No. 10-542

IN THE

Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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December 22, 2010

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QUESTIONS PRESENTED

1. Under subsections 202(a) and (b) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), (b), did the court of appeals correctly conclude, given the language, context, and purpose of the Act as an antitrust law, that a plaintiff must plead and prove an anticompetitive effect from the defendant's challenged conduct?

2. Whether the court of appeals correctly declined to give *Chevron* deference to the Secretary of Agriculture's interpretation of subsections 202(a) and (b) of the Packers and Stockyards Act, 7 U.S.C. § 192(a), (b), when the federal courts of appeals previously have held that Congress's intention in these subdivisions was clear from their plain language?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Tyson Farms, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc. No publicly held company owns 10% or more of Tyson Foods, Inc.

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INTRODUCTION

Petitioner cannot demonstrate a conflict among the federal courts of appeals on whether subsections 202(a) and (b) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 192(a), (b), require a plaintiff to plead and prove an injury to competition. In the decision below, the Sixth Circuit noted that "seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results." Pet. App. 11a. And the court below specifically joined this "tidal wave" of authority, *id.* at 10a, explaining that "the vast body of cohesive precedent" made the "construction of this nearly 90-year old statute ... a matter of settled law," *id.* at 14a.

Given the uniform agreement among the courts of appeals on this issue, petitioner can merely raise the same statutory interpretation arguments that the Sixth Circuit and seven other circuit courts have now rejected. Petitioner would read the terms of subsections 202(a) and (b) of the Act without regard to the context or purpose of the PSA. But this contravenes basic principles of statutory construction. *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006). As this Court has recognized, the PSA is an antitrust statute through which Congress intended to stop practices that hindered competition in the meat packing industry. Indeed, the specific terms used—unfair, unjustly discriminatory, or unreasonable preferences—were borrowed from prior antitrust legislation at a time when this Court interpreted those terms to require a consideration of competition in assessing a violation of these laws. The settled interpretation of subsections 202(a) and (b) does not warrant this Court's intervention.

The Court should also decline to address the second question presented because the court below did not pass on the question whether the Secretary of Agriculture's interpretation of subsections 202(a) and (b) deserves *Chevron* deference. As a result, the question is not properly presented here. In all events, petitioner has raised no conflict among the courts on this issue. That is because *Chevron* deference is unwarranted. The federal courts of appeals have long held that the plain language of subsections 202(a) and (b)—which further Congress's antitrust aims, and which incorporate language from prior antitrust legislation—require that a challenged action have an anticompetitive effect.

The Court should deny the petition.

STATEMENT OF THE CASE

1. Tyson Farms, Inc. is the nation's largest poultry processing firm. Pet. App. 2a. To produce its poultry products, Tyson contracts with independent growers to raise Tyson's broiler chickens. *Id.* at 4a. Under these contracts, Tyson supplies the chicks, feed, and technical advice. *Id.* The grower provides farm facilities, farm equipment, utilities, labor, and know-how to raise the chicks to a target weight, at which point the matured birds are returned to Tyson for processing. *Id.*

In 2001, petitioner purchased a poultry-growing farm from one of Tyson's independent growers in Tennessee and took over management of the farm's poultry flock. Pet. App. 5a, 35a. According to petitioner's complaint, he soon learned of problems that growers had with Tyson and other poultry integrators. *Id.* at 5a, 35a. After attending a conference in 2002 addressing these problems, petitioner allegedly began trying to organize growers

in his area. *Id.* at 5a, 35a-36a. In 2004, he was elected chairman and director of a Tennessee-based growers association. *Id.* at 5a, 36a. In this role, petitioner catalogued and reported grower complaints against Tyson and educated growers about their rights. *Id.*

Petitioner alleged that as a grower he became concerned that Tyson was not promptly weighing his poultry upon arrival at Tyson's plant. Pet. App. 5a, 36a. On two different occasions in 2004, Tyson supposedly denied petitioner access to its plant, in violation of federal regulations, when he attempted to watch the weighing of his birds. *Id.* at 5a-6a, 36a; 9 C.F.R. § 201.108-1(e)(4) (poultry growers are entitled to observe weighing).

Petitioner alleges that in 2005 he again unsuccessfully attempted to observe the weighing of his chickens at Tyson's plant. Pet. App. 6a, 36a. According to his complaint, he arrived at 2:00 a.m. with his delivery of poultry but was informed that his birds would not be weighed until after 4:00 a.m. *Id.* When he returned at 4:00 a.m., Tyson supposedly denied him access to the plant. *Id.*

Later in the week, petitioner met with local Tyson managers. Pet. App. 6a, 37a. Afterward, Tyson allegedly delayed placement of broilers with petitioner for a full flock rotation, costing him $30,000 in lost compensation. *Id.* At a second meeting with Tyson's managers, petitioner learned of Tyson's "'company decision'" to discontinue placement of birds at his farm. *Id.* In early 2006, Tyson informed petitioner that it would not renew its contract with him.

2. Petitioner sued Tyson in January 2008. Pet. App. 37a. He alleged that Tyson violated the Agricultural Fair Practices Act, 7 U.S.C. § 2301 *et*

seq., by discriminating against him based on his membership in an association of producers. Pet. App. 37a. He also alleged that Tyson violated subsections 202(a) and (b) of the PSA, 7 U.S.C. § 192(a), (b), by refusing to allow petitioner to observe the weighing of his poultry, delaying placement of his flock, and terminating his contract. Pet. App. 37a-38a, 49a.

The district court granted Tyson's motion to dismiss both causes of action. It agreed that petitioner's Tennessee-based growers association was not an "association of producers" as that term was defined at the time in the Agricultural Fair Practices Act. Pet. App. 44a-45a.

The district court also agreed that petitioner failed to state a claim under the PSA because he failed to allege that Tyson's allegedly "wrongful actions affected or were likely to affect competition." Pet. App. 50a. The court agreed that the terms "unfair, unjustly discriminatory, or deceptive practice or device" in subsection 202(a) of the Act, 7 U.S.C. § 192(a), and "undue or unreasonable preference or advantage" in subsection 202(b), *id.* § 192(b), must be read in light of Congress's purpose in passing the PSA, namely to curb the destruction of competition in the packing industry. Pet. App. 46a-47a. Accordingly, the trial court concurred with every other federal court of appeals that has "addressed the issue in holding that § 202 requires a showing of anticompetitive effect in order to sustain a cause of action." *Id.* at 47a, 49a.

In so holding, the district court analyzed and rejected petitioner's argument that there is a circuit split on this issue. Pet. App. 48a. The court explained that, contrary to petitioner's argument, the Ninth Circuit's decision in *Spencer Livestock Commission Co.* v. *Department of Agriculture*, 841 F.2d 1451, 1455

(9th Cir. 1988), could not create a circuit split on whether section 202 requires a showing of anticompetitive effect because that decision addressed section 213 of the PSA, not section 202. Pet. App. 48a. According to the court, "the Ninth Circuit has held, consistent with the majority of other circuits, that § 202 requires a showing that defendant's actions had an anticompetitive effect." *Id.* at 48a (discussing *De Jong Packing Co.* v. *Dep't of Agriculture*, 618 F.2d 1329, 1331 (9th Cir. 1980)).

After examining petitioner's complaint in the light most favorable to him, the district court concluded the "complaint does not allege that [Tyson's] actions had an anticompetitive effect" as required by a long line of precedent. Pet. App. 50a. Instead, petitioner "focuses solely on how [Tyson's] action harmed him as an individual grower." *Id.* Accordingly, petitioner failed to allege that Tyson's actions "affected or were likely to affect competition" as required by subsections 202(a) and (b).

3. Petitioner appealed to the Sixth Circuit, challenging, among others, the district court's conclusion that subsections 202(a) and (b) required him to plead that Tyson's actions had an effect on competition. Pet. App. 7a-8a. The Sixth Circuit affirmed. *Id.* at 8a, 15a. It noted that this issue "is not novel to other courts" and "has been addressed by seven ... sister circuits, with consonant results." *Id.* at 8a. As the court explained, "[a]ll of these courts of appeals unanimously agree that an anticompetitive effect is necessary for an actionable claim under subsections (a) and (b)." *Id.*

After examining the "rationale employed by [its] sister circuits," the Sixth Circuit found the decisions "well-reasoned and grounded on sound principles of statutory construction." Pet. App. 14a. The court of

appeals thus chose to join what it characterized as a "tidal wave" of authority on this issue, *id.* at 10a, and specifically declined petitioner's invitation to "deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict." *Id.* at 12a. The Sixth Circuit held "that in order to succeed on a claim" under subsections 202(a) or (b) of the PSA, "a plaintiff must show an adverse effect on competition." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

Petitioner makes no effort to allege any conflict among the federal courts of appeals on the first question presented. Nor could he. As the Sixth Circuit recognized, the federal circuit courts to address the issue have unanimously agreed that subsections 202(a) and (b) of the PSA require a plaintiff to demonstrate an anticompetitive effect from the defendant's challenged conduct. Petitioner thus cannot present any disagreement or lack of uniformity that warrants this Court's attention. On that basis alone, the Court should deny the petition.

Petitioner's arguments on the merits do not warrant this Court's intervention, especially when, as the Sixth Circuit acknowledged, "the construction of this nearly 90-year-old statute [is] a matter of settled law." Pet. App. 14a. Petitioner's entire argument requires reading subsections 202(a) and (b) without considering the context or purpose of the PSA. That approach contravenes settled principles of statutory interpretation, which require courts to "consider[ ] the purpose and context of the statute, and [to] consult[ ] any precedents or authorities that inform the analysis." *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 486 (2006). This Court has explained that the PSA is an antitrust law through which

Congress intended to target practices that hinder competition. Indeed, the specific terms of subsections 202(a) and (b) originated in prior antitrust legislation, which this Court had interpreted to require a consideration of competition.

The second question presented likewise does not warrant this Court's review. The Sixth Circuit did not pass on the issue, which makes this case a poor vehicle for raising the question in this Court. Moreover, the lower courts are in agreement on the issue. Every court of appeals to consider this issue has correctly refused to give *Chevron* deference to the Secretary of Agriculture's interpretation of subsections 202(a) and (b). Nor is any deference warranted, because the competitive injury requirement under these subsections arises from the clearly expressed intention of Congress.

The petition should be denied.

I. CERTIORARI IS UNWARRANTED BECAUSE THE FEDERAL COURTS OF APPEALS UNIFORMLY REQUIRE A SHOWING OF ACTUAL OR THREATENED COMPETITIVE INJURY UNDER SUBSECTIONS 202(a) AND (b) OF THE PSA.

Petitioner cannot demonstrate a need for this Court's intervention because every federal court of appeals to address whether subsections 202(a) and (b) of the PSA require a showing of competitive injury has held that they do. As the Sixth Circuit recognized, "seven circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—have now weighed in on this issue, with unanimous results." Pet. App. 11a. With the Sixth Circuit joining this "tidal wave" of authority, *id.* at 10a, eight circuits now uniformly require proof of

competitive injury under subsections 202(a) and (b). Given this cohesion among the circuit courts, the Court should deny the petition on this basis alone.

A. The Sixth Circuit Has Joined Every Other Federal Circuit Court That Has Addressed This Issue In Holding That Subsections 202(a) And (b) Require A Showing Of An Anticompetitive Effect From The Challenged Conduct.

Starting with the Seventh Circuit, the federal courts of appeals have consistently required a showing of anticompetitive effect to establish a violation of subsections 202(a) and (b) of the PSA. The Seventh Circuit first addressed the meaning of subsections (a) and (b) more than seventy years ago, in *Swift & Co.* v. *Wallace*, 105 F.2d 848 (7th Cir. 1939). In *Swift*, the court of appeals set aside a finding by the Secretary of Agriculture ("Secretary") that charging different prices was unjustly discriminatory or unreasonable under subsections 202(a) and (b). *Id.* at 857. The court held that the Secretary erred by failing to consider the influence of or effect upon competition from these practices. *Id.* at 854, 857. The court explained that subsections 202(a) and (b) of the PSA must be interpreted consistently with similarly worded provisions of other antitrust legislation, such as the Interstate Commerce Act. *Id.* at 856-57.

The Seventh Circuit solidified its interpretation of subsections 202(a) and (b) in *Armour & Co.* v. *United States*, 402 F.2d 712 (7th Cir. 1968). There, the court again set aside a determination by the Secretary because the Secretary "erroneously construed" subsections 202(a) and (b). *Id.* at 727. The court explained that the PSA was an antitrust law designed to halt the destruction of competition in the

meat packing industry and that Congress had used familiar terms from prior antitrust legislation. *Id.* at 717, 720 (citing H.R. No. 66-1297, at 11 (1921)). This "statutory language," according to the court, "enjoin[s] the Department and courts to apply *a rule of reason* in determining the lawfulness of a particular practice under Section 202(a) and (b)." *Id.* at 717 (emphasis added). That is, liability under these provisions requires a showing of "intent to eliminate competition or ... the effect of ... lessen[ing] competition." *Id.* at 720, 725-26; see also *Pac. Trading Co.* v. *Wilson & Co.*, 547 F.2d 367, 369 (7th Cir. 1976).

Since *Armour*, the federal courts of appeals that have addressed this issue have uniformly agreed with the Seventh Circuit, holding that a violation of subsections 202(a) and (b) requires a showing that the challenged conduct has an actual or likely effect on competition. In 1980, the Ninth Circuit agreed with the Seventh Circuit's reading of section 202. In *De Jong Packing Co.* v. *USDA*, 618 F.2d 1329 (9th Cir. 1980), the court affirmed the Secretary's finding that a conspiracy to "coerce a change in marketing practices by concerted action" violated subsection 202(a). *Id.* at 1335. The court explained that "§ 202 of the Packers and Stockyards Act may have been made broader than antecedent antitrust legislation [but] it nonetheless incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Id.* at 1335 n.7. Relying on *Armour*, the court therefore followed "the courts that have considered § 202 [and] have consistently looked to decisions under the Sherman Act for guidance." *Id.*; see also *id.* at 1335-36. The Ninth Circuit then concluded, consistent with the Seventh Circuit, that "unfair practices under § 202 are not confined to

those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint on competition." *Id.* at 1337.

Five years later, the Eighth Circuit first considered whether section 202 requires a showing of anticompetitive harm. In dicta, the court stated that subsection 202(a) "authorize[s] the Secretary of Agriculture to regulate anticompetitive trade practices in the ... meat industry in accord with 'the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation.'" *Farrow* v. *USDA*, 760 F.2d 211, 214 (8th Cir. 1985) (quoting *De Jong Packing*, 618 F.2d at 1335 n.7). The Eighth Circuit later confirmed the plain import of this reasoning—that subsection 202(a) and (b) require a showing of actual or potential anticompetitive harm. *IBP, Inc.* v. *Glickman*, 187 F.3d 974 (8th Cir. 1999). In *IBP,* the court followed its earlier statements in *Farrow*, reviewing only whether the record supported a USDA finding that particular practices had "the effect or potential effect of suppressing or reducing competition." *Id.* at 976-77. Because substantial evidence did not support a finding of actual or potential anticompetitive effect, the court vacated the USDA's decision. *Id.* at 977, 978.

The Fourth Circuit in an unpublished decision briefly addressed this issue in 1998. In *Philson* v. *Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998), *available at* 1998 WL 709324, the court of appeals considered whether a district court had properly instructed the jury on claims under subsection 202(a). The court of appeals held that while this subsection does not necessarily require proof of "*actual* injury ... a plaintiff must nonetheless establish that

the challenged act is *likely* to produce the type of injury that the Act was designed to prevent." *Id.* at *4.

Consistent with these other circuits, the Eleventh Circuit held in 2005 "that in order to prevail under [subsections 202(a) or (b) of the] PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition." *London* v. *Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005). The Eleventh Circuit specifically joined the other circuits that have addressed this issue, construing subsections 202(a) and (b) in light of the purpose of the PSA—*i.e.*, "halting a general course of action for the purpose of destroying competition." *Id.* at 1302 (quoting *Armour*, 402 F.2d at 720) (internal quotation marks omitted). The court noted the absurdity of construing these subsections without considering the context and purpose of the PSA: "Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *Id.* at 1304. The Eleventh Circuit reaffirmed its adherence to this rule in *Pickett* v. *Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005).

The Tenth Circuit joined its sister circuits in *Been* v. *O.K. Industries, Inc.*, 495 F.3d 1217 (10th Cir. 2007). There, the court held that subsection 202(a) "requires a plaintiff who claims that a defendant's conduct was 'unfair' to show that such conduct results in or is likely to result in an injury to competition." *Id.* at 1238. In harmony with the other circuits on this issue, the Tenth Circuit read section 202 in light of its purpose, *id.* at 1228, and rejected the argument (raised anew by petitioner) that because subsections

(c), (d), and (e) of section 202 specifically prohibit practices that restrain commerce or create monopolies, "the absence of similar language in § 202(a) conclusively means that proof of a competitive injury is not required," *id.* at 1229. The court read subsection 202(a) as a "catchall" because Congress "could not list the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices" that it intended to prohibit. *Id.*

The last circuit to address this issue before the court below was the Fifth Circuit. In *Wheeler* v. *Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc), the Fifth Circuit sitting en banc ruled that to "support a claim that a practice violates" subsections 202(a) or (b), "there must be proof of injury, or likelihood of injury, to competition." *Id.* at 363. Like the other circuits to address this topic, the Fifth Circuit concluded that section 202 must be construed according to the "'whole statutory text, considering the purpose and ... precedents or authorities that inform the analysis.'" *Id.* (quoting *Dolan*, 546 U.S. at 486). Also, after examining the numerous decisions from the courts of appeals, the Fifth Circuit noted that "up to 2002, Congress has amended [section 202] seven times without making any changes that would affect the many court interpretations." *Id.* at 361. Accordingly, the Fifth Circuit concluded that "congressional silence in response to circuit unanimity 'after years of judicial interpretation supports adherence to the traditional view.'" *Id.* at 362 (quoting *Gen. Dynamics Land. Sys., Inc.* v. *Cline*, 546 U.S. 581, 593-94 (2004)).

The decision below explicitly joined these circuits, holding "that in order to succeed on a claim under [subsections 202(a) and (b),] a plaintiff must show an adverse effect on competition." Pet. App. 14a. The

Sixth Circuit based its holding on the view that "the rationale employed by our sister circuits is well-reasoned and grounded on sound principles of statutory construction." *Id.* The court also "deem[ed] the construction of this nearly 90-year-old statute to be a matter of settled law." *Id.*

Because the Sixth Circuit's decision is consistent with the unanimous decisions of the other circuit courts, and because all of the circuit courts that are likely to address this issue have spoken, the Court should deny the petition.

B. Petitioner Cannot Demonstrate A Conflict That Warrants This Court's Review.

Despite the uniform construction of section 202 by the courts of appeals, petitioner suggests that two conflicts warrant intervention by this Court. Pet. 17, 19, 24. This argument is incorrect.

1. Petitioner argues that the Sixth Circuit erroneously disregarded "the Ninth Circuit's conflicting decision in *Spencer Livestock*." Pet. 24. As petitioner implicitly—and the district court below explicitly—acknowledges, the Ninth Circuit's decision in *Spencer Livestock* cannot create a conflict on the issue presented because that case dealt with section 213 of the PSA, not section 202. *Id.* at 19, 24 (acknowledging that *Spencer Livestock* dealt with section 213); Pet. App. 48a. Rather, in conformity with the other circuits addressing the meaning of section 202, the Ninth Circuit in *De Jong Packing* held that a claim under section 202 requires a

showing of actual or likely injury to competition. 618 F.2d at 1337; see also *id.* at 1335 n.7.[1]

Petitioner's veiled attempt at undercutting the Ninth Circuit's holding in *De Jong Packing* is unavailing. In a brief sentence and a footnote, petitioner tries to incorporate a dissenting opinion from *Wheeler* v. *Pilgrim's Pride Corp.*, in which Judge Garza argued that decisions from the Eighth and Ninth Circuits can be read in a manner that does not join the other circuits in uniformly construing subsections 202(a) and (b). Pet. 24 & n.20. Petitioner's argument fails.

In dissenting from the majority in *Wheeler*, Judge Garza tried to distinguish *De Jong Packing* by suggesting that the Ninth Circuit "did not hold that the PSA *only* prohibits anticompetitive conduct." *Wheeler*, 591 F.3d at 381. As the majority in *Wheeler* recognized, this argument is mistaken. The Ninth Circuit specifically stated that the PSA "incorporates the basic antitrust blueprint" of "other pre-existing antitrust legislation" and followed the approach taken by the Seventh Circuit in *Armour*, which required an actual or likely injury to competition. *De Jong Packing*, 618 F.2d at 1335 n.7. More importantly, the Ninth Circuit specifically held that "unfair practices under § 202 are not confined to those where competitive injury has already resulted,

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[1] As the district court recognized, there is no conflict between the Ninth Circuit's decisions in *Spencer Livestock* and *De Jong Packing*. Moreover, even if there were tension between these holdings, that would be a matter for the Ninth Circuit sitting en banc, *see* Fed. R. App. P. 35(a)(1), not this Court, especially when the Ninth Circuit's standard under section 202 is consistent with the standard in every other federal court of appeals to address the issue.

but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint on competition." *Id.* at 1337. The only tenable reading of this holding is that a showing of either actual or likely harm to competition is necessary under section 202. Had the court intended to suggest that no demonstration of injury to competition is necessary at all—as petitioner contends here—it would have done so directly, rather than list the two harms actionable under this provision.

Similarly, petitioner mistakenly asserts that the Eighth Circuit's decision in *IBP* v. *Glickman* was equivocal. Pet. 24 & n.20 (citing *Wheeler*, 591 F.3d at 381 (Garza, J. dissenting)). Petitioner claims that the Eighth Circuit merely suggested that a showing of actual or likely harm to competition may be sufficient under section 202, but did not indicate it was necessary. *Id.* That too is wrong. In *IBP*, the Eighth Circuit explicitly followed its earlier statements in *Farrow* that a showing of either an actual or likely effect on competition is necessary under the Act. *IBP*, 187 F.3d at 977. Because there was insufficient evidence that the practice there actually or would "potentially suppress or reduce competition," the Eighth Circuit vacated the USDA's decision. *Id.*

2. Petitioner's second alleged conflict likewise does not warrant this Court's intervention. Petitioner argues that the Secretary of Agriculture's interpretation of section 202 in various Agriculture Decisions conflicts with those of the unanimous federal courts of appeals, and that this conflict warrants the Court's review of the issue. Pet. 17, 19. But the Secretary's position on the interpretation of section 202 provides an affirmative reason for this

Court to decline review of the question presented in this case.

Whatever the Secretary's prior position may have been in various orders, the Secretary recently proposed and requested comment on new regulations addressing the very issue of whether an actual or likely anticompetitive injury is necessary to violate subsections 202(a) and (b) of the PSA. See *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 (proposed June 22, 2010). And in the Secretary's view, "the new regulations [on the very question presented in the petition] constitute a material change in circumstances that warrants judicial reexamination of the issue." *Id.* at 35,341. Although Tyson has demonstrated in comments on the proposed rules that the Secretary is bound to follow the holdings of the courts of appeals on the plain meaning of subsections 202(a) and (b), see, *e.g.*, *Armour*, 402 F.2d at 717, and therefore the proposed new regulations should be rejected, the Secretary's inchoate stance on the requirements of subsections 202(a) and (b) is an affirmative reason for this Court to decline review of the issue until that position has been solidified and the lower courts have considered it.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT A SHOWING OF ACTUAL OR LIKELY ANTICOMPETITIVE EFFECT IS NECESSARY TO STATE A CLAIM UNDER SUBSECTIONS 202(a) AND (b) OF THE PSA.

Unable to demonstrate a conflict that would warrant this Court's review, petitioner principally re-argues the merits of his appeal. These arguments,

however, do not merit review by this Court. The Sixth Circuit correctly concluded that subsections 202(a) and (b) require a showing of anticompetitive effect.

1. Petitioner's main quarrel with the Sixth Circuit's conclusion is his assertion that the court of appeals failed to read the language of subsections 202(a) and (b) according to its plain definitional meaning, so that these subsections stop all "unjustly discriminatory," or "deceptive" practices, and all "unreasonable preference[s]" by live poultry dealers without regard to any anticompetitive effect. 7 U.S.C. § 192(a), (b); Pet. 20-25. Contrary to petitioner's argument, the Sixth Circuit followed well established law on statutory interpretation. As this Court has instructed, the bare meaning "of words in isolation ... is not necessarily controlling in statutory construction." *Dolan*, 546 U.S. at 486. A word or phrase "may or may not extend to the outer limits of its definitional possibilities." *Id.* Proper statutory interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.*; see also *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) ("'As in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.'" (alterations in original) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)).

The context and purpose of the PSA prove that a showing of anticompetitive effect is necessary to state a claim under subsections 202(a) and (b). This Court has stated consistently that the PSA is an antitrust statute through which Congress intended to prevent anticompetitive behavior in the meat production and

processing industry. See *Mahon* v. *Stowers*, 416 U.S. 100, 106 (1974) (per curiam); *Stafford* v. *Wallace*, 258 U.S. 495, 514-15 (1922). In 1922, just one year after Congress passed the PSA, this Court stated that the "chief evil" the Act is designed to counter "is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys." *Stafford*, 258 U.S. at 514-15, 524-25. The Court explained that "what Congress had in mind primarily was to prevent" the type of antitrust "conspiracies" addressed in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), "by supervision of the agencies which would be likely to be employed in it," *Stafford*, 258 U.S. at 520.

Unsurprisingly, given the PSA's antitrust aims, Congress used language in subsections 202(a) and (b) that originated in prior antitrust legislation and that had been interpreted by this Court to require a particular consideration of the effect of competition. In particular, the language in subsections 202(a) and (b) mirrors language in the Interstate Commerce Act of 1887, ch. 104, §§ 2, 3, 24 Stat. 379, 379-80, which prohibited "unjust discrimination" and "any undue or unreasonable preference or advantage." *Compare id.*, *with* 7 U.S.C. § 192(a), (b) (prohibiting "unfair, unjustly discriminatory, or deceptive practice or device" and "any undue or unreasonable preference or advantage"). By the time Congress enacted the PSA, this Court had interpreted these specific phrases of the Interstate Commerce Act to require a consideration of competition in assessing a violation of that Act. See *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 566, 567-68 (1919); *ICC* v. *Chi. Great W. Ry.*, 209 U.S. 108, 119, 122 (1908); *ICC* v.

Ala. Midland Ry., 168 U.S. 144, 164 (1897); *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197, 233 (1896).

The term "unfair" in subsection 202(a) similarly had its origins in antitrust legislation that required a consideration of competition in determining whether a violation had been committed. The Federal Trade Commission Act of 1914 ("FTCA"), ch. 311, § 5, 38 Stat. 717, 719, used the term "unfair," and the Supreme Court, just two years prior to the passage of the PSA, interpreted it as targeting practices that have a "dangerous tendency unduly to hinder competition or create monopoly," *FTC* v. *Gratz*, 253 U.S. 421, 427-28 (1920).[2]

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[2] Petitioner contends that the FTCA's use of "unfair" cannot demonstrate Congress's intention to target anticompetitive conduct because the FTCA uses "'unfair methods of competition,'" whereas the PSA addresses "'unfair ... device[s].'" Pet. 28. Petitioner's pursuit of identical phrasing continues to ignore the purpose and context of the PSA as legislation designed to target injuries to competition in the meat processing industry, not to mention Congress's specific reliance on *Gratz* in passing the PSA. *See* H.R. Rep. No. 67-77, at 2-10 (1921).

Amici—but not petitioner—argue erroneously that modern interpretations of the FTCA support their broad reading of subsection 202(a). Br. of *Amici* 12-13. This argument is incorrect for several reasons. First, interpretations of the FTCA after the passage of the PSA have no bearing on Congress's understanding of the term "unfair" when enacting the PSA. Two years before the passage of the PSA, this Court made clear that "unfair" as used in antitrust legislation targeted practices that hindered competition. Second, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972), upon which *amici* rely, is inapplicable here. "Unlike the case" here, "the question in *Sperry and Hutchinson* was one of agency jurisdiction, namely whether § 5 empowered the FTC to define 'unfair practices' to include practices without anticompetitive effects and of a noncompetitive nature." *Been*, 495 F.3d at 1227 n.7.

Ultimately, the context, purpose, and language used in subsections 202(a) and (b) make clear that Congress intended to target only those practices that do or could adversely affect competition. This conclusion is reinforced by the presumption that Congress "knows and adopts the cluster of ideas that were attached to each borrowed word" from similar legislation. *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952); see also *Moskal* v. *United States*, 498 U.S. 103, 121 (1990); *Carolene Prods. Co.* v. *United States*, 323 U.S. 18, 26 (1944).

These are the same "sound principles of statutory construction" that the court below found in the decisions of the courts of appeals that it followed. Pet. App. 14a. For instance, the Ninth Circuit specifically concluded that section 202 "incorporates the basic antitrust blueprint of ... other pre-existing antitrust legislation" and thus looked to decisions under that legislation for interpretive guidance. *De Jong Packing*, 618 F.2d at 1335 n.7. And as early as 1939, the Seventh Circuit had concluded that whether "preferences or discriminations are unreasonable" should be interpreted consistently between the PSA and the Interstate Commerce Act. *Swift & Co.*, 105 F.2d at 856. The Seventh Circuit later held that the terms "'unfair' and 'unjustly' in Section 202(a) and 'undue' and 'unreasonable' in Section 202(b)," with their antitrust ancestry, "enjoin the Department and courts to apply a rule of reason in determining lawfulness" under these sections. *Armour*, 402 F.2d at 717.

When read in context and according to the PSA's purpose, the prohibitions in subsections 202(a) and (b) require a plaintiff to plead and prove an anticompetitive effect from a defendant's challenged conduct.

2. Petitioner launches several attacks on this natural reading of the PSA. None is availing.

The nub of petitioner's argument that subsections 202(a) and (b) require no showing of an anticompetitive effect is that "subdivisions (c), (d), (e), and (f) [of section 202] explicitly refer to anticompetitive conduct" but (a) and (b) do not. Pet. 21. Contrary to petitioner's contention, however, the fact that other subdivisions of section 202 require a showing of anticompetitive conduct confirms that (a) and (b) require the same. A basic rule of statutory interpretation is that when "several items in a list share an attribute ... the other items" should be interpreted "as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994); see also *Norton* v. *S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("the interpretive canon of *ejusdem generis* would attribute to the last item ... the same characteristic of discreteness shared by all the preceding items"). Because the prohibitions in subdivisions (c)-(e) relate only to conduct that has an anticompetitive effect, subsections (a) and (b) are properly read to do the same.

Nor does requiring an anticompetitive effect under subsections 202(a) and (b) make an absurdity of section 202. See Pet. 20-23. Rather, as the Tenth Circuit recognized, subsections (a) and (b) are catch-all prohibitions designed to capture all of the anticompetitive "acts that Congress could not, at the time of enactment, have foreseen and specified." *Been*, 495 F.3d at 1229.

Perhaps most important, petitioner's contrary construction would render most of section 202 superfluous. If subsections 202(a) and (b) are read—as petitioner proposes—to prohibit all activity that is "unfair, unjustly discriminatory, or deceptive," or that

provides any "undue or unreasonable preference or advantage," regardless of any anticompetitive harm, then these provisions would swallow all of the specific prohibitions in subdivisions (c) through (e), and much more. Petitioner's construction contravenes the fundamental rule that a statute should be read so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Even worse, this construction would bring within the PSA, and the federal jurisdiction of district courts, issues that are purely matters of state law and that Congress could not have intended to fall within its purview. As the Eleventh Circuit recognized, "[f]ailure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised." *London*, 410 F.3d at 1304. Almost any economic practice can be considered subjectively unfair, undue, or unreasonable. Without requiring a showing that a practice harms competition, petitioner's broad reading of these terms would permit all such practices to be challenged under the PSA. But Congress did not intend to provide every farmer with an opportunity to convince a jury in federal court that his or her own beliefs about the economic unfairness of any particular action are correct, without any demonstration that these individual economic theories are related to preserving competition in the marketplace.

Petitioner also argues that Congress's subsequent amendments of the PSA support his expansive reading of the Act. Pet. 25-27. Not so. "'Congress is presumed to be aware of [a] ... judicial interpretation

of a statute and to adopt that interpretation when it reenacts a statute without change.'" *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 782 n.15 (1985) (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975)); *accord Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2494 n.11 (2009). As petitioner notes (at 4), Congress has amended the PSA 23 times over its 90-year history, but it has remained silent on the showing necessary under subsections 202(a) and (b) in the face of numerous federal circuit court decisions interpreting these subsections to require a demonstration of an anticompetitive effect from challenged practices. As petitioner emphasizes (at 8, 26), Congress even extended the protections of section 202 to poultry sellers and growers, but did nothing to change the decisions of the courts of appeals requiring an actual or likely anticompetitive effect to establish a violation under subsections (a) and (b). The only permissible conclusion is that Congress intended to ratify this commonsense requirement, rather than make every activity that someone deems "unfair" the subject of a federal lawsuit.[3]

In an attempt to get around the clear antitrust ancestry and purpose of the PSA, petitioner argues *Stafford* does not clearly indicate "that anticompetitive conduct was the only evil to which those provisions could be applied." Pet. 25. Not true.

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[3] Petitioner contends that requiring a showing of anticompetitive effect under subsections 202(a) and (b) would nullify the prohibitions against the "unfair practices" of false weighing and failure promptly to pay poultry producers that Congress recently enacted. Pet. 26-27. This argument is baffling. Congress provided specific enforcement mechanisms for these offenses, mechanisms entirely separate from subsections 202(a) and (b). *See* 7 U.S.C. § 228b-2.

The Court upheld the PSA against a Commerce Clause challenge specifically because the PSA was aimed at monopolistic and anticompetitive activities. The Court found a sufficient effect on interstate commerce because "Congress has found an evil to be apprehended and to be prevented by the act here in question, in the use and control of stockyards and the commission men to *promote a packers' monopoly of interstate commerce.*" *Stafford*, 258 U.S. at 524-25 (emphasis added). The PSA satisfied the Commerce Clause because the "act finds and imports this injurious direct effect of such agencies"—*i.e.*, those that promote a monopoly—"upon interstate commerce." *Id.* at 525.

Moreover, in the course of deciding this issue, this Court made clear that Congress designed the PSA specifically to combat anticompetitive conduct. While the Court noted that Congress intended to stop evils other than the "chief evil" that "is the monopoly of the packers," the other evils identified were "all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other." *Id.* at 514-15. And each of the other harms identified by the Court were anticompetitive in nature. As examples, the Court noted collusion, market players joining forces to impose an "undue burden on ... commerce" in the form of "exorbitant or unreasonable" charges, "duplication of commissions," and the "deceptive practices in respect of prices." *Id.* at 515.

Nothing in the Court's discussion suggests that the PSA or section 202 in particular extended beyond the anticompetitive concerns that motivated Congress to pass the Act. And the Court's decision certainly does not suggest—as petitioner contends—that Congress

intended to make every subjectively "unreasonable" or "discriminatory" practice a matter of federal law no matter how much it promotes healthy competition or how intrastate it may be.

Thus, petitioner is wrong in baldly asserting that the PSA "is not an antitrust law." Pet. 27. As *Stafford* and numerous courts of appeals have acknowledged, the PSA is just such a law. Nor does petitioner's citation to section 405 of the PSA support his assertion. As he acknowledges (at 27), that provision only states that the PSA will not "prevent or interfere with the enforcement of, or the procedure under" pre-existing antitrust laws. Packers and Stockyards Act, 1921, ch. 64, § 405, 42 Stat. 159, 168 (codified as amended at 7 U.S.C. § 225). That Congress had to address whether the PSA would interfere with other antitrust legislation supports the view that the PSA was aimed at addressing the same harm.

Petitioner also argues that reading the PSA according to its purpose of targeting practices that hinder competition will disregard the notion that the PSA was meant to be "'more than a mirror of the antitrust laws.'" Pet. 16. But as the Tenth Circuit explained, in requiring a showing that "a practice has injured or is likely to injur[e] competition," federal circuit courts "have not required a showing that the defendant engaged in the unfair practice with the intent to cause the injury or other unlawful effect," as required under antitrust laws. *Been*, 495 F.3d at 1231. A plaintiff need only show that "specific practices have the *effect* of injuring competition or are likely to do so." *Id.*

Finally, petitioner contends that requiring a plaintiff to show an anticompetitive effect will leave growers without any remedy for abusive practices. Pet. 18. This argument falls flat. Growers have no

shortage of state law remedies to cure perceived abuses. For instance, growers can resort to breach of contract claims. After all, petitioner contends that "the legal foundation" for an "enormous sector of the agricultural economy is the production contract." *Id.* at 16. Similarly, growers can turn to state laws that protect against abusive or deceptive business practices.

In sum, petitioner presents no basis for this Court's intervention, and the petition should be denied.

III. THE SECOND QUESTION PRESENTED WAS NOT PASSED ON BY THE COURT BELOW AND DOES NOT WARRANT CERTIORARI IN ANY EVENT.

The Court should decline to review the second question presented because the courts below did not pass on it, and because it seeks error correction that does not warrant this Court's attention.

1. Petitioner seeks review of the question whether, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the lower courts should have deferred to the Secretary of Agriculture's interpretation of subsections 202(a) and (b). Pet. i, 29. But neither the Sixth Circuit nor the district court passed on this issue, and "rais[ing] questions that were not decided by the court below .... is ordinarily fatal to the petition." Eugene Gressman et al., *Supreme Court Practice* 506 (9th ed. 2007). After all, "[i]t is the general rule ... that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

As petitioner notes (at 33), the Secretary submitted an *amicus* brief before the Sixth Circuit advocating for *Chevron* deference. But petitioner, the party to

the appeal, only advocated for *Chevron* deference in a single sentence in his opening brief. See Final Br. of the Appellant at 14-15, *Terry* v. *Tyson Farms, Inc.*, No. 08-5577 (6th Cir. filed Oct. 9, 2008). Accordingly, the Sixth Circuit declined to pass on the issue, presumably having concluded that petitioner forfeited this argument by failing to raise it adequately in his briefs. See *Treesh* v. *Bagley*, 612 F.3d 424, 434 (6th Cir. 2010) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). And having concluded that petitioner failed to raise this argument, the court presumably declined to reach an issue raised by an *amicus* but not the party it supports. *Bakal Bros., Inc.* v. *United States*, 105 F.3d 1085, 1090 (6th Cir. 1997) ("Because the argument" by an amicus "was not raised by plaintiff, we are not required to pass upon the claim."). Because the second question presented was not passed on by the lower courts, the Court should decline to review it.

2. In all events, petitioner's second question presented does not warrant this Court's review because it seeks mere error correction and is ultimately meritless.

Petitioner does not suggest that the courts of appeals are in conflict on whether the Secretary's interpretation of subsections 202(a) or (b) deserves *Chevron* deference. Nor can he. The federal circuit courts to address this specific issue have all held that *Chevron* deference is unwarranted. See *Wheeler*, 591 F.3d at 362; *London*, 410 F.3d at 1304; *Been*, 495 F.3d

at 1227.[4] Rather, he argues in essence that the Sixth Circuit erred in failing to defer to the Secretary's construction. Pet. 18, 29-31. But this Court does not sit as a court of error correction. See *Halbert* v. *Michigan*, 545 U.S. 605, 611 (2005).

The Court's review is also unwarranted because the Secretary's interpretation of subsections 202(a) and (b) is not entitled to *Chevron* deference. When "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." *Chevron*, 467 U.S. 842-43. As explained above, the plain language of subsections 202(a) and (b), in light of the context and purpose of the PSA, requires a showing of anticompetitive effect to state a claim. See *supra* pp. 16-26; see also *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Because Congress's intention is clear, there has been no delegation of authority to the Secretary that requires deference. *Chevron*, 467 U.S. at 841-42.

Moreover, contrary to petitioner's suggestion (at 31), this is precisely a situation in which a "court's prior judicial construction of a statute trumps an agency construction" because "the prior court decision [held] that its construction follows from the unambiguous terms of the statute and thus leaves no

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[4] As some of these courts have recognized, no *Chevron* deference is due to the Secretary's interpretation in part because Congress has not delegated authority to the Secretary to adjudicate violations of section 202 by live poultry dealers. *See, e.g.*, *London*, 410 F.3d at 1304.

room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In *Armour*, for example, the Seventh Circuit specifically held that the Secretary had "erroneously construed" subsections 202(a) and (b) of the PSA and that "the statutory language" of the Act "enjoin[ed] the Department and courts to apply a rule of reason." 402 F.2d at 717, 727. In other words, the court held that its conclusion followed from the unambiguous terms of the statute.[5]

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[5] Petitioner's concern (at 30) over a possible conflict between the courts' and Secretary's constructions of subsections 202(a) and (b) is no basis for certiorari. As explained above, the Secretary has initiated a rulemaking concerning its interpretation of subsections 202(a) and (b). *See supra* pp. 15-16. Moreover, on several occasions, the federal circuit courts have set aside the Secretary's interpretation of these subsections because the Secretary failed to construe them properly. *See, e.g.*, *Armour*, 402 F.2d at 727. The conflict arises from the Secretary's unwillingness to comply with the plain language of the PSA, not the courts' failure to give deference where it is due.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully yours,

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