

# Tyson and Leviathan: USDA Rulemaking and the PSA Harm to Competition Requirement

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*Facing concentration in meatpacking, farmers and ranchers are making increasingly urgent calls for protection from practices they claim make it difficult for them to earn a living. Among the statutes they have turned to for recourse is the Packers and Stockyards Act, a 1921 law that prohibits meatpackers from engaging in unfair, deceptive, or unjustly discriminatory practices. Courts, however, have made PSA cases more difficult to win by requiring that plaintiffs prove “harm to competition” to bring a successful case. Recently, the USDA has intervened in this debate, alternately supporting each side of the harm to competition question in controversial rulemakings, and it is now planning to once again propose a rule saying the PSA does not require harm to competition. This Comment surveys the USDA fight over the harm to competition requirement, and assesses the consequences of rulemaking for the harm to competition requirement under Chevron and the administrative deference regime that may succeed it. It argues that the USDA’s view of the harm to competition requirement, if the agency successfully embodies it in a rule, should receive deference.*

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## I. INTRODUCTION

At the intersection of agribusiness regulation and antitrust law, a controversy has been percolating for the past fifteen years over the proper interpretation of the Packers and Stockyards Act (PSA). The PSA prohibits meatpackers and live poultry dealers from using any “unfair, unjustly discriminatory, or deceptive practice or device,”<sup>1</sup> and from giving any “undue or unreasonable preference or advantage” to any grower.<sup>2</sup> The US Department of Agriculture is the primary regulator tasked with enforcing the law, but farmers can also bring private actions.<sup>3</sup> Interpreting the PSA has bitterly divided the Fifth Circuit Court of Appeals, prompted riders in four Congressional appropriations bills and given rise to seesawing USDA rulemaking.<sup>4</sup> The question over which courts, regulators, and Congress are divided is simple: must a plaintiff prove harm to competition or likely harm to competition to prove a violation of the PSA? Put more simply: is the PSA a farm-specific antitrust law?

When the Eighth Circuit heard oral argument in a challenge to the Trump Administration’s new PSA regulation, farmers protested the harm to competition requirement outside the St. Louis courthouse.<sup>5</sup> The public interest in this question of statutory interpretation is the result of farmers’ experiences litigating the PSA under the harm to competition requirement.<sup>6</sup> This requirement demands that farmers present economic evidence regarding competitive effects when seeking to challenge a meatpacker practice that hurts their ability to survive as a small farm or that they

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<sup>1</sup> 7 U.S.C. § 192(a).

<sup>2</sup> 7 U.S.C. § 192(b).

<sup>3</sup> Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 2003 ARK. L. NOTES 35, 46 (2003).

<sup>4</sup> *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); see *Org. for Competitive Mkts. v. U.S. Dep’t of Agric.*, 912 F.3d 455, 457–58 (8th Cir. 2018).

<sup>5</sup> Joe Harris, *Farmers Press Eighth Circuit to Clear Regulatory Hurdle*, COURTHOUSE NEWS SERV. (Sept. 26, 2018), <https://perma.cc/G34M-E93K>.

<sup>6</sup> See *id.*

consider “unjustly discriminatory” on its face.<sup>7</sup> The requirement makes it very difficult for plaintiffs to challenge practices they argue are unfair or discriminatory but that do not have a clear effect on consumer prices—like retaliating against growers for their participation in advocacy organizations;<sup>8</sup> administering a “tournament system,” in which a grower’s pay is decreased if his or her output is below the regional median;<sup>9</sup> or buying cattle using marketing agreements that tie prices to a thin cash market, thus reducing grower compensation.<sup>10</sup>

The fight over the PSA has intensified as the meat industry has consolidated dramatically in the past 50 years.<sup>11</sup> Market share of the top four beef-packing firms has risen from 25 percent in 1977 to 82 percent today; from 35 percent to 54 percent in poultry processing, and from 33 percent to 66 percent in hog processing.<sup>12</sup> At the same time, ranchers, pig and chicken growers, and farmers across markets, are collecting a diminishing share of the money consumers spend on food.<sup>13</sup> Farmers and ranchers have become increasingly desperate and their pleas for help more urgent.<sup>14</sup> At a rally in Omaha to “Stop the Stealin’,” cattle market analyst Corbitt Wall, a former USDA employee, told the crowd of cattlemen that they are “at the mercy of the packers” and need regulation to protect them.<sup>15</sup> One of the goals of the Omaha rally was to convince the USDA to make a rule saying the PSA does not require harm to competition.<sup>16</sup>

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<sup>7</sup> See Christopher M. Bass, *More Than a Mirror: The Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement*, 12 DRAKE J. AGRIC. L. 423, 426–27 (2007).

<sup>8</sup> See *Triple R Ranch, LLC v. Pilgrim’s Pride Corp.*, 456 F. Supp. 3d 775, 778 (N.D.W. Va. 2019).

<sup>9</sup> See *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1223 (10th Cir. 2007).

<sup>10</sup> See *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1281 (11th Cir. 2005).

<sup>11</sup> See Brian Deese et al., *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, WHITE HOUSE BLOG (Sept. 8, 2021), <https://perma.cc/X79S-GXVN>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see Patrick Canning, *A Revised and Expanded Food Dollar Series*, U.S. DEP’T OF AGRIC., at 1 (2011), <https://perma.cc/ZF79-P6W4> (finding that the farmer share of the consumer food dollar decreased steadily between 1970 and 2010); see also Letter from Tammy Baldwin, Senator, U.S. Senate & Joshua Hawley, Senator, U.S. Senate, to Fed. Trade Comm’n (Apr. 29, 2020), <https://perma.cc/WVB5-VBFE>.

<sup>14</sup> See Letter from Senators Tammy Baldwin and Joshua Hawley, *supra* note 13; see also Peter S. Goodman, *Record Beef Prices, but Ranchers Aren’t Cashing In*, N.Y. TIMES (Dec. 27, 2021), <https://perma.cc/ED6V-AVYS>.

<sup>15</sup> Greg Henderson, *Omaha Rally Seeks Trump’s Attention, Perdue’s Firing*, DROVERS BLOG (Oct. 2, 2019), <https://perma.cc/FRR8-TCWV>.

<sup>16</sup> *Id.*

In 2016, the USDA published an interim rule that would have done that, but the rule was repealed after Secretary of Agriculture Sonny Perdue took office.<sup>17</sup> Now, once again, the USDA plans to enact a rule expressing its view that a plaintiff need not prove harm to competition to succeed on a PSA claim.<sup>18</sup> The bitter and protracted nature of the fight over USDA rulemaking poses something of a puzzle. The only court to consider the harm to competition question *en banc* concluded that the language of the statute is clear, so the agency's interpretation would receive no deference.<sup>19</sup> Yet the fight over rulemaking suggests a PSA harm to competition rule would influence courts' interpretation of the statute.

I offer three reasons why the USDA harm to competition rulemaking would be consequential.

First, a USDA rule on harm to competition is a better candidate for deference than a view on the issue announced in adjudication or put forward in an *amicus* brief, which is what the courts have confronted previously. A USDA rule would require fresh analysis and would be more likely to receive deference than other categories of agency action.

Second, the influential Seventh Circuit cases in which the courts have rebuked the USDA, disagreeing with the interpretation of the PSA it applied in adjudicative proceedings, did not narrow the scope of the PSA to require harm to competition. The Seventh Circuit imposed such a requirement only where the plaintiff claimed competitive harm or when the USDA sought to regulate packer relations with distributors (sell-side PSA cases) rather than farmers.<sup>20</sup> To date, the circuit courts have imposed the express harm to competition requirement in private actions, but not in a USDA regulatory action;<sup>21</sup> that is, these courts have not ruled *against* the USDA to impose the harm to competition requirement.

Third, the harm to competition requirement is more unsettled than its proponents have acknowledged. In 2009, the Sixth

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<sup>17</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017) (withdrawing interim rule published Dec. 20, 2016).

<sup>18</sup> Press Release, U.S. Dep't of Agric., USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act (June 11, 2021), <https://perma.cc/2YEA-7LBU>.

<sup>19</sup> *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009) (*en banc*).

<sup>20</sup> *See infra* Section V.

<sup>21</sup> *Wheeler*, 591 F.3d 355 (private action brought by chicken grower); *Terry v. Tyson Farms*, 604 F.3d 272 (6th Cir. 2010) (private action brought by poultry grower); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007) (private action brought by chicken grower); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005) (private action brought by cattle producer).

Circuit saw a “tidal wave” of support for the requirement.<sup>22</sup> But today, the waters are choppy. In the Fourth and Eighth Circuits, which include some of the largest farm-output states, precedent for it is equivocal, and some district courts have squarely rejected it.<sup>23</sup>

The importance of USDA rulemaking for farmers’ efforts to enforce the PSA illustrates the significance of the USDA generally to the effective operation of agriculture regulations. In their recent book defending the administrative state, *Law and Leviathan*, Cass Sunstein and Adrian Vermeule argue that critics of administrative law attend to the risks of federal government action but largely ignore the risks of inaction, including harmful uses of private power.<sup>24</sup> Our agricultural economy in 2022 has acquainted us with some of the risks of inaction: populist anger,<sup>25</sup> risks to public safety,<sup>26</sup> and less redundancy and resiliency.<sup>27</sup> As the only entity that can face down Tyson and the other meatpackers on whom farmers and consumers depend, the USDA is farmers’ best hope.

## II. THE *WHEELER* INTERPRETATION

Of appellate courts to consider the harm to competition requirement, only the Fifth Circuit has decided the issue *en banc*.<sup>28</sup> Its decision in that case, *Wheeler v. Pilgrim’s Pride Corp.*,<sup>29</sup> endorsed the harm to competition requirement. The vote was nine to seven, with Judge Emilio Garza, who wrote the initial Fifth Circuit decision saying there was no harm to competition requirement,<sup>30</sup> dissenting.<sup>31</sup> The Fifth Circuit opinion is the canonical view among those endorsing the harm to competition

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<sup>22</sup> Terry v. Tyson Farms, 604 F.3d 272, 277 (6th Cir. 2010) (“The tide [of decisions imposing a harm to competition requirement] has now become a tidal wave.”).

<sup>23</sup> See *id.*

<sup>24</sup> ADRIAN VERMEULE & CASS SUNSTEIN, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 34 (2020).

<sup>25</sup> See Henderson, *supra* note 15.

<sup>26</sup> See Goodman, *supra* note 14.

<sup>27</sup> Reliance on a small number of meatpackers can create supply chain vulnerabilities. This risk was apparent in the summer of 2021, when meatpacker JBS was the victim of a cyberattack that briefly took its plants offline. Tom Polansek & Nandita Bose, *JBS Meat Plants Reopen as White House Blames Russia-Linked Group Over Hack*, REUTERS (June 2, 2021), <https://perma.cc/6CCD-P3T8>.

<sup>28</sup> Wheeler v. Pilgrim’s Pride Corp., 591 F.3d 355 (5th Cir. 2009) (en banc).

<sup>29</sup> *Id.*

<sup>30</sup> Wheeler v. Pilgrim’s Pride Corp., 536 F.3d 455 (5th Cir. 2008), *rev’d*, 591 F.3d 355 (5th Cir. 2009) (en banc).

<sup>31</sup> Wheeler, 591 F.3d at 371.

requirement. Other circuits have cited it when adopting the requirement.<sup>32</sup> Meanwhile, opinions rejecting the harm to competition requirement have cited Judge Garza's dissent.<sup>33</sup>

The Fifth Circuit in *Wheeler* concluded that the purpose of the PSA is "to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act."<sup>34</sup> It relied on the PSA's origin as a response to the monopoly of the "Big 5" meatpackers, the Seventh Circuit's mid-century interpretations of the law, and decisions of several other circuits purportedly affirming the harm to competition requirement.<sup>35</sup> By way of background on the PSA, this Section describes the *Wheeler* court's interpretation of the legislative history of the PSA and an early Supreme Court decision finding it to be constitutional, noting objections to the majority's reasoning along the way.

#### A. Statutory Purpose

The PSA was a product of the same moment in American history that produced the core antitrust laws: the Sherman Act, Clayton Act, and Federal Trade Commission Act.<sup>36</sup> While the Sherman Act took aim at the great "trusts" that pooled economic strength of competing enterprises to expand control over each industry in which they were formed,<sup>37</sup> the goals of the PSA were at once narrower and broader. They were narrower in that the PSA is limited to one sector of the economy, but broader in that it promised more aggressive and direct regulation of the industry in which it operated.<sup>38</sup>

Congress passed the PSA shortly after the Federal Trade Commission (FTC) published a report on the meatpacking

<sup>32</sup> See, e.g., *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277 (6th Cir. 2010); see also John D. Shively & Jeffrey S. Roberts, *Competition Under the Packers and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419, 420 (2010).

<sup>33</sup> See, e.g., *M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, No. 14-CV-32, 2015 WL 13841400 (N.D.W. Va. Oct. 26, 2015).

<sup>34</sup> *Wheeler*, 591 F.3d at 357.

<sup>35</sup> See *Terry*, 604 F.3d at 279.

<sup>36</sup> See Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 AGRICULTURAL LAW § 3.02 (John H. Davidson ed., 1981).

<sup>37</sup> See Randal C. Picker, *What Should We Do About the Big Tech Monopolies?*, 1 TECHREG CHRON. 28 (2021); but see Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 1 (2021) (arguing that goal of antitrust laws was not only to restrict the power of the trusts, but also to restrict accumulation of private power generally).

<sup>38</sup> See Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness v. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 93-94 (2003) (arguing from legislative context and history that Congress intended the PSA "to be more aggressive than all previous antitrust or trade regulation").

industry in 1918 and 1919.<sup>39</sup> As FTC Chairman William Colver described the agency's findings, the FTC concluded that the "Big 5" meatpackers (Armour, Swift, Morris, Wilson, and Cudahy) had gained an "unfair advantage . . . over producer, consumer, and competitor," resulting from their control of stockyards and the means of transportation of livestock.<sup>40</sup> The FTC concluded that the packers' consolidated ownership over the industry was not in the public interest, but it did not recommend a full government takeover of the packers, which was a legislative proposal under consideration at that time.<sup>41</sup> Among the powers of the Big Five that the agency identified as "unfair[] and illegal[]" were their ability to "[m]anipulate live-stock markets," "[c]ontrol the prices of dressed meats," and "[s]ecure special privileges from railroads."<sup>42</sup> The Department of Justice sued each of the Big Five packers for violating the Sherman Act in 1920, and the packers entered into a consent decree with the DOJ in 1920.<sup>43</sup> Apparently unsatisfied that the consent decree would resolve its concerns, Congress passed the PSA in 1921.<sup>44</sup> True to the FTC's concern with the actions of the Big Five, the statute only applied to large stockyards.<sup>45</sup>

The PSA is broader than antecedent antitrust legislation in that it grants the Secretary of Agriculture more authority to regulate the meatpacking industry than the FTC's authorizing statute granted to that agency. The Secretary of Agriculture can, for example, regulate stockyard rates and assess monetary penalties against stockyard operators who violate his commands.<sup>46</sup> The House Report on the legislation went so far as to say that a "careful study of the bill, will . . . convince one that it . . . is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except

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<sup>39</sup> FTC, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT PACKING INDUSTRY (1919); see Campbell, *supra* note 36, at § 3.02.

<sup>40</sup> William B. Colver, *The Federal Trade Commission and the Meat-Packing Industry*, 82 ANNALS AM. ACAD. POL. & SOC. SCI. 170, 171 (1919).

<sup>41</sup> *Id.* at 171–72.

<sup>42</sup> FTC, *supra* note 39, at 32–33. See Campbell, *supra* note 36, at § 3.02.

<sup>43</sup> For a description of the consent decree, see *United States v. Swift & Co.*, 189 F. Supp. 885, 888 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (denying petition by Swift, Armour, and Cudahy to modify decree). See also *Stafford v. Wallace*, 258 U.S. 495, 501 (1922).

<sup>44</sup> Packers and Stockyards Act, 1921, Pub. L. No. 67–51, 42 Stat. 159, codified as amended at 7 U.S.C. §§ 181–229.

<sup>45</sup> The original act exempted stockyards with a slaughtering area of less than 20,000 square feet. *Id.* at 42 Stat. 163. The current version gives the USDA Secretary the authority to determine which stockyards are subject to PSA regulation. 7 U.S.C. § 202.

<sup>46</sup> 7 U.S.C. § 207.

possibly the interstate commerce act.”<sup>47</sup> The § 202(a) prohibition on “any unfair, unjustly discriminatory, or deceptive practice or device”<sup>48</sup> by a packer or stockyard, was part of a larger scheme granting the USDA significant authority to directly regulate the practices of meatpackers and stockyard operators.<sup>49</sup>

## B. Initial Interpretation at the Supreme Court

The Supreme Court first confronted the PSA in *Stafford v. Wallace*,<sup>50</sup> with Chief Justice William Howard Taft rejecting a Commerce Clause challenge to the law brought by the packers. While the *Wheeler* court took this opinion as definitive support for the harm to competition requirement, Judge Garza disputed that conclusion in his dissent;<sup>51</sup> the argument from *Stafford* is not a slam dunk. In *Stafford*, Chief Justice Taft set forth the context and purpose of the PSA to explain what brought it within Congress’s power under the Commerce Clause.<sup>52</sup> He described its purpose as follows:

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East.<sup>53</sup>

Describing the mode of regulation contemplated by the PSA, Chief Justice Taft wrote that it “treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East.”<sup>54</sup> He went on to cite a challenge to antitrust regulation of meatpackers in *Swift & Co. v. United States*<sup>55</sup> in support of his determination that the PSA is within Congress’s Commerce Clause power. The principle established in that case, as he saw it, was that even intrastate agricultural transactions could

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<sup>47</sup> Campbell, *supra* note 36, at § 3.03 (quoting H.R. REP. NO. 67–77, at 2 (1921)).

<sup>48</sup> 7 U.S.C. § 192(a).

<sup>49</sup> See, e.g., 42 Stat. at 164 (requiring stockyards to charge “just, reasonable, and nondiscriminatory” rates and post their rates publicly).

<sup>50</sup> 258 U.S. 495 (1922).

<sup>51</sup> *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 374–75 (5th Cir. 2009) (en banc).

<sup>52</sup> *Stafford*, 258 U.S. at 514.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 516.

<sup>55</sup> 196 U.S. 375 (1905).



be regulated, as instrumental to the interstate flow of agricultural goods throughout the country.<sup>56</sup> He wrote:

The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. . . . It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the Swift Case.<sup>57</sup>

The Fifth Circuit in *Wheeler* concluded that the Supreme Court held the PSA to be constitutional “because it protects competition and opposes combinations in restraint of trade,” an objective the Court previously accepted in *Swift*.<sup>58</sup> From this perspective, the PSA is an agriculture-specific antitrust enforcement mechanism. As Chief Justice Taft wrote, “If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift* Case, certainly it may provide regulation to prevent their formation.”<sup>59</sup>

The *Wheeler* majority’s argument can be summarized as follows: The Supreme Court only upheld the PSA because protecting competition in interstate commerce from conspiracy and monopolization is constitutional. Thus, enforcement of the PSA is only constitutional under the commerce clause insofar as it protects competition. *Stafford*, however, is primarily concerned with establishing Congressional authority to regulate intrastate packer and stockyard activity, not with the limits of that authority.<sup>60</sup> The core holding is that because of the “natural development of interstate commerce,” strictly intrastate livestock transactions are in fact a part of interstate commerce, allowing for their regulation by federal law.<sup>61</sup> To the extent the *Wheeler* gloss on *Stafford* focuses on Chief Justice Taft’s interpretation of Congressional intent, Judge Garza responds appropriately that Taft’s decision “spoke of monopoly as the ‘chief’ evil against which the PSA protects, not as the ‘only’ evil.”<sup>62</sup>

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<sup>56</sup> *Stafford*, 258 U.S. at 518.

<sup>57</sup> *Id.* at 518–20.

<sup>58</sup> *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 358, 362 (5th Cir. 2009) (en banc).

<sup>59</sup> *Stafford*, 258 U.S. at 529.

<sup>60</sup> *Id.* at 522.

<sup>61</sup> *Id.* at 518.

<sup>62</sup> *Wheeler*, 591 F.3d at 378 (Garza, J., dissenting).

### III. PROVING HARM TO COMPETITION

The concept of competitive harm is vague but important. Admittedly, it has been interpreted more loosely in some courts than in others. In Judge Harris Hartz's concurrence in *Been v. O.K. Industries*,<sup>63</sup> he observed that the concept of competitive harm the majority endorsed appeared to be capacious enough to cover any conduct a court might consider "unfair."<sup>64</sup> But debate over the requirement has been so fierce because it gives courts license to impose high burdens of proof that can only be satisfied with economic evidence.<sup>65</sup> Two recent cases in the Eleventh Circuit illustrate how it operates.

#### A. Unfairness Claims

The 2021 case *Breaking Free v. JCG Foods of Alabama*<sup>66</sup> shows the difficulties the harm to competition requirement creates for an individual PSA plaintiff who challenges a widespread practice as unfair; even if the practice in general may harm competition, the plaintiff's evidence only shows harm to him or herself.<sup>67</sup> In *Breaking Free*, chicken grower Connie Buttram sued chicken company Koch Foods for allegedly cutting off her contract because of her husband's involvement in an association of chicken growers and his participation in a documentary by Morgan Spurlock (of *Super Size Me* fame<sup>68</sup>) on the chicken industry.<sup>69</sup> The court dismissed Buttram's claims on the basis that she only alleged harm to her own farm, not harm to the market at large.<sup>70</sup> The court noted that it found no authority for the proposition that "evidence of a plaintiff's individual damages can show likely competitive harm to an industry at large."<sup>71</sup>

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<sup>63</sup> 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., concurring/dissenting).

<sup>64</sup> *Been*, 495 F.3d at 1242 ("The alleged injuries may be caused by the existence of a monopoly. But it is unclear to me how the practices (such as unilaterally decreasing production by delivering fewer chicks to growers) reduce competition among either growers or dealers.").

<sup>65</sup> See Brief in Support of Petition for Review at 22–25, *Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455 (8th Cir. 2018) (No. 17–3723), 2018 WL 1583441, at \*22–25 (arguing that farmers can "more readily file[] claims [and] enjoy[] the protections that the Act promises" when the harm to competition requirement is not in place).

<sup>66</sup> *Breaking Free, LLC v. JCG Foods of Ala., LLC*, No. 18–cv–01659, 2021 WL 2139052 (N.D. Ala. May 26, 2021).

<sup>67</sup> *Id.* at \*8.

<sup>68</sup> *SUPER SIZE ME* (Samuel Goldwyn Films 2004).

<sup>69</sup> *SUPER SIZE ME 2: HOLY CHICKEN* (Samuel Goldwyn Films 2019).

<sup>70</sup> *Breaking Free*, 2021 WL 2139052, at \*9.

<sup>71</sup> *Id.* at \*8.

Even the allegation that the specific challenged practice is widespread is unlikely to save a PSA claim under the harm to competition regime. This is because, first, it is difficult to prove industry-wide harm, even when the practice is common, and second, the defendant can often claim a procompetitive justification. In *Breaking Free*, the court rejected Buttram's contention, supported by the testimony of economist C. Robert Taylor, that pervasive fear of retaliation by chicken growers reduces grower compensation.<sup>72</sup> It concluded that Buttram had not presented evidence adequate to create a triable issue of fact as to whether Koch's retaliation decreased overall grower pay.<sup>73</sup> It also held that even if Koch's practices did decrease grower pay, they could not violate the PSA because Koch had a clear procompetitive justification: it removed chickens from Buttram's farm because her husband's involvement with the Spurlock documentary (he raised chickens as part of that project) could contaminate the Koch flock.<sup>74</sup>

#### B. Harm to the Market

Claims that sound in harm to operation of the market, and not a broader concept of unfairness, are also difficult to bring under the PSA harm to competition regime. Meatpackers are often able to claim that their practices benefit the consumer and are thus "pro-competitive" even if they depress prices for growers. For example, a 2005 Eleventh Circuit case, *Pickett v. Tyson Fresh Meats, Inc.*,<sup>75</sup> shows the uphill battle growers face in proving a pervasive industry practice harms competition. *Pickett* was an early challenge to a then-new practice in cattle markets in which meatpackers would buy pens of cattle at a price tied to the prevailing cattle market price, rather than buying each pen at auction individually.<sup>76</sup> A class of ranchers challenged Tyson's use of these "Alternative Marketing Arrangements" on the ground that the agreements were removing buyers from auctions, thus pushing down the price Tyson paid for cattle at those auctions and then, by extension, the prices it paid under the marketing arrangements that were tied to the auction price.<sup>77</sup> The trial judge instructed the jury that Tyson's use of the agreements only

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<sup>72</sup> *Breaking Free*, 2021 WL 2139052, at \*8.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*9.

<sup>75</sup> 420 F.3d 1272 (11<sup>th</sup> Cir. 2005).

<sup>76</sup> *Id.* at 1276.

<sup>77</sup> *Id.* at 1277.

violated the PSA if it harmed competition and had no legitimate procompetitive justification.<sup>78</sup> Finding both conditions for liability satisfied, the jury awarded \$1.2 billion to the class of ranchers for Tyson's PSA violations.<sup>79</sup> The trial judge threw out the verdict on the basis that no reasonable jury could find that there was no legitimate procompetitive justification for Tyson's use of these alternative marketing arrangements.<sup>80</sup> The Eleventh Circuit affirmed.<sup>81</sup>

The Eleventh Circuit's formulation of the PSA harm to competition requirement is extremely adverse to efforts by growers to prove PSA claims because it requires them to show the practice not only harms competition, but harms competition *more* than the packer benefits from the practice.<sup>82</sup> It accepted several of Tyson's justifications for its use of the marketing agreements as adequate to overcome Pickett's showing that the agreements harm competition: the agreements secure for Tyson a "reliable and stable supply of cattle for its packing plants;"<sup>83</sup> they reduce transaction costs because they eliminate costly and time-consuming auctions;<sup>84</sup> and they allow Tyson to encourage growers to produce high-yield cattle.<sup>85</sup> It suggested the jury, in awarding \$1.2 billion to ranchers, was swayed by a romantic appeal to the historic independence of cattle ranchers rather than the ranchers' claims of market harm.<sup>86</sup> "The PSA was enacted to ensure that the market worked, and markets are notoriously unromantic," Judge Ed Carnes wrote for the Eleventh Circuit.<sup>87</sup> The court concluded that Tyson had good reasons for using a purchasing method that depressed the price the ranchers receive for their cattle, and that the PSA would not interfere with the operation of such contracts, into which ranchers freely entered.<sup>88</sup> While the *Pickett* court did not cite

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<sup>78</sup> *Id.* at 1277–78.

<sup>79</sup> *Id.* at 1278.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1288.

<sup>82</sup> See Shively & Roberts, *supra* note 32 at 440.

<sup>83</sup> *Id.* at 1282.

<sup>84</sup> *Id.* at 1284–85.

<sup>85</sup> *Id.* at 1285–86. When Tyson buys cattle using these marketing agreements it adjusts payment based on the yield and quality of the cattle in the pen, allowing it to calibrate payment more exactly than when it pays a flat amount for a pen at auction. *Id.*

<sup>86</sup> *Pickett*, 420 F.3d at 1287.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1288. Amid a declining grower share of the consumer beef dollar, ranchers continue to object to packers' use of the marketing arrangements challenged in *Pickett*. See Goodman, *supra* note 14. The USDA, in addition to the courts, has been unwilling to challenge these agreements, however. In a 2014 report, the agency concluded that the marketing agreements lowered the prices ranchers received but were on net

antitrust precedents, its approach to market harm is consistent with the “consumer welfare standard” in antitrust, under which consumer prices are the primary lodestar for evaluating allegations of antitrust harm.<sup>89</sup>

### C. The Antitrust Roots of the Harm to Competition Analysis

While the *Pickett* court did not cite antitrust cases, it stated that the PSA was “enacted to prevent unfair practices, price fixing and manipulation, and monopolization.”<sup>90</sup> The courts’ experience with protecting competition and preventing monopoly comes primarily from the antitrust laws and thus these references to an anti-monopoly focus suggest a reliance on methods of reasoning developed in antitrust law. This reliance on antitrust reasoning is most apparent when courts say they are applying a “rule of reason” analysis, assessing whether a challenged practice’s competitive benefits outweigh its harms.<sup>91</sup>

The problem this creates for growers alleging PSA violations arises from the focus in modern antitrust law on the consumer interest. Since the late 1970s, it has been widely accepted that the antitrust laws serve economic efficiency.<sup>92</sup> While consumer benefit is not a perfect proxy for economic efficiency, courts typically accept that “consumer welfare” is a good metric of the efficiency goals that antitrust seeks to serve.<sup>93</sup> “Consumer welfare” is not a dogma of modern antitrust practitioners and scholars—and much recent economic antitrust research shows how practices that may seem facially to benefit consumers hurt economic efficiency<sup>94</sup>—but nonetheless courts following the modern antitrust

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procompetitive. GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., U.S. DEP’T OF AGRIC., INVESTIGATION OF BEEF PACKERS’ USE OF ALTERNATIVE MARKETING ARRANGEMENTS (July 2014), <https://perma.cc/N5V7-LDA7>.

<sup>89</sup> *Pickett*, 420 F.3d at 1287.

<sup>90</sup> *Id.* (citing *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1301 (11th Cir. 2005)).

<sup>91</sup> See, e.g., *In re Pilgrim’s Pride Corp.*, 728 F.3d 457, 462 (5th Cir. 2013) (citing *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202–04 (2010)) (“When evaluating competitive injury, we ordinarily rely upon a ‘rule of reason’ analysis: in light of all the relevant facts, an action is unlawful only if it is likely to suppress or destroy competition.”); GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., *supra* note 88, at 79 (describing “rule of reason” approach in PSA cases); Shively & Roberts, *supra* note 32, at 439–44.

<sup>92</sup> See RICHARD POSNER, *ANTITRUST LAW*, at vii (2d ed. 2001); see also Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 220 (1995).

<sup>93</sup> See Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 598 (2020) (discussing convergence of economic efficiency and consumer welfare in modern antitrust thinking).

<sup>94</sup> See Jacobs, *supra* note 92, at 240 (discussing work of “post-Chicago” antitrust economists).

method often look to short-term consumer outcomes to determine whether a practice should be illegal under the antitrust laws.<sup>95</sup> Harms of monopsony or collusion by purchasers are recognized under antitrust laws,<sup>96</sup> but they have not been a primary focus of enforcement efforts.<sup>97</sup> A rising antitrust movement, which counts the current leaders of the two federal antitrust agencies among its adherents, argues antitrust should promote goals beyond economic efficiency, such as protecting small producers.<sup>98</sup> But this remains a fringe position. The *Pickett* court's derision of the idea of using law to protect a system of small producers is typical of modern antitrust law.<sup>99</sup> This is the problem the harm to competition requirement poses for PSA grower plaintiffs: it makes it difficult to challenge a packer practice that hurts them, but plausibly benefits consumers in the short term.

#### IV. THE ROLE OF THE USDA IN ENFORCING THE PSA

One option for courts seeking to cut through the confusion on the harm to competition requirement is to defer to the USDA's interpretation of the statute. In this Section, I explain the USDA's role in enforcing the PSA and explore the consequences of that institutional design for deference to the agency under *Chevron* and the administrative deference regime that may succeed it. I

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<sup>95</sup> In a 1987 article, Judge Frank H. Easterbrook, a proponent of Chicago School antitrust theory, described the role of economics in modern antitrust analysis, writing, “[m]odern antitrust law is a search for economic explanations of problematic conduct. If the explanations show the conduct likely to be in consumers’ benefit, then a court stays its hand; if not, a court condemns the conduct.” *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305–06 (1987).

<sup>96</sup> See *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (“The Sherman Act . . . also applies to abuse of market power on the buyer side— often taking the form of monopsony or oligopsony.”).

<sup>97</sup> See, e.g., ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* (2021) (arguing that antitrust has not been adequately concerned with collusion among employers and other antitrust harms related to purchase of employee labor).

<sup>98</sup> In a statement accompanying an executive order on competition policy in July 2021, President Joe Biden denounced the antitrust policy of the past forty years as a misguided “experiment.” President Joseph Biden, Remarks at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://perma.cc/G8RA-KU5S>. He appointed Lina Khan, a prominent critic of the focus on economic efficiency in antitrust, see Lina M. Khan, *The End of Antitrust History Revisited: The Curse of Bigness: Antitrust in the New Gilded Age* by Tim Wu, 133 HARV. L. REV. 1655 (2020), as chair of the FTC. His pick for head of the DOJ's antitrust division, Jonathan Kanter, is a critic of large technology companies. See Steve Lohr & Cecilia Kang, *A Star Corporate Lawyer Now Set to Take On Corporate America*, N.Y. TIMES (Oct. 6, 2021), <https://perma.cc/G3Y2-LNYS>.

<sup>99</sup> See *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1287 (11th Cir. 2005) (“While talk about the independence of cattle farmers has emotional appeal, the PSA was not enacted to protect the independence of producers from market forces. . . . The PSA was enacted to ensure that the market worked.”).

conclude that the agency enacting its position in a formal rule would dramatically improve the agency's argument for deference. I then describe the agency's recent, halting efforts to enact such a rule, arguing that the back-and-forth over the rule has hurt the agency's argument for deference because it has made the agency's position inconsistent. I conclude, however, that much of the damage done would be repaired by a successful rulemaking.

#### A. *Chevron* Deference and the Structure of PSA Enforcement

Under *Chevron*,<sup>100</sup> courts defer to the interpretation of an agency tasked with interpreting an ambiguous statute.<sup>101</sup> Where Congress has left a gap for an administrative agency to fill, a court may not substitute its own interpretation for a reasonable interpretation made by the administrator of an agency.<sup>102</sup> While the USDA has consistently argued that its interpretation of the PSA is deserving of *Chevron* deference,<sup>103</sup> the *Wheeler* court rejected that argument on the basis that the PSA is unambiguous.<sup>104</sup> It held that deference is “unwarranted where Congress has delegated no authority to change the meaning the courts have given to the statutory terms.”<sup>105</sup> In support of its conclusion, it argued that the Seventh Circuit previously rejected the USDA's interpretation of the statute that the agency had announced in an adjudication.<sup>106</sup> In dissent, Judge Garza agreed that the USDA's interpretation is not entitled to deference “because the PSA is unambiguous.”<sup>107</sup> But he showed more of an interest in listening to the agency's perspective on the issue, arguing the court should “give respect to the experience and expertise” of the agency and noting the USDA has consistently rejected the harm to competition requirement.<sup>108</sup>

Other courts have looked beyond the question of statutory ambiguity to ask whether the design of PSA enforcement means the USDA's interpretation of the statute is deserving of deference.

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<sup>100</sup> *Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>101</sup> *Id.* at 843–44.

<sup>102</sup> *Id.* at 844.

<sup>103</sup> En Banc Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees, *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (No. 07–40651), 2009 WL 7349991, at \*25.

<sup>104</sup> *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009) (en banc).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*; see *infra* Section V.

<sup>107</sup> *Id.* at 373 n.3 (Garza, J., dissenting).

<sup>108</sup> *Id.* at 373 (Garza, J., dissenting) (quoting *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., concurring/dissenting)).

In conducting this Chevron Step Zero<sup>109</sup> analysis, these courts have asked whether the USDA's interpretation of the PSA is the kind of agency interpretation that should be granted *Chevron* deference. Both the Tenth and Eleventh Circuits have conducted this analysis. They emphasized the structure of USDA authority, concluding that the USDA's interpretation of the statute as it concerns poultry dealers was not deserving of deference<sup>110</sup> because the agency does not have adjudicatory authority over those companies.<sup>111</sup>

Of the decisions endorsing the harm to competition requirement, Judge Deanell Reece Tacha's decision in *Been v. OK Industries*<sup>112</sup> showed the most openness to deference to the USDA. She noted that "[r]egulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference," as is the agency's "adjudication of matters over which it has the authority to adjudicate."<sup>113</sup> In Judge Hartz's *Been* concurrence, he observed that not deferring to the agency's decisions with regard to live poultry dealers is "peculiar," given that the *Been* majority relied for its construction of the statute on cases concerning the application of the USDA to packers, "in which *Chevron* deference would have been proper."<sup>114</sup>

Nothing in the design of the PSA precludes a court from deferring to the USDA's interpretation of the statute. First, the PSA

<sup>109</sup> "[T]he initial inquiry into whether the *Chevron* framework applies at all." See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

<sup>110</sup> *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005) (The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. . . . The absence of such delegation compels courts to afford no *Chevron* deference to the Secretary's construction of Section 202(a).); *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007) ([T]he Secretary has not promulgated a regulation applicable to the practices the Growers allege violate § 202(a), and the USDA has no authority to adjudicate alleged violations of § 202 by live poultry dealers.).

<sup>111</sup> The PSA allows the Secretary of Agriculture to interpret the PSA prohibitions on unfair and deceptive practices; the Secretary may bring a complaint for violation against a meatpacker or swine contractor and adjudicate the complaint in an internal proceeding. 7 U.S.C. § 193(a). If he finds the packer has violated the PSA, he orders the packer to cease the practice and may assess a civil penalty of \$10,000 for each violation. 7 U.S.C. § 193(b). The order is conclusive unless within thirty days the packer appeals in circuit court. 7 U.S.C. § 194(a). The appeals court may "affirm, modify, or set aside" the order of the Secretary. 7 U.S.C. § 194(e). In proceedings against live poultry dealers, by contrast, the Secretary may not adjudicate complaints in an internal proceeding and must instead bring an action alleging a violation of the PSA in federal court. 7 U.S.C. § 209(a). See also *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1457 (8th Cir. 1995) ("Under the plain language of the PSA, the administrative complaint procedure under § 309 of the PSA is simply not available for claims against a live poultry dealer.").

<sup>112</sup> 495 F.3d 1217 (10th Cir. 2007).

<sup>113</sup> *Id.* at 1226–27.

<sup>114</sup> *Id.* at 1238–39 (Hartz, J., concurring/dissenting).



is “ambiguous” regarding the exact contours of the PSA’s prohibitions.<sup>115</sup> The debate among courts over the meaning of the statute’s terms suggests as much. Second, the USDA adjudicates violations of the PSA by meatpackers and is thus “entrusted to administer” the statute with respect to them.<sup>116</sup> Third, courts defer to agency interpretations of similar statutes. For example, in *FTC v. Sperry & Hutchinson Co.*,<sup>117</sup> the Supreme Court set forth the proper design of appellate review of the FTC’s statutory mandate to enforce against “unfair methods of competition” and “unfair or deceptive acts or practices.”<sup>118</sup> It concluded that the appellate court could properly review whether the FTC acted reasonably when it concluded that a practice was “unfair” in violation of the FTC Act but that it could not substitute its judgment for the FTC’s on the scope of the prohibition on unfair practices.<sup>119</sup> It rejected the court of appeals’ imposition of a harm to competition requirement in FTC Act cases when the FTC had determined that no such showing was required to prove a violation of the FTC Act.<sup>120</sup> While this decision preceded *Chevron*, it establishes that *Chevron*-like deference is appropriate where Congress gives an administrative agency the authority to adjudicate the bounds of a vague Congressional prohibition on unfair practices.<sup>121</sup>

A successful rulemaking on the PSA would put the agency’s position on the harm to competition question in a significantly better position to receive *Chevron* deference. While *Wheeler* found the PSA unambiguous, *London* and *Been* both focused on the structure of PSA enforcement and the extent to which Congress delegated authority to define the scope of the PSA. Successful notice-and-comment rulemaking would give the agency a better claim that it is exercising congressionally delegated authority to define the exact bounds of the PSA.<sup>122</sup>

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<sup>115</sup> See *Chevron U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

<sup>116</sup> *Id.* at 844.

<sup>117</sup> 405 U.S. 233 (1972).

<sup>118</sup> 15 U.S.C. § 45(a)(1).

<sup>119</sup> *Sperry & Hutchinson*, 405 U.S. at 249–50.

<sup>120</sup> *Id.* at 244 (“[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the laws or encompassed in the spirit of the antitrust laws.”).

<sup>121</sup> See Bass, *supra* note 7, at 434–35.

<sup>122</sup> See *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1226 (10th Cir. 2007) (“Regulations promulgated by an agency exercising its congressionally granted rule-making authority are clearly entitled to *Chevron* deference.”).

B. Deference to the USDA Under *Skidmore*

The Supreme Court has cast doubt on the future of *Chevron* in recent years; observers predict the Court will soon narrow the reach of *Chevron* or perhaps do away with it altogether.<sup>123</sup> This trend is significant for the question of deference to the USDA's interpretation of the PSA, as decisions on deference to the USDA may well be made in a post-*Chevron* world. That world could still allow for deference to the USDA under *Skidmore v. Swift & Co.*,<sup>124</sup> and prospects for deference would be significantly improved by formal rulemaking.

*Chevron* deference today is sufficiently imperiled to be almost an anti-canon, with litigants raising it only as a last resort.<sup>125</sup> Justices Clarence Thomas and Neil Gorsuch have suggested that *Chevron* deference may be unconstitutional, while Justice Brett Kavanaugh has questioned the breadth of the doctrine.<sup>126</sup> Even if the Court does expressly abandon *Chevron*, that likely would not be the end of administrative deference altogether. Today, when courts decline to defer to an agency interpretation under *Chevron*, they typically apply the older approach to administrative deference described in *Skidmore v. Swift & Co.*<sup>127</sup> Under *Skidmore*, courts may consider various factors in determining how much weight to give an agency's interpretation of a statute. The *Skidmore* court originally identified four such factors, writing: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>128</sup> Kristin E. Hickman and Matthew D. Krueger

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<sup>123</sup> See, e.g., Kristin E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1016–17, 1017 n.16 (2021).

<sup>124</sup> 323 U.S. 134 (1944).

<sup>125</sup> Daniel Hemel, *Argument Analysis: Hating on Chevron*, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), <https://perma.cc/C2NV-M35L>.

<sup>126</sup> See *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

<sup>127</sup> 323 U.S. 134 (1944); see Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1246 (2007) (finding that the Supreme Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000), revived *Skidmore* as the "baseline deference standard"); see also Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1390 (2013).

<sup>128</sup> *Skidmore*, 323 U.S. at 140.

have distilled the *Skidmore* analysis, as glossed by the Supreme Court in the modern cases that revived it, down to five factors: “thoroughness, formality, validity, consistency, and agency expertise.”<sup>129</sup>

These factors suggest the USDA interpretation of the PSA may be entitled to some weight even if not enacted in rulemaking,<sup>130</sup> but that the prospects for deference would be much better after a successful rulemaking. The formality question is most straightforward, as notice-and-comment rulemaking is the paradigmatic example of a formal agency process.<sup>131</sup>

Application of the consistency prong of the *Skidmore* analysis is complicated by the recent back-and-forth over rulemaking. While in 2007 the USDA stated in its brief in *Wheeler* that the agency has “never state[d] that adverse effect on competition is a necessary element of a [PSA claim],”<sup>132</sup> the USDA has recently waived on enforcing the PSA outside of its application to anti-trust harms.<sup>133</sup> A formal rulemaking may also alleviate doubts caused by this recent inconsistency, however. As I explain below, the USDA rescinded a rule that would have rejected the harm to competition requirement, but it never expressly endorsed the requirement. A court may see a formal rule as the culmination of an extended political fight, consistent with the agency’s long-held historical position and thus supporting the long-term consistency of the agency’s view on harm to competition.

Rejecting the harm to competition requirement in a formal rule may also influence how a court weighs the remaining factors: thoroughness, validity, and agency expertise. Agency decisions embodied in a formal rule have been historically more likely to receive deference than decisions made in adjudication, as Hickman and Aaron L. Nielson note in a recent article on the future of

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<sup>129</sup> Hickman & Krueger, *supra* note 127, at 1246.

<sup>130</sup> See *Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., concurring/dissenting) (“[A]t the least I would think that we owe some respect to the experience and expertise of the USDA regarding the PSA.”).

<sup>131</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (finding that the “overwhelming number” of cases in which the court deferred to an agency interpretation were in the context of notice-and-comment rulemaking or formal adjudication).

<sup>132</sup> Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees at 25, *Wheeler v. Pilgrim’s Pride Corp.*, 536 F.3d 455 (5th Cir. 2008) (No. 07–40651), 2007 WL 7215909, at \*25; see also *Been*, 495 F.3d 1217, 1239 (Hartz, J., concurring/dissenting) (identifying agency’s “longstanding view” that the PSA does not require competitive injury).

<sup>133</sup> See *infra* Section IV.C.

administrative deference.<sup>134</sup> They go on to argue that formal rules are better candidates for deference because of the institutional features of rulemaking.<sup>135</sup> Many of the advantages they identify, including information gained through the notice-and-comment process and the public record of the agency's thinking that the process develops, indicate that the process improves the thoroughness, validity and expertise brought to bear on agency decision-making.<sup>136</sup> The outcome of *Skidmore* review is impossible to predict, in part because its dictates remain unsettled.<sup>137</sup> Still, the chances of deference would be improved by formal rulemaking.

### C. USDA Interpretation of the PSA

The USDA first considered formalizing its approach to the harm to competition requirement in a rule in 2008, on a mandate from Congress. The result was a bitter political fight, with the USDA no closer to enacting such a rule today than it was 14 years ago. To summarize: the USDA proposed a draft rule interpreting the PSA, was prohibited by Congress from finalizing that rule, proposed it again, then withdrew it and promulgated a rule setting forth a different interpretation of the PSA. In 2021, it announced plans to reverse the interpretation it had just finalized.

In the 2008 farm bill, Congress mandated that the USDA publish a rule clarifying its interpretation of the PSA.<sup>138</sup> The USDA published its proposed rule in June 2010.<sup>139</sup> On § 202(a) and (b), the proposed rule stated:

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<sup>134</sup> Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931 (2021).

<sup>135</sup> *Id.* at 943.

<sup>136</sup> *Id.* at 965–66 (“Because agency officials do not have a monopoly on knowledge, they develop their expertise and improve their decisionmaking by reaching out to the public seeking information [in notice-and-comment rulemaking]. . . . [A]ll else being equal, a process that solicits comments and forces agencies to engage with the views of the public should generally lead to better policy outcomes.”).

<sup>137</sup> See Hickman & Krueger, *supra* note 127, at 1238 (identifying “independent judgment” as one mode of *Skidmore* review, which “effectively denies any deference to the agencies”).

<sup>138</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–246, § 11006, 122 Stat. 2120 (2008) (“As soon as practicable, but not later than 2 years after the date of the enactment of this Act, the Secretary of Agriculture shall promulgate regulations with respect to the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) to establish criteria that the Secretary will consider in determining— (1) whether an undue or unreasonable preference or advantage has occurred in violation of such Act. . . .”).

<sup>139</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of Act, 75 Fed. Reg. 35338 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

The appropriate application of section 202(a) and (b) of the Act depends on the nature and circumstances of the challenged conduct. A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition.<sup>140</sup>

The supplementary information accompanying the rule offered an analysis of the history and interpretation of the PSA and said the USDA disagreed with the *Been*, *London*, and *Wheeler* decisions.<sup>141</sup> It described conduct brought to its attention at public meetings that it considered unfair or unjustly discriminatory, to illustrate the need for new regulations.<sup>142</sup>

The USDA's proposed regulation also provided eight examples of conduct the agency considered unfair and in violation of the PSA.<sup>143</sup> These included "unjustified material breach of a contractual duty" and retaliation against growers for participating in grower associations, among other practices.<sup>144</sup> It also specified circumstances in which a packer practice *would* likely cause competitive harm.<sup>145</sup> For example, a packer or poultry dealer "wrongfully depress[ing] prices paid to a producer or grower below market value or impair[ing] the producer or grower's ability to compete with other producers or growers" would likely harm competition.<sup>146</sup> It further provided that "[d]isparate treatment of similarly situated growers and producers can be a violation of the P&S Act when that disparate treatment is undue or unreasonable."<sup>147</sup> The proposed regulation included specific rules for the poultry tournament system, including a requirement that all growers compensated through such a system receive the same base pay.<sup>148</sup>

As it turned out, Congress blocked the USDA from finalizing the rule.<sup>149</sup> On November 3, 2011, the USDA notified interested

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 35341.

<sup>142</sup> *Id.* at 35342 ("Congress recognized, and GIPSA has been informed by poultry growers and industry organizations, that the disproportionate negotiating power of a live poultry dealer may sometimes infringe on poultry grower's rights.").

<sup>143</sup> *Id.* at 35342.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 35341.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 35343.

<sup>148</sup> *Id.* at 35352.

<sup>149</sup> Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 721, 125 Stat. 583 (2012).

parties that it sent an interim final rule to the Office of Management and Budget for final review.<sup>150</sup> Fifteen days later, on November 18, 2011, Congress enacted the FY2012 Agriculture Appropriations Act barring the USDA from finalizing the sections of the rule describing the scope of the PSA.<sup>151</sup> The USDA issued its final rule on livestock and poultry marketing practices on December 9, 2011.<sup>152</sup> The regulation did not finalize the rule on the harm to competition requirement or the examples of conduct that would violate § 202(a) or (b).<sup>153</sup> The preamble stated that comments on the proposed rule were “sharply divided” with respect to the PSA and the harm to competition requirement.<sup>154</sup> It continued:

Those supporting the proposal pointed out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm. Opposing comments relied heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element of a violation of sections 202(a) and (b) of the P&S Act.<sup>155</sup>

Congress continued to block the USDA from finalizing the PSA rule in the FY2013,<sup>156</sup> FY2014<sup>157</sup> and FY2015<sup>158</sup> appropriations laws.<sup>159</sup> The FY2013 appropriations law went further, requiring the USDA to rescind regulations on poultry dealers that did go through in 2011, including a requirement that companies give growers ninety days’ notice before canceling their contracts to raise chickens.<sup>160</sup> The FY2016 appropriations bill did not include

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<sup>150</sup> JOEL L. GREENE, CONG. RSCH. SERV., R41673, USDA’S “GIPSA RULE” ON LIVESTOCK AND POULTRY MARKETING PRACTICES 1 (2016).

<sup>151</sup> Consolidated and Further Continuing Appropriations Act, 2012, *supra* note 149.

<sup>152</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 Fed. Reg. 76874, 76875, 9 C.F.R. § 201.1–201.218 (2011).

<sup>153</sup> *Id.* at 76875.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113–6, § 742, 127 Stat. 233 (2013).

<sup>157</sup> Consolidated Appropriations Act, 2014, Pub. L. No. 113–76, § 744, 128 Stat. 41 (2014).

<sup>158</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 731, 128 Stat. 2167 (2014).

<sup>159</sup> See David Rogers, *Big Agriculture Flexes Its Muscle*, POLITICO (Mar. 25, 2013), <https://perma.cc/8QYR-27NU>.

<sup>160</sup> Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113–6, § 742, 127 Stat. 233 (2013).

the rider barring publication of the PSA rule, and in December of 2016, the USDA published an interim final rule stating that a showing of harm to competition is not required to prove a violation of the PSA.<sup>161</sup> The rule was to go into effect on February 21, 2017.<sup>162</sup>

Instead, the USDA withdrew the interim final rule following the change in presidential administrations in 2017.<sup>163</sup> In its explanation for withdrawing the rule, the USDA focused primarily on the conflict the rule would create with rulings endorsing the harm to competition requirement.<sup>164</sup> It concluded that the Fifth and the Eleventh Circuits were unlikely to give deference to the USDA's interpretation of the PSA, so the rule would conflict with precedent in those circuits.<sup>165</sup> It also found the rule would conflict with precedent in the Sixth and Tenth Circuits, which impose the harm to competition requirement but have not categorically refused to defer to the USDA's interpretation.<sup>166</sup> The USDA acknowledged that the position stated in the interim rule was the agency's "longstanding position," and also found that commenters had overstated the extent of opposition in the circuits to that position.<sup>167</sup> But the contrary position of the Fifth and Eleventh Circuits meant the rule had to be abandoned. The agency concluded that "because at least two courts of appeals have held that the text of the P&S Act unambiguously forecloses USDA's longstanding interpretation, allowing the [interim final rule] to go into effect would create an unworkable legal patchwork."<sup>168</sup> In 2020, the USDA promulgated a rule that serves as a partial replacement, stating the factors it considers when deciding whether a packer violated § 202(b) of the PSA.<sup>169</sup> That rule, finalized on December

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<sup>161</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 81 Fed. Reg. 92566, 92594 (interim final rule published Dec. 20, 2016) (to be codified at 9 C.F.R. pt. 201).

<sup>162</sup> *Id.* at 92566.

<sup>163</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594 (Oct. 18, 2017) (withdrawing the interim rule published Dec. 20, 2016 and stating the USDA would take no further action on it).

<sup>164</sup> *Id.* at 48598.

<sup>165</sup> *Id.* at 48597.

<sup>166</sup> *Id.* at 48596–97.

<sup>167</sup> *Id.* at 48597.

<sup>168</sup> *Id.* at 48598. It also concluded that the USDA did not go through the appropriate procedure under the Administrative Procedures Act, 5 U.S.C. § 553(b)–(c), for promulgating the rule, because it did not have "good cause" to forego the normal comment procedure. Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. at 48598.

<sup>169</sup> Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 1771 (Jan. 13, 2020) (codified at 9 C.F.R. pt. 201).

11, 2020, does not take a position on the competitive harm question.<sup>170</sup>

The rule specifies four criteria the USDA may consider when determining whether a meatpacker or poultry dealer has given an “undue or unreasonable preference or advantage.”<sup>171</sup> It effectively establishes provisional safe harbors for preferences or advantages provided by packers or poultry companies. All four justifications for a preference or advantage are related to whether the packer has a legitimate business rationale for the preference.<sup>172</sup> While the USDA originally had proposed a safe harbor for preferences “customary in the industry,”<sup>173</sup> it replaced that provision with one suggesting that preferences “justified as a reasonable business decision” are acceptable.<sup>174</sup> Commenters criticized the proposal as overly broad and legitimating harmful packer practices, but the USDA responded that the rule “balance[s] the interests of all segments of the livestock, meat, and poultry industries.”<sup>175</sup> It also emphasized consumer interests in its justification, writing that the rule “provide[s] a framework from which both producers and processors can benefit, while not harming consumers.”<sup>176</sup> The agency noted that the criteria can be used to determine a preference is illegal, because if the proposal cannot be justified for any of the legitimate reasons provided, that would suggest it is more likely to violate the PSA.<sup>177</sup>

Perhaps more important to the shape of PSA regulation than the proposed rule, the USDA also reorganized during Secretary Sonny Perdue’s tenure,<sup>178</sup> eliminating the Grain Inspectors, Packers and Stockyards Administration as a separate division of the USDA and placing it within the agency’s Agricultural Marketing

<sup>170</sup> 9 C.F.R. § 201.211 (2020).

<sup>171</sup> Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. 79779 (Dec. 11, 2020).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Undue or Unreasonable Preferences or Advantages, 9 C.F.R. § 201.211(d) (2020). The USDA explained that the proposed provision was criticized from both sides, either because customary is ambiguous or because the language could legitimate practices that are unfair but already pervasive in an industry. Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. at 79786.

<sup>175</sup> Undue and Unreasonable Preferences and Advantages Under the Packers and Stockyards Act, 85 Fed. Reg. at 79780.

<sup>176</sup> *Id.* at 79782.

<sup>177</sup> *Id.* at 79782–83 (describing factors the USDA considered in deciding whether to prohibit specific practices instead of setting forth agency considerations).

<sup>178</sup> The Senate confirmed Perdue on April 24, 2017. *Senate Confirms Sonny Perdue as Agriculture Secretary*, AP NEWS (Apr. 24, 2017, 6:19 PM EST), <https://perma.cc/3YDP-468J>. Revocation of the interim PSA harm to competition rule took place during his tenure.



Service (AMS).<sup>179</sup> The USDA formally codified the change in a rule published on November 29, 2018, giving the AMS administrator authority to administer the Packers and Stockyards Act.<sup>180</sup> The Organization for Competitive Markets, a farmers' trade group, criticized the reorganization, calling it the "death knell for anti-trust enforcement in the meatpacking industry," because of the Agricultural Marketing Service's collaborative work with meatpackers in its marketing role.<sup>181</sup> The Packers and Stockyards Division is now a sub-sub-division of the USDA, within AMS's Fair Trade Practices program.<sup>182</sup>

#### D. What's Next

The saga of the USDA interpretation of the PSA harm to competition requirement is not over. In June of 2021, the USDA announced its intention to re-propose a rule stating that parties bringing PSA claims do not need to show harm to competition.<sup>183</sup> It also said it hopes to use the rule to strengthen enforcement against unfair and deceptive practices.<sup>184</sup> In a fact sheet on the PSA published in August 2021, the USDA said the 2020 rule does not provide a complete safe harbor and specified that the criteria it established are not determinative.<sup>185</sup> That fact sheet provides examples of packer practices the USDA may investigate for violations of the PSA and identifies several suspect practices,

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<sup>179</sup> Memorandum from Sonny Perdue, Sec'y, U.S. Dep't of Agric. (Nov. 14, 2017), <https://perma.cc/EE6S-ARKE>; *see* Revision of Delegations of Authority, 83 Fed. Reg. 61309 (Nov. 29, 2018); *see also* Press Release, U.S. Dep't of Agric., Secretary Perdue Announces USDA Improvements for Customer Service & Efficiency (Sept. 7, 2017), <https://perma.cc/GM67-C8QX>.

<sup>180</sup> Administrator, Agricultural Marketing Service, 7 C.F.R. § 2.79 (2022); *see* Revision of Delegations of Authority, 83 Fed. Reg. 61309 (Nov. 29, 2018).

<sup>181</sup> *GIPSA Is Dead; The Fight for Producer Protections Continues*, ORG. FOR COMPETITIVE MKTS. (Nov. 29, 2018), <https://perma.cc/NAU5-ZFPR>.

<sup>182</sup> *See Fair Trade Practices Program*, U.S. DEP'T OF AGRIC., <https://perma.cc/XCW6-B262> (last visited Feb. 10, 2022). Part of the rationale for reorganizing GIPSA was to separate the Packers and Stockyards Administration from the USDA's grain inspection program, which was merged with PSA administration in 1994. *See* Letter from Randall C. Gordon, President & CEO, Nat'l Grain & Feed Ass'n, to Off. of Budget & Program Analysis, U.S. Dep't of Agric. (Oct. 7, 2017), <https://perma.cc/9DJ8-BB6V>; *see also* GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., U.S. DEP'T OF AGRIC., 2013 EXPLANATORY NOTES 20-1 (2013), <https://perma.cc/F5TT-B7GV>.

<sup>183</sup> Press Release, U.S. Dep't of Agric., USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act (June 11, 2021), <https://perma.cc/2YEA-7LBU>; *see* Semiannual Regulatory Agenda, Spring 2021, 86 Fed. Reg. 41172 (July 30, 2021).

<sup>184</sup> Fair Trade Practices Program, *supra* note 182.

<sup>185</sup> Frequently Asked Questions on the Enforcement of Undue and Unreasonable Preferences Under the Packers and Stockyards Act, U.S. DEP'T OF AGRIC. (Aug. 2021), <https://perma.cc/DU75-9TPE>.

including retaliation for membership in grower organizations and inadequate documentation of factors influencing grower pay, that have no evident connection to antitrust harm.<sup>186</sup>

As the USDA itself acknowledged when rescinding its earlier harm to competition rule, courts would have good reason to defer to a USDA harm to competition rule—enactment of the USDA’s position in a formal rule would offer an additional reason to defer to the agency.<sup>187</sup> In the next section, I explain why deferring to a broad USDA rule of this kind—saying the PSA does not require harm to competition—is consistent with courts’ historical practice in reviewing USDA decisions.

#### V. SEVENTH CIRCUIT DECISIONS REBUKING THE USDA

One of the arguments advanced against deferring to the USDA on harm to competition is that such deference has not been the consistent practice of courts that have evaluated the PSA. In addition to the forward-looking response to this argument that I advance above—that courts have yet to confront a formal rule on harm to competition and that such a rule would be more deserving of deference—I address in this section the extent to which the Seventh Circuit has refused to defer to the USDA in PSA adjudications. I argue that the seminal Seventh Circuit adjudication decisions required harm to competition in some but not all circumstances: when the agency alleged harm to the competitive process, or unfairness in packer sales practices, *but not* when the agency alleged unfairness in packers’ dealings with growers. This approach makes sense. Enforcing a “fairness” mandate in commercial dealings between packers and grocery stores, for instance, would be unwieldy and could directly conflict with antitrust law. More importantly, it would overextend the PSA to a point where it would govern commerce generally (the domain of antitrust) rather than protecting farmers and consumers (the proper domain of the PSA). These Seventh Circuit decisions do not provide good precedent for courts to overrule a USDA rule saying the PSA does not require harm to competition in all circumstances.

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<sup>186</sup> *Id.*

<sup>187</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594, 48598 (Oct. 18, 2017) (arguing that a harm to competition rulemaking would create a “patchwork” because at least some courts would defer to the agency’s position).

### A. Cases in Which the Plaintiff Claims Competitive Harm

One of the earlier Seventh Circuit PSA cases, *Swift & Co. v. United States*,<sup>188</sup> illustrates the court's approach when the plaintiff alleges competitive harm. In *Swift*, the Seventh Circuit considered a USDA enforcement action against packer Swift over two practices: an agreement not to bid against a rival hog dealer following intense competition between Swift and the dealer, and dealers calling Swift to find out the prices it would pay them for hogs.<sup>189</sup> The USDA challenged both practices for interfering with proper competition among hog buyers.<sup>190</sup> The Seventh Circuit agreed regarding the first claim on the authority of its previous holding that packer bid-rigging violated the Sherman Act.<sup>191</sup> It rejected the second claim, however, finding that the price sharing was a forward contract that strengthened competition in hog markets, since it allowed dealers to secure guaranteed minimum prices.<sup>192</sup> Critically, the USDA had "claim[ed] that [the price sharing] practice eliminated competition."<sup>193</sup> Swift was entitled to review of that contention, and the Seventh Circuit found the USDA was wrong about the practice's competitive effects.<sup>194</sup> Applying antitrust learning only where the USDA alleged harm to competition followed from the court's reading of the statute; it stated that the PSA is "broader in scope than antecedent legislation such as the Sherman Antitrust Act [and other antitrust laws]."<sup>195</sup>

### B. Sell-side PSA Cases

Meatpackers are middlemen—buying and slaughtering livestock and then selling meat—and the Seventh Circuit has looked beyond the PSA to determine its proper scope most often when it has considered challenges to meatpackers' practices as sellers. When the USDA has challenged a practice that is common in business generally, and not one of the "special mischiefs and injuries inherent in livestock and poultry traffic,"<sup>196</sup> it has required

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<sup>188</sup> 308 F.2d 849 (7th Cir. 1962).

<sup>189</sup> *Id.* at 853.

<sup>190</sup> *Id.* at 853–54.

<sup>191</sup> *Swift & Co. v. United States*, 308 F.2d at 853; *see Swift & Co. v. United States*, 196 U.S. 375 (1905).

<sup>192</sup> *Swift*, 308 F.2d at 853.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 854.

<sup>195</sup> *Id.* at 853 (citations omitted).

<sup>196</sup> *Armour & Co. v. United States*, 402 F.2d 712, 722 (1968).

the USDA follow principles of market regulation elucidated in other areas of law, including antitrust.

The Seventh Circuit established this approach early on. In one of the earliest Seventh Circuit PSA decisions, *Swift & Co. v. Wallace*,<sup>197</sup> it focused on the competitive consequences of the challenged practice, preferential credit terms a meatpacker gave to institutional buyers, like schools and cruise ships, over intermediary meat sellers (purveyors).<sup>198</sup> It threw out the USDA's order that Swift cease giving thirty-day credit terms to institutional buyers unless it began giving the same credit terms to any buyer with a certain minimum credit rating.<sup>199</sup> The Seventh Circuit looked to broader principles of market regulation to determine whether the PSA bars preferential treatment regarding credit terms.<sup>200</sup>

Competition factored into the court's analysis in two ways, neither of which was directly related to antitrust law. First, institutional buyers demanded long credit terms.<sup>201</sup> This was not because of any peculiar characteristic of the meat business, but because public institutions were generally unwilling or unable to pay their bills on a weekly schedule.<sup>202</sup> As a result, Swift needed to extend credit for longer than a week to compete with other companies seeking to sell to public institutions, including purveyors.<sup>203</sup> The court took this as strong evidence of the reasonableness of the practice.<sup>204</sup> Second, the packers competed with purveyors (also their customers) for the business of institutional buyers, but the purveyors did not compete against the institutional buyers.<sup>205</sup> The court cited to Supreme Court precedent interpreting similar unjust discrimination provisions enforced by the Interstate Commerce Commission for the proposition that unjust discrimination is of particular concern when a middleman tips the scales in favor of one of two competing enterprises.<sup>206</sup> Conversely, a preference given when the two customers are not competing is not as much of a concern.<sup>207</sup> The real competition was between packers selling

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<sup>197</sup> 105 F.2d 848 (7th Cir. 1939).

<sup>198</sup> *Id.* at 852.

<sup>199</sup> *Id.* at 863.

<sup>200</sup> *Id.* at 853.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 854.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 855.

<sup>205</sup> *Id.* at 858.

<sup>206</sup> *Id.* at 856.

<sup>207</sup> *Id.* at 855

directly to institutions and purveyors, and the Seventh Circuit did not want to use the PSA to limit Swift's ability to compete against the purveyors.<sup>208</sup> It viewed such use as beyond the scope of the PSA.<sup>209</sup>

Underlying the Seventh Circuit's focus on competition in *Swift & Co. v. Wallace* was a concern that the USDA was regulating commerce beyond the scope of its authority. It summarized its concerns:

Perhaps the fundamental difficulty is that the Secretary of Agriculture is in fact attempting to exercise authority to enforce uniformity of discount terms, terms of credit, and trade practices in the business of distribution of packers' products. We do not think that the Packers and Stockyards Act confers such extensive authority upon the Secretary. . . . [S]uch a program . . . presupposes a power at least as comprehensive as the power of the Interstate Commerce Commission in its field, and such as can be exercised effectively only by treating the packing industry as a public utility.<sup>210</sup>

The USDA was challenging practices accepted in business generally, not just in the meat industry.<sup>211</sup> Then it tried to resolve its concerns by extensively regulating Swift's business practices, requiring it to offer its supposedly unreasonable discounts to additional customers.<sup>212</sup> Nothing in the PSA's text or history indicated that it authorized this kind of broad market regulation.<sup>213</sup>

In the 1960s, the Seventh Circuit decided several cases in which it had to wrestle with the extent to which antitrust precedents are relevant in determining whether a packer sales practice is unfair under the PSA. The court made clear that the scope of the PSA is wider than that of the antitrust laws, but nonetheless incorporated antitrust reasoning into some of its PSA unfairness decisions. The court outlined this approach in *Wilson & Co. v. Benson*,<sup>214</sup> in which it upheld a USDA order finding meatpacker Wilson violated the PSA when it slashed prices to push out a

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<sup>208</sup> *See id.* at 858.

<sup>209</sup> *Id.* at 856 ("There is no contention in the instant case that petitioner is restricted by any rule of law, or by any standards of business conduct, in its right to compete with the purveyors.")

<sup>210</sup> *Id.* at 862–63.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 862.

<sup>213</sup> *Id.* at 863 ("We do not think that the Packers and Stockyards Act confers such extensive authority upon the Secretary.")

<sup>214</sup> 286 F.2d 891 (7th Cir. 1961).

smaller competitor headed by a former employee.<sup>215</sup> At the outset, the court noted that the PSA reaches farther than the antitrust laws.<sup>216</sup> But, in concluding that Wilson’s price-cutting violated the PSA, it referred to the policy on competition Congress outlined in the antitrust laws, citing the Congressional determination that “certain forms of price competition are not in the public interest.”<sup>217</sup> It noted that § 202(a) bars violations of the Clayton Act, and cited Supreme Court Clayton Act precedent from the previous year—*Federal Trade Commission v. Anheuser-Busch, Inc.*<sup>218</sup>—holding that price discrimination limited to a particular geographic market that is intended to push out competitors in that market can violate the Clayton Act.<sup>219</sup> The situation in *Wilson* was closely analogous to the situation in *Anheuser-Busch*; in both cases a national seller slashed prices in a specific geographic region and dramatically boosted its sales there.<sup>220</sup> Taking its cues from the Supreme Court’s recent antitrust jurisprudence, the Seventh Circuit found that Wilson’s geographically limited below-cost pricing violated the PSA.<sup>221</sup>

The Seventh Circuit harmonized enforcement of the PSA against packer sales practices more closely with antitrust law in *Armour & Co. v. United States*,<sup>222</sup> concluding that a packer coupon promotion does not violate the PSA “absent some predatory intent or some likelihood of competitive injury.”<sup>223</sup> The court noted at the outset that the case was “admittedly a test case to determine the validity of coupon promotion plans under the Packers and Stockyards Act,” limiting its requirement of proof of harm to competition to coupon programs.<sup>224</sup> In determining whether the coupon practice violated the PSA, the *Armour* court referred to several

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<sup>215</sup> *Id.* at 893.

<sup>216</sup> *Id.* at 895 (“Section 202(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.”).

<sup>217</sup> *Id.* at 895.

<sup>218</sup> 363 U.S. 536 (1960).

<sup>219</sup> *Wilson & Co.*, 286 F.2d at 895.

<sup>220</sup> *Anheuser-Busch*, 363 U.S. at 539.

<sup>221</sup> *Wilson & Co.*, 286 F.2d at 896. Thirty years later, the Supreme Court set forth more restrictive requirements for price discrimination in violation of the Robinson-Patman Act. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 210 (1993). The offense now requires a showing of below-cost pricing and likelihood that the alleged monopolist would recoup its losses. *Id.*; see also C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2058 (2018).

<sup>222</sup> 402 F.2d 712 (1968).

<sup>223</sup> *Id.* at 717.

<sup>224</sup> *Id.* at 715.

antitrust decisions from other food businesses, such as oat flour and ice cream.<sup>225</sup> Those decisions barred below-cost pricing where there was intent to eliminate competition.<sup>226</sup>

The factual circumstances the Seventh Circuit emphasized show it wanted to harmonize sell-side PSA regulation with other commercial regulation, and particularly food sales regulation. It noted that Armour's promotion—on thick-sliced bacon—was intended to introduce consumers to a new, potentially high-profit item, to the benefit of consumers as well as other meatpackers.<sup>227</sup> It mentioned that “[c]oupon practices [were] widespread in the food industries and [had] been employed by Armour's competitors.”<sup>228</sup> And the promotion was “inspired by an outside advertising agency” (whose activities presumably were not limited to the meat industry).<sup>229</sup> As in *Swift & Co. v. Wallace*, the Seventh Circuit worried that a contrary ruling would extend the USDA's authority beyond what Congress intended.<sup>230</sup> It wrote that the PSA does not “give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers.”<sup>231</sup>

The Seventh Circuit's statement in *Armour* of the scope of the PSA conveys the rationale for different treatment of practices specific to the meatpacking business and those common in commerce generally: “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*.”<sup>232</sup> It would not make much sense to ban coupon discounting in the meat business but not elsewhere in the marketplace. While the legislative history of the PSA shows concern with the fate of small butchers and other meat retailers,<sup>233</sup> analogous concerns were expressed when the antitrust laws were

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<sup>225</sup> *Id.* at 718 (citing Quaker Oats Co., CCH Trade Reg. Rep., 1963–1965 Transfer Binder, P17, 134 (FTC 1964)); *Bailan Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955).

<sup>226</sup> *Armour & Co.*, 402 F.2d at 718.

<sup>227</sup> *Id.* at 720.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 717.

<sup>231</sup> *Id.* at 721–22 (citing Meat Packer Legislation: Hearings Before the H. Comm. on Agric., 66th Cong. 2211, 2657 (1920)).

<sup>232</sup> *Id.* at 722 (emphasis added).

<sup>233</sup> *Id.* at 721 (quoting Meat Packer Legislation: Hearings Before the H. Comm. on Agric., 67th Cong. 237 (1921)).

passed and by some courts interpreting those laws.<sup>234</sup> Coupon discounting is not a “mischief” special to the meatpacking business.<sup>235</sup>

The Seventh Circuit endorsed a competitive harm requirement in another sell-side PSA case in *Pacific Trading Co. v. Wilson & Co.*<sup>236</sup> In *Pacific*, the Seventh Circuit affirmed a district court decision throwing out a private PSA enforcement action over the sale of poor-quality hams, finding that the PSA did not then allow for enforcement by private plaintiffs.<sup>237</sup> The Seventh Circuit attached the district court’s memorandum opinion as an appendix to its ruling affirming that decision.<sup>238</sup> That memorandum opinion described the PSA as “prohibiting a variety of unfair business practices which adversely affect competition.”<sup>239</sup> The decision is weak precedent, however, for a broad harm to competition requirement. First, the case was thrown out on the grounds that “the proper party to enforce [the PSA] is the Secretary of Agriculture.”<sup>240</sup> This shows a skepticism of private plaintiffs alleging a practice is unfair or deceptive without the support of the Secretary of Agriculture, but does not imply a harm to competition requirement for claims brought by the USDA.<sup>241</sup>

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<sup>234</sup> See, e.g., *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897) (“Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein.”). For an example of the modern treatment of concern for the fate of small businesses in antitrust law, see *Phila. Taxi Ass’n, Inc. v. Uber Techs., Inc.*, 886 F.3d 332, 338 (2018) (rejecting small taxi companies’ claims that they were pushed out of business by wealthy rideshare company Uber, because antitrust law exists “to protect *competition*, not *competitors*”). See also discussion *supra* Section III.C (discussing the approach to competitive harm in modern antitrust law).

<sup>235</sup> The USDA objected to the limitations on the reach of the PSA the Seventh Circuit suggested in *Armour*. See Campbell, *supra* note 36, at § 3.47. The USDA also disagreed with the *Armour* court’s findings of fact, however, and in a later administrative proceeding said it would not have alleged an “unfair practice” under the facts as stated in *Armour*. *Id.* at § 3.51 (citing *Cent. Coast Meats, Inc.*, 33 Agric. Dec. 117, 172 (1974), *rev’d on other grounds sub nom.* *Cent. Coast Meats, Inc. v. U.S. Dep’t of Agric.*, 541 F.2d 1325 (9th Cir. 1976)).

<sup>236</sup> *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367 (7th Cir. 1976).

<sup>237</sup> *Id.* at 369.

<sup>238</sup> *Id.* at 368.

<sup>239</sup> *Id.* at 369.

<sup>240</sup> *Id.* at 369–70.

<sup>241</sup> Congress amended the enforcement provisions of the Packers and Stockyards Act shortly after the decision in *Wilson* was handed down. It revised the Act to provide: “If any person subject to this Act violates any of the provisions of this Act . . . he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.” Act of Sept. 13, 1976, Pub. L. 94–410, § 6, 90 Stat. 1250 (codified as amended at 7 U.S.C. § 209). The original Packers and Stockyards Act allowed aggrieved farmers to petition the Secretary of Agriculture for redress of purported harms, allowing a farmer to sue in federal district court only if the Secretary awarded him damages and



Additionally, for his competition-focused description of the scope of the PSA, district Judge William Lynch (whose opinion the Seventh Circuit affirmed and appended to its decision in *Wilson*) pointed to *Bruhn's Freezer Meats v. United States Department of Agriculture*.<sup>242</sup> In *Bruhn's*, the Eighth Circuit upheld a USDA finding that a meatpacker's delivery to customers of lower-grade beef than it promised was unfair and deceptive in violation of § 202(a).<sup>243</sup> *Bruhn's* made no reference to competition or the antitrust laws and interpreted the PSA as providing extensive power to the USDA:

The Act was framed in language designed to permit the fullest control of packers and stockyards which the Constitution permits, and its coverage was to encompass the complete chain of commerce and give the Secretary of Agriculture complete regulatory power over all packers and all activities connected therewith.<sup>244</sup>

The *Wilson* decision also shows the Seventh Circuit's concern, present in *Armour*, with over-extending the PSA to cover commercial transactions that are not unique to the meatpacking industry. Plaintiffs in *Wilson* were sold poor-quality goods and then tried to recover the money spent on those goods.<sup>245</sup> While the regulatory scheme governing salability of meat could set this transaction apart from other contract breach claims,<sup>246</sup> the court gave no indication that defendant used that regulatory scheme to carry out the alleged deception. Instead, plaintiffs alleged a standard breach of contract, unrelated to a "mischief" unique to the meatpacking industry, and the PSA did not convert it to a federal claim.<sup>247</sup> The thrust of the opinion was that private parties were

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the packer did not pay. Packers and Stockyards Act of 1921 § 309, Pub. L. No. 67-51, 42 Stat. 165-66. See *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1469 (N.D.N.Y. 1984) (holding that PSA authorizes private damages actions for violation of 7 U.S.C. § 192). For a general discussion of private rights of action for violation of regulatory statutes, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

<sup>242</sup> *Wilson & Co.*, 547 F.2d at 369 (citing *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971)).

<sup>243</sup> *Bruhn's Freezer Meats of Chi., Inc. v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971).

<sup>244</sup> *Id.* at 1339.

<sup>245</sup> *Wilson & Co.*, 547 F.2d at 369.

<sup>246</sup> See *id.* at 370 (discussing plaintiffs' claims for alleged violation of Federal Meat Inspection Act).

<sup>247</sup> *Id.* at 371 ("The Court finds that the legislative intent behind enactment of these statutes [the PSA and other food regulations] was to regulate the packing, storage and distribution of meat and not to create a federal cause of action for a breach of contract

not the proper plaintiffs to enforce the PSA and, to the extent the court went beyond that, it, like the *Armour* court, was skeptical of applying stricter regulations than those imposed by antitrust law to standard commercial transactions that happen to involve meatpackers.<sup>248</sup>

## VI. HARM TO COMPETITION IN THE REMAINING CIRCUITS

The consequences of potential USDA rulemaking on the harm to competition requirement would vary by circuit, as different circuits have to this point taken different positions on harm to competition and the weight to be given the USDA's position. In addition to the Fifth Circuit, the Eleventh,<sup>249</sup> Tenth,<sup>250</sup> and Sixth<sup>251</sup> Circuits have all expressly adopted the harm to competition requirement. Precedent on harm to competition in the remaining circuits that have considered the issue is equivocal. Three other courts discussed in the *Wheeler* court's opinion as supporting the requirement did not expressly endorse it.<sup>252</sup> Those three courts suggested a showing of harm to competition is necessary in some circumstances but not all (Fourth Circuit) or sufficient but not necessary (Eighth and Ninth Circuits).<sup>253</sup>

PSA jurisprudence in the Fourth and Eighth Circuits is particularly unsettled because district courts in those circuits have held that the PSA does not require harm to competition. Those circuits are especially important for agriculture regulation because they include several of the top meat-producing states. Iowa (Fourth Circuit) is the nation's top pork producer by a large margin,<sup>254</sup> while North Carolina (Eighth Circuit) is the top producer of poultry.<sup>255</sup> Uncertainty in these circuits makes it more likely they may follow a USDA interpretation advanced in rulemaking,

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simply because a defense to said contract was that the product was purportedly 'off-condition' meat.").

<sup>248</sup> *Id.* at 369–70.

<sup>249</sup> *London v. Fieldale Farms*, 410 F.3d 1295 (11th Cir. 2005).

<sup>250</sup> *Been v. O.K. Indus., Inc.*, 495 F.3d 1217 (10th Cir. 2007).

<sup>251</sup> *Terry v. Tyson Farms*, 604 F.3d 272 (6th Cir. 2010).

<sup>252</sup> *See Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 359–60 (5th Cir. 2009) (en banc).

<sup>253</sup> *See infra* Section VI.A–B; *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451 (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.").

<sup>254</sup> Travis Averill, Nat'l Agric. Stat. Serv., *Quarterly Hogs and Pigs: Agricultural Statistics Board Briefing*, U.S. DEP'T OF AGRIC. (Sept. 24, 2021), <https://perma.cc/R75T-JNW8>.

<sup>255</sup> *Agricultural Production and Prices*, U.S. DEP'T OF AGRIC., <https://perma.cc/3ZTM-LLXB> (last visited Feb. 10, 2022).

as they may determine their experience with the statute indicates that its proper scope is a matter of policy preference ill-suited to judicial resolution.<sup>256</sup>

#### A. The Fourth Circuit

The Fourth Circuit's jurisprudence on the harm to competition requirement illustrates how decisions on the requirement that do not stake out a firm position have given rise to conflicting characterizations. The decision most often cited as endorsing the harm to competition requirement in the Fourth Circuit is *Philson v. Goldsboro Milling Co.*<sup>257</sup> In that case, the Fourth Circuit upheld a jury instruction requiring a showing of harm to competition in a claim brought by a turkey grower against his turkey dealer over incorrect weighing and low-quality birds.<sup>258</sup> It cited the Eighth Circuit's decision in *Farrow v. United States Department of Agriculture*<sup>259</sup> and concluded that the lower court accurately instructed that the Philsons needed to prove harm to competition to win their case.<sup>260</sup>

This decision has several weaknesses as precedent for a strict harm to competition requirement. Judge John Preston Bailey of the Northern District of West Virginia noted some of these weaknesses in a 2017 decision concluding that the PSA does not require harm to competition.<sup>261</sup> First, the decision is unpublished and thus has no precedential value in the Fourth Circuit.<sup>262</sup> Second, the court did not analyze the PSA statutory interpretation question from scratch. To the extent it considered the question at all, it relied on a reading of *Farrow* that district courts in the Eighth Circuit subsequently rejected.<sup>263</sup> Third, the court's embrace of the harm to competition requirement may apply only to the circumstances of the Philsons' case. Incorrectly weighing a poultry grower's birds—the only issue on which the jury found in

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<sup>256</sup> See Thomas W. Merrill, *Re-reading Chevron*, 70 DUKE L. J. 1153, 1165 (discussing how “the importance of having discretionary policy decisions made by politically accountable institutions” can tip the balance of judicial considerations in favor of deference to an agency).

<sup>257</sup> *Philson v. Goldsboro Milling Co.*, Nos. 96–2542 & 96–2631, 1998 WL 709324 (4th Cir. Oct. 5, 1998).

<sup>258</sup> *Id.* at \*1, \*8.

<sup>259</sup> 760 F.2d 211 (8th Cir. 1985).

<sup>260</sup> *Philson*, 1998 WL 709324, at \*4.

<sup>261</sup> *M&M Poultry, Inc. v. Pilgrim's Pride Corp.*, No. 15–CV–32, 2015 WL 13841400 (N.D.W. Va. Oct. 26, 2015).

<sup>262</sup> See *id.* at \*9; see also *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 417 (4th Cir. 2014).

<sup>263</sup> *Philson*, 1998 WL 709324, at \*4; see *M&M Poultry*, 2015 WL 13841400, at \*9.

favor of the Philsons—is a state law offense in North Carolina.<sup>264</sup> It is reasonable to require a special showing of competitive harm in this situation—where the challenged action affects only a single grower and is governed by a separate statutory scheme. *Philson* does not preclude treating other grower practices as *per se* unfair or discriminatory without a showing of harm to competition.

Subsequent interpretation of the PSA by Judge Bailey also indicates that the statute does not impose a concrete harm to competition mandate. In Judge Bailey’s 2017 decision in *M&M Poultry, Inc. v. Pilgrim’s Pride Corp.*,<sup>265</sup> he denied chicken company Pilgrim’s Pride’s motion to dismiss a claim brought by growers challenging Pilgrim’s Pride’s use of the tournament system. Analyzing the plain text of the PSA and the circumstances of its passage, as well as subsequent decisions interpreting it, he concluded that the PSA does not require a showing of harm to competition.<sup>266</sup> He allowed the growers to pursue their claim that the tournament system is unfair in violation of the PSA without proving harm to competition.<sup>267</sup> In his analysis of the purpose and history of the PSA he quoted at length from Judge Garza’s *Wheeler* dissent.<sup>268</sup> This decision was unreported but left undisturbed by the Fourth Circuit, and Judge Bailey reaffirmed it in *Triple R Ranch, LLC v. Pilgrim’s Pride Corp.*,<sup>269</sup> in which growers alleged that Pilgrim’s Pride retaliated against them for participating in growers’ associations. Judge Bailey rejected Pilgrim’s Pride’s request that he revisit his decision on harm to competition in *M&M*,<sup>270</sup> pointing to that decision as the appropriate statement of the law on the question.<sup>271</sup>

## B. The Eighth Circuit

The Eighth Circuit’s PSA jurisprudence shows a similar pattern: an equivocal decision on the harm to competition requirement interpreted by a lower court as not mandating such a

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<sup>264</sup> N.C. Gen. Stat. § 75–1.1(a).

<sup>265</sup> 2015 WL 13841400.

<sup>266</sup> *Id.* at \*9. Judge Bailey concluded that the USDA’s position on harm to competition should not be given deference, noting that the Secretary of Agriculture “has not promulgated a regulation applicable to the practices alleged in this case, and the USDA has no authority to adjudicate violations of [§ 202] by live poultry dealers.” *Id.* at \*6.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at \*11.

<sup>269</sup> 456 F. Supp. 3d 775 (N.D.W. Va. 2019).

<sup>270</sup> *Id.* at 778.

<sup>271</sup> *Id.*

showing. In *Farrow v. United States Department of Agriculture*,<sup>272</sup> the Eighth Circuit affirmed an administrative decision of the USDA holding that a bid-rigging agreement by cattle buyers violated the PSA, even though the buyers showed they paid the “top, best, and fair price” for the cattle while the agreement was in place.<sup>273</sup> The *Farrow* court noted that the PSA followed the “anti-trust blueprint” of the Sherman Act and other antitrust legislation,<sup>274</sup> and that its provisions are “liberally construed so as to give effect to the remedial purposes of the Packers and Stockyards Act.”<sup>275</sup> Rejecting the cattle buyers’ effort to fend off PSA liability on the grounds that they paid the ranchers a “fair” price, the court concluded: “A practice is ‘unfair’ under § 213(a) if it injures or is likely to injure competition.”<sup>276</sup> In its context, this statement appears as a non-exclusive definition of what the PSA prohibits: it must prohibit, at least, classic antitrust offenses such as bid-rigging.<sup>277</sup>

The Eighth Circuit’s 1999 decision in *IBP, Inc. v. Glickman*<sup>278</sup> also focused on the adequacy of the USDA’s showing of harm to competition, but only because the USDA based its argument against the practice it challenged on the practice’s effect on competition.<sup>279</sup> The court concluded that the USDA misjudged the effect of a right-of-first refusal bidding arrangement on ranchers and that the practice did not have the effect on competition the USDA claimed.<sup>280</sup> The decision does not mandate a harm to competition showing for all PSA claims,<sup>281</sup> especially since it acknowledged that undue discrimination would be a separate basis for a violation.<sup>282</sup>

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<sup>272</sup> 760 F.2d 211 (8th Cir. 1985).

<sup>273</sup> *Id.* at 214.

<sup>274</sup> *Id.* (quoting *De Jong Packing Co. v. U.S. Dep’t of Agric.*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980)).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 381 (5th Cir. 2009) (en banc) (Garza, J., dissenting).

<sup>278</sup> 187 F.3d 974 (8th Cir. 1999).

<sup>279</sup> *Id.* at 976.

<sup>280</sup> *Id.* at 978 (“The presence of the initial bid at a fair market price, with the feedlots’ attendant right to accept or reject the bid, essentially ensures that the potential for undue or arbitrary lowering of prices is eliminated.”); see *Wheeler*, 591 F.3d at 381 (Garza, J., dissenting).

<sup>281</sup> See *Schumacher v. Cargill Meat Sols. Corp.*, 515 F.3d 867 (8th Cir. 2008).

<sup>282</sup> *Glickman*, 187 F.3d at 977 (“Even the JO recognized that while the Agreement discriminates and gives an advantage or preference, the Agreement does not do so unduly, as required for a violation of the Act.”).

These equivocal precedents leave district courts in the Eighth Circuit free to allow growers to pursue PSA cases without proving harm to competition. In *Schumacher v. Tyson Fresh Meats, Inc.*,<sup>283</sup> Judge Charles Kornmann held that the PSA does not require harm to competition, finding *Farrow* and *IBP* do not mandate the contrary conclusion. He put his conclusion colorfully:

Defendants would have the court read *Farrow* as holding that a practice is unfair *only* if it injures or is likely to injure competition. That is simply not the law. It is akin to a statement that red is a color. This does not tell us that blue is not a color. The PSA must be broadly construed as condemning ‘any practices that inhibit the fair trading of livestock’ by those persons and entities covered under the Act.<sup>284</sup>

Judge Kornmann allowed plaintiff cattlemen to pursue a PSA claim against beef packers for using inaccurate USDA-published prices to negotiate cattle prices lower than what they would have been had the cattlemen known the accurate USDA prices.<sup>285</sup> The ambiguous directive of *Farrow* and *IBP* remains the law; the Eighth Circuit has not stepped in to enforce a strict harm to competition requirement.<sup>286</sup>

## VII. CONCLUSION

Farmers and ranchers are in dire straits. In reports on the state of livestock farming today, it is common to read heartbreaking stories of bankruptcy and suicide.<sup>287</sup> In response to complaints aired on the front page of the *New York Times* in December 2021, a spokeswoman for beef giant JBS responded that markets are competitive and that consolidation has nothing to do with the

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<sup>283</sup> 434 F. Supp. 2d 748 (D.S.D. 2006).

<sup>284</sup> *Id.* at 752 (quoting *Farrow v. U.S. Dep’t of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985)).

<sup>285</sup> *Id.* at 750. The case went to trial and the jury found the packers violated § 202(e) of the PSA but not § 202(a). *Schumacher v. Cargill Meat Sols. Corp.*, 515 F.3d 867, 870 (8th Cir. 2008). The Eighth Circuit eventually threw out the § 202(e) verdict over Judge Kornmann’s jury instructions regarding that section and did not have occasion to review the § 202(a) harm to competition requirement. *Id.*

<sup>286</sup> In an antitrust class action alleging a conspiracy to manipulate beef prices, Judge John Tunheim of the District of Minnesota stated the law as requiring a showing that the challenged practice has “at least the potential to suppress or reduce competition,” but he noted that § 202 of the PSA “is meant to be broader in scope than the Sherman Act.” See *In re Cattle Antitrust Litig.*, No. CV 19–1129, 2020 WL 5884676, at \*7 (D. Minn. Sept. 29, 2020).

<sup>287</sup> See Goodman, *supra* note 14; see also Dan Kaufman, *How Suffering Farmers May Determine Trump’s Fate*, NEW YORKER (Aug. 10, 2020), <https://perma.cc/8XYW-XP9P>.

squeeze on farmers and ranchers.<sup>288</sup> There is nothing to worry about, the meatpacking executives respond. The causal connection between concentration and grower prices is perhaps a factual question; a bipartisan group of senators has called for an investigation that could help clear it up.<sup>289</sup>

Regardless of the answer, farmers and ranchers feel their interests are not being adequately protected by their government. They are raising the kind of concerns to which Congress responded when it passed the PSA,<sup>290</sup> and their political mobilization has pressured members of the elected branches to take action to respond to these concerns. The current USDA efforts to enact its view of the harm to competition requirement in a rule are one such response. If these efforts are fruitful, courts should defer to that interpretation, allowing the USDA to define the bounds of the PSA's prohibitions.

Farmers' need for USDA rulemaking to fight the harm to competition requirement also illustrates the inadequacies of private enforcement of the PSA without USDA support. Simply put, the PSA fight shows that farmers need the strong and consistent backing of the USDA to successfully invoke the law's protections. A rule renouncing the harm to competition requirement would be a start, allowing more farmers and ranchers to invoke the PSA against unfair practices. Abandoning the harm to competition requirement alone will not give rise to energetic enforcement of agricultural regulation, but the USDA rejecting the requirement in rulemaking could set the agency on a path to enforcing the statute effectively. For courts to retain the requirement in the face of the USDA's opposition would enfeeble the agency.<sup>291</sup>

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<sup>288</sup> Goodman, *supra* note 14.

<sup>289</sup> Senators Jon Tester, Chuck Grassley and Mike Rounds have introduced legislation that would require the USDA to appoint a "Special Investigator for Competition Matters." Meatpacking Special Investigator Act, S. 2036, 117th Cong. (2021).

<sup>290</sup> *Compare* Stafford v. Wallace, 42 S. Ct. 397, 399 (1922) (discussing dominance of Big 5 packing operations that reduced buyer competition), *with* Goodman, *supra* note 14 (discussing farmer complaints that meatpackers today can "extinguish competition and dictate prices").

<sup>291</sup> *See* THE FEDERALIST NO. 10 (Alexander Hamilton) ("A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.").