No. 17-3723

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORGANIZATION FOR COMPETITIVE MARKETS, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Respondents.

ON PETITION FOR REVIEW OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE

BRIEF FOR RESPONDENTS

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Petitioners assert claims relating to the administration of the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.*, by the United States Department of Agriculture (USDA). First, petitioners contend that USDA failed to meet a statutory deadline to issue a rule establishing criteria the Secretary will consider in determining whether an "undue or unreasonable preference" has been given in violation of 7 U.S.C. § 192(b). Petitioners ask this Court to intervene in USDA's regulatory process and dictate a timeline for issuing such a rule, notwithstanding Congressional appropriations riders that barred USDA from taking action for several years and USDA's substantial efforts to comply.

Second, petitioners challenge as arbitrary and capricious USDA decisions as to three rule provisions under the Act. Petitioners challenge USDA's withdrawal of a rule interpreting 7 U.S.C. § 192(a) and (b) as not necessarily requiring proof of harm or likely harm to competition. They also challenge USDA's notice of no further action with respect to two sections of a proposed rule that would have elaborated on the meaning of the statute in light of USDA's interpretation. USDA's decisions explained that the rules would have required protracted litigation to defend them and a patchwork of decisions as to their validity.

The government agrees that oral argument is appropriate and suggests fifteen minutes per side.

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STATEMENT OF JURISDICTION

With respect to petitioners' request to compel USDA to issue a required rule, this Court has jurisdiction over under the All Writs Act, 28 U.S.C. § 1651(a). *See Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (holding that, under All Writs Act, court of appeals may review agency's failure to take required action "in order to protect its future jurisdiction"); 28 U.S.C. § 2342(2) (providing courts of appeals jurisdiction to review rules issued by USDA).

With respect to petitioners' arbitrary-and-capricious challenges, this Court has jurisdiction pursuant to 28 U.S.C. § 2342(2). The USDA decisions at issue were issued on October 18, 2017. *See* 82 Fed. Reg. 48,594 (Pet. Add. 1); 82 Fed. Reg. 48,603 (Pet. Add. 10). Petitioners timely filed this petition for review on December 14, 2017. *See* 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES

1. Whether this Court should compel USDA to follow a judicially dictated timeline for issuing a rule required by the 2008 Farm Bill, Pub. L. No. 110-246, § 11006(1), 122 Stat. 1651, 2120 (Pet. Add. 12).

Apposite Authorities: *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967);

Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76, 80 (D.C. Cir. 1984).

2. Whether it was arbitrary and capricious for the USDA to (a) withdraw the interim final rule at 9 C.F.R. § 201.3(a); (b) issue a notice of no further action with respect to section 201.210 of its proposed rule; or (c) issue a notice of no further action with respect to section 201.211 of its proposed rule.

Apposite Authorities: 7 U.S.C. § 192; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009) (en banc).

STATEMENT OF THE CASE

A. Statutory Background

The Packers and Stockyards Act (the Act) was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers." *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974). Congress intended the Act to combat practices including "exorbitant charges, duplication of commissions, [and] deceptive practices in respect of prices." *Stafford v. Wallace*, 258 U.S. 495, 515 (1922). The section at issue in this case, 7 U.S.C. § 192, makes it unlawful for "any packer or swine

contractor with respect to livestock, . . . or 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).[1]

The Act authorizes the Secretary of Agriculture to enforce section 192 against packers and swine contractors through administrative hearings. 7 U.S.C. § 193.[2] Either the Attorney General or a private litigant can also bring a lawsuit to enforce section 192, including with respect to live poultry dealers. 7 U.S.C. §§ 209, 224. The Act authorizes the Secretary to "make such rules, regulations, and orders as may be necessary to carry out" the statute. 7 U.S.C. § 228(a). Additionally, the 2008 Farm Bill directed the Secretary, within two years, to "promulgate regulations . . . to establish criteria that the Secretary will consider in determining . . . whether

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[1] Section 192 originally applied only to the livestock and meat packing industries. "Live poultry dealers" were added in 1935. *See* Pub. L. No. 74-272, 49 Stat. 648 (1935).

[2] The Secretary can enforce section 192(a) against live poultry dealers through administrative hearings to the extent they engage in an "unfair practice" by delaying or attempting to delay payments. *See* 7 U.S.C. §§ 228b-1, 228b-2.

an undue or unreasonable preference or advantage has occurred in violation of such Act." § 11006(1), 122 Stat. at 2120.

B. Regulatory Background

1. 2010 Notice of Proposed Rulemaking

In 2010, USDA proposed regulations that would, among other things, have provided further clarification of what conduct constitutes a violation of 7 U.S.C. § 192(a) and (b). 75 Fed. Reg. 35,338, 35,338 (June 22, 2010). Three components of the proposed rule are relevant here.

First, section 201.3(c) of the proposed rule would have codified the agency's position that "[c]onduct can be found to violate section [192](a) and/or (b) . . . without a finding of harm or likely harm to competition." 75 Fed. Reg. at 35,351. Although the text of section 192(a) and (b) contains no requirement of harm to competition, several courts of appeals have held that plaintiffs must demonstrate competitive injury or a likelihood thereof to establish a violation of that section. *Id.* at 35,340-41. The Secretary's long-standing position has been that, although an act's effect on competition may be relevant in some cases, *id.*, "[a] finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases," *id.* at 35,351.

Second, section 201.210 of the proposed rule provided examples of conduct that would constitute an "unfair . . . practice" under section 192(a). The rule

further provided that "[a]ny act that causes competitive injury or creates a likelihood of competitive injury" is an unfair practice. 75 Fed. Reg. at 35,351-52.

Third, section 201.211 of the proposed rule identified criteria to satisfy the requirement in the 2008 Farm Bill that the Secretary promulgate criteria for determining whether an undue preference has occurred in violation of section 192(b). § 11006(1), 122 Stat. at 2120; 75 Fed. Reg. at 75,343.

2. Fiscal Year 2012-2015 Appropriations Riders

In November 2011, Congress enacted an appropriations rider for fiscal year 2012 that prohibited the Secretary from expending funds "to publish a final or interim final rule in furtherance of, or otherwise implement" several provisions from the 2010 proposed rules, including sections 201.3(c), 201.210, and 201.211. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 552, 583 (2011). In December 2011, the Secretary finalized other provisions from the 2010 proposed rules that were not precluded by the appropriations rider. 76 Fed. Reg. 76,874, 76,875 (Dec. 9, 2011). In the course of doing so, USDA explained that some proposed provisions had "proved to be controversial," drawing over 61,000 comments, and that the agency had "reconsidered each of its proposed provisions." *Id.*

Congress continued to enact appropriations riders prohibiting further action on proposed sections 201.3(c), 201.210, and 201.211 each year through fiscal year

2015. 81 Fed. Reg. 92,566, 92,567 (Dec. 20, 2016) (Pet. App. 2). However, the appropriations bills for fiscal years 2016 and 2017 did not contain those restrictions. *Id.*

3. 2016 Interim Final Rule and Notice of Proposed Rulemaking

In December 2016, the Secretary promulgated the provision on harm to competition—now redesignated as section 201.3(a)—as an interim final rule. 81 Fed. Reg. at 92,594 (Pet. App. 29). USDA acknowledged that "[f]our courts of appeals have disagreed with USDA's interpretation . . . and have concluded . . . that plaintiffs could not prove their claims under sections [192](a) and/or (b) without proving harm to competition or likely harm to competition." *Id.* at 92,568 (Pet. App. 3). The agency explained, however, that "USDA continues to believe that its longstanding interpretation of the . . . Act is correct." *Id.* The agency noted that "[t]o the extent that these courts failed to defer to USDA's interpretation of the statute because that interpretation had not previously been enshrined in a regulation, this new regulation may constitute a material change in circumstances that warrants judicial reexamination of the issue." *Id.* Finally, USDA explained that it was promulgating section 201.3(a) as an interim final rule because of "the intervening six years" since it last conducted notice and comment and "the significant level of stakeholder interest." *Id.* at 92,570 (Pet. App. 5).

The Secretary simultaneously issued a notice of proposed rulemaking presenting revised proposals for sections 201.210 and 201.211. USDA explained that "[c]omments in opposition to proposed § 201.210"—which provided examples of unfair practices under the Act—"argued that the regulation was unclear, vague, and ambiguous," and that "[a]s a result of the comments, [the agency] has restructured and revised proposed § 201.210." 81 Fed. Reg. 92,703, 92,703-04 (Dec. 20, 2016) (Pet. App. 30-31). Among other changes, the revised proposal made clear that the listed examples constitute unfair practices "regardless of whether the conduct or action harms or is likely to harm competition." *Id.* at 92,722 (Pet. App. 49).

With respect to section 201.211—which established criteria for finding an undue preference, as required by the 2008 Farm Bill—USDA explained that commenters had criticized the regulation's "ambiguity and lack of clarity" and argued that the proposal "would have the unintended consequence of . . . eliminating alternative marketing arrangements" used in the livestock industry. 81 Fed. Reg. at 92,706 (Pet. App. 33). USDA rewrote the proposal, replacing the original criteria with six new criteria. *Id.* at 92,723 (Pet. App. 50).

The interim final rule at section 201.3(a) never took effect. USDA postponed its effective date shortly after its issuance. 82 Fed. Reg. 48,594, 48,594 (Oct. 18, 2017) (Pet. Add. 1). In April 2017, USDA postponed the effective date

further and issued a notice of proposed rulemaking seeking comments regarding four alternative dispositions of the rule—(1) allow it to take effect, (2) suspend it indefinitely, (3) delay it further, or (4) withdraw it. *Id.*

C. Agency Action Under Review

1. Withdrawal of Interim Final Rule at Section 201.3(a)

In October 2017, USDA withdrew the interim final rule at section 201.3(a) due to "serious legal and policy concerns related to its promulgation and implementation." 82 Fed. Reg. at 48,596 (Pet. Add. 3). USDA explained that it had not abandoned its position "that not all violations of the . . . Act require a showing of harm or likely harm to competition," and that it had "adhered to this interpretation of the . . . Act for decades." *Id.* However, the agency explained that "[t]here is good reason to believe that several of" the courts of appeals that had rejected USDA's interpretation "would continue to do so even if USDA's interpretation were codified in a final rule." *Id.* USDA explained "that at least two federal circuits"—the Fifth and the Eleventh—"are unlikely to defer to USDA's interpretation" because of circuit precedent that foreclosed such deference even if USDA codified its interpretation. *Id.* at 48,597 (Pet. Add. 4). The agency found that "[p]rotracted litigation to both interpret this regulation and defend it serves neither the interests of the livestock and poultry industries nor" the agency. *Id.* at 48,597, 48,598 (Pet. Add. 4, 5).

USDA also explained that the agency "believe[d] [the interim final rule] did not satisfy the [Administrative Procedure Act (APA)]'s notice and comment requirements at 5 U.S.C. [§] 553(b) and (c)." 82 Fed. Reg. at 48,598 (Pet. Add. 5). The agency cited circuit court precedent stating that "[a]lthough the [APA] does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite." *Id.* (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 (D.C. Cir. 1983)) (second alteration in original). The agency explained that "USDA is unwilling to assert" that the six-year-old notice-and-comment record "was still 'fresh.'" 82 Fed. Reg. at 48,599 (Pet. Add. 6). Instead, "[the agency] should have re-opened the comment period to refresh the rulemaking record or terminated the rulemaking record." *Id.*

2. Notice of No Further Action on Proposed Sections 201.210 and 201.211

USDA simultaneously published a notice that it would take no further action on sections 201.210 and 201.211 of the proposed rule. 82 Fed. Reg. 48,603, 48,603 (Oct. 18, 2017) (Pet. Add. 10). The agency explained that the proposed rule "closely relates to the interim final rule" at section 201.3(a) that USDA withdrew. *Id.* Proposed sections 201.210 and 201.211, consistent with the interim final rule, described conduct that could violate the Act without harm or likely harm to competition. *Id.* The proposed rule therefore "conflict[ed] with legal precedent in several Circuits" for the same reasons as the interim final rule and would inevitably

lead to protracted litigation to interpret and defend the rule, which would be in the interests of neither the livestock and poultry industries nor the agency. *Id.*

D. Petition for Review

Petitioners in this case are three poultry and cattle farmers located in the Eleventh Circuit and this Circuit, as well as a membership organization, one purpose of which is to "[a]dvocat[e] for effective regulation and enforcement by the federal government under the Packers and Stockyard[s] Act." Pet. Add. 33. Petitioners seek an order compelling the Secretary to issue the regulation required by the 2008 Farm Bill. Petitioners also challenge the Secretary's withdrawal of the interim final rule at section 201.3(a) and the Secretary's notice of no further action with respect to proposed section 201.210 and proposed section 201.211, contending that the Secretary's actions with respect to each of these three provisions are arbitrary and capricious under the APA, 5 U.S.C. § 706(2).

SUMMARY OF ARGUMENT

I. Petitioners first ask this Court to dictate USDA's timeline for complying with a statutory mandate to promulgate criteria for determining whether an undue preference has been given in violation of the Packers and Stockyards Act, 7 U.S.C. § 192(b). That argument rests on the mistaken premise that this Court is compelled to issue a mandatory injunction any time an agency misses a statutory deadline. This Court would issue such an order in this case pursuant to its

mandamus jurisdiction under the All Writs Act. Mandamus relief is discretionary and equitable, and it is appropriate only in extraordinary circumstances. The Supreme Court has made clear that the APA, on which petitioners rely, incorporates the same principles. *See Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

Equity counsels against granting relief in this case. Although Congress originally required USDA to promulgate the required rule within two years, it later barred further work on the rule through a series of appropriations riders, thereby leaving Congress's intended timeline unclear. Moreover, USDA completed significant work on the rule when not prohibited from doing so. Compelling the agency to expedite action on the rule would significantly impede other agency activities of higher priority, including its effort to meet an imminent congressional deadline for completing a bioengineered food labeling standard.

II. Petitioners also challenge as arbitrary and capricious the USDA's withdrawal of an interim final rule and two sections of a proposed rule. The interim final rule codified USDA's view that harm to competition is not always required under the Act's prohibitions on unfair practices, 7 U.S.C. § 192(a), and undue preferences, *id.* § 192(b). The two sections of the proposed rule would have further elaborated on the meaning of these two statutory provisions in light of USDA's interpretation. This Court should reject petitioners' challenge because

USDA's decisions fully satisfy the APA's requirements. USDA withdrew these provisions because precedent in some circuits foreclosed deference to USDA's interpretation, regardless of whether USDA codified that interpretation in a regulation. Had the rule gone into effect, the inevitable result would have been conflicting decisions as to the rule's validity that could have been resolved only by the Supreme Court.

STANDARD OF REVIEW

With respect to petitioners' request for a mandatory injunction directing USDA to issue the regulation required by the 2008 Farm Bill, a court may compel agency action on a judicially established timetable only if it concludes not only that the agency failed to take a discrete, required action, *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004), but also that it is appropriate to exercise the court's equitable discretion, *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984) (identifying six factors to guide inquiry). Such relief is "extraordinary" and requires "extraordinary circumstances to be present." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) (quoting *Community Nutrition Inst. v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985)).

With respect to plaintiffs' challenge to the withdrawal[3] of the interim final rule and the two sections of the proposed rule, this Court upholds agency action unless it is "arbitrary, capricious, . . . an abuse of discretion, or otherwise not in accordance with law." *See Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) (quoting 5 U.S.C. § 706(2)(A)). This standard "requires that [the Court] give 'agency decisions a high degree of deference.'" *Voyageurs Nat'l Park*, 381 F.3d at 763.

ARGUMENT

I. PETITIONER'S REQUEST TO COMPEL ISSUANCE OF A REGULATION SHOULD BE DENIED

A. The Petition Fails to Establish that Mandamus Relief Is Appropriate

1. Petitioners' Request to Compel Agency Action Is Properly Construed as a Mandamus Petition Under the All Writs Act

The 2008 Farm Bill required USDA to promulgate regulations, within two years, "to establish criteria that the Secretary will consider in determining . . . whether an undue or unreasonable preference or advantage has occurred in violation of" the Packers and Stockyards Act, 7 U.S.C. § 192(b). § 11006(1), 122 Stat. at 2120. USDA proposed such a rule—proposed section 201.211—in 2010.

[3] For the sake of brevity, this brief uses "withdrawal" to refer to both the agency's withdrawal of the interim final rule and its notice of no further action with respect to sections 201.210 and 201.211 of the proposed rule.

75 Fed. Reg. at 75,343. Congress then enacted the first of a series of appropriations riders that barred USDA from working on the rule for several years. 81 Fed. Reg. at 92,567 (Pet. App. 2). When those riders expired, USDA proposed a rewritten version of section 201.211, but it has since reconsidered the approach reflected in that proposal. 81 Fed. Reg. at 92,723 (Pet. App. 50). Petitioners contend that, because the original statutory deadline has passed, this Court has no choice but to compel the agency to issue the rule on a judicially dictated timeline.

That is plainly not the case. Petitioners style this claim for relief as an action, arising directly under the APA, to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1); Br. 32. However, petitioners identify no statute giving the courts of appeals jurisdiction over a standalone APA action of this type. Petitioners purport to invoke this Court's jurisdiction under 28 U.S.C. § 2342(2), which grants the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" "all *final orders* of the Secretary of Agriculture" under the Act, absent certain exceptions not implicated here. *Id.* (emphasis added). But petitioners' request to compel promulgation of a regulation does not seek review of a "final order"; "indeed, the lack of a final order is the very gravamen of the petitioners' complaint."

Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 75 (D.C. Cir. 1984) (*TRAC*).[4]

As a result, the proper basis for jurisdiction over petitioners' delay claim is not 28 U.S.C. § 2342, but rather the All Writs Act, 28 U.S.C. § 1651(a), which authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions."

As the D.C. Circuit's frequently cited decision in *TRAC* explains, "section 1651(a) empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction." 750 F.2d at 76. "Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails" to take action required by statute, a court of appeals may, by way of its mandamus power, review the agency's failure to act "in order to protect its future jurisdiction." *Id.*; *see also, e.g.*, *In re A Community Voice*, 878 F.3d 779, 783 (9th Cir. 2017) (citing *TRAC* for proposition that court of appeals' jurisdiction over unreasonable-delay claim is based on the All Writs Act); *Towns of Wellesley, Concord & Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (same); *In re Howard*, 570

[4] Nor can petitioners assert jurisdiction directly under the APA, which contains no grant of subject-matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977).

F.3d 752, 757 (6th Cir. 2009) (same); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1421 (11th Cir. 1993) (same).[5]

2. The Petition Does Not Warrant Exercise of This Court's Equitable Discretion

The facts of this case do not justify the exercise of this Court's equitable discretion to reorder agency priorities and dictate a timeline for USDA to promulgate the regulation required by the 2008 Farm Bill.

a. The Supreme Court has emphasized that even when the prerequisites for a writ of mandamus are met—that is, the party seeking the writ has demonstrated a "clear and indisputable" right to relief and the absence of an alternative remedy—"the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004). Moreover, because mandamus relief is "extraordinary," courts have required "extraordinary circumstances to be present before [they] will interfere with an ongoing agency process." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999). "[R]espect for the

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[5] This Court's jurisdiction is exclusive. "[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *TRAC*, 750 F.2d at 78-79.

By contrast, where "no statute restricts judicial review. . . to the Courts of Appeals, the district court ha[s] jurisdiction under 28 U.S.C. § 1331" to review claims of agency delay. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (citations omitted).

autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). Thus, even in exceptional cases of agency delay, the appropriate judicial role generally extends no further than to retain jurisdiction over a case and require periodic progress reports until the agency has completed its final action. *See United Mine Workers*, 190 F.3d at 556 (D.C. Cir. 1999) (in case where agency missed statutory deadline by eight years, retaining jurisdiction and requiring semi-annual progress reports from the Mine Safety and Health Administration until it issued final regulations); *TRAC*, 750 F.2d at 81 (retaining jurisdiction pending FCC's resolution of underlying issues).

This Court and most courts of appeals rely on a six-factor test, first outlined by the D.C. Circuit in *TRAC*, to guide their discretion in determining whether mandamus relief is appropriate in cases of agency delay. *See Irshad v. Johnson*, 754 F.3d 604, 607 (8th Cir. 2014).[6] Petitioners agree that, if the relief they seek is

[6] *See also, e.g.*, *Towns of Wellesley, Concord & Norwood*, 829 F.2d at 277 (First Circuit); *A Community Voice*, 878 F.3d at 784 (Ninth Circuit); *TRAC*, 750 F.2d at 80 (D.C. Circuit); *Martin v. O'Rourke*, 891 F.3d 1338, 1343 (Fed. Cir. 2018).

discretionary, the so-called *TRAC* factors should guide the Court's analysis. Br. 43.

TRAC explained:

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

TRAC, 750 F.2d at 80 (citations omitted).

b. In this case, the 2008 Farm Bill originally required USDA to promulgate, within two years, a regulation establishing criteria for finding an undue preference under the Packers and Stockyards Act, 7 U.S.C. § 192(b). § 11006(1), 122 Stat. at 2120. USDA proposed a regulation that would have complied with that requirement—proposed section 201.211—in 2010. 75 Fed. Reg. at 75,343. Shortly thereafter, Congress enacted an appropriations rider barring USDA from doing more work on the rule, Pub. L. No. 112-55, § 721, 125 Stat. at 583, and continued to enact similar riders through fiscal year 2015. 81 Fed. Reg. at 92,567 (Pet. App. 2). USDA then published a second, completely rewritten

proposal for section 201.211 in 2016. 81 Fed. Reg. at 92,723 (Pet. App. 50). The proposal built upon the interim final rule at section 201.3(a), which codified USDA's view that harm or likely harm to competition is not necessarily required to establish violations of 7 U.S.C. § 192(a) and (b). When USDA withdrew the interim final rule in 2017 after more fully assessing the likely judicial reception, *see infra* pp. 33-37, it also issued a notice of no further action on its second proposal for section 201.211, 82 Fed. Reg. at 48,603 (Pet. Add. 10).

c. The *TRAC* factors weigh against judicial intervention on these facts. Under the first and second factors, the Congressional actions relevant to the rule of reason include not only the original statutory deadline, but also subsequent Congressional enactments effectively directing the agency *not* to promulgate the originally required regulation. After USDA proposed a rule that would have complied with the statutory requirement, Congress prohibited USDA from expending funds "to publish a final or interim final rule in furtherance of, or otherwise implement," the proposed rule. Pub. L. No. 112-55, § 721, 125 Stat. at 583. By enacting this and subsequent riders, Congress provided a new and modified "indication of the speed with which it expects the agency to proceed." Although USDA could have finalized proposed section 201.211 not long after the original deadline, Congress plainly did not intend for USDA to do so. The appropriations riders therefore left Congress's expected "timetable" unclear. At

best, Congress indicated that USDA should act no *earlier* than October 1, 2015, when the last appropriations rider expired. Nor is it likely that Congress expected USDA to immediately finalize the very proposed rule it had until then been prohibited from implementing. Congress's apparent disapproval reinforced USDA's observation in 2011 that its proposed rules had "proved to be controversial," 76 Fed. Reg. at 76,875, and it was reasonable to expect that the agency would need time to reconsider its approach. Indeed, USDA published a completely rewritten version of proposed section 201.211 in 2016, just over a year after the expiration of the appropriations riders. 81 Fed. Reg. at 92,723 (Pet. App. 50). Petitioners' claim that USDA "is now almost eight years late," Br. 44, ignores these indications of Congressional intent, including the fact that Congress affirmatively prohibited compliance for almost four years.

d. The sixth factor weighs against intervention because the agency has engaged in neither "impropriety" nor "unreasonable delay." As the regulatory history shows, USDA has made significant efforts to comply with Congress's mandate. Its delay is due not to recalcitrance, but rather to the challenges the agency has confronted in developing an effective and appropriate set of criteria. USDA's first version of proposed section 201.211 raised concerns about vagueness and unintended consequences; commenters "asked for additional clarification about the language proposed and were concerned about the impacts of the

provision on marketing arrangements and other beneficial contractual agreements." 76 Fed. Reg. at 76,875. After the appropriations riders lapsed, USDA completely reworked the rule in an attempt to address these concerns, publishing a new proposal at the end of 2016. 81 Fed. Reg. at 92,723 (Pet. App. 50). As explained below, however, the agency has since reconsidered the regulatory strategy underlying that proposal—one which would have brought USDA into direct confrontation with several circuit courts—thus requiring the agency to reevaluate its approach. *See infra* pp. 33-37, 38-40.

Contrary to petitioners' assertion, the USDA has not "expressly stated that it has no intention of moving forward with a rulemaking to comply with the Farm Bill's directive." Br. 44, 45. Instead, USDA stated only that it would "take no further action *on the December 20, 2016, proposed rule*." 82 Fed. Reg. at 48,604 (Pet. Add. 11) (emphasis added). As noted, USDA's notice of no further action on proposed section 201.211 reflects its decision to reconsider the regulatory approach underlying the proposal.

e. The third and fifth factors concern the nature of the interests involved. The third factor weighs against intervention because the issue falls "in the sphere of economic regulation" rather than "human health and welfare." The required rule concerns the regulation of economic transactions between participants in the

supply chain for agricultural commodities, not topics directly touching on health and welfare, such as highway safety or health care.

The fifth factor similarly supports the agency because the "interests prejudiced by delay" are minimal. Those injured by an "undue or unreasonable preference or advantage," 7 U.S.C. § 192(b), already have the ability to pursue remedies under the Act as appropriate, *id.* §§ 193, 209, 224. The required rule would not grant such persons a new entitlement to relief, but would merely "establish criteria that the Secretary will consider in determining . . . whether an undue or unreasonable preference or advantage has occurred in violation of" section 192(b). It is unlikely that continuing in the interim to establish standards through adjudication, rather than through rulemaking, will substantially prejudice the interests of any affected parties.

f. The fourth factor counsels against intervention because "the effect of expediting delayed action on agency activities of a higher or competing priority" would be significant. The USDA component responsible for administering the Packers and Stockyards Act, the Agricultural Marketing Service (AMS), is currently finalizing the National Bioengineered Food Disclosure Standard (NBFDS), a significant new rule that would require mandatory disclosure of

information about bioengineered foods and ingredients.[7] Congress required USDA to complete the NBFDS within two years, and that period expires on July 29, 2018. 7 U.S.C. § 1639b(a)(1). USDA published a proposed rule on May 4, 2018, 83 Fed. Reg. 19,860, and is currently devoting significant rulemaking resources to finalizing that rule. Expediting action on the rule required by the 2008 Farm Bill would require USDA to transfer resources away from the NBFDS, jeopardizing USDA's ability to complete the latter rulemaking before or close to the statutory deadline. *Cf.* 1 Pierce, *supra*, § 7.4, at 595 ("An agency can require years of time and tens of thousands of person-hours to identify, analyze, and respond to all the criticisms and suggested alternatives contained in comments in a manner that a court is likely to consider adequate to avoid a judicial decision that the rule is arbitrary and capricious.").

In sum, all relevant considerations demonstrate that equitable principles do not support petitioners' request to compel agency action. This Court should accordingly decline petitioners' request to mandate a timeline for completion of USDA's policymaking process.

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[7] The responsible component used to be known as the Grain Inspection, Packers, and Stockyards Administration (GIPSA). In 2017, GIPSA was dissolved and this responsibility was transferred to AMS. *See* Office of the Secretary, United States Department of Agriculture, Secretary's Memorandum 1076-018, Improving Customer Service and Efficiency (Nov. 14, 2017), https://www.ocio.usda.gov/sites/default/files/docs/2012/SM%201076-18.pdf.

B. The Same Result Would Obtain Under Section 706(1) of the APA

Plaintiffs urge that the Court should consider their claim solely under section 706(1) of the APA. Br. 32-42. Even if they are correct, the result would remain the same: injunctive relief under section 706(1) is also discretionary and requires reference to the same equitable standards that govern mandamus relief under the All Writs Act.

1. Section 706(1) provides "authorization for courts to 'compel agency action unlawfully withheld.'" *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis omitted). As with writs of mandamus, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64 (emphasis omitted). "[W]hen 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." *Id.* at 65 (emphasis added).

The Supreme Court explained in *Southern Utah* that the APA "carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a)." 542 U.S. at 63 (emphasis omitted). That interpretation is consistent with the near-

contemporaneous understanding of the statute in the *Attorney General's Manual on the Administrative Procedure Act* (1947) (*Manual*), https://go.usa.gov/xQqby. The *Manual*, which the Supreme Court has "often found persuasive," *Southern Utah*, 542 U.S. at 63, confirms that the APA provision "authorizing a reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed' . . . appears to be a particularized restatement of existing judicial practice" and "was apparently intended to codify these judicial functions." *Manual* 108.

The Supreme Court's conclusion in *Southern Utah* is grounded in the text of the APA, which defines the form of proceeding by reference to existing causes of action, and nowhere purports to create a new form that dispenses with equitable discretion. The APA provides that, where there is no special statutory review proceeding, the "form of proceeding" is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction." 5 U.S.C. § 703.

Longstanding Supreme Court precedent further confirms that, by codifying existing practice, the APA preserved the equitable and discretionary nature of orders to compel agency action. The Supreme Court has long instructed that the APA's "injunctive and declaratory judgment remedies are discretionary." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Because these "remedies are equitable in nature, . . . equitable defenses may be interposed." *Id.* at 155. Thus,

although the APA provides that "[t]he reviewing court *shall* . . . (2) hold unlawful and set aside agency action . . . found to be" arbitrary and capricious, 5 U.S.C. § 706(2) (emphasis added), the Supreme Court has concluded that a court is not required to do so when equitable considerations counsel against judicial action, *Abbott Labs.*, 387 U.S. at 155. That reasoning also applies to section 706(1), which shares the same introductory clause: "[t]he reviewing court shall . . . (1) compel agency action unlawfully withheld or unreasonably delayed." *See also* 3 Richard J. Pierce, Jr., *Administrative Law Treatise* § 18.4, at 1701 (5th ed. 2010) ("Declaratory and injunctive relief are equitable remedies . . . . available in the discretion of the court.").

This reading is consistent with the Supreme Court's admonition that it "do[es] not lightly assume that Congress has intended to depart from established principles" governing equitable discretion regarding the issuance of an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) ("As this Court has long recognized, 'a major departure from the long tradition of equity

practice should not be lightly implied.'") (quoting *Romero-Barcelo*, 456 U.S. at 320).

Injunctive relief to "compel agency action unlawfully withheld" under section 706(1) therefore requires courts to exercise the same equitable discretion that governs mandamus relief. *See Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (concluding in section 706(1) case that "a finding that delay is unreasonable does not, alone, justify judicial intervention" (quoting *Barr Labs.*, 930 F.2d at 74)); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002) (stating that, under section 706(1), "a statutory violation does not always lead to the automatic issuance of an injunction," but concluding that relief was mandatory under the Endangered Species Act).

2. Petitioners object to this reading on the ground that it renders section 706(1) superfluous, Br. 41, but that argument misunderstands section 706's nature and purpose. Section 706(1) is not "superfluous" because it provides remedies already available under the All Writs Act. Because Congress specifically intended section 706 as a "restatement of existing judicial practice" under the All Writs Act, *Manual* 108, overlap between the two statutes was an intended result, not something courts should seek to avoid through judicial construction. For the same reason, petitioners miss the point when they argue that the All Writs Act is irrelevant because it applies only in the absence of other remedies, whereas the

APA authorizes the relief at issue here. Because the APA codified existing practice under the All Writs Act, the All Writs Acts informs the interpretation of the APA even if the APA now provides an independent basis for the same relief.[8]

3. Petitioners' textual argument rests entirely on the term "shall" in section 706, which they contend "creates an obligation *impervious to judicial discretion*." Br. 37 (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). The Supreme Court's decision in *Abbott Laboratories* squarely contradicts that position by concluding that section 706's remedies are "discretionary." 387 U.S. at 148. The fact that the petitioners in *Abbott Laboratories* asked to set aside agency action as contrary to law, rather than to compel agency action unlawfully withheld, does not diminish the decision's

[8] Petitioners also object to the D.C. Circuit's supposed interpretation of the term "herein" in 5 U.S.C. § 702, but this Court need not grapple with that issue. Section 702 provides that a person aggrieved by agency action "is entitled to judicial review thereof" and states that "[n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." Petitioners contend that the term "herein" in that sentence refers to section 702 itself, rather than the APA as a whole. Br. 40. As noted above, the Supreme Court has instructed that the section 706 "remedies are discretionary" and "equitable in nature," without any need to rely on that provision of section 702. *Abbott Labs.*, 387 U.S. at 148, 155. Moreover, it is unclear if the D.C. Circuit cases cited by petitioners even disagree with petitioners' interpretation of "herein." *TRAC* does not even cite section 702, let alone rely on it. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985), states that the limitation petitioners cite applies to "[the APA's] judicial review provision"—that is, section 702. Either way, the interpretation of that term has little relevance to the ultimate question.

relevance.[9] Section 706 contains two subsections identifying specific forms of relief, joined by a shared introductory clause:

> The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, . . . or otherwise not in accordance with law.

5 U.S.C. § 706. The word "shall" appears in the introductory clause and must therefore have the same meaning for both subsections, and the Supreme Court's conclusion that injunctive relief is "equitable" and "discretionary" logically also applies to both types of claims. Petitioners make no attempt to square their position with *Abbott Laboratories*, and indeed do not even cite that decision.

Petitioners' remaining arguments likewise fail. Petitioners point to language in *Southern Utah* stating that failure to meet a statutory deadline "would have supported a judicial decree under the APA." Br. 33 (quoting *Southern Utah*, 542 U.S. at 65). As noted above, however, *Southern Utah* expressly recognized that the APA "carried forward the traditional practice" of judicial review, "principally writs of mandamus under the All Writs Act." 542 U.S. at 63. Under that practice,

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[9] The petitioners in *Abbott Laboratories* argued that an agency regulation was contrary to a federal statute, thus implicating section 706's statement that a court "shall . . . (2) hold unlawful and set aside agency action . . . found to be . . . not in accordance with law." 387 U.S. at 149; *see also id.* (concluding that regulation was "final agency action" within the meaning of the APA).

Southern Utah explained, "a court *can* compel the agency to act" if "an agency is compelled by law to act within a certain time period." *Id.* at 65 (emphasis added). Petitioners' quotation merely restates the proposition that failure to meet a statutory deadline "would . . . *support*[]" a judicial decree, in the sense that such a violation would be a basis for mandamus; it does not hold that such relief is mandatory. *Id.* (emphasis added).

The sole circuit court decision petitioners cite in support of their argument is the Tenth Circuit's opinion in *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). But *Forest Guardians*—whose holding does not appear to have been adopted by any other court of appeals—was issued before *Southern Utah* and is inconsistent with the principles the Supreme Court reiterated in that decision. Moreover, *Forest Guardians* does not cite the Supreme Court's decision in *Abbott Laboratories*, let alone explain how *Forest Guardians*'s conclusion that the APA "'restrict[ed] the court's jurisdiction in equity' by making injunctive relief mandatory," *id.* at 1187, is consistent with *Abbott Laboratories*'s conclusion that "[t]he injunctive . . . remed[y] . . . [is] discretionary" and "equitable in nature." 387 U.S. at 148, 155.

4. Petitioners agree that, if relief under section 706(1) is discretionary, the *TRAC* factors guide the exercise of that discretion. Br. 43. As discussed, those

factors counsel against imposition of a judicial timetable in this case. *See supra* pp. 16-23.

II. USDA'S DECISIONS TO WITHDRAW THE INTERIM FINAL RULE AND PROPOSED RULE WERE NOT ARBITRARY OR CAPRICIOUS

Petitioners also assert a separate set of claims in which they contend that three USDA actions should be set aside as arbitrary and capricious under the APA. 5 U.S.C. § 706(2). First, petitioners challenge USDA's withdrawal of the interim final rule at section 201.3(a), which, had it gone into effect, would have codified the agency's position that "[c]ertain conduct or action can be found to violate sections [192](a) and/or (b) of the Act without a finding of harm or likely harm to competition." 81 Fed. Reg. at 92,594 (Pet. App. 29). Second, petitioners challenge USDA's notice of no further action with respect to section 201.210 of the December 2016 proposed rule, which if enacted would have provided examples of unfair practices that violate section 192(a) of the Act in light of the interpretation codified in the interim final rule. Third, petitioners challenge USDA's notice of no further action with respect to section 201.211 of the proposed rule, which if enacted would have specified criteria for determining whether an undue preference

has occurred in violation of section 192(b) of the Act, again in light of the interim final rule. All three claims lack merit.[10]

A. The Scope of Arbitrary-and-Capricious Review of the Withdrawal of a Rule Is Narrow

"The scope of review under the 'arbitrary and capricious' standard is narrow . . . ." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The standard requires only that the agency "examine the relevant data and articulate a satisfactory explanation for its action." *Id.* Thus, "[i]f an agency's determination is supportable on any rational basis, we must

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[10] Petitioners' three arbitrary-and-capricious claims are distinct and must stand or fall on their own merits. However, for the sake of brevity, the discussion below combines arguments where they are common to more than one of the three decisions.

Petitioners' arbitrary-and-capricious claims are also separate from their request to compel agency action. If petitioners prevail on their claim that the notice of no further action on proposed section 201.211 was "arbitrary and capricious under the APA" because the Secretary "has not provided sufficient reasons for" the decision, Br. 45, 47, the appropriate remedy, if any, is to set aside that notice or to remand for further explanation, not to compel the agency to promulgate a regulation complying with the 2008 Farm Bill. Conversely, the relief petitioners seek with respect to their "agency action unlawfully withheld" claim is an order "compel[ling] the Department to comply" with the 2008 Farm Bill, Br. 45, not an order directing the Secretary to take any particular action with respect to proposed section 201.211. Indeed, petitioners concede—as they must—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." *Southern Utah*, 542 U.S. at 65; Br. 33.

uphold it." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004).

The same standard applies when an agency changes its policy. The Supreme Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), explained that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." The Court rejected "a requirement that all agency change be subjected to more searching review." *Id.* at 514.

Fox Television further explained that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." 556 U.S. at 515. "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which [a] conscious change of course adequately indicates." *Id.* The agency should "display awareness that it *is* changing position" and cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.* (citation omitted).

B. USDA's Withdrawal of Section 201.3(a) Was Not Arbitrary or Capricious

1. In this case, USDA's explanation for withdrawing the interim final rule at section 201.3(a)—which codified the agency's position that harm or likely harm to competition is not necessarily required to establish a violation of section

192(a) and (b) of the Act—fully satisfies the *Fox Television* standard. The agency's principal rationale for withdrawing the rule was that some of the "courts of appeals have held that the text of the . . . Act unambiguously forecloses USDA's longstanding interpretation," precluding deference to that interpretation. 82 Fed. Reg. at 48,598 (Pet. Add. 5). Allowing the rule to go into effect would inevitably have brought the agency into conflict with those circuits, *id.* at 48,597 (Pet. Add. 4), resulting in a "legal patchwork" in which some circuits, but not others, struck down section 201.3(a) as unlawful, *id.* at 48,598 (Pet. Add. 5).

This rationale was reasonable and more than adequate to support USDA's decision to withdraw the rule. Precedent in at least two circuits indicates that those courts of appeals will not defer to the Secretary's interpretation on this issue, even if codified in a regulation. The agency almost certainly would not have received deference in the Eleventh Circuit, which held in *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005), that "[b]ecause Congress plainly intended to prohibit 'only those unfair, discriminatory or deceptive practices adversely affecting competition,' a contrary interpretation of Section [192](a) deserves no deference." (Citation omitted). *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the

unambiguous terms of the statute and thus leaves no room for agency discretion.'"); 82 Fed. Reg. at 48,596 (Pet. Add. 3). The Fifth Circuit was also extremely unlikely to defer to the agency's interpretation, for a slightly different reason; that Court held in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009) (en banc), that deference was "unwarranted" because "Congress has delegated [the agency] no authority to change the meaning the courts have given to the statutory terms." *See also London*, 410 F.3d at 1304 ("The [Act] does not delegate authority to the Secretary to adjudicate alleged violations of Section [192] by live poultry dealers. Congress left that task exclusively to the federal courts. The absence of such delegation compels courts to afford no *Chevron* deference to the Secretary's construction of Section [192](a)." (Citation omitted)).

The agency's original decision issuing the interim final rule did not fully address these concerns. At the time, the agency "acknowledged that multiple federal circuit courts had held," contrary to the agency's long-standing interpretation, "that harm to competition is required to prove violations of 7 U.S.C. [§] 192(a) and (b)." 82 Fed. Reg. at 48,596 (Pet. Add. 3). The agency suggested that codifying the agency's interpretation would prompt those circuits to reconsider their precedent and defer to the agency's position. 81 Fed. Reg. at 92,568, 92,570 (Pet. App. 3, 5). The agency did not distinguish, however, between those circuits in which precedent would allow a newly-codified interpretation to trump contrary

case law, and those in which precedent foreclosed that possibility. *Id.* Nor did the agency discuss the specific Fifth and Eleventh Circuit holdings that would have precluded deference.

2. Petitioners dispute the interpretation of *London* and *Wheeler*, but these concerns are irrelevant to the ultimate point. Petitioners contend that it was inappropriate for those courts to rely on extratextual sources if the Act is unambiguous, and that *Wheeler* noted ambiguity in some of the statutory terms. Br. 54. The essential point, however, is that these circuits rejected deference to the agency's interpretation in holdings that leave no room for altering the result by simply codifying the rejected interpretation. *London* held that because Congress's intent was plain, "a contrary interpretation of Section [192](a) deserves no deference," 410 F.3d at 1304, and *Wheeler* held that USDA had "no authority to change the meaning the courts have given to the statutory terms," 591 F.3d at 362. USDA agrees with petitioners that these cases were wrongly decided, but that does not diminish the force of the agency's conclusion that these decisions would result in a patchwork of decisions and protracted litigation regarding the rule's validity.

Petitioners also contend that near-certain losses in two circuits "does not justify abandoning an effort that inevitably aimed for the Supreme Court." Br. 55. But nothing in USDA's explanation of the interim final rule suggested that USDA expected or intended to litigate all the way to the Supreme Court. To the contrary,

the agency stated that the new rule "provides sufficient clarity to obtain deference from the courts," 81 Fed. Reg. at 92,571 (Pet. App. 6), and suggested that codification would "constitute a material change in circumstances that warrants judicial reexamination of the issue," *id.* at 92,568 (Pet. App. 3). As support, the agency cited a Tenth Circuit opinion suggesting that the court would defer to USDA if it promulgated a regulation. *Id.* at 92,570 (Pet. App. 5) (citing *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007)). In any event, whatever USDA's original expectations were, it was free to reconsider the wisdom of a regulatory approach that required confrontation with two circuit courts and eventual resort to the Supreme Court.

3. USDA also noted an additional reason for withdrawing the interim final rule, observing that the agency should have conducted a new notice-and-comment period in light of the six-year delay between the initial comment period and the rule's promulgation. 82 Fed. Reg. at 48,598-99 (Pet. Add. 5-6). Generally, whether refreshing the record is necessary is "entrusted to agency discretion" in the first instance, *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 561 F.2d 293, 307 (D.C. Cir. 1977), and the agency is responsible for determining whether to assert exceptions to the APA's notice-and-comment requirement. The agency's determination that it could not defend the "freshness" of the record against allegations of staleness is therefore entitled to weight, and it further supports the

agency's decision to withdraw the interim final rule. *Cf. International Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 44 (D.C. Cir. 2004) (stating in case where agency abandoned rulemaking that "staleness of the record . . . is reason enough for an agency to hesitate before promulgating a proposed rule," but noting that before promulgation it is more reasonable to "supplement the record rather than terminate the docket"); *Mobil Oil Corp. v. U.S. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994) (stating in case where agency sought to repromulgate rule previously vacated by court that "[a]lthough the Administrative Procedure Act does not establish a 'useful life' for a notice and comment record, clearly the life of such a record is not infinite").

C. USDA's Decisions to Take No Further Action on Proposed Sections 201.210 and 201.211 Were Not Arbitrary or Capricious

USDA's decisions to take no further action on sections 201.210 and 201.211 of its proposed rule are subject to even more deferential review.[11] Courts "give more deference to an agency's decision to withdraw a proposed rule than . . . to its decision to promulgate a new rule or to rescind an existing one." *International Union*, 358 F.3d at 43. "The circumscribed scope of this review is dictated by both

[11] The D.C. Circuit has held that "discretionary decisions not to adopt rules are reviewable where, as here, the agency has in fact held a rulemaking proceeding and compiled a record narrowly focused on the particular rules suggested but not adopted." *National Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1047 (D.C. Cir. 1979).

the nature of the administrative proceeding (informal rulemaking) and by the nature of the ultimate decision (not to promulgate rules)." *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983). Publishing a proposed rule does "not obligate [the agency] to adopt that rule (or, for that matter, any rule)," although "the agency '[i]s not free to terminate the rulemaking for no reason whatsoever.'" *International* Union, 358 F.3d at 43-44.

Here, the agency's notice of no further action fully satisfies this deferential standard. USDA explained that proposed sections 201.210 and 201.211 "closely relate[d] to the interim final rule" at section 201.3(a). 82 Fed. Reg. at 48,603 (Pet. Add. 10). Specifically, "proposed 9 CFR 201.210(b) and 201.211 give examples of conduct that does not require likelihood of harm to competition to violate 7 U.S.C. [§] 192(a) and (b)." *Id*; *see* 81 Fed. Reg. at 92,722 (Pet. App. 49) (proposed section 201.210(b) providing an "illustrative list of conduct" violating the Act "regardless of whether the conduct or action harms or is likely to harm competition); 81 Fed. Reg. at 92,723 (Pet. App. 50) (proposed section 201.211 listing criteria, including favored treatment "on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status," with harm to competition as only the last of six factors). Because the proposed rule refined, and was predicated upon, the statutory interpretation codified in the interim final rule at section 201.3(a), it also implicated the principal

concern that led to that rule's withdrawal: the proposed rule was likely to generate "[p]rotracted litigation to both interpret this regulation and defend it," due to adverse precedent not fully addressed in the notice of proposed rulemaking. 82 Fed. Reg. at 48,603 (Pet. Add. 10).

USDA also noted that commenters criticized the rule for "vague terms and phrases" and argued that the rule contained "ambiguity regarding the conduct or action that would be permitted or prohibited." 82 Fed. Reg. at 48,603 (Pet. Add. 10). USDA further explained that "the prescriptions of the proposed rule could have the unintended consequence of preventing future market innovations," and that the agency intended to continue "approach[ing] the elimination of specific unfair and deceptive practices on a case-by-case basis." *Id.* at 48,604 (Pet. Add. 11). Petitioners misconstrue the latter statement as indicating that USDA would defy Congress's directive to specify criteria the Secretary would use in evaluating undue preferences under 7 U.S.C. § 192(b). To the contrary, the reference to "specific unfair and deceptive practices," *id.*, makes clear that the agency was referring to section 192(a), which prohibits "any unfair . . . or deceptive practice"—and was not addressed in the 2008 Farm Bill's mandate—rather than section 192(b), which prohibits "any undue or unreasonable preference or advantage."

D. Petitioners' Allegations of an Unexplained Reversal Are Unfounded

Petitioners' principal argument in support of their arbitrary-and-capricious claims is that the decisions at issue result from an unexplained shift in USDA's "desired policy outcome," from wanting "more private enforcement of the Act" to wanting less. Br. 50. Petitioners allege that in promulgating and proposing the rules at issue, USDA "trumpeted the benefits . . . of making it easier for farmers" to obtain remedies under the Act, but adopted the "opposite perspective" in withdrawing them by concluding that "less litigation is better." Br. 47. Those contentions find no support in the agency's decisions and misunderstand the agency's actual rationale.

As explained above, USDA withdrew the rules at issue because it reasonably concluded that certain courts of appeals would reject them as foreclosed by circuit precedent, causing them to be enjoined and creating a circuit conflict as to their validity. *See supra* pp. 33-37. The agency's original decision never grappled with this possibility because it assumed that courts would defer to the agency's interpretation once codified in the interim final rule, without considering whether circuit precedent would foreclose deference under *Brand X* or for other reasons.

The agency's reasonable decision not to continue down this path after an assessment of the likely judicial response does not constitute an unexplained reversal. Contrary to petitioners' assertion, USDA did not arbitrarily change its

view as to what types of costs and benefits the rules might potentially produce; rather, it reconsidered the degree to which they would actually accrue.[12] The agency explained that its original expectation of benefits from the interim final rule at section 201.3(a) was likely overstated because its "estimates were based on the assumption that all courts would enforce the [interim final rule], ignoring the case law to the contrary." 82 Fed. Reg. at 48,601 (Pet. Add. 8). Likewise, the agency's original decision failed to fully account for the cost of protracted litigation "to not only interpret [the] regulation, but also to uphold it" in light of hostile circuit precedent. *Id.*; *see also* 82 Fed. Reg. at 48,603 (Pet. Add. 10) ("Protracted litigation to both interpret this regulation and defend it serves neither the interests of the livestock and poultry industries nor GIPSA."). Nor does this reference to litigation costs reflect a sudden denigration of the value of private enforcement of the Act. To the contrary, the agency was referring not to the costs associated with private enforcement actions more generally, whether increased or not, but rather to

[12] In both promulgating and withdrawing section 201.3(a), USDA recognized that section 201.3(a) had the potential "qualitative benefit of . . . broader protection and fair treatment for livestock producers, swine production contract growers, and poultry growers, which may lead to more equitable contracts." 82 Fed. Reg. at 48,600 (Pet. Add. 7); *see* 81 Fed. Reg. at 92,587 (Pet. App. 22). Likewise, at both times, USDA recognized that "it is difficult to predict" how the poultry and livestock "industries will respond," and that the rule could have high costs if it caused those industries to "respond by reducing the use of [alternative marketing arrangements] and restricting their use of incentive pay." 81 Fed. Reg. at 92,586 (Pet. App. 21); *see* 82 Fed. Reg. at 48,600 (Pet. Add. 7).

costs specifically occasioned by the judicial response to the new rule—that is, the cost of litigation to interpret and defend the regulations. 82 Fed. Reg. at 48,601 (Pet. Add. 8); 82 Fed. Reg. at 48,603 (Pet. Add. 10).

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **10,169** words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

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WEILI J. SHAW

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Weili J. Shaw
WEILI J. SHAW