

QUESTIONS PRESENTED

The Farm Service Agency (“FSA”) makes farm operating loans, farm ownership loans, and emergency loans in order to assist farmer-borrowers in financial distress. The Agricultural Act of 1987 allows farmers who are in default to apply for various loan servicing and debt restructuring options. One of the benefits offered through the program is the writing down of principal and accumulated interest charges of Farm Service Agency loans. Borrowers who qualify for a write-down on a loan secured by real estate may be required to enter into a shared appreciation agreement.

Petitioners Donald and Patsy Israel and Richard and Shirley Quinton, all d/b/a Israel and Quinton Farms (“Petitioners”) entered into a shared appreciation agreement (“Agreement”) with FSA on September 15, 1989. At the time of the execution of the Agreement, an FSA loan officer explained to Petitioners that no recapture would be made unless Petitioners paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write-down period. Nevertheless, at the conclusion of the ten year write-down period, FSA contacted Petitioners, demanding a payment of \$96,500.00 in shared appreciation. Despite Petitioners’ vigorous protestations, FSA refused to reconsider its determination and, on September 9, 1999, FSA affirmed its decision requiring Petitioners to pay \$96,500.00 in shared appreciation.

Two questions are presented herein: (a) whether FSA’s determination that Petitioners are responsible for \$96,500.00 in “shared appreciation” is arbitrary, capricious, contrary to law, and unsupported by substantial evidence and (b) whether FSA is estopped from collecting \$96,500.00 from Petitioners for the appreciated value of their property between 1989 and 1999.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

On September 9, 1999, FSA affirmed its decision requiring Petitioners to repay \$96,500.00 in shared appreciation. On October 7, 1999, Petitioners filed a joint appeal before the National Appeals Division of the Department of Agriculture. On January 3, 2000, Hearing Officer Benner ruled that FSA's decision to demand \$96,500.00 in shared appreciation from Petitioners was not erroneous. The decision of the National Appeals Division of the Department of Agriculture (Pet. App. 95a-101a) is not otherwise published. On February 4, 2000, Petitioners requested a Director Review of FSA's determinations. On or about March 17, 2000, a Final Director Review Determination was entered affirming FSA's determinations. The Final Director Review Determination (Pet. App. 90a-94a) is not otherwise published.

Petitioners commenced this action on April 17, 2000. On March 2, 2001, the United States District Court for the Western District of Wisconsin (per Crabb, D.J.) affirmed FSA's decisions. The opinion of the United States District Court for the Western District of Wisconsin (Pet. App. 54a-73a) is published at 135 F.Supp.2d 945 (W.D. Wis. 2001). On April 17, 2001, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. On March 8, 2002, the United States Court of Appeals for the Seventh Circuit entered its opinion and order (per Kanne, C.J.) affirming the decisions of FSA and the United States

District Court for the Western District of Wisconsin. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-15a) is published at 282 F.3d 521 (7th Cir. 2002).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its opinion and order on March 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556 and 701, relevant to this petition are reprinted in the Appendix at 114a-117a.

STATEMENT OF THE CASE

During the late 1980s, in the midst of the national farm crisis, the Farmers Home Administration ("FHA"), now known as FSA, negotiated with numerous farmers for write-downs of their existing debts; these write-downs were authorized by the Agricultural Act of 1987. In 1988, Petitioners entered into negotiations with FHA/FSA for a write-down of their debt, which consisted of six notes, having an aggregate principal amount of approximately \$200,000.00. Pet. App. 78a. The negotiations between FHA and Petitioners culminated in the execution of a Shared Appreciation Agreement (the "Agreement") dated September 15, 1989. Pet. App. 78a.

When the Agreement was signed, Mike Drewiske ("Drewiske"), FHA/FSA's Farm Loan officer in Spooner,

Wisconsin, explained to Petitioners that no recapture would be made unless Petitioners paid their loan in full, ceased farming operations, or transferred title to the security during the ten year write-down period. Pet. App. 80a. At the time of the execution of the Agreement, it was Petitioners' understanding that no recapture would be made if the Agreement expired after ten years and Petitioners had not paid the loan in full, ceased farming operations, or transferred title to the security. Pet. App. 80a. This understanding was corroborated by subsequent discussions with and correspondence from Karilyn Corbett ("Corbett"), another FHA/FSA loan officer, who told Petitioners that the Agreement was to be so interpreted and understood. Pet. App. 110a-111a.

Nevertheless, at the conclusion of the ten year write-down period, FSA contacted Petitioners, demanding a payment of \$96,500.00 in shared appreciation. Despite Petitioners' vigorous protestations, FSA refused to reconsider its determination and, on September 9, 1999, FSA affirmed its decision requiring Petitioners to pay \$96,500.00 in shared appreciation. Pet. App. 84a.

1. On October 7, 1999, Petitioners filed a joint appeal before the National Appeals Division of the Department of Agriculture. Pet. App. 84a. Pursuant to Petitioners' appeal, a scheduling conference was held in Eau Claire, Wisconsin, before FSA Hearing Officer David Benner ("Hearing Officer Benner"), on November 18, 1999. Pet. App. 84a. At the scheduling conference, Petitioners requested to have Drewiske and Corbett subpoenaed to attend the evidentiary hearing. Pet. App. 84a. Drewiske was the officer who originally negotiated the Agreement, and made statements to Petitioners regarding the interpretation of the Agreement; Corbett is an FSA official with particular

knowledge as to the interpretation of the Agreement, and who also made statements to Petitioners regarding their particular contract. Pet. App. 84a.

On December 2, 1999, Petitioners requested that Russell Kiecker (“Kiecker”) also be subpoenaed to attend and testify at the hearing. Pet. App. 84a. Kiecker, who served as Petitioners’ County Agent during the relevant period, was to present testimony concerning land values in the area and to submit an opinion regarding FSA’s appraisal of the value of Petitioners’ property for purposes of calculating the amount of the recapture. On December 8, 1999, Hearing Officer Benner denied all three of Petitioners’ subpoena requests. *See* Pet. App. 102a-105a.

Pursuant to 7 U.S.C. § 6997(c), a hearing before Hearing Officer Benner was held on December 9, 1999. Neither Drewiske, Corbett, nor Kiecker were produced to testify at the hearing. Hearing Officer Benner therefore had only a partial record upon which to base his determination. On January 3, 2000, Hearing Officer Benner ruled that FSA’s decision to demand \$96,500.00 in Shared Appreciation from Petitioners was not erroneous. Pet. App. 95a-101a. On February 4, 2000, Petitioners requested a Director Review of FSA’s determinations. On March 17, 2000, a Final Director Review Determination was entered affirming Hearing Officer Benner’s determinations. Pet. App. 90a-94a. On April 17, 2000, Petitioners filed an action in the United States District Court for the Western District of Wisconsin seeking judicial review of FSA’s determination that they were responsible for the alleged Shared Appreciation and asserting that FSA was estopped from collecting any alleged Shared Appreciation from Petitioners. Pet. App. 76a-89a.

2. The United States District Court for the Western District of Wisconsin held (a) that the Director of the National Appeals Division for the Department of Agriculture (the “Director”) “did not err in concluding that appreciation is recoverable” at the expiration of the Agreement and (b) that FSA “cannot be estopped from collecting \$96,500.00 from [Petitioners] for the appreciated value of their property between 1989 and 1999.” Pet. App. 54a-73a.

Specifically, the District Court held that “[a]fter reviewing the administrative record, including the transcript of the evidentiary hearing” it could not find that the Director’s determination that appreciation is recoverable at the expiration of the Agreement was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence.” Pet. App. 69a-70a (internal quotation marks and citation omitted). The District Court’s conclusion was founded primarily upon its findings (a) that the Director’s determination that “the language of the shared appreciation agreement was clear,” Pet. App. 66a, and (b) that the Agreement “conveyed the basic concept that borrowers had to give up a share of the appreciation of the loan collateral in return for the debt write-down and that this share would become due when the agreement expired or earlier if the agreement was terminated upon the happening of a specified event.” Pet. App. 67a. Based upon these findings, the District Court stated it could not hold that the Director’s determination that appreciation is recoverable at the expiration of the Agreement “was not rational or that the director failed to consider the language of the agreement and the parties’ arguments as to its meaning in reaching his conclusion.” Pet. App. 69a-70a.

As to Petitioners’ estoppel claim, the District Court ruled that FSA could not be estopped from recapturing an

appropriate percentage of the appreciation at the expiration of the Agreement. Pet. App. 70a-73a. Fundamental to the District Court's analysis were its findings that (a) FSA was not acting in a proprietary capacity in its dealings with Petitioners, Pet. App. 71a, (b) FSA's loan officers lacked the authority to bind Respondent to a certain position by misstating the terms of the shared appreciation agreement, Pet. App. 71a, and (c) that Petitioners "failed to demonstrate any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision." Pet. App. 72a.

The District Court first explained that "[t]he government acts in a proprietary capacity when it undertakes activities primarily for the commercial benefits of the government" (internal quotation marks omitted) and that "[i]t cannot be said that the FSA acts in a proprietary capacity in lending money to farmers in financial distress." Pet. App. 70a-71a. The District Court then noted that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority," Pet. App. 71a (internal quotation marks omitted), and that the "Farm Service Agency loan officials did not have the authority to bind [FSA] to a certain position by misstating the terms of the shared appreciation agreement." Pet. App. 71a. Finally, the District Court ruled that Petitioners may assert their equitable estoppel claim only "when the traditional elements of estoppel are shown and there is affirmative misconduct on the part of the government" and there is "more than mere negligence." Pet. App. 72a. In concluding its analysis of Petitioners' estoppel claim, the District Court stated that the alleged misstatements of FSA's loan officers were "correct but incomplete statement[s] of the terms of the agreement" and found that Petitioners "failed to demonstrate

any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision.” Pet. App. 72a.

3. On Petitioners’ appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that FSA did not err in concluding that recapture is provided for at the expiration of the Agreement. Pet. App. 1a-15a. The Seventh Circuit held that the “plain language of the Agreement provides for recapture at the expiration date of the Agreement” and that FSA’s determinations were “strongly supported” by the language of 7 U.S.C. § 2001(e). Pet. App. 14a. The Seventh Circuit also based its decision upon *In re Moncur*, No. 98-03213, 1999 WL .33287727 at * 4 (Bankr. D. Idaho May 27, 1999) (holding that FSA’s loan program “contemplated a recapture payment at the conclusion of the [agreement] term if payment in full of the write-down balance had not been made during the term of the [agreement]”). Pet. App. 15a.

Despite the Seventh Circuit’s statement at footnote 3 of its opinion that Petitioners “concede[d] that their estoppel argument is without merit,” *see* Pet. App. 15a, Petitioners’ appellate brief presented a detailed written argument vigorously asserting their estoppel claim. Pet. App. 43a-47a. Specifically, Petitioners’ Appellate Brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982). *See* Pet. App. 44a-45a. Moreover, Petitioners’ counsel did not concede that Petitioners’ estoppel argument was without merit at oral argument.

The Seventh Circuit’s decision in this case (a) approves of and, therefore, implicitly participates in the

arbitrary and capricious decisions of FSA in refusing to allow Drewiske, Corbett, or Kiecker to present evidence at the hearing of December 9, 1999, and in rendering determinations based upon only a partial record thereby depriving Petitioners of their right to a fair and unbiased hearing of their claims against FSA; (b) virtually impresses our national judicial system's "seal of approval" on determinations of FSA which are patently contrary to law and unsupported by substantial evidence; (c) modifies an existing rule of law in that it deprives Petitioners, and a significant cross-section of America's family farmers, of an adequate opportunity to seek redress for their claims against a governmental agency as well as due process of law; (d) involves an issue of continuing public interest in that it subjects Petitioners, and a significant cross-section of America's family farmers, to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the provisions of the Agricultural Act of 1987; and (e) completely ignored Petitioners' estoppel claim against FSA and deprived Petitioners of due process of law.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition should be granted for four reasons. First, the decision below merits this Court's immediate intervention because it approves of and implicitly participates in the arbitrary and capricious decisions of FSA in (a) refusing to allow Drewiske, Corbett, or Kiecker (collectively referred to herein as "Petitioners' Witnesses") to present evidence at the hearing of December 9, 1999, (b) rendering a decision based upon only a partial record, and (c) interfering with Petitioners' right to a fair and unbiased hearing of their claims

against FSA and due process of law. Second, certiorari is warranted because FSA's determinations were contrary to law and unsupported by substantial evidence.

Third, the decision below merits this Court's immediate intervention because (a) it modifies an existing rule of law in that it deprives Petitioners, and a significant cross-section of America's family farmers, of both an adequate opportunity to seek redress for their claims against a governmental agency and due process of law and (b) it involves an issue of continuing public interest because it subjects Petitioners, and a significant cross-section of America's family farmers, to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the provisions of the Agricultural Act of 1987.

Fourth, certiorari is warranted because the decision below completely ignored Petitioners' estoppel claim against Respondent, depriving Petitioners of due process of law. Despite the Seventh Circuit's statement at footnote 3 of its opinion that Petitioners "concede[d] that their estoppel argument is without merit," *see* Pet. App. 15a, Petitioners' appellate brief presented a detailed written argument vigorously asserting their estoppel claim. Specifically, Petitioners' appellate brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982).¹ Pet. App. 43a-47a.

¹ Although Petitioners' appellate brief acknowledged that the Seventh Circuit may not be the proper forum to hear a classic estoppel claim, Petitioners presented their estoppel argument therein in conjunction with and in support of their argument that FSA's actions were arbitrary, capricious, and contrary to law. In this case, FSA, acting essentially as a bank, entered into the Agreement

I. Certiorari is Warranted because the Decision Below Approves of and Implicitly Participates in the Arbitrary and Capricious Decisions of FSA.

In refusing to allow Petitioners' Witnesses to testify at the hearing of December 9, 1999, and in rendering determinations based upon only a partial record, Hearing Officer Benner and FSA conducted themselves in an arbitrary and capricious manner which inevitably deprived Petitioners of their right to a fair and unbiased hearing of their claims against FSA and due process of law. Throughout the proceedings below, FSA was permitted to introduce parol evidence in support of its interpretation of the Agreement. Specifically, FSA relied upon 7 U.S.C. § 2001 and 7 C.F.R. §§ 1951.914(b) and 1922.201 in support of its argument that FSA's decision to demand \$96,500.00 in shared appreciation was not erroneous. Petitioners' requests to introduce parol evidence (*i.e.*, the testimony of Petitioners' Witnesses) in support of their own interpretation of the Agreement were arbitrarily and capriciously rejected by FSA and brushed aside by the District Court and the Seventh Circuit.

That FSA was permitted to introduce parol evidence in support of its interpretation of the Agreement while Petitioners' requests to introduce similar evidence in support of their own interpretation of the Agreement were refused both highlights the arbitrary and capricious nature of the proceedings below and substantiates Petitioners' claim that they were deprived of their right to a fair and unbiased hearing of their claims against FSA as well as due process of

with Petitioners and its agents made certain representations to Petitioners regarding the manner in which the Agreement would be interpreted. Petitioners relied upon these representations to their obvious detriment and have been deprived of an adequate opportunity to seek redress.

law. Section 706(A) of the APA requires a finding that the “actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” That the proceedings below and FSA’s subsequent determination that that it was entitled to collect \$96,500.00 in shared appreciation were arbitrary and capricious is obvious when FSA’s actions are examined in light of the plethora of cases construing the arbitrary and capricious standard:

Although the “arbitrary and capricious standard is highly deferential,” an agency’s actions will be upheld only if “the agency considered all relevant factors and the [reviewing] court can discern a rational basis for the agency’s choice.” *See Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99 (1977). An “agency’s decision is not arbitrary or capricious as long as the agency’s path may be reasonably discerned.” *Mount Sinai Hospital Medical Center v. Shalala*, 196 F.3d 703, 708 (7th Cir. 1999) (internal quotation marks omitted). Because FSA refused to hear testimony from Petitioners’ Witnesses relating to Petitioners’ interpretation of the Agreement, the record FSA’s determinations were founded upon was incomplete. As such, FSA did not consider “all relevant factors” and the “path” FSA followed in determining that it was entitled to collect \$96,500.00 in shared appreciation cannot be “reasonably discerned.”

The decision below approves of, and implicitly participates in, the arbitrary and capricious decisions of FSA together with the corresponding and resultant interference with Petitioners’ right to a fair and unbiased hearing of their claims against FSA and due process of law. As such, the decision below merits this Court’s immediate intervention.

II. Certiorari is Warranted because FSA's Determinations were Contrary to Law and Unsupported by Substantial Evidence.

The substantial evidence test applies when agency action occurs in connection with a public adjudicatory hearing, *see* 5 U.S.C. §§ 556 and 557, which was precisely the type of hearing held in this case. In *Morgan v. United States*, 298 U.S. 468, 480 (1936) (*Morgan I*), this Court explained that such a public adjudicatory hearing “has a quality resembling that of a judicial proceeding” and that such proceedings are frequently described as possessing “a quasi-judicial character.” Continuing, the *Morgan I* Court held that a public adjudicatory hearing under 5 U.S.C. §§ 556 and 557 “is the hearing of evidence and argument” and that if the hearing officer “who determined the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.” 298 U.S. at 480-81.

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), this Court stated in no uncertain terms that “substantial evidence” under the APA requires a thorough review of the entire record. According to the *Universal Camera* Court’s analysis, the Administrative Procedure Act definitively bars the practice of ignoring “contradictory evidence or evidence from which conflicting inferences could be drawn * * *.” 340 U.S. at 487. Continuing, the *Universal Camera* Court held that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that the court consider the whole record.” 340 U.S. at 488. The APA’s own legislative history, which reinforces *Universal Camera* Court’s analysis, indicates that the APA’s “requirement of review upon the whole record” means that an agency fact-

finder “may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.” Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

In addition, in *Morgan v. U.S.*, 304 U.S. 1, 18 (1938) (*Morgan II*), this Court concluded that the “right to a hearing” embraces “the right to present evidence” as well as the right to contest the claims of the opposing party. According to the holding in *Morgan II*, the “right to submit argument implies [an opportunity to present evidence]; otherwise the right may be but a barren one.” 304 U.S. at 18. Continuing, the *Morgan II* Court held that citizens “who are brought into contest with the Government in a quasijudicial proceeding” are entitled “to be heard” before the government issues its final decision. In this case, Petitioners’ right to present evidence was effectively sterilized by FSA’s decision to exclude the testimony of Petitioners’ Witnesses. Consequently, FSA’s determination that it was entitled to collect \$96,500.00 from Petitioners was not based upon a review of “the whole record” and Petitioners were effectively deprived of their right to be heard.

Pursuant to the holdings in *Morgan I*, *Morgan II*, and *Universal Camera*, the APA’s own legislative history, FSA was required to consider “the whole record” before ruling on Petitioners’ claims. In denying Petitioners’ requests to introduce the testimony of Petitioners’ Witnesses in support of their interpretation of the Agreement, FSA ignored evidence Petitioners sought to introduce into the record in accordance with 5 U.S.C. §§ 556 and 557. Because this evidence, “from which conflicting inferences could be drawn,” 340 U.S. at 487, was summarily excluded from the record – a practice both prohibited by this Court in *Universal Camera* and denounced in the APA’s legislative history –

FSA failed to consider “the whole record” before ruling on Petitioners’ claims. FSA’s decision to exclude the testimony of Petitioners’ Witnesses ensured that the record contained only evidence supporting its interpretation of the Agreement in violation of both the letter and the spirit of the APA: According to the APA’s own legislative history, an agency fact-finder “may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.” Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

According to the *Morgan I* Court, the weight ascribed by the law to FSA’s determinations herein “rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify.” 298 U.S. at 481. Continuing, the *Morgan I* Court noted that the duty of an agency’s fact-finder to render a determination based upon a review of the whole record “cannot be performed by one who has not considered evidence or argument * * * The one who decides must hear.” 298 U.S. at 481. Although Petitioners have attempted to pursue their claims against FSA in compliance with the APA, FSA has essentially ignored the APA in excluding the testimony of Petitioners’ Witnesses. In failing to consider “the whole record” before ruling on Petitioners’ claim, FSA violated the letter and the spirit of the APA, at the same time producing a one-sided, self-serving record upon which the decisions of the lower courts were founded. Because FSA failed to consider “the whole record” before ruling on Petitioners’ claim, and because both the District Court and the Seventh Circuit’s heavily relied upon the record of the administrative proceedings below, Petitioners have never been afforded a fair, unbiased, and complete adjudicatory hearing of their claims against FSA. As such, Petitioners have been

denied due process of law and FSA's determination that it was entitled to collect \$96,500.00 from Petitioners was contrary to law and unsupported by substantial evidence. Accordingly, this Court's immediate intervention is required.

III. Certiorari is Warranted because the Decision Below Modifies an Existing Rule of Law and Involves an Issue of Continuing Public Interest.

(A) The Decision Below Modifies an Existing Rule of Law in that it Deprives Petitioners, and a Significant Cross-Section of America's Family Farmers, of both an Adequate Opportunity to Seek Redress for their Claims Against a Governmental Agency and Due Process of Law.

Because Petitioners' requests to introduce the testimony of Petitioners' Witnesses in support of their interpretation of the Agreement were arbitrarily and capriciously rejected by FSA, the record upon which FSA based its determination that it was entitled to collect \$96,500.00 from Petitioners contains only evidence supporting FSA's interpretation of the Agreement. In refusing to allow Petitioners' Witnesses to testify at the hearing of December 9, 1999, FSA "stacked the deck" in its own favor by depriving Petitioners of a fair and unbiased hearing and due process of law.

According to the holding in *Morgan I*, because the hearing officer "who determined the facts which underlie [FSA's determination that it was entitled to collect \$96,500.00 from Petitioners] has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-81. Based upon this analysis, if the decision below is

allowed to stand, Petitioners will have been deprived of their right to seek redress for their claims against a governmental agency – a more perfect example of a violation of due process of law could not be fabricated by the most creative law professor. Moreover, if the decision below is allowed to stand, a significant cross-section of America’s family farmers will be subjected to the same potential for abuse of the administrative process. In fact, the issues presently before this Court have been addressed by or are being addressed in federal courts across the country. *See, e.g., Stahl v. U.S. Department of Agriculture*, A3-01-85 (D. ND. May 24, 2002); *Bukaske v. U.S. Dept. of Agriculture*, 193 F.Supp.2d 1162 (D. S.D. March 27, 2002); *Viers v. Glickman*, 2000 WL 33363197 (S.D. Iowa Nov. 28, 2000); *Curtis v. Farm Service Agency*, 2001 WL 822413 (W.D. Mich. June 22, 2001); *Wright v. Farm Service Agency*, 2001 WL 822417 (W.D. Mich. June 22, 2001); *Pandora Farms v. USDA*, Civil No. 00-1753-A (E.D. Va. July 5, 2001); *In re Moncur*, No. 98-03213, 1999 WL 33287727 (Bankr. D. Idaho May 27, 1999); and *In re Tunnisen*, 216 BR 834 (Bankr. D. S.D. 1996).

That Petitioners were not afforded an adequate opportunity to challenge FSA’s interpretation of the Agreement is problematic – justice and equity cannot prevail when one party is denied a fair, unbiased, and complete adjudicatory hearing. Even more troublesome, however, is FSA’s reliance upon *Kafkaesque* techniques in enforcing its policies and agreements without consistency, explanation, or responsibility. If the decision below is allowed to stand, a significant cross-section of America’s family farmers will be subjected to an unprecedented potential for abuse of the administrative process. Because the Seventh Circuit affirmed FSA’s decision to exclude the testimony of Petitioners’ Witnesses, the decision below modified an existing rule of

law governing the administrative process and denied Petitioners a fair and unbiased hearing and due process of law. As such, this Court's immediate intervention is required.

(B) The Decision Below Subjects Petitioners, and a Significant Cross-Section of America's Family Farmers, to FSA's Arbitrary and Capricious Decision-Making Processes Relating to its Enforcement of Shared Appreciation Agreements.

The weight ascribed by the law to FSA's determinations herein "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify." *Morgan I*, 298 U.S. at 481. As such, the duty of an agency's fact-finder to render a determination based upon a review of the whole record "cannot be performed by one who has not considered evidence or argument * * * The one who decides must hear." 298 U.S. at 481. Because FSA refused to "hear" testimony from Petitioners' Witnesses, the record FSA's determinations were founded upon was incomplete. As such, FSA did not consider "all relevant factors," *see Camp*, 411 U.S. at 143 and *Overton Park*, 401 U.S. at 415-16, and the "path" FSA followed in determining that it was entitled to collect \$96,500.00 in shared appreciation cannot be "reasonably discerned." *See Mount Sinai*, 196 F.3d at 708. Consequently, FSA's determination that it was entitled to collect \$96,500.00 from Petitioners was arbitrary and capricious. In affirming the District Court's decision below, the Seventh Circuit approved of and reinforced the arbitrary and capricious decisions of FSA and exasperated the corresponding and resultant interference with Petitioners'

right to a fair and unbiased hearing of their claims against FSA and due process of law.

Furthermore, if the decision below is allowed to stand, a significant cross-section of America's family farmers will potentially be subjected to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the Agricultural Act of 1987. As indicated at Section III(A) herein, the issues before this Court have been addressed by or are being addressed in federal courts across the country, highlighting the national importance of this litigation.² In many of these cases, America's family farmers have been arbitrarily and capriciously denied the opportunity to present evidence in support of their own interpretations of their Shared Appreciation Agreements. Based upon the Seventh Circuit's approval of the arbitrary and capricious decisions of FSA herein, and the significance of this litigation to America's family farmers in general, the decision below merits this Court's immediate intervention.

² See, e.g., *Stahl v. U.S. Department of Agriculture*, A3-01-85 (D. ND. May 24, 2002); *Bukaske v. U.S. Dept. of Agriculture*, 193 F.Supp.2d 1162 (D. S.D. March 27, 2002); *Viers v. Glickman*, 2000 WL 33363197 (S.D. Iowa Nov. 28, 2000); *Curtis v. Farm Service Agency*, 2001 WL 822413 (W.D. Mich. June 22, 2001); *Wright v. Farm Service Agency*, 2001 WL 822417 (W.D. Mich. June 22, 2001); *Pandora Farms v. USDA*, Civil No. 00-1753-A (E.D. Va. July 5, 2001); *In re Moncur*, No. 98-03213, 1999 WL 33287727 (Bankr. D. Idaho May 27, 1999); and *In re Tunnisen*, 216 BR 834 (Bankr. D. S.D. 1996).

IV. Certiorari is Warranted because the Decision Below Completely Ignored Petitioners' Estoppel Claim Against FSA and Deprived Petitioners of Due Process of Law.

Despite the Seventh Circuit's statement that Petitioners "concede[d] that their estoppel argument is without merit," Petitioners' Appellate Brief (*see* Pet. App. 15a, n. 3) presented a detailed written argument vigorously asserting their estoppel claim.³ Specifically, Petitioners' appellate brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982).⁴ Because the Seventh Circuit's decision completely ignored Petitioners' estoppel claim against Respondent, Petitioners were deprived due process of law; as such, the decision below merits this Court's immediate intervention.

In *Portmann*, the Seventh Circuit recognized the distinction between "proprietary" governmental activities and "sovereign" governmental activities. 674 F.2d at 1160. Under this approach, the government is immune from an

³ *See* 282 F.3d 521, 528 n. 3 (7th Cir. 2002).

⁴ Although Petitioners' appellate brief acknowledged that the Seventh Circuit may not be the proper forum to hear a classic estoppel claim, Petitioners presented their estoppel argument therein in conjunction with and in support of their argument that FSA's actions were arbitrary, capricious, and contrary to law. In this case, FSA, acting essentially as a bank, entered into the Agreement with Petitioners and its agents made certain representations to Petitioners regarding the manner in which the Agreement would be interpreted. Petitioners relied upon these representations to their obvious detriment and have been deprived of an adequate opportunity to seek redress.

estoppel claim only when it is engaged in “sovereign” governmental activities. 674 F.2d at 1160. According to the *Portmann* court, activities undertaken for the commercial benefit of the government or an individual government agency are subject to estoppel. 674 F.2d at 1160. Specifically, the *Portmann* court held that the proprietary or commercial character of the transaction “militates in favor of allowing an estoppel claim,” and that a claim of estoppel should be allowed where the government has entered into written agreements which support such a claim. 674 F.2d at 1161-62.

The District Court’s decision states: “The government acts in a proprietary capacity when it undertakes activities primarily for the commercial benefits of the government.” *Israel v. U.S. Department of Agriculture*, 135 F.Supp.2d 945, 952 (W.D. Wis. 2001) (citations and internal quotation marks omitted). Despite the District Court’s reliance upon this proposition and Petitioners’ reliance upon the holding in *Portmann*, the District Court failed to provide any meaningful analysis of Petitioners’ estoppel claim. In light of the full text of 7 U.S.C. § 2001, the provisions of which govern FSA’s debt restructuring and loan servicing activities, and the holding in *Portmann*, it is clear that FSA’s actions *vis a vis* Petitioners should be classified as “proprietary” governmental activities.

According to 7 U.S.C. § 2001(a)(1), FSA’s debt restructuring and loan servicing activities are to be administered “to the maximum extent possible – to avoid losses to the Secretary [of Agriculture] on such loans, with priority consideration being placed on writing-down the loan principal and interest * * * whenever these procedures would facilitate keeping the borrower on the farm or ranch * * *.” Based upon the plain meaning of 7 U.S.C. § 2001(a)(1), it is

overwhelmingly clear that one of the primary purposes of FSA's debt restructuring and loan servicing activities is to secure "commercial benefits" for the government. According to the holding in *Portmann*, activities undertaken for the commercial benefit of the government or an individual government agency are subject to estoppel. 674 F.2d at 1160. As such, the District Court's determination that "[i]t cannot be said that [FSA] acts in a proprietary capacity in lending money to farmers in financial distress" and the Seventh Circuit's affirmation of the District Court's decision are clearly erroneous and must be reversed. As such, the decision below merits this Court's immediate intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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