No. 01-____

IN THE

Supreme Court of the United States

JERRY GOETZ,
d/b/a Jerry Goetz and Sons

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; Anne Veneman, Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant, vacate, and remand the Tenth Circuit's decision sustaining an administrative collection action for assessments under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq*. (the Beef Act) where petitioner's First Amendment challenge to the collection proceeding formed the basis of the split identified by the government in *United States* v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001), which struck down assessments under the virtually identical Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq*. (the Mushroom Act)?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner-appellant below, and petitioner in this Court, is Jerry Goetz.

The respondents-appellees in the District of Kansas and in the Tenth Circuit, and respondents in this Court, are United States Department of Agriculture; Anne Veneman (succeeding Dan Glickman), Secretary of the U.S. Department of Agriculture; and The Acting Administrator of the Agricultural Marketing Service.

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Petitioner Jerry Goetz respectfully petitions for a writ of certiorari to vacate and remand the judgment of the United States Court of Appeals for the Tenth Circuit for reconsideration in light of this Court's June 25, 2001 decision in *United States* v. *United Foods, Inc.*, -- U.S. --, 121 S. Ct. 2334 (2001).

OPINIONS BELOW

This case began with an administrative complaint against petitioner Goetz, filed by the Acting Administrator of the Agricultural Marketing Service of the United States Department of Agriculture. The complaint was stayed pending a chal-

lenge to the proceeding in the District Court for the District of Kansas. That challenge was rejected by the district court, the Tenth Circuit affirmed, and this Court denied certiorari. After the administrative proceeding resumed, the administrative law judge and the Judicial Officer for the Secretary of Agriculture ruled against Goetz and ordered the payment of assessments, late fees, and penalties. A petition for review was filed in the District Court for the District of Kansas, which affirmed the Judicial Officer's decision in all respects. The Tenth Circuit likewise affirmed. This petition asks this Court to grant, vacate, and remand (GVR) that decision of the Tenth Circuit.

The decision of the District Court for the District of Kansas rejecting Goetz's constitutional challenge to the proceeding is published at 920 F. Supp. 1123 and is reproduced as Appendix B (pages B1-B19). The decision of the Tenth Circuit affirming the district court's decision is published at 149 F.3d 1131 (*Goetz I*) and is reproduced as Appendix C (pages C1-C19). The decision of the ALJ ordering petitioner to pay fees, interest, and penalties is unpublished. The Decision of the Judicial Officer incorporating, modifying, and elaborating upon the ALJ's decision, and ultimately affirming that decision in relevant part, is published at 56 Agric. Dec. 1470, 1997 WL 730378 (USDA), and is reproduced as Appendix D (pages D1-D71). The decision of the Judicial Officer denying Goetz' petition for reconsideration is published at 57 Agric. Dec. 426, 1998 WL 174654 (USDA), and is reproduced as Appendix E (pages E1-E25). The decision of the District Court for the District of Kansas affirming the Judicial Officer's decision is published at 99 F. Supp.2d 1308 and is reproduced as Appendix F (pages F1-F22). The decision of the Tenth Circuit affirming the district court's decision is unpublished, not yet noted in a table in F.3d, but available in full at 2001 WL 401594 (*Goetz II*), and is reproduced as Appendix A (pages A1-A14).

JURISDICTION

The Tenth Circuit entered its judgment on April 20, 2001. On July 16, 2001, Justice Breyer granted petitioner an extension to and including August 9, 2001, in which to file this petition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

At issue in this petition is the constitutionality of the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq*. (the Beef Act) and the Beef Promotion and Research Order, 7 C.F.R. Part 1260 (the Beef Order). The relevant provisions of the Beef Act and Beef Order are reproduced as Appendices G & H, respectively (pages G1-G7, and H1-H5).

STATEMENT OF THE CASE[1]

The Beef Act directs the Secretary to promulgate a Beef Order that provides for financing beef promotion and research through assessments on cattle sold in the United States and cattle, beef, and beef products imported into the United States. 7 U.S.C. §§ 2901(b), 2903, 2904(8)(A)-(C); 7 C.F.R. Part 1260.

The Beef Act requires cattle producers in the United States to pay a one dollar per head assessment on cattle sold in this country. 7 U.S.C. §§ 2904(8)(A) & (C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310. Each person making payment to a cattle producer for cattle is a "collecting person" who is required to collect the assessments and remit them to the appropriate entities responsible for coordinating and spending such assessments. 7 U.S.C. § 2904(8)(A); 7 C.F.R. §§ 1260.311(a), 1260.312(c).

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[1] Unless otherwise noted, the facts are taken from the Tenth Circuit's opinions in *Goetz I* and *Goetz II*, attached as Appendices C and A.

As both a "producer" and a "collecting person," petitioner is subject both to making payments on cattle he sells, and collecting and remitting payments on certain cattle he buys.

On October 29, 1993, the USDA commenced an administrative proceeding against Goetz because he failed to pay and remit certain required assessments. Goetz answered the administrative complaint and argued, among other things, that the Beef Act was unconstitutional on a variety of grounds, including under the First Amendment. *See* App. D2, D30 (noting administrative Answer and arguments alleging unconstitutionality).

On August 2, 1994, Goetz filed a civil action in the District Court for the District of Kansas challenging the constitutionality of the Beef Act and moved for a temporary restraining order to enjoin the administrative proceeding. The district court stayed the proceeding during an initial audit and continued the stay throughout the litigation.

In the district court, Goetz argued the Beef Act was unconstitutional because it (1) was beyond Congress' power to regulate interstate commerce, (2) imposed an unconstitutional direct tax, (3) effected an impermissible delegation of legislative authority, (4) violated the Takings Clause of the Fifth Amendment, (5) violated the Equal Protection Clause of the Fifth Amendment, and (6) infringed on the First Amendment rights of cattle producers.

On February 28, 1996, the district court upheld the constitutionality of the Beef Act, adopting the reasoning of the Third Circuit in *United States* v. *Frame,* 885 F.2d 1119 (CA3 1989), *cert. denied,* 493 U.S. 1094 (1990). The district court dismissed the complaint and set aside stay of the administrative proceeding. App. B19.

Goetz appealed.

On July 10, 1998, the Tenth Circuit in *Goetz I* rejected Goetz' appeal and affirmed the district court.

Regarding Goetz' First Amendment claims, the Tenth Circuit held that the district court erred in applying the test for restrictions on commercial speech, but nonetheless affirmed based on its reading of this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.,* 521 U.S. 457 (1997). App. C16-C17. In reaching this conclusion the Tenth Circuit simply ignored petitioner's discussion of the collectivization rationale on which *Glickman* was based, and offered no answer to petitioner's argument that, "[u]nlike the fact situations to which the [*Glickman*] decision has been restricted, the beef industry is not only a highly competitive industry, competition within the beef industry is fully protected by the antitrust laws." App. *I* 1 (Appellant's Supplemental Brief).

The Tenth Circuit also rejected Goetz' other remaining constitutional challenges. Regarding Goetz' Commerce Clause challenge, the Tenth Circuit concluded that the beef industry substantially affects interstate commerce, the objective of the Beef Act is valid, and the stimulation of the beef market is a proper regulatory activity. App. C12. The Tenth Circuit likewise rejected Goetz' Taxing Clause challenge, agreeing with the district court that the assessment was not a tax because the primary purpose of the Beef Act is regulation, not to raise revenues. App. C14-C15. Finally, the Tenth Circuit rejected Goetz' Equal Protection challenge, concluding that because no fundamental right was implicated, strict scrutiny did not apply and the Beef Act satisfied the rational basis test. App. C17-C19.

Goetz petitioned for certiorari, which this Court denied on January 19, 1999.

Following the district court's dismissal of Goetz' challenge and while the case was on appeal, the administrative proceeding resumed.

On February 26, 1997, the ALJ issued a Decision and Order finding that Goetz had violated the Beef Act and ordering Goetz to pay past due assessments, late fees, and penalties.

Goetz appealed the ALJ's decision to the Judicial Officer to whom the Secretary had delegated authority to act as a final deciding officer.

On November 3, 1997, the Judicial Officer issued a Decision and Order modifying, but generally affirming, the ALJ's order. The Judicial Officer recognized Goetz' continued pursuit of the constitutional challenges raised in *Goetz I*, but rejected each of those challenges.

Regarding the First Amendment challenge, the Judicial Officer held that *Glickman* was dispositive of the First Amendment issue and further relied upon the Third Circuit's decision in *Frame* and the district court's decision underlying *Goetz I*, both rejecting First Amendment challenges to the Beef Act. App. D35-36. The Judicial Officer also rejected Goetz' other constitutional challenges. App. D36-D48 (rejecting Goetz' Taxing Clause, Commerce Clause, and Equal Protection challenges).

Both sides filed motions for reconsideration.

On April 3, 1998, the Judicial Officer filed an order modifying its previous determinations on several matters in favor of the USDA, and denying reconsideration as sought by Goetz. The Judicial Officer's final order (1) ordered Goetz to cease and desist from violating the Beef Act; (2) assessed a civil penalty of $69,804; and (3) required payment of assessments and late fees of $66,913. App. E24-E25.

Goetz petitioned for review of the Judicial Officer's order to the United States District Court for the District of Kansas. In his petition, Goetz again reiterated and preserved his still-pending constitutional challenges at issue in *Goetz I*. App. J1-J2 (preserving constitutional challenges). The government answered, alleging that the constitutional challenges to the Beef Act were *res judicata*. App. K1.

On May 23, 2000, the district court affirmed the Judicial Officer in all respects. The district court's decision contained no discussion of the constitutional challenges, other than to

note that *Goetz I* had been decided against petitioner and that this Court had denied certiorari. App. F5-F6.

Goetz appealed.

On April 20, 2001, the Tenth Circuit affirmed, with no further discussion of the constitutional challenges it had addressed in *Goetz I*.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted, and the case vacated and remanded for reconsideration in light of *United Foods*, because the invalidation of assessments under the Mushroom Act in that case casts grave doubt on the validity of assessments under the Beef Act in this case.

I. THIS CASE SHOULD BE REEVALUATED BY THE TENTH CIRCUIT IN LIGHT OF THIS COURT'S RECENT DECISION IN *UNITED FOODS*.

If there is any petitioner equitably entitled to a GVR in light of *United Foods*, it is Mr. Goetz: His initial First Amendment challenge (*Goetz I*) to the collection action in this case formed the basis of the split identified by the United States when seeking certiorari in *United Foods*, and was repeatedly relied upon by the United States in its unsuccessful defense of the Mushroom Act. The Tenth Circuit in *Goetz I* relied almost exclusively on the earlier decision of the Third Circuit in *Frame* and on this Court's decision in *Glickman*. Those cases likewise formed a substantial part of the government's basis for seeking certiorari in *United Foods*. The government's merits arguments in *United Foods* also relied heavily on *Frame* and *Glickman*, and those arguments were ultimately rejected by this Court.

In *United Foods*, this Court held that compelled support for mushroom promotion violated the First Amendment rights of objecting mushroom handlers. Addressing the question

"whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced," this Court held that the First Amendment barred such compelled support for speech. -- U.S. --, 121 S. Ct. at 2338.

This Court in *United Foods* distinguished its earlier *Glickman* decision on a variety of grounds and rejected the government's expansive interpretation of some of the language in *Glickman*. For example, in rejecting the government's argument that the First Amendment was not even implicated because the promotion program involved only "economic regulation," Brief for the Petitioners, *United States* v. *United Foods, Inc.,* No. 00-276 (Jan. 24, 2001), at 19, this Court held that its "precedents concerning compelled contributions to speech provide the beginning point for our analysis. The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection * * *. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree." -- U.S. --, 121 S. Ct. at 2338.

In another telling example, where the government had argued that regulation collectivizing the marketing of a commodity was irrelevant to *Glickman's* ruling, this Court disagreed, holding – just as Goetz had argued below – that

> [i]n *Glickman* we * * * emphasized "the importance of the statutory context in which it arises." 521 U.S., at 469. The California tree fruits were marketed "pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity." *Id*., at 469. Indeed, the marketing orders "displaced competition" to such an extent that they were "expressly exempted from the antitrust laws." *Id*., at 461. The market for the tree fruit regulated by the program was characterized by "[c]ollective action, rather than the aggregate consequences of independent competitive choices." *Ibid*. The

> producers of tree fruit who were compelled to contribute funds for use in cooperative advertising "d[id] so as a part of a broader collective enterprise in which their freedom to act independently [wa]s already constrained by the regulatory scheme." *Id*., at 469. The opinion and the analysis of the Court *proceeded upon the premise that the producers were bound together* and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation.

United Foods, -- U.S. --, 121 S. Ct. at 2339 (emphasis added).[2] This Court then went on to identify the distinguishing characteristics of the mushroom program:

> The features of the marketing scheme found important in *Glickman* are not present in the case now before us. * * * Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemp-

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[2] In *Glickman*, the collectivization of the tree fruit industry was merely a "premise" upon which the case was argued and decided. It is not at all clear that such premise, suggested by the government and relied upon by this Court, was in fact *true*. *Compare* Brief for Petitioner, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184, 1995 U.S. Briefs (Lexis) 1184 (July 29, 1996) ("regulatory framework uses monetary assessments to fund *collective activities* having an expressive component") (emphasis added), *with* Reply Brief (Merits) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (Apr. 9, 2001), at 2 (contention that *Glickman* "turned on the comprehensive nature of the marketing orders … rests on an *erroneous premise* regarding the extent of regulation of the California tree fruit industries") (emphasis added). Although not directly relevant here, given the questionable nature of the government's original assertions underlying this Court's "premise" of collectivization in *Glickman*, that case's result is called into doubt and the opinion might eventually prove to be unintentionally advisory *dicta* on a fact pattern not actually presented by the reality of the tree fruit industry.

> tion from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions. As the Court of Appeals recognized, * * * "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." [197 F.3d], at 222, 223.

-- U.S. --, 121 S. Ct. at 2339.

In the present case, petitioner Goetz made precisely the same arguments in *Goetz I* that were relied upon by this Court in *United Foods*. App. *I* 1. Furthermore, the government argued, and the decisions below relied upon, precisely the same arguments *rejected* by this Court in *United Foods*. There can be no doubt, therefore, that the validity of the present collection action was sustained based on legal premises that have been definitively rejected by this Court's recent decision in *United Foods*.

Petitioner pressed his arguments at every point they remained available to him and was only forced off those arguments when they became *res judicata* as a result of the denial of certiorari in *Goetz I*. But with this Court's decision in *United Foods*, the Tenth Circuit's decision in *Goetz I* is no longer good law and has lost its *res judicata* effect. *See, e.g.*, *Spradling* v. *City of Tulsa*, 198 F.3d 1219, 1223 (CA10 2000) ("*[R]es judicata* and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions. * * * [An intervening Supreme Court decision] constitutes an intervening change in the law sufficient to render collateral estoppel and *res judicata* inapplicable."). Petitioner's constitutional arguments thus take on revived force and the Tenth Circuit should be required to reconsider those arguments in light of *United Foods*.[3]

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[3] Several of the other constitutional challenges raised by petitioner are also influenced by *United Foods*. For example, the application of rational ba-

II. THE BEEF ACT IS MATERIALLY INDISTINGUISHABLE FROM THE MUSHROOM ACT AND CANNOT SURVIVE A FIRST AMENDMENT CHALLENGE UNDER THE STANDARDS ARTICULATED IN *UNITED FOODS*.

The Beef Act at issue in this case is indistinguishable in all material respects from the Mushroom Act struck down in *United Foods*. Aside from the compelled promotion itself, there are no laws or regulations forcing cooperative marketing within the beef industry and certainly none forcing such cooperation among the beef producers who must pay the fees under the Beef Act. Indeed, the government itself acknowledged as much in numerous filings before this Court in *United Foods*. For example, when the United States sought certiorari in *United Foods* it argued that the Sixth Circuit's decision created a split with the Tenth Circuit's decision in *Goetz I*, which had upheld the Beef Act on the authority of the *Glickman* decision. *See* Petition for Writ of Certiorari, *United States* v. *United Foods, Inc.*, No. 00-276 (Aug. 18, 2000), at 11 ("the court of appeals' decision in this case conflicts with the Tenth Circuit's post-*Wileman Brothers* decision in *Goetz* v. *Glickman*").[4] The government was quite correct in its understanding that *United Foods* conflicted with *Goetz I*. And in light of this Court's affirmation of *United Foods*, *Goetz I* is no longer good law.

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sis scrutiny to Goetz' Equal Protection argument was premised on the notion that no fundamental interest was implicated by the Beef Act. That premise is no longer sound in light of *United Foods*. Additionally, should the government seek to defend the Beef Act by asking the courts to reconceptualize it as "government speech," rather than as the regulation and support of third-party speech – a view rejected by the courts below – such a revised view of the nature of the Beef Act would significantly alter the Tenth Circuit's analysis of petitioner's other constitutional challenges.

[4] S*ee also* Reply Brief (Cert.) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000), at 6 ("the conflict that (quite aside from the holding of an Act of Congress unconstitutional) warrants this Court's intervention is * * * with *Goetz* v. *Glickman*").

The government further represented to this Court that the Mushroom and Beef Acts were equivalent for First Amendment purposes because the Beef Act "does *not* extensively regulate the relevant sector of the agricultural industry. The Beef Act, like the Mushroom Act, is concerned *solely* with 'promotion and advertising, research, consumer information, and industry information' funded through assessments on producers. 7 U.S.C. 2904(4)(B)." Petition for Writ of Certiorari, *United Foods*, at 11 (emphasis added). The Beef and Mushroom Acts "*are substantively identical*; both are concerned almost exclusively with the establishment of programs to promote an agricultural commodity that are funded by assessments on producers or handlers." Reply Brief (Cert.) for the Petitioners, *United States* v. *United Foods, Inc.*, No. 00-276 (November 3, 2000), at 6 (*comparing* 7 U.S.C. § 2901 *et seq. with* 7 U.S.C. § 6101 *et seq.*) (emphasis added); *id* ("The Secretary's orders implementing those programs are also *identical* in all pertinent respects. Compare 7 C.F.R. Pt. 1260 (Beef Order) with 7 C.F.R. Pt. 1209 (Mushroom Order).") (emphasis added).

In its briefs on the merits in *United Foods*, the government continued to emphasize the similarity between the Beef and Mushroom Acts. In discussing the pre-*Glickman* case of *Frame*, the government represented that, like the program then before this Court, the Beef Act "does not extensively regulate the relevant industry. The Beef Act, like the Mushroom Act, is concerned *solely* with 'promotion and advertising, research, consumer information, and industry information' funded through assessments on producers and importers. 7 U.S.C. 2904(4)(B)." Brief for the Petitioners, *United Foods*, at 23 (emphasis added). The government then cited with approval the description of the beef program in *Frame* that the Beef Act "'was structured as a "self-help" measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of govern-

ment regulation and the cost of government "hand-outs."'" Brief for the Petitioners, *United Foods*, at 24 (*quoting Frame*, 885 F.2d at 1122); *see also id*. (equating "'stand alone' generic advertising programs such as the ones here and in *Frame*").

Indeed, the government's brief in *United Foods* noted that this Court in *Glickman*

> was made aware of the differences in regulatory scope between the orders in *Wileman Brothers* and *Frame*. *See* Oral Argument Tr. at 26, *Wileman Bros*. (No. 95-1184) (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124; *see also Wileman Bros*., 521 U.S. at 466-467 (discussing *Frame*).

Brief for the Petitioners, *United Foods*, at 24. Yet, as this Court subsequently noted in *United Foods*, it was precisely those differences in the tree fruit program that made all the difference to the result:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

-- U.S. --, 121 S. Ct. at 2338-39.[5] Thus, the very difference between *Frame* and *Glickman* identified by the government in

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[5] *See also United Foods*, -- U.S. --, 121 S. Ct. at 2340 ("As noted above, the market for tree fruit was cooperative. To proceed, the statutory scheme used marketing orders that to a large extent deprived producers of their ability to compete and replaced competition with a regime of cooperation. * * * Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*,

its *Glickman* arguments were the differences this Court emphasized in its *Glickman* decision and that in *United Foods* it described as "fundamental" to its ruling regarding the Mushroom Act.

Finally, insofar as there is different regulation in the beef industry than in the mushroom industry, it is regulation aimed at maintaining *competition* rather than cooperation or collectivization; precisely the opposite circumstances from those described in *Glickman*.[6] Such regulation squarely repudiates any collectivist notions regarding the beef industry and only strengthens the First Amendment interest at stake in this case, making this an even more compelling case than *United Foods* for striking down the compelled subsidies for speech.

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in furtherance of an otherwise legitimate program."); *id*. at 2340-41 ("The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. * * * The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.").

[6] *See, e.g.,* Packers and Stockyards Act, 7 U.S.C. §§ 192(c) & (d) (unlawful for any packer to sell, buy, or transfer for another "any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly" or "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"); *id*. §§ 192(e) & (f) (unlawful to "[e]ngage 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" or to "[c]onspire, 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").

III. VACATUR AND REMAND SERVE THE EQUITIES OF THE CASE AND FURTHER THE ORDERLY AND EFFICIENT ADMINISTRATION OF JUSTICE.

This petition represents the final stage of a collection action threatening petitioner with over $130,000 in assessments, late fees, and penalties. Petitioner has, at every opportunity available to him, consistently and doggedly challenged the constitutionality of the Beef Act on which such assessments are based. While his challenges to date have been uniformly unsuccessful, they played a central role in the split that led to this Court's grant of certiorari in *United Foods* and have now been vindicated by this Court's decision in *United Foods*.

If the decision below is allowed to stand unexamined, petitioner will be forced to pay what is, to him, an inordinate amount of money on the basis of a law that is almost certainly unconstitutional. He would then be forced to initiate a new round of litigation to seek an uncertain refund of such unconstitutionally extracted funds. Rather than waste the limited time and resources of petitioner, the government, and the courts by forcing new litigation, this Court should instead adopt the more efficient remedy of vacatur and remand to allow the Tenth Circuit to reconsider its earlier position in light of *United Foods*. Such a result is both equitable to petitioner and a more efficient application of the time and resources of the courts and the parties.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and vacate and remand to the Tenth Circuit for reconsideration in light of *United Foods*.

Respectfully submitted,

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Dated: August 9, 2001.