NO. 07-40651

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CODY WHEELER, DON DAVIS, AND DAVEY WILLIAMS.
Plaintiffs-Appellees,

V.

PILGRIM'S PRIDE CORP.
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION
IN CASE NO. 5:02-CV-136

EN BANC BRIEF FOR 54 FARMING, RANCHING, AND CONSUMER ORGANIZATIONS AS _AMICI CURIAE_ IN SUPPORT OF PLAINTIFFS-APELLEES.

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American Agriculture Movement
California Farmers Union
Campaign for Contract Agriculture Reform
Campaign for Family Farms and the Environment
Cattle Producers of Washington
Center for Rural Affairs
Contract Poultry Growers Association of the Virginias
Dakota Resource Council
Family Farm Defenders
Farm and Ranch Freedom Alliance
Food and Water Watch
GrassWorks Inc
Idaho Rural Council
Illinois Farmers Union
Independent Cattlemen of Nebraska
Independent Cattlemen of Wyoming
Indiana Farmers Union
Institute for Agriculture and Trade Policy
Iowa Citizens for Community Improvement
Iowa Farmers Union
Kansas Cattlemen's Association
Kansas Farmers Union
Land Stewardship Project
Michigan Farmers Union
Minnesota Farmers Union
Mississippi Livestock Markets Association
Missouri Rural Crisis Center
Montana Farmers Union
National Catholic Rural Life Conference
National Family Farm Coalition
National Farmers Union
National Latino Farmers and Ranchers Trade Association
National Sustainable Agriculture Coalition
Nebraska Farmers Union
New England Farmers Union
New Mexico Cattle Growers' Association
North Carolina Contract Poultry Growers Association

North Dakota Farmers Union
Ohio Farmers Union
Oregon Livestock Producers Association
Organic Consumers Association
Organization for Competitive Markets
Pennsylvania Farmers Union
Powder River Basin Resource Council
R-CALF USA
Rocky Mountain Farmers Union
Rural Advancement Foundation International- USA (RAFI-USA)
South Dakota Farmers Union
South Dakota Stockgrowers Association
Texas Farmers Union
Virginia Association for Biological Farming
Western Organization of Resource Councils
Wisconsin Farmers Union

CERTIFICATE OF INTERESTED PERSONS

Case No. 07-40651
Cody Wheeler, Don Davis, and Davey Williams, Plaintiffs-Appellees v. Pilgrim's Pride Corporation, Defendant-Appellant

As required by Local Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. All parties have consented to the filing of this amicus brief. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICI CURIAE*

The central goal of the Packers and Stockyards Act is to create fair, open, efficient, and transparent markets for livestock. *See* H.R. Rep. No. 85-1048 at 2 (1957). The current question before this Court will have a dramatic effect on key provisions of the Packers and Stockyards Act allowing farmers and ranchers to enforce the Act's protections. The *amici* are fifty-four of the preeminent farming, ranching, and consumer groups involved in advocacy on behalf of their constituencies throughout the United States.

National Farmers Union was founded in 1902 in Point, Texas, to help family farmers address profitability issues and monopolistic practices. Today, with a membership of 250,000 farm and ranch families, National Farmers Union continues its original mission to protect and enhance the economic well-being and quality of life for family farmers and ranchers and their rural communities. The Organization for Competitive Markets is a national, non-profit, public policy research organization headquartered in Lincoln, Nebraska. OCM believes we must work together, across all commodities, toward the common purpose of returning its food and agricultural sector to true supply-demand based competition through competitive markets. The Ranchers Cattlemen Action Legal Fund, United

Stockgrowers of America ("R-CALF USA") is a national non-profit cattle association representing thousands of U.S. cattle producers in 46 states on issues concerning international trade and marketing to ensure the profitability and continued viability of independent U.S. cattle producers. The Rural Advancement Foundation International - USA (RAFI-USA) cultivates markets, policies and communities that support thriving, socially just, and environmentally sound family farms. Together with the other fifty *amici*, these organizations represent more than two million farmers and ranchers nationwide, are actively engaged in advocating for free and competitive agricultural markets, and believe that affirmation of the district court and panel majority opinions below is a crucial step in maintaining the integrity of the Packers and Stockyards Act.

STATEMENT OF THE ISSUE

Whether a plaintiff must show an adverse effect on competition to prevail under sections 192 (a) and (b) of the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 192(a)-(b).

STATEMENT OF CASE

Plaintiffs Wheeler, Davis, and Williams raised chickens under contract for Defendant Pilgrims' Pride Corporation ("PPC"). Their complaint alleges violations of 7 U.S.C. §§ 192(a) and (b), among other

claims, based on differential treatment of an inside grower. The district court denied a summary judgment motion by PPC, ruling that no adverse effect on competition need be shown under §§ 192(a) and (b). A three judge panel of this Court affirmed on interlocutory appeal, stating that "the language of sections 192(a)-(b) is plain, clear, and unambiguous, and . . . it does not require the Growers to prove an adverse effect on competition." *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 460 (5th Cir. 2008). This Court subsequently granted a petition by PPC for *en banc* review on July 27, 2009.

STATEMENT OF FACTS

PPC enters into contracts with independent contract farmers, known as "growers" in the chicken industry. Under these contracts, PPC sends baby chickens to a grower who raises them under strict contractual standards set by PPC. 1 R. at 3388. This is commonplace in the chicken industry, which is dominated by large companies called "integrators," which are vertically integrated companies that control production of chickens, known in the industry as "broilers." 1 R. at 3388, ¶ 5. PPC is one of the largest integrators in the country. *Id*.

PPC pays its growers based on a "tournament system" in which all growers within a regional complex are compared to each other. 1 R. at

3388-89, ¶ 8. PPC pays growers deemed more efficient more than growers deemed less efficient based upon this system. *Id*. Lonnie "Bo" Pilgrim, PPC's CEO, also raised broilers on his own farm, named the "LTD Farm." 2 R. at 7954, ¶¶ 2-5. PPC did not pay Mr. Pilgrim under the tournament system, and as a result paid Mr. Pilgrim more than the growers paid under the tournament system. 1 R. at 3389-90, ¶¶ 9-11; 2 R. at 8415, 8419.

Based upon this disparity in compensation, Plaintiffs Wheeler, Davis, and Williams brought this action under sections 192(a) and (b) of the Packers and Stockyards Act alleging unfair practices and undue preference. Fifth Amended Complaint at ¶¶ 57-58 (Docket No. 371). PPC moved for summary judgment, alleging that a plaintiff bringing an action under sections 192(a) and (b) needs to show an adverse effect on competition. The district court denied this motion (PPC Record Excerpts Tab F, at 4), and a panel majority of this Court affirmed on appeal (*Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455 (5th Cir. 2008)).

SUMMARY OF ARGUMENT

The district court and the original panel of this Court correctly rejected PPC's summary judgment motion and refused to read a requirement to show an adverse effect on competition into sections 192(a) and (b) of the PSA. The PSA was intentionally designed by Congress to be broader than

the antitrust legislation preceding it because of the nature of abuses in agricultural markets, and the inability of standard antitrust law to effectively reign in these abuses. Classic tenets of statutory construction require a plain reading of sections 192(a) and (b). Grafting a requirement to demonstrate an adverse impact on competition will severely restrict the ability to bring actions under the PSA, and undermine congressional intent to ensure fair and competitive livestock markets. The unique nature of abuses by highly concentrated buyers in agricultural markets, and in particular the broiler market, only underscores the purpose of the PSA and the necessity of refusing to read an unwritten requirement into an unambiguous statute such as the PSA.

ARGUMENT

A. The PSA is Broader than the Sherman and Clayton Acts

The primary purpose of the PSA is "to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry." H.R. Rep. No. 85-1048 (1957). When Congress passed the PSA in 1921, it was primarily motivated to regulate the sale of livestock by farmers to the more powerful livestock buyers. Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meatpacker Relationships*, 8 DRAKE J. AGRIC. L. 91, 91-92 (2003). Advances in

refrigeration and transportation technology opened up meatpacking from its previous regional markets to one nationwide market, and this in turn led to consolidation in the meatpacking industry in the late nineteenth century. William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening*, J. AGRIC. & FOOD INDUS. ORG. Vol. 5, Article 4 at 7-8 (2004). This consolidation produced a concentration in the industry dominated by five major players. *Id*. After unsuccessful attempts at breaking up the meatpacking consolidation through the antitrust laws (*Id*. at 6-10), Congress passed the PSA in 1921 based on its dissatisfaction with the inability of the antitrust laws and the FTC Act to restrain the meatpackers' conduct. Stumo & O'Brien, 8 DRAKE J. AGRIC. L. at 93-94 (2003).

The PSA was intentionally designed to be broader than its analogous antitrust laws, the Sherman and Clayton Acts. C. Robert Taylor, *Buyer Power Litigation in Agriculture: Pickett v. Tyson Fresh Meats, Inc.*, 53 ANTITRUST BULLETIN 455, 456-57 ("[The PSA] was intended to go much further than the Sherman and Clayton Acts to protect livestock producers (the sellers) from various unfair and anticompetitive practices by meatpackers (the buyers) . . . ."). The text of the statute itself states this explicitly, noting that the private right of action under the PSA: "shall not in

any way abridge or alter remedies now existing at common law or by statute, ***but the provisions of this chapter are in addition to such remedies***." 7 U.S.C. § 209(b) (emphasis added). The Supreme Court confirmed a broad construction of this statute in *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922):

> The chief evil feared [by the PSA] is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys . . . Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. ***Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.***

(emphasis added). More recent case law has confirmed the role of the PSA to combat a broad range of unfair and anticompetitive practices. *See United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982) ("As originally enacted in 1921, the purpose of the [PSA] was to combat anticompetitive ***and*** unfair practices.") (emphasis added).

B. PPC and its *Amici* Misconstrue the PSA by Conflating PSA Standards with Antitrust Standards Used under the Sherman and Clayton Acts

The PSA was enacted years after the Sherman Act and the watershed moment in its jurisprudence, *Standard Oil Co. of New Jersey v. United*

States, which grafted an "unreasonable" qualification onto the Sherman Act prohibition of agreements "in restraint of trade." 221 U.S. 1 (1911). The PSA's broader nature was indeed a direct response to the inability of the previous antitrust legislation to effectively curtail unfair or deceptive practices in the meatpacking industry:

> section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Anti-Trust Act were not broad enough to meet the public needs as to business practices of packers. Section [192](a) and (b) was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest.

Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961). The American Meat Institute, the nation's largest and oldest meat and poultry association representing meatpackers, has even conceded that the breadth of the PSA far exceeds that of the antitrust laws. Press Release, American Meat Institute, Statement of the American Meat Institute on Ag Economists' Debate Over Packer Ownership Ban at 1 (March 13, 2002) ("[The PSA] is an additional layer of fair business practice mandates on meatpackers, ***above and beyond the Sherman Act and Clayton Act*** . . ."") (emphasis added), *available at* http://www.meatami.com/ht/d/ReleaseDetails/i/3000.[1]

[1] The American Meat Institute has filed a brief as *amicus curiae* supporting Pilgrim's Pride Corporation in this matter, asserting that the PSA was intended to merely mirror the

Pilgrims' Pride misconstrues the breadth of the PSA and tries to apply a standard designed to narrow antitrust culpability to a statute designed specifically to broaden the scope of culpability where antitrust legislation was too narrow. The Tenth and Eleventh circuits have made this same mistake in *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 *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005). All are wrong, and all have ignored express authority on the scope of "unfairness" from the Supreme Court: "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior." *FTC v. Sperry & Hutchinson, & Co.*, 405 U.S. 233, 244 (1972).[2] *Cf. Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968) ("[s]ection 202(a) should be read liberally enough to take care of the types of anticompetitive practices properly deemed 'unfair' by the Federal Trade Commission and to also reach any of the special mischiefs and injuries inherent in livestock and poultry traffic."). The PSA proscribes acts that would not be illegal under other antitrust legislation. *Swift & Co. v. United*

Sherman and Clayton Acts despite its previous assertions to the contrary. *See* National Chicken Council and American Meat Institute, *Amicus Curiae* Brief at 12.

[2] *See infra* pp. 14-15 for a more detailed discussion of *Sperry & Hutchinson* and the FTC Act's (15 U.S.C. § 45) relevance to the PSA.

States, 393 F.2d 247 (7th Cir. 1968). *See also* Stumo & O'Brien, 8 Drake J. Agric. L. at 93-97 (discussing the added breadth of the PSA in terms of micro [unfairness] and macro [antitrust] effects).

C. Statutory Construction Rules Require a Narrow Reading of §§ 192(a) and (b)

a. Supreme Court and Fifth Circuit Authority Both Require a Narrow Reading of Statutes

Courts should "resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Resolving statutory ambiguities without a solid textual anchor makes a court's "pronouncement[s] appear[] uncomfortably like legislation." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1185 (1989). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Justice Scalia's line of reasoning is well supported: "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when a statute's language is plain, the sole function of the

courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.'").

"[T]he starting point in any case involving the meaning of a statute[] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). The language at issue here from the Packers and Stockyards Act, 7 U.S.C. §§ 192(a)-(b), is unambiguous and clear:

> It shall be unlawful . . . for any live poultry dealer with respect to live poultry to: (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

7 U.S.C. § 192(a)-(b). As this Court has noted, "[w]hen the language of the federal statute is plain and unambiguous, it begins and ends our enquiry." *Thompson v. Goetzman*, 337 F.3d 489, 495 (5th Cir. 2003). The language of this statue is indeed "plain and unambiguous." *See* PPC *En Banc* Brief at 20 ("the plain meaning of sections 192(a) and (b) is evident.").

Further, Congress did place language requiring an adverse effect on competition for other subsections of § 192, and the absence of language in §§ 192(a) and (b) is further evidence that no adverse effect on competition is required. *See* 7 U.S.C. § 192(c) (". . . if such apportionment has the

tendency or effect of restraining commerce or of creating a monopoly."); 7 U.S.C. § 192(d) (". . . or with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce."); 7 U.S.C. § 192(e) (". . . or with the effect of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce."). This is further reason for this Court not to read new requirements into the law: "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Where "other sections of the statute reveal[] that Congress had considered the possibility" of the provision in question, reading that section literally does not "yield an 'absurd' result or one that was at odds with congressional intent." *Johnson v. Sawyer*, 120 F.3d 1307, 1320 (5th Cir. 1997) (allowing a prisoner to be paid witness fees where the language of the statute excepted prisoners in other sections, but not the section under which the prisoner testified).

The *Been* court laments that, if this statute were read literally as statutory construction requires, it "would make a federal case out of every breach of contract." *Been*, 495 F.3d at 1229. This logic, however, fails and falls into the trap Justice Scalia warns of above, and makes the *Been* court's

decision "appear[] uncomfortably like legislation." Scalia, 56 U. Chi. L. Rev. at 1185. *Been*, *London*, and *Pickett* all ignored this basic canon of statutory construction. *Been*, 495 F.3d at 1240 (discussing the PSA's antitrust background as reason to read a requirement of adverse effect on competition); *London*, 410 F.3d at 1307 (reading the PSA's legislative history, "antitrust ancestry," and "policy considerations" to require an adverse effect on competition); *Pickett*, 420 F.3d at 1279-80 (following *London*). *See also* Taylor, 53 Antitrust Bulletin at 458-59 (discussing the inappropriate use of antitrust standards to the PSA in *Pickett*).

The Supreme Court denounced this statutory gerrymandering in *Tennessee Valley Authority v. Hill*, in which the language of the Endangered Species Act of 1973 required the stoppage of work on a nearly finished dam that the U.S. government had already spent more than $100 million dollars in building. 437 U.S. 153 (1978). By ignoring the ordinary, plain language of the statute, the Court noted that they would be akin to Lewis Carroll's incarnation of Humpty Dumpty: "'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what *I* choose it to mean – neither more nor less.'" *Tennessee Valley Authority*, 437 U.S. at 174 n.18 (quoting Lewis Carroll, Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939)). As the Court noted, "neither the [Act] nor

Art. III of the Constitution provides federal courts with the authority to make such fine utilitarian calculations" as whether the statute would make federal cases out of breaches of contract. *Id*. at 187. The district court and this Court's majority panel rightfully decided the same thing in their opinions here.

This reasoning has resonated with district courts across the country for many of these same reasons. The Northern District of Iowa noted that: "only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited." *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1103 (N.D. Iowa 2004). *See also Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp. 2d 748, 754 (D.S.D. 2006) ("7 U.S.C. § 192(a)[] does not prohibit only those unfair and deceptive practices which adversely affect competition."); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465 (N.D.N.Y 1984) (dismissing argument that § 192(a) required a showing of restraint on trade or competition). Further, district courts have since picked up on *Wheeler*'s reasoning, expressly rejecting the opinions in *Been*, *London*, and *Pickett*: "if Congress had intended to similarly limit the scope of 192(a-b) to those acts which adversely affect competition, it could have included that same language

therein, but did not." *Milton Abeles, Inc. v. Creekstone Farms Premium Beef, LLC*, 2009 WL 875553, *20 (E.D.N.Y. March 30, 2009). *See also White v. Pilgrims' Pride Corp.*, 2008 WL 4471656 (E.D. Tex. Sept. 29, 2008) (ruling that plaintiff need not prove an adverse effect on competition under §192(a)-(b) based on *Wheeler*).

Just like the PSA, the FTC Act was passed in order to *supplement* previous antitrust laws by prohibiting a broader category of unfair and anticompetitive practices: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). The Supreme Court faced this very issue of whether an adverse effect on competition is required by the FTC Act, rejecting that proposition and holding that the FTC Act proscribes "practices as unfair or deceptive in their effect upon consumers, ***regardless of their nature or quality as competitive practices or their effect on competition***." *Sperry & Hutchinson*, 405 U.S. at 239 (emphasis added). There is no requirement of effect on competition in the FTC Act because "[t]he point where a method of competition becomes 'unfair' within the meaning of the [FTC] Act will often turn on the exigencies of a particular situation, trade practices, or the practical

requirements of the business in question." *FTC v. Motion Picture Adver. Co.*, 344 U.S. 392, 396 (1953).

"[Congress] does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). By reading an adverse competitive effect into sections 192(a)-(b), the other circuits have spotted an elephant in this mousehole. The district court and the majority panel of this Court, however, ruled consistently with Supreme Court precedent, and this Court's own precedent: "in the absence of ambiguity, we are not to look beyond the plain wording of the statute or regulation to divine legislative intent." *Copeland v. C.I.R.*, 290 F.3d 326, 332-33 (5th Cir. 2002). *See also Sawyer*, 120 F.3d at 1318 ("It is for Congress, not this court, to strike a balance between these interests.") (internal quotes omitted). Courts cannot take the place of Congress in deciding matters of policy. *Hill*, 437 U.S. at 194-95; *see also Moosa v. I.N.S.*, 171 F.3d 994, 1009 (5th Cir. 1999) (noting that courts "will not second-guess such policy choices properly made by the legislative branch."); *General Tel. Co. of Southwest v. U.S.*, 449 F.2d 846, 859 (5th Cir. 1971) ("The wisdom or expediency of a given law or regulation is not open to question in the courts.").

b. The Disproportionate Power Structure between Growers and Buyers Underscores the Importance of Following Strict Statutory Construction Rules

Agricultural markets are particularly susceptible to harmful uses of buyer power, many of which may not rise to the level of an antitrust violation. Buyer concentration in the early nineteenth century prompted the original PSA legislation because of the abusive power yielded by highly concentrated buyers in agricultural markets. Stumo & O'Brien, 8 DRAKE J. AGRIC. L. at 93-94 (2003). The broiler industry is currently highly concentrated in favor of buyers, here in the form of processors.[3] A recent preliminary study performed by two U.S.D.A. agricultural economists confirms this concentration in the broiler industry. Key & McDonald at 2, 7.

Buyer consolidation in agricultural markets primarily impacts farmers and ranchers for whom prices are driven down. Peter Carstensen, Buyer Power and Merger Analysis: The Need for Different Metrics, Statement to the Workshop on Merger Enforcement held by the Antitrust Division and Federal Trade Commission at 17 (Feb. 17, 2004). *See also* Press Release, American Antitrust Institute, Smithfield Acquisition of Farmland Foods:

[3] *See* Steve W. Martinez, *Vertical Coordination in the Pork and Broiler Industries: Implications for Pork and Chicken Products*, Food and Rural Economics Division, Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economics Report No. 777 (1999); Nigel Key & James M. McDonald, Local Monopsony Power in the Market for Broilers? Evidence from a Farm Survey at 2, Presented at the Annual Meeting of the Agricultural and Applied Economics Association (July 27-29, 2008) *available at* http://ageconsearch.umn.edu/bitstream/6073/2/sp08ke30.pdf.

Proposed Pork Processing Acquisition Raises Cutting Edge Antitrust Issues at 1 (Aug. 7, 2003) (noting that the most likely victims in an agricultural monopsony are the small farmers and ranchers). In fact, the broiler industry has shown itself to be particularly susceptible to this — growers with a single integrator in their area receive nearly 7% less in fees than those growers with four or more companies in their area. Key & McDonald at 8. This phenomenon appears in other areas of agriculture as well — the same effect has been shown in pear markets in California where the buyers have consolidated heavily. Leslie Butler & Adam McCarthy, *Market Power in the Northwest D'Anjou Pear Industry: Implications for California Agriculture*, 11 UNIV. OF CAL., DAVIS AGRIC. & RESOURCE ECON. UPDATE 8 (Sept./Oct. 2007) (noting that buyer consolidation in the pear market in the Northwest United States has had a significant negative effect on selling prices to the farmers).

Harms from buyer power extend beyond direct effects on "upstream" or "downstream" competition as traditionally understood in antitrust law. Buyers in a highly concentrated market have great discretionary power in markets where there are many sellers and few buyers. *See* Peter Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULLETIN 271, 289 (2008).

See also Todd v. Exxon Corp., 275 F.3d 191, 208 (2d Cir. 2001) ("Generally speaking, the possibility of anticompetitive collusive practices is most realistic in concentrated industries."). Discretionary power can be used to harm individual producers by exclusion from the market, discriminatory practices, or undue favoritism. Carstensen, 53 ANTITRUST BULLETIN at 297-302. This is currently happening in the broiler industry, where broiler processing firms, such as Pilgrims' Pride, can exercise their power in an abusive manner because the localized nature of the production complexes limit the integrators with whom sellers can contract. Key & McDonald at 3.

Sections 192(a) and (b) are explicit efforts to regulate the use of this discretionary power inherent in the agricultural market where congress deemed the antitrust laws to be insufficient. Stumo & O'Brien, 8 DRAKE J. AGRIC. L. at 93-94 (2003). These sections were designed to ensure equitable treatment, and are further proof that Congress designed the statute in this way purposefully. *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [congressional] purpose is the statutory text adopted by both houses of Congress and submitted to the President.").

D. Grafting an Adverse Effect on Competition in §§ 192(a)-(b) Ignores Congressional Intent and Perverts the PSA's Purpose

Been, London, and *Pickett* all ignored appropriate statutory construction rules, and in doing so have perverted the true intention of the

PSA. If Congress had wanted antitrust standards to apply to §§ 192(a)-(b), they easily could have written them into the statute, as they did in §§ 192(c)-(e). *Milton Abeles*, 2009 WL 875553 at *20. Reading an adverse competitive effect into §§ 192(a)-(b), however, manipulates the standard in favor of processors who hold a disproportionate share of power in the broiler market and gives them free reign to engage in unfair contracting practices as long as they do not affect competition. This defeats the express purpose of the PSA, and would make it nearly impossible for a small farmer or rancher to protect its rights under the PSA because of the difficulty in proving an adverse effect on competition. *See* AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS at 809-37 (6th ed. 2007) (describing the costs and complexities of demonstrating an adverse effect on competition under the antitrust laws). Statutes like the PSA "are intended to facilitate the efficient and fair operation of these markets, but they often fail in this mission and in fact exacerbate the problems caused by buyer power." Carstensen, 53 ANTITRUST BULLETIN at 274. Reading a requirement of adverse effect on competition into sections 192(a) and (b) of the PSA will exacerbate the very problems the PSA was intended to solve.

CONCLUSION

The district court and panel majority correctly refused to read an unwritten requirement to show an adverse effect on competition into sections 192(a) and (b) of the PSA. This Court should affirm the district court and panel majority opinions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, David A. Balto, hereby certify that on this 16th day of September, 2009, I filed and served the foregoing *En Banc* Brief of *Amici Curiae* 54 Farming, Ranching, and Consumer Organizations in Support of Plaintiffs-Appellees by delivering the original, twenty paper copies, and one electronic PDF copy on a CD-ROM to this court via Federal Express overnight. I further certify that two true and complete copies and one electronic PDF copy on a CD-ROM of the foregoing *En Banc* Brief of *Amici Curiae* 54 Farming, Ranching, and Consumer Organizations in Support of Plaintiffs-Appellees have been sent by First Class Mail, U.S. Postal Service, to the following counsel of record:

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CERTIFICATE OF COMPLIANCE UNDER
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(c)

I, David A. Balto, certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). Excluding the portions of the brief allowed by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 4,649 words.

This brief further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared on Microsoft Word X for Mac in 14 point Times New Roman font.

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