

13-840
No. 13-840

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

GARY HEATH AGERTON, *et al.*,

Petitioners,

v.

PILGRIM'S PRIDE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an antitrust Rule of Reason analysis under the Packers & Stockyards Act of 1921 (“PSA”), should all of the Courts of Appeals analyze “the impact on competitive conditions” within the relevant meat or poultry market rather than only the financial benefits to the defendant?
2. Does unilateral output reduction for the purpose of achieving price stabilization constitute price “manipulation” in violation of 7 U.S.C. § 192(e) of the PSA?
3. Under Section 192(e), is manipulation of price established by proof that the defendant acted with the intent to increase price without regard to whether the intentional conduct was “deceptive, unnatural, or illegitimate”?
4. Is an intentional reduction in market supply for the purpose of increasing price sufficient to make a prima facie showing of injury to competition under Section 192(e)?

LIST OF PARTIES

Petitioners are 90 poultry-farm families in Arkansas and Louisiana who "grew" chickens for the El Dorado, Arkansas complex of Respondent Pilgrim's Pride Corporation: Gary Heath Agerton, Jacob Wilson Agerton, Jerry and Sandra Agerton, Daniel and Brenda Albritton, Dennis Andrews, Tommy Barker, Jean Walters and T&J Farms, Jack and Patti Baumgardner, Evelyn Beard, James David Bennett, Tommy Bennett, Curtis and Pam Boykin, Coty Bradford, Donald and Lavonne Brasher, Walter Warner Brown, Michelle Bush Bennett, Administrator of the Succession of Larry Bush, Delea Bussell and Bussell Farms, Inc., Frederick Caldwell, Charles C. Cater, John and Dana Cater, Thomas Choate, III, Becky Choate and Grand Rogers Farm, David Chrisman, Christine Cole, Sonja Dianne Cole, Ralph Cole, Melvin Daniels, Clark Dean, Griselda Dorman, Richard Dale Elkins, Morgan Farris, Joe M. Ford on behalf of the Gloria Ford Estate, Jeff and Penny Foster, Ernest Devayne Garriss, Stacy and Barbara Gates, David Graham, Robert and Dianne M. Gulley, Johnny Hamaker, William Rhett Hanry, Pete Harrell, Robert Heard, Elmer and Leta Hearn, David and Rhonda Hunt, Kevin Hux, Kaye Hux and Hux Farm LLC, Denise Jackson, Mike and Connie Jerry, Thomas and Vivian Jerry, Robert A. Jiles, Edward and Mona Johnson, Jean and Gary Kenly, James and Sally Knight, Delton and Jerry Langley, Terry Laster, Tim Loftin and Timkel Farms, Inc., Will Martin, Dennis and Marsha Martindale, Jackie and Joyce Martindale, James O. and Daphne McDougale, Johnny Mooney, Steven Moore and Moore Farms, Inc., Timothy and Angelia Murphy, Paul Odom, Bobbie Orr, Jeffery and Tammy Orr, Randall and Carolyn Pagan, Ryan and Lanelia Peek, William Lloyd

Phelps, Bob and Dorothy Poole, Robert and Mary Poole, Barry Pratt, Russell Pratt, Pat and Gloria Risinger, Liandro and Juana Ruiz, Roberto and Danah Ruiz, Bobby Smith, Paul J. Smith, Tim Smith, Laura Smith and Shows & Smith LLC, Frank Stevenson, Jr., John M. Sutterfield, Tony Taylor, Joyce Taylor and Double T Farms, Rex Thurlkill, Todd and Leah Thurlkill, Raymond Merle Tucker, Glenn E. Walters, Alan Mark Ware, Perry and Aleta C. Watkins, Patricia Webb, Roy and Nelda Williams, David W. Wilson, Patricia Wilson, Casey Wooten, and Larry O'Neil Wooten. Respondent is Pilgrim's Pride Corporation.

CORPORATE DISCLOSURE STATEMENT

The Petitioners' incorporated farming operations are not publicly traded and have no third-party owners.

Respondent Pilgrim's Pride Corporation ("PPC") is a publicly traded corporation. PPC's parent company is JBS USA Holdings, Inc. JBS, S.A. is the Brazilian parent company of JBS USA Holdings, Inc.

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OPINION BELOW

On August 27, 2013, a two-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the September 30, 2011 decision of the United States District Court for the Eastern District of Texas, Marshall Division, reported at 2011 U.S. Dist. LEXIS 124163, 2011-2 Trade Cas. (CCH) P77,616 (E.D. Tex. 2011). The opinion of the Fifth Circuit panel is reported at *Agerton v. Pilgrim's Pride Corporation*, 728 F.3d 457 (5th Cir. 2013). See Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on August 27, 2013. See Appendix B. The Petition for Rehearing *En Banc* was denied on October 15, 2013. See Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 7 United States Code, Section 192.

Unlawful practices enumerated.

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

...

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce;

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid and abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e).

Title 7 United States Code, Section 209.**Liability to individuals for violations;
enforcement generally.**

(a) If any person subject to this Act violates any of the provisions of this Act, or of any order of the Secretary under this Act, relating to the purchase, sale, or handling of livestock, the purchase or sale of poultry, or relating to any poultry growing arrangement or swine production contract, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

See Appendix D.

STATEMENT OF THE CASE

In 2008, Respondent PPC, one of the world's largest chicken producers, had a 50% share of the commodity chicken market.¹ PPC does not raise the chickens processed at its facilities, instead relying upon the housing and labor of dozens of local contract "growers" like Petitioners. In 2008, high feed and low chicken prices caused PPC to begin losing money, but no other U.S. chicken producer experienced similar losses. On December 1, 2008, PPC filed for Chapter 11 in the Northern District of Texas.

In February 2009, PPC announced the unprecedented, simultaneous "idling" in May of three carefully-selected, remotely-located processing plants, including El Dorado, Arkansas. After PPC told the press that the idlings were to reduce output (most growers at the isolated plants could not grow for a PPC competitor) and "thereby" increase prices,² Petitioners immediately³ filed

1. The Fifth Circuit two-judge panel decision acknowledged that PPC had market power over price: "PPC . . . was producing more chicken than the market appeared to need, and was **thereby** driving the market price of chicken down at great cost to itself." Appendix B at 12a (emphasis added).

2. At trial, despite numerous incriminating internal emails, PowerPoint presentations and admissions by its executives and counsel, PPC denied it had intended to increase prices and having relied upon a secret, \$3 million "Project Alpha" study that determined in the Fall of 2008 that (1) PPC would net \$524 million cash and \$180-300 million in Total Enterprise Value from increased market prices from idling plants, and (2) risked only \$100-125 million in potential grower liability for doing so.

3. Petitioners' case has absolutely nothing to do with PPC's rejection in bankruptcy of their contracts, which occurred months after the plant idlings.

unilateral⁴ §192(e) price-control claims.

The Northern District of Texas withdrew the reference, denied PPC's motion to dismiss the PSA claims, and transferred the case to the Eastern District of Texas. The Parties agreed to trial before a Magistrate Judge. After a trial from June 16 to August 12, 2011, the Magistrate Judge found that "PPC's idling of the El Dorado plant was done for the purpose of manipulating or controlling the price of chicken,"⁵ in violation of §192(e). He also found:

- "The evidence supports a finding that PPC's decision to idle El Dorado was motivated by a desire to manipulate the price of chicken";
- "PPC's overriding motive was to curtail supply to force prices to rise on the national chicken market";
- PPC's Chief Restructuring Officer Snyder stated in an internal email that PPC's "plans" were "to restrict the chicken in the area and allow prices to rise";

4. Although unilateral conduct short of monopolization is not illegal under the Sherman Act or for firms in other industries, Congress has expressly prohibited it for a "live poultry dealer" by enacting 7 U.S.C. § 192(e) and creating a private cause of action in 7 U.S.C. § 209. *See* Appendix D.

5. Appendix C at 25a. Contrary to the panel decision's characterization of Petitioners' allegations and the trial court's findings as PPC having "hoped" to increase price, (see Appendix B at 5a, 7a and 13a), the trial court made multiple findings that PPC *intended* to cut production *in order to* increase commodity chicken prices for consumers. *See* Appendix C at 23a-25a.

- “PPC expected that the idling of El Dorado would materially affect the national supply of commodity chicken and would result in an upward price adjustment. By idling the plant and not selling or leasing it, PPC sought to ensure, as it had in Farmerville, that a competing integrator could not, in Mr. Snyder’s words, ‘flood the market with cheap chicken and foil our plans to restrict the chicken in the area and allow prices to rise.’”⁶

Appendix C at 23a-25a (emphasis added).

Adhering to the Fifth Circuit’s *en banc* decision in *Wheeler v. Pilgrim’s Pride Corporation*, 591 F.3d 355 (5th Cir. 2009), requiring injury to competition in order to establish a PSA violation, the trial court expressly found that PPC’s market share, its reduction in output, and the length of time needed to replace the reduction “were likely to lead to a competitive injury.” *Id.* at 25a & 38a. After the Magistrate Judge resigned, Chief Judge Folsom took over this case and found the Magistrate Judge’s findings fully supported by the record.

Contrary to the Fifth Circuit two-judge panel opinion’s premise that PPC “idled” the El Dorado plant in May of 2009 because it was unprofitable, it is undisputed that PPC knew by early April that improved feed and commodity chicken prices meant that El Dorado was profitable and that *idling* it would cause PPC, already in bankruptcy, to *lose* \$17.5 million in 2009. PPC’s cost-savings “justification” was simply a pretext for its intentional manipulation and control of commodity prices.

6. Compare footnote 5 *supra*.

PPC's plan to stabilize price for its own financial benefit was effective, removing 760 million pounds of chicken from the market. PPC announced the plant idlings on February 27, 2009, the plants closed in early May, and national chicken prices were *declining* until May. After PPC's idlings, the national price of chicken "*stabilized*," as PPC had argued to the trial court,⁷ abruptly turning from decreases in February, March, and April of 2009 to a significant increase in May, the precise effect PPC sought.⁸

As Petitioners' experts explained at trial, chicken prices are very sensitive to volume decreases, and PPC's simultaneous idling of three large processing plants removed the 5% alleged "oversupply" in the market that PPC had publicly stated was responsible for lower prices. PPC's market analysts had calculated that removing supply would result in price stabilization and higher prices, resulting in hundreds of millions of dollars in cash and increased Enterprise Value for PPC.

7. In PPC's summary judgment reply brief to the trial court, it argued that idling its plants was simply an "effort by Pilgrim's to *balance supply and demand such that the market price of chicken would stabilize*." Petitioners' Fifth Circuit Brief at 13 (emphasis added).

8. Petitioners' Fifth Circuit Brief at 7. Petitioners' experts explained that, based upon market analysis, the 2009 price increase was due to PPC's *output reduction* and not to normal seasonal fluctuations as PPC had argued.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT WITH THIS COURT'S DECISIONS, TO RESOLVE A CIRCUIT CONFLICT REGARDING THE PROPER ANALYSIS OF A VIOLATION OF THE PSA, AND TO ENFORCE THE CONGRESSIONAL MANDATE THAT THE NATION'S MEAT AND POULTRY PRICES BE SET FREELY AND WITHOUT MARKET MANIPULATION.

A. The Panel Opinion Conflicts with this Court's Relevant Antitrust Decisions.

By rejecting 70 years of antitrust jurisprudence and the Tenth Circuit's and Department of Agriculture's constructions of the PSA, a two-judge panel of the Fifth Circuit has now determined that intentional price stabilization is not price "manipulation" and is therefore not anti-competitive conduct under the PSA. The panel's reasoning was as follows:

In the instant case, PPC had overextended itself into the commodity chicken market, was producing more chicken *than the market appeared to need*, and was *thereby driving the market price of chicken down* at great cost to itself. Recognizing the damage inflicted by its own *excess production*, PPC wisely decided to stop flooding the market with unprofitable chicken. Not surprisingly, we have located no case finding such conduct to be unfair, illegal, or injurious to competition; in truth, PPC's unilateral conduct had nothing to do with

competition. Even if PPC hoped⁹ that *chicken prices would respond to the output reduction by settling at a higher equilibrium price*, that would not alter our conclusion. Far from being a nefarious goal, higher prices are the natural consequence of a reduction in supply.

Appendix B at 12a-13a (footnotes omitted; all emphasis added).

The Fifth Circuit panel's concept—that production can be *too high*¹⁰ or prices *too low*,¹¹ and that an elimination of alleged “excess production” to stabilize¹² prices is thus not “anti-competitive”—was, however, long ago expressly rejected by this Court. The case that the panel was inexplicably unable to locate had been cited to it by Petitioners: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

In that case, this Court held that “stabilization is but one form of manipulation” and refused, in the absence of express legislation requiring it, “to adopt a construction [of the Sherman Act] making the difference between legal and illegal conduct in the field of business relations

9. See footnote 5 *supra*.

10. As the two-judge panel stated, “more chicken than the market *appeared to need*.” (emphasis added).

11. As the two-judge panel stated, “driving the price of chicken down at great cost to itself.”

12. As the two-judge panel stated, dropping production so that “chicken prices would *respond to the output reduction by settling at a higher equilibrium price*.” (emphasis added).

depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.” *Id.* at 213-215 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927)). Despite the panel’s determination that preventing “excess production” or ruinous competition is not anti-competitive and can justify price stabilization to a “higher equilibrium price,” this Court held just the opposite in *Socony-Vacuum*:

Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case.

Id. at 221. Even when the PSA was enacted in 1921, it was already well settled that the reasonableness of the prices being fixed was no excuse. *See United States v. Trans-Missouri Freight*, 166 U.S. 290, 340-41 (1897); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (“The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct”).

What is injury to competition under the Sherman Act is injury to competition under the PSA. The circuit courts deciding to require injury to competition under the PSA have done so through citations to this Court’s antitrust precedents interpreting the Sherman Act. *See, e.g., Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 363 (5th

Cir. 2009)(en banc)(anti-competitive effect is necessary for an actionable claim under the PSA, “[g]iven the clear antitrust context in which the PSA was passed”); *Been v. O.K. Industries*, 495 F.3d 1217, 1228 (10th Cir. 2007) (PSA requires plaintiff to show injury to competition because PSA “incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation”); *De Jong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980)(same). Just as price stabilization cannot be pro-competitive under the Sherman Act, it cannot be pro-competitive under the PSA, as the Fifth Circuit panel has now held.

B. The Panel Opinion Furthers a Circuit Split Regarding What Constitutes “Injury to Competition” under the PSA.

As this Court has long recognized, “[p]rice is the ‘central nervous system of the economy.’” *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1977)(quoting *Socony-Vacuum Oil Co.*, 310 U.S. at 226 n.59). “[A]n agreement that ‘[interferes] with the setting of price by free market forces’ is illegal on its face.” *Id.* (citing *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)). Broader than the reach of the Sherman Act, the PSA was enacted by Congress to prohibit not only agreements to manipulate price, but also *unilateral* attempts to control prices of meat and poultry products.¹³

13. Compare 7 U.S.C. § 192(e) with 7 U.S.C. §192(g). In §192(e), the PSA states that a live poultry dealer may not, with respect to live poultry, “[e]ngage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices,” while in § 192(g) the Act prohibits a dealer from acting to “conspire, combine, agree, or arrange with any other person to [violate] subdivision . . . (e).” See Appendix D.

Despite this mandate, the Fifth Circuit two-judge panel ruled, without analyzing injury to competition through an examination of market-based competitive conditions, that price stabilization is excused under the PSA (based upon a purported lack of injury to competition) when the stabilization is justified by the exigencies of the *defendant's own business* or when it would inure to the *defendant's financial benefit*. The two-judge panel decision clearly and directly conflicts with the precedents of this Court as to what constitutes a *prima facie* case of injury to competition, and it furthers a serious *split among the circuits* regarding an issue of national importance—the congressional goal of allowing free market forces, rather than appellate judges, to set national commodity meat and poultry production and prices.

As established in the undisturbed findings of the trial court, PPC (1) acted with the specific intent to increase the price of chicken on a national basis, and (2) caused an “injury to competition” by removing chicken from the national market for a period of time during which it could not be replaced by competitors, thus reducing overall supply. Appendix C at 25a & 38a. The two-judge panel decision, however, held that this act was not a violation of § 192(e), because (1) PPC did not act in a “deceptive, illegitimate or unnatural” manner, and (2) PPC did not injure competition, because its intent (which the panel re-characterized as mere “hope”) to increase price was simply “the natural consequence of a reduction in supply.” Appendix B at 13a.

The Fifth Circuit thus joined the Eleventh and Eighth Circuits in utilizing for PSA cases an injury to competition analysis that permits market-distorting

conduct when such conduct inures to the financial benefit of the *defendant*, rather than an analysis of injury to competition that focuses on market-based considerations of competitive conditions. See *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280-87 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006)(accepting, among the alleged pro-competitive justifications for impact on price, the defendant's claim that the challenged practice provided the defendant "with a reliable and stable supply of cattle for its packing plants" and reduced its transaction costs); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977-78 (8th Cir. 1999) (observing that the contract provision at issue "is an effort by IBP to have a more reliable and efficient method of obtaining a supply of cattle," and concluding, without undertaking a Rule of Reason analysis, that it "does not potentially suppress or reduce competition sufficient to be proscribed by the Act").¹⁴

On the other side of this circuit split stand the Tenth Circuit's decisions in *Been v. OK Indus., Inc.*, 495 F.3d 1217, 1233 (10th Cir. 2007)(refusing to apply the approach of the Eleventh Circuit in *Pickett* and the Eighth Circuit in *Glickman* because "they tend to focus on the benefits

14. This purported efficiency argument has no factual application in this case. PPC did not simultaneously "idle" these three plants at the beginning of the summer "grilling season" in order to insure a steady supply of chickens into its plants, because PPC owns and controls all aspects of the production of its chickens from their conception to slaughter, including their numbers, feed, medicine and weight at slaughter. See *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 456-57 (5th Cir. 2008), *rev'd on other grounds en banc*, 591 F.3d 355 (5th Cir. 2009). In any event, the two judge panel in this case *did not* base its decision on any "efficiency" argument. See Appendix B at 12a-14a.

to the processor, rather than the market as a whole”), and *Excel Corp. v. U.S.D.A.*, 397 F.3d 1285, 1293 (10th Cir. 2005) (“contrary to Excel’s assertion, the fact that a particular act is ‘required by the exigencies of the business,’ . . . has no impact on whether that act is violative of the P&S Act”).

Moreover, as indicated in *Excel*, the Department of Agriculture has long taken the position that violations of the PSA and the regulations under it cannot be justified by financial benefits to the defendant from the otherwise violative conduct. 397 F.3d at 1293. Indeed, in a proposed regulation under the PSA that the Secretary of Agriculture ultimately withdrew, the Department proposed defining “injury to competition” in the same manner that this Court and the courts of appeals have routinely defined it under the Sherman and Clayton Acts: “A competitive injury occurs when conduct *distorts competition* in the market channel or marketplace.” 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. 35338, 35351 (June 22, 2010)(emphasis added).

The Tenth Circuit’s and USDA’s market-based analysis of injury to competition comports with this Court’s decisions. This Court has consistently ruled that any application of the Rule of Reason must assess competitive conditions *at the market level*, rather than financial exigencies or benefits for the defendant. See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 114-120 (1984)(rejecting justifications under Rule of Reason that did not result in actual *market-wide* efficiencies); *National Society of Professional Engineers*, 435 U.S. at 693-94 (rejecting purported business justifications that

defendant's acts "will tend to maintain the price level" and perhaps result in inferior products, because "these are not reasons that satisfy the Rule [of Reason]"); *Otter Tail Power Co.*, 410 U.S. at 380 (rejecting alleged justification of self-preservation of the defendant); *Socony-Vacuum Oil Co.*, 310 U.S. at 220-25 (rejecting self-preservation, elimination of "competitive evils," and reasonableness of the prices "stabilized" as improper considerations).

In the context of price manipulation under the PSA, the Fifth Circuit has now gone well beyond the Eleventh Circuit's decision in *Pickett*, for rather than merely factoring in the financial benefits of the conduct to the defendant, the two-judge panel's decision makes the defendant's own financial benefits—what this Court has characterized as an improper consideration—the *sole consideration* in determining injury to competition.¹⁵ A review of the two-judge panel's brief opinion demonstrates that no market analysis was undertaken, and that the trial court's findings of an intentional, sustained, market-wide reduction in production and injury to competition were not disturbed. *See* Appendix B.

Instead, the two-judge panel focused solely on the "reasonableness" of PPC's decision from the perspective of PPC's own financial considerations. In direct conflict with the Rule of Reason analytical framework set forth in *Society of Professional Engineers* and *NCAA*, the

15. The Fifth Circuit two-judge panel's assessment of anti-competitive effect, pro-competitive effect, and injury to competition is exceedingly short. *See* Appendix B at 11a-13a. Nowhere did the panel undertake an economic analysis of market conditions, except to acknowledge PPC's market power in "driving the market price of chicken down at great cost to itself." *Id.* at 12a.

panel determined that PPC's actions were reasonable because (1) its act was unilateral, (2) it was "driving the market price of chicken down at great cost to itself," (3) it "wisely stopped flooding the market with unprofitable chicken," and (4) even if it acted with the "hope" that chicken prices would increase and "respond" to its output reduction, this was justified because "higher prices are the natural consequence of a reduction in supply. Appendix B at 12a-13a.

This type of analysis, now utilized in PSA cases by the Fifth, Eighth and Eleventh Circuits, is clearly not a Rule of Reason analysis, either in full form or in a "quick look" form. As this Court stated in both *Professional Engineers* and *NCAA*, in determining whether a restraint of trade is unreasonable, "the inquiry is confined to a consideration of impact on competitive conditions." *NCAA*, 468 U.S. at 103. The two-judge panel decision improperly avoided this required analysis, because the panel abortively and without analysis concluded that "PPC's unilateral conduct had nothing to do with competition." Appendix B at 13a. Clearly, because the trial court found the actions of PPC materially affected the national supply of commodity chicken, *Appendix C at 25a*, they had "something" "to do with competition." Yet, without conducting any market analysis of PPC's reduction in output—a factor acknowledged in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986), to be an injury to competition—the two-judge panel merely concluded that no such injury existed. In so doing, the panel decision conflicts not only with the Tenth Circuit's PSA decisions and the USDA's interpretation of injury to competition, but also with the long line of Rule of Reason decisions by this Court requiring an analysis of "the impact on competitive conditions" within the relevant market.

As recently as *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2216-17 (2010), this Court addressed the focus of a proper Rule of Reason analysis, quoting the “classic formulation” of it by Justice Brandeis in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918). That analysis involves precisely the market factors ignored by the two-judge panel in this case. In *American Needle*, this Court also cited *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-887 (2007), and *Society of Professional Engineers* for their formulation of the Rule of Reason, which also emphasizes the same market-based considerations ignored by the two-judge panel in this case.¹⁶

It is vitally important that this case be addressed by this Court, not only because PPC’s conduct concerns the manipulation of a vital national food market—manipulation now validated by the panel as permissible for any meat or poultry company that can justify a PSA violation by its own financial benefits from the violation—but also

16. In *Society of Professional Engineers*, 435 U.S. at 688-691, referring to the tests set forth in *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911), this Court required a full, market-based analysis, explaining:

Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Id. at 690 (footnote omitted). See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51 (1977)(emphasizing “competitive impact” and “economic analysis” throughout).

because this Court's required Rule of Reason analysis has simply been ignored by the Fifth Circuit panel. If an end-around of the Rule of Reason may be accomplished merely by announcing that conduct found at trial to be anti-competitive "has nothing to do with competition," then this Court's antitrust precedents will be easily and continually ignored.

II. THE FIFTH CIRCUIT TWO-JUDGE PANEL OPINION DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS BY ADDING AN ELEMENT NOT FOUND IN THE UNAMBIGUOUS LANGUAGE OF §192(e), AND IT WHOLLY IGNORES THE TRIAL COURT'S FINDING OF THAT SAME ELEMENT.

This Court has repeatedly held that if statutory language is plain and unambiguous, it should be applied as written, without engrafting words not found in the text. *Dodd v. United States*, 545 U.S. 353, 359 (2005) ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms")(quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.S.*, 530 U.S. 1, 6 (2000)). Yet, this is precisely what the Fifth Circuit two-judge panel has done in interpreting and applying the words "manipulate" and "control" in §192(e).

Section 192 provides, in relevant part, as follows:

It shall be unlawful for . . . any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any *unfair, unjustly discriminatory, or deceptive* practice or device;
or

(b) Make or give any *undue or unreasonable* preference or advantage to any particular person or locality in any respect whatsoever. . . ; or

...

(e) Engage in any course of business or do any act for the purpose or with the effect of *manipulating or controlling prices* . . . ; or

(f) Conspire, combine, agree, or arrange *with any other person* . . . (3) to *manipulate or control prices*; or

(g) Conspire, combine, agree, or arrange *with any other person* to do, or aid and abet . . . , any act made unlawful by subdivision (a), (b), (c), (d) or (e).

Appendix D (emphasis added). Although §192(a) requires a practice to be “unfair, unjustly discriminatory, or deceptive,” and §192(b) requires an advantage to be “undue or unreasonable,” §192(e) ***contains no such adjectives or requirements***. An act violates §192(e) if it is done “for the purpose or with the effect of manipulating or controlling prices.”¹⁷

17. The language and presence of subsections (f) and (g) make clear that unilateral conduct can violate subsection (e).

The Fifth Circuit two-judge panel opinion reads into §192(e) three adjectives (including “deceptive,” found in §192(a)-(b) but not in §192(e)), and holds that in §192(e) Congress “prohibited only deceptive, illegitimate, or unnatural” attempts to influence prices. *See* Appendix B at 10a. Before the panel decision, ***no case had ever held such an element to be required by §192(e).***¹⁸ The panel stated that it borrowed these adjectives from the Oxford English Dictionary, despite the fact that this dictionary defines the word “control” as merely “to exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command,” (Appendix B at 10a), thus *failing to ascribe any “deceptive,” “illegitimate” or “unnatural” meaning to the word.*

The panel’s interpretation is in direct conflict with this Court’s well-established statutory construction precedents. Thirty years ago in *Russello v. United States*, 464 U.S. 16, 23 (1983), this Court examined a subsection of RICO that did not contain certain language, while other subsections did. Quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972), *Russello* held that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” This Court’s long-standing reasoning, as

18. Conspicuously absent from the Fifth Circuit two-judge panel opinion is any citation to the only other circuit court decision analyzing “manipulating or controlling” in § 192(e), *Schumacher v. Tyson Fresh Meats*, 515 F.3d 867, 872 (8th Cir. 2008)(holding that to prove a § 192(e) violation a plaintiff must merely “show that a packer *intentionally* committed unlawful conduct”)(emphasis in original).

set forth in *Russello, North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), and *United States v. Naftalin*, 441 U.S. 768, 773-774 (1979), is that if Congress intended to restrict one subsection with the language it placed in another subsection in the same Act, “it presumably would have done so expressly as it did in the [other subsection].” *Russello*, 464 U.S. at 23.

Section 192(a) of the PSA contains the same or similar words (“unfair, unjustly discriminatory, or deceptive”) engrafted by the panel opinion onto §192(e) (“deceptive, illegitimate or unnatural”). However, the two-judge panel opinion’s words are ***conspicuously absent*** from the express language of §192(e). Under *Russello*, if Congress intended §192(e) to proscribe only “deceptive” or “illegitimate” attempts to control prices, it would have said so, just as it did in §192(a). The absence of those words in §192(e) means that the panel’s insertion of them into §192(e) conflicts with binding decisions of this Court on this important construction of the PSA.

In addition, the panel’s reasoning in footnote 11, that a violation of §192(e) requires a violation of §192(a), conflicts with *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001), that prohibits statutory constructions that create surplusage. In *TRW*, the Court emphasized that any statutory interpretation that renders a provision “insignificant, if not wholly superfluous,” is improper. If, as the panel reasoned, every §192(e) violation must also include a violation of §192(a), (see Appendix B at 13a), there would be no need for §192(e), and Congress could have stopped after writing only §192(a). However, §192(e) is *not* “insignificant” or “wholly superfluous,” and the panel’s construction conflicts with *TRW* and a line of cases back to

1883. *E.g.*, *Duncan v Walker*, 533 U.S. 167, 173-74 (2001); *United States v. Menashe*, 348 U.S. 528, 538-539 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

Of equal importance, even if a “deceptive” requirement could be judicially engrafted onto §192(e), the panel decision ignores the trial court’s express findings, not only of “manipulation” and “control,” but also of “unfair or deceptive acts or practices” in PPC’s “conduct done for the purpose of manipulating or controlling the price of chicken.” Appendix C at 23a-24a, 25a & 27a (Findings of Fact 20, 23 & 28). The trial court found that, although PPC’s conduct was not sufficiently “unfair or deceptive” to violate §192(a), PPC’s idlings, under cover of public statements that the plants were idled for inefficiency reasons when they were in fact idled to increase price, *id.* at 23a-25a (Findings 20-21), were sufficiently “unfair or deceptive” to violate §192(e). The trial court was unpersuaded that “PPC committed any *unfair or deceptive acts or practices beyond the conduct* done for the purpose of manipulating or controlling the price of chicken,” thus characterizing the acts as, to a sufficient extent, “unfair or deceptive.” *Id.* at 27a (Finding 28) (emphasis added).

In *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), this Court changed the analysis of vertical price restraints from a *per se* rule to a Rule of Reason analysis and remanded to the Fifth Circuit, which then remanded to permit the plaintiff, who had prevailed at trial, to re-plead in response to the change in the law. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 416 (5th Cir. 2010). If the Magistrate Judge’s above-quoted finding is somehow insufficient for the newly-added “deceptive, illegitimate, or unnatural”

element, *Leegin* requires that Petitioners be given the opportunity to obtain a more complete finding on that new element.

III. THE FIFTH CIRCUIT PANEL DECISION DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT THAT IMPOSE ON AN ANTITRUST DEFENDANT THE BURDEN OF PLEADING AND PROVING ANY PRO-COMPETITIVE BUSINESS JUSTIFICATION AS AN “AFFIRMATIVE DEFENSE.”

Before trial began, PPC admitted in its trial briefing that the assertion of pro-competitive business justifications for its price manipulation is an *affirmative defense* under the Rule of Reason.¹⁹ This is precisely the ruling of this Court in *NCAA v. Board of Regents*, where the Court explained the parties’ burdens of proof under the Rule of Reason:

the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon [NCAA] a heavy burden of establishing

19. PPC provided the trial judge a “PSA Legal Analysis Framework” chart reflecting “Hornbook law” and represented in open court that, after the Plaintiffs put on a *prima facie* case under §192(e), the burden shifted to PPC to show legitimate business justifications for what it did, and asserted that if PPC showed that there was a legitimate business reason for what it did, there could not be an anti-competitive act. *See* Appendix E.

an *affirmative defense* which competitively justifies this apparent deviation from the operations of a free market. *See Professional Engineers*, 435 U.S. at 692-96. We turn now to the NCAA's proffered justifications.

468 U.S. at 113 (emphasis added). *See Professional Engineers*, 435 U.S. at 693 (rejecting the Society's "affirmative defense" that "the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health").

Despite this clear precedent, the Fifth Circuit two-judge panel, recognizing that PPC had failed to plead any such affirmative defense, improperly re-characterized the assertion of PPC's financial justifications as merely "evidence relevant to whether there was any underlying anti-competitive conduct to begin with." Appendix B at 12a, footnote 8. The panel then proceeded to accept PPC's financial justifications, despite PPC's failure to have pleaded them. The panel's footnote simply reverses the burden of pleading and proof made clear in *NCAA* and *Professional Engineers*.

It cannot be, as the panel opinion asserts in footnote 8, that certain pro-competitive business justifications are affirmative defenses that must be pleaded, while others are merely "evidence relevant to whether there was anti-competitive conduct to begin with." Appendix B at 12a. Petitioners satisfied their initial burden under the Rule of Reason by showing, as the trial court found, that PPC reduced output in order to increase price—the trial court's basis for finding injury to competition. Under *NCAA* and

Professional Engineers, the burden then shifted to PPC to establish, as an affirmative defense, any legitimate, pro-competitive business justification for its anti-competitive conduct. After the Petitioners established this *prima facie* case, *any* evidence attempting to justify the output reduction and price increase would have to be submitted in support of a timely pleaded affirmative defense of pro-competitive business justification, and there is but *one* category of such evidence, not *two* as asserted by the two-judge panel. Appendix B at 12a.

The lone case cited by the panel to attempt to justify its re-characterization of PPC's affirmative defense is *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201, 2216-17 (2010). However, in *American Needle*, this Court did not address the issue of the assertion of pro-competitive business justifications as an affirmative defense, and that decision clearly does not support the panel's determination that evidence of such justifications is simply considered in determining whether a defendant's conduct is anti-competitive "to begin with," rather than part of an affirmative defense. *American Needle* does not purport to overrule *NCAA* and *Professional Engineers*.

In addition to ignoring this Court's binding precedents, the panel decision also ignores four undisputed facts: (1) that PPC never obtained leave from the trial court to amend its Answer to assert (months after the pleadings deadline and just two weeks before trial) the "business justifications" relied upon by the panel decision in reversing the trial court's judgment; (2) that PPC never appealed the implied denial of its motion for leave to amend; (3) that the trial court granted Petitioners a running objection to PPC's "justification" evidence and neither PPC's opening brief nor its reply brief in the Fifth Circuit argued trial by

consent; and (4) PPC provided the trial court a “PSA Legal Analysis Framework” chart judicially admitting that PPC had the burden of proving “offsetting legitimate business reasons for [its] conduct at issue.” *See* Appendix E.

After inexplicably re-characterizing PPC’s purported pro-competitive business justifications as part of the determination of whether PPC’s conduct (found to have intentionally reduced output in order to increase price) was anti-competitive and not an affirmative defense, the Fifth Circuit panel then expressly relied upon PPC’s three never-pleaded, purportedly pro-competitive business justifications: (1) PPC’s need to survive, (2) the panel’s *post hoc*, unsupported determination that too much chicken was being produced for the American public’s needs, and (3) the low market price of that chicken. *See* Appendix C at 12a (“PPC had overextended itself into the commodity chicken market, was producing more chicken than the market appeared to need, and was thereby driving the market price of chicken down at great cost to itself”). However, as explained above, it has been established since *Socony-Vacuum Oil Co.* in 1940 that there is no “right to survive” defense to antitrust violations, and market forces, *not judges*, determine how much chicken should be produced and at what prices it should be sold in this country.

Equally disturbing is the panel opinion’s further explanation that the panel could best determine after the fact the appropriate amount of chicken that PPC should have been producing in the Spring and Summer of 2009: “Recognizing the **damage** inflicted by its own **excess** production, PPC **wisely** decided to stop **flooding** the market with unprofitable chicken.” Appendix B at 12a (emphasis added). This is the equivalent of the NCAA

being able to justify its illegal television plan by arguing that without the plan the market would be “flooded” with college football broadcasts, or the Indiana Federation of Dentists justifying its refusal to provide x-rays on the grounds that the costs of providing them to insurers would damage the dentists and the extra copies would be “excess production.”

The two-judge panel opinion’s reliance on unpleaded financial justifications (that PPC judicially admitted to the trial court were affirmative defenses and that it had failed to plead as required by this Court’s rulings in *Professional Engineers* and *NCAA*) and the opinion’s *post hoc* determinations that too much chicken was being produced at prices too low are such wild departures from the accepted and usual course of judicial proceedings as to call for this Court’s exercise of its supervisory power to correct the panel’s decision.

IV. THE PANEL DECISION DIRECTLY CONFLICTS WITH THIS COURT’S DECISION THAT A *PRIMA FACIE* CASE OF INJURY TO COMPETITION IS ESTABLISHED BY PROVING OUTPUT REDUCTION WITHOUT A SHOWING OF “DECEPTIVE, ILLEGITIMATE, OR UNNATURAL” CONDUCT BY THE DEFENDANT.

The panel decision reversed and rendered, “[b]ecause PPC’s unilateral decision to reduce production was *neither illegitimate* nor anti-competitive.” Appendix B at 4a (emphasis added). After determining that by enacting §192(e) Congress prohibited only “deceptive, illegitimate, or unnatural” attempts to influence prices, the decision posited the “relevant question” as “whether

PPC's decision to reduce its chicken output was *improper and* anti-competitive." Appendix B at 11a (emphasis added). However, this Court requires only proof of anti-competitive effect on the market—injury to competition—to establish a *prima facie* violation. Neither illegitimacy nor impropriety is an element of proof.

In *NCAA*, 468 U.S. at 95-96, the trial court found that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act by fixing the price for particular telecasts and placing an artificial limit on production. In analyzing whether a Rule of Reason or *per se* analysis should be applied, this Court noted that, "[w]hile as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that *good motives will not validate an otherwise anticompetitive practice.*" *Id.* at 101, n.23 (emphasis added).²⁰ Applying a Rule of Reason analysis, the Court pointed out that "[r]estrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."²¹ *Id.* at 107-08. Quoting from *Professional Engineers*, 435 U.S. at 692,

20. Although the panel decision correctly observed in its footnote 9 that "even a devious intention will not necessarily delegitimize an otherwise permissible act," (Appendix B at 13a), the panel decision missed this corollary point from *NCAA*—that good motives cannot "validate an otherwise anticompetitive practice"—and the main point of *NCAA*—that an antitrust "inquiry is confined to a consideration of impact on competitive conditions."

21. In contrast, the Fifth Circuit two-judge panel decision accepted PPC's position: "Because its output reductions were not anti-competitive, PPC asserts, it has not violated §192(e)." Appendix B at 8a.

the Court summarized its determination that the plaintiffs had proved a *prima facie* case of injury to competition through showing that the restraint reduced output:

the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to **raise prices and reduce output**.

68 U.S. at 113 (emphasis added).

Similarly, in a unanimous decision two years later in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986), the Court analyzed whether the Federation had restrained trade by withholding x-rays requested by dental insurers. The Federation argued that the FTC had failed to define the market and to prove market power. The Court rejected the argument, explaining that market definition and market power are used to determine the potential for adverse effects on competition, but “‘proof of actual detrimental effects, **such as a reduction of output**,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects.’” *Id.* at 460-61 (quoting P. Areeda, *ANTITRUST LAW* (1986)) (emphasis added).

The Fifth Circuit two-judge panel decision directly conflicts with *NCAA* and *Indiana Federation of Dentists* by imposing on Petitioners—after the trial—the purported obligation to establish “illegitimate” or “improper” conduct by PPC. Petitioners had no such obligation. PPC’s unprecedented simultaneous idling of these three plants, with the express purpose of massively

reducing output into the market of which it controlled 50% and “thereby” increasing price, *was prima facie* anticompetitive conduct as defined by this Court.

V. THE PANEL DECISION CONFLICTS WITH THIS COURT’S DECISIONS AND THE LANGUAGE OF §192(e), BECAUSE IT WRONGLY DECIDES THAT THE “UNILATERAL CONDUCT” OF A SINGLE FIRM CANNOT VIOLATE THAT PROVISION.

It is clear, in the holding and analysis of the Fifth Circuit panel, that it did not consider “*unilateral*” conduct to be violative of §192(e). In the first paragraph of the opinion, the panel explained its reversal of the trial court: “Because *PPC’s unilateral decision* to reduce production was neither illegitimate nor anticompetitive, we reverse and render judgment in favor of PPC.” Appendix B at 4a (emphasis added). In its reasoning and analysis, the panel explained: “*a unilateral attempt to raise prices*, without more, is not inherently illicit or anticompetitive.” *Id.* at 11a (emphasis added)(citing the Oxford English Dictionary). Concluding its analysis, the panel reasoned that “[i]f it is lawful for a business to independently control *its own output*, then it is also lawful for the business to hope for the natural consequences of its actions.”²² *Id.* at 13a (emphasis added).

22. Petitioners agree with this sentence—until the word “chicken” is placed before the word “business,” and “intend” replaces “hope” in it. Section 192(e) proscribes what the Sherman Act does not. *See Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 358 (5th Cir. 2009)(en banc)(explaining that the PSA’s legislative history supported a wider power to prohibit unfair methods of competition than did antecedent antitrust legislation); *Been v. OK Indus., Inc.*, 495 F.3d 1217, 1231 (10th Cir. 2007)(same); *DeJong Packing Co. v. USDA*, 618 F.2d 1329, 1335 nn.7&8 (9th Cir.)(same), *cert. denied*, 449 U.S. 1061 (1980).

Congress, however, created no such protected status or “safe harbor” for the unilateral actions of a single “live poultry dealer,” and the panel’s reading of §192(e) directly conflicts with both the PSA’s express language and this Court’s precedents regarding how that language must be interpreted. First, §192(e) clearly does *not* contain words proscribing collusive conduct, but §192(f) and (g) clearly *do*. Those subsections proscribe acts made “to conspire, combine, agree, or arrange with any other person.” As set forth above, this Court’s decisions require courts not to read statutory language so as to create surplusage. *See TRW, Inc.*, 534 U.S. at 31; *Duncan v. Walker*, 533 U.S. 167, 173-74 (2001). The Fifth Circuit panel opinion, immunizing unilateral price manipulation and requiring a combination or agreement to constitute a violation of §192(e), writes §192(e) completely out of the PSA.

Further, under this Court’s statutory construction holdings, including *Russello*, 464 U.S. at 23, the language of §192(e), read together with §192(f)-(g), requires the interpretation that unilateral acts are prohibited by §192(e). As explained previously in this Petition, under these precedents, the inclusion of the words “conspire, combine, agree, or arrange” in §192(f) and §192(g) and the exclusion of those words in §192(e) mean that Congress acted intentionally in that inclusion, and thus did not intend §192(e) to apply only to collusive conduct.²³

23. Even the panel decision’s OXFORD ENGLISH DICTIONARY definitions of “manipulate” and “control” fail to include any bilateral aspect, each such definition discussing the actions of one person or entity rather than any combination. *See* Appendix B at 10a, footnote 4 (quoting OXFORD ENGLISH DICTIONARY definitions of “manipulate” as “to manage” and “to cause,” implying a single actor, and quoting definition of “control” as “to exercise restraint or direction over,” implying a single actor).

By refusing to follow the express language of Congress in §192(e), the Fifth Circuit two-judge panel decision substitutes its own concept of what conduct should be proscribed by the PSA, rather than simply applying the express language of the unambiguous statute and the undisturbed findings of the trial court. The panel decision thus rejects both Congressional will and this Court's precedents.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court grant review of this matter.

Respectfully submitted,

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