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# BEEFING UP COMPETITION: EXAMINING AMERICA'S FOOD SUPPLY CHAIN

## HEARING

BEFORE THE

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# C O N T E N T S

## OPENING STATEMENTS



## WITNESSES



## ADDITIONAL SUBMISSIONS

# BEEFING UP COMPETITION: EXAMINING AMERICA'S FOOD SUPPLY CHAIN

**WEDNESDAY, JULY 28, 2021**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m., in Room 226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Klobuchar, Blumenthal, Hirono, Booker, Ossoff, Grassley, Lee, Cruz, Sasse, Hawley, and Cotton.

Also present: Senator Hyde-Smith.

## OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. Good afternoon. The hearing will come to order.

Today's hearing is on competition and consolidation in America's food supply chain, specifically in the beef industry. Our witness panel includes representatives from farm to table and from cow to consumer.

I might note that the Ranking Member has a cow lapel pin with the flag of State of Iowa on it. He is properly attired for this hearing.

We'll have an important conversation about ensuring competitiveness and fairness in the marketplace for family farmers and ranchers while also maintaining access to sale—safe, healthy, affordable food.

This hearing is at Representative—pardon me, at the Ranking Member Grassley's request. I joined in willingly and brought in Senator Klobuchar, who was also anxious to be part of this because of her great work on the Antitrust Subcommittee.

We're going to discuss challenges facing each link in the beef supply chain: farmers, producers, packers, grocers, consumers, and to elevate the concerns of many Americans about the cost and availability of food particularly during this pandemic.

Once again, thanks to Senator Klobuchar for her important Committee—Subcommittee on Antitrust and Consumer Rights—and the Ranking Member, Senator Lee, who I saw speaking on the floor as I walked in. So he may join us soon.

This Subcommittee, under Senator Klobuchar, has held a series of hearings on the Nation's competition policy. Already this year they've had hearings on prescription drugs, smart home technology, hospitals, mobile app stores.

They've helped ignite a national conversation on antitrust and a best-selling book. In industry after industry, they've identified opportunities to make markets more competitive and transparent.

Senator Grassley, Senator Klobuchar, and I serve on the Committee on Agriculture as well. We represent three States in the Midwest where our farmers and ranchers play a big role.

Over the past century, our agriculture sector has served as a foundation of the most productive and efficient food supply on earth. That is the genius of American innovation. Despite droughts, floods, pandemics, and other disruptions, we continue to produce an abundance of food and not only feed our people, but we feed the world.

Yet, the COVID–19 pandemic, where there have been problems with supplies, wasted crops, and shifts in consumer spending have shown a bright light on the cracks in our food system that need to be addressed. We're here today about how the pricing system in livestock must be structured to encourage quality and efficiency but also fair, transparent, and competitive.

We must support food producers large and small, start by addressing the barriers that prevent small farmers and livestock producers from thriving in the marketplace. We'll learn about the dangers of consolidation and market concentration, especially in the beef processing industry, where just four companies control about 80 percent of the national market.

There will be discussions about keeping business costs down, but those efforts must also preserve and strengthen a safe environment and livable wages for workers. I actually worked in a meatpacking plant. I won't give you—it's a heartbreaking story. I won't give you that story again. I did once, that's enough. I'll just tell you that I understand a little about this process from personal experience.

Senator Stabenow, the Chair of the AG Committee, has been a leader in this area. She introduced the Food Supply Protection Act, which I cosponsored, authorizing financial assistance to help expand capacity at smaller, regional levels.

Already we've made some progress and expanding support for these farmers and producers. The December COVID package and the American Rescue Plan included funding.

Secretary Vilsack has announced the USDA plans to invest $4 billion into our food supply chain, which will include millions of dollars in grants to develop and expand meat processing. There's more to do.

We had a hearing yesterday on ransomware. We all know that one of the major suppliers was hit by a ransomware attack. That attack briefly forced JBS to shut down all of its beef plants in the United States. They account for nearly a fourth of America's entire beef supply. The shutdown cost an immediate jump in the price of wholesale beef, which sent cattle futures swinging.

This episode demonstrate—demonstrated the vulnerability that our food suppliers have when it comes to cyberattacks. We have to take it seriously. We need to make sure that American innovation has ensured that fundamentals of our food supply remain strong, but there are still too many Americans for whom our food supply is not working.

Today, we'll have an hon—honest conversation on addressing these shortcomings. I want to turn Senator Grassley for his opening remarks and then to Senator Klobuchar and Senator Lee.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Since you didn't remind us of your years at the packing plant, I won't remind people about my six years at the Rath Packing Company in Waterloo, Iowa.

Chair DURBIN. People are grateful to both of us.

[Laughter.]

Senator GRASSLEY. First of all, I thank Chairman Durbin and Antitrust Subcommittee Chairman Klobuchar for accommodating my request to have this hearing. This is an area that I've been concerned about for a long time. Many other Senators are also airing concerns from their constituents.

Today's hearing will focus on competition matters within the meat supply chain, particularly in regard to beef. I'm pleased that we have two Iowans here with us as witnesses today and look forward to their testimony. I thank all of our witnesses for coming and sharing their expertise with us. Family farmers who feed cattle are the lifeline of rural communities across Iowa, and they're currently on life support for more than two decades.

I've expressed strong reservations about consolidation and concerns about competition in agriculture. My first legislation on this subject was introduced in 2003. Today, only four packers, JBS, Tyson's, Cargill, and National Beef control more than 80 percent of the cattle market. These companies hold a tremendous amount of market power.

Independent cattle producers in Iowa and across the country deserve a free and fair market. The amount of cattle trading on a cash market in the early 2000's were more than 50 percent. Today, it has dropped to less than 20 percent. All other cattle contracts use the cash market as base price for their negotiations but not true of beef.

I've heard from many Iowa cattlemen like one of our witnesses today, Jon Schaben, who fought to keep auction markets open and functioning as close to normal during the pandemic because they're so vital to price discovery in the cattle industry. My home State has 60 percent cash trade, and the Iowa cattle producers are frustrated that they're shouldering this burden of price discovery.

I've also heard that alternative marketing agreements like formulas offered advantages to some producers. However, these contracts have no price transparency. Captive supply is unfair and anticompetitive when packers choose these types of arrangements to fill their needs and small producers can't get a bid for their fed cattle.

Many of us believe that packers have so much power that they unfairly leverage it against other players in the market and to the detriment of the consumer. Although I have many concerns with this industry, I would like to recognize and commend the employees of these packing plants around the country during the pandemic who continue to work so hard to keep food on Americans' plates.

The pandemic has shed light on many problems with the Packers and Stockyards Division and its inability to preserve our Nation's beef supply chain. According to the U.S. Department of Agriculture, for every $1 Americans spend on food, only 14 and 3/10 cents go to the farmers. Meanwhile, the retail price of beef for consumers has increased and remains high.

I want to make it clear that I'm not upset about paying more for beef. What I'm upset about: farmers not getting paid for the work they do in the sense of not having profit.

As the first link in our food supply chain, farmers and ranchers assume incredible risk for each crop and each animal raised. Their livelihoods depend on receiving a fair price. Even before the pandemic, farmers and ranchers witnessed the price of their cattle fall while the price of boxed beef from the processor increased. The market's clearly not working fairly when demand is extraordinarily strong and supply—supply at the same time is strong.

The packers are making record profits, and ranchers are losing money. That's why I believe it's important that the Department of Agriculture, the Department of Justice, and the Federal Trade Commission be engaged and aggressive in policing anticompetitive activity.

A year ago last March, I wrote to Attorney General Barr and Secretary Perdue, who was Secretary at that time, calling for an investigation about the possible illegal practices in the cattle industry.

I know that the Justice Department issued civil investigative demands in May 2020, but I'm disappointed that we're not yet able to learn anything about this investigation. I currently have legislation pending to address the concerns of some of my colleagues and I have a—and I have about cash trade in the cattle market.

I also have a bill with Senator Tester to create special investigator for competitive matters within USDA's Packers and Stockyards Division to address anticompetitive practices and enforce our competition laws.

Most recently, I was pleased to hear the Biden administration and Secretary Vilsack announcement about restoring the Packers and Stockyards Act to fight unfair practices and rebuild the competitive playing field for farmers and ranchers.

I do look forward today's hearing to beef up competition in our beef supply chain.

Chair DURBIN. Beef up competition. Right. Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Chairman Durbin, Senator Grassley. Thank you for holding this hearing.

As many of you know, Senator Lee and I have been conducting, as mentioned by the Chairman, a series of hearings in our Subcommittee examining the broad scope of America's monopoly problem. Today, we are glad to explore the competition issues in the food supply chain.

The COVID–19 pandemic painfully exposed some of the inherent risk to our food supply chain resulting from high levels of industry consolidation. As the spread of the virus forced closures at major

meatpacking facilities, for example, livestock producers were left with no willing buyers for their livestock.

Due to consolidation in the meat processing industry, there weren't really alternatives. The result for consumers was inflated retail prices for beef and pork products and, in some areas, empty meat cases.

Of course, COVID–19 has had devastating effects on many industries. In the meat industry, those effects were exacerbated by the lack of competition up and down the supply chain. The takeaway message should be clear. A concentrated food supply chain is a vulnerable food supply chain. Although meat products are back in supermarket meat cases and major meatpacking facilities have resumed operation, the long-standing structural problems with our meat supply chain remain.

Four companies, as noted by my colleagues, control more than 80 percent of beef processing. Four companies control 70 percent of pork processing. That is why livestock producers are as concerned as ever about market consolidation and market power in the meat supply chain. This is especially true for independent livestock producers who have seen their margins dwindle as they're forced to sell at depressed prices and on unfavorable terms.

We cannot just look at meat processors in isolation. Further down the supply chain, there are concerns about large retailers exerting buyer power to suppress product pricing for meat suppliers putting pressure on wholesalers, packers, and livestock producers.

According to the Open Markets Institute, approximately 65 percent of grocery sales are controlled by the top four grocery companies nationwide. That percentage can be much higher in local markets. Such retailer buyer power risks compromising independent retailers access to meat supply and other supplies during times of market disruption and limits consumers' potential retail choices.

It also risks harming livestock producers, food production workers, and the rural communities in which they live and work, as large national retailers capture a larger share of what consumers spend on products.

We are focused on meat in this hearing, but it is important to point out that we have excessive consolidation and competition problems throughout our food supply chain. In addition to meat processing and retailing, we have seen a handful of large companies dominating food-relating markets such as corn and soybean seed, fertilizer, pest control, farm equipment, food distribution, and food manufacturing.

According to the American Antitrust Institute, only a small fraction of the 1,300 mergers in the food processing, manufacturing, and distribution sectors were challenged by the Government. The rate of agency second request for mergers in these sectors have been steadily declining.

The meat issue is part of a larger problem. Monopoly and monopsony power exist up and down the food supply chain. If you look at history, at the Grangers Movement fight against monopolies after the Civil War, competition issues in the farm and food economy are a big part of why we have antitrust laws in the first place.

In fact, it was Senator Grassley's home State—he wasn't there after the Civil War, I just——

[Laughter.]

I'm just—okay. It was Senator Grassley's home State, Iowa, that passed the first State antitrust law in 1888, in large part to address concerns from farmers and livestock producers. Yet here we are today, still talking about the serious competition problems in our food supply chain.

The Antitrust Division's ongoing prosecution against criminal price-fixing in the poultry industry and its investigation into potential anticompetitive practices in the highly concentrated beef processing industry are clear signs that consolidation in these markets is causing harm.

As Chair of the Senate Competition Policy Subcommittee, I've been pushing for greater antitrust enforcement across the board. That's why the bill Senator Grassley and I have, the Merger Filing Fee Modernization Act, is so important. Our enforcers need the resources. I thank this Committee for passing it through, and it passed the Senate and is now awaiting action in the House.

Second, the Competition and Antitrust Law Enforcement Reform Act would make sweeping changes. Many others on both sides of the aisle have been working on this issue. To me, this is the tip of the iceberg. We are very pleased to have this hearing today. Thank you, Mr. Chair.

Chair DURBIN. Thanks, Senator Klobuchar. Senator Lee.

## STATEMENT OF HON. MICHAEL S. LEE, A U.S. SENATOR FROM THE STATE OF UTAH

Senator LEE. Thank you, Mr. Chairman.

The vitality and stability of our food supply is of concern to all Americans. The meat processing industry is particularly important to people in my home State of Utah. During the height of the pandemic, meatpacking plants either operated under significantly reduced processing capacity or, in many cases, closed entirely. The decreased supply of meat products led to increased prices for consumers and in some areas to a complete unavailability of certain meats despite a backup of livestock among many growers.

In this really difficult circumstance, we found that hog farmers were being forced to euthanize perfectly good hogs because they were quickly outgrowing the size restrictions of the pork processing plants. It's sickening that these farmers had to destroy perfectly good food while out-of-work Americans were paying higher prices for meat or going without meat altogether.

Today, we're focused on the dynamics of our beef supply chain. Fortunately, cattle don't outgrow the processing plant quite as quickly and easily as hogs do. We're still seeing significant impacts of processing reductions on the cattle industry.

The numbers tell an interesting story. Beef prices are up, and packers are making strong profits. Many of our cattle producers are operating at negative margins, and some are quitting the business altogether. If these are natural glitches in the market caused by the pandemic itself, then the market should eventually right itself. However, if the market doesn't self-correct, we have to sort out the problem, whether it's bad actors, a lack of transparency, overregulation, or overconsolidation, and do whatever it is that we can to fix it.

First, we have to ensure that the market is operating freely and fairly, that there's no anticompetitive behavior forcing new entrants or the feeders who support them out of the market. If we fight anticompetitive behavior, we need to use every legitimate means to stop it. Price discovery and transparency will go a long way toward ensuring a free and a fair market. The cash market determines the base price for cattle, which is then used for every other form of price determination.

However, today, at most 20 percent of cattle are sold on the cash market. That number is down from about 50 or 60 percent just 15 years ago. This lack of price transparency makes it difficult to discern whether these pricing dynamics are disrupting the balance of negotiating power or whether they're creating a negative feedback loop suppressing all cattle prices.

Fairness in the market is impacted by packer consolidation. Where there's lack of competition, packers can dictate the rate of available supply. We need to ask why chain speeds are down. Is it due to lingering COVID restrictions? Is it—is production below capacity because packers simply can't get employees to come back post-pandemic in light of unemployment insurance factors or other government precipitated conditions?

Is it low because the packer's not facing genuine competition in many, many areas of the country, recognize the benefits that flow to them if supply simply remains suppressed?

We must also ask why this market is so concentrated. If we've approved too many mergers and made regulations so burdensome that massive wide-scale consolidation is unavoidable, then we can't be surprised when we end up with these regional monopsonies.

Congress is not and should not be responsible for structuring industries. Many of the proposed solutions I've seen mostly mandating Government intervention in the market would ultimately increase the price—the price of beef, especially the price of beef for the end consumer. Increasing the cost for the packer won't bless the producer, and it certainly will harm the consumer.

What we should do is look for opportunities to free up the free market. Let's lift stifling Federal regulations, which I believe are responsible for a lot of the problems we see in this industry. It's why I'm a proud sponsor of something called the PRIME Act, which would lift many of the onerous Federal mandates on small meatpackers, allowing them to sell their meat cuts as allowed by State law.

Let's enforce antitrust law. If and when violations occur, then let's get out of the way and allow these businesses to thrive. You see, sometimes when we see a lack of competition, there's collusion among industry. Sometimes when we see a lack of competition, it's Government that's driving that lack of competition. This is one of those places, I believe.

Senator KLOBUCHAR [presiding]. Thank you very much, Senator Lee. We're going to introduce the witnesses. I believe Senator Grassley has two witnesses to introduce.

## OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I do have two witnesses from my State. Jon Schaben was not even born when his dad was Democratic leader of the State Senate, and I served with him in the legislature that particular time. He's from Dunlap, Iowa. His wife Julie, they have four children, two actively engaged in agriculture. Jon graduated from Iowa State University with a degree in animal science, is also a graduate of the Missouri Auction School.

He was a 2003 World Champion Livestock Auctioneer. Jon co-owns and operates the Dunlap Livestock Auction and the West Point Livestock with his brothers. They're the second-generation to run the Dunlap Livestock, which was started by his parents in the 1950's. Jon also operates a commercial cow-calf herd. Jon has been a member of the Iowa Cattlemen's Association since the 1980's and currently serves on the beef product labeling task force.

Shane Miller was born and raised in Ruthven, Iowa, currently resides in Sioux City, Iowa. He's a graduate of Westmar College with a bachelor's degree in accounting and finance. He's the group president of Fresh Meats at Tyson's Food and is responsible for all beef and pork operations and fresh meat sales. In his role leading Fresh Meats, Shane has oversight of 35,000 Tyson team members and 25 manufacturing facilities. Working for three decades in the meat industry, he's held various roles at Tyson's, including numerous management and office level positions.

We welcome both of you and thank you for testifying.

Senator KLOBUCHAR. Okay. Very good. Did you want to add anything, Senator Cotton.

Senator COTTON. Yes.

Senator KLOBUCHAR. Then Senator Sasse has something.

## OPENING STATEMENT OF HON. TOM COTTON, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator COTTON. Thank you, Senator Klobuchar.

I just want to take a minute to recognize and welcome Shane Miller as well. He may be an Iowan, but we also like to claim him here since he's representing Tyson, which is an Arkansas company. Shane's been working in beef for three decades, first with Iowa Beef Processors before he joined the Tyson food family. And as group president of the Fresh Meat section, he brings excellent expertise on the beef supply.

I also want to take a moment to recognize those in our food supply chain who kept things running during the Wuhan coronavirus pandemic over the last 18 months. Our cattle ranchers and meatpackers made sure that Americans had beef on the table. We had an amazing—we have an amazing food supply chain in the United States, and that's because of hardworking farmers and ranchers in my State and many other States, along with companies like Tyson that ensure those products get to our tables in a safe and affordable way.

I'm glad to welcome Shane Miller here today, and I look forward to hearing what he and all the other witnesses have to say.

Senator KLOBUCHAR. Senator Sasse.

## OPENING STATEMENT OF HON. BEN SASSE, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator SASSE. Thank you, Madam Chairwoman.

This is obviously a critically important hearing. Thank you for hosting it. There are a number of questions that we on this dais have for the witnesses, and we're voting in other committees and on the floor right now. If I could just ask unanimous consent, I want to introduce this statement from the Nebraska Cattlemen to the record. I look forward to returning later in the hearing as well.

[The information appears as a submission for the record.]

Senator KLOBUCHAR. Excellent. Thank you. It'll be on the record.

I'm going to finish introducing the witnesses now. Next up, Tim Schellpeper. He is the president of the Fed Beef division at JBS USA, where he oversees JBS's feedlot fattened beef cattle unit. He has held that position since 2017, and he has more than 35 years of experience in the protein industry.

David Smith. David is the president and CEO of Associated Wholesalers Grocers, Inc., a position he has held since 2015. AWG is a cooperative wholesaler that supplies around 3,100 grocery stores in 28 States. He has more than three decades of experience in the food industry.

Rob Larew. Rob, who I know personally, is the president of the National Farmers Union, where he represents the approximately 200,000 farmer and rancher members of the National Farmers Union. Previously, he spent more than 22 years working in Congress and for the USDA.

Last but not least, George Slover. George is the senior policy counsel for Consumer Reports. He formerly worked for the House Judiciary Committee and the Department of Justice. He is an expert on competition issues.

After we swear in the witnesses, each witness will have 5 minutes to make an opening statement and then we will turn to senators' questions with 5-minute rounds. Could all the witnesses please stand, including the ones at home, to be sworn in?

[Witnesses are sworn in.]

Senator KLOBUCHAR. Okay. Thank you very much. Mr. Schaben, why don't you proceed with your statement.

## STATEMENT OF JON SCHABEN, OWNER OF DUNLAP LIVESTOCK AUCTION AND WEST POINT LIVESTOCK AUCTION, IOWA CATTLEMEN'S ASSOCIATION, DUNLAP, IOWA

Mr. SCHABEN. Thank you very much, Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee. Thank you for the opportunity to testify on behalf of the Nation's independent cattle producers.

As I said before, my name is Jon Schaben. I'm from Dunlap, Iowa. My family operates a livestock auction business in not only Dunlap, Iowa, but West Point, Nebraska. We do think that livestock auctions are the greatest form of price discovery out there as we need competition in our marketplace every day for those to function.

I'm also a cow-calf producer. My family runs a backgrounding operation, and we feed out some steers and heifers annually.

Today, I'm here to represent the Iowa Cattlemen's Association, which is headquartered in Ames, Iowa, and a grassroots organization representing nearly 8,000 cattle producers and industry affiliates.

My hope is that this testimony in this hearing will encourage meaningful change to benefit all independent cattle producers.

Cattle producers in Iowa and across the Nation have expressed grave concern regarding the severe lack of cash trade, limited price discovery, and an imbalance in leverage between those who raise cattle and those who process them into the beef we consume.

When—with an increasing prevalence of extreme market shifts and limited ability of producers to mitigate market risk in the cattle industry, it is imperative that we uplift the concerns of those in the production sector for this Senate Judiciary Committee hearing. Simply put, the beef supply chain begins with, and relies upon, thousands of dedicated independent cattle producers.

I think—I think in this—in this Committee hearing—I'm going to go off text here just a minute. I think if we don't hear it here, we've heard it all the way up to date about these black swan events that have affected our industry over the last couple of years.

I hear about that they're responsible for why we're probably here today. I just don't think in the context of what they are that that's actually factual. I think the black swan events were a great example of what's broken about the marketing chain in live—live cattle. They show the—some of the things that need to be changed within this industry.

I think it's unfair to say that they're causing the problems that we have, which is this great big discrepancy between what our cattle are worth alive when we sell them and what they end up worth as retail beef.

A couple things I think back that up. In 2015, 51-and-a-half percent of the consumer dollars spent on beef returned to producers. In 2020, that figure dropped to 37 percent. That—that's been a steady decline from what the producers are getting from what the retail dollar is. I think that's one of the reasons why we're here to address that.

Most recently, we see live values of cattle in the $1,500-$1,700 range, but the carcass values of when they're processed in the $2,500-$2,700 range—a $1,000 difference between what the producers are getting for and what the end product becomes out. If we process more than a half a million cattle a week in the fed cattle industry, in my simple math, that's a half a billion a week that is eroded out of our rural economy.

As we all look for ways to stimulate rural economy, it looks if we can bring a functioning cattle market back and bring that spread narrowed down, that's a way we could infuse more cash into our rural sector.

From the Iowa Cattlemen's standpoint, first and foremost, we ask that the Department of Justice provides an update regarding their antitrust investigation into the major beef packers. Senate Bills 949 and 543 need to prioritize and, in addition, Senate Bill 2036, we applaud that to bring up the anticompetitive practices in the meat industry.

In conclusion, cattle producers work hard to manage inputs, mitigate risk, and raise cattle that ultimately provide the high-quality beef demanded by meatpackers, retailers, and consumers. The greatest fear of independent cattle producers is to lose their livelihoods for the sake of meat packing efficiency. An example, vertical integration.

We've witnessed vertical integration firsthand with the swine and poultry industries, so we know what that path is like. The combination of limited competition, captive supply, and formula contracting has not only suppressed live cattle prices, but has placed a tremendous financial burden on the shoulders of cattle producers.

This is and will continue to lead to the decline of independent cattle producers in Iowa and across the country. The lifeblood of our rural communities is agriculture. Independent cattle producers support their local communities. They are the best possible caretakers of the land and the natural resources in America. We must do all we can to ensure they survive to continue providing high-quality, sustainably produced, and nutritious beef for consumers.

Cattle producers deserve a level playing field. We're asking for a transparent, competitive marketplace to strengthen the beef supply chain. Failure to take swift action leaves Congress, USD, and the DOJ culpable for the countless cattle producers that will inevitably be starved out of the industry.

Since 1978, Iowa's lost more than 45,000 family farms that sold cattle. How many more family farmers and ranchers do we need to lose before we recognize the negative impacts of the highly concentrated meatpacking industry on our beef supply chain and our rural communities?

Thank you, and I'll welcome any questions.

[The prepared statement of Mr. Schaben follows as a submission for the record.]

Senator KLOBUCHAR. Very good. Thank you. That was quite fast. I have a feeling you're an auctioneer on the side. We sometimes have bills read into the record. We may contact you. Next, Mr. Larew.

**STATEMENT OF ROB LAREW, PRESIDENT, NATIONAL FARMERS UNION, WASHINGTON, DC**

Mr. LAREW. All righty. Thanks so much. Chairwoman Klobuchar, Ranking Member Grassley, and Members of the Committee, thank you for the invitation to testify this afternoon.

I am Rob Larew, and I serve as President of the National Farmers Union. Our organization works to ensure that family farmers and their communities are respected, valued, and enjoy economic prosperity and social justice. Founded in 1902, Farmers Union is made up of 200,000 farm families across the country. Our organization was started in part to help to restore and enhance competition in agriculture. While there are many challenges that face our members, having a fair marketplace remains a central issue for Farmers Union and for the economy as a whole.

As President Biden said recently, capitalism without competition isn't capitalism. It's exploitation. Family farmers and ranchers and our communities are worse off because of the domination and mar-

ket manipulation by multinational meat companies like those represented here today.

The four largest companies in each sector of the meat industry have grown dramatically in the last few decades. Today, as has been mentioned, those companies control 85 percent of beef packing, 70 percent of pork processing, and 54 percent of broiler chicken processing. In beef, there's been a shift toward alternative marketing agreements and a thinning cash or spot market, which gives packers even greater control over the cattle supply.

The concentrated markets also increase the opportunity for manipulation, and there's been a raft of price-fixing litigation against processors. Allegations have touched all three major meat sectors, cattle, hogs, and broiler chickens, and they have—and both of the corporations represented here today are among the companies that have paid fines or settled lawsuits for price-fixing.

The danger of an uncompetitive livestock market is not only economic. It is also felt in food security. This was clear in the first few months of the pandemic. Closures or slowdowns at meatpacking plants resulted in loss markets for farmers, endangered our food supply, and the health of workers, and led to higher prices for consumers. Soon after, family farmers and ranchers endured historic spreads between live animal prices and retail meat prices.

We saw similar issues with the fire at Tyson's Holcomb plant in 2019 and the cyberattack against JBS earlier this year. These corporations are too big. When they fail or take advantage of their power, we all suffer. We must learn from this experience. Greater emphasis must be placed on resilience in the food supply and unbridled corporate power must be checked.

Farmers Union is not the only producer organization that has joined in the call for swift and meaningful reform. Despite the very independent nature lots of times of groups that represent ranchers, the vast majority of these groups got together and agreed on what needed to be done. With that in mind, the time for action is now.

Fortunately, there are steps that Congress, this Committee, and the Administration can take to support a food supply chain that is competitive and resilient. These reforms can be investments and incentives but must also include regulatory and enforcement actions.

First, USDA can support the Packers and Stockyards Act by implementing rules that ensure specific protections for family farmers and ranchers. This idea features heavily in President Biden's recent executive order on competition and is a monumental step forward.

Second, Congress and USDA can enact reforms to price reporting and labeling that will provide accurate, reliable, and timely information. This should include a minimum level of cash transactions, contract libraries, and the reauthorization of mandatory price reporting.

Third, there needs to be greater investment in local and regional marketing and processing options. USDA has already committed $500 million from the American Rescue Plan to help in this effort, and more will be needed.

Fourth, we need to better scrutinize mergers with legislation like Senator Klobuchar's Competition and Antitrust Law Enforcement

Reform Act. Furthermore, it is time to push for more vigorous antitrust enforcement to rein in the unchecked power of the packers and, if need be, bust them up.

I look forward to working with this Committee to bring about greater fairness for family farmers and ranchers. Thank you for the opportunity in testifying, and I look forward to answering your questions.

[The prepared statement of Mr. Larew follows as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Mr. Larew. Next up via video, Mr. Miller.

## STATEMENT OF SHANE MILLER, GROUP PRESIDENT OF FRESH MEATS, TYSON FOODS, DAKOTA DUNES, SOUTH DAKOTA

Mr. MILLER. Members of the Judiciary Committee, thank you for inviting me here today.

I proudly represent Tyson Foods, a company based in Springdale, Arkansas. I lead our beef and pork businesses from Dakota Dunes, South Dakota. We are a company based in rural America. In fact, I speak to you today first and foremost as a grandson of Iowa farmers. See, I was born and raised in Northwest Iowa farm country, in a small town called Ruthven.

In rural communities across the country every year, Tyson invests more than $15 billion with over 11,000 independent pork producers, cattle producers, and poultry producers. We rely on these farmers and producers and want them to be successful because without a steady pipeline of livestock we're unable to run our business.

The present divide between live cattle and boxed beef prices is not the result of a consolidated industry, lack of competition, or the cash markets. The concentration of ownership within the meat processing industry is virtually unchanged over the past 30 years. Instead, the present spread between live cattle and beef prices has everything to do with the law of supply and demand.

Multiple unprecedented market shocks, including a pandemic and severe weather conditions this past year, led to an unexpected and drastic drop in processors' abilities to operate at capacity. This led to an oversupply of live cattle and undersupply of beef, all while demand for beef products is at an all-time high.

It should not surprise any of us that as a result the price for cattle fell while the price for beef rose. While Tyson does not and cannot control market forces, our success depends on the entire beef supply chain being properly incentivized to meet America's continued demand for higher quality beef.

Accordingly, at Tyson, we are committed to ensuring fair compensation for ranchers and farmers. We're proud that we have relationships with producers of all sizes that stretch back for generations. Producers decide for themselves how to best market and sell their cattle. With Tyson, they have a variety of options available, whether that be in the negotiated cash market or with contracting or tailored alternative marketing agreements, or AMAs.

Many of our producers prefer tailored agreements because they provide a stable and reliable market for their cattle. The agree-

ments also help meet expectations for consistently higher quality beef as well as demand for customer-specific programs.

This is just not Tyson's beef. The U.S. Department of Agriculture concluded that the use of AMAs, and I quote, "provides livestock buyers and sellers with improved risk management options that lowers costs and allows for the creation and capture of greater value."

I would also point out that our agreements don't lock a producer into selling only to Tyson. They're free to sell to whoever they choose. Tyson must incentivize producers to continue to sell the cattle to us. We welcome competition because it makes us all better, and it helps put more affordable, higher quality food on American tables.

I can tell you that the competition is intense. Customers have multiple meat suppliers from which to choose, and they put suppliers through competitive bidding processes based on the terms that the customers specify.

Finally, I'd point out that feeding this growing country while meeting consumers' evolving demands requires operating efficiently. This has been especially important while navigating the unprecedented market shocks we faced over the past 18 months.

With labor shortages across the country, some producing facilities and some production facilities were idle. However, Tyson was able to quickly adjust operations, including reconfiguring our production lines, diverting animals to other facilities, and rerouting our transportation network. This allowed us to keep protein products flowing to communities across the Nation.

Most importantly, our breadth of resources and diverse capabilities enabled us to keep our team members better protected during the pandemic. For example, we have spent more than $700 million related to COVID including sourcing PPE, bringing medical providers onsite, installing protective barriers, and providing onsite testing and vaccinations.

In conclusion, for nearly a century, Tyson has been proud to play an important role in feeding this country and also protecting our food supply chain all while helping to make protein accessible and affordable. I thank this Committee for the opportunity to be here today and to talk about our role, and I welcome any questions. Thank you.

[The prepared statement of Mr. Miller follows as a submission for the record.]

Chair DURBIN [presiding]. Thank you very much. Mr. Schellpeper from JBS.

**STATEMENT OF TIM SCHELLPEPER, PRESIDENT OF USA FED BEEF, JBS USA, GREELEY, COLORADO**

Mr. SCHELLPEPER. Good afternoon, Chairman Durbin, Ranking Member Grassley, Chairwoman Klobuchar, and other Members of the Committee. Thank you for the opportunity to be here.

My name is Tim Schellpeper. I am president of the JBS Fed Beef division, JBS USA Food Company. I'm a fourth-generation farmer, and I operate the farm that my great-grandfather originally settled in 1887. I have led JBS beef division since 2017 and have been in the protein industry for 35 years.

JBS USA and Pilgrim's Pride USA are leading producers of beef, pork, and poultry in the United States. With 84 facilities across the United States, employing more than 66,000 team members, we contribute millions of dollars each day to local communities through purchases of livestock, poultry, and plant supplies.

It is JBS' mission to ensure the best products and service for our customers, a relationship of trust with our suppliers, profitability for our shareholders, and the opportunity of a better future for all of our team members. We do this through significant, targeted investments in every area of our business and giving back to the local communities where we live and work. For example, we are investing more than $130 million in the beef—U.S. beef industry to increase production capacity. We are investing $70 million in the local communities through our Hometown Strong program.

The most significant challenge facing our industry today is labor availability. To operate our facilities safely, efficiently, and at capacity, we need a consistent and skilled workforce. In our beef division alone, we are investing more than $150 million in annualized pay increases to attract and retain new workers.

Today, average wages across our beef facilities are more than $22 an hour. Our starting wages are approximately $20 per hour. We also invest in our team's education through our Better Futures program, which provides upfront, free tuition to community college for our team members and their dependents.

Likewise, sustainability, achieving more with less, is at the forefront of our culture. JBS is leading the protein industry with a commitment to achieve net-zero emissions by 2040. We will invest more than $1 billion over the next ten years in emission-reduction projects and $100 million by 2030 in on-farm research and development.

Without question, the COVID–19 pandemic challenged all of society and critical infrastructure industries, forcing everyone to make every resource available to face this unprecedented threat. Using the best guidance available, we immediately implemented health and safety procedures to keep our team members safe and to continue critical operations.

Additionally, we invested more than $600 million in our response to the pandemic, which included voluntarily removing vulnerable populations with full pay and benefits, hosting vaccine clinics at our plants, and providing incentives for our team members to receive vaccines. Today, nearly 75 percent of JBS USA team members have been vaccinated.

The cattle and beef markets are cyclical and decisions made by producers today may not be realized until years from now. Historically, cattle were sold in lots, and every animal in the lot received the same average price, preventing producers from receiving increased returns for higher-quality beef that met consumer demands. Following the cattle crash in the 1970s and 1980s, when beef lost about 50 percent of the consumer market share, cattlemen joined together to create alternative marketing arrangements with processors.

These alternative marketing arrangements, or AMAs, provide a mechanism for producers to realize premium prices for the investments they make in superior genetics, herd health management,

and marketing. They also help to ensure a consistent supply of high-quality cattle for processing that results in a consistent supply of high-quality beef options at the meat case for consumers.

It is important to note that JBS purchases from cattle feeders of all sizes. AMAs help ensure producers capture the more—more of the consumer beef dollar in an industry where cattle often change ownership two to three times after they leave the farm or the ranch.

JBS is committed to supporting innovation, transparency, and enhancing incentives to keep the U.S. cattle industry ahead of competition and abroad. We will continue to invest in our people, our processing facilities, and communities to help ensure a sustainable, affordable, and resilient food supply.

Thank you for the opportunity to speak with you today, and I look forward to any questions you might have.

[The prepared statement of Mr. Schellpeper follows as a submission for the record.]

Chair DURBIN. Thank you very much. I believe our next witness is Mr. Smith.

## STATEMENT OF DAVID SMITH, PRESIDENT AND CEO OF ASSOCIATED WHOLESALE GROCERS, NATIONAL GROCERS ASSOCIATION, KANSAS CITY, KANSAS

Mr. SMITH. Thank you, Chairman Durbin, Ranking Member Grassley, and Members of the Committee for the opportunity to testify on the health and competition in the food supply chain.

My name is David Smith. I'm the president and CEO of Associated Wholesale Grocers, or AWG, which is based in Kansas City, Kansas. AWG supplies over 3,100 supermarkets in 28 States. I'm testifying today on behalf of the National Grocers Association, which is the national trade association for independent community grocers and their wholesalers.

Independent community grocers punch way above their weight. They account for 1.2 percent of the Nation's overall economy and generate 1.1 million jobs. AWG is a cooperative, which means we're owned by independent retailers that we service, and our profits are all returned to those retailers.

We have approximately 1,100 owner-shareholders or family businesses. Our cooperative structure is like a farmer-owned cooperative, but instead of selling food to the suppliers, we buy for our retailers. We aggregate our collective resources and purchasing power, which then helps us establish economies of scale and buy products in bulk. This allows us to keep prices low for our stores and their customers. Our purchasing power equates to roughly $22 billion in retail sales annually.

Even though our volume is substantial and have the same efficiencies as our largest competitors, we don't really compete on a level playing field. We pale in comparison to our dominant chain rivals. As Senator Klobuchar mentioned earlier, the top 5 retailers dominate over 65 percent of the marketplace. These dominant grocery retailers we call power buyers use their size and their positions as gatekeepers to the American consumer to dictate terms and conditions to suppliers.

This ranges from more favorable pricing, more favorable packaging, and access to exclusive products that we can't get. Their size and market power alone enables them to secure advantages for themselves and harm the smaller players in the food retail marketplace. This pandemic has really put this problem on full display. Everyday Americans who rely on community grocers have not been able to access the products they need to feed their family as the largest retailers demand priority to high-demand products like cleaning supplies, paper products, and shelf-stable items.

The problem—the problem of retail consolidation and also buying power is also why we've ended up with this meatpacking conundrum. Consolidation at retail causes consolidation upstream in the supply chain, and meatpacking is a stark example. Suppliers respond to retail consolidation by consolidating rapidly themselves in hopes that getting bigger will allow them to gain the leverage against that retail domination.

We seek consolidation everywhere, from the protein markets to consumer packaged goods and even private label manufacturing. These problems begin with buyer power in the grocery aisle. The results are predictable. Farmers and ranchers struggle to get fair prices as fewer firms compete for the product. Consolidated supply chains are more vulnerable to disruption, as we saw with the meat during the pandemic. Smaller food suppliers face high barriers to entry to reach grocery consumers.

The independent segment is best at providing these opportunities for small-scale producers like independent meatpackers or small farmers, but our share of the market has shrunk in the face of rapid consolidation. In the last 25 years, grocery storefronts have shrunk by a third according to the U.S. Census Bureau. During the same time period, we've seen a concerning pattern of food desert growth particularly in rural and low-income communities.

Full-service grocery stores have often been replaced by limited assortment dollar stores, and this only threatens the—not only threatens the public health, including growing rates of diet-related diseases, but also when a grocery store leaves a community, it's deadly to a small local economy.

This spiral of supply chain consolidation and shrinking access to food coincides with the absence of antitrust law enforcement. A legal standard meant to protect consumer welfare is doing just the opposite. Americans who happen to live in communities served by an independent grocer are faced with paying higher prices and fewer options and are left behind in supply crunches.

At the same time, dominant firms rake in record profits, get preferential terms, and engage in a pattern of behavior that wipes out competition. I like to call one of those anticompetitive tactics harvest and invest. They invest by using their buying power and cash position to lower prices that their competition can't meet. Then, once they're the last man standing, they harvest by increasing prices at will.

As a grocer of more than 40 years, I've seen it happen over and over again. It's why rural towns like Mitchellville, Iowa, and urban communities like in the South Side of Chicago can only rely on dollar stores for their grocery needs.

Senators, if you've ever been in one of those stores, you know they're not what—where a family can find healthy foods and abundant choices. Senators, we do have a choice. We can choose to end these unfair schemes. We can choose to support fairness for retailers, suppliers, farmers, and consumers. We can choose to enforce antitrust laws that ensure robust competition throughout the food supply chain.

I thank all of you for inviting me here today to share AWG's story with you on behalf of Americans' independent community grocers and wholesalers. I will be happy to take your questions when you're ready.

[The prepared statement of Mr. Smith follows as a submission for the record.]

Chair DURBIN. Thank you very much, Mr. Smith. Our last witness is George Slover. Is that correct, George? You've been here before.

Mr. SLOVER. Yes, Senator. Yes, I have.

Chair DURBIN. I'm glad to have you back from——

Mr. SLOVER. Thank you.

Chair DURBIN [continuing]. Consumer Reports. Take it away.

## STATEMENT OF GEORGE SLOVER, SENIOR POLICY COUNSEL, CONSUMER REPORTS, WASHINGTON, DC

Mr. SLOVER. Thank you. Competition is key to a marketplace that works for consumers at the end of the supply chain. It gives us choice to comparison shop. That spurs businesses to improve quality and affordability. Nowhere are quality and affordability more important than the food we eat.

Too many of us, especially in remote rural and marginalized urban areas, lack good food options—a problem aggravated by overconcentration. You've heard today from farmers and ranchers who must sell their produce and livestock to a dwindling number of larger and more powerful packers and processors.

It's also a consumer problem. For the marketplace to work for us, it has to be working for everyone, farm to table. That's how we get our choices. When powerful packers or processors or high-volume distributors or retailers push producers to sell at cut-rate or risk being cutoff, pressure to cut corners can hurt quality, variety, safety, and nip innovation in the bud.

Some might think consumers should be happy for producer prices to be pushed down. Doesn't that mean we also pay less? It doesn't work that way. Market power takes from everyone, producers and consumers alike. Producers also face overconcentration for inputs: seed and genetics, fertilizer and chemicals, feed and additives, and farm equipment.

One illustration: overconcentration has dramatically restricted how ranchers can market their cattle. Two short generations ago, the top four beef packers had a third of the market, and ranchers had options. Typically, cattle sold on the spot market, priced day of sale by competitive bidding—even live auction, the ultimate in competitive bidding. A feedlot might have a dozen packers show up.

Today, after a merger cascade, the top four packers control 85 percent. These multibillion-dollar giants know how to stay out of

each other's way. Now, a feedlot might have one packer show up, no auction, no bidding, no negotiation.

Today, most cattle are purchased in advanced long-term contracts, prearranged prices giving packers a captive supply and magnifying their control. Cattle, like other farm animals and crops, are perishable. They're carefully fed to be at their peak. A rancher can't just hold them back for the next sale date. Ranchers get pushed to cut corners beyond what makes sense. Some may give up. Either way, it can diminish what's available to consumers.

Ranchers are most likely to be run off for trying innovative methods that don't obey the business model dictated by the packers. These packers can also cut deals with high-volume distributors and retailers that close them off to smaller innovative packers.

There are also more acute vulnerabilities. COVID outbreaks caused widespread meatpacking plant shutdowns. Consumers found empty shelves at the grocer, while producers were forced to kill off millions of animals that couldn't be brought to slaughter.

This spring, a ransomware attack forced JBS to shut down all its U.S. plants, a fourth of all our beef. These jolts remind us that competition is about far more than just dry economic efficiency. When the food supply chain is disrupted, it can be literally a matter of life and death.

Many competition problems in the food supply chain are the same we see elsewhere and will benefit from the same reforms. A bill by Senator Klobuchar and other Members of this Committee has a number of proposals that would promote more competitive, better functioning marketplaces, such as by strengthening the law against harmful mergers and against dominant corporations using their muscle to freeze out competition.

A bill by Senators Klobuchar, Grassley, and Durbin would strengthen enforcement resources by raising filing fees on the largest mergers. A new bill by Senators Lee and Grassley contains proposals we hope will also be part of discussions leading to bipartisan consensus.

USDA is considering other measures to improve food supply chain resilience and competitive functioning. This hearing will help inform these efforts.

Strengthening competition can give us better food choices at more affordable prices and a more resilient food supply chain that can better weather storms foreseen and unforeseen.

Thank you again.

[The prepared statement of Mr. Smith follows as a submission for the record.]

Chair DURBIN. Thank you, Mr. Slover. I'm going to start the questioning. Let me start with a question for Mr. Schellpeper and Mr. Miller.

Mr. Schellpeper, in your testimony, you say, and I quote, "The most significant challenge facing our industry, JBS, is labor availability." You say that, quote, "to operate our facilities safely, efficiently, and at capacity, we need consistent skilled labor."

I'd like to ask each of you, what percentage of your processing workforce would you estimate are immigrants?

Mr. SCHELLPEPER. Senator Durbin, this is Tim Schellpeper from JBS. Thank you for the question. I don't have that particular piece

of information in front of me. I would have to get back with that information to you, Senator.

Chair DURBIN. I wish you would. Mr. Miller. Do you know?

Mr. MILLER. Senator, thank you for the question. You know, as an important employer in many of our communities, we rely on immigrant labor in a lot of our facilities to—for one, we give a lot of these folks an opportunity and provide them an entry point.

I don't have the specific numbers. I will tell you that we have several team members that come from diverse backgrounds, and they're going to speak more than 50 different languages, and it really is a true reflection of America itself.

You know, coming back with an actual percentage or a number like that is something I'm going to have to follow-up with you on.

Chair DURBIN. Thanks. I wish you would. Let me just say this. According to the Migration Policy Institute, immigrants make up about 40 percent of the meatpacking workforce. No surprise to me. Go to be Beardstown, Illinois, and see who's working the processing plant there. I can tell you half of them are speaking Spanish, and many of them are from Africa.

I know that because of the naturalization ceremonies we have in Springfield, and I meet their families. I make that point because there are some Members of this Committee who are opposed to immigration. They say, "We've got enough. These people are going to come here and take away American jobs."

These are tough jobs in meat processing. I think we all know that, those of us who have any familiarity with it. Townspeople don't really line up in a queue waiting for the opportunity for a lot of these jobs. People who are trying to put together a meat processing facility turn to immigrant labor, and I believe that they're skillful and dependable, and, over and over again, they've proven that.

Mr. Schaben, I just asked the Senator next to me where Dunlap was, and he showed me it on a map. You're really far west, aren't you?

Mr. SCHABEN. Yes. Real close to Omaha, Nebraska. Yes.

Chair DURBIN. Where do most of your ranchers process their food? Where do—I mean, their cattle? Where do they send them?

Mr. SCHABEN. If they are in a—for a finishing process, there are a—there is a Tyson plant at Dakota City, Nebraska, a Cargill plant at——

Chair DURBIN. Is that processing?

Mr. SCHABEN. Yes. Final processing.

Chair DURBIN. Final?

Mr. SCHABEN. Yes. Final processing. Yes. Actually, our proximity to the meatpackers is decent. Unfortunately, we're real close—15 miles from my hometown, we saw the effects of losing a packer. Tyson shut their plant down in Denison, Iowa. I think—I don't know this. I think it might be their most recent shutdown of a plant.

Chair DURBIN. In your testimony, you talked about the plants that have shut down.

Mr. SCHABEN. Yes. That was specific to that one. We've had several in Iowa, and then another one I think that's meaningful in Iowa, Chairman, we had—we talk about these startup companies.

We had a great example of an independent coming into Iowa. It was at Tama, Iowa, which is in kind of central Iowa. They get up and get going and have a marvelous market, a new buyer in the marketplace, something that we all cherish. When they got up and got going good, and I assume the profits or the plant is profitable, they sold out to one of these four packers.

It's probably one of the things we talk about in this Committee the—when is it too concentrated? I can promise you, losing that buyer in the marketplace was pretty significant to the producers in our—in the Midwest—because not only Iowa people supplied cattle, but there would have been Minnesotan, and Missouri, and Illinois people that would have supplied that plant.

Chair DURBIN. I'd like to ask the gentleman who's from the grocery wholesalers. My impression at the market, the price of beef is up. That's what I seemed to see when I walked through either in Springfield or in Chicago. Yet we've heard from some of the producers here that unless you're in on the deal with one of these four major producers, it's a struggle.

How do we resolve that contrast that the market for the consumer is more expensive and yet when it comes to the profitability of meat—of beef—those who are raising beef, cattle ranchers and such, it's not a profitable operation? Mr. Smith?

Mr. SMITH. Yes, sir. The answer is, I guess, from our perspective it certainly is not at the supermarket level. The cost of the product going to the stores is up a significant amount. Whenever I think back to during the pandemic, when retails were the highest and the wholesale cost to our stores was the highest, there wasn't a direct correlation, as many of you have mentioned, back to what was being paid to the farmer.

Of course, it is supply and demand. There were a lot of challenges for them in actually doing the production. Independent supermarkets were unique in that timeframe, Mr. Chairman, in that many of them were in—they've still—the vast majority continues to do all of their store—their in-store cutting from primals. They didn't go through central processing facilities. They were much more nimble and were able to stay in business with fresh meat. They also were able to take up some of the slack that was in the restaurant supply chain being able to repurpose that product.

As far as the pricing today, we know what we pay for it. We don't necessarily have a view, exactly, of the drivers behind those increases.

Chair DURBIN. Thank you, sir. Senator Grassley.

Senator GRASSLEY. Yes. Just so you can plan, I hope we can have a second round unless every—oh, Okay. Thank you.

Mr. Miller, my first question's for you. Iowa cattle producers tell me that during the first week of May this year, Tyson's was buying cattle from independent producers—wasn't buying cattle. With so few players in the market, that gives producers limited options, as noted in Mr. Schaben's testimony.

According to data from the National Daily Cattle and Beef Summary Report at USDA Marketing Service, on May 10th of this year, the choice boxed beef cutout was valued at more than $309 per hundredweight.

At the same time, cattle producers struggled to break even, receiving average bids of approximately $118 per hundredweight. The gross package market—packer market on the average steer weighing approximately 1,400 pounds with a 63 percent dressing percentage exceeded $1,000 per head. How do you justify making such low bids when you're turning such a significant profit?

Mr. MILLER. Thank you for the question, Senator. First and foremost, as I said in my testimony, my oral testimony and the written testimony, we depend on independent cattle operations of all sizes. We can't do without all of them. I don't know the specific date here you referenced in May—what we were doing in the marketplace that day versus another day. What we pay Iowa cattle feeders truly depends on the market conditions. How they end up deciding to sell their cattle, whether they want to negotiate or put them on an AMA, is totally up to them.

For instance, in the Upper Midwest, a larger percentage of cattle feeders prefer to use cash basis as a life—of a—as a method to sell their livestock. As you go further into the South, they prefer the AMAs. The AMAs guarantee a market for these specialized cattle, but they also ensure that the producer is compensated for the value that they add to the market.

In a long, long-winded answer, I guess, when you look at the AMAs versus the negotiated trade, the AMAs unlock value that the customer and, ultimately, the consumer are looking for.

Senator GRASSLEY. I hope you know how depressive that is when you're not making money, and packers are making $1,000 a head, and the price of beef at the supermarket isn't down at all.

Mr. Schellpeper, are independent producers who negotiate offered the same opportunities to market their cattle as large or corporate feedlots do through formula contracts? Would you be opposed to having the base price, premiums, and any discounts shared with the public?

Mr. SCHELLPEPER. Thank you for the question, Senator. We are active in the cash market every single day at JBS. In fact, in the State of Iowa, we have several buyers that are headquartered there. Again, active participants, are they offered the same price? Yes, they are on a cash basis, on a day in and day out basis.

Relative to publishing contract terms or some type of contract library, I would need to understand that. I understand there's dialog in the industry about that. I would need to do more research on that and to learn more about that issue, Senator.

Senator GRASSLEY. Without having that information, we don't have price transparency, and those that negotiate every day on a daily basis don't know for sure what the price is. Having that information available is very important to have the transparency that's necessary in the price discovery.

Mr. Miller, producers in Iowa tell me they can't find bidders for their fed cattle, and it's a take it or leave it situation where they feel like price takers. Then producers are telling me the packer won't accept their cattle for delivery for several weeks. How do you defend this as an open and fair marketplace?

Mr. MILLER. Yes. Thanks for the question. I think I'll—the way that I would frame this up is—and if you rewind the tape here to some degree and you think about what we've all been navigating

with COVID, I think, Senator, the best way to frame this up, for I think it simplifies it, is it is taking 6 days worth of processing to get five days worth of cattle harvested and processed.

In a sense, our teams are working 6 days a week, virtually every week right now, to work through 5 days worth of harvest—on our cattle that are harvested. We can out harvest them, but we can't get them processed. In a sense, what we're having to do is we're having to revert back to only being able to harvest and process what we know we can get through our plants. It's reducing our throughput through our facilities.

The other side of it, we do contract cattle in Iowa. The volumes vary, but they're mostly market driven. The cattle do have to be a specific type and kind to fill our customers' specifications, but we do contract cattle in Iowa, and we do bid on cattle in Iowa.

In fact, we also go to the sale barns and—excuse me, sale barns in the State of Iowa and negotiate. However, sale barn cattle are not included in the negotiated trade as livestock mandatory reporting is set up today. In fact, we do purchase, and we do negotiate cattle at sale barns.

Senator GRASSLEY. I'll yield at this point.

Chair DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. This hearing really affects all Americans. Obviously, Senators from the Midwestern States have the biggest stake in the production of beef and other agricultural products. Connecticut also is a producer, and certainly, all of us in Connecticut are consumers.

What we're seeing impacting consumers all around the country is a bottleneck supply chain that is a result of consolidation, bigness, that's been permitted under both Republican and Democratic administrations. This hearing is not a partisan exercise.

Today, the beef industry is dominated by the big four as you all know. They are the titans that package an astonishing 85 percent of the American beef slaughtering and packaging. Thirty-five million cattle are slaughtered in the United States annually. That's 26 billion pounds of beef, and it's done at 50 plants. They account for 98 percent.

We've also seen the rapid consolidation in the food supply chain at the retail level, as you all know. Now, entering this market is Amazon, which has used its economic power to bulldoze its way into new markets, not just groceries with the purchase of Whole Foods but also entertainment, audiobooks, smart devices, gaming. Every time our antitrust enforcers have taken a narrow view and given these acquisitions the green light.

I would like to ask what you see as the impact of Amazon's entry through its purchase of Whole Foods, as well as the data-rich resources that it is gaining through Amazon Prime and the Amazon marketplace, enhancing the power of its acquisition. Amazon has unique access to vast troves of data that none of you can lay claim to.

That economic power, I fear, will aggravate the kinds of bottlenecks that we've seen in our supply chain. By tying Amazon Prime membership to discounts at Whole Foods and opening a new line of Amazon Fresh grocery stores, Amazon has cleared another path to potential monopolization of commerce, and it's on track to double

its sales over the next 5 years and overtake Walmart as Americans—America's dominant grocer.

Is that a cloud on the horizon so far as you all are concerned?

Mr. LAREW. Senator, from the Farmers Union's perspective, we certainly have grave concerns about the growing level of concentration throughout the entire food chain. Today's focus on the beef packers, I think, tells a story though that resonates through that. As we look at what that means throughout the rest of the chain and for big players like Amazon, what was once, I think, kind of, maybe even laughable or not a vision that anybody could imagine we now—it wouldn't be too surprising to see an Amazon even acquiring one of the big four in a market like this.

The consequences of that would be devastating. We've seen vertical integration and the impact that that has on certainly family farmers and ranchers, but all the way up the chain, it would have devastating consequences.

Senator BLUMENTHAL. Anyone else?

Mr. SMITH. Senator, this is David Smith with AWG. I think about it in your home State, and our sister cooperative Wakefern with the ShopRites and the Price Rite stores that you have there and competing. The situation with Amazon is really just a further expansion of the power buyers. The meat discussion we're having today is really a single ingredient in an overall situation that is created when you have these power buyers.

Companies such as the manufacturers and producers are unable to be able to get the pricing that they need because of the tremendous dominance that they have. When a singular retailer can have 30 or 35 percent of all your sales, but yet you and your products may represent 1 percent or less of that retailer sales, there's a disproportionate risk.

The power buyers, what I was speaking about earlier with harvest and invest, in Amazon, I think they may have defined it. I think they may have actually came up with the very definition for harvest and invest by leveraging Amazon Web Services to produce incredible income in order to be able to get into the retail business.

Is that an existential threat to supermarkets? Yes. Is it an existential threat to suppliers? Of course. Having so much of a—of an aggregated power with those companies—it's a tremendous risk.

Mr. SLOVER. Senator, those concerns you expressed resonate with us across the entire economy. Here in the food supply chain, in the retail grocery sector, it would be indeed ironic if some of the grocers—the chain store grocers who now dominate that segment start expressing concerns about Amazon's entry and overconcentration at that level.

Senator BLUMENTHAL. Thank you. You know, I can't say you heard it here first because you didn't hear it here first. It's a question and a fear that I think is shared widely throughout your industries and across the country. It's one of the reasons we're here today. It affects beef, but as you've rightly pointed out, many other products are at risk as well in terms of competition that benefits consumers and the producers. I think it's an important point.

Senator KLOBUCHAR [presiding]. Thank you.

Senator BLUMENTHAL. Thanks very much.

Senator KLOBUCHAR. Thank you. Next up, Senator Lee.

Senator LEE. Thank you. Mr. Schaben, I'd like to start with you. As I mentioned in my opening remarks, I'm a proud sponsor of something called the PRIME Act. This is an act that recognizes that some of our problem relates to regulatory bottlenecks, and this is a piece of legislation that would allow States to exercise their regulatory jurisdiction over meatpacking plants that operate solely intrastate and would free local packing facilities from costly Federal regulation, which is, right now, exclusive. It's pervasive. You can't get around it except in very, very rare circumstances.

As I understand it, the large meat-packers process about 85 percent of beef. I've also been told that these big players no longer purchase many animals, if any animals at all, from smaller feeders or producers. The average cow-calf operator now is in a strange position because the average cow-calf operator owns about 40 head of cattle.

If these dynamics are correct, then the little guy, the smaller producer, is in real trouble. In your opinion, Mr. Schaben, would the PRIME Act allow these smaller suppliers greater access to the marketplace?

Mr. SCHABEN. Senator, thanks for the question. A couple comments. The—I don't—and in my testimony, I don't think I've ever mentioned that or said that—that these large meatpackers don't participate in the cash market or don't participate in—with smaller producers because, actually, I don't think that's factually correct. They probably do. It's at what level that we are concerned about and what level of transparency that is done.

As small-scale producers, do we have all the access to information to make the best marketing decisions that we can and are we at a disadvantage to somebody that's significantly bigger that gets, you know, quote, unquote, "a better deal."

In relationship to your PRIME Act, first of all, I commend you for—I think in my State of Iowa and—and around, small local processors have been tough to stay in business. I can only imagine that regulation would be one of those things.

I think anything that we could do to make—to make local processing better for local producers is a great thing. In relationship to your act, the only thing—and the reason I won't comment, when it comes to food safety in relationship to inspection regulations, I am not near expert enough to comment directly on that.

The thought process of it, making it easier for those small-scale producers to operate, seems fantastic to me because we've just—in our local communities, we've watched these smaller locker plants just, I mean, literally dissolve. What did—what we did find out in our COVID—through our COVID system is that the supply chain and the ability to participate in that did get broken, so a lot of smaller producers were looking for avenues just like you're talking about.

We were shut out of some of those because, I mean, it—you might talk around it. To book—to book a spot or two to get a local process now could be a year out, could be longer than a year out. Obviously, that's not been—it's probably because just exactly like you say, they've been overregulated.

Senator LEE. Right. Over time, people have assumed that it always has to be this way, you know? Of course, the Federal Govern-

ment is not a government of general jurisdiction, doesn't have general police powers. It has specifically enumerated powers. One of those powers, the one that's invoked here, is the power to regulate interstate commerce. There's no reason—it's understandable why for meatpackers that operate nationally or across State lines and they're selling interstate, it's understandable why that—there might be some good reasons to have a Federal meat inspection system there. There's no reason why it ought to apply for intraState operations.

That same access that you acknowledged, presumably, that same access could help improve the ability of producers to get competitive prices for their animals, right? If you had some place else to go, that could open things up for you a little.

Mr. SCHABEN. Anything that creates more capacity in a competitive market-related thing is good. In this instance, there—if you're processing your own, then the market—the spot market probably doesn't mean as much to you. From an industry standpoint, yes. Increase—increased processing capacity is one factor, is one thing that we're all talking about. It's sure—when I saw your—that—your bill, when it first came out, looked to me like a, you know, not—again, not knowing all the innards of how we—how we regulate inspection services, looks like a great deal to increase capacity.

Senator LEE. Thank you. Madam Chair, got one more question I wanted to ask. Is that all right? Thank you. Thank you.

Mr. Miller, if social distancing mandates required packers to operate with slower chain speeds during COVID, we shouldn't be surprised that the reduction in supply led to increased cost. That slowing of production would naturally result in higher prices for consumers.

I'd first like to know whether that's right, and then what would happen if retail—to retail prices if the Government mandates that packers run less efficient businesses or we increase cost by requiring you to pay USDA inspectors more. Would that also result in higher cost to the consumer?

Mr. MILLER. Thanks for the question, Senator Lee. A couple things here. Yes, if you go back to the pandemic, yes, we were throttled back considerably. It was really, specifically, driven around the fact that we didn't have the team members to come into the facility to work. Therefore, the chain speeds, the amount of pounds we were producing was curtailed dramatically.

Since then, we've been able to get some of our chain speed back. We're still not back to the level we need to be and back to pre-COVID levels. In—and as a result of that is we're producing less food through our facilities than what we were prior to COVID. Prices have moved up as a result of that from a supply and demand economics perspective.

Senator LEE. Thank you. Thank you, Madam Chair.

Senator KLOBUCHAR. Thank you. Thank you, Senator Lee.

Mr. Smith, America has a monopoly problem and it—I discussed it in the opening. It affects many different businesses, from cat food to caskets. We now have about one-third fewer grocery stores across the country than we had 25 years ago. How does the loss of local grocery stores impact consumers, especially in rural communities?

Mr. SMITH. Fantastic question, Senator. I guess let me tell you a story. One of our member retailers, which operates several different stores—and he already competes with the largest retailer here in the U.S.—he had been receiving a lot of requests to open a new store in an area that really only had a supercenter there to serve the needs. They wanted a full-service supermarket with really great prepared foods and everything else.

He did his homework. Prior to going into the town, he had a service do a full book, retail price check, to make sure that the retail pricing there was comparable to the other markets where he was at that he was already competing with that competitor. Sure enough, he found that it actually was higher.

He checked that off the list and said, "That's not really a concern." He spent millions of dollars preparing the facility and opened it up. After opening, the retail pricing in that market, because it was isolated—he was—he was kind of carved out. The retail prices there at that competing store undercut him at every turn. Anecdotally, from the people from that competitor's store, we were hearing that a store lost millions of dollars during that period of time that that store was open. Our member lost millions of dollars from his family business and ultimately closed. To put the——

Senator KLOBUCHAR. At the—Okay.

Mr. SMITH. Yes.

Senator KLOBUCHAR. I think that it's example too how it is to be a new entrant as a small business. Just a quicker answer on this one. What about the dominance of power buyers and their anti-competitive behavior? How does that affect independent grocers?

Mr. SMITH. Yes. The power buyer, they—it isn't directly related to efficiencies. It's a misnomer. What I was speaking to a moment ago is that this notion of consumer welfare, Senator, is that the consumer is benefited by the lower prices. Those are very short-term. Actually, they pay more because of that harvest and invest. They invest in those areas to drive out competition. Then after the competition goes away, it increases.

The power buyers are using that positioning against the manufacturer, which they've even cited in their own SEC filings, that that's one of the biggest threats against their ability to compete for the manufacturers because it's not proportionate to the risk as I mentioned earlier if it's——

Senator KLOBUCHAR. Okay.

Mr. SMITH [continuing]. Thirty-five percent. Yes. It's too much.

Senator KLOBUCHAR. I'll ask you some more questions later on the record about how we can fix this because I want to go on to a few other things.

Mr. Schaben, second-generation family farmers you explained. Could you tell us about how the price paid for your cattle has changed over the course of your career? Do you think farmers like you will be able to survive into the next generations?

Mr. SCHABEN. We have—yes. Thanks for the question, Senator. The price that we've received—I think what's changed, and what I mentioned before, was the percentage of the retail dollar. That's the thing, I guess, for me is the simplest to go off of, as it just has eroded down, as I mentioned before, from 50 cents to that dollar

in 2015, to now down, I think, to 37 cents to the dollar that we receive that's spent on beef.

If you spent all this time and effort to promote your product and to do it in the marketplace——

Senator KLOBUCHAR. I think that's a good point.

Mr. SCHABEN [continuing]. And you don't get it.

Senator KLOBUCHAR. Let me just follow-up with Mr. Miller, Mr. Schellpeper. Why do you think the farmer share has dropped so significantly and so fast?

Mr. MILLER. Thanks for the question, Senator. You know, there's a couple things that play into that. Similar to other commodities, you can take into consideration chocolate or coffee, for example, the value in today's food often comes from its processing and in items being further valued up the supply chain.

For example, in our industry, more is being done to prepare food before it even gets to the table, hence the reason more items are cut, marinated, breaded, precooked, which all adds more value to the product. In addition to that, more people are also eating away from home. This means the farmer is going to receive a smaller share because the price of the restaurant meal typically is going to include preparation, service, we all know the labor situation and the marketing it corresponds with.

Senator KLOBUCHAR. Okay. Thank you. You want to answer that as well?

Mr. SCHELLPEPER. Senator.

Sentor KLOBUCHAR. Yes.

Mr. SCHELLPEPER. The beef industry—thank you for the question. The beef industry fundamentals are based on supply and demand. They are going to be shifting over time. At JBS, over the last several years, we worked hard on changing our product mix inside of our plant with more value-added products, more branded products, more products into the food service channel. We are doing more and more inside of our facility that is adding value to that beef. Therefore, it's being sold in a different fashion, if you will, to our customers.

Sentor KLOBUCHAR. Okay. Maybe Mr. Larew do you want to respond to this? Because, you know, Mr. Schaben's shown us how the farmer's share of a dollar spent on beef has dropped from 52 percent in 2015 to about 37 percent in 2020. You heard the answers from our witnesses. How do you respond to that?

Mr. LAREW. I would simply say that when you look at USDA data and you look at the information on how they capture and measure that share of the food dollar for these packages, we are not talking about restaurant investment. We are not talking about a lot of this further processing for these core products. When we look at the spread, we are indeed trying—we are capturing that farmers, in particular, are not only capturing less of that dollar but indeed some of that money is going elsewhere. I think what we are talking about today is that spread that has been mentioned before and how much of that dollar is actually being captured somewhere else in the middle perhaps by the packers.

Senator KLOBUCHAR. Mr. Slover, do you want to add anything to that as well as any comments of my last question here on the grocer issues we raised?

Mr. SLOVER. On your last question, I would say it's no coincidence that in this very concentrated supply chain, in all these different levels, the two parts that are hurting the most are the least concentrated, the least able to exert any of their own choices against the concentrated levels.

Senator KLOBUCHAR. Thank you for summing that up. I think next up we have Senator Hawley.

Senator HAWLEY. Thank you very much, Madam Chair, and thanks to all the witnesses for being here.

I just want to follow-up on this same line of questioning about how we got to this point. Mr. Slover, maybe I'll just start with you. You, earlier this year, stated in a written testimony to the Antitrust Subcommittee that antitrust enforcement has grown weak over the years in part because courts have tended to require the Government to prove demonstrable, concrete, imminent, quantifiable harm.

We've known—I think it's been well-documented at this hearing. We've got four in the beef sector—we've got four packers, four companies that produce—that process, rather, 85 percent of beef in the United States. Over on the pork side, that's three that do 63 percent. That's pretty dramatic concentration.

Can you just give us a sense of how we got to this point? In particular, I'm wondering, you know, you said earlier in your testimony that we need to reaffirm that acquisitions by the largest corporations that already have significant market power are anticompetitive and unlawful, subject to a clear showing that they're not. Should—with some of these mergers that led to this kind of concentration, should they have been prevented? I mean, how did we get to this point that we are now with this kind of mass consolidation?

Mr. SLOVER. Yes. I think there was a lull—most of the mergers that we're talking about in beef packing, at least the first wave of them, were in the 1980s. There have been some more recent acquisitions of already large companies. JBS is a relatively new entrant in the U.S.-based giants. It has been a trend of consolidation leading to overconcentration.

Then about once you get to that place in a marketplace, the incentives, the corporate incentives for chasing profits change. They change in a way that goes against responding to competitive pressures and doing what consumers want because you know that there's somebody else out there ready to do that. I think in essence that's what's brought us to where we are.

Senator HAWLEY. Very good. Thank you for that. Mr. Larew, I want to ask you about something that you wrote. Last year, you had some very pointed words to say about this issue of excessive concentration in the meat industry. You said that price-fixing in the meat industry is not a new phenomenon. You talked about the example of a century ago. Then you go on to say, "As was true 100 years ago, radical and immediate action is needed to create a fair and balanced food system."

What do you have in mind? I mean, what's the—what does the response needs—need to be from a policy perspective?

Mr. LAREW. Right. I think it's a combination of things, Senator. It is about shining light on the issue. It is about a greater antitrust

review—even review and look back as suggested just a moment ago—and really making sure that—although today we are hearing a lot of conversation about supply and demand, seasonality, and the way markets fluctuate, all that is very much true.

What should not be happening is coordinated efforts in that space, dark markets. We need a lot more light brought into these markets for fairness both in terms of the price but then also in terms of how the packers themselves are functioning as a unit.

Senator HAWLEY. Yes. I think you mentioned this, but just to put a fine point on it, I mean, how about breaking up some of these—some of these packers?

Mr. LAREW. Look. We are all for shining a light, having a review, and if necessary, break them up.

Senator HAWLEY. I want to ask you, Mr. Schellpeper. I can't leave this topic without asking you about the consent decree or two that you entered into—your company entered into in 2018. You entered into a consent agreement with the Department of AG to pay tens of thousands of dollars in fines after inaccurately reporting beef prices, meaning that a number of farmers, shall we say, quite a few, got underpaid.

In 2016, USDA found that there were similar problems with reporting inaccurate weights at two of your facilities in Texas and in Colorado. That happened because you were using inaccurate scales. In 2018, your company had to pay tens of thousands dollars more in penalties for doing that.

My question to you is, given this, I mean, why wouldn't American farmers be concerned about concentration among meatpackers when they're staring down the barrel of practices like those?

Mr. SCHELLPEPER. Thank you for the question, Senator. We work hard every single day on State, local, and Federal laws. This is a very competitive industry. I think it's also—keep in mind that we are very active in the cash market with the producers. Margins do shift. Markets go in cycles. To answer your question specifically, we work very, very hard to be compliant with all State, Federal, and local laws.

Senator HAWLEY. I think I'll just say—my time's nearly expired. I'll just say in closing that I can just tell you from hearing the cattle ranchers in my State, the State of Missouri—we're a big beef producing State. From hearing from my own relatives—I happened to marry into a cattle-ranching family. My wife is generation number six, I think it is, born to the ranch.

The present situation for, particularly, small producers, cow-calf operations, is simply untenable. It is untenable. It cannot be sustained. We cannot have this level of concentration in this industry and have the farmer, the rancher be paid less and less and less, the consumer charged more and more and more. Something is seriously wrong here, and it cannot go on as it currently is. I, for one, think it's time to take that kind of action you were talking about, Mr. Larew. I think we need antitrust enforcement, and I think we as a Committee have got to look forward some policy suggestions to change the balance. Thank you, Madam Chair.

Senator KLOBUCHAR. Well said. Next up, Senator Booker, who's with us remotely.

Senator BOOKER. I appreciate that, Chairwoman. I have to say I feel strongly in alignment with many of the people who've spoken before and really celebrate what Josh Hawley was just talking about. I'm going to submit some questions for the record.

I want to dive in because in the past years I've been sounding an alarm about how deeply broken America's food system is. We are in a crisis, and now we've seen unprecedented consolidation. Amy Klobuchar has been talking about that, with a few multinational corporations now in control of our entire food system.

Today, I want to spend some time talking specifically about how our meat production system is broken and how it was broken in large part—really the innovator in this brokenness was Tyson Foods, our Nation's biggest meat company. Up to 50 years ago, farmers throughout our country farmed in ways that were very similar to their parents and grandparents, the way they had farmed. In fact, it goes back for generations. This was our precious heritage. Up until about 50 years ago, farmers and ranchers raised livestock in a way that, you know, treated animals humanely; that was environmentally sustainable; that allowed our farmers and ranchers to make a decent living.

As our independent family farmers prospered, so did rural communities. Independent businesses such as feed mills, hatcheries, slaughter plants, and food processing facilities created good jobs for rural residents. The wealth created by farmers circulated throughout those rural communities.

Then Tyson's created a vertically integrated business model, where they bought up all the independent businesses in the supply chain. While Tyson's didn't buy up all the farms, they took control of them through the use of restrictive contracts. These restrictive contracts that Tyson's entered into with farmers forced those farmers to adopt the industrialized model of livestock raising that we have today—a model which poisons our air and our water, tortures animals, and has contract farmers often living below the poverty line and with staggering amounts of debt.

In order to compete with this business model, independent family farmers were forced to either get big or get out. We've seen a massive disappearance of independent family farmers and ranchers in America. Today, Tyson's—excuse me. Tyson's first brought this model into the chicken market and then expanded it into the hog market. This caused 90 percent—90 percent—of independent hog farmers to disappear in America and led to higher prices for consumers but lower prices for the farmers, as Tyson's has kept the difference for themselves.

It led to the horrible hollowing out of rural America as all the wealth that used to circulate on Main Street in rural communities among the independent family farmers and independent businesses was sucked into Tyson's corporate headquarters to the benefit of Wall Street.

The big four meatpacking companies, Tyson's, JBS, Cargill, and National Beef are trying to do our cattle ranchers—to do to our cattle ranchers what they did to our independent chicken farmers and pig farmers. The critical task for Congress that we face now is to make sure this does not happen.

In 1980, there were approximately 1.6 million cow-calf operators in the United States. The big four meatpacking companies controlled only 36 percent of cattle slaughter, and almost all cattle were sold on the cash market.

Fast forward to today and almost half of the cow-calf operators are gone. Gone. The big four meatpackers now control over 80 percent of the cattle slaughter, and only 25 percent of the cattle are sold on the cash market. Companies like JBS import beef from other countries and deceptively label that meat as product of the USA.

Congress needs to act quickly and take action to protect our——

Senator KLOBUCHAR. Senator Booker, you went mute.

Senator BOOKER. Thanks a lot, Senator Klobuchar.

Senator KLOBUCHAR. Okay.

Senator BOOKER. We need to amend the Packers and Stockyards Act to require that at least 50 percent of cattle are purchased on the spot market. We need to ban packer ownership of more than seven days prior to slaughter, and we need to mandate that only cattle born, raised, and slaughtered in the United States are labeled as product of the United States of America.

The Farm System Reform Act, which I recently reintroduced this Congress, would do all these things. We must actually do more. I'm calling on the Department of Justice, the FTC, the USDA to enforce existing antitrust laws and break up companies like Tyson and JBS, who have gotten so large that they now use their economic and political power to rig the entire system in their favor.

These Federal agencies also need to address the extreme levels of concentration in the retail grocery sector, which has now led to suppressed wages and a lack of bargaining power for workers.

Thank you, Chairman, and I'm going to put a lot of questions to the witnesses for the record. I'm very happy to hear a lot of agreement across the aisle on the crisis we have in the American food system. Thank you.

Senator KLOBUCHAR. Okay. Very good. Senator Cotton.

Senator COTTON. Thank you, Madam Chair. Before I begin the questioning, I'd like consent to enter into the record an article published by Bloomberg News on Monday. It's entitled, "Prices for young cattle are soaring, signaling expensive beef."

[The information appears as a submission for the record.]

Senator KLOBUCHAR. It'll be entered in the record. Thank you.

Senator COTTON. I'm going to welcome all of our witnesses both here in person and virtually as well. Mr. Schaben, it's a pleasure to get to visit with you earlier as a fellow family cow-calf operator. I think your operation is a lot bigger than the Cotton family's. Thank goodness. Welcome to you all.

There's been a lot of talk about price transparency this afternoon in regards to pricing. I want to explore that a little bit more.

Mr. Miller, testifying virtually, under the Mandatory Livestock Reporting Act, Tyson Foods has to report what they pay for cattle and what they sell beef for every day to the U.S. Department of Agriculture. Is that right?

Mr. MILLER. Yes, sir. Senator, we actually—under the Livestock Mandatory Reporting Act, we report what we buy for cattle in the morning and then we turn around and report what we purchase by

the end of the day. Those are—those reports go out twice a day. In fact, there's additional reports that are produced on a weekly basis. There is plenty of information that can lay out how many cattle we're negotiating, how many cattle were purchased under a forward pricing arrangement, and how many cattle were purchased under some sort of alternative marketing agreement.

The same holds true on the—on the boxed beef side of it and pork side of our product sales too. Those products are negotiated. Anything that's negotiated is reported twice a day. The same thing at the end of the week. There's a weekly report that shows what's been sold globally and at the international space—how many pounds—the same thing as what's been sold forward, what's been sold in the spot market. There is plenty of transparency in this business.

Senator COTTON. Mr. Schellpeper, is that the same for JBS?

Mr. SCHELLPEPER. Thank you, Senator. Yes, it is.

Senator COTTON. Okay. Mr. Miller, if someone is interested in finding out those prices you just discussed, where would they go to look up that information?

Mr. MILLER. Yes. The USDA—so the AMS Division of the USDA publishes it daily. There's a website out there that if I need to, I can get information to all the senators so they can pass it on to your constituents. It's readily available.

Senator COTTON. That's quite all right, Mr. Miller. I'm sure everyone can Google. I want to turn to another topic that we've discussed a lot today here, which is concentration in the meatpacking segment. Obviously, that has antitrust implications, which is squarely within our jurisdiction.

Mr. Miller, do you know about how much of the beef market share Tyson had in 1990?

Mr. MILLER. Yes. I started with the company in 1992. I would guess that number to be approximately 25 percent.

Senator COTTON. What about a decade later in 2000?

Mr. MILLER. That number would have been somewhere near 23, 24 percent.

Senator COTTON. What about last year in 2020?

Mr. MILLER. This past year, we're approximately 20 percent of the market share.

Senator COTTON. Your market share for beef has declined over the last 30 years?

Mr. MILLER. Yes, sir.

Senator COTTON. Mr. Schellpeper, do you how much beef market share JBS has today?

Mr. SCHELLPEPER. Thank you, Senator. Yes, I do. In total, we'll be something around 23 or 24 percent.

Senator COTTON. Thank you. Mr. Miller, I want to go back to the combined market share now of the four biggest beef firms. In 1994, do you know what their combined market share was?

Mr. MILLER. It was approximately 80 percent.

Senator COTTON. What's the combined market share of the four biggest beef firms today?

Mr. MILLER. Yes. Approximately the same level. It's moved, you know, a percentile or two up and down over the past 30 years, but directionally, it's virtually unchanged over the last 30 years.

Senator COTTON. Okay. A third topic we've heard a lot about is the price of cattle. I have heard a lot of references to 2014 and 2015. Do you know what the price was in 2015, Mr. Miller?

Mr. MILLER. I don't have that in front of me. I do know the value of the product in 2014, 2015 was around $2.35-$2.40 a pound.

Senator COTTON. Yes. The price is $166, which is pretty high historically. If you go back 10 years, 2011, it was only $110. If you go back 11 years, it's $88. Obviously, the starting point for some of these figures influences the size of the growth or the decline. I've just got one final question I want to discuss. Mr. Miller, formula transactions or alternative marketing agreements, AMAs, we've heard a lot about how these are causing cash cattle trade to decline.

Can you talk to me, Mr. Miller, about how Tyson uses AMAs and how they help contribute to a sufficient supply of specialty products and why some producers might choose to use AMAs?

Mr. MILLER. Yes. A little bit of background on that. AMAs—the advent of AMAs had been around for probably 30—25 to 30 years, maybe even a little bit older than that, but somewhere in that range. Over time, if you go back to the 19—early 1990s, as an industry, our typical cattle grade from a meat quality perspective, we were grading somewhere right around 60 percent choice or higher.

This past year in 2020 and 2021 had been record grading years from a quality attribute perspective. Choice or higher has been grading 83 to 85 percent and upwards of—if you look at the prime category, which is the category above choice, historically, that would trade—that would be somewhere right around 1 to 3 percent of the supply would meet that prime grade.

This past year, those numbers have been upwards of 10 to 15 percent. We've had tailwinds at times closer to 18 percent. The quality that we're supplying our customers is matching what the consumer wants. That's a better eating experience when it comes to beef.

Senator COTTON. All right. Thank you, Mr. Miller. My time has expired.

Senator KLOBUCHAR. Thank you very much, Senator Cotton. Next up, Senator Hirono patiently waiting in the wings.

Senator HIRONO. This has been very interesting. There you go. Thank you very much, Madam Chair.

I have questions for Mr. Miller. In 2019, Immigration and Customs Enforcement conducted raids at a handful of chicken processing plants in Mississippi, carrying out one of the largest immigration raids in recent history, arresting nearly 700 people. In the end, it was the workers who paid the price, and the companies and the people who knowingly hired them faced little, if any, consequences.

Then during the pandemic, one of the few times that President Trump used the Defense Production Act was to keep meatpacking plants open. These people who worked in the meatpacking plants were deemed essential workers.

Do you support, Mr. Miller, a pathway to citizenship for such workers?

Mr. MILLER. First off, thank you for the question, Senator. I'm not familiar with the specific poultry reference you did make. How-

ever, I will say this. We believe in a comprehensive immigration reform plan that can help to provide border security but also proper documentation of future applicants.

As I mentioned earlier, our team members come from diverse backgrounds. As I mentioned, we have more than 50 languages in our beef and our pork facilities. They truly reflect the makeup, and the thread, of what America is itself. We believe in immigration reform. We believe that allowing these immigrants into our communities provides an entry point for many Americans and also immigrants. We give them an opportunity to thrive and succeed.

Senator HIRONO. Thank you. Has your company taken a public position in support of comprehensive immigration reform, which also, basically up to now, in the 2013 Immigration Reform Law, provided a pathway to citizenship? Has your company taken a public position?

Mr. MILLER. Senator, this is not really an area of expertise for me. I'm not familiar with the position we've taken. I will go back to my team and then we can revert back to you and get you a response with that.

Senator HIRONO. You just testified that you support comprehensive immigration reforms. That is good news to me, and it would be helpful if other companies who utilize immigrant labor also took that kind of position.

Mr. Slover, I was particularly interested in your testimony because you come at it from a consumer standpoint. You note in your testimony that you support various bills that you listed in your testimony. Is any one of these bills more important in terms of what we should do first to provide more competition in the areas that we're talking about so that it ultimately benefits to—benefits the consumer?

Mr. SLOVER. I listed three bills. One of them is the bill that Senator Klobuchar introduced, S. 225, which I believe makes a number of well-founded reforms based on established antitrust and competition principles that we have supported, I think, since before it was introduced. I would put that one at the top of the list as the right starting point for bipartisan discussions that need to take place.

The bill that Senator Klobuchar introduced with Senator Grassley and Senator Durbin to change the filing fees to raise them on the largest mergers will increase enforcement resources. I think that one's important too.

There's also a bill that's been introduced recently by Senator Lee and Senator Grassley that has a number of proposals that I think should—that we think should also be a part of that mix. I would start with those three.

Senator HIRONO. Good. Bipartisan. In the early 20th century, the Justice Department broke up the 5 biggest US meatpackers, and we had decades of competition in the beef industry. After the five largest meatpackers were broken up, we had a lot of competition, apparently, in this industry. We're down to the big four now. In your view, is it time to break up the giants in the meatpacking industry once again?

Mr. SLOVER. We have refrained so far from calling for a breakup without the investigation that would justify that under existing law

or under the principles underlying existing law. We would not be opposed to that if the facts warranted, and certainly, that could bring increased competition and more opportunities up and down the supply chain.

Senator HIRONO. Clearly——

Mr. SLOVER. We're not just—we're not unfavorable toward it.

Senator HIRONO. Right now, the Justice Department, I think, is investigating a certain—the corporations in the industry—for price-fixing. That's a per se violation of the antitrust laws. When you have so few players, you have a lot of parallel behavior going on. I think you call that accommodating reactions. We may be at the point for our consumers to really look at breaking up these big companies. Thank you, Madam Chair.

Mr. SLOVER. That's——

Senator KLOBUCHAR. Next up, Senator Cruz.

Senator CRUZ. Thank you, Madam Chair. Welcome to the witnesses. Competition is critical to our economy. Competition helps workers, helps employers, and it helps consumers to lower prices and to increase quality. I'm concerned about the very real lack of competition in the meatpacking industry.

In 1988, the 4 largest companies controlled 70 percent of the market. That share grew to 81 percent of the market in 1999. Today, the market share of those 4 companies, that oligopoly, is now at 85 percent. We need to make sure that even in the face of market concentration there remains real and meaningful competition and price transparency.

Mr. Schaben, I'd like to start with you. In your judgment, what steps can Congress or the USDA take to bring more transparency in pricing, to ensure competition, and to facilitate more negotiation between producers and packers?

Mr. SCHABEN. Senator, thanks and I appreciate your comments. I think there are several things, and I do think some of those are addressed in what we refer to as Senator Grassley's 5014 bill. And one thing I want to be clear about, we're hearing a lot about these alternative marketing agreements. We're not dictating how people market their cattle. What we're trying to see is that it's done in a competitive fashion and that it's not done to take competition away, the very thing that you have stressed from the second you started speaking. It's vital to all our industries.

Somehow through this—through our beef business, we've tried—they've tried to take that away from us and tried to take the competition. I think there's a number of things. Better—when we talk about livestock market reporting, a better system to know exactly what's going on in relationship to how the marketing agreements—what they constitute, so producers have an idea of what they're doing.

More cash trade. Those alternative marketing agreements they keep talking about producing—bringing the quality of the product up. The north plat—northern cattle feeders are—have the highest quality, and yet we have the lowest alternative marketing agreements. I don't see the correlation that I keep hearing here today.

We just think we need a robust—a system of how to do it. We think an enforcement of the Packers and Stockyards Act, which was put in place ironically after they broke up the big five, that

came into play. That's why I guess I'm here, to beg you, as a Committee. I think what producers are asking for is just a fair playing field. We like the game. We're up for the fight. We just want the rules to be fair.

Senator CRUZ. What would help produce a fair playing field? What would ensure that capital are able to moved at a fair market value?

Mr. SCHABEN. One thing that takes so much away today is all the contracted cattle. All the alternative marketing agreements, they're contracted. Just like a simple supply and demand, when you have X amount of cattle that are contracted ahead of time, obviously, that's going to take away demand for the cash cattle market. Yet all those formula cattle are based off that market. How great it is—it's a great tool. I credit the packers for doing it. It's not helping the cash market for producers.

When we talk about the concentration issue—and I don't have the figures in front of me—but just 20 or 30 years ago, when almost, probably 80, 90 percent of our cattle are traced—are sourced on an open, competitive market—that thing has literally flip-flopped today, Senator Cruz, where there's—where now our cash in some states gets down to less than—can get down to less than 10 percent of a competitive open market.

Senator CRUZ. In your experience, what percentage of your business is done on a formula basis?

Mr. SCHABEN. I don't know the percentage. The State of Iowa and in the Midwest is considerably low. As we trend farther South, and I believe in your home State, it gets pretty high. I think their percentage of their formula cattle get there to where it might be in the 90 percent or more.

Once again, how you market them isn't so much. It's how the prices derive. Is it competitive when we do it? As a livestock auction market owner, Senator Cruz, I can tell you the way to fix it is if all of them are have—well, had to be procured in an open competitive daily market, but that would be a little self-serving.

The two gentlemen here representing the packers are customers of mine. They come buy cattle at my market every week, and I'm darn happy to have them. What's happened over time, and that concentration issue, is to where we used to have five, six, seven buyers, we've got it down to two. That is fundamentally a problem.

I don't think any people in here would disagree that if 20 people are bidding on this bottle of water, it's probably going to bid—bring more than if one or two are bidding on it. I think that's what we're trying to accomplish in this—through this hearing.

Senator CRUZ. Okay. Let me ask one final question of Mr. Schaben and Mr. Larew. President Biden has proposed, as part of his multi-trillion dollar tax increase, ending the stepped-up basis in tax treatment. How would that impact farmers and ranchers? What kind of damage, what kind of devastation would eliminating stepped-up basis cause for farmers and ranchers all across the country?

Mr. LAREW. Yes. Certainly, I appreciate that. For Farmers Union, we have communicated very clearly to the administration and to any Members of Congress who have proposed that, that this would have devastating impact on family farmers and ranchers and

the ability for them to, quite frankly, remain economically viable in many cases.

Senator CRUZ. Mr. Schaben.

Mr. SCHABEN. I would have said the exact same thing. The stepped-up basis is—helps family farms stay generational. It is a very—very important thing, I think, to our people and all the customers that I represent. It—obviously, in the agriculture industry, most of our customers live asset rich and cash poor, but to be in a position at the end to have to—to not have a stepped-up basis, probably, would see a drastic shift in land ownership, I would think, and pretty scared about that, I guess. I think Mr. Larew and I are 100 percent on the same page.

Senator CRUZ. Thank you.

Senator KLOBUCHAR. Next up for a second round, I think Senator Blackburn may join us in a while. Oh, I want to mention that Senator Hyde-Smith has been with us as well. Thank you for joining us today. Outside of our Committee, we always welcome visitors and interested parties. Senator Grassley, you have some additional questions.

Senator GRASSLEY. Let me add that Senator Hyde-Smith took a very active role in this same subject as a Member of the Agriculture Committee and has some very tough questions——

Senator KLOBUCHAR. Yes

Senator GRASSLEY [continuing]. On this every issue. I'm going to take off with the recent discussion that Senator Cruz had with you, Mr. Schaben. Also, I think it's central to what Senator Cotton asked about. Senator Cotton asked appropriate questions. He got appropriate answers and as he should.

When you say that we have the cash market, and you report daily—so I'm talking to Miller or Schellpeper. When you say you report twice daily these sales, remember, you're reporting on about less than 20 percent of your sales in most cases. Consequently, then, what we need is that other 80 percent to have transparency so that people that are selling on a cash-negotiated basis on a daily basis knows that—what they're getting. If we had that, I don't think we'd be here today with this issue.

It's my understanding from the laws that are already on the books that Secretary Vilsack might have the authority to bring about more transparency in these contracts that are out there. Confi—confidentiality's part of those contracts, but these packers can't give those prices out. What's the reason for keeping that secret? I don't know. I don't understand at all that that should be secret. If you had 100 percent of this daily kill being reported, then those people that negotiate price would know exactly what they're—what they're getting.

I just think I ought to point that out. There was nothing inappropriate with any of these questions about what transparency there is, but there isn't enough of it. That's because of these contracts having these confidential clauses, or whatever you want to call it, in them.

I'm going to go to you, Mr. Schaben. I know your family farm's been in the livestock business since 1950. Besides livestock auctions, your farm includes cow-calf. I'm excited to hear that your kids are also involved in the agriculture. How does the lack of cash

trade in other regions impact livestock markets today, like your livestock market?

Mr. SCHABEN. The lack of cash trade, and if we're right in saying that it brings a more robust, and in this instance, a more price-appropriate response back to the cattle feeders, how it makes a great deal is the people that we service, Senator, in our auction markets are the independent cow-calf producers.

As the price of fed cattle rises, the bids that then go back to the people who produced it from the start get higher. It's a—it'd be the quickest way to add value into the rural sector. That's—that is the big thing here that we push about. If that money that can get created in this system gets trickled down so fast, and anybody that's been around agriculture knows that that's a continuous wheel that literally goes 24 hours a day, and they—and that money gets recirculated back as good as it goes. Putting it back into rural America's the best we can ask for.

Senator GRASSLEY. Mr. Schaben, how many packers do you participate with in any given week? Would more competition benefit you and the independent producers?

Mr. SCHABEN. Of course, more competition, Senator, is going to benefit all independent producers. It's in—as it was pointed out by Senator Cruz, it's the backbone of our whole society. It's going to benefit it for sure. As far as how we deal with—ironically, the two gentlemen that are represented here today, like I said before, are direct customers of mine. They come to my market every week and participate it and that—for that, we're very thankful.

Over time, what we've seen through consolidation, specifically in my business, to the cull cow market, to the—to what ends up back in the ground beef chain, sir—we have seen such a consolidation in that industry that 20 years ago, 15 years ago, maybe 10 years ago, we would have had between five and eight buyers weekly at our market to purchase the cull cows that go back into the hamburger supply chain. We have two today. We have two.

We're so glad we have two. We're just afraid that what happens if we go to one—in consolidation if we go to one or—I don't know. It's a very scary proposition.

Senator GRASSLEY. I'm going to ask Mr. Miller and Mr. Schellpeper. With regard to the Tyson fire and also JBS ransomware attack, the highly concentrated meatpacking industry showed it's extremely vulnerable; shutting down one plant even for a few days, weeks, or months backs up production, leads to higher prices for consumers, lower prices for farmers, and meat shortages.

Would you agree these disruptions highlight the need for more competition?

Mr. MILLER. Senator, thank you for the question. One thing I want—I want to revert back to a statement you had just made in a question you had asked the gentleman prior to me. We do report every purchase. The USDA then takes it from there, whether it's a formula purchase or a negotiated trade. Then they move it into the specific report. The same for the sale of product. Whether it's sold on a formula basis or a negotiated, it goes into those varying reports. I just want to clarify that for you and the Committee.

Senator GRASSLEY. Have you answered my question? Would you agree that these disruptions highlight the need for more competition?

Mr. MILLER. I'd like to speak a little bit on the Holcomb disruption. If you go back—you know, and an unexpected disruption similar to this will shock the system. There's no doubt. However, we took measures to lessen the impact of the fire by shifting cattle out of that region to other production facilities, to be able to take advantage of our other five facilities in the United States here, and to increase our harvest capacity in those plants.

We also temporarily moved team members around from plant—from that Kansas region up into our other facilities to increase our chain speed.

Senator GRASSLEY. Mr. Miller, you want to answer that question? Would you agree that these disruptions highlight the need for more competition?

Mr. MILLER. When we talk about competition, we welcome all the competition there is. There's small players. There's large players. As I said in my opening testimony and in the written testimony, the competition is intense. In fact, if you look at the announcements that have been made in the last 60 to 90 days, there's upwards of 8 to 10 thousand head of additional harvest capacity that's scheduled on our line over the next several years. We do welcome more competition.

Senator GRASSLEY. This will be my last question. You just said that you report data. As a matter of fact, it's not made public. Would you be okay with removing confidentiality blanket in those contracts?

Mr. MILLER. I'm sorry, Senator. Are you referring to——

Senator GRASSLEY. The——

Mr. MILLER [continuing]. The library of contracts? Are you reported—are you talking about reported trades?

Senator GRASSLEY. I'm talking about the fact that you say you report daily or maybe——

Mr. MILLER. That's right.

Senator GRASSLEY [continuing]. Twice a day all the data, including what's precontracted and any other arrangements you have. That information is not made public. It goes to the USDA. Would you be okay with removing the confidentiality blanket that's in these that keeps this information from being made public?

Mr. MILLER. I believe that is a question for the USDA and AMS Division to make a decision on that. I do believe confidentiality plays an important role in this too, especially if there's only one party that's negotiating or trading that specific day. We have to take confidentiality into consideration.

Senator GRASSLEY. Okay. I——

Senator KLOBUCHAR. Very good.

Senator GRASSLEY. Thank you.

Senator KLOBUCHAR. Thank you, Senator Grassley. On remotely, Senator Ossoff.

Senator OSSOFF. Thank you, Madam Chair. I want to thank you and Chair Durbin. I want to thank, in particular, Ranking Member Grassley for his leadership on this issue and for putting together a bipartisan coalition that's trying to get a fair shake for cattle

farmers in Georgia and in Iowa and across the country. Thank you, Ranking Member Grassley.

First question's for Mr. Larew. Mr. Larew, there are 15,000 cattle producers in the State of Georgia. While we're known for peaches and pecans, cattle is actually the fourth largest commodity from our State. While demand for beef has continued to grow, most cattle producers, like the 87 percent of Georgia cattle producers who have less than 100 head, don't know whether they will make or make lose money on their next calf crop.

My question for you, Mr. Larew, is what is the biggest barrier to establishing a more stable and profitable market for Georgia's cattle farmers and cattle farmers across the country?

Mr. LAREW. Very succinctly, it's a lack of competition, transparency, and really shining a light on things also like labels to make sure that consumers are not only being misled, that producers out there are able to market their product in a—in an open and truly truthful way. Right—I would say first, it's competition. We don't have fair competition right now. The rules of fairness need to be rebuilt. Then it's a question of transparency to add to that, and then labeling.

Senator OSSOFF. Thank you, Mr. Larew. Appreciate that. Mr. Schaben, as I said, there's about 15,000 cattle producers in Georgia, around a million farms nationwide, and they all compete against each other, but most of the livestock winds up going to one of just four packers. Mr. Schaben, who would you say has the biggest influence on the short-term demand for the cattle you sell? Is it consumers or is it someone else?

Mr. SCHABEN. On the short-term demand meaning—can you rephrase the question?

Senator OSSOFF. Yes. Who is driving the demand dynamics, and who is setting the prices for your products and the products of farmers in similar position?

Mr. SCHABEN. If it's about who's setting the prices, then that would fall directly to the end users. I mean, if you're a cow-calf producer, the one driving the price is the feeder that's bidding on them. The feeder's prices are derived from what they get from the packer. The packer's prices, we'd like to hope and think, are derived from the consumer and what they're willing to pay for beef. That's where we found a major impasse.

We have finally created this system that has our product selling so good, and in an event as COVID, and through that crisis, when people turned to what they knew, and they knew the best and bought all this beef product up and bought it so well, and that these prices on the retail level shot through the roof, the prices that the feeders received went down almost in reverse the same.

Then, of course—then the prices that they paid the cow-calf producers in your State and all the other cow-calf producers went down. There is a part in the system where it hasn't worked. When we talk about supply and demand, and I hear that all the time, the problem with the supply and demand issue is if too many of these cattle are forward contracted and at—and then we don't have an open, competitive cash market, it probably sets an artificial floor where the cash price is and probably sends dynamics down the system that really aren't truthful to the market.

Senator OSSOFF. Thank you, Mr. Schaben. Appreciate that. Mr. Slover, there have been recent widely covered events that have had a huge impact on the market for beef: the Tyson plant fire in 2019, the recent ransomware attack targeting JBS. When we have this kind of consolidation in the packing sector, what does that mean in terms of the impact on the market of these events that can have a huge impact at one facility or for one company?

Mr. SLOVER. It makes the supply chain more vulnerable to these disruptions. It points out starkly that the marketplace and competition means more than just a dry economic efficiency. It's a matter of severe consequences, potentially life and death.

I would also like to say in reference to your previous questions that it's the concentration in the middle of the supply chain. All of those points of starting with the packers and ending with the retailers—that's got the producers on one side and the consumers on the other suffering. They're bearing the brunt of the choke points along the rest of the chain. It's just a question of how those choke points are interacting with each other. The signals for demand at the consumer side are not making their way through to the producers at the supply side without interference by those choke points.

Senator OSSOFF. Thank you, Mr. Slover. Appreciate that. Certainly, my office is hearing from cattle producers in Georgia about the impact that concentration in the packing sector has on them. I want to thank you again, Ranking Member Grassley for convening this hearing, Chair Durbin, and Chair Klobuchar. Appreciate our panel's attendance, and I yield.

Senator KLOBUCHAR. Also Ranking Member Lee. We thank him. I will note, Senator Ossoff, you had the best lighting of any of our guests so far remotely. That was kind of——

Senator OSSOFF. Regards to Ranking Member Lee as well. Appreciate it. Thank you, Senator Klobuchar.

Senator KLOBUCHAR. Yes. We like——

Senator LEE. That really should come with a prize or——

Senator KLOBUCHAR. With the green. With the look. It was really—it was actually very good.

Senator LEE. Yes. It was good and very well done.

Senator KLOBUCHAR. Very well done. Okay. Senator Lee. Second round, I guess.

Senator LEE. Mr. Larew, we've heard from the meatpackers that they're already required by law to report, I think, twice each day to the U.S. Department of Agriculture the price they pay for all cattle and the price at which they sell. Is that right?

Mr. LAREW. Yes.

Senator LEE. If that's the case, why is that reporting not enough to ensure adequate price discovery?

Mr. LAREW. Most of what is actually reported does not show a true cash—or because cash is now such a small part of what ends up being reported, we don't have a true capture of where that market lies. Because we have such a large amount of that now captured by the AMAs, this actually has a loop effect. Not only does it have an effect of driving that cash price down, but then that gets built in to the AMAs because that's typically used as the base price, which then further erodes that cycle.

I would—if it would be okay, I would just draw to the Committee's attention—earlier there was a reference to a report from 2008 that talked about the benefits of an AMA from USDA and their Packers and Stockyards Program. There is a 2014 report which describes this process that we are now seeing with the increase of AMAs and the lack of transparency in those, the effect that that has on the cash price, and then that loop and eroding effect.

Senator LEE. Are there changes that can be made to the mandatory reporting requirements that would be more helpful—that would make it more helpful?

Mr. LAREW. Yes. First of all, I do believe that we need to make sure that we are increasing the amount of cash or spot market negotiations. I think that on top of that, bringing some light and transparency to the terms of these marketing agreements through a contract library would be very helpful.

Senator LEE. Mr. Schellpeper, these AMAs and contract cattle are said to encourage better quality animals and bring efficiencies into the system. Of course, the Government can't be in the business of mandating against efficiencies and quality. That being the case, all producers and feeders could probably make better business decisions if they had a reliable base price.

Can you tell me about what percentage of the cattle that JBS produces each week—what percentage comes from the cash market as opposed to cattle that come to you under contractual obligations?

Mr. SCHELLPEPER. Thank you, Senator. I don't have that particular piece of information in front of me on what that percentage is. I think it's important to note that when we talk about AMAs, that this is then a producer decision as well, that they have to——

Senator LEE. Wait. Why wouldn't you know that? I'm confused as to why you wouldn't know that information.

Mr. SCHELLPEPER. I don't have that information in front of me, Senator. I can certainly get back with you or your office with that information.

Senator LEE. Okay. You have a rough——

Mr. SCHELLPEPER. Yes, what we are——

Senator LEE [continuing]. Approximate guess?

Mr. SCHELLPEPER. We are—Senator, I would like to note that we are very active in the cash market. We're in the cash market every day. We're in numerous sale barns every day. We are also a very active participant in video markets. We are very much a supporter of the cash market, and we are an active participant. We have both AMAs and active participation in cash markets.

Senator LEE. Okay. Mr. Miller, what about—what about you? What percentage of the cattle Tyson purchases each week come from the cash market as opposed to cattle coming through contractual obligations? Did we lose you Mr. Miller?

Senator KLOBUCHAR. Senator Lee, hold on. Mr. Miller?

Mr. MILLER. Yes. I'm here. Can you hear me?

Senator LEE. Yes.

Senator KLOBUCHAR. Yes. Thank you.

Mr. MILLER. Not sure what happened there. All right. Sorry about that. Senator, thank you for the question. What I was saying was that, you know, the competitiveness of this marketplace—obviously with a competitor on this—in this hearing and this call, I

don't really want to divulge my specifics. I will say this. From a formula-based AMA perspective, over 50 percent of those cattle that we do purchase are under an AMA.

The other piece of this too that we're leaving out, another component that's in the negotiated trade are component—a by—I'll say it's a by-product of the negotiated trade, is our forward contracts. We do contract with specific producers because they want to have a risk management program in place to allow them to minimize their risk, but also from a banking perspective too, that if they're able to lock in a specific price on a forward contract they can go back to their bank and say, "Look. I have my cattle sold off in the futures market at X."

There are some other components to this too, hence the reason I don't want to give you specifics. I can certainly—we can certainly follow back up with you, Senator.

Senator LEE. In your opinion, would—would better price discovery and transparency benefit the producers and feeders who are left out of the AMAs and other contract pricing?

Mr. MILLER. I think one thing—AMAs do not lock out any supplier to selling to Tyson. We'll put together an AMA with anyone. I think that the negativity that's being cast on the AMAs is not accurate. They do give producers a forward look of what the value of their cattle are going to bring. But they do not lock them. We don't say, "If you're a smaller producer, you can only bring 100 head. We're not going to put you on an AMA." That's not true.

Senator LEE. Okay. Thank you.

Mr. MILLER. You're welcome.

Senator KLOBUCHAR. Thank you. Do you have anything else, Senator Grassley, follow-up? Okay. I just have one or two very——

Senator GRASSLEY. Oh. Hey, there is one thing I wanted you to see.

Senator KLOBUCHAR. Oh, of course. Yes. Okay. You see——

Senator GRASSLEY. Unanimous consent to add to the record a letter from R-CALF USA.

[The information appears as a submission for the record.]

Senator KLOBUCHAR. Okay. So be added. Just quickly, Mr. Larew, Secretary Vilsack—I know he was recently in your State, Mr. Schaben, with—and talking about his home State, some of the things the USDA can do that are contained in the President's executive order on competition. Do you want to elaborate a little bit on that?

Mr. LAREW. Yes. Absolutely. I appreciate it. We are excited and hopeful that the President's executive order will provide some movement forward in this space. First of all, the Packers and Stockyards Act that's been mentioned a few times today is celebrating its 100th birthday in just a matter of days and yet has really kind of been eroded in terms of enforcement and really good fair protections for family farmers and ranchers.

USDA has signaled that they will begin rulemaking to address some key challenges within the Packers and Stockyards Act and to provide protections for growers out there. We see major problems in contract growers of poultry. We see challenges within the hog industry and certainly within the beef industry as well. Bringing greater clarity for what are unfair practices, bringing greater cer-

tainty for protections, including protections against retaliation against some of these players.

They also in that executive order have clarified that they will be looking at labels such as product of the USA, which right now in meat products can be used even if it contains foreign meat. As long as those products has been partially modified, once they are imported, they are able to use the product of the USA label.

We certainly feel, and I think most family farmers and ranchers believe, that this is a—is not only anticompetitive but for—from the consumer's point of view is an egregious failure to provide truthfulness in labeling.

We're encouraged by these actions and certainly would encourage additional action to bring competition to this marketplace.

Senator KLOBUCHAR. Mr. Smith back there, we haven't heard from you a little bit. Just sort of the same type of question, not on rulemaking necessarily but just what you see as a solution for some of the grocer issues you raised.

Mr. SMITH. Thank you, Senator. Yes. Certainly, I'm a grocer. All we're asking for is a level playing field. Robinson-Patman, we thought, should ensure that we get fair terms and fair prices for the same product. What we're dealing with is that it's gone unenforced. We really see nothing that is stopping the continued increase of market power by those power buyers. It's the same thing. It's transparency and fairness and an equal opportunity. That's all we're asking for.

Senator KLOBUCHAR. Okay. Very good. Thank you. Maybe we end with Mr. Slover because you mentioned my bill a few times as well as Senator Grassley and Senator Lee's bill. Just the idea, as we look at targeted approaches, from the meatpacking discussions we've had today to pharma, where there is bipartisan work being done there and has been done, especially with the two people right here sitting with me and also on Tech.

At the same time, if we want to get at some of this consolidation overall, the virtue of doing at least some changes that would help us with consolidation in general to make it easier to bring these cases—because I view this as pro-competition going way back to Adam Smith, who always warned about—as he talked about the invisible hand and the importance of capitalism. He literally, from the beginning of our country, warned about the unbridled army of monopolies and what could happen if we let that go.

Could you just talk briefly about the importance of making some changes that would be more comprehensive to make it easier to bring some of these cases, not just to—in the food industry or grocers as just discussed, but in general?

Mr. SLOVER. Yes. Thank you, Senator. Two things that I highlighted in my written statement that are in your bill, one of them would strengthen merger enforcement by focusing on the largest mergers and creating presumptions that are—have been recognized in the courts before but aren't recognized as often as they should be to have the merging parties justify that their mergers are not going to cause harm.

The other one that I highlighted in my testimony is strengthening the laws against abuse by dominant corporations closing off competition by sabotaging essentially the competitive efforts of

their rivals and making that be able to reach more clearly to all of the dominant firms that have that power.

Then very briefly, I would just like to piggyback on what Mr. Larew said, that we are all in favor of country-of-origin labeling. Consumers want to know where their food is coming from as well. Thank you.

Senator KLOBUCHAR. Okay. Very good. I just think, to my colleagues, as we forge ahead here and look at some of these specific industries, we also should try to find common ground on some of these changes we can make in general to the laws because then it's going to be another industry, and then it's going to be online travel, and then it's going to be something else because I think if we get the resources to the agencies, shift the burden in these biggest cases, and make some changes that I truly don't think will be radical and will help the vast majority of businesses, it's going to take some leap of faith because everyone's going to have business that won't like it.

Then when you really push it, I think they're going to tell you that, you know, they can survive in a competitive market. I think that is our challenge and our burden as we go forward here. This has been a fantastic hearing. Thank you for staying to the end, Senator Cotton. You get the prize.

[Laughter.]

Also, just thank you to Senator Grassley, Senator Durbin, Senator Lee, and really everyone that took part in this. I hope you saw the best of a spirited discussion, some different views but also some commonalities. That's what we're really trying to carve out here in this area of competition, so we can find some areas where we can work together.

Thank you all. We're going to keep the record open for this hearing for a week until August 5th, 2021. We welcome further questions, comments, or anything you want to say.

With that, I'm going to have to reach over to adjourn the hearing. The hearing is adjourned.

[Whereupon, at 5:03 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

**TESTIMONY OF ROB LAREW**
**President**
**National Farmers Union**

SUBMITTED TO THE U.S. SENATE COMMITTEE ON THE JUDICIARY

"Beefing up Competition: Examining America's Food Supply Chain"
July 28, 2021

226 Dirksen Senate Office Building
Washington, D.C.

Chairman Durbin, Ranking Member Grassley, members of the committee, thank you for the opportunity to testify today.

My name is Rob Larew, and I serve as the president of National Farmers Union, a grassroots organization that advocates on behalf of family farmers and ranchers and rural communities. Founded in 1902, today NFU represents approximately 200,000 farmers across the country whose operations range in size, type, and production method.

NFU's policy book, established annually at our national convention by our members, states that "inadequate market competition is one of the most pressing issues facing producers across the country." Today, most sectors in America's farm and food system are heavily consolidated and dominated by a small handful of multinational corporations. As a direct result, farmers have been deprived choices, innovation, fair prices, and fair treatment.

While farm families have paid a steep price for these structural shifts, there are also broader consequences for national security and the health, safety, and economic wellbeing of all communities.

The COVID-19 pandemic and several other recent events, including the Holcomb, Kansas, meat packing plant fire and the hacking of JBS computer systems, laid bare the fragility underlying our current farm and food system. The inadequate market competition we face today must be addressed to protect our family farms and all the communities that depend on them for food, fiber, and fuel.

To ensure a more resilient food supply for consumers and a competitive marketplace for family farmers and ranchers, there are several steps that must be taken. Across the economy, there must be more scrutiny of buyer power, and regulators must consider the need for robust competition at all links of the supply chain. In the meat and poultry sector, rules must be implemented that reinvigorate the Packers and Stockyards Act (PSA), clearly delineate prohibitions on packers under the PSA, and create needed protections for farmers under contract. Market participants must be provided with reliable information through mandatory price reporting and accurate labeling. Furthermore, federal and state governments should invest in supporting more market competition in marketing and processing to build a more resilient livestock sector and to ensure greater value accrues to local and regional food systems.

**The state of competition in America's farm and food supply chain**

Today, a small handful of dominant firms control the market for most farm inputs (such as seed, crop protection, fertilizer, and in equipment manufacturing), processing (including livestock slaughter and processing), food manufacturing, wholesale distribution, food service, and retail grocery. Family farmers and consumers sit on either end of this consolidated supply chain and are comparatively numerous and decentralized. Thus, the small set of large, consolidated firms in the middle of the supply chain wield immense market power, as oligopolists or oligopsonists (and in fewer cases as monopolists or monopsonists), compared to farmers and consumers.

The incentives for firms to merge or acquire rivals are strong, since getting bigger can increase bargaining power relative to customers and suppliers. Firms also gain market power through vertical integration, where they control multiple links in the supply chain to their advantage. Consolidation, both horizontally and vertically, can help firms exclude smaller rivals from accessing markets, increase barriers to enter markets and compete, and create the conditions for large rivals to work together to manipulate markets to their shared advantage.

The trend toward greater consolidation of our farm and food system is striking. The four-firm concentration ratios (CR4), a commonly used metric for illustrating market concentration that specifies the market share for the top four firms in an industry, has risen precipitously among meat packers and poultry processors. Between 1977 and 2018, the CR4 for beef packers slaughtering steers and heifers rose from 25 to 85 percent[1]; for pork, the CR4 rose from 33 percent in 1976 to 70 percent in 2018[2]; for broiler chickens, the CR4 rose from 34 percent in 1986 to 54 percent in 2018.[3] [4] While the magnitude of national-level industry consolidation may be lower for broilers, concentration is often higher in more localized markets.[5]

The trend toward increasing consolidation and declining competition is stark in other sectors as well. As of 2015, the top four firms for corn and soybean seeds controlled 85 percent and 76

[1] Cai, X., K. W. Stiegert, and S. R. Koontz, "Oligopsony Fed Cattle Pricing: Did Mandatory Price Reporting Increase Meatpacker Market Power?" Proceedings of the NCCC-134 Conference on Applied Commodity Price Analysis, Forecasting and Market Risk Management. St. Louis, MO. https://legacy.farmdoc.illinois.edu/nccc134/conf_2011/pdf/confp24-11.pdf

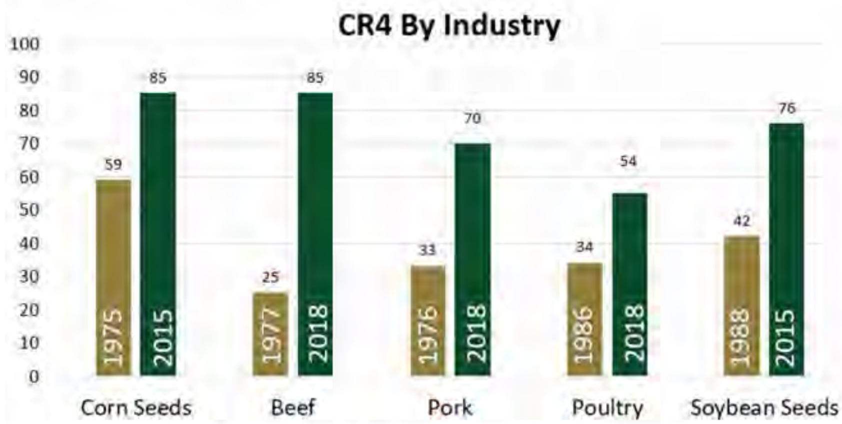
[2] Clement E. Ward, "Economics of Competition in the U.S. Livestock Industry," January 2010. https://www.justice.gov/sites/default/files/atr/legacy/2011/09/09/AGW-15639-a.pdf

[3] Joel Greene, "USDA's 'GIPSA Rule' on Livestock and Poultry Marketing Practices." (Washington: Congressional Research Service, 2016), https://www.everyersreport.com/files/20160107_R41673_e1d67b445c928f46a6b23a04c38d116fdb819c93.pdf

[4] USDA, Agricultural Marketing Service (AMS), Packers and Stockyards Division, "Annual Report 2019." https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf

[5] James M. MacDonald, "Technology, Organization, and Financial Performance in U.S. Broiler Production" (U.S. Department of Agriculture Economic Research Service, 2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0

percent of the market, respectively; this compares to 59 percent for corn seed in 1975, and 42 percent for soybean seed in 1988.[6] [7] Four firms account for approximately 84 percent of the global herbicide and pesticide market,[8] and just two companies manufacture about half of the tractors and other essential farm machinery used by farmers.[9] Market share in retail grocery is also heavily consolidated, with the top four retailers controlling approximately 65 percent of sales in 2018.[10] As corporate consolidation of our food system has marched steadily forward, farmers have watched their choices and their market power dwindle.




*Data compiled by the National Farmers Union from multiple sources

The rise in consolidation and decline in competition we see today in America's food supply chain has several explanations. In part, the issue has been the result of a shift in thinking regarding the interpretation of our existing antitrust laws.[11] This, in turn, has led to anemic merger enforcement across the supply chain. As companies have gotten larger and competition

[6] Jorge Fernandez-Cornejo, "The Seed Industry in U.S. Agriculture: An exploration of data and information on crop seed markets, regulation, industry structure, and research and development," *USDA Economic Research Service*, https://www.ers.usda.gov/webdocs/publications/42517/13616_aib786_1_.pdf?v=3857.1

[7] James MacDonald, "Mergers and Competition in Seed and Agricultural Chemical Markets," *USDA Economic Research Service*, 2017, https://www.ers.usda.gov/amber-waves/2017/april/mergers-and-competition-in-seed-and-agricultural-chemical-markets/

[8] Claire Kelloway and Sarah Miller, "Food and Power: Addressing Monopolization in America's Food System," *Open Markets Institute*, May 13, 2019. https://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system

[9] Ibid.

[10] CBRE, "2019 U.S. Food In Demand Series: Grocery," May 2019.

[11] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, 2018.

has declined, anticompetitive conduct by dominant firms has received insufficient scrutiny.[12] Additionally, with respect to livestock and poultry, the Packers and Stockyards Act (PSA) has seen significant failures in enforcement.[13] And despite direction from Congress in the 2008 Farm Bill to develop new rules to clarify the PSA, the more robust rules that were promulgated – the "Farmer Fair Practices" rules – were either not finalized or shelved,[14] and a subsequent rule that was finalized provides no meaningful protections for farmers.[15]

**Examining competition in the livestock and poultry sectors**

While there are some important differences between the structure of the industries that produce cattle, hogs, and poultry, farmers and ranchers raising these livestock all face a shared challenge: slaughter and processing sectors that are more concentrated today than they were several decades ago. These industries are also more vertically integrated, eroding farmers' control over their livelihoods. Furthermore, farmers and ranchers face thinning or nonexistent cash markets, which can hamper price discovery and suppress prices.

*Competition problems facing cattle producers*

Corporate consolidation in the beef packing industry was a severe problem in the early 1900s, which precipitated antitrust enforcement that resulted in more competitive markets in beef slaughter and processing. But in the mid-1970s, the trend shifted back toward greater concentration with the consummation of a slate of mergers and acquisitions. Whereas the top four beef packing firms accounted for about 25 percent of the market for steer and heifer slaughter in the 1970s, by 1990, the top four firms controlled approximately 70 percent of the market. During this same period, the number of cattle feeding operations in the top 13 cattle feeding states declined approximately 40 percent, despite a relatively stable number of fed cattle marketed during this period.[16]

[12] Diana L. Moss and Laura Alexander, "When COVID-19 is the Symptom and Not the Disease: Consolidation, Competition, and Breakdowns in Food Supply Chains," *American Antitrust Institute*, May 7, 2020.
[13] United States Government Accountability Office (GAO), Testimony before the Committee on Agriculture, Nutrition, and Forestry, United States Senate, "Packers and Stockyards Programs: Continuing Problems with GIPSA Investigations of Competitive Practices," March 9, 2006. https://www.gao.gov/assets/gao-06-532t.pdf
[14] National Farmers Union, "NFU Deeply Disappointed by USDA Decision to Terminate Farmer Fair Practices Rules," October 17, 2017. https://nfu.org/2017/10/17/nfu-deeply-disappointed-by-usda-decision-to-terminate-farmer-fair-practices-rules-2/
[15] National Farmers Union, "Rule Fails to Protect Farmers from Discriminatory Practices, According to Farmers Union," December 10, 2020. https://nfu.org/2020/12/10/rule-fails-to-protect-farmers-from-discriminatory-practices-according-to-farmers-union/
[16] United States General Accounting Office, "Beef Industry: Packer Market Concentration and Cattle Prices," December 1990, GAO/RCED-91-29. https://www.gao.gov/assets/rced-91-28.pdf

Today, just four companies control most of the beef slaughter and processing. While vertical integration in beef has not been as pervasive as in the hog and broiler chicken industries, the large beef packers have incorporated more processing activities into their own operations. There has also been a shift toward greater alternative marketing arrangements and a thinning cash or spot market, that give packers greater control over the cattle supply. AMAs in the form of formula pricing averaged nearly 65 percent of total fed cattle procurement, compared to about 45 percent a decade earlier. By comparison, the negotiated grid and cash market for fed cattle declined to an average of about 24 percent nationally in 2019, compared to over 45 percent in 2009.[17]

Heavy corporate consolidation in beef packing, and the shift toward fewer, very large plants, makes the industry more vulnerable to shocks. This puts producers at greater risk of experiencing lower prices and consumers are more likely to see high prices at retail. In the weeks and months following the fire that shut down the Tyson beef packing plant in Holcomb, Kansas, in August 2019, and following disruptions caused by the COVID-19 pandemic in 2020, the spread between the Choice boxed beef cutout values and fed cattle prices reached record levels.[18] This means that packers were purchasing cattle at relatively low prices and selling them for relatively high prices. Additionally, in July 2020, the price received for steers and heifers dropped to a recent historic monthly low, below $100 per cwt, which had not happened at any other time over the period from 2012 to the present.[19]

While many variables influence the prices for farm products and the retail cost of food, the large price swings caused by recent disruptions are in large part a function of disrupted supply chains. The vulnerability of these supply chains to shocks is a feature of the extreme concentration in the middle of the supply chain between farmers and consumers. The rapid consolidation of packing and processing, driven by mergers and acquisitions by the Big Four, made the supply chain prone to breakdowns and bottlenecks. This, in turn, put more pressure on farmers and ranchers, who often operate on razon-thin margins. Significant price declines and volatile markets can threaten their livelihoods.

Ultimately, this confluence of factors – fewer meatpackers, vertical integration, a thinning cash market, which would typically assist with price discovery, and a hyper-concentrated supply

[17] USDA, Agricultural Marketing Service (AMS), Packers and Stockyards Division, "Annual Report 2019." https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf
[18] USDA Agricultural Marketing Service (AMS), "Boxed beef and fed cattle price spread investigation report," July 22, 2020. https://www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf
[19] USDA, NASS, "Prices Received: Cattle Prices Received by Month, US," June 30, 2021. https://www.nass.usda.gov/Charts_and_Maps/Agricultural_Prices/priceca.php

chain vulnerable to shocks – leaves producers at a significant disadvantage relative to the packers.

*Competition problems facing pork and broiler (chicken) producers*

The term "chickenization" is used to refer to increasing vertical integration and the trend for companies to maintain near total control over all stages of their supply chain. While these structural shifts initially occurred in broiler chicken production and are most extensive in that industry, the challenges facing hog farmers and contract poultry growers have many similarities. Hog and poultry growers alike have faced large increases in processor buyer power due to increasing industry concentration, the vertical integration of supply chains, and the dominance of production contracts. Hogs produced under contract effectively doubled from 34 percent in 1996/1997 to 63 percent in 2017.[20] The remainder were raised by packer-owned and operated feedlots.[21] Contracting is even more prevalent in broiler chickens, where by 2011, 97 percent of broiler chickens were raised on contract operations.[22] Both of these sectors also feature thinning or nonexistent cash markets, which may hamper price discovery. By 2014, negotiated cash markets for hogs had effectively vanished,[23] and there is practically no cash market for poultry.

The problems with production contracts are best known and documented in broiler chicken production. For broilers grown under production contracts, integrators control the inputs provided to the grower, including live chicks, feed, and medication, and dictate transportation and processing. Specifications for grow houses and equipment are set in contracts, and integrators typically retain the right to require updates to these facilities. The grower typically provides housing, equipment, labor, and fuel – at their own risk – to grow out the birds. The payment received by poultry growers for their birds is typically determined by a tournament, or grower ranking system, even though growers have no control over the inputs and conditions that determine the quality of the birds they grow.[24]

[20] "America's Diverse Family Farms: 2018 Edition," *USDA, Economic Research service*, EIB 203, December 2018, https://www.ers.usda.gov/webdocs/publications/90985/eib-203.pdf?v=9520.4

[21] Zoe Willingham and Andy Green, "A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America," May 7, 2019, https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/

[22] James M. MacDonald, "Technology, Organization, and Financial Performance in U.S. Broiler Production" (U.S. Department of Agriculture Economic Research Service, 2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=0

[23] Mathews, Brorsen, Hahn, Arnade, and Dohlman, "Mandatory Price Reporting, Market Efficiency, and Price Discovery in Livestock Markets," *USDA, Economic Research Service (ERS)*, LPDM-254-01, September 2015.

[24] C. Robert Taylor and David A. Domina, "Restoring Economic Health to Contract Poultry Production," May 13, 2010 – prepared for the joint DOJ and USDA Public Workshop on Competition Issues in the Poultry Industry, May 21, 2010, Normal, AL.

Even though the broiler industry does not appear as consolidated at the national level as some other livestock markets, lack of competition is evident at more localized levels. More than half of all poultry farmers report having only one or two poultry integrators in their area with whom they can contract their services. In 2011, 21.7 percent of growers reported only having one integrator in their area. Research by USDA using 2006 ARMS broiler survey data indicated that integrators in highly concentrated local markets exercise local monopsony power, driving down pay for contract poultry growers. Markets with only one integrator experienced receiving pay about 8 percent lower, on average, compared to growers in markets with four or more integrators.[25] There is documented evidence of monopsony power in hog processing as well, which results in diminished pay for producers,[26] and might even have resulted in the demise of relatively large firms.[27]

*Price-fixing in the livestock and poultry industries*

Concentrated market structures also increase opportunities for market manipulation and coordinated behavior. There has been a spate of price fixing litigation brought against major livestock industry companies since 2016, with multiple indictments and guilty pleas. Allegations have touched all three major meat sectors – beef cattle, pork, and broiler chickens.

Accusations of collusion began to shadow the broiler chicken industry in late 2016 with the filing of the Maplevale lawsuit. [28] The suit alleged that large poultry companies coordinated prices between 2008 and 2016, resulting in a 50 percent price increase for broiler chickens, despite a roughly 20 to 23 percent decrease in input costs over the same period.[29] There have been several follow-on suits from other companies that purchase poultry making the same allegations.

The Department of Justice (DOJ) later intervened in the Maplevale case, and in June 2020 the first indictments of chicken-industry executives related to the case were announced.[30] In

[25] https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=
[26] Zoe Willingham and Andy Green, "A Fair Deal for Farmers: Raising Earnings and Rebalancing Power in Rural America," May 7, 2019, https://www.americanprogress.org/issues/economy/reports/2019/05/07/469385/fair-deal-farmers/
[27] Sarah Mock, "How does one of the world's biggest pork firms go bust during a boom?" October 27, 2020. https://www.theguardian.com/environment/2020/oct/27/how-does-one-of-the-worlds-biggest-pork-firms-go-bust-during-a-boom
[28] Maplevale Farms, Inc. vs. defendants; case: 1:16-cv-08637, United States District Court for the Northern District of Illinois, https://www.locklaw.com/wp-content/uploads/assets/090216-complaint-maplevale-farms.pdf
[29] Leah Douglas, "Justice Dept. intervenes in major poultry price-fixing case," *FERN*, June 24, 2019.
[30] Brent Kendall and Jacob Bunge, "Chicken Industry Executives, Including Pilgrim's Pride CEO, Indicted on Price-Fixing Charges," *Wall Street Journal*, June 3, 2020. https://www.wsj.com/articles/chicken-industry-executives-including-pilgrim-s-pride-ceo-indicted-for-price-fixing-11591202113

October 2020, Pilgrim's Pride, which is majority owned by JBS, plead guilty to one count of conspiracy in restraint of competition, and agreed to pay a fine of $110.5 million.[31] Additional settlements by chicken companies about price-fixing claims followed,[32] and an indictment, of Claxton Poultry Farms, followed in May 2021.[33]

Multiple lawsuits were also brought against beef packers[34] and the pork industry[35] in August 2019. In the case of pork, multiple settlements were subsequently announced, including $24.5 million from JBS in December 2020, another $20 million in March 2021, and $12.75 million in April 2021. It was announced in June 2021 that Smithfield Foods would pay $83 million to settle its case.[36]

These instances of market manipulation are a symptom of concentrated markets. While the pursuit of these cases by federal regulators is a welcome development, the need for these actions is a product of under-enforcement of existing antitrust laws.

**The COVID-19 pandemic and disruptions to supply chains**

Livestock slaughter and processing is heavily consolidated. Today, there are approximately 835 federally inspected slaughter facilities and 1,938 other slaughter facilities in the United States.[37] In 1968, there were nearly 10,000 total slaughtering establishments across the country.[38] As the number of plants decreased, many remaining plants have become bigger; for example, just 50

[31] Pilgrim's Pride Corporation, Quarterly Report Pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934, for the period ended September 27, 2020. https://ir.pilgrims.com/static-files/4f802b29-38d5-4474-8581-6a12d0b545b1?source=email
[32] Lillianna Byington, "Pilgrim's Pride pleads guilty to price fixing with DOJ and agrees to pay $108M fine," *FoodDive*, January 11, 2021, updated February 24, 2021. https://www.fooddive.com/news/pilgrims-pride-to-pay-75m-price-fixing-settlement-to-chicken-buyers/593154/
[33] Department of Justice, "Broiler chicken producer indicted for price fixing and big rigging," May 20, 2021. https://www.justice.gov/opa/pr/broiler-chicken-producer-indicted-price-fixing-and-bid-rigging
[34] Leah Douglas, "Multiple lawsuits allege price-fixing by big beef companies," *FERN*, October 28, 2019. https://thefern.org/ag_insider/multiple-lawsuits-allege-price-fixing-by-big-beef-companies/
[35] Leah Douglas, "More antitrust lawsuits hit the meat industry. This time, it's pork," *FERN*, November 7, 2019. https://thefern.org/ag_insider/more-antitrust-lawsuits-hit-the-meat-industry-this-time-its-pork/
[36] Jessi Devenyns, "Smithfield Foods will pay $83M to settle pork price-fixing claims," *FoodDive*, Nov 6, 2020, updated June 30, 2021. https://www.fooddive.com/news/jbs-settles-a-portion-of-pork-price-fixing-lawsuit/588514/
[37] "Livestock Slaughter: 2019 Summary," *USDA National Agricultural Statistics Service (NASS)*, April 2020, https://downloads.usda.library.cornell.edu/usda-esmis/files/r207tp32d/34850245n/5712mr72x/lsan0420.pdf.
[38] "Livestock Slaughter: 1969," *USDA Statistical Reporting Service*, April 1970. https://downloads.usda.library.cornell.edu/usda-esmis/files/r207tp32d/ht24wp48q/9k41zj37t/LiveSlauSu-04-00-1970.pdf

plants slaughter and process 98 percent of all cattle in the United States.[39] While these larger plants may create certain efficiencies, they also create serious supply chain vulnerabilities.

During the COVID-19 pandemic, extreme concentration in agricultural supply chains was most evident in the disruption in the meat and poultry industries, where the closures or slowdowns at several massive meatpacking plants resulted in lost markets for farmers, constrained supplies, and higher prices for consumers. As of June 16, 2021, nearly 60,000 meatpacking plant workers at 574 meatpacking plants tested positive for COVID-19.[40] Many of these cases were part of outbreaks that led to temporary closures, greatly reducing processing capacity. At the peak of closures, beef and pork facilities were operating at 25 percent[41] and 40 percent[42] below average, respectively. This bottleneck stranded farmers with animals that were market-ready but had nowhere to go, leading to euthanized animals and depressed prices.

A telling example of the potential consequences of supply chain vulnerabilities, even before the COVID-19 pandemic, was the fire that shut down operations at Tyson Foods' Holcomb, Kansas, beef processing plant for months. The plant at the time ranked as one of the eight largest plants in the United States in terms of daily harvest capacity; the fire eliminated approximately 30,000 head per week of capacity. While the company was ultimately able to shift some production to other plants, the event precipitated market reactions that lowered prices paid to ranchers, and increased prices for consumers, for several months.[43] [44]

A more recent demonstration of supply chain vulnerabilities was the cyberattack in late May and early June of 2021 that shuttered plants operated by the world's largest meat processor. JBS, which controls approximately one fifth of U.S. cattle slaughter, was hacked by a Russian-based ransomware group, forcing all nine of its beef plants in the U.S. offline.[45] JBS's poultry

[39] Michael Corkery and David Yaffe-Bellany, "The Food Chain's Weakest Link: Slaughterhouses," *The New York Times*, April 18, 2020, https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html.
[40] Leah Douglas, "Mapping COVID-19 outbreaks in the food system," *Food and Environment Reporting Network*, April 22, 2020, accessed June 16, 2021, https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/
[41] Laura Reiley, "Meat processing plants are closing due to COVID-19 outbreaks. Beef shortfalls may follow." *The Washington Post*, April 16, 2020, https://www.washingtonpost.com/business/2020/04/16/meat-processing-plants-are-closing-due-covid-19-outbreaks-beef-shortfalls-may-follow/
[42] Laura Reiley, "Tyson says nation's pork production is down 50%, despite Trump's order to keep meat plants open," *The Washington Post*, May 4, 2020, https://www.washingtonpost.com/business/2020/05/04/tyson-says-nations-pork-production-is-down-50-despite-trumps-order-keep-meat-plants-open/
[43] "The smoldering impact of Tyson's Holcomb fire," *Meat+Poultry*, October 14, 2019. https://www.meatpoultry.com/articles/22036-the-smoldering-impact-of-tyson-holcomb-fire
[44] Elliott Dennis, "A historical perspective on the Holcomb fire: Differences and similarities to the COVID-19 situation and other significant market events," September 11, 2020, https://farm.unl.edu/historical-perspective-holcomb-fire-differences-and-similarities-covid-19-situation-and-other
[45] Rebecca Robbins, "Meat processor JBS paid $11 million in ransom to hackers," *New York Times*, June 9, 2021. https://www.nytimes.com/2021/06/09/business/jbs-cyberattack-ransom.html

and pork plants were disrupted as well.[46] While the long-term effects of this break in the supply chain are yet to be fully felt and understood, market analysts reported anticipating higher consumer prices and backlogs that would negatively impact ranchers.[47]

While many meat processing plants were shuttered or had reduced capacity during the pandemic due to outbreaks among workers, dairy processing was impacted by COVID-19 because unprecedented demand shifts emerged nearly overnight in March 2020. Consumer spending on food away from home plummeted as restaurants and food service facilities were closed, and demand for more traditional at-home dairy products spiked.[48] The relative efficiencies of the dairy supply chain were a liability during these times, and even with extremely high demand for some products there was very little demand for others. Backlogs ensued, and 2.5 percent of all milk produced in the U.S. in April 2020, or about 40.6 million gallons, was dumped. At the same time, in late spring and early summer of 2020, farm prices for milk dipped while retail prices rose.[49]

**Reliable, accurate, and robust market information**

Fair and competitive markets rely upon transparency and equitable access to reliable and accurate information. For farmers and ranchers to bargain effectively with packers and integrators, they need true price transparency in the marketplace. For consumers to make informed choices about the food they are buying, labels need to accurately represent the nature of the product. We must address current shortcomings related to price discovery and reporting in the livestock and poultry sectors, as well as inaccurate origin labeling.

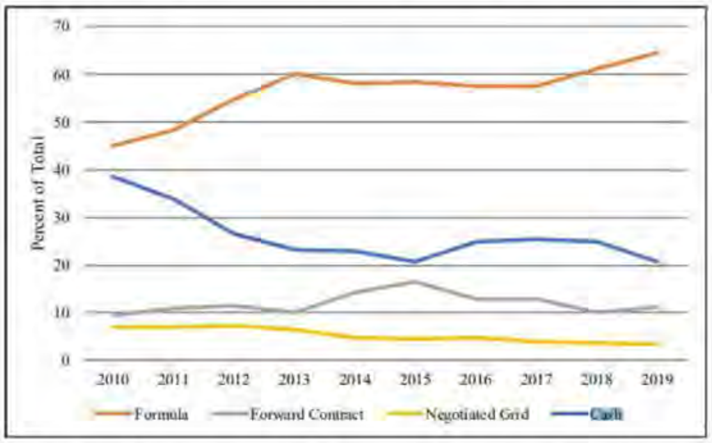
*Price transparency, discovery, and reporting*

Fed cattle procurement has continued to trend toward formula pricing and other alternative marketing arrangements (AMAs), and away from the cash market. Congress passed the Livestock Mandatory Reporting Act (LMRA) in 1999 in response to concerns about AMAs as well

[46] Julie Creswell, Nicole Perlroth and Noam Scheiber, "Ransomware disrupts meat plants in latest attack on critical U.S. business," *New York Times*, June 1, 2021.
[47] Jacob Bunge, "Meat buyers scramble after cyberattack hobbles JBS," *Wall Street Journal*, June 2, 2021. https://www.wsj.com/articles/meatpacker-jbs-hit-by-cyberattack-affecting-north-american-australian-operations-11622548864
[48] USDA Economic Research Service, "COVID-19 Economic Implications for Agriculture, Food, and Rural America," accessed June 15, 2021. https://www.ers.usda.gov/covid-19/food-and-consumers/
[49] Christopher A. Wolf, Andrew M. Novakovic, and Mark W. Stephenson, "COVID-19 and the U.S. Dairy Supply Chain," *Choices*, Quarter 3. https://www.choicesmagazine.org/choices-magazine/theme-articles/agricultural-market-response-to-covid-19/covid-19-and-the-us-dairy-supply-chain

as rising concentration in the meat packing industry. LMRA resulted in mandatory price reporting (LMR) of most transactions for livestock, and it has been renewed and amended multiple times.[50] While LMR has been beneficial for price discovery in general, the continued erosion of the cash market for cattle is undermining its benefits. There is also relatively little price transparency in hogs and poultry, where cash markets have dwindled further, or been eliminated altogether.

**Figure 2. Fed Cattle Procurement by Purchase Type, 2010–2019**




*From: USDA, Agricultural Marketing Service (AMS), Packers and Stockyards Division, "Annual Report 2019."

USDA has determined that on a week-to-week basis, higher levels of AMA procurement is associated with lower negotiated cash prices. Ultimately, AMA prices are also negatively impacted, because many packer pricing formulas and contract prices are based on cash markets prices. This trend toward thinner and thinner cash markets is eroding cash and AMA prices alike.[51]

It is not surprising that packers prefer AMAs, because they can reduce procurement and transaction costs and allow plants to operate closer to capacity more consistently. AMAs can also help sellers lock in prices, guarantee market access, and reduce transaction costs. Yet, the fact that AMAs are eroding price discovery and depressing cash market prices for fed cattle (and in turn, AMA prices), should be cause for concern. The near elimination of a cash market

[50] Mathews, Brorsen, Hahn, Arnade, and Dohlman, "Mandatory Price Reporting, Market Efficiency, and Price Discovery in Livestock Markets," *USDA, Economic Research Service (ERS)*, LPDM-254-01, September 2015.
[51] USDA, Grain Inspection, Packers and Stockyards Administration (GIPSA), "Investigation of Beef Packers' Use of Alternative Marketing Arrangements," July 2014.

for hogs, and the complete elimination of a cash market for poultry – and the negative implications for growers – should also give cattle market participants pause.

*Truth In Labeling*

Fair and competitive markets also require product labels that are truthful. A supply chain that contains false or misleading product labels puts domestic producers at a competitive disadvantage while preventing consumers from making fully informed decisions about the products they buy. Farmers and ranchers want to provide consumers with accurate information about the origins of the food they purchase and consume, and federal labeling laws should support farmers in achieving that goal.

Moreover, consumers consistently express a desire to know the origin of their food. A 2017 poll demonstrates that 89 percent of a representative sample of American adults favored requiring retailers to indicate on the package label the country of origin of fresh meat they sell.[52] Furthermore, 88 percent of adults favored requiring food sellers to indicate on the package label the country or countries in which animals were born, raised, and processed.[53] More recently, a survey of a representative sample of American adults showed that 87 percent of American think that beef and pork should have a label listing its country of origin, with fairly consistent support across age groups, party identification, and areas of residence (rural, suburban, and urban).[54]

NFU has been a stalwart proponent of mandatory country-of-origin labeling (COOL) for meat. NFU policy states that mandatory COOL "is a valuable marketing tool for producers, and it allows consumers to know where the meat products they consume are born, raised, slaughtered, and processed."[55] NFU also supports the mandatory COOL rules in effect for other agricultural products, such as dairy, produce, honey, and nuts.
Truthful and accurate voluntary labels are important to producers and helpful for consumers, but voluntary labeling is not a replacement or substitute for mandatory COOL. The misuse of voluntary product label claims, including "Product of USA" and "Made in USA," are highly misleading to consumers and financially injurious to family farmers and ranchers.

[52] Consumer Federation of America. "Large Majority of American Strongly Support Requiring Origin Information on Fresh Meat." July 24, 2017. https://consumerfed.org/press_release/large-majority-of-americans-strongly-support-requiring-origin-information-on-fresh-meat/
[53] Ibid.
[54] Lake Research Partners. "Results from a National Online Survey Around Rural and Agricultural Issues." Designed by Lake Research Partners, administered by CARAVAN in a national online omnibus survey. Conducted July 20-31, 2020, using a demographically representative sample of Americans 18 years of age or older.
[55] National Farmers Union, *Policy of the National Farmers Union*, March 2019.

Currently, the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) Food Standards and Labeling Policy Book presents standards that do not require a meat product to be born, raised, and slaughtered in the U.S. to be labeled "Product of USA."[56] The standard allows imported animals that are processed in the U.S. at USDA-inspected slaughter facilities to be labeled as "Product of USA." Due to the significant number of cattle imported from Canada and Mexico, many beef products of foreign origin are being represented with some variation of a "Made in USA" claim.

In response to a petition submitted by U.S. Cattlemen's Association in October 2019, FSIS stated that:

> *"Permitting imported meat products that are further processed in a federally-inspected establishment to be labeled 'Product of USA' may be misleading to consumers and may not meet consumer expectations of what 'Product of USA' signifies. FSIS also agrees that to address these issues, the Agency needs to establish clear parameters that prescribe which meat product may voluntarily be labeled with U.S. origin statements, such as 'Product of USA' or 'Made in USA.'"*[57]

Thus, the standard used by USDA-FSIS to regulate the labeling of meat products is insufficient.

**The effects of corporate consolidation and inadequate competition on rural communities**

High levels of concentration and the buyer power wielded by relatively few market intermediaries put farmers operating on relatively thin profit margins, and in turn, the communities that they support, at risk. Agriculture continues to play an essential role in many rural areas; 1 in 5 rural counties are economically dependent on farming.[58] Thus, market intermediaries with even modest market power can capture market surplus for themselves, paying farmers below a competitive level, and preventing those benefits from flowing to rural communities.

[56] USDA-FSIS, Office of Policy, Program and Employee Development. *Food Standards and Labeling Policy Book.* August 2005. https://www.fsis.usda.gov/wps/wcm/connect/7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-Policy-Book.pdf?MOD=AJPERES

[57] USDA-FSIS Final Response to Petition. March 26, 2020. https://www.fsis.usda.gov/wps/wcm/connect/dba58453-e931-4c1d-9b4e-fb36417049ee/19-05-fsis-final-response-032620.pdf?MOD=AJPERES

[58] USDA Economic Research Service (ERS), "Rural economies depend on different industries," updated October 9, 2018. https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58290

Unchecked consolidation and corporate power have other important, yet less tangible effects on farmers and rural communities. For example, farmers have less choice and autonomy in a consolidated agricultural system, and this may force farmers to make decisions they would otherwise reject for various reasons. Constrained choices and lack of options also reduce bargaining power.[59] Furthermore, there is widespread acknowledgment that a more consolidated farm and food system has had detrimental effects on communities, including population decline and increasing income inequality.[60]

**Solutions: Promoting competition in America's food supply chain**

In May 2021, NFU joined five other organizations[61] representing cattle producers to discuss challenges involved in the marketing of finished cattle, and to build consensus about how to ensure financial sustainability for cattle feeders and cow-calf producers.[62] This meeting reflected the fact that the power of the packers has grown too large, there is insufficient price discovery in the marketplace, and options for slaughter and processing of fed cattle are constrained. It also reflects the pressing need to act now to ensure our farmers and ranchers can participate in fair, open, and competitive markets.

Thankfully, the Biden administration has heard the clarion call for greater competition in agriculture, and many other sectors of the economy. On July 9, 2021, President Biden issued Executive Order 14036 on "Promoting Competition in the American Economy" which calls upon more than a dozen federal agencies to institute reforms, promulgate rulemakings, and conduct oversight, to address rising corporate consolidation in America.[63] Many of the directives in the executive order specifically address competition issues in agriculture and rural economies,

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[59] Hendrickson, M. K., and James, H. S. 2005. The ethics of constrained choice: How the industrialization of agriculture impacts farming and farmer behavior. Journal of Agricultural and Environmental Ethics, 18(3), 269–291; and Hendrickson, M. K., and James, H. S. 2016. Power, Fairness and Constrained Choice in Agricultural Markets: A Synthesizing Framework. Journal of Agricultural and Environmental Ethics, 29(6), 945–967. https://doi.org/10.1007/s10806-016-9641-8

[60] Lobao, L., and C.W. Stofferahn. 2007. "The community effects of industrialized farming: Social science research and challenges to corporate farming laws." Agriculture and Human Values 25(2):219–240. https://doi.org/10.1007/s10460-007-9107-8; and 1 Gibson, Jane W. and Benjamin J. Gray. 2019. "The Price of Success: Population Decline and Community Transformation in Western Kansas." Pp. 325–62 in In Defense of Farmers: The Future of Agriculture in the Shadow of Corporate Power, edited by J. W. Gibson and S. E. Alexander. Lincoln, NE: University of Nebraska Press

[61] American Farm Bureau Federation, Livestock Marketing Association, National Cattlemen's Beef Association, R-CALF USA, and the United States Cattlemen's Association.

[62] National Farmers Union, "National Farmers Union and Group of Cattle Producer Organizations Hold Historic Talks to Address Problems in Marketplace," May 17, 20201. https://nfu.org/2021/05/17/national-farmers-union-and-group-of-cattle-producer-organizations-hold-historic-talks-to-address-problems-in-marketplace/

[63] See https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy

including the livestock sector. Of course, many members of Congress are taking a hard look at these issues too, as reflected in this hearing.

To build a food supply chain that is resilient and a marketplace that works for family farmers and ranchers, several steps must be taken. It is finally time to revitalize the PSA by promulgating rules that make the law enforceable and that ensures specific protections for producers. Furthermore, all market participants must be able to access accurate, reliable, and timely information through price reporting and labeling. It is essential that there is robust and strategic investment in local and regional marketing and processing options for livestock and other agricultural products as well. And finally, significantly more vigorous antitrust enforcement is needed, especially greater scrutiny of buyer power.

*Packers and Stockyards Act (PSA) reform*

The Packers and Stockyards Act of 1921 (PSA) is a law meant to assure fair competition, safeguard farmers and ranchers, and protect consumers, from unfair, deceptive, and unjustly discriminatory and monopolistic practices of the meat and poultry industries. Unfortunately, the PSA has been underenforced,[64] and Congressional action to strengthen the law, such as through the 2008 Farm Bill, has yet to come to fruition. The PSA must be bolstered and vigorously enforced.

NFU is heartened that President Biden's executive order on competition both reaffirms the government's commitment to the principles that led to the passage of the PSA and specifically mentions the need for the Secretary of Agriculture to initiative rulemakings under the PSA "to address the unfair treatment of farmers and improve conditions of competition in markets for their products."[65] Furthermore, USDA has signaled that it will take action to strengthen the PSA.[66]

USDA should establish and clearly state through the rulemaking process that it is not necessary to show a competitive injury broadly to find an action of a packer, swine contractor, or live poultry dealer to be unlawful under the PSA. As USDA has repeatedly argued in court cases, the unambiguous language of section 202(a) and (b) of the PSA does not require any proof of an adverse effect on competition or of restraint of commerce or trade. The legislative history of

[64] United States Government Accountability Office (GAO), Testimony before the Committee on Agriculture, Nutrition, and Forestry, United States Senate, "Packers and Stockyards Programs: Continuing Problems with GIPSA Investigations of Competitive Practices," March 9, 2006. https://www.gao.gov/assets/gao-06-532t.pdf

[65] Executive order 14036 of July 9, 2021, "Promoting Competition in the American Economy," Federal Register Vol. 86, No. 132, July 14, 2021.

[66] "USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act," *USDA*, June 11, 2021. https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act

the PSA shows that Congress intended to prohibit actions that give undue and unreasonable preferences without regard to whether they restrain trade, create a monopoly or control prices.

Additionally, USDA should revisit the final rule with respect to "undue or unreasonable preference or advantage," which failed to provide meaningful protections for producers, instead enshrining unfair, anti-competitive behavior already employed by the industry. Specifically, USDA should clarify that a "reasonable business decision" cannot justify an undue preference or advantage.

More generally, the update to the PSA should provide greater clarity about what practices in the meat and poultry industries constitute unfair, unjustly discriminatory, or deceptive practices, and thus violate the PSA. Especially close attention should be paid to prohibiting unfair practices regarding grower ranking systems or "tournaments." PSA rulemaking should also institute anti-retaliation protections that help ensure farmers' right to association and so that farmers can speak up about unfair treatment without fear of retribution.

Lastly, updated rules are unhelpful if they are not vigorously enforced. Consideration should be given to ensuring USDA has the resources it needs, both in terms of personnel and otherwise, to enforce the PSA, and collaborate with the DOJ and the Federal Trade Commission as appropriate.

*Improving price discovery and ensuring fair and accurate market information*

Problems with price discovery in cattle markets and the erosion of prices due to the ascension of AMAs should be addressed, in part, by establishing a minimum level of cash transactions in the marketplace. Since AMAs are known to erode cash prices, and since base prices for AMAs are themselves typically based on the cash market, a too thinly traded cash market will result in producer prices that are lower than they otherwise would be with a more robust cash market. Additionally, a thinly traded cash market is more susceptible to manipulation.

Furthermore, USDA should establish a cattle contract library, which would constitute a collection of marketing contracts between packers and producers. This library would help producers have greater knowledge of the different contract provisions that exist, so that producers can negotiate more favorable terms. Another concern in market openness is how a lack of consistency has reduced the effectiveness of LMR due to the withholding of information because of confidentiality concerns. These issues must be addressed for LMR to be an important price discovery tool for producers.

Finally, truthful product labels are also essential to promoting fair competition in the marketplace. The need for mandatory country-of-origin labeling (COOL) remains. The misuse of existing voluntary product label claims, including "Product of USA" is a significant problem, because it misleads consumers and makes it difficult for farmers and ranchers to fairly distinguish the origin of their products in the marketplace. Thankfully, USDA has announced it plans to review the current "Product of USA" label, and the FTC recently took steps to enhance its enforcement of the "Made in USA" standard more broadly. We urge USDA to act quickly to address these misleading labels.

*Facilitating competition and more diverse market opportunities*

The COVID-19 pandemic highlighted how large, seemingly efficient systems of production can falter when there are shocks to those systems. Local and regional food systems also faced disruptions but were often better positioned to adapt rapidly to new conditions and protect against shocks, given their shorter supply chains and more direct connection to consumers.[67] Thus, there is a need to strengthen local and regional food systems, which can also help promote greater competition in farm and food supply chains.

Local and regional food systems have grown tremendously in recent decades. Nationally, between 1992 and 2007, direct-to-consumer sales of unprocessed products approximately doubled from $706 million to $1.4 billion (in 2017 dollars).[68] The number of farmers' markets in the United States grew from fewer than 2,000 in 1994 to more than 8,600 registered in the USDA Farmers' Market Directory today.[69] This growth can be attributed to many factors, including federal investment and support for local and regional food systems, and growing consumer interest in the source of their food.

Despite the positive trends in local and regional food systems, a major gap remains: a lack of local and regional meat and poultry processing infrastructure. Many farmers are forced to schedule access to slaughter facilities years in advance and have no choice but to transport their livestock hundreds of miles to the nearest facility. The rise in massive slaughter and processing facilities and decline in smaller-scale facilities makes our food system more vulnerable to disruptions that can and have occurred at a small number of facilities. Farmers

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[67] Dawn Thilmany, Elizabeth Canales, Sarah A. Low, and Kathryn Boys, "Local Food Supply Chain Dynamics and Resilience during COVID-19," *Applied Economic Perspectives and Policy*, October 26, 2020. https://onlinelibrary.wiley.com/doi/10.1002/aepp.13121

[68] Jeffrey K. O'Hara and Matthew C. Benson. "Where have all the direct-marketing farms gone? Patters revealed from the 2017 Census of Agriculture." *Journal of Agriculture, Food Systems, and Community Development*. August 23, 2019.

[69] Farmers Market Coalition. https://farmersmarketcoalition.org/education/qanda/

Union members and state divisions have led campaigns to help achieve greater access to state and local funds to foster new marketing options for family farmers and ranchers. [70]

Thankfully, action is being taken on this front. Recently, USDA announced an investment of more than $150 million to help existing small and very small processing facilities weather the challenges they have faced because of the COVID-19 pandemic as well as expand capacity.[71] USDA also announced its intention to invest $500 million in American Rescue Plan funds to expand meat and poultry processing capacity.

USDA should continue its work to develop detailed guidance to help new or existing small meat and poultry slaughter and/or processing establishments comply with regulations, and to evaluate how current regulations or fees may create unnecessary barriers for those facilities that may seek federal inspection. Investment of financial and technical resources to expand meat processing training programs is sorely needed, and USDA should prioritize this in future efforts. The department should also facilitate the development of mobile slaughter units that can fill gaps in slaughter where appropriate. When offering financial assistance to the development of new processing facilities, particular emphasis ought to be placed on producer- or worker-owned cooperative business structures. Finally, USDA should ensure it is setting up new or expanded plants for success, including by taking steps to prevent the use of predatory practices by dominant market participants.

*Reinvigorated antitrust enforcement*

There is increasing recognition that concentrated economic power has reached dangerous levels in many sectors of the American economy and that corporate consolidation is a threat to democracy itself. Agriculture is one of those sectors that has seen enormous levels of consolidation, as outlined earlier in this testimony. In addition to buttressing the PSA, ensuring more transparency in markets, and promoting competition and new market opportunities, federal regulators must vigorously enforce existing antitrust laws, including looking back at the potential anticompetitive effects of many consummated mergers and acquisitions in agriculture.

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[70] https://www.wisconsinfarmersunion.com/processing

[71] Approximately $55 million is dedicated to the new Meat and Poultry Inspection Readiness Grant (MPIRG) program and includes the Planning for a Federal Grant of Inspection (PFGI) project for processing facilities currently in operation and working toward Federal inspection, as well as the Cooperative Interstate Shipment (CIS) Compliance project for processing facilities located in states with a Food Safety and Inspection Service (FSIS) CIS program. Another $100 million is dedicated to helping small and very small processing facilities deal with overtime inspection fees incurred dne to increased slaughter and processing demand during the COVID-19 pandemic. More here: https://www.usda.gov/media/press-releases/2021/06/21/usda-invests-552-million-grants-increase-capacity-and-expand-access.

An important piece of legislation that can help promote increased and more effective antitrust enforcement is S.225, Senator Amy Klobuchar's "Competition and Antitrust Law Enforcement Reform Act of 2021."[72] This bill would address DOJ and FTC enforcement budgets that are incommensurate with the number of merger filings and other demands of agency resources. The bill would also strengthen prohibitions against mergers. This includes updating the legal standard for permissible mergers, including by making clear that monopsony, or buyer power, should be a key consideration. And it would also shift the burden to merging parties to prove their mergers are not anticompetitive. Finally, the bill would establish a new FTC division that would conduct merger retrospectives, which is especially important given the series of mergers in agriculture over the past several decades.

**Conclusion**

Over the decades, the entire farm and food supply chain has become highly consolidated and uncompetitive, much to the detriment of family farmers, ranchers, rural communities, and consumers. While competition in America's food supply chain may be perilously low, renewed attention to these problems gives us hope.

Thank you for holding this hearing today and for the opportunity to testify. I appreciate the committee's attention to this important issue and look forward to answering any questions you may raise.

[72] S.225 - 117th Congress (2021-2022): Competition and Antitrust Law Enforcement Reform Act of 2021. (2021, February 4). https://www.congress.gov/bill/117th-congress/senate-bill/225

**Written Testimony of**
**Shane Miller**
**Group President, Tyson Fresh Meats**
**before the**
**U.S. Senate Committee on the Judiciary**
**July 28, 2021**

Chairman Durbin, Ranking Member Grassley, members of the Judiciary Committee, thank you for inviting me here today.

I proudly represent Tyson Foods, a company based in Springdale, Arkansas, and founded nearly a century ago by John W. Tyson, who started this business trucking chickens to markets across the Midwest.

I'd like to start by telling you a little about who we are today.

**Tyson Provides Opportunity to Many**

Today, Tyson employs more than 120,000 team members in 32 states. The business I lead, Tyson Fresh Meats, the beef and pork segments, comprises 35,000 Tyson team members across 18 plants. This includes 12 harvest plants and six portioning and case-ready plants, with two additional facilities under construction. Fresh Meats' largest footprint is in Iowa and Nebraska.

We are not just a food company. As an important employer in many communities, we provide an entry point, for many Americans, recent immigrants and others, to opportunity. Our team members come from diverse backgrounds, speak more than 50 languages, and reflect the makeup of America itself.

Many have attained citizenship, life skills, high school equivalency, and English as a second language education through Upward Academy, our onsite education program. We also offer career development opportunities – like providing training for highly-skilled jobs – through our Upward Pathways on-site training and education program. We do this because Tyson understands that we all want to create a better life for ourselves and our families.

When our team members need a little extra help for unexpected events and challenges, we support them through our Helping Hands program. We also have rehabilitation programs across our business, which give team members a second chance as they transition from prison or overcome substance abuse.

And, at an average compensation of $22 per hour, which includes medical and other benefits, Tyson team members can take advantage of a competitive wage and benefit package.

Our impact on people's lives extends to the communities so many of us call home – from anti-hunger drives to support for public schools. Last year alone, Tyson and our team members donated 120 million meals and countless volunteer hours to feed the hungry. And our economic impact extends to farmers, ranchers, and suppliers across America, many of whom have also worked with Tyson for generations.

Since our founding, Tyson has considered itself a steward of natural resources vital to feeding the nation. We have always taken seriously our obligation to responsibly use, protect, and preserve these resources for future generations.

Accordingly, we recently announced our ambition to achieve net-zero greenhouse gas emissions by 2050 across our global operations and supply chain. This makes Tyson the first U.S.-based protein company to have an emissions reduction target – approved by the Science Based Targets initiative – to help combat the growing challenge of climate change.

In addition, earlier this year, one of our beef facilities was certified under the Alliance for Water Stewardship (AWS) standard by international third-party certification body SCS Global Services, making it the first and only meat processing plant in the country certified under the AWS standard. Implementation of the standard is intended to achieve five main outcomes of good water stewardship at the site: good water governance; sustainable water balance; good water quality status; important water related areas; and safe water, sanitation, and hygiene.

**We Continue to Navigate the Impact of COVID-19**

Perhaps there is no way to fully prepare for a once-in-a-lifetime pandemic, but I can say that at Tyson, we have been absolutely determined to do everything we can to help keep team members safe. For example, early in the pandemic, when personal protective equipment (PPE) was scarce, we chartered transportation ourselves, so that we could source the PPE more quickly, and better protect team members and their families.

To date, we have spent more than $700 million related to COVID-19, including on efforts to combat its spread, such as buying masks, face shields and temperature scanners, installing protective barriers and providing on-site testing and vaccinations. We also partnered with an independent medical provider to bring medical services on site, hired an additional 200 nurses and our first Chief Medical Officer.

This year, so far, we have invested countless hours educating our team members, in dozens of languages, about the benefits of COVID-19 vaccination. We have also

conducted more than 100 on-site vaccination events at our facilities and partnered with community leaders. To further encourage vaccinations, our team members who accessed their vaccination offsite received four hours of paid leave per dose. In April this year, we also expanded our on-site vaccination efforts to make the families of team members eligible. Today, more than 56,000 of our U.S. team members are vaccinated; our efforts to reach, educate and vaccinate the remainder continue.

In sum, I would want this Committee to know that Tyson is a company committed to caring for our team members, supporting our communities, protecting our natural resources, and creating value for our customers and consumers.

This is who we are, and this is why thousands of people look to Tyson for opportunity and partnership.

**The Meat Processing Industry: Rural America's Economic Engine**

Across our business, the vast majority of our team members live in rural America – places like Perry, Iowa, population 7,600, or Lexington, Nebraska, population 10,000. And in fact, I speak to you today first and foremost as the grandson of Iowa farmers: I was born and raised in northwest Iowa – in a small town called Ruthven. Today, I live with my family in Sioux City, Iowa, where many of our friends and family members continue to work in the livestock business.

I joined this industry three decades ago, when, in northwest Iowa, there were few other opportunities for someone like me. I am proud today to help lead a business that gives this same opportunity to others – people like me and my family. In Iowa today, we employ 11,000 people, paying them a collective $487 million per year. We pay our cattle suppliers in Iowa $1.3 billion, and our hog suppliers in the state $1.4 billion. Overall, our statewide economic impact in Iowa is $3.3 billion.

In rural communities across America, every year, we invest more than $15 billion with 11,000 independent farms supplying us with cattle, pigs and chickens. We rely on these independent farmers, and want them to succeed, because without a steady pipeline of livestock, we're unable to run our business. And so, when the market experiences significant, unexpected shocks, we are there to support our partners. For example, as the impact of the pandemic took hold, we supported producers by providing lump sum premiums – above the market price – for cattle harvested. We offered our cattle and hog producers relief for animals that did not meet pre-agreed specifications, and also gave hog producers that had cash market pricing agreements the option to transition to a cash-cutout blended price arrangement.
Another example: a few years ago, one of our more significant specialty beef customers experienced an extended business disruption that created a large

devaluation in the premium market for cattle. This meant that independent producers had no alternative buyers for their niche, premium category cattle. We understand from our partners that other companies walked away from their commitment to take delivery, leaving these independent producers to absorb the losses. Tyson chose not to do that. Though we had no buyers, we continued to pay, and pay a premium, for their specialty cattle. We absorbed the losses, rather than pushing them on to our independent producer partners.

For animal feed, we are reliant on grain farmers, with whom we invest millions, to provide us with essential commodities, such as corn and soybeans for livestock feed. We also produce thousands of products that use ingredients sourced from farmers across America. For example, our breakfast sandwiches use products from dairy and egg farmers, grain and baked good suppliers, and seasoning suppliers. And in turn, we supply products to a variety of other industries, including pet, pharmaceuticals and clothing.

Importantly, we also help make states like Arkansas, Iowa, and Nebraska competitive overseas: exporting specialty products *not* in high demand here in America (for example, hides and leather, organ meats or chicken paws), which strengthens the profitability of American farmers and ranchers by making the entire animal more valuable.

At Tyson, our intention is to create as much value as possible, which means making use of every part of the animal. And this benefits every player in the supply chain, not just Tyson: without the export market, these portions would, at best, go into animal feed meal or biofuel at a reduced value, or, at worst, go to waste.

I would also note that more demand for such products overseas leads to higher demand for cattle here in America to harvest these products, which also benefits American farmers and ranchers, by increasing the demand (and price paid) for their livestock.[1]

Finally, we also support growth in rural America by sourcing critical materials and employing infrastructure services that help produce and distribute food – from ingredients and packaging to transportation and warehousing. For example, Tyson has one of the largest private fleet of trucks, at over 1,000 strong, and a cold storage distribution chain that employs thousands of skilled workers, including thousands of truckers, forklift operators and mechanics.

[1] Industry experts "expect U.S. beef exports to accelerate in 2021, as evidence by the USDA projecting a 6% increase in U.S. beef exports…" BMO Capital report on Tyson Foods, May 10, 2021.

**Higher-Quality Meat and Great Value: Evidence the Market is Working**

The quality, variety, safety, and affordability of the food produced here in America, by American companies like Tyson, is something I know everyone here today wants to protect.

Questions have been raised about whether the beef processing industry is consolidated in a way that harms cattle producers, customers, and consumers. At Tyson, we are committed to ensuring fair compensation for farmers and ranchers, and that safe, high-quality meat, across the product offerings Americans are demanding, remains reasonably priced in all the places we call home. We believe market forces are working as they should.

According to the U.S. Department of Agriculture (USDA), "The share of disposable personal income spent on total food has trended downward since 1960, which has been driven by a shrinking share of income spent on food at home." The USDA also notes that, "In 2020, U.S. consumers spent an average of 8.6 percent of their disposable personal income on food."[2]

When I was a kid, beef used to be a special treat mom and dad served on Sundays and for special events. Today, thanks to companies like Tyson and supportive government policies over the years, we are fortunate that beef is affordable, available, and accessible for so many more Americans.

I am equally pleased to say that with advancements in technology and improvements in modern cattle production, the beef we consume today is consistently of a higher quality than what my family used to eat, back in Ruthven. Higher quality and great value – a good example of how the market is working as it is supposed to, for everyday Americans.

To be clear, at Tyson, we welcome competition. Healthy competition not only makes us better – it also helps put affordable, higher-quality food on the tables of more Americans.

And the competition is intense. Customers have multiple meat suppliers from which to choose and they subject suppliers to competitive bidding processes based on terms the customers specify. Customers often work with several meat suppliers to ensure orders are filled according to their product specifications, volume requirements, and pricing terms, which adds to the constant pressure to outperform the competition.

[2] https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/ (last visited July 26, 2021).

Evidence of healthy competition can also be found by looking at historical outcomes. For example, we have seen a rise in availability and quality of beef, while the price has become more affordable over the past quarter-century: data shows that while the concentration of the industry has remained relatively constant for close to 30 years, quality has significantly improved.

If we look at the historical ratios of margins of cow and calf producers and feeders (please see Table 1) versus processors, we can see that cow and calf and feeder margins outpace processor margins in almost every year except the most recent, a point I address in more detail later in my testimony.

**Table 1: Historical Margins per Head of Cattle**


*Source*: USDA Packers and Stockyards Division (concentration); Sterling Marketing (margins)

## Cattle Producers Market Their Own Products, and Often Prefer AMAs

Tyson does not and cannot control market forces, and our success depends on the entire beef supply chain being properly incentivized to meet America's continued demand for higher-quality beef.

Accordingly, we are committed to ensuring fair compensation for farmers and ranchers. And we're proud that we have relationships with producers of all sizes that stretch back for decades.

At Tyson, we buy cattle on the open, cash market and through contract sales. At times we hear that contract sales – such as alternative marketing agreements

(AMAs) – are responsible for the current spread between live cattle and processed beef prices. This is not the case.

Cattle producers decide how they market and sell their products. With respect to the beef market, producers have a variety of options available to sell their livestock – whether that be on the transactional, open negotiated market, forward contracting or through tailored AMAs. Many producers, including those we work with, prefer tailored agreements because they provide a stable, reliable market for their cattle and they ensure easier access to capital. The agreements also help meet expectations for consistently higher-quality beef as well as demand for customer-specific programs.

As, Professor Glynn Tonsor of the Department of Agricultural Economics at Kansas State University recently said in his testimony before the U.S. Senate Agriculture Committee, "AMAs have grown in use in recent decades" because they "...present a multitude of well-documented economic benefits to the industry," including providing "efficiencies" such as "...coordinating logistics, lowering marketing and procurement expenses" and "...enhance[ing] demand" for specific attribute cattle, which "...increase the economic pie for industry participants."[3]

This perspective – which is shared by other agricultural economists – is supported by the USDA itself, which in its study of AMAs, concluded that: "...provid[ing] livestock buyers and sellers with improved risk management options that lower costs or allow for the creation and capture of greater value." [4]

I'd like to expand a bit on the real benefits of such AMAs.

Growing cattle is a capital and time intensive process because of the length of time it takes before the animals are ready to harvest. The cycle begins with cow and calf operators – ranchers and farmers who breed cows and produce calves.

To give the committee some detail: a cow's gestation period is approximately 283 days; calves are weaned at 6-10 months. After reaching a weight of 300-600 pounds, calves are sold to stocker operators or directly to the feedlot operator. Stocker operators put additional weight on the calves to bring them to 600-800 pounds before they go into feedlots at an age of 8-14 months. At this point, the animals, called feeder cattle, are purchased by feedlot operators and raised to a harvest weight of 1,100-1,400 pounds. When the cattle reach harvesting weight at

[3] See June 23, 2021, Testimony of Glynn T. Tonsor, Ph.D., before the United States Senate Committee on Agriculture, Nutrition, & Forestry Hearing on "Examining Markets, Transparency, and Prices from Cattle Producer to Consumer."

[4] *Assessment of the Livestock and Poultry Industries* Fiscal Year 2007 Report, United States Department of Agriculture Grain Inspection, Packers and Stockyards Administration May 2008, p. 28-29.

12-22 months, they are sold as fed cattle to meat processors for harvesting. This timeline is summarized in Table 2, below.

**Table 2: Growing Cattle is a Time-Intensive Process**

## Cattle (39 Months)

| Heifer to Cow | Gestation | Wean | Stocker | Feedlot |
|---|---|---|---|---|
| 13 Months | 10 Months | 8 Months | 3 Months | 4.5 Mos. |

Cattle producers need about 39 months to alter supply once a decision has been made to increase or decrease production. At more than three years, cattle production has the slowest response time of the three major proteins.

Because of the time and investment required to raise cattle, certainty of income is important for producers and their lenders. AMAs give cattle feeders a consistent, reliable market for their cattle. This in turn provides other benefits: for example, just the way retail banks like to lend to people who have a stable, reliable income, banks offering agricultural loans also prefer to lend to producers with AMAs in place because they are contractual proof of the feeders' consistent, reliable income – and guaranteed customers.

In addition, AMAs have helped producers align their cattle to meet consumer expectations for more consistent high quality beef products. Consumers today are demanding a more consistent quality experience in beef, including a preference for certain breeds and upper two-thirds "Choice" steaks, more "Prime" or "No Antibiotics Ever (NAE)" beef. AMAs have contributed to satisfying this increasing demand trend over the past 20 years, during which time the percent of beef grading at the top two levels, "Choice" and "Prime," has increased from 60 percent in 2000 to 85 percent in 2020.[5]

Many progressive producers and feeders are meeting such specialized demand, thereby creating greater value for their operations. We often partner with such producers. But our ability to meet the increased demand from customers to offer these products would not be possible in a transactional commodity environment. AMAs guarantee a market for these specialized cattle and ensure the producers are compensated for the value they add to the market.

[5] See June 23, 2021, Testimony of Julie Anna Potts, President and Chief Executive Officer, North American Meat Institute, before the United States Senate Committee on Agriculture, Nutrition, & Forestry Hearing on "Examining Markets, Transparency, and Prices from Cattle Producer to Consumer."

Forcing cattle feeders to trade on the transactional, open negotiated market subjects them to a volatile commodity market, placing financial risk with those who may be least equipped to meet it. As I noted earlier in my testimony, however, a look at historical margin ratios of cow and calf, and feeders, versus processors like Tyson, shows that cow and calf and feeder margins have outpaced processor margins *almost every year*. (Please see Table 1, above.)

And, today, more of our customers and consumers are demanding traceability of their products. They want to know – and be able to verify – where their beef was raised, what it was fed, and how it was cared for at every stage of the cycle. We agree that transparency is important, and recently announced our support of a traceability program called U.S. Cattle Trace. To support this, we are collaborating with others that use DNA technology to trace beef back to the individual animal of origin. This traceability is also a critical food safety tool in the case of an outbreak of a food-born illness or foreign animal disease.

However, providing this information requires significant investment and effort from every link along the cattle supply chain, a process that would frankly be impossible without agreements in place.

I have also heard the suggestion that AMAs lock producers into selling their cattle to a single processor for an extended period of time, thus depriving the producer of free access to the market. I can't speak for the entire industry, but I can say that none of our AMAs lock a producer into selling only to Tyson. In fact, at every step of the process, producers have a choice. First, producers are free to decide how many of their cattle they want to sell to us and how many they want to sell to other processors. Second, they can also choose whether they want to use market-based, forward contracting or negotiated pricing. So, in order for AMAs to last, they must consistently benefit both suppliers and Tyson.

To make that point another way: if producers do consistently sell to Tyson over other processors, it is by choice – not due to contractual mandates – and a testament to the competitive prices and premiums we are willing to pay for their cattle. This is why some of our relationships with our partners stretch back decades. Again, we feel this is further evidence of a healthy, competitive market working as it should.

To those concerned about price transparency, I will note that Tyson, by law, must electronically report the prices we pay for all cattle, and all prices at which we sell our beef, to the U.S. Department of Agriculture twice per day. Mandatory price reporting (MPR) – industry-wide pricing data – is publicly available at the USDA website.

**Why Then is the Current Price Spread Between Live Cattle and Beef Cutout So Wide?**

The present divide between live cattle and boxed beef prices is not the result of a consolidated industry, lack of competition or the cash markets. Industry consolidation has remained constant for decades. As someone who has worked in this industry for three decades, allow me to suggest that the present spread has everything to do with the law of supply and demand and the unprecedented and massive – but we believe, temporary – system shock brought on by the COVID-19 pandemic.

As the pandemic took hold, and concern rose around the country, and the world, we saw (and continue to see) significant absenteeism in our workforce, resulting in the idling of beef processing facilities. This resulted in a dramatic drop in processors' ability to operate at capacity, which in turn led to an oversupply of live cattle and an undersupply of beef while demand for beef products surged to an all-time high.

It should not surprise any of us that, as a result, the price for cattle fell, while the price for finished beef rose. And, as I noted earlier, raising cattle is a lengthy process – taking some three years per head – and when there is a shock to the system, like COVID-19, producers can't simply turn off the supply because the market demands less.

I'll also add that the cattle industry is susceptible to cycles the way other commodities are – from grain to aluminum. In this case, when COVID-19 hit, we were at the top of the cattle supply cycle, meaning that the country already had an ample supply of live cattle, and that any significant disruption in existing harvest capacity would have created a backlog of live cattle. But COVID-19 was, in fact – and still is – an enormous disruption. We are not yet back to normal.

As with everything from houses to cars, when supply outpaces demand, prices fall. And of course, when demand outpaces supply, prices rise.

And to reiterate, this is precisely what happened in 2020 and into 2021 – the supply of live cattle outpaced processors' ability to process those cattle. At the same time, idled and slower production – again, the result of labor shortages – dramatically reduced the ability to produce finished beef (and other meat products).

So, consumer demand for finished beef outpaced our ability to supply it, and there were more live cattle than the market could harvest resulting in lower live prices.

And on the consumer end, limited ability to supply finished product to meet strong demand drove prices higher.[6]

This anomalous market behavior is not due to insufficient industry capacity or industry concentration. Rather, as I noted earlier, it is due to COVID-19-related labor shortages creating shorter-term, unexpected capacity constraints.

Many processors, including Tyson, are not able to run their facilities at capacity in spite of ample cattle supply. This is not by choice: despite our average wage and benefits of $22 per hour, there are simply not enough workers to fill our plants. When the labor shortage subsides, we are confident we will be able to increase capacity utilization and work more quickly through the backlog of market-ready live cattle.

As production stabilizes, and traditional capacity utilization returns, we expect the effects of this temporary shock to eventually evaporate – and in fact, as we approach late summer, a season when beef and cattle prices usually fall, the daily USDA cut-out report shows finished beef prices lower while the price of live cattle has begun to stabilize.

**Feeding America Requires Operating at Scale**

Finally, let me add that feeding this growing country, while meeting consumers' evolving demands, requires operating efficiently with breadth and depth. We call that scale. And scale is important because in our case, it fosters agility.

Meat is a staple in many American diets. As this Committee may recall, in the early days of the pandemic, when many grocery stores were running extremely low on meat and other supplies, Americans were so concerned that they started stocking up on whatever they could find.

But, even at the height of the pandemic and despite labor shortages across the industry, some production facilities were idled. However, Tyson was able to quickly adjust operations – including reconfiguring production lines, diverting animals to other facilities and rerouting our transportation network. This allowed us to keep our protein products flowing to communities across the nation.

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[6] That these market conditions were the primary drivers of the spread between live cattle and cut out pricing was highlighted by numerous industry analysis. For example, in its May 13, 2021 report, Barclays Research stated that "in May 2020 . . . plants were forced to close . . . [and] Consumers responded by rushing to grocery stores searching for the last available cuts." These conditions resulted in a "beef super-cycle, as the industry faces ample cattle supply and strong demand for beef."

Beyond keeping food on American tables, including during difficult times, operating at scale has other benefits. Scale allows Tyson to operate efficiently, which keeps the cost of meat down for families around the country.

Importantly, scale also lets us invest heavily in food safety and biosecurity, including documented biosecurity plans at all our facilities, foreign animal disease preparedness, product tracking and tracing, cattle traceability, robust sanitation standards and regular and rigorous third-party audits.

Let me be clear: Tyson is pro-small businesses – after all, that's how we began, and today, we work with thousands more – but having Americans rely only on a network of small processors would create inefficiency in the system, meaning families would pay significantly more for their meat. It would also increase the burden on retailers and national restaurant chains, as well as regulatory agencies, as the nature of these markets, involving live animals and products with a short shelf life, requires constant coordination. This in turn would also increase the price of meat and further complicate the already vast and complex supply chain.

As we look to the future, we face a growing global population: according to the United Nations, we can expect a global population of 9.7 billion in 2050. That's two billion more people. Coupled with this population growth is increasing demand for affordable and accessible meat. Here in America, the economies of scale offered by large protein companies is a fundamental part of this country's food security.

In addition, in times of crisis or market disruption – like this year's severe winter storms or the pandemic – our scale allows us to act, and react, quickly. Our scale also means that we have deep and broad expertise that allow us to quickly adjust and adapt operations to efficiently meet the needs of American families.

And as I've said above, beyond quite literally putting meat on the table, scale helps us keep costs down – savings we pass on to families across the country.

**We Continue to Feed a Changing World**

For nearly a century, Tyson has been proud to play an important role in our food supply. I would like to thank the Committee for the opportunity to talk about that role today.

At Tyson, we are committed to producing food more sustainably and to do so in a way that creates healthy communities in places like my home state of Iowa.

We are proud to provide jobs and opportunities for so many team members – and to offer them competitive wages and benefits. In doing so, we are also proud of the meaningful and positive impact we have on rural communities across our country.

Our relationships with farmers and ranchers – many of which extend back generations – are crucial to the work we do as part of keeping America's food supply strong and secure.

As recent developments in other parts of the world demonstrate, America is fortunate to have a resilient food supply chain that has allowed us to weather a changing world, including unprecedented, unexpected events like COVID-19.

Our company was founded, nearly a century ago, by John W. Tyson, who wanted to find a better way to feed Americans. Tyson today is proud to honor this legacy, and help make protein accessible and affordable.

Thank you again for having me here today.

Iowa Cattlemen's Association

**Written Testimony of the Iowa Cattlemen's Association**

**With assistance and consultation from**
**Jon Schaben**
**Dunlap, Iowa**

**Submitted to the U.S. Senate Judiciary Committee**

**"Beefing up Competition: Examining America's Food Supply Chain"**

**July 28, 2021**
**Washington, D.C.**

**Introduction**

Chairman Durbin, Ranking Member Grassley, and members of the Senate Judiciary Committee—thank you for the opportunity to testify on behalf of our nation's cattle producers.

My name is Jon Schaben. I live in Dunlap, Iowa with my wife, Julie. We have four children, of which two are actively involved in agriculture.

I'm a 1987 animal science graduate of Iowa State University, where I was a member of the meats and meat animal evaluation teams and president of the Block & Bridle Club. My wife and I actively support Iowa State University; in 2016, we were recognized as Cy's Favorite Alum by the Iowa State Athletic Department. I'm also a 1993 graduate of the Missouri Auction School and was selected as the 2003 World Champion Livestock Auctioneer.

I co-own and operate the Dunlap Livestock Auction in Dunlap, Iowa and West Point Livestock in West Point, Neb. with my brothers Jay and Jim Jr. We are the second generation to run Dunlap Livestock, which was started by my parents in 1950. Additionally, I operate a commercial cow-calf herd and my family background and feed out steers and heifers annually.

I've been a member of the Iowa Cattlemen's Association since the 1980s and currently serve on the Beef Product Labeling Task Force. I also serve on the Government and Industry Affairs Committee for the Livestock Marketing Association. As you can see, I am passionate about the livestock industry and its people. I believe in the importance of a strong rural economy as it is the lifeblood to keep communities thriving in rural America. A strong, competitive and independent beef sector is a vital tool for these agricultural areas.

Today, I am here to represent the Iowa Cattlemen's Association (ICA). ICA, headquartered in Ames, Iowa, is a grassroots organization representing nearly 8,000 cattle producers and industry affiliates. As the voice of Iowa's beef business, it is ICA's responsibility to carry the messages of their members forward to key decision makers. Our hope is that my testimony in this hearing will encourage meaningful change to benefit *all* independent cattle producers.

Cattle producers in Iowa, and across the nation, have expressed grave concern regarding the severe lack of cash trade, limited price discovery, and imbalance in leverage between those who raise cattle and those who process them into the beef we consume. With an increasing prevalence of extreme market shifts and limited ability of producers to mitigate market risk in the cattle industry, it is imperative that we uplift the concerns of those in the production sector for this Senate Judiciary Committee hearing. Simply put—the beef supply chain begins with, and relies upon, thousands of dedicated cattle producers.

**Cattle Production 101: Sustainable from Pasture to Plate**

Cattle producers take great pride in stewarding the land and natural resources. Sustainability is the heart of cattle production, both from a producer management standpoint and how cattle naturally function. The vast majority of what cattle eat cannot be consumed by humans. Their ruminant digestive system allows them to process grass, forages, and byproducts into a high-quality, nutritious protein source for humans. This act is referred to as 'upcycling.' One example of a byproduct digested by cattle would be distillers grain from the ethanol industry.

The cattle production cycle begins with the cow-calf producer. Cow-calf producers maintain herds of cows that birth calves once a year. The gestation period for a calf is nine months. For the first few months of life, calves nurse milk and graze alongside their mothers in pasture.

When a calf reaches 450 to 700 pounds (typically between 6 and 10 months of age), they are weaned off of their mother's milk. At this time, calves are capable of receiving their nutrition from other sources. Weaning also takes unnecessary stress off of cows by allowing them to utilize nutrients previously dedicated for milk in preparation for their next calf.

After weaning, calves may be sent to a stocker/backgrounder to further develop, or be sold at a livestock auction market. Once matured, these cattle are sent to feedyards for finishing.

Cattle spend anywhere from four to six months at the feedyard. The goal during this stage of production is to reach market weight, which averages approximately 1,400 pounds. Fed cattle are usually ready for harvest around 15 to 20 months of age.

The final step in the cattle production cycle is harvesting at a locker or meatpacking facility. This is where cattle are humanely processed into wholesome, nutritious beef. Further processing takes place before beef is purchased by consumers.

To learn definitions and terminology used to describe cattle, see Appendix A.

**Iowa Cattle Industry Overview**

Iowa's cattle industry is an economic boon to the state, generating more than $6.8 billion in business activity and supporting more than 33,000 jobs.[1] .

[1] Department of Economics, Iowa State University.

More than 25,000 cattle operations in Iowa raise 3.65 million head, including 890,000 beef cows.[2] In 2020 alone, more than 1.7 million head of fed cattle were marketed by Iowa cattle producers.

Iowa is fourth in the nation for cattle and calves on feed, totaling nearly 1.2 million head.[3] While greater volumes of cattle come from our neighbors in the beef belt, Iowa is best known for leading the nation in the sheer number of family farms finishing beef cattle for market.

**Cattle Procurement Methods**

There are two main procurement methods utilized for fed cattle: 1) commission firms; and 2) direct exchange between packer and producer. Most cattle are sold directly to the packer by negotiated trade or by use of alternative marketing arrangements (AMAs).

There are four purchase types used by packers to procure cattle from producers: 1) negotiated cash; 2) negotiated grid; 3) formula marketing arrangements; and 4) forward contracts (see Appendix B for definitions).

**Livestock Mandatory Reporting (LMR)**

The U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) monitors marketing of cattle. In 1999, Congress passed the Livestock Mandatory Reporting (LMR) Act in response to producer concerns regarding concentration and price manipulation (primarily in the swine industry). According to USDA, the Act created the LMR program to provide livestock marketing information to producers; improve USDA's price and supply services; and encourage competition in the marketplace for livestock and livestock products.[4]

To meet the requirements of the law, USDA AMS established reporting regions and provides several daily and weekly reports. The USDA AMS '5-Area' includes the following major cattle feeding regions: Iowa/Minnesota, Nebraska, Kansas, Colorado, and Texas/New Mexico/Oklahoma (see Appendix C for map). Cattle sourced from states outside of the five regions are reported in a comprehensive national report and by origin in USDA reports.

Federally-inspected meatpackers that slaughter more than 125,000 head of cattle per year are required to report prices and quantities of cattle to USDA. Reports from regions include purchase

[2] U.S. Department of Agriculture. *State Agriculture Overview*, 2020. https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=IOWA. Accessed 20 July 2021.
[3] Ibid.
[4] *Livestock Mandatory Reporting Background*. U.S. Department of Agriculture - Agricultural Marketing Service, www.ams.usda.gov/sites/default/files/media/LivestockMandatoryReportingBackground.pdf. Accessed 20 July 2021.

types, descriptions (e.g. quality grade, weights, etc.), and more. If there is enough packer competition within a reporting region to meet the USDA AMS 3/70/20 Confidentiality Guideline, then this information can be publicly reported.[5] As of October 2020, 34 plants report cattle information under LMR to USDA, which accounts for approximately 92 percent of all cattle purchases nationwide.[6]

**Regional Variation Across the Beef Belt**

There is significant variance in cattle marketing methodology between reporting regions, which highlights concerns related to price discovery and market vulnerabilities. Over the course of two decades, we've witnessed a shift in how cattle are bought and sold. The use of formula marketing arrangements has grown to a majority in every feeding region except Iowa/Minnesota (see Appendix D for historical LMR data).

In the Iowa/Minnesota region, 50 percent or more of fed cattle are sold via the cash, or spot, market. Conversely, 10 percent or less of the trades in Texas/New Mexico/Oklahoma are negotiated. While declines in the cash market have occurred across the entire beef belt, strong regional disparity is evident based on market reporting data.

**Primary Challenges in the Cattle Industry**

1. <u>Lack of Price Discovery and Transparency</u>

Price discovery provided by the cash fed cattle market also impacts prices of feeder cattle, beef, and futures markets. Without this important signal, producers are challenged with determining the true value of their cattle.

Currently, price discovery occurs more robustly among independent cattle feeders in the Midwest. At the same time, southern cattle feeders greatly benefit from price discovery taking place outside their regions, as base prices may be derived from the transparent, negotiated prices established in Iowa/Minnesota and Nebraska. Many large and/or corporate feeders are rewarded for the quantity of cattle they sell, which provides efficiency to cattle buyers as they procure cattle for meatpackers. These cattle may bring 20 to 40+ dollars per head more than negotiated cash cattle, even though cattle in Iowa and the upper Midwest generally grade much higher in terms of quality.

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[5] Presentation by Taylor Cox. *3/70/20 Confidentiality Guideline.* https://www.ams.usda.gov/sites/default/files/LMRConfidentialityGuidelinePresentation.pdf. Accessed 17 July 2021.

[6] *User's Guide to USDA LMR Cattle Price Reports.* U.S. Department of Agriculture - Agricultural Marketing Service, Oct. 2020, www.ams.usda.gov/sites/default/files/media/LMRCattleUserGuide.pdf. Accessed 20 July 2021.

Finally, while the intent of LMR is to provide more transparency to cattle marketing, it's clear there are barriers that impede access to information. Negotiated cattle purchases are reported with actual prices during a specific time period. However, data from AMAs, to include the base price, net price, and any premiums or discounts, remain undisclosed to the public.

2. Meatpacking Concentration and Competition

For more than a century, the meatpacking industry has been scrutinized for concentration and the potential for use of anticompetitive practices. These concerns led to the passage of the Packers and Stockyards Act of 1921, which was intended to protect producers and consumers.

In 1980, the four largest meatpackers accounted for 36 percent of steer and heifer slaughter. According to the most recent USDA AMS Packers and Stockyards Division report, Cargill, JBS, National Beef, and Tyson control approximately 85 percent of all fed cattle slaughter in the U.S.[7] Fed cattle slaughter is more concentrated than hogs, sheep and lambs, broilers, and turkeys.

In Iowa, we've witnessed loss of beef packing capacity firsthand. Since the 1980s, we've lost major packing facilities in Des Moines, Fort Dodge, Oakland, and Spencer.[8] These plant closures hit home, often costing hundreds of locals their jobs and triggering economic disaster response plans.[9] In 2015, Tyson closed a plant in Denison, just 18 miles from my hometown of Dunlap, Iowa.

3. Captive Supply

Captive supply is defined by the following: formula marketing arrangements, forward contracts, and/or packer-owned cattle. Captive cattle are procured, or committed, months in advance with no negotiation.

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[7] *Packers and Stockyards Division Annual Report 2019*. U.S. Department of Agriculture - Agricultural Marketing Service, 2019, www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf. Accessed 19 July 2021.

[8] *Economic Importance of Iowa's Beef Industry*. Iowa State University Extension and Outreach - Iowa Beef Center, May 2018, www.iabeef.org/Media/IABeef/Docs/ibc0127bexecutivesummarypressquality050218.pdf. Accessed 16 July 2021.

[9] Wolf, Gordon, and Scott Stewart. "Closing of Historic Denison Beef Plant Triggers Economic Disaster Response." *The Daily Nonpareil - Council Bluffs, Iowa*, 14 Aug. 2015, nonpareilonline.com/news/local/closing-of-historic-denison-beef-plant-triggers-economic-disaster-response/article_128184c6-abff-53a1-8d8f-b367a69f8082.html.

The chief concern for independent cattlemen is that ample captive supply allows meatpackers to meet their demand without participating in the cash market. As a result, independent cattle feeders find themselves as residual suppliers for meatpackers. Despite raising some of the highest-quality cattle in the nation, they are on the 'short end of the stick' because of their operating capacity. This predatory practice is widely utilized by four main meatpackers, justified by 'efficiency.'

When the market is disrupted, whether unexpectedly or coordinated, meatpackers find themselves well-leveraged for purchasing in the cash market. And if they have all or most of their cattle committed, they might even remove themselves from the market. Iowa cattle producers have weathered several market disruptions by taking whatever bid they could get or feeding market-ready cattle for many weeks beyond what is necessary because they have nowhere to sell.

4. Price Manipulation: An Exercise of Market Power

In the span of just two years, the cattle industry has suffered multiple extreme market disruptions, often referred to as 'black swan events.' These disruptions are unpredictable, such as the Tyson plant fire in Holcomb, Kan., or the supply chain disruption caused by the COVID-19 pandemic, and are often accompanied by a ripple effect directly or indirectly affecting the cattle industry for an extended period of time.

Every market disruption comes with a significant price—some more than others. The cattle industry is particularly vulnerable due to a few buyers in the market. The concentration of processing power between Cargill, JBS, National Beef, and Tyson has created a severe bottleneck in the beef supply chain during black swan events and has also opened the door for market manipulation. These market disruptions highlight the oligopsony within the meatpacking sector.

*Tyson Plant Fire*

On August 9, 2019, a single plant fire in Holcomb, Kan., created extreme volatility in the cattle markets. This plant, owned and operated by Tyson Foods, accounts for nearly six percent of the nation's cattle slaughter capacity.

In the weeks following the fire, Iowa State University estimated a return for a 1,300-lb. steer to be negative $234.47.[10] Most producers did not see positive returns until December 2019. The price spread between dressed fed cattle and boxed beef cutout values grew to a record high. We expected to see a market disruption, however, we did not expect the number of fed cattle

[10] Department of Economics, Iowa State University.

slaughtered post-fire to exceed normal conditions.[11] Higher boxed beef prices and low fed cattle prices created an incentive for meatpackers to increase production, thus driving their profits.

*COVID-19 Pandemic*

Cattle producers were sucker-punched again with the onset of the COVID-19 pandemic. In March 2020, the estimated return on a market-ready steer for an Iowa cattle producer was negative $86.22 per head.[12] By April, the estimated return dropped to negative $244.44 per head.[13] Over the course of an entire year, most cattle producers found themselves 'in the red' 75 percent of the time.

The greatest spread between dressed fed cattle and boxed beef cutout values during the pandemic exceeded $279/cwt.[14] Between early April 2020 and the second week of May, the price spread grew by 323 percent.[15]

At the height of the COVID-19 pandemic, many Iowa cattle feeders found themselves shut out of the market for several weeks, receiving no bids for cattle. If they did get a bid, they couldn't negotiate and had to take what they could get. Throughput at processing facilities was slowed due to a compromised labor force, causing a significant backlog of cattle across the country. Meatpackers had no incentive to fill their shackles with cash cattle. The pandemic disproportionately affected cattle producers that participate in the cash market.

*Spring 2021*

This spring, cattle producers weathered poor market conditions. ICA wrote to U.S. Attorney General Merrick Garland and U.S. Agriculture Secretary Tom Vilsack to elevate the concerns of Iowa cattlemen by calling for concurrent investigations examining whether regulated meatpackers violated the Packers and Stockyards Act through price manipulation, collusion, restrictions of competition, or other unfair practices.

Demand for beef remained high throughout the COVID-19 pandemic. The value of beef exports reached record highs in March 2021, with 124,808 metric tons of beef equalling $801.9 million

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[11] *Boxed Beef and Fed Cattle Price Spread Investigation Report*. U.S. Department of Agriculture - Agricultural Marketing Service, 22 July 2020, www.ams.usda.gov/sites/default/files/media/CattleandBeefPriceMarginReport.pdf. Accessed 18 July 2021.

[12] *Finishing Yearling Steers*. Iowa State University Extension and Outreach. www2.econ.iastate.edu/estimated-returns/. Accessed 16 July 2021.

[13] Ibid.

[14] *Boxed Beef and Fed Cattle Price Spread Investigation Report*. U.S. Department of Agriculture - Agricultural Marketing Service.

[15] Ibid.

purchased outside of the U.S.[16] In addition, daily cattle slaughter reports from the USDA AMS reflected healthy demand for beef and the ability to process the cattle necessary to fulfill purchase requests.

On May 10, 2021, the choice boxed beef cutout was valued at more than $309/cwt (approximately $2,822/head). At the same time, cattle producers received average bids of approximately $118/cwt (approximately $1,711/head). The gross packer margin, on an average steer weighing approximately 1,450 lbs. with a 63 percent dressing percentage, exceeded $1,000 per head. This alone would not be cause for concern, however, thousands of cattle producers in Iowa and across the nation have struggled to break even. On average, estimated returns for cattle producers were below cost of production.

In concert with extremely irregular disparity between fed cattle demand and beef product demand, fed cattle delivery times have consistently been pushed several weeks following purchase. To further exacerbate the issue, most of those cattle were purchased using lucrative formula contracts, with details undisclosed to the public. We recently witnessed the impact of captive supply in Iowa, as one of the major meatpackers announced they would not be active in the market for an entire week. While cattle producers waited for their purchased cattle to be harvested, they were expected to cover the cost of care, feed, and yardage for livestock they no longer owned. At that time, corn exceeded $7.00 per bushel. This left cattle producers hemorrhaging thousands of dollars.

*Ransomware Attack on JBS*
Most recently, JBS experienced a ransomware attack that shuttered cattle slaughter at several packing plants. To mitigate the problem, JBS paid $11 million to cybercriminals. USDA recognized the significance of this disruption, and released the following statement:

> As noted earlier today by the White House, USDA is aware of the ransomware attack against JBS, which is affecting the company's operations, including its facilities in the United States. USDA continues to work closely with the White House, Department of Homeland Security, JBS USA and others to monitor this situation closely and offer help and assistance to mitigate any potential supply or price issues. As part of that effort, USDA has reached out to several major meat processors in the United States to ensure

[16] *Record-Breaking Performance for U.S. Beef and Pork Exports in March.* U.S. Meat Export Federation, 5 May 2021. www.usmef.org/news-statistics/press-releases/record-breaking-performance-for-u-s-beef-and-pork-exports-in-march/. Accessed 20 July 2021

> they are aware of the situation, encouraging them to accommodate additional capacity where possible, and to stress the importance of keeping supply moving.
>
> USDA has also been in contact with several food, agriculture and retail organizations to underscore the importance of maintaining close communication and working together to ensure a stable, plentiful food supply. USDA will continue to encourage food and agriculture companies with operations in the United States to take necessary steps to protect their IT and supply chain infrastructure so that it is more durable, distributed and better able to withstand modern challenges, including cybersecurity threats and disruptions.[17]

Please take note of the highlighted sections above. With the level of concentration we have in the meatpacking sector, how exactly would USDA 'mitigate any potential or supply issues?'

**Proposed Solutions**

First and foremost, we ask that the DOJ provide an update regarding their antitrust investigation of Cargill, JBS, National Beef, and Tyson. More than a year has passed since civil investigative demands were issued following complaints from cattle producers across the nation.

We understand the purview of the Judiciary Committee, but we'd be remiss to not recognize the value of legislation as a pathway forward to address the aforementioned issues. However, we cannot solely count on Congress to legislate their way out of this mess. Thorough oversight of antitrust law and competition policy by the Department of Justice (DOJ) must accompany any legislative proposal.

Two legislative proposals (S. 949 and S.543) have been introduced in the Senate this year to restore price discovery and transparency in the cattle market. ICA supports the use of a federal mandate to require meatpackers to consistently participate in the cash market. We believe this is wholly necessary, especially due to the market power of the four main meatpackers.

In June 2021, Sens. Charles Grassley (R-Iowa), Mike Rounds (R-S.D.), and Jon Tester (D-Mont.) introduced legislation (S. 2036) to address anticompetitive practices in the meat and

[17] *Statement from the U.S. Department of Agriculture on JBS USA Ransomware Attack*. U.S. Department of Agriculture, 1 June 2021. www.usda.gov/media/press-releases/2021/06/01/statement-us-department-agriculture-jbs-usa-ransomware-attack Accessed 16 July 2021.

poultry industries that threaten our nation's food supply and national security. ICA supports the establishment of the Office of the Special Investigator for Competition Matters, as it would provide additional oversight of the meatpacking industry.

Additionally, it's worth noting that President Joe Biden and Secretary Vilsack have recognized the importance of a fair and competitive marketplace. In his most recent executive order dated July 9, 2021, President Biden emphasized a 'whole-of-government' approach to address anticompetitive conduct. ICA urges the USDA Packers and Stockyards Division to promulgate rules to promote robust competition in the beef meatpacking industry, including protections for new competitors.

**Conclusion**

Cattle producers work hard to manage inputs, mitigate risk, and raise cattle that ultimately provide the high-quality beef demanded by meatpackers, retailers, and consumers. We do our best to align production with seasonal consumer demand patterns to maximize market opportunities. Despite all of this, most are unable to better position themselves in the market due to the exploitative actions of the meatpacking industry.

High concentration in the meatpacking industry does not guarantee unjust exercise of market power, but it does provide ample opportunity to do so. Although there have been several allegations of unjust, anticompetitive, and predatory practices by the meatpacking industry, USDA and the DOJ have largely been unable to provide results. We must not ignore the obvious—we have a clear oligopsony in the beef meatpacking industry that exacerbates vulnerabilities in our beef supply chain.

The greatest fear of independent cattle producers is to lose their livelihoods for the sake of meatpacking efficiency, i.e. vertical integration. We've witnessed vertical integration firsthand with the swine and poultry industries. The cattle industry is not transforming in the same manner other industries have due to the necessity of forage land for the cow-calf sector. However, meatpackers are changing the way we conduct business through their exercise of market power. The combination of limited competition, captive supply, and formula contracting has not only suppressed live cattle prices, but has also placed an exorbitant financial burden on the shoulders of cattle producers. This is and will continue to lead to the decline of independent cattle producers in Iowa and across the country.

The lifeblood of our rural communities is agriculture. Independent cattle producers are the men and women who volunteer at the local food bank, serve on the school board, and lead various community initiatives. They spend money in their local communities, and their taxes provide public goods. And, they are the best possible caretakers of the land and natural resources in rural

America. We must do all we can to ensure they survive to continue providing high-quality, sustainably produced, and nutritious beef for consumers.

Cattle producers deserve a level playing field. We're asking for a transparent and competitive marketplace to strengthen the beef supply chain. Failure to take swift action leaves the Congress, USDA, and the DOJ culpable for the countless cattle producers that will inevitably be starved out of the industry by four meatpackers. Since 1978, Iowa has lost more than 45,000 family farms that sold cattle.[18] How many more family farmers and ranchers do we need to lose before we recognize the negative impacts of a highly concentrated meatpacking industry on our beef supply chain and our rural communities?

[18] U.S. Census of Agriculture

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## Appendix A

| Industry Definitions[19] | |
|---|---|
| Auction market/auction barn | A facility to which cattle producers bring cattle to be sold via auction. This is the most common method of marketing cattle. Auction markets primarily host live sales of cattle on the premises, while some auction markets also host video sales. |
| Backgrounding/stocking | A growing program where feeder cattle graze or are fed harvested feed from the time they are weaned as calves until they are on a finishing ration in the feedlot. |
| Bull | A mature (approximately 24 months of age or older) uncastrated, male bovine. |
| Boxed beef | Cuts of beef put in boxes for shipping from a packing plant to retailers. These primal (rounds, loins, ribs, chucks, etc.) and subprimal cuts are intermediate cuts between the carcass and retail cuts. |
| Boxed beef cutout | Represents the estimated gross value of a beef carcass, based on prices paid for individual beef items derived from the carcass. |
| Calf | A young male or female bovine animal under one year of age. |
| Cow | A sexually mature female bovine animal that has usually produced a calf. |
| Cow-calf operation | A management unit that maintains a breeding herd and produces weaned calves. |
| Cull cow | A cow that is removed from the main breeding herd for one or more reasons (i.e. poor production, physical ailment, poor disposition, genetic selection, etc.) and is generally sold for slaughter and not destined to be a replacement. |
| CWT | Abbreviation for hundredweight and the unit in which most prices are quoted ($/cwt). |
| Dressing percentage/yield | The percentage of the live animal weight that becomes the carcass weight at slaughter. It is determined by dividing the carcass weight by the live weight then multiplying by 100. Also referred to as yield. |
| Fat/fed/finished cattle; live cattle | Steers and heifers that have been fed a nutrient-dense |

[19] Griffith, Andrew P. *Cattle and Beef Market Definitions*. University of Tennessee, extension.tennessee.edu/publications/Documents/W801.pdf.

| | |
|---|---|
| | ration for the purpose of growing the animals, usually for 90 to 180 days in a feedlot or until they reach a desired slaughter weight and are ready for slaughter. |
| Feedlot/feed yard | An animal feeding operation used to intensively feed and grow cattle for finishing. |
| Feeder cattle | Steers or heifers mature enough to enter a feedlot. |
| Heifer | A female bovine animal that has not produced offspring. |
| Heiferettes | Heifers placed in the feedlot after losing a calf or determined open after the breeding season. |
| Seedstock | Breeding cattle typically registered with a breed association (Angus, Charolais, Hereford, etc.) |
| Steer | A castrated male bovine animal. |
| Quality grade | An evaluation of the degree of marbling (intramuscular fat) and degree of maturity affecting the tenderness, juiciness and flavor of beef. (USDA grades: Prime, Choice, Select, Standard, etc.) |
| Yearling | Calves between one and two years of age. |
| Yield grade | USDA grades identifying differences in cutability: the boneless, fat-trimmed retail cuts from the round, loin, rib and chuck. (Yield grade 1-5 with yield grade 1 carcasses having the highest cutability.) |

**Appendix B**

| Purchase Types[20] | |
|---|---|
| Negotiated cash | The term "negotiated purchase" means a cash or spot market purchase by a packer of livestock from a producer under which the base price for the livestock is determined by seller-buyer interaction and agreement on a delivery day. The livestock are scheduled for delivery to the packer not more than 14 days after the date on which the livestock are committed to the packer. |
| Negotiated grid | The term "negotiated grid purchase" in reference to cattle means the negotiation of a base price, from which premiums are added and discounts are subtracted, determined by seller-buyer interaction and agreement on a delivery day. The livestock are scheduled for delivery to the packer not more than 14 days after the date on which the livestock are committed to the packer. |
| Formula marketing arrangement | When used in reference to live cattle, the term "formula marketing arrangement" means the advance commitment of cattle for slaughter by any means other than through a negotiated purchase or a forward contract, using a method for calculating price in which the price is determined at a future date. |
| Forward contract | When used in reference to live cattle, the term "forward contract" means an agreement for the purchase of cattle, executed in advance of slaughter, under which the base price is established by reference to prices quoted on the Chicago Mercantile Exchange, or other comparable publicly available prices. |

[20] Livestock Mandatory Reporting, 7 CFR § 59.30.

**Appendix C**
**USDA AMS 5-Area Regions**[21]


[21] Presentation by Taylor Cox. *2018 LMR Negotiated Cattle Market.* https://www.ams.usda.gov/sites/default/files/media/2018LivestockMandatoryReportingNegotiatedCattleMarketReviewPresentation.pdf. Accessed 17 July 2021.

## Appendix D
## LMR Purchase Type Breakdown by Region[22]

**NATIONAL (%)**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 52.1 | 49.4 | 47.3 | 42.6 | 38.8 | 37.4 | 32.6 | 26.0 | 23.1 | 23.1 | 21.3 | 25.6 | 25.7 | 25.5 | 20.9 | 23.4 |
| Formula | 33.2 | 34.3 | 37.4 | 39.1 | 43.7 | 43.1 | 47.4 | 54.8 | 59.8 | 56.8 | 57.0 | 57.6 | 57.2 | 61.1 | 64.8 | 62.7 |
| Forward Contract | 4.8 | 7.2 | 6.8 | 11.2 | 9.5 | 11.9 | 13.2 | 12.0 | 10.8 | 15.8 | 17.5 | 12.7 | 13.0 | 9.6 | 11.0 | 8.9 |
| Negotiated Grid | 9.9 | 9.0 | 8.5 | 7.1 | 8.0 | 7.6 | 6.7 | 7.2 | 6.3 | 4.3 | 4.2 | 4.1 | 4.1 | 3.8 | 3.3 | 5.0 |

**5-AREA (%)**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 55.8 | 52.0 | 49.8 | 45.3 | 43.2 | 42.4 | 36.8 | 27.8 | 24.1 | 24.0 | 21.3 | 26.3 | 26.8 | 26.1 | 20.5 | 23.3 |
| Formula | 31.9 | 33.3 | 35.9 | 38.1 | 42.3 | 42.2 | 46.5 | 56.2 | 61.8 | 58.7 | 58.8 | 59.4 | 59.5 | 64.2 | 69.6 | 67.0 |
| Forward Contract | 4.6 | 7.1 | 6.8 | 10.4 | 8.1 | 9.9 | 10.9 | 10.0 | 8.6 | 13.7 | 16.7 | 11.2 | 10.8 | 7.0 | 7.6 | 5.4 |
| Negotiated Grid | 7.7 | 7.7 | 7.5 | 6.3 | 6.4 | 5.5 | 5.7 | 5.9 | 5.4 | 3.6 | 3.2 | 3.1 | 2.9 | 2.7 | 2.3 | 4.3 |

**TEXAS -OKLAHOMA-NEW MEXICO**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 ** | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 47.2 | 42.5 | 36.7 | 31.5 | 26.4 | 21.5 | 17.0 | 10.2 | 6.1 | 3.0 | 2.6 | 6.4 | 9.3 | 6.2 | 5.4 | 10.1 |
| Formula | 42.2 | 42.2 | 48.4 | 53.3 | 60.4 | 66.9 | 72.7 | 76.0 | 83.0 | 84.6 | 85.9 | 82.4 | 81.8 | 86.2 | 87.9 | 84.2 |
| Forward Contract | 3.1 | 5.0 | 4.4 | 5.8 | 5.4 | 4.9 | 4.4 | 5.4 | 4.0 | 7.4 | 9.3 | 7.0 | 6.2 | 4.9 | 5.3 | 4.3 |
| Negotiated Grid | 7.5 | 10.3 | 10.5 | 9.3 | 7.8 | 6.7 | 5.9 | 8.4 | 6.9 | 5.1 | 2.1 | 4.2 | 2.6 | 2.7 | 1.6 | 1.4 |
| | | | | | | | | | | | | | | | **Q 1-Q3 | |

**KANSAS (%)**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 50.6 | 47.3 | 44.8 | 41.7 | 39.9 | 41.0 | 36.9 | 27.4 | 21.0 | 15.6 | 12.5 | 23.0 | 21.9 | 19.3 | 16.2 | 18.2 |

[22] U.S. Department of Agriculture - Agricultural Marketing Service Livestock, Poultry & Grain Market News

| | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Formula | 44.8 | 46.0 | 48.5 | 48.0 | 52.1 | 51.6 | 54.1 | 63.6 | 68.5 | 69.5 | 64.8 | 67.3 | 70.7 | 76.4 | 81.6 | 76.7 |
| Forward Contract | 2.8 | 5.4 | 5.4 | 7.8 | 7.0 | 6.3 | 7.1 | 5.7 | 6.5 | 14.3 | 22.2 | 9.3 | 7.0 | 3.9 | 1.7 | 1.4 |
| Negotiated Grid | 1.8 | 1.3 | 1.3 | 2.4 | 1.0 | 1.0 | 2.0 | 3.4 | 4.0 | 0.7 | 0.6 | 0.4 | 0.4 | 0.4 | 0.5 | 3.7 |

**NEBRASKA (%)**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 64.6 | 63.7 | 64.7 | 61.0 | 60.4 | 55.8 | 48.3 | 38.9 | 36.4 | 38.3 | 32.6 | 42.1 | 41.3 | 43.0 | 32.9 | 36.1 |
| Formula | 18.3 | 16.8 | 17.8 | 17.8 | 22.6 | 23.4 | 28.7 | 41.0 | 48.4 | 42.6 | 44.4 | 42.0 | 41.0 | 45.2 | 52.4 | 54.0 |
| Forward Contract | 5.8 | 9.7 | 7.8 | 14.7 | 9.0 | 14.0 | 15.6 | 14.8 | 10.2 | 14.7 | 17.7 | 12.7 | 13.5 | 8.5 | 11.7 | 4.6 |
| Negotiated Grid | 11.3 | 9.8 | 9.6 | 6.5 | 8.0 | 6.7 | 7.4 | 5.3 | 5.0 | 4.4 | 5.3 | 3.2 | 4.2 | 3.3 | 3.0 | 5.3 |

**COLORADO**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 JAN-JUN | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 51.8 | 40.7 | 39.6 | 28.5 | 28.8 | 19.7 | 17.9 | 12.5 | 10.6 | 11.2 | 8.3 | 13.8 | 16.0 | 13.5 | N/A | N/A |
| Formula | 30.1 | 46.7 | 46.3 | 54.5 | 57.9 | 64.0 | 64.1 | 69.1 | 71.4 | 64.1 | 70.8 | 73.4 | 69.4 | 74.5 | N/A | N/A |
| Forward Contract | 8.6 | 7.3 | 7.5 | 13.3 | 10.5 | 14.4 | 16.0 | 16.8 | 16.8 | 24.1 | 20.3 | 12.2 | 14.1 | 10.9 | N/A | N/A |
| Negotiated Grid | 9.5 | 5.3 | 6.6 | 3.8 | 2.7 | 1.9 | 2.0 | 1.6 | 1.2 | 0.6 | 0.6 | 0.6 | 0.5 | 1.1 | N/A | N/A |

**IOWA/MINNESOTA**

| | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cash | 73.9 | 68.8 | 68.8 | 66.7 | 63.9 | 65.6 | 61.8 | 56.4 | 54.6 | 57.0 | 56.7 | 50.9 | 51.0 | 57.1 | 50.0 | 51.2 |
| Formula | 7.2 | 8.4 | 8.2 | 9.0 | 10.3 | 11.2 | 10.9 | 20.5 | 23.2 | 20.3 | 20.2 | 21.1 | 21.3 | 22.3 | 25.3 | 24.7 |
| Forward Contract | 7.1 | 10.2 | 13.3 | 16.7 | 13.2 | 13.9 | 17.1 | 13.2 | 13.8 | 17.1 | 16.1 | 20.1 | 19.8 | 13.6 | 17.8 | 15.6 |
| Negotiated Grid | 11.8 | 12.6 | 9.7 | 7.6 | 12.6 | 9.3 | 10.2 | 9.9 | 8.4 | 5.7 | 7.0 | 7.9 | 7.9 | 7.0 | 6.9 | 8.5 |

**United States Senate Committee on the Judiciary hearing, July 28, 2021**
**Opening Statement of Tim Schellpeper, JBS USA, President of Fed Beef Division**

## Introduction

Good afternoon Chairman Durbin, Ranking Member Grassley and members of the committee. Thank you for having me. My name is Tim Schellpeper, President of Fed Beef, JBS USA Food Company.

I am a 4th generation farmer and operate the farm my great-grandfather originally settled in Nebraska in 1887. I have led the JBS Fed Beef Division since 2017 and have been in the protein industry for over 35 years.

## JBS USA Food Company

JBS USA and Pilgrim's Pride USA are leading producers of beef, pork, and poultry in the U.S. With 84 facilities across the United States, employing more than 66,000 team members, we contribute millions of dollars each day to local economies through purchases of livestock, poultry, and plant supplies.

It is JBS' mission to ensure the best products and services for our customers, a relationship of trust with our suppliers, profitability for our shareholders, and the opportunity of a better future for all of our team members. We do this through significant, targeted investments in every area of our business and by giving back to the communities where we live and work. For example, we are investing more than $130 million in the U.S. beef industry to increase production capacity, and we are investing $70 million in local communities through our Hometown Strong program.

The most significant challenge facing our industry today is labor availability. To operate our facilities safely, efficiently, and at capacity, we need consistent, skilled labor. In our beef division alone, we are investing more than $150 million in annualized pay increases to attract and retain new workers. Today, average wages across our beef facilities are more than $22 per hour and starting wages are approximately $20 per hour. We also invest in our team's education through our Better Futures program, which provides upfront, free tuition to community college for our team members and their dependents.

Likewise, sustainability—achieving more with less—is at the forefront of our culture. JBS is leading the protein industry with a commitment to achieve net-zero emissions by 2040. We will invest more than $1 billion over the next 10 years in emission-reduction projects, and $100 million by 2030 in on-farm research and development.

## COVID-19 Pandemic

Without question, the COVID-19 Pandemic challenged all of society and critical infrastructure industries, forcing everyone to make every resource available to face this unprecedented threat. Using the best guidance available, we immediately implemented health and safety procedures to keep our team members safe and to continue critical operations. Additionally, we invested more than $600 million in our response to the pandemic which included voluntarily removing vulnerable populations with full pay and benefits, hosting vaccine clinics at our plants, and providing incentives for team members to receive vaccines. Today, nearly 75% of our JBS USA team members have been vaccinated.

## Cattle Industry

The cattle and beef markets are cyclical and decisions made by producers today may not be realized until years from now.

**United States Senate Committee on the Judiciary hearing, July 28, 2021**
**Opening Statement of Tim Schellpeper, JBS USA, President of Fed Beef Division**

Historically, cattle were sold in lots and every animal in the lot received the same average price, preventing producers from receiving increased returns for higher quality beef that met consumer demands. Following the cattle crash in the 1970's and 1980's, when beef lost about 50% of the consumer market share, cattlemen joined together to create alternative marketing arrangements with processors.

These Alternative Marketing Arrangements, or AMAs, provide a mechanism for producers to realize premium prices for the investments they make in superior genetics, herd health, management, and marketing. They also help to ensure a consistent supply of high-quality cattle for processing that result in a consistent supply of high-quality beef options at the meat case for consumers.

It is important to note that JBS purchases from cattle feeders of all sizes. AMAs help ensure producers capture more of the consumer beef dollar in an industry where cattle often change ownership 2-3 times after they leave the farm or ranch.

## Conclusion

JBS is committed to supporting innovation, transparency, and enhancing incentives to keep the U.S. cattle industry ahead of the competition here and abroad. We will continue to invest in our people, our processing facilities, and our communities to help ensure a sustainable, affordable, and resilient food supply.

Thank you for the opportunity to speak with you today, and I look forward to any questions you might have.

**STATEMENT OF**

**GEORGE P. SLOVER**
**SENIOR POLICY COUNSEL**

**CONSUMER REPORTS**

**BEFORE THE**

**SENATE COMMITTEE ON THE JUDICIARY**

**ON**

**BEEFING UP COMPETITION:**
**EXAMINING AMERICA'S FOOD SUPPLY CHAIN**

**JULY 28, 2021**

Chairman Durbin, Ranking Member Grassley, Chairwoman Klobuchar, Ranking Member Lee, Committee Members, thank you for the opportunity to appear before you today to discuss how competition problems in the food supply chain can impact consumers.

The American economy is suffering under the weight of excessive market concentration across numerous sectors.

There is a profound imbalance of power in the marketplace. Increasing concentration and consolidation is leaving consumers with fewer choices and less leverage. Sellers of essential products and services are increasingly able to offer consumers one choice – take it or leave it. Consumer spending is the engine that drives the economy, yet consumers are being denied a fair voice.

The trend toward higher corporate concentration is occurring throughout the economy. According to one study, there have been marked increases in corporate concentration, as measured by the Herfindahl-Hirschman Index, in 75 percent of the industrial sectors, over the past two decades, with the average concentration level close to doubling.[1]

Since our founding 85 years ago, Consumer Reports has emphasized, as a key part of our mission to work for a marketplace that is fair and just for all, the fundamental importance of competition for ensuring a marketplace that works for consumers. Competition empowers consumers with the leverage of choice, the ability to go elsewhere for a better deal. That motivates businesses to be responsive to consumers' interests, with more affordability, better quality, and new innovative thinking.

That is why we have been strong and consistent supporters of the antitrust laws as an essential protector of competition, and strong and consistent advocates for keeping them strong.

[1] Gustavo Grullon, Are US Industries Becoming More Concentrated? *Review of Finance*, Oxford University Press, July 2019, https://academic.oup.com/rof/article/23/4/697/5477414.

In recent years, we have been active in advocating for stronger protections for competition, in enforcement and in legislative reform, in a number of industries, and broadly across the economy. In any marketplace, effective competition fosters consumer benefits in the form of a greater variety of higher quality and more affordable products and services, increased innovation, and greater attention to other aspects that consumers value, including safety.

And nowhere is it more important that consumers can have confidence in the quality, variety, and safety of the products they purchase than in the food they eat.

Food is essential to everyone. But many consumers, particularly in remote rural and marginalized urban areas, lack food options that are accessible and affordable – a problem aggravated by over-concentration in grocery retail that has created "food deserts."[2]

Concerns about the ill effects of over-concentrated agriculture markets often come to the attention of policymakers from the producers – the farmers and ranchers who must sell their produce and livestock to a dwindling number of increasingly large and powerful outlets. But this is also a concern for consumers. For the marketplace to bring meaningful options to consumers, there need to be meaningful options at all parts of the input, production, distribution, and marketing chain, from farm to table. For the marketplace to work for consumers, it has to be working for businesses that seek to reach them. It has to be working for everyone.

That's why monopsony power, market power on the buyer side, can be as harmful as monopoly power, market power on the seller side. When corporate packers and processors in a concentrated buyer marketplace can exert excessive pressure on producers of livestock and poultry and produce to sell at ever-lower prices, at the risk of being cut off, that creates excessive pressure on producers to cut corners on their costs, which can impair quality, variety, and safety, and can nip innovation in the bud.

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[2] *See, e.g.,* Wesley R. Dean, et al, The Possibilities and Limits of Personal Agency: The Walmart that Got Away and Other Narratives of Food Acquisition in Rural Texas, https://www.tandfonline.com/doi/abs/10.1080/15528014.2016.1145006?journalCode=rffc20&.

Some might naively reason that consumers should be pleased that a packer or processor – or high-volume wholesaler or retailer – is using its power to bring down the prices it pays – doesn't that mean consumers also pay less? But it doesn't work that way. Market power flexes its muscle to take from everyone, in all directions. Indeed, over-concentration makes a market more conducive to collusion and price-fixing, as evidenced by recent criminal prosecutions and private lawsuits involving tuna,[3] pork,[4] chicken,[5] and peanuts.[6]

Farmers and ranchers also confront an over-concentrated marketplace when they go to buy the inputs they need – seed and genetics, fertilizer and chemicals, feed and additives, and farm equipment. All these critical input markets have become more concentrated in recent years. Farm equipment manufacturers are making it even worse, by restricting the ability of farmers and ranchers to get their equipment affordably and conveniently repaired.

Agriculture is the cornerstone of America's rural economy. Unfortunately, agricultural producers, squeezed on both sides by over-concentrated market power, are finding it increasingly challenging to survive and thrive. This has contributed to an economic decline in Rural America, and suppressed the growth of independent businesses that would help revitalize it.

A prominent example is beef packing, where market concentration has led to dramatic restrictions in how ranchers can market their cattle.

Two short generations ago, the top four packers accounted for roughly a third of the market.[7] There were lots of other packers, and ranchers had many options. Typically, cattle were sold on the cash market, also called the spot market, where prices were determined on the day of sale based on competitive

[3] Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna, DOJ press release, June 16, 2020, https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna.
[4] Jennifer Shike, JBS USA Settles Third Pork Price-Fixing Lawsuit, Farm Journal, April 20, 2021, https://www.porkbusiness.com/news/industry/jbs-usa-settles-third-pork-price-fixing-lawsuit.
[5] One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and Is Sentenced to a $107 Million Criminal Fine, DOJ press release, Feb. 23, 2021, https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million.
[6] Sam Bloch, Peanut farmers advance in price-fixing lawsuit against Big Shell, The Counter, Dec. 14, 2020, https://thecounter.org/price-fixing-peanut-farmers-lawsuit-georgia-antitrust-adm/.
[7] USDA, Packers and Stockyards Statistical Report, 2006 Reporting Year, May 2008, p. 44.

bidding. A feedlot might have a dozen or more packers show up to bid against each other.[8] Many cattle were sold at live auction, with open bidding, the most competitive kind of market there is. In a cash market, both sides had to be ready for some healthy give and take, but it was balanced, and it worked.

Today, after a cascade of mergers, the top four beef packers – Tyson, Cargill, and two Brazil-owned corporations, JBS USA and National – control 85 percent of the market between them.[9]

Similar consolidation has taken place in pork, and in poultry.

These packers are multi-billion-dollar giants. And with fewer competitors to worry about, their buyers are better able to stay out of each other's way and avoid competing. They don't have to actually agree to collude. They can use what the DOJ-FTC Horizontal Merger Guidelines refer to as "accommodating reactions."[10] They all know, and they all know that they all know; they don't have to say it to each other outright. (And sometimes they may actually be agreeing to collude.[11])

But either way, the effect is the same – meaningful competition evaporates.

Today, on the day a feedlot is ready to sell its cattle, it may be visited by one single buyer, for a single packer, with one offer. No auction.[12] No bidding. No negotiation. Take it – or leave it.[13] And the vast majority of cattle are now

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[8] Rancher Mike Callicrate recalls that 20 packers would show up at his feedlot in the late 1970s. What's the Beef? How the Beef Packing Cartel Hurts Producers and Consumers and How Independent Cattle Producers and Processors Can Help Restore Competition and Choice, Interview, American Antitrust Institute, July 13, 2021, at minute 5:50, https://www.antitrustinstitute.org/work-product/whats-the-beef-how-the-beef-packing-cartel-hurts-producers-and-consumers-and-how-independent-processors-can-help-restore-competition-and-choice/.

[9] USDA, Packers and Stockyards Division, Annual Report 2019, p. 9. https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf.

[10] Horizontal Merger Guidelines, section 7.

[11] *See, e.g.*, Jacob Bunge and Brent Kendall, Justice Department Issues Subpoenas to Beef-Processing Giants, Wall St. J., June 5, 2020, https://www.wsj.com/articles/justice-department-issues-subpoenas-to-beef-processing-giants-11591371745.

[12] Based a 2014 USDA investigation, as of that year, only about 1 percent of fed cattle marketed in the U.S. are procured through livestock auctions. USDA GIPSA, Investigation of Beef Packers' Use of Alternative Marketing Arrangements, July 2014, p. 12.

[13] *See* Mike Callicrate interview, note 8, supra; Stephanie Paige Ogburn, Cattlemen struggle against giant meatpackers and economic squeezes, High Country News, March 21, 2011, https://www.hcn.org/issues/43.5/cattlemen-struggle-against-giant-meatpackers-and-economic-squeezes.

purchased in advance through long-term exclusive contracts, at pre-arranged prices, giving the packers a "captive supply" and increasing their control over producers.[14]

The packers' lopsided bargaining muscle is further exacerbated by the fact that selling cattle is extremely time-sensitive. Cattle, like other agricultural commodities, are perishable. The cattle ready for sale have been carefully fed and nurtured to be at their peak on the scheduled sale date. A rancher can't afford to just hold them back for the next sale date and wait to see if a better offer comes along then.[15]

When farmers and ranchers get squeezed like this, not only are they pressured to cut corners. Ultimately, many may decide they simply can't make a go of it, that it isn't worth trying. When that happens, their exit can diminish what's available to consumers.

And it potentially cuts off prospects for better consumer choices in the future. The farmers and ranchers most likely to be disfavored and run off by the major established outlets – the packers, processors, and high-volume wholesalers and retailers – are the ones seeking to adopt innovative methods that don't fit the current business model dictated by the downstream powers.

Packers with market power can also use exclusionary arrangements to impede the ability of smaller, innovative packers to sell downstream to high-volume distributors and retailers – including packers who want to give greater attention to quality than is possible with massive-scale assembly line processes. And with the independents subdued or eliminated, the dominant packers have less of their own incentive to innovate.

In addition to these usual kinds of harm to consumers and the marketplace that result from insufficient competition, which we are used to discussing in

[14] *See, e.g.,* Amelia Pollard, 'Big Four' Meatpackers Are Crushing Small Ranchers, The American Prospect, June 9, 2021, https://prospect.org/power/big-four-meatpackers-crushing-small-ranchers/.
[15] *See* Ogburn, note 13, supra.

antitrust and competition policy circles, more acute vulnerabilities in an over-concentrated food supply chain have recently come into stark relief.

- Last year, COVID outbreaks caused widespread meat-packing plant shutdowns, with ripple effects up and down the supply chain. Consumers found empty shelves at the grocery store, while producers were forced to kill off millions of animals that could not be brought to slaughter.[16]

- This spring, a ransomware cyber-attack forced Brazil-based JBS Foods, one of the four top beef packers, to shut down all of its U.S. plants temporarily.[17] Those plants account for a quarter of all beef sold in the United States.

In these instances, the lack of alternatives available to absorb the shock exposed dangerous vulnerabilities created by over-reliance on just one or a very few suppliers of critical products and inputs. These critical vulnerabilities had been woefully underappreciated in the quest to reduce the values of competition to just economic efficiency.

And when it's the food supply chain that is disrupted, it can be literally a matter of life and death, for many, many consumers.

The situation is particularly dire for Americans living in remote rural and marginalized urban communities who already did not have the same access to food options. Before COVID hit, there were already 35 million Americans who were food insecure – meaning they did not have reliable access to affordable, nutritious

[16] *See, e.g.,* National Institutes of Health, Meat Production and Supply Chain Under COVID-19 Scenario: Current Trends and Future Prospects, May 7, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8137951/#B7; Federal Reserve Bank of Kansas City, COVID-19 Disruptions in the U.S. Meat Supply Chain: The emergence of COVID-19 in the United States has created substantial challenges for all segments of the meat supply chain, but especially for producers and consumers, July 31, 2020, https://www.kansascityfed.org/agriculture/ag-outlooks/COVID-19-US-Meat-Supply-Chain/, July 31, 2020; Michael Corkery and David Yaffe-Bellany, The Food Chain's Weakest Link: Slaughterhouses, New York Times, April 18, 2020, https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html.

[17] *See* Fabiana Batista et al, All of JBS's U.S. Beef Plants Were Forced Shut by Cyberattack, Bloomberg, June 1, 2021, https://www.bloomberg.com/news/articles/2021-05-31/meat-is-latest-cyber-victim-as-hackers-hit-top-supplier-jbs; Sara Morrison, Ransomware attack hits another massive, crucial industry: Meat, Vox, June 10, 2021, https://www.vox.com/recode/2021/6/1/22463179/jbs-foods-ransomware-attack-meat-hackers.

food.[18] During COVID, that number jumped by half, to an estimated 54 million, of whom over 18 million were children.[19]

So there are unique aspects to agriculture not present in other sectors.

But many of the competition problems we see in the food supply chain are the same kinds of problems we see in other concentrated sectors in our economy. And they will benefit from the same reforms to antitrust law and enforcement.

We have previously indicated our support for S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021, introduced by Senator Klobuchar and others on this Committee. Two of its proposed reforms are especially worth highlighting here.

- One proposal would reinvigorate the prohibition against anticompetitive mergers, by clarifying the legal standard to be more consistent with Congress's intent to stop harmful concentration trends before it is too late,[20] and adding some specific threshold triggers for the largest mergers, which would have to be affirmatively justified as not creating an appreciable risk of materially lessening competition, or tending to create a monopoly or monopsony.

- The other proposal would strengthen the prohibition against anticompetitive exclusionary conduct by a dominant corporation to freeze out competitors – to sabotage their ability to compete, cutting off access to critical supplies or customers or means of distribution. This proposal would clarify that the prohibition reaches all situations where the corporation has sufficient market power to harm competition, not just an already-baked-in monopoly.

These and other proposals in the Klobuchar bill are sound and well-considered, based on established principles of antitrust and competition. They

[18] USDA, Economic Research Service, Food Security in the U.S., 2019, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics/.
[19] True Cost of Food: Measuring What Matters to Transform the U.S. Food System, Rockefeller Foundation, July 2021, https://www.rockefellerfoundation.org/wp-content/uploads/2021/07/True-Cost-of-Food-Full-Report-Final.pdf.
[20] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

would help promote a fairer, more competitive, better functioning marketplace in agriculture as they would in other sectors. Importantly, the bill adds explicit references to monopsony power into the antitrust statutes.

We have also been supporting S. 228, the Merger Filing Fee Modernization Act, introduced by Senators Klobuchar, Grassley, and Durbin to strengthen antitrust enforcement resources by increasing pre-merger filing fees for the largest corporate mergers. It has already passed the Senate, and we are looking forward to seeing it pass in the House as well.

And the TEAM Act, S. 2039, introduced last month by Senators Lee and Grassley, contains a number of well-thought and constructive proposals, which we hope will also be part of the discussions leading to a bipartisan consensus on moving forward with legislation to strengthen antitrust enforcement and competition for the benefit of consumers, businesses, workers, and the economy.

Finally, we are aware of efforts underway at USDA to examine food supply chain resilience and security, at the request of the President. And more recently, the President's Executive Order on Promoting Competition in the American Economy calls on USDA to consider a number of measures to improve the competitive functioning of the agricultural supply chain and the marketplaces that constitute it, including reinvigorating the Packers and Stockyards Act's prohibitions against unfair practices. This hearing will help inform USDA in these efforts.

Improving competition, in the food supply chain as in other marketplaces, can give consumers more and better food choices, at more affordable prices, and will spur more innovation to create even better food choices. And it can give us a more reliable and resilient food supply chain that can better weather the storms, foreseen and unforeseen.

Thank you again for the opportunity to be here before you today. I would be happy to answer any questions.

Prepared Testimony and Statement for the Record of

David Smith, President & CEO, Associated Wholesale Grocers

On Behalf of the National Grocers Association

Hearing on "Beefing up Competition: Examining America's Food Supply Chain"

Before the

Senate Judiciary Committee

July 28, 2021

Dirksen Senate Office Building Room 226

Washington, D.C.

**Power Buyers and the Impact on American Consumers**

My name is David Smith. I am the President and CEO of Associated Wholesale Grocers, or AWG, which is based in Kansas City, Kansas. AWG supplies over 3,100 supermarkets in 28 states. I'm testifying today on behalf of the National Grocers Association, the national trade association for independent community grocers and their wholesalers.

The grocery industry is my life. I've grown up in independent grocery stores and have dedicated my life to making independent grocery stores viable for the future. Today, I'd like to tell you about the grocery industry and the problems that we see flowing from high level of concentration in the supply chain.

**The Grocery Industry & The Benefits of Independents**

First, I would like to provide you with a bit of background on the grocery industry. The grocery industry is an approximate trillion-dollar retail segment of the U.S. economy. There are about 38,000 supermarkets, employing approximately 5 million Americans. Notably, our industry invested $24 billion due to COVID-19 to help keep our employees and customers safe.

My company, Associated Wholesale Grocers, or AWG, is a cooperative wholesaler supplying groceries, produce, perishables, and general merchandise, as well as an array of support services to over 3,100 stores in the United States. We have approximately 1,100 owner/shareholders, predominantly family businesses, all of whom live and work in the communities in which their stores are located. In addition to AWG, there are seven other cooperative wholesalers in the United States, and several other companies that provide products to independent grocery stores in the United States. Independent grocers like those who are the owners of AWG account for almost 1.2% of the nation's overall economy and are responsible for generating $253B in sales, 1.1 million jobs, $42B in wages, and $36B in taxes. Overall, grocery represents $1 trillion of the nation's economy.

The size of the grocery stores supplied by AWG and similarly situated wholesalers varies widely. A store in a small rural area of Kansas may purchase less than $10,000 per week, while a grocery store in a Chicago suburb may purchase over $500,000 per week. As a result of having diverse ownership of stores, diverse communities served by the stores, and diverse store sizes, there is very little one-size-fits-all for our stores.

All of this is a way of saying, the independent grocery retailer is exceptionally diverse by design as they cater to the communities they serve and have positively differentiated their businesses through their offerings, service, quality, and freshness of products, and by being a local business with a heart for the communities they serve.

In 2020, AWG had wholesale sales to member retailer stores of $10.6B, and the aggregated retail sales of these stores totaled over $22B. The gap between retail sales

and wholesale purchases is generally not due to markup; stores purchase substantial inventory from other sources, locally and through direct store delivery. Operating expenses in our industry represent 85% or more of the gross margin, from salaries to fixed facility costs and utilities, to credit card fees (a story for another day), to supplies and donations to the local food pantry, and sponsorship of the local soccer and baseball teams. The average supermarket net profit after taxes for 2019, according to FMI, The Food Industry Association, is 1% of sales, ranking our industry among the lowest in recorded net profitability.

Independent grocers and their wholesalers play a crucial role in American communities. They compete to offer low prices, higher food quality, better service, more accessible and convenient locations, a greater variety of products, and good jobs.

**The Problem: Buyer Power in the Grocery Aisle**

AWG has had a front row seat to increasing levels of concentration in the food supply chain in recent decades—both at the retail level and among suppliers like meatpackers. Today, 1 in 4 grocery dollars in the United States are spent at Walmart. Our 3,100 stores, which comprise $22 billion in sales for the industry, can look like peanuts compared to the dominant retailers. Walmart derives almost $300B of their $514B in retail sales from grocery. Kroger brings in $121 billion. We estimate Amazon, which doesn't break out its grocery sales, is at approximately $70 billion. Finally, Alberton's brings in $61 billion and AholdDelhaize brings in $44 billion. That's almost $600 billion—or 60% of the entire industry's sales—in the top 5 retailers.

High levels of concentration allow the dominant retailers to act as gatekeepers to consumers. These retailers use their control over the market to advantage themselves at the expense of everyone else. They dictate terms and conditions to suppliers, including more favorable pricing and price terms, more favorable packaging, and access to exclusive products. Some even pressure suppliers not to sell certain products to independents. And because of their position as gatekeepers to so many shoppers, suppliers have no choice but to acquiesce. These dominant retailers, which we call power buyers, in some cases represent 35% or more of a supplier's total sales. In a razor-thin margin business, those suppliers have no choice but to comply with big retailers' demands—or face crashing stock prices or worse yet, closure.

For some products, power buyers extract such an unfair advantage that their retail prices are lower than the wholesale prices available to independent grocers—making it impossible for independent grocers to compete on price. At times, the wholesale prices available to local store owners are so high that they resort to buying product directly from a competitor like Walmart or Amazon, because these dominant retailers are offering a lower price than the wholesale price from the store's supplier. Needless to say, this makes it impossible for local store owners to compete with dominant retailers on price.

In response to the problem of the buyer power at the retail level, suppliers have consolidated to gain their own economic power. Consolidation at retail causes consolidation upstream in the food supply chain, and meatpacking is one stark example. In meatpacking, a small handful of powerful, vertically integrated companies control the entire market. And we see this type of consolidation everywhere – from protein, to consumer packaged goods, to even private label manufacturing. These problems are interrelated, and it begins in the grocery aisle.

In meatpacking in particular, farmers and ranchers face the same buyer power problem we do. With such a high level of concentration in meatpacking, the dominant players dictate prices to farmers and ranchers, who have no one else to sell to and therefore no choice but to acquiesce, even with prices so low that they are pushing these workers into poverty. And consolidated supply chains are more vulnerable to disruption, as we saw with meat during the pandemic.

Ultimately, we have seen the result of concentration in the communities we serve. Long after the seemingly good deals and better prices are gone, there is less competition, higher prices, and less availability and access to fresh, healthy, and affordable foods. Local, independent store owners lose out. They can't get access to products that consumers want. Rural families, urban families and communities of color, who often live in food deserts where the big box stores aren't nearby, don't have easy access to healthy foods when they don't have access to independent stores. So they lose out disproportionately.

Who else loses out? People who prefer shopping at a local store or who don't have easy access to transportation. And store employees, whose jobs are disappearing as local and independent stores close down. Ranchers, farmers, manufacturers, and suppliers — they struggle to get fair prices as fewer firms compete for their product. And entrepreneurs who dream of opening an independent store lose out, as running an independent grocery store becomes increasingly impractical.

**The Food Supply Chain & COVID-19**

I want to take a moment to provide a bit of background on the two primary ways that grocery stores set retail prices, and why this mattered during the pandemic.

The vast majority of grocery retailers, including the majority supplied by AWG, follow an everyday and sale pricing strategy. In ordinary grocery shopper terms: they have a regular shelf price that is based on a retail pricing zone with suggested retail prices for a geographic region, and then every week, with the help of special allowances provided by suppliers, run sales on specific high-demand items, sometimes well below the retailer's wholesale acquisition cost net of all allowances and promotional dollars. So, if you go into a store today for mayonnaise, it may be $4.99, but if it is on special, it may be 2 for $5.00 or even $1.99. These sales or special prices are available to these retailers due to promotional dollars provided by the vendors and augmented by significant reductions to the standard product markup by the retailer.

A number of the power buyers, including Walmart, go a different route and negotiate with vendors for flat, reduced prices – known in the industry as "Every Day Low Price" or EDLP. As a result, those retailers require suppliers to bill them at a net cost on every shipment and do not receive the additional advertising dollars based on promoted pricing.

Now, you may be wondering why this is important in this antitrust discussion. It became crucial in the past year when suddenly manufacturers could not produce the quantities of products necessary to supply all retailers with the desired inventory levels. As a result, the manufacturers placed allocations and restrictions on product flow to retailers and suppliers. While we never like being on allocation, we agreed with the concept of making sure each purchaser could get access to their fair share of products since supplies were suddenly scarce. There was not enough to meet the demands of consumers, and we were willing to do our part. Unfortunately, though we gladly provided the retail demand information by item and location back to the suppliers, we could not receive the same visibility to the supply side production of product or availability at the manufacturing facilities. This lack of transparency by the suppliers frustrated our expectations of fair allocations, a subject I will discuss later.

Allow me to make it clear, the pandemic was not the first time power buyers undertook anticompetitive activities; it was just the mechanism by which these activities, which we know have been going on for decades, but could not easily prove, were laid bare for all to see. As the pandemic began and panic buying ensued, our shelves were decimated. The last thing a manufacturer wanted was a reduced or sale price on their product to encourage accelerated sales on products they couldn't produce. In a situation like ours, we suddenly found that the advertising dollars that our retailers had already earned by buying a full assortment of the manufacturer's products and counted on receiving when setting their shelf prices were non-existent. Yet, manufacturers did not reduce prices or offer these advertising dollars to purchasers to offset the higher retail prices. At the same time, those who had negotiated EDLC pricing could take advantage of reduced prices without the need to run any of the planned and anticipated sale campaigns.

This stark contrast in pricing strategy resulted in substantially higher costs at wholesale for independent grocery stores, subsequently higher prices at retail, and the double impact of scarce products and higher prices for consumers. Our stores did not raise retail prices or increase their profit margin expectations during COVID. The higher retail costs consumers experienced were due to the substantial reduction in promotional spending by manufacturers as they couldn't meet retail product demands and pulled promotions to control output.

As I mentioned earlier, product allocation was a prominent issue over the past 16 months. Without providing us with visibility of how much they were producing, they told the industry as a whole that we were all receiving our fair share of products. But in fact, independent grocery stores did not receive their fair share. I spent months last year receiving photos from AWG member retailers of their empty shelf sections at their stores, as well as pictures from those same member retailers of whole pallets of the

products missing from independents' shelves in the big box retailers across the street. Sanitizers, disinfecting wipes, paper towels, toilet paper, the list goes on and on. When we asked some of these suppliers, they told us, "we provide priority to mass merchants, as they support healthcare workers and the front line." Hence, they received first preference alright—an extremely frustrating answer for our retailers who serve front-line workers and their families every day. The distinction was not really about the consumers they served because the supply to healthcare went through supply companies and not retailers. Hospitals don't send someone to buy their antiseptic wipes at Walmart or Sam's Club. The real reason dominant retailers were prioritized was because they demanded it—and suppliers had no choice but to yield to the incredible leverage they wield.

To add insult to the injury we were already feeling, in the Fall, when inbound supply was still running behind at only 85% of pre-pandemic levels from manufacturers, Walmart issued a new on-time and in-full mandate. In the middle of a pandemic with supply chains interrupted, Walmart demanded that suppliers must deliver 98% of orders on-time and in-full or pay a 3% penalty of the dollar amounts outside those requirements. This demand came at a time where almost no manufacturer had recovered from the initial panic buying at the beginning of the pandemic, at a time when COVID positivity rates were still climbing, at a time when there was no vaccine, and at a time when the industry was attempting to prepare for the most unpredictable holiday period the industry has ever encountered.

The impact of this requirement is clear—suppliers are forced to prioritize Walmart's orders over the orders of Walmart's competitors. Across the industry, suppliers are only running at 85% capacity. And no supplier can afford to pay a 3% penalty in an industry with a net profit of 1%. To comply with Walmart's demands, suppliers would need to reduce the service level to all others to 81% or less, further exacerbating the existing supply issues for independent stores—all to the benefit of Walmart.

We were also floored by the candor of the nation's only full-line canning supplies company when they sent us, as well as many other similarly situated companies, a letter stating that since they couldn't meet demand, they had decided to play favorites and only supply the top 6 retailers, even going to the point of listing those retailers on their website. Remember, it is independent retailers located in small, rural communities that supports the consumer that does the most canning and freezing of homegrown produce and proteins every year. This strategy would have forced many rural consumers to drive 40 miles or more to get the supplies they needed. Ultimately, the company reconsidered their plans. But this episode reveals the pressure suppliers face from power buyers, and the confidence that both power buyers and suppliers have that openly advantaging some competitors at the expense of others will not lead to antitrust enforcement. The company was so confident that it could pick winners and losers that it actually sent out letters to each of its customers informing them that they had decided to play favorites and that we – the independent grocer – were not among the chosen few.

Finally, beef pricing during the pandemic rose dramatically, even though farmers and ranchers were paid less and retailers and wholesalers were paying more. The only explanation for this is consolidation—meatpackers used the pandemic and supply shortages as an opportunity to squeeze their upstream suppliers and their downstream customers, boosting their own profits at everyone else's expense. To make matters worse, some independent grocers were wrongly accused of price gouging in 2020. But in the cases of alleged price fixing, investigators found that stores were simply passing through a portion of their own increased costs to consumers. In fact, retail profitability on fresh meat actually fell during this time as many independents absorbed costs increases from meatpackers and processors to protect their retail customers from monopoly pricing.

**Consolidation & Supply Chain Fragility**

In addition to the harms that flow from buyer power, concentration also makes our food supply chain fragile. In the last 16 months, COVID-19 revealed the dangers of a consolidated meat supply chain. Today, meatpacking plants are so concentrated that coronavirus outbreaks at a small number of plants led to disruptions and shortages across the entire beef, pork, and poultry supply chain.

NGA's members, in contrast, showed the benefits of diverse ownership during this time. Many NGA members employ butchers that cut fresh meat from primal cuts. The dominant retailers, in contrast, primarily sell prepackaged meat produced through central processing facilities. Many consumers prefer store meat cut fresh by experienced butchers, without additives or solutions, which may be as much as 10% of the meat's weight by volume.

When the pandemic impacted processing centers, many of NGA's members fared better because they continued to have access to bulk meat that they then prepared in store. Other NGA members facing supply shortages were able to secure excess supply from restaurants and caterers to keep meat on their shelves. Dominant retailers like Walmart were nowhere near nimble enough to respond to disruptions in this way, and no meat was available in their stores until the dominant suppliers could supply it.

**The Impact of Unrestrained Buyer Power on the Food Supply Chain**

Companies like AWG, which has a total of 8 full-line grocery distribution centers, have been working for decades to make sure our retailers can take advantage of the economies of scale. In fact, that is what initially brought the original owners of AWG together back in 1926 to protect themselves against a much larger retailer entering the marketplace. We combine our purchases in the most economical fashion, buying by the truckload, and operate highly efficient billion-dollar-plus warehouse facilities, just like the power buyers. Still, we cannot obtain the same terms, conditions, and pricing as the power buyers.

One primary reason for this is that the playing field is not level. The dominant grocery retailers are not nearly as dependent on a particular supplier as the supplier is on the retailer. Think about it, even if a manufacturer has a substantial number of products compared to the overall number of products for sale in any grocery store (in the tens of thousands), the total amount provided by a single manufacturer is only a fraction of a grocery retailer's sales. And a power buyer often enjoys a choice between several potential branded suppliers for a particular product in addition to selling its own, private-label versions of the same product. As a result, a dominant retailer has a substantial advantage over its suppliers in a negotiation because the risk for the retailer, if the supplier refuses its demands and no deal results, is substantially smaller than it is for the supplier. As a result, the power buyer can extract discriminatory terms – better prices, more favorable terms, unfair allocations of products.

The U.S. House Judiciary Committee found that Amazon exercises significant market power over suppliers. The Committee found that Amazon and Walmart ignore minimum advertised prices set by brand manufacturers, by which other sellers must abide, as there is effectively no different path to reach their customer base. Unfortunately, with power buyers now dominating the grocery industry, we have no point of reference for the real economies of scale and performance levels. Those are hidden and kept in secrecy, shielded by explanations such as separate classes of trade, partnership agreements, and other special arrangements.

We continue to grow and prosper as a company, but the pool of independent grocers is declining. That's detrimental to our communities, our economy, and the family unit. The local grocer is the backbone of the communities they serve. These stores are particularly important to inner-city and rural communities, many of which would otherwise suffer from a lack of access to healthy foods. When independent grocers leave, food deserts emerge. Small towns begin to fall apart, and our government spends billions each year trying to rebuild. But it's too late after all of the grocers leave. Prevention is the only way to stop this costly erosion.

Our most vulnerable population, generally the most financially challenged, is affected most, causing food insecurity, poor diet, increased health-related risk, and increased demands for governmental assistance. They need access to fresh, healthy, affordable food, and we want to provide that for them.

We want to clarify that we do not see the vendor/manufacturer as the bad guy in this issue; in fact, they are the primary victim. Many food manufacturers state in their SEC filings that the increasing control that dominant players have over their business is one of the greatest business risks they face.

As far as meeting the needs of retailers, wholesalers, and consumers, I believe manufacturers and suppliers do a great job given the demands. Still, they are in an untenable spot where they must disappoint and disadvantage the less powerful to serve the bidding of the power buyers. Their survival requires it.

As we all know, incremental volume on a fixed cost basis produces economies of scale and reduces the cost to serve as sales increases. But this also applies only to a specific point when capacity is reached. Then when existing capacity is exceeded, capacity must be added, increasing fixed costs, which cannot easily be reversed. The economies of scale are then superseded by the law of diminishing return as the incremental cost to increase capacity must then be applied across the entire block of business. Accordingly, the potential loss of significant retailers brings a far greater vulnerability to the supplier as they can seldom unwind the capacity expansion necessary to supply the growing power buyer. This is precisely what has happened, and as there is no protection for the manufacturer and supplier, and bucking the system to stand up to these largest retailers is clearly financial suicide, they must improve profitability on the balance of their business to remain viable as the power buyers segment of their business is too big to lose and the pricing required is too low to be sustainable on its own. So the cycle continues.

**Antitrust's Failures to Address Buyer Power**

I am not a lawyer. I sell groceries to make a living. But as I understand it, the antitrust laws were designed to protect consumers and suppliers from firms with buyer power. It has only been in recent decades that our antitrust laws have gone unenforced in this space, because of a theory that consumers benefit from reduced pricing above all else. But this legal standard—which is meant to protect consumer welfare—is doing just the opposite. Americans who happen to live in communities serviced by an independent must pay higher prices for fewer options, and are left behind in supply crunches. At the same time, dominant firms rake in record profits, get preferential terms, and engage in a pattern of behavior that wipes out competition. And even for Americans served by the dominant retailers, the short-term prices they get cannot be considered a consumer benefit, when the end result is higher prices and less choice.

AWG does retail price analyses every four weeks on the regions where we do business. We look at the power buyers in each region and compare their retail prices to our suppliers' costs. Using Walmart as a prime example, our monthly research shows that their retail pricing varies significantly by market depending on whether they face competition. On June 7, 2021, for example, the highest Walmart pricing in our eight region study versus the lowest varied by 3.08%. In May, the variance was 3.22% and in April it was 3.06%. It's like this every month. The regions that are at the highest and lowest change over time, but there are always substantial variances. Why is that? Two words: **Harvest** and **Invest**. In regions where a power buyer dominates the local market and drives out the competition—and there are many—the power buyer **harvests** its power by charging consumers higher prices. And in areas where there are still battles to be won, they **invest** retail gross margin in the form of reduced retail prices. This is not a theory; it's a fact.

As a grocer of more than 40 years, I've seen it happen over and over again. It's why rural towns like Mitchellville, Iowa, and urban centers like South Chicago can only rely on dollar stores for their grocery needs. Senators, if you've ever been in one of these

stores, you know: they're not where a family can go for healthy food or abundant choices.

So, do consumers benefit from the increased competition? Yes. We appreciate and believe in competition and we are up to the challenge. But consumers do not ultimately benefit from the predatory tactics used by power buyers. The ultimate goal of these retailers is to eliminate competition by dominating the markets, creating a monopoly, and harvesting with increased retail pricing.

If we want to protect Americans from the impact that monopolies can cause, we need to look further than just big tech. We choose to use social media and search engines, but we all must buy groceries and eat. Accordingly, we need to look into the unfair and unjust buying advantages afforded to the power buyers. Bring the manufacturer and supplier buying brackets, the scale at which specific discounts and allowances are available, out into the light, so all of us are afforded an equal and fair opportunity to work for and achieve the best cost—the best cost for retailers and the best prices for consumers. Give everyone a shot at competing fairly. This will genuinely preserve competition for the long haul, not just until the contest is gone.

Our company was founded in 1926 to help independent merchants achieve scale and buy competitively. While companies like AWG make the cost of goods clear to all our customers, this transparency no longer exists at wholesale. When I began my grocery career in the 70's, there was a different cost for a case, for a pallet, and a truckload. Everyone knew those costs, and we bought the best we were able to do. It was fair, and it was transparent. We long for that level of transparency and fairness.

###

**United States Senate Committee on Judiciary**

**Hearing on Beefing up Competition: Examining America's Food Supply Chain**

**July 28, 2021**

**Questions for the Record for George P. Slover, Consumer Reports**

**Senator Sasse**

**Question 1**

- Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting? How have you seen wholesale and retail beef prices change over the last several years?

**Question 2**

- If all capacity constraints go away over the next 6 months - so labor shortages disappear, transportation bottlenecks are non-existent, and there are no demand disruptions or regulatory shocks for bumps – how would this impact the cash and contract markets for beef? Would you anticipate significant change or the markets to function relatively similar to the way they do now?

**SENATOR CORY A. BOOKER**

**Mr. Rob Larew**

1. In 2019 there was a fire at a major packing plant. In 2020 we were collectively hit by the COVID pandemic. In 2021 a cyberattack against JBS took processing facilities off-line. The big meatpacking companies claim that our current consolidated system is very "efficient", but what each of these shocks to the system demonstrated is that the system is very brittle and lacks resilience.
    a. In your opinion is this tradeoff between supposed efficiency and resilience worth it?

National Farmers Union is deeply concerned by the brittleness of the current system, and that farmers and consumers are both hurt by the highly consolidated livestock processing sector. More marketing streams for farmers and ranchers make for more competitive markets and supply chains that are better equipped to withstand disruptions.

2. In 2015, over half (51.5%) of each dollar consumers spent on beef was returned to cattle producers. But the cattle producer's share has since diminished to just over 37% in 2020, the lowest annual percentage on record.
    a. Why do you believe the cattle producer's share of the consumer's beef dollar is shrinking?

There are many variables that contribute to the cost of food and the share of the retail dollar received by farmers. A key component of the falling share of the cattle producers' share of the consumer dollar is lax antitrust enforcement, which has allowed just four corporations to control 85 percent of beef slaughtering and packing in the United States. As a result, those companies can manipulate farmers' and consumers' prices to their advantage.

NFU has long published information about the farmer's share of the retail food dollar, derived from USDA data, for a wide variety of food products. As of August 2022, NFU published that farmers and ranchers receive on average only 14.3 cents of every food dollar that consumers spend. This constitutes an approximately 17 percent decline since 2011.

https://nfu.org/farmers-share/

3. Since January of 2017, retail beef prices have risen higher, with the all-fresh retail beef price increasing from $5.49 per pound to a reported $7.11 per pound in the month of June. Despite the temporary increase to $138 per cwt in May of 2017, fed cattle prices have since dropped and were only $120 per cwt in June.
    a. Why do you believe beef prices and cattle prices have moved in opposite directions since 2017?

Boxed beef and fed cattle price spreads are partially attributable to coronavirus pandemic-related disruptions, but this also underscores the dangers of a highly concentrated food system. There are relatively few, very large meat packing plants. The shuttering of any of these plants,

as we saw during the pandemic, led to massive disruptions that harmed producers (who received low prices or lack of access to processing) and consumers (who faced high prices or lack of access to finished products).

4. USDA data shows the monthly returns to cattle feeders has been a loss of over $25 per head per month for each animal fed over the past two decades.
    a. Why do you believe, despite this average monthly loss, the number of the largest feedlots in the U.S.—those with capacities of over 50K head—have increased by 71% (from 45K in 1996 to 77K in 2020) while independent cattle feedlots—those with capacities of less than 1K head—have shrunk by 75% during the same period (from 110K in 1996 to 27K in 2020)?

NFU is deeply concerned by the loss of independent feedlots, and we believe the highly concentrated beef slaughter and processing sector and anticompetitive practices could be contributing to these losses. As the largest meatpacking companies run roughshod over the marketplace, smaller feedlots have been driven out of business in favor of the largest packer-friendly feedlots.

5. The beef industry boasted all-time record beef exports in 2018 yet fed cattle prices fell 4% from 2017 to 2018.
    a. If increased exports are associated with increased cattle prices, why do you believe cattle prices did not increase when beef exports hit record levels in 2018?

There are multiple factors that contribute to cattle prices; exports are not the sole determinant. The market power of the dominant packers puts continual downward pressure on prices paid to producers regardless of the domestic or international destinations for beef production.

6. Many industry analysts attributed higher cattle prices in 2014 in part to low cattle supplies following the late 2010 – 2013 drought. In other words, they say there was low cattle supplies (as measured by the number of cattle ready for slaughter), which drove cattle prices higher. Industry analysts then speculated that the increased cattle supply in 2015 contributed to a collapse in cattle prices—suggesting there were more cattle slaughtered in 2015, which helped drive cattle prices lower. However, the USDA reports that the number of cattle slaughtered in 2015 (28.3 million) was less than in 2014 (29.7 million) which means that in 2015, there were both lower cattle supplies and lower cattle prices.
    a. Can you explain this phenomenon?

Volatility in the cattle markets can be caused by a wide number of factors and influences. Given the long record of abuse of market power by the biggest beef packers, their behavior and influence likely contributed to this phenomenon.

**United States Senate Committee on Judiciary**

**Hearing on Beefing up Competition: Examining America's Food Supply Chain July 28, 2021**

**Question for the Record for Rob Larew, National Farmers Union**

**<u>Senator Sasse</u>**

**Question 1**

- Your testimony mentions the closure of several meatpacking plants in Iowa. While many witnesses mentioned reduced packing capacity as a reason for bottlenecks and lower cattle prices, there have been multiple examples of communities rejecting the construction of new packing plants, in Nebraska, Kansas, and recently South Dakota. With substantial upfront construction costs, how can potential new packing plants overcome some of those issues and ensure that they are economically viable into the future?

Part of ensuring economic viability of new packing plants is ensuring we have a competitive marketplace in the first place. We need strong enforcement of our antitrust laws, the strengthening of the Packers and Stockyards Act, and other reforms such as improved cattle price discovery and transparency. Additionally, federal support that helps with those upfront costs, technical assistance, and other needs are important for ensuring the success of new plants; USDA has recently put several programs in place to help address these needs. By fostering the development of new marketing options for farmers and ranchers, the cattle sector will enjoy greater resilience and competition.

**Question 2**

- The pork industry uses the producer cooperative model in some instances, with facilities constructed in recent years in Missouri, Michigan and Iowa under this type of partnership. Do you believe there is opportunity for greater occurrence of producer cooperatives partnering with packers to expand beef processing capacity? How would this opportunity impact cattle producers?

NFU is a strong supporter of farmer-owned cooperatives, which can help reduce costs of production, effectively market and process farm products, and improve farmer livelihoods. As farmers collectively explore market opportunities, such as new beef processing ventures, they must do their due diligence and have access to capital before moving forward with such projects.

**Question 3**

- Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting? What are the top three potential markets for beef exports, and what are some of the barriers blocking that trade access?

It is essential that farmers have access to fair and competitive markets, regardless of their size and changes in consumer preferences (which will inevitably shift over time). A September 2022 USDA market outlook report projects the retail weight per capita disappearance of beef to decline by nearly three pounds over 2022 and 2023. This decline follows a several-years-long trend of increased consumption of beef. Meanwhile, the volume of beef exports from the U.S. in the first half of 2022 increased by six percent from the previous year, with much of that growth driven by Asian markets, along with increases in shipments to the Caribbean and Central America, Europe, and the Middle East.

https://www.ers.usda.gov/topics/animal-products/cattle-beef/market-outlook/

https://www.drovers.com/news/industry/us-beef-exports-remain-torrid-pace-pork-exports-lower

**SENATOR CORY A. BOOKER**

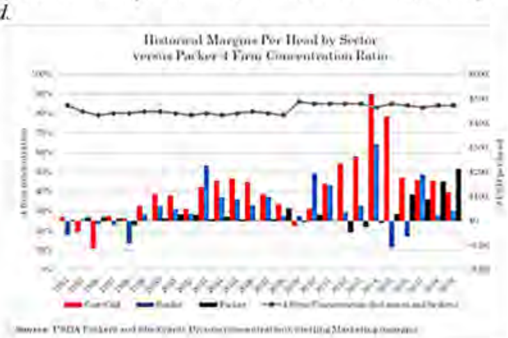
**<u>Mr. Shane Miller</u>**

1. In 2019 there was a fire at a major packing plant. In 2020 we were collectively hit by the COVID pandemic. In 2021 a cyberattack against JBS took processing facilities off-line. Each of these unanticipated "black swan" events presented a different type of shock to the system, yet in each instance the outcome was the same: consumers paid more for meat, ranchers were paid less for their cattle, and the large meatpacking companies' profits increased. It appears that the system is rigged: all of the risk is borne by consumers and cattle ranchers, and regardless of the cause of any disruption the meatpacking companies bear none of the risk and suffer none of the harm.
    a. Can you explain how this is a fair and just system?

*The performance of cattle and beef markets, and all protein markets, in the United States are linked to the laws of supply and demand. When supply decreases relative to demand, due to an unexpected event or cyclical trends, prices increase. Conversely, prices fall when supply increases relative to demand. These fundamental economic principles apply to the consumer, producer, and processor alike. In the cases of the 2019 fire and the COVID pandemic (the two events cited that impacted Tyson), processing capacity in the beef industry was reduced for periods of time, while the availability of cattle and consumer demand was not impacted.*

*As shown in the USDA data chart below, there are periods in which cattle supply has been low relative to both processor need and consumer demand. In those cases, processors pay more for cattle and their profit margins are lower.*

*Prices resulting from market conditions during the pandemic are not representative of historical trends nor future expectations. In fact, the margins obtained by ranchers and feeders exceeded those earned by processors in nearly every year prior to the pandemic. This is true even though the concentration in the industry has remained relatively stable for the past thirty years. The chart below illustrates this history. As reflected in Tyson's FY22 third quarter earnings statement, beef margins have already started to decrease from historically high levels as we emerge from the pandemic. Paired with a decline in the total U.S. herd size, going forward, we expect margins for producers and packers to continue to normalize in response to the forces of supply and demand.*



2. Meatpacking workers in the United States are significantly more likely to suffer from serious injuries, including burns, head trauma, fractures, and amputations, than the average American worker. In fact, this fast-paced work results in, on average, two amputations of hands, fingers, feet, or limbs per week.
    a. How many amputations have been recorded in all of the processing plants operated by Tyson in the last 3 years?

*At Tyson, we are committed to providing a safe workplace for all of our team members. We aspire to zero work-related injuries, and our goal is to reduce workplace injuries and illnesses year-over-year. We are proud of the fact that this commitment is reflected in the decline, over the past six years, in workplace injuries at Tyson. During Tyson's FY22, our recordable incident rate is declining steadily compared to FY21.*

*Tyson maintains a safety culture grounded on the premise of empowering every team member to help eliminate workplace incidents, risks, and hazards. We created and implemented processes to help eliminate safety events by reducing their frequency and severity. We also closely review and monitor our safety performance daily.*

*Our safety culture is evident by looking at the depth and breadth of our safety and health organization, which is led by a Senior Vice-President of Safety, Health and Environmental, and our safety governance structure. Each Tyson processing facility has at least one Safety Manager, who reports directly to a Senior Area Safety Manager. Area Safety Managers oversee the safety programs for several facilities and report to a Director of Safety, who in turn report to a Vice-President of Safety. In addition to traditional safety professionals, Tyson's Safety organization includes numerous Exposure Reduction Coaches (ERCs), who implement the "We Care" safety system- Tyson's safety leadership system- across the organization. ERCs coach managers at each facility on the safety leadership skills needed to identify and reduce exposure and decrease incidents.*

*Tyson's safety governance structure includes an Executive Safety Council, that is led by Tyson's CEO and the Company's business and functional executive leadership team. Each business division also has its own Safety Council, that relies on input from the individual plant Safety Councils. Each processing facility has both a Safety Council and an hourly Safety Committee, each of which meet at least monthly. The plant Safety Council is comprised of management and is responsible for setting and executing the safety strategy for the facility, adopting, and executing safety initiatives and analyzing trends in injuries and near misses to develop comprehensive preventative strategies. The Safety Committee is comprised of mostly hourly team members. The Committee members are involved in formal and informal safety audits and act as liaisons with hourly team members at the plant. The Safety Committee, led by the Safety Manager, meets at least monthly to identify and share safety issues and to determine issues and concerns and potential solutions to elevate to the Safety Council.*

*Tyson also has a number of enterprise-wide safety standards and programs that are implemented at the facility level. Many of these are designed to eliminate amputation hazards, such as Tyson's Lockout Tagout and Machine Guarding Standards, and there is extensive training for all team*

*members on these standards. Tyson also has a number of enterprise initiatives each year designed to decrease amputations and other serious incidents. For example, in 2022, Tyson launched its enterprise-wide "SIF campaign" and Prevention through Design program. The SIF campaign teaches team members about the four leading contributing behaviors to serious injury events and the protective behaviors and actions that will prevent many such incidents. Through the Prevention through Design program, cross-functional teams analyze changes to existing equipment, processes, or technology to properly identify, analyze, and control hazards prior to a change.*

*In the event of an injury, as part of our continuous improvement efforts, Tyson conducts investigations into both serious and near miss incidents to determine the root cause and appropriate corrective actions. We prioritize solutions that eliminate hazards and engineered solutions. We also implement other measure such as administrative controls or personal protective equipment. Tyson communicates learnings and corrective actions across the enterprise.*

3. Alternative Marketing Arrangements (AMAs) are promoted as a tool to ensure certain quality-related production practices are followed. The USDA reports that in 2020, about approximately 77% of all fed cattle were procured through AMAs while about 23% were procured in the negotiated cash market.
    a. What percentage of Tyson's AMAs actually specify the production steps that must be followed and what percentage of Tyson's AMAs are simply contracts that commit cattle to a packer?

*The specific terms and distribution of business agreements between Tyson and its suppliers are proprietary information. However, Tyson does have several programs that utilize AMAs to meet product specifications needed by customers to meet consumer demand. For example, our Open Prairie Natural Angus Beef Program has detailed steps in cattle production that must be taken to meet its requirements, along with adhering to specific quality/breed attributes. Many progressive producers and feeders are meeting such specialized demand, thereby creating greater value for their operations.*

*Further, the use of alternative marketing arrangements is favored by many suppliers and has resulted in substantial efficiencies that work to the benefit of producers, packers, and consumers alike. Specifically, AMA's provide producers with a consistent, reliable market for their cattle and help them align their procurement models to meet customer and consumer expectations for more consistent high quality beef products. Consumers, in turn, have enhanced access to the types of beef they prefer which has contributed to a 56% increase in consumer per capita expenditure on beef between 2002 and 2019.*

**United States Senate Committee on Judiciary**

**Hearing on Beefing up Competition: Examining America's Food Supply Chain**

**July 28, 2021**

**Questions for the Record for Shane Miller, Tyson Fresh Meats**

**Senator Sasse**

**Question 1**

- If all capacity constraints go away over the next 6 months - so labor shortages disappear, transportation bottlenecks are non-existent, and there are no demand disruptions or regulatory shocks for bumps – how would this impact the cash and contract markets for beef? Would you anticipate significant change or the markets to function relatively similar to the way they do now?

  *As I mentioned in my testimony, the industry experienced significant capacity disruption during the last several years at the height of the cyclical cattle market, including the factors listed in your question, resulting in an oversupply of cattle. This disruption and significant increases in consumer demand led to lower prices for fed cattle while finished beef prices rose. If the factors restricting capacity return to normal, Tyson would expect the operation of markets to return to their normal historical cycles with cattle supply and processing capacity finding alignment and relative price stability for consumers within historical norms. We really don't speculate on what the live cattle contract markets will or could do as they are reflective of the forward interest for cattle, but also are impacted by domestic and global beef demand, weather impact, grain inputs, currency, and other outside influences.*

**Question 2**

- Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting? If it is expanding, what level of expansion would induce Tyson to invest in increasing their packing capacity? What are the top three potential markets for beef exports, and what are some of the barriers blocking that trade?

  *Domestic beef demand is expected to stay strong largely due to improved meat quality and responsiveness to consumer preferences. At present, consumers are still purchasing despite inflationary pressures across the economy. We have found that when consumers have the money to buy beef, it is their protein of choice. However, it is possible that a recession may lead to a softening in demand.*

  *Despite strong export markets, Tyson, due in large part to supply chain, labor availability and port challenges affecting broad swaths of the economy, is not currently maximizing production capacity in its existing facilities. Resolving these existing capacity constraints is our primary focus to increasing production capacity.*

  *While selecting the top three potential markets for export is a complicated question subject to interpretation and debate, it is clear that U.S. beef exports are gaining traction in quickly expanding Asian and Latin American markets where consumer*

*preference tends to further value the quality and consistency that the US provides. Historically, access to overseas markets has been impeded by tariffs and other non-tariff barriers such as age-based restriction due to fears around bovine spongiform encephalopathy (BSE a.k.a. "Mad Cow Disease"), prohibitions on production technologies such as hormones and science-based feed enhancements, and many other regulatory hurdles with, in many cases, dubious scientific bases. Some progress has been made on these issues in some foreign markets through recent trade agreements, such as the United States-Mexico-Canada Agreement. We are optimistic that additional non-tariff barriers can be addressed through the ongoing Indo-Pacific Economic Framework talks.*

**Question 3**

- Many of the witnesses mentioned the need for increased beef packing capacity. Some in the pork industry use the producer cooperative model, with facilities constructed in recent years in Missouri, Michigan and Iowa under this type of partnership. Do you believe there is opportunity for greater occurrence of producer cooperatives partnering with packers to expand beef processing capacity? Have producers approached Tyson with interest in this type of partnership?

  *Tyson is not aware of any offers by producers to partner on a cooperative model. However, Tyson stands ready and willing to consider any proposals that would provide for the more efficient delivery of quality beef to consumers.*

Iowa
Cattlemen's
Association

September 29, 2022

The Honorable Richard J. Durbin
Chair
U.S. Senate Committee on the Judiciary
Washington, DC 20510-6275

Dear Chairman Durbin:

The Iowa Cattlemen's Association submits the following response to written questions from Sen. Ben Sasse of Nebraska. We sincerely appreciated the opportunity to work with Mr. Jon Schaben as he testified before the Senate Committee on the Judiciary on July 28, 2021. Unfortunately, many of the same challenges we shared more than a year ago remain today. The Iowa Cattlemen's Association welcomes continued discussion on these important matters.

**Question 1**

- Your testimony mentions the closure of several meatpacking plants in Iowa. While many witnesses mentioned reduced packing capacity as a reason for bottlenecks and lower cattle prices, there have been multiple examples of communities rejecting the construction of new packing plants, in Nebraska, Kansas, and recently South Dakota. With substantial upfront construction costs, how can potential new packing plants overcome some of those issues and ensure that they are economically viable into the future?

Developing, expanding, or updating a packing plant is capital intensive. Today's inflation does not make it any easier. It's also challenging for any business to enter the market as a new competitor.

In the meatpacking business, the odds are not in favor of new, small or regional plants. Established packers, particularly the nation's four largest packers, are incredibly efficient, have access to labor, and can outbid competitors any day of the week. Their supply chain is supported by strong relationships with corporate feedyards and a captive supply that allows them to exit the market whenever they benefit most. The lack of competition in the meatpacking sector is not beneficial to most producers or consumers, which became increasingly evident at the height of the pandemic and months to follow.

While there are no guarantees for economic viability, there are opportunities to support new competitors in the meatpacking sector. The U.S. Department of Agriculture (USDA) has targeted programs, such as the Meat and Poultry Processing Expansion Program, Meat and Poultry Inspection Readiness Grant Program, and Meat and Poultry Processing Capacity Technical Assistance Program, to assist in the development and/or expansion of processing facilities. The aforementioned programs can be used to modernize equipment and technology, ensure compliance with packaging and labeling requirements, offset costs to become an inspected facility, and more. However, investing in new packers via USDA grants isn't an end all be all solution.

The actions of Congress today will improve supply chain resiliency and strengthen the food supply of tomorrow. The Iowa Cattlemen's Association implores you to take action on the following proposed solutions:

1. Request the Department of Justice provide a long overdue update regarding its antitrust investigation of Cargill, JBS, National Beef, and Tyson;
2. Restore price discovery and transparency in the cattle market by supporting the passage of the Cattle Price Discovery and Transparency Act (S. 4030); and
3. Require the USDA Packers and Stockyards Division to promulgate rules to promote robust competition in the meatpacking sector, inclnding protections for new competitors.

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**Question 2**

- Your testimony mentions some of the differences between the pork and beef supply chains. The pork industry uses the producer cooperative model in some instances, with facilities constructed in recent years in Missouri, Michigan and Iowa under this type of partnership. Do you believe there is opportunity for greater occurrence of producer cooperatives partnering with packers to expand beef processing capacity? How would this opportunity impact cattle producers?

Unfortunately, there is constant pressure for the beef cattle industry to evolve by combining stages of production for the benefit of large corporate entities. The vertical integration that has taken place in the pork industry does not appeal to most independent cattle producers in Iowa. As stated in Mr. Schaben's testimony, "The greatest fear of independent cattle producers is to lose their livelihoods for the sake of meatpacking efficiency, i.e. vertical integration." Giving a few large packers more control of the food supply chain, with even fewer producers, does not benefit producers or consumers.

Not having read any academic literature on producer cooperative models for beef processing, it's difficult to fully realize pros and cons. It's possible that producer cooperatives may provide opportunities to some producers as an additional marketing channel.

**Question 3**

- Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting? What are the top three potential markets for beef exports, and what are some of the barriers blocking that trade access?

Mr. Schaben's testimony, provided on July 28, 2021, was not focused on domestic or international trade. The U.S. Meat Export Federation and USDA Economic Research Service are two reputable sources for this specific information.

Questions or comments related to this letter may be directed to Cora Fox, Director of Government Relations, at (515) 296-2266 or at cora@iacattlemen.org.

Respectfully,

Matt Deppe

Matt Deppe
CEO, Iowa Cattlemen's Association

**Responses to Questions for the Record to Tim Schellpeper, JBS USA**
**United States Senate Committee on the Judiciary**
**Hearing on "Beefing up Competition: Examining America's Food Supply Chain"**

**QUESTIONS FROM SENATOR BEN SASSE**

**Question 1:**

If all capacity constraints go away over the next 6 months - so labor shortages disappear, transportation bottlenecks are non-existent, and there are no demand disruptions or regulatory shocks for bumps – how would this impact the cash and contract markets for beef? Would you anticipate significant change or the markets to function relatively similar to the way they do now?

**Response:**

There are a variety of factors that impact the U.S. beef industry, and thus, speculating on how the industry would be impacted if all capacity constraints were eliminated would be challenging. JBS, however, is always working to reduce capacity constraints, and JBS has (and continues to) invest hundreds of millions of dollars to increase our beef production capacity. Although JBS continues to face labor constraints, it is operating at pre-pandemic production levels. As a packer, reducing capacity constraints allows JBS to continue to support American families and communities by increasing the supply of beef in the marketplace, providing for more affordable beef for American consumers.

**Question 2:**

Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting? If it is expanding, what level of expansion would induce JBS to invest in increasing their packing capacity? What are the top three potential markets for beef exports, and what are some of the barriers blocking that trade?

**Response:**

Per capita consumption of beef appears to have been on an upward trend over the last decade. JBS continues to support American families by investing in its beef production capacity in the United States, including in Grand Island and Omaha, in order to help meet this growing demand. These investments will allow JBS to sell more products to its customers and add value to cattle producers by selling more products to international markets. At the same time it is investing in the United States, JBS welcomes the opportunity to feed the world, including potential top markets such as Japan, South Korea, and China, despite facing international trade constraints such as shipping constraints and tariffs.

**Question 3:**

Many of the witnesses mentioned the need for increased beef packing capacity. Some in the pork industry use the producer cooperative model, with facilities constructed in recent years in Missouri,

Michigan and Iowa under this type of partnership. Do you believe there is opportunity for greater occurrence of producer cooperatives partnering with packers to expand beef processing capacity? Have producers approached JBS with interest in this type of partnership?

**Response:**

JBS has not been approached by producers with an interest in a cooperative partnership, and so JBS has not formed an opinion on any such cooperatives. JBS has, however, recently announced new or expanded plants in Missouri and Nebraska which will allow JBS to continue to support American families and communities by increasing the supply of protein in the marketplace, providing for more affordable protein for American consumers.

**QUESTIONS FROM SENATOR CORY A. BOOKER**

**Question 1:**

In 2019 there was a fire at a major packing plant. In 2020 we were collectively hit by the COVID pandemic. In 2021 a cyberattack against JBS took processing facilities off-line. Each of these unanticipated "black swan" events presented a different type of shock to the system, yet in each instance the outcome was the same: consumers paid more for meat, ranchers were paid less for their cattle, and the large meatpacking companies' profits increased. It appears that the system is rigged: all of the risk is borne by consumers and cattle ranchers, and regardless of the cause of any disruption the meatpacking companies bear none of the risk and suffer none of the harm. Can you explain how this is a fair and just system?

**Response:**

As a packer, JBS purchases fed cattle from feedlots, and the feedlots, in turn, purchase feeder cattle from other cattle producers. JBS does not own any cattle and does not control what is paid by the feedlot to other cattle producers. Likewise, as a packer, JBS sells products wholesale to retailers and into foodservice channels who set the prices that American families are paying for beef at grocery stores and restaurants. The amount of profits that cattle producers and feedlots receive for cattle, whether and how much profit JBS realizes from its production of such cattle, and the amount of profits retailers obtain based on the ultimate prices they set for customers to pay for beef at the grocery store, are all reflections of fundamental supply and demand principles as well as market conditions at that time.

For example, lower feed costs as well as high cattle and feeder cattle prices in 2015 created an incentive for the cattle producers to expand their herds, which led to an overall larger cattle herd size in the U.S., which, in turn, increased the cattle supply and naturally led to lower cattle prices. The unprecedented "black swan" events in 2020 and 2021, however, including the global COVID pandemic, aggravated supply and demand imbalances as well as created extreme market conditions that affected JBS. Indeed, in 2020, the COVID pandemic increased customer demand for beef as retail customers' incomes were supplemented with government transfer payments and beef spending was shifted towards retail consumption. On the other hand, these "black swan" events created a unique set of

circumstances (*e.g.*, labor shortages, etc.) that decreased packing capacity and created a backlog of fed cattle through 2020 and into 2021 as cattle were kept on feed for longer periods. Moreover, higher feed costs (beginning in 2020) coupled with severe droughts across the West and Great Plains pushed cattle from pasture into feed yards, leading to high levels of cattle-on-feed inventories while JBS worked to increase production back to pre-pandemic levels despite facing labor shortages, supply chain disruptions, growing inflation, and other capacity constraints.

As cattle supplies continue to tighten, JBS's production capacities returned to pre-pandemic levels, and demand for beef continues to normalize through 2022, the cattle producers' and feeding sectors' share of retail value has increased while the packers' share of retail value has decreased. Although retail prices consumers are currently paying for beef at grocery stores has remained steady (which are prices that JBS does not control), JBS sells its products at wholesale prices, which are lower than they were a year ago.

**Question 2:**

The National Cattleman's Beef Association (NCBA) recently joined a broad meeting of cattle organizations to discuss market concentration and the widespread concerns of cattle producers that the market is no longer fair. Shortly thereafter, your organization, JBS, left NCBA. Why?

**Response:**

JBS's decision to suspend its membership in NCBA in 2020 was part of JBS' routine reviews of its organizational memberships. JBS has maintained productive communications with NCBA since its decision and continues to support U.S. producers through its daily participation in cash cattle markets and through state producer associations.

**Question 3:**

Meatpacking workers in the United States are significantly more likely to suffer from serious injuries, including burns, head trauma, fractures, and amputations, than the average American worker. In fact, this fast-paced work results in, on average, two amputations of hands, fingers, feet or limbs per week. How many amputations have been recorded in all of the processing plants operated by JBS in the last 3 years?

**Response:**

Keeping team members safe is our top priority at JBS. JBS, therefore, is continuously focused on safety by having robust safety programs, improving worker training, enhancing line layouts, and investing in technology to protect its team members. Indeed, as of P8 2022, the number of nonfatal occupational injuries and illnesses that resulted in "days away from work, job restrictions, or transfer" ("DART Rate") at JBS was 2.35, which is less than half of the overall DART Rate reported by the U.S. Bureau of Labor Statistics for Animal Slaughter and Processing (NAICS 31161) of 5.7 in 2020.

**Question 4:**

In 2015, over half (51.5%) of each dollar consumers spent on beef was returned to cattle producers. But the cattle producer's share has since diminished to just over 37% in 2020, the lowest annual percentage on record. Why do you believe the cattle producer's share of the consumer's beef dollar is shrinking?

**Response:**

2015 and 2020 exhibited two different extremes in the fed cattle and feeder cattle markets. Presently, as cattle supplies continue to tighten, JBS's production capacities returned to pre-pandemic levels, and demand for beef continues to normalize through 2022, the cattle producers' share of retail value has increased relative to 2020 and 2021 levels while JBS's share of retail value hit its lowest levels since 2009.

In 2006, high feed costs prompted a liquidation phase in the cattle industry that was further propagated by drought conditions in 2011 and 2012. In 2014, the U.S. cattle industry reached a cyclical low inventory which pushed cattle producers' share of retail value to 55.2% in 2014 and 51.5% in 2015. In 2015, improved pasture conditions, lower feed costs, as well as high cattle and feeder cattle prices created an incentive to start an expansion that led to larger cattle herd sizes, which increased supply and pushed farmers' share of retail value to a low of 42.5% in 2019.

In 2020, the global COVID pandemic aggravated supply and demand imbalances by creating a backlog of fed cattle through 2020 and into 2021 as cattle were kept on feed for longer periods. Moreover, higher feed costs (beginning in 2020) coupled with severe droughts across the West and Great Plains pushed cattle from pasture into feed yards, leading to high levels of cattle-on-feed inventories, which further pushed cattle producers' share of retail value down to 37.5% in 2020 and 36.9% in 2021.

In 2022, cattle producers' share of retail value has started to recover as cattle supplies have tightened and beef demand has normalized. Through this transition, cow prices and feeder cattle prices have started to rally in 2022 (reaching their highest level in over five years), which suggests a continued increase of cattle producers' share of retail value. On the other hand, packers' share of retail value is diminishing as JBS's customers (the retailers) are paying less money for beef products today than they were a year ago, even though retail prices for beef at the grocery stores have remained steady.

**Question 5:**

Since January of 2017, retail beef prices have risen higher, with the all-fresh retail beef price increasing from $5.49 per pound to a reported $7.11 per pound in the month of June. Despite the temporary increase to $138 per cwt in May of 2017, fed cattle prices have since dropped and were only $120 per cwt in June. Why do you believe beef prices and cattle prices have moved in opposite directions since 2017?

**Response:**

There are a variety of factors that impact the variance between retail beef prices and cattle prices, including cattle supply, freight costs, labor costs, energy costs, changes in production mix, value add, retailer merchandizing strategy, availability of substitute proteins, and ultimately consumer demand, all of which continue to fluctuate over time.

**Question 6:**

USDA data shows the monthly returns to cattle feeders has been a loss of over $25 per head per month for each animal fed over the past two decades. Why do you believe, despite this average monthly loss, the number of the largest feedlots in the U.S.—those with capacities of over 50K head—have increased by 71% (from 45K in 1996 to 77K in 2020) while independent cattle feedlots—those with capacities of less than 1K head—have shrunk by 75% during the same period (from 110K in 1996 to 27K in 2020)?

**Response:**

JBS is a packer that neither owns nor feeds any cattle, and thus, JBS is not in a position to speculate about the decisions made by feedlots.

**Question 7:**

The beef industry boasted all-time record beef exports in 2018 yet fed cattle prices fell 4% from 2017 to 2018. If increased exports are associated with increased cattle prices, why do you believe cattle prices did not increase when beef exports hit record levels in 2018?

**Response:**

Increased exports are not necessarily associated with increased cattle prices—cattle price is driven by many factors, predominantly supply and demand, but also including labor costs, feed costs, freight costs, cattle quality, etc.

**Question 8:**

Alternative Marketing Arrangements (AMAs) are promoted as a tool to ensure certain quality-related production practices are followed. The USDA reports that in 2020, about 77% of all fed cattle were procured through AMAs while about 23% were procured in the negotiated cash market. What percentage of JBS' AMAs actually specify the production steps that must be followed and what percentage of JBS' AMAs are simply contracts that commit cattle to a packer?

**Response:**

JBS negotiates with and purchases cattle from cattle feeders (both big and small) all across the country in the manner in which the feeders want to sell them—whether it is in the cash market (either live or dressed), at auction barns, via alternative marketing arrangements, CME futures contracts, video exchanges, or otherwise. JBS does not dictate the way feeders

sell their cattle, and JBS competes every day to purchase quality cattle at reasonable prices and in a manner that allows JBS to sell products to retailers at competitive prices.

**Question 9:**

Many industry analysts attributed higher cattle prices in 2014 in part to low cattle supplies following the late 2010 – 2013 drought. In other words, they say there was low cattle supplies (as measured by the number of cattle ready for slaughter), which drove cattle prices higher. Industry analysts then speculated that the increased cattle supply in 2015 contributed to a collapse in cattle prices—suggesting there were more cattle slaughtered in 2015, which helped drive cattle prices lower. However, the USDA reports that the number of cattle slaughtered in 2015 (28.3 million) was less than in 2014 (29.7 million) which means that in 2015, there were both lower cattle supplies and lower cattle prices. Can you explain this phenomenon?

**Response:**

Although cattle prices are impacted predominantly by supply and demand, they are also driven by many other market conditions such as cattle quality, freight costs, labor costs, and energy costs, etc., all of which affected cattle prices in 2015.

**United States Senate Committee on Judiciary**

**Hearing on Beefing up Competition: Examining America's Food Supply Chain**

**July 28, 2021**

**Questions for the Record for David Smith, Associated Wholesale Grocers**

**<u>Senator Sasse</u>**

**Question 1**

- *Is the domestic market for beef expanding or shrinking? What do the best projections show? Is the international market for beef expanding or contracting?*

The U.S. cattle industry goes through cycles and we are currently in a contraction cycle. Given current trends, cattle supplies will continue to shrink in 2023 and 2024. The USDA reported that, on July 1, 2022, the total inventory of all cattle and calves was 98.8 million head, 2 million head less (down 2%) than the previous year and 4 million head less (down 4%) from the cycle peak in 2018. Drought conditions and high feed costs have all but assured that we will have fewer cattle in 2023 and 2024. Producers have been liquidating beef cows (the production base) at the fastest rate in almost 30 years. The inventory of beef cows on July 1 was 2.4% lower than the previous year. Producers are indicating that they are holding back fewer females for herd rebuilding. This means there will be an even smaller beef cow herd next January and very likely next summer. Fewer cows today mean fewer calves next spring and fewer cattle coming to slaughter in 2024 and 2025.

If instead of questioning whether or not supplies are increasing, we question whether beef demand in the domestic market is expanding, the answer is not so simple. Prices have been higher to address issues with demand, leaving wholesale and retail beef prices for last year and this year at or near record levels. There are substantial capacity constraints in the market, labor being one of the biggest issues, yet producers are continuing to liquidate their herds.

The USDA is currently projecting beef production in 2023 to be down 6.2% next year. Private estimates are that production will be down 4.5% to 6% in 2023 and down as much as 7% in 2024. The USDA has not published 2024 estimates but they will very likely be down as well. It should be noted that when companies like Wal-Mart take an ownership interest in companies such as Sustainable Beef LLC, a rancher-owned company based in North Platte, Nebraska, a guaranteed supply of beef is removed from the marketplace, making the overall supply tighter for all purchasers.

In speaking to the international market, it depends on the market. European supplies are shrinking while supplies in New Zealand are steady. Brazil continues to expand, with the Brazilian cattle herd today being 17% higher than five years ago. Brazil is now by far the biggest beef supplier in the world. Australia saw a big decline in their herd in the last couple of years due to drought conditions, however, the situation in Australia appears to have improved and their herd is expected to be higher this year as well as in 2023 and 2024. It is

expected that, by 2024, the Australian herd will rebound and be back to where it was in 2018. Australia's cattle industry is very cyclical with weather playing a major factor as a large portion of their cattle are finished on grass.

Demand in the international market has increased largely due to the emergence of China as a major international buyer. Although China is self-sufficient in pork production, it is not able to meet its domestic demand for beef. Currently, China is by far the largest beef buyer in the world, taking over from Japan who was the largest beef importer in the world ten years ago, when China was buying only 3% of what Japan was buying. Today, China is buying almost 4 times as much as Japan.

**Question 2**

- *If all capacity constraints go away over the next 6 months - so labor shortages disappear, transportation bottlenecks are non-existent, and there are no demand disruptions or regulatory shocks for bumps – would you anticipate significant change or the markets to function relatively similar to the way they do now? How would this impact retail beef prices?*

It should be noted that in the past 14 months since the date of the original hearing before the U.S. Senate Judiciary Committee, capacity constraints, supply chain disruptions and labor shortages may have improved slightly, but these constraints are still with us. Even if capacity constraints, supply chain disruptions and labor shortages disappear in the next 6 months, independent grocers would still face significant competitive challenges compared to their larger national chain rivals. Economic discrimination against independents existed well before the supply effects of the COVID-19 pandemic unraveled and the constraints in the market during the pandemic simply magnified the problem. Dominant retail power buyers will continue to use their power to secure preferable terms from suppliers resulting in discrimination against independents with no market power. The remedy we need now and going forward is a competitive marketplace using strong enforcement of the antitrust laws.

With respect to the cattle markets, we expect cattle prices to almost certainly increase because tighter supplies are already baked in for the next 2-3 years. However, without capacity or regulatory constraints, this change will provide incentives for growth and result in more competition among processors for cattle. The function of retail beef prices is to adjust. Tighter supplies mean prices need to be higher in order to ration out available demand. That will not change. It is our understanding that the labor situation at plants has improved, but we do not have any data to back that up.

One way to look at this overall is with a theoretical gross margin for packers. We say theoretical because we do not know the price and cost of specific packers. However, from the USDA, we get the calculated value of beef traded at wholesale (beef cutout), the imputed value of by-products (drop credit) as well as what packers pay for cattle each week. Packer revenue is determined by cutout and by-products and packer cost is determined by what they pay for cattle. Last year at this time, the calculated gross margin was $1,370/head. Today, it is $484/head. Capacity constraints, especially the tight labor market, contributed to those outsized margins last year. Fed cattle slaughter is a bit higher today than it was last year and yet the gross margin is down. Those margins may be compressed further in the next 6 months as cattle numbers slowly decline. We say slowly because there is still a fair number of cattle

in feedlots. We will see bigger declines in cattle availability in the second half of 2023 and in 2024, which will result in more capacity slack and, thus, more competition for cattle.

**SENATOR CORY A. BOOKER**

**Mr. David Smith**

1. *In your opinion, is there a connection between the growing food desert problem and grocery industry consolidation and buyer power?*

   Yes, there's a direct connection. Independent grocers tend to locate in places where larger chains don't see a great potential for profit, particularly in sparsely populated rural communities and low-income urban neighborhoods. However, it has become increasingly difficult for independents to stay afloat in these communities due in large part to economic discrimination caused by the buyer power abuses of dominant retail players. Unfortunately, independent grocers are unable to access the market on a fair and competitive basis even when they partner with a large wholesaler like AWG to capture the same economies of scale and efficiencies as our large rivals. As a result, many independent grocers have shut their doors leaving food deserts in their wake. If Congress hopes to solve the food access crisis, then it must insist that our antitrust laws are enforced to ensure that grocery markets remain competitive.

2. *Dollar stores have grown exponentially over the past few years. Communities throughout New Jersey that once had a grocery store now only have a dollar or corner store that offers ultra-processed foods and a limited assortment of fresh foods.*

   *a. Does your antitrust problem explain the proliferation of dollar stores and retreat of grocery investment in low-income areas?*

   Dollar stores are indeed expanding rapidly, growing from roughly 18,000 locations in 2009 to more than 34,000 today, with plans to continue expanding to more than 50,000 locations. Dollar stores have become an increasing threat to grocers in low-income and rural communities where consumers tend to be on a tighter grocery budget and need to stretch their dollars further. Dollar stores exploit the lack of antitrust enforcement by commanding exclusive smaller-quantity packaging (often known as "cheater packs") that traditional grocers cannot access due to arbitrary "channels of trade" distinctions – where a traditional "grocery store" may not be considered to be in the same channel of trade as a "discounter", so these products are simply not even made available to companies like AWG to purchase for resale to their members/customers. We compete for the same consumer dollar as the dollar store channel, yet loopholes in antitrust laws allow them to secure exclusive offerings that attract our budget-minded customers. These aggressive tactics have led to a number of grocery store closures that leave communities without a full-service supermarket. Shoppers then become overly reliant on dollar stores that provide a very limited offering of fresh and healthy foods that consumers need to maintain a healthy diet.

Before the

**United States Senate Committee on the Judiciary**

In the Matter of

**Beefing up Competition: Examining America's Food Supply Chain**

Wednesday, July 28, 2021

**Statement for the Hearing Record**

by

Bill Bullard, CEO

Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA)

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Senate Committee on the Judiciary
Rm. 224
Dirksen Senate Office Bldg.
Washington, DC 20510-6200

Dear Chairman Dick Durbin, Ranking Member Charles Grassley, and Members of the Committee:

The Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) appreciates this opportunity to present this written statement to the U.S. Senate Committee on the Judiciary regarding its July 28, 2021 hearing on *Beefing up Competition: Examining America's Food Supply Chain.*

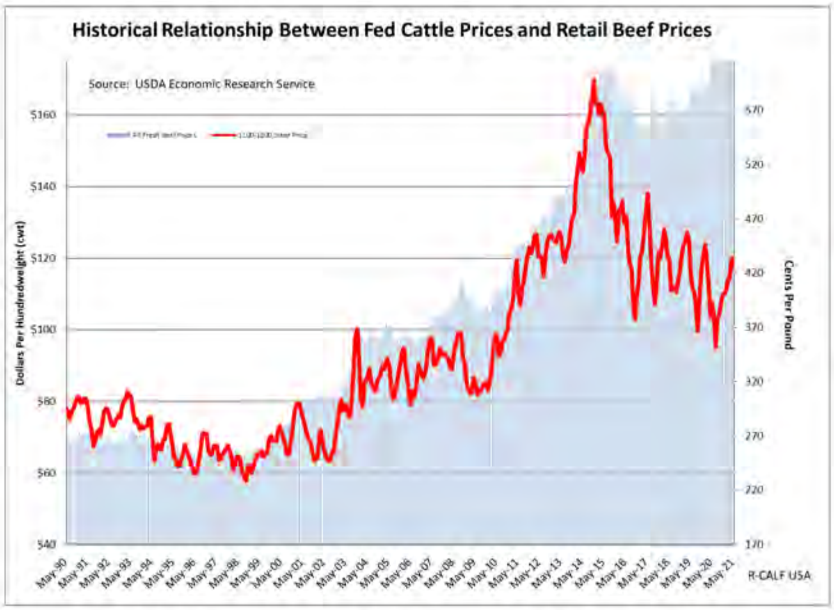
R-CALF USA is the largest U.S. trade association that exclusively represents United States cattle farmers and ranchers within the multi-segmented beef supply chain. Its thousands of members reside in 45 states and include cow-calf operators, cattle backgrounders and stockers, and feedlot owners. R-CALF USA also represents U.S. sheep producers.

As depicted below in Chart 1, for a quarter century (1990-2015) there was a strong synchronous relationship between monthly fed cattle prices and monthly retail beef prices. Something – a glue of sorts – held this strong price relationship together over this considerable period despite the occurrence of exogenous factors such as drought, changes in cattle inventories, changes in feed costs, changes in currency valuations, changes in beef demand, and changes in the price of protein substitutes.

But no more. Beginning around the first of 2015, cattle prices inexplicably collapsed. And when the dust settled, monthly fed cattle prices and monthly retail beef prices began moving in opposite directions. That something – that glue of sorts – that long held the historically strong synchronous price relationship together had been vanquished.

Longer than four years after the 2015 manifest disconnect between fed cattle prices and retail beef prices, the nation's beef supply chain encountered its first of three major market shocks – the August 2019 temporary closure of a major beef packing plant in Holcomb, Kansas. This event highlighted the fragility of the beef supply chain that now lacks the glue that once held the supply chain together. The onset of COVID-19 in early 2020 was the second major shock, and it served to exacerbate the disastrous symptoms associated with the first shock. The third major shock, a cyberattack impacting one of the four largest beef packers, served to further highlight the systemic weakness of America's beef supply chain.

**Chart 1**

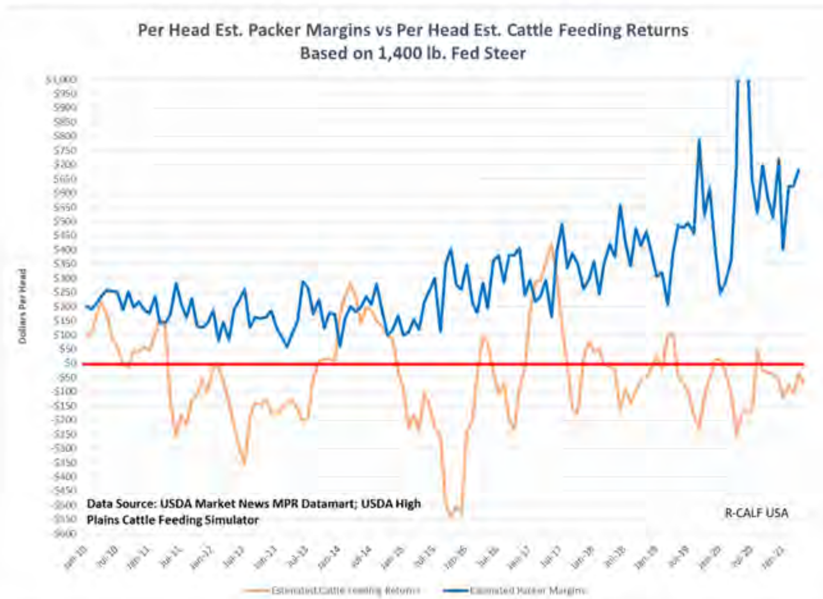



Everyone should now know that that something – that glue of sorts – that held the pricing relationship within the entire beef supply chain together was none other than competitive market forces. And since at least 2015, those competitive market forces have been purged from the beef supply chain.

This is now an elephant in the room crisis that Congress must tackle with swift and decisive action. If not, we will soon witness a further acceleration of the already fast-shrinking domestic cattle industry, and we will witness it in months, not years. Many cattle producers, already suffering severely depressed cattle prices, now face unprecedented drought conditions. The situation is critical and America's family farm and ranch system of cattle production hangs in the balance.

Chart 2 below illustrates the financial harm accruing to the live cattle sector of the beef supply chain in a marketplace now void of competition. It depicts ever rising and unprecedented weekly beef packer margins beginning in 2015 while cattle feeders continually struggle to achieve monthly returns that would allow them to just break even.

**Chart 2**




America's family farm and ranch system of cattle production cannot be sustained if the situation described above, *i.e.*, lack of competitive market forces resulting in systemic losses to the live cattle sector, is allowed to persist.

Congress has several options with which to address this acute problem: 1) It can address the core of the problem by taking decisive measures to reinsert competitive market forces where they have been purged from within the beef supply chain. 2) It can build, or cause to be built, an alternative beef processing infrastructure (e.g., new and expanded local and regional packing plants) to compete against the existing beef processing infrastructure. 3) It can, of course, pursue a combination of the first two options.

R-CALF USA urges Congress to immediately pursue the first option as it holds the greatest potential to provide both immediate and permanent results. This is because a robustly competitive industry is inherently more sustainable than one propped up with government subsidies, as would be required under the second option.

Importantly, Congress must recognize a critical fact that can be deduced from Chart 1 above. And that is that since 2015 consumers have demonstrated their willingness to pay more than enough for retail beef to have made everyone along the beef supply chain whole. The problem, therefore, is a supply-chain allocation of profits problem and it is competition itself that is best suited to correct it.

We recommend Congress implement two immediate triage measures for which to reinsert competitive market forces along and within the beef supply chain: 1) Force the concentrated beef packers to immediately begin competing for the available supply of cattle by requiring them to purchase at least half of their cattle needs in the negotiated cash market, which is the most important price discovery market for the entire live cattle industry. Bipartisan Senate Bill 949 sponsored by Senators Chuck Grassley and Jon Tester is the appropriate means with which to reinsert competition in the domestic cattle market. 2) Empower consumers to exercise choice in the retail marketplace by differentiating between beef produced exclusively from cattle born and raised by U.S. cattle farmers and ranchers and beef produced in whole or in part in foreign countries. New legislation to require all beef in U.S. commerce to be labeled as to where the animal was born, raised, and harvested – known as mandatory country-of-origin labeling (mCOOL), is the appropriate means with which to reinsert competition in the retail beef market.

Given the oligopolistic structure of the nation's beef packing industry, the forgoing recommendations must be viewed as merely the first step – the triage step – in restoring for consumers and cattle producers alike a more resilient and reliable domestic beef supply chain. The second step must address each transaction point along the entire beef supply chain where competition has been purged.

To accomplish this, Congress should enact legislation to reverse those non-competitive cattle procurement practices by the oligopolistic beef packers that have now become institutionalized under the misguided theory that efficiency trumps competition. Prohibiting packers from contracting for cattle without establishing a firm base price at the time of the agreement and banning packer ownership and control of cattle for more than seven days before slaughter are two such legislative reversals of institutionalized cattle procurement practices that contribute greatly to the loss of competitive market forces within the beef supply chain.

Thank you for this opportunity to submit our written statement in the hearing record. We would appreciate the opportunity to meet with you and your staff for purposes of further examining America's beef supply chain and formulating a more comprehensive plan to improve it.

Sincerely,

Bill Bullard

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Organization for Competitive Markets
P. O. Box 6486
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United States Senate Judiciary Committee

Beefing up Competition: Examining America's Food Supply Chain

Organization for Competitive Markets: Statement for the Hearing Record

July 30, 2021

Senate Committee on Judiciary

Chairman Senator Dick Durban, Ranking Member Senator Charles Grassley, and Members of the Committee:

The Organization for Competitive Markets (OCM) thank you for the opportunity to present this written statement to the Senate Committee on Judiciary relative to your July 28, 2021 hearing on Beefing up Competition: Examining America's Food Supply Chain.

OCM was founded in 1997 by a group of producers and industry enthusiasts dedicated to working for transparent, fair, and truly competitive agriculture and food markets. Over the past 25 years, agricultural livestock producers have been subjected to the constricting market forces of the multinational corporations which control the harvesting and marketing of over 85% of America's meat supplies. Within the past 6 years, these 4 monopolistic giants have demonstrated their absolute control over the beef industry through a variety of measures including imported captive supplies, Alternative Marketing Arrangements (AMAs), non-cash purchase discovery, and withholding market participation.

This current dire livestock marketing situation has a stranglehold on producers and consumers alike and is reminiscent of the 100-year-old packing industry monopsony which lead to the 1920 Consent Decree and the 1921 Packers and Stockyards Act. The current lack of federal enforcement of our industry has already resulted in vertical integration of the hog and poultry industries and currently, family beef production and feeding are not far behind.

The prices producers receive for their livestock and the prices consumers pay at retail are widening alarmingly as packers are realizing record profits nearing $1200 recently. This growing spread between producer marketing prices and consumer retail costs is substantiated by USDA Economic Research Service (ERS) statistics (1.). Summarizing the critical years 2015 – 2020 Choice beef Net farm values decreased 44% while Retail values increased 9%. For the same period, the farmer's share of the beef dollar declined to 31.3 cents for a loss of 20%. All-fresh beef retail value increased nearly 12% or seventy cents; meanwhile, five market steer prices declined 52.8 cents for a 45.7% drop.

2015 to 2020 USDA ERS statistics also record a 48% price decline for 500-550 lbs. feeder steers. This equates to a nearly 50% loss of many farm family annual incomes. America's family farmers and ranchers cannot sustain their operations with these losses and America's food supply is in pearl which also jeopardizes our national security.

America beholds tremendous fruitful agricultural lands of which 70% are only suitable for livestock grazing thereby making livestock agriculture's largest industry. The true wealth creation of animal agriculture magnifies many times over the American economic portfolio as well as benefiting America's domestic food security.

Current negative forces transforming production agriculture into vertically integrated systems controlled by multi-national corporate monopolies is the product of many neglected open-door paths which have facilitated greed within our industry; Greed which cannot be countered by a single solution but rather many fixes.

OCM commends your Senate Judiciary Committee for taking the first steps to resolve the plight of America's farmers and ranchers and to secure our national food supplies. Your direction to Congress needs to include: 1) Solutions establishing transparent price discovery, truth, and fairness in labeling, and restricting the use of both foreign and domestic captive supplies for market manipulation. 2) The strengthening and enforcement of the GIPSA rules for producer retribution when violations occur. 3) Recommend and assist the Department of Justice investigation and breakup of current monopsony powers within America's food supply chain and 4) assist with the planning and expansion of new independent food processing infrastructure.

Thank you for the opportunity to present this written statement for inclusion in the hearing record. In keeping with our mission, OCM stands ready to further assist your committee and its members with communications in regards to examining and improving America's food chain.

Sincerely,

Vaughn Meyer

OCM President

(1.) Sources: USDA Economic Research Service/ Dept. of Labor, Bureau of Labor Statistics, and USDA Agricultural Marketing Service data

Bloomberg

# Prices for Young Cattle Are Soaring, Signaling Expensive Beef

By Michael Hirtzer | July 26, 2021, 3:10 PM EDT

A little-known market, that of young cattle, is signaling that pricey beef could be here to stay awhile.

Feeder cattle are animals that have not yet been fattened on corn for slaughter in feedlots. Prices for those on the futures market climbed to the highest since March 2016 in Chicago. The gains followed a survey showing the American herd shrank 1.3% from a year ago.

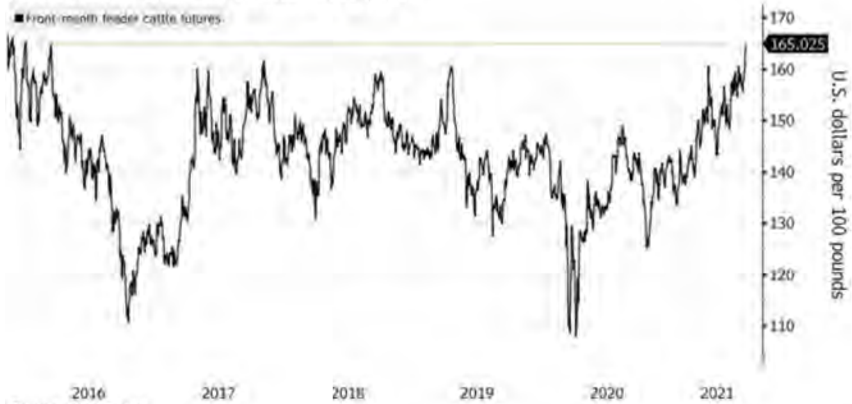
Harsh weather and high feed prices have helped the trend, with abnormal cold killing calves earlier this year. Recent droughts and record-high temperatures have also forced cattlemen to send animals to slaughter earlier.

The shift could mean that even higher beef prices are on the way for consumers, who have already seen increases on burgers and steaks in the past year after the pandemic threw supply chains into turmoil.

It also means meatpackers like Tyson Foods Inc., who have been enjoying record high beef margins during the upsets, will have to pay more for cattle.

**Bull Run**

**Feeder cattle climb on smaller U.S. herd**




**Source: CME Group**

Cattle operators have been complaining to Washington that beef packers capture an outsize share of profits while ranchers suffer. Now, ranchers may be able to regain leverage by reducing the number of animals available for sale.

"All else equal, lower cattle supply historically has been a negative for packers such as Tyson," JPMorgan Chase & Co. analysts including Ken Goldman said in a note Monday.

Feeder cattle futures for September delivery rose as high as the 3-cent exchange limit to $1.65525 a pound in Chicago, the highest since March 17, 2016.

Tyson declined to comment, citing a quiet period before earnings.

*Originally published online at https://www.bloomberg.com/news/articles/2021-07-26/prices-for-young-cattle-are-soaring-signaling-expensive-beef.*

NORTH AMERICAN MEAT INSTITUTE

**Testimony Submitted for the Record**
**Julie Anna Potts, President and Chief Executive Officer,**
**North American Meat Institute**

**Hearing before the Senate Judiciary Committee**
**Beefing up Competition: Examining America's Food Supply Chain**

**July 28, 2021**

On behalf of the North American Meat Institute (NAMI or the Meat Institute) based in Washington, DC, and its 724 members around the country, thank you for the opportunity to submit this testimony.

The Meat Institute is the United States' oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. NAMI members include more than 350 meat packing and processing companies, large and small, and account for more than 95 percent of the United States' output of meat and 70 percent of turkey production. The Meat Institute provides legislative, regulatory, international affairs, public relations, technical, scientific, and educational services to the meat and poultry packing and processing industry.

On July 19, NAMI and eleven other organizations representing livestock producers, farmers and companies who produce the vast majority of America's meat, poultry, and dairy, as well as animal feed and ingredients, unveiled the Protein PACT for the People, Animals, and Climate of Tomorrow. The Protein PACT is the first joint initiative designed to accelerate momentum and verify progress toward global sustainable development goals across all animal protein sectors to ensure customers, consumers, and policy makers trust that meat aligns with their sustainability expectations. The Protein PACT has been submitted to the United Nations' (UN) Food Systems Summit as a sustainability game changer, and sustainable livestock and poultry production was featured in a side event at the Food Systems Summit ministerial in Rome on July 27.

Through the Protein PACT, Meat Institute members have developed robust metrics for continuous improvement that sustain healthy animals, thriving workers and communities, safe food, balanced diets, and the environment and align with the UNs' 2030 Sustainable Development Goals.

**Claims about Increasing Consolidation and Concentration are Misplaced.**

Let me state at the outset, the members of the Meat Institute – and their livestock suppliers – benefit from, and depend on, a fair, transparent, and competitive market. This testimony is offered to provide a comprehensive picture of the dynamic, competitive market in which cattle producers and beef packers operate.

Much of the rhetoric about concentration in the beef packing sector wrongly implies that consolidation is on-going and that packers' market power is becoming more and more concentrated. That is not the case. The four-firm packer concentration ratio for fed cattle slaughter has not changed appreciably in more than 25 years. According to the Agricultural Marketing Service's (AMS) Packers and Stockyards Division (P&S), the four firm concentration ratio was 82 percent in 1994; today it is 85 percent.

The meat packing industry has been, and continues to be, one of the most highly scrutinized industries when it comes to antitrust review. P&S is uniquely charged, by statute, to provide on-going oversight for fair business practices and to ensure competitive markets in the livestock, meat, and poultry industries. Additionally, any potential merger or acquisition regulators believe threatens "too much market power" is subject to review by the Justice Department or the Federal Trade Commission. The last proposed merger of two of the "big four" fed cattle slaughterers occurred in 2008 – and it was blocked by the Department of Justice.

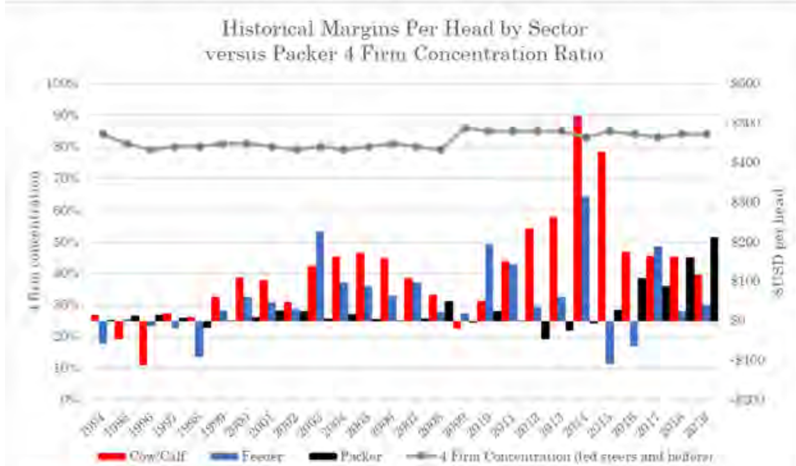
Another clarification is needed. It is frequently claimed that the big four packers control 85 percent of beef production in the U.S. Again, that is not the case and a misleading exaggeration. Fed cattle make up 79 percent of the total cattle slaughter. Cows and other non-fed cattle, make up the balance, primarily slaughtered to be made into hamburger. The lean meat from these animals is a necessary ingredient to be made into America's supply of hamburger produced in combination with the less demanded muscle cuts from the fed cattle. This distinction is important because up to 50 percent of all beef in the U.S. is consumed as hamburger. Even factoring in the non-fed cattle slaughter plants they own; the four largest beef packers represent about 70 percent of total U.S. beef production.

Critics of the industry frequently mistake individual packing plant size with overall industry concentration. The size and location of plants, however, reflect basic economic factors like the cattle supply and the economics of plant operations. Indeed, the cattle supply itself is concentrated. The farms and ranches that produce about half of all beef cattle in the U.S. are in just seven states. Further, more than 70 percent of all fed cattle are in just five states. Economies of scale drive the capacity and production of a packing plant. That is especially true in areas with large numbers of fed cattle.

Likewise, cow slaughter plants rely on a supply of cull cows from pasture-based cow-calf farms or dairy farms and are structured based on those factors. Each packing plant has its own cost structure. Packers bid on cattle based on the supply and demand factors in their own region. Owning a plant in Texas does not change the bottom-line to a company's operation in Iowa or Colorado.

Finally, given that the structure of the beef packing industry industry is driven by supply and demand factors, the false premise regarding concentration providing undue market power for beef packers must be corrected. The bottom-line is the current level of four-firm concentration has existed for more than 25 years and it has not ensured packer profitability at the expense of producers.

No sector – cow-calf, feedlot, nor packer – has realized positive margins every year. For example, the four-firm ratio in 2014, when cow-calf and feedlot margins were at record highs, was the same as in 2017 when all three sectors showed positive margins. However, over this 25-year timeline, the cow-calf sector incurred negative margins the fewest number of years of the three as the chart below shows.




*Source* USDA Packers and Stockyards Divison (concentration); Sterling Marketing (margin)

**The U.S. Meat Industry is Efficient and Affords Americans the Benefit of Spending Less of their Personal Disposable Income on Food than any other Country in the World.**

Notwithstanding some popular perspectives being espoused about supply chains, particularly the meat the industry's response to significant "black swan" events, including the Holcomb packing plant fire, the recent cybersecurity attack, and the COVID-19 pandemic, the facts support the conclusion the industry proved resilient in extraordinary circumstances. One can argue the market worked as one would expect and suggestions that the government needs to step in and "do something" may be trying to fix something that is not broken.[1]

Before trying to "fix" something it is prudent to look back and acknowledge the benefits that flow from the system as it exists. In 2019, Americans spent an average of 9.5 percent of their disposable personal incomes on food—divided between food at home (4.9 percent) and food away from home (4.6 percent). Between 1960 and 1998, the share of disposable personal income spent on total food by Americans, on average, fell from 17.0 to 10.1 percent, driven by a declining share of income spent on food at home.[2] Indeed, Americans spend less of their disposable personal income on food than any other country in the world. This remarkable drop is attributable largely to systemic efficiencies that allow food processors to offer food to consumers at lower prices.

**COVID-19 Affected the Cattle and Beef Markets.**

The COVID-19 pandemic was a shock to the meat supply chain, as it was for every industry in America. A brief review provides some instructive context for a discussion of cattle and beef markets during the pandemic. Meat was not the only item affected in the grocery store; we saw similar situations in everything from toilet paper, to disinfectants, to hand sanitizer.

Last year, pandemic-related plant interruptions temporarily idled about 40 percent of slaughter capacity for cattle and hogs at the peak of its impact. This disruption happened in tandem with unprecedented retail demand for beef due to panic buying and freezer stocking as shelter-in-place orders were put in place. The situation was worsened by the significant operational changes needed to rebalance production, processing, and distribution away from foodservice toward retail. The type of cuts, product sizes, processing equipment, packaging and distribution vary considerably between retail and foodservice and are not easily transitioned.

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[1] *Economic Reasons for What was Observed in Fed Cattle and Beef Markets During the Spring of 2020*, Steve Koontz, Department of Agricultural & Resource Economics, Colorado State University, may 28, 2020.

[2] https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/

The impact of the shift from foodservice to retail was substantial. Before the pandemic, in both 2018 and 2019, foodservice accounted for about 61 percent of all domestic beef consumption. That dropped to less than 55 percent in 2020. Conversely, retail sales of beef increased from 38 percent to 45 percent of overall domestic consumption.[3]

According to the Beef Checkoff,

> A major change in consumer behavior that affected the retail industry was the "stocking-up" behavior experienced at the beginning of the pandemic. Shoppers rushed to their grocery stores to buy surplus groceries, especially meat products. Even as late as September of last year, 50% of consumers surveyed reported to be "stocking-up" at a greater rate than normal. With this behavior, and with the foodservice industry restricted or shutdown, 83% of consumer meals were being cooked and consumed at home. Ground beef was one of the main products to be stored in refrigerators and freezers, with over 50% of consumers reporting to have surplus ground beef products.[4]

This had a dramatic impact. In 2020, retail beef sales increased by 606 million pounds by volume, or more than 11 percent. All fresh meat and poultry sales increased 19 percent by value, an increase of $9.6 billion. Beef sales increased by $5.9 billion in value, accounting for 61 percent of that overall growth in protein demand. Ground beef sales alone grew by $2.02 billion[1], accounting for 21 percent of the total increased aggregate demand for meat and poultry. Beef demand remains high: the total volume of beef sales in 2021 from January through mid-June remained more than 4 percent higher than the pre-pandemic levels over the same period in 2019. This increase in beef demand in 2020 happened while the packing sector's ability to process cattle was experiencing operational constraints, and has continued into this year while labor availability has similarly affected the packing industry's ability to operate at full capacity. Meanwhile, the supply of fed cattle remained large. In short, COVID-19 created a significant "kink in the chain" that took time to straighten.

Early in the pandemic the National Cattlemen's Beef Association (NCBA) commissioned the Oklahoma Cooperative Extension Service and several distinguished agricultural economists to examine the impact COVID-19 was having and was expected to have on the beef cattle industry. That paper warned "the timeline for market recovery from COVID-19 is unknown, and cow-calf losses could expand into 2021 when the summer and fall 2020 calf crops would be marketed."[5]

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[3] Nielsen, Answers on Demand, 2020 Beef Sales; NPD Category Sizing

[4] Beef Checkoff, Hindsight 2020: Retail and Foodservice Trends Through the Pandemic, accessed July 2021

[1] *Id* at 3

[5] Economic Damage to the U.S. Beef Cattle Industry due to COVID-19, OSU/NCBA, April 2020

The market is rebounding. This week Feeder Cattle futures reached contract highs for the August through March 2022 contracts. On Monday, July 26, the Feeder Cattle contract closed at its highest since March 2016. Live Cattle futures prices so far in July have averaged higher than the same month in 2017, 2018, and 2019, all pre-pandemic. This reflects a smaller supply of cattle, which according to USDA's mid-year cattle inventory report released last week, is down 1 percent from last year. Also, it reflects the recovery in cattle processing capacity.

**Fed Cattle Marketing and Price Discovery.**

From ranch to the slaughter plant rail, live cattle typically change ownership two to three times. Cow-calf producers market their cattle to feeders, or to backgrounders who in turn move those cattle to feeders, who then market to packers. The price for cattle at any of those three most common points of transactions is a function of how many cattle are in each respective market segment. In other words, the price is determined by supply of cattle to sell from one segment and the demand for buying cattle by the next segment. That explains why each segment can experience different margins and why there is a futures contract for two types of cattle: feeder cattle and fed cattle. When any of those segments are out of balance, prices move, and the moves can be dramatic, as witnessed by the COVID-spurred retail beef demand, which represents the final segment of the entire pasture to plate value chain, and the COVID-imposed imbalance within various segments of the cattle sector.

Considerable attention has been focused on packer margins hitting historic levels during COVID, and before that, after the 2019 fire at the beef packing plant in Holcomb, Kansas (which happened right before Labor Day weekend, a point of high seasonal beef demand). These dramatic and unforeseen events put the cattle supply chain temporarily out of balance. In both cases due to a temporary loss of processing capacity, the interrupted demand for cattle led cash market fed cattle prices to fall, while the reduced and uncertain supply of beef led wholesale beef prices to rise dramatically.

In his analysis of the COVID situation, Dr. Steve Koontz of Colorado State University wrote,

> To expect historical relationships between meat price and livestock prices to persist when major facilities in the packing sector are at times closed and in others operating at reduced capacity has no economic foundation.[6]

Nonetheless, calls for investigations into market transparency, collusion, and the structure of the beef packing industry were made. In August 2019 USDA

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[6] Koontz

announced its intent to investigate the economic impact to the cattle market stemming from losing beef processing capacity after the fire at the Holcomb slaughter facility. In April 2020 that investigation was expanded to include the impact of COVID-19 to "determine if there is any evidence of price manipulation, collusion, restrictions of competition or other unfair practices."[7]

In July 2020, USDA's AMS released its Boxed Beef and Fed Cattle Price Spread Investigation Report detailing the agency's investigation into cattle and beef price margins, finding no wrong-doing and confirming the disruption in the beef markets was due to devastating and unprecedented events.

Further, per that report, AMS related "One of the underlying concerns about price discovery is the declining number of participants in the negotiated cash market."[8] Since then, there have been several proposals, including legislation introduced in Congress, to restructure and regulate the cattle market through significant government intervention. Prominent among the proposals is to require cattle feeders to sell cattle to packers, and packers to buy from feeders, a mandatory minimum volume of fed cattle on a cash, spot market basis, or "negotiated" basis purportedly to improve price discovery. These proposals, however, threaten the industry with numerous adverse, unintended consequences.

There is robust price discovery in the cattle and beef markets. Congress established and USDA administers the Livestock Mandatory Reporting Act (LMR) program to facilitate open, transparent price discovery and provide all market participants, both large and small, with comparable levels of market information for slaughter cattle and beef, as well as other species.

Under LMR, packers must report to AMS daily the prices they pay to procure cattle, as well as other information, including slaughter data for cattle harvested during a specified time period and with net prices, actual weights, dressing percentages, percent of beef grading Choice, and price ranges, and then AMS publishes the anonymized data. AMS publishes 24 daily and 20 weekly cattle reports each week. Weekly reports start Monday afternoon and end the next Monday morning. These reports cover time periods, regions, and activities and the data include actual cattle prices.

Further, packers report all original sale beef transactions in both volume and price through the Daily Boxed Beef Report. This data is reported *twice* daily, at 11:00 a.m. and at 3:00 p.m. Central Time. The morning report covers market activity since 1:30 p.m. of the prior business day until 9:30 a.m. of the current business day. The afternoon report is cumulative, including all market activity in the morning plus all additional transactions between 9:30 a.m. and 1:30 p.m., and is on the

[7] USDA Statement on Beef Processing Facility in Holcomb, Kansas, August 28, 2019
[8] Boxed Beef and Fed Cattle Price Spread Investigation Report, USDA AMS, July 22, 2020

USDA DataMart website. The boxed beef report covers both individual beef item sales and beef cutout values and current volumes, both of which are derived from the individual beef item sales data.

Stepping back for a moment, it is unimaginable in virtually any other industry participants in a free market would be required to report such data on an on-going, daily basis, and that the data would then be published by the government for competitors and other market participants to view, analyze, and use as a basis for strategic decisions. And yet, despite all of the onerous, mandated reporting requirements already in place, some people claim there is no market transparency and there needs to be more price discovery. Where does it end?

The proposals to implement a mandatory minimum volume of negotiated cash sales go far beyond the purported objective of market transparency and price discovery to regulating terms of sale in a private transaction between producers and packers. They represent the beginning of the Federal government regulating more – or all – terms of sale in the cattle market. Such behavior should be concerning to producers given the number of transactions among the segments of the cattle production supply chain described earlier.

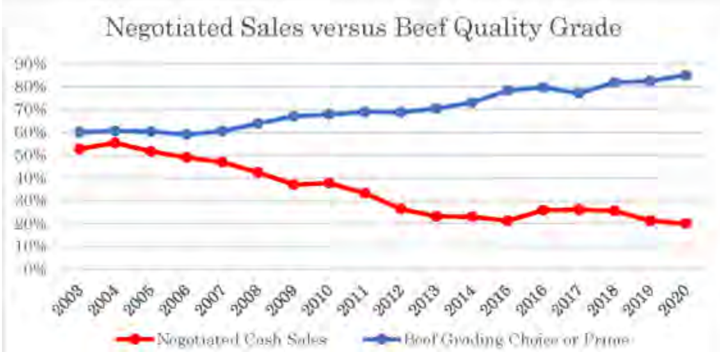
Further, there have been suggestions Congress should amend the confidentiality provisions in the Agricultural Marketing Act applicable to LMR. One bill has been introduced that would prohibit USDA from withholding any "information, statistics, and documents." This concept has data privacy and antitrust implications for both packers and feeders. USDA has examined the LMR confidentiality requirements and determined relaxing the requirements would not ensure anonymity among the market participants. Producers are not the only market participants using the published LMR data: packers and others constantly analyze the data, and any loosening of the confidentiality requirements could provide some market participants full view of their competitors' actions in the market.

By design, a mandate for packers to meet a minimum volume of negotiated cash sales would limit a producer's ability to use other, preferred types of cattle procurement and marketing tools, including forward contracts and various formula-based purchases that comprise the majority of transactions for market-ready cattle. These pricing methods – collectively known as alternative marketing arrangements (AMAs) – combined with the negotiated cash market pricing, have served U.S. cattle producers, the beef industry, and consumers well over the past two decades by:

- Providing producers and cattle feeders with an effective risk management tool;
- Reducing marketing costs for cattle feeders and producers;
- Improving efficiency though the supply chain;

- Improving the quality of U.S. beef;
- Meeting U.S. consumer demand and building trust by incentivizing not only quality, but the safety, sustainability, and consistency of U.S. beef; and
- Enhancing the competitiveness of U.S. beef in global export markets.

Greater utilization of AMAs has coincided with a significant improvement in beef quality. The percent of beef grading at the top two levels, Choice and Prime, has increased from 60 percent in 2000 to 85 percent in 2020.




*Source*: AMS

There are economic and business reasons why cattle transactions have evolved in the way they have. In its 2018 Report to Congress, AMS said "Stakeholders were in general agreement that formula-based purchases provide greater benefits, in terms of operational efficiency, for both packers and feedlots."[9] Proponents of mandatory negotiated cash sale volumes have not acknowledged, much less addressed, fundamental questions such as which producers would be forced to give up their AMAs, and what effect on beef quality and demand could result.

Analysis of this impact has been done, however. The Research Triangle Institute (RTI) conducted the definitive study about the use of and benefits that flow to all sectors regarding AMAs.[10] The study was mandated and funded by Congress, published in six volumes, by 30 researchers in four teams, conducting nearly three years of research and was peer reviewed. In the executive summary RTI said:

[9] Report to Congress, Livestock Mandatory Reporting, USDA AMS, 2018
[10] See United States Dept. of Agriculture. Grain Inspection, Packers and Stockyard Administration. *GIPSA Livestock and Meat Marketing Study*. Vol. 1. Research Triangle Park: RTI International. 2007

> Many meat packers and livestock producers obtain benefits through the use of AMAs, including management of costs, management of risk (market access and price risk), and assurance of quality and consistency of quality.[11]

RTI also concluded:

> In aggregate, restrictions on the use of AMAs for sale of livestock to meat packers would have negative economic effects on livestock producers, meat packers, and consumers.[12]

RTI also found, for cattle, that

> Hypothetical reductions in AMAs, as represented by formula arrangements (marketing agreements and forward contracts) and packer ownership, are found to have a negative effect on producer and consumer surplus measures. ... Over 10 years, a hypothetical 25% restriction in AMA volumes resulted in a decrease in cumulative present value of surplus of
> - 2.67% for feeder cattle producers;
> - 1.35% for fed cattle producers;
> - 0.86% for wholesale beef producers (packers); and
> - 0.83% for beef consumers.
>
> A hypothetical 100% restriction in AMA volumes resulted in a decrease in cumulative present value surplus of
>
> - 15.96% for feeder cattle producers;
> - 7.82% for fed cattle producers;
> - 5.24% for wholesale beef producers (packers); and
> - 4.56% for beef consumers.[13]

Finally, "price discovery" should not be confused with price determination, *i.e.* supply and demand fundamentals. Typically, when market prices are low or falling, there are increased concerns expressed about "price discovery." There appears to be a widespread perception that a reduction in cash trade is, by definition, bearish. In fact, in times of market disruption, formula and contract pricing can prevent precipitous drops and support quicker recovery. From an economic perspective, bearish cattle prices result from "price determination" factors, such as supply of cattle in each segment of the supply chain and the capacity to process cattle into beef, but also the overall demand for beef and other competing proteins.

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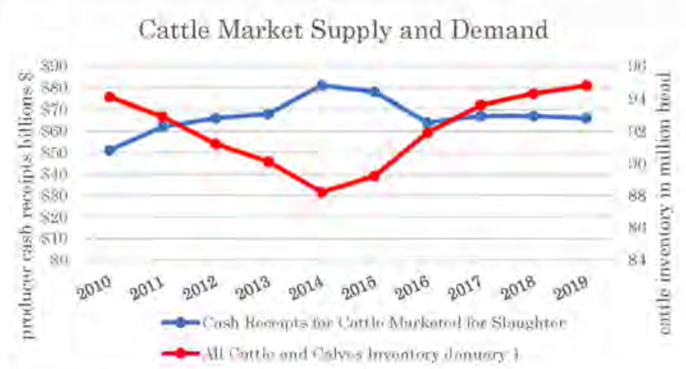
[11] *Id.* at ES-3.
[12] *Id.*
[13] *Id.* at ES-8-9.

Mandating more cash purchases does nothing to remedy bearish price fundamentals. The volume of cash sales is less relevant than is the type and quality characteristics of the cattle sold being representative of the market. Additionally, the types of cattle transactions vary greatly over time, even week to week. Imposing mandatory minimum volumes creates an incentive to alter transaction types that could result in less price discovery.

**Supply and Demand Fundamentals Are at Work.**

Before the pandemic, the supply of cattle was growing. For the first three months of 2020, the fed cattle supply experienced year-over-year growth. For each month – January, February, and March – the number of cattle and calves in feedlots with capacity of 1,000 or more head was larger than it was during the same months in 2019. The supply of fed market cattle remains high this year. USDA reports that in 2021, the cattle-on-feed inventory has been the second highest monthly total ever on record for four of the first six months of the year, February through June 2021.

As expected, when supplies of cattle increase, prices decrease – and vice versa. The chart below shows how this has played out over the past 10 years, with or without such significant "black swan" events as COVID, the fire at the Holcomb packing plant in 2019, or this year's cyber ransomware attack.

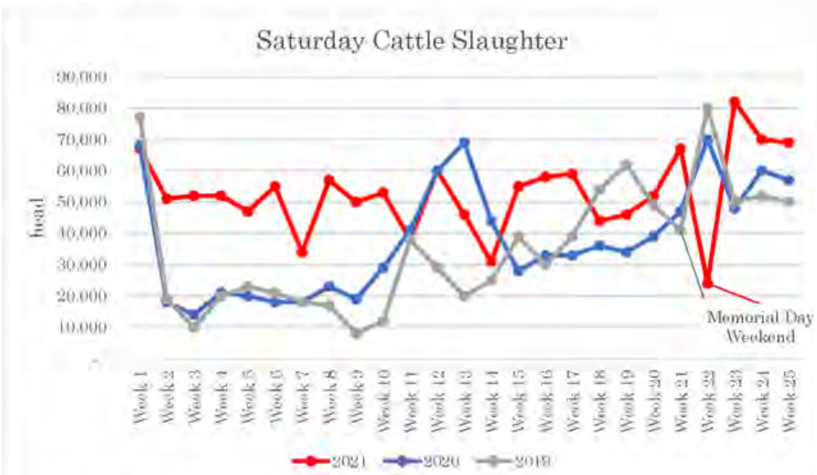



*Source*: USDA AMS

Nonetheless, in the face of the many challenges, the beef packing sector has proven resilient. Total beef production in 2020 was slightly higher than 2019, based on heavier slaughter and carcass weights. As expected, cattle weights increased during the disruptions from COVID. Total head of commercial slaughter in 2020

was down just two percent from 2019, despite the dramatic disruption to the cattle harvest during the second quarter of 2020 resulting from the pandemic.

Packers adjusted to the combination of the large supply of cattle and constraints on their capacity by increasing their Saturday slaughter and processing operations to increase through-put. Saturday slaughter year-to-date (through June 19, 2021) has been nearly 40 percent higher than 2020 and 50 percent higher than the more normal year of 2019.




*Source*: USDA AMS

Although through the first half of 2021 there remained a large supply of fed cattle to be harvested, which affected cattle markets and prices, through June, year-to-date cattle slaughter is nearly six percent greater than the previous five-year average for the same period.

**The Labor Supply Affects Cattle Markets.**

Production in meat packing and processing plants are, in some respects, tied to the number of employees working the line. During the early phases of the COVID-19 pandemic, employee absenteeism, whether due to contracting COVID-19, or being sent home with symptoms, or quarantined because of exposure, or simply because of apprehension of coming to work as seen in some locations, caused processing lines in some plants to slow. Additionally, many packers were further challenged by the hodge-podge of enforcement actions, however well-intentioned, taken at the state and local level.

Moreover, certain cuts of beef and pork require comparatively more labor to process compared to other cuts. These include boneless steaks, which are high value products in high demand. Labor shortages for fabricating these cuts exacerbate the economic impact on beef and cattle prices from plant slowdowns. A slowdown at any point in a beef packing plant creates a bottleneck through the whole plant. Meat and poultry companies are utilizing capacity to the best of their abilities with COVID protocol constraints still in place and despite significant labor challenges.

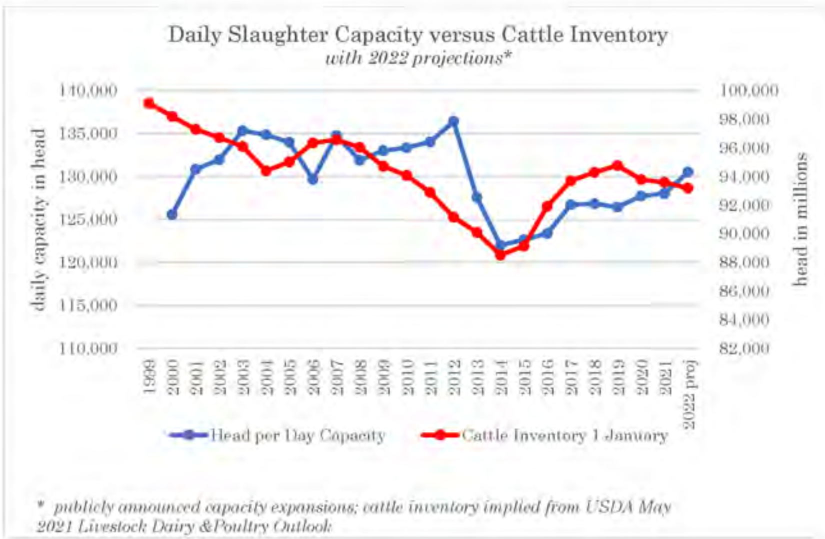
To be clear, labor challenges were not caused by the pandemic; COVID-19 only exacerbated the issue. The meat industry has been facing a labor shortage for some time, and it continues today. Indeed, the pace of Saturday shifts has also strained available labor and adds to processing costs. Recent press stories report the industry's recruitment efforts, including wage increases, signing bonuses, relocation bonuses, retention bonuses and generous benefits. This labor shortage impact is not only on processing lines but also warehouse workers, maintenance positions, and other jobs also critical to maintaining the supply chain.

Virtually none of the calls for government intervention into the market acknowledge or address labor availability, even though it is, and is likely to remain, a significant factor that affects utilization of capacity. Packers cannot work through large supplies of market-ready cattle when plants are not fully staffed with skilled labor.

**The Private Sector is Adding Packing Capacity.**

USDA has announced it will provide $500 million in grants and loans from the American Rescue Plan to expand meat and poultry processing. Asking taxpayers to subsidize harvest capacity ignores two fundamental issues. First, adding more capacity simply for the sake of having added capacity for a notoriously cyclical cattle supply is short sighted and could distort more significant and longer-term private sector investments. Second, adding capacity ignores the long-running challenge of finding a sufficient labor pool.

The beef and cattle markets are not static, but rather regularly adjust to find balance as the chart below shows. The industry responds to market signals in terms of capacity and the size of the cattle herd, and ultimately beef demand.


Daily Slaughter Capacity versus Cattle Inventory
with 2022 projections*
daily capacity in head
head in millions
140,000
135,000
130,000
125,000
120,000
115,000
110,000
100,000
98,000
96,000
94,000
92,000
90,000
88,000
86,000
84,000
82,000
1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 proj
Head per Day Capacity
Cattle Inventory 1 January
* publicly announced capacity expansions; cattle inventory implied from USDA May 2021 Livestock Dairy &Poultry Outlook

Over the past 10 months, in response to market signals, one new plant has opened, and several expansions and new facilities have been announced – including those with investment from cattle producer stakeholders.

| 2020-2021 Publicly Announced Beef Packing Capacity Expansion | | | | | | | |
|---|---|---|---|---|---|---|---|
| | Announced | | | | | | |
| Packer | Date | Action | Capacity *hd/day* | State | Est Investment | Ownership | Est on-line |
| AgriBeef/ True West | Aug 2020 | New Plant | 500 | ID | | Producer | TBD |
| FPL | Oct 2020 | Expansion | 500 | GA | $120 mln | FPL | Q42021 |
| Iowa Premium/ National Beef | Mar 2021 | Expansion | 1,250 | IA | $100 mln | National Beef | Q42022 |
| Sustainable Beef | Mar 2021 | New Plant | 1,400 | NE | $300 mln | Feeder | TBD |
| Missouri Prime | Mar 2021 | Converted pork plant | 500 | MO | | NexGen, feeders | Mar 2021 |
| JBS | Jun 2021 | Expansion | 1,050 | NE | $150 mln | JBS | Q42021 |
| American Foods Group | Jun 2021 | New Plant | TBD | WI | | AFG | TBD |
| TOTAL | | | 5,200 + | ***Source***: company press releases and news coverage | | | |

These new entrants or company expansions were based on decisions to build or expand based on market conditions, not because of government intervention. Government interference into the market could well undermine this industry growth.

This market-based expansion of the beef packing industry is what cattle industry analysts have identified and called for in various reports. As a Rabobank analysis stated in September 2020, "An additional daily packing capacity of 5,000 to 6,000 head of fed cattle could restore the historical balance of fed cattle supplies and packing capacity and still allow for positive packer margins."[14] The Rabobank report further stated, "While many have discussed the need for more geographically dispersed, smaller plants, adding packing capacity in the name of supply chain resiliency is unlikely to work. It must be driven by long-run economics."[15] Dr.

[14] *The Case for Capacity: Can the US Beef Industry Expand Packing Capacity?* Rabobank, Sept. 2020

[15] *Ibid.*

Koontz expressed similar concerns about building capacity that is not used when not needed but built "just in case."[16]

Small and midsize beef slaughter and processing companies endured the same challenges large companies faced during the pandemic, perhaps more so. Artificially creating more, smaller regional harvest facilities will not prevent future market disruptions nor protect cattle producers from cyclical or volatile markets. The unintended outcome could be the opposite.

**Proposed Regulatory Actions by USDA Under the Packers and Stockyards Act will Adversely Affect Producers and Packers.**

On June 11, USDA announced it planned to propose rules to "strengthen enforcement" of the Packers and Stockyards Act (PSA).[17] The expected proposed regulations would be problematic for several reasons, including their impact on livestock producers' options to market their cattle, as described previously.

The concepts expressed in USDA's announcement are not new and were considered, and rejected, in the past. When proposed, they will conflict with legal precedent in no less than eight federal appellate circuits, and will hurt livestock producers, packers, and consumers.

For example, USDA plans on re-proposing a rule to clarify that a plaintiff need not demonstrate harm to competition to bring and prevail in Packers and Stockyards Act litigation. Additionally, USDA indicates that it intends to "propose a new rule that will provide greater clarity to strengthen enforcement of unfair and deceptive practices, undue preferences, and unjust prejudices."[18] It is beyond dispute that eliminating the need for a plaintiff to show harm to competition, or likely harm to competition, will encourage litigation, most of it likely specious litigation. That threat will severely limit or terminate AMAs with all the adverse unintended consequences discussed.

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[16] *Economic Reasons for What was Observed in Fed Cattle and Beef Markets During the Spring of 2020*, Steve Koontz, Department of Agricultural & Resource Economics, Colorado State University, May 28, 2020.

[17] https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act
[18] Ibid

**Conclusion**

The discussion above demonstrates that market fundamentals drive the cattle and beef markets and that what we have seen before and during the course of the pandemic was to be expected. The North American Meat Institute is prepared to discuss these issues and work with the Committee on the issues facing the industry. Thank you for the opportunity to provide this testimony.

**Buyer Power and Economic Discrimination in the Grocery Aisle: Kitchen Table Issues for American Consumers**

**The National Grocers Association**

### Introduction

The National Grocers Association (NGA) represents independent community grocers across the country, as well as their wholesaler partners. America's approximately 21,000 independent grocers are the true entrepreneurs of the grocery industry, passionately committed to their customers, their employees and the markets they serve. And they are at the heart of local communities, where they provide jobs and boost tax revenue while bringing choice, convenience and value to hard-working Americans.

Our members compete in markets that are increasingly dominated by a handful of national and international chains. These dominant chains wield tremendous economic power to the detriment of independent retailers and producers and the American consumer. For decades, they have used their "buyer power" to dictate terms and conditions to suppliers, which in turn forces suppliers to discriminate against independent grocers and drives consolidation throughout the supply chain. Buyer power also harms small and mid-sized producers, such as independent farmers and ranchers, who are paid prices far below competitive levels.

Although these problems are not new, the grocery power buyers have taken advantage of the COVID-19 pandemic to further entrench their economic power at the expense of smaller competitors and producers. Many independent grocers have struggled throughout the pandemic to stock must-have products—such as essentials like paper towels and toilet paper, cleaning supplies, and critical packaged foods like canned soup—while large national chains have exercised their buyer power to demand on-time, complete orders, and in some cases to secure excess supply. In those months that small businesses struggled to keep products on their shelves, dominant retailers such as Amazon, Costco, and Dollar General posted their largest profits ever, and Walmart doubled the size of its e-commerce business.[1]

[1] Jeffrey Dastin & Akanksha Rana, *Amazon Posts Biggest Profit Ever at Height of Pandemic in U.S.*, REUTERS, July 30, 2020, https://www.reuters.com/article/us-amazon-com-results/amazon-posts-biggest-profit-ever-at-height-of-pandemic-in-u-s-idUSKCN24V3HL; Phil Wahba, *Walmart's E-Commerce Sales Nearly Double As Shoppers Go Beyond Groceries in Online Orders*, FORTUNE, Aug. 18, 2020, https://fortune.com/2020/08/18/walmart-ecommerce-sales-covid-doug-mcmillon; Jeremy C. Owens, *Costco Clears $4 Billion in Earnings For The First Time Amid Record Growth*, MARKETWATCH, Sept. 24, 2020, https://www.marketwatch.com/story/costco-clears-4-billion-in-earnings-for-first-time-amid-record-growth-but-the-stock-is-falling-11600979558, Micah Maidenberg, *Dollar General, Dollar Tree Draw in Consumers Amid Economic Weakness*, WALL ST. J., Aug. 27, 2020,

The result of increasing concentration and unchecked buyer power is a system that benefits a select few at the expense of everyone else, including consumers, workers, and independent retailers and suppliers: consumers have a narrowing range of choice to shop for the goods and services they need; entrepreneurs and independent businesses struggle to start and sustain businesses; and producers such as farmers and ranchers are forced to accept unfavorable economic terms, conditions, and prices imposed by the largest members of a consolidated supply chain.

America's buyer power problem was not inevitable. The antitrust laws were designed to address these very issues, including by protecting consumers and suppliers from firms with buyer power and by defending small businesses from the predatory tactics of large rivals. And for many decades they did.[2] It was only in the last 30 years that policymakers and courts adopted an orthodoxy that "mega"-sized firms are more efficient and better positioned to drive down consumer prices, sacrificing other considerations that animated the antitrust laws.

Today, a growing consensus is emerging that the antitrust laws are a critical tool in the economic toolbox to address rising levels of concentration and the harms that flow from these market structures. Congress—on a bipartisan basis—and the public are increasingly understanding that effective and timely antitrust enforcement should promote and protect competitive markets, including by ensuring a level playing field and preventing large competitors from acting to disadvantage smaller rivals and depriving consumers of the benefits of competitive markets.

This paper uses independent grocers as a case study to explore the problems that flow from increased retailer buyer power and economic discrimination in today's economy. Part I details the many benefits of independent grocers. Part II discusses the growing concentration in the grocery sector, and how dominant retailers threaten the health of the grocery ecosystem. Part III describes the ways in which dominant players in the grocery industry use their buyer power to impose discriminatory terms and conditions on suppliers that disadvantage smaller, independent grocers and harm consumers. Part IV explores how antitrust enforcement has failed to maintain a level playing field for independent businesses trying to compete against increasingly powerful rivals.

## I. Independent Grocers Benefit Local Economies, Competition, and Consumers

Small and mid-sized independent businesses are critical drivers of competition, economic growth, and jobs in American communities. They compete on the basis of price, but also on other important dimensions of competition that are often overlooked by bigger players—

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https://www.wsj.com/articles/dollar-general-dollar-tree-draw-in-consumers-amid-economic-weakness-11598548959?mod=article_inline (reporting Dollar General quarterly sales rose by about 19% in the second quarter of 2020).

[2] *See* Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARVARD L. & POLICY REV. 235, 270 (2017) (citing the legislative history of the Sherman Act and the Clayton Act).

including by offering higher quality, better service, more convenient locations, and a greater diversity of products.

This is particularly true in the grocery sector. Independent grocers, which are family or employee-owned grocery retailers, account for close to one percent of the nation's overall economy and are responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes.[3] These grocery stores act as an economic anchor in their communities, attracting consumers and generating foot traffic that creates opportunities for other area businesses.

Independent grocers are also strong competitors. In addition to price, independent grocers compete through food quality, variety, and availability; selection of healthy options; selection of locally produced foods; cleanliness; checkout speed; and availability of staff; as well as accessibility and convenience of location.[4] To remain competitive and keep food prices as low as possible, independent grocers operate with a median net profit margin of about 0.7 percent.[5]

Consumer sentiment reflects the benefits of independent and regional grocers. In a 2019 review of grocery stores, Consumer Reports found that consumers overwhelmingly preferred regional grocery stores over national chains, including the warehouse clubs and supercenters that dominate the space.[6] The regional grocery stores included in the survey outperformed national chains on a number of dimensions of competition, including price competitiveness, breadth of goods, and produce quality.[7]

Independent grocers also play a crucial role in ensuring food access and in meeting local demand. Independent grocers serve smaller, rural communities as well as high density urban ones. These stores are particularly important to inner-city and rural communities, many of which would otherwise suffer from a lack of access to healthy foods.[8] A 2017 study found that from 2005 to 2015, the number of independent grocery stores in rural counties and in counties with

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[3] How COVID-19 Impacted Small Businesses Across the Food System: Hearing Before the House Small Business Comm., 116th Cong. (2020) (statement of Jimmy Wright, Owner, Wright's Market On Behalf of the National Grocers Association), https://smallbusiness.house.gov/uploadedfiles/09-30-20_mr._wright_testimony.pdf [hereinafter Testimony of Jimmy Wright].

[4] *Best Grocery Stores and Supermarkets*, CONSUMER REPORTS, Apr. 16, 2019, https://www.consumerreports.org/grocery-stores-supermarkets/best-grocery-stores-and-supermarkets.

[5] The average net profit for independent grocers in 2019 was 1.05 percent, and 35.1 percent of independent grocers reported negative profit results in 2019. *See* National Grocers Association & FMS Solutions, 2020 Independent Grocers Financial Survey, https://blog.fmssolutions.com/blog/eng/2019-performance-enabled-independent-grocer-success-amid-pandemic.

[6] Consumer Reports, *supra* note 4.

[7] *Id.*

[8] In 2009, the U.S. Department of Agriculture (USDA) began mapping food access to identify communities where there was low availability of affordable, nutritious foods. The USDA's most recent data estimates that approximately 17 million people live in food-desert communities. *See* Food Access Research Atlas, U.S. Dep't of Ag., Econ. Res. Serv., https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/#changes.

growing Black populations increased, while the number of chain stores decreased in these areas.[9] In one striking example, Detroit, Michigan, a city of 700,000 residents (78 percent of whom are Black), is served by only three locations of national chain grocery stores in its 143 square mile area, but approximately 70 independent grocery stores.[10] Studies have also shown that independent grocers are more likely to serve low-income areas, and that Supplemental Nutrition Assistance Program (SNAP) benefits are more likely to be redeemed at independently owned stores, particularly in rural areas.[11]

In small towns and urban neighborhoods that are not served by independent grocers, many consumers are left with no access to healthy food. For example, a 2018 study found that in northern Tulsa, Oklahoma, there is no full-service grocery store, and the only option for residents to buy groceries close to their home are dollar store chains.[12] Those stores offer only a narrow selection of processed foods, and there are no fresh vegetables, fruits, or meats on the shelves.[13]

In addition to offering competitive products and services, independent grocers also benefit communities by creating opportunities and serving populations that are overlooked by large chains. Independent businesses extend opportunities throughout rural, suburban and urban America and protect local communities from being overly dependent on one business or industry.[14]

Many independent grocers are family-owned or employee-owned businesses that have been in business for generations. Economic research has shown that a higher percentage of small businesses in a community is strongly associated with greater economic well-being, including employment growth.[15]

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[9] Clare Cho and Richard Volpe, *Independent Grocery Stores in the Changing Landscape of the U.S. Food Retail Industry*, ERR-240, U.S. Dep't of Ag., Econ. Res. Serv., Nov. 2017, https://www.ers.usda.gov/webdocs/publications/85783/err-240.pdf.

[10] Nathaniel Meyersohn, *How The Rise of Supermarkets Left Out Black America*, CNN BUSINESS, June 16, 2020, https://www.cnn.com/2020/06/16/business/grocery-stores-access-race-inequality/index.html.

[11] *See, e.g.*, Powell, L., S. Slater, D. Mirtcheva, Y. Bao, and F. Chaloupka, *Food Store Availability and Neighborhood Characteristics in the United States*, Preventive Medicine 44(3):189-195 (2007); King, R., E. Leibtag, and A. Behl, *Supermarket Characteristics and Operating Costs in Low-Income Areas*, Agricultural Econ. Rep. No. 839, U.S. Dep't of Ag., Econ. Res. Serv., 2004.

[12] Stacy Mitchell and Marie Donahue, *Report: Dollar Stores Are Targeting Struggling Urban Neighborhoods and Small Towns*, Dec. 6, 2018, https://ilsr.org/dollar-stores-target-cities-towns-one-fights-back/ (identifying various towns that have lost their only grocery store and observing that "[l]ocal grocers that survived Walmart are now falling to Dollar General"). There is growing evidence that these stores are not responding to economic distress—but rather causing it. In rural areas and urban centers, these dominant retailers have saturated communities with multiple outlets, forcing full-service grocery stores to close and making it impossible for new grocers to open. *Id.*

[13] *Id.*

[14] *See* Cho and Volpe, *supra* note 9 ("In addition to improving food access, independent stores provide job opportunities that may help attract residents and generate tax revenues that aid in development efforts.").

[15] *See, e.g.*, Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well-Being?* (Fed. Res. Bank of Atlanta Community and Econ. Disc. Paper No. 01-13, 2013), https://www.frbatlanta.org/-/media/documents/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.pdf.

Independent grocers also foster innovation and new business growth at the supplier level by stocking products from local and small-scale businesses. For example, independent grocers are a critical distribution channel for local brands, many of which are not stocked at larger stores. NGA member Woodman's Food Market, which operates fifteen retail grocery stores located in Wisconsin and Illinois, carries Mad Dog and Merrill condiments, Bucky Badger snacks, and Huber jams and jellies that larger competitors do not distribute. In addition, various smaller suppliers, including suppliers of spices, seasonings, sauces, sausages, and salad dressing brands, have used independent grocers to enter the market before reaching the shelves of larger chains. And during the pandemic, local craft distillers around the country were able to shift their production capacity to manufacture alcohol-based hand sanitizer, a product they largely distributed to consumers through independent businesses.[16] Without independent grocers, these new entrants and smaller suppliers would lose a key channel to reach consumers and grow their businesses.

Small businesses also have a proven track record of supporting their employees during crises. According to a recent NGA and FMS Solutions study, about 85 percent of independent grocers paid "hero pay" to their workers by increasing overtime pay or paying employees above their normal rate of pay for working during the pandemic.[17] Wright's Market, a family-owned business serving the community of Opelika, Alabama, provided an extra week of pay to its employees early in the pandemic and provided bonuses and overtime pay as the pandemic continued.[18] Other small businesses have reporting staying open just to pay their employees, or at a minimum, to preserve their healthcare coverage during the pandemic.[19]

## II. Dominant Retailers Threaten the Healthy Grocery Ecosystem

Despite the benefits of a robust independent retail grocery sector, grocery is becoming increasingly concentrated. Independent grocers are constantly losing ground to a handful of dominant retailers, to the disadvantage of both consumers and local communities.

Today, large, national chains increasingly control the grocery sector.[20] For example, Walmart alone currently captures one out of every four dollars Americans spend on groceries

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[16] For example, New Holland Brewing Company quickly shifted its production to hand sanitizer at the start of the pandemic, produced 1,000 gallons of hand sanitizer by the end of March 2020. Its hand sanitizer was delivered to health care and emergency providers as well as grocery stores throughout West Michigan. *See Coppercraft, New Holland Produce 1,000 Gallons of Hand Sanitizer for Area Hospitals*, KTVB7, Mar. 27, 2020, https://www.ktvb.com/article/news/health/coronavirus/lakeshore-distilleries-create-1000-gallons-hand-sanitizers/69-2ee9b6de-3bf8-4164-8ea0-16acf518e90b.

[17] Testimony of Jimmy Wright, *supra* note 3, at 3.

[18] *Id.*

[19] Stacy Mitchell, *The Imminent Small-Business Collapse*, THE PROSPECT, Mar. 22, 2020, https://prospect.org/economy/imminent-small-business-collapse-coronavirus.

[20] *Courage to Learn: Agriculture*, AMERICAN ECON. LIBERTIES PROJECT, Jan. 11, 2021, https://www.economicliberties.us/our-work/ctl-agriculture (the market share of the top four grocers in the United States has increased from 25 percent in 1997 to 44 percent in 2018).

nationwide.[21] And in many areas Walmart's presence is even greater. According to a 2019 study, Walmart captured more than 50 percent of grocery sales in 43 metropolitan areas in the U.S., and more than 70 percent of grocery sales in 38 regions.[22]

These chains' dominance is even more striking given consumers' preference for regional grocery stores—where those stores exist—and consumers' negative views of the grocery shopping experience at large national chains. For example, in the Consumer Reports study, Walmart received a "disappointing" overall score, and it received the lowest score of *any store* included in the survey for employee helpfulness and attentiveness.[23]

In addition to degrading the consumer experience, growing concentration has contributed to stagnating wage growth and widening income inequality.[24] Large chains centralize employment opportunities in a small number of American cities, and pay high wages to a select few. Large, non-local businesses have a negative effect on income.[25] People who work for retail businesses with fewer than 100 employees make about 30 percent more than employees working at chains with more than 10,000 employees.[26] Even the smallest retailers—those with fewer than ten employees—pay more, on average, than large, national chains.[27]

Growing concentration has also harmed farmers, farm communities, and food production workers. Because of their bargaining leverage, dominant retailers can and do aggressively drive down the prices they pay to farmers, ranchers, meatpackers, and other suppliers.[28] The result is that dominant retailers are capturing a greater and greater share of each consumer dollar spent on food, while suppliers are forced to lower the prices they pay to farmers and the wages they pay to

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[21] Stacy Mitchell, *Walmart's Monopolization of Local Grocery Markets*, INST. FOR LOCAL SELF-RELIANCE, June 2019, https://ilsr.org/wp-content/uploads/2019/06/Walmart_Grocery_Monopoly_Report-_final_for_site.pdf.
[22] *Id.*
[23] *Id.*
[24] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AMER. SOCIOLOGICAL REV. 2 (2018), https://journals.sagepub.com/doi/full/10.1177/0003122418762441 (analyzing panel data on publicly traded companies and concluding that "[t]he spread of unequal bargaining relations between corporate buyers and their suppliers has slowed wage growth for workers").
[25] Stephan Goetz & David Fleming, *Does Local Firm Ownership Matter?*, 25 ECON. DEV. Q. 277 (2011), https://journals.sagepub.com/doi/abs/10.1177/0891242411407312 ("Economic growth models that control for other relevant factors reveal a positive relationship between density of locally owned firms and per capita income growth but only for small (10-99 employees) firms, whereas the density of large (more than 500 workers) firms not owned locally has a negative effect.").
[26] Stacy Mitchell, *Why Small Businesses Matter for Workers*, INST. FOR LOCAL SELF-RELIANCE, April 18, 2018, https://ilsr.org/how-small-businesses-benefit-workers.
[27] *Id.*
[28] United Food and Commercial Workers International Union, Report: Ending Walmart's Rural Stranglehold ("Walmart's entry into the retail grocery market in the early 1990s, and the company's meteoric rise to become the number one grocery retailer, gave it unprecedented buyer power over the packers to continue exerting strong downward pressure on prices paid to suppliers, preventing the meatpackers, workers and farmers from recovering their previous share of the consumer meat retail dollar.")

workers, and market participants throughout the supply chain have less money to invest in expanding their businesses.[29] All of this has a devastating impact on rural communities.[30]

Historically, some have argued that the relentless drive to reduce labor and supply costs by national chains is economically beneficial, and that a concentrated grocery sector is more efficient and more innovative.[31] But in reality, industries with more small businesses are consistently and significantly *more* innovative than industries dominated by a few large companies.[32] And the purported tradeoff between efficiency and small and midsized businesses is false. Smaller and medium-sized grocers often purchase products through cooperatives and other mid-sized wholesalers to take advantage of the same economies of scale in distribution and best practices in inventory management as national chains.[33] Grocery wholesale cooperatives like Wakefern, Topco, and other NGA wholesale members provide scale economies that allow grocers to match the efficiency of large chains while preserving the benefits of independent businesses. For example, these wholesale cooperatives combine purchases to buy in the most efficient manner possible (by the truckload) and provide other services at scale, including advertising, technology, and risk management.[34] At bottom, the claim that power buyers deliver greater benefits to consumers because they are more efficient is simply wrong.

Moreover, economic research suggests that dominant players do not pass their efficiencies on to consumers. For example, one study examining the impact of grocery consolidation on food prices in major urban centers found that while consolidation may have generated economies of scale for supermarkets, those benefits are not being passed on to consumers, and many markets are vulnerable to significant price increases due to high levels of concentration.[35]

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[29] *See id.* at 2-4, 7-8.

[30] *Id.* at 19 ("[T]his inevitably leads to lower wages for workers, less money for farmers, growers and ranchers and fewer choices for consumers. Instead of providing rural economic development, Walmart stores become wealth extraction points that bleed our rural communities dry.")

[31] The FTC has approved several major mergers between large grocery chains in recent years, including Kroger and Harris Teeter in 2014 and Albertsons and Safeway in 2015. In some cases, the FTC has required divestitures to address competitive harm caused by the mergers, only to see those divestitures fail. For example, the FTC required Safeway and Albertsons to sell off 168 stores as a condition of the merger. Months after the sale, however, one of the major buyers of the stores declared bankruptcy and shuttered the divested stores. Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger; Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, WALL ST. J., Oct. 9, 2015, http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394.

[32] Wilfred Dolfsma & Gerben van der Velde, *Industry Innovativeness, Firm Size, and Entrepreneurship: Schumpeter Mark III?*, 24 J. EVOLUTIONARY ECON. 713 (2014), https://www.researchgate.net/publication/272591124_Industry_innovativeness_firm_size_and_entrepreneurship_Schumpeter_Mark_III ("[W]e find that, in a number of different and robust model specifications, the contribution of a presence of large firms to industry innovativeness is distinctly negative for industry innovativeness . . . . Small firms, however, consistently, positively and significantly contribute to industry innovativeness.").

[33] *See* Steve W. Martinez, *The U.S. Food Marketing System: Recent Developments, 1997-2006*, U.S. Dep't of Ag., Econ. Res. Serv., May 2007, https://www.ers.usda.gov/webdocs/publications/45818/11562_err42_1_.pdf?v=4803.8

[34] *Id.*

[35] Kyle W. Stiegert, *Impacts of Nontraditional Food Retailing Supercenters on Food Price Changes*, Food System Res. Group, Dep't. of Ag. and Applied Econ., U. of Wisc.-Madison, FSRG Monograph Series No. 20, Feb. 2006,

All of this raises the question: if a concentrated retail grocery sector is harmful to consumers, the economy, and local communities why are dominant retailers growing their control of the sector?

## III. Retail Buyer Power and Economic Discrimination in Grocery

In the grocery sector, demands from power buyers impose disadvantageous terms, conditions, and prices on independent grocers. This economic discrimination reduces the smaller rivals' competitiveness through higher costs or reduced product supply or quality, and directly harms competition, consumers, and the economy. Retail buyer power has also driven increased concentration in the grocery supply chain, reducing alternatives for independent retailers, producers, and consumers alike. This makes the supply chain more vulnerable to disruption, ultimately raising prices and threatening supply, and creating a vicious cycle that enhances the power of dominant retailers.

Buyer-side market power exists when a purchaser can use its bargaining leverage to secure sub-competitive prices from its suppliers—i.e., prices or terms below those that would exist in a competitive market—or impose discriminatory terms on the purchaser's rivals—i.e., obtain price or supply concessions that are not available to its competitors.[36] In the grocery sector, the large national chains have buyer power because of their significant bargaining leverage over suppliers.[37] This leverage exists because the national chains are critical "gatekeepers" between grocery suppliers and consumers. These retailers control a substantial proportion of the shelf space—whether physical or digital—that provides the key distribution channel for suppliers' products.[38] For example, the top four national grocery chains controlled 44 percent of grocery sales in 2018.[39]

Critically, this dependency is asymmetric; the dominant grocery retailers are not nearly as dependent on a particular supplier as the supplier is on the retailer. This is because a particular grocery supplier's products generally represent only a small fraction of a grocery retailer's sales, which may encompass tens of thousands of products.[40] And a dominant retailer often enjoys several potential branded suppliers for a particular product in addition to selling its own, private label brand versions. As a result, a dominant retailer has a substantial advantage over its

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https://www.researchgate.net/publication/228790460_Impacts_of_nontraditional_food_retailing_supercenters_on_food_price_changes (examining pricing data from 1993 through 2003 for 23 demographic metropolitan areas and concluding "our findings suggest if supermarkets did receive efficiency gains from mergers, they did not pass cost savings on to consumers").

[36] John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L. J. 625, 652 (2005).

[37] Sofia Berto Villas-Boas, Vertical Relationships Between Manufacturers and Retailers: Inference with Limited Data, 74 REV. OF ECON. STUDIES 625, 647 (2007) (analysis of U.S. wholesale and retail yogurt prices consistent with "high bargaining power of retailers" relative to manufacturers).

[38] Paul Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L. J. 2, 555 (2005).

[39] Claire Kelloway and Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Institute, Mar. 27, 2019, http://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system.

[40] *Id.*

suppliers in a negotiation because the risk for the retailer, if the supplier refuses its demands and no deal results, is substantially smaller than it is for the supplier.[41]

The paradigmatic example for this one-sided bargaining dynamic is Walmart. Its ability to unilaterally demand concessions from suppliers is legendary. For example, in 2017, Walmart announced a new requirement that suppliers for Walmart stores and Walmart's e-commerce business must provide on time and in full deliveries 75 percent of the time.[42] Since then, Walmart has repeatedly tightened this requirement, raising the bar for on time, in full deliveries from 75 percent to 85 percent and then to 87 percent in 2019.[43] In September 2020, while manufacturers and suppliers throughout supply chains were struggling to safely meet demand during the COVID-19 pandemic, Walmart raised the bar again, demanding 98 percent on time, in full deliveries.[44] Walmart punishes suppliers that fail to meet its demands by charging a penalty of 3 percent of the cost of goods sold—a devastating penalty in an industry already operating with razor-thin margins.[45]

Likewise, in its report on competition in the digital markets, the U.S. House Judiciary Committee found that Amazon exercises significant market power over suppliers.[46] In one striking example, the Committee found that Amazon and Walmart ignore minimum advertised prices set by brand manufacturers, by which other sellers must abide.[47] One anonymous source explained that suppliers have "no realistic threat" against Amazon, because they have no other path to reach their customer base.[48] And the Committee cited internal Amazon documents showing that it does not fear the consequences of failing to comply with suppliers' policies.[49]

Two of the anticompetitive effects that flow from unchecked retail buyer power in the grocery sector are economic discrimination and supply chain concentration.

*Economic Discrimination:* For decades, dominant players in the grocery industry have used their buyer power to impose discriminatory terms and conditions on suppliers that disadvantage smaller, independent grocers and harm consumers. More recently, e-commerce giants have

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[41] *Id.*
[42] Jennifer Smith & Sarah Nassauer, *Walmart Toughens Delivery Demands for Suppliers*, WALL ST. J., Mar. 6, 2019, https://www.wsj.com/articles/walmart-toughens-delivery-demands-for-suppliers-11551914501.
[43] *Id.*
[44] Thad Rueter, *Walmart Pressures Suppliers on Delivery Times*, PROGRESSIVE GROCER, Sept. 4, 2020, https://progressivegrocer.com/walmart-pressures-suppliers-delivery-times.
[45] *Id.*
[46] Investigation of Competition in Digital Markets Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 258 (2020).
[47] Brand manufacturers often establish minimum prices to prevent retailers from freeriding off of other stores' investment and promotions, product displays, and expertise. *Id.* at 258-259; *see also* n.1584 (citing an Amazon internal document asking "Why did Walmart break MAP and we didn't?").
[48] *Id.*
[49] *Id.* at 259 & n.1584 (citing an internal Amazon document to "audit that we are price matching . . . any diapers.com pricing. If this puts us in the soup with P&G on their pampers map price, so be it").

emerged using the same playbook. Because these powerful buyers are the gatekeepers to consumers, suppliers are left with virtually no leverage to negotiate.[50]

Examples of economic discrimination in the grocery sector include:

- Price discrimination: charging one purchaser a more favorable price than other purchasers for the same product. Price discrimination in grocery can take the form of failures to provide price promotions or packaging with a lower per unit cost. It also comes in the form of less favorable payment terms. For example, certain power buyers demand and receive "scan-based payment" terms from suppliers, meaning they only pay once a product has been scanned for final sale to a customer. Meanwhile, the same suppliers require independent grocers to pay for products upon receipt (or within a fixed period of receipt), shifting the risk that a product sits on the shelves to the grocers. These terms provide significant advantages for dominant retailers, who in effect receive free credit on their purchases and can stock a greater diversity of products, without taking on any risk that the products will take time to sell, or will not sell at all.

- Product supply discrimination: refusing to supply products to independent grocers that are made available to powerful buyers, or favoring power buyers on allocations or delivery terms. For example, suppliers often enforce arbitrary minimums on certain products to effectively make them exclusive to power buyers. For example, one NGA member wanted to carry a 36-count jumbo pack of a popular, high-end toilet paper, which is regularly available at Sam's Club. The manufacturer said they could only offer the product if the member committed to 2,380 pallets of the jumbo packs—a volume that would have exceeded all of the member's sales of that product in the previous year. Independent grocers have also been told that they cannot purchase "test" products for months or even years after they have become widely available at Walmart or other large chains.

- Packaging discrimination: refusing to provide certain package sizes or promotional packaging to certain grocers, while providing them to competing retailers. Some manufacturers have stopped supplying large package size versions of products—that some consumers associate with greater value—to independent grocers while providing them to big box retailers or club stores. In addition, Dollar General has used its buyer power to demand "cheater size" products, which include smaller amounts in a package that can then be sold at a lower price. These "cheater size" products create a false impression among

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[50] *See, e.g.*, Albert Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?*, AAI Working Paper No. 16-02 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Working-Paper-No.-16-02.pdf (detailing laws related to abuse of superior bargaining position outside the United States and arguing that "a serious gap exists in the law regulating vertical relations" in the U.S.).

consumers that they are paying a lower price for the same product they see at independent grocers.

Economic discrimination has a two-fold effect on smaller competitors such as independent grocers: First, the powerful buyer secures more advantageous terms for itself. Second, the powerful buyer imposes higher purchasing costs or other disadvantages on its rivals, as suppliers seek to make up for the discounts and other advantages they are forced to extend to the powerful buyer with higher charges to other buyers. In many cases, the wholesale price offered to independent grocers is higher than the *retail* price at wholesale clubs like Costco. As a result, independent grocers often resort to buying entire pallets of must-have products from their competitors.[51]

Economists call this phenomenon "the waterbed effect," and have explained how it harms consumers as well as rivals:

> While a large and powerful firm improves its own terms of supply by exercising its bargaining power, the terms of its competitors can deteriorate sufficiently so as ultimately to increase average retail prices and, thereby, reduce total consumer surplus. Such consumer detriment from the waterbed effect is more likely if the adversely affected firms are already sufficiently squeezed, due to relatively higher wholesale prices and, consequently, lower market shares.[52]

Economists have observed this effect in the grocery industry, explaining that buyer power allows dominant players to enter into a "virtuous circle" in which they use their power to undercut smaller rivals and gain market share, which they then exploit to further undercut smaller rivals and capture even more market share.[53]

There is a foreseeable outcome of Walmart's exercise of buyer power, described above, in demanding ever higher requirements for on time and in full deliveries: Suppliers focus on fulfilling Walmart's shipments at the expense of Walmart's competitors because Walmart is the indispensable customer. Smaller grocers receive fewer on time, full deliveries, and are forced to over-inventory products, which raises their costs and damages their ability to fairly and

[51] For example, one NGA member purchased over $2 million in various products from Sam's Club in 2015 and 2016, and over a $1 million from January through July of 2017, when Sam's Club made the decision to stop selling to its rival. Even with Sam's Club's markup and the added transportation costs, the retail price at Sam's Club was still lower than the price available to the independent—even through cooperative wholesalers that buy in large volume.

[52] Roman Inderst & Tommaso M. Valletti, *Buyer Power and "The Waterbed Effect,"* LIX J. INDUST. ECONOMICS 1, 2, (2011); *see also* Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 336-37 (2008) (discussing the circumstances that can give rise to the waterbed effect, and how the phenomenon can distort downstream competition and harm consumers).

[53] *See* Dobson, *supra* note 38 (noting that the circle is only "virtuous" for the dominant retailer but "vicious" for the smaller, independents).

effectively compete. As a result, consumers lose access to lower prices at their local grocers, and in many cases lose access to must-have products from local grocers entirely.

Amazon has also exercised its economic power to impose prices on suppliers that are significantly lower than the prices independent grocers pay. In many cases, Amazon's retail price is lower than independent grocers' wholesale price. In fact, one NGA member tried to offer diapers to an employee at cost, only to learn that the employee was paying a lower price for diapers on Amazon than the NGA member was paying at wholesale.[54]

The economic discrimination imposed by Amazon through its suppliers is also apparent in the delivery space. On Cyber Monday 2020, UPS notified drivers across the U.S. to stop picking up packages from a group of retailers, including Gap, Nike, L.L. Bean, and Macy's, due to surging demand and limited capacity.[55] There were no reports that UPS imposed similar restrictions on Amazon, its largest customer.[56]

Competition authorities outside the United States have investigated the problems associated with buyer power and economic discrimination in the grocery industry.[57] For example, in 2000, the U.K.'s Competition Commission released a study of the grocery industry that identified 52 practices by dominant grocery retailers that could have potentially distorting effects on supplier and/or retailer competition. The Commission concluded:

> These practices, when carried on by any of the major buyers, adversely affect the competitiveness of some of their suppliers with the result that the suppliers are likely to invest less and spend less on new product development and innovation, leading to lower quality and less consumer choice. This is likely to result in fewer new entrants to the supplier market than otherwise. Certain of the practices give the major buyers substantial advantages over other smaller retailers, whose competitiveness is likely to suffer as a result, again leading to a reduction in consumer choice.[58]

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[54] For a detailed look at how Amazon became the dominant e-commerce supplier of diapers, *see* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) ("Through its purchase of Quidsi, Amazon eliminated a leading competitor in the online sale of baby products. Amazon achieved this by slashing prices and bleeding money, losses that its investors have given it a free pass to incur—and that a smaller and newer venture like Quidsi, by contrast, could not maintain.").
[55] Paul Ziobro, *UPS Slaps Shipping Limits on Gap, Nike to Manage E-Commerce Surge*, WALL ST. J., Dec. 2, 2020, https://www.wsj.com/articles/ups-slaps-shipping-limits-on-gap-nike-to-manage-e-commerce-surge-11606926669.
[56] In January 2020, UPS boasted a 9 percent growth in total volume across all products, and reported that its growth was led by its largest customer, Amazon. *See* Press Release, UPS Releases 4Q 2019 Earnings, Jan. 30, 2020, http://www.investors.ups.com/news-releases/news-release-details/ups-releases-4q-2019-earnings.
[57] *See, e.g.*, OECD, Competition issues in the Food Chain Industry (2013) (incorporating submissions from over 30 competition authorities).
[58] U.K. Competition Comm'n, *Supermarkets: A Report on the Supply of Groceries From Multiple Stores in the United Kingdom* at 7, https://web.archive.org/web/20070109000906/http://www.competition-commission.org.uk/rep_pub/reports/2000/fulltext/446c1.pdf. The 2013 OECD survey of market conditions in the

The harms to consumers from economic discrimination can be substantial. As described above, these practices may raise rivals' costs, causing them to charge their customers higher prices. Dominant retailers can raise their own prices if independent competitors are driven out of a particular geographic market. And beyond price, consumers also lose on other dimensions of competition—including convenience, service, and quality—when independent grocers are hobbled or forced to close.[59] Moreover, all of these problems disproportionately impact rural communities and urban centers, which are more likely to be served by independent grocers.

Dominant retailers such as national big box or club store chains often seek to justify discriminatory treatment targeting independent grocers—and avoid condemnation under the antitrust laws—by arguing that independent grocery stores are in a different "channel of trade" and therefore are not competitors. But these channel distinctions do not reflect reality. Independent grocery stores vary widely in size and format, including ones that rival the biggest national chains in size.[60] And the evidence shows that consumers see big box or club stores and "traditional" grocery stores as alternatives for an array of products, including core staples such as produce, packaged goods, paper products, and cleaning supplies.[61]

Although dominant retailers often tout the "efficiencies" of size and scale, there is little evidence that their market power as buyers actually translates into lower consumer prices. In fact, studies have found a link between higher levels of local retail concentration and grocery prices.[62] Rather than passing their savings on to consumers, power buyers squeeze their suppliers for greater margins. In other words, today's market structure allows dominant retailers to transfer wealth from farmers, manufacturers, suppliers, and consumers to their own bottom lines.[63] And dominant retailers may rest on their laurels and become less efficient once the independents are gone and competition reduced, destroying value entirely.[64]

*Supply Chain Concentration:* Buyer power is also increasing concentration throughout the grocery supply chain. Power buyers' demands on suppliers for lower costs are forcing consolidation among food and consumer goods manufacturers. For example, meat packing in

food supply chain across 30+ countries concluded that "increasingly dominant retail firms" was an already common but increasing trend across many countries. OECD 2013, *supra* note 57, at 36.

[59] John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625 (2005).

[60] For example, NGA member Woodman's Food Market is believed to operate among the fifteen largest grocery stores in the world, averaging in excess of 235,000 square feet in size per store. *See* Complaint, *Woodman's Food Mkt., Inc. v. Clorox Co.*, 833 F.3d 743 (7th Cir. 2016).

[61] *See Best Grocery Stores and Supermarkets*, CONSUMER REPORTS, Apr. 16, 2019, https://www.consumerreports.org/grocery-stores-supermarkets/best-grocery-stores-and-supermarkets (detailing grocery store attributes that are important to consumers).

[62] *See, e.g.*, Ronald W. Cotterill, *Antitrust Analysis of Supermarket Retailing: Common Global Concerns that Play Out in Local Markets*, Food Marketing Policy Center 5-7 (July 2005) (summarizing economic literature on price effects in the retail supermarket industry).

[63] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, AM. SOCIOLOGICAL REV., Mar. 27, 2018, https://journals.sagepub.com/doi/full/10.1177/0003122418762441 (discussing evidence that greater dependence on a small number of powerful corporate buyers leads to lower wages).

[64] *See* Kirkwood, *supra* note 36.

the United States is now concentrated among just four firms—Tyson Foods, JBS, Cargill, and National Beef. Similarly, just four companies—Archer Daniels Midland, Bunge, Cargill, and Dreyfus—control as much as 90 percent of the global grain trade,[65] and another "big four" dominates the global seed market.[66]

Supply chain concentration is particularly acute in private label manufacturing—the grocery supply sector that manufactures store brand versions of food products and consumer goods, such as paper products. Store brands are important alternatives to branded products for consumers and retailers alike. But under pressure from dominant retailers, the private label sector is consolidating dramatically. For example, today there is only a single major private label manufacturer of canned soups, and there is significant consolidation in private label manufacturing in a diverse list of other products from canned fruit and pasta, to snack foods, and paper products.

Concentration in the grocery supply chain does not insulate it from retailer buyer power; it makes suppliers even more beholden to leverage. As manufacturers consolidate, they become more dependent on the largest buyers, who represent a substantial portion of their sales. Meanwhile, small and mid-sized grocers see their relative value to manufacturers decline, even when they pool their purchasing through wholesale cooperatives. Although such cooperatives may be highly efficient, and place tens of millions of dollars in purchases with a supplier, those sales are a drop in the bucket compared to national retail grocery chains.

As a result, dominant retailers effectively dictate supply decisions to grocery suppliers. This has become particularly acute in private label. For example, private label manufacturers are forced to prioritize runs ordered by their biggest buyers, limiting capacity for products sought by independents. They have also narrowed their available products in order to serve demand from power buyers, reducing product diversity and consumer choice.

Invariably, products sought by independent grocers are the ones eliminated. Some private label manufacturers have largely dedicated their capacity to dominant national chain grocers, foregoing independents' business almost entirely. Not only does this harm independent grocers and their customers directly, through loss of these popular products especially for cost-conscious consumers, it also reduces independents' bargaining leverage with branded suppliers by eliminating alternative sources of product supply to which independents might switch. As a result, independent grocers are even less able to push back on discriminatory treatment imposed by retail power buyers.[67]

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[65] *See* Sophia Murphy, David Burch and Jennifer Clapp, *Cereal Secrets: The World's Largest Grain Traders and Global Agriculture*, OXFAM RES. REP., Aug. 2012, https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-cereal-secrets-grain-traders-agriculture-30082012-en_4.pdf.

[66] *See* Kristina "Kiki" Hubbard, *The Sobering Details Behind the Latest Seed Monopoly Chart*, CIVIL EATS, Jan. 11, 2019, https://civileats.com/2019/01/11/the-sobering-details-behind-the-latest-seed-monopoly-chart/.

[67] *See* Dobson, *supra* note 38 (describing private label as an important negotiating level for grocery retailers).

In addition to reduced product choice and increased prices for independent grocers and their consumers, greater concentration can result in anticompetitively low prices paid to independent producers, such as ranchers and farmers. And, as discussed below, manufacturer concentration can make the grocery supply chain more vulnerable to disruption due to natural disasters or a pandemic.

## IV. The COVID-19 Pandemic has Exacerbated Economic Discrimination in Grocery

In 2020, the COVID-19 pandemic has exacerbated the impact of economic discrimination and buyer power in the grocery sector. Americans across the country experienced shortages of staples such as toilet paper, cleaning products, and canned soup. Behind the scenes, unchecked buyer power in the grocery sector made these shortages worse, and made their impact fall more heavily on independent grocers and their customers.

As described above, the buyer-side market power of dominant retailers has increased concentration in the grocery supply chain, making the system less resilient and more vulnerable to disruption and shortages.[68] As concentration among suppliers has increased, grocery manufacturing has also been consolidated to achieve the scale efficiencies demanded by power buyers. As a result, a smaller number individual factories—built on a massive scale—have become critical lynch pins in the supply chain. Closures of just a handful of meatpacking plants led to food shortages, and outbreaks at other food processing and dairy facilities continue to threaten future shortages.[69] A less concentrated supply chain with more distributed manufacturing would have mitigated these impacts.

Buyer power and economic discrimination have come into play in another way during the pandemic: the shortages have not affected all grocery retailers equally. Dominant retailers and e-commerce giants have used their buyer power to pressure suppliers into prioritizing their shipments over other retail customers, including independent grocers. In many cases, these powerful buyers have secured inventory at the expense of other retailers. As one group of sellers reported to the FTC, "Amazon's hold over sellers effectively took food from the shelves of neighborhood grocery stores . . . and moved it to Amazon's own warehouses, where it earned fees for Amazon."[70]

NGA members have been told by numerous manufacturers that, as a result of pandemic supply challenges, they would receive reduced allocations or no allocations of popular staples and essential products such as paper towels, toilet paper, cleaning and disinfecting products,

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[68] See Michael Pollan, *The Efficiency Curse*, WASH. POST, Feb. 5, 2021, https://www.washingtonpost.com/outlook/2021/02/05/pandemic-food-resilience/?arc404=true.

[69] *Id.*; *see also* Mike Dorning, *Coronavirus Spreads Beyond Meat Plants With Outbreaks at 60 US Baking, Agricultural, Dairy Facilities, Raising Specter of Food Shortages*, CHICAGO TRIB., June 10, 2020, https://www.chicagotribune.com/coronavirus/ct-nw-coronavirus-food-meatpacking-plants-shortages-20200610-gvgfl5cxt5crtjuve6oi23xeui-story.html.

[70] Investigation of Competition in Digital Markets Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 258 (2020) (citing July 23, 2020 letter from International Brotherhood of Teamsters, Communications Workers of America, United Food, Commercial Workers International Union, and Change to Win to the FTC).

aluminum foil, and canned soup—meanwhile, after some initial shortages at the start of the pandemic, those same products have been fully stocked at Amazon and on the shelves of big box national chain retailers.

Independent grocers have also faced increased price discrimination, favoring dominant players, as a result of the pandemic. The periodic price promotions that independent wholesalers and grocers receive from suppliers, which allows them to discount at or below the prices charged by dominant retailers, have frequently been suspended or cancelled during the pandemic. And to make matters worse, some independent grocers that were forced to pass their increased costs on to consumers were wrongly accused of price gouging.[71]

Dominant retailers and e-commerce giants quickly recovered from supply chain shortages and other challenges brought on by the pandemic. Dominant firms such as Walmart, Amazon, Target, and Dollar General have reported surging profits and captured significant market share during 2020.[72] But smaller retailers, including independent grocers, continue to experience higher prices and shortages of key high-demand products. Due to the pandemic, independent grocers have increasingly resorted to buying entire pallets of must-have products from wholesale clubs like Costco, because their own wholesale costs from the supplier are higher than Costco's retail price (a problem that preceded the pandemic).

For example, in January 2021, an NGA member reported that its wholesale price for a popular packaged food product was over 19 percent higher than the *retail* price for the equivalent sized product at a local Walmart. Similarly, the independent grocer's wholesale price for a branded cake mix was 53 percent higher than the Walmart retail price. And the wholesale price for a staple branded cracker, on a per ounce basis, for the independent retailer was nearly 20 percent higher than the retail price at Dollar General. Other NGA members have reported paying higher wholesale prices than the retail prices available at large chains for many of their top private label products, including salsa, ketchup, mustard, barbeque sauce, peanut butter, canned fruit, soup, broth, vegetable oil, granulated sugar, flour, and coffee, and numerous members reported paying higher wholesale prices than the retail price for other popular branded products.

This economic discrimination is driven by the demands of the power buyers. Rather than provide the same price to all of their customers, suppliers are forced to extend discounts and

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[71] Testimony of Jimmy Wright, *supra* note 3, at 5. For example, suppliers drastically increased the prices independent grocers pay for must-have products like eggs and protein. Egg prices in particular soared to historic levels, including a nearly $2.00 increase between March and April, despite a lack of evidence that suppliers faced increased price or lower output at that time.

[72] Jeffrey Dastin & Akanksha Rana, *Amazon Posts Biggest Profit Ever at Height of Pandemic in U.S.*, REUTERS, July 30, 2020, https://www.reuters.com/article/us-amazon-com-results/amazon-posts-biggest-profit-ever-at-height-of-pandemic-in-u-s-idUSKCN24V3HL; Phil Wahba, *Walmart's E-Commerce Sales Nearly Double As Shoppers Go Beyond Groceries in Online Orders*, FORTUNE, Aug. 18, 2020, https://fortune.com/2020/08/18/walmart-ecommerce-sales-covid-doug-mcmillon; Melissa Repko, *Target Reports A Monster Quarter*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/target-tgt-q2-2020-earnings.html.

other advantageous terms to the dominant retailers and make up for their losses by charging higher prices to other buyers.

## V. Antitrust's Failures to Address Buyer Power and Economic Discrimination

Prior to the late 1970s, the antitrust laws reached the harms that flow from buyer power. As the Supreme Court recognized repeatedly in rulings across several decades of the 20th Century, Congress passed the Sherman Act and the Clayton Act with the goal of dispersing concentrated power and protecting the economic rights and freedoms of Americans as both consumers and producers. An express goal of these laws was to ensure that small, independent producers had the ability to compete without being unfairly muscled aside by big businesses.[73] For example, in 1945, Judge Learned Hand wrote in *United States v. Alcoa* that Congress was motivated to pass the Sherman Act due to a preference for "a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of the few."[74] And in 1962, the Supreme Court recognized that Congress passed the antitrust laws to combat a rising tide of economic concentration, hoping to preserve local control over industry and small business.[75]

However, since the late 1970s, the antitrust laws have been increasingly eroded in significant respects through court decisions and agency practice that rely on mistaken orthodoxies regarding "business efficiency."[76] This orthodoxy wrongly assumes that independent businesses cannot achieve equivalent economies of scale, and it ignores the tradeoffs that so-called "efficiencies" imposed by dominant firms have for consumers, producers, and independent competitors.[77]

The elevation of "business efficiency" over other goals has led to at least three failures of enforcement that contribute to America's buyer power problem: (1) a lack of attention to buyer-side market power, (2) a lack of scrutiny of vertical restraints, and (3) a failure to enforce the Robinson-Patman Act.

### 1. Antitrust's Failure to Address Buyer-Side Market Power

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[73] *See, e.g.*, Bd. of Trade v. United States, 246 U.S. 231, 240-41 (1918) (enumerating the benefits of a traderegulation that allowed country dealers and farmers to participate in wholesale markets in Chicago on more favorable terms) (Brandeis, J.).
[74] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[75] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 315-16, 333 (1962) (discussing the legislative history of the Sherman Act and explaining "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business.").
[76] For a discussion of this shift in jurisprudence, *see, e.g.*, Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 270 (2017); Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 921–26 (2014).
[77] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES" A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015) (discussing evidence that mergers justified on efficiencies grounds have neither lowered prices nor led to efficiency gains); Stacy Mitchell, *Monopoly Power and the Decline of Small Business*, Aug. 10, 2016, https://ilsr.org/monopoly-power-and-the-decline-of-small-business/ ("Small businesses deliver distinct consumer and market benefits, and in some sectors provide more value and better outcomes than their bigger competitors. And they often achieve these superior results because of their small scale, not in spite of it.").

The Sherman Act and the Clayton Act were passed in the late 19th and early 20th Centuries in response to concerns that powerful sellers were acting in various ways to harm consumers and small businesses. But as detailed above, economic power in today's retail economy is concentrated in the hands of powerful buyers who act as gatekeepers to consumers.

Despite the growing buyer power problem, courts have made it exceedingly difficult to bring a case challenging the anticompetitive exercise of buyer power, and these types of cases are extremely rare. One example is the Supreme Court's 2007 decision in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* In that case, a lumber supplier challenged predatory bidding practices by Weyerhaeuser, a powerful buyer in the market for sawlogs.[78] The supplier alleged that Weyerhaeuser's bidding strategy was part of a scheme to drive its competitors out of business. The Supreme Court set the same high bar for a predatory bidding claim that applies to predatory pricing: in order to prove that the conduct was anticompetitive, the supplier would need to show that (i) Weyerhaeuser bid below its costs, and (ii) there was a dangerous probability that Weyerhaeuser would recoup its losses (through higher prices in the future). Thus, under the Court's reasoning, driving the lumber supplier out of business alone would not be sufficient to bring a case—instead, the Court would only find harm to competition if there was proof that Weyerhaeuser's predatory bidding would result in sustained, supracompetitive prices.

The Court's treatment of predatory bidding is misguided because it assumes that the only conceivable harm to competition could be sustained, supracompetitive prices. This focus on price effects overlooks other key dimensions of competition, including the various ways that the exercise of buyer power can harm quality, service, consumer choice, and the ability and opportunity for entry by smaller competitors.[79] It also ignores empirical research, which has shown various ways that dominant firms use predation strategies to limit and deter competition and increase their market power.[80]

Further, even where a plaintiff can point to price discrimination that harms competition, courts have barred claims. In *Boise Cascade Corp.*, for example, the D.C. Circuit overturned an FTC decision finding a distributor/retailer of office supplies liable for exercising its buyer power to extract discounts to the detriment of disfavored retailers.[81] In concurrence, Judge Williams boldly declared that "it is black letter economics that price discrimination *cannot occur* if the favored customers can resell to the disfavored."[82] But this ivory tower "black letter economics" ignores the real world impact of price discrimination on less powerful buyers (who bear a disproportionate share of the seller's total costs of production) as well as the downstream impact

[78] *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).
[79] *See* Kirkwood, *supra* note 36.
[80] Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 82 (2015) (discussing evidence of predation in various industries, including the airline, coffee, oil, shipping, sugar, telecommunications, and tobacco industries, among others).
[81] Boise Cascade Corp. v. F.T.C., 837 F.2d 1127, 1148 (D.C. Cir. 1988).
[82] *Id.* at 1149 (emphasis added).

this has on consumers.[83] And as Judge Mikva explained in dissent, the D.C. Circuit reached this decision despite evidence that profit margins were higher for the powerful buyer than for its disfavored competitors, and even though the defendant failed to provide any evidence that the price differences were justified by a lower cost associated with selling to the powerful buyer.[84]

Although the U.S. antitrust agencies have brought a small number of merger cases premised on buyer power,[85] they have not made buyer power an enforcement priority, much less challenges to retailer buyer power. For example, a 2012 FTC retrospective study on the impact of grocery store mergers on competition did not even address retail buyer power.[86]

#### 2. Antitrust's Failure to Scrutinize Vertical Restraints

The antitrust laws distinguish between horizontal restraints (which flow from agreements among competitors) and so-called "vertical restraints." Vertical restraints refer to agreements and arrangements among market participants at different levels of the supply chain. Classic vertical restraints include resale price maintenance, exclusive dealing or distribution arrangements, discriminatory pricing agreements, and tying arrangements that condition the sale of one product on the purchase of a different (or "tied") product.

The late 1970s and early 1980s marked a sea change in the application of antitrust to vertical restraints. Prominent antitrust commentators, including Robert Bork, Richard Posner, and Frank Easterbrook, argued that the antitrust laws should only be concerned with horizontal restraints, and called for per se *legality* of all vertical restraints.[87] These commentators pushed a pro-big business policy towards vertical restraints, arguing that antitrust enforcement had wrongly overlooked "business efficiencies" created by vertical arrangements.[88] According to these commentators, vertical restraints would promote interbrand competition (i.e., competition

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[83] By Judge Williams' mistaken logic, competition and consumers would be equally well off if independent grocers supplied themselves wholly through local dominant competitors such as Costco or Amazon rather than direct relationships with suppliers.
[84] *Id.* at 1153.
[85] *See, e.g.*, United States v. George's Foods, No. 5:11-cv-00043 (W.D. Va. May 10, 2011), http://www.justice.gov/atr/case/us-v-georges-foods-llc-et-al.; United States v. JBS S.A. & Nat'l Beef Packing Co., No. 08CV5992. (N.D. Ill. Oct. 20, 2008), http://www.justice.gov/atr/case/us-and-plaintiff-states-v-jbs-sa-and-national-beef-packing-company-llc; United States v. Anthem, Inc. & Cigna Corp., No. 16CV01493 (D.D.C. July 21, 2016), https://www.justice.gov/atr/file/903111/download.
[86] Daniel Hosjen, Luke M. Olson, Loren K. Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing*, Fed. Trade Comm'n Bureau of Competition Working Paper (Dec. 2012). For example, the FTC's analysis of Walmart's acquisition of the Supermercado Amigo chain in Puerto Rico apparently did not examine whether the transaction would give the combined firm increased bargaining leverage to the detriment of competing grocery stores or competition. *See* FTC Letter to Albert A. Foer, President of the American Antitrust Institute (Feb. 27, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/02/ftc.gov-letterfoer.htm.
[87] *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 288 (1978) ("Analysis shows that every vertical restraint should be completely lawful."); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158 (1984).
[88] *See id.*

between suppliers of different brands) more than they suppressed intrabrand competition (i.e., competition among distributors or retailers of the same branded product).[89]

By 1977, advocates for so-called business efficiency reached the Supreme Court. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court ruled that non-price restrictions would no longer be treated as per se illegal, but would instead by analyzed under the rule of reason.[90] The Court reasoned that potential competitive harm posed by vertical restraints can be checked by interbrand competition, and that courts should therefore conduct a fact-intensive inquiry into the net effects of a given restraint on competition. While the Court's decision in *Sylvania* was limited to territorial restrictions, the case led to a seismic shift to the rule of reason for almost all conduct other than horizontal price agreements.

In 1991, Judge Douglas Ginsberg examined how appellate courts were applying the rule of reason to vertical restraints under *Sylvania*.[91] Judge Ginsberg examined every case that cited *Sylvania* on the merits and found that defendants prevailed in more than 90 percent of the cases.[92] He concluded that "courts of appeals are generally not engaging in the balancing of gains in interbrand competition against losses in intrabrand competition that the Supreme Court envisioned," and that markets where there is any interbrand competition "have been effectively freed from antitrust regulation of vertical nonprice restraints."[93]

*Sylvania* and its progeny also led to a significant decline in investigations and enforcement actions against vertical restraints by the antitrust agencies. These changes had a predictable effect: large firms became more aggressive as they realized that there was little to no risk associated with conduct that had once been condemned as per se illegal.

In the grocery industry, this doctrinal shift allowed dominant players to emerge and use their size to harm competition through vertical arrangements with suppliers, including by exercising buyer power to disadvantage smaller rivals. And in the grocery space in particular, the law's current assumption that interbrand competition offsets restraints on intrabrand competition is misguided: certain branded products are viewed as "must-haves" by consumers and the ability to display a variety of brands—e.g., more than one brand of canned soup or cold cereal—is important to independent stores' competitiveness. NGA members' experience during the pandemic has shown that independent grocers lose business when they cannot carry must-have products.

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[89] *See id.*
[90] 433 U.S. 36 (1977).
[91] Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. (1992).
[92] *Id.* at 71.
[93] *Id.* at 67, 76; *see also* D. Daniel Sokol, *The Transformation Of Vertical Restraints: Per Se Illegality, The Rule Of Reason, And Per Se Legality*, 79 ANTITRUST L.J. 1003, 1007 (2014), http://scholarship.law.ufl.edu/facultypub/546 (explaining that in practice, the rule of reason has led to "presumptive or even per se legality").

### 3. Hostility to the Robinson-Patman Act

Congress recognized the benefits of independent retail and the threats posed by power buyers when it enacted the Robinson-Patman Act, which it intended to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."[94] Among other things, the statute makes it unlawful to "discriminate in price between different purchasers of commodities of like grade and quantity" if the purchasers are competitors.[95] Leading up to passage of the statute, Congress found that in certain cases large retail chains used their size to coerce suppliers to sell products to them at significantly lower prices, or on better terms, than those provided to their smaller competitors.

The advantages the chains received were not necessarily based on their greater efficiency, but were sometimes due to the chains' ability to leverage their role as gatekeepers to large swathes of consumers. The discriminatory advantages demanded and obtained by these buyers included not only demands that suppliers sell to smaller, independent rivals only at higher prices, but also that such competitors be denied promotional benefits that enhanced the large stores' sales. Congress determined that these practices should be prohibited, and that the then-existing provisions of the Sherman Act and the Clayton Act were inadequate to do so.

To accomplish these "broad goals," Congress passed the Robinson-Patman Act (15 U.S.C. § 13).[96] Across its multiple subsections, the Act prohibits different methods by which suppliers can discriminate among their competing customers. Section 2(a) of the Act prohibits certain discrimination over terms connected to the initial sale of a product to a wholesaler or retailer (e.g., discrimination in prices charged, terms of credit, etc.), while Sections 2(d) and (e) prohibit discrimination over terms promoting resale of the product to the end consumer (e.g., discrimination in advertising allowances, provision of in-store displays, etc.).[97] Congress intended these sections, taken together, to be a comprehensive framework to "eliminate these inequities" that put "independent stores . . . at a hopeless competitive disadvantage" against large "chain buyers." *Id.*

Despite Congress's broad goals in 1936, enforcement against buyer power-driven economic discrimination, including violations of the Robinson-Patman Act, has largely lapsed at the DOJ Antitrust Division, the Federal Trade Commission, and by private plaintiffs. The DOJ Antitrust Division has not enforced the Robinson-Patman Act since the 1970s, and has not brought a criminal case under Robinson-Patman since the 1960s.[98] The FTC brought its last Robinson-

[94] FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968); *see also* Volvo Trucks N. America, Inc. v. Reeder-Simco GMC, 546 U.S. 164 (2006) ("Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.").
[95] 15 U.S.C. § 13(a).
[96] *Fred Meyer*, 390 U.S. at 349.
[97] FTC v. Simplicity Pattern Co., 360 U.S. 55, 69 (1959).
[98] Antitrust Modernization Commission, Report and Recommendations 316 (2007).

Patman enforcement action more than 20 years ago.[99] The agencies have not recently pursued economic discrimination in the retail sector using the other antitrust laws either.

The hostility to enforcement against economic discrimination is not limited to the antitrust agencies. In the last few decades, the courts have "read the 1936 Robinson-Patman Act almost out of existence" by imposing heightened standards on price discrimination actions that disregard the statute's text.[100]

For example, Section 2(a) of the Robinson-Patman Act prohibits price discrimination against retailers where the conduct may "substantially [] lessen competition or tend to create a monopoly in a line of commerce"—a standard similar to that applied to other unlawful conduct under the antitrust laws, such as monopolization or anticompetitive mergers.[101] Meeting this standard is a high bar under current interpretations of the antitrust laws, typically requiring the plaintiff to prove market-wide harm to competition in a well-defined relevant market.[102] But Section 2(a) also prohibits economic discrimination in cases where these showings are not met, so long as the effect of the conduct may "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."[103] Under this standard, price discrimination that prevents one retailer from effectively competing with another is also a violation.

Recent decisions by the U.S. Supreme Court and lower courts ignore and even contradict this part of the statute. The courts have held that proving a Robinson-Patman Act violation requires the same challenging burden as other antitrust cases—proof of substantial, market-wide harm to competition.[104] Courts have rejected Robinson-Patman Act claims based on economic discrimination where the plaintiff's evidence failed to meet this high standard, even where there is evidence that the conduct harmed the competitiveness of the disfavored retailer.[105] Some commentators have even argued that economic discrimination "ought to be very, very

[99] *See* Decision and Order at 1, McCormick & Co., Docket No. C-3939 (F.T.C. Apr. 27, 2000) (finding 3-2 a narrowly applied Robinson-Patman violation by suggesting that market power should be viewed as a prerequisite for the application of the Morton Salt inference); *see also* D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 6, 2073 & n.77 (noting "McCormick might be better characterized as an exclusive dealing case masquerading as a Robinson-Patman case. McCormick had a market share of about eighty percent and was foreclosing competitors from shelf space.").

[100] Daniel Crane, *Antitrust Antitextualism*, NOTRE DAME L. REV. at 4 (forthcoming).

[101] *Compare* 15 U.S.C. § 13(a) with 15 U.S.C. §§ 2, 7.

[102] Ohio v. American Express Co., 138 S. Ct. 2274, 2288 (2018) (describing the three-step, burden-shifting framework that applies under the rule of reason and concluding that plaintiff's did not carry the initial burden of proving that the challenged conduct had an anticompetitive effect).

[103] 15 U.S.C. § 13(a).

[104] *See, e.g.*, Brooke Group Ltd. v. Brown and Williamson Tobacco Co., 509 U.S. 209, 222-23 (1993); Volvo Trucks N. America, Inc. v. Reeder-Simco GMC, Inc. 546 U.S. 164, 181 (2006).

[105] Cash & Henderson Drug, Inc. v. Johnson & Johnson, 799 F.3d 202, 213 (2d Cir. 2015) (rejecting discrimination claims for failure to show harm to competition generally); Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 864 (6th Cir. 2007); Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 227 (3d Cir. 2008).

presumptively innocent," applying Chicago School's presumptions that all vertical restraints are efficient.[106]

In so doing, the courts and antitrust agencies are contradicting Congress's policy judgment to disfavor economic discrimination as presumptively anticompetitive. As evidenced by the Robinson-Patman Act, Congress determined that discriminatory treatment imposed by buyer-side market power was pernicious and should be prohibited.

**Conclusion**

Independent grocers have worked hard during the pandemic to continue to deliver a high-quality, low-price shopping experience to consumers; but dominant buyer power threatens their ability to do so. Many consumers have lost access to products at their local grocers. Moreover, rural areas and urban centers that are served by independent grocers have suffered a disproportionate impact, with consumers being forced to travel longer distances to find products they need at more crowded large chain retailers.

Buyer power and economic discrimination will continue to threaten independent businesses and American consumers and producers long after the pandemic is over—unless we change course. Specifically, we propose:

- Investigations and Hearings. Through congressional investigations and hearings, Congress should shine a bright light on anticompetitive practices in the food marketing/grocery sector—with a particular focus on the discriminatory impacts on rural and urban consumers, producers, and businesses.

- Congressional Oversight. Congress should use its inherent oversight and authorization powers to hold antitrust enforcers accountable if they continue their lax enforcement to check retailer buyer power and its effects.

- Legislation. The Sherman Act, the Clayton Act, the Robinson-Patman Act, and state antitrust laws provide the tools enforcers need to curb discriminatory practices by dominant retail chains. However, because of lax enforcement by the antitrust agencies, a number of courts have barred private actions to enforce the same antitrust prohibitions. Congress may need to step in to restore the original purposes and vigor of the antitrust laws when directed at striking economic discrimination in all sectors of the economy.

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[106] U.S. Dep't of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, 2008, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-5#N_96 (summarizing commentary from panelists at joint FTC and DOJ hearings on Section 2 enforcement); *see also* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44-45 (2006) (observing that "price discrimination may provide evidence of market power" but "it is generally recognized that it also occurs in fully competitive markets").

- Enforcement and Agency Action. The FTC, DOJ, and states attorneys general should investigate the arrangements between grocery power buyers and suppliers to determine whether dominant retailer bargaining leverage is imposing discriminatory prices, terms, and supply on independent grocers. This should include the important issue of whether "channels of trade" distinctions among competing grocery businesses are being used to evade laws against economic discrimination.

    - The FTC should immediately use its authority under 6(b) of the Federal Trade Commission Act to study competition and concentration in the grocery supply chain, including private label, and the impacts on independent grocers and producers, such as farmers and ranchers. This should include an inquiry into whether retail buyer power is driving concentration throughout the supply chain.

    - In these and other inquiries, antitrust enforcement should look beyond price effects to include other dimensions of competition, including impacts on quality, service, and convenience as a result of dominant retailer buyer power, economic discrimination, and increasing consolidation. This should include consideration of these issues in merger investigations in the grocery supply chain.

    - Other federal agencies such as the Small Business Administration and the Department of Agriculture can also address these issues by studying the benefits of small business to competition and the role of independent grocers and farmers and ranchers in ensuring broad access to healthy foods.

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## The Truth About Industrial Agriculture:

## A Fragile System Propped up by Myths and Hidden Costs

Large, concentrated supply chains once yielded short-term production benefits, but now that industrial corporations have a stranglehold on our food system, we are seeing vulnerable supply chains, unfairly compensated farmers and unprecedented farm debt, poorly-paid and badly-treated workers, environmental degradation, poor public health outcomes, and unequal access to affordable, healthy food.

**The truth is, industrial agriculture is an economically flawed system that only survives due to two factors:**

### EXTERNALIZED COSTS

Industrial agriculture interests intentionally evade the true costs of production, foisting the bill onto other entities. If they accounted for these costs and liabilities, their businesses would no longer be economically viable and they would not be competitive with independent farmers and ranchers.

### MYTH-BASED MARKETING CAMPAIGNS

Industrial agriculture interests would rather spend billions of dollars on lobbyists and myth-based marketing campaigns than alter their wealth-extracting supply chains. The falsehoods they perpetuate persuade consumers and policymakers alike that there is no other option.

## REPORT AND COMPANION MATERIALS

### Full Report

This report is a tool to educate policymakers, advocates, and the public about the impact industrial agriculture corporations have on the U.S. food and agriculture system.

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Short on time? Try our summary companion guide — an easy-to-read encapsulation of the paper's main arguments.

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