No. 17-3723

In the

United States Court of Appeals

for the

Eighth Circuit

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.

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

In October 2017, the United States Department of Agriculture withdrew the Farmer Fair Practices Rules, which were designed to strengthen protections for farmers under the Packers and Stockyards Act and level the playing field between farmers and large agribusiness in an increasingly concentrated agricultural market. The Department insists the withdrawals were based, not on a change in underlying policy, but rather on a concern that the rules would not survive judicial scrutiny, notwithstanding that in issuing the Rules ten months earlier, it considered and explained why the rules *would* withstand judicial scrutiny and *were* necessary to solve the legal patchwork that had developed in the absence of formal agency regulations.

The truth is that the Department no longer thinks the Rules are good policy. This is confirmed by Secretary Perdue's view that the practices that would have been prohibited by the Rules cannot actually be addressed by regulations. Congress, however, has judged otherwise, requiring that rules were to have been issued by June 2010, and it is that judgment that controls here. By failing to comply with that judgment, the Department has failed to take legally required action, and this Court must compel it to act.

In addition to flouting a Congressional command, the Department's withdrawal of the Rules was arbitrary and capricious. Although an agency may

change policy positions, it must ground those changes in reasoned decisionmaking. That entails, at a minimum, that the agency acknowledge the changed position and adequately explain the reasons for it. That is all the more necessary here where the Department's reversal comes on the heels of an earlier considered policy judgment that the Rules were necessary to protect farmers. The Department's withdrawal falls well short of that requirement and should be set aside.

ARGUMENT

I. This Court Should Compel the Department to Promulgate the Regulations that Congress Commanded in the 2008 Farm Bill.

The 2008 Farm Bill directed the Department to promulgate specified regulations by 2010. *See* Food, Conservation, and Energy Act of 2008 (the "2008 Farm Bill"), Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120, Add.12. These regulations would aid farmers in availing themselves of the Packers and Stockyards Act's important protections by establishing 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 Act. *Id*. § 11006(1), 122 Stat. at 2120, Add.12. More than eight years later, the Department still has not issued the required regulations and has indicated that it has no intent to do so in the foreseeable future. Respondents quibble about the precise amount of time that the Department has been in violation of its statutory duty but do not contest that they have failed to timely act. *See* Resps.' Br. at 19-20. That undisputed fact resolves

Petitioners' claim under section 706(1) of the Administrative Procedures Act ("APA").

A. Section 706(1) of the Administrative Procedure Act requires this Court to compel the Department to issue the regulations.

1. Where Congress has required an agency to act but the agency has failed to do so, the APA prescribes a remedy: "The reviewing court *shall* … compel agency action unlawfully withheld." 5 U.S.C. § 706(1) (emphasis added). Although courts in equity generally have broad discretion, "Congress may intervene and guide or control the exercise of the courts' discretion." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).[1]

Here, the APA's text is unequivocal; granting an injunctive remedy is not a matter of discretion when a court finds that an agency has missed a statutory deadline. As the Supreme Court and this Court have explained, a statute's use of the word "shall" creates a non-discretionary duty. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (interpreting the statutory phrase "shall forfeit … any property" and noting that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied");

[1] For this reason, section 703 of the APA, 5 U.S.C. § 703, is of no help to Respondents. *See* Resps.' Br. at 25 (arguing that the APA does not create a new form of proceeding). Petitioners do not argue that section 706(1) creates a new form of proceeding, only that it constrains this Court's discretion to issue equitable remedies under pre-existing forms.

McLaurin v. Prater, 30 F.3d 982, 984-85 (8th Cir. 1994) ("The statute's use of the word 'shall' … is a mandatory command."). And where, as here, the "plain meaning" of a statute is "unambiguous," the court's "inquiry is complete." *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 465-66 (8th Cir. 2015) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Simply put, "'[s]hall' means shall." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) (emphasis omitted).

That conclusion is buttressed by the "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." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under Respondents' interpretation, section 706(1) does nothing more than reaffirm a court's preexisting equitable powers. But such a view renders section 706(1) "insignificant, if not wholly superfluous"—a result this Court should be "reluctant" to reach. *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Respondents do not dispute that their proffered reading disregards this interpretive canon, but rather, citing only generally the Attorney General's Manual on the APA,[2] insist that the redundancy is "an intended result." Resps.' Br. at 27. But the Manual makes no such claim, and Respondents provide no further support.

[2] Attorney General's Manual on the Administrative Procedure Act (1947), https://go.usa.gov/xQqby.

Nor could they. As the legislative history makes clear, Congress enacted section 706(1) to do more than simply codify a court's preexisting equitable power and its discretionary roots; it enacted section 706(1) to *restrain* that discretion and direct courts to grant injunctive relief in the face of unlawfully withheld or unreasonably delayed agency action. *See* 92 Cong. Rec. S2158 (1946) (statement of Sen. McCarran, the APA's sponsor) ("[C]ourts are *required* to compel action shown to be unlawfully withheld or unreasonably delayed.") (emphasis added)); 92 Cong. Rec. H5654 (1946) (statement of Rep. Walter) ("[C]ourts *must* compel action unlawfully withheld or unreasonably delayed.") (emphasis added)); H.R. Rep. No. 79-1980, at 278 (1946) (describing the Bill as "expressly recogniz[ing] the *right of properly interested parties to compel agencies to act* where they improvidently refuse to act." (emphases added)); S. Rep. No. 79-758, at 214 (1945) (same). The cabining of judicial discretion when presented with an agency's failure to take a Congressionally prescribed action reflects the concerns leading to the enactment of the APA, which "was framed[,] against a background of rapid expansion of the administrative process[,] as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their office." *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950); *see Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523 (1978) (explaining that the APA was "not only 'a new, basic and comprehensive

regulation'" of agency practice but also "settled 'long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest'") (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)).

In sum, in section 706(1), Congress acted deliberately in using mandatory language to impose a mandatory duty on courts—a conclusion the text of the statute, interpretive canons, and legislative history all make strikingly clear.

2. Rather than grapple with the plain language of section 706(1), Respondents insist that courts retain discretion to not compel legally required agency action, *i.e.*, that "shall" actually means "may," citing two Supreme Court cases. Resps.' Br. at 24-27 (citing *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55 (2004) and *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977)). But neither case addresses the question here presented or provides a basis upon which to ignore the clear statutory command of section 706(1).

SUWA involved only the threshold question of what a "failure to act" means for purposes of challenging agency inaction. 542 U.S. at 57-58. Relying on section 706(1)'s use of the word "unlawfully," not "shall," the Court held that "the only agency action that can be compelled under the APA is action legally *required*." *Id.* at 63, 64 (further explaining that the relevant action must be a "*discrete* agency

action that an agency is *required to take*").[3] It was only "in this regard" that the Court compared the APA to "the traditional practice prior to its passage," noting that writs of mandamus were "normally limited to enforcement of a 'specific, unequivocal command,'" and acknowledged that the Attorney General's Manual had discussed a similar interpretation of the same statutory phrase—"agency action unlawfully withheld or unreasonably delayed." *See id.* at 63-64. But nowhere in *SUWA* did the Court suggest that Congress incorporated *every* aspect of traditional writs practice into the APA or, more to the point, discuss the scope of judicial authority when presented with an agency's failure to act.[4]

Abbott Laboratories is likewise unavailing. At issue there was whether Congress, by the Federal Food, Drug, and Cosmetic Act, had intended to foreclose pre-enforcement review of a drug labeling regulation. 387 U.S. at 139-40. The Court's discussion of the "equitable" and "discretionary" nature of "injunctive and declaratory judgment remedies" concerned ripeness, or the timing of judicial

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[3] Notably, the representative example it gave was of an agency's failure to issue regulations by a statutory deadline. *Id.* at 65.

[4] Respondents identify language in *SUWA* that "a court *can* compel the agency to act." Resps.' Br. at 24, 30. But, read in full, that language simply explains that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *SUWA*, 542 U.S. at 65. The Court, in other words, was differentiating between what a court *can* and *cannot* compel as a remedy under section 706(1), not between whether it *may* or *must* act in the face of a violation.

review so as to ensure that a court did not intervene before an agency had taken final action. *Id*. at 148. Thus, the fact that injunctive remedies are traditionally discretionary and equitable, while true, is beside the point. The question here is whether Congress has limited courts' equitable discretion. *See Romero-Barcelo*, 456 U.S. at 313. And on that question, *Abbott Laboratories* provides little guidance. It does not cite section 706 at all, much less interpret section 706(1) or define the word "shall," which, as discussed above, makes clear Congress's intent to impose a non-discretionary duty on courts.

Nor does the Court's reasoning in *Abbott Laboratories* suggest that the plain language of section 706(1) should be disregarded. According to Respondents, the Court's implicit recognition of *certain* equitable defenses available in a section 706(2) claim necessarily precludes Petitioners' position here. *See* Resps.' Br. at 25-26. Not so. As an initial matter, a case concerning section 706(2) is of little relevance to the present dispute, which concerns section 706(1), given that courts approach these two provisions independently. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1227 (Fed. Cir. 2004) (distinguishing the "shall means shall" holding of *Forest Guardians* in a 706(2) case because "the case related to *section 706(1)*, not to the standard of review from *section 706(2)(A)*" (emphasis added)).

In any event, *Abbott Laboratories* does no more than suggest that for section 706(2) claims, courts may consider equitable defenses on *threshold* issues, such as

ripeness, timeliness, venue, and whether the proper parties are named. 387 U.S. at 148-150, 154-155. That proposition—about a court's equitable authority with regard to threshold issues—sheds little light on the separate issue, presented here, whether the APA constrains courts' equitable authority to act on the merits issues where an agency has missed a statutory deadline.

Respondents also assert that the Attorney General's Manual "confirms" that section 706(1) preserved courts' discretionary equitable power when faced with an agency failure to take lawfully required action. Resps.' Br. at 25. The Manual, however, is not nearly that definitive, stating without any elaboration that section 706(1)'s predecessor "*appears* to be a particularized restatement of existing judicial practice" and "was *apparently* intended to codify these judicial functions. Manual at 108 (emphasis added). That equivocation, at a minimum, counsels caution in reading section 706(1)'s mandatory language to mean something less. *Cf. Pub. Emps. Ret. Sys. of Oh. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."), *superseded by statute*, 104 Stat. 978.

Respondents further point out, this time correctly, that "a major departure from the long tradition of equity practice should not be lightly implied." Resps.'

Br. at 26-27. But the Court need not make any blithe assumptions in order to properly construe section 706(1) as mandating injunctive relief. As the Supreme Court has explained, "a statute in so many words" can "restrict[] the court's jurisdiction in equity." *Romero-Barcelo*, 456 U.S. at 313 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The plain text of section 706(1) is unambiguously mandatory; there is no need to speculate about the statute's "implications." Furthermore, it is not *just* the text of the APA that speaks in mandatory language. The 2008 Farm Bill does too, requiring the Department to promulgate certain regulations by June 18, 2010. *See* 2008 Farm Bill § 11006(1), 122 Stat. at 2120, Add.12. Congress is fully aware that agencies operate with limited staff, limited resources, and competing responsibilities. Yet Congress nonetheless determined that a deadline was necessary and two years was sufficient for the Department to promulgate the Rules. That legislative judgment should not lightly be disregarded.

At bottom, Respondents ask this Court to depart from the plain meaning of section 706(1), based on a vast overreading of *SUWA* and *Abbott Laboratories*, neither of which addressed the operative language at issue here; a hedged interpretation of that language in the Attorney General's Manual; and the premise that although Congress enacted the APA to ensure adequate oversight of the administrative process, it was content to leave to judicial discretion whether to

compel agencies to meet statutory deadlines. The Court, however, need not take that winding road. "In the law, as in life, the simplest explanation is sometimes the best one." *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 718 (D.C. Cir. 2016). So it is here. The simplest reading of section 706(1)—that shall should mean shall—is also the correct one. And presented with the Department's failure to meet Congress's deadline for issuing the Rules, the Court must compel the agency to act.

B. Even under *TRAC*, this Court should compel the Department to act.

Even if the decision to grant equitable relief remains discretionary in the face of section 706(1)'s compulsory language, this Court would act well within that discretion in compelling the Department to act. Under the six-factor test set forth in *Telecommunications Research & Action Center v. FCC* ("*TRAC*"), 750 F.2d 70 (D.C. Cir. 1984), "[t]he first and most important factor is that 'the time agencies take to make decisions must be governed by a rule of reason,'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). And as *TRAC*'s second factor makes clear, Congress's two-year "timetable" for action, with a deadline of June 18, 2010, "suppl[ies] content for this rule of reason." *TRAC*, 750 F.2d at 80. The D.C. Circuit has determined that "a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). Here, the Department has missed its deadline

by over eight years—a length Respondents acknowledge represents an "exceptional case[] of agency delay"—and no rule is in sight. Resps.' Br. at 17 (citing *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 556 (D.C. Cir. 1999) (granting relief when agency missed deadline by eight years)).

Respondents contend that appropriations riders from 2012 to 2015 mitigate against undue delay. *See* Resps.' Br. at 19. But even under that scenario, the Department has missed Congress's deadline by over four years, including nearly three years after the last rider expired. More fundamentally, Respondents are mistaken in suggesting that these riders effectively repealed the 2008 Farm Bill's 2-year deadline and imposed a "new and modified indication of the speed with which [Congress] expects the Department to proceed." *See* Resps.' Br. at 19. The Supreme Court is clear that "the intention of the legislature to repeal must be clear and manifest." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978) (citations omitted). That "cardinal rule" applies "with full vigor when the subsequent legislation is an *appropriations* measure." *Id.* Since the passage of the 2008 Farm Bill, the Department's duty to promulgate regulations has been on the books, and its failure to act has been in clear violation of it.

The balancing of interests contemplated by the remaining *TRAC* factors also weigh in favor of equitable relief. As to factors three and five, the required rule most certainly affects human welfare, as well as farmers' ability to exercise their

rights to free speech and association without fear of retaliation. *See* Pets.' Br. at 44. Indeed, the Department itself previously acknowledged that the regulation required by the 2008 Farm Bill would "*offset*[] *any potential abuse of market power* by clearly stating to all contracting parties the criteria that the Secretary will consider." 81 Fed. Reg. at 92,718, App.045 (emphasis added).

The Department now appears to have changed its mind, claiming that the interests affected by the Farmer Fair Practices Rules are "minimal" and fall squarely in the realm of "economic regulation." Resps.' Br. at 21-22. But the Rules were not merely business-to-business rules, but rather sought to level the playing field between large agribusiness and independent farmers. And, as Petitioners have explained, absent these rules, farmers have been forced to fold, unable to withstand the one-sided contract terms that have resulted from an increasingly concentrated market. *See* Pets.' Br. at 44. Where the ability of individuals to maintain their livelihoods is at stake, human welfare is also at stake. *See Air Line Pilots Ass'n, Int'l v. C.A.B.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (holding that a delay in adjudicating unemployment assistance claims affects human welfare).

As to the fourth *TRAC* factor, Respondents insist that the Rules must give way to allow the Department to meet another statutory deadline to publish a rule concerning the labeling of bioengineered food for retail sale. *See* Resps.' Br. at 22-23. But Respondents fail to explain why the labeling rule should be considered a

"higher or competing priority." Nor could they seriously make such a claim. Secretary Perdue has described the labeling rule as having nothing to do with consumer safety but rather is "all about marketing." *See* Thomas Phippen, *Ag Secretary Says GMO Labeling Is 'All About Marketing'*, Daily Caller (May 4, 2017), dailycaller.com/2017/05/04/ag-secretary-says-gmo-labeling-is-all-about-marketing.[5] In any event, even if the Department believes that a marketing rule should take precedence over a rule to protect the livelihoods of independent farmers, the former is to be completed by July 29, 2018, well before this case is resolved. *See* Resps.' Br. at 22-23 (arguing that compelling agency action on the Rules will jeopardize the Department's ability to complete labeling rule "before or close to the statutory deadline"). And the Department offers nothing to suggest that an order compelling the agency to promulgate the required regulations under the 2008 Farm Bill, issued in the due course of this proceeding, will affect its ability to complete its labeling rule.

Finally, the Department has provided no reason to think that it ever intends to publish the regulations required by the 2008 Farm Bill. This disqualifies the Department from appealing to *TRAC*'s sixth factor. As the D.C. Circuit has explained, "the issue of impropriety" in the sixth factor is intertwined with the

[5] This Court may consider extra-record material when evaluating a section 706(1) claim. *See Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

fourth factor's "sensitivity to the agency's legitimate priorities," and "[w]here the agency has manifested bad faith, as by … asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities." *In re Barr Labs, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). As the Department clearly stated, it will "take no further action" on the 2016 proposed rule. 82 Fed. Reg. at 48,603, Add.10, App.060. And Respondents have failed to identify *any* action since that announcement to suggest they are moving towards meeting Congress's deadline in the 2008 Farm Bill.

Respondents point to the abandoned regulatory efforts of prior administrations to try to demonstrate the Department's good faith. Resps.' Br. at 20-21. But the agency should not receive credit for past proposals when Petitioners' challenge is to the agency's subsequent decision to abandon them. Unless this Court compels the Department to act, it seems highly unlikely that any such proposals are forthcoming—a reality made clear by the fact that upon withdrawing the 2016 proposed rule, Secretary Perdue stated that the issues the rule addressed—legal violations by large agribusinesses that harm independent farmers like Petitioners here—"are moral actions that I don't believe that regulations and litigation actually solve." *See* Cindy Zimmerman, *GIPSA Rules Withdrawn by Administration,* AgWired (Oct. 17, 2017), http://agwired.com/2017/10/17/gipsa-rules-withdrawn-by-administration/.

Congress, of course, has come to a different judgment, and that is the one that controls here.

Moreover, the regulatory history makes it clear that the agency's internal deliberations cannot justify the delay, as Respondents' insist. *See* Resps.' Br. at 20. Changes between the 2011 proposed rule and the 2016 version were simply intended to address concerns about "ambiguity and clarity" and avoid an "unintended" consequence of limiting alternative marketing arrangements. 81 Fed. Reg. at 92,706, App.033. A comparison of the two versions shows that the Department tightened the regulatory language; it in no way "completely reworked the rule." Resps.' Br. at 21. Likewise, the decisions of two Courts of Appeals relating to a distinct issue (*see* Resps.' Br. at 21)—namely, whether proof of competitive harm is required to prove an "unfair practices" claim under the Act—cannot explain the Department's choice to abandon its effort to promulgate Congressionally required criteria that are applicable in situations where harm to competition exists as well as where it does not.

In sum, given the years-long failure to meet a statutory deadline, the welfare interests at stake in the required Rules, the lack of a competing agency priority more compelling than the livelihoods of affected farmers, and the Department's avowed intent not to complete the mandated regulations, the *TRAC* factors weigh in favor of compelling the Department to act.

C. The source of this Court's jurisdiction is immaterial.

Respondents' digression about the appropriate source of this Court's jurisdiction to hear Petitioners' claim is a red herring. Notably, Respondents do *not* claim that this Court lacks jurisdiction to hear Petitioners' "unlawfully withheld" claim. *See* Resps.' Br. at 15. Nor do they contest that the source of this Court's jurisdiction affects the standard for evaluating that claim. *See* Resps.' Br. at 24. The critical question presented is whether the APA *constrains* this Court's equitable discretion to issue a remedy. Whether that remedy takes the form of a writ of mandamus under the All Writs Act or an injunction under 28 U.S.C. § 2342(2) is immaterial.

1. Nevertheless, Respondents err in asserting that this Court must resort to its residual All Writs Act authority for jurisdiction. The All Writs Act only supplies jurisdiction when no other statute does. *See* Pets.' Br. at 41-42. But this court has "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," with certain exceptions irrelevant here. 28 U.S.C. § 2342(2). Respondents assert that petitioners "do[] not seek review of a 'final order.'" Resps.' Br. at 14. But they provide no support for this conclusory claim other than to quote *TRAC*'s observation that "the lack of a final order is the very gravamen of the petitioners' complaint." *Id*. (quoting *TRAC*, 750 F.2d at 75).

Contrary to Respondents' view, Petitioners do in fact challenge final orders. As this Court has concluded, "the word 'order'" should be construed "expansively," to "mean any agency action capable of review on the basis of the administrative record." *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1313-14 (8th Cir. 1981). Here, the long administrative record highlighting the Department's consideration of the Rules (*see* Pets.' Br. at 12-19) provides a sufficient record to enable review, particularly given the purely legal nature of Petitioners' claim. The Court thus has jurisdiction under 28 U.S.C. § 2342(2) to hear Petitioners' challenge.

In addition, and for two independent reasons, the "order" here—the agency's inaction in violation of a statutory deadline—is sufficiently "final" to allow review at this stage.

First, the Department's inaction in violation of a statutory mandate itself constitutes a "final order" that this Court can review. The APA explicitly recognizes that the "failure to act" is an "agency action," 5 U.S.C. § 551(13); *see SUWA*, *supra*, and this Court has rejected "abstract distinction[s] between agency action and inaction," *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1021 (8th Cir. 2010). When inaction is in breach of a statutory duty to act by a specified deadline, this "agency action" is "final" for the purpose of special review statutes like 28 U.S.C. § 2342(2). *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir.

1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review"); *see also Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) ("At some point administrative delay [has] sufficient finality … to permit judicial review … When agency recalcitrance is in the face of a *clear statutory duty* … the court has the power to order the agency to act." (emphasis added) (citations omitted).

Second, the Department's announcement that it will "take no further action" on the proposed rule, *see* 82 Fed. Reg. at 48,603, Add.10, App.060, constitutes a "final order" that confers jurisdiction. *See Coal. For Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001) (noting that there is final agency action where an agency "affirmatively reject[s] a proposed course of action").

2. Even if the All Writs Act supplies jurisdiction instead of 28 U.S.C. § 2342(2), the debate Respondents seek to have concerns form rather than substance. As long as the APA, in section 706(1), *requires* a court to "compel agency action unlawfully withheld," it is wholly irrelevant whether a court exercises that duty through mandamus or an injunction. In either case, this Court must act.

Of course, writs of mandamus—like injunctions and other equitable remedies—are "[a]s a general matter" "discretionary." *Tenn. Valley Auth.*, 437 U.S. at 193. But, as discussed above, while "a statute that expressly provides for equitable relief does not automatically restrict … traditional equitable discretion[,]" "Congress may impose such restrictions." *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 602 (8th Cir. 1992) (citing *Weinberger*, 456 U.S. at 314). Respondents emphasize the discretionary nature of writs of mandamus (*see* Resps.' Br. at 16), but the cases they cite only describe the standard for issuing writs of mandamus *in the absence of other statutory standards*. Those cases provide no support for the claim that the All Writs Act *overrides* subsequent congressional restrictions on how a court can exercise its discretion.

At bottom, the source of this Court's jurisdiction has no bearing on the central dispute between Petitioners and Respondents: whether Congress has restricted this Court's equitable discretion by mandating that it "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). Under either 28 U.S.C. § 2342(2) or the All Writs Act, the result is the same and Respondents must be compelled to issue the regulations required by the 2008 Farm Bill.

II. This Court Should Order the Department to Reinstate the Farmer Fair Practices Rules.

In 2017, the Department's views toward the Farmer Fair Practices Rules changed dramatically. Under the direction of Secretary Perdue, the Department

suddenly decided to withdraw the IFR, *see* 82 Fed. Reg. 48,594, Add.1-9, App.051-059, and take no further action on the proposed rules, *see* 82 Fed. Reg. at 48,603, Add.10, App.060. The Department's perfunctory reasoning for doing so falls short of the reasoned consideration required by the APA. Indeed, as noted above, Secretary Perdue's stated justification for withdrawing the Rules was that predatory business practices are "moral actions" and that the Rules would have led "to unnecessary and unproductive litigation." *See* Zimmerman, *supra* 16. Accordingly, the withdrawals should be set aside as arbitrary and capricious.

A. The Farmer Fair Practice Rules aimed "to strengthen the protection afforded the nation's livestock producers and poultry growers" through enhanced private enforcement of the Packers and Stockyards Act. 81 Fed. Reg. at 92,571, App.006. In withdrawing the Rules, the Department decided to forego "broader protection and fair treatment" for producers and growers, 82 Fed. Reg. at 48,600, Add.7, App.057, crediting commenters' fears that the Rules would have "embolden[ed] producers and growers to sue for any perceived slight by a packer or integrator," *id.* at 48,594, Add.1, App.051. Respondents' protests notwithstanding, *see* Resps.' Br. at 41-43, this is a reversal. And, as the Supreme Court has made clear, a reversal of policy, like any other agency action, must be grounded in reasoned decisionmaking. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009).

It is bedrock administrative law that "an agency must give adequate reasons for its decision." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An 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,'" and it "must cogently explain why it has exercised its discretion in a given matter." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983) (citation omitted). Respondents agree that these requirements apply when an agency attempts to deregulate. Resps.' Br. at 33; *State Farm*, 463 U.S. at 42. Where an agency changes its policy, 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." *Fox*, 556 at 514-15.

In withdrawing the Rules, the Department provided no "rational basis" to justify its decision. *See Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). The undeniable purpose of the Rules was to remedy the "unequal bargaining power and market failures" that have plagued family farms in an increasingly concentrated agricultural market. 81 Fed. Reg. at 92,576, App.011. Indeed, the Department repeatedly made clear that the Rules were meant to help small farmers protect themselves from unfair trade practices through private enforcement of the Packers and Stockyards Act. *See* 81 Fed. Reg. at 92,569,

App.004, 92,571, App.006, 92,576, App.011, 92,591, App.026; 81 Fed. Reg. at 92,712, App.039, 92,714, App.041, 92,717, App.044.

In withdrawing the Rules, the Department departed from its previous design. Yet it did so without acknowledging its changed policy and despite the fact that the "underlying facts and reasoning" it cited in issuing the Rules "ha[d] not changed to any material extent." 82 Fed. Reg. at 48,600, Add.7, App.057. The complete lack of factual basis for the Department's actions, makes the withdrawals arbitrary and capricious and requires this Court to set them aside. 5 U.S.C. § 706(2)(A).

B. Respondents' additional reasons for withdrawing the IFR do not withstand scrutiny.

First, Respondents insist that the Department's concern about creating a "legal patchwork" justifies its withdrawal. Resps.' Br. at 33-34. Not so. To begin, the Department is simply incorrect that the IFR would have *created* a "legal patchwork." Resps.' Br. at 34. That patchwork already existed. *Compare London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005) (interpreting the Packers and Stockyards Act as requiring plaintiffs to demonstrate competitive injury), and *Wheeler v. Pilgrim's Pride Corp*., 591 F.3d 355, 362 (5th Cir. 2009) (same), *with Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961) ("[T]he language in section 202(a) of the Act does not specify that a 'competitive injury' … be prove[n] in order to show a violation of the statutory language."); *Farrow v.*

USDA, 760 F.2d 211, 215 (8th Cir. 1985) (same); *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1337 (9th Cir. 1990) (same). In fact, that patchwork was part of the reason the Department originally sought to promulgate the IFR. *See* 81 Fed. Reg. at 92,568 & n.15, App.003. As noted by the Department, the IFR "provide[d] sufficient clarity to obtain deference from the courts." 81 Fed. Reg. at 92,571, App.006.

Nor is it clear that courts, even in the Fifth and Eleventh circuits, would continue to decline to defer to the Department's longstanding interpretation of the Packers and Stockyards Act once it was codified in regulation. As discussed in Petitioners' opening brief, neither Court of Appeals clearly held that the text of the Act foreclosed the Department's interpretation. *See* Pets.' Br. at 53-55. Accordingly, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), posed no legal hurdle and thus cannot justify the withdrawal of the IFR. Moreover, in proposing the Rules in 2010, the Department knew about (and discussed) the Fifth and Eleventh circuit cases, *see* 75 Fed. Reg. at 35,341 n.31, and it knew about (and discussed) them in 2016 when adopting the IFR, 81 Fed. Reg. at 92,568 n.13, App.003.[6] Despite there being no

[6] Respondents claim that the Department did not previously distinguish between circuits. Resps.' Br. at 35. Not so. The 2010 proposal specifically addressed the analysis of the "three courts of appeals" that had "disagreed with the USDA's interpretation of the … Act." 75 Fed. Reg. at 35,341. In addition, in the 2016 IFR,

change in the legal landscape since 2010, the Department has changed its mind, asserting that these courts might reject the IFR under *Brand X*. But the Department provides no reasoned basis for changing its view. Without more, and in light of the Department's unexplained new view, the Fifth and Eleventh circuit decisions do not justify withdrawing the IFR. *See State Farm*, 463 U.S. at 52 (observing that when engaging in "policymaking in a complex society," it is not enough "for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions").

Second, Respondents point to the Department's argument that the record on which the IFR was based was stale. Resps.' Br. at 37-38. This argument is also unavailing. As an initial matter, the D.C. Circuit has held that the staleness of a record can only be a reason "for the agency to *hesitate* before promulgating a proposed rule, but *not* for abandoning it altogether." *Int'l Union, United Mining Workers of Am. v. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (emphasis added). Additionally, the Department's "determination that it could not defend the 'freshness' of the record against allegations of staleness" (*see* Resps.' Brief at 37) is unfounded, given the Supreme Court's clear instruction that courts be "extremely reluctant" to vacate agency action in that circumstance. *Miss. Indus. v.*

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the Department specifically discussed the Fifth Circuit case, noting that the vigorous dissent provided grounds for thinking the court might afford deference to the agency's interpretation if it were codified. 81 Fed. Reg. at 92,570, App.005.

FERC, 808 F.2d 1525, 1567 (D.C. Cir. 1987) (citing *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)). Finally, the staleness argument ignores that the Department in fact reopened the comment period in order to provide the public with additional opportunity to "freshen" the record. *See* 81 Fed. Reg. at 92,703, App.030; 81 Fed. Reg. at 92,566, App.001. Accordingly, record staleness cannot justify the withdrawal of the IFR.

In sum, the Department's withdrawal of the IFR was not the product of reasoned decisionmaking, and this Court should vacate it as arbitrary and capricious.

C. In defending their withdrawal of the NPRM, Respondents point out that review of an agency's decision to withdraw a proposed rule is more deferential than review of an agency's decision to issue a rule. Resps.' Br. at 38-39. True though that may be, it is of little consequence here. Like any other agency action, an agency's decision to withdraw a proposed rule must result from reasoned decisionmaking. *See, e.g.*, *Williams Nat. Gas v. FERC*, 872 F.2d 438, 443 (D.C. Cir. 1989); *Envtl. Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 39 (D.D.C. 2015). The Department's asserted reasons for abandoning the rulemaking fail that standard. Its concerns about the supposed "vague terms and phrases" and "ambiguity regarding the conduct or action that would be permitted or prohibited," Resps.' Br. at 40, would justify at most amending the proposal, not abandoning it

altogether. And the Department's insistence that it can advance its interpretation of the Act through "case-by-case" enforcement actions, *id.* at 40, is belied its reasoning in issuing the Rules in the first place.

Finally, the termination of the rulemaking on what constitutes "undue or unreasonable preference or advantage" flies in the face of the Department's statutory duty under the 2008 Farm Bill. *See* Resps.' Br. at 22. Even the case cited by Respondents regarding the standard of review acknowledges a statutory duty would render a terminated rulemaking arbitrary and capricious. *See Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983) (noting that the termination of rulemaking did not involve "a situation where the agency has shirked its statutory duty by refusing to regulate").

For these reasons, the withdrawal of the Rules was arbitrary and capricious and must be set aside.

CONCLUSION

Petitioners respectfully request that the Court vacate the withdrawal of the Rules and order the Department to issue the regulations mandated by the 2008 Farm Bill.

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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 6,444 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: July 30, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 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: July 30, 2018

/s/ *Karianne M. Jones*
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