Before the

UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of Horse Protection Amendments; Further Delay of Effective Date, and Request for Comment	)	Docket No. APHIS-2022-0004

COMMENTS OF THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION, THE TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION, AND THE WALKING HORSE TRAINERS ASSOCIATION

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INTRODUCTION

In enacting the Horse Protection Act, 15 U.S.C. § 1821 *et seq.* ("HPA" or "Act"), Congress made clear that its twin goals in the legislation were to prohibit the practice of soring horses and simultaneously to protect and enhance fair competition. The text of the Act states that "Congress finds and declares that . . . the soring of horses is cruel and inhumane," and "horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore." 15 U.S.C. § 1822(1)-(2). *See also Thornton v. USDA*, 715 F.2d 1508, 1511 (11th Cir. 1983) ("The Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry.").

Congress made clear its belief that these goals can both be achieved and that they need not be at odds with one another. That is also the view of the Tennessee Walking Horse National Celebration Association ("National Celebration Association"), the Tennessee Walking Horse Breeders' and Exhibitors' Association, and the Walking Horse Trainers Association (collectively, "Associations"). Soring horses is an abhorrent practice that should be eradicated. Those who engage in the practice should be punished. At the same time, those who compete fairly and do not engage in soring should not be collaterally punished because of those who do.

The Associations believe that Congress's twin goals can—and must—be met. However, as recent history shows, the Department of Agriculture ("USDA" or "Agency") and the Animal Plant and Health Inspection Service ("APHIS") cannot balance these two goals without a reasoned, thoughtful approach that is based on evidence and that genuinely seeks to respect the congressional goal of preserving fair competition in the Tennessee Walking Horse Industry ("Industry").

In 2024, the Agency announced a new rulemaking (the "2024 Rule") that had been in the making for almost two years that did *not* reflect a thoughtful, evidence-based approach and did not respect the goal of fostering fair competition.[1] Instead, among other things, the Agency sought to effectively eliminate the Performance Division of competition by banning action devices and pads entirely. And it made a half-hearted effort to address due process defects in its existing rules without providing any pre-deprivation process for disqualifications at horse shows. The result was that three of the four major changes in the 2024 Rule—including the ban on action devices and pads and the purported due process "fix"—were vacated in their entirety on judicial review as contrary to the HPA or contrary to the requirements of the Due Process Clause of the Fifth Amendment. *See The Tennessee Walking Horse Nat'l Celebration Ass'n, et al. v. USDA*, No. 2:24-cv-00143, 2025 WL 360895 (N.D. Tex. Jan. 31, 2025) ("*TWHNCA*"). This decision was just the latest volley in a decade-long game of regulatory ping-pong, in which USDA's rules governing its Horse Protection Program were promulgated before being promptly withdrawn, prospectively brought back to life, remanded, or vacated—all while those in the Industry were attempting to understand the rules that would apply as they trained their horses and brought them to competitions.

[1] *See* Horse Protection Amendments, 89 Fed. Reg. 39,194 (May 8, 2024).

The most recent ruling striking down large portions of the 2024 Rule provided a major impetus for the Agency's decision to postpone the effective date for the remaining portions of the rule until February 1, 2026. And the Agency has now sought comment on whether that postponement is sufficient or whether it should further delay the effective date for the remainder of the 2024 Rule. At the same time, the Agency has indicated that it believes it should use the postponement "for further examination of the horse protection program, especially in light of the Court's decision," and that it should "evaluate the program as a whole[] and assess whether [the Agency] wishes to proceed with the [2024 Rule], as vacated, or take other action." Horse Protection Amendments; Further Delay of Effective Date, and Request for Comment, 90 Fed. Reg. 13,272, 13,275 (March 21, 2025).

As explained below, the Agency should postpone the effective date further and take the time to initiate and complete a new rulemaking that will both comprehensively address defects that have lingered in the Agency's HPA rules for decades and reassess the recent decision in the 2024 Rule to eliminate the Designated Qualified Person ("DQP") program. Specifically, the Agency should announce a new rulemaking to address at least three issues.

First, the existing horse protection regulations fail to provide trainers and owners with due process. Under the current system, owners and trainers have no right to appeal a disqualification—either pre- or post-show. At least two courts have held that some form of pre-deprivation process is required to satisfy the Due Process Clause. USDA must come up with a system that ensures that its attempts to address soring do not come at the expense of the constitutional due process rights of horse trainers and owners.

Second, USDA must abandon and replace the repeatedly discredited Scar Rule. That Rule is at odds with the HPA because it allows inspectors to disqualify horses based on criteria that are unrelated to the statutory definition of "sore." Worse, the Rule produces completely arbitrary results, leaving owners and trainers with no ability to assess whether their horses will or will not be disqualified prior to an inspection. For these reasons, USDA should also stop enforcing the Scar Rule pending new rulemaking.

Third, USDA should jettison its plan to eliminate the DQP program. USDA has provided no assurance that, under the new system announced by the 2024 Rule, there will be sufficient horse inspectors available to ensure that shows can continue to operate. Indeed, USDA's own figures suggest that it has been unable to train sufficient numbers of veterinarian Horse Protection Inspectors ("HPIs") to cover existing shows, even if those shows could afford the increased cost needed to compensate the HPIs.

Because USDA cannot hope to address these and other concerns prior to the start of the 2026 show season, it should extend the effective date of the surviving portions of the 2024 Rule until at least February 1, 2027. That would allow the Agency time to conduct a comprehensive rulemaking and to issue a comprehensive new rule that appropriately balances the need to abolish soring with the equally important need to protect fair competition. The Associations stand ready to assist USDA in doing so.

INTEREST OF THE TENNESSEE WALKING HORSE NATIONAL CELEBRATION ASSOCIATION, THE TENNESSEE WALKING HORSE BREEDERS' AND EXHIBITORS' ASSOCIATION, AND THE WALKING HORSE TRAINERS ASSOCIATION

The National Celebration Association owns and operates the largest Tennessee Walking Horse ("TWH") show in the country: the Celebration. The Celebration takes place in Shelbyville, Tennessee each year over eleven days in late summer. The Celebration has taken place every year since 1939 and each year it crowns the World Grand Champion. The National Celebration Association also owns and operates the Fun Show, which occurs every year in Shelbyville in the spring, and the Celebration Fall Classic, which occurs every year in autumn in Shelbyville. The National Celebration Association's ownership and production of these shows make it the most significant participant in the Industry.

The Tennessee Walking Horse Breeders' and Exhibitors' Association is the official breed registry organization for the TWH. Founded ninety years ago in May 1935, the breed registry was established to record the pedigrees of the Tennessee Walking Horse. Its goal is to maintain the purity of the breed, to promote greater awareness of the TWH and its qualities, to encourage the expansion of the breed, and to help assure its general welfare.

The Walking Horse Trainers Association was founded to promote and develop activities of horse trainers in the Industry. It published a trainers' Code of Ethics to promote and protect the welfare of the Tennessee Walking Horse, and to preserve the Industry for future generations.

The Associations' members cherish TWHs. Indeed, their love of the breed is why they and other participants in the Industry train TWHs, show TWHs, and put on TWH shows and exhibitions. The Associations and Industry are committed to ensuring the welfare of TWHs, including by pursuing rigorous steps to eliminate the practice of soring completely. But they are also committed to ensuring that regulations under the HPA are fair to those who do not engage in soring.

To protect these interests, the National Celebration Association successfully challenged several components of the 2024 Rule. *See TWHNCA*, 2025 WL 360895, at *13. USDA cited the court's decision in *TWHNCA* as the primary reason for its decision to grant an additional postponement to the surviving portions of the 2024 Rule. Given the *TWHNCA* judgment, the time is ripe for USDA to return to the drawing board and write new regulations.

The Associations believe that the twin goals of the HPA, protection of horses and fair competition, can be achieved as Congress envisioned: with the Industry and USDA working together. The Associations stand ready to partner with USDA to do so.

BACKGROUND

A. USDA Repeatedly Tries To Overhaul the Horse Protection Program.

Twice in the last decade, USDA has attempted—and failed—to overhaul its Horse Protection Program. In 2016, USDA issued a notice of proposed rulemaking with a draft rule proposing many changes to the regulations under the Act. 81 Fed. Reg. 49,112 (July 26, 2016). The National Celebration Association filed 125 pages of comments on the proposed rule. *See* Comments of the TWHNCA in Response to APHIS's Notice of Proposed Rule to Amend Horse Protection Regulations (Oct. 25, 2016). On January 11, 2017, the head of APHIS signed a document summarizing the results of the notice-and-comment process and providing amended text for the rules under the Act. He subsequently transmitted that document (the "2017 Rule") to the Office of the Federal Register ("OFR"). On January 23, 2017, under a directive from the new Trump administration, the USDA withdrew the 2017 Rule from OFR before it had been published in the Federal Register. *See* Regulatory Freeze Pending Review, 82 Fed. Reg. 8,346, 8,346 (Jan. 24, 2017).

In July 2017, after the 2017 Rule had been withdrawn from publication, the USDA and Tennessee Walking Horse industry representatives jointly invited the National Academy of Sciences ("NAS") to oversee an independent study to analyze whether the USDA's regulations, and specifically the Scar Rule, were "based on sound scientific principles" and "can be applied with consistency and objectivity." *See* Nat'l Academies of Sciences, Engineering, and Medicine, *A Review of Methods for Detecting Soreness in Horses* 2, 17 (2021), https://doi.org/10.17226/25949 ("NAS Report").

That review came to devastating conclusions about the Scar Rule. Most significantly, it found that "the rule as written is not enforceable." *Id.* at 83. As NAS explained, the Scar Rule required inspectors to disqualify horses as sore based on visually observed criteria that have no actual connection to soring and, worse, on criteria that *cannot be visibly observed*. Specifically, the Scar Rule requires inspectors to find a horse to be "sore" based on the existence of a granuloma, a particular type of inflammatory lesion composed of certain cells. *Id.* But NAS observed that, not only was there no evidence that granulomas were present in horses that are "sore" within the meaning of the Act, but granulomas "cannot be determined to be present by gross examination alone." *Id.* Instead, as NAS observed, a "microscopic examination" is "absolutely necessary." *Id.* In other words, the Scar Rule tells inspectors to determine visually whether the tissue shows something (granulomas) that (i) has never been shown by data to be connected with "sore" horses and (ii) *cannot* be detected visually in any event. As a result, NAS concluded that the rule was based on a "fallacy" and that it cannot "be interpreted and applied in a consistent manner" by inspectors—that is, it necessarily produces arbitrary results. *Id.* The NAS Report boils down its key conclusion by explaining that the Scar Rule must be changed because "[t]he scar rule language needs to be based on what can accurately be assessed by a gross examination." NAS Report Conclusion 4-5, at 11. Despite being told that the Scar Rule was inherently flawed, the Agency continued to enforce the discredited Scar Rule while defending its ability to withdraw the 2017 Rule in litigation.

In 2022, the United States Court of Appeals for the D.C. Circuit decided that USDA's withdrawal of the 2017 Rule was unlawful. *Humane Soc'y of the United States v. USDA*, 41 F.4th 564, 565 (D.C. Cir. 2022). The court remanded the case back to the district court to determine the proper remedy.

On remand, USDA finally conceded that it needed to take action in response to the NAS Report's conclusions, telling the district court that it was working to promulgate a new rule that would address the findings in the NAS Report. The district court, recognizing the risk of regulatory whiplash, chose to remand to USDA without vacating the withdrawal of the 2017 Rule so that the Agency could promulgate this new rule rather than impose a flash-cut to the 2017 Rule. *Humane Soc'y of the United States v. USDA*, No. 19-cv-2458, 2023 WL 3433970, at *1 (D.D.C. May 12, 2023). The court explained that a remand was the better approach so as to not "disrupt USDA's ongoing effort to . . . 'incorporate[ ] more recent findings and recommendations, including' the 2021 National Academy of Sciences study." *Id.* at *13.[2]

On August 21, 2023, USDA issued a notice of proposed rulemaking, 88 Fed. Reg. 56,924 (Aug. 21, 2023), followed by a final rule issued on May 8, 2024. *See* Horse Protection Amendments, 89 Fed. Reg. 39,194 (May 8, 2024) (the "2024 Rule"). The 2024 Rule proposed a number of drastic changes to the Horse Protection Program. Most significantly, like the 2017 Rule, the 2024 Rule sought to ban action devices and pads, as well as ban the use of all substances on TWHs and racking horses during competition; it sought to eliminate the DQP program entirely; it replaced the Scar Rule with a new provision termed "Dermatological Conditions Indicative of Soring"; and it added a limited appeal mechanism so horse owners and trainers could challenge disqualifications after a competition had concluded.[3]

B. The *TWHNCA* Court Vacates Multiple Parts of the 2024 Rule.

In July 2024, the National Celebration Association and two TWH owners, Kimberly Lewis and Tom Gould, filed a pre-enforcement challenge to the 2024 Rule. The parties agreed to resolve the case by cross-dispositive motions and, in January 2025, the U.S. District Court for the Northern District of Texas issued an order vacating four substantive provisions in the 2024 Rule. *See TWHNCA*, 2025 WL 360895, at *13.

First, the court determined that the ban on action devices and pads in the 2024 Rule exceeded the USDA's statutory authority. Beginning with the text of the HPA, *see* 5 U.S.C. §§ 1824, 1828, the court explained that USDA's rulemaking authority to "prevent the soring of horses" permits only regulations that restrict practices that cause soring, not practices merely correlated with soring. *TWHNCA*, 2025 WL 360895, at *3. Because the Agency had offered no

[2] USDA first announced its decision to reanalyze its Horse Protection Program with updated data in December 2021. *See* Horse Protection; Licensing of Designated Qualified Persons and Other Amendments, 86 Fed. Reg. 70,755 (Dec. 13, 2021).

[3] The National Celebration Association submitted 64 pages of comments on the proposed rule. *See* Comments of the TWHNCA, 2023 Horse Protection Rule (Oct. 20, 2023) ("2023 TWHNCA Comment").

evidence that action devices and pads cause soring, the Court vacated the ban on action devices and pads. *Id.* at *4, *13.

Second, the court held that the ban on substances also exceeded the USDA's statutory authority. *Id.* at *5. Using reasoning similar to its analysis of the ban on action devices and pads, the court reasoned that the ban on all substances improperly reached substances (like lubricants) that do not cause soring. *Id.* The court vacated the ban on substances. *Id.*

Third, the court held that USDA's proposed replacement for the Scar Rule—a rule it dubbed "Dermatologic Conditions Indicative of Soring," or "DCIS"—was fundamentally vague and failed to give horse owners and trainers fair notice of what conduct would or would not disqualify their horses from competition. *Id.* at *6. The court emphasized that the DCIS Rule "fail[ed] to list any specific criteria that must be present for a horse to be deemed sore" and further "reli[ed] solely on the personal discretion of each inspector to identify" conditions that "*they* determine are indicative of soring." *Id.* (quoting 89 Fed. Reg. at 39,247). The court vacated the DCIS rule. *Id.* at *13.

In the course of ruling on the DCIS rule, the court also explained in considered dicta that the "disreputable and unscientific" Scar Rule, which it described as "a relic of a bygone era," exceeded the Agency's authority under the HPA. *Id.* at *5. Specifically, the court explained that the HPA allows USDA to prohibit only "specific actions" by a person that "caus[e] a horse to 'suffer' or 'reasonably expect[] to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.'" *Id.* at *5 (quoting 15 U.S.C. § 1821(3)). And since "a horse could be disqualified as sore under the Scar Rule without any proof of specific misconduct or soring inflicted by artificial means" such as "something like hair loss [which] can be naturally occurring," the court observed that the Scar Rule "r[a]n contrary to the HPA." *Id.*

Fourth, the court ruled that mechanisms USDA promulgated for post-deprivation review of disqualification decisions failed to provide due process. *Id.* at 9. The 2024 Rule enhanced the procedural protections of horse owners and trainers by allowing the horse owner or trainer the opportunity to appeal a disqualification within 21 days after the show. *Id.* at 7. The court found that this limited after-the-fact appeal mechanism did not satisfy due process. Citing *McSwain v. Vilsack*, No. 1:16-cv-01234, 2016 WL 4150036, at *4 (N.D. Ga. May 25, 2016), the court held that owners and trainers have a "constitutionally-protected interest in showing Tennessee Walking Horses without unreasonable government interference." 2025 WL 360895, at *8 (brackets omitted). It further held that "pre-deprivation review is required" and was not "adequately provided by the 2024 Rule." *Id.*

C. USDA Postpones The Effective Date Of The Surviving Provisions Of The 2024 Rule And Requests Comment Regarding Further Delay And Future Action.

On March 21, 2025, USDA explained that, "[i]n light of the [*TWHNCA*] Court's decision," it was postponing the effective date for the remaining provisions of the 2024 Rule to February 1, 2026. Horse Protection Amendments; Further Delay of Effective Date, and Request for Comment, 90 Fed. Reg. 13,273, 13,275 (Mar. 21, 2025) ("Request for Comment"). As APHIS explained, "due to the vacatur of the provisions governing prohibited items at shows and criteria for

identifying soring—*i.e.*, the provisions that the HPIs have received training under—APHIS must redevelop its HPI training program and re-train each of the 17 prospective HPIs in accordance with the surviving regulations." *Id.* at 13,275. APHIS also observed that the delay would "allow . . . for further examination of the horse protection program" and if APHIS "determine[s] that future rulemaking is desired, preserving the status quo until February 1, 2026 will insulate the public from any would-be 'regulatory whiplash' resulting from any shifts in policy decisions." *Id.* Finally, APHIS "specifically request[ed] comment regarding whether this extension provides a sufficient period of time, or whether the delay should be extended for a second season." *Id.*

SPECIFIC COMMENTS

APHIS correctly observed that the *TWHNCA* decision significantly shifted the regulatory landscape and that, absent the regulatory pause entered by the Agency, permitting the surviving portions of the 2024 Rule to go into effect would have irreparably harmed the Industry. APHIS was also correct to state that it should take this opportunity, with new guidance from the *TWHNCA* court, to "evaluate the [horse protection] program as a whole." *Id.* at 13,275. As the *TWHNCA* court recognized (and as the NAS Report recognized before it), the Agency's current rules are outdated, rely on questionable science, and fail to provide horse owners and trainers with adequate due process. APHIS should initiate a new, comprehensive rulemaking to address once and for all these and other ongoing problems in the Horse Protection Program. Because such rulemaking cannot be completed prior to the February 1, 2026 effective date, APHIS should further pause the implementation of the 2024 Rule until at least February 1, 2027, to allow the Agency time to receive and review comments before promulgating a new rule.

I. USDA Should Further Postpone the Effective Date of the 2024 Rule To Initiate Comprehensive Rulemaking to Address Longstanding Problems in the Horse Protection Program.

USDA should further postpone the effective date of the 2024 Rule to give the Agency time to "evaluate the program as a whole," 90 Fed. Reg. at 13,275, and engage in a comprehensive rulemaking to modernize the Horse Protection Program and end longstanding constitutional defects that have been identified by multiple courts and acknowledged by the Agency.

Three examples illustrate why the Agency needs to develop a new rule. First, the Agency's current regulations fail to provide horse owners and trainers with the ability to challenge disqualifications, a failure that at least two courts have found runs afoul of the Due Process Clause of the Fifth Amendment. Second, the Agency continues to operate under the Scar Rule, despite the fact that it (i) is not grounded in reputable science or the text of the HPA, (ii) fails to provide objective criteria to horse inspectors to identify soreness, and (iii) does not give fair notice to horse owners and trainers of what will lead to disqualification. Third, the elimination of the Designated Qualified Persons ("DQP") program will lead to significant Industry disruption, as there is no

evidence that there will be sufficient Horse Protection Inspectors ("HPIs") available to meet demand, creating a substantial risk that shows will be unable to operate.

II. USDA Should Conduct Rulemaking to Provide Constitutionally Required Due Process Protections.

USDA should initiate rulemaking to fix one of the most glaring problems in the Horse Protection Program: the lack of due process protections. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). USDA's current regulations do not provide for meaningful review of a disqualification, as recognized now by two federal courts.

In *McSwain v. Vilsack*, No. 1:16-cv-01234, 2016 WL 4150036, at *3 (N.D. Ga. May 25, 2016), the court held that APHIS violated the rights of a horse's owner and trainer because they did "not have the opportunity to appeal or otherwise be heard prior to their horse's disqualification." *Id.* at *5. As the court observed, although the regulations permit USDA to seek a civil or criminal penalty after a violation, the decision whether to pursue a penalty is entirely within USDA's discretion—and USDA historically has rarely sought such penalties. *Id.* at *5. Thus, the court found that due process "require[d] pre-deprivation" review. *Id.* at *6. It also found that any post-deprivation process provided in connection with a penalty proceeding could not cure the due process violation, because "there is no guarantee of post-deprivation process." *Id.* at *5. The court concluded that "[t]he disqualification of [Plaintiffs' horse] marks the point of deprivation and Plaintiffs have no guarantee of either pre- or post-deprivation process." *Id.* The system found to be unconstitutional in *McSwain* remains in place today.

More recently, the *TWHNCA* court reaffirmed that, when APHIS inspectors disqualify horses at shows, some pre-deprivation review process is required. The *TWHNCA* court addressed APHIS's efforts to provide additional due process in the 2024 Rule and held that those efforts fell short. In the 2024 Rule, USDA provided horse owners and trainers the ability to appeal within 21 days *after* a disqualification. *See TWHNCA*, 2025 WL 360895, at *7. That review mechanism was vacated by the *TWHNCA* court on the ground that it did not satisfy the demands of due process. The court confirmed the holding of *McSwain* that owners and trainers have a "constitutionally protected interest in showing Tennessee Walking Horses without unreasonable government interference." *Id.* at *8 (quotations omitted). It then held that the 2024 Rule would unconstitutionally deprive horse owners and trainers of that property interest because it failed to provide pre-deprivation process. *Id.* at *8-9. "Once a horse is disqualified," the court explained, "the opportunity for that horse to compete is practically extinguished because inspection occurs approximately 30 minutes before the horse enters the arena." *Id.* at *8 (quotation omitted). The addition of a right to an appeal within 21 days after disqualification did not cure the deprivation because "overturning a disqualification still forecloses the ability of a horse to compete, as well as any ability for owners or trainers to claim prize money and notoriety within the industry." *Id.*

Now that two courts have told APHIS that its current regulations fail to provide adequate due process, the Agency has no excuse to continue failing to protect the constitutional rights of horse owners and trainers. USDA should postpone the 2024 Rule to allow time to initiate new rulemaking to create pre-deprivation review mechanisms for HPA enforcement.

The absence of any constitutional review mechanism is a significant problem for the Industry that is made worse by USDA's current policy of prohibiting a horse that is disqualified from reappearing *at all* during a multi-day event. Under that policy, a horse that is disqualified on the first day of competition, for example, will miss out on eleven days of competition at the National Celebration, the Industry's marquee event—even if that disqualification was for a non-soring violation. This rule makes no sense because the factors that may have caused a horse to appear sore on one night (and to fail inspection) can rapidly dissipate such that the horse can pass inspection (and not be sore) within a day or two. For this reason, VMOs will regularly pass a horse who was disqualified the night before by a different VMO at a different show. USDA's application of a policy requiring that a horse be disqualified for the entirety of a multi-day event when it is definitively *not* sore is not only arbitrary, but it is contrary to the HPA, which permits USDA to disqualify only horses that are sore, not horses that were sore two days ago. USDA should end this process, as well.

III. USDA Should Initiate a Rulemaking To Replace the Unlawful and Pseudoscientific Scar Rule and Should Exercise Its Discretion Pending the Rulemaking to Stop Enforcing That Rule, Which USDA Has Known Is Unlawful Since At Least 2021.

Compounding the consequences from the lack of due process is the Scar Rule. Promulgated over 45 years ago, the Scar Rule was USDA's first effort to create visual inspection standards to identify horses that had been subject to soring. 44 Fed. Reg. 25,172, 25,176 (Apr. 27, 1979). In the years since, multiple scientific authorities have concluded that there are significant problems with the Scar Rule. The Scar Rule requires a visual inspection for, among other things, granulomas, but the NAS Report concluded that granulomas cannot be seen with the naked eye—and therefore inspectors cannot apply the rule in a consistent manner. It concluded the "rule as written is not enforceable." NAS Rep. 83. The *TWHNCA* decision recognized these problems, calling the Scar Rule a "disreputable and unscientific" "relic of a bygone era." *TWHNCA*, 2025 WL 360895, at *5. Indeed, USDA acknowledged that the Scar Rule had to be replaced when it sought to supplant it with the entirely new DCIS rule in the 2024 Rule.[4]

The Agency should further postpone the effective date of the surviving portions of the 2024 Rule to engage in new rulemaking to develop a horse inspection standard that actually remedies the problems with the Scar Rule. And in the interim the Agency should stop enforcing the Scar Rule, which the Agency has known for years is unscientific and cannot be fairly enforced.

First, APHIS should abandon the Scar Rule because it exceeds the Agency's authority under the HPA. The Act mandates that a finding of soreness can be made only where a person has taken specific actions that cause a horse to "suffer[]" or that can "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." 15 U.S.C. § 1821(3). The Scar Rule casts aside these requirements and requires inspectors to find a horse is "sore" based on different, fundamentally vague criteria set by USDA.

[4] The *TWHNCA* court correctly concluded that the DCIS Rule—which left it completely up to an inspector to decide what was and was not soring—did not "provide a remedy" to the problems with the Scar Rule. *Id.*

For example, a horse may be disqualified as sore under the Scar Rule if it shows an "excessive loss of hair." But loss of hair is not found in the statutory definition of "sore," and there are many reasons—including use of approved training equipment (or "action devices")—for hair loss that have no relation to soring as defined in the Act. Hair loss and inflammation may also be caused by skin conditions that have non-human causes. For example, pastern dermatitis is a condition marked by many of the same symptoms that would cause a horse to be disqualified under the Scar Rule. *See* DANNY W. SCOTT, DVM & WILLIAM H. MILLER, JR., VMD, EQUINE DERMATOLOGY 460-61 (Elsevier Science 2011). This condition can be marked by hair loss and inflammation. *Id.* And it has many potential causes, including bacterial infection, worm or mite infection, and irritation from exposure to alkaline soil. *See id.* at 460. None of those causes is related to soring. But the mere loss of hair can lead a horse inspector to disqualify a horse under the Scar Rule. In other words, by enforcing the Scar Rule, USDA disqualifies horses as "sore" even though they are ***not*** sore under the HPA definition of that term.

For this reason, the *TWHNCA* decision noted that that the Scar Rule requires inspectors to disqualify horses based on "characteristics [that] run contrary to the HPA" because "[i]n essence, a horse could be disqualified as sore under the Scar Rule without any proof of specific misconduct or soring inflicted by artificial means." *TWHNCA*, 2025 WL 360895, at *5.

Second, the Scar Rule should be abandoned because it produces arbitrary results. The Scar Rule asks inspectors to identify things on a visual inspection that USDA's own experts have told it cannot be seen with the naked eye. Specifically, the Scar Rule requires that all horses' fore pasterns "be free of bilateral granulomas." 9 C.F.R. § 11.3. But the NAS Report explained that granulomas cannot be seen with the naked eye. *Id.* at 83 ("A microscopic evaluation of the tissue is absolutely necessary to establish the presence of granulomatous inflammation."). As a result, the Scar Rule asks inspectors to look for things they cannot see and will necessarily produce arbitrary results. As NAS concluded, "the rule as written is not enforceable." *Id.*

NAS's finding that the Scar Rule is not enforceable as written is consistent with the earlier research of Dr. Paul Stromberg, a professor at the Ohio State University College of Veterinary Medicine. Dr. Stromberg evaluated 136 biopsies from 68 Tennessee Walking Horses that were disqualified for violations of the Scar Rule at the 2015 and 2016 National Celebration to determine whether the tissue from horses that had been disqualified under the Scar Rule actually showed any medical evidence that would support the violations. His answer was no. His findings, as reported by NAS, were that "no scar formation or granulomatous inflammation was present in any of the tissue samples." NAS Report at 78. As a result of Dr. Stromberg's research, NAS concluded that "[t]he primary injuries to the pastern of the horses in the Stromberg study or any of the TWHs presenting with lichenification of the skin or the palmar aspect of the pastern are not known." *Id.* at 80. In other words, none of the horses in Dr. Stromberg's study met the criteria for a Scar Rule violation. Based on this sample, USDA's testing protocol had an accuracy rate of zero percent.

Dr. Stromberg reached similar conclusions based on a review of horses disqualified from the 2014 Celebration. Dr. Stromberg observed that these disqualifications "must be considered false positives" because:

> All I found was some minor folding in the skin of the flexor surface and sulcus of both pasterns. . . . The skin did not feel thick nor was there any clinical evidence of granulomatous inflammation, granulation tissue (scar tissue or proud flesh) or anything else that could be interpreted to be a scar.

Exhibit A to the Declaration of Dr. Paul Stromberg (attached as Exhibit 1). In other words, Dr. Stromberg agrees with NAS: the Scar Rule directs inspectors to look for skin conditions (granulomas) that cannot be seen with a naked eye and, even if they could be, are not connected with soring.

Unsurprisingly, the NAS Report found that the Scar Rule could not be "applied in a consistent manner by VMOs and DQPs tasked with the examination of horses." NAS Report at 85. Here again, this finding was in step with research by other specialists of equine medicine. For instance, Dr. Stromberg explained that "[i]nspectors are attempting to detect the presence of a pathologic process far below the level of clinical significance **based on what they think they see and feel** without independent verification. They conclude from this it is proof of a scar rule violation. The result, not unexpectedly, is inconsistency in passing or disqualifying a horse for competition and many false positives." Stromberg Decl. Ex. A at 10 (emphasis original).

Dr. Stromberg's concerns were echoed by Dr. Joseph Bertone, a professor of equine medicine. He concluded that the examination protocol applying the Scar Rule "is highly subjective and unlikely to be applied consistently" and that "observations of the VMOs applying this examination protocol at the Celebration lead me to be skeptical that results from this examination protocol can be accurately interpreted to identify horses that are sore and those that are not sore." Statement of Dr. Joseph Bertone ¶ 16 (attached as Exhibit 2).

Accordingly, the NAS Report repeatedly recommended that additional studies must be done to determine whether any visually observable conditions on a horse's skin—such as lichenification—are evidence of soring or whether they result from other, non-soring practices. *See* NAS Report at 10 ("More studies are needed to determine if training practices that can cause soreness in TWHs also result in lichenification . . . These studies might elucidate at what point, if at all, during training epidermal hyperplasia and lichenification would develop and what particular training practices would cause these conditions."); *id.* ("Studies are also needed to determine if epidermal thickening (hyperplasia) and lichenification are solely caused by the action devices worn by TWHs."). To date, the Industry is not aware that any of these studies have been conducted.

All of these points were raised in the 2023 Comments of the National Celebration Association, incorporated by reference into this comment as if fully set forth below. *See* 2023 TWHNCA Comment, *available at* https://www.regulations.gov/docket/APHIS-2022-0004/comments.

For all of these reasons, the USDA should postpone the 2024 Rule and commence new rulemaking to replace the Scar Rule.

Pending completion of that new rulemaking, USDA should immediately exercise its discretion to stop enforcing the Scar Rule. USDA has known since at least the NAS Report's publication in 2021 that the rule is not enforceable as written. And the Agency acknowledged that the rule had to be replaced when it sought to displace it in favor of the new DCIS provision in the 2024 Rule. Now that a federal court has held that the DCIS rule was even worse and set it aside, the Agency cannot simply fall back on the Scar Rule when it is fully aware of fatal legal defects in that rule. The Agency's failure to devise a lawful replacement for the Scar Rule cannot justify continuing to enforce a rule that the Agency knows is fatally flawed.

IV. USDA Should Initiate a Rulemaking to Reconsider the Decision in the 2024 Rule To Eliminate the Designated Qualified Persons Program.

Eliminating the DQP program was, at best, a bad policy choice, and it should be reconsidered through new rulemaking.

By eliminating the DQP Program, APHIS has effectively made it impossible for show managers to have sufficient horse inspectors to continue operating. Congress recognized that USDA had limited resources and personnel for conducting inspections, which is why it amended the HPA in 1976 to give the Industry itself a major role in policing compliance with the Act. *See* H. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976) ("This limited budget and low manpower level is understandably inadequate for USDA to carry out its horse protection responsibilities."). As amended, the Act squarely places the obligation for disqualifying sore horses on "[t]he management of any horse show or exhibition." 15 U.S.C. § 1823(a). It also specifies that inspectors should be appointed "by the management of any horse show," subject to "requirements" set by USDA. *Id.* § 1823(c). Although Congress preserved the ability of USDA to send its own inspectors to shows, *see id.* § 1823(e), its primary objective was to ensure that most horse inspections would be conducted by inspectors privately hired by show management, not the Agency—because the Agency would not be *able* to conduct most horse show inspections.

The changes in the 2024 Rule eliminating DQPs failed to acknowledge this resource management problem. Worse, they required horse show management to pay to hire an inspector who meets the new qualification and licensing requirements as a USDA-approved HPI—who must be a veterinarian and who will charge a fee accordingly. Even USDA concedes that the requirement for HPIs to be veterinarians may be "cost-prohibitive for smaller shows," 88 Fed. Reg. at 56,953, forcing many to use APHIS inspectors instead.

The squeeze placed on show management to use APHIS inspectors is made worse by a well-documented shortage of licensed veterinarians available to serve as HPIs.[5] Given this shortage, it is not clear that there are enough veterinarians who could inspect the large number of horses that compete annually. In 2022, for example, 3,449 individual horses competed in the 52

[5] The American Veterinary Medical Association recently established a commission to address the shortage of veterinarians in equine practice and has noted concern that it could compromise the welfare of horses if corrective measures are not implemented. R. Scott Nolen, *Labor shortage prompts AAEP to form workforce commission*, Am. Veterinary Med. Assoc. (Aug. 17, 2022), https://perma.cc/ZCS9-K8BE.

TWH events managed by the SHOW HIO alone. *See* SHOW Records (attached as Exhibit 3). Furthermore, there is no evidence that veterinarians will have any incentive to seek USDA certification as HPIs. Taken together, the prohibitive cost of HPIs and shortage of qualified individuals to serve as HPIs makes it overwhelmingly likely that there will not be sufficient inspectors available to horse show management. Indeed, USDA has acknowledged that, since the 2024 Rule was promulgated one year ago, APHIS has received only 67 pending applications from persons hoping to become HPIs and has trained only "17 prospective HPIs." By contrast, in 2024, SHOW had 68 licensed DQPs available to work at shows across the country, four times the number of HPIs who have been trained. These numbers are limited only to SHOW; they do not account for other HIOs or horse breeds who will be required to use HPIs if they intend to conduct horse inspections to comply with their obligations under the HPA.

APHIS suggested that it would provide its own inspectors to accommodate shows that cannot afford an HPI or where an HPI is unavailable. But USDA fails to point to any data suggesting it would be able to accommodate every horse show and every request for inspectors. Indeed, in the 2025 season, only two VMOs have attended any horse shows where SHOW DQPs were in attendance. The inability of USDA to identify and train a sufficient numbers of inspectors by the time the 2024 Rule was originally set to go into effect is evidence that it cannot ensure adequate numbers of inspectors to accommodate horse shows.

Finally, the decision to eliminate Industry participation in self-regulation through the DQP program reflected a policy approach that is decidedly at odds with the regulatory approach of the current Administration. As USDA has acknowledged, "[o]ne of our priorities is ensuring policy is in alignment with the President's objectives." 90 Fed. Reg. at 13,275. One of the clear objectives of the current Administration is reducing the burdens of regulation and downsizing federal regulatory personnel. The President has called for a ten-for-one repeal of regulations to "alleviate unnecessary regulatory burdens," *see* Exec. Order No. 14,192 (Jan. 31, 2025), and directed all agency heads to "reduce the size of the Federal Government's workforce," Exec. Order No. 14,210, 90 Fed. Reg. 9,669, 9,669 (Feb. 11, 2025). To implement downsizing, agencies are to "undertake preparations to initiate large-scale reductions in force," prioritizing for reduction, among other things, "offices that perform functions not mandated by statute." *Id.* at 9,670. Absorbing back into USDA what was formerly a largely industry-run and industry-supported inspection program and effectively requiring USDA personnel themselves to shoulder a higher proportion of all inspections runs directly counter to the deregulatory and downsizing course the President has instructed his Department heads to pursue.

USDA should extend the postponement of the 2024 Rule and propose a new rule restoring the DQP program. USDA could consider eliminating the HPI program outright, or allowing DQPs as an option show management can choose alongside HPIs.

CONCLUSION

For the reasons discussed in this Comment, USDA should further postpone the effective date of the surviving portions of the 2024 Rule to initiate an entirely new, comprehensive rulemaking to address defects that have plagued the Agency's HPA rules for years. USDA has been trying to revamp its horse protection regulations for nearly a decade. New rulemaking is likely inevitable because two federal courts have now set out an analysis making clear that the

current Horse Protection Program denies competitors at TWH shows due process, and at least one federal court, in considered dicta, concluded that the Scar Rule is contrary to the HPA. Moreover, the Agency itself has recognized since 2021 that, in light of the conclusions of the NAS Study that the Agency itself commissioned, the Scar Rule cannot survive. Horse owners and trainers whose horses are disqualified under the existing program miss out not just on the ability to compete on a given night, but they are also prevented from having their horses compete throughout an entire multi-day show, even if their horses were disqualified for a minor issue and could easily pass reinspection. Initiating rulemaking now to develop mechanisms that will provide adequate due process, establish objective inspection standards, and restore the industry's role in self-regulation is the best path to ensure regulations that comply with the law and align with the Administration's priorities.

The Associations stand ready to work with USDA to develop a new rule that will achieve the twin goals Congress had in mind in enacting the HPA—eliminating soring while preserving fair competition.

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Respectfully submitted,

/s/ *Patrick F. Philbin*

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