No. 10-542

In the Supreme Court of the United States

ALTON T. TERRY,

Petitioner,

v.

TYSON FARMS, INC.,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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Petitioner, a poultry producer, sued in a federal district court under 7 U.S.C. §192(a) and (b), alleging violation of Packers and Stockyards Act ("PSA") regulations that grant poultry growers the right to be present when their production is weighed by live poultry dealers like Tyson Farms, Inc. The Sixth Circuit affirmed dismissal of the complaint on the ground that the regulation cannot be enforced unless the complaint alleges competitive harm to the entire broiler market. The PSA, however, has dual purposes: to protect competition and consumers, and to preserve fair, efficient and transparent markets for livestock and poultry producers. When provisions implementing these purposes do not overlap, they can be enforced independently. Section 192(a) and (b) was intended to assure that incipient and actual deception, bad faith, fraud, or unreasonable discrimination by processors against meat and poultry producers could not be used to gain price advantages in the highly concentrated meat industry. Congress banned all such conduct from the interstate marketplace without requiring a further showing of competitive harm.

1. a. Contrary to Respondent, the PSA is a regulatory statute, not an "antitrust law." Opp. 6, 25; Pet. App. 10a. No provision in it defines the PSA as an antitrust law, nor does the Clayton Act, 15 U.S.C. §12, the Interstate Commerce Act ("ICA"), 49 U.S.C. §10706, or the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §44. Indeed, the PSA and the FTCA draw a clear line between PSA and FTCA jurisdiction. 7 U.S.C. §227(d); 15 U.S.C. §45(a)(2).

b. This Court has never held that the PSA is an antitrust law. In *Stafford v. Wallace,* 258 U.S. 495 (1922), the Court recognized that the PSA is much more. It was a response to abusive commercial practices by the oligopoly then dominating the meat packing business. The industry's lack of competition justified regulation of all packers operating in interstate commerce; the abusive trade practices justified the Act's special protections for producers. Packers were forbidden "to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, *or* to do any of a number of acts to control prices or establish a monopoly in the business." *Id*. at 513 (emphasis added). *Stafford* also held that commerce was unlawfully obstructed by "[a]ny unjust or deceptive practice or combination that unduly and directly enhances" the ability of the packers to "unduly and arbitrarily . . . lower prices to the shipper who sells, and unduly and arbitrarily . . . increase the price to the consumer who buys. . . ." *Id.* at 514-15.

c. Numerous cases recognize the PSA's origins in Sherman Act violations, but nevertheless hold that Congress intended the statute to be more than an antitrust law. *E.g. Spencer Livestock Comm'n v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988) (the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."); *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). *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968) ("1968 *Swift*") ("[T]he statutory prohibitions of . . . the [PSA] are

broader and more far-reaching than the Sherman Act or even Section 5 of the [FTCA]."); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962) ("The legislative history showed Congress understood the sections of the [PSA] under consideration were broader in scope than antecedent legislation such as the Sherman Antitrust Act, sec. 2 of the Clayton Act, 15 U.S.C.A. § 13, sec. 5 of the [FTCA], 15 U.S.C.A. § 45 and sec. 3 of the [ICA], 49 U.S.C.A. § 3."). Even courts holding that competitive injury is a necessary element of a violation of 7 U.S.C. §192(a) and (b) have refrained from characterizing the PSA as an antitrust law per se. Instead, they have limited the reach of § 202(a) and (b) because, "[a]lthough intended to be broader than antecedent antitrust legislation," it also "incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation." *Been v. O.K. Indus., Inc.,* 495 F.3d 1217, 1228 (10th Cir. 2007) (quoting *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335, n.7 (9th Cir. 1980)). The statement quoted from *De Jong,* however, addressed a conspiracy to rig the livestock market: "What is charged as unfair is the attempt to coerce a change in marketing practices by concerted action . . . to obtain a favorable change in marketing practices that could not have resulted from the free play of competitive forces." *De Jong*, 618 F.2d at 1335. As the *De Jong* court noted, "decisions under the Sherman Act are germane to the issues before us." *Id. De Jong's* application of Sherman Act precedents to a PSA case involving a conspiracy to restrain trade in the livestock industry, however, does not compel the conclusion that only violations sounding in antitrust law can be remedied under §192(a) and (b) of the PSA. This is shown by the Ninth Circuit's subsequent decision in *Spencer Livestock.*

2. Respondent mistakenly asserts that Petitioner claims no conflict, and that *Spencer Livestock* is inapplicable because it involves a different provision of the PSA, 7 U.S.C. §213. Opp. 6, 13. Section 213, however, is parallel to §192(a) and (b) because it prohibits "any unfair, unjustly discriminatory, or deceptive practice" in the purchase and sale of livestock by market agents. *See* Pet. 19, 24; see also 7 U.S.C. §§228b(c), 228b-1(b) (defining delayed payment to producers as "unfair" without regard to competitive effects). Also mistaken is Respondent's contention that any tension between *De Jong* and *Spencer Livestock* presents only an intra-circuit matter. Opp. 14, n.1. There is none. *De Jong* involved concerted efforts to coerce changes in marketing practices. *Spencer Livestock* involved classic fraudulent behavior and violation of PSA regulations intended to prevent it. The Department of Agriculture found that a livestock marketing agent had violated § 213 and implementing regulations by using false weights and shrinkage allowances. On judicial review, the agent contended that it could not be held liable because none of its sales exceeded the prevailing market price, so that consumers were not harmed, nor was any anti-competitive effect proven. Looking to the PSA's objectives, and consistent with *Stafford v. Wallace,* the Ninth Circuit ruled that the Act is aimed not only at preserving fair competition, but at "protect[ing] the livestock market from unfair and deceptive business tactics." *Spencer Livestock*, 841 F.2d at 1455.

3. a. The decision below undermines the PSA's purpose to protect upstream suppliers in meat and poultry markets from actual and incipient unfair, deceptive, fraudulent and unreasonably discriminatory

practices. The petition (at 20-25) and the supporting amicus brief of 55 Farming, Ranching and Consumer Organizations (at 14-18) demonstrate that reading a competitive injury requirement into §192(a) and (b) violates basic principles of statutory construction. The consequences of this error ripple across the nation's meat supply because they defeat Congress's continuous efforts to provide federal remedies for unfair, deceptive, fraudulent and unreasonably discriminatory practices in livestock and poultry markets. Poultry growers who must deal with the intensely concentrated processor side of the industry are particularly hard hit because they have no recourse for damages under the PSA except an action in federal district court of the kind barred by the decision below.

b. The Sixth Circuit's decision fails to give due weight to the 1935, 1958, 1987 and 2008 Amendments to the PSA, which were intended to strengthen protection for livestock and poultry producers. See Pet. 6-10, 25-27. Those amendments are guides to the dual purposes of the PSA, and Congress's intent in the PSA to provide protection for producers independent of competitive impact. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 783 n.17 (1992) ("When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.") *Accord, Tiger v. W. Inv. Co*., 221 U.S. 286, 309 (1911); *NLRB v. Bell Aerospace Co. of Textron, Inc*., 416 U.S. 267, 275 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-381 (1969); *United States v. Stafoff*, 260 U.S. 477, 480 (1923) (opinion of Holmes, J.). For example, in § 11004(a)(1) of the 2008 Farm Bill (the Food, Conservation and

Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651, 2117 (2008), Congress again recognized the PSA's line between financial, trade practice and competitive violations. It added a new provision to the Act, §416 (7 U.S.C. §229), requiring the Secretary to submit annually a report stating "for the preceding year, *separately for livestock and poultry and separately by enforcement area category (financial, trade practice or competitive acts and practices)*, with respect to investigations into possible violations of this Act--- . . . ." 122 Stat. 2117. The new §416 clearly reflects the understanding of Congress that the PSA deals separately with financial practices, trade practices, and competitive practices.

c. In the poultry amendments to the PSA, Congress expressly described the evils to be remedied: rampant oppressive, deceptive, prejudicial, and fraudulent practices in the poultry market that led to producers receiving prices far below the true value of their poultry. The 1935 amendment almost literally restated *Stafford v. Wallace*'s observations about the 1921 Act: "such practices . . . are an undue restraint and unjust burden upon interstate commerce." 49 Stat. 648. In 1921 and in repeated amendments to the PSA, Congress condemned such abuses without regard to their ultimate impact on competition and consumer prices.

4. a. The construction of §192 below is inconsistent with cases holding that deceptive weighing and similar fraudulent practices violate the PSA. It fails to distinguish between cases in which the conduct involved was allegedly anticompetitive, and those which involved deception, fraud, and unreasonable discrimination or PSA rules. The lower

courts overlooked the PSA's dual purposes. They lumped all of the cases together, putting violation of regulations intended to prevent deceptive weighing beyond the PSA's reach unless competition and consumers were harmed. In effect, they invite processors in this highly concentrated industry to compete by oppressing their producers.

b. Respondent contends that the competitive injury requirement originated in *Swift v. Wallace*, 105 F.2d 848 (7th Cir. 1939) ("1939 *Swift*") and was "solidified" in *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968). Opp. 8-9. Both cases, however, involved allegedly anticompetitive practices. *Armour* simply explained that "the [1939 *Swift*] Court observed that discriminatory action 'necessarily resulting in injury' to competitors would appear to violate Section 202(a) of the Act." 402 F.2d at 722. *Armour* also preserved the distinction between the PSA's provisions protecting growers from abuse, and those protecting consumers:

> Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed "unfair" by the Federal Trade Commission . . . *and* also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic.

Id. (citation omitted; emphasis added). As applied to such "special mischiefs and injuries," the Seventh Circuit has never disavowed its holding in 1968 *Swift* that "[§ 192] does not require the Government to prove injury to competition. The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and

consumers at the expense of middlemen." 393 F.2d 247, 253 (citations omitted). Such "mischiefs and injuries" have been, and continued to be independent violations of the PSA under the 1935 addition of poultry dealers to §192, the 1958 addition of poultry and poultry products to §192, and in the federal judicial remedy for poultry growers added by the 1987 Poultry Act that displaced the 1935 Act. Such abuses have also been the basis of decisions directed at false weighing and violation of anti-fraud regulations in cases like *Spencer Livestock*; *Parchman v. USDA,* 852 F.2d 858, 864-65 (6th Cir. 1988); and *Glover Livestock Comm'n Co. v. Hardin,* 454 F.2d 109, 111 (8th Cir. 1972), *judicial vacation of administrative remedy reversed sub nom., Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973).[1]

5. Respondent's contention that a judicially-imposed competitive injury requirement is necessary to prevent displacement of state law is unsound. Opp. 22. The PSA embodies Congress's decision to create federal remedies establishing liability for individual violations. Such remedies are in addition to existing common law and statutory remedies. 7 U.S.C. §209(b). State law remedies are therefore not displaced; rather,

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[1] *Mahon v. Stowers*, 416 U.S. 100 (1974) is not inconsistent. That case concerned priorities in the bankruptcy of a meat packer. It held only that neither §192, nor regulations requiring prompt payment and the keeping of grade-and-weight records supported imposition of a trust conferring priority on the seller over other creditors. The Court saw no indication in §192's "intention to control deceptive and monopolistic practices in the packing industry," a further intention to provide such a benefit. *Id.* at 107-09. The case did not hold that deceptive practices can be remedied only if monopolistic practices are proved.

Congress intended §192 to be a broader federal alternative to state law, which typically does not reach incipient fraud. *See e.g. Braswell v. Conagra, Inc.*, 936 F.2d 1169 (11th Cir 1991) (false weighing claims applying Alabama law of contract and fraud). Respondent's assertion that dealers would be subject to "liability under the PSA for simple breach of contract or for justifiably terminating a contract" (quoting *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1304 (11th Cir. 2005)) makes no legal sense. Contract claims involving only simple breach or justifiable termination do not fall within the conduct remediable under §192(a) and (b), and both the courts and the Secretary of Agriculture can recognize the distinction. *London* is inconsistent with Congress's legislative choice and the PSA's dual purposes.

6. Cases holding that competitive injury is necessary to a §192 violation assert a groundless concern: that without such a limitation the statute lacks judicially ascertainable standards and limitations. This concern ignores the role of the Department of Agriculture's implementing regulations in aiding the courts to identify false weighing, deception, fraud, and other incipient and realized forms "of the special mischiefs and injuries inherent in livestock and poultry traffic." *Armour & Co*., 402 F.2d at 722. It also disregards the origins of terms like "unfair" or "unreasonable" as they appear in the PSA. In 1939 *Swift* the Seventh Circuit analyzed "unreasonable discrimination" in §192. It observed that: "'Unreasonable' is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage." 105 F.2d at

854-55. Then, after reviewing cases defining unreasonable preference under the FTCA and ICA, it held:

> We believe that it is well within the discussion and reason found in the opinions in the foregoing cases to say that actual competition carried on in good faith by normally fair methods *not "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression * * *"* is a fact which must be given substantial weight in determining whether preferences or discriminations are unreasonable within the meaning both of the Interstate Commerce Commission Act and the Packers and Stockyards Act.

Id. at 856 (footnote omitted; emphasis added). The italicized quote above is from *FTC v. Gratz*, 253 U.S. 421, 427-428 (1920). *Gratz*'s restriction to "heretofore regarded" abuses was later overruled. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). These cases show, that the courts know how to confine §192(a) and (b) in light of the PSA's dual purposes and administrative constructions, as well as embedded legal traditions that seek to keep the marketplace free from abuses and deception, including the risk of false weighing. *See Leviticus* 19:36. Further guidance comes from the Secretary of Agriculture's primary jurisdiction to enforce the Act. Although he cannot award damages or reparations for violation of §192, he has authority under 7 U.S.C. §210(c) to investigate anything as to which a complaint may be filed, "or concerning which any question may arise" under the Act. In such inquiries, §210(c) further authorizes the

Secretary to proceed on his own motion as if a complaint had been filed, and to issue any appropriate order, "except orders for the payment of money."

7. If §192 is ambiguous, the courts should defer to the Secretary of Agriculture's construction. Respondent acknowledges that the Petitioner's alternative second question was presented in the court of appeals in the opening brief and in the brief of the United States as amicus curiae. Opp. 26. It argues, however, that the Secretary has no authority to enforce §192 against poultry dealers. Opp. 28, n. 4. As shown above, that argument confuses the Secretary's lack of authority to award reparations or damages with his much broader authority under §210(c) to issue any order except for the payment of money. The deference issue is therefore properly before the Court if it deems §192 ambiguous.

8. The United States' role as amicus curiae in three recent appellate cases construing §192 shows that the Court would benefit by having the Secretary of Agriculture's views placed before it. Pet. 33, n.25 Tyson urges the Court to deny review because of a pending proposal to codify into a regulation the views of successive Secretaries of Agriculture that competitive injury is not a necessary element of liability under §192(a) and (b). Whether that codification would accomplish a meaningful "material change" is itself a reason to request the views of the United States.

CONCLUSION

This case impacts every meat and poultry producer in the nation. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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