**No. 17-3723**

***In the***

# United States Court of Appeals

***for the***

# Eighth Circuit

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ORGANIZATION FOR COMPETITIVE MARKETS; JONATHAN BUTTRAM; CONNIE BUTTRAM; AND JAMES DINKLAGE,

*Petitioners*,

– v. –

U.S. DEPARTMENT OF AGRICULTURE; SONNY PURDUE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF AGRICULTURE; AND THE UNITED STATES OF AMERICA,

*Respondents*.

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## BRIEF IN SUPPORT OF PETITION FOR REVIEW

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## SUMMARY OF THE CASE

This case concerns the Department of Agriculture's failure to abide a statutory mandate, and to heed the requirements of the Administrative Procedure Act, in withdrawing regulations that would have helped farmers seek redress for unlawful treatment. In the 2008 Farm Bill, Congress required the Department to promulgate, within two years, regulations setting forth the criteria it uses to determine whether an "undue or unreasonable preference or advantage" has been given in violation of section 202(b) of the Packers and Stockyards Act, 7 U.S.C. § 192(b). Almost eight years later, the Department still has not complied. Further, while the Department initiated rulemaking in partial response to Congress's directive, and promulgated the Farmer Fair Practices Rules in 2016, it abruptly changed course in 2017, withdrawing the Rules without adequate justification and announcing that it intended to proceed no further with the task Congress set for it.

This Petition presents the questions whether the Department has unlawfully withheld agency action by failing to heed Congress's mandate, 5 U.S.C. § 706(1), and whether its orders withdrawing the Rules are arbitrary and capricious, *id.* § 706(2)(A). Given the importance and complexity of these questions, Petitioners respectfully submit that oral argument may aid the Court's resolution of this matter and suggest 20 minutes per side.

## CORPORATE DISCLOSURE STATEMENT

Petitioner the Organization for Competitive Markets ("OCM") is a non-governmental, nonprofit corporation. OCM has no parent or subsidiary. Neither OCM, nor its affiliates, have ever issued shares or debt securities to the public.

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## INTRODUCTION

In December 2016, the United States Department of Agriculture published regulations to strengthen protections for farmers under the Packers and Stockyards Act, a landmark law passed by Congress in 1921 to reform the agricultural market and shield its participants from unfair and discriminatory practices. The Department's rules, known as the Farmer Fair Practices Rules, responded to a statutory mandate in the 2008 Farm Bill and would have provided necessary clarity regarding what conduct violates certain provisions of the Act.

Less than a year later, despite acknowledging that there had been no change in the underlying facts, the Department changed course and withdrew the Rules. Because the Department has not adequately explained its new policy, and because it is continuing to flout Congress's directive, Petitioners—individual farmers and the Organization for Competitive Markets, an association that advocates on their behalf—appeal to this Court.

Sections 202(a) and (b) of the Packers and Stockyards Act prohibit agricultural corporations from engaging in "unfair, unjustly discriminatory, or deceptive" practices, and from "making or giving of any undue or unreasonable preference or advantage" in the marketplace. 7 U.S.C. §§ 192(a), (b). In its December 2016 Interim Final Rule (the "IFR"), 81

Fed. Reg. 92,566 (Dec. 20, 2016), App.1, the Department formalized its longstanding interpretation that claimants under sections 202(a) and (b) need not demonstrate that the unfair conduct at issue distorts competition in the market as a whole—*i.e.*, that they need not prove "competitive injury." At the same time, the Department published a Notice of Proposed Rulemaking (the "NPRM"), 81 Fed. Reg. 92,703 (Dec. 20, 2016), App.30, to propose regulations that provided specific examples of conduct that constitutes an "unfair practice" under section 202(a) and, in response to Congress's mandate in the 2008 Farm Bill, that established criteria the Department would consider in determining whether an unfair preference had been given in violation of section 202(b).

The Farmer Fair Practices Rules aimed to provide contract and independent farmers with some semblance of bargaining power in an increasingly concentrated market. Such farmers contract with large agribusinesses—packers and processors—to grow and raise livestock and poultry. However, as packers and processors have consolidated, farmers have found themselves with only a limited number of possible buyers in any given region. This means that farmers lack bargaining power and are often forced to accept contracts on a take-it-or-leave-it basis. Because a farmer can be pushed out of the market if the few buyers in a region refuse to buy

that farmer's product, or refuse to buy at a reasonable price, fear of retaliation—a fear that has been borne out by Petitioners' own experiences—pressures farmers to capitulate. The Rules responded to these market realities; the Rules' withdrawal ignores them, leaving farmers on the same unlevel playing field as before.

The Rules' withdrawal also violates the law. Although agencies can pursue new agendas (within the bounds Congress has established), they cannot ignore statutory commands, change course without explanation, or pretend that no change has occurred. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Department has violated each of these precepts, ignoring Congress's directive in the 2008 Farm Bill, putting forth inadequate explanations, and failing to grapple with its changed position as to the Rules' necessity. The Department's actions violate the Administrative Procedure Act, 5 U.S.C. §§ 706(1), (2)(A), and Petitioners respectfully request that the Court vacate the Department's orders withdrawing the Rules and require the Department to comply with Congress's mandate in the 2008 Farm Bill.

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2342, which provides that "[t]he court of appeals…has exclusive jurisdiction to enjoin,

set aside, suspend (in whole or in part), or to determine the validity of…all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under section 210(e), 217a, and 499g(a) of title 7." 28 U.S.C. § 2342(2); *see Nw. Airlines v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981) ("the word 'order' for purposes of special review statutes" is interpreted "expansively, to permit direct review (in the courts of appeals) of regulations promulgated through informal notice-and-comment rule-making" (citations omitted)). The Department's orders on review here were issued under chapter 9 of title 7 (the Packers and Stockyards Act).

## STATEMENT OF ISSUES

1. Whether the Department has unlawfully withheld agency action, 5 U.S.C. § 706(1), by missing by almost eight years (and counting) a Congressionally-prescribed deadline to promulgate certain regulations under the Packers and Stockyards Act. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120, Add.12; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis omitted); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999).

2. Whether the Department has acted arbitrarily and capriciously, 5 U.S.C. § 706(2)(A), by issuing orders, *see* 82 Fed. Reg. 48,594 (Oct. 18,

2017), App.51; 82 Fed. Reg. 48,603 (Oct. 18, 2017), App.60, withdrawing an interim final rule and announcing no further action on a notice of proposed rulemaking without adequate explanation. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

## BACKGROUND

### I. The Packers and Stockyards Act

Congress enacted the Packers and Stockyards Act in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).[1] The "chief evil" that Congress sought to regulate was "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 v. Wallace*, 258 U.S. 495, 514-15 (1922). "Another evil" Congress wanted to

[1] Petitioners' presentation draws substantially from amicus briefs the United States has filed in the past to defend the robust protections that the Packers and Stockyards Act provides to individual farmers. *E.g.*, Brief for Amicus Curiae the United States of America in Support of Plaintiff-Appellant, *Terry v. Tyson Farms, Inc.*, No. 08-5577, 604 F.3d 272 (6th Cir. 2010), 2008 WL 5665508; En Banc Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees, *Wheeler v. Pilgrim's Pride Corp.*, No. 07-40651, 591 F.3d 355 (5th Cir. 2009) (en banc), 2009 WL 7349991.

combat was "exorbitant charges, duplication of commissions, [and] deceptive practices in respect of prices," *id.* at 515, as this Court has repeatedly recognized, *see, e.g.*, *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337 (8th Cir. 1971). And as this Court has acknowledged, because the Act "is remedial legislation," it "should be liberally construed to further its life and fully effectuate its public purpose." *Id.* at 1336.

Today, as relevant here, section 202 of the Act, codified at 7 U.S.C. § 192, declares that "[i]t 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," among other things,

> (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….

7 U.S.C. § 192.

The Act authorizes the Department of Agriculture to enforce violations of section 202 by packers and swine contractors through formal adjudication. *Id.* § 193. While the Act does not authorize the Department to

enjoin violations by live poultry dealers, individuals injured by such violations, and by those committed by packers and swine contractors, may sue in federal district court to recover "the full amount of damages sustained in consequence of such violation[s]." *Id.* § 209.

## II. The 2008 Farm Bill and the Department's Promulgation of the Farmer Fair Practices Rules

In the Packers and Stockyards Act, Congress granted the Department general authorization to issue implementing regulations. *Id*. § 228. In the 2008 Farm Bill, given rising concentration in agricultural markets, Congress mandated that the Department issue specific regulations under the Act and established a strict timeline. *See* Food, Conservation, and Energy Act of 2008 (the "2008 Farm Bill"), Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120, Add.12. As relevant here, Congress required the Department, "[a]s soon as practicable, but not later than 2 years after" the 2008 Farm Bill's enactment—*i.e.*, by June 18, 2010—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" section 202(b) of the Packers and Stockyards Act. *Id.* § 11006(1), 122 Stat. at 2120, Add.12. The Department still has not done so, and has recently made clear its intention not to do so, in disregard of Congress's mandate.

### A. The Department Initiates Rulemaking: June 2010 Notice of Proposed Rulemaking

The Department once intended otherwise. Starting shortly after the 2008 Farm Bill's passage, the Department's Grain Inspection, Packers and Stockyards Administration ("GIPSA") held public meetings and began gathering comments and data to support the required rulemaking. *See* 75 Fed. Reg. 35,338, 35,339 (June 22, 2010).[2] In June 2010, based on the "comments, information, and recommendations" GIPSA received, and based on its "expertise, experience, and interactions in the livestock and poultry industries," *id.* at 35,339, the Department issued proposed regulations that, as relevant here, accomplished two key objectives. *See also* 81 Fed. Reg. at 92,567, App.2 (summarizing the history of the rulemaking).

Proposed 9 C.F.R. § 201.211. *First*, in response to Congress's mandate in section 11006(1) of the 2008 Farm Bill, the Department proposed new 9 C.F.R. § 201.211 "to address undue or unreasonably preferential treatment of poultry growers, swine production contract growers

[2] In November 2017, Secretary of Agriculture Sonny Perdue announced the elimination of GIPSA as a standalone agency and stated it would be re-established under the Fair Trade Practices program within the Department's Agriculture Marketing Service. *See* Dep't of Agric., Secretary's Mem. 1076-018, Improving Customer Service and Efficiency (Nov. 14, 2017), https://www.ocio.usda.gov/sites/default/files/docs/2012/SM%201076-18.pdf.

or livestock producers" by "establish[ing] criteria that the Secretary may consider in determining if [such] differential treatment" violates the prohibition against "undue or unreasonable preference[s] or advantage[s], or …undue or unreasonable prejudice[s] or disadvantage[s]" in Section 202(b) of the Packers and Stockyards Act. 75 Fed. Reg. at 35,343; *see id.* at 35,352 (proposed criteria). The Department explained that GIPSA had learned of the prevalence of such treatment, *id.* at 35,343, and that the proposed regulation would "[b]enefit[]…the industry and the market" by "establishing parity of negotiating power between" livestock producers and packers, and between poultry growers and live poultry dealers, *id.* at 35,346.

Proposed 9 C.F.R. §§ 201.3, 201.210. *Second*, under the Packers and Stockyard Act's general rulemaking authority, the Department responded to the "increased use of contracting in the marketing and production of livestock and poultry" and to "market concentration," *id.* at 35,338, by confirming that claimants under sections 202(a) and 202(b) need not prove competitive injury to establish a violation, *see id.* at 35,341 (proposed 9 C.F.R. § 201.3), and by providing specific examples of conduct deemed unfair under section 202(a) of the Act, *see id.* at 35,342 (proposed 9 C.F.R. § 201.10).

In proposing 9 C.F.R. § 201.3, the Department first reaffirmed its "longstanding" position that "a violation of section 202(a) or (b) can be proven without proof of likelihood of competitive injury." *Id.* at 35,340. The Department explained that its interpretation is consistent with the Act's "legislative history and purposes" and with "other sections of the…Act using similar language." *See id.* at 35,340-41. But because certain courts of appeals had adopted a different construction, holding that claimants under sections 202(a) and (b) must establish competitive injury, *see id.* at 35,341 & nn.31-32, and had in certain instances refused to defer to the Department's interpretation because it had not previously been enshrined in a regulation, the Department proposed 9 C.F.R. § 201.3 to confirm that "[c]onduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition," *id.* at 35,351.

Finally, in proposing 9 C.F.R. § 211.210, the Department explained that GIPSA had "been informed by growers and producers" that they "are sometimes at a distinct disadvantage in negotiating the terms of an agreement" with dealers and packers; that dealers and packers have "exert[ed] their disproportionate positions of power by misleading or retaliating against" growers and producers; and that growers and producers are forced to "acquiesce" to packers' and dealers' "terms for entering into a

contract or growing arrangement, or acquiesce to unfair conduct[,] in order to continue in business." *Id.* at 35,342. Accordingly, the Department proposed 9 C.F.R. § 211.20 to confirm "the broad coverage of section 202(a)," including by providing "examples of conduct deemed unfair." *Id.* (listing examples).

### B. The Department Promulgates the Farmer Fair Practices Rules: December 2016 IFR and NPRM

The appropriations acts for fiscal years 2012-2015 prevented the Department from finalizing certain of the regulations that it had proposed in June 2010, including proposed 9 C.F.R. §§ 201.3, 201.210, and 201.211. 81 Fed. Reg. at 92,567, App.2. Subsequent appropriations acts did not include this limitation, however, and in December 2016, the Department published the IFR and NPRM—the Farmer Fair Practices Rules.

The IFR. The Department issued as an interim final rule a provision similar to that which it had proposed, in June 2010, to confirm that claimants under sections 202(a) and (b) of the Packers and Stockyards Act need not establish competitive injury. *Id.* at 92,570, App.5. Specifically, the IFR provided that:

> The appropriate application of sections 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct or action. A finding that the challenged conduct or action adversely affects or is likely to adversely affect competition is not necessary in all cases. Certain conduct or action can be found to violate sections 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.

*Id.* at 92,594, App.29 (to be codified at 9 C.F.R. § 201.3(a)).[3] The Department once again explained how its longstanding interpretation "is consistent with the language and structure of the…Act, as well as its legislative history and purposes." *Id.* at 92,567, App.2; *see id.* at 92,567-70, App.2-5. The Department defended its interpretation against contrary interpretations adopted by certain courts of appeal and explained that it was promulgating the IFR to provide additional reasons for courts to defer to its construction. *See id.* at 92,568 & nn.13-16, App.3, 92,570 & nn.21-27, App.5.

The Department acknowledged that the IFR might "initially encourage litigation"—indeed, increased private enforcement was the Department's aim: the IFR's purpose was to "lower costs" to producers and growers "should they bring legal action for an alleged violation of section 202(a) or section 202(b)." *Id.* at 92,571, App.6. As the Department stated,

[3] In the June 2010 notice of proposed rulemaking, this provision was to be codified at 9 C.F.R. § 201.3(c), but because of its "primary importance," in the December 2016 IFR the Department "chang[ed] its designation from (c) to (a)." 81 Fed. Reg. at 92,566, App.1.

"[b]y removing the burden to prove harm or likely harm to competition in all cases, this interim final rule promotes fairness and equity in the livestock and poultry industries." *Id.* Specifically, after providing a lengthy explanation of certain "structural issues" in agricultural markets that produce contracts with "detrimental effects" on growers and producers, the Department explained that "[t]hese structural issues and market failures will be mitigated by relieving plaintiffs from the requirement to demonstrate competitive injury." *Id.* at 92,576, App.11. The Department concluded that the IFR's "primary benefit" would be to "increase[]" the ability of producers and growers to "enforce[]" sections 202(a) and (b) of the Act so as to "reduce instances of unfair, unjustly discriminatory, or deceptive practices or devices and undue or unreasonable preferences, advantages, prejudices, or disadvantages and increased efficiencies in the marketplace." *Id.* at 92,588, App.23.

Finally, the Department explained why it was issuing 9 C.F.R. § 201.3 as an interim final rule with opportunity for additional comment. Because the Department had solicited comments on the provision in its June 2010 proposed rule, it concluded that it had "fulfilled the notice and comment requirements of the Administrative Procedure Act." *Id.* at 92,570, App.5. Indeed, the IFR was informed by three public meetings, five joint public workshops, and over 61,000 comments. *See id.* at 92,566-67, App.1-2.

"However," the Department continued, "given the significant level of stakeholder interest in this regulatory provision, the intervening six years, and in the interests of open and transparent government," it had "decided to promulgate the rule as an interim final rule and provide an additional opportunity for public comment." *Id.* at 92,570, App.5. The Department stated that after the comment period closed, it would publish another document in the Federal Register addressing the comments and making any amendments to the IFR. *See id.* at 92,570-71, App.5-6.

The NPRM. The NPRM, issued simultaneously with the IFR, proposed revised versions of 9 C.F.R. §§ 201.210, 201.211. 81 Fed. Reg. at 92,704-07, App.33-34. In addition to restructuring the proposed 9 C.F.R. § 201.210 somewhat, the Department again set forth "a non-exhaustive list of the types of conduct or action that [the Department] believes is unfair, unjustly discriminatory, or deceptive and a violation of section 202(a) of the…Act regardless of whether the conduct harms or is likely to harm competition." *Id.* at 92,704, App.31. The Department noted that neither the Act nor the Department's regulations had ever defined certain of the Act's key terms, and explained that its list was "intended to reduce confusion regarding" what constitutes unlawful conduct. *Id.* at 92,704-05, App.32-33 (explaining the examples). Crucially, the first example the Department identified as a violation of section 202(a), in proposed 9 C.F.R.

§ 201.210(b)(1), was "retaliatory action or threat of retaliatory action by a packer, swine contractor or live poultry dealer…when done in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower." *Id.* at 92,704, App.31.

As to the proposed 9 C.F.R. § 201.211, the Department again acknowledged Congress's mandate in section 11006(1) of the 2008 Farm Bill, addressed comments it had received in response to the June 2010 proposed rule, and explained its revised, proposed criteria for what constitutes an undue or unreasonable advantage under section 202(b) of the Act. *See id.* at 92,705-07, App.32-34. As in the IFR, given structural issues in the market, the Department's aim in the NPRM was to facilitate private enforcement of the Act and deter unlawful behavior, and thereby "lower overall costs throughout the entire production and marketing complex of all livestock, poultry, and meat." *Id.* at 92,717, App.44. And like the Department's proposed 9 C.F.R. § 201.210, its proposed 9 C.F.R. § 201.211 emphasized the particular problems that attend retaliation: "Packers, swine contractors or live poultry dealers who treat some producers and growers more favorably than producers or growers who choose to exercise their rights are giving an undue preference or advantage to a group of producers

or growers to the detriment of others," and their "conduct violates section 202(b)." *Id.* at 92,706, App.33.

## III. The Department Withdraws the Farmer Fair Practices Rules

In October 2017, the Department changed course and withdrew the Farmer Fair Practices Rules, rescinding the IFR and abandoning the NPRM.

Rescission of the IFR. After delaying the IFR's effective date several times and soliciting comment on certain alternatives that it had proposed, on October 18, 2017, the Department withdrew its interpretation of sections 202(a) and (b) that would have been codified as 9 C.F.R. § 201.3(a). 82 Fed. Reg. at 48,594, App.51. The Department purports to stand by its interpretation that violations can be established without proving competitive injury, and has not explicitly abandoned its view that if growers and producers *are* required to prove competitive injury to bring claims under the Act, they will "continue to be subjected to unfair business practices, and their businesses [will] be at risk." *Id.* at 48,596-97, App.53-54. The Department even admits that "the underlying facts…have not changed to any material extent" since it issued the IFR. *Id.* at 48,600, App.57.

Nonetheless, the Department now professes to have "serious legal and policy concerns related to [the IFR's] promulgation and implementation." *Id.* at 48,596, App.53. Having once sought to *facilitate* farmers' efforts to

avail themselves of the Packers and Stockyard Act's protections through litigation, the Department now seeks to *prevent* "increased litigation," concerned that "the IFR would embolden producers and growers to sue for any perceived slight by a packer or integrator." *Id.* at 48,594, App.51; *see id.* at 48,601, App.58. And having once understood that facilitating litigation by farmers would *deter* packers and integrators from treating farmers unfairly and committing violations of the Act, the Department now believes that "[f]ear of litigation" would lead to undesirable consequences. *See id.* at 48,594-95, App.51-52.

The Department further claims that, contrary to its prior analysis, courts would not defer to its interpretation of sections 202(a) and (b) even if that interpretation were enshrined in a regulation. *See id.* at 48,596-98, App.53-55. The Department asserts that in issuing the IFR it "ignor[ed] case law…contrary" to its interpretation, *id.* at 48,601, App.58, notwithstanding that the IFR explicitly addressed those very cases, *see* 81 Fed. Reg. at 92,568, 92,587, App.3, 22.

Finally, the Department argues that it impermissibly issued its interpretation as an interim final rule when, instead, it should have solicited another round of comment. *See* 82 Fed. Reg. at 48,598-99, App.55-56. Although in issuing the IFR the Department never invoked the APA's good

cause exception for foregoing notice and comment, and instead explained that it had satisfied the APA's requirements by soliciting comments on the proposed rule in June 2010, *see* 81 Fed. Reg. at 92,570, App.5, the Department now is of the view that it was required to establish good cause in the IFR and failed to do so, *see* 82 Fed. Reg. at 48,599, App.56.

Abandonment of the NPRM. Simultaneous with rescinding the IFR, the Department announced that it "will take no further action" on the NPRM. *Id.* at 48,603, App.60. Notwithstanding that the aim of the NPRM (as of the IFR) was to enhance private enforcement of the protections that Congress has afforded farmers in the Packers and Stockyards Act, the Department now cites approvingly to comments complaining that the NPRM, if it had been finalized, would have "increase[d] litigation industry-wide." *Id.* Although "recogniz[ing] that the livestock and poultry industries have a vested interest in understanding what conduct or actions violate" sections 202(a) and (b) of the Act, the Department dismisses that interest out of concern for the "protracted litigation" that it believes the "proposed rule…would inevitably generate." *Id.* The Department does not mention Congress's dictate in § 11006(1) of the 2008 Farm Bill, and does not acknowledge that it is now almost eight years late in complying.

## IV. The Petition for Review

Petitioners challenge the Department's withdrawal of the Farmer Fair Practices Rules and failure to abide Congress's mandate in the 2008 Farm Bill. Petitioners Connie and Jonathan Buttram, in Albertville, Georgia, and Jim Dinklage, in Knox County, Nebraska, are lifelong farmers who have experienced firsthand the kinds of retaliatory and discriminatory treatment that the Rules were designed to protect against. *See* C. Buttram Decl. (Ex. A), Add.14; J. Buttram Decl. (Ex. B), Add.18; Dinklage Decl. (Ex. D), Add.28. Petitioner Organization for Competitive Markets researches the causes of concentration in agricultural markets, educates the public about them, counsels farmers about counteracting their effects, and advocates on its members' behalves. *See* Maxwell Decl. (Ex. E), Add.32. Because the Department has turned its back on Petitioners by defying Congress's mandate and unlawfully withdrawing the Farmer Fair Practices Rules, Petitioners respectfully request that this Court intervene.

## SUMMARY OF THE ARGUMENT

In withdrawing the Farmer Fair Practices Rules, the Department violated the APA in two respects. First, it has unlawfully withheld agency action. In the 2008 Farm Bill, Congress—in plain, mandatory terms—directed the Department to promulgate by June 2010 regulations explaining

the criteria it uses to determine whether actions are unreasonably prejudicial under section 202(b) of the Packers and Stockyards Act. Because the Department has undeniably failed to do so, the Court must "compel agency action unlawfully withheld." 5 U.S.C. § 706(1).

Second, the Department acted arbitrarily and capriciously in failing to adequately explain its grounds for reversing course and withdrawing the Rules. The Department purports to stand by the Rules' logic, that facilitating increased enforcement of the Act would deter packers and processors from engaging in unfair and unlawful practices—practices that, per the Department's own analysis, are rampant in the livestock and poultry industries. But now, without explaining why, the Department simply asserts that increased enforcement is no longer a good thing. In the absence of reasoned decisionmaking, this Court must hold the Department's withdrawal of the Rules unlawful and set it aside. *Id.* § 706(2)(A).

## ARGUMENT

### I. The Department's Actions Have Injured Petitioners

Petitioners have standing to challenge the Department's withdrawal of the Rules and failure to comply with Congress's mandate in the 2008 Farm Bill. As the Department itself has acknowledged, the Rules' withdrawal has made it harder for farmers like petitioners Jonathan and Connie Buttram and

Jim Dinklage (the "Individual Petitioners"), and OCM member Mike Callicrate, to avail themselves of the Act's protections. The Buttrams and Mr. Dinklage therefore have standing to sue in their own right, and OCM has associational standing to sue on behalf of its members. Finally, OCM also has organizational standing. The Rules' withdrawal has left farmers to turn to OCM for assistance and required OCM to establish new programs to help them, thereby diverting OCM's resources from its other core initiatives.

### A. Petitioners Jonathan Buttram, Connie Buttram, and Jim Dinklage Have Standing

The Individual Petitioners have demonstrated "(1) injury in fact, (2) a causal connection between that injury and" the Department's withdrawal of the Farmer Fair Practices Rules, "and (3) the likelihood that a favorable decision by the court" vacating the Department's withdrawal "will redress the alleged injury." *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013).

The Individual Petitioners are among the millions of farmers harmed by the Department's withdrawal of the Rules. Accordingly, they have suffered "the type of concrete and actual or imminent harm necessary to establish an injury in fact." *Id.* at 870. The Buttrams and Mr. Dinklage have experienced the very kinds of actions that the NPRM, had it been finalized, would have confirmed constitute violations of the Packers and Stockyards

Act. C. Buttram Decl. ¶ 4, Add.15; J. Buttram Decl. ¶¶ 6-11, Add.19-21; Dinklage Decl. ¶¶ 4-6, Add.29.[4]

For example, in response to Mr. Buttram's advocacy efforts—especially his role with the Alabama Contract Poultry Growers Association—major poultry companies have terminated contracts with his family's farms. J. Buttram Decl. ¶ 8, Add.20; C. Buttram Decl. ¶ 4, Add.15. The NPRM, if finalized, would have clarified that the poultry companies' "retaliatory action[s]…in response to" the Buttrams' "lawful…association" and "assertion of rights" are "violations of section 202(a)." 81 Fed. Reg. at 92,704, App.31 (proposed 9 C.F.R. § 201.210(b)(1)). And both the NPRM and the IFR would have confirmed that the Buttrams could seek redress in court under the Act without having to establish competitive injury. *See id*. at 92,567, 92,704, App.2, 31. Then, the Buttrams would have more readily filed claims against the companies and enjoyed the protections that the Act

[4] *See, e.g.*, *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 833 (9th Cir. 2006) (assessing a plaintiff's standing to challenge an agency decision to abandon a proposed policy by considering whether the policy, if finalized as proposed, would have benefited the plaintiff), *opinion vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007) (vacating the panel opinion upon the parties' settlement).

promises. J. Buttram Decl. ¶ 12, Add.21; C. Buttram Decl. ¶ 6, Add.15.[5] Indeed, the Department cited "the increased ability for the enforcement of the…Act" by litigation brought by individual farmers as the Rules' "primary benefit," *see* 81 Fed. Reg. at 92,588, App.23, and, subsequently, as a reason for their withdrawal, *see* 82 Fed. Reg. at 48,594-95, App.51-52.

Moreover, the harm to the Individual Petitioners is ongoing and will continue absent judicial intervention. *See Park v. Forest Service of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000). Although the retaliatory and discriminatory treatment the Individual Petitioners have experienced has caused them to shift their farming operations, were the Rules in place, and were they therefore more likely to succeed in challenging such treatment in court, they would be more likely to resume their prior work—and more likely to require the Rules' protection. *See* J. Buttram Decl. ¶¶ 12-13,

[5] Additional examples abound. To take but two: Mr. Buttram experienced discriminatory treatment when a poultry processor manipulated the scales while weighing his birds. J. Buttram Decl. ¶ 10, Add.20; *see* 81 Fed. Reg. at 92,705, App.32 (the proposed 9 C.F.R. § 201.210(b)(8) would have "set[] forth GIPSA's position on [inaccurate weighing] as unfair, unjustly discriminatory or deceptive in violation of section 202(a) of the…Act"). And because Mr. Dinklage was treated less "favorably as compared to others similarly situated" by a meatpacker on account of his "lawful…assertion of [his] rights," *id.* at 92,706, App.33 (citing proposed 9 C.F.R. § 201.211(a)); *see* Dinklage Decl. ¶¶ 5-6, Add.29, under the Rules the Department likely would have determined that he had been subjected to an undue disadvantage under section 202(b).

Add.21; C. Buttram Decl. ¶¶ 5-7, Add.15-16; Dinklage Decl. ¶¶ 6-7, Add.29-30.

The Individual Petitioners also satisfy standing's causation and redressability requirements. *See Iowa League of Cities*, 711 F.3d at 869. Their injuries are caused by the Department's withdrawal of the Rules and would be redressed by a court order vacating that withdrawal and ordering the Department to comply with Congress's command in the 2008 Farm Bill. That the Department would have discretion as to any final rule it might adopt does not alter the analysis. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered"); *Iowa League of Cities*, 711 F.3d at 871 (where a petitioner asserts a procedural injury, the redressability prong "does not require petitioners to show that the agency would alter its rules upon following the proper procedures").

### B. OCM Has Associational Standing

OCM is a membership organization that exists to promote fairness in agricultural markets and to pursue equitable treatment for farmers. Maxwell

Decl. ¶¶ 2, 4-6, Add.32-33. Because the interests at stake here are undoubtedly "germane to [OCM's] purpose," and because, as explained above, the Individual Petitioners have "standing to sue in their own right," OCM has "associational standing" to bring suit on its members' behalves. *Iowa League of Cities*, 711 F.3d at 869 (citation omitted);[6] *see* Maxwell Decl. ¶ 7, Add.33 (confirming the Buttrams' membership in OCM).[7]

In addition, Mike Callicrate is an OCM member, *see* Maxwell Decl. ¶ 8, Add.33, who also would have standing to sue in his own right. Like the Buttrams and Mr. Dinklage, Mr. Callicrate is a farmer who has experienced retaliatory and discriminatory treatment, in his case at the hands of meatpackers—treatment that he could have more easily challenged in court

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[6] The associational standing test also requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Iowa League of Cities*, 711 F.3d at 869 (citation omitted). Because OCM claims only that the Department's withdrawal of the rules must be struck down, and that the Department must be ordered to comply with Congress's command in the 2008 Farm Bill, this requirement is satisfied. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986) (requirement satisfied where a "suit raises a pure question of law"); *see, e.g.*, *AARP v. EEOC*, 226 F. Supp. 3d 7, 20 (D.D.C. 2016) (requirement satisfied where suit challenging agency action seeks only injunctive relief).

[7] The Petition for Review erroneously identified petitioner James Dinklage as a member of OCM. After filing the petition for review, the undersigned learned that while Mr. Dinklage is engaged with OCM's work, he is not presently a member under the terms set forth in OCM's bylaws.

had the Rules not been withdrawn. *See* Callicrate Decl. (Ex. C) ¶¶ 2, 4-6, Add.24-26. Mr. Callicrate's experiences as an OCM member further confirm that OCM has standing to bring this action on its members' behalves.

### C. OCM Has Organizational Standing

Having been directly injured by the Department's actions, OCM also has standing in its own right. An entity has organizational standing when it demonstrates "a concrete and demonstrable injury to [its] activities which drains its resources and is more than simply a setback to its abstract social interests." *Nat'l Fed'n of Blind of Mo. v. Cross* ("*NFB*"), 184 F.3d 973, 979 (8th Cir. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). OCM has set forth "specific facts establishing," first, "distinct and palpable injuries fairly traceable to [the Departments'] conduct," and second, that OCM has been required to "drain[] its resources" to counteract that harm. *Id.* (quoting *Ark. ACORN Fair Hous., Inc. v. Greystone Dev. Co.*, 160 F.3d 433, 435 (8th Cir. 1998)). The Rules' withdrawal, and the Department's failure to comply with the 2008 Farm Bill, have hampered OCM's ability to pursue its mission and disrupted its daily activities in at least three ways. *See* Maxwell Decl. ¶¶ 11-16, Add.33-37.

First, as a result of the Rules' withdrawal, OCM now fields substantially more complaints from farmers regarding packers' and processers' unfair actions. Maxwell Decl. ¶¶ 11-14, Add.33-35. OCM has long counseled individual farmers who face such treatment. *Id.* ¶ 11, Add.33-34. After evaluating an individual farmer's situation, OCM attempts to assist the farmer in finding market alternatives, in understanding his or her options under the Packers and Stockyards Act, and in contacting relevant regulators. *Id.* ¶ 14, Add.35. The Rules' withdrawal has increased the number of requests to OCM for assistance by 50%. *Id.* That has resulted in a substantial increase in the OCM staff time devoted to counseling activities, *id.*, significantly depleting OCM's resources. Were the Rules restored, the burden on OCM would lessen, as farmers would be better able to protect themselves and would lean on OCM less. *See id.*

Second, the Rules' withdrawal has forced OCM to reorient its focus. *Id.* ¶ 15, Add.35-36. Now that farmers' own access to courts is curtailed, OCM—in keeping with its longstanding commitment to fair agricultural markets, but in new and newly urgent ways—must work to ensure that the Department has the resources, capacities, and will to patrol those markets itself. OCM has therefore had to respond to the Rules' withdrawal by establishing a new initiative focused on the Department's enforcement of the

Act. *Id*. Were the Rules restored, OCM could deprioritize this initiative. *See id.*

Third, the resources diverted to providing additional counseling to farmers and establishing a new project oriented around the Department are no longer available for OCM's other key programs. *Id.* ¶ 16, Add.36-37. The consequences for OCM have been stark. Most significantly, OCM has had to suspend its Taking It Back Tour, whereby OCM organizes events in its Board members' states to educate farmers about fairness in the marketplace. *Id.* OCM had planned one event for late 2017 and three events for early 2018, but it has had to cancel all of them in light of the Rules' withdrawal and the corresponding drain on its resources. *Id.* OCM has also had to divert resources away from other programs, including those focused on the upcoming farm bill. *Id.*

These are not mere "setback[s]," and they concern far more than OCM's "abstract social interests." *NFB*, 184 F.3d at 979. Rather, the effects of the Rules' withdrawal on OCM have been drastic and concrete, both in terms of the injuries to OCM and OCM's response. This case, therefore, is not at all like *NFB*, where the putative organizational plaintiff did "not allege[] that the [challenged] policy…impacted *it* in any measurable way," *id.* at 980, or like *Arkansas ACORN Fair Housing*, where the plaintiff

"present[ed] no facts to quantify the resources, if any, that [it] expended to counteract the [defendant's challenged conduct]," 160 F.3d at 434.

Rather, OCM faces the same injuries as the organizational plaintiff in *Granville House, Inc. v. Department of Health and Human Services*, where this Court approved organizational standing because the challenged agency action had "perceptibly impaired [the plaintiff's] ability to provide its services" by "caus[ing] it to forego" certain of its traditional activities and by requiring it "to withdraw" somewhat "from its primary mission." 715 F.2d 1292, 1297-98 (8th Cir. 1983). OCM's injuries also resemble those of the plaintiff in *Association of Community Organizations for Reform Now v. Fisher*, where the Fifth Circuit—after a searching analysis—concluded that the organizational plaintiff could proceed where it had put forward evidence to show that it was spending resources to "counteract[]" the defendant's allegedly unlawful activity, observing that such "wasted resources, which [it] could have put to [other] use[s,]…provide[d] [it] with standing." 178 F.3d 350, 361 (5th Cir. 1999).

Likewise, this case resembles *PETA v. U.S. Department of Agriculture*, where the D.C. Circuit recently approved organizational standing because the plaintiff alleged, with sufficient specificity, that the agency's actions had "perceptibly impaired [its] ability to…continue to

educate the public," and that it had undertaken "expenditures in response to, and to counteract the effects of the defendants' alleged unlawful acts." 797 F.3d 1087, 1095, 1097 (D.C. Cir. 2015); *see Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986) (finding organizational standing where the plaintiffs had "alleged inhibition of their daily operations, an injury both concrete and specific to the work in which they are engaged").

As in those cases, OCM has demonstrated in detail the many ways in which the Department's withdrawal of the Rules has hampered its ability to carry out its overall mission, required it to shift and spend its finite resources, and interfered with its day-to-day work. *See* Maxwell Decl. ¶¶ 12-16, Add.34-37. OCM therefore has organizational standing to test the legality of the Department's actions.

## II. The Department Is Defying Congress's Mandate in the 2008 Farm Bill, and this Court Must Compel It to Act

The 2008 Farm Bill required the Department, by June 18, 2010, 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" section 202(b) of the Packers and Stockyards Act. 122 Stat. at 2120, Add.12. Almost eight years later, the Department still has not complied with Congress's mandate, and it has

declared its intention to take "no further action" in response to it. 82 Fed. Reg. at 48,603, App.60. This Court must order the Department to comply with Congress's directive.

### A. Under Section 706(1) of the APA, Courts Must Intervene When Agencies Miss Statutory Deadlines to Issue Regulations

Section 706(1) of the Administrative Procedure Act directs that courts "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also id.* § 551(13) (defining "agency action" reviewable under the APA to include a "failure to act"). As this Court has acknowledged, "[i]t is clear that section 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act." *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). Specifically, as relevant here, when an agency misses a statutory deadline to issue a regulation, the "agency has failed to take a discrete action that it is required to take," *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 64 (2004) (emphasis omitted), and section 706(1) requires courts to intervene. Indeed, in *SUWA*, after setting forth the relevant principles, *see id.* at 61-65, the Supreme Court highlighted these very circumstances as the quintessential example of when relief under section 706(1) is warranted:

> For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations.

*Id.* at 65.

Precisely so here. In enacting the 2008 Farm Bill, Congress spoke clearly when it directed the Secretary of Agriculture to "promulgate regulations" establishing "criteria that the Secretary will consider" in determining whether a violation of section 202(b) of the Packers and Stockyards Act has occurred. 122 Stat. at 2120, Add.12. The 2008 Farm Bill required the promulgation of such regulations "[a]s soon as practicable, but not later than 2 years after the date of the enactment of this Act," *id.*, *i.e.*, by June 18, 2010.

The Department is now almost eight years delinquent and has recently declared its intent to take "no further action" to comply. 82 Fed. Reg. at 48,603, App.60. Accordingly, the Department has unlawfully withheld agency action and, under section 706(1) of the APA, this Court must order it to issue the regulations that Congress has required.

Of course, under well-established principles of separation of powers and administrative law, the Court's "judicial decree" cannot "set[] forth the content of those regulations," but neither can the Department continue to

ignore Congress's directive. *SUWA*, 542 U.S. at 65. Both in the 2008 Farm Bill and in section 706(1), Congress could not have been more clear. "'Shall' means 'shall.'" *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (emphasis omitted). As the Tenth Circuit has reasoned:

> [W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers.

*Id.* at 1190. Thus, "when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action" under section 706(1) of the APA "and courts, upon proper application, must compel the agency to act." *Id.*

To be sure, notwithstanding Congress's mandatory language, certain courts have held that section 706(1) does not mandate intervention when an agency has ignored a statutory deadline. Instead, those courts have fashioned a "rule of reason," considering Congress's deadline as just one of several factors relevant to determining whether relief is warranted. *See, e.g.*, *Telecommunications Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984) (identifying six principles, including whether Congress has provided a deadline, a court should consider in determining whether to grant relief pursuant to section 706(1)); *see also In re Barr Labs.*,

*Inc.*, 930 F.2d 72 (D.C. Cir. 1991) (applying the *TRAC* factors in a case where an agency exceeded a statutory deadline).

To Petitioners' knowledge, the question presented here—whether when an agency misses a statutory deadline to issue a regulation, "shall means shall" in section 706(1) or, instead, permits discretion—is one of first impression in this Circuit. For the reasons explained below, Petitioners urge this Court to follow the Tenth Circuit in holding that Congress's clear language means courts cannot deny relief where, as here, an agency has unlawfully withheld agency action by failing to promulgate statutorily mandated regulations within a statutorily mandated period of time.

*1. The plain meaning of section 706(1) requires courts to compel agency action unlawfully withheld*

"As with any question of statutory interpretation," this Court "turn[s] first to the plain language of the statute." *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 466 (8th Cir. 2015) (citing *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010)). In doing so, this Court must "'presume that a legislature says in a statute what it means and means in a statute what it says.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). If the words of a statute are unambiguous, this Court's inquiry is "complete." *Id.*

Section 706(1) of the APA states that courts "shall" compel agency action unlawfully withheld. 5 U.S.C. § 706(1). The Supreme Court and this Court have made clear that, when Congress uses mandatory language, it means what it says. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("The word 'shall' usually creates a mandate, not a liberty."); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (holding that by using the word "shall" in the civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988) (holding that Congress's use of the "word" shall in a housing subsidy statute constituted "mandatory language"); *McLaurin v. Prater*, 30 F.3d 982, 984-85 (8th Cir. 1994) ("The statute's use of the word 'shall'…is a mandatory command. Despite [defendant's] protestations to the contrary, 'shall' does not mean 'may' or 'is permitted to'; 'shall' has been consistently understood to mean that something is required.").

The mandatory nature of the word "shall" applies with no less force when Congress uses it to direct courts to act in certain ways. *See Murphy*, 138 S. Ct. at 787 (observing that Congress's use of the word "shall" "tells us that the district court has some nondiscretionary duty to perform"). Indeed, as the Supreme Court has reaffirmed on several occasions, the word "shall"

"normally creates an obligation *impervious to judicial discretion*." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (emphasis added) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

Take, for example, the Supreme Court's recent decision in *Murphy*, which considered whether a district court has discretion under 42 U.S.C. § 1997e(d)(2). 138 S. Ct. at 786. That statute provides that when a prisoner wins a civil rights suit and the district court awards fees to the prisoner's attorney, "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The Court held that the use of the phrase "shall be applied" created a "mandate" that the "district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap." *Id.* at 787. "If Congress had wished to afford the judge more discretion in this area, it could have easily substituted 'may' for 'shall.'" *Id.* But, as the Supreme Court observed, "Congress didn't…. And respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Id.* at 787-88.

That principle applies here with equal force. Congress could have chosen to draft section 706(1) of the APA to state that a court "*may*," or "*is*

*authorized to*," compel agency action unlawfully withheld or unreasonably delayed. But it didn't. And this Court must give effect to the statute as written. Accordingly, Congress's use of the word "shall" in section 706(1) means that courts lack discretion to refrain from compelling agency action once it is determined that an agency has "unlawfully withheld" agency action. *See Forest Guardians*, 174 F.3d at 1186-89.

*2. Contrary decisions that find room for discretion in the APA's mandatory language are misguided*

Despite section 706(1)'s mandatory language, the D.C. Circuit has held that claimants appealing to that provision are effectively seeking a writ of mandamus, which is an equitable form of relief that "does not necessarily follow a finding of a violation." *In re Barr Labs.*, 930 F.2d at 74. Accordingly, in the D.C. Circuit's view, the relevant question in cases involving statutory deadlines is "whether [a court] should exercise [its] equitable powers to enforce the deadline." *Id.* This question is in turn informed by the six "*TRAC* factors" fashioned by the D.C. Circuit to guide courts in determining when to grant section 706(1) mandamus relief. *See* 750 F.2d at 80.

The D.C. Circuit's holding in *TRAC* is based on that court's reading of another provision of the APA—the waiver of sovereign immunity in section 702—which provides, in relevant part, that a claimant

> seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States…. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States[.]

5 U.S.C. § 702. This waiver of sovereign immunity is subject to, as relevant here, one important caveat: "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." *Id.*

It is the "herein" caveat in section 702 that grounds the D.C. Circuit's belief that a court retains equitable discretion to deny relief under section 706(1), even where an agency has clearly defied a statutory deadline. According to the D.C. Circuit, the "herein" clause in section 702 means that Congress has waived the government's sovereign immunity only as to nonmonetary, discretionary forms of relief—*i.e.*, injunctive, mandamus, or declaratory relief. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985). And, the reasoning goes, courts are empowered to grant such relief not by the APA itself but instead by the All Writs Act, which provides that "[t]he Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Thus, the D.C. Circuit has held that section 706(1)'s mandatory language is irrelevant because, under

section 702, nothing in the APA limits or precludes legal or equitable defenses, and the power to grant a writ of mandamus to compel agency action comes not from section 706(1) but rather from the All Writs Act. *TRAC*, 750 F.2d at 76-77.

This conclusion misinterprets the meaning of the word "herein" in section 702, renders section 706(1) superfluous in violation of traditional principles of statutory interpretation, and misapplies the All Writs Act.

*First*, section 702's use of the word "herein" refers *only to section 702 itself*. This interpretation is supported by the provision's statutory and legislative history. Section 702 was expanded in 1976 to include language that waived the government's right to raise a sovereign immunity defense. *See* Pub. L. No. 94-574, 90 Stat. 2721 (1976). Crucially, as the House Report accompanying that amendment makes clear, the "herein" caveat immediately following the sovereign immunity waiver was added to clarify that nothing in the *amendment* itself was "intended to affect or change defenses other than sovereign immunity." *See* H.R. Rep. 94-1656, at 12 (1976). In other words, the "herein" caveat means only that section 702 does not limit or preclude the government's ability to raise any legal or equitable defense except for the defense of sovereign immunity. But section 706(1), by its plain terms, *does* limit the government's ability to raise

equitable defenses, specifically when a claimant identifies agency action unlawfully withheld. And "it is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017) (citation omitted).

*Second*, if the D.C. Circuit's reading of section 702 is correct, then section 706(1) is rendered superfluous, in violation of another canon of statutory construction. If the "herein" caveat in section 702 means that claimants challenging agency inaction must invoke the All Writs Act, seek a writ of mandamus, and appeal to courts' equitable discretion to compel agency action, then section 706(1)—where Congress has provided that courts "s*hall*…compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (emphasis added)—has no meaning. That cannot be. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that 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." (citations omitted)).

*Third*, the D.C. Circuit's reliance on the All Writs Act as a reason to ignore the standard for compelling agency action unlawfully withheld in section 706(1) is misplaced. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." *Pa.*

*Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). But "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id.* For example, in *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, a district court, relying on the All Writs Act, issued a writ of habeas corpus, directing the Marshals Service to transport prisoners not in their custody. The federal habeas statute, by contrast, would have limited such a directive to the prisoners' custodians. *Id.* The Supreme Court held this directive unlawful: "Although the [All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.*

Likewise here. Section 706(1) of the APA specifically mandates that a court "shall…compel agency action unlawfully withheld." 5 U.S.C. § 706(1). It is, therefore, this specific statutory mandate that should supply the standard for determining whether to issue an order compelling the agency to act in this case.

### B. Even if this Court Determines that Section 706(1) Permits Discretion, this Court Should Still Compel the Department to Adhere to Congress's Directive

Even if this Court finds that it retains equitable discretion to determine whether relief is warranted in the case of a missed statutory deadline under section 706(1) of the APA, it should still grant relief here. As noted above, the D.C. Circuit has identified six factors to guide a court in determining whether to issue orders compelling agency action:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed."

*TRAC*, 750 F.2d at 80 (citations omitted). Here, these factors counsel in favor of issuing an order directing the Department to comply with Congress's mandate in the 2008 Farm Bill.

As to the first two factors, the two-year deadline established in the 2008 Farm Bill provides content to the "rule of reason" governing the reasonableness of the Department's ongoing delay in this case. The

Department is now almost eight years late and has expressly stated that it has no intention of moving forward with a rulemaking to comply with the Farm Bill's directive. This Court should therefore issue an order to compel compliance.

The third, fourth, and fifth factors—which require a court to balance the effect of the delay on public health and welfare and on other prejudiced interests against any competing agency priorities—likewise tip in favor of judicial intervention. Congress determined that the mandated regulations would directly benefit the lives and livelihoods of farmers across this country, including the Individual Petitioners. Each Individual Petitioner has been subjected to unfairly discriminatory and predatory practices precisely because he or she chose to exercise rights of speech and association—practices that the Department's proposed regulations would have confirmed as unlawful. *See* 82 Fed. Reg. at 92,706, App.33. The Department's delay in promulgating such regulations thus directly touches the lives and welfare of the Individual Petitioners and severely prejudices their interests in continuing to participate in increasingly concentrated markets, contrary to Congress's directives. The Department has not identified, and cannot identify, an issue that should be given any higher priority.

Finally, as to the sixth factor, while the Court need not find any "impropriety" in the Department's delay under *TRAC*, 750 F.2d at 80, the Department's avowed intent to "take no further action" in response to Congress's mandate, 82 Fed. Reg. at 48,603, App.60, should rightly cause this Court some concern.

For these reasons, even if the Court were to apply the "rule of reason" set forth in *TRAC*, it should compel the Department to comply with Congress's command.

## III. The Department's Withdrawal of the Farmer Fair Practices Rules Was Arbitrary and Capricious

The Department has violated the law in an additional way: its reasons for rescinding the IFR and abandoning the NPRM are arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A). Accordingly, this Court must set aside the Department's withdrawal of the Rules.[8]

[8] The APA's requirement of reasoned decisionmaking applies to the Department's decision to take no further action on the NPRM. "An agency decision" not to act "after a notice and comment period is reviewable agency action." *NRDC v. EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (en banc); *see, e.g.*, *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43-44 (D.C. Cir. 2004) ("Although the [agency's] publication of the proposed…rule certainly did not obligate it to adopt that rule (or, for that matter, any rule), the agency was not free to terminate the rulemaking for no reason whatsoever." (citation omitted)).

It is fundamental that, in order to comply with the APA, "an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (citation omitted). Where an agency "entirely fail[s] to consider an important aspect of the problem," *id.*, or acts on the basis of "an improper understanding of the law," the agency's action is arbitrary, capricious, and an abuse of discretion under section 706(2)(A) of the APA, *Kazarian v. U.S. Citizenship & Immigration Servs.*, 596 F.3d 1115, 1118 (9th Cir. 2010); *see SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("an order may not stand if the agency has misconceived the law").

Agencies do not get a pass when they attempt to deregulate. *See State Farm*, 463 U.S. at 42 ("[T]he forces of change do not always or necessarily point in the direction of deregulation."). To the extent "Congress established a presumption from which judicial review should start, that presumption…[is] *against* changes in current policy that are not justified by the…record." *Id.* Accordingly, where an agency changes its policy, even if it need not always satisfy a "heightened standard," it must still "provide reasoned explanation for its action," "display awareness that it is changing

position," and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (emphasis omitted); *see, e.g.*, *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 828 (8th Cir. 2006) (courts provide "considerably less deference to agency reversals of position than to longstanding agency views" (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993))).

The Department has not provided sufficient reasons for changing course and abandoning the Farmer Fair Practices Rules.

### A. The Department's Overarching Rationale for Withdrawing the Farmer Fair Practices Rules Runs Directly Counter to Its Reason for Issuing Them in the First Place

In issuing the Rules, the Department trumpeted the benefits, to individuals and the market as a whole, of making it easier for farmers to avail themselves of the protections that the Packers and Stockyards Act provides. In withdrawing the Rules, the Department adopted the exact opposite perspective, saying less litigation is better. But crucially, the Department has failed to explain how it got from point A to point B, from favoring to disfavoring easing farmers' access to courts under the Act. Nowhere does it explain why its new position is good policy when it had previously determined it was not. Because the Department has not set forth adequate, or indeed *any*, "good reasons for [its] new policy," its orders

rescinding the Rules are arbitrary and capricious and must be set aside. *Fox*, 556 U.S. at 515.

In issuing the IFR, the Department identified numerous benefits that would flow from increased private enforcement of the Packers and Stockyards Act. Increased enforcement by farmers, the Department said, would "serve to strengthen the protection afforded the nation's livestock producers and poultry growers." 81 Fed. Reg. at 92,571, App.6. It would begin to address various structural issues in certain agricultural markets—discussed at length, *see id.* at 92,574-76, App.9-11—by alleviating hold-up problems, making contracts easier to enforce, incentivizing packers and processors "to avoid exploitation of market power and asymmetric information" and other "behaviors that result in the market failure," and increasing efficiency, *id.* at 92,576, App.11. In sum, the Department concluded that the IFR would permit producers and growers "to have more protections and be treated more fairly." *Id.* at 92,587, App.22. That, in turn, would lead to "more equitable contracts," fewer "instances of unfair, unjustly discriminatory, or deceptive practices," and "increased efficiencies in the marketplace"— "benefit[s]" that would "accrue to all segments of the value chain in the production of livestock and poultry, and ultimately to consumers." *Id.* at 92,587-58, App.22-23.

So, too, in the NPRM: the Department described how additional clarity regarding what conduct violates sections 202(a) and (b) of the Act would "promote fairness and equity," *id.* at 92,712, App.39; "deter violations"; "lower …costs throughout the entire production and marketing complex of all livestock, poultry, and meat"; and "improve efficiencies in the regulated markets…and reduce market failures" by "increas[ing] the amount of relevant information to market participants" and "foster[ing] competition," *id.* at 92,717, App.44. Specifically, the Department explained the benefits of "providing notice to all market participants of specific examples of conduct…that, absent demonstration of a legitimate business justification, [is] unfair, unjustly discriminatory, or deceptive," including "retaliatory conduct" and "failure to ensure accurate scales and weights." *Id.* at 92,717-18, App.44-45. Such benefits, the Department said, include "reduc[ing] the risk of violat[ions of] sections 202(a) and 202(b)" and "establishing parity of negotiating power between packers, swine contractors, and live poultry dealers and livestock producers, swine production contract growers, and poultry growers by reducing the ability to use market power with the resulting deadweight losses." *Id.* at 92,718, App.45.

So why, then, did the Department decide to withdraw the Farmer Fair Practices Rules? What changed? Not "the underlying facts and reasoning," which the Department said had "not changed to any material extent" between the issuance and the rescission of the Rules. 82 Fed. Reg. at 48,600, App.57. Indeed, the Department admitted that by rescinding the IFR, it was foregoing "broader protection and fair treatment" for producers and growers. *Id.*

Rather, what shifted was the Department's desired policy outcome. Where the Department once wanted more private enforcement of the Act, the Department now wants less. The Department states, without further explication, that "an increase in litigation…serves neither the interests of the livestock and poultry industries nor GIPSA." *Id.* at 48,601, App.58 (IFR rescission); *see id.* at 48,603, App.60 (NPRM abandonment) (similar). Without saying why, the Department credits those commenters who opposed the Rules on grounds that they "would embolden producers and growers to sue for any perceived slight by a packer or integrator." *Id.* at 48,594, App.51 (IFR rescission); *see id.* at 48,603, App.60 (NPRM abandonment) (similar). The Department does so even though it initially supported the Rules precisely because they would lower the costs of litigation for farmers, resulting in myriad benefits cataloged by the Department and summarized

above. The loss of those benefits is undoubtedly "an important aspect of the problem" associated with withdrawing the Rules, and the Department's utter "fail[ure] to consider" that loss is fatal. *State Farm*, 463 U.S. at 43.

Finally, although the Department pays lip service to the "livestock and poultry industries[']…vested interest in understanding what conduct or actions violate" sections 202(a) and (b) of the Act, 82 Fed. Reg. at 48,603, App.60, the Department has decided not to provide examples of prohibited conduct, or to set forth the criteria it uses to determine when violations of section 202(b) have occurred—criteria that Congress has required it to publish. Rather, without even mentioning Congress's mandate—certainly, a "relevant factor[]" under the APA, *State Farm*, 463 U.S. at 42—the Department has returned to a "case-by-case" approach, 82 Fed. Reg. at 48,604, App.61.

The Department is permitted, of course, to change its mind about the value of robust private enforcement of the Act—at least within the bounds of the discretion that Congress has provided. *See Fox*, 556 U.S. at 514-15. But under the APA, it is not permitted to do so without adequate justification—without "show[ing] that there are good reasons for [its] new policy." *Id.* at 515. Here, the Department has provided none: its orders do not disclose any reason why it now opposes increased private enforcement of the Act, or

increased clarity concerning what conduct the Act prohibits. Accordingly, the Department's orders withdrawing the Farmer Fair Practices Rules are arbitrary and capricious, *see id.*; *Friends of Boundary Waters Wilderness*, 437 F.3d at 828, and must be "set aside," 5 U.S.C. § 706(2)(A).

### B. The Department's Additional Reasons for Withdrawing the IFR Do Not Withstand Scrutiny

The Department provided two additional reasons for withdrawing the IFR. First, in yet another reversal from its previous position, the Department now believes that courts would not have deferred to the IFR's interpretation of the Packers and Stockyards Act, and second, the Department now claims that its decision to issue the IFR without another round of notice and comment was legal error. Neither explanation satisfies the APA's requirement of reasoned decisionmaking, and neither saves the Department's withdrawal of the IFR. *See Int'l Union*, 358 F.3d at 44-45 (granting petition for review where, although one rationale advanced by the agency was adequate, others were not).

Deference. In issuing the IFR, the Department explained that it was codifying its longstanding interpretation of the Packers and Stockyards Act in regulation because, in the absence of such codification, courts had refused to defer to it. 81 Fed. Reg. at 92,568 & n.15, App.3 (citing *Been v. O.K. Indus.*, 495 F.3d 1217, 1226-27 (10th Cir. 2007)). For example, in *Been*, the

Tenth Circuit discounted the value of amicus briefs that the Department had submitted to defend its interpretation, reasoning that they "do not reflect the deliberate exercise of interpretive authority that regulations…demonstrate." 495 F.3d at 1227 (citation omitted). The court held that absent such a regulation, deference was not warranted. *See id*. Accordingly, the Department explained that it was issuing the IFR to answer such concerns, and that the IFR "[might] constitute a material change in circumstances that [would] warrant[] judicial reexamination of the issue." 81 Fed. Reg. at 92,568, App.3.

In rescinding the IFR, the Department changed its tune, once again without adequate justification. The Department now believes that courts—or at least two courts, the Fifth and the Eleventh circuits—would not have deferred to the IFR. *See* 82 Fed. Reg. at 48,596-97, App.53-54 (discussing *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005)). But the Department's assessment of why the Fifth and Eleventh circuits would refuse deference to an agency rule is flawed.

The Department invokes the Supreme Court's decision in *Brand X*, which held that where an appellate court has found a statute to have a clear, unambiguous meaning, *stare decisis* demands that that court not

subsequently defer to an agency's contrary interpretation. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005). Contrary to the Department's assessment, however, it is not at all clear that *Wheeler* and *London* in fact found the Packers and Stockyards Act unambiguous. Indeed, in *Wheeler* the Fifth Circuit *emphasized* the elasticity of the statutory text. 591 F.3d at 363 ("'unfair,' 'unjust,' 'undue,' and 'unreasonable'" are statutory terms that have multiple dictionary meanings and "do not" necessarily "extend to the outer limits of their definitional possibilities" (citation omitted, alteration adopted)).

Moreover, in both *Wheeler* and *London* the courts looked well beyond the statutory text in determining its meaning. *See id.* at 362-63 (considering what "motivated Congress to pass the Act," policy concerns favoring "predictab[ility] and consisten[cy]," and other "outside sources," even while acknowledging that doing so "may be inappropriate when determining the meaning of an unambiguous statute"); *London*, 410 F.3d at 1302-04 (considering "the purposes Congress sought to serve," "the backdrop of corruption the Act was intended to prevent," the Act's "antitrust ancestry," legislative history," and "[p]olicy considerations"). Setting aside the permissibility of such methods in general, the Supreme Court has explicitly forbidden them for determining the meaning of unambiguous statutory text.

*See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation *only to the extent* they shed a reliable light on the enacting Legislature's understanding of *otherwise ambiguous terms*." (emphasis added)). Thus, to accept the Department's reasoning—that the Fifth and Eleventh circuits deemed the Act unambiguous—would be to assert that those courts ignored the Supreme Court's directive.

Finally, a prediction that two courts of appeal, out of a dozen, might continue to refuse deference does not justify abandoning an effort that inevitably aimed for the Supreme Court. Nor were *Wheeler* and *London* unknown to the Department when it promulgated the IFR. *See* 81 Fed. Reg. at 92,568 & n.13, App.3. Ultimately, the Department has not adequately explained why it now believes that promulgating the IFR would not buttress its interpretation of the Packers and Stockyards Act.

Notice and comment. The Department's claim that the IFR erred in invoking the APA's "good cause" exception, *see* 82 Fed. Reg. at 48,598-99, App.55-56, makes no sense. Upon establishing good cause, the APA permits an agency to issue a regulation without undergoing notice and comment. 5 U.S.C. § 553(b), (c). But here, the IFR did *not* invoke the APA's good cause exception, and it did not need to. Rather, the IFR

explained that the Department had "fulfilled the [APA's] notice and comment requirement" because, in the Department's June 2010 proposed rule, it solicited comments about promulgating its interpretation as a regulation. 81 Fed. Reg. at 82,570, App.5. That conclusion was legally correct; the Department's new view—that courts would conclude that the rulemaking record was too "stale," 82 Fed. Reg. at 48,599, App.56—is legal error, and therefore cannot support its order withdrawing the IFR, *see Chenery*, 318 U.S. at 94.

The Supreme Court has instructed courts to be "extremely reluctant" to vacate agency action on the basis of staleness challenges. *Miss. Indus. v. FERC*, 808 F.2d 1525, 1567 (D.C. Cir.) (citing *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)), *revised on reh'g en banc*, 822 F.2d 1104 (D.C. Cir. 1987); *see Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 906 (D.C. Cir. 1980) ("Courts are properly reluctant to base a remand of an agency's decision on the ground that the decision relies on evidence which has grown stale."). And where courts do so, it is typically because "a court [had] vacated the agency rule at issue, thus taking the rule off the books and reinstating the prior regulatory regime," and the agency attempted to promulgate a new rule on the basis of its old rulemaking record. *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 84 (D.D.C. 2007).

Here, the Department has provided no valid reason to suggest that courts would have taken the rare step of vacating the IFR on staleness grounds. That is particularly so given the substantial rulemaking record that supported the IFR, consisting of three public meetings, five joint public workshops, and 61,000 comments. *See* 81 Fed. Reg. at 92,566-67, App.1-2. Indeed, it is hard to imagine what gap of time might prompt a court to preclude the Department from promulgating its longstanding interpretation of the Packers and Stockyards Act.

## CONCLUSION

The Department's withdrawal of the Farmer Fair Practices Rules cannot withstand scrutiny, and its failure to comply with Congress's mandate in the 2008 Farm Bill is clear. Accordingly, Petitioners respectfully request that the Court vacate the withdrawal of the Rules and order the Department to issue the mandated regulations.

Dated: March 29, 2018

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,484 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: March 29, 2018

/s/ *Karianne M. Jones*
Karianne M. Jones

## CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2018, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM-ECF system.

Dated: March 29, 2018

/s/ *Karianne M. Jones*
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