No. 08-08-576

IN THE
SUPREME COURT OF THE UNITED STATES

FIN-AG, INC.,

Petitioner,

v.

PIPESTONE LIVESTOCK AUCTION MARKET, INC.; SOUTH DAKOTA LIVESTOCK SALES OF WATERTOWN, INC.; WATERTOWN LIVESTOCK AUCTION, INC.; and CIMPL'S, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A federal statute, the Food Security Act of 1985 ("FSA"), 7 U.S.C. §1631, established uniform provisions for the protection of security interests in farm products sold through commission merchants as well as the protection of purchasers of farm products who comply with the FSA. In states that have established central filing systems, such as South Dakota and Minnesota, agricultural lenders have relied upon the FSA and expect that their name will be listed as co-payees on proceeds checks from sales of farm products collateral. The balance established by the FSA between the competing interests of lenders and purchasers who wish to take free and clear of security interests has proven to be workable for over twenty years. This balance, however, will likely come undone if the South Dakota Supreme Court's interpretation of the federal statute, which is in conflict with the language of the FSA and the recent decision of the Minnesota Supreme Court, is allowed to stand.

The question presented is whether a commission merchant or other purchaser of farm products is protected by the FSA when the debtor sells secured farm products using a fictitious name that is neither registered nor listed in the UCC/EFS filing with the state.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are contained in the caption. The Respondents shall be collectively referred to as "Sale Barns".

CORPORATE DISCLOSURE STATEMENT

Fin-Ag, Inc. is a wholly-owned subsidiary of its parent corporation, CHS, Inc. There are no publicly held corporations that own 10% or more of corporate stock.

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Petitioners pray for a writ of certiorari to review three interrelated decisions of the Supreme Court of South Dakota.

OPINIONS BELOW

The opinions of the Supreme Court of South Dakota are reported at: 754 N.W.2d 1 (*Fin-Ag, Inc. v. Cimpl's, Inc.*); 754 N.W.2d 23 (*Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.*); and 754 N.W.2d 29 (*Fin-Ag, Inc. v. Pipestone Livestock Auction Agency, Inc. and South Dakota Livestock Sales of Watertown, Inc.*). The cited opinions are set forth in the Appendix. App. A-2 - A-112.

The opinion of the Supreme Court of Minnesota is reported at 720 N.W.2d 579 (*Fin-Ag, Inc. v. Hufnagle, Inc., f/k/a P & H Trucking, et al.*). The cited opinion is set forth in the Appendix. App. A-113 - A-134.

JURISDICTION

The final judgments by the Supreme Court of South Dakota were entered on June 18, 2008. Under South Dakota law, the filing of the opinion of the Supreme Court of South Dakota constitutes entry of judgment. Petitioner timely filed petitions for rehearing on their claims against the defendants regarding the Court's interpretation and application of the FSA. The petitions for rehearing were denied July 29, 2008. App. A-135 - A-140. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT STATUTORY PROVISIONS

The pertinent statute is the Food Security Act of 1985, Pub. L. 99-198, Title XIII, § 1324, 99 Stat. 1535, as amended at 7 U.S.C. § 1631. The relevant provisions are reproduced in the Appendix. App. A-141 - A-157.

STATEMENT OF THE CASE

A. Factual Background

1. The Food Security Act

One of the principal purposes of the Food Security Act was to modify the "farm products" exception codified in the Uniform Commercial Code ("UCC"). 7 U.S.C. § 1631(a)-(b). The general rule of UCC § 9-307 was that a "buyer in the ordinary course of business" would take goods free of a valid security interest, if the security interest was created by the seller of the goods. So, for example, if one purchased a hammer from the hardware store, any security interest (if the store had inventory financing) would not follow the hammer, but would attach only to the proceeds of the sale and the buyer would take the hammer free and clear. This general rule, however, did not apply to buyers of farm products. *Id.* "Thus, the UCC protected buyers in the ordinary course of business only from security interests created by the buyer's seller; and buyers of farm products were excluded from even this narrow protection." *Fin-Ag, Inc. v. Hufnagle, Inc.,* App. A-115.

The justification for this perhaps unduly strong protection of agricultural liens rested, in part, on the asserted unique nature of agricultural financing.

Charles W. Wolfe, *Section 1324 of the Food Security Act of 1985: Congress Preempts the "Farm Products Exception" of Section 9-307(1) of the Uniform Commercial Code*, 55 UMKC L.Rev. 454, 457 (1987).[1] Some states attempted to ameliorate the perceived unfairness the farm products exception. One consequence of this, however, was an inconsistent application of the UCC. Congress recognized this problem in the FSA House Report:

> These consideration[s] have led 20 states to "opt out" of the Farm Products Exception and establish their own central filing or notice systems. Under such conditions, the Uniform Commercial Code is hardly "uniform" anymore in this particular field. And with the increasingly interstate nature of agricultural marketing, this patchwork of rules and regulations has become intolerable for buyers and sellers of farm products alike. Application of the current myriad of state laws has created a substantial burden on interstate commerce in agricultural products. *A single federal rule is needed to restore consistency to this area of the law*, and remove that burden.
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> *H.R. Rep. 99-271(I)*, p. 109 (emphasis).

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[1] It may also be related to the fungibility of farm products, which makes the existence of liens harder to detect. Unlike motor vehicles, for example, that have VIN numbers, most agricultural products are not readily identifiable as to the owner, except in some areas of the country where cattle are branded, which was not the case here.

Congress enacted the Food Security Act to address the problem of inconsistent rules and the resulting burden that the farm products exception had created for interstate commerce in agricultural products. In so doing, Congress did not leave agricultural lenders without protection of their interests. Commission merchants, also known in the Midwest as "sale barns", are subject to the security interests created by the seller if the lender has filed an effective financing statement with the Secretary of State and the lender has not waived or released its security interest. 7 U.S.C. § 1631(g)(2)(D). In addition, the FSA retained an important provision from UCC 9-307 in that the protection for the farm products purchaser was limited to security interests "created by the seller":

> Except as provided in subsection (e) of this section [describing purchases subject to a security interest] and notwithstanding any other provision of Federal State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller; even though the security interest is perfected; and the buyer knows of the existence of such interest.
>
> 7 U.S.C. § 1631(d).

In striking a balance between lenders and third party purchasers of secured collateral, Congress did not provide that purchasers would take free of, or be protected from, all security interests. *Hufnagle*, App.

A-117 ("But the protection actually provided by section 1631 was not as sweeping as the statement of intent might suggest.").

It is fair to say that this balance has proven to be workable for over twenty years, as evidenced by the continuation of agricultural lending post-FSA and the relative lack of litigation under the new provisions. The question, however, is whether this balance will continue to hold as the courts deal with the problem of a debtor who seeks to avoid the strictures of a valid security interest by selling secured collateral under another name in order to evade the co-payee requirement for the proceeds check.

2. Application of the Food Security Act to this Case

Fin-Ag, Inc. ("Fin-Ag") made cattle and operating loans exceeding four million dollars to the Berwalds.[2] The loans were secured by cattle owned by the Berwalds. Fin-Ag duly filed a Financing Statement with the Secretary of State of South Dakota in order to give notice of Fin-Ag's secured interest in the cattle.

In August of 2004, Fin-Ag learned that collateral cattle had been sold by the Berwalds, using the name of C&M Dairy, to or through the Sale Barns. C&M Dairy was not listed on any of the financial statements or income tax returns submitted

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[2] The loans were made to certain individuals and entities, namely, Calvin Berwald, Michael Berwald, Kimberly Berwald, Berwald Brothers, Berwald Partnership, and Sokota Dairy, LLC (collectively referred to as "Berwalds").

to Fin-Ag. There were no fictitious name filings in the State of South Dakota under the name of C&M Dairy. For those sales made in the name of C&M Dairy, the Sale Barns did not list Fin-Ag as a co-payee on the proceeds checks. This practice was repeated many times, with several different sale barns, including the four sale barns involved in this litigation. The deception allowed the Berwalds to receive over one million dollars in proceeds free and clear. It did not, however, prevent their financial collapse and they eventually filed a Chapter 11 bankruptcy petition.

B. Proceedings Below

1. The Trial Court Proceedings

Fin-Ag brought actions in state court against the Sale Barns for conversion, seeking damages equal to the amount of the payments tendered for the sale of the Berwalds' collateral cattle.[3] The Sale Barns claimed C&M Dairy was not listed in South Dakota's master list of the filed financial statements and therefore they were not obligated to list Fin-Ag as a co-payee. Fin-Ag and the Sale Barns brought cross-motions for summary judgment in each of the

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[3] One of the defenses offered by the Sale Barns was that Fin-Ag suffered no damage because the Berwalds' bankruptcy reorganization plan provided for full payment of its claim. Unfortunately, the "promise" of full payment is diminished by the reality that it will occur, if at all, only when the Berwalds are able, despite their history of financial distress and dishonesty, to convince another lender to re-finance their operation before the balloon payment deadline. In any event, any recovery in the state actions would be offset against Fin-Ag's bankruptcy claim against the Berwalds.

underlying actions. Summary judgment was granted in Fin-Ag's favor in two of the cases and in favor of one of the Sale Barns in another, and there was a "split" decision in the remaining case.[4] All decisions were appealed to the Supreme Court of South Dakota.

2. The Appeal to the South Dakota Supreme Court

Under the FSA, there are two ways in which a security interest will survive a sale to a third party purchaser. First, a purchaser does not take free from a security interest if the "seller" is a debtor whose name appears to the UCC/EFS filing with the Secretary of State. Thus, Fin-Ag argued that, if the Berwalds were considered the "seller," the Sale Barns would be subject to the security interest because the Berwalds were identified in South Dakota's master list. 7 U.S.C. § 1631(g)(2)(D). Second, a purchaser only takes free of security "created by the seller." 7 U.S.C. § 1631(d). Thus, if C&M Dairy was considered the "seller," the Sale Barns were only protected under the FSA for the security interests created by C&M Dairy. See also 7 U.S.C. § 1631(g)(1). Because C&M Dairy did not create any of the security interests in the cattle sold, the FSA did not provide the Sale Barns with protection and they were still subject to Fin-Ag's security interests in the cattle.

As further support of its position, Fin-Ag cited to the Supreme Court of Minnesota's decision in *Fin-*

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[4] In *Pipestone Livestock and South Dakota Livestock*, the trial court ruled in favor of the sale barns, except to the extent that the sale barn had acted as a lender in crediting sales proceeds against a previous open account.

Ag, Inc. v. Hufnagle, Inc., 720 N.W.2d 579 (Minn. 2006); App. A-113 - A-134. In *Hufnagle*, the Minnesota Supreme Court addressed a similar "fronting" situation and held that the FSA did not provide protection to the farm products dealer and upheld Fin-Ag's conversion claim. Fin-Ag argued to the Supreme Court of South Dakota that the only difference between *Hufnagle* and the present Sale Barn cases was that the Berwalds used a d/b/a to front their sales as opposed to the use of employees' or children's names in *Hufnagle*.

In holding that the FSA provided protection to the Sale Barns, the Supreme Court of South Dakota, in a 3 to 2 decision, concluded that the "seller", for purposes of written notice under § 1631(e)(3) and (g)(2)(D), was C&M Dairy. App. A-22. However, when addressing the FSA's limitation of protection to only those interests "created by the seller" under § 1631(d) and (g)(1), the Supreme Court of South Dakota concluded that the "seller" was not C&M Dairy, but instead was the Berwalds. App. A-34.

Justices Sabers and Konenkamp issued a vigorous dissent, stating that the majority misinterpreted and misapplied the FSA as evidenced by it defining "seller" two different ways within the same statute. The dissenting justices observed:

> The opinion can call it anything it wants, but it cannot hide what is plain and obvious. In its attempt to decide this case in favor of the Sale Barns, it arrives at some conflicting conclusions. For example, the opinion concludes that C&M Dairy is a "business entity" and

> therefore separate from Calvin and Michael Berwald and can be a seller under the statute, thus the FSA protects Sales Barns. Then, in the next portion of analysis, C&M Dairy is merely a d.b.a. and cannot be separated from the Berwalds, therefore C&M Dairy created the security interest and again, Sale Barns win. In reality, C&M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego - and certainly not both the "seller" and the "seller who created the security interest.
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> App. A-41.

Underlying the majority's reading of the FSA was its belief that Congress intended to "shift the burden of potential loss from the buyers and commission merchants to the lenders who finance farm operations." App. A-11 (quoting *Merchantile Bank of Springfield v. Joplin Reg. Stockyards, Inc.*, 870 F.Supp. 278, 282 (W.D. Mo. 1994)). The dissent objected, however, that this was in conflict with the "created by the seller" limitation that Congress had expressly incorporated from UCC 9-307.[5] In other

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[5] The dissenting justices specifically stated:

> Significantly, despite its criticism, Congress included this clause ["created by the seller"] in section 1631 of the FSA when attempting to correct some of the other problems of buying food products under the UCC. [Citation omitted].
>
> White and Summers have discussed the difficulties with the "created by the seller" language. See 4 White & Summers, Uniform

words, the asserted "policy" of Congress was allowed to contravene the express provisions of the FSA.

REASONS FOR GRANTING THE WRIT

The South Dakota Supreme Court has in effect created an approved roadmap for dishonest debtors to bypass UCC/EFS regulations and to wrongfully obtain proceeds from the sale of secured farm collateral. By interpreting the term "seller" differently within the FSA, it allows "fronting" sales and thereby has reduced the protections afforded to agricultural lenders. Such decision is contrary to the language of the FSA and is also in direct conflict with the Supreme Court of Minnesota's decision in *Fin-Ag, Inc. v. Hufnagle.*

I. The Court Should Grant Review To Resolve the Conflict Between Two State Supreme Courts Regarding "Fronting" Sales Under the FSA.

In the absence of exclusive federal jurisdiction, state courts have the power to interpret federal law,

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Commercial Code § 33-13 (4th ed 1995 & Supp. 2007) (discussing the problems produced by the created by the seller language in former UCC § 9-307). Importantly, they theorize that: "Perhaps the drafters intended that as between two innocent parties the ultimate loss should fall on the party who dealt most closely with the 'bad guy.'" *Id.* Although this may conflict with the FSA policy, we have to presume that Congress knew what it was doing when it borrowed this language from the UCC.

App. A-42-43.

but their interpretations are subject to review in this Court. *Reed v. Farley,* 512 U.S. 339, 361 (1994) (there is an interest in promoting "uniformity in the state courts' interpretation and application of federal law"); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida,* 496 US. 18, 29 (1990) ("State courts must interpret and enforce faithfully 'the Supreme Law of the Land,' and their decisions are subject to review by this Court."); *Martin v. Hunter's Lessee,* 1 Wheat. 304, 307-08 (1816) (Congress recognized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution.") (emphasis in original); Rules of the Supreme Court of the United States, Rule 10(b).

The interpretation and application of the FSA is an important federal question that has a nationwide impact. The fact that South Dakota and Minnesota have interpreted and applied this federal statute differently on a matter that is now likely to recur frequently supports review by this Court. Moreover, South Dakota and Minnesota are neighboring states and farm producers may sell their products across state lines (as did happen in one of the cases here) and agricultural lenders may make loans across state lines and thus the conflicting opinions regarding the interpretation and application of the FSA must be resolved.

A. Minnesota's Interpretation and Application of the FSA.

In *Fin-Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006) (App. A-113 - A-134), the Supreme Court of Minnesota held that the FSA did not protect the purchaser in a "fronting" sale. Fronting sales occur when "a seller of farm products that are subject to a security interest has a third party sell them under the third party's name." App. A-122. The debtors, Larry and Ronda Buck, sold collateral corn under their employees' and minor children's names to Kent Meschke Poultry Farms. Meschke was a registered farm products dealer who had received Minnesota's master list of sellers and thereby had notice of those debtors who were subject to security interests. Meschke defended against Fin-Ag's conversion claim, arguing that he was entitled to protection under the FSA because the corn was sold by parties who were not on the master list.

In addressing the grain purchaser's claims, the *Hufnagle* court carefully considered the history of the FSA, including what Congress had changed and what it had not changed through the legislation, and explicated the federal protection as follows:

> To summarize, under 7 U.S.C. § 1631 a buyer of farm products in the ordinary course of business (1) takes free of security interests created by the seller, unless notice of the seller-created security interest has been given by one of three specific notice procedures, which include the Minnesota central filing

> system provided under chapter 336A; but (2) takes subject to security interests created by someone other than the seller.
> App. A-119.

The *Hufnagle* court affirmed the granting of summary judgment in favor of Fin-Ag. It noted the ambiguity of who was the "seller" under the FSA, but concluded that the same result would be reached regardless of whether the debtors treated as the seller or the "fronting" persons were treated as the seller:

> If we view Buck [the debtors] as the seller, assuming that the Tookers [the fronting individuals] sold the corn as agents for Buck as an undisclosed principal, the exception in section 1631(e) for a security interest as to which notice has been given would apply because Meschke [the purchaser] received notice of Fin Ag's interest against Buck, and Meschke did not secure a waiver of the interest from Fin Ag. See 7 U.S.C. § 1631(e)(3). Accordingly, Meschke's interest in the corn would be subject to Fin Ag's security interest.
> App. A-126.

If, on the other hand, the fronting persons are to be regarded as the "seller," then other provisions of the FSA become applicable. If the fronting persons "sold" the collateral as "commission merchants" or "selling agents," they are subject to the security interest if they have failed to register with the Secretary of State and the secured lender has filed an effective financing statement. 7 U.S.C. 1631(g)(2)(C).

If the fronting persons "sold" the corn on their own behalf, the sale to the purchasers would only be free of any security interest created by the "sellers," i.e., the fronting persons, and thus would be subject to the security interest created by the debtor, who is not the seller. 7 U.S.C. § 1631(d). The *Hufnagle* court concluded that under all possible factual scenarios, the purchaser in a fronting situation takes subject to the security interest. App. A-126-128.

> The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest. This is because if we view Buck as the seller, we must conclude that Meschke's rights are subject to Fin Ag's security interest under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, if we view the Tookers as the sellers, we must conclude that Meschke's rights are subject to Fin Ag's security interest, under either section 1631 or Minnesota's UCC, because both statutes only protect a buyer from a security interest created by the seller

> and not from a security interest created by an undisclosed owner, which continues in the product despite the sale. App. A-125.

The Minnesota Supreme Court's ruling was faithful to the language of the FSA and was consistent with the balance the FSA had established to protect both lenders' and purchasers' interests. The decision implicitly recognizes that the balance comes undone, rather easily, if a dishonest debtor may circumvent the rules simply by selling through a fronting person.

B. South Dakota's Interpretation and Application of the FSA.

Subsequent to *Hufnagle*, the Supreme Court of South Dakota was presented with cases that were virtually identical on their facts. The only difference was that the Berwalds used a d/b/a, "C&M Dairy," to front their sales rather than using employees' or family members' names. Instead of following the *Hufnagle*'s analysis of the FSA, the majority posed the matter this way:

> Because C&M Dairy was the only identified seller in the sales at issue, there are two "seller" questions that must be resolved to determine whether the FSA protected [the Sale Barn]: (1) was C&M Dairy the seller of the cattle within the meaning of the written notice exception of the FSA; and (2) should C&M Dairy be regarded as the seller who

> created Fin-Ag's security interest within the meaning of the FSA limitation.
> App. A-14.

The majority concluded that C&M Dairy was the "seller" under the FSA and not the Berwalds. App. A-22. As a consequence, Fin-Ag could not prevail under 7 U.S.C. § 1631(e) because C&M Dairy was not listed on the state master list. The court, however, also concluded that the *Berwalds* were the "seller" when applying the "created by the seller" exception to the protection. App. A-34.

1. The Fronting Entity as a Separate and Distinct "Seller."

The majority concluded that C&M Dairy, as either an informal partnership, joint venture, or other association, came within the FSA definition of "seller" that included "any other business entity." App. A-16-17. 7 U.S.C. § 1631(c)(10). It noted that the South Dakota Administrative Rules for implementing the FSA central filing system provided that the "use of doing business as is considered an additional debtor and shall be listed as such . . . ." App. A-19-20. Thus, it was the lender's burden to discover whether the debtor was using a d/b/a "entity"[6] as part of a fraudulent scheme to defeat the lender's security interest. App. A-20-21.

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[6] In this case, the d/b/a was not registered even though this was a requirement of South Dakota law. S.D.C.L. 37-11-1. The "C&M" of C&M Dairy corresponded to the initials of the two principal debtors, Calvin and Michael Berwald.

2. The Fronting Entity as the "Alter Ego" of the Debtor.

Having decided that the "seller" for purposes of the notice provision was C&M Dairy, the majority turned to the second question, whether the Sale Barns would take free of a security interest "created by the seller." C&M Dairy, of course, created no security interest in any cattle, much less the cattle involved in any of the underlying transactions. The security interest of Fin-Ag was created by the Berwalds and the majority had just concluded that the Berwalds were not the seller.

In order to deal with this difficulty, the majority concluded that "as the alter ego of Berwalds, C&M Dairy should be regarded as the seller who created the security interest within the meaning of 7 U.S.C. § 1631(d)." App. A-31. In other words, even though C&M Dairy did not create the security interest, the Berwalds did and C&M Dairy is so close to the Berwalds as to be their "alter ego" and should be regarded as having created the security interest.

The dissent strongly criticized this approach: "In reality, C&M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego -- and certainly not both the 'seller' and the 'seller who created the security interest.'" App. A-41. The dissenting justices agreed with the *Hufnagle* court and identified the majority's inconsistent interpretations of the term "seller" under the FSA:

> There are two different interpretations of a supposed entity, yet the same

> strained outcome. When defining "seller," it is inconsistent to say that in one instance C&M Dairy is an entity distinct from the Berwalds, so C&M Dairy can be the seller and claim Sale Barns did not receive notice of Fin-Ag's security interest, and then to say the Berwalds and C&M Dairy are "one and the same" in order to find C&M Dairy is the "seller who created the security interest." In *Hufnagle*, the Minnesota Supreme Court specifically refused to "define seller two different ways in the same analysis without a significant indication that this was the legislature's intent. No such indication [of legislative intent] exists here." 720 NW2d at 588-89. We should not interpret seller two different ways.
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> App. A-41-42.

Consistency in the interpretation and the application of a single term appearing more than once in a federal statute is the "normal rule of statutory construction." As this Court stated in *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 570 (1995):

> The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning." *Department of Revenue of Ore.*

> *v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994) (internal marks and citations omitted); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168 (1993); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932). That principle applies here. If the contract before us is not a prospectus for purposes of § 10 -- as all must and do concede -- it is not a prospectus for purposes of § 12 either.

As a policy matter, the dissenting justices charged that the majority's approach effectively sanctioned the Berwald's fraudulent scheme:

> The opinion's analysis of this issue sends the message to deceitful debtors that they can avoid the security interest if they use their initials as a fictitious name to sell their collateral to sale barns. The opinion blindly accepts the answer of the driver of the cattle truck to the yardman that the seller is "C&M Dairy," even if the driver of the truck is Calvin Berwald, Michael Berwald or their Father, Arlen Berwald. Interpreting the statutes in this manner produces the exact result we should prohibit – absurd. The opinion claims the burden should be on the lender, the party who is more capable of policing this problem.

> However, it seems it would be next to impossible for a lender to prevent its debtor from creating a fictitious name, with no fictitious name filing, and selling cattle under that name, while it would be relatively easy for the Sale Barn to dig past the fictitious name and inquire as to the proper owner and seller of the cattle.
> App. A-44-45.

There is a direct conflict between Minnesota's and South Dakota's interpretation of the Food Security Act and only this Court can authoritatively clarify the interpretation and application of the FSA. Because farm products are sold nationally and across state lines, the protections afforded under the FSA need to be clarified so that there can be uniformity amongst the states in regard to farm products sales and the protection of security interests. The conflict will have an immediate affect on interstate lending and the sale of farm products due to the inconsistent application of the FSA between the states.[7]

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[7] Although not directly on point, the decision in *Agriliance, LLC v. Runnells Grain Elevator, Inc.*, 272 F.Supp.2d 800 (S.D. Iowa 2003), suggests that Iowa may fall on the Minnesota side of this conflict. In that case, the federal district court noted the grain elevator's failure to properly inquire and protect secured lender's interest in the crops and stated:

> It appears that grain elevators, in the business of purchasing grain, rely primarily on the word of the seller or representative delivering the grain to distinguish and identify the crops they are purchasing. But even assuming that the business of grain brokerage is conducted on the same informal basis as Runnells' operations, the

II. The Court Should Grant Review to Correct the South Dakota Supreme Court's Erroneous Recognition of a Fronting Entity as a "Seller" Under the FSA.

The prospect that dishonest farm debtors may escape the strictures of valid security interests simply by creating a fictional name and selling under that

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> Court does not believe that Runnells' lack of actual knowledge that the crops were the ones subject to the Agriliance interest shields it from liability. Having received a Food Security Act notice, Runnells was obligated to maintain a mechanism that would properly protect the interests of the secured party. Here, Runnells knew that the Mitchells' 2001 crops were subject to Agriliance's security interest. Marvin Mitchell was also the party who delivered the crops and with whom they had directly negotiated the purchase. On these facts, Runnells should have known that the crops were quite possibly 2001 crops owned by the Mitchells and could therefore be subject to Agriliance's interest. . . . Thus, Runnells' failure to determine whether the crops delivered by the Mitchells were subject to Agriliance's interest evidences a reckless disregard for Agriliance's claim to the crops, which constitutes a wrongful intent to exercise control over the crops and their proceeds to the detriment of Agriliance.
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> 272 F.Supp.2d at 806-07.

The *Agriliance* court's interpretation and application of the Food Security Act regarding the delivery and sale of crops is more closely aligned with the *Hufnagle* decision because it recognizes that lack of knowledge of the security interest does not necessarily shield the elevator from liability for conversion.

name will become a self-fulfilling prophecy if the decision of the South Dakota Supreme Court is allowed to stand. The problem, as identified by the dissenting justices below, lies in the recognition of and granting "seller" status to a fictional entity that does not own the collateral. Whenever there is fronting person or entity, used solely for the purpose of filtering off the security interest, the balance established by Congress, with its rules to protect both lenders and farm products purchasers, is jeopardized. This Court should grant review to correct the erroneous interpretation of the FSA by the South Dakota Supreme Court.

III. The Court Should Grant Review to Clarify That a Sale by a Fronting Entity Does Not Allow a Purchaser To Take Free and Clear of a Security Interest Created By the Debtor.

Congress incorporated the "created by the seller" language of 7 U.S.C. § 1631(d) directly from UCC § 9-307. In order to retain the viability of this requirement, this Court should grant review to clarify that a term in a federal statute, here "seller," must have a consistent meaning throughout the FSA. Without such a clarification, the dishonest debtor can easily circumvent any co-payee requirement through a fronting sale. Under the South Dakota Supreme Court's interpretation of the FSA, the dishonest debtor gets the benefit of hiding the true identity of the seller, while enjoying the advantage selling collateral free and clear of all security interests.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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