

Written Testimony of

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“Reviving Competition, Part 5: Addressing the Effects of Economic
Concentration on America’s Food Supply”

before the

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I. Introduction

There is a wide range of possible explanations for the rise in consumer food prices over the past year: Increased demand driven by fiscal stimulus, disruptions arising from an unprecedented set of simultaneous supply and demand shocks, the incentive effects of government responses to the COVID-19 pandemic, and an increase in the money supply, among others. Each of these factors is interrelated, and each has surely contributed in varying degrees to current headline inflation woes.

What is *not* a plausible explanation is increased concentration and the exercise of market power in the food supply chain.

Between December 2019 and September 2021, the U.S. money supply (driven primarily by the Federal Reserve’s purchases of Treasuries and mortgage-backed securities), grew by approximately \$5.5 trillion—a 36% increase.¹ Likewise, the federal government has approved about \$4.5 trillion in pandemic relief and stimulus payments since the beginning of COVID-19.² The government also injected a huge amount of money into the economy and added about \$5 trillion to the federal debt.³

Massive debt spending isn’t inherently inflationary as long as people understand that taxes will increase or spending will decrease to “pay off” the debt. But today it seems that people do not have much of an expectation that taxes will meaningfully increase or that spending will meaningfully decrease. Indeed, the discourse around the administration’s “Build Back Better” legislation gives the impression of a virtually endless spending binge with little additional revenues to offset the spending. This feeds inflation expectations, and expectations can be self-fulfilling.

To make matters worse, the pandemic was not a standard demand-driven recession. Pre-COVID, the U.S. economy was more or less roaring. Unemployment was at its lowest rate in 50 years.⁴ Labor force participation among the working age populations was back to pre-Great Recession levels.⁵ The Dow Jones Industrial Average was at an all-time high.⁶ Americans may have needed relief to get through the pandemic, but the economy did not need any stimulus.

We should also be clear that the current 7% headline inflation rate is a measure of past price-level changes between December 2020 and December 2021. It’s not a measure of the *rate* at which prices are increasing *right now*, however. And while the 7% number grabbed all the headlines, the CPI rose at a slower rate in December than it did in November, meaning the monthly inflation rate

¹ Board of Governors of the Federal Reserve System (US), M2 [WM2NS], *available at* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/WM2NS> (Jan. 17, 2022).

² Nate Rattner & Jacob Pramuk, *The U.S. has spent most of its Covid relief funding, but there are still billions left to dole out*, CNBC (Dec. 9, 2021), *available at* <https://www.cnbc.com/2021/12/09/covid-relief-bills-us-has-spent-most-of-coronavirus-aid-money.html>.

³ U.S. Department of the Treasury. *Fiscal Service, Federal Debt: Total Public Debt* [GFDEBTN], *available at* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/GFDEBTN> (Jan. 17, 2022).

⁴ U.S. Bureau of Labor Statistics, *Unemployment Rate* [UNRATE], *available at* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/UNRATE>, (Jan. 18, 2022).

⁵ U.S. Bureau of Labor Statistics, *Labor Force Participation Rate - 25-54 Yrs.* [LNS11300060], *available at* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/LNS11300060> (Jan. 18, 2022).

⁶ S&P Dow Jones Indices LLC, *Dow Jones Industrial Average* [DJIA], *available at* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/DJIA> (Jan. 18, 2022).

(as well as the implied annualized inflation rate) actually *fell* in December. The point is that, problematic as they are for actual consumers, current consumer prices and trends do not provide a sound basis for massive, economy-wide government intervention.

It is hardly surprising that shifting consumption patterns and the post-vaccine re-opening of the economy have led to short-term frictions, such as backlogs at ports, a shortage of truckers, and disruption throughout the supply chain, all of which are associated with important *relative* price movements. But they aren't "inflation" in the sense that all prices and wages aren't increasing together. These shocks are most likely transitory, and higher prices will recede as the supply chain returns to normal. That is, as long as sensible economic and fiscal policies predominate. But in the face of the harsh *political* realities of the current state of affairs, there is no guarantee that reason will prevail.

Rather than accepting these extremely likely causes of the recent increase in prices, some blame inflation on a widespread pandemic of "greed" and "collusion" by businesses. Wide swaths of American industry have been hit with these allegations, including oil companies, natural gas producers, health care providers, meat packers, and grocery stores.

Critics of American business blame years, if not decades, of so-called "rising concentration."⁷ It's claimed that the increase in concentration stems from mergers and acquisitions over the years that were blessed by lax antitrust regulators or merely overlooked by overworked agencies. These critics give the impression that in virtually all corners of the American economy lurk sleeper cells of colluding cartels that activated their plans just as the country went into lockdown.

Under this thinking, vigorous antitrust enforcement will punish the colluders and stop the scourge of rising prices. But this thinking is misplaced.

First, antitrust is simply not the proper tool. The purpose of antitrust law in the U.S. is to protect competition, rather than to guarantee low prices in and of themselves. That's why it is illegal to conspire to raise prices or attempt to monopolize a market. Conversely, this also explains why high or rising prices are not an antitrust violation—because these prices may be the result of the undistorted competition antitrust ultimately protects. Even price gouging during a disaster rarely merits antitrust scrutiny because it's understood that that is how markets work—especially competitive markets. That is because it is widely understood that the price system is the most effective system for allocating resources, even when the process itself is painful.

Second, and more practically, antitrust enforcement often moves at a glacial pace. Even successful prosecutions of anticompetitive behavior take years to resolve. The DOJ's investigations of price fixing in the broiler chicken market and the packaged seafood market were announced several years after the alleged collusion began. While the investigations led to guilty pleas and a criminal conviction, they did nothing to reduce prices at the time the conspiracies were active.

⁷ Jim Tankersley & Alan Rappeport, *As prices rise, Biden turns to antitrust enforcers*, NEW YORK TIMES (Dec. 25, 2021) available at <https://www.nytimes.com/2021/12/25/business/biden-inflation.html> ("The turn to antitrust levers stems from Mr. Biden's belief that rising levels of corporate concentration in the U.S. economy have empowered a few large players in each industry to raise prices higher than a more competitive market would allow.").

All of this is not to say that some producers are not monopolizing a market or conspiring with competitors to raise prices. If they are, there is an important role for an antitrust investigation and enforcement—that is the purpose of our antitrust laws. But even relatively rapid and vigorous antitrust investigations will do little to reduce the prices consumers are paying *today*, especially if they are the perfectly predictable, if messy, result of market competition in the midst of a global pandemic. As much as some would like antitrust to be the Swiss Army knife of public policy, it is an entirely inappropriate tool to address economy-wide inflation.

At the same time, even within the industries that have seen particularly newsworthy price increases, and which are the subject of today's hearing, the complex competitive dynamics of those industries offer far more plausible explanations of current prices than do unsubstantiated claims of anticompetitive conduct or collusion. But they don't offer convenient scapegoats to quell the political consequences of these price increases.

It is difficult not to see the pursuit of a scapegoat in the administration's focus on concentration and market power as a culprit for today's higher food prices.

II. The actual (but conveniently denied) relationship between government policy and inflation

A. The scapegoating of private enterprise

There are clear parallels between today's situation and the Nixon administration in 1971, which used expansionary monetary and fiscal policy in a thinly-veiled attempt to get re-elected in 1972, and simultaneously imposed wage/price controls in an effort to delay the adverse effects of this stimulus until after the election. The current administration may not have been quite so opportunistic with its implementation of expansionary policies, but it is hard not to see an effort to try to glean the political benefit of those policies while hiding their politically unpopular consequences. It's possible they were the right policies at the right time; but pretending like those policies don't have consequences by shifting attention and shifting blame onto the private sector is indefensible.

Intervening in markets to impede their operation precisely when they are confronting enormous demand and supply shocks is patently a recipe for disaster. It hardly matters if you think you can identify some localized market-power problems: They aren't the source of the overarching massive problem (7% inflation), and intervening will only serve to exacerbate the larger problem and ensure that the problems are endemic.

To begin with, it is entirely misguided to look to extremely long-term causes for short-term problems. Consumer prices have been increasing for a year. Market concentration numbers in every relevant market at issue have been in place for far longer—decades, in some cases. How can a market structure that hasn't changed since 1990 be to blame for a sharp, radical rise in prices in 2021?

The closest anyone has come to a legitimate answer to that question is to say that the ability to exercise the market power enabled by those market structures is dramatically increased when demand and supply shocks occur because it is easier not to pass along cost savings or to pass along larger-than-justified cost increases through the exercise of that power. This is despite standard

economic theory telling us that firms in perfectly competitive markets are most likely to pass cost increases through to consumers (as, by definition, they price at marginal cost).

But this explanation—still, the best one there is—contains the seeds of its own demise. Its very premise is that there exists an exogenous demand/supply shock that is being exacerbated by existing market structures. By definition, the exacerbating force isn't the cause of the underlying shock. Yet that is what most people are concerned about. It is surely of little concern that concentrated markets may add an extra .2% to prices that would otherwise have gone up by 6.8% anyway. Surely policy responses should aim at the factors that contribute most to inflation.

One can quibble about the numbers, but there is no escaping the overall dynamic: If concentration was already a problem for a decade, it can't be identified as the root cause of today's sudden price increases. Progressive policymakers are not focusing on antitrust because they think today's inflationary predicament reveals some ancillary issues with antitrust enforcement. Instead, they are attempting to find a scapegoat so as to obfuscate the first order effects of their own policies—regardless of how necessary and well-intentioned they might have been.

Unfortunately, attempting to divert antitrust into an anti-inflationary tool will exacerbate the underlying problems. For instance, there have been several calls to break up Kroger because retail grocery prices are “too high.” But Kroger (or any other grocery retailer for that matter) is unlikely to have market power—retail profits margins are generally miniscule, and the market is highly competitive.⁸ More than that, what would happen if the government claimed the economic and legal authority to break up Kroger, a company with razor-thin margins and less than 10% market share?⁹ It is almost certain that grocery distribution would *not* become more efficient and prices would *not* go down. Quite the opposite. If the government could claim the mantle of legitimacy in *that* intervention it would have carte blanche to intervene just about anywhere in the economy. This would cause investment to tank and innovation would grind to a halt, leading to precisely the higher prices policymakers are seeking to curb.

B. Politically driven Biden administration actions that will in fact make matters worse

As suggested in the previous section, today's calls to use antitrust law to curb inflation come at a time when the administration has adopted countless policies that were either liable to reinforce inflationary pressures or likely to exacerbate existing supply chain shortages and bottlenecks. The administration has also continued to enforce existing policies that likely increase those effects.

1. Setting exactly the wrong tone with his Executive Order

President Biden's recent Executive Order (EO) may nominally be about competition, but large swaths of it are self-avowedly not about lowering consumer prices. While there may be

⁸ See, e.g., Haley Peterson, *The grocery wars are intensifying with Walmart and Kroger in the lead and Amazon poised to 'cause disruption'*, BUSINESS INSIDER (Jan. 30, 2020), <https://www.businessinsider.com/walmart-kroger-dominate-us-grocery-amazon-gains-share-2020-1>.

⁹ See *id.*

anticompetitive conduct that manifests primarily in input markets or through non-price effects, a focus on these will not combat inflationary consumer prices; it will do the opposite.¹⁰

Right out of the gate the EO makes clear that it is not primarily interested in consumers or in the traditional indicia of anticompetitive effects:

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

Consumers are last on this list, which instead asserts that competition should serve, first, inchoate and undefined concepts like “basic economic liberties” and “democratic accountability,” and then the welfare of a few preferred political constituencies whose interests often *conflict* with the welfare of consumers. This is not competition enforcement policy; it is a political agenda.

The EO goes on to lay the blame for perceived macroeconomic and social ills at the feet of private enterprise: “[A]s industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and **widening racial, income, and wealth inequality.**” No doubt this reflects the position of White House advisor, Tim Wu, that economic power leads inexorably to political power and that both lead to economic and social inequality.¹¹

Addressing these is a worthy goal, but it is not the province of antitrust, and making it so would necessarily undermine antitrust’s actual goal of protecting competition and consumers.¹²

Most relevant to this hearing, the EO claims that

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries—seed, fertilizer, feed, and equipment suppliers—and concentrated market power in the channels for selling agricultural products. As a result, farmers’ share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.¹³

Concern for the welfare of farmers has long been a dominant feature of U.S. political economy. There are few interest groups that have had more significant influence on federal legislation, regulation, and spending. That may be good or bad; too much or too little. But it is difficult to deny the extent of government action aimed at protecting farmers. (It is also difficult to deny the invitation that has created for rent-seeking by some of the various agricultural businesses that are nominally the *target* of today’s focus). Protecting farmers may be the right policy, but almost by definition, most of the time it will be *antithetical* to protecting consumers.

¹⁰ Executive Order on Promoting Competition in the American Economy (Jul. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> [Competition EO].

¹¹ See generally TIM WU, THE CURSE OF BIGNESS (2018).

¹² See, e.g., A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269 (2020).

¹³ Competition EO, *supra* note 10.

And in the midst of worrying, substantial retail price increases and grocery shortages it might not be the best policy *for the moment*. Regardless, if it is going to be implemented, pro-farmer policy need not entail the coopting and subversion of sound antitrust policy to accomplish its ends. **It is that endeavor—the redirection of fundamental consumer welfare protection to serve politically preferred objectives—that is indefensible.** And it beggars belief that such an effort would be suborned by rhetoric claiming the exact opposite—that such efforts are part of an effort to protect consumers in an unprecedented inflationary environment.

Indeed, the Biden EO is completely transparent about the intended effects of its interventions, and invokes the Robinson-Patman Act (RPA)—which was never even intended to protect consumers¹⁴—in particular:

(i) The Secretary of Agriculture shall:

(iv) to improve farmers’ and smaller food processors’ access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers’ practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74-692, 49 Stat. 1526, 15 U.S.C. 13 et seq.).

Whether such an objective is worthy or not, determining that should entail consideration of the broader consequences beyond the effect on small businesses and farmers. And no economist would deny that an inevitable consequence of such intervention—as demonstrated by many studies of the effects of the RPA—would be *higher* consumer prices.

And that’s just the *intended* consequences. At the same time, the prospect for abuse and unintended consequences is exponentially increased with antitrust laws aimed at implementing ambiguous and often conflicting principles.

It is very difficult to go beyond these rather general suggestions toward a formulation which would take a more precise account of the socio-political aspects of [antitrust] cases. Indeed, if contemporary theory is less than exact with respect to the economic consequences of [business conduct], it would be hard to characterize much of the thinking about noneconomic effects as anything more than speculation buttressed either by rather dubious analogies imported from abroad or by random examples at home.¹⁵

2. FTC overreach

Several initiatives undertaken by the FTC could have similarly detrimental effects on supply chain shortages, thus feeding the inflationary cycle progressive policymakers are paradoxically seeking to curb.

In November 2021 the FTC announced a change in its Mission Statement with the release of its Draft Strategic Plan for 2022-2026, most significantly, removing the phrase “without unduly burdening legitimate business activity.” For years, this phrase has conveyed a crucial commitment by

¹⁴ See *infra* Section I.B.

¹⁵ Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 248 (1960).

the agency to basic cost-benefit principles, and to the existence of fundamental limitations on the permissible scope and aims of its enforcement and regulatory activities. Fundamentally, the phrase served as a statement of recognition by the FTC that it would focus on constraining illegal and economically harmful activity, and work to preserve the legitimate business functions that benefit consumers and competition. It is difficult not to see in the decision to remove this language an implicit assertion by the current agency leadership that legitimate business activity is not generally beneficial, and that its curtailment will effect no significant harm; only the government can provide benefits to consumers.

This follows closely on the heels of the agency's majority rescinding the 2015 UMC Policy Statement. Importantly, among the reasons offered by the majority for rescinding the Statement was the claim that its requirement that challenged conduct be "unreasonable" under a rule-of-reason-like standard was overly constraining and inappropriate.¹⁶ According to the commissioners, taking account of procompetitive benefits and balancing them against possible anticompetitive harms is "unwieldy."

Last but not least, the FTC majority adopted a prior approval policy for mergers that would impose upon merging firms settling with the agency a requirement that they seek pre-approval from the agency for any mergers over a minimum of the ensuing 10 years.¹⁷

Taken together, these and other actions signal a repudiation of the Consumer Welfare Standard and a rejection of a focus on consumer harm as the touchstone for illegal conduct. This is likely ill-advised if we believe that today's supply chain problems are, at least in part, caused by pent-up consumer demand and firms refusing to invest in order to expand output. Critics sometimes argue that oligopolistic firms and monopolists are more likely to restrict output than firms in competitive markets. While this may indeed be true, it ignores other crucial determinants of firms' investment decisions. To cite but one example, firms in key industries will not invest resources to expand output if they anticipate authorities will then expropriate those investments through arbitrary and politically-driven antitrust enforcement. Unfortunately, by eroding the FTC's long-standing commitment to the consumer welfare standard, the agency's leadership has raised the specter of arbitrary enforcement and sent precisely the wrong signal to firms that already had to contend with tremendous uncertainty due to the pandemic.

3. Perennially misguided oil and gas regulation and investigations

The Biden administration's missteps, and their harmful consequences, are perhaps nowhere clearer than in the oil and gas industry. With respect to the claims of market power and manipulation made about oil and gas prices, the Biden White House even sent a letter to the FTC asking it to investigate the "mounting evidence of anti-consumer behavior by oil and gas companies". The letter surmises that the problem is straightforward: "The bottom line is this: gasoline prices at the pump remain high, even though oil and gas companies' costs are declining."

¹⁶ See FTC, *Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Jul. 9, 2021) at 5, available at <https://www.ftc.gov/public-statements/2021/07/statement-commission-withdrawal-statement-enforcement-principles-regarding>.

¹⁷ <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive> .

The assertion concerning oil and gas companies' declining costs are particularly troubling. The price of crude oil and natural gas have both skyrocketed during the past year, and that has little to do with the American firms that import and distribute those commodities. Indeed, in 2020 oil prices bottomed out—they even were negative for a time. The result, in part, was that some companies went bankrupt and some investors got spooked, and everyone stopped pumping oil because, as far as they knew, the absence of travel and other oil-using activities was going to last a long time. When the demand for oil boomed again in 2021, the resulting mismatch between supply and demand was significant. And the consequences are likely still being felt today.

Significantly more troubling, however, is the fact that the Biden administration itself seems to have willfully and recklessly contributed to the current situation.¹⁸ Take Biden's rejection of the Keystone XL Pipeline, the suspension of new leasing on federal lands (subsequently struck down by a court¹⁹), and attempts to dissuade banks from lending money for fossil fuel-related projects (called out by some GOP senators as "extralegal," who also warned of the risk of "higher energy costs for American consumers and slower economic growth")²⁰. These actions are part of the administration's climate agenda, but that doesn't mean they don't have ramifications outside of the climate arena. Once again, they may be good policy, but determining that means taking account of the higher prices they support, not pretending otherwise and blaming industry as if there were no other possible causes.

4. *The price controls known as Agricultural Marketing Orders*

Meanwhile, if we're looking for a culprit, it isn't difficult to find existing regulatory schemes that are *certain* to increase consumer food prices. At least one of these is overtly anticompetitive: the legalized collusion to set volume limitations on the production and sale of certain agricultural products (fruits, vegetables, specialty crops, and dairy products) known as "agricultural marketing orders."²¹ These restrictions are euphemistically aimed at ensuring "orderly market conditions" under the New-Deal-era Agricultural Marketing Agreement Act,²² but the practical effect in most cases is output restrictions, reduced incentive for innovation, and higher consumer prices. Yet these orders are exempted from federal antitrust law.²³ A 1985 GAO study of a sample of the then-47 existing agricultural market orders found significant market distortions, suppressed competition,

¹⁸ See Andy Puzder, *John Kerry's Financial Crusade Against Oil and Gas*, WALL ST. J. (Dec. 15, 2021), <https://www.wsj.com/articles/john-kerry-crusade-against-oil-gas-fracking-climate-banks-fossil-fuels-biden-energy-prices-11639603757>.

¹⁹ Western Energy Alliance, *Biden Interior Department Fails to Lease in FY2021 in Defiance of Court Order* (Aug. 17, 2021), <https://www.westernenergyalliance.org/pressreleases/biden-interior-department-fails-to-lease-in-fy2021-in-defiance-of-court-order>

²⁰ Zack Coleman, *Kerry to Wall Street: Put your money behind your climate PR*, POLITICO (Mar. 12, 2021), <https://www.politico.com/news/2021/03/12/kerry-to-wall-street-put-your-money-behind-your-climate-pr-475565>; Letter from US Senators to John F. Kerry (Apr. 20, 2021), available at https://www.banking.senate.gov/imo/media/doc/toomey_gop_members_letter_to_kerry.pdf.

²¹ Agricultural Marketing Service, *Marketing Orders and Agreements*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ams.usda.gov/rules-regulations/moa>.

²² 7 U.S.C. §§ 601, 602(1) (2012),

²³ See *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939) (holding that marketing orders do not violate the Sherman Antitrust Act as long as they are consistent with the AMAA).

and literal product waste (although it did also find that orders governing minimum quality standards increased consumer confidence).²⁴

Volume-control marketing orders are less common than they once were. Today there are some 29 produce marketing orders and many fewer that contain volume-control restrictions. There are 11 Federal Milk Marketing Orders, all of which set minimum prices and distribute revenues among farmers and processors.

Among other complications, the COVID pandemic caused a shift in food-buying patterns, most notably by shifting large volumes of purchasing from the foodservice distribution channel to the retail channel. While that shift is unlikely to reflect a substantial change in the total consumption of calories from food, it certainly causes significant disruptions that can be reflected in price and the distribution of profits both vertically and horizontally within the food supply chain.

The consequences of these shifts are also magnified for retailers facing unprecedented shifts in consumers' consumption baskets.

Retailers are, by now, very sophisticated in terms of their use of inventory and demand-management data in order to optimize prices and assortments in real time. The fact that shelves are empty for some categories (e.g., toilet paper and pasta) and not others (e.g., apples, tomatoes, and strawberries) is a testament to the knife's edge upon which retailers operate. Even a small change in demand leads to category-reallocations within the store that result in perceptions of scarcity, even though retail supply chains remain relatively robust.²⁵

And there could, indeed, be a volume effect given that, for produce, for example, 47% of food waste (in Canada, where this data comes from) occurs in the home, while the foodservice sector (restaurants and hotels), is responsible for only 9%, even though the proportion of food consumed in each is roughly equal (and foodservice is historically higher).²⁶ Shifting consumption from foodservice to households may, in fact, increase the amount of fresh produce that is wasted. At the same time, "over-purchasing is one of the key drivers of household food waste. If anxiety over the viability of the fresh produce supply chain leads to hoarding, or at least overbuying, then more fresh produce will be wasted as a result."²⁷

Marketing Orders can also operate to impose rigidity on a market, which is especially problematic in the face of unexpected disruptions. These effects are felt not only by consumers but by producers, as well. As one recent study of Federal Milk Marketing Orders (FMMOs) discusses, COVID had a particularly disastrous effect on milk-producer profits because of the way FMMOs are structured:

²⁴ GAO, *The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions*, GAO-RCED-85-57 (Jul. 31, 1985), available at <http://archive.gao.gov/d8t2/127646.pdf>.

²⁵ Timothy J. Richards & Bradley Rickard, *COVID-19 impact on fruit and vegetable markets*, 68 CANADIAN J. AGRICULTURAL ECON. 189, 191 (2020).

²⁶ Martin V. Gooch and Abdel Felfel, "\$27 Billion" Revisited: *The Cost of Canada's Annual Food Waste*, Value Chain Management International Report (Dec. 10, 2014), available at <https://vcm-international.com/wp-content/uploads/2014/12/Food-Waste-in-Canada-27-Billion-Revisited-Dec-10-2014.pdf>.

²⁷ Richards & Rickard, *supra* note 25, at 192.

Due to extensive reduction in away-from-home eating occasions, dairy prices collapsed in April 2020. The government intervened through the Farmers to Families Food Box program, which increased domestic disappearance of American-style cheese and fluid milk and resulted in record-high cheese prices as supply chains struggled to adjust to a shift in demand between cheese types (USDA, 2020).

* * *

The proximate causes were government purchases made for the Farmers to Families Food Box program implemented by USDA to counter COVID-19 effects on food security and faltering dairy markets, and depressed butter prices due to reduced foodservice demand. However, a deeper question is why the US dairy sector did not have more flexibility to shift production toward cheese types that could be sold in retail or distributed through donation boxes. One reason may be that the [FMMO] allowances, not updated since 2010, no longer accurately reflect true cheese manufacturing costs.²⁸

Although COVID heightened the problems, the fundamental issue long predates COVID. Most importantly, it is extremely problematic to evaluate (let alone blame) the efficiency and distributional effects of market structure in a market made so rigid and stilted by regulatory overlay. Whatever the contribution of processor or retailer market power might be, a crucial culprit of depressed dairy-farmer profits seems to be FMMO intervention in the agreements between producers and processors which have dramatically altered the structure of the industry. At the same time, changing demand patterns, increasing water and environmental regulation, and rising feed and labor costs have exacerbated the harmful consequences of the system for producers, processors, and consumers alike.²⁹

By contrast, critics of the industry, from many of whom the administration takes its cues, propose not only the continuation of these policies, but their *expansion*. While such proposals are aimed directly at redistributing resources to small farmers and businesses, there is no pretense that the effect would be higher consumer prices. For example, in its 2019 report on the food supply chain (which was used by the administration to support its calls for intervention against meatpackers), the Open Markets Institute recommends Farm Bill reforms to reimpose disfavored policies like “grain reserves, price floors, and incentives to take land out of production.” The stated objective is to reverse policies that have “promote[d] maximized production, often beyond demand, *driving down prices* and pushing farms to survive on volumes.”³⁰

²⁸ Marin Bozic & Christopher A. Wolf, *Negative producer price differentials in Federal Milk Marketing Orders: Explanations, implications, and policy options*, 105 J. DAIRY SCI. 424, 430, 437 (2022).

²⁹ For an interesting, in-depth discussion of the history of FMMOs and the evolution of the industry, see Taylor Genzoli, *A Review of the Federal Milk Marketing Orders and the Advantages and Disadvantages of a Free Market Pricing System*, Presented to the Faculty of California State University, Stanislaus in Partial Fulfillment of the Requirements for the Degree of Master of Business Administration (Aug. 2018), available at <https://scholarworks.calstate.edu/downloads/f4752h601>.

³⁰ Claire Kelloway and Sarah Miller, *Food and Power: Addressing Monopolization in America's Food System*, Open Markets Institute Report (Mar. 2019 (updated Sep. 2021)) at 13 (emphasis added), available at <https://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system>.

5. *Spending more on inefficient agricultural firms*

Apart from the threat of invigorated antitrust enforcement allegedly aimed at combating inflation, the administration continues to throw money at the alleged problem. Most recently the White House announced plans to impose tighter labeling rules and to provide financial support to small businesses in the industry, justifying the actions as promoting competition: “Capitalism without competition isn’t capitalism, it’s exploitation.”³¹

But it is not clear that such efforts will enhance competition meaningfully:

Support for small and local processors might benefit local economic ecosystems and increase custom harvest operations for producers, but these operations, because they lack economies of scale, must focus on quality and service to be competitive, and are such a small part of the national industry that investments at this size are unlikely to significantly alter the aggregate industry capacity. It is also worth noting that costs of adding packing capacity are not limited to concrete and iron. I encourage you to consider other costs and barriers that limit new entrants thus expanded capacity. Availability of labor has been a significant challenge for the industry and labor constraints put a limit on processing capacity. Other factors include the costs of complying with federal, state, and local regulations related to labor, food safety, zoning, transportation, and more.³²

Nevertheless, the US Department of Agriculture (USDA) plans to spend \$1 billion of American Rescue Plan money to prop up smaller meat processors with a combination of programs that will artificially preserve the longevity of less efficient competitors, but “do nothing to cure supply and regulatory problems that affect rising meat prices. It will, however, misallocate resources.”³³ (Actually, one element of the plan is, in fact, aimed at regulatory relief. But it doesn’t actually alleviate the regulations; it simply offers to help cover some of the costs they impose. Of course, if that’s the concern, there is no basis (other than special-interest pandering) for limiting such relief only to smaller competitors).³⁴

The overt focus of enhanced antitrust investigations based on firm size is, of course, likewise misguided and certain to raise, not lower, food prices. Such efforts will “bloat those companies’ costs and discourage them from engaging in cost-reducing new capacity and production improvements.”³⁵ The predictable consequence is a tendency to raise, not lower, prices.

³¹ Patrick Thomas and Catherine Lucey, *Biden Promotes Plan Aimed at Tackling Meat Prices*, WALL ST. J. (Jan. 3, 2022), https://www.wsj.com/articles/biden-promotes-plan-aimed-at-tackling-meat-prices-11641242596?mod=article_inline (quoting Biden).

³² Lusk Testimony at 3.

³³ Alden Abbott, *Crusade Against ‘Big Meat’ Is Latest Example of Misguided Effort to Use Antitrust as Anti-Inflation Tool*, TRUTH ON THE MARKET (Jan. 5, 2022), <https://truthonthemarket.com/2022/01/05/crusade-against-big-meat-is-latest-example-of-misguided-effort-to-use-antitrust-as-anti-inflation-tool/>.

³⁴ See Keith Nunes, *Biden commits \$1 billion to independent meat processing capacity*, SUPERMARKET PERIMETER (Jan. 4, 2022), <https://www.supermarketperimeter.com/articles/7592-biden-administration-to-invest-in-us-meat-processing-capacity>.

³⁵ Abbott, *supra* note 33.

III. The phantom relationship between concentration and market power generally

The assertion that increased market concentration has been driven by anticompetitive conduct (fueled by lax antitrust enforcement) and that it has, in turn, resulted in economic harm is not supported by the evidence or empirical research.

To begin with, the assumption that “too much” concentration is harmful assumes both that the structure of a market is what determines economic outcomes, and that anyone knows what the “right” amount of concentration is. But, as economists have understood since at least the 1970s (and despite an extremely vigorous, but futile, effort to show otherwise), market structure is not outcome determinative.³⁶

Once perfect knowledge of technology and price is abandoned, [competitive intensity] may increase, decrease, or remain unchanged as the number of firms in the market is increased. . . . [I]t is presumptuous to conclude . . . that markets populated by fewer firms perform less well or offer competition that is less intense.³⁷

This view is not an aberration, and it is held by scholars across the political spectrum. To take one prominent, recent example, professors Fiona Scott Morton (Deputy Assistant Attorney General for Economics in the DOJ Antitrust Division under President Obama), Martin Gaynor (former Director of the FTC Bureau of Economics under President Obama), and Steven Berry surveyed the industrial organization literature and found that presumptions based on measures of concentration are unlikely to provide sound guidance for public policy:

In short, there is no well-defined “causal effect of concentration on price,” but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration. . . .

Our own view, based on the well-established mainstream wisdom in the field of industrial organization for several decades, is that *regressions of market outcomes on measures of industry structure like the Herfindahl-Hirschman Index should be given little weight in policy debates.*³⁸

Competition rarely takes place in national markets; it takes place in local markets. And although it appears that national-level firm concentration is growing, this is actually driving increased competition and decreased concentration at the local level, which is typically what matters for consumers. The rise in national concentration is predominantly a function of more efficient firms competing in more—and more localized—markets, so rising national concentration, where it is observed, is a result of increased productivity and competition that weed out less-efficient producers.

³⁶ See Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973).

³⁷ Harold Demsetz, *The Intensity and Dimensionality of Competition*, in HAROLD DEMSETZ, *THE ECONOMICS OF THE BUSINESS FIRM: SEVEN CRITICAL COMMENTARIES* 137, 140-41 (1995).

³⁸ Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, Working Paper (Jun. 2019) at 5-6 (emphasis added), available at <https://www.researchgate.net/publication/333966085> (emphasis added). See also Jonathan Baker & Timothy F. Bresnahan, *Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*, John M. Olin Program in L. & Econ., Stanford Law Sch. Working Paper 24 (Sep. 2006) (“The Chicago identification argument has carried the day, and structure-conduct-performance empirical methods have largely been discarded in economics.”).

Similar results hold for labor market effects. According to one recent study, while the labor market power of firms appears to have increased, “labor market power has not contributed to the declining labor share because, despite an overall increase in national concentration, we find that . . . local labor market concentration has declined over the last 35 years.”³⁹

This means it is inappropriate to draw conclusions about the strength of competition from national concentration measures.

By way of illustration, it hardly matters to a shopper in, say, Portland, OR, that there may be fewer grocery store chains nationally if she has *more* stores to choose from within a short walk or drive from her home. If you’re trying to connect the competitiveness of a market and the level of concentration, the relevant market to consider is *local*.

Moreover, because many of the large firms driving the national concentration data operate across multiple product markets that do not offer substitutes for each other, the relevant *product* market definition is also narrower. In other words, it implies virtually nothing about competition in, for example, the produce market that Walmart dominates in “retail” or even “discount retail.” In the real world, Walmart competes for consumers’ produce dollars with other large retailers, supermarkets, smaller local grocers, and local produce markets. It also competes in the gasoline market with other large retailers, some supermarkets, and local gas stations. It competes in the electronics market with other large retailers, large electronic stores, small local electronics stores, and a plethora of online sellers large and small—and so forth.

This conclusion is not merely a supposition: In fact, recent empirical work demonstrates that national measures of concentration do not reflect market structures at the local level.

In a recent paper,⁴⁰ the authors look at both the national and local concentration trends between 1990 and 2014 and find that:

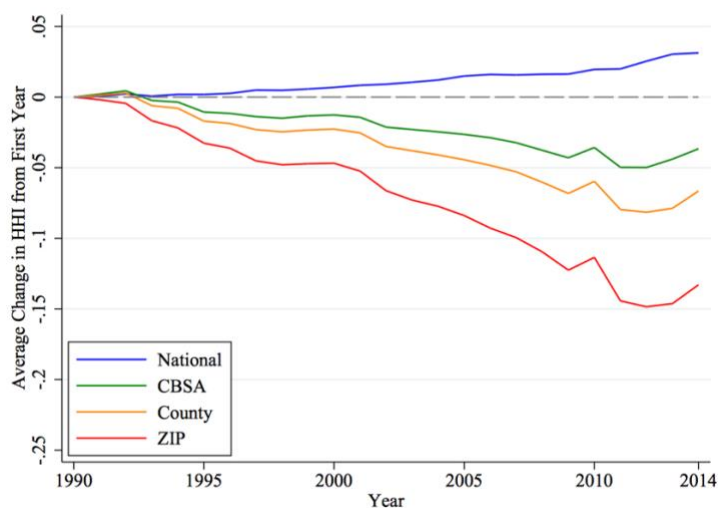
1. Overall and for all major sectors, concentration is increasing nationally but decreasing locally.
2. Industries with diverging national/local trends are pervasive and account for a large share of employment and sales.
3. Among diverging industries, the top firms have increased concentration nationally, but *decreased* it locally.
4. Among diverging industries, opening of a plant from a top firm is associated with a long-lasting decrease in local concentration.⁴¹

³⁹ David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, IZA—Institute of Labor Economics Working Paper (April 2019) at 1, available at <http://ftp.iza.org/dp12276.pdf>.

⁴⁰ Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, in NBER MACROECONOMICS ANNUAL 2020, VOLUME 35 (Martin Eichenbaum & Erik Hurst, eds., 2021).

⁴¹ Rossi-Hansberg, et al., *Presentation: Diverging Trends in National and Local Concentration*, slide 3, available at https://conference.nber.org/conf_papers/f132587/f132587.slides.pdf.

Figure 1: Diverging economy-wide national and local concentration trends



Source: Rossi-Hansberg, et al. (2020)⁴²

Nor is it possible to connect increased concentration to changes in labor market share; all of the above apply not only to product markets, but to *labor* markets, as well:

The proportion of aggregate U.S. employment located in all SIC 8 industries with increasing national market concentration and decreasing ZIP code level market concentration is 43 percent. Thus, given that some industries have also had declining concentration at both the national and ZIP code level, 78 percent (or over 3/4) of U.S. employment resides in industries with declining local market concentration.⁴³

What is perhaps most remarkable about this data is the unique role of large firms in driving the *reduction* in concentration at the local level:

[T]he increase in market concentration observed at the national level over the last 25 years is being shaped by enterprises expanding into new local markets. This expansion into local markets is accompanied by a fall in local concentration as firms open establishments in new locations. *These observations are suggestive of more, rather than less, competitive markets.*⁴⁴

A related paper explores this phenomenon in greater detail.⁴⁵ It shows that new technology has enabled large firms to scale production over a larger number of establishments across a wider geographic space. As a result, these large, national firms have grown by increasing the number of local markets they serve, and in which they are actually relatively *smaller* players.⁴⁶

⁴² Rossi-Hansberg, et al, *supra* note 40, at 9.

⁴³ *Id.* at 14 (emphasis added).

⁴⁴ *Id.* at 27 (emphasis added).

⁴⁵ Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, Working Paper (Mar. 17, 2020), available at <https://www.princeton.edu/~erossi/IRS.pdf>.

⁴⁶ *Id.* at 4 (“[R]ising [national] concentration in these sectors is entirely driven by an increase [in] the number of local markets served by the top firms”).

What appears to be happening is that national-level growth in *concentration* is actually being driven by increased *competition* in certain industries at the local level.⁴⁷ The net effect is a *decrease* in the power of top firms relative to the economy as a whole, as the largest firms specialize more, and are dominant in fewer industries.⁴⁸

These results turn the commonly accepted narrative on its head:

- First, rising concentration, where it is observed, is a result of increased productivity and competition that weed out less-efficient producers. This is emphatically a *good* thing.
- Second, the rise in concentration is predominantly a function of more efficient firms competing in more—and more localized—markets. This means that competition is *increasing*, not decreasing, whether it is accompanied by an increase in concentration or not.

The same results hold for labor market effects. Another paper takes a similar approach to analyzing the effect of increased firm size on labor market share.⁴⁹ In a complete refutation of the popular narrative, the paper finds that, while the labor market power of firms appears to have increased, “labor market power has not contributed to the declining labor share because, despite an overall increase in national concentration, we find that . . . local labor market concentration has declined over the last 35 years.”⁵⁰ Moreover, the authors find that, “[a]s large firms become larger, concentration rises even though the labor market is more competitive. *Competition, output, wages and welfare all increase at the same time as markets become more concentrated.*”⁵¹

Further studies have corroborated these findings, noting that, on an industry-by-industry basis, the explanatory power of increasing concentration (or increasing firm size) is extremely weak. For example, while Autor, et al. (2020) attribute the purported decline in the labor share of the US economy to the rise of “superstar” firms,⁵² Stanford economist Robert Hall shows that the data is far more nuanced. Thus, comparing the employment shares of firms with 10,000 or more workers in the 19 NAICS sectors between 1998 and 2015, Hall finds that:

- “In four of the 19 sectors, very high-employment firms declined in importance over the 17-year span of the data. The weighted-average increase across all sectors was only 1.8 percentage points, from 25.3 percent to 27.1 percent. *Thus it seems unlikely that rising concentration played much of a role in the general increase in market power. . . .*”; and
- “[T]here is essentially no systematic relation between the mega-firm employment ratio . . . and the ratio of price to marginal cost. . . . Over the wide range of variation in the employment ratio, sectors with low market power and with high market power are found, with essentially the same

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* at 17

⁴⁹ David Berger, Kyle Herkenhoff & Simon Mongey, *Labor Market Power*, IZA—Institute of Labor Economics Working Paper (April 2019), available at <http://ftp.iza.org/dp12276.pdf>.

⁵⁰ *Id.* at 1.

⁵¹ *Id.* at 39 (emphasis added).

⁵² See David Autor, et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 635 (2020).

average values. *There is no cross-sectional support for the hypothesis of higher markup ratios in sectors with more very large firms and thus more concentration in the product markets contained in those sectors.*⁵³

Economists have been studying the relationship between concentration and various potential indicia of anticompetitive effects—price, markup, profits, rate of return, etc.—for decades. There are, in fact, hundreds of empirical studies addressing this topic. Contrary to the claims of some, however, taken as a whole this literature is singularly unhelpful in resolving our fundamental ignorance about the functional relationship between structure and performance: “Inter-industry research has taught us much about how markets *look*... even if it has not shown us exactly how markets *work*.”⁵⁴

Though some studies have plausibly shown that an increase in concentration in a particular case led to higher prices (although this is true in only a minority share of the relevant literature), assuming the same result from an increase in concentration in other industries or other contexts is simply not justified: “The most plausible competitive or efficiency theory of any particular industry’s structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power.”⁵⁵

Finally, it should be noted that the national concentration statistics that are used to justify invigorated antitrust law and enhanced antitrust enforcement are generally derived from available data based on industry classifications and market definitions that have limited relevance to antitrust. As Luke Froeb (former Deputy Assistant Attorney General for Economics in the DOJ Antitrust Division under President Trump; former Director of the FTC Bureau of Economics under President Bush) and Greg Werden (former Economic Counsel in the DOJ Antitrust Division from 1977-2019) note:

[T]he data are apt to mask any actual changes in the concentration of markets, which can remain the same or decline despite increasing concentration for broad aggregations of economic activity. Reliable data on trends in market concentration are available for only a few sectors of the economy, and for several, market concentration has not increased despite substantial merger activity.⁵⁶

This view is shared by many economists across the political spectrum. Carl Shapiro (former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department

⁵³ Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the US Economy*, Working Paper 16 (April 27, 2018) (emphasis added), available at <https://web.stanford.edu/~rehall/Evidence%20on%20markup%202018>.

⁵⁴ Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 1000 (Richard Schmalensee & Robert Willig eds., 1989). See also Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011, 1053-54 (Richard Schmalensee & Robert Willig eds., 1989) (“[A]lthough the [most advanced empirical literature] has had a great deal to say about measuring market power, it has had very little, as yet, to say about the causes of market power.”); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986) (“Today it is hard to find an economist who believes the old structure-conduct-performance paradigm.”).

⁵⁵ Baker & Bresnahan, *supra* note 38, at 26.

⁵⁶ Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74, 74 (2018).

of Justice under President Clinton), for example, raises these concerns regarding the national concentration data:

[S]imply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, i.e., for the products and locations over which competition actually occurs. As a result, it is far from clear that the reported changes in concentration over time are informative regarding changes in competition over time.⁵⁷

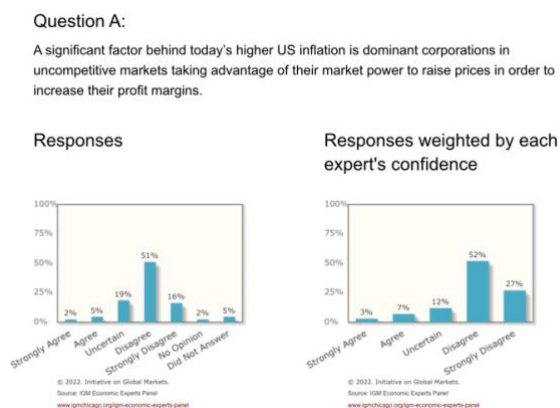
IV. The spurious relationship between antitrust enforcement and price inflation generally

Despite the actions of the Biden administration that have, at least, contributed to the current inflationary woes, several scholars and politicians have called on policymakers to turn towards antitrust policy to combat inflation. Unfortunately, available evidence suggests antitrust enforcement is at best tangentially related to inflation. This is true about antitrust enforcement in general, specific antitrust instruments such as the Robinson-Patman Act, as well as potential antitrust reforms put forward by so-called neo-Brandeisian scholars.

A. Economists on inflation and antitrust generally

The Chicago Booth Initiative on Global Markets survey of top economists recently asked its panel about the relationship between inflation, market power, and price controls.⁵⁸

In response to the statement, “A significant factor behind today’s higher US inflation is dominant corporations in uncompetitive markets taking advantage of their market power to raise prices in order to increase their profit margins,” only 7% agreed at all and 67% disagreed (the rest were uncertain or didn’t answer).⁵⁹ This poll includes economists from across the political spectrum, many of whom generally support increased antitrust enforcement.

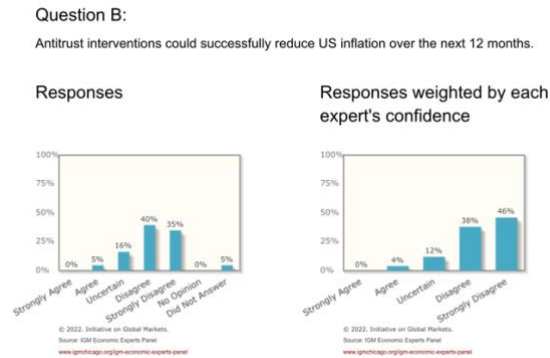


⁵⁷ Carl Shapiro, *Antitrust in the Time of Populism*, 61 INT’L J. OF INDUS. ORG. 714, 727-28 (2018).

⁵⁸ *Inflation, Market Power, and Price Controls*, THE INITIATIVE ON GLOBAL MARKETS (Jan. 11, 2022), <https://www.igmchicago.org/surveys/inflation-market-power-and-price-controls/>.

⁵⁹ *Id.*

Even more telling, in response to the statement, “Antitrust interventions could successfully reduce US inflation over the next 12 months,” only 5% agreed, while 65% disagreed, half of those “strongly.”⁶⁰



Fundamentally, temporary supply constraints cannot cause long term inflation. As one of the panelists, Stanford economist Bob Hall, noted, “[t]he proposition is an elementary confusion of levels and changes—market power causes high prices, not rising prices.”⁶¹ As economist Joseph Politano recently succinctly summed it up:

But are corporate profits even really to blame for the rise in inflation? In short, no. High profit margins do not cause, and are often not correlated with, high inflation—and the jump in profit margins is not particularly large. Would antitrust actions help reduce inflation? In the short run it is possible, but not by any significant amount. The items experiencing idiosyncratic price increases due to the pandemic are mostly not in monopolistic or oligopolistic markets. And would price controls be a useful tool in combating inflation? Not at all.⁶²

There has been pushback against this basic, almost-unanimous view by advocates, of course. None of it is convincing. Pointing, for example, to a Washington Post story claiming that “[a]fter the White House blasted corporate profits in the meatpacking industry, meat prices fell in December, following months of increases,”⁶³ antitrust advocate Hal Singer asserted that the only possible explanation was the White House’s threat of antitrust intervention: “What else would cause retail meat prices to fall suddenly and so sharply? Demand shifting back to restaurants and away from groceries due to the “end” of Covid? Come the f@ck on. Occam’s razor applies here—the simplest and most intuitive answer is most often the best explanation.”⁶⁴ As discussed below, the complex dynamics of the meatpacking industry and its response to the ongoing disruptions of the COVID-19 pandemic and government responses to it offer some possible clues to why meat prices

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Joseph Politano, *Are Rising Corporate Profit Margins Causing Inflation?*, APRICITAS—AN ECON BLOG (Jan. 1, 2022), <https://apricitas.substack.com/p/are-rising-corporate-profit-margins>.

⁶³ Matt Viser and Jeff Stein, *Democrats worry Biden could pay the political price for rising inflation*, WASH. POST (Jan. 12, 2022), https://www.washingtonpost.com/politics/democrats-worry-biden-could-pay-the-political-price-for-rising-inflation/2022/01/12/6f76ba68-73c7-11ec-8b0a-bcfab800c430_story.html.

⁶⁴ Hal Singer (@HalSinger), Twitter (Jan. 14, 2022, 5:41 AM), <https://twitter.com/HalSinger/status/1481984914845224964?s=20>.

might have fallen.⁶⁵ Of course, ignorance of supply-side effects and limited appreciation for the complexity of demand-side effects is a recipe for finding spurious correlations.

B. Misguided calls to reinvigorate the Robinson-Patman Act

A number of advocates have called recently for a reinvigoration of federal enforcement of the Robinson-Patman Act (RPA).⁶⁶ Why not intervene to start enforcing a law already on the books but largely ignored by government enforcers (though not private plaintiffs) that is nominally aimed at fixing problems in retail?

For starters, the RPA was never aimed at lowering prices—in fact, exactly the opposite. Second, even if that were the aim today, it wouldn't accomplish that outcome. We have decades of research and empirical data to confirm this. The non-enforcement of RPA didn't arise out of thin air or some sort of grand conspiracy among all enforcers across the political spectrum for the past 30 years. If anything, the real question is why Congress hasn't repealed the law.

The economics of consumer welfare have guided the enforcement and adjudication of the antitrust laws for more than half a century. We need not rehash here whether that is consistent with the original intent behind the laws or not, nor whether the “common-law-like” nature of antitrust enforcement was Congress' intent. But we certainly know that Congress is *capable* of writing antitrust legislation aimed at specific social or distributional outcomes rather than the welfare of consumers because it has done so in the past: The Robinson-Patman Act of 1936.

The legislation was enacted specifically to address the rise of retail chains (of which the A&P grocery store was the most important example in the 30s). Its avowed aim: to protect small competitors against large retailers. Indeed, the bill that became the RPA was initially titled the “Wholesale Grocer's Protection Act.”⁶⁷ The RPA was borne of “an attempt by politically well-organized small retailers to reduce the ability of the A&P grocery chain to use its scale advantage to extract better terms from suppliers than its smaller competitors through price discrimination or buyer power.”⁶⁸

The Supreme Court interpreted the RPA in exactly this way, noting that:

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages⁶⁹

⁶⁵ See *infra*, Sections V.B.2, V.B.3, & V.B.4.

⁶⁶ See, e.g., Competition EO, *supra* note 10; Errol Schweizer, *Why Food Price Inflation Is Not Inevitable*, FORBES (Jan. 4, 2022) <https://www.forbes.com/sites/errolschweizer/2022/01/04/why-food-price-inflation-is-not-inevitable/?sh=6298678e649f>. See also Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13 (2012)).

⁶⁷ See Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1123 (1983).

⁶⁸ D. Daniel Sokol, *Limiting Anticompetitive Government Interventions that Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 128-29 (2009) (citing Joel B. Dirlam & Alfred E. Kahn, *Antitrust Law and the Big Buyer: Another Look at the A&P Case*, 60 J. POL. ECON. 118, 118-19 (1952)).

⁶⁹ *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) ((citing S. Rep. No. 74-1502 (1936)).

“[S]olely because of the large buyer’s quantity purchasing ability” is another way of saying “efficiency.” So the RPA was enacted to *constrain* efficiency enhancements. The aim may have been to “deprive a large buyer of such advantages,” but the practical effect was also to deprive *consumers* of those advantages. As Herb Hovenkamp put it, the RPA “was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices.”⁷⁰

Indeed, the primary, and most obvious, effect of RPA enforcement is higher prices. By deterring manufacturers from achieving economies of scale and scope in distribution by requiring them to protect smaller, less efficient competitors, the RPA prevents consumer prices from falling due to these efficiencies. Indeed, much like predatory pricing, the first consequence of the kinds of discriminatory discounts prohibited by the RPA is to lower retail costs and thus consumer prices. One can debate whether the long-term effect could ultimately be the opposite (if, e.g., discriminatory discounting puts existing, less-efficient competitors out of business, and prices ultimately rise above the level even their limited competitive constraint would offer). But there is no debate that the immediate effect is almost certain to be higher consumer prices.

The Robinson-Patman Act had its intended effect, at least in the first decades after its enactment. . . . A&P and other supermarket chains lost profits even as they raised retail prices to cover the higher cost of wholesale goods. **Again, the ultimate victims of the Act were the millions of ordinary consumers forced to pay higher prices for food and other necessities.**⁷¹

The RPA also prevents sellers from responding to varied and changing market conditions, ensuring that they cannot effectively and efficiently respond to supply and demand shocks—exactly the sort of policy that would exacerbate the disruptions we have experienced during the COVID-19 pandemic. The RPA effectively imposes wholesale price uniformity on sellers which deters innovation (or, as noted, price reductions) and new entry. It deters existing firms from introducing innovations responding to heterogeneous customer demands and it prevents new entrants from reducing prices in particular cases in order to overcome the inertia of established relationships. To the extent RPA compliance would force a new entrant to offer the same reductions for all purchasers, the new entrant may not find entry economical; to the extent it would force a new entrant to try to enter only at uniform, higher prices, the new entrant may be prevented from being able to gain a foothold against established incumbents.

Meanwhile, compliance with the RPA is extremely costly and its proscriptions uncertain; “many firms have run afoul of it simply by inadvertence.”⁷² And because the costs of RPA compliance encourage suppliers to switch away from independent dealers and toward vertical integration, it actually hurts the small dealers it was intended to protect.⁷³

⁷⁰ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE*, § 14.6a1 (3d ed. 2005).

⁷¹ Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, 54 REV. IND. ORGAN. 651 (2019) (citing MARC LEVINSON, *THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA* (2011)).

⁷² Herbert Hovenkamp, *Testimony on Robinson-Patman Act*, before the Antitrust Modernization Commission (Jul. 2, 2005), at 7.

⁷³ *See id.*

Further, if one's concern is the exercise of monopoly power, it is notable that the RPA is simply not aimed at the problem: The RPA has no market power requirement, so it doesn't distinguish between monopolized and competitive markets. Manufacturers in competitive industries can violate the Act just as readily as dominant firms exercising market power.⁷⁴

As the Antitrust Modernization put it in advocating for repeal of the RPA:

[T]he RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against U.S. companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.⁷⁵

As Herb Hovenkamp put it, “[a]s a matter of competition policy the Robinson-Patman Act is completely unnecessary and should be repealed.”⁷⁶

They are not alone. “Few federal statutes have received criticism as relentless and withering as that which has been levied at the Robinson-Patman Act.”⁷⁷ While it has perhaps been Chicago School economists who have spoken out against the RPA the loudest—Robert Bork in the *Antitrust Paradox* called it “antitrust’s least glorious hour”⁷⁸—they were neither the first to do so, nor were they alone in their condemnation. They may have done so most colorfully, however: Bork went on to add that the RPA is “the misshapen progeny of intolerable draftsmanship coupled to wholly-mistaken economic theory,” and quipped that, “[a]llthough it does not prevent much price discrimination, at least it has stifled a great deal of competition.”⁷⁹

Indeed, far from being limited to Chicago School adherents or right-wing economists, even Democratic Congressman Emanuel Celler—by no measure an opponent of vigorous antitrust legislation and its enforcement—opposed the bill in Congress, ridiculing it as “a bill that seeks to help a very small segment of our business population.”⁸⁰ Scholars from across the political spectrum

⁷⁴ See, e.g., *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 548 (1990) (applying RPA to a retail gasoline market characterized by the Court as “highly competitive”).

⁷⁵ REPORT AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION (Apr. 2007) at iii.

⁷⁶ Hovenkamp, *supra* note 72, at 2.

⁷⁷ *Id.* at 7. The many criticisms of the RPA adduced by Hovenkamp include: “Report of the Attorney General’s National Committee to Study the Antitrust Laws 155-221 (1955); United States Dept of Justice, Report on the Robinson-Patman Act (1977); H. Hansen, Robinson-Patman Law: A Review and Analysis, 51 Fordham L. Rev. 1113 (1983); R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences (1976); W. Baxter, A Parable, 23 Stan.L.Rev. 973 (1971). See also M. Schwartz, The Perverse Effects of the Robinson-Patman Act, 31 Antitrust Bull. 733 (1986); T. Ross, Winners and Losers Under the Robinson-Patman Act, 27 J. L. & Econ. 243 (1984); H. Hovenkamp, Market Power and Secondary-Line Differential Pricing, 71 Georgetown L.J. 1157 (1983); P. Neal, Let’s Reform It, 45 Antitrust L.J. 52 (1976); ABA Antitrust Section, The Robinson-Patman Act: Policy and Law (1980).”

⁷⁸ ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 399 (2021 ed.)

⁷⁹ *Id.*

⁸⁰ 80 Cong. Rec. 8108 (1936) (cited in Hansen, *supra* note 67, at 1123).

continue to disparage it today.⁸¹ Among them, FTC Commissioner Noah Phillips and former FTC Commissioner Joshua Wright aptly summed up the fundamental disconnect between reinvigorating the RPA and fighting high prices:

When Americans are paying nearly 30% more for eggs and meat, now is exactly the wrong time for the government to discourage companies from lowering prices.

* * *

Antitrust reformers are too focused on corporate size. Fetishizing outdated ideas from the 1960s and before, they propose reforms that would focus myopically on bigness, punish lower prices, and embrace the higher prices of their preferred cartels. At a time of historic inflation, these ideas are bad for all Americans, and they will hurt the poor the most.⁸²

A. The misguided focus on neo-Brandeisian antitrust

What about concentration and its effects more generally? We've heard endless claims about this, especially from the proponents of so-called neo-Brandeisian antitrust—a school of thought that had for long remained at the fringes of the antitrust debate but which gained prominence in the mid to late 2010s, taking advantage of the wave of anti-capitalist sentiment and rhetoric to climb the policy ladder. Today, two of its main representatives sit at the White House (Tim Wu) and the FTC (Lina Khan).

The claims of the neo-Brandeisians rest on some basic assertions: 1) Antitrust enforcement has been indefensibly lax for the last 30 years as a result of the acceptance by the courts of the postulates of the Chicago School of antitrust, which argued that antitrust enforcement should be guided by the comparatively narrow goal of consumer welfare, rather than a hotch-potch of objectives and values; 2) This laxity has led to an increase in concentration throughout the U.S. economy; 3) Rising concentration has led to greater market power; 4) The exercise of this market power has inflated profit margins for corporations, without a corresponding benefit to consumers in price or to workers in wages; (5) It has also led to a plethora of other social ills and undesirable outcomes—including, of course, inflation, but also racial injustice, inequality, slow innovation, the decay of democracy, etc. (the list lacks any limiting principles and is thus potentially infinite).⁸³

Every element of this story is questionable. That's not to say it couldn't be true, or that it couldn't be partly true, or true in a couple of industries in particular. But what's animating this hearing and the overall shift in the political valence of antitrust is the overall claim and its broad strokes. However, what should be clarified at the outset is that assertions are not underpinned by any serious empirical data or sophisticated theory, but rather hinge on a simplistic, albeit politically

⁸¹ See, e.g., Roger D. Blair & Christina DePasquale, "Antitrust's Least Glorious Hour": *The Robinson-Patman Act*, 57 J.L. & ECON. 201 (2014).

⁸² Noah Joshua Phillips and Joshua D. Wright, *As Inflation Rises, Antitrust 'Reformers' Target Lower Prices*, WALL ST. J. (Dec. 20, 2021), <https://www.wsj.com/articles/inflation-rises-antitrust-reformers-lower-prices-competition-consumer-benefit-brandeis-biden-11640032926>.

⁸³ See, e.g., Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 767 (2016); Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 THE YALE LAW JOURNAL FORUM 960 (2018).

attractive, formula which equates “big” with “bad”⁸⁴. Given the paucity of the evidence put forth in support of such a position, there is simply no good reason to think that the neo-Brandeisian narrative is accurate or even close to the full story.

Unfortunately, however, the administration seems to have bought into these sketchy arguments as showcased by the fact that the main thrust of antitrust enforcement today is decidedly not focused on consumer welfare, but is instead consistent with the overarching principles espoused by the neo-Brandeisians: namely, that concentration is the root of all social evil and that antitrust is the magic bullet capable of solving such evils through break-ups and other far-reaching and highly invasive measures. There’s some lip service to consumer welfare, to be sure, but the main thrust is clear, and the inherent conflict between consumer welfare and these other objectives will necessarily result in less effective consumer protection.

For instance, as mentioned above, in November 2021 the FTC announced a change in its Mission Statement with the release of its Draft Strategic Plan for 2022-2026, most significantly, removing the phrase “without unduly burdening legitimate business activity.” The practical effect of this seemingly trifling omission is to greatly expand the likely scope of permissible agency intervention by suggesting that there are no costs to antitrust enforcement or that such costs do not matter. Of course, such an approach fits nicely with—and is even a necessary corollary of—the administration’s broader push to substitute the conceptually rigorous consumer welfare standard for an array of hazy goals and values. This is well encapsulated in a recent speech given by Commissioner Slaughter, where she declared that “Antitrust can and should be deployed in the fight against racism.”⁸⁵ Similar sentiments are echoed in President Biden’s EO, which goes on to lay the blame for all manner of perceived macro-economic and social ills at the feet of market concentration: “[A] industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and **widening racial, income, and wealth inequality.**” Note that consumers are placed at the very end of this long list.⁸⁶

Lastly, none of this should perhaps come as a surprise given that the administration has placed key neo-Brandeisian figures, such as Lina Khan and Tim Wu, in key antitrust positions. The pre-administration scholarship of both authors has clearly percolated into this administration’s understanding of competition law and policy—as well as its enforcement priorities. A comprehensive literature review of both authors is beyond the scope of this testimony, but two examples will suffice to get the point across. Thus, in *The Curse of Bigness*, Wu attributes every sin in the book to company size and calls for wide-ranging break-ups with little in terms of supportive evidence. In a similar vein, Khan’s *Amazon’s Antitrust Paradox*, which catapulted her to fame in 2016, argues that, while Amazon’s business model perhaps doesn’t fall foul of the antitrust rules from the perspective of the “narrow” Chicagoan consumer welfare standard, it does produce a range of other deleterious effects

⁸⁴ See, e.g., Tim Wu, *Be Afraid of Economic ‘Bigness.’ Be Very Afraid*, THE NEW YORK TIMES (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html>; Wu, *supra* note 11.

⁸⁵ *Antitrust at a Precipice*, Remarks of Commissioner Rebecca Kelly Slaughter, GCR Interactive: Women in Antitrust (Nov. 17, 2020) at 3, available at https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

⁸⁶ Competition EO, *supra* note 10.

which *should* constitute actionable offenses. Remarkably, Khan also contends that Amazon engaged in predatory pricing *prior* to being dominant—an absurd proposition that, if accepted as an antitrust offense, would be tantamount to punishing firms for lowering prices. And yet this perfectly encapsulates the ethos of the neo-Brandeisian school: vague propositions underpinned by scant evidence which translate into the enforcement of slogans⁸⁷ by agencies with unbounded discretion.

By paying heed to this brand of populist antitrust, the administration will not only miss the mark on inflation and undermine incentives to grow *today*, it will also contribute to cementing a way of thinking that will, in the long run, not only be ruinous to sound antitrust policy and economic efficiency, but that will also substitute legal certainty and the rule of law for practically unlimited agency discretion, all the while unduly limiting freedom of enterprise. The consequences of making the wrong decision therefore transcend momentary inflationary pressures.

V. The mangled perception of the relationship between concentration, market power, and prices in the food supply chain in particular

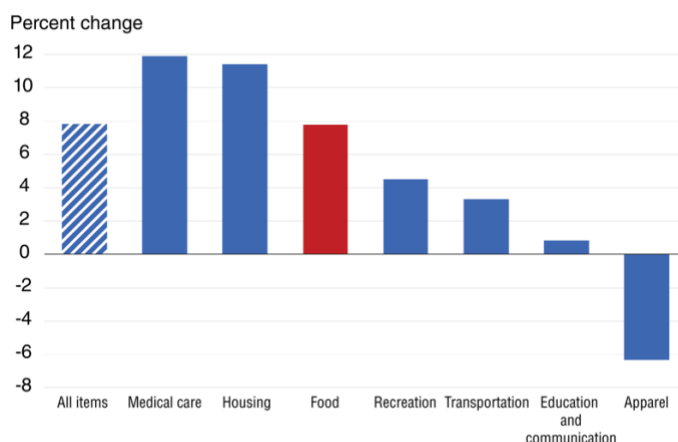
A. The questionable basis of the claims of unique price distortions in the food supply chain

In the first place, it is not entirely clear where claims of dramatically increased food prices actually come from. It's not that food prices aren't up; they are. It's that food prices in general—and meat prices in particular—are not up by appreciably more than overall consumer prices. This is important because it suggests that explanations for food-price increases that rely on the industry-specific exercise of market power are not supported by the data.

The food-price data provided by the USDA's Economic Research Service (ERS) show food prices rising in line with overall inflation (CPI) since 2016:

⁸⁷ See, e.g., Pablo Ibanez Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, CHILLIN' COMPETITION (Apr. 24, 2019), <https://chillingcompetition.com/2019/04/24/self-preferencing-yet-another-epithet-in-need-of-limiting-principles/>.

Price change for major CPI categories, 2016–2020



CPI = Consumer Price Index.

Source: USDA, Economic Research Service using data from the U.S. Bureau of Labor Statistics.

From 2016 to 2020, the all-food CPI rose 7.8 percent—the same as the all-items CPI. Food price increases were below the 11.9-percent rise in medical care costs and the 11.4-percent increase in housing costs. **Retail pricing strategies, efficient food supply chains, slow wage growth, and relatively low oil prices tempered food price inflation from 2016–2019; however, 2020 was a year of high food price inflation due to shifts in consumption patterns and supply chain disruptions resulting from the coronavirus pandemic.**⁸⁸

At the same time, the ERS notes that larger price increases for food consumed at home in 2020 “were primarily a result of shifts in consumption patterns and supply chain disruptions related to the coronavirus pandemic.”⁸⁹ These consumption-pattern shifts were significant:

Food-at-home spending (food purchased from supermarkets, convenience stores, warehouse club stores, supercenters, and other retailers) increased . . . in 2020, while food-away-from-home spending (food purchased from restaurants, fast-food places, schools, and other away-from-home eating places) decreased **This resulted in food-at-home spending accounting for 51.9 percent of total food expenditures, the first year it has accounted for more than half of food spending since 2008, during the Great Recession.**⁹⁰

For beef in particular, the effect of this shift on *aggregate* prices masks a variation in price effects between different beef products that further erodes claims that prices were elevated due to the exercise of market power. “The shutdown affected various beef products differently according to

⁸⁸ Economic Research Service, *Food price inflation over 2016–2020 equal to economy-wide inflation*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58350>.

⁸⁹ *Id.*

⁹⁰ Economic Research Service, *U.S. food-at-home spending surpasses food-away-from-home spending in 2020*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58364>.

their primary use,”⁹¹ initially leading to price decreases for predominantly foodservice-oriented products and increases for products primarily sold at retail.⁹²

Table 1.
Wholesale beef price changes, selected products

| | Product | IMPS* | Shut down impacts | | Reduced production impacts | |
|----|-----------------|-------|-------------------------------|-------------------------------|----------------------------|--|
| | | | % Price change 3/6/20–4/10/20 | % Price change 4/10/20–5/8/20 | | |
| 1 | Ribeye | 112A | -17.1 | | +80.9 | |
| 2 | Chuck Clod | 114A | +27.1 | | +150.7 | |
| 3 | Chuck Roll | 116A | +39.1 | | +67.9 | |
| 4 | Brisket | 120A | -15.5 | | +105.5 | |
| 5 | Inside Round | 168 | +28.4 | | +106.2 | |
| 6 | Gooseneck Round | 170 | +31.1 | | +90.6 | |
| 7 | Loin Strip | 180 | +17.8 | | +50.7 | |
| 8 | Loin Top Butt | 184 | -2.1 | | +129.0 | |
| 9 | Tenderloin | 189A | -42.0 | | +126.2 | |
| 10 | Fresh 50s | Trim | -38.9 | | +720.0 | |

Data sources: USDA AMS LM_XB 459 and LM_XB 460, compiled by the Livestock Marketing Information Center.
*Institutional Meat Purchase Specifications.

These price patterns reinforce the observation that particular prices both rose *and fell* during various stages of the pandemic in predictable response to demand shifts from government-mandated foodservice shutdowns and supply shifts from pandemic-induced labor forced reductions. “Never before have so many packing and processing plants been affected simultaneously by reductions in capacity.”⁹³

The correlation in price changes between food prices and overall consumer prices during the pandemic, the variation in price effects between cuts of beef (correlating most significantly to differential effects on foodservice versus retail distribution channels), and the dramatic, *overall* beef price increases entirely attributable to production constraints (column 2, above) should suggest extreme caution for claims that the size of current price effects are explainable by the exercise of market power.

With respect to claims of outsized meatpacker margins relative to other markets (i.e., *reduced* prices paid by meatpackers to livestock producers), it is notable that the farmer share of livestock revenue follows a similar pattern to the share of crop revenue. Overall, farm-level prices for livestock have risen considerably since 2000 (indeed, until 2014 by *more* than the farmer share of crop prices).⁹⁴

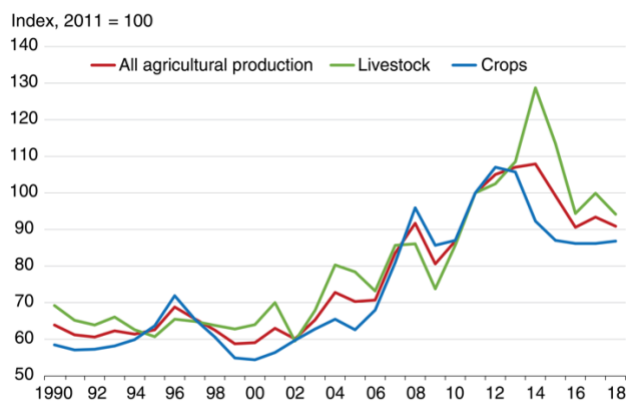
⁹¹ Derrell Peel, *Beef supply chains and the impact of the COVID-19 pandemic in the United States*, 11 ANIMAL FRONTIERS 33, 34 (Jan. 2021).

⁹² *Id.* at 34 & 36, Table 1.

⁹³ *Id.* at 35.

⁹⁴ Economic Research Service, *Farm-level prices have declined from recent highs*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58360>.

U.S. prices received by farmers, 1990-2018



Source: USDA, Economic Research Service using data from USDA, National Agricultural Statistics Service, *Agricultural Prices*.

According to the ERS, more recent declines (again, seen across agricultural sectors, not just livestock) are attributable to production increases in response to higher prices: “Prices for both crops and livestock have fallen since 2014, however, as U.S. and global markets responded to higher prices by increasing production.”⁹⁵

Moreover, as discussed in greater detail below,⁹⁶ it must be noted that the use of farmer-share statistics and marketing margins to measure changes in welfare across levels of the supply chain is simply not reliable.

[S]ome have argued that decreases in FS [farmer share] statistics (and, by construction, increases in farm-to-retail marketing margins) are indicators of anti-competitive behavior in the food processing industry. Agricultural economists have long noted that such relationships cannot be justified on theoretic grounds. . . .

. . . We have empirically demonstrated that FS statistics and, by construction, farm-to-retail marketing margins, are not reliable measures of changes in producer surplus (welfare) given exogenous shocks to various economic factors. . . . Consequently, these data should not be used for policy purposes.⁹⁷

At the same time, to the extent that farmer-share statistics permit any reasonable inferences, a decline in farm share corresponds to long-term trends toward greater consumption of processed food. “[A]s consumers choose foods that have been further processed and prepared, more of the dollar goes to the people that add the additional value in the form of preparedness, packaging, convenience, etc., that consumers value.”⁹⁸ And while advocates focus myopically on the effect on the farmer share, the consequence of this shift has been a reduction in food-dollar share for *virtually every segment of the food industry*. Food processing firms—including *meatpackers*—have also seen their

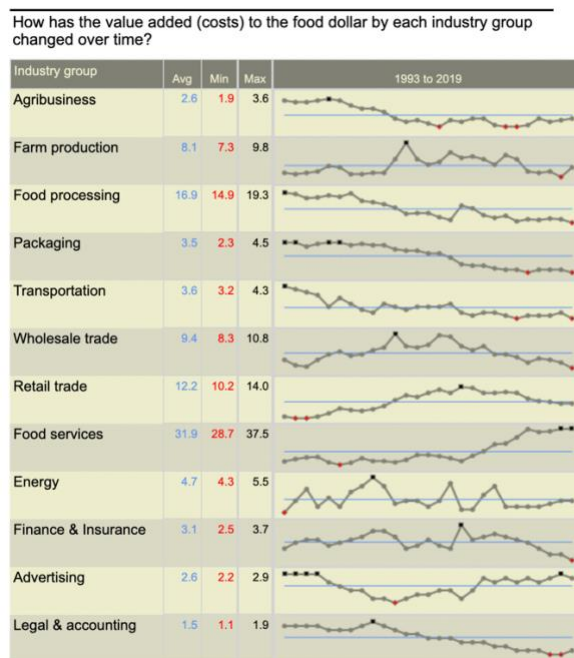
⁹⁵ *Id.*

⁹⁶ See *infra*, Section V.B.4 (discussing issues with inferring producer surplus from food dollar share numbers for cattle/beef).

⁹⁷ Gary W. Brester, John M. Marsh, and Joseph A. Atwood, *Evaluating the Farmer’s Share-of-the-Retail-Dollar Statistic*, 34 J. AG. & RESOURCE ECON. 213, 213-14 & 232 (2009) (emphasis added).

⁹⁸ Michael Sykuta, *Why Sen. Warren is Wrong on Trust-busting Big Ag*, MICHAEL SYKUTA BLOG (Apr. 3, 2019), <https://michaelsykuta.com/2019/04/why-sen-warren-is-wrong-on-trust-busting-in-ag/>.

share decline, and for many industry segments the relative decline has been greater than the farmer-share decline.⁹⁹



In fact, only retailers and foodservice providers have seen any appreciable increase in food-dollar share, precisely because that is where “more of value-adding convenience and food preparation are being contributed.”¹⁰⁰

B. The extremely questionable claims of the exercise of inordinate market power in the meatpacking industry

Like every other facet of the economy, the provision of meat for consumers is impressively complex. Facile explanations for variations in the industry, particularly during unprecedented and disruptive times, are dangerous and wrong.

I. The phantom relationship between concentration and market power in the fed cattle slaughter (beef packing) industry in particular

Claims of harmful effects arising from excessive concentration in the meatpacking industry are long-standing.¹⁰¹ There is little doubt that the industry is relatively concentrated. But it simply

⁹⁹ Economic Research Service, *Food Dollar Series*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ers.usda.gov/data-products/food-dollar-series/> (NB: The farm share in this data is the combination of the Agribusiness and Farm production segments’ shares).

¹⁰⁰ Sykuta, *supra* note 98.

¹⁰¹ See, e.g., Clement E. Ward, *Economics of Competition in the U.S. Livestock Industry* (Jan. 2010), presentation at DOJ Ag Workshop on Livestock (Panel 1), Aug. 27, 2010, at 7, available at <https://www.justice.gov/atr/events/public-workshops-agriculture-and-antitrust-enforcement-issues-our-21st-century-economy-10/ag-workshops-livestock-industry-agenda> (“Producers and competitors have been concerned about concentration and competition for many years, but to date there has apparently been insufficient evidence presented in court to rule in favor of those concerns.”).

cannot be assumed from the fact of concentration that there are deleterious effects, and it certainly cannot be inferred that long-standing concentration has caused recent consumer price increases (or decreases in farmer profits). As we've known since the structure-conduct-performance (SCP) paradigm was debunked in the 1970s, harmful effects cannot be inferred from high market concentration.¹⁰² Rather, high concentration is just as commonly correlated with efficiencies as it is monopolization.¹⁰³

While it is common to make inferences of market power based on concentration statistics, there is simply no basis in actual analysis to support such claims. A 1990 United States Government Accountability Office (GAO) study of concentration trends for various levels of the food supply chain found no support in the literature for the claimed connection between concentration and market power:

Empirical economic literature has not established that concentration in the processing segment of the beef, pork, or dairy sectors or in the retail sector overall has adversely affected commodity or food prices. . . . **Most of [the 33 reviewed studies] found either no evidence of market power, or efficiency effects that were larger than the market power effects of concentration. . . .**

. . . While several studies we reviewed found evidence of market power, primarily in the retail and dairy sectors, it is unclear whether concentration affected this market power. Even though concentration is one potential source of market power, other sources could also affect market power, depending on the particular characteristics of the industry. **Therefore, the evidence of market power does not, by itself, mean that concentration is the source of that market power.**¹⁰⁴

Not only is there no evidence for claims that concentration in the food supply chain (and beef packing in particular) leads to market power, there is strong evidence that scale efficiencies (the primary source of concentration in these markets) outweigh any negative market-power effects. Indeed, **“most economic research confirms that the benefits to cattle producers due to economies of size in packing largely offset the costs associated with any market power exerted by packers. Research indicates that there is market power, but its effect has been small.”**¹⁰⁵ “Largely offset” may be understatement, as “[r]esearch shows that small but significant **negative price impacts of market power are outweighed by several magnitudes in cost efficiencies that benefit producers and consumers.**¹⁰⁶

One study looking at the relationship between concentration and margins found that the usual suppositions are incomplete—and directionally entirely wrong.

¹⁰² See *supra* Section III.

¹⁰³ See Demsetz, *supra* note 36; Demsetz, *supra* note 37.

¹⁰⁴ GAO, *U.S. Agriculture: Retail Food Prices Grew Faster Than the Prices Farmers Received for Agricultural Commodities, but Economic Research Has Not Established That Concentration Has Affected These Trends*, GAO-09-746R Concentration in Agriculture (Jun. 30, 2009), at 27-28 (emphasis added).

¹⁰⁵ Bart L. Fischer and Joe L. Outlaw, *Introduction*, in *THE U.S. BEEF SUPPLY CHAIN: ISSUES AND CHALLENGES* (Bart L. Fischer, et al. eds., 2021), at x (emphasis added).

¹⁰⁶ Derrell S. Peel, *How We Got Here: A Historical Perspective on Cattle and Beef Markets*, in *ID.*, at 1, 30 (emphasis added).

Azzam and Schroeter (1995) address the tradeoffs in efficiency gains and oligopsony losses. . . . Overall they found that when consolidation leads to economies of size efficiencies and increased oligopsony pricing behavior, **even modest efficiency gains offset the oligopsony or welfare losses. They estimated that cost savings of 2.4% or less would offset anti-competitive effects from a 50% increase in beef-packing concentration.** Their estimate of actual cost savings was 4%. Thus, **they conclude structural changes have been welfare enhancing in the beef-packing industry.**¹⁰⁷

Other studies investigating aspects of these relationships have found similar results:

- Schroeter, Azzam, and Zhang (2000) “**conclude the data best fit a model of oligopsony behavior by retailers. They found that meatpackers were price-takers with little or no evidence of oligopoly behavior.**”¹⁰⁸
- Paul (2001) “**confirmed significant economies of size In addition, she found little evidence of price-depressing, oligopsonistic effects for fed cattle.** Her findings are consistent with previous research on tradeoffs between cost efficiency gains and oligopsony losses.”¹⁰⁹
- Sexton (2000) “concludes that market power estimates in meatpacking (i.e., the focus of much of the conjectural variation literature) are modest and **structural changes on balance are probably beneficial from an efficiency viewpoint.**”¹¹⁰
- Overall, “[p]rice distortions of 3% or less were found in most studies. These fall well short of regulatory agency standards related to merger impacts and non-competitive behavior, i.e. often assuming a 5% price impact rule.”¹¹¹

And yet, undeterred critics of private enterprise continue to ignore the evidence, assume a causal relationship between concentration and price, and advocate for policies based on aesthetic preferences (e.g., a preference for smaller, mom-and-pop stores) that may well be self-defeating.¹¹²

Remarkably, these critics are even quick to blame high concentration for the recent, substantial spikes in food prices. As one commentator asserts, citing Matt Stoller, “[t]hanks to lax antitrust enforcement, four companies now control 55 to 85 percent of the markets for beef, pork,

¹⁰⁷ Ward, *supra* note 101, at 21 (emphasis added).

¹⁰⁸ *Id.* at 22 (emphasis added).

¹⁰⁹ *Id.* at 22-23 (emphasis added).

¹¹⁰ *Id.* at 24 (emphasis added).

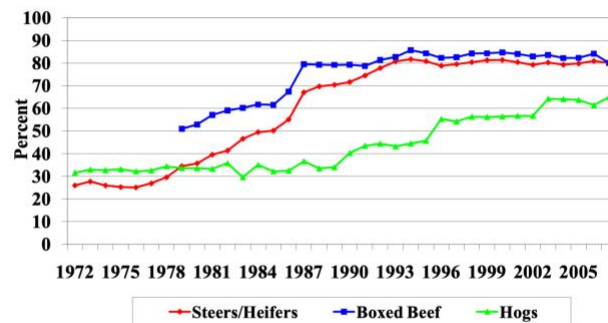
¹¹¹ *Id.* at 25 (emphasis added). The author does note that even small price distortions “may make a substantial difference to livestock producers and rival meatpacking firms operating at the margin of remaining viable or being forced to exit an industry.” *Id.* But that can cut either way, of course, as the process may more effectively weed out inefficient firms (improving overall industry conditions) or may reduce competition by removing relatively inefficient, but otherwise-still-viable competitors (harming overall industry conditions).

¹¹² On this last point, see John M. Crespi, Tina L. Saitone and Richard J. Sexton, *Competition in U.S. Farm Product Markets: Do Long-Run Incentives Trump Short-Run Market Power?*, 34 APPLIED ECON. PERSP. & POL’Y 669, 671 (2012) (“Further, policy proposals grounded in the presumed linkage between concentration, competition, and market power may well be misguided and detrimental to the objectives that proponents seek to advance.”).

and poultry. Since the fall of 2020, the price of beef has risen by more than 20 percent, far higher than the inflation rate.”¹¹³

Even accepting for a moment that the claim of concentration due to lax antitrust enforcement is correct, there is a huge problem with the assertion that it explains a 20% rise in the price of beef since 2020: *For increased concentration to explain increased prices there has to actually be an increase in concentration.* Yet there has been virtually no change in the amount of concentration in the fed cattle slaughter (beef packing) industry over the last quarter century. The most significant concentration increases in meatpacking occurred in the 1980s and 1990s, although it is a consistent trend over a longer period:¹¹⁴

Figure 1. National four-firm concentration in steer and heifer slaughtering, boxed beef production, and hog slaughtering, 1972-2007



Source: GIPSA, USDA

Today the numbers are little changed, and the most recent four-firm concentration ratio calculated by the USDA for beef packing is 85 (essentially unchanged since it reached 82 in 1994).

It is a wonder how concentration ratios established in the 1990s can account for unprecedented price spikes over the last year. And yet the Biden administration recently claimed exactly that, rejecting the possibility that current supply shocks could explain recent increases (and not even considering the particular market characteristics discussed below¹¹⁵), and asserting instead that “dominant meat processing companies are taking advantage of market power to raise prices and grow profit margins”:

Some claim that meat processors are forced to raise prices to the level they are now because of increasing input costs (e.g., things like the cost of labor or transportation). . . . If rising input costs were driving rising meat prices, those profit margins would be roughly flat, because higher prices would be offset by the higher costs. **Instead, we’re seeing the dominant meat processors use their market power to extract bigger and bigger profit margins for**

¹¹³ Paul Glastris, *Pretending Monopoly Has Nothing to Do with Inflation*, WASHINGTON MONTHLY (Jan. 12, 2022), <https://washingtonmonthly.com/2022/01/12/pretending-monopoly-has-nothing-to-do-with-inflation/>.

¹¹⁴ Ward, *supra* note 101, at 2, Figure 1.

¹¹⁵ See *infra*, Section V.B.2.

themselves. Businesses that face meaningful competition can't do that, because they would lose business to a competitor that did not hike its margins.¹¹⁶

As discussed below, the administration's conclusion is unsupported.¹¹⁷

2. *The infinitely better efficiency explanations of concentration in the fed cattle slaughter (beef packing) industry in particular*

Important is the understanding of the causes of concentration, which seems undeniable, but far from inherently pernicious.

To begin with, as is common throughout the food supply chain, meatpacking is a margin business.

[M]eatpacking firms search for ways to control costs per unit of output as a means of controlling net margins. As a result, one of the driving forces in meatpacking is the need to be a low-cost slaughterer and processor. And one way to achieve lower costs per unit is to operate larger, more efficient plants at near-capacity levels of utilization. The 1980s saw consolidation of packers and plant closings and reopening to control labor costs¹¹⁸

Studies confirm that “firms operate larger beef-packing and pork-packing plants in order to be competitive. The consistent finding of economies of size is quite robust across a variety of approaches.”¹¹⁹

But this is precisely why superficial concentration numbers cannot be used to infer harmful effects. The competitive dynamic that leads to larger plants in this environment is an inexorable drive toward greater efficiency, the most obvious consequence of which is . . . greater efficiency.

Economies of size lead to dynamic structural changes. When a firm expands a plant . . . , [it] experiences lower per-head operating costs. . . . Plants losing slaughter volume to the larger plant experience higher costs per unit because their plant utilization decreases. **The result over time is that smaller plants experience higher costs and less profit, go out of business, and concentration in meatpacking increases. . . . Smaller plants exit at higher rates than larger plants, due to smaller plants being less cost competitive. . . .**¹²⁰

¹¹⁶ Brian Deese, Sameera Fazili, and Bharat Ramamurti, *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, WHITE HOUSE BLOG (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/> (emphasis added). Notably, the White House bases its claims on gross margin numbers

¹¹⁷ Importantly, the reasoning from gross margin data in this context is particularly specious. See Jayson L. Lusk, Glynn T. Tonsor, and Lee L. Schulz, *Beef and Pork Marketing Margins and Price Spreads during COVID-19*, 43 APPLIED ECON. PERSP. & POL'Y 4, 14-15 (2021) (“The price spread does not provide any direct indication of whether observed price changes are cost-justified (Mathews et al. 1999). Going further, aggregate marketing margins do not separately measure costs or profits for any one type of firm or industry group. Brester, Marsh, and Atwood (2009) empirically demonstrate that marketing margins are not reliable measures of changes in producer surplus, given exogenous shocks to various economic factors.”). This defect is explored at length *infra*, Section V.B.4.

¹¹⁸ Ward, *supra* note 101, at 4.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.*

Of course, this doesn't inherently mean that *firm size* increases or greater industry concentration must follow. Yet there are similar explanations for that observed data as well. Most notably, economies of scope can lead to consolidation, and studies have found evidence that larger and more diversified plants have greater technological economies than smaller plants.¹²¹ Scope economies may also enable multi-plant firms to operate more efficiently than single-plant firms by spreading overhead and administrative costs across several plants, alleviating pressures related to food-safety (by diversifying the risk of a food-safety shutdown), and reducing marketing costs and improving access to wholesale and retail customers (by enabling multi-species (e.g., beef and pork) contracting).¹²² These findings are supported by literature showing a preponderance of synergistic mergers in meatpacking, in which acquired firms are very productive pre-merger and even more productive post-merger.¹²³

Further characteristics of the beef supply chain, in particular—precisely the sort of industry dynamics that are ignored by SCP inferences—support efficiency explanations for increased consolidation. “[T]he logical inference made from such observations, namely that lack of competition is associated with buyer market power, may well be incorrect in modern markets where exchange is governed by stable contractual relationships among buyers and farmers.¹²⁴

In particular, the increasing vertical coordination in the industry (the use of long-term supply contracts is commonly cited as one of the mechanisms of abuse) is readily explained by the economic literature:

Because these scale-related efficiency gains are based upon achieving consistent and optimal levels of throughput, packers must ensure a steady supply of live animals to their plants. The efficient way to achieve this goal is likely to involve substantial vertical coordination, known in the industry as “captive supplies,” so that attaining sufficient throughput essential to a plant’s profitable operation (and with the characteristics desired by the processor) is not left to the vagaries of spot-market competition.¹²⁵

Given the dynamics of the industry, the exercise of short-run oligopsonistic power would be self-defeating.

Consistent suppression of farm prices in this manner will cause long-run returns to investment in production of the commodity to fall below the so-called “normal” or competitive level, thus causing resources to exit the industry. If downstream buyers have extensive investments in assets that are committed to the specific industry (in the sense that they cannot be used for other products) and geographic location (in the sense that they cannot be moved), it is very likely not in the long-run interests of buyers for resources to exit production of the farm

¹²¹ See, e.g., Catherine J. Morrison Paul, *Market and Cost Structure in the U.S. Beef Packing Industry: A Plant-Level Analysis*, 83 AM. J. AG. ECON. 64 (2001).

¹²² Ward, *supra* note 101, at 6.

¹²³ Sang V. Nguyen and Michael Ollinger, *Mergers and Acquisitions and Productivity in the U.S. Meat Products Industries: Evidence from the Micro Data*, 88 AM. J. AG. ECON. 606 (2006).

¹²⁴ Crespi, et al., *supra* note 112, at 671.

¹²⁵ *Id.* at 682.

commodity in this setting because their exit will jeopardize returns on the buyers' own investments, which rely upon a secure, stable, and readily accessible supply of farm product.¹²⁶

What is crucial to glean from this is that the nature of the relationship between levels of the supply chain can exert important constraints on anticompetitive behavior; it isn't just the number of horizontal competitors that has this effect, as the literature debunking SCP has been showing for decades. Indeed, one implication of the meatpacking industry analysis above is that the same dynamics that have led to the market's concentrated structure arguably ensure that the exercise of buyer power is *inversely* related to the level of buyer concentration.

3. *The unheeded lessons from the COVID-19 pandemics' effects on the beef packing market*

Recent studies looking directly at the effects of COVID-19 on the meatpacking industry and the plausibility of market power explanations further reinforce that that the concentration-driven market power story holds little water—and show it directly with respect to recent price increases.

One study, which looks at market conditions before and during the pandemic, finds results that the authors argue can only be rationalized by a competitive market structure:

[T]he ratio of cattle and boxed beef price coefficients is remarkably close to the biologically driven dressing percentage. . . . There is nothing in a simple regression that forces this relative price impact estimate, rather this reflects the inner workings of cattle-buying and wholesale beef-selling markets that are revealed here to be strongly in line with base biology of dressing yield percentage (which varies over time). **On balance, the more competitive markets are in an industry, the more economists would anticipate similar findings. Conversely, if there was undue market power or forces at play in either the fed cattle or wholesale beef market it seems very unlikely this regression finding would persist.**¹²⁷

Notably, that study also strongly refutes the Biden administration's claims that beef packer margins during the pandemic have been outsized ("Their profit margins—the amount of money they are making over and above their costs—have skyrocketed since the pandemic. Gross margins are up 50% and net margins are up over 300%"¹²⁸), let alone that they were caused by the unique ability to exercise market power afforded by the crisis. Instead the study finds that, while margins increased for the period studied, they increased by considerably *less* than they would have based on models derived from pre-COVID data. In other words, whatever the extent of market power held by beef packers, the margins they earned in 2020 during the pandemic were not even attributable to the exercise of "customary" market power, let alone *exceptional* market power enabled by the crisis.¹²⁹

¹²⁶ *Id.* at 683.

¹²⁷ Lusk, et al., *supra* note 117, at 8 (2021).

¹²⁸ Deese, et al., *supra* note 116.

¹²⁹ Lusk, et al., *supra* note 117, at 18-19 ("The key point is yes, the marketing margin widened notably, but this was predictable and consistent with economic theory. The fact that the actual margin change was about 50% less than the [amount] projected by [the net margin model], using pre-COVID-19 data, is noteworthy.").

Another study aimed directly at the question whether oligopoly/oligopsony models explain recent price effects finds that market power is not explanatory. Instead, the most obvious cause—increased processing costs—is the most likely:

We cannot reject the hypothesis of competitive beef price spreads during the COVID-19 disruption based on our results. . . . In light of the current level of concentration in the U.S. beef packing industry, it stands to reason to claim that the dramatic increase in the farm-to-wholesale price spread during COVID-19-driven disruptions to cattle slaughter is due to concentration-driven market power. **The econometric evidence in our study does not (statistically) support such a claim. That leaves a rise in processing costs as the most likely driver of the increase in the beef price spread during COVID-19 plant shutdowns and slowdowns.**¹³⁰

Of course, none of this should be surprising. Given the longstanding persistence of concentration in the meatpacking industry, if concentration conferred market power, meatpackers could have capitalized on that by reducing capacity prior to the unexpected arrival of an exogenous shock like the pandemic. That they did not do so—and that they did not do so even during the pandemic when processing costs were significantly higher—suggests they operate in (or *believe* they operate in. . .) a competitive market in which revenue is maximized by operating near capacity, not by constraining output to artificially increase their margins.

Finally, despite the claims of excess profitability based on unweighted and time-period-constrained margin numbers, casual analysis of stock-market data shows no such outsized returns. “On balance, **changes in the stock prices of companies with significant packing operations do not suggest substantial windfalls corresponding with COVID-19 driven developments, and indeed the performance of publicly traded packing companies has lagged that of the overall market since the first of the year.**”¹³¹

The bottom-line assessment most consistent with the evidence is not that of the White House and others claiming that today’s elevated food prices (and depressed producer profits) are the consequence of anticompetitive market actors. Rather, “[p]erhaps **market developments are rational responses to massive shocks from a common enemy to society, COVID-19.**”¹³²

4. *The misuse of cattle-to-beef price disparities and the farmer share to draw unsupported conclusions about beef packers’ market power*

Among the many aspects of the beef industry pointed to to support the claim that meatpackers exercise excessive market power is the disparity between the (high) price of packaged beef purchased by consumers at retail (and prepared beef purchased from foodservice providers) today and the (low) price of cattle. Unfortunately, measures of the farmer share and marketing margins (which are the difference between farmer share and wholesale prices) are poor measures of producer surplus.

¹³⁰ Azzeddine Azzam and Sunil Dhoubhadel, *COVID-19, Beef Price Spreads, and Market Power*, J. AG. & RESOURCE ECON.: PREPRINT (2021), at 8, available at <https://jareonline.org/preprint-online/>.

¹³¹ Lusk, et al., *supra* note 117, at 20.

¹³² *Id.*

“Agricultural economists have long noted that such relationships cannot be justified on theoretic grounds.”¹³³ Even decades ago one group of economists disparaged the farmer’s share as “the most frequently quoted, but misused, number published by the USDA. There is a tendency to use the number to indicate the ‘well-being’ of farmers or to indicate that marketing costs are ‘too high.’ In fact, the farmer’s share statistic has little to say about either problem.”¹³⁴ “The widespread misuse of FS [farmer’s share] statistics is curious given that economic theory provides no support for their use as a proxy for producer welfare.”¹³⁵ Historical data show the absence of correlation between farmer’s share and producer surplus. “[B]etween 1913 and 2006, the FS statistics for all U.S. agricultural commodities and for meat products have trended downward. . . . [O]ver this same time period, [however,] real per farm net income has trended upward. Thus, FS statistics may not always be positively correlated with producer surplus, and consequently may not be reasonable indicators of producer well-being.”¹³⁶

Among other things, the nature of the relationship between exogenous shocks and the distribution of profits within the supply chain is such that “an increase in the cost of labor increases the marketing margin and reduces both the [farmer share] statistic and producer surplus.”¹³⁷ At the same time, “an increase in consumer demand increases the marketing margin, reduces the FS statistic, but increases producer surplus.”¹³⁸

One straightforward issue is that, as retail beef prices increase because of higher per capita income (demand shock), because the entirety of the increase isn’t passed on to producers, the farmer’s share declines, although producers in aggregate are better off than they would be without the retail price increase.¹³⁹

None of this is to say that concentration can’t be correlated with distributional concerns, and the same research finds that “a 10% increase in beef packing concentration reduces both cattle producer surplus and the FS statistic.”¹⁴⁰ But it also finds that “[a] 10% increase in wages in meat processing plants decreases both hog producer surplus and the FS statistic.”¹⁴¹ When we know (as we do right now) that there is a labor crunch and wages are probably increasing, and that there is no recent increase in concentration, it is not difficult to imagine which might be having a current effect on the farmer’s share, retail prices, and the like.

But the really crucial thing is the overall effect of each:

[I]ncreases in beef packing concentration (holding other variables constant) cause reductions in both cattle producer surplus and FS statistics. However, beef packing concentration could

¹³³ Brester, et al, *supra* note 97, at 214.

¹³⁴ WILLIAM G. TOMEK AND HARRY M. KAISER, *AGRICULTURAL PRODUCT PRICES* (1972) at 115-16.

¹³⁵ Brester, et al, *supra* note 97, at 214.

¹³⁶ *Id.* at 215.

¹³⁷ *Id.* at 216.

¹³⁸ *Id.*

¹³⁹ *See id.* at 228-29.

¹⁴⁰ *Id.* at 229.

¹⁴¹ *Id.*

have cost-saving benefits that are not captured by our structural model. For example, **it is possible to find joint realizations (six in total) where increases in beef packing concentration increase producer surplus while the FS statistic declines. Increases in meat processing plant wages clearly reduce both [] producer surplus and the FS statistic[, however].**¹⁴²

Thus, meatpacking plant wage increases unequivocally reduce both farmer share *and* producer surplus, while concentration increases have an ambiguous effect on actual surplus, even though they decrease the farmer share. The upshot is that looking at farmer share simply doesn't indicate the overall effect we should be concerned with. No doubt certain farmers, under certain conditions, are harmed, and we should adopt the appropriate policy response to such effects. But what simply cannot be said is that a decrease in farmer share (or marketing margins which are their counterpart) is evidence of a structural problem or anticompetitive conduct meriting intervention.

Meanwhile, the actual fundamentals that determine relative distribution of revenue between producers and processors exhibit trends that appear to support competitive explanations for the current disparity.

No doubt a multitude of causes, many of them unseen, contribute to the current disparity. But of perhaps greatest importance—and completely undermining the White House claim that the two should move in tandem—are the labor, transportation, and other constraints on packers that “effectively cleaved beef product markets from cattle markets for several weeks” near the beginning of the pandemic.¹⁴³ During that period, “[t]he lack of packing capacity created beef shortages that led to immediate and dramatic price spikes for beef products while that same lack of packing capacity created an immediate excess supply of fed cattle relative to packer demand and led to lower fed cattle prices.”¹⁴⁴ As the author notes, far from being unexplainable by competitive market forces, “the market reactions at all levels were exactly what is expected and helped support a remarkably rapid recovery in beef product markets.”¹⁴⁵ Beyond the initial shock, the effects of the disruption were much longer-lasting,¹⁴⁶ and subsequent waves of the pandemic, combined with shifting government responses, have repeated the same dynamic over and over again during the pandemic.

One key element contributing to the current disparity—conveniently overlooked by critics—is the combination of recent drought in several key cattle-producing parts of the country, which saw many producers liquidating their herds, with ongoing constraints in the middle of the supply chain due to labor shortages, transportation issues, and other fallout from the COVID-19 crisis, as well as newly surging, strong demand by consumers. Once the bottleneck in-between is better alleviated, the glut of cattle from the drought-induced liquidation should help prices fall. But in the meantime, we

¹⁴² *Id.*

¹⁴³ Peel, *supra* note 91, at 36. See also Economic Research Service, *COVID-19-related labor force absences in beef packing facilities significantly impact record pace of beef production*, USDA.GOV (last visited Jan. 16, 2022), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=983336>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 37 (“Reduced cattle slaughter in April and May resulted in a large backlog of fed cattle that took many weeks over the summer and fall to work through. No cattle were depopulated and delayed feedlot marketings resulted in excess supplies of fed cattle that pushed fed cattle price lower into July before recovering into the fall.”).

have high beef prices and low cattle prices. It isn't really that difficult to work out, and it doesn't obviously have any relationship to monopolization by meat packers.

There is a serious risk, however, that the drought effects will persist, possibly further depressing prices received by cattle ranchers:

With dry conditions persisting since 2020 in some regions, many beef cattle operations have already made significant adjustments and will have very little flexibility if the current drought extends into 2022. This could result in another severe round of cow liquidation in the first half of next year. **A decade ago, severe drought caused the unplanned liquidation of some two million beef cows and affected cattle markets for several years, arguably up to the current time. It is possible it could happen again.**¹⁴⁷

It is worth noting that the continuing progress of the market in this regard is surely a better explanation of recent, minor price declines than some advocates' unsubstantiated claims that the Biden administration willed it to be so.¹⁴⁸

Among other things (notably, shifting consumer consumption patterns) that can explain the changing relative shares of the food dollar among beef producers and processors are supply shocks. The history of the beef industry is replete with these shocks, and the ensuing market dynamics have resulted in consistent swings in relative prices.

"From 2010 to 2015, the total number of commercial cattle slaughtered fell by more than 16%."¹⁴⁹ At the time, there was too much packing capacity relative to the number of cattle. Cattle producers received elevated returns and cattle processing profits decreased. In response, and as expected, the total packing capacity fell, partly due to some smaller firms exiting the market, and partly due to realignment by larger firms to reflect the then-current economic conditions.

This was followed by a predictable response, and producers began expanding their herds to capture the benefits of higher prices. "By 2019, total commercial cattle slaughter had increased 16.7% relative to the 2015 low."¹⁵⁰ Meatpackers, having adjusted to a smaller herd size, were faced with a large number of cattle relative to processing capacity. This, in turn, put downward pressure on cattle prices.

Then came a catastrophic fire at one of the country's largest packing facilities in Holcomb, Kansas,¹⁵¹ COVID-19-induced demand changes, severe drought, and severe labor shortages arising

¹⁴⁷ Derrell Peel, *Drought Impacts in 2021, 2022 and Beyond*, OKLAHOMA FARM REPORT (Dec. 6, 2021) http://www.oklahomafarmreport.com/wire/news/2021/12/00149_CowCalfCorner12062021_111544.php.

¹⁴⁸ See *supra* note 64 and accompanying text.

¹⁴⁹ See Testimony of Jayson L. Lusk, Ph.D., on the issue of "State of the Beef Supply Chain: Shocks, Recovery, and Rebuilding," before the U.S. House Committee on Agriculture Subcommittee on Livestock and Foreign Agriculture (Jul. 28, 2021) at 1, available at <http://jaysonlusk.com/blog/2021/7/27/testimony-before-the-us-house-of-representatives>.

¹⁵⁰ *Id.*

¹⁵¹ Michael Nepveux, *Impacts of the Packing Plant Fire in Kansas*, Farm Bureau Market Intel (Sep. 10, 2019), <https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas>. An investigation and report by the USDA found that the effects of the fire on prices and profit margins followed what would be expected given basic supply and demand economics. There is no public information yet on whether margins were exacerbated by manipulation by meat packers, as

from COVID-19 and government’s response to it. “If these unexpected events had occurred in 2014 or 2015, the impacts on producers would have been much different.”¹⁵²

Although hardly dispositive, a quick glance at producer prices for slaughter cattle reflects these cycles. Interestingly, it also shows a steady increase in producer prices since July of 2020:¹⁵³



It’s true that there have been allegations of collusion in the industry in the past, and some settled cases that may or may not indicate some truth to the allegations. But the industry is closely monitored, its basic structure hasn’t changed in any meaningful way in decades, and it’s not clear what about current conditions might be enabling renewed collusion or other exercise of market power.

C. The absurdity of calls to break up grocery stores

What about grocery stores? There’s a long history of antitrust involvement in grocery stores, and none of it is good.

Senator Elizabeth Warren said we should bring action against grocery stores, calling out the Kroger Co., in particular.¹⁵⁴ She then Tweeted that Kroger should be broken up: “What happens when only a handful of giant grocery store chains like @Kroger dominate an industry? They can force high food prices onto Americans while raking in record profits. We need to strengthen our antitrust laws to break up giant corporations and lower prices.”¹⁵⁵

some have claimed. See USDA AGRICULTURAL MARKETING SERVICE, BOXED BEEF & FED CATTLE PRICE SPREAD INVESTIGATION REPORT (JUL. 22, 2020), available at <https://www.ams.usda.gov/reports/boxed-beef-and-fed-cattle-price-spread-investigation-report>.

¹⁵² Lusk, *supra* note 149, at 1.

¹⁵³ U.S. Bureau of Labor Statistics, Producer Price Index by Commodity: Farm Products: Slaughter Cattle [WPU0131], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/WPU0131>, January 17, 2022.

¹⁵⁴ Interview with Elizabeth Warren, STEPHANIE RUHLE REPORTS, MSNBC (Jan. 5, 2022) available at https://archive.org/details/MSNBCW_20220105_140000_Stephanie_Ruhle_Reports/start/2520/end/2580 (“The other [tool] is antitrust law to say break these giants up and let them get out there and compete in an open market. ... Think of the example right now, for example, with grocery stores. Remember how many grocery stores there used to be? And now what? You’ve got is a handful of giant chains, and then what happens? Kroger, their profits just in the third quarter of 2021 were almost \$900 million. That was more than three times what their profits were in the same time period in 2019.”).

¹⁵⁵ Elizabeth Warren (@SenWarren), Twitter (Jan. 7, 2022, 6:49 AM), <https://twitter.com/SenWarren/status/1479465304795324422>.

While 2020 saw an increase in grocery net margins—approaching 3.0%— in 2021 the margins moved closer to their long-run average of around 1.25%.¹⁵⁶ The Wall Street Journal reports in the third quarter of 2021, Kroger’s operating margin of 1.9% lagged behind peers such as Albertsons, Ahold Delhaize, Sprouts Farmers Market, and Walmart.¹⁵⁷

Although Kroger claims to be the largest grocery chain in the country, it accounts for only a small share of the market. Complicating the measurement of market share is the fact that Walmart and Amazon—which some do not consider “grocery” retailers—each had grocery sales in 2020 that exceeded Kroger’s.¹⁵⁸ Target—also not considered a “grocery” retailer by some—had grocery sales in 2020 that would place it within a top 10 list.¹⁵⁹ Any antitrust scrutiny of supermarkets or grocery stores must begin with a common understanding of what relevant market is being investigated.

U.S. antitrust regulators have a history of narrowly defining relevant markets, often to the point of absurdity. The Federal Trade Commission (FTC) famously declared that Whole Foods and Wild Oats operated in the “premium natural and organic supermarkets market,” a definition that appeared designed to exclude other supermarkets that carry premium natural and organic foods, such as Walmart and Kroger.¹⁶⁰ Similarly, for the Staples/Office Depot merger, the FTC narrowly defined the relevant market as “office superstore” chains, which excluded general merchandisers such as Walmart, K-Mart, and Target that, at the time, accounted for 80% of office-supply sales.¹⁶¹ There is a real risk that any investigation undertaken by this administration will undertake a similar “slicing and dicing” of market definitions to achieve pre-determined conclusions.

More importantly, the current focus on a short-term increase in grocery prices obscures some of the long-run improvements for consumers that have occurred over the years, if not decades. Consumers have seen a steep increase in the number of products available to them. From 1990 to 2020 the number of items stocked in grocery stores nearly doubled from 16,500 to 31,119.¹⁶² From 1995 to 2020, the average store size grew by 30%.¹⁶³ As retailers consolidated and vertically integrated, stores expanded to include deli, meat, seafood counters and in-store bakeries as well as in-store pharmacies, gasoline pump stations, ready-to-go meals and snacks, general merchandise

¹⁵⁶ CSIMarket, Inc., *Grocery store industry profitability* (various quarters) available at https://csimarket.com/Industry/industry_Profitability_Ratios.php?ind=1305, retrieved Jan. 18, 2022. See also, FMI, *Grocery store chains net profit* (2022) available at <https://www.fmi.org/our-research/supermarket-facts/grocery-store-chains-net-profit>.

¹⁵⁷ Jinjoo Lee, *Kroger’s modest margins could become a strength*, WALL STREET JOURNAL (Dec. 2, 2021), available at <https://www.wsj.com/articles/krogers-modest-margins-could-become-a-strength-11638473147>.

¹⁵⁸ FoodIndustry.com, *A list of the top ten grocery chains in the United States, updated for 2020* (n.d.), available at <https://www.foodindustry.com/articles/a-list-of-the-top-ten-grocery-chains-in-the-united-states/>, retrieved Jan. 18, 2022.

¹⁵⁹ Gina Acosta, *Target’s flair for food*, PROGRESSIVE GROCER (Oct. 12, 2021), available at <https://progressivegrocer.com/targets-flair-food>.

¹⁶⁰ See Geoffrey Manne, *Premium natural and organic bulls**t*, TRUTH ON THE MARKET (Jun. 6, 2007), available at <https://truthonthemarket.com/2007/06/06/premium-natural-and-organic-bullst/>.

¹⁶¹ W. Kip Viscusi, Joseph E. Harrington, Jr. and David E. M. Sappington, *ECONOMICS OF REGULATION AND ANTITRUST*, MIT Press, 2005 at 214-215.

¹⁶² Leonard I. Nakamura, *The measurement of retail output and the retail revolution*, Federal Reserve Bank of Philadelphia, Working Paper No. 97-4 (May 1997), available at <https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/1997/wp97-4.pdf>; FMI, *Supermarket facts* (various years), available at <https://www.fmi.org/our-research/supermarket-facts>.

¹⁶³ FMI, *Supermarket facts* (various years), available at <https://www.fmi.org/our-research/supermarket-facts>.

centers, and florist kiosks.¹⁶⁴ Despite the nostalgia for the days of the neighborhood grocer, the one-stop-shopping convenience afforded to today's shoppers has improved consumer welfare in ways that are virtually impossible to quantify.

No one calling for a break-up any grocery chain has articulated in what way consumers would be better off. On the one hand, advocates argue that increased competition for consumers will lead to lower prices. All other things being held constant, that may be the case. But, on the other hand, advocates also claim break-ups will reduce retailers' bargaining power vis-à-vis wholesalers and other suppliers. This is argued with the understanding that retailers would then pay higher prices to those suppliers—higher prices that will be passed on to consumers. Advocates overlook the fact that consolidation came hand-in-hand with vertical integration and economies of scale. Nearly every large grocery retailer has a vertically integrated logistics operation that streamlines its supply chain and reduces its costs of getting goods to market. Breaking up these firms into smaller companies may yield firms of insufficient scale to take advantage of such vertical integration.

At the same time, even the low national market-share statistics may not accurately capture the extent of competition and the role of vertical relationships in constraining potential abuses.¹⁶⁵ “The U.S. population is also large enough and diverse enough in terms of preferences that we do not have a simple national food supply system. Food distribution systems are regional and are often relationship-based. There are national chains, but most of the largest grocers and distributors are regionally managed.”¹⁶⁶ While some have alleged that buyer power enjoyed by large, national chains is a cause of problems, in many food markets, in particular, where food distribution is often regional or local, this claim is harder to sustain. If groceries have buyer power, that would lead to a decrease in their wholesale costs—a decrease that would be impossible to enjoy by maintaining prices on the sales side if competition forces groceries to pass those cost reductions on to consumers. And there are few (if any) who argue that local competition on the consumer side isn't strong.

It is already well known that grocery retailers operate on relatively small profit margins. If breaking up the largest chains further erodes margins, investors may be unwilling to invest in the industry. If there is a shortfall of capital flowing into the industry, the newly smaller firms may not have the resources to invest in new stores, new services, or capital improvements. Again, despite the nostalgia for days of Mr. Whipple, most Americans seem to prefer the modern world of supercenters.

As you investigate food supply and the role of grocery chains, it is imperative that you clearly identify what the relevant market is, which firms operate in that relevant market, and what anticompetitive conduct is being alleged. Today, we have no clear answers on any of these issues. More importantly, if you decide to go down the road of breaking up major grocery chains, you need clear answers regarding in what way will consumers—your constituents—be better off. There is no clear answer that they will. Right now, all we have is speculation that more firms and smaller firms

¹⁶⁴ Jenny Rudd, *Checking out productivity in grocery stores*, 8 PRODUCTIVITY 1 (Dec. 2019), available at <https://www.bls.gov/opub/btn/volume-8/checking-out-productivity-in-grocery-stores.htm>.

¹⁶⁵ This disconnect between national data and actual, local competitive conditions is a general problem, as discussed *supra*, Section III.

¹⁶⁶ Stephen R. Koontz, *Economic Reasons for What was Observed in Fed Cattle and Beef Markets During the Spring of 2020*, North American Meat Institute White Paper (May 28, 2020) at 4, available at <http://www.themarketworks.org/sites/default/files/uploads/studies/Economic-Reasons-Koontz.pdf>.

will lead to lower prices. But it is more likely that any interventions will lead to a myriad of unanticipated consequences that will make consumers, workers, and suppliers demonstrably worse off.

Certainly some businesses fared better than others during the pandemic. But excoriating the small, short-term bright spots during an otherwise difficult time is absurd. Meanwhile, historical profit margins in the relevant businesses are in line with what we see today.¹⁶⁷ The average profit margin in grocery retailing is 1.1%. The average margin in food processing is 8.4%; food wholesalers 6.9%. What's more, the pattern of successes and failures during the pandemic is exactly what you would expect in the face of the demand and supply shocks it led to. There's no need to look at false correlations to find a culprit. Indeed, there's no culprit at all, other than the virus and the disruptions that followed.

Many of those disruptions were the consequences of or exacerbated by government policies, both in place pre-pandemic and imposed during the pandemic. An increase in or expansion of antitrust enforcement would exacerbate the problems still further.

¹⁶⁷ See Margins by Sector (US), https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/margin.html.