COMPETITIVE ENTERPRISE INSTITUTE

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September 10, 2024

S. Brett Offutt
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USDA AMS Fair Trade Practices Program
1400 Independence Avenue SW
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Re: Fair and Competitive Livestock and Poultry Markets, Docket No. AMS-FTPP-21-0046, RIN 0581–AE04, 89 Fed. Reg. 53,886 (June 28, 2024); 89 Fed. Reg. 68376 (Aug. 26, 2024).

Dear Mr. Offutt:

On behalf of the Competitive Enterprise Institute, we respectfully submit these comments to the Department of Agriculture ("the Department") on its proposed rule entitled Fair and Competitive Livestock and Poultry Markets, RIN 0581–AE04, 89 Fed. Reg. 53,886, 53,910 (proposed June 28, 2024) (to be codified at 9 C.F.R. § 201.308). The Competitive Enterprise Institute is a non-profit public interest organization committed to the free operation of markets. The Competitive Enterprise Institute does not favor any particular group of market participants be they producer or processor, buyer or seller, wholesaler or retailer.

General Principles
"The province and duty of the judicial department"

The Department had the misfortune of proposing a rule "to provide clearer standards . . . for the courts," 89 Fed. Reg. at 53,893, on the very day the Supreme Court decided *Loper Bright Enterprises, Inc. v. Raimondo*, 144 S. Ct. 2244 (2024), and held that the duty to provide standards flows in the opposite direction. The Court reaffirmed the doctrine of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 2257 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Agencies, the Court held, "have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment." *Id.* at 2266.

Whether or not the word "unfair" as used in section 202(a) of the Packers and Stockyards Act of 1921 ("the Packers and Stockyards Act" or "the Act") is ambiguous, the standards for its interpretation

must come from the relevant jurisprudence, not from the allegedly longstanding interpretation of the secretary of agriculture.[1] This comment will be guided by that jurisprudence.

Unfair Practices with Respect to Market Participants

A.

The proposed rule "would define unfair practices as conduct that harms market participants and conduct that harms the market." 89 Fed. Reg. at 53,886. It creates a separate test for each of those two types of conduct. Proposed section 201.308(a) defines unfair practices with respect to market participants. Proposed section 201.308(b) is not part of the definition. It contains factors that the secretary may consider in connection with section 201.308(a)'s definition. Proposed section 201.308(c) defines unfair practices with respect to markets. Section 201.308(d) contains factors that the secretary may consider in connection with section 201.308(c)'s definition.

With its first words, section 201.308(a)'s definition of unfair practices with respect to market participants immediately diverges from the term it is supposed to define. "Unfair practices" are defined as "[a]n act," a solitary act. The language in section 202(a) of the Act that the Department should be defining is "any unfair, unjustly discriminatory, or deceptive practice or device." Packers and Stockyards Act § 202(a); 7 U.S.C. § 192(a). A practice is not the same as a single act however injurious. The difference between a practice and an act is illuminated by the Supreme Court's discussion of the constitutionality of this provision: "Whatever amounts to *more or less constant practice*, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause. . . ." *Stafford v. Wallace*, 258 U.S. 495, 521 (1922) (emphasis added). The Department has taken the position that a single transaction can be a "practice" because the word refers to a practice of the industry rather than a practice of a particular respondent. *Gen. Indus., Inc. v. Ellis*, 42 Agric. Dec. 873, 886-95 (1983); 89 Fed. Reg. at 53,894 n.87. The proposal, however, does not require that the act be a practice of either the industry or the respondent.

The type of act that the proposal declares to be unfair is even more unbounded. It is an act that "causes or is likely to cause substantial injury to one or more market participants, which the participant or participants cannot reasonably avoid." This is the wrong way to circumscribe an act because a legitimate business practice can cause substantial and unavoidable harm to a market participant without being unfair. The Seventh Circuit Court of Appeals pointed out in a case brought under the Act that a pricing policy is not prohibited just because it might destroy a competitor. *Armour & Co. v. United States*, 402 F.2d 712, 719 (7th Cir. 1968). A report of the Congressional Research Service observed that "[s]mall hog producers claim that packers offer lower prices for small lots of hogs, even if hogs are comparable to larger lots from larger producers."[2] Packers quite properly may be willing to pay a higher price for larger lots in order to

[1] A notice of proposed rulemaking the Department previously issued on this subject contumaciously scolded federal appellate courts for issuing opinions that "fail to defer to the Secretary's longstanding and consistent interpretation of a statute administered by the Secretary." Implementation of Regulations Required under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35,338, 35,341 (June 22, 2010).

[2] Congressional Research Service, *USDA's "GIPSA Rule" on Livestock and Poultry Marketing Practices* 21 (Jan. 7, 2016), *available at* https://crsreports.congress.gov/product/pdf/R/R41673.

save on transaction costs. In this case, transaction cost savings could include fewer transactions for the same number of hogs, bulk shipping savings, more assurance of uniform quality, and other savings in time, effort, and relationship-building, as well as money. Nonetheless, small hog producers who claim to have been substantially harmed would have a claim that satisfies the elements of proposed section 201.308(a).

Instead of describing the effect of an act on a market participant, the definition should describe its unfairness. Between parties to a contract, fraud and other misconduct (including misrepresentation in forming the contract) and breach of contract (including nonpayment) are unfair. As to third parties, conspiracies to commit crimes, raise prices, or organize cartels are unfair. While no longer good law on the scope of the Federal Trade Commission Act,[3] the Supreme Court's 1920 decision in *FTC v. Gratz*, 253 U.S. 421 (1920), provides insight into the original public meaning of "unfair" in this context and at the time of the adoption of the Packers and Stockyards Act of 1921 that is more pertinent and more authoritative than the undated dictionary cited by the Department. 89 Fed. Reg. at 53,888 n.14. Echoing *Marbury* and *Loper Bright*, the Court said in *Gratz*,

> The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

253 U.S. at 427–28. Those concepts in some form need to be in the definition of unfair practices.

The next clause of proposed section 201.308(a), the affirmative defense, does not remedy this deficiency. The affirmative defense qualifies the injury to one or more market participants as one "which the regulated entity that has engaged in the act cannot justify by establishing countervailing benefits to the market participant or participants or to competition in the market that outweighs the substantial injury or likelihood of substantial injury." The clause is clearly worded as an affirmative defense as it places the burden on the regulated entity to "justify by establishing countervailing benefits."

A substantial injury to a market participant without more is not unfair, *see Armour & Co.*, 402 F.2d at 719, but it could be unfair if there are no countervailing benefits. Given the way the proposal defines unfair practices, the absence of countervailing benefits is an element of the offense. It is part of the Department's burden of proof as the proponent of an order. *Cf. Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1286 (11th Cir. 2005) (Plaintiff "did not present any evidence from which a reasonable jury could conclude that Tyson lacked pro-competitive justifications for using the agreements."). The proposal shifts that burden to the respondent in violation of the Administrative Procedure Act. 5 U.S.C. § 556(d).

[3] *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

Aside from the unlawfully misplaced burden of proof, the affirmative defense is defective because it omits countervailing benefits to consumers from the balance. Consideration of consumer welfare is not alien to the Packers and Stockyards Act. The Act was intended to address monopolistic practices that increase prices to consumers, *Stafford*, 258 U.S. at 514-15, as the Department recognizes. 89 Fed. Reg. at 53,897, 53,899. No understanding of the meaning of "unfair" is complete if it disregards consumers.

Although it may be that "[b]alancing allegedly unfair conduct against countervailing benefits is not a new consideration for the Secretary," 89 Fed. Reg. at 53,895, such balancing is not necessarily something the secretary is capable of doing or something the secretary should do. Even when both sides of the balance are quantifiable, countervailing benefits need not be greater than a competitor's loss to be reasonable.

The considerations in proposed section 201.308(b) do not save the definition either. First, they are permissive: they are factors that "the Secretary may consider." Second, the considerations in proposed section 201.308(b)(2) and (3) again focus on the effect of an act on a market participant not on its unfairness. They are, as proposed section 201.308(b) states, factors that the secretary may consider "[w]hen assessing whether a practice under paragraph of this section causes or is likely to cause substantial injury." As written, the proposal subjects legitimate business practices and arrangements that have competitive justifications to the peril of civil fines, cease and desist orders, and reparations.

This objection is not mere speculation. The Department and private complainants have brought charges opposing such legitimate arrangements. Some of them come under the umbrella of alternative marketing arrangements, which are agreements such as forward contracts to purchase livestock by means other than the cash market.[4] Innovative agreements that increase efficiency and expand competition have been subjected to unwarranted complaints under the Packers and Stockyards Act brought by the Department, *IBP, Inc. v. Glickman*, 187 F.3d 974, 977-78 (8th Cir. 1999); *Corona Livestock Auction, Inc. v. U.S. Department of Agriculture*, 607 F.2d 811, 815-16 (9th Cir. 1979), and by private complainants. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1282-87 (11th Cir. 2005); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 828-28 (E.D. Va. 2002). In such cases, the Department has disregarded not only efficiency but also consumers' welfare, which goes unmentioned.

In *De Jong Packing Co. v. U.S. Department of Agriculture*, 618 F.2d 1329 (9th Cir. 1980), the Department challenged a change in packers' terms of sale from sales of cattle "as is" to sales subject to the cattle passing government inspection. The dissent pointed out that the Department failed to offer evidence of an adverse effect on either consumers or competition.

> It is possible that "subject" terms would enhance competition with respect to the quality of animals offered for sale and reduce the costs of meat to consumers. It is also possible that they would be no more and no less anti-competitive than are "as is" terms. All we know for certain is that the farmers, stockyard owners, and the Department of Agriculture favor "as is" sales. The solidity of this front does not

[4] Congressional Research Service, *supra* note 2, at 21 n.34.

> guarantee that its position is more competitive, or even less anti-competitive, than that favored by the packers.

Id. at 1338 (Sneed, J., dissenting).

Indeed, the Department seems to have actively worked against consumer interests in cases such as *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968), where the Department found that Armour committed an unfair practice by offering a fifty-cent discount on thick cut bacon in order to expand its market share on the west coast, where it consistently maintained less than a five per cent share of bacon sales. In setting aside the Department's order, the court found it necessary to explain to the Department that "in Section 202(a) Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged." *Id.* at 722.

B.

These cases illustrate the damage that the definition's overbreadth portends. The definition also suffers from what it omits. The test for unfair practices with respect to market participants emulates the FTC Act in that "[h]arm to competition is not part of the test." 89 Fed. Reg. at 53,894. The omission of this element implements the Department's position that "section 202(a) covers unfair practices beyond harm to competition." *Id.* at 53,889.

That position is untenable. In *Stafford v. Wallace*, 258 U.S. 495 (1922), the Supreme Court examined the problems Congress sought to address in the recently enacted Packers and Stockyards Act. Having surveyed the record, the Court found that those problems involved monopoly and collusion:

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other.

Id. 514-15. The Court held that the Act's language confirmed those purposes: "The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies [to obstruct interstate commerce] by supervision of the agencies which would be likely to be employed in it." *Id.* at 520.

The Court's findings have a constitutional significance that the preamble's discussion of legislative history does not. The purpose of the Court's analysis was to determine whether the Packers and Stockyards Act was within Congress's power to regulate interstate commerce. *Id.* at 513, 517. Having found that the Act addressed monopoly and conspiracies to obstruct commerce, the Court concluded: "Thus construed

and applied, we think the act clearly within Congressional power and valid." *Id.* at 528. What that means is that to the extent the Act "covers unfair practices beyond harm to competition" it has not been held to be within Congress's power or valid.

The Department argues that a later Congress's amendment to the Act, which created a remedy for nonpayment in section 408, somehow implied that "it did not require any harm to competition to be a violation of section 202(a)." 89 Fed. Reg. at 53,888; s*ee* Act of Sept. 13, 1976, Pub. L. 94-410, § 5, 90 Stat. 1249, 1250. This amendment and the other amendments to the Act do not cast doubt on the interpretation that harm to competition is an element of a violation of section 202(a). *Wheeler v. Pilgrim's Pride Corp.,* 591 F.3d 355, 361-62 (5th Cir. 2009) (en banc).

To the contrary, Congress has spoken more directly on the subject; in doing so, it has rejected the view that harm to competition is not required. It responded to the Department's 2010 proposed rulemaking concerning the Act. Proposed section 201.3(c) provided, "A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases."[5] Before the proposed rule was finalized, Congress prohibited the use of funds in fiscal year 2012 to publish proposed section 201.3(c) as a final or interim rule. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, § 721, 125 Stat. 552, 583 (2011). The final rule did not include that provision. In any event, appropriation acts for fiscal years 2013, 2014, and 2015 continued the prohibition of the proposed rule.[6]

The jurisprudence of the federal circuit courts of appeals on this issue accords with the will of Congress and *Stafford*'s limiting construction. *E.g.*, *Wheeler*, 591 F.3d at 367 (Jones, J., concurring) ("Congress intended, and made plain by its choice of language, that injury to competition would be an element of the inquiry."); *Pickett v. Tyson Fresh Meats, Inc.,* 420 F.3d 1272, 1280 (11th Cir. 2005) ("It was not Congress' intent in enacting the PSA to interfere with a meat packer's business practices where those practices did not interfere with competition."). The element of injury to competition does not make subsections (a) and (b) superfluous, as the Department asserts. 89 Fed. Reg. at 53,889. Subsections (a) and (b) are residual; they cover restraints of trade that are not covered specifically by subsections (c)-(e). *Wheeler*, 591 F.3d at 371.

The preamble mischaracterizes the jurisprudence in an effort to invent an inconsistency that falls to the Department to correct. The courts have not "inconsistently applied the Judicial Officer's decisions." 89 Fed. Reg. at 53,886. Their duty is to apply the law, not the judicial officer's decisions, and they have been consistent in doing so: the Department's interpretation has "been consistently rejected by numerous courts of appeals for over 75 years, without congressional intervention." *Org. for Competitive Markets v. U.S. Dep't of Agric.*, 912 F.3d 455, 458 (8th Cir. 2018). Seven circuits have adopted the interpretation that an anticompetitive effect is necessary for an actionable claim under section 202(a) or (b) of the Act. *Philson v. Goldsboro Milling Co.*, Nos. 96–2542, 96–2631, 164 F.3d 625, 1998 WL 709324, at *4–5 (4th

[5] Implementation of Regulations Required under Title XI of the Food, Conservation and Energy Act of 2008, *supra* note 1, 75 Fed. Reg. at 35,351.
[6] Congressional Research Service, *supra* note 2, at 12-13, 15.

Cir. Oct. 5, 1998) (unpublished table decision); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362-63 (5th Cir. 2009) (en banc); *Terry v. Tyson Foods, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir.1976); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir.1999); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir.1995); *Been v. O.K. Indus.*, Inc., 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005). *See also In re Pilgrim's Pride Corp.*, 728 F.3d 457, 461 (5th Cir. 2013) (citing *Wheeler* and holding that section 202(e) of the Act proscribes only anti-competitive conduct).

This is more than "a handful of Circuits." 89 Fed. Reg. at 53,891. It is a "legion," "a tidal wave." *Terry*, 604 F.3d at 276, 277. The courts have rejected the Department's position so regularly that they have become weary of performing that duty: "Once more a federal court is called to say that the purpose of the Packers and Stockyards Act of 1921 is to protect competition and, therefore, only those practices that will likely affect competition adversely violate the Act. That is this holding." *Wheeler*, 591 F.3d at 357.

The district court opinions the Department cites as contrary authority do not create "a legal patchwork" either. 89 Fed. Reg. at 53,892 & n.73. "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed. 2011)).

Neither *stare decisis* nor collateral estoppel precludes an agency from challenging circuit court decisions—at least where the Supreme Court has not resolved the issue. *United States v. Mendoza*, 464 U.S. 154 (1984); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1374 (Fed. Cir. 2001) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958)). But here the Supreme Court has resolved the issue. In *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282 (1958), the Court recounted that Chief Justice Taft's opinion for the Court in *Stafford* "echoes and re-echoes with the fear of monopoly in this field," *id.* at 289, and then concluded:

> We take the Act as written. As written, it is aimed at all monopoly practices, of which discrimination is one. When Chief Justice Taft wrote of the aim of the Act in terms of the ends of a monopoly, he wrote faithfully to the legislative history. The Senate Report stated 'It has been demonstrated beyond question that the history of the development of this industry has been the history of one effort after another to set up monopoly.'

Id. at 289-90 (internal citation omitted).

Those words conclusively establish the meaning of the Act. The Supreme Court in *Stafford* and *Denver Union Stock Yard Co.* has foreclosed the Department's open-ended interpretation of the Act. If the Department required more clarity from the Supreme Court, it should have petitioned the Court for a writ of certiorari in at least one of the cases in which it lost on appeal on because it did not establish

competitive injury, namely, *IBP, Inc. v. Glickman*, 187 F.3d 974, 977-78 (8th Cir. 1999); *Armour & Co. Co. v. United States*, 402 F.2d 712, 718-22 (7th Cir. 1968); and *Swift & Co. v. Wallace*, 105 F.2d 848, 854-58 (7th Cir. 1939). In not one of those cases did the Department file a petition for certiorari. Such a petition would have been the proper place for the discussion of cases and the arguments the Department now rehearses in the preamble in support of its discredited theory.

An agency's nonacquiescence in adverse circuit court decisions can give the Supreme Court the benefit of permitting several circuits to explore a difficult question before the Court grants certiorari. *See Mendoza*, 464 U.S. at 160. But "any nonacquiescence depends upon the agency actually seeking Supreme Court review of adverse decisions." *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16, 22 (D.C. Cir. 2016). Failure to seek review ensures that the Court will not have an opportunity to review and to render a decision binding the agency. It forces regulated parties to relitigate at their expense the same issue in a circuit, even though the agency will lose. H.R. Rep. 98-618 at 23-25 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3060-62.

Having failed to seek Supreme Court review in each of the cases in which it had an opportunity to do so, the Department must accept the consistent authority it has failed to challenge. The majority in *Johnson v. U.S. Railroad Retirement Board* opined that "now that three circuits have rejected the Board's position, and not one has accepted it, further resistance would show contempt for the rule of law." 969 F.2d 1082, 1093 (D.C. Cir. 1992). Here the weight of authority is listing even more heavily against the Department. Until the Department seeks and obtains a Supreme Court decision limiting or overruling *Stafford* and *Denver Union Stock Yard Co.* in this regard, it should not adopt a rule without competitive harm as an element of its burden of proof. The Department could incorporate that element by combining the two tests of its proposal and requiring in all cases the presence of at least some of the standards set forth with admirable thoroughness in proposed sections 201.308(b), (c), and (d).

If the Department proceeds with this rulemaking without combining the tests, the final rule should provide for awards of attorney fees incurred at the administrative and judicial review levels by any respondent who prevails on this issue. Such a provision would "recognize the real-world consequences of forcing parties to waste time and resources litigating." *Heartland*, 838 F.3d at 18.

Conclusion and Recommendations

The first two of the four priorities the Department lists on the homepage of its website are tackling social justice, equity, and opportunity and addressing climate change. In view of this ostentation of ultra vires priorities, the Department deserves some credit for addressing one of its actual statutory responsibilities in this proposed rulemaking. Unfortunately, the proposal combines a disregard of economics with contempt for the rule of law. It would have to be substantially rewritten to be of any value.

Instead, the proposal should be abandoned as the Department and its Fair Trade Practices Program now have a more serious problem to deal with: compliance with *Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117 (2024), a case that renders the proposed rule largely unenforceable. In *Jarkesy* the Supreme Court held that the right to a jury trial guaranteed by the Seventh Amendment to the

Constitution "[i]n Suits at common law" extends to statutory claims that are legal in nature, as opposed to equitable in nature. *Id.* at 2128.

A suit for a civil penalty, the Court said, is analogous to a common law action in debt. *Id.* at 2129; *accord Tull v. United States*, 481 U.S. 412, 418-20 (1987). A civil penalty is also a type of remedy at common law that could only be enforced by courts of law. A penalty is legal if it is punitive rather than compensatory. *Jarkesy*, 144 S. Ct. at 2129; *Tull*, 481 U.S. at 422. In *Jarkesy* the Court found that "the civil penalties in this case are designed to punish and deter, not to compensate." 144 S. Ct. at 2130. That finding was decisive in the Court's conclusion that the Seventh Amendment applied. *Id.*

The Court added that its conclusion was confirmed by the close relationship between the claims brought by the Securities and Exchange Commission and common law fraud. *Id.* at 2130-31. The Court further held that the public rights exception to the Seventh Amendment requirement does not extend to suits in the nature of an action at common law. *Id.* at 2138-39. It concluded that the petitioners "are entitled to a jury trial in an Article III court." *Id.* at 2139.

The foregoing principles are easily applied to the Packers and Stockyards Act. Much like a common law action in debt, section 203(b) of the Act authorizes the secretary to assess civil penalties not greater than ten thousand dollars.[7] Section 203(b)'s criteria for determining the amount of a penalty do not relate to compensating the victim.[8] Reparations are instead authorized separately in sections 209 and 210. As in *Jarkesy*, the civil penalties authorized by section 203(b) are designed to punish and deter, not to compensate. The nature of this remedy compels the conclusion that the Seventh Amendment requires a jury trial if the Department seeks to assess a civil penalty for violation of the Act.

And as in *Jarkesy*, the close relationship between the statutory causes of action and common law causes of action confirms that conclusion. The concurring opinion in *Wheeler v. Pilgrim's Pride Corp.* discussed the "statutory and common-law antecedents" of the words of the Packers and Stockyards Act, 591 F.3d 355, 364 (5th Cir. 2009) (Jones, J., concurring), in much the same terms as *Jarkesy* discussed the "enduring link between federal securities fraud and its common law 'ancestor.'" *Compare Jarkesy*, 144 S. Ct. at 2130, *with Wheeler*, 591 F.3d at 364-68. Many, perhaps most, proceedings instituted under the Packers and Stockyards Act involve a claim deeply rooted in the common law, either fraud or breach of contract including nonpayment and late payment. *Cf. Penn. Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Penn. 1980) (discussing the parallel obligations to pay for livestock accepted by meat-packer under the common law and the Packers and Stockyards Act). And, as discussed, all cases instituted under the Act should involve anticompetitive activity. In that respect as well, the cases are analogous to "[s]uits at common law." There is a long history of state common-law remedies against monopoly. *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Indeed, for centuries before the Founding unfair competition, restraints of trade, and combinations and conspiracies to prevent fair competition violated English common law. Gary Minda, *The Common Law, Labor and Antitrust*, 11 Indus.

[7] The section's authorization of cease-and-desist orders do not implicate the Seventh Amendment.

[8] "In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." Packers and Stockyards Act § 203(b); 7 U.S.C. § 193(b).

Rel. L.J. 461 (1989); *People v. Aachen & Munich Fire Ins. Co.*, 126 Ill. App. 636, 640 (1905). Therefore, the Act implicates the Seventh Amendment, and the public rights exception does not apply. Respondents under the Act are entitled to a jury trial in an Article III court before a civil penalty may be imposed on them.

A review of the Packers and Stockyards Act discloses that it does not provide for that constitutionally-mandated procedure. The finder of fact is the secretary. Packers and Stockyards Act § 203(b); 7 U.S.C. § 193(b). The secretary has not delegated that function to juries but to administrative law judges. 9 C.F.R. § 202.200; 7 C.F.R. §§ 1.132, 1.141. The Department can pursue civil penalties only in agency enforcement proceedings. It needs an act of Congress to do otherwise. *Jarkesy*, 144 S. Ct. at 2173-74 (Sotomayor, J., dissenting).

Consequently, a pressing task before the Department is to propose legislation providing for jury trials in cases seeking the imposition of civil penalties for alleged violations of the Packers and Stockyards Act. This could be done by expanding the provision in section 203(b) that authorizes the secretary to refer nonpayment of a penalty to the attorney general, who may recover the penalty in an action in district court.

In addition, the Department should prepare a rule announcing that under the current state of the law it will not seek civil penalties in cases it initiates pursuant to the Packers and Stockyards Act. Such a rule is needed and lawful. Neither of those characteristics, however, can be attributed to the proposed rule.

Thank you for your consideration of these comments.

Cordially yours,

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COMPETITIVE ENTERPRISE INSTITUTE