was not compelled to follow the recommendations of the OIG Report"). For the reasons noted above, the Court is satisfied that the new rule "conform[s] to minimal standards of rationality" and therefore is "reasonable and must be upheld." *Texas Oil & Gas Ass'n*, 161 F.3d at 934 (citation omitted).[21]

[21] Plaintiffs re-urge their statutory-due-process argument through 5 U.S.C. § 554, which applies, with certain exceptions, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C.A. § 554(a) (West 2013). When it applies, § 554 requires an agency to provide notice of "(1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted," among other procedural protections. *Id.* § 554(b)(1)-(3), (c), (d). As noted above, however, an HIO's enforcement of the minium-suspension penalties prescribed by the new rule does

C. Constitution

Plaintiffs lastly contend that the new rule "contravenes the very structure of the Constitution," Articles I and III in particular. (Pls.' Summ. J. Br. 37.) Article I, Section 1 provides that "[a]ll legislative Powers herein granted shall be vested in a Congress," and Article I, Section 8 confers on Congress the power "[t]o constitute Tribunals inferior to the supreme court." U.S. Const. art. I, § 1 & § 8, cl. 9. Article III, Section 1 states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art III, § 1.

According to Plaintiffs, "[t]he new rule contravenes these constitutional provisions by attempting to sanction individuals with federally mandated penalties, in tribunals that are not congressionally created administrative courts or Article III courts, and whose decisions are not subject to review and final adjudication by administrative tribunals or Article III courts." (Pls.' Summ. J. Br. 38.) In the Court's view, this is an

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not present a situation in which "adjudication [is] required by [the HPA] to be determined on the record after opportunity for an agency hearing." *Id.* § 554(a). Rather, HPA § 1825's protections come into play only when an entrant is facing liability to the United States. *See* 15 U.S.C.A. § 1825(a)-(e). Therefore, Plaintiffs argument fails here for the same reasons noted above in connection with the Court's analysis at step two of the *Chevron* framework. *See* discussion *supra* Part III.A.2.

inaccurate characterization of the new rule. As noted above, the new rule does not directly impose any penalties on entrants. *See* 9 C.F.R. § 11.25. It requires HIOs, as a prerequisite to certification, to agree to enforce and include in their rulebooks certain minimum suspension penalties. *See id.* § 11.25(a)-(c). Consequently, no entrant will be subject to the minimum penalties set out in the new rule unless HIOs agree to enforce those penalties. *See* discussion *supra* Part III.A.1, at 20-22. And even then, it is to the HIO--not the United States--that the entrant is liable. In view of this, it is not entirely accurate, and certainly not precise, to say that HIOs have been charged with adjudicating federal law.

Under the HPA, Congress delegated rulemaking authority to the Department to prescribe requirements for the appointment by management of DQPs and, more generally, to adopt regulations to carry out the provisions of the HPA. *See* 15 U.S.C.A. §§ 1823(c), 1828. The Department, in turn, issued the new rule. See 9 C.F.R. § 11.25. Although "Congress generally cannot delegate its legislative power to another branch[,] . . . some amount of delegation is unavoidable, and the limits on delegation are frequently stated but rarely invoked." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009) (citations omitted) (internal quotation marks omitted). The pivotal inquiry is "whether Congress has provided an 'intelligible principle' to guide the agency's

regulations." *Id.* (quoting *United States v. Mistretta*, 488 U.S. 361, 372 (1989)).

Section 1828's limitation on the Department's rulemaking authority to rules it "deems necessary to carry out the provisions of [the HPA]" provides such an intelligible principle, as does § 1823(c)'s narrow directive to prescribe "requirements for the appointment . . . of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing [the HPA]." 15 U.S.C.A. §§ 1823(c), 1828; *see also Whaley*, 577 F.3d at 264 (noting that "[t]he intelligible principle can be broad" and that a "delegation is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority" (quoting *Yakus v. United States*, 321 U.S. 414 (1944)) (internal quotation marks omitted)). In light of this, the Court concludes that neither the HPA's delegation of rulemaking authority to the Department nor the new rule itself is unconstitutional.

IV. Conclusion

Based on the foregoing, the Court concludes that the new rule, given due deference, is lawful under the HPA, the APA, and the United States Constitution and should, therefore, be upheld. The Department's motion for summary judgment is GRANTED, and Plaintiffs' motion is DENIED. Accordingly, all claims in the

above-styled and -numbered cause are DISMISSED WITH PREJUDICE.[22]

SIGNED July 29, 2013.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[22] Plaintiffs, in their briefing, also challenge the new rule under the Paperwork Reduction Act. This claim is not raised in their complaint, however, and is therefore not before the Court.