No.

IN THE

Supreme Court of the United States

UNITED SOURCE ONE, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; FOOD SAFETY AND INSPECTION SERVICES; THOMAS J. VILSACK, SECRETARY, USDA; ALFRED V. ALMANZA, ADMINISTRATOR, FSIS; AND WILLIAM C. SMITH, ASSISTANT ADMINISTRATOR, FSIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL H. GARDNER

801 NW Vesper
Blue Springs, MO 64015
lkgardner@hotmail.com
(816)224-3005

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
dennisderrick@comcast.net
(978)768-6610

CURRY & TAYLOR ♦ 202-393-4141

QUESTION(S) PRESENTED

1. Have respondents subverted the rulemaking process of the Administrative Procedure Act when they arbitrarily and capriciously enforced against petitioner a nonexistent new "rule" about its meat export business which they announced without notice and comment as required by the APA?

2. Does respondents' procedurally invalid enforcement of a new "rule" against petitioner deny it due process by giving regulatory power to its private, self-interested competitors?

RULE 29.6

Petitioner United Source One, Inc., is a Maryland corporation with no parent or affiliated entities and it issues no stock. Thus no publicly held company owns 10 percent or more of United Source One, Inc.

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The published Opinion of the United States Court of Appeals for the District of Columbia Circuit in *United Source One, Inc. v. United States Department of Agriculture et al.*, C.A. No.16-1209, decided and filed August 4, 2017, and reported at 865 F.3d 710 (D.C. Cir. 2017), denying petitioner's petition for review of a ruling by respondents that the labeling used by petitioner in its meat export business was false and misleading, is set forth in the Appendix hereto (App. 1-19).

The unpublished Final Determination of respondent Alfred V. Almanza, Administrator of respondent Food Safety and Inspection Service, dated May 27, 2016, denying petitioner's second Administrative Appeal and affirming the propriety of FSIS's refusal to permit petitioner to label its meat export boxes with the establishment number of the original producers of the meat without their consent to do so, is set forth in the Appendix hereto (App. 20-32).

The unpublished Decision of respondent William C. Smith, Assistant Administrator of respondent Food Safety and Inspection Service, dated September 28, 2015, denying petitioner's initial Administrative Complaint and Appeal arising from FSIS's enforcement of a new rule requiring petitioner to discontinue labeling its meat export boxes with the establishment number of the original producers of the meat without their consent to do so, is set forth in the Appendix hereto (App. 33-36).

The unpublished order of the United States Court of Appeals for the District of Columbia Circuit in *United Source One, Inc. v. United States Department of Agriculture et al.*, C.A. No.16-1209, decided and filed on October 27, 2017, denying petitioner's petition for rehearing *en banc*, is set forth in the Appendix hereto (App. 37).

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's petition for review was entered on August 4, 2017; and its further order denying petitioner's timely filed petition for rehearing *en banc* was filed and decided on October 27, 2017 (App. 1-19; 37).

This petition for writ of certiorari is filed within ninety (90) days of October 27, 2017. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

5 U.S.C. § 551(4) [Definitions under the Administrative Procedure Act]

For the purpose of this subchapter—

....

> (4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. § 552(a)(1)(E) [The APA] :

> (a) Each agency shall make available to the public information as follows:
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public----
> ....
> (E) each amendment, revision, or repeal of the foregoing [rules].
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published....

5 U.S.C. § 553 [Rule making]:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706 [Scope of review]:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine

the meaning or applicability of the terms of an agency action.

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

21 U.S.C. § 601(n)(1) [Definitions under The Federal Meat Inspection Act]:

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

....

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular;

....

21 U.S.C. § 607(e):

Use withholding directive respecting false or misleading marking, labeling, or container; modification of false or misleading matter; hearing; withholding use pending proceedings; finality of Secretary's action; judicial review; application of section 194 of title 7

If the Secretary has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this subchapter is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking, labeling or container does not accept the determination of the Secretary, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless, within thirty days after receipt of notice of such final determination, the person, firm, or corporation adversely affected thereby appeals to the United States court of appeals for the circuit in which such person, firm, or corporation has its principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of title 7 shall be applicable to appeals taken under this section.

21 U.S.C. § 610(d) [Prohibited Acts]:

> No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals—
>
> ....

(d) Adulteration or misbranding

> do, with respect to any such articles which are capable of use as human food, any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

21 U.S.C § 611(b)(2) [Devices, marks, labels, and certificates; simulations]:

> **(b) Other misconduct.**
> No person, firm, or corporation shall—
> ....
> (2) without authorization from the Secretary use any official device, mark, or certificate, or simulation thereof, or alter, detach, deface, or destroy any official device, mark, or certificate....

9 CFR § 317.2(c)(5):

> (c) Labels of all products shall show the following information on the principal display panel (except as otherwise permitted in this part), in accordance with The requirements of this part or, if applicable, part 319 of this subchapter:
> ....
> (5) An official inspection legend and, except as otherwise provided in paragraph (i) of this section, the number of the official establishment, in the form required by part 312 of this subchapter;

9 CFR § 317.2(i):

> (i) The official establishment number of the official establishment in which the product was processed under inspection shall be placed as follows:
> (1) Within the official inspection legend in the form required by part 312 of this subchapter; or
> (2) Outside the official inspection legend elsewhere on the exterior of the container or its labeling, e.g., the lid of a can, if shown in a prominent and legible manner in a size sufficient to insure easy visibility and recognition and accompanied by the prefix "EST";
> or
> (3) Off the exterior of the container, e.g., on a metal clip used to close casings or bags, or on the back of a paper label of a canned product, or on other packaging or labeling material in the container, e.g., on aluminum pans and trays

placed within containers, when a statement of its location is printed contiguous to the official inspection legend, such as "EST. No. on Metal Clip" or "Est. No. on Pan", if shown in a prominent and legible manner in a size sufficient to insure easy visibility and recognition; or

(4) On an insert label placed under a transparent covering if clearly visible and legible and accompanied by the prefix "EST".

9 CFR § 317.8(a) [False or misleading labeling or practices generally; specific prohibitions and requirements for labels and containers]:

No product or any of its wrappers, packaging, or other containers shall bear any false or misleading marking, label, or other labeling and no statement, word, picture, design, or device which conveys any false impression or gives any false indication of origin or quality or is otherwise false or misleading shall appear in any marking or other labeling. No product shall be wholly or partly enclosed in any wrapper, packaging, or other container that is so made, formed, or filled as to be misleading.

9 CFR § 320.1(a) & (b)(11)[Records required to be kept]:

(a) Every person (including every firm or corporation) within any of the classes specified in paragraph (a)(1),

(2), or (3) of this section is required by the Act to keep records which will fully and correctly disclose all transactions involved in his or its business subject to the Act....

(b) The required records are:

....

(11) Records of labeling, product formulas, processing procedures, and any additional documentation needed to show that the labels are consistent with the Federal meat
and poultry regulations and policies on labeling, as prescribed in § 412.1 of this subchapter.

9 CFR § 350.3(a)(1), (2) and (3) [Types and availability of service]:

Upon application in accordance with § 350.5 the following types of service may be furnished under the regulations in this part:

(a) Identification service.

(1) Meat or other product that is federally inspected and passed at an official establishment, or upon importation, under the meat inspection laws, is officially marked to identify it as federally inspected and passed. In order to facilitate the division of such meat or other product into smaller portions or its combination into larger units and still maintain its identity as product which has been federally inspected and passed and so marked, inspectors may supervise the handling of the product and mark such portions or units with the marks of Federal inspection when they determine that the identity has been maintained.

(2) At the time service is furnished product must be sound, wholesome and fit for human food. The

service will be available only on premises other than those of an official establishment. The sanitation of the plant or area where service is furnished must comply with applicable provisions of part 416, §§ 416.1 through 416.6 of this chapter.
(3) The mark of inspection shall be applied only under the immediate supervision of an inspector.

9 CFR § 362.2(c) [Types and availability of service]:

Upon application, in accordance with § 362.3, the following types of service may be furnished under the regulations in this part:
....
(c)Identification Service.

(1) Poultry or other product that is federally inspected and passed at an official establishment, or upon importation, under the Poultry Products Inspection Act, is officially marked to identify it as federally inspected and passed. In order to facilitate the division of such poultry or other product into smaller portions or its combination into larger units and still maintain its identify as product which has been federally inspected and passed and so marked, inspectors may supervise the handling and weighing of the product and mark such portions and units with the official mark of inspection when they determine that identify has been maintained.
(2) At the time service is furnished, product must be sound, wholesome, and fit for human food. The service will be available only on

premises other than those of an official establishment. The sanitation of the place or area where service is furnished must comply with provisions of §§ 416.1 through 416.6 of this chapter.

Directive 12600.1 [FSIS Directive for Voluntary Reimbursable Inspection Services]:

Title VI A. 1. Identification Service. –9 CFR § 350.3 and 362.2(c)

ID Service is provided to ensure that the identity of federally-inspected and passed meat and poultry product is maintained throughout the division of such meat and poultry product into smaller portions, its combination into larger units, or its repackaging and relabeling. Product units and portions are officially marked to identify them as inspected and passed.

Title X A. 1,2 & 3 Identification Service.–9 CFR § 350.3 and 362.2(c)

1. Inspection program personnel are to review records and observe the handling of product to verify that the facility maintains product identity and are to verify that the facility handles the product in a manner that prevents product adulteration.
2. Inspection program personnel will verify that facilities are using approved labels, wrappers, or containers bearing the official mark of inspection. When facilities label or relabel product at an ID warehouse, freezer, cold

storage, or dry storage facility, either the originating official establishment number or the official warehouse number may be used. Facilities may label product with the inspection legend provided they apply the label under FSIS supervision.

3. Whenever labeling with the originating official establishment number is used by an ID facility (i.e., labeling depicting the official number of the establishment that produced the product), inspection program personnel will verify that the ID facility code marks the product in a manner that will clearly indicate that the product was last handled and labeled at the ID facility. The ID facility must maintain records of label transfers and records of products labeled or relabeled at the facility to identify properly the product origin in the event of a product control problem (e.g., voluntary product recall).

STATEMENT

Petitioner United Source One, Inc. ("petitioner" or "US1") is a Maryland corporation which since 2000 exports meat and other food products from its warehouse in Belcamp, Maryland, to food distributors and restaurant chains located primarily in the Middle East. Its meat export business is regulated and subject to inspection by respondent Food Safety and Inspection Service ("respondent" or "FSIS"), an agency of respondent United States Department of Agriculture ("respondent" or "USDA").

Pursuant to a delegation of power from respondent Secretary of Agriculture, FSIS's duty regarding petitioner's business is to administer the regulations implementing the Federal Meat Inspection Act, 21 U.S.C. §§ 601 *et seq*., as well as the Agricultural Marketing Act, 7 U.S.C. §§ 1621 *et seq*. In this role, FSIS regulates the labeling, marking and container requirements for meat it has already inspected and passed under the Federal Meat Inspection Act (21 U.S.C. § 607); and it also performs so-called identification services for meat it has already inspected and passed consistent with 9 CFR § 350.3(a)(1).

9 CFR § 350.3(a)(1) requires FSIS to provide this identification service so that

> [m]eat or other product that is federally inspected and passed at *an official establishment*...under the meat inspection laws, is officially marked to identify it as federally inspected and passed. In order to facilitate the division of such meat or other product into smaller portions or its combination into larger units and still maintain its identity as product which has been federally inspected and passed and so marked, [FSIS's] inspectors may supervise the handling of the product and mark such portions or units with the marks of Federal inspection when they determine that the identity has been maintained.

(emphasis supplied). In this regime, petitioner is *not* "an official establishment" because it does not itself process meat. Instead, it receives various types of vacuum-packaged cuts of meat from such originating "official establishments" which have already slaughtered, packed or otherwise processed the meat, having obtained FSIS's stamp of approval in the process. These official establishments have their own distinctive USDA number for identification purposes in the inspection process.

Petitioner then repackages these vacuum-packed cuts of meat into smaller or larger portions for shipment overseas without disturbing the integrity of the vacuum packaging of the originating official establishments. Since petitioner's business involves "the division of such meat or other product into smaller portions or its combination into larger units" within the meaning of 9 CFR § 350.3(a)(1), it applied for and obtained this identification service by FSIS in order to identify that the meat and other products it exports are officially inspected and approved by the USDA. Thus FSIS regularly performed on-site inspections of the meat petitioner repackaged at its warehouse in Maryland in order to verify that petitioner's operations met all applicable statutory and regulatory requirements. Incident thereto, petitioner was assigned USDA ID warehouse number V21467.

In performing these voluntary reimbursable inspection services at petitioner's warehouse, FSIS conducted itself consistent with FSIS Directive 12600.1. Title X A.2 thereof provides that its inspectors

> will verify that facilities are using approved labels, wrappers, or containers bearing the official mark of inspection. *When facilities label or relabel product at an ID warehouse*, freezer, cold storage, or dry storage facility, *either the originating official establishment number or the official warehouse number may be used.*

> *Facilities may label product with the inspection legend [of the originating official establishment] provided they apply the label under FSIS supervision.*

(emphasis supplied). Moreover, Title X A.3 of this Directive provides if petitioner labels its repackaged meat with the originating official establishment number, it must also mark the product in a way that will clearly indicate its own warehouse ID number in order to show where the product was last handled and labeled for recall purposes, among others.

In January of 2012, petitioner inaugurated a custom export re-boxing program in order to improve service to its customers who wanted a smaller, sturdier export-quality box than the one provided by its meat packers/suppliers; and this custom box projected a single brand image for petitioner which its customers could market more easily. This new re-boxing program which replaced the original meat packers' boxes with petitioner's custom boxes also met the demand for hands-on visual inspection of each vacuum-packaged cut of beef which petitioner never altered in any way.

In implementing this custom re-boxing program, petitioner retained Dr. Daniel LaFontaine, a licensed veterinarian and a USDA compliance consultant, to provide compliance guidance. It also looked to the plain terms of FSIS Directive 12600.1, *supra*. With LaFontaine's advice and relying on the Directive, petitioner applied to each of its custom boxes the originating official establishment number, i.e., the number USDA assigned to these originating establishments where the meat was originally processed, inspected and then vacuum packaged. In addition, petitioner's address was printed on the outside of every one of its custom boxes so that it was clear that the product was last handled at its facilities in Maryland.

This protocol made the meat more easily traceable to its source and simplified export clearances in foreign markets. It also avoided confusion created for some international buyers in identifying the original producer of the meat when only petitioner's USDA ID warehouse number 21467 was on the outside of the export box while the inner pieces of meat carried the different establishment number of the original producer. In carrying out this re-boxing program, petitioner did not obtain the permission of these official establishments before using their originating official establishment numbers on its custom export boxes *because no statute, USDA rule, or FSIS Directive required that petitioner do so.*

Petitioner carried out this custom re-boxing program from January of 2012 until January of 2015----three full years----with the full knowledge, supervision and approval of FSIS and its inspectors who verified petitioner's recordkeeping and its regulatory compliance. During this time, FSIS conducted regular inspections at petitioner's warehouse and supervised its application of the marks of federal inspection as required by 9 CFR §§ 350.3(a)(1)& (3), inspecting every export transaction involving re-boxed meat, specifically reviewing and approving the labels applied to the boxes.

In January of 2015, however, FSIS personnel concluded that a "policy clarification" was in order. Despite three years of petitioner's unquestioned compliance with all relevant regulations in its re-boxing program, FSIS's serial inspections attesting to that compliance, and the fact that the askFSIS website(http://askfsis.custhelp.com/), a USDA website which answers questions concerning regulatory topics, responded that it was acceptable under USDA's regulatory regime for petitioner to apply the establishment number of the originating establishment to re-boxed meat under FSIS Directive 12600.1, FSIS decided that petitioner must now obtain consent from each originating producer before using its establishment number on petitioner's export boxes and maintain records of such consent. Without recorded evidence of this consent, FSIS now refused to approve the labels used by petitioner in its re-boxing program, reducing sales revenues and substantially disrupting its business.

In response to claims by petitioner and Dr. LaFontaine, its USDA compliance consultant, that these new requirements were "wrong" and created a new requirement that has no regulatory basis, FSIS's Deputy Director of Labeling in an e-mail justified them by citing the need for FSIS's inspectors "to be assured that the labels are not false and misleading and that the ID warehouse is not unlawfully using another establishment's number." As he insisted without citing any rule or regulation requiring the consent of originating producers to petitioner's use of their numbers, "if the facility intends to re-box and re-apply the producer's inspection legend, [FSIS] will verify the plant maintains appropriate documentation to demonstrate consent from the producer to utilize their inspection legend."

On April 30, 2015, petitioner filed an Administrative Complaint and Appeal with respondent William C. Smith, USDA's Assistant Administrator for the Office of Field Operations ("respondent" or "Smith"). It argued that neither 9 CFR § 350.3(a) nor 9 CFR § 362.2(c), both addressing FSIS's identification services, contains any requirement for obtaining consent from meat suppliers before using their official establishment numbers on petitioner's boxes and that FSIS could not explain how its accurate use of the suppliers' establishment numbers in its "Re-Box Program was misleading...." After receiving further documentation about petitioner's re-boxing program and affidavits from petitioner's principals, Smith issued a decision on September 28, 2015, denying petitioner's appeal without a hearing (App. 33-36).

Smith did *not* identify any statute, USDA rule or FSIS Directive which would support the new requirement by FSIS that petitioner now obtain the consent of originating establishments before using their numbers on its boxes (App. 33-35). Instead, he adverted to FSIS's new "clarification" of its generic recordkeeping requirements under 9 CFR § 320.1, one which recognized that "historically [the producing establishment] shipped [their labels] directly to the ID warehouse for use, which makes consent between the producer and ID warehouse transparent" (App. 35). Even though this supposed "historical practice" by producing establishments of shipping their labels to ID warehouses like petitioner was *never* mandated by any statute, rule or FSIS Directive, Smith still believed that this "historical practice" carried with it the requirement that petitioner now obtain the consent of these producing establishments before using their labels on its export boxes (*Id*.). With petitioner having no records indicating that it received such labels from its producing establishments and thus no having no proof of consent, he concluded that petitioner "failed to maintain adequate records as required by 9 CFR § 320.1(a) and [failed] to prevent false impression or indication of origin as required by 9 CFR § 317.8(a)" (App. 35-36).

Petitioner sought a hearing before Smith contending that his decision was unsupported by substantial evidence, was arbitrary and capricious and did not comply with notice and comment rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.. On January 20, 2016, Smith refused to change his decision but forwarded petitioner's appeal to FSIS's Office of Administrator, inviting petitioner to provide it with additional documentation for its review.

Petitioner did so, detailing its legal objections to Smith's decision and submitting affidavits by Dr. LaFontaine and petitioner's CFO. As petitioner's counsel argued in writing,

> there is no requirement in any statute or regulation that a facility must have "consent from the producing firm" in order to apply a label accurately indicating that the "producing firm" is the source of the product. Mr. Smith, in his official capacity as FSIS Assistant Administrator, generated this requirement

> himself, without following the required rulemaking procedures.

Nor could petitioner's counsel find textual support for the new recordkeeping requirement in 9 CFR § 320.1 or FSIS Directives; and the USDA failed to explain how petitioner's accurate labeling of the establishment's number on its export boxes was"false or misleading" under 9 CFR § 317.8(a) since FSIS personnel had never before identified petitioner's labeling as such (App. 29).

On May 27, 2016, respondent Alfred V. Almanza ("respondent" or "Almanza"), FSIS's Administrator, issued a Final Determination denying petitioner's appeal (App. 20-32). As it did before Smith, FSIS claimed that 9 CFR § 320.1(b)(11) justified a consent requirement since it "specifically requires additional documentation needed to show that the labels are consistent with the Federal meat and poultry regulations and policies on labeling" (App. 23). Once again, it also claimed "that labeling policies and the regulations have historically permitted official establishments to arrange for off-site labeling/re-labeling of their product at approved ID facilities, by transferring their labels, bearing their official inspection legend, to such facilities...." (App. 25). Yet it *never* identified any statute, regulation or FSIS Directive which mandates this "historical"permissive arrangement supposedly used by producing establishments for the off-site labeling of their product; and it never anchored the supposed corresponding duty of petitioner to now accomplish that transfer of labels (and thereby achieve consent to its re-labeling) in any regulatory command (App. 25-26).

Almanza nonetheless concluded that “[a]bsent a documented transfer of labels, or other records that would assure FSIS of the knowledge, consent, or direction of the owner of the official establishment number, FSIS has reason to believe that the consuming public may be misled by application of the official mark of inspection” (App. 31-32). FSIS’s decision was therefore neither arbitrary nor capricious “and represented no change to prior regulatory requirements” (App. 31).

Consistent with 21 U.S.C. § 607(e), petitioner filed a petition for review of this final agency decision with the court of appeals for the District of Columbia Circuit (App. 9). On August 4, 2017, a majority of the court of appeals denied petitioner’s petition for review deciding that FSIS’s determination that petitioner’s labeling is misleading was neither arbitrary nor capricious within the meaning of the APA, 5 U.S.C. § 706 (App. 1-19). According to the majority, the only way for a re-boxer like petitioner to use its meat suppliers’ establishment number on its boxes was if a supplier consents to the practice, consent which is “‘historically’ given by transferring its labels containing its establishment number to the re-boxer,” provided documentation of such transfers is made available to FSIS inspectors (App. 10-11quoting FSIS Directive 12,600.1 at X A. 3 [“The ID facility must maintain records of label transfers and records of products labeled or relabeled at the facility ....”]).

Because petitioner’s records could not document this consent from its meat suppliers, the majority adopted respondents’ argument that petitioner’s use of their establishment number on its boxes carries with it the false indication that it did have such consent, an event which renders the labeling misleading to the consuming public and therefore "misbranded" within the meaning of 21 U.S.C. § 601 (App. 11-12). Although it found respondents' reasoning "less than pellucid," the majority concluded that this requirement of consent had a sufficiently "rational connection between the facts found and the choice made" (App. 12 quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). It rejected the idea that the applicable regulations *required* petitioner to use the establishment number on its boxes irrespective of consent; that this requirement amounts to a new "legislative rule" announced without notice and comment rulemaking under the APA; or that FSIS's determination was an unexplained departure from agency precedent developed over three years of approving petitioner's use of the supplier's establishment number on its labels without consent (App. 12-14).

Senior Circuit Judge Sentelle dissented (App. 14-17). No matter how many times he read the record, it was clear that petitioner was being sanctioned "for violating the rule against using the original establishment number without the permission of the original establishment" (App. 14). The problem he saw is that *there is no such rule* in the administrative record requiring petitioner to obtain the consent of the original establishment before using its number on petitioner's boxes and that "[i]f this is not a new rule, I know not what is" (App. 14-15). As a new rule, "it needed the proper procedures mandated by the Administrative Procedure Act in order to come into existence" (App. 15 citing 5 U.S.C. §§ 553, 556-567). As he concluded, without the imprimatur of notice and comment rulemaking, there could be no such rule and no misleading created by petitioner's labels; and FSIS's claim of a labeling violation "does not cure the defective source of the nonexistent violation" (App. 15-16).

While observing that FSIS may be right that a rule requiring the consent of the originating establishments to a re-labeling of their product might be a good one, the Circuit Judge explained that this did not mean that the rule actually exists or that FSIS has the authority to create it without following the process mandated by the APA (App. 16). He concluded:

> It seems to me a giant step in the progress of the administrative state to permit agencies to enforce regulations *that do not exist* against regulated entities....[I]f there is a good reason for requiring the secondary shipper to obtain the permission of the original establishment for the use of its number, then it is time for the Secretary of Agriculture to repair to the process of rulemaking.

(App. 16-17) (emphasis supplied).

On October 27, 2017, the court of appeals denied petitioner's petition for rehearing *en banc* (App. 37).

REASONS FOR GRANTING THE PETITION

1. Respondents Subverted The Rulemaking Process Of The Administrative Procedure Act When They Arbitrarily And Capriciously Enforced Against Petitioner A Nonexistent New "Rule" Which They Announced Without Notice And Comment As Required By The APA.

A majority of the court of appeals allows FSIS to enforce as a regulation having the force of law a non-existent requirement that petitioner now obtain the consent of its meat suppliers before using their labels in its re-boxing program, a duty that in turn relies upon some "historic" permissive arangement by meat suppliers of shipping their labels to ID facilities for off-site re-labeling which, according to FSIS, makes consent between the supplier and ID warehouse transparent. The problem with this outcome is that there is *no* regulation or FSIS Directive mandating that meat suppliers demonstrate their consent to the use of their labels by transferring them to ID facilities like petitioner; and there is *no* regulation or FSIS Directive which obligates petitioner to accomplish that transfer of labels (and thereby achieve consent to its re-labeling) before using those labels in its re-boxing business. Simply put, there is no duty founded in any regulation or FSIS Directive for meat suppliers to consent to a re-labeling of their product by ID facilities like petitioner or for petitioner to obtain such consent before re-labeling takes place.

Moreover, even if FSIS wanted to enforce a new "rule" requiring consent by a re-boxer's meat supplier, it is a legislative rule which without notice and comment rulemaking under the APA could not be enforced against a re-boxing facility like petitioner or even against its meat supplier. Finally, respondents' change in policy by requiring that petitioner now obtain the consent of meat suppliers before using their labels on its export boxes----after three years of never requiring such consent----is arbitrary and capricious agency decisionmaking.

First, respondents' new "rule" is *nowhere found in the administrative record*. The reliance by respondents Smith and Almanza on a purported historical, permissive arrangement by meat suppliers to transfer or ship their labels to ID facilities for re-labeling purposes thereby signifying their consent to the process of re-labeling finds no support in any USDA rule or FSIS Directive. That Title X A.3 of FSIS Directive 12600.1, requires ID facilities like petitioner to maintain "records of label transfers" does *not* imply that such label transfers are mandated, only that when they do occur they should be recorded which petitioner did. There simply is no rule, no Directive and therefore no mandate that meat suppliers demonstrate their consent to the use of their labels by transferring them to ID facilities like petitioner; and there is *no* regulation or FSIS Directive which obligates petitioner to accomplish that transfer of labels (and thereby achieve consent to its re-labeling) before using those labels in its re-boxing business.

Absent such mandate in a rule or FSIS Directive, there was no legal basis for Smith to regard this purported consent requirement as a "clarification" of petitioner's generic recordkeeping duties under 9 CFR § 320.1, to blame petitioner for failing to keep records reflecting this consent and for creating false and misleading labels in violation of 9 CFR § 317.8(a) (App. 35). For the same reason, there was no legal basis for Almanza to find that without such documented transfers of labels, petitioner had violated the recordkeeping provisions of 9 CFR § 320.1(b)(11), thereby giving FSIS "reason to believe that the consuming public may be misled by application of the official mark of inspection" and justifying its refusal to authorize petitioner's use of the labels (App. 31-32).

The majority commits the same error when it adopts as a "rule" FSIS's explanation----unanchored in any identified regulation or Directive----that official establishments "have *historically [been] permitted*...to arrange for off-site labeling/re-labeling of their product at approved ID facilities, by transferring their labels, bearing their official inspection legend, to such facilities, provided [that] documentation of such transfers and other applicable records are made available to inspection personnel" and that this transfer of labels provides clear knowledge and consent for the use of their legends (App. 10-11;25) (emphasis supplied).

But *none* these historical arrangements by meat suppliers of permissively transferring their labels to approved ID facilities in order to signify their consent to re-labeling can be bootstrapped by the majority into a regulation or FSIS Directive mandating that meat suppliers demonstrate their consent to the use of their labels by transferring them to ID facilities like petitioner and that petitioner accomplish that transfer of labels (and thereby achieve consent to its re-labeling) before using those labels in its re-boxing business.

There simply is no extant USDA rule or FSIS Directive mandating that such label transfers by official establishments (and the permission they signify) must precede any labeling or re-labeling by an ID facility like petitioner. As Judge Sentelle rightly observed, "there is no such rule" and in its absence there can be no misbranding or false labeling to justify FSIS's refusal to approve petitioner's labels in its re-boxing program.

It may be good policy to mandate that an ID facility like petitioner obtain the permission of a meat supplier before re-labeling a product with its legend or to require meat suppliers always to signify their consent to re-labeling by transferring their labels to ID facilities. But rather than rely on a nonexistent "rule" to this effect which FSIS announced without notice and comment under the APA, "it is time for the Secretary to repair to rulemaking," not to forbid conduct which is otherwise allowed under this regulatory regime. See *Contractor's Sand & Gravel v. Fed. Mine Safety Health Comm'n*, 199 F.3d 1335, 1342 (D.C. Cir. 2000) (nonexistent, imaginary rule cannot justify repeated citations for its violation). See *Secretary of Labor v. Federal Mine Safety and Health Review Com'n*, 111 F.3d 913, 918-919 (D.C. Cir. 1997) (deficient regulation should invoke new rulemaking). That meat suppliers have "historically" been allowed to transfer their labels to ID facilities for re-labeling purposes does not convert this permissive arrangement into a positive requirement with the force of law for petitioner's re-boxing program in the absence of rulemaking; and enforcing such an imaginary rule against petitioner is not "a substantially justified government act." *Contractor's Sand & Gravel, supra.*

Petitioner faithfully hewed to all USDA regulations and FSIS Directives for three years with the full knowledge, supervision and approval of FSIS and its inspectors who verified petitioner's recordkeeping and its regulatory compliance. It is against this regulatory backdrop and historical perspective that the propriety of petitioner's conduct should be measured, not by FSIS's recent invention of a new, nonexistent rule which engrafts onto the regulatory scheme a requirement neither stated nor implied by its plain language.

Second, even if respondents wanted to enforce this new requirement, it possesses the dimensions of a substantive or "legislative" rule having the force of law because it affects individual rights and obligations of regulated parties like petitioner and would be the basis for an enforcement action for violations of those obligations or requirements. *Chrysler Corporation v. Brown*, 441 U.S. 281, 301-302 (1979) citing *Morton v. Ruiz*, 415 U.S. 199, 232; 235-236 (1974). Accord, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-252 (D.C. Cir. 2014); *Mendoza v. Perez*, 754 F.3d 1002, 1020-1021 (D.C. Cir. 2014). See 5 U.S.C. § 551(4) ("Rule" defined). As such, respondents were required by the APA to publish notice of this proposed rulemaking in the Federal Register and to accept and consider public comments by interested parties on the proposed rule. 5 U.S.C. § 553. See also *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995) (APA rulemaking would still be required if a "guideline" or interpretive rule adopted a new position inconsistent with any of the Secretary's existing regulations). Having failed to pursue rulemaking under the APA for this proposed new rule, respondents cannot enforce it against petitioner now. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001).

Finally, regardless of whether this new "rule" has been properly promulgated consistent with the APA, respondents' reliance on the rule now to require petitioner to obtain the consent of its meat suppliers before using their legend on its boxes----after three years of never requiring such consent----is arbitrary or capricious. Under the APA, a court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Motor Vehicle Manufacturers Ass'n. of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41 (1983) citing 5 U.S.C. § 706(2)(A). *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003).

Agency action is arbitrary or capricious when it departs from agency precedent without explanation because while "[a]gencies are free to change course as their expertise and experience may suggest or require,...when they do so they must provide a 'reasoned analysis' indicating that prior policies or standards are being deliberately changed, not casually ignored." *Ramaprakash v. F.A.A.*, 346 F.3d at 1124-1125 quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1993). Thus an agency's failure to come to grips with conflicting precedent constitutes "an inexcusable departure from the essential requirement of reasoned decision making." *Id.* at 1125 quoting *Columbia Broad Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971).

Respondents' rationale based on an unsupported risk of misbranding for imposing a new consent requirement on petitioner lacks a reasoned explanation for why after three years of petitioner using establishment numbers on its re-boxed meat without consent and without any violation of any pertinent regulation or rule, a change in policy was being deliberately pursued rather than casually ignored. Their "policy clarification" is bereft of any facts to justify the change except to cite an "historical" arrangement sometimes carried out by meat suppliers to transfer their labels to ID facilities like petitioner for re-labeling purposes. See *ANR Pipeline Co. v. F.E.R.C.*, 71 F.3d 897, 901 (D.C. Cir. 1995 (court looks only to reasons given by the agency). But this "clarification" deviated from three years of settled precedent, contravened FSIS Directive 12600.1 and established FSIS policy as reflected in the askFSIS website (http://askfsis.custhelp.com/), which responded that it was acceptable under USDA's regulatory regime for petitioner absent any consent by its meat suppliers to apply their establishment number to its re-boxed meat under FSIS Directive 12600.1.Their unsupported rationale is therefore inadequate and improper, leaving courts with no power to affirm their decisionmaking. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962).

The core concern underlying the prohibition of arbitrary or capricious agency action is that agency "ad hocery" is impermissible. *Ramaprakash v. F.A.A.*, 346 F.3d at 1130 quoting *Pacific N.W. Newspaper Guild, Local 82 v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir. 1989). *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Without a reasoned explanation for their abrupt rule change despite a longstanding record of regulatory compliance by petitioner, respondents have failed to come to grips with its own conflicting precedent, a failure which exposes their new "rule" as nothing more than unfounded "ad hocery." Those regulated by administrative agencies are entitled to "know the rules by which the game will be played." *Alaska Professional Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1033-1034 (D.C. Cir. 2003) quoting O.W. Holmes, *Holdsworth's English Law*, 25 Law Quarterly Rev. 414 (1909). Respondents changed the rules of the game for petitioner arbitrarily or capriciously and committed an inexcusable departure from the essential requirement of reasoned decisionmaking.

2. Respondents' Procedurally Invalid Enforcement Of A New "Rule" Against Petitioner Denies It Due Process By Giving Regulatory Power To Its Private, Self-Interested Competitors.

The legislative rule which respondents promulgated without notice and comment rulemaking is "procedurally invalid." *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d at 1108-1109. Besides being procedurally invalid, this rule requiring petitioner to obtain the consent of its meat suppliers before it could use their labels on its export meat boxes is an impermissible delegation of regulatory authority to a private entity, i.e., petitioner's meat suppliers, who now possess the power to regulate petitioner's custom re-boxing business by exercising, or refusing to exercise, their consent to petitioner's re-labeling of their product with their establishment numbers.

This result works a denial of due process to petitioner by giving its self-interested private-party competitors in the marketplace of exported boxed and re-boxed meat the power of regulatory control over its business. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-312 (1936). *Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121-122 (1928) (landowners empowered to decide how a neighbor may use his own property). *Ass'n of Am. R.R. v. U.S. Dept. of Transp.*, 821 F.3d 19, 27-29;31 (D.C. Cir. 2016). *Beary Landscaping, Inc. v. Costigan*, 667 F.3d 947, 950 (7th Cir. 2012). The consent of the original producers/suppliers of re-boxed meat to any re-labeling program is *nowhere* required in the relevant regulations or FSIS Directives; and respondents' procedurally invalid "policy clarification" unconstitutionally insinuates their participation into petitioner's custom re-boxing business thereby denying petitioner due process of law. *Carter v. Carter Coal Co.*, *supra*.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the decision of the court of appeals and, ultimately, to vacate and reverse that ruling and remand the matter to FSIS with instructions to allow petitioner to label its boxes with its meat suppliers' establishment numbers without their consent as previously allowed; and that if respondents deem such consent to be required, order them to submit that proposed rule to the notice and comment rulemaking process of the Administrative Procedure Act; or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Dennis P. Derrick
Counsel of Record
7 Winthrop Street
Essex, Massachusetts 01929
(978)768-6610
dennisderrick@comcast.net

Paul H. Gardner
801 NW Vesper
Blue Springs, MO 64015-3733
(816)224-3005
lkgardner@hotmail.com