SUPPLY MANAGEMENT WHITE PAPER:

The Capper-Volstead Act Authorizes Farmers Through Their Cooperatives to Agree on Production Levels

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NCFC

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I. Introduction

This White Paper sets forth the position of the National Council of Farmer Cooperatives ("NCFC") that the Capper-Volstead Act, 7 U.S.C. § 291 *et seq.*, authorizes farmers through their cooperatives to agree on the amount of product that they will produce, handle, and sell, from the pre-planting stage to the post-harvest stage. Agreeing on production levels or managing the supply of a product that the cooperative and its members produce is known as "supply management." Any change in the interpretation of the Capper-Volstead Act's scope to remove the ability to manage supply would contravene the intent of the Act and its eighty-seven years of judicial interpretation. Such a change also would be bad public policy, as it would disrupt the functioning and productivity of the cooperative sector of U.S. agriculture, and reduce the competitiveness of U.S. farmers who rely on the cooperative model.

Farmer cooperatives are a critical component of U.S. agriculture. Congress recognized this in 1922 when it enacted the Capper-Volstead Act. This law has been called the Magna Carta of agricultural cooperatives, and it is designed to permit farmers to cooperate with each other under a limited immunity from the antitrust laws. The Act's key benefit provides farmers with the ability to join together and make decisions concerning the production and sale of their products *as if they were a single corporation or enterprise*, without fear of prosecution as a conspiracy under the antitrust laws. It is well accepted that a single corporation is entitled to determine its own levels of production, and farmers acting jointly in a cooperative have the same right and the same need. The Act recognizes this, and for that reason contains the right for farmers to set prices and the right to determine production levels. Courts and industry, moreover, have shared this understanding of the Act for the past eighty-seven years.

Currently, the question has been raised as to whether the Capper-Volstead Act authorizes farmers through their cooperatives to agree on production levels, or whether the Act should be re-interpreted to exclude this ability. NCFC sets forth in this White Paper its position that the Act authorizes supply management, and that any change in enforcement policy that seeks to strip cooperatives of the ability to manage supply would do harm in several ways. First, stripping cooperatives of the ability to engage in supply management would largely nullify the other benefits provided by the Capper-Volstead Act. The Act provides cooperative members with the right to determine their sales prices and to engage in collective bargaining. This is beyond dispute. But standard economic theory teaches that a business has no ability to determine pricing without the ability to set its own production levels. Thus the power of farmers to determine their prices through their cooperatives is nullified if they cannot also agree on their own production levels – the right to engage in joint selling must encompass the right to determine how much to produce, or it is no right at all.

Second, stripping farmers of the right to determine their production levels through their cooperatives forces them to "fly blind" in their advance planning and will foster instances of under- and over-production, uneconomic decision making, and waste of resources, investment, and labor. It will prevent or impede the advance planning that is so necessary for the survival of U.S. farmers. Congress did not intend to deny farmers the ability to jointly plan their production levels when it enacted the Capper-Volstead Act.

Last, overturning protection for supply management would invalidate eighty-seven years of practice and precedent, and thus result in major upheaval in U.S. agriculture. In the short term, stripping farmers in cooperatives of the ability to engage in supply management would create immediate economic disruption and distress in the cooperative sector, as cooperatives

would be forced to halt many of their current supply management practices. And for the long term, depriving farmers of this ability would reduce their competitiveness domestically and worldwide, result in waste and inefficiency, and discourage U.S. farmers from making the new investments needed to compete in a globalized market. Foreign cooperatives, still possessing the ability to engage in supply management, would seek to fill that gap, to the great detriment of the U.S. farming economy.

In summary, the Capper-Volstead Act rightly provides farmers with the ability to agree through their cooperatives on the amount they will produce, and it is the position of the NCFC that it would be bad law and bad policy to attempt to roll back this aspect of the Act.

II. NCFC And Its Role In Speaking For Farmer Cooperatives

Since 1929, NCFC has represented business and policy interests of America's farmer cooperatives. NCFC's members include regional and national farmer cooperatives, which in turn comprise nearly 3,000 local farmer cooperatives across the United States. NCFC membership also includes state and regional councils of cooperatives located throughout the country. A majority of the more than two million farmers in the United States belong to one or more farmer cooperatives.

America's farmer-owned cooperatives provide a comprehensive array of services for their members. These diverse organizations handle, process, and market virtually every type of agricultural commodity.[1] They also provide farmers with access to infrastructure necessary to manufacture, distribute, and sell a variety of farm inputs and provide credit and related financial

* NCFC notes its appreciation for the work of Christopher E. Ondeck, Timothy C. Carson, and Kathleen M. Clair, of Crowell & Moring, LLP in drafting this paper.

[1] *See, e.g.*, KATHERINE C. DEVILLE ET AL., USDA RURAL DEVELOPMENT, COOPERATIVE STATISTICS 2008, SERVICE REPORT 69, at 2-3 (Nov. 2009), *available at* http://www.rurdev.usda.gov/rbs/pub/CoopStats2008.pdf.

services, including export financing.[2] Earnings derived from these activities are returned by cooperatives to their farmer-members on a patronage basis, thereby enhancing their overall farm income.[3]

America's farmer cooperatives generate substantial benefits that strengthen the U.S. national economy. They provide jobs for over 200,000 Americans with a combined payroll of over $8 billion.[4] Many of these jobs are in rural areas where employment opportunities are often limited.[5] With farmer-controlled boards of directors, cooperatives "encourage democratic decision making processes, [and] leadership development," and allow individual farmers the ability to own and lead organizations essential for continued competitiveness in both domestic and international markets.[6]

NCFC represents the interests of these farmer cooperatives and their members before Congress, administrative agencies, and in courts where cases of importance may affect farmer cooperative interests. NCFC is the primary voice of the agricultural cooperative system and its farmer members concerning the importance of the Capper-Volstead Act and its application across a wide variety of American farming practices.

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[2] *E.g.*, Randall E. Torgerson, USDA Rural Development, *Introduction to* JOHN R. DUNN ET AL., USDA RURAL BUSINESS-COOPERATIVE SERVICE, AGRICULTURAL COOPERATIVES IN THE 21ST CENTURY, COOPERATIVE INFORMATION REPORT 60, at v (Nov. 2002), *available at* http://www.rurdev.usda.gov/RBS/pub/cir-60.pdf; JAMES J. WADSWORTH, USDA RURAL DEVELOPMENT, STRATEGIC PLANNING SYSTEMS OF LARGE FARMER COOPERATIVES, RESEARCH REPORT 103, at iii (Aug. 1992) .

[3] DONALD A. FREDERICK, USDA RURAL BUSINESS-COOPERATIVE DEVELOPMENT SERVICE, TAX TREATMENT OF COOPERATIVES, COOPERATIVE INFORMATION REPORT 23 (revised May 1995), *available at* http://www.rurdev.usda.gov/RBS/pub/cir23/cir23.pdf; *see generally* DONALD A. FREDERICK & GENE INGALSBE, USDA AGRICULTURAL COOPERATIVE SERVICE, WHAT ARE PATRONAGE REFUNDS?, COOPERATIVE INFORMATION REPORT 9 (Jan. 1985), *available at* http://www.rurdev.usda.gov/RBS/pub/cir9.pdf.

[4] *See* National Council of Farmer Cooperatives, *Cooperative Facts*, http://www.ncfc.org/cooperative-facts.html (last visited Dec. 11, 2009); National Council of Farmer Cooperatives, *About NCFC*, http://www.ncfc.org/about-ncfc.html (last visited Dec. 11, 2009).

[5] DEVILLE ET AL., *supra* note 1, at i ("Cooperatives were a major employer in rural areas.").

[6] Torgerson, *supra* note 2, at v.

As the recognized leader in the legal, regulatory, and policy issues of farmer cooperatives, NCFC provides the industry viewpoint on the issue of supply management, which is ubiquitous and necessary throughout the U.S. agricultural sector. NCFC speaks for the agricultural cooperatives and their farmer members to explain to government policymakers and enforcers, and all interested parties, the importance, practical uses, and necessity of supply management – and to set forth its understanding of the Capper-Volstead Act's protection of supply management under applicable principles of statutory interpretation and case law precedent.[7]

III. Farmers Have Legitimate Needs To Engage In Supply Management

A. Individual farmers are forced to deal with large agribusinesses in supply, processing, and marketing

Individual farmers, acting independently, are too small and too numerous to deal effectively with larger agribusinesses in the supply, processing, and marketing sectors of agriculture. Standing alone, farmers lack bargaining power and are subject to the uncertainties inherent in farming when they make decisions as to the amount of supply to produce and the consequent necessary decisions about purchasing seed, fertilizer, and other inputs. This is as true today as it was when the Act was passed in 1922.

These conditions apply throughout the entire farming process, from pre-planting, through harvest, to sale and delivery. At each of these stages, individual farmers face harsh economic and industry realities. Consequently, beginning in the late 19th and early 20th centuries, farmers

[7] The views expressed herein are those solely of NCFC and not necessarily the views of each member. In addition, this paper does not create any legally enforceable obligations or duties for the members of NCFC. NCFC also does not purport to modify or change any legal, regulatory, or professional requirements of any company or individual by the positions set forth herein. The adoption or use of the positions set forth in this paper by any specific company or person is dependent on an assessment of their own specific facts and circumstances, and companies and individuals should interpret and apply NCFC's positions accordingly. Lastly, this paper is not a commentary on the past, present, or future operations of any member of NCFC; and the application of the positions herein to NCFC members necessarily varies, and is appropriate only when taking their different factual and legal circumstances into account.

joined forces in the United States to form cooperative associations to work collectively in their farming endeavors.

Congress enacted the Capper-Volstead Act in 1922 to foster the development of these farmer cooperatives in recognition of the exposed position of individual farmers and their need to be able to act collectively in dealing with suppliers and purchasers that had much greater bargaining power. Speaking in support of the bill, as first introduced in 1920, Representative Alben Barkley (D-KY) emphasized individual farmers' unequal bargaining power as compared to that of the firms that sold them supplies and purchased their output:

> [I]t is economically impossible for any individual farmer to compete with the conditions under which he must live. When he buys from a merchant he buys at the merchant's price, and he has no power to compel the merchant to reduce the price. When he buys agricultural machinery from implement houses he has no power as an individual to exercise a voice in determining the price he pays for it.
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> …
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> When he sells his product … he must sell it at a price dictated not by himself but by others who have had no part in its production. For that reason I favor the passage of laws that will enable him and encourage him to cooperate with others similarly situated….[8]

Upon the bill's reintroduction the following year, Representative Ira Hersey (R-ME) championed the importance of farmer cooperation through cooperative associations. The bill, by allowing cooperation among farmers, "does away with the middleman, the speculator, and the importer," and instead:

> creates a civic force in large farming communities which protects the farmers, both for the present and for the future. They can thereby operate together in buying seed, fertilizer, farm machinery, and everything needed for the conduct of the farm. They can work and act together in marketing their products, both in the local and

[8] 59 CONG. REC. 8034 (1920).

> in all markets of the world. The small farmer is assisted in his efforts to hold or market his crops.[9]

Courts as well have recognized the inherent and unique difficulties faced by farmers. In a 1929 Supreme Court opinion, Justice Sutherland noted that U.S. policy is to recognize the special needs of farmers: "It is settled that to provide specifically for peculiar needs of farmers or producers is a reasonable basis of classification."[10] And in a case reviewing the constitutionality of a Texas antitrust law, Justice Frankfurter acknowledged that:

> [f]armers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.[11]

These "threats" included then, as now, the inequality of bargaining power described above. In finding that Kentucky cooperative marketing statutes promoted the common interest, Justice McReynolds cited the lower court's finding that the statutes were enacted because producers were "at the mercy of speculators and others."[12]

These manufacturers, processors, buyers, and other third-parties from whom farmers must buy and to whom they must sell have grown increasingly concentrated and integrated up to the present day. The USDA has described the squeeze this concentration puts on farmers and their cooperatives:

> Consolidation of firms at the processing, wholesale, and retail levels of the U.S. food marketing system continues unabated. Market influence and bargaining strength of even the largest cooperatives are limited as a consequence. Food retailers flex their

[9] 61 CONG. REC. 1043 (1921).

[10] *Frost v. Corp. Comm'n*, 278 U.S. 515, 535 (1929).

[11] *Tigner v. Texas*, 310 U.S. 141, 145 (1940).

[12] *Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Mktg. Ass'n*, 276 U.S. 71, 93 (1928).

> market muscle by imposing coordination mechanisms that demand strict discipline and conformity from suppliers. Food processors exert greater control over distribution channels by integrating back into the production of raw materials through a variety of ownership and contractual arrangements. Such arrangements rob producers of decision-making authority and market choices.[13]

Indeed, one major, concentrated segment of farmers' buyer base has developed since 1922: the national or regional grocery store chain. When Capper-Volstead was enacted, the paradigm for retail grocery sales was the neighborhood store. To a large and increasing extent, however, the grocery industry is concentrated into powerful chains that exert enormous buying power. For example, the top eight retailers in the grocery sales rankings account for over 40 percent of total sales.[14] The USDA has taken note of this trend:

> Consolidation among U.S. retail food marketers is continuous. It is augmented by the entry of foreign firms into the U.S. market through aggressive acquisition strategies . . . Retailers are positioned to dictate product requirements, prices, and other terms of trade to suppliers. Purchasing is centralized for logistical and pecuniary leverage as retailers seek to purchase as many products as possible from the fewest number of suppliers. Moreover, suppliers must be substantial enough to carry not only a nationwide presence, but also global networks of stores. As traditional supermarkets expand in size and scope, volume discounters and warehouse clubs are entering food retailing and becoming dominant market participants.[15]

Accordingly, a recent USDA-published economic study of several produce products concluded that the evidence shows that retail grocery chains "are often able to exercise oligopsony power in procuring fresh produce commodities."[16] For example, in the purchase of

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[13] DUNN ET. AL., *supra* note 2, at 4; *see also, e.g.*, J. MICHAEL HARRIS ET AL., THE U.S. FOOD MARKETING SYSTEM, 2002, USDA AGRICULTURAL ECONOMIC REPORT NO. 811 at 2, 6, 15, 17-19, 26-28, 32-33 (June 2002), *available at* http://www.ers.usda.gov/publications/aer811/aer811.pdf.

[14] DUNN ET. AL., *supra* note 2, at 6.

[15] *Id.*

[16] RICHARD SEXTON, MINGXIA ZHANG, & JAMES CHALFANT, USDA ECONOMIC RESEARCH SERVICE, GROCERY RETAILER BEHAVIOR IN THE PROCUREMENT AND SALE OF PERISHABLE FRESH PRODUCE COMMODITIES,

iceberg lettuce, "retailers were able to capture the lion's share (about 80 percent) of the market surplus, whereas under competitive procurement, the entire surplus would go to producers."[17] In contrast, producers of Florida mature-green tomatoes were able to retain more of the market surplus through collective action.[18] This achievement "demonstrates the potential benefits to producers through the coordinated behavior allowed them under the law."[19] This well-illustrates one of the key benefits for farmers from the Capper-Volstead Act: the ability to gain competitive strength by acting jointly.

Farmers also face concentrations of power when they turn to purchase their supplies from fertilizer, equipment, agrochemical, and seed companies. "As buyers of inputs and ingredients, cooperatives feel the cost-price squeeze. They, like their members, face fewer, larger suppliers."[20] Indeed, a mere thirteen firms account for over half of fertilizer products sold worldwide, with the top five suppliers controlling 30 percent of the global market.[21] As of 2007, the top six manufacturers of farm equipment, including Deere & Company, CNH, Agco, and others, controlled 41.2 percent of worldwide market share, and there is little price competition in the industry.[22] The top ten producers of agrochemicals such as pesticides, herbicides, and fungicides – including Bayer, Syngenta, BASF, Dow, and Monsanto – control 89 percent of the

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CONTRACTORS AND COOPERATORS REPORT NO. 2, at 45 (2003), *available at* http://ddr.nal.usda.gov/dspace/bitstream/10113/32806/1/CAT30930093.pdf.

[17] *Id.*

[18] *Id*.

[19] *Id.*

[20] DUNN ET AL., *supra* note 2, at 7.

[21] *See* Kyösti Arovuori & Hanna Karikallio, Consumption Patterns and Competition in the World Fertilizer Markets 12-13 (paper presented at the Nineteenth Symposium of the International Food & Agribusiness Management Association, June 20-21, 2009, Budapest, Hungary), *available at* http://www.ifama.org/library.asp?collection=2009_budapest&volume=symposium/1035_paper.pdf.

[22] THE FREEDONIA GROUP, WORLD AGRICULTURAL EQUIPMENT TO 2012, at 180-83 (2008); First Research, *Farm Equipment Manufacture*, *available at* http://premium.hoovers.com/subscribe/ind/fr/profile/basic.xhtml?ID=203 (last visited Dec. 11, 2009).

global agrochemical market, with the top six companies controlling 75 percent of the market.[23] The world's largest agrochemical manufacturers, the "gene giants," also dominate the seed industry, where the top ten companies control half the world's commercial seed sales.[24] The seed industry is characterized by "fairly high" barriers to entry and increasing concentration not only in the firms themselves, but also in the ownership and control of seeds' genetic material and the processes through which plant breeding is performed.[25] Commentators who have studied the concentration in the market for agricultural supplies have expressly noted that as a result of this concentration, farmers need the ability to plan on a collective basis, through their Capper-Volstead cooperatives, as a solution to improve their bargaining positions.[26]

Moreover, cooperatives face large-scale concentration and integration not only on the part of the businesses that buy farmers' products and sell them supplies, but even among their direct competition at the producer level. Investor-owned firms are increasingly integrating vertically, operating at the levels of initial production (what farmers do), processing and marketing (what many farmer cooperatives do), and distribution and retailing (what much of farmers' usual customer base does). A USDA study concludes:

> As part of their response to the growth of consumer power, food processors and retailers are extending their influence over associated market channel activities. Firms that control key elements of the distribution and marketing system are attempting to control each level of the process, up to and including delivery to the consumer . . . Competition gives way to coordination, as large consolidated firms internalize transactions through ownership or

[23] ETC Group, *Who Owns Nature? Corporate Power and the Final Frontier in the Commodification of Life*, COMMUNIQUÉ, Nov. 2008, *available at* http://www.etcgroup.org/upload/publication/707/01/etc_won_report_final_color.pdf.

[24] ETC Group, *Global Seed Industry Concentration - 2005*, COMMUNIQUÉ, Sept./Oct. 2005, *available at* http://www.etcgroup.org/upload/publication/48/01/seedmasterfin2005.pdf.

[25] Neil E. Harl, *The Age of Contract Agriculture: Consequences of Concentration in Input Supply*, 18 J. OF AGRIBUSINESS (SPECIAL ISSUE) 115, 116, 118-20 (2000), *available at* http://www.jab.uga.edu/Library/M00-10.pdf.

[26] *See, e.g., id.* at 123-25.

> other coordination mechanisms that give them greater control of variables affecting profitability. It also results in thinner markets where the disparity in bargaining power among the parties becomes even more pronounced.[27]

The conditions that applied at the time of the Act's passage thus apply equally today. Individual farmers face large concentrations of power from their suppliers, from their corporate-farming competitors, and from their customers. The level of concentration at each of these levels is growing more acute. What is more, the unequal bargaining power that farmers face, and which motivated the Capper-Volstead Act, is not limited to "small" farmers. Larger farmers face the same conditions, and across the board, farmers are price takers.[28] Even at the time the Act was drafted, large cooperatives existed, and legislators' discussions reveal that they intended the benefits of the Act for these large cooperatives just as they did for small ones.[29] Hence, the strength of the policy rationales set forth by Congress in 1922 has not diminished. If anything, farmers and their cooperatives need the Act more today than ever. And one of farmers' greatest needs under the Act is to engage in advance planning through their cooperatives for how much they will produce.

B. Advance planning is even more important for farmers than for most businesses

In farming, as in all businesses, one of the centrally important decisions is: how much should the business produce? If the farmers in a cooperative produce too little, they can miss opportunities to fulfill market demands and thereby fall short of the returns they need to survive

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[27] DUNN ET AL., *supra* note 2, at 5.

[28] *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 69 (4th ed. 2005); *see also* Letter from Keith Collins, Chief Economist, USDA, to Deborah A. Garza, Antitrust Modernization Commission, at 6 (July 15, 2005), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/immunities_exemptions_pdf/050715_Collins_USDA.pdf ("as ever growing processors and retailers increase their food marketing power, the market strength of even the largest farmers continues to pale in comparison to that of the firms buying agricultural products").

[29] 62 CONG. REC. 2157 (1922) (statement of Sen. Thomas Walsh); 59 CONG. REC. 8024-25 (1920) (statement of Rep. Hugh S. Hersman); 60 CONG. REC. 313 (1920) (debate of Sens. William King and Porter McCumber).

another season. Producing too much can be worse; overproduction wastes the investment in raw materials, such as seed and fertilizer, and in the labor and equipment used for growing and harvesting. In addition, the acreage involved is neither put to its optimum use, such as growing a different product more in demand, nor used for competing purposes such as conservation and environmental preservation. Thus, as with any business or corporation that produces a product, the farmers in a cooperative frequently need to make decisions about how much to produce. This is a reality that the drafters of the Capper-Volstead Act acknowledged when they permitted farmers in a cooperative to act as if they were a single corporation or business, and it is the reality of how cooperatives have operated up to the present day.

Farmers, moreover, have an even greater need than other businesses to engage in joint advance planning for their production. The immutable characteristics of farming – substantial initial investment made by farming families and small businesses, the unique caprices of weather, unequal bargaining power, inelastic demand – necessitate a cooperative approach to planning production levels. Many of these conditions are specific to farming, and they lie behind the rationale for the Capper-Volstead Act:

1) Farmers must make production decisions long before actual demand for the product is known;

2) Once production decisions are made, they cannot be easily or quickly changed;

3) Many farmers negotiate their purchases of seed, fertilizer, and equipment collectively through their cooperatives, and thus need to engage in advance planning on production levels;

4) Weather, disease, insects, and other conditions may impact farming plans;

5) Due to the perishable nature of most farming products, farmers have few opportunities to delay selling;

6) Capital investments cannot be easily transferred to alternative production choices; and

7) Thousands of small-scale farm firms sell to and buy from only a few large-scale, non-farm firms, resulting in inequality in bargaining power.[30]

As the USDA has recognized, these conditions – almost all relating to the management of supply – make it "difficult for producers to consistently market their production on a profitable basis"[31] without joint action through their cooperatives. Farmer cooperatives are the primary instrument for raising farm income and improving farmers' well-being by correcting or alleviating these structural imbalances – the same imbalances that impelled the passage of the Act and continue to justify the protections it affords cooperatives.

In addition to these difficulties inherent in agriculture, farmer cooperatives themselves face practical constraints that place them in a more challenging situation than non-farmer owned businesses. Agricultural cooperatives are grower-owned and consist of a limited number of grower-investors. Cooperatives typically do not seek capital from outside investors and their ability to raise additional capital from their grower-members is limited, due to what one cooperative expert has identified as the "portfolio and horizon problems":

> The portfolio problem arises because producer-members are required to invest capital in an industry in which they already have significant investment in production capacity. The horizon problem occurs because, traditionally, cooperatives' residual earnings are contractually tied to their producer-members' current transactions, rather than to their investment. Since members are unable to recognize appreciation in their equity investment, they exert pressure on their cooperative to maximize current returns rather than investing for higher future returns.[32]

Such practical limitations on access to capital pose a major impediment to the activities of most agricultural cooperatives, and make it difficult for cooperatives to expand and to bargain on an

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[30] *See also* Letter from Keith Collins, *supra* note 28, at 2-3.

[31] *Id.* at 3.

[32] Shermain Hardesty, *Positioning California's Agricultural Cooperatives for the Future*, AGRICULTURAL AND RESOURCE ECONOMICS UPDATE, Jan./Feb. 2005, *available at* http://www.agecon.ucdavis.edu/extension/update/articles/v8n3_4.pdf.

equal footing. This is particularly acute for advance planning by cooperatives that requires substantial capital investment or commitment of resources, such as planning for operating and expansion expenses, environmental compliance, expansion into the global market, or corporate governance and accountability. In these matters, cooperatives' need to engage in advance planning with their members about production levels is greater than for non-cooperative businesses.

Thus, without the ability to determine their own production levels through their cooperatives, farmers cannot engage in effective advance planning, are at a competitive disadvantage, and have almost no bargaining power for their purchases and sales. Moreover, the gains from coordination and advance planning that the cooperative model allows "can be accomplished only with some decrease in the scope of decision making by the member."[33] In other words, for most farmers, a "go-it-alone" strategy simply is not an option for survival.

C. Supply management is a response to consumer demand

The primary means by which farmers respond to changing consumer demands is by determining what products to produce, and at what quality and volume. And for farmers who sell their products through a cooperative, the need to jointly discuss and agree on their production levels is an absolute requirement for addressing changes in consumer demand. When consumer demand for a specific product increases because, for example, a new product has been developed through breeding, horticulture, technology, or otherwise, farmers need the ability to engage in collective planning as to the amount to produce. Without this ability, some new products and technologies would never be implemented, or would be implemented at a slower pace, thus risking loss of a new market to competitors outside the United States. A single farmer

[33] Lee F. Schrader, *Economic Justification, in* COOPERATIVES IN AGRICULTURE 121, 129 (David Cobia, ed., 1989).

typically cannot spearhead the implementation of a new technology or new product to respond to consumer demand; the risk is too great, and the scale too small.

Instead, farmers need the ability to make collective decisions to undertake such new production, both so that the investment in new processing and handling can occur, and so that increases in the underlying product can be planned in advance. These are the new products and technologies that keep U.S. agriculture on the cutting edge of competition and that respond to consumer demand, and they are generated specifically from the U.S. agricultural cooperative sector. Without the ability – afforded by the Capper-Volstead Act – to engage in advance planning as to production levels through their cooperatives, solo farmers cannot bear the risk of making the investments necessary to grow the products in question, to buy and develop the related processing requirements, and undertake the other labors involved in bringing a new product to market.

But joint advance planning is required not only for *increases* in demand and production. Advance planning is required as well by decreases in consumer demand. As consumer preferences change over time, farmers must be nimble in response.[34] But farmers cannot respond effectively if they are prohibited from agreeing with each other to reduce their production. Instead, preventing farmers from managing their supply, in instances of decreasing demand, often will result in wasteful over-production and production of the wrong items for the demands of the market. Wreaking such harm on farmers and on the U.S. economy was not the intent of

[34] Gary D. Thompson, Retail Demand for Greenhouse Tomatoes: Differentiated Fresh Produce 2-3 (paper presented at the American Agricultural Economics Association Annual Meeting, Montreal, Canada, July 27-30, 2003) ("Understanding retail demand for differentiated food products is important because substantial investments in research and development, *production capacity*, and marketing are necessary for making such products available at retail . . . . Without an understanding of the nature of retail demand for differentiated types of fresh tomatoes, . . . sizable investments in product development, production, and marketing may not yield future profits.") (emphasis added).

the Act, nor has it been how Congress, courts, and cooperatives themselves have interpreted the Act over the past eighty-seven years.

D. Basic economics dictate that cooperatives should engage in supply management

Basic economics dictate that cooperatives and their members should produce their products in the most efficient manner, using the fewest resources and generating the least waste. If farmers were not permitted to engage in advance planning jointly through their cooperatives, instances of over- or under-production would result. Indeed, it might be said that prohibiting supply management encourages wasteful overproduction. Such a policy, however, would greatly harm the U.S. cooperative agriculture sector.

Overproduction has two layers of negative economic consequences. First, it adds to direct cost in the form of wasted resources. All the seed, fertilizer, chemicals, equipment, labor, and capital used to produce the surplus crop are wasted. Those costs must then be included in the cost of the products that actually are consumed, resulting in higher prices for the food products in question and harming all U.S. consumers. Alternatively, the direct cost is absorbed by farmers, thus defeating the purpose of the Capper-Volstead Act, which seeks to provide farmers with greater returns in order to ensure the continued survival and vibrancy of the cooperative farming sector.

A second negative result of overproduction – with perhaps even more far-reaching consequences – is opportunity cost, that is, the indirect costs resulting from loss of the benefits that wasted resources otherwise would have generated. When land, labor, and supplies are used for one crop (which is overproduced), they are not then used to produce other crops that society actually demands. When the U.S. economy loses the opportunity to produce these other products that are in greater demand, the result can be shortages or price spikes for those products, or

worse, loss of those markets to foreign competition. In short, if farmers are denied the ability under Capper-Volstead to engage in joint planning for production levels and thereby to attempt to avoid overproduction, they are unable to employ their resources in the best alternative uses.

E. Supply management permits acreage and other assets to be put to the optimum uses, which include conservation purposes

Overproduction that prevents acreage and assets from being put to the best uses not only prevents farmers from efficiently producing the most needed and profitable crops; it also prevents them from putting land to alternative purposes that would have positive externalities. These alternative purposes include permitting land to lie fallow; planting it with holding materials or cover crops; implementing rotational grazing; or engaging in other management practices that limit runoff of nitrogen, phosphorus, and sediment pollution for purposes of soil conservation, water quality, and regeneration.[35] The inability to engage in supply management and advance planning also prevents correct determinations being made as to when conservation purposes are the optimal use for land and assets. If farmers cannot engage in joint advance planning with their cooperatives, the resulting overproduction will mean land that should have either temporarily or permanently served as a conservation or environmental resource will not do so.

Worse, the overproduction itself may carry direct negative consequences. Farmers today often must pay to have surplus products and unused husks, stalks, leaves, rinds, and other remainders of agricultural production hauled away. In some instances, the only option is to landfill these remainders. Preventing farmers from controlling surpluses can only add to this waste. Clearly, it defies common sense to intentionally adopt a policy that prevents farmers from

[35] *See, e.g.*, CHESAPEAKE BAY FOUNDATION, A GUIDE TO PRESERVING AGRICULTURAL LANDS IN THE CHESAPEAKE BAY REGION: KEEPING STEWARDS ON THE LAND 3-4 (2006), *available at* http://www.cbf.org/Document.Doc?id=138

controlling such surpluses, and instead to foster the growing of unnecessary products that will create further landfill burdens in the United States. Preventing farmers from engaging in collective planning as to the amount of their own product to produce thus would have a wide array of food supply, economic, and societal harms.

F. Cooperatives currently engage in many forms of supply management

Cooperatives currently engage in a wide variety of supply management activities. These practices are necessary to the continuing operations and viability of their members, as illustrated by the following examples of practices in use today:

In one program, a cooperative agrees with its farmer-members on the amount and quality they will produce prior to the planting season. The cooperative then accepts product only from contracted acres based on agreed-to quality standards. The cooperative and its members thereby agree in advance on the amount of acreage that will be deployed to grow the crop. This cooperative also has stabilized supply through improved horticultural practices.

A second cooperative manages supply by entering into agreements with its farmer-members on production levels prior to the growing season in which each member is issued a limited number of preferred shares. Each preferred share confers the right to deliver one acre, subject to a planting tolerance determined by the Board of Directors. Prior to planting, the cooperative will inform members of the planting range based on production capacity and government-imposed marketing allocations. If the crop is anticipated to be too large, the board will establish "at risk" acreage, and then later determine whether members can deliver the "at risk" amount. If not, members leave the product in the ground in order to avoid costs of harvesting, disposal, and related environmental costs.

(last visited Dec. 11, 2009); Chesapeake Bay Foundation, *Agriculture*, *available at* http://www.cbf.org/Page.aspx?pid=506 (last visited Dec. 11, 2009).

A third cooperative has instituted a fruit tree-pull program with the support of the USDA. Members are paid to remove acreage and thereby reduce production. In the year before the program began, USDA spent tens of millions of dollars to purchase surplus product. In contrast, to support the supply management program, the USDA was able to make a much smaller payment, paid only once, and has brought its payments to purchase surplus to zero.

A fourth cooperative agrees in advance with its members to identify the acreage that each member is permitted to deliver to the cooperative. The member agrees to bring all product from acreage identified in the agreement, and the Board of Directors approves any new acreage, subject to a priority list. Members may deliver product from other acres, but will receive the spot market price and will not share in the cooperative's profits on those deliveries.

In a fifth example, another cooperative engages in a herd retirement program to reduce the production assets of its members and thereby manage the levels of supply produced. The cooperative funds a pool for the program by charging members ten cents per hundredweight to participate. The program raises $120 million annually to fund herd reductions and buyouts, and has completed eight herd retirements since it began in 2003, removing a total of 451,000 animals that produced over 8.6 billion pounds of product.

A sixth cooperative and its members agree to regional base plans which determine the amount each member-producer in the region may produce, subject to penalties for over-production. The cooperative and its members thus enter into agreements regarding production levels prior to the members investing resources and engaging in surplus production.

As a seventh example, one cooperative manages supply by determining a target price for its members' products and then establishing a volume of production that would satisfy customer demand at that price. The cooperative then informs members of their allocations of volume to

produce according to a pro rata formula using their prior volumes on a pre-established base year. As such, the cooperative agrees with its members prior to planting on the volumes of the crop that will be produced and seeks to avoid over-production. If the members produce beyond that level, the cooperative encourages them to discard or destroy the surplus product.

An eighth cooperative similarly manages supply by establishing a target price and calculating an associated production volume for members. In this program, if the market price drops below the target price, the cooperative and its members agree to a "trigger" mechanism whereby the members withhold production until and unless the price climbs back above the trigger price.

As the above examples illustrate, the historic and current operations of agricultural cooperatives in the United States include myriad supply management techniques. Any change in the application or interpretation of the Capper-Volstead Act would impact activities and planning throughout the agriculture sector, and could disrupt and lessen the competitiveness of a significant portion of the U.S. farming economy.

G. It would be inefficient to permit farmers to manage supply only after, but not before, a crop is grown

It has been suggested that the Capper-Volstead exemption could be artificially dissected, so as to permit management of supply by farmers after the product has been produced, but not permit such management prior to production. In practice, this means that farmers would be permitted to destroy crops already grown, instead of planning in advance to limit the amount of production. As discussed in the sections below, there is no basis in the statute, legislative history, or case law for such an artificial distinction.[36] But even more important, such a

[36] *See infra* Section IV.

distinction would be both illogical and harmful to the efficient functioning of the U.S. agricultural sector.

Congress enacted the Capper-Volstead Act to enable cooperatives to operate as efficiently as any corporate entity or business. No other business is limited in its ability to engage in advance planning and determine the amount to produce. As discussed above, forcing farmers to first grow their products, but then destroy them in the field or after they are produced is both uneconomic and unfair. This position encourages the unnecessary expenditures associated with producing the surplus product. It forces the farmers to go through the effort and process of creating a crop, only to then permit them to lift the curtain and communicate with one another to determine how much of their production is surplus, so they can then destroy the fruits of their labors. This artificial distinction violates a fundamental principle of economics – "productive efficiency": the principle that the production of goods should be done in the most cost-effective manner using the fewest resources. Last, the examples above in which production plans are linked to price demonstrate that this position also would contravene farmers' right to set prices through their cooperatives – a right which is beyond dispute. Thus, such a position both runs counter to economic theory and offends principles of basic fairness. This position also contravenes the legislative purposes and case law interpretations of the Capper-Volstead Act.

IV. The Capper-Volstead Act Immunizes Cooperative Supply Management

A. Section 6 of the Clayton Act created the basic antitrust exemption for collective action by producers for the production and sale of agricultural products

While the Capper-Volstead Act is perhaps the most often cited source of statutory antitrust exemption for agricultural cooperatives, the Act itself is an outgrowth of the basic

exemption provided eight years earlier in Section 6 of the Clayton Act.[37] Section 6 of the Clayton Act, in the same breath, provides parallel exemptions for the existence, operation, and legitimate objects of "labor" – as well as – "agricultural, [and] horticultural organizations."[38] As such, the interpretation of the statutory agricultural cooperative exemption should be informed by the scope of the statutory labor exemption, created in the same statutory framework.

The statutory labor exemption created by the Clayton Act allows union members to act collectively with regard to the prices they charge (wages) and the amount of labor they supply, including agreements to limit output through peaceful strikes.[39] The strike is a form of supply management in which a union agrees with its members to control – specifically, to limit – their supply of labor. Both practice and precedent make clear that the Clayton Act authorizes such supply management by labor – though neither "management of supply" nor "control of supply" is mentioned in that Act. Farmers stand in the same position as union members. Under the Clayton Act, both may lawfully seek to manage or limit their output and production.

B. The Capper-Volstead Act clarified and expanded the scope of legal cooperative activity

Congress passed the Capper-Volstead Act to clarify and expand the limited immunity from the antitrust laws provided to farmers in the Clayton Act. Prior to those statutes, courts had held that the very nature of cooperatives violated the antitrust laws. Joint action by farmers was

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[37] *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 824 (1978); *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

[38] 15 U.S.C. § 17.

[39] *See Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 438 (1987) ("The language of the Clayton Act was broad enough to encompass all peaceful strike activity . . . ."); *United States v. Hutcheson*, 312 U.S. 219, 233 (1941) (recognizing that the Clayton Act "plainly" allows strikes); *see also* DONALD A. FREDERICK, USDA RURAL BUSINESS-COOPERATIVE SERVICE, ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT, COOPERATIVE INFORMATION REPORT 59, at 75 (Sept. 2002), *available at* http://www.rurdev.usda.gov/RBS/pub/cir59.pdf ("After *Loewe v. Lawlor* [208 U.S. 274 (1908) (applying Sherman Act to a labor union's activities)] there was a widespread demand for an end to the threat of prosecution as unlawful combinations in restraint of trade that hung over labor and farm organizations. Section 6 of the Clayton Act is the result.").

held to be a conspiracy to restrain trade and, along with labor unions, cooperatives were challenged under the Sherman Act as illegal conspiracies.[40] Consequently, Congress first enacted Section 6 of the Clayton Act, which exempted agricultural organizations from certain antitrust laws if they were established for mutual help, did not have capital stock, and were not operated on a for-profit basis.[41] But Section 6 did not specify the types of activities in which a cooperative could engage, nor did it apply to cooperatives organized on a stock basis. The shortcomings of the Clayton Act led to the passage of the Capper-Volstead Act in 1922.[42]

Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, provides as follows:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
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> **First**. That no member of the associations is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
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> **Second**. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> And in any case to the following:
>
> **Third**. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Congress enacted the Capper-Volstead Act in recognition of the problems faced by individual farmers, recognizing that as a segment of the American economy individual farmers

[40] 15 U.S.C. § 1; *see, e.g.*, *United States v. King*, 250 F. 908 (D. Mass. 1916); *Loewe*, 208 U.S. at 301 (holding union's activity to be a combination in restraint of trade in violation of the Sherman Act, in part because of the failure of legislative efforts to exempt "*organizations of farmers* and laborers" from the Sherman Act, thus signaling an understanding of agricultural cooperatives as subject to the Sherman Act's prohibitions) (emphasis added).

[41] 15 U.S.C. § 17.

lack bargaining power and are exposed, often cruelly, to the vagaries of weather and other production conditions. The Act permits farmers to join together and make decisions concerning the production and sale of their products *as if they were a single corporation or enterprise*, without fear of prosecution as a conspiracy under the antitrust laws. This is the key function of the Act – to permit farmers to "act together in associations."[43]

The Act is not merely a joint-selling law; it speaks broadly of "the production of agricultural products."[44] In addition, the Act contains language that covers the gamut of farming activities, including "collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged." Courts that have interpreted this language have noted that Congress's intent was to speak broadly and to cover the entire scope of growing and selling agricultural products.[45]

Any re-interpretation of the Act so as to prohibit farmers from engaging in advance planning through their cooperatives on a joint basis would run directly counter to the specific grant of authority the Act provides. Determining how much to produce is a component of "preparing [products] for market." The Act also authorizes farmers to make joint decisions to "handl[e]" product; that right also encompasses the right to determine how much they will handle. Last, and most important, the Act specifically grants farmers the joint right of "marketing [their products] in interstate and foreign commerce." Under principles of common sense, industry practice, and basic economic theory, the right to market includes the right to determine *how much to market*, and in fact, to determine whether to produce anything at all for such marketing.

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[42] *See Case-Swayne Co. v. Sunkist Growers, Inc*., 389 U.S. 384 (1967).

[43] 7 U.S.C. § 291.

[44] *Id.*

C. Congress intentionally used broad language

Congress cast the protection provided to agricultural cooperatives in the broadest terms when it immunized collective "processing, preparing for market, handling, and marketing" agricultural products.[46] This language encompasses the whole scope of farming activity, from pre-planting, through harvest and processing, to sale. Congress did not intend to narrowly limit the Act to specific farming activities, and then exclude all the rest in a form of legislative "gotcha."

For example, the Capper-Volstead nowhere includes the word "price." Yet all authorities agree that the Act authorizes farmers to engage in joint pricing through their cooperatives. How so, if the word "price" is not used in the Act, and the statute does not specifically enumerate a right to engage even in joint sales or joint selling? The answer lies in the design of the Act – courts have stated that the broad sweep of activity described by "processing, preparing for market, handling, and marketing" includes joint pricing – the situation is similar for supply management.[47] The Act covers the joint functions necessary for a cooperative on behalf of its members in their farming activities – and includes agreements by them on the amount of product to produce.

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[45] *See infra* Section IV.E.

[46] 7 U.S.C. § 291.

[47] *See, e.g.*, *Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974) (internal citations omitted); *see also United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981) (extending Capper-Volstead immunity to pricing even though the Act does not explicitly reference prices) (*citing, e.g., N. Cal. Supermarkets v. Cent. Cal. Lettuce Producers Coop.*, 413 F. Supp. 984, 992 (N.D. Cal. 1976)) ("[E]ven if [the cooperative] engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption."), *aff'd per curiam*, 580 F.2d 369 (1978) (affirming "for the reasons stated by the trial judge"), *cert. denied*, 439 U.S. 1090 (1979).

D. The Capper-Volstead Act's legislative history reveals an intent to immunize supply management

The legislative history for the Capper-Volstead Act is a key guide for interpreting the statute. The Supreme Court and lower courts often have cited to the statements of Congressional intent when interpreting and applying the Act, and it is well-established that courts consider the Act's legislative history when interpreting and applying the Act.[48] That legislative history clearly indicates that Congress intended to provide farmers with the right to agree to set prices, and control, limit, and withhold production, i.e., to engage in supply management.

During the debates, several members of Congress explained that their intent was to put cooperatives on equal footing with corporations, and that this included the right to control their production. Senator Hitchcock pointed out that manufacturers could reduce production; however, the antitrust laws precluded farmers from joining together to respond in the same way, which necessitated the passage of the Capper-Volstead Act:

> Not only that, but when there is a check in demand for the products which they are making, the [manufacturers] can *reduce the production* . . . discharge their men, cut down their forces, and run their factories upon what is called 25 to 30 percent capacity, and merely feed out to the market what it will consume at their prices. The farmer can not do that . . . . He is not in a position to do as a manufacturer does. He can not control his markets and he can not make his own prices, and he never ought to have been made subject to the provisions of the antitrust law.[49]

Senator Hitchcock stated that, as a consequence, farmers needed the protection of the Act.[50]

Senator Lenroot similarly stated that "from the standpoint of public benefit and public welfare alone, we are justified in enacting this legislation which will enable the farmers of this

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[48] *See, e.g., Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 826-29 (1978) (looking to legislative history to interpret the Act); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) (same); *Md. & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458, 466-68 (1960) (same); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1043 (2d Cir. 1980) (same).

[49] 62 CONG. REC. 2262 (1922) (emphasis added).

country to put themselves somewhat nearer an equality of bargaining power and *control of output* in production that all other industries have today."[51] Senator Capper also confirmed that: "The Capper-Volstead bill. . . was designed simply to give the growers or the farmers the same opportunity for successful organization and distribution of their products that the great corporations of America have enjoyed for many years."[52]

Senator Capper's unambiguous intent has been echoed and adopted by the Second Circuit Court of Appeals:

> As Senator Capper himself expressed it, when he successfully opposed Senator Walsh's proposed amendment to Capper-Volstead that would have prohibited the creation of cooperative monopolies, see S. Rep. No. 236, 67th Cong., 1st Sess. (1921), "no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates."[53]

As Senator Capper pointed out, prior to and without the exemption, farmers often were helpless – compelled to dump their product on a glutted or oversupplied market at prices below their cost of production with significant farmer attrition.[54] Senator Kellogg also lamented farmers' inability to join together so as to manage their production, explaining that there was no "coordination, but each man proceeded to dump his stuff upon the railroads. Consequently the markets were glutted."[55]

Congressional supporters of the Act agreed, and expressly stated that the Act was designed to remedy these supply-management issues. For example, Senator King noted that

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[50] *Id.*

[51] *Id.* at 2225 (emphasis added).

[52] *Id.* at 2058.

[53] *Fairdale Farms*, 635 F.2d at 1043.

[54] 62 CONG. REC. 2058-59 (1922).

[55] 60 CONG. REC. 361 (1920).

"they shall not only be permitted to combine for the purpose of marketing their products, but *for the purpose of holding them for an indefinite period* in order to secure higher prices, even though such action might constitute a monopoly or restrain trade."[56] Senator Hitchcock seconded Senator Capper and agreed with Senator King that a cooperative would be able to withhold and limit product from the market.[57]

Continuing in the same vein, Senator Lenroot stated during the debates:

> If the farmers in the United States could, through cooperation, *have some control and agreement as to production* and as to prices, not for the purpose of making exorbitant profits, but so that they might at least secure back the cost of production, we would see in the United States immediately an upward turn toward prosperity.[58]

While some passages of the legislative history reference a goal to increase output in general or over the long term, the same passages also express a desire to allow farmers to make production "more uniform," implying that production control is a goal of the Act.[59] These statements in the legislative history that express hope the Act will result in increased production, moreover, must be read in context. First, such statements clearly acknowledge that the Act grants the right of supply management – with one possible result being increases in the food supply. Second, the Act was passed during a depression in the agricultural segment of the economy. At that time, low prices for agricultural products were causing farmers to leave their farms for the cities, and Congress feared that the decline in agricultural production could lead to food shortages.

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[56] *Id.* at 312 (emphasis added).

[57] 62 CONG. REC. 2277 (1922).

[58] *Id.* at 2225 (emphasis added).

[59] *See* 59 CONG. REC. 7852 (1920) ("prices will be stabilized, production will be more uniform and larger in the aggregate").

The Act was intended therefore to provide farmers with the ability to generate greater returns by authorizing joint action that included advance planning on production, and in so doing to ensure reliable agricultural production for the future.[60] That is in fact what has occurred. The food supply in the United States has been dependable since the Act's passage, in part due to the ability granted to farmers to jointly plan for production increases and decreases, and for changes in consumer demand, economic conditions, technological innovation, and worldwide competition.

The legislative history of Congressional support for the cooperative model and its authorization of joint actions by farmers to control production levels did not end with the passage of the Act. Such support continues to the present day. As recently as 2006, the Senate reaffirmed its support for "the ability of farmers and ranchers in the United States to join together in cooperative self-help efforts."[61] It further noted that "farmer- and rancher-owned cooperatives also play an important role in providing consumers in the United States and abroad with a *dependable supply* of safe, affordable, high-quality food, fiber, and related products."[62] Congress thus recognized the important role that cooperatives serve in engaging in advance planning for agricultural supply. Such a statement would not have been made if Congressional policy had changed and now sought to disenfranchise farmers of the right to engage jointly in advance planning for their production levels.

E. Courts also have held that cooperatives can engage in supply management

All courts that have considered the Act's treatment of supply management programs – including courts located in the Second, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as

[60] *Id*.

[61] S. CON. RES. 119, 109th Cong. (2006).

the Federal Trade Commission – have ruled that farmers may enter into agreements through their cooperatives to control supply. The cases uniformly agree that supply management initiatives by farmers in cooperatives are limited only by the prohibitions against exclusionary and predatory conduct faced by any other single-entity actor under the antitrust laws. The specific circumstances and holdings of these cases are as follows:

1. *Holly Sugar v. Goshen County Cooperative Beet Growers Ass'n*: Cooperatives can engage in pre-season price setting and supply management programs for their members' production, just like any other corporation

A cooperative confronted with excess capacity has the right to pursue the same business alternatives available to any corporate entity and reduce production or control supply in anticipation of and response to market conditions and demand.[63] In *Holly Sugar v. Goshen County Cooperative Beet Growers Ass'n*,[64] members of a sugar beet cooperative entered into an agreement giving the cooperative exclusive control over marketing their crops. When the cooperative failed to reach a purchase agreement with the local sugar manufacturer, members of the cooperative voted to disallow members from contracting individually with the manufacturer, which had the effect of preventing farmers from planting sugar beets and thus reducing the supply of sugar beets in the market.[65]

The Tenth Circuit Court of Appeals held that such supply management was covered by the Capper-Volstead Act. Even prior to planting their crops, farmers are permitted to agree though their cooperative to manage supply. The court held that there was "no cause of action

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[62] *Id.* (emphasis added).

[63] *Holly Sugar v. Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 569-70, 572 (10th Cir. 1984).

[64] 725 F.2d 564 (10th Cir. 1984).

[65] *Id.* at 566. ("The negotiations have continued into the time when growers need to be and should be planting beets.").

based on an antitrust violation by the association," because this conduct did not fall outside the "qualified exception … from the antitrust laws" created by the Capper-Volstead Act.[66]

2. The Dairy Cooperative Cases: Cooperatives can control, reduce, or withhold their members' production

A line of cases in the dairy industry clearly demonstrates the judiciary's familiarity with, and approval of, a host of supply management programs. These cases establish a cooperative's right to control, reduce, or withhold production, as a means of facilitating lawful price fixing. In *Kinnett Dairies, Inc. v. Dairymen, Inc.*, fluid milk processors that bought raw milk from farmers complained that a cooperative's program of "buying options" to keep surplus milk from entering the market violated the antitrust laws. The cooperative associations at issue in *Kinnett Dairies* also managed the day-to-day quality control of member milk producers, which can also impact supply.[67] Moreover, the cooperatives shared market information in order to assist the coordination among members in managing their production.[68]

Directly relating lawful price fixing activity to supply management programs, the court upheld these activities under Capper-Volstead, explaining that the cooperatives may lawfully fix the price at which the milk will be sold, and in seeking to obtain the best price for the milk may exercise such market leverage as is afforded by *managing the combined production of its members*.[69] The court went even further, noting that cooperative associations may manage the supply of their members' products in the market through, for example, allocating certain territories or customers for the sale of certain members' products.[70]

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[66] *Id.* at 569.

[67] *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 613 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983).

[68] *Id.* at 615.

[69] *Id.* at 632.

[70] *Id*.

In *Alexander v. National Farmers Organization*, the National Farmers Organization ("NFO") withheld milk deliveries from the market, including to another cooperative, Mid-America Dairymen ("Mid-Am"), in order to effect more favorable contract terms for NFO and its members.[71] Mid-Am complained that the activity had the sole purpose of eliminating NFO's competitors, including Mid-Am.[72] The trial court rejected Mid-Am's claim, stating:

> NFO's sponsorship of a two-week milk withholding action was broad in scope and part of concerted demands for higher dairy prices. [N]o individual farmer's decision to withhold milk was coerced by NFO or otherwise. When not directed at the elimination of competition, this type of activity, as a general matter, is within the scope of the Capper-Volstead exemption.[73]

The Eighth Circuit found the activity at issue to be nothing more than permissible supply management designed to obtain higher prices:

> Capper-Volstead provides only limited immunity and co-ops have occasionally sought to extend their market power in ways not intended by Congress. Co-ops cannot, for example, conspire or combine with nonexempt entities to *fix prices* or *control supply*, even though *such activities are lawful when engaged in by co-ops alone*.[74]

Seven years later the Eighth Circuit again upheld a supply management program in *Ewald Bros., Inc. v. Mid-America Dairymen, Inc.*[75] There, a group of dairy cooperatives created a standby pool to provide its members with a reserve milk supply so they could meet demand during seasonal low periods. The cooperatives entered option agreements to purchase Grade A

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[71] *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1188 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983) "NFO encouraged dairy farmers who were NFO members to withhold their milk from the market and encouraged other dairy farmers to sign an NFO membership agreement and then withhold their milk from the market." *In re Midwest Milk Monopolization Litig.*, 510 F. Supp. 381, 394 (D.C. Mo. 1981).

[72] *Alexander*, 687 F.2d at 1187.

[73] *Id.* at 1188.

[74] *Id.* at 1182 (citing *United States v. Borden*, 308 U.S. 188, 207-08 (1939)) (emphasis added). The court explained that the operation of the standby pool "served legitimate business purposes" and was important, at least in principle, to the stable supply of milk. *Id.* at 1206-07.

[75] *Ewald Bros., Inc. v. Mid-America Dairymen, Inc.*, 877 F.2d 1384 (8th Cir. 1989).

milk from members and non-members, and could thereafter exercise the options on short notice by paying the current minimum price of the Federal Milk Marketing Order.[76] If the cooperatives did not exercise the option, then the milk would not be sold to handlers regulated by the Federal Milk Marketing Order at issue. The plaintiff, a milk handler, complained that the option agreements illegally reduced the supply of, and raised the price of, Grade A milk.[77]

The Eighth Circuit held that the creation of the standby pool did not violate antitrust laws because there was no evidence that the cooperatives engaged in predatory practices or that the cooperatives formed the standby pool with any unlawful intent.[78] Rather, the cooperatives formed the standby pool to stabilize supply, thereby stabilizing prices, during seasonal low periods.[79] Moreover, milk's perishable nature combined with the fact that "demand and supply cycles of milk are seasonal and do not correspond" supported the need for effective supply management,[80] a concern faced by all of America's farmers. Here, again, a court upheld the legality of management of supply and production by a cooperative and its members, as permitted and covered by the Capper-Volstead Act.

[76] *Id.* at 1385-86.

[77] *Id.*

[78] *Id.* at 1392. ("the 'overriding issue' in determining the liability of . . . cooperatives under the antitrust laws 'is one of tactics and intent'" (citing *Alexander*, 687 F.2d at 1206)).

[79] *Id.* at 1394 ("while the options may have enhanced the cooperatives' ability to set prices, the pool served the legitimate purpose of providing an adequate reserve supply to meet fluctuations in consumer demand for fluid milk"); *see also Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 715 F.2d 30, 31 (2d Cir. 1984) (holding that it is not predatory for an agricultural cooperative, acting alone, to cut off a portion of the supply of raw milk).

[80] *Ewald Bros.*, 877 F.2d at 1387-88.

3. *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*: Pre-season price setting and pre-season supply management are linked rights for cooperatives

In *Treasure Valley*, two associations of potato farmers fixed the price of *pre-season* contracts between their members and the potato processors.[81] Individual farmer members of the associations were then prohibited from selling their potatoes under a pre-season contract unless the contract was approved by the association.[82] The court held this pre-season price fixing to be "marketing" within the meaning of the Act and therefore covered by its protection.[83] While *Treasure Valley* spoke directly to a cooperative's right to fix the price of the product before the product is even planted, fixing prices and restricting supply are two sides of the same coin, and it would be incongruous to allow pre-season price fixing agreements, yet ban pre-season attempts to agree on volume.

In upholding the right of farmers to fix prices before the crop is planted, the court explained that the term "marketing" as used in the Capper-Volstead Act is far broader than the word "sell."[84] In particular, *Treasure Valley* recognized, as aspects of marketing, both "standardizing" output and "supplying market information" – activities that normally constitute supply management programs within an industry.[85] Moreover, the court recognized that producers and their associations may make the necessary contracts to carry out the legitimate objects of the producers and their associations.[86] If a legitimate object of an association and its members is to fix prices, and one of the most effective ways to fix prices is to control supply,

[81] *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974).

[82] *Id.*

[83] *Id.* at 215.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 216 n.11.

then a contract between the association and its members to control supply in order to effectively fix prices must be protected under the Capper-Volstead Act.

In reaching its holding in *Treasure Valley*, the Ninth Circuit also pointed out that the exemption was buttressed by the Cooperative Marketing Act of 1926, which sanctions the dissemination among producers and cooperatives of prospective, past, present, crop, market, and statistical information to facilitate the collective handling and marketing of their products.[87] While these activities would normally be suspect under a traditional antitrust analysis because of the strong likelihood that they would facilitate agreements regarding supply, the court's discussion illustrates that Capper-Volstead and its companion legislation supports exactly this type of activity for producers of agricultural products.

4. State courts also have recognized the right to engage in supply management

In *United Dairymen of Arizona v. Schugg*,[88] cooperative members argued that the cooperative's "dumping" policy was anti-competitive.[89] The cooperative marketing agreement provided that the cooperative would market all Grade A milk produced by its members, and would use its "best efforts" to market the milk to the best advantage of its members.[90] Part of the cooperative's strategy was to set minimum prices above the federal market order price.[91] When the cooperative's two largest customers refused to pay the higher prices, certain cooperative members, including the Shuggs, agreed not to sell them milk.[92] As in *Treasure Valley*, the

[87] *Id.* at 214, 216.

[88] 128 P.3d 756 (Ariz. Ct. App. 2006).

[89] *Id.* at 764.

[90] *Id.* at 762.

[91] *Id.*

[92] *Id.*

Arizona Supreme Court explained that the term "market" is broader than the term "sell."[93] In fact, the cooperative's

> contractual duty to "market" milk reasonably includes taking actions to protect its long-term ability to sell at prices beneficial to its members. UDA attempted to obtain long-term contracts and premiums from its primary customers by limiting the supply of milk from its members and from members of other cooperatives. In doing so, it was exercising its authority to "market" in a manner it deemed to be to the best advantage of its members.[94]

Thus, the cooperative's "'dumping' policy was [not] part of an illegal anti-competitive scheme to limit milk supply in violation of federal and state antitrust laws."[95] Instead, it was part of the right to manage supply covered by the Capper-Volstead Act.

5. Government enforcement agencies have taken the position that farmers can legally agree to manage supply

Both the United States Department of Justice ("DOJ")[96] and the Federal Trade Commission ("FTC"), in prior proceedings, have taken the position that farmers can agree to manage supply through their cooperatives. This is especially evident in their interpretations of the Fisherman's Collective Marketing Act,[97] which is the fishing industry's equivalent to the Capper-Volstead Act.[98] In 1964, the FTC issued an administrative complaint against the

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[93] *Id.* at 763.

[94] *Id.*

[95] *Id.* at 764.

[96] The DOJ Antitrust Division's competitive impact statement and the consent judgment in *Oregon v. Mulkey*, 1997-1 Trade Cases (CCH) ¶ 71,859, at ¶ 80,042 (D. Or. 1997) implicitly recognized the right of an association of fishermen to agree to fix prices and to reduce, eliminate, or limit production.

[97] 15 U.S.C. §§ 521-22 (1934).

[98] "[T]hough there are some differences between Capper-Volstead and the Fisherman's Act, the two Acts provide exemptions from antitrust liability for essentially the same activities, the primary difference being the fact that one Act applies to the agricultural industry and the other to the fishing industry; [therefore] whether the conduct [of a cooperative] is exempt or not, it is the same under either Act." *United States v. Hinote*, 823 F. Supp. 1350, 1353 n.4 (S.D. Miss. 1993). Further, courts have relied on case law interpreting the Fisherman's Collective Marketing Act to interpret the Capper-Volstead Act. *See, e.g.*, *In re Mushroom Direct Purchaser Antitrust Litig*, 621 F. Supp. 2d 274, 285 (E.D. Pa. 2009) (citing *Hinote*, 823 F. Supp. at 1358); *see also* 78 CONG. REC. 9175 (1934) (statement of Rep. Schuyler Bland clarifying that the Fisherman's Collective Marketing Act, then under consideration, "provides for

Washington Crab Association ("WCA").[99] The WCA was a cooperative of crab fisherman formed to obtain higher prices from crab processors. When processors refused to pay the higher prices, the WCA members agreed to refuse to fish. In other words, the members agreed in advance to set their production levels at zero. The boycott continued for one month, until the fisherman purchased their own processing plant, and the processors agreed to the price demanded by the WCA.[100] The FTC held that the WCA's effort to control supply by refusing to fish was lawful.

Taking issue with the over-breadth of the hearing examiner's initial order, which would have prevented simple agreements among members and the Association to voluntarily control supply, the full Commission relied on Capper-Volstead's analogous protections, explaining:

> [The hearing examiner's] provision would . . . be violated if these respondents agreed among themselves to reduce their catch, whether by "sitting on the beach" until the processors agreed to pay the price they were demanding, or by "rotating their boats" so as to divide equally among the members the business of supplying the first few processors that do accept their price demands. To be sure, this is a "limitation on production" and, except for the exemption afforded to these respondents by the Fisherman's Collective Marketing Act, 15 U.S.C. 521, would be a *per se* violation of the Sherman Act and the Federal Trade Commission Act. But the Supreme Court has held, as noted above, that "the general philosophy of Capper-Volstead was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage – and responsibility – available to businessmen acting through corporations as entities." *Maryland & Virginia Milk Producers Ass'n*, [362 U.S. 458, 466 (1960)]. Thus, so long as the members of a cooperative are acting pursuant to an agreement *voluntarily* entered into among themselves, they are to be considered as a single entity for antitrust purposes, the same as an ordinary

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the same relief for the fishermen that has already been given to the farmers. There is no change in the law except it is made applicable to fishermen.").

[99] *In re Washington Crab Ass'n*, 66 F.T.C. 45 (1964).

[100] *Id.* The FTC found that the WCA had engaged in other predatory and coercive tactics to force non-members and processors to comply with the WCA's demands.

> business corporation with a number of "divisions." There is no obligation on the single corporation to produce at capacity; it may produce in any volume that it likes, and allocate production among its several "divisions" in such proportions as it sees fit. . . . We see nothing unlawful in their limiting production by agreement among themselves, or in their "boat rotation."[101]

Therefore, the cooperative was permitted to continue its supply management program.[102]

6. There is no well-reasoned or persuasive countervailing precedent

Despite the clear legislative history and strong judicial precedent interpreting the Act to permit and authorize supply management programs by farmers through their cooperatives, it has been suggested that other authority establishes limits on such supply management programs. These sources, however, are either inapposite or lack any coherent analysis or rationale. For example, a 1968 DOJ Business Review letter issued to the Colorado Grange, which has been cited as disfavoring supply management by cooperatives, relies on cases that contain no analysis or rationale.[103] One of the cited cases, *United States v. Grower-Shipper Vegetable Ass'n*,[104] involved a request for a preliminary injunction that was dismissed as moot, and the case does not even involve a cooperative – the organization was described as a trade association in the government's brief on appeal.[105] The other cited case, *United States v. Shade Leaf Tobacco Growers Agricultural Ass'n*,[106] was a settled consent judgment. Neither case has any compelling precedential value or persuasive force.

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[101] *Id.*

[102] *Id.* (This activity, absent coercion and threats or use of violence "would be nothing . . . to concern the [FTC].").

[103] DOJ Business Review Letter from Edwin M. Zimmerman, Assistant Attorney General, Antitrust Division to Ray Obrecht, Master, Colorado Grange (Oct. 2, 1968).

[104] *United States v. Grower-Shippers Vegetable Ass'n of Cent. Cal.*, 344 U.S. 901 (1952).

[105] Brief of Petitioner-Appellant at 5 n.1, *Grower-Shippers Vegetable Ass'n of Cent. Cal.*, 344 U.S. 901 (No. 461), 1952 WL 82103.

[106] *United States v. The Shade Tobacco Growers Agric. Ass'n*, C.v. A. No. 3992, 1954 U.S. Dist. LEXIS 3703, (D. Conn. May 10, 1954).

Others have suggested that farmers possess solely the right to fix prices through their cooperative, but not the right to control production. But that suggestion is not persuasive because it lacks support in the statutory language and the legislative history, and is contrary to case authority and economic logic. For example, the FTC's decision in *In re California Lettuce Producers*,[107] contains dicta implying that production control is not exempt. After recognizing that a cooperative had the right to fix prices, the FTC opined in a footnote that the exemption did not cover production controls even though that was not an issue in the case. The footnote cited inapposite legislative history in which Senator Capper noted that a cooperative which reduced production in one year would inevitably face overproduction in the following year because farmers would be incentivized to overproduce.[108]

The cited legislative history does not render the footnote true; it merely recognizes that, as a practical matter, an agricultural cooperative cannot charge inflated prices because that would inevitably invite overproduction in later growing seasons. Moreover, it is trumped by Senator Capper's clear statement, specific to the point at hand, that the exemption was designed to permit cooperatives to control production and plan ahead to produce in anticipation of projected demand.[109] Thus, neither the 1968 DOJ Business Review letter issued to the Colorado Grange nor the FTC's footnote in *In re California Lettuce Producers* overrides the clear legislative intent and the long line of judicial precedent squarely placing supply management programs within the broad immunity provided by the Act.

[107] 90 F.T.C. 18, 62 n.2 (1977).

[108] 62 CONG. REC. 2059 (1922).

[109] 62 CONG. REC. 2058-59 (1922); *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1043 (2d Cir. 1980).

F. Supply management is a fundamental component of setting prices

It is well-established under traditional antitrust law that control of price and control of supply are two versions of the same conduct, with the same market impact. Output restrictions are tantamount to price-fixing agreements, and this is the very reason they implicate antitrust concerns. "Because economics teaches that an agreement to limit output is effectively an agreement to fix price, courts also have applied the per se rule to agreements to limit production or set quotas" or engage in other activities that set minimum or maximum output quantity under the Sherman Act.[110] It would be incongruous to suggest that Congress intended to permit farmers to combine to fix prices without the correlative right to control or limit their production. The unmistakable economic reality is that one cannot set prices unless one has control of output or production. Otherwise, the right to fix prices would be illusory.

This fundamental principle – that supply control is a form of price fixing – is well-supported by case precedent. As the Supreme Court observed in *F.T.C. v. Superior Court Trial Lawyers Ass'n*, a "constriction of supply is the essence of price-fixing, whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."[111] The Court has also condemned as *per se* illegal a conspiracy among companies to purchase one another's excess supply, in a system of "quotas" or "allocations," *because* these measures amounted to price fixing.[112] As the Supreme Court reasoned in that decision, "the machinery employed by a combination for price-fixing is immaterial."[113]

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[110] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 86 (6th ed. 2007).

[111] 493 U.S. 411, 423 (1990) (internal quotation marks omitted).

[112] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 179-84, 223-24 (1940).

[113] *Id.* at 223.

Similarly, the court in *United States v. Andreas* rejected an argument that output and customer allocation agreements were not *per se* violations of Section 1 because "[a]t bottom, the … cartel's agreement was a conspiracy to limit the producers' output and thereby raise prices. Functionally, an agreement to restrict output works in most cases to raise[] prices above a competitive level."[114] And, as the cases discussed in Part IV.E, *supra*, make clear, this same understanding of cooperative price setting and cooperative supply management as two sides of the same coin has long been embraced by courts interpreting the Capper-Volstead Act.

That price and supply decisions are inextricably interrelated is also evidenced by cooperatives' negotiating practices, as documented by the USDA. When farmers negotiate about price with processors that have the greater bargaining power, the farmers' negotiation arsenal includes the ability to "leave crop in the field" in the short term, or to "discontinue or reduce production" or transition to different crops in the long term.[115] And it has been documented that when growers negotiate with buyers before planting, the quantity they supply tends to be a function of the price they are able to negotiate in the pre-season period.[116] And similarly, even when farmers negotiate with buyers after planting, price is a function of the projected supply.[117] In either situation, cooperatives' price and supply decisions are, from an economic standpoint, the same conduct based on the same decision-making process.

G. The Act already contains important protections

While Capper-Volstead immunity is inclusive, it is not unlimited. Congress carefully considered how to address the risk that the Act may allow associations to harm consumers with

[114] 216 F.3d 645, 667 (7th Cir. 2000).

[115] J. ISKOW & R. SEXTON, AGRICULTURAL COOPERATIVE SERVICE, BARGAINING ASSOCIATIONS IN GROWER-PROCESSOR MARKETS FOR FRUITS AND VEGETABLES, USDA-ACS RESEARCH REPORT 104, at 11 (1992), *available at* http://www.rurdev.usda.gov/rbs/pub/rr104.pdf.

[116] *Id.*

undue price enhancements, and Section 2 of the Act responds to this concern.[118] Section 2 of the Act grants the Secretary of Agriculture oversight and enforcement power for "[m]onopolizing or restraining trade and unduly enhancing prices."[119] The Act empowers the USDA Secretary to intervene and seek an injunction when the Secretary determines an association has monopolized or restrained trade to such an extent that the price of any agricultural product is unduly enhanced.[120]

Furthermore, courts have long since established two additional limitations on Capper-Volstead immunity: First, a cooperative has no antitrust immunity when it combines or conspires with non-exempt entities, such as non-producers (other than an appropriate marketing agent), to monopolize or restrain trade.[121] Second, a cooperative may not engage in monopolistic or predatory practices that are outside the legitimate purposes of a cooperative, such as attempting to force non-members to join or to punish or exclude them from the relevant market.[122] These limits to the Capper-Volstead Act immunity are well-established and effective at controlling conduct outside the policy goals of the Act; there is no need to limit the Act's protections with regard to supply management.

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[117] *Id.* at 13.

[118] *See, e.g.*, 62 CONG. REC. 2058 (1922) (statement of Sen. Arthur Capper); 62 CONG. REC. 2049 (1922) (statement of Sen. Frank Kellog); 61 CONG. REC. 1044 (1921) (discussion of Reps. Andrew Volstead and Hatton Sumners).

[119] 7 U.S.C. § 292.

[120] *Id.*

[121] *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939); *United States. v. Md. Coop. Milk Producers, Inc.*, 145 F. Supp. 151, 153 (D.D.C. 1956).

[122] *United States v. Md. & Va. Milk Producers Ass'n*, 362 U.S. 458, 467-68 (1960); *N. Tex. Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 193-94 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 483-84 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966).

H. Other sources of law and commentary also support farmers' right to engage in supply management

1. Cooperative Marketing Act

The Cooperative Marketing Act of 1926 specifically provides for the exchange of information among producers, cooperatives, or federations of cooperatives:

> Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.[123]

While the CMA does not reference the Capper-Volstead Act, it borrows some of its language and embodies a Congressional policy favoring the types of information sharing that make supply management more effective and efficient. The CMA's legislative history shows that Congress intended the Act to foster and permit data exchange and indicates that its purpose in doing so was to help producers address overproduction, prevent uninformed decision-making, and provide further means of collaboration by producers. The House Report from the Committee on Agriculture states:

[123] 7 U.S.C. § 455 (emphasis added).

> The bill also provides for the acquisition and dissemination by associations of farmers, of crop and market information. It is highly important that associations should be allowed to keep their members fully informed in regard to all of the factors affecting the demand for their products. It is generally known that farmers, due to the large number of them and to their widely scattered geographical situation, proceed in many respects unintelligently in regard to the production and marketing of their products. The provision in question would tend to alleviate this condition.[124]

During the floor debate for the full House vote, Representative Barbour stated that until this bill "[t]here has been no way in which information could be gathered successfully and disseminated among the members of an association in a way that would *prevent the overproduction of the farm products* which these associations handle and market."[125] Thus, viewed along with the Capper-Volstead Act's protections, the enactment of the CMA further reveals Congress's intent that agricultural cooperatives be permitted to engage in the same type of supply management as any proprietary corporation.

2. Other agriculture statutes

The Capper-Volstead Act and the Cooperative Marketing Act are merely two of a number of federal statutes that embody a Congressional policy of supporting cooperatives in their activities, including supply management activities. The Agricultural Marketing Act of 1929 (codified as part of the Farm Credit Act, 12 U.S.C. § 1141 (1929)), confirmed the important public policy of promoting the economic efficiency of farmers in managing and limiting their production in order to avoid and prevent surpluses and overproduction:

> (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and

[124] H.R. REP. NO. 116, 69th Cong., 1st Sess. (1926).

[125] 67 CONG. REC. 2775 (1926) (emphasis added).

> producer-controlled cooperative associations and other agencies; [and]
>
> (4) by aiding in preventing and controlling surpluses in any agricultural commodity, through orderly production and distribution . . . and prevent such surpluses from causing undue and excessive fluctuations or depressions in prices for the commodity.[126]

Thus, Congress again articulated in clear and unambiguous statutory language its intent to permit farmers to form cooperative entities to fix prices and control their production in order to efficiently operate and market their products.

Congress further supports associations of agricultural producers through the Agricultural Marketing Agreement Act of 1937,[127] which grants the Secretary of Agriculture authority to enter into marketing agreements with associations of producers and to thereby help stabilize market conditions and assure consumers of adequate supplies of commodities. Marketing orders for dairy, poultry, fruits, vegetables, and livestock are currently in place. The terms of orders are developed through public hearings held by the Department of Agriculture, providing an opportunity for the public and other government agencies to comment prior to issuance. A recent study determined that orders do not prevent entry into the industry and "do not allow producers to set prices directly or even to set limits on pricing such as price floors."[128]

These statutes provide examples of Congressional policy to foster supply management planning and practices in U.S. agriculture. When necessary, Congress even authorizes direct action by U.S. agencies to assist the farming sector with supply management support and

[126] 12 U.S.C. § 1141(a)(3)-(4).

[127] 50 Stat. 246 (1937) (codified as amended 7 U.S.C. § 601 *et seq.*).

[128] RICHARD J. SEXTON, TIMOTHY J. RICHARDS, & PAUL M. PATTERSON, RETAIL CONSOLIDATION AND PRODUCE BUYING PRACTICES, GIANNINI FOUNDATION MONOGRAPH NO. 45, at 32 (2002).

subsidies. This supports, and in no way preempts, the ability of agricultural cooperatives to engage in supply management as industry participants.

3. USDA policy support

The USDA has a long-standing history of supporting supply management practices by agricultural cooperatives. One USDA expert stated:

> A cooperative, confronting declining demand or low prices, can, pursuant to the terms of the statutes and their legislative history, respond as does any corporate entity facing similar situations – with legitimate business options, which include closing plants, lowering, limiting or reducing production and cutting down its work force in order to attempt to efficiently confront the market demand presented.[129]

A USDA publication titled "Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act," confirms the legality of producer agreements to control production through their cooperative:

> It is uncontested…that a value-added cooperative can, just like its non-cooperative competitors, limit the amount of product it offers for sale. These precedents suggest that members of a cooperative may voluntarily agree among themselves to limit their production as well.[130]

Another USDA report states that:

[129] S*ee* ISKOW & SEXTON, *supra* note 115, at 10-13.

[130] FREDERICK, *supra* note 39, at 291.

> "Supply chain management" is the term describing the tools consolidating control over "key elements of the distribution and marketing system [in an] attempt[] to control each level of the process, up to and including delivery to the consumer. These firms strive to assure: a) product quality that satisfies their customers' specific preferences; b) minimum costs subject to meeting the quality specifications; and c) that the associated risks are managed within acceptable levels."[131]

This report goes on to discuss the need for joint planning on supply in part due to "shortened planning horizons," that are particular to agriculture.[132]

The USDA also has noted farmers' purchasing needs as one of the key underpinnings for cooperatives' advance planning on production levels.

> By banding together and purchasing business supplies and services as a group, individuals offset the market power advantage of firms providing those supplies. You can gain access to volume discounts and negotiate from a position of greater strength for better delivery terms, credit terms, and other arrangements. Suppliers will be more willing to discuss customizing products and services to meet your specifications if the purchasing group provides them sufficient volume to justify the extra time and expense.[133]

Thus, the USDA has a track-record of advocating and supporting supply management practices by farmers through their cooperatives.

V. To Exclude Supply Management From Immunity Is To Tie The Hands Of U.S. Farmers In International Competition

In order to compete in global markets, U.S. farmers and their cooperatives need the same ability to manage supply that cooperatives in other countries possess. The cooperative format for agriculture is not unique to the United States, but exists in virtually all parts of the developed and

[131] DUNN ET AL., *supra* note 2, at 5.

[132] *Id.* at 6.

[133] DONALD A. FREDERICK, USDA RURAL BUSINESS-COOPERATIVE SERVICE, DO YOURSELF A FAVOR: JOIN A COOPERATIVE, COOPERATIVE INFORMATION REPORT 54, at 4 (Nov. 1996), *available at* http://www.rurdev.usda.gov/rbs/pub/cir54.pdf.

developing world.[134] These cooperatives compete in a global market and as direct competitors to U.S. farmers for exports to the United States. U.S. cooperatives compete with these global cooperatives in foreign markets throughout the world, and U.S. cooperatives' direct exports make up an important share of all U.S. exports.[135] Yet, at the same time that slow growth in U.S. population and income are "requiring U.S. producers to look to the 96 percent of the world's consumers outside the United States," U.S. producers are being "particularly hard hit by globalization," as the foreign producers against which they must compete have much lower labor, land, and other input costs.[136] Thus, the importance of advance planning to U.S. cooperatives' efforts to compete internationally cannot be overstated.[137] To be sure, cooperatives overseas actively engage in rational, intelligent, and collective supply management as part of their growing competition with U.S. agriculture. To tie the hands of U.S. farmers would make the United States the odd-man-out, and would harm the competitiveness of U.S. farmers in cooperatives.

As in the United States, other countries' legal regimes contain statutory antitrust exemptions that enable agricultural cooperatives to engage in supply management measures.[138] In some instances, their statutes employ broad language of the kind typically used in U.S. antitrust statutes such as the Capper-Volstead Act, with the right of supply control included in their scope. In other instances, regulations specifically spell out the right to engage in supply

[134] EGERSTROM, MAKE NO SMALL PLANS: A COOPERATIVE REVIVAL FOR RURAL AMERICA (Lone Oak Press 1995).

[135] TRACEY L. KENNEDY, USDA RURAL DEVELOPMENT, U.S. COOPERATIVES IN INTERNATIONAL TRADE, 1997-2002, RESEARCH REPORT 211, at 7-10, *available at* http://www.rurdev.usda.gov/rbs/pub/RR211.pdf.

[136] DUNN ET AL., *supra* note 2, at 7.

[137] *Id*.

[138] *See generally* Arie Reich, *The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation*, 42 TEX. INT'L L.J. 843 (2007), *available at* http://tilj.org/journal/entry/42_843_reich/ (noting that between 1997 and 2002, cooperatives' direct exports ranged from 8.6 percent to 13.8 percent of all U.S. exports). Moreover, the agricultural sector in general is twice as dependent on exports as the U.S. economy generally. KENNEDY, *supra* note 135, at 10.

control. But in both situations, it is clear that from an economic standpoint, and based on the simple realities of farming, cooperatives must possess the ability to manage supply.

For example, the European Community's analogous exemption was intended to "allow the efficient functioning of associations of farmers in the form of agricultural cooperatives" and applies to producers of, rather than traders in, agricultural products.[139] A complementary E.C. regulation, likewise intended "to strengthen the position of the producers in the market in the face of 'ever greater concentration of demand,'"[140] does so by:

> encourag[ing] the establishment of such organizations by giving them a central role in the regulation of the market, entrusting them with special powers to intervene in the supply and demand side of the market.[141]

Israel's analogous exemption also "grants a broad exemption to all types of arrangements made in relation to the growing and marketing of agricultural products, not only to collective arrangements between farmers, as in the U.S. exemption."[142] Under the Israeli exemption, there have been "several successful arrangements to eliminate surpluses" in the potato, carrot, banana, and milk industries, aimed at keeping domestic prices high through methods including destruction of excess supply and subsidized export.[143]

As another example, under Section 10 of South Africa's Competition Act, the national Competition Commission must grant exemptions from the Act's restrictive-agreements and abuse-of-dominance prohibitions for either particular agreements or practices or general

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[139] Reich, *supra* note 138, at 849, 852, *available at* http://tilj.org/journal/entry/42_843_reich/.

[140] *Id.* at 852 (quoting Council Regulation 2200/96, On the Common Organization of the Market in Fruit and Vegetables, 1996 O.J. (L 297) 1, at 2 ¶ 7 (EC)).

[141] *Id.* (citing Council Regulation 2200/96, On the Common Organization of the Market in Fruit and Vegetables, 1996 O.J. (L 297) 1, at 3 ¶¶ 16-17, tit. IV, arts. 23, 25, 30, tit. V, art. 35 (EC).

[142] *Id.* at 858.

[143] *Id.* at 864-65.

categories thereof, when certain conditions are met.[144] Specifically, Section 10 calls for exemptions for practices, even if otherwise violative of the Act's *per se* prohibitions, if the practices contribute to, *inter alia*, the maintenance or promotion of exports or to change in productive capacity necessary to stop decline in an industry.[145]

These are a few examples of the legal frameworks governing the foreign cooperatives with which U.S. cooperatives must compete. Many other countries also employ the cooperative structure for agriculture, and they similarly foster their joint activities and hoped-for competition with U.S. agriculture. In addition to the countries discussed above, there are agricultural cooperatives in Egypt, Morocco, Tanzania, Uganda, Brazil, Canada, India, Japan, Korea, Malaysia, Mongolia, Sri Lanka, Thailand, Cyprus, Bulgaria, Denmark, Finland, Hungary, Norway, Poland, Slovak Republic, Turkey, the United Kingdom, and others.[146] Cooperatives, and attendant joint supply control, are ubiquitous in the global marketplace. In light of this environment in which U.S. cooperatives must compete, any diminution of the Capper-Volstead Act's immunity for supply-control measures would tie the hands of U.S. farmers in the domestic and international marketplace.

VI. Conclusion

It is NCFC's position that the Capper-Volstead Act authorizes farmers through their cooperatives to agree on the amount that they will produce, handle, and sell, from the pre-planting stage to the post-harvest stage. In the eighty-seven years since the passage of the Act, farmers have engaged in varied forms of supply control through their cooperatives. Supply management has enabled farmer cooperatives to respond to changing consumer demands,

[144] Competition Act 89 of 1998 s.10, *as amended*, Competition Second Amendment Act 39 of 2000 s.5.

[145] *Id.* s.10(3)(b)(i) & (iii).

[146] International Cooperative Agricultural Organisation, *Members Directory*, http://www.agricoop.org/directory/africa.htm.

compete in a global economic environment, reduce waste and inefficiency, and promote efficient use of environmental resources. The language of the Act itself encompasses joint action on production, Congress sanctioned controlling production in the legislative history, and courts clearly have held that the Act enables farmers to agree on production levels. This is the status quo. Any change in enforcement policy that seeks to strip farmers of the ability to manage supply through their cooperatives would harm U.S. agriculture. Thus, it is NCFC's position that such a change in enforcement is unwarranted, unwise, and not supported by law or by practice.