IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS; JAMES DINKLAGE; and JONATHAN and CONNIE BUTTRAM, *Petitioners*, v. U.S. DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as SECRETARY OF AGRICULTURE; and the UNITED STATES OF AMERICA, *Respondents*.	Case No. 17-_____

PETITION FOR REVIEW

Pursuant to Sections 202(a)-(b) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. § 192(a)-(b); 28 U.S.C. §§ 2342-2344; 5 U.S.C. § 706; and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioners Organization for Competitive Markets ("OCM") and Mr. Jim Dinklage, Mr. Jonathan Buttram, and Ms. Connie Buttram (OCM members) hereby seek judicial review of two orders of the United States Department of Agriculture ("USDA"), published at 82 Fed. Reg. 48,594 (Oct. 18, 2017) and 82 Fed. Reg. 48,603 (Oct. 18, 2017). Copies of these orders

are attached as Attachment A. In the challenged orders ("the Withdrawals"), USDA withdrew both an interim final rule, *see* 81 Fed. Reg. 92,566 (Dec. 20, 2016), and a Notice of Proposed Rulemaking, *see* 81 Fed. Reg. 92,703 (Dec. 20, 2016), collectively known as the Farmer Fair Practices Rules. This Court has jurisdiction under 28 U.S.C. § 2342, and venue lies in this Court under 28 U.S.C. § 2343 because OCM has its principal office in Lincoln, Nebraska, and because Mr. Dinklage resides in Orchard, Nebraska.

Sections 202(a) and 202(b) of the PSA make it unlawful for "any packer or swine contractor" to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device," 7 U.S.C. § 192(a), or "[m]ake or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect," *id*. § 192(b). Pursuant to these provisions, USDA published, in December 2016, the Farmer Fair Practices Rules—designed to provide robust protections for independent farmers by ensuring that large agribusinesses are held accountable for a wide variety of unfair business practices, including bad faith breaches of contract, retaliatory actions, and opaque pricing schemes. USDA determined that these rules were essential for independent farmers to continue operating in a market dominated by a small number of powerful buyers.

The Farmer Fair Practices Rules consisted of an interim final rule and proposed regulations. In the interim final rule (the "IFR"), USDA made clear that a farmer could establish that a packer or swine contractor had violated Section 202(a) or Section 202(b) of the PSA without proving that the packer's or swine contractor's actions caused, or would be likely to cause, competitive harm to the market, as opposed to individualized harm to the victim of the unfair practice. 81 Fed. Reg. at 92,567-68. In this way, the IFR codified USDA's longstanding interpretation of the PSA and was promulgated to supplant contrary judicial interpretations that had been adopted by courts in four circuits.[1] *Id.* at 92,568 & n.13. In the proposed regulations, USDA sought to (1) clarify certain types of conduct that USDA considers to be unfair, unjustly discriminatory, or deceptive, and thus a violation of Section 202(a) of the PSA; and (2) identify criteria that USDA would consider in determining whether a packer or swine contractor had engaged in activity that constituted an undue or unreasonable preference or advantage in violation of Section 202(b) of the PSA. 81 Fed. Reg. at 92,703. Adoption of these rules was necessary, in part, to satisfy a statutory mandate in the 2008 Farm Bill that USDA "promulgate regulations with respect to the Packers

[1] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007); *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005).

and Stockyards Act . . . to establish criteria that the Secretary will consider in determining" whether, *inter alia*, "an undue or unreasonable preference or advantage has occurred in violation of such Act." Pub. L. No. 110-246, § 11006, 122 Stat. 1651, 2120 (2008) (codified at 7 U.S.C. § 228 note).

USDA has now reversed course. Under the direction of Secretary Perdue, USDA has withdrawn the Farmer Fair Practices Rules, and, in so doing, re-stacked the deck for multinational meat packing corporations at the expense of independent farmers. According to Secretary Perdue, predatory business practices are "moral actions" that "regulation and litigation" do not "actually solve."[2] USDA's only stated grounds to support its decision fall well short of the reasoned consideration required by the APA.

USDA first insists that the Farmer Fair Practices Rules must be withdrawn because they conflict with the decisions of courts in four circuits. USDA's reasoning, however, gets it backward. The existence of contrary circuit precedent weighs in favor of, not against, regulation because a codified agency interpretation would be afforded *Chevron* deference that otherwise is unavailable if USDA remains silent. That is all the more so here where USDA's mandate under GIPSA is to protect independent farmers from predatory trade practices, and the court

[2] Cindy Zimmerman, *GIPSA Rules Withdrawn by Administration*, AgWired (Oct. 17, 2017), http://agwired.com/2017/10/17/gipsa-rules-withdrawn-by-administration/.

decisions in question predate USDA's rule making and did not have the benefit of the agency's expertise that is the foundation for *Chevron* deference.[3] USDA next suggests that the public did not have sufficient opportunity to comment on the Farmer Fair Practices Rules. But this is belied by the record: the Farmer Fair Practices Rules were published after the USDA had held three public meetings and received over 61,000 comments. *See* 81 Fed. Reg. at 92,566-68. Moreover, the Farmer Fair Practices Rules themselves opened a comment period during which USDA received almost 2,000 additional comments. *See* 82 Fed. Reg. at 48,595-96. Finally, in withdrawing the Farmer Fair Practices Rules, USDA entirely failed to account for the fact that parts of those rules were statutorily mandated by the 2008 Farm Bill. *See* 7 U.S.C. § 228 note.

In these respects and others, the Withdrawals are arbitrary, capricious, and contrary to the PSA in violation of 5 U.S.C. § 706(2), and by withdrawing the Farmer Fair Practices Rules without replacing them, USDA has unlawfully withheld agency action under the 2008 Farm Bill in violation of 5 U.S.C. § 706(1). Accordingly, Petitioners respectfully request that this Court vacate the unlawful

[3] Indeed, the Tenth Circuit acknowledged as much when addressing the precise issue later codified by the Farmer Fair Practices Rules: "[r]egulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference. . . . Here, however, the Secretary has not promulgated a regulation applicable to the practices the [Plaintiffs] allege violate § 202(a)." *Been*, 495 F.3d at 1226-27.

withdrawal orders and reinstate the Farmer Fair Practices Rules, or provide such other relief as this Court deems appropriate.

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Respectfully submitted,

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