

# STANDING ON NEW GROUND: UNDERENFORCEMENT OF ANIMAL PROTECTION LAWS CAUSES COMPETITIVE INJURY TO COMPLYING ENTITIES

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## INTRODUCTION

On a trip to the local grocer or butcher shop, a consumer sees two appetizing filet mignon steaks on sale. One costs \$4.99 per pound, and the other costs \$6.99 per pound. The steaks look the same, and the butcher says that they are of the same quality. With such an assurance of similar quality, most rational consumers will choose to purchase the less expensive filet mignon. What the butcher cannot assure the consumer of, however, is that the price difference is not due to an extreme act of inhumanity. That steak may be less expensive because it came from a slaughterhouse that moves its production line at a pace so fast that cows frequently do not die humanely as required by law, but instead die slowly and in terror as they are left hanging upside down while slaughterhouse workers cut off body parts one at a time. Perhaps the consumer armed with that information would not purchase the less expensive steak.<sup>1</sup> However, that type of information does not readily reach the consumer conscience in our mass market for meat consumption. If it did, a consumer might wonder: “Aren’t there laws against boiling pigs to death or cutting cows to pieces while they are still alive and conscious?”

Indeed, there are such laws. However, federal animal protection laws have proved a great source of frustration for people who care about the humane treatment of animals. The United States Department of Agriculture (USDA) tends to underenforce animal protection laws such as the Humane

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1. One would hope. If compassion for animals is not enough to inspire a consumer to seek humanely slaughtered meat, perhaps that consumer would be more motivated to choose the more humane product armed with knowledge that even industry groups acknowledge that “[f]ear and pain cause animals to produce hormones that damage meat.” Joby Warrick, *They Die Piece by Piece*, WASH. POST, Apr. 10, 2001, at A1; see also GAIL A. EISNITZ, SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY 24–25, 28–29 (1997) (describing what happens when improperly stunned cattle regain consciousness while being processed).

Methods of Slaughter Act (HMSA)<sup>2</sup> and the Animal Welfare Act (AWA).<sup>3</sup> Private citizens who want to see these laws enforced face a high barrier to judicial review because most private citizens lack standing to challenge the USDA. Judicial reluctance to review agency decisions not to enforce the laws the agency is charged with enforcing provides an additional barrier.

However, there exists an unexplored avenue for seeking better enforcement of federal animal protection laws—the injured competitor. Essentially, when one slaughterhouse commits the resources required to comply with the HMSA and another slaughterhouse does not, the non-complying slaughterhouse has a lower production cost. Those lower production costs give the non-complying slaughterhouse an unfair and illegal competitive advantage in the marketplace. The USDA’s failure to enforce the HMSA is closely connected to that non-complying slaughterhouse’s illegal advantage, and a complying slaughterhouse should be allowed to challenge the USDA’s lack of enforcement.

Similar competitively unfair scenarios are imaginable for entities regulated by the AWA, which the USDA also chronically underenforces. For instance, a dog breeder who expends resources to house her breeding dogs and puppies in humane conditions has higher production costs than a breeder who does not comply with humane-care standards. Reports are widespread of “puppy mills” that mass produce purebred puppies in horrendous conditions; those puppy mills put unfair competitive economic pressure on reputable breeders.<sup>4</sup> Consider whether Ringling Brothers and Barnum & Bailey Circus (Ringling Brothers), dubbed by some animal welfare groups as “The Cruellest Show on Earth,”<sup>5</sup> could stay in business if it took the measures necessary to comply fully with the AWA and treat its performing animals humanely. Perhaps there is no large competitor in the market for traveling performing animal shows because it is financially impossible to run a circus and treat circus animals humanely. However, if a humane traveling animal show were physically and financially possible in a vacuum, it might not be possible in reality simply because Ringling Brothers has developed such a monopoly in the market<sup>6</sup> based on its “more

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2. Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901–1906 (2000).

3. Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2000).

4. See, e.g., Inside a Puppy Mill, [http://stoppupmills.org/inside\\_a\\_puppy\\_mill.html](http://stoppupmills.org/inside_a_puppy_mill.html) (last visited Oct. 18, 2007) (noting that puppy mills can successfully navigate or entirely avoid laws such as the AWA by selling to consumers).

5. Animal Prot. Inst., Thirty Controversial Anti-Circus Billboards Blanket Los Angeles, <http://www.commondreams.org/news2000/0714-03.htm> (last visited Oct. 18, 2007).

6. See *Ringlings Buy Out Barnum & Bailey*, N.Y. TIMES, Oct. 23, 1907 (“The purchase of the Barnum & Bailey Show gives the Ringling brothers practically a monopoly of the circus business in America.”).

affordable” approach to caring for its performing animals.<sup>7</sup>

This Article explores competitive injury as a basis for challenging the USDA’s failure to enforce the HMSA and AWA. Part I.A provides background on claims that the Acts are both underenforced. Part I.B then introduces the problem of standing in the context of animal welfare lawsuits. Part II.A analyzes Article III standing requirements as applied to a competitively injured plaintiff. Part II.B then analyzes what the Administrative Procedure Act (APA)<sup>8</sup> requires for an injured competitor to bring suit against the USDA for failure to enforce the HMSA and AWA. This Article concludes by suggesting that the HMSA provides the best vehicle for a competitive injury suit against the USDA because Congress has made abundantly clear its desire to see the HMSA fully enforced.

## I. BACKGROUND

There are two significant sources of frustration to citizens who care about the purposes behind federal laws that mandate some standard of humane treatment for animals: agency underenforcement and “standing.” This Part provides some background on reports of USDA underenforcement of the HMSA and AWA and then introduces the concept of standing and the barriers it presents to citizens concerned with animal welfare.

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7. See *Ringling Brothers and Barnum & Bailey Circus*, PETA FACTSHEET (People for the Ethical Treatment of Animals, Norfolk, Va.), June 26, 2007, at 3–8, available at <http://www.circuses.com/pdfs/RinglingFactsheet.pdf> [hereinafter PETA Factsheet] (identifying countless instances of Ringling Brothers’ substandard care of circus animals).

8. 5 U.S.C §§ 500–559 (2000).

*A. Underenforcement of Federal Animal Protection Laws—“Pigs and Chickens . . . Boiled to Death, . . . Cows . . . Skinned and Dismembered Alive”<sup>9</sup>*

The USDA is charged with enforcement of the HMSA and the AWA.<sup>10</sup> Concerns that the USDA chronically underenforces federal animal protection laws have been widely documented.<sup>11</sup> This Article does not attempt to prove or disprove such claims. Instead, this Article assumes underenforcement for the sake of argument.

The HMSA requires only that slaughterhouses render animals “insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”<sup>12</sup> In 2001, the Washington Post printed an article called “They Die Piece by Piece,” which exposed chronic

9. Satya: Interview with Gail Eisnitz of the Humane Farming Association, <http://www.satyamag.com/jan98/farming.html> (last visited Dec. 5, 2007). Although chickens account for ninety-five percent of farmed animals (approximately 8.5 billion slaughtered each year), chickens are not covered by the HMSA. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 208 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). In addition, farm animals are usually exempted from anti-cruelty laws. See Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624, 56624 (Sept. 28, 2005) (observing that “there is no specific federal humane handling and slaughter statute for poultry”). There is a federal law that regulates poultry production, but it does not provide for the humane slaughter of poultry. Poultry Products Inspection Act, 21 U.S.C. §§ 451–471 (2000). Therefore, it is currently not against the law in most states to boil a chicken to its death. *Id.*

10. See Humane Methods of Slaughter Act of 1958, 7 U.S.C. §§ 1901–1902, 1904, 1906 (2000) (asserting the Secretary of Agriculture’s duty to examine animals and the methods by which they are handled and slaughtered); Animal Welfare Act, 7 U.S.C. § 2146 (2000) (asserting the Secretary of Agriculture’s duty to administer and enforce the AWA).

11. See, e.g., EISNITZ, *supra* note 1, at 24–25, 46, 188–90 (discussing how the meat industry’s concern with profits influences the USDA’s enforcement decisions); Ass’n of the Bar of the City of N.Y., *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345, 346–48 (2003) (discussing USDA’s reluctance to enforce the AWA); Varu Chilakamarri, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 252–53 (2004) (discussing underenforcement of the AWA and HMSA); Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1318–19 (2005) (stating that enforcement of the HMSA “is practically nonexistent”); Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937, 957 (2002) (stating that USDA discretion results in infrequent AWA enforcement); Wolfson & Sullivan, *supra* note 9, at 207–08 (stating that “[t]here can be little doubt that the [HMSA] is not being effectively enforced”); Collette L. Adkins Giese, Comment, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 242–44 (2006) (discussing the USDA’s incomplete enforcement of the AWA); Warrick, *supra* note 1 (stating that “sanctions [for inhumane slaughter] are rare”).

12. 7 U.S.C. § 1902(a).

underenforcement of the HMSA.<sup>13</sup> The article reported that “[e]nforcement records, interviews, videos and worker affidavits describe repeated violations of the Humane Slaughter Act” and “the government took no action against a Texas beef company that was cited 22 times in 1998 for violations that included chopping hooves off live cattle.”<sup>14</sup>

The only available penalty for an HMSA violation is withdrawal or suspension of federal inspection, which would result in a temporary production-line shutdown.<sup>15</sup> That might not seem like much, but it is probably very expensive for a slaughterhouse to halt its production line. Indeed, it is logical to assume that desire to avoid the expense of slowing the production line contributes to an environment in which animals can end up still alive on the production line long after they should have died. If the USDA fully enforced the HMSA, slaughterhouses would either (1) have to slow down their production process to ensure that animals are humanely slaughtered in compliance with the HMSA or (2) face the expense of the USDA repeatedly halting their production line entirely. Either option would cost slaughterhouses money, but Congress did not qualify its demand that animals be humanely slaughtered by stating: “Unless slaughterhouses feel it is too expensive to do so.” And, this expense demonstrates exactly why the USDA’s failure to fully enforce the Act competitively injures slaughterhouses that *comply* with the HMSA.

The USDA faces similar scrutiny for underenforcement of the AWA. Animal welfare advocates argue the USDA under-inspects the sites under its charge: laboratories that experiment on animals, animal dealers, and exhibitors of animals for entertainment.<sup>16</sup> Certainly, if the USDA is not inspecting regulated sites, the USDA cannot enforce the AWA at those sites. Further, violations that are discovered are too often met with a warning or minimal fine.<sup>17</sup> Indeed, the USDA seems to cite Ringling Brothers for AWA violations almost monthly.<sup>18</sup> In 2006, the USDA cited Ringling Brothers for—among numerous other violations—failing to provide veterinary care to a camel with two actively bleeding wounds; for causing trauma, stress, physical harm, and unnecessary discomfort to two elephants; and for failing to provide the AWA-mandated enclosures for

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13. Warrick, *supra* note 1.

14. *Id.* This article led to congressional action demanding stronger enforcement efforts from the USDA. See 7 U.S.C. § 1901 note (Supp. IV 2004) (Enforcement of Human Methods of Slaughter Act of 1958) (directing the Secretary of Agriculture to enforce the HMSA); discussion *infra* Part II.B.1.

15. Wolfson & Sullivan, *supra* note 9, at 227 n.4.

16. Swanson, *supra* note 11, at 955.

17. *Id.* at 956–57.

18. See PETA Factsheet, *supra* note 7, at 3–6 (listing the dates of multiple offenses).

various animals, many of them dangerous.<sup>19</sup> When the most visible performing animal circus continually violates the AWA, even in the face of regular USDA citation, enforcement is obviously failing. However, animal welfare groups that would like to see federal animal protection laws fully enforced face a formidable barrier in constitutional and prudential standing doctrines.

### B. Standing—A Significant Barrier to Private Suits

Numerous articles have detailed the challenges the standing doctrine presents to animal welfare groups; many of them propose new avenues to gain standing.<sup>20</sup> The doctrine of constitutional standing prevents parties from participating in an Article III “case or controversy” in which they are not really involved.<sup>21</sup> Over time, judges have developed this constitutional doctrine to keep their courts clear of inappropriate lawsuits they do not have the power to decide. The idea is that if there truly is a problem with someone violating a law, the “genuinely adverse parties” with a “personal stake” in the dispute will come before the court to resolve that problem.<sup>22</sup> However, with animal protection laws, courts have sometimes perceived the only “real party in interest” as the animals whose legally provided rights are being violated. Since animals cannot come to court for themselves to seek agency enforcement of federal laws to protect them,<sup>23</sup> animal welfare groups have tried to do so on the animals’ behalf, with varying success. Some of those animal protection lawsuits have been turned away from the courthouse based on the animal welfare group’s or concerned citizen’s lack

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19. *Id.* at 3–5.

20. *See, e.g.*, Chilakamarri, *supra* note 11, at 253 (stating that “the taxpayer standing doctrine may open a new door to those seeking to enforce animal protection statutes”); David Cussuto et al., *Legal Standing for Animals and Advocates*, 13 ANIMAL L. 1, 69–71 (2006) (discussing legal standing based on informational-injury claims); Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word “Standing” with Its Meaning in Animal Cases*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 681, 684 (2005) (arguing that a more careful application of the standing doctrine to HMSA and AWA cases would provide standing to guardians or guardians *ad litem*); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1366 (2000) (recommending the AWA be amended to create a private cause of action).

21. *Orr v. Orr*, 440 U.S. 268, 285 (1979) (Stevens, J., concurring); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976); *see also* U.S. CONST. art. III, § 2 (permitting federal courts to hear only “[c]ases” and “[c]ontroversies”). *See infra* Part II.A for a detailed presentation of the standing doctrine.

22. *Orr*, 440 U.S. at 290–91 (Rehnquist, J., dissenting).

23. *E.g.*, *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177–78 (9th Cir. 2004) (holding that animals do not have standing to sue—even though they were meant to be protected by the ESA—because ESA only authorizes suits by persons).

of standing to sue.<sup>24</sup> Parties seeking to challenge administrative action, or lack thereof, face the additional layer of prudential standing requirements that courts have developed from their reading of the APA.<sup>25</sup> This Article presents a new avenue for standing to challenge an agency's failure to enforce federal animal protection laws—standing based on competitive injury to a regulated entity.

## II. ANALYSIS

An entity suffering competitive injury due to a competitor's violation of animal protection laws and corresponding agency inaction can bring an APA challenge against the agency.<sup>26</sup> This Part addresses the constitutional requirement that a plaintiff present an actual "case or controversy," which the Supreme Court has interpreted as an "Article III standing" test.<sup>27</sup> This Part then analyzes an injured competitor's potential challenge to agency inaction under § 702 of the APA.

### A. Article III Standing

For an entity successfully to raise its competitive injury as the basis for a lawsuit (against the agency or the competitor), the entity must first satisfy Article III standing requirements. The injured party must show it presents a "case or controversy" appropriate for the court's consideration. The test for standing under Article III requires a plaintiff to show injury in fact, causation, and redressability.<sup>28</sup> While courts have long recognized economic harm as an injury in fact,<sup>29</sup> the causation and redressability

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24. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (rejecting standing for lack of imminence); *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 501–04 (D.C. Cir. 1994) (rejecting informational-injury standing for AWA challenge); *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 938 (4th Cir. 1986) (rejecting standing for failure to allege cognizable injuries and failure to prove that the implicated federal statute authorized plaintiffs' right to seek relief).

25. Administrative Procedure Act, 5 U.S.C. § 702 (2000).

26. See *id.* (providing judicial review of agency action). The injured competitor has two other potential avenues for relief. First, the entity could bring an antitrust action against the non-complying competitor under § 2 of the Sherman Act. Sherman Act, 15 U.S.C. § 2 (2000). Also, the entity could encourage the Federal Trade Commission (FTC) to take action against the non-complying competitor based on the FTC's independent power to regulate behavior that is harmful to competition. See Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2000) (empowering and directing the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce"). These two alternative avenues are beyond the scope of this Article, but are promising nonetheless.

27. *E.g.*, *Lujan*, 504 U.S. at 560 (discussing the elements of standing).

28. *E.g.*, *id.* at 560–61.

29. *E.g.*, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

requirements could present a challenge to an injured competitor's standing under Article III. Below, each element is addressed in turn.

### 1. Injury in Fact

An entity financially injured by a competitor's illegally gained competitive advantage would face little challenge to its claim of an injury in fact.<sup>30</sup> Economic harm has "long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review."<sup>31</sup> Recognized economic injuries include lost profits or reduction in sales,<sup>32</sup> lost opportunity to engage in a business enterprise,<sup>33</sup> and loss of business to a competitor.<sup>34</sup>

In *Air Courier Conference v. American Postal Workers Union*, which held that competitively injured employees lacked standing under the APA because they fell outside of the "zone of interests" the statute at issue protected,<sup>35</sup> the Supreme Court noted that the lower court accepted the employees' claim to an injury in fact because "increased competition through international remailing services might have an adverse effect on employment opportunities of postal workers."<sup>36</sup>

Under Article III standing jurisprudence, the plaintiff's claimed injury in fact must be an invasion of a legally protected interest that is concrete and particularized, actual or imminent, instead of conjectural or

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30. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963). "Appellants' standing has not been, nor could it be, successfully questioned. The appellants have in fact suffered a palpable injury as a result of the acts alleged to violate federal law, and at the same time their injury has been a legal injury." *Id.*

31. *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972) (citing *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 7 (1968)); see also *Ass'n of Data Processing*, 397 U.S. at 152 (recognizing need for actual injury, "economic or otherwise"); *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 83 (1958) (noting that plaintiff had standing because of a direct and substantial personal interest in the outcome); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (stating that Congress had the power to confer standing upon "one likely to be financially injured by the issue of a license").

32. See *Ass'n of Data Processing*, 397 U.S. at 152 (noting that competition by national banks in the business of providing data processing services could potentially lead to future loss of profits for petitioners).

33. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 (1977) (discussing lost opportunity to build a housing development due to town's failure to rezone).

34. See *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977) (finding economic injury where allegedly discriminatory tax diverted business from plaintiff's business to competitor exchange); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1499 (D.C. Cir. 1996) (finding economic injury where drug manufacturer claimed the FDA had authorized illegal marketing of a generic drug).

35. See *infra* Part II.B.2 for a discussion of the "zone of interests" test and APA standing.

36. *Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991).



hypothetical.<sup>37</sup> Courts are unwilling to grant standing to a plaintiff who claims an injury no greater than that suffered by the public at large.<sup>38</sup> A competitor's claim to competitive injury is particularized because as a business competitor, that entity suffers in a way that the general public cannot. The competitive injury is concrete because the injury results in a loss of business.

## 2. Causation (Fairly Traceable)

A competitor would also need to claim that the defendant caused its injury in a way that is "fairly traceable" to the defendant's action.<sup>39</sup> Courts have held that the causal chain may consist of "more than one link" and still satisfy Article III, so long as the connection between injury and cause is not "hypothetical or tenuous."<sup>40</sup> The D.C. Circuit requires "only a showing that 'the agency action is at least a substantial factor motivating the third parties' actions'" when it reviews claims of injury flowing "not directly from the challenged agency action, but rather from independent actions of third parties."<sup>41</sup>

In 2006, the Ninth Circuit held that a plaintiff's aesthetic injury from viewing non-human primates in inhumane conditions at a zoo was fairly traceable to the USDA's failure to adopt a Draft Policy that would have required zoos to ameliorate those inhumane conditions.<sup>42</sup> Even though the third-party zoo subjected the non-human primates to inhumane conditions rather than the defendant USDA, the court reasoned that the USDA's failure to adopt a policy on non-human primate conditions created the environment

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37. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972).

38. *See Lujan*, 504 U.S. at 560 n.1 (noting that injury should "affect the plaintiff in a personal and individual way"); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982) (seeking to avoid having federal courts serve as "merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding").

39. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976) ("[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant . . .").

40. *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (citing *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984)); *see also Autolog Corp.*, 731 F.2d at 31 ("We are concerned here not with the length of the chain of causation, but . . . the plausibility of the links that comprise the chain." (quoting *Pub. Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717 n.31 (D.C. Cir. 1977))).

41. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (quoting *Cmty. for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C. Cir. 1987)).

42. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 834 (9th Cir. 2005), *vacated en banc*, 490 F.3d 725 (2007).

where the zoo could maintain inhumane conditions.<sup>43</sup> Therefore, the USDA's inaction was appropriately viewed as a link in the causal chain leading to the plaintiff's injury.<sup>44</sup> The court later vacated its opinion at the request of the parties, who had reached a settlement agreement.<sup>45</sup> However, the court's reasoning in its now-vacated opinion remains relevant to this discussion.

In the injured competitor's case, both the non-enforcing agency and the non-complying competitor are sources of the competitive injury. The injured competitor can claim the agency's failure to enforce federal animal protection laws creates an environment of law-violating behavior such that a non-complying entity would continue violating the laws, thereby decreasing the non-complying entity's production costs<sup>46</sup> and unfairly placing the non-complying entity at a competitive advantage in the marketplace.

### 3. Redressability

The final Article III standing element requires a plaintiff to show a favorable decision is likely to redress the plaintiff's injury.<sup>47</sup> The burden to show redressability is much higher for a plaintiff charging that an agency's action or inaction toward a regulated entity caused its injury because redressability will depend on "unfettered choices made by independent actors not before the courts."<sup>48</sup> However, a plaintiff in such a case does not need to show that a favorable decision would immediately and certainly redress the plaintiff's injury. Instead, the plaintiff can satisfy the redressability element by showing that the requested relief would be "highly influential" in changing the regulated entity's behavior.<sup>49</sup> The plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury."<sup>50</sup>

In the case of an injured competitor challenging the agency's failure to enforce animal protection laws, the plaintiff would need to produce evidence either that the non-complying entity tends to take action to comply

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43. *Id.*

44. *Id.*

45. *Veneman*, 490 F.3d at 726.

46. *See supra* Part I.A.

47. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984).

48. *Lujan*, 504 U.S. at 562 (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

49. *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 309 (D.C. Cir. 2001).

50. *Lujan*, 504 U.S. at 562.

with laws following agency action, or that, as a general rule, non-complying entities comply with laws after an agency takes or threatens action. Therefore, if a court ordered the agency to take action against the non-complying entity, the agency's subsequent action would be highly influential in bringing the non-complying entity into compliance.

### B. APA § 702 Challenge

Even after the competitively injured entity establishes Article III standing, an entity wishing to challenge the agency's inaction faces further barriers to judicial resolution of its claim—APA prudential standing requirements. Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”<sup>51</sup> The statute requires two elements before granting judicial review of agency action or inaction: (1) an injury resulting from agency action or inaction; and (2) that the aggrieved party is within the “zone of interests” of the relevant statute.<sup>52</sup> Further, § 701(a)(2) of the APA excludes from judicial review agency action that is “committed to agency discretion by law.”<sup>53</sup> These requirements present significant challenges to a private entity's case against an agency for its failure to enforce animal protection laws. However, under the right circumstances, an injured competitor's claim could see its day in court.

#### 1. Agency (In)Action

The first requirement of a § 702 claim is an injury resulting from agency action or inaction.<sup>54</sup> In addition to the need for an injury in fact,<sup>55</sup> this requirement presents two additional hurdles to the injured competitor. The competitor must convince the court (1) that the agency's failure to

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51. Administrative Procedure Act, 5 U.S.C. § 702 (2000).

52. *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–53 (1970). The second sentence of § 702 shows inaction is a possible grounds for judicial review.

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis added).

53. 5 U.S.C. § 701(a)(2).

54. *Id.* § 702.

55. *See supra* Part II.A.1.

enforce an animal protection law constitutes “final agency action,”<sup>56</sup> and (2) that the agency’s inaction is reviewable by the court and not “committed to agency discretion by law.”<sup>57</sup>

The text of the APA provides support for a court considering an agency’s inaction as reviewable “action.” Agency action, as defined by the APA, “includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*”<sup>58</sup> Further, § 706 of the APA states that a court shall “compel agency action unlawfully withheld or unreasonably delayed.”<sup>59</sup>

While courts can broadly construe the term “agency action,” it “is not so all-encompassing as to authorize [courts] to exercise ‘judicial review [over] everything done by an administrative agency.’”<sup>60</sup> When an agency declines to take any action, the inaction is presumed unreviewable absent a statutory mandate for action, because courts have no “focus for judicial review.”<sup>61</sup>

However, this presumption against reviewability is more appropriately applied to an agency’s failure to promulgate a desired regulation rather than an agency’s failure to act upon direct violations of a statute under its enforcement authority. Judicial restraint from reviewing an agency’s failure to engage in a particular rulemaking is more appropriate because courts do not have the ability to weigh the “infinite number of rules that an agency could adopt in its discretion.”<sup>62</sup> Courts usually lack the information relevant to rulemaking which is “peculiarly within [the agency’s] expertise.”<sup>63</sup>

The injured competitor must also show the agency’s inaction is not otherwise “committed to agency discretion by law,” as § 701(a)(2) of the APA exempts such action from judicial review.<sup>64</sup> The Supreme Court has interpreted § 701 as establishing a broad presumption of reviewability. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court held that § 701(a)(2) exempts agency action from review only when “statutes are drawn in such broad terms that in a given case there is no law to apply.”<sup>65</sup>

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56. 5 U.S.C. § 704.

57. *Id.* § 701(a)(2).

58. *Id.* § 551(13) (emphasis added).

59. *Id.* § 706(1).

60. *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (alteration in original) (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948)).

61. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

62. *Natural Res. Def. Council v. SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979). The court in this case found that abandonment of a rulemaking course of action was only narrowly reviewable. *Id.* at 1046–47.

63. *Heckler*, 470 U.S. at 831. The Court in *Heckler v. Chaney* found that failure to take enforcement action was unreviewable. *Id.* at 830–31.

64. 5 U.S.C. § 701(a)(2).

65. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting *S. REP.*

However, in the more recent case of *Heckler v. Chaney*, the Court denied review in a challenge to the Food and Drug Administration's (FDA's) refusal to take enforcement actions because "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."<sup>66</sup> *Heckler v. Chaney* has been cited for the proposition that an agency's failure to take an enforcement action is unreviewable.<sup>67</sup> Such a reading of that case is too broad.

*Heckler v. Chaney* involved death row inmates seeking judicial review to compel FDA to enforce the Federal Food, Drug, and Cosmetic Act.<sup>68</sup> The inmates believed the use of lethal drug doses on death row inmates violated the Act because the drugs were misbranded, and the FDA had not approved the drugs for use in human execution.<sup>69</sup> After unsuccessfully petitioning the FDA for enforcement action, the inmates took their claim to court.<sup>70</sup> The Supreme Court held the FDA's refusal to take an enforcement action unreviewable under § 701(a)(2) of the APA because there was no law to apply in reviewing the FDA's decision not to act.<sup>71</sup>

The Court stated that an agency's decision not to take enforcement action is "only *presumptively* unreviewable."<sup>72</sup> However, that presumption may be overcome by a showing that Congress "set[] substantive priorities, or . . . circumscribe[ed] an agency's power to discriminate among issues or cases it will pursue."<sup>73</sup> For instance, the *Heckler* Court noted its approval of *Dunlop v. Bachowski*, which held judicial review was appropriate when the Secretary of Labor decided not to file suit after receiving a union member's

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NO. 752, at 26 (1945)). The Court concluded that a statutory provision stating that the Secretary of Transportation could only authorize federal aid to construct a highway through a public park when there was "no feasible and prudent alternative" provided law upon which a court could base its review. *Id.* at 411 (quoting 23 U.S.C. § 138(a) (2000)).

66. *Heckler*, 470 U.S. at 830.

67. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 825 (1987) (Scalia, J., concurring) (citing *Heckler*, 470 U.S. 821) (recognizing that decisions not to prosecute are ordinarily unreviewable); *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1315 n.5 (Fed. Cir. 2006) (citing *Heckler*, 470 U.S. 821) ("The government does not contend that [a letter implementing or giving public notice of an agency decision] reflects an enforcement decision unreviewable under *Heckler v. Chaney*."); *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 788 (D.C. Cir. 2000) (citing *Heckler*, 470 U.S. at 832) ("[A]n agency's decision not to commence an investigation is analogous to an agency's decision not to take an enforcement action—which the Supreme Court held unreviewable in *Heckler*.").

68. *Heckler*, 470 U.S. at 823.

69. *Id.* at 823–24.

70. *Id.* at 824.

71. *Id.* at 830.

72. *Id.* at 832 (emphasis added).

73. *Id.* at 833.

complaint related to a union election.<sup>74</sup> In that case, the governing statute stated that “[t]he Secretary shall investigate . . . and, if he finds probable cause . . . shall . . . bring a civil action.”<sup>75</sup> The Secretary lacked absolute prosecutorial discretion because the statute “indicated that the Secretary was required to file suit if certain ‘clearly defined’ factors were present.”<sup>76</sup>

The *Heckler* Court focused on an administrative reason that agency decisions to refuse enforcement are generally unsuitable for judicial review—the agency’s decision to refuse enforcement is often based on “a complicated balancing of a number of factors which are peculiarly within its expertise.”<sup>77</sup> These factors include the best uses of agency resources, whether the agency has enough resources to take action, the likelihood of success if the agency acts, and whether the enforcement “fits the agency’s overall policies.”<sup>78</sup>

Assuming that a competitor possesses compelling evidence of a clear violation of animal protection laws, a court could view an agency’s failure to act upon that evidence as more amenable to review than a failure to engage in a rulemaking. Put simply, the question whether a regulated entity violated a federal statute is much more straightforward than the question whether the agency should revise its interpretation of a particular statute. Further, animal protection statutes frequently are explicit in what they require of regulated entities and how an entity might violate the statute.<sup>79</sup> The statutes generally do not leave discretion with USDA to determine what constitutes a violation thereof.<sup>80</sup>

*Heckler v. Chaney* also noted that in a case where an “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities[,] . . . the statute conferring authority on the agency might indicate that such decisions were not ‘committed to agency discretion.’”<sup>81</sup> The USDA has frequently

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74. *Id.* (citing *Dunlop v. Bachowski*, 421 U.S. 560 (1975)).

75. *Dunlop*, 421 U.S. at 563 n.2 (quoting 29 U.S.C. § 482(b) (2000)).

76. *Heckler*, 470 U.S. at 834 (quoting *Dunlop*, 421 U.S. 560).

77. *Id.* at 831. The Court also noted that when an agency does not take enforcement action, at least the agency is not risking exceeding its statutory power against individual liberty and property rights. *Id.* at 832. Finally, the Court analogized an agency decision not to enforce to the discretion of an Executive Branch prosecutor. *Id.* However, the Executive Branch prosecutor is granted discretion by the U.S. Constitution, whereas the agency is a creation of Congress and directed to act by Congress. *Id.*

78. *Id.* at 831. The question of whether enforcing the law Congress charged the agency with enforcing “fits the agency’s overall policies” is a curious one. Congress creates the agency and delegates enforcement of a certain law to that agency. For an agency to determine whether enforcing that law fits its “policies” describes an inappropriate level of autonomy from congressional directives.

79. *See, e.g.*, Humane Methods of Slaughter Act of 1958, 7 U.S.C. § 1902 (2000) (requiring regulated entities to use either of two specified humane methods of slaughtering and handling animals).

80. *See infra* text accompanying note 84.

81. *Heckler*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir.

submitted such low—occasionally even non-existent—requests to Congress for its AWA enforcement budget that Congress has responded by appropriating more funds than the USDA requested.<sup>82</sup> The USDA certainly cannot claim its decisions not to enforce are based on the complicated balancing of factors related to its available funds for enforcement when it has a history of requesting less than Congress provides for that purpose.

Although the HMSA originally was unclear about the Secretary of Agriculture's enforcement mandate,<sup>83</sup> Congress recently spoke quite clearly in favor of vigorous HMSA enforcement. In 2002, Congress responded to reports of systemic HMSA underenforcement by passing the Farm Security and Rural Investment Act of 2002 with a section entitled "Enforcement of Humane Methods of Slaughter Act of 1958."<sup>84</sup> This section provides:

(a) SENSE OF CONGRESS.—It is the sense of Congress that the Secretary of Agriculture should—

(1) continue tracking the number of violations of Public Law 85–765 (7 U.S.C. 1901 et seq.; commonly known as the "Humane Methods of Slaughter Act of 1958") and report the results and relevant trends annually to Congress; and

(2) *fully enforce* Public Law 85–765 by ensuring that humane methods in the slaughter of livestock—

(A) prevent needless suffering;

(B) result in safer and better working conditions for persons engaged in slaughtering operations;

(C) bring about improvement of products and economies in slaughtering operations; and

(D) produce other benefits for producers, processors, and consumers that tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce.

(b) UNITED STATES POLICY.—It is the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter *shall* be carried out only by humane methods, as provided by Public Law 85–765.<sup>85</sup>

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1973)).

82. Adele Douglas, Dir., Am. Humane Ass'n, Address at Animal Welfare Act: Historical Perspectives and Future Directions: Symposium Proceedings (Sept. 12, 1996) (transcript on file with Vermont Law Review), available at <http://www.nal.usda.gov/awic/pubs/96symp/awasymp.htm>.

83. The only enforcement provision in the HMSA specifically addresses enforcing rules the Secretary of Agriculture deems necessary to regulate the humane handling of *nonambulatory* livestock ("downers"). 7 U.S.C. § 1907(c).

84. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10305, 116 Stat. 134, 493–94 (codified at 7 U.S.C. § 1901 note (Supp. IV 2004) (Enforcement of Humane Methods of Slaughter Act of 1958)).

85. 7 U.S.C. § 1901 note (emphases added).

This Bill demonstrates Congress does not intend the Secretary of Agriculture to have discretion over whether to enforce the HMSA. Indeed, this congressional action should provide just the evidence *Heckler v. Chaney* requires to support review of an agency's failure to enforce.<sup>86</sup>

AWA enforcement provisions are more explicit,<sup>87</sup> but also leave more room for agency discretion. AWA enforcement provisions dealing with license suspension or revocation, and civil penalties describe the Secretary of Agriculture's enforcement role in permissive, discretionary terms.<sup>88</sup> For instance, the provisions state that the Secretary "may suspend such person's license"<sup>89</sup> and licensees in violation of the Act "may be assessed a civil penalty by the Secretary."<sup>90</sup>

In contrast, the language of the AWA's enforcement provision related to criminal penalties for knowing violation of the Act are unequivocal. The criminal section provides: "Any dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, who knowingly violates any provision of this chapter *shall*, on conviction thereof, be subject to imprisonment for not more than 1 year, or a fine of not more than \$2,500, or both."<sup>91</sup> Demonstrating that a regulated entity has engaged in a knowing violation of the AWA increases the burden on the injured competitor in presenting an APA challenge to the agency's failure to enforce the AWA.

Assuming that an injured competitor presents compelling evidence of a regulated entity's knowing violation of the AWA, the statute appears to leave no room for the Secretary of Agriculture to exercise discretion and refuse to prosecute. However, the inmates in *Heckler v. Chaney* unsuccessfully raised a similar claim by arguing that the statute's criminal phrase "*shall* be imprisoned . . . or fined" mandated criminal enforcement of all criminal violations.<sup>92</sup> The Court focused its refusal to "attribute such a sweeping meaning to this language" on the statute's provision that the Secretary is only charged with recommending prosecution, with the real prosecutorial decision resting with the Attorney General.<sup>93</sup> Similarly, the

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86. Further explaining its refusal to review the FDA's enforcement action, the *Heckler* Court stated: "The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress." *Heckler*, 470 U.S. at 834.

87. Animal Welfare Act, 7 U.S.C. § 2149 (2000).

88. *Id.* § 2149(a)–(b).

89. *Id.* § 2149(a) (emphasis added).

90. *Id.* § 2149(b) (emphasis added).

91. *Id.* § 2149(d) (emphasis added).

92. *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (emphasis added) (alteration in original) (quoting 21 U.S.C. § 333(a)(1) (2000)).

93. *Id.*



AWA criminal provision states that USDA attorneys may conduct the prosecution of criminal AWA violations “with the consent of the Attorney General.”<sup>94</sup> Therefore, a court would not likely find that the language of the AWA rebuts the presumption against reviewability of the USDA’s failure to enforce the law.

## 2. Zone of Interests

After the injured competitor has shown that it has suffered an injury in fact because of agency action or inaction, “the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”<sup>95</sup> In cases where the plaintiff was not directly subjected to the challenged agency action, the zone-of-interests test precludes review if the plaintiff’s interests are marginally related to or inconsistent with the statute’s implicit purposes such that the court cannot reasonably assume that Congress intended to permit such a challenge.<sup>96</sup> However, the test does not require an explicit statutory statement that Congress intended to benefit the plaintiff.<sup>97</sup> For example, *Shays v. Federal Election Commission* dealt with a challenge by members of Congress to the Federal Election Commission’s regulations implementing the Bipartisan Campaign Reform Act (BCRA).<sup>98</sup> One might have reasonably viewed the purpose of BCRA’s enactment as the protection of citizens (not congressional incumbents) from corruption of the election process. However, the D.C. Circuit held that members of Congress fell within the “zone of interests” protected by BCRA because the members were the subjects of the statute’s regulations and because they had competitive interests in the statute’s implementing regulations.<sup>99</sup>

The zone-of-interests test does not exist to make things harder for plaintiffs seeking review. The D.C. Circuit has stated that the zone-of-interests test “focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the

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94. 7 U.S.C. § 2149(d).

95. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990) (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 396–97 (1987)).

96. See *Clarke*, 479 U.S. at 399 (explaining that the zone-of-interests test is “not meant to be especially demanding”); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 621 (1971) (holding that investment companies had standing to challenge whether banks could begin competing with them).

97. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *Inv. Co. Inst.*, 401 U.S. at 621.

98. *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 79 (D.C. Cir. 2005).

99. *Id.* at 83.

statute protects”<sup>100</sup> and that the test reaches those who are “intended to be protected, benefited or regulated by the statute under which suit is brought.”<sup>101</sup>

Both the HMSA and the AWA regulate the entities that would challenge the USDA’s failure to enforce the laws. Although no cases seem to have interpreted who falls within the HMSA’s zone of interests, Congress has provided a compelling roadmap. In fact, Congress specifically recorded its intention to *protect* the slaughterhouse operations the Act regulates. Congress’s 2002 Bill seeking full enforcement of the HMSA included “bring[ing] about improvement of products and economies in slaughtering operations” and “produc[ing] other benefits for producers, processors, and consumers that tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce” among its goals.<sup>102</sup> Under the HMSA and Congress’s 2002 Bill, an injured competitor that the Act regulates and seeks to protect most certainly should fall within the HMSA’s “zone of interests.”

As an entity regulated by the AWA, the injured competitor should not have a “zone of interests” problem. Numerous administrative challenges have been brought under the AWA, and, accordingly, the courts have developed some definition of the AWA’s zone of interests. For example, human visitors to animal exhibitions are included in the AWA’s zone of interests, since the “very purpose of animal exhibitions is, necessarily, to entertain and educate people,” while a sadist’s interest in seeing inhumane treatment of animals does not.<sup>103</sup> However, animal welfare groups are not within the zone of interests of the AWA’s laboratory standards regulations because the court found evidence of “congressional intent to . . . preclude[] . . . private advocacy organizations” from challenging regulations in the creation of oversight committees at each laboratory facility.<sup>104</sup>

Since courts take a broad view of the zone-of-interests test, a competitor injured due to lack of enforcement of either the HMSA or the AWA should easily satisfy this element of its APA challenge.

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100. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998).

101. *Autolog Corp. v. Regan*, 731 F.2d 25, 29 (D.C. Cir. 1984).

102. 7 U.S.C. § 1901 note (Supp. IV 2004) (Enforcement of Humane Methods of Slaughter Act of 1958)). Note that Congress also articulated an interest in protecting *consumers*. *Id.* The idea of consumer suits to require enforcement of the HMSA would encompass a whole other article.

103. *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 434 n.7, 444 (D.C. Cir. 1998).

104. *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 724 (D.C. Cir. 1994).

## CONCLUSION

Standing requirements under Article III and the APA still present significant barriers to those who seek to challenge the USDA's underenforcement of federal animal protection laws in the courts. The AWA seems to leave enforcement discretion to the Secretary of Agriculture, which likely prevents a viable APA challenge for agency inaction. In contrast, Congress made explicit its desire for the USDA to fully enforce the HMSA in its 2002 Bill. This Bill provides not only that the USDA lacks the direction necessary to decide to not enforce the HMSA, but the Bill also explicitly brings slaughterhouse operators into the HMSA's "zone of interests." Reputable slaughterhouse operators commit the resources necessary to comply with the HMSA by humanely slaughtering the animals on their production line. Those complying entities suffer competitive injury in the marketplace at the hands of lax USDA enforcement and rampant HMSA violations at other slaughterhouses. Complying entities should use this competitive injury to seek *full* USDA enforcement of the HMSA that Congress mandated in 2002.