

No. 07-40651

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Cody Wheeler, et al.,
Plaintiffs-Appellees,

v.

Pilgrim's Pride Corp.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

**BRIEF OF *AMICUS CURIAE* CARGILL MEAT SOLUTIONS CORP.
IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR
REHEARING OR REHEARING EN BANC**

Michael E. Lackey, Jr.
Andrew E. Tauber
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000 (phone)
(202) 263-3300 (fax)

*Counsel for Amicus Curiae
Cargill Meat Solutions Corp.*

September 8, 2008

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties

| | |
|-----------------------------|-----------|
| Cody Wheeler | Plaintiff |
| Don Davis | Plaintiff |
| Davey Williams | Plaintiff |
| Pilgrim's Pride Corporation | Defendant |

Amici Curiae

| | |
|------------------------------------|----------------------|
| Cargill Meat Solutions Corporation | <i>Amicus Curiae</i> |
|------------------------------------|----------------------|

*Cargill Meat Solutions Corporation
is a wholly-owned subsidiary of
Cargill, Incorporated.*

Counsel

| | |
|--|------------------------|
| Kelly Tidwell Patton, Tidwell & Schroeder, LLP 4605 Texas Boulevard Texarkana, Texas 75505-5398 | Counsel for Plaintiffs |
|--|------------------------|

| | |
|--|------------------------|
| Bradley C. Weber Thomas F. Loose Christopher M. Bass Locke Liddell & Sapp, LLP 2200 Ross Avenue, Suite 2200 Dallas, Texas 75201 | Counsel for Plaintiffs |
|--|------------------------|

Mark D. Taylor
Clayton E. Bailey
Alexander M. Brauer
Baker & McKenzie, LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

Counsel for Defendant

Jennifer Parker Ainsworth
Wilson, Sheehy, Knowles, Robertson,
& Cornelius, P.C.
909 ESE Loop 323
Tyler, Texas 75701

Counsel for Defendant

Michael E. Lackey, Jr.
Andrew E. Tauber
Mayer Brown LLP
1909 K Street, N.W.
Washington, DC 20006

Counsel for *Amicus Curiae*
Cargill Meat Solutions Corp.

Michael S. Raab
Jonathan H. Levy
United States Department of Justice
Civil Division
950 Pennsylvania Avenue N.W.
Suite 7231
Washington, DC 20530

Counsel for *Amicus Curiae*
The United States of America

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*¹

Cargill Meat Solutions Corporation (“CMS”), which processes and packages beef, pork, and turkey, is one of the largest meat packing companies in the United States. CMS plants across the country process 20,000 head of cattle each day, including more than 9,500 in Texas alone. To maintain a consistent supply of high-quality animals, CMS buys cattle raised by thousands of producers in numerous states. In doing so, CMS enters into a wide variety of contractual arrangements with feeders and producers.

CMS files this brief to bring two points to the Court’s attention. First, it is important to the entire industry that livestock producers and packers retain the ability to enter into variously structured contracts, the benefits of which redound to producers, packers, consumers, and the livestock market as a whole. Second, these benefits from free contracting are threatened by the panel’s erroneous reading of the Packers and Stockyards Act of 1921 (“PSA”), 7 U.S.C. §§ 181 *et seq.*, in this case.

¹ Pursuant to Fifth Circuit Rule 29.1 and Federal Rule of Appellate Procedure 29(b), this brief is accompanied by an unopposed motion for leave to file the brief. Although Plaintiff-Appellee does not affirmatively consent to its filing, neither party opposes the filing of this brief under Federal Rule of Appellate Procedure 29(a).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The freedom to contract in flexible and innovative ways is vital to the producers and packers who participate in the markets for livestock and to the consumers who depend upon them for a steady supply of high-quality, specialized meat.

Historically, packers such as CMS bought livestock in cash transactions on the spot market. Exclusive reliance on the often volatile spot market meant that packers and producers were unable to establish the stable relationships required for the collaborative development of the specialized meats increasingly demanded by consumers, and that it was often difficult for producers to secure the credit they needed to expand and improve their operations.

But the development of marketing agreements, formula contracts, and other innovative contractual arrangements has transformed the industry. Forward-looking, written contracts have enabled cattle producers to reduce risk, to increase revenues through the production of specialty animals, and to secure the financing they need to operate in a highly competitive market. Forward-looking, written contracts also benefit packers by ensuring a reliable supply of livestock in general, and of specialty animals in particular.

Consumers are the ultimate beneficiaries of forward-looking contracts. When packers and producers enter into contractual relationships that ensure

packers a steady supply of high quality livestock from predetermined sources, packers can invest in—and provide producers the results of—the research and development that is necessary for the production of specialized products tailored to consumers’ increasingly sophisticated tastes. As a result, consumers are able to enjoy beef that is more tender and that has a more consistent texture as well as pork that is free of antibiotics, hormones, and growth stimulants.

The panel’s interpretation of the PSA directly threatens the ability of producers and packers to enter into these types of beneficial forward-looking contracts. In particular, the panel opinion exposes packers to suits by any cattle producer who would prefer that all cattle be sold on the cash market, regardless of its inherent risks and disadvantages. As such, the decision threatens the economic security of cattle producers, the regular supply of cattle to packers, and the ability of the packers to provide continued benefits to consumers. Moreover, the opinion places market actors in Texas, the nation’s largest cattle-producing state, in a disadvantageous position vis-à-vis buyers and sellers located outside the Fifth Circuit. Because the panel’s opinion has the potential to result in the litigation-driven eradication of legitimate, mutually beneficial contracts from livestock markets, CMS respectfully asks the Court to grant Pilgrim’s Pride’s petition for rehearing or rehearing en banc.

ARGUMENT

I. FREEDOM OF CONTRACT IN THE LIVESTOCK MARKET BENEFITS PRODUCERS, PACKERS, AND CONSUMERS.

The ability to contract freely is critical to livestock markets. It allows individualist producers to operate as they wish, selling their cattle on the spot market without the need to coordinate with packers. At the same time, it allows other producers, who are interested in benefiting from the packers' latest scientific research, to enter long-term agreements that guarantee packers a steady supply of the specialty cattle that consumers increasingly demand.

Traditionally, packers have bought cattle from producers or from third-party feed yards in handshake deals on the spot market. *See Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1274–75 (11th Cir. 2005) (describing the cash market).² Indeed, cash transactions on the spot market still account for a significant majority of cattle sales today.

But cash transactions on the spot market have severe disadvantages for both producers and packers. Producers who sell on the spot market face a host of risks. They are at the mercy of the weather, fluctuating feed costs, and—most

² Even on the cash market, prices are set in a variety of ways. Some prices are based on the cattle's live weight, while others are based on the weight of the dressed carcass after slaughter. *Cf. Packers, Producers Need Each Other* (Mar. 28, 2007), available at http://www.tristateneighbor.com/articles/2007/03/29/tri_state_news/livestock_news/live14.txt (describing grid-based pricing).

importantly—daily changes in the sales price of cattle. From the standpoint of the packers, the spot market cannot guarantee an adequate supply of cattle. The capacity of U.S. packers to process cattle exceeds the number of cattle raised by producers, while the processing costs of the packers are fixed. *See Pickett*, 420 F.3d at 1283. Packers therefore need reliable supplies of cattle—but there is no guarantee that a sufficient number of cash deals will be successfully completed. *See Livestock Weekly, Ranchers Renaissance President Stresses Project’s Partnership* (Feb. 21, 2002), at <http://www.livestockweekly.com/papers/02/02/21/whlbutler.asp> (describing the need for a constant supply). Procuring cattle on the spot market also involves enormous transaction costs, as buyers representing the packers travel from feedlot to feedlot, evaluating and bidding on individual lots of cattle. Finally, the cash market is particularly ill-suited for specialty products, because suitable animals are relatively scarce. *Cf. Ray A. Goldberg et al., Friona Industries: Delivering Better Beef* 8 (Harv. Bus. Sch. Case 906-405, Aug. 7, 2005) (describing the traditionally erratic supply of cattle to feedyards).

To offset these disadvantages, many packers and producers now use a variety of forward-looking contracts. These innovative contractual forms include but are not limited to marketing agreements, formula contracts, and forward contracts. Although there is considerable variation across the different types of forward-looking contracts, all of them reduce market volatility by establishing

relationships between producers and packers that endure beyond a one-off cash transaction on the spot market. Marketing agreements, for example, establish long-term relationships between producers, feedyards, packers, and sometimes retailers, in which the price for the cattle is set according to a pre-arranged formula and the precise delivery date is negotiated between the feedyard and the packer. *See Pickett*, 420 F.3d at 1275–76. Formula contracts also peg the sale price to a pre-arranged formula but, rather than establishing long-term relationships, are short-term contracts resulting from week-to-week negotiations initiated by producers. Under a forward contract, cattle are sold “at a fixed future date but at a price set at the time the contract is written.” *In re Gold Coast Seed Co.*, 751 F.2d 1118, 1119 (9th Cir. 1985). There are still other contractual arrangements that producers and packers enter. For example, a packer and producer will sometimes jointly own and raise a small number of cattle, particularly cattle destined to become specialty meat. Furthermore, specific contracts may contain a mélange of provisions that do not fit neatly into these categories, but which meet the needs of the particular producer and packer at the time of contracting.

These various contractual arrangements reduce the price risk borne by producers. Other things being equal, this reduction in risk induces financial institutions to provide producers greater financing at lower interest rates. The access to increased financing on more favorable terms, in turn, allows producers to

feed and raise a greater number of cattle, increasing the individual producers' revenue and the aggregate supply of cattle on the market. By enabling smaller producers to expand their operations and thereby compete with larger producers, forward-looking contracts increase competition in the cattle industry. *See Pickett*, 420 F.3d at 1284 (finding that marketing agreements have “pro-competitive benefits for the industry”).

Contract sales also benefit producers in a more immediate ways. Packers pay premium prices to producers who agree to raise cattle in accordance with certain contractual specifications. *See Packers, Producers Need Each Other*, *supra* n.2; Goldberg et al., *Friona Industries* 10. Moreover, because producers are able to choose freely between the various contractual arrangements, they can select the arrangement that best suits their current needs. *See Review of Western Organization of Resource Councils Petition for Rulemaking*, Grain Inspection and Packers and Stockyards Administration, *Packers and Stockyards Programs* 31–32 (1997), at http://archive.gipsa.usda.gov/psp/issues/worc_petition/worchmpg.pdf.³

³ Of course, producers who wish to enter only into cash sales on the spot market may do so—just as those who prefer to tailor contractual arrangements to particular economic circumstances may individualize their agreements. The freedom to contract maximizes economic well-being by ensuring that all market participants can arrange their affairs as they see fit.

The use of contracts in lieu of cash sales benefits packers as well. As the Eleventh Circuit has noted, “marketing agreements provide a more reliable and stable supply of cattle for meat packers, reduce their transaction costs for purchasing cattle, and allow them to better match price to actual quality and yield.” *Pickett*, 420 F.3d at 1287; *see also id.* at 1280 (noting that marketing agreements “allow [packers] to keep up with competitors”); Goldberg et al., *Friona Industries* 10. The other types of forward-looking contracts provide the same security of supply and reduction of risk.

Finally, the benefits of contractual cattle sales extend to consumers. Consumers want and expect beef products that are both consistent and consistently tender. *See* Wes Ishmael, *Love Me Tender*, *Beef Magazine* 27, 27 (May 2006), *available at* http://beefmagazine.com/mag/beef_love_tender/; Goldberg et al., *Friona Industries* 12. Few producers have sufficient capital to fund or perform the scientific research that results in beef that possesses these qualities. While some of CMS’ research advances can be implemented by CMS alone in the packing process, the characteristics of meat are relatively inflexible after slaughter. Thus, the qualities valued by consumers depend heavily on how the cattle were bred and raised. For this reason, CMS invests heavily in the research and development of planned breeding programs that incorporate genetic advances, state-of-the-art feeding, and related innovations. *See, e.g.*, Goldberg et al., *Friona Industries* 7

(detailing CMS's research); John Maday, *Balancing Act* (Sept. 19, 2002), available at http://www.ranchersrenaissance.com/media/drovers_sept-2002-b.pdf (describing research into cattle implants used by a marketing alliance in which CMS participates). The resulting products include multiple lines of Angus beef, which is more tender and flavorful than other beef, and meats tailored to the needs of multicultural consumers.

A packer such as CMS will share the results of its proprietary research with producers, and thereby generate these consumer benefits, if, but only if, the packer is assured—through forward-looking contracts—of obtaining the resulting cattle. If, however, packers and producers dealt with each other exclusively through cash transactions on the spot market, there would be no opportunity for producers to implement any of the packers' research-driven programs, many of which result in a supply of specialty cattle for a particular product line. Thus, forward-looking contracts, which establish on-going relationships between packers and producers, are essential to securing the benefits of packers' scientific research. See Suzanne B. Bopp, *Report on Progress* (Sept. 19, 2002), at http://www.ranchersrenaissance.com/media/drovers_sept-2002-a.pdf (noting that there now is “an increased willingness of packers to share more information with producers”). This benefits all participants in the livestock marketplace: Consumers receive the specialized meat products they prefer, packers are able to procure a steady supply of cattle to

satisfy consumer demand, and producers are paid a premium for breeding and raising scientifically improved cattle.

These mutual gains are illustrated by Ranchers Renaissance (“RR”), a cooperative alliance founded by cattle producers that includes ranchers, feedyards, stockers, and CMS. *See, e.g.,* Colleen Schreiber, *Alliance Teams Up with Kroger to Unveil Branded Beef Product*, *Livestock Weekly* (Aug. 2, 2001), at <http://www.livestockweekly.com/papers/01/08/02/whlren.asp>.⁴ RR members cooperate to provide a continuous supply of consistently tender mid-grade beef to consumers via a line of branded products sold at Kroger supermarkets. *See* Curt Olson, *Ranchers Renaissance Changes the Face of Beef Marketing*, *National Cattlemen* 20, 21-22 (Aug. 2001); Schreiber, *Alliance Teams Up*. To do so, RR tracks individual cattle from birth through processing and engages in over twenty quality-control checks over the life of each animal. *See* Schreiber, *Alliance Teams Up*; Olson, *Ranchers Renaissance*, at 20. Genetic improvements, cutting-edge tenderness testing, and post-slaughter tenderizing processes are also used to ensure that consumers receive consistently tender meat from RR. *See* Olson, *Ranchers Renaissance*, at 20–22; Ishmael, *Love Me Tender*, at 27. After the meat is processed, each entity involved in bringing the meat to market is paid in

⁴ Excel Corporation, identified in Schreiber as the packing company involved in Ranchers Renaissance, is the former name of CMS.

accordance with a profit-sharing methodology that ensures producers are paid a premium for the cattle that met RR specifications. *See* Wes Ishmael, *A Value Visionary*, Beef Magazine (Nov. 1, 2001), available at <http://industryclick.com/magazinearticle.asp?releaseid=9572&magazinearticleid=133169&siteid=5&magazineid=13>; Olson, *Ranchers Renaissance*, at 20; Schreiber, *Alliance Teams Up*. By “[p]roviding consumers with more high-quality products,” CMS and its RR alliance partners “will increase beef demand and, ultimately, industry-wide profitability,” thereby providing future benefits to all market players. *Packers, Producers Need Each Other*, *supra* n.2.

II. THE PANEL DECISION ENDANGERS THE BENEFITS DERIVED FROM FREE CONTRACTING IN THE LIVESTOCK MARKET.

The Packers and Stockyards Act (“PSA”) is “designed to promote efficiency, not frustrate it.” *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995). The panel’s opinion in this case, however, endangers the system of free contracting that has produced all of the benefits described above.

The panel read 7 U.S.C. § 192(a) and (b) extremely broadly, “as not requiring an adverse effect on competition.” *Wheeler v. Pilgrim’s Pride Corp.*, ___ F.3d ___, 2008 WL 2789319, at *3 (5th Cir. July 21, 2008). But the panel’s reading is, as several courts have noted, flatly inconsistent with the purpose of the statute, which is to prohibit a “monopoly of the packers.” *Stafford v. Wallace*, 258 U.S. 495, 514 (1922); *see also, e.g., London v. Fieldale Farms Corp.*, 410 F.3d

1295, 1304 (11th Cir. 2005) (“[E]limination of a competitive impact requirement would subvert the policy justifications for the PSA’s adoption.”); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir. 1976) (“the purpose of the [PSA] is to halt unfair business practices which adversely affect competition”). Therefore, as a matter of statutory interpretation, the panel’s reading cannot stand. See *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983) (“[T]he words of th[e] statute[] [must be interpreted] in light of the purposes Congress sought to serve.”).

The panel’s decision, however, is much more than a simple statutory misinterpretation: It represents a threat to the entire structure of livestock markets. Contrary to the teachings of prior decisions, the panel opinion promises to “upset the traditional principles of freedom of contract,” *Jackson*, 53 F.3d at 1458, to “interfere with a meat packer’s business practices where those practices [do] not interfere with competition,” *Pickett*, 420 F.3d at 1280, and to “stifl[e] the initiative of the industry,” *Armour & Co. v. United States*, 402 F.2d 712, 720 (7th Cir. 1968). It does so in two ways.

First, the panel’s reading invites legal challenges to the use of forward-looking contracts. Disaffected cattle producers who pine for the pure cash market despite its inherent risks and disadvantages have already brought numerous lawsuits under the PSA in an effort to declare “unfair” and therefore illegal the

various kinds of mutually economically beneficial contracts described above. *See, e.g., Pickett*, 420 F.3d 1272. Similarly, producers unhappy with economic conditions not within the control of either contracting party have also tried to sue packers under the PSA. *See, e.g., Schumacher v. Cargill Meat Solutions Corp.*, 515 F.3d 867, 871-72 (8th Cir. 2008) (dismissing a case against packers based on a Department of Agriculture error in calculating prices). If successful, either type of suit would impair the ability of producers and packers to enter into continuing relationships. As a result, the benefits described above would be lost. To date, plaintiffs attempting to restructure the markets via litigation in these ways have been rebuffed—but largely because other courts have properly interpreted every provision of Section 192 to require plaintiffs to prove an injury to competition. *See, e.g., id.; Pickett*, 420 F.3d 1272; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999). By rejecting that requirement, the panel has opened the door for these economically detrimental claims, particularly insofar as the panel decision fails to define the statutory terms “unfair,” “unjust,” and “unreasonable” in the context of the PSA. *Cf. Wheeler*, 2008 WL 2789319, at *3–*6. Moreover, even if such claims are ultimately unsuccessful, the panel’s opinion will nevertheless expose producers and packers to severe legal uncertainty and to the necessity of lengthy,

expensive defenses of legitimate business practices that benefit not only themselves but consumers as well.⁵

Second, the panel opinion concededly “conflicts with nearly every decision of [other] Circuits on this issue.” *Wheeler*, 2008 WL 2789319, at *5. Indeed, the Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have each expressly held that Section 192 and its various subsections uniformly demand that there be an injury to competition before liability arises under the PSA. *See, e.g., Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *London*, 410 F.3d at 1303; *Philson v. Goldsboro Milling Co.*, 164 F.3d 625 (table), 1998 WL 709324, at *4 (4th Cir. Oct. 5, 1998); *Farrow v. U.S. Dep’t of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *DeJong Packing Co. v. U.S. Dep’t of Agric.*, 618 F.2d 1329, 1335 n.7, 1337 (9th Cir. 1980); *Armour & Co.*, 402 F.2d at 717. The creation of this circuit split upsets a previously settled legal question. It also exacerbates the unfortunate consequences of the panel’s opinion by placing in-circuit producers and packers at a competitive disadvantage. Packers in this Circuit will now be forced to choose

⁵ The terms of a contract “do not suddenly become ‘unfair’ or ‘deceptive’ within the prohibitions of the PSA simply because they are in a contract between a packer and a livestock producer.” *Kinkaid v. John Morrell & Co.*, 321 F. Supp. 2d 1090, 1104 (N.D. Iowa 2004). Accordingly, even a broad reading of Section 192 should not encompass the contractual arrangements in the cattle market discussed in Section I, *supra*. Nevertheless, the panel decision creates uncertainty around current contracts, significant incentives to litigate, and corresponding disincentives against innovation.

between entering into contracts that may later be challenged under the PSA by disgruntled producers, dealing exclusively on the cash market for cattle, or purchasing livestock elsewhere and transporting it across longer distances for processing. Producers, meanwhile, will face the same contractual uncertainty and the prospect of lost business. They will also confront a decreased ability to borrow funds from financial institutions—and will therefore be able to raise fewer cattle. The magnitude of these dangers is, moreover, particularly acute in this Circuit, because Texas has both the largest number of fed cattle and the largest number of overall cattle in the United States. *See* USDA National Agricultural Statistics Service, “Quick Stats,” *available at*: http://www.nass.usda.gov/QuickStats/indexbysubject.jsp?Pass_group=Livestock+%26+Animals.⁶

In short, the panel’s decision misinterprets Section 192, needlessly creates a circuit split, and—most importantly, from the view of producers and packers—casts a deep shadow of uncertainty over the thriving livestock market in this Circuit.

⁶ The specific data may be reached by clicking on “Livestock” and then selecting either “Cattle All” or “Cattle on Feed” from the commodity list.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing or rehearing en banc.

Respectfully submitted,

Michael E. Lackey, Jr.
Andrew E. Tauber
MAYER BROWN LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3000

*Counsel for Amicus Curiae
Cargill Meat Solutions Corp.*

Dated: September 8, 2008

**CERTIFICATE OF COMPLIANCE WITH
FRAP 32(a) AND FIFTH CIRCUIT RULES 32.1 and 32.2**

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font and contains 3,392 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Andrew E. Tauber

Dated: September 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2008, I served two copies of the foregoing Brief for *Amicus Curiae* Cargill Meat Solutions Corp. in Support of Defendant-Appellant's Petition for Rehearing or Rehearing En Banc as well as one copy of that brief in PDF format on a compact disc by UPS overnight delivery on each of the following:

Kelly Tidwell
Patton, Tidwell & Schroeder, LLP
4605 Texas Boulevard
Texarkana, Texas 75505-5398

Counsel for Plaintiffs

Bradley C. Weber
Thomas F. Loose
Christopher M. Bass
Locke Liddell & Sapp, LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201

Counsel for Plaintiffs

Mark D. Taylor
Clayton E. Bailey
Alexander M. Brauer
Baker & McKenzie, LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

Counsel for Defendant

Jennifer Parker Ainsworth
Wilson, Sheehy, Knowles, Robertson,
& Cornelius, P.C.
909 ESE Loop 323
Tyler, Texas 75701

Counsel for Defendant

Michael S. Raab
Jonathan H. Levy
United States Department of Justice
Civil Division
950 Pennsylvania Avenue N.W.
Suite 7231
Washington, DC 20530

Counsel for *Amicus Curiae*
The United States of America

Andrew E. Tauber