No. _____

In the Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this damage action under the Packers and Stockyards Act (PSA), a poultry grower alleged that a live poultry dealer violated PSA regulations and 7 U.S.C. § 192(a) and (b) by not weighing the grower's production immediately upon its arrival at the dealer's plant, by denying his right to observe the weighing, and by terminating his contract because he complained to the Department of Agriculture. Subdivisions (a) and (b) of § 192 make it unlawful for any packer or live poultry dealer to engage in unfair, unjustly discriminatory or unreasonably prejudicial acts or practices with respect to transactions in livestock, meats or live poultry, but do not expressly refer to anticompetitive conduct. In contrast, subdivisions (c) through (f) of § 192 expressly enumerate anticompetitive acts. The district court dismissed the complaint on the ground that competitive injury must be pleaded to pursue a claim alleging violation of § 192(a) and (b). The court of appeals affirmed. The questions presented are:

1. Must injury to competition be pleaded and proved to establish liability for violation of § 192(a) and (b)?

2. In the alternative, assuming that § 192 is ambiguous, should the courts have deferred, under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984), to Department of Agriculture decisions holding that § 192(a) and (b) does not require a showing of injury to competition?

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PETITION FOR A WRIT OF CERTIORARI

Alton T. Terry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a) is reported at 604 F.3d 272 (6th Cir. 2010). The Memorandum and Order of the United States District Court for the Eastern District of Tennessee (Pet. App. 33a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2010. Pet. App. 32a. A timely Petition for Rehearing En Banc was denied on June 23, 2010. Pet. App. 54a. Justice Thomas extended the time to file this petition to October 21, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

7 U.S.C. § 192(a) and (b) (2006), § 202(a) and (b) of the Packers and Stockyards Act, 1921, provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . . .

The full text of § 192 and other relevant portions of the Act are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner Alton T. Terry owned and managed a poultry farm in Tennessee,[1] where he raised broiler chickens for Tyson Farms, Inc. ("Tyson") until Tyson terminated his contract in 2006. Mr. Terry sued Tyson in federal district court under the Packers and Stockyards Act, 1921 ("PSA"), 7 U.S.C. § 181 et seq. (2006), and the Agricultural Fair Practices Act of 1967 ("AFPA"), 7 U.S.C. § 2301 et seq. He alleged that Tyson violated 7 U.S.C. § 192(a) and (b) by not weighing his production immediately upon arrival at Tyson's plant and denying his right to observe the weighing, contrary to PSA regulations, and by terminating his contract because he complained to the Department of Agriculture. The district court granted Tyson's motion to dismiss for failure to state a claim upon which relief could be granted. Pet. App. 33a. It held that Mr. Terry could not pursue his claims under

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[1] Mr. Terry has lost his farm to foreclosure.

either statute because: (1) the Tennessee Poultry Growers Association did not meet the AFPA's definition of an "association of producers,"[2] and (2) § 192's prohibition of "unfair, unjustly discriminatory, [and] deceptive practice[s]" and imposition of "undue or unreasonable prejudice" by poultry dealers applies only if the alleged violations injure competition. Pet. App. 38a, 47a. The Sixth Circuit affirmed.

A. The Packers and Stockyards Act, 1921

This case presents another chapter in the long struggle between those who grow our food and those who process and market it. That struggle has been conducted against the background of legislation enacted not only to protect competition and consumers, but also to protect farmers and ranchers from overreaching by economically powerful processors and marketers. Congress enacted the PSA in 1921. Pub. L. No. 67-51, 42 Stat. 159 (1921) (codified as amended at 7 U.S.C. § 181 et seq. (2006)). As described in this Court's first decision construing the PSA, the legislation was enacted: "to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business." *Stafford v. Wallace,* 258 U.S. 495, 513 (1922) ("*Stafford*"). Although the Act has

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[2] This petition does not seek review of the dismissal of Mr. Terry's AFPA claim.

been amended some 23 times,[3] including a number of major revisions and expansions, its purpose remains as Chief Justice Taft described it in *Stafford.*

The 1921 Act consisted of four titles. Title I set forth definitions. Title II imposed general duties on "packers." Title III imposed public utility regulation on stockyards, including a duty to adopt just, reasonable and non-discriminatory practices (§ 307, 42 Stat. at 165 (current version at 7 U.S.C. § 208)). It also specifically declared unlawful the use of any unfair, unjustly discriminatory or deceptive practice in connection with stockyard operations by owners, marketing agencies and dealers, including practices relating to the weighing or handling of livestock. § 312, 42 Stat. at 167 (current version at 7 U.S.C. § 213). Persons injured by violations of § 307 and other specific provisions of Title III could either complain to the Secretary for administrative relief, or bring a suit for damages in a federal district court. § 308(a), 42 Stat. at 165 (current version at 7 U.S.C. § 209(a)). The statute expressly declared that existing common law and statutory remedies were preserved, and that the Act's administrative and judicial remedies were in addition to such remedies. § 308(b), 42 Stat. at 165 (current version at 7 U.S.C. § 209(b)). Congress also made clear that nothing contained in the PSA was to supplant the antitrust laws except as specifically provided. § 405, 42 Stat. at 168-69 (current version at 7 U.S.C. § 225).

The provision at issue in this case originated in § 202 of Title II, 42 Stat. at 161, and is now codified at

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[3] Subsequent amendments to the PSA are listed in the Appendix.

7 U.S.C. § 192.[4] The original provision made it unlawful for any "packer" to "(a) [e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or (b) [m]ake or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Subsections (a) and (b) made no reference to restraints of commerce, creation of a monopoly, or the manipulation or control of prices. In contrast, (c) through (f) of § 192 expressly rendered unlawful conduct that had the tendency, purpose or effect of restraining commerce or creating a monopoly or of manipulating or controlling prices. In 1921 this section could be enforced only by cease-and-desist orders of the Secretary of Agriculture, subject to review in the courts of appeals. §§ 203, 204, 42 Stat. at 161, 162-63 (codified as amended at 7 U.S.C. §§ 193, 194).

The 1921 Act extended to poultry, but limited its regulation to persons also engaged in the business of manufacturing or marketing livestock products.[5] That

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[4] Except as the context otherwise indicates, sections of the PSA are cited hereinafter by their section numbers in Title 7 of the U.S. Code.

[5] The 1921 Act defined the term "packer" to include "any person engaged in the business . . . of marketing . . . poultry [or] poultry products in commerce," but declared that "no person engaged . . . in such marketing business shall be considered a "packer" unless such person is also engaged in, owns, controls or has a 20 percent

limitation was modified in 1935, when Congress amended the PSA's coverage by adding Title V—Live Poultry Dealers and Handlers.[6] Section 501 of the 1935 amendment explained that live poultry markets in large population centers were "attendant with various unfair, deceptive and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry in comparison with prices of other commodities . . . ," and that "[s]uch practices and devices are an undue restraint and an unjust burden upon interstate commerce . . . ." *Id.* at 648. Section 503 extended the provisions of § 192 to "live poultry dealer[s]," a term broadly defined to mean "any person engaged in the business of buying or selling live poultry in commerce for purposes of slaughter either on his own account or as the employee or agent of the vendor or purchaser." *Id.* at 649.

In subsequent amendments Congress responded to the substantial changes in the production, processing, and marketing of livestock and poultry that had occurred since 1921. The 1958 amendment, Pub. L. No. 85-909, 72 Stat. 1749 (1958), was a major updating of the Act's scope, regulatory remedies and enforcement. H.R. Rep. No. 85-1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212. Among other changes, § 192 was revised to expressly cover "poultry, or

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interest in the business of manufacturing or preparing livestock products. § 201, 42 Stat. at 160.

[6] Title V—Live Poultry Dealers and Handlers, Pub. L. No. 74-272, 49 Stat. 648 (1935), *repealed by* Poultry Producers Financial Protection Act of 1987, Pub. L. No. 100-173, § 10, 101 Stat. 917, 922 (1987).

poultry products." 72 Stat. 1749. The Agriculture Committee's report explained that the 1921 Act was not only intended to assure fair competition, but also "to safeguard farmers and ranchers from receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc." 1958 U.S.C.C.A.N. at 5213.

In 1976 Congress expanded the administrative and judicial remedies of 7 U.S.C. § 209(a), originally limited to enumerated sections, to encompass violation of "any of the provisions of this Act . . . relating to the purchase, sale, or handling of livestock . . . ." Pub. L. No. 94-410, § 6, 90 Stat. 1249, 1250 (1976). Poultry was not included at that time.

In the subsequent decades, the poultry sector saw dramatic restructuring, and significant new problems for poultry producers. Those problems led to amendment of the PSA by the Poultry Producers Financial Protection Act of 1987 ("Poultry Act"), Pub. L. No. 100-173, § 1, 101 Stat. 917 (1987). The Poultry Act was intended to adjust the PSA's market-facilitating protections for poultry growers to the large scale, integrated poultry production and processing industry that had developed in the Nation's agricultural economy. H.R. Rep. No. 100-397, at 6 (1987), *reprinted in* 1987 U.S.C.C.A.N. 855, 856.

In addition to defining key terms related to poultry production, the Poultry Act established a trust to protect poultry growers in the event of poultry dealer insolvency, required prompt contractual payment of poultry producers, and clarified the Federal Trade Commission's jurisdiction over certain poultry

marketing practices. Further, the Poultry Act finally extended to poultry sellers and growers § 209's federal judicial remedy for violation of "any of the provisions of this Act." Poultry Act § 5, 101 Stat. at 918; *see* 1987 U.S.C.C.A.N. at 855.

Section 209(a) of the PSA, as amended by the Poultry Act, now provides that:

> If any person . . . violates any of the provisions of this chapter, or of any order of the Secretary under this chapter, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

7 U.S.C. § 209(a). Although § 209(b) provides that liability under subsection (a) can be remedied by a complaint to the Secretary or an action in federal district court, subsection (b) remains limited to the livestock sector as provided by § 210. Thus, a poultry grower's only remedy for violations of § 192 by a live poultry dealer such as Tyson is by a complaint in

federal district court.[7] Mr. Terry pursued that remedy in this case.

Currently, § 192(a) makes it unlawful for any live poultry dealer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." 7 U.S.C. § 192(a). Section 192(b) makes it unlawful for any live poultry dealer to "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect." 7 U.S.C. § 192(b). Subsections (c) through (f) of § 192 prohibit conduct having the purpose, tendency, or effect of restraining commerce, manipulating or controlling prices, or creating a monopoly. 7 U.S.C. § 192(c)-(f).

In 2002, the Act was again amended to prevent processors from including in production contracts confidentiality provisions that barred livestock and poultry producers from discussing the terms or details of their contracts with federal and state agencies, legal advisers, lenders, accountants, executives or

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[7] In addition to the protections afforded by amended § 209, the Poultry Act amended § 228a of the PSA to authorize the Secretary of Agriculture ("Secretary") to apply to the appropriate district court (via the Attorney General) for a temporary injunction or a restraining order "[w]henever the Secretary has reason to believe that any person . . . has failed to pay any poultry grower what is due on account of poultry obtained under a poultry growing arrangement . . . ." 7 U.S.C. § 228a. The Poultry Act also provided the Department of Agriculture's Packers and Stockyards Administration with the authority to enforce the prompt payment and trust provisions of the legislation against poultry dealers. 7 U.S.C. § 228b-1, b-2, b-4.

managers, landlords or members of their immediate family. Pub. L. No. 107-171, § 10503, 116 Stat. 509, 510 (2002) (codified at 7 U.S.C. § 229b (2006)).

In § 11006 of the Food, Conservation, and Energy Act of 2008, Congress directed the Secretary of Agriculture to promulgate regulations "to establish criteria that the Secretary will consider in determining . . . whether an undue or unreasonable preference or advantage has occurred in violation of" the PSA. Pub. L. No. 110-246, 122 Stat. 1651, 2120 (2008). The Secretary issued proposed regulations on June 22, 2010. Among other things, the regulations would formalize the Department of Agriculture's "longstanding" position that a violation of § 192(a) or (b) "can be proven without proof of predatory intent, competitive injury, or likelihood of injury." Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,340 (June 22, 2010).

B. The Economic Organization of Broiler Production

Large poultry "integrators" such as Tyson control most of the variables relevant to the poultry growing process. The United States Department of Agriculture ("USDA") has succinctly described the current organization of this sector of the agricultural economy:

> Broiler production is organized in a distinctive manner. Most farms are linked to an integrator through a production contract, under which the integrator provides chicks, feed, veterinary services, and other inputs to the

> farmer, who grows the birds to market weight. Besides providing their own labor, farmers invest in specialized poultry housing (along with associated equipment), pay for any hired labor, and bear some or all of the cost of utilities. Because broiler housing is specialized and long-lived, the decision to produce broilers is a long-term commitment, and most producers have worked with their integrator for at least 10 years.[8]

The "[i]ntegrators usually own hatcheries, feed mills, slaughter plants, and further processing plants—that is, they may be vertically integrated into all stages except for broiler production, where they rely on networks of growers assembled through production contracts."[9] The growers, in turn, must make a major investment in the broiler houses in which the chicks supplied by the integrator are grown for processing. A 30,000 square-foot house cost $300,000 in 2006, and most growers must operate more than one.[10] Moreover, the USDA has found that "[b]ecause production occurs in localized networks, growers in most areas have very few integrators . . . in their area and most have no more than three."[11] *See also London*

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[8] USDA Economic Research Service, James M. McDonald, *The Economic Organization of U.S. Broiler Production,* at 2 (June 2008), *available at* http://www.ers.usda.gov/Publications/EIB38/EIB38.pdf.

[9] *Id.* at 3.

[10] *Id.* at 7.

[11] *Id.* at 4.

v. Fieldale Farms Corp., 410 F.3d 1295, 1298-99 (11th Cir. 2005) ("*London*").

Growers are paid according to a formula that assesses the weight gained by the chickens relative to the amount of food provided. The weight of the chickens is therefore a critical factor in grower compensation. Pet. App. 60a. USDA regulations issued under the PSA require that weighing take place immediately upon the delivery of chickens to the dealer's plant, and require that growers be allowed to watch the weighing and obtain any information pertaining to the weight. 9 C.F.R. §§ 201.82(b), 201.108-1(e)(4) (2010). Delayed weighing can be devastating to a grower's payment because shrinkage occurs rapidly. The grower then loses the full value of his efforts and is also discriminatorily disadvantaged in comparison to growers whose birds are timely weighed.

C. Factual Background

Mr. Terry's complaint alleged that he purchased his poultry farm in 2001, after being assured by the production manager at the Shelbyville complex of Tyson Farms, Inc. that the farm was a top producing poultry farm and that the facility and equipment were in excellent condition and suitable for growing chickens. The Tyson manager's assurances led Mr. Terry to believe that the farm's poultry equipment would need no major improvements in the near-term.

Upon assuming control of the farm, Mr. Terry alleged, he began to learn about problems poultry growers were experiencing with Tyson and similar poultry dealers. Mr. Terry became actively involved in

organizing the poultry growers in his area into the Tennessee Poultry Growers Association ("TPGA"). As the elected chairman of the directors of the TPGA, Mr. Terry informed growers of their rights under federal law and reported complaints about Tyson's practices to officials at the Grain Inspection, Packers & Stockyards Administration ("GIPSA") in Washington, D.C. Pet. App. 5a-6a.

Concerned that his own chickens were not being weighed immediately upon delivery to Tyson as required by law and his contract, Mr. Terry made multiple attempts to watch the weighing at the plant. After being denied access to the plant in August and December of 2004, Mr. Terry notified a federal official and requested that Tyson be sent a letter. On February 13, 2005, the weighing of his production was delayed; he asked to observe the weighing of his birds at the Tyson plant, but was denied access. Mr. Terry called an official of GIPSA, who said that he was en route to the plant to investigate. That week, Tyson "delayed" placement of chickens with Mr. Terry for a full flock rotation, costing Mr. Terry $30,000 in lost compensation. The following month, Tyson informed Mr. Terry that the company had decided to discontinue placement of chickens at his farm after he made the weighing complaint. Mr. Terry requested and was denied compensation for the missed flock. Tyson subsequently terminated Mr. Terry's contract, citing his confrontational behavior towards Tyson's representatives and his failure to make costly upgrades to the equipment on his farm. At the time of the termination, Mr. Terry was well above average in the poultry grower rankings. Mr. Terry subsequently put his farm on the market, but was unable to sell it due to Tyson's insistence that expensive upgrades be

made before birds will be placed at the farm. Pet. App. 7a.

D. Court Proceedings and Decisions

On January 7, 2008, Mr. Terry sued Tyson under § 209 in the U.S. District Court for the Eastern District of Tennessee. He alleged: (1) Tyson violated the Agricultural Fair Practices Act ("AFPA"), 7 U.S.C. § 2301 et seq., by discriminating against Mr. Terry because of his membership in an association of producers; and (2) Tyson violated § 192(a) and (b) of the PSA by engaging in "unfair, unjustly discriminatory, or deceptive practice[s]" and by subjecting Mr. Terry to "undue or unreasonable prejudice or disadvantage." 7 U.S.C. § 192(a) and (b).

The district court granted Tyson's Motion to Dismiss for failure to state a claim upon which relief could be granted. It dismissed Mr. Terry's claim under the PSA on the ground that a plaintiff seeking judicial relief under § 209 for a violation of § 192(a) and (b) must not only allege injury from conduct prohibited by those provisions, but must also allege that the defendant's actions adversely affect the pricing of poultry or overall competition in the poultry industry. Noting that the question of whether § 192(a) and (b) requires a showing of competitive impact had not been decided by the Sixth Circuit, the district court chose to follow the holdings of several other circuits that require an allegation of competitive injury. The district court also ruled that policy considerations support such a requirement, lest dealers be subjected to liability under the PSA for simple breach of contract or "justifiable termination" of a poultry grower for failure to perform its contract. Pet. App. 50a.

On Mr. Terry's appeal, the United States filed a brief amicus curiae setting forth the Department of Agriculture's longstanding position that § 192(a) and (b) does not require allegation or proof of an adverse effect on competition. The Sixth Circuit, however, affirmed the judgment of the district court. In a brief discussion, it agreed that whether competitive injury must be alleged under § 192(a) or (b) of the PSA was a question of first impression in the Circuit. It held that seven other circuits had read the PSA to require a showing of competitive injury when § 192(a) or (b) is invoked. It also recited its obligation to make an independent examination of the issue. Its decision, however, rested upon its determination that it should maintain harmony with its sister circuits. Without analyzing the language of § 192, it concluded that:

> under the fundamental principle of stare decisis, we deem the construction of this nearly 90-year-old statute to be a matter of settled law. We therefore join these circuits and hold that in order to succeed on a claim under §§ 192(a) and (b) of the PSA, a plaintiff must show an adverse effect on competition.

Terry, 604 F.3d at 279, Pet. App. 1a. Mr. Terry's petition for rehearing en banc was denied. Pet App. 54a.

REASONS FOR GRANTING THE PETITION

I. Introduction

In the PSA, and in subsequent amendments, Congress had three principle objects: (1) to assure fair competition in the marketing of meat and poultry

products; (2) to protect producers from abuses that deny them access to open, fair and efficient markets in the meat and poultry industries; and (3) to provide for meaningful administrative or judicial damages for those injured by such abuses. By expressly stating in the statute which provisions deal with competition, and which with unfair or deceptive practices, Congress made clear that it intended the PSA to be "more than a mirror of the antitrust laws." *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988) ("*Spencer Livestock*").

Poultry growers in the United States produce some 42 billion pounds of poultry meat, of which four-fifths is from broilers grown under production contracts with large integrators like Tyson. Most of the $20 billion farm value of U.S. poultry comes from broiler production.[12] The legal foundation for this enormous sector of the agricultural economy is the production contract by which individual poultry farmers are bound to the integrators.

Successive Secretaries of Agriculture have ruled that proof of competitive injury or general harm to consumers is sufficient but not necessary to establish an unfair or deceptive practice under the PSA. Statement at 10. This understanding is based on the plain language of 7 U.S.C. § 192(a) and (b), and similar language in §§ 208 and 213. Yet the Sixth Circuit has disregarded fundamental rules of statutory construction, the amicus brief of the United States

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[12] USDA Economic Research Service, Briefing Room: *Poultry and Eggs: Background* (Apr. 16, 2009), *available at* http://www.ers.usda.gov/Briefing/Poultry/Background.htm.

presenting the Secretary's construction of the statute he administers, and the Ninth Circuit's conflicting construction in *Spencer Livestock*. Instead, it has read into § 192(a) and (b) a requirement for alleging and proving injury to over-all competition that is not there. Eschewing any effort to provide an independent explanation of its analysis, it has simply adopted the views of other circuits. Those circuits have found ambiguity in the face of plainly expressed Congressional intent, asserted that such ambiguity "meant it was left to the courts to determine what anti-competitive practices could be unfair, unjustly discriminatory or deceptive,"[13] and over-ridden the Secretary of Agriculture's construction on the basis of their own policy preferences.[14]

The result is a complete frustration of Congress's efforts to protect farmers and ranchers from unfair, prejudicial or deceptive practices by the agri-businesses to which they deliver their production. The Sixth Circuit's ruling, like the decisions of circuits treading the same path, particularly impacts poultry growers. Growers injured by unfair or deceptive practices of the integrator-party to their production contracts can almost never show that abuses inflicted upon them individually will broadly impact competition or consumer prices. The decision of the Sixth Circuit and the courts it follows effectively nullifies the federal judicial remedy under § 209 that

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[13] *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 359 (5th Cir. 2009) (en banc) ("*Wheeler*"), describing *Been v. O.K. Indus.*, 495 F.3d 1217 (10th Cir. 2007).

[14] *See id.* at 371-75 (Garza, Cir. J., dissenting from the 9-7 en banc decision).

Congress provided in 1987. Poultry growers have no other damage remedy for integrators' abusive practices because § 209(b)'s option of seeking damages in proceedings before the Secretary of Agriculture is limited by § 210(a) to provisions of the PSA relating to commerce in livestock. Because the localization of integrator networks typically makes the integrators local monopsonists (Statement at 10-11), and because poultry growers must make substantial investments to enter and perform production contracts, they are effectively at the mercy of the integrators. As a recent study notes, "[i]t is well known in the chicken industry that producers dare not speak out against integrators."[15] The results in this case and its predecessors in other circuits have thus reinforced the imbalance between growers and integrators that Congress sought to redress in the PSA.

Even if, contrary to Petitioner's contentions, the unfair practice provisions of the PSA are ambiguous, the familiar principle of deference enunciated in *Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 844 (1984) ("*Chevron*"), should apply to the Secretary's construction. Any other approach leads to inconsistent and anomalous results.

For example, under the Sixth Circuit's ruling, a poultry grower suing for damages in district court resulting from delayed, deceptive or concealed weighing of delivered broilers, in violation of § 192(a) and (b), must also show that such misconduct is

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[15] David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture,* 15 Drake J. Agric. L. 61, 100 (2010) (footnote omitted).

harming competition or consumers generally. Otherwise it cannot be remedied. On the other hand, a livestock producer complaining to the Secretary of unfair and deceptive weighing in violation of § 213(a) need not make such a showing because the Secretary,[16] and the Ninth Circuit in *Spencer Livestock,* have correctly perceived that the PSA's unfair practice provisions do not require such a showing.

The Sixth Circuit's conflicting standard also is anomalous because it attributes to Congress an intent to allow deceptive weighing practices in the poultry sector. This conclusion is inconsistent with the PSA as originally enacted, and the entire course of subsequent amendments, which have provided increased federal protection for farmers and ranchers as food production and its attendant abuses have changed.

The Sixth Circuit's insertion into § 192(a) and (b) of an unenacted competitive injury requirement devastatingly impacts implementation of the PSA in the poultry sector. That huge slice of agricultural production is showing increasing trends toward concentration, and thus ever increasing power over growers by large integrators like Tyson.[17] This Court

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[16] *In re Ozark Cnty. Cattle Co.*, 49 Agric. Dec. 335, 365 (1990). Accord, e.g. *In re Rodman*, 47 Agric. Dec. 885, 912 (1988); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 742 (1988); *In re White*, 47 Agric. Dec. 229, 276 (1988); *In re Corn State Meat Co., Inc.*, 45 Agric. Dec. 995, 1023 (1986); *In re ITT Cont'l Baking Co.*, 44 Agric. Dec. 748, 781 (1985).

[17] The Government Accountability Office has identified a trend toward increased concentration in broiler production as measured by the market share of the four largest food processing firms. In

should decide whether the courts can turn the PSA into "nothing more than a mirror of the antitrust laws"[18] despite § 192's clear provisions specifying when competitive impact is a element of a violation and when it is not.

II. Proof of Injury to Competition is Not a Necessary Element of a Violation of 7 U.S.C. § 192(a) and (b).

Three established principles inform the construction of § 192(a) and (b). First, a "legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1992). Second, "'[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Carcieri v. Salazar,* 129 S. Ct. 1058, 1065 (2009); *see INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (citation omitted). *A fortiori*, this principle applies when the disparate exclusion and inclusion are only lines away from each other in different subdivisions of the same section. Third, "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001) (citation omitted).

1982 that ration was 27 percent. By 2006 it was 57 percent. GAO-09-746R Concentration in Agriculture, at 18 (June 30 2009), *available at* http://www.gao.gov/new.items/d09746r.pdf.

[18] *Spencer Livestock*, 841 F.2d at 1455.

The complaint in this case invokes § 192(a) and (b). Section 192 divides the practices it condemns into seven disjunctive subdivisions enumerated (a) through (g). Its opening sentence provides: "It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to [carry out any of the seven practices]." § 192. Subdivisions (a) and (b) thus make it unlawful for a live poultry dealer to:

> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or . . . .

Id. at § 192(a) and (b). Nothing in subdivisions (a) and (b) expressly makes effects on competition a required element of the offense, although some forms of the conduct condemned may harm competition and thus be within the scope of these subdivisions. In contrast, subdivisions (c), (d), (e), and (f) explicitly refer to anticompetitive conduct:

> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or

> with the effect of apportioning the supply between any such persons, **if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or**
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article **for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce**; **or**
>
> (e) Engage in any course of business or do any act **for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or**
>
> (f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) **to manipulate or control prices; or . . . .**

Id. at § 192(c)-(f) (emphasis added). Subdivision (g) addresses agreements to engage in, or abet conduct condemned in five of the preceding subdivisions:

> (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing

> of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

Id. at § 192(g).

Because the subdivisions are set forth in the disjunctive, they provide for and describe seven separate and independent unlawful practices. Each subdivision unambiguously specifies the necessary elements of the act or practice which is rendered unlawful under the opening sentence of § 192. By making defined anticompetitive conduct a clearly expressed element of an unlawful practice under subdivisions (c), (d), (e), and (f), Congress itself conclusively established that in the food industries covered by § 192, competition is harmed when the acts covered by those subdivisions are proven. Such anticompetitive acts are violations of the subdivisions in which they appear. Subdivisions (a) and (b) contain no similar proscription of specified anticompetitive conduct, or indeed, any other reference to competition. The contrast between subdivisions (a) and (b) on the one hand and subdivisions (c) through (f) is stark. Indeed, if subsections (a) and (b) already include a requirement of injury to competition, then the references to anticompetitive conduct in subdivisions (c) through (f) are completely superfluous. *Wheeler,* 591 F.3d at 375 (Garza, Cir. J., dissenting). The controlling principles of statutory construction described above leave no room for the Sixth Circuit's conclusion that Congress intended to make competitive injury an indispensable element of subdivisions (a) and (b).

The Sixth Circuit did not attempt to explain how, in the face of § 192's plain language and structure,

only injuries from unfair and deceptive practices that adversely affect competition can be remedied under subdivisions (a) and (b). Instead, it concluded that seven other circuits "unanimously" so construed the statute[19] and that it should join them in the interests of avoiding conflicts, respecting stare decisis and insuring predictability. Pet. App. 8a. This analysis is flawed because it misreads and miscounts the holdings of the cases cited.[20] It also fails to recognize the Ninth Circuit's conflicting decision in *Spencer Livestock,* which ruled that proof of an anticompetitive effect is not required under § 213's prohibition of unfair and deceptive practices in the livestock sector. 841 F.2d at 1455-56. Section 213 closely parallels § 192(a) and (b). The analysis is also flawed because only three of the cited cases attempted any sort of independent

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[19] *Wheeler*, 591 F.3d at 362-63; *Been v. O.K. Indus.*, 495 F.3d 1217 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London*, 410 F.3d at 1303, *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980); and *Pac. Trading Co. v. Wilson & Co., Inc.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

[20] Judge Garza's dissent in *Wheeler* shows that only four of the circuits cited have issued published opinions holding that a plaintiff injured by conduct in violation of § 192(a) or (b) must also prove an injury to competition: *Wheeler,* 591 F.3d 355 (5th Cir. 2009), *Been*, 495 F.3d 1217 (10th Cir. 2007), *London,* 410 F.3d 1295 (11th Cir. 2005), and *Pac. Trading Co.,* 547 F.2d 367 (7th Cir. 1976).

analysis.[21] But of greater significance is the fact that none of the decisions followed by the Sixth Circuit confront the plain language of the statute. Rather, they rest on a policy choice constructed from parts of the legislative history of the original PSA and selected amendments. Such a choice is beyond the proper role of Article III courts. *See Wheeler*, 591 F.3d at 379-80 (Garza, Cir. J., dissenting).

This Court's decision in *Stafford* reviewed the history of the 1921 enactment in determining that Congress's imposition of regulation on stockyard commission merchants and dealers in the PSA was constitutional under the Commerce Clause. The Court recognized that in the PSA Congress sought to remedy the effects of monopolization and collusion in the livestock industry revealed in the Federal Trade Commission's 1918 report on the industry, in committee hearings, and in antitrust proceedings against the major meatpackers of the day. Nothing in the decision, however, held that these evils defined the limits of every provision of the Act or that anticompetitive conduct was the only evil to which those provisions could be applied.

Subsequent amendments revealed a continuing course of expanding market facilitating protections for farmers and ranchers based upon the amending Congress's understanding of the purposes of the PSA. As noted above, one of the evils addressed by the 1935 amendments was widespread fraud practiced by dealers against poultry producers. Statement at 5-6.

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[21] *Wheeler,* 591 F.3d 355; *London,* 410 F.3d 1295; *Pickett,* 420 F.3d 1272.

In 1958, the prohibition of unfair or deceptive practices in § 192 was amended to include live poultry dealers. *Id.* at 6-7. The 1958 amendment also directed the Secretary to establish a separate unit to administer and enforce Title II of the Act, which includes § 192. 72 Stat. at 1751. These provisions were enacted on the understanding that although the PSA's primary purpose was to assure fair competition, it was also intended to assure open and reasonable trade practices to facilitate accessible, fair, and economically efficient markets for farmers and ranchers, as well as consumers. Statement at 7-8. "[T]he PSA is a remedial statute . . . to be 'construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.'" *Been v. O.K. Industries, Inc.*, No. 08-7078, 2010 U.S. App. LEXIS 21131, at *24-25 (10th Cir. 2010).

The same understanding underlay the 1987 amendments, which provided extensive financial protection for poultry producers, and granted them a judicial remedy in federal district court to recover damages for violation of any provision of the Act. Statement at 7-8. The 2002 amendments likewise expanded producer protections. They were intended to correct abusive confidentiality requirements that had become widespread in contracts between processors and producers of livestock and poultry. Statement at 9-10. In limiting such provisions, Congress granted producers a federally enforceable right to discuss details of their contracts with government agencies, legal advisers, lenders, accountants, executives and managers of a party, landlords and members of their immediate family. 7 U.S.C. § 229b(b).

The long list of amendments described above are not ordinary legislative history; they are a chain of enacted legislation that reflects the intent of Congress in the PSA as it stands today. The Sixth Circuit's ruling perpetuates a gross misreading of that intent. Contrary to that misapprehension, Congress has deemed the PSA's unfair practice provisions to be so central to its purpose to protect producers that it has declared particular acts, such as false weighing (§ 213) and failure to promptly pay poultry producers (§ 228b(c)) to be unfair practices. Yet, under the construction of the PSA in the decisions the Sixth Circuit has adopted, such false weighing or untimely payment cannot be remedied by the Secretary or the Courts because such practices do not impact the market as a whole "despite an unfair effect on the plaintiffs." *Wheeler,* 591 F.3d at 360.

The courts that created this restriction trace it to the original 1921 Act, which they construe to be rooted solely in the market competition protected by the antitrust laws. *E.g.*, *Wheeler*, 591 F.3d at 360-64. In effect, those courts have imported into the PSA the concepts of antitrust injury necessary to establish standing in private antitrust actions. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The PSA, however, is not an antitrust law and its provisions do not affect the antitrust laws except as specifically provided. § 405, 42 Stat. at 168-69 (codified as amended at 7 U.S.C. § 225). Moreover, when Congress provided judicial and administrative remedies for individuals injured by violations of any of the PSA's provisions, it made clear that those remedies were in addition to, and thus independent of, existing common law and statutory remedies. § 209(b). Thus, a finding that the PSA has been violated does not in

itself supply a basis for antitrust liability. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Since nothing in § 192(a) and (b) refers to those laws or to competitive injury, there is no basis whatsoever to make such injury an element of liability to individuals damaged by the unfair or deceptive practices those subdivisions make unlawful.

The courts requiring a showing of competitive injury also compare the PSA to the Federal Trade Commission Act ("FTCA"), which declares unlawful "unfair methods of competition" and "unfair or deceptive acts and practices" in or affecting commerce. 15 U.S.C. § 45(a) (2006). The term "unfair methods of competition" as used in the FTCA necessarily requires a showing of an impact on market competition, not merely on competition between rival sellers. *FTC v. Klesner*, 280 U.S. 19 (1929). The term "unfair or deceptive acts and practices" in the FTCA requires a showing that the questioned act or practice "causes or is likely to cause substantial injury to consumers . . . ." 15 U.S.C. § 45(n).

In contrast, § 192(a) of the PSA bars "any unfair, unjustly discriminatory, or deceptive practice or device" without reference to competition. Section 192(b) bars subjecting "any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect" whatsoever without reference either to competition or consumers. Further, § 45(a) of the FTCA is enforced solely through complaints issued by the Federal Trade Commission seeking cease-and-desist orders, and provides no private cause of action to injured individuals. The PSA provides both administrative and judicial damage remedies for

unfair or deceptive acts and practices. § 209. In sum, the PSA declares unlawful a range of unfair or deceptive acts and practices without the limitations contained in the FTCA; in contrast to the FTCA, the PSA provides a private cause of action to any person injured by such acts and practices; and permits such injured persons to recover damages, which the FTCA does not. There is no basis, therefore, to restrict § 192(a) and (b) by the limitations on unfair methods, acts and practices contained in the FTCA.

III. In the Alternative, the Sixth Circuit Should Have Accorded *Chevron* Deference to the Secretary's Consistent Position that § 192(a) and (b) Does Not Require a Showing of Injury to Competition.

For the reasons set forth above, § 192 clearly and unambiguously means that Congress did not require complainants invoking subdivisions (a) and (b) to plead and prove injury to competition. That construction coincides with the Secretary's well-established rulings to the same effect. It is also confirmed under the first step of *Chevron,* 467 U.S. at 842-43: where "Congress has directly spoken to the precise question at issue. . . . [and] the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.*

Assuming, however, that § 192 is ambiguous as to whether competitive injury is a necessary element of liability under subdivisions (a) and (b), then the Secretary's interpretation should be given deference by the courts under Chevron's second step:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnotes omitted).

It may be objected that *Chevron* is inapplicable here because the Secretary has no authority to enforce § 192 in the context of poultry production. *London,* 410 F.3d at 1304. He can, however, enforce the PSA's unfair practice provisions in the livestock context pursuant to §§ 209, 210 (complaints for damages for any violation of the act) and 213 (prevention of unfair, discriminatory or deceptive practices by stockyard owners, market agencies and dealers). Indeed, a violation of § 213 is also a violation of § 192(a). *De Jong Packing Co.,* 618 F.2d at 1336-37.

Failure to apply *Chevron* to the construction § 192(a) and (b) simply because those provisions are invoked in an action involving poultry instead of livestock would institutionalize conflict between the courts and the Secretary over the interpretation of the same statutory language. Such a result is not consistent with the principles of *Chevron* or the structure of the PSA. Therefore *Chevron* Step 2 applies to the Secretary's longstanding interpretation of the unfair practice provisions of the PSA whether they are invoked in a livestock case or a poultry case.

In applying Step 2 to the Secretary's interpretation, the contrary rulings of the courts cited by the Sixth Circuit are not controlling because none of those decisions analyzed § 192's language and structure.

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . [A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's.

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 982 (2005). Such a restriction would be contrary to Chevron's fundamental principle. *Id.* at 982-83.

The Secretary's construction is reasonable, and therefore permissible. It fits tightly into § 192's language, structure and purpose to prevent unfair and deceptive acts and practices in the industries regulated by the PSA, particularly with respect to core conduct involving the weighing of meat and poultry.

IV. The Questions Presented are of National Importance to the Production of Meat and Poultry in the United States

The decision of the Sixth Circuit is the latest in a string of rulings that has frustrated Congress's

continuing effort to protect meat and poultry producers from abusive behavior by large packers and dealers. In the poultry sector the damage remedy enacted for "any" (§ 209(a)) violation of the Act has become an empty promise. Five of the poultry cases cited by the Sixth Circuit as requiring a showing of injury to competition were decided after passage of the Poultry Act.[22] But the frustration of Congress's intent is not confined to poultry production. It extends as well to the even larger livestock industry. In 2009, beef and cattle products accounted for 26.07 billion pounds valued at $31 billion. Four of the cases relied on by the Sixth Circuit involved the livestock sector.[23] Similarly affected is the huge hog and pork industry, which has seen a substantial increase in the use of production contracts since 1992.[24] In 2002, Congress recognized this development by including swine contractors in § 192. Pub. L. No. 107-171, § 10502(b)(1), (b)(2)(A), 116 Stat. at 509.

In the hope that the courts will reconsider the issue, the Secretary is now considering a proposed regulation that would codify the position to which he and his predecessors have long and consistently adhered—that competitive injury is a sufficient, but

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[22] *Wheeler,* 591 F.3d 355; *Been,* 495 F.3d 1217; *London,* 410 F.3d 1295; *Philson,* 1998 WL 709324; *Jackson,* 53 F.3d 1452.

[23] *Pickett,* 420 F.3d 1272; *IBP, Inc.,* 187 F.3d 974; *Farrow,* 760 F.2d 211; *De Jong Packing Co.,* 618 F.2d 1329.

[24] *See* USDA Economic Research Service, Nigel Key & William McBride, *The Changing Economics of U.S. Hog Production*, at 7-8, (Dec. 2007) *available at* http://www.ers.usda.gov/Publications/ERR52/ERR52.pdf.

not a necessary element of the PSA's unfair practice provisions. Statement at 10. Even if that proposal is adopted, however, it is unlikely that the courts requiring competitive injury will reconsider, because they base their holdings not on the language of the PSA, but on a misreading of its legislative history, a mistaken application of stare decisis, and policy concerns over predictability and economic efficiency. It is difficult to understand how there can be a predictability or efficiency interest in the imposition of unfair or deceptive practices on agricultural producers. For the courts requiring competitive injury, the position the Secretary proposes to codify has been conclusively rejected both in damage suits brought by producers and on judicial review of the Secretary's remedial orders. There is no reason, therefore, for this Court to await the possible promulgation and judicial review of the proposed regulation. The Department of Justice presented the justifications for the Secretary's position to the Sixth Circuit and to the Fifth and Eleventh Circuits as well[25] in briefs amicus curiae authorized by the Solicitor General. The Court may therefore wish to invite the views of the United States as to whether it should grant certiorari in this case. Whether the Court does so or not, the persistent misconstruction of the PSA involved in this case merits review and correction by this Court.

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[25] *Wheeler,* 591 F.3d 355; *London,* 410 F.3d 1295; *Pickett,* 420 F.3d 1272.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2010