January 17, 2022

S. Brett Offutt
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USDA, AMS, FTPP
1400 Independence Ave., SW
Washington, DC 20250-3601

Re: **Comment by Farm Action on the Agricultural Marketing Service's Proposed Rule concerning Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, RIN 0581-AE05**

Submitted via regulations.gov

Dear Mr. Offutt,

Farm Action is a farmer-led advocacy organization dedicated to building a food and agriculture system that works for everyday people instead of a handful of powerful corporations. Our network includes farmers, ranchers, rural community leaders, food system workers, and policymakers across the country. We submit this comment in response to the Agriculture Marketing Service's ("AMS") October 3, 2022 notice of proposed rulemaking and request for public comments regarding inclusive competition and market integrity under the Packers and Stockyards Act ("P&S Act").[1]

Farm Action broadly and generally supports the revisions to existing P&S Act regulations proposed by AMS's Notice (collectively, the "Proposed Rule"). The Proposed Rule would go a long way toward providing greater clarity to regulated entities about their obligations under the P&S Act — and greater clarity to other market participants about the scope of the protections afforded to them against unfair and deceptive practices. We write below to raise particular points of emphasis, offer additional suggestions, respond to questions AMS raised, and provide supplemental research for the record to AMS that we hope will be helpful as AMS works to finalize this proposal.

Section I of this comment addresses AMS's proposals concerning protections for market-vulnerable individuals. It argues that such protections are consistent with the agency's statutory authority, calls on AMS to more specifically prohibit discrimination based on protected

[1] 87 Fed. Reg. 60,010.

class status, and suggests refinements and further development of AMS's procedures to identify other market vulnerable groups. *Section II* addresses AMS's proposals to limit retaliatory conduct, and suggests further clarification of the burden of proof for complainants to allow for fulsome protections in the marketplace. *Section III* addresses AMS's proposals concerning deceptive conduct, and encourages AMS both to ensure that the protections of the P&S Act apply broadly and to identify specific practices that foster deception and abuse in the marketplace. *Section IV* briefly encourages AMS to be explicit about the role of private litigation in vindicating the P&S Act's goals, and to clarify the benefits of meritorious litigation for the purposes of the agency's cost-benefit analysis.

I. Farm Action supports AMS's efforts to clarify the P&S Act's prohibition on discrimination based on market-vulnerable or protected-class status

Farm Action strongly supports AMS's proposal to clarify the duty of packers, swine contractors, and poultry integrators to ensure full and non-discriminatory market access to covered producers, but urges AMS to supplement the provisions of the proposed § 201.304 to ensure that its protections are enforceable.

The proposed § 201.304(a)(1) — which prohibits prejudice, disadvantage, or the denial or reduction of market access by regulated entities against covered producers based on their status as "market vulnerable" producers[2] — would give producers an important tool to address evolving barriers to inclusive market access as they arise over time. In doing so, it vindicates both the plain meaning of the P&S Act's text and its legislative purpose to prevent unfair competition and unfair trade practices in the livestock supply chain. For these reasons, we believe the prohibition on discrimination against market-vulnerable individuals should not only be retained, but strengthened, in the final rulemaking.

Our primary concern with respect to the proposed § 201.304 is that it may impose a difficult burden of proof on covered producers who seek its protection. As currently written, § 201.304 would require a producer alleging discrimination based on their status as a member of a historically marginalized group (*e.g.*, a racial minority) to nonetheless demonstrate that their group is MVI-qualified — that is, a group whose members have historically been subjected to, or are at a heightened risk of, adverse treatment because of their identity as members of the group without regard to their individual qualities. Furthermore, AMS's explanation of MVI status in its Notice suggests that producers — whether alleging discrimination based on their protected-class status or otherwise — would have to demonstrate market vulnerability "in relevant markets." If these provisions are interpreted to require producers to plead and prove, in each case, both a relevant product-geographic market and their MVI status within that market, the burden of proof on producers will likely be substantial. In fact, it will be comparable to the burden of proof under the status quo's anticompetitive-harm requirement, which also requires producers to define

[2] "Market vulnerable individual" ("MVI") would be defined as "a person who is a member, or who a regulated entity perceives to be a member, of a group whose members have been subjected to, or are at heightened risk of, adverse treatment because of their identity as a member or perceived member of the group without regard to their individual qualities. A market vulnerable individual includes a company or organization where one or more of the principal owners, executives, or members would otherwise be a market vulnerable individual." 87 Fed. Reg. at 60,054.

markets and assess the agency of actors within them — the only difference being that producers will have to show their own market *vulnerability* instead of the defendant's market *power*.

We anticipate that fewer cases would succeed under the proposed § 201.304 than needed to fully vindicate the P&S Act's protections if this burden of proof is not altered. Accordingly, we suggest that AMS modify the proposed rule in three ways. *First*, we urge AMS to clarify that the P&S Act directly prohibits discrimination based on protected-class status. This approach would be consistent with the P&S Act's text and purpose; concurrently, it would be substantially more efficacious than alternative methods of reducing the burden of proof in protected-class discrimination claims. *Second*, we suggest that AMS identify covered producers subject to monopsony or near-monopsony power in their local livestock markets as MVI-qualified producers. At a minimum, this category should include producers whose geographic location makes them dependent on only one or two regulated entities for access to livestock distribution channels. *Finally*, we recommend that AMS promulgate procedures for demonstrating MVI status and claims of discrimination that clarify the applicable standards of proof and establish prudent burden-shifting frameworks.

Collectively, we believe these modifications would ensure that the unlawful prejudices, disadvantages, and discriminations targeted by the Proposed Rule are consistently challenged, penalized, and deterred.

Section I.A explains the legal and factual basis for prohibiting discrimination under the P&S Act against market-vulnerable individuals and individuals based on protected-class status. Section I.B reviews AMS's legal authority to act in this area. Section I.C encourages further refinements to AMS's proposal to provide consistent and necessary protections to producers at risk of discriminatory treatment.

A. The text, structure, and legislative history of the P&S Act show that it prohibits discrimination based on market-vulnerable status and protected-class status

The P&S Act plainly bans all forms of discrimination based on a producer's market vulnerability or protected classification for a simple reason — that all such discrimination subjects producers to differential treatment on an "unjust," "undue," and "unreasonable" basis. As AMS's interpretation of the key phrases in Section 202, 7 U.S.C. § 192 ("unjustly discriminatory" and "undue or unreasonable prejudice or disadvantage") cogently shows, at a minimum, these provisions prohibit all actions by regulated entities that adversely differentiate between producers without a legitimate basis.[3] Where an appropriate justification is absent, discriminating against a producer based on their race, gender, or other protected classification — or on their vulnerability to abuse in the marketplace — is precisely the kind of differentiation prohibited by the Act.

[3] *See* 87 Fed. Reg. at 60,015-16.

1. Discrimination based on protected-class or market-vulnerable status constitutes "unjust," "undue," and "unreasonable" differential treatment within the plain meaning of Sections 202(a) and 202(b) of the P&S Act

The courts have long recognized that discrimination against persons based on a "suspect" or "quasi-suspect" classification — including race, color, national origin, religion, sex, sexual orientation, gender identity,[4] marital status, or family status — is "essentially unjust" and "objectively unreasonable."[5] These classifications are "suspect" because, as the Supreme Court has often repeated, they distinguish between persons based on characteristics that bear no "relation to [a person's] ability to perform or contribute to society."[6] As a result, a person's

[4] Although the Supreme Court has not decided whether sexual orientation or gender identity constitute a suspect or quasi-suspect classification, it has held that discriminating against an individual for being lesbian, gay, transgender, or queer is discrimination on the basis of sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."). Sex, of course, is a quasi-suspect classification. *See United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). Additionally, the Supreme Court has held that classifications based on sexual orientation lack a rational basis. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

[5] *See, e.g.*, *Mitchell v. United States*, 313 U.S. 80, 94-95 (1941) (finding that "denial of equality of accommodations [to train passenger] because of his race" was, "in view of the nature of the right and of our constitutional policy," an "essentially unjust" discrimination within the meaning of the Interstate Commerce Act); *Nguyen v. La. State Bd. of Cosmetology*, 236 F. Supp. 3d 947, 959 (M.D. La. 2017) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)) ("It is objectively unreasonable to apply and administer a facially neutral law or ordinance 'exclusively against a particular class of persons.'"). *See also United States v. Windsor*, 570 U.S. 744, 811 (2013) (Alito, J., dissenting) (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) ("Underlying our equal protection jurisprudence is the central notion that '[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' The modern tiers of scrutiny [strict scrutiny for suspect, intermediate scrutiny quasi-suspect, and rational-basis scrutiny for non-suspect classifications] are a heuristic to help judges determine when classifications have that 'fair and substantial relation to the object of the legislation.'").

[6] *Hecox v. Little*, 479 F. Supp. 3d 930, 973 n. 29 (D. Idaho 2020) ("[T]he Supreme Court employs a four-factor test to determine whether a class qualifies as suspect or quasi-suspect: (1) when the class has been historically subjected to discrimination; (2) has a defining characteristic bearing no relation to ability to perform or contribute to society; (3) has obvious, immutable, or distinguishing characteristics; and (4) is a minority or is politically powerless.") (internal quotation markets and citations omitted). *Accord, e.g.*, Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) ("The Supreme Court uses certain factors to decide whether a new classification qualifies as a quasi-suspect class. They include: A) whether the class has been historically subjected to discrimination; B) whether the class has a defining characteristics that frequently bears [no] relation to ability to perform or contribute to society; C) whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and D) whether the class is a minority or political powerless. Immutability and lack of political power are not strictly necessary factors to identify a suspect class.") (internal citations omitted), aff'd, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

protected-class status is "seldom relevant to the achievement of any legitimate . . . interest," and "generally provides no sensible ground for differential treatment."[7]

Even when dealing with distinctions between persons that are based on non-suspect characteristics, the Supreme Court has found discrimination that is not justified by "individual variations in capacity" — or by other "relevant" characteristics — to be "arbitrary" and "irrational."[8] A distinction is "reasonable," the Court has emphasized, only if it "rest[s] upon some ground of difference having a fair and substantial relation" to a legitimate, nondiscriminatory interest.[9] Moreover, where the "natural operation and effect" of a discrimination is to "stigmatize" or "oppress" a "powerless segment of society," the Court has found discrimination to be "palpably unjust."[10]

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[7] *See City of Cleburne v. Cleburne Living Ctr, Inc.*, 473 U.S. 432, 440 (1985) (explaining that a suspect classification is "so seldom relevant to the achievement of any legitimate state interest" and that a quasi-suspect classification "generally provide[s] no sensible ground for differential treatment").

[8] *See Cleburne*, 473 U.S. at 446-47 ("To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. . . . The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *id.* at 468 (Marshall J., concurring in part and dissenting in part) (explaining that, "[p]ermissible distinctions between persons must bear a reasonable relationship to their *relevant* characteristics" under the equal protection clause, and must not use classifications "as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.") (emphasis in original).

[9] *See Reed* v. *Reed*, 404 U.S. 71, 76 (1971) (quoting *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)) ("[Under the Fourteenth Amendment,] [a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

[10] *See Holden v. Hardy*, 169 U.S. 366, 398 (1898) ("The question in each case [under the equal protection clause of the Fourteenth Amendment] is whether the legislature adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."); *Truax v. Raich*, 239 U.S. 33, 40-41 (1915) (citing *Henderson v. New York*, 92 U.S. 259, 268 (1875) and *Bailey v. Alabama*, 219 U.S. 219, 244 (1911)) ("The purpose of an act must be found in its natural operation and effect"); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, J., concurring in part and dissenting in part) ("[R]acial classifications that stigmatize — because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism — are invalid without more"); *Id.* at 327 ("[R]ace has too often been used by those who would stigmatize and oppress minorities"); *Id.* at 360 ("[R]ace, like gender-based classifications too often [have] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society."); *Mitchell v. United States*, 313 U.S. at 94-95 (describing discrimination based on race as "essentially" and "palpably unjust"); *Henderson v. United States*, 339 U.S. 816, 825 (1950) ("We need not multiply instances in which these rules [subjecting Black passengers to discrimination in railroad's dining car facilities] sanction unreasonable discrimination. The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility.") (Emphasis added).

These decisions by the Supreme Court reflect not only our "constitutional policy" that "all persons similarly situated should be treated alike," but also our traditions as a "free people whose institutions are founded upon the doctrine of equality."[11] There is no indication that Congress intended for these common public values to be ignored in the interpretation of the words "unjust," "unreasonable," and "undue" in Section 202 of the P&S Act. To the contrary, Congress directly invoked these values in the text of the Act. At the time of the P&S Act's enactment, the "fundamental rule" of the Court's equal-protection jurisprudence was that "no essentially *unjust or arbitrary discriminations* of a substantial nature shall be made between persons (including corporations) who are in a similar situation or condition with reference to the regulation and its practical consequences."[12] This constitutional principle was clearly echoed in the provisions of the P&S Act — and before the Act, in the provisions of the Interstate Commerce Act — prohibiting unjust discrimination and undue or unreasonable prejudices and disadvantages. Where a statutory term is "obviously transplanted from another legal source" in

[11] *See Mitchell*, 313 U.S. at 94-95 ("The denial to [a train passenger] of equality of accommodation because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment, and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination . . . was not essentially unjust."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) ("[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Cleburne*, 473 U.S. at 439 (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

[12] *See* 14 Fletcher Cyc. L. Corps. § 6716 (2022). *See also, e.g.*, *Holden v. Hardy*, 169 U.S. 366, 383 (1898) (describing the "two classes" of state action prohibited by the equal protection clause to include cases "where [state actors] have unjustly discriminated in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community"); *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (overruled by *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954)) (describing "unjust discrimination" in violation of the equal protection clause of the Fourteenth Amendment to include "exercise[s] of the police power" that are either "[un]reasonable" or "enacted . . . for the annoyance or oppression of a particular class"); *Yick Wo*, 118 U.S. at 373-74 (holding that "unequal and unjust discrimination in [the] administration" of a law that was "fair on its face" constituted a "denial of equal justice . . . within the prohibition of the [Fourteenth Amendment]"); *San Bernardino Cnty. v. S. Pac. R. Co.*, 118 U.S. 417, 422-23 (1886) (Field, J., concurring) (urging that state corporate tax levy should have been held invalid for making "an unlawful and unjust discrimination between the property of the defendant and the property of individuals, to its disadvantage," and "to that extent depriv[ed] it of the equal protection of the laws guarant[e]ed by the fourteenth amendment"); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) ("The fourteenth amendment, in declaring that no state 'shall . . . deny to any person . . . the equal protection of the laws' undoubtedly intended [*inter alia*] that no greater burdens should be laid upon one than are laid upon others in the same calling and condition"); *C.R. Cases*, 109 U.S. 3, 25 (1883) (holding that the equal-protection clause of the Fourteenth Amendment prohibited "laws [which] themselves make any unjust discrimination"); *In re State Freight Tax*, 82 U.S. 232, 263 (1872) (explaining that a Pennsylvania tax law would violate the equal-protection clause if it created an "unjust discrimination" between residents and non-residents).

this way, "it brings its soil with it."[13] And, indeed, the Supreme Court has already held as much while interpreting the analogous language of the Interstate Commerce Act. The "fundamental right of equality of treatment," the Court held in *Mitchell* (1941), was "specifically safeguarded" by the exact "provisions of the [Interstate Commerce] Act" that are paralleled in the P&S Act.[14]

The broad reach of Sections 202(a) and (b) is further confirmed when those sections are read in context in the statutory scheme — because their breadth contrasts notably with the more tailored scope of the following Sections 202(c) through 202(f).[15] While those latter sections target particular business practices with anticompetitive market impacts (*e.g.*, that have the purpose or effect of restraining commerce or creating a monopoly), Sections 202(a) and 202(b), by their plain terms, reach "*any* unfair, unjustly discriminatory, or deceptive practice or device" and "*any* undue or unreasonable prejudice or disadvantage *in any respect*." The exclusion of such broad language — and particularly the phrase "in any respect," which is unique to Section 202(b) — from all other parts of Section 202 is strong evidence that Congress "acted intentionally and purposely" to give the provisions of paragraphs (a) and (b) a more expansive meaning.[16]

Against this backdrop, the text of Sections 202(a) and 202(b) outlawing unjustified or illegitimate differential treatment must be interpreted to encompass discrimination against covered producers based on their protected-class status or their status as members of groups that are powerless to resist — *i.e.*, are vulnerable to — market abuse. Indeed, in light of our "constitutional policies" and our "traditions as a free people," it would strain credulity to suggest that adverse differential treatment based on these group classifications is anything *but* unjust, undue, and unreasonable.

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[13] *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)). *See also Morissette v. United States*, 342 U.S. 246, 263 (1952) (noting that, in borrowing terms from jurisprudence, Congress is presumed to "know[] and adopt[] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

[14] *See Henderson v. United States*, 339 U.S. 816, 825 (1950) (quoting *Mitchell*, 313 U.S. at 97 ("The comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment [to particular passengers], a right *specifically safeguarded by the provisions of the Interstate Commerce Act* [prohibiting common carriers from subjecting 'any particular person . . . to any unjust discrimination or any unjust or unreasonable prejudice or disadvantage']") (emphasis added).

[15] *See Yates v. United States*, 574 U.S. 528, 543 (2015) (statutory language must be read in context). It is, of course, a basic principle of statutory interpretation that "differences in language … convey differences in meaning." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). And that canon applies with even greater force when applied to provisions that are parallel and enacted "in the same section of the same Act." *United States v. Granderson*, 511 U.S. 39, 63 (1988) (Kennedy, J., concurring). For a more detailed comparison of these sections of the statute, please see Letter from Farm Action, et al., to Bruce Summers, Adm'r, AMS *Re: U.S. Department of Agriculture, Proposed Rulemaking, Unfair Practices in Violation of the Packers and Stockyards Act, RIN: 0581-AE05* (April 5, 2022), attached as Attachment A.

[16] *Gozlon–Peretz v. United States*, 498 U.S. 395, 404 (1991) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

2. Interpreting Section 202 to prohibit discrimination based on protected-class and market-vulnerable status advances the legislative purposes of the P&S Act

The interpretation of the P&S Act's text proposed above — and in AMS's Notice — is supported by the P&S Act's legislative history and consistent with its statutory purpose of ensuring fair competition and fair trade practices in livestock markets. As AMS amply documented in its notice, prejudicial discrimination based on protected-class and market-vulnerable status is "a market abuse that undermines market integrity, deprives the producer of the benefit of the market, and prevents the producer from obtaining the true market value of the livestock."[17] It is also an abuse that restrains trade and inhibits competition by historically marginalized and vulnerable classes of producers — restricting their ability to enter and participate in markets in ways that reduce output and interfere with the efficient allocation of resources.[18] In these ways, discrimination based on protected-class or market-vulnerable status falls squarely within the P&S Act's recognized scope as a "market facilitating regulation."[19]

But it should also be recognized that legislators did not view "market-facilitating regulation" through a myopic economic lens when they enacted the P&S Act. As Senator Kendrick explained during the debates on the Act, the "principal cause" for Congress's concern about livestock markets was "the unequal conditions under which the man who *sells* in the stockyard and the man who *buys* face each other."[20] This inequality not only drove livestock growers to "financial ruin and disaster," the Act's proponents argued, but also threatened "the equal, inalienable rights of the producer and consumer."[21] In describing how the Act would "eliminate the[se] evils," key lawmakers said it would protect the "moral rights" of producers and consumers to participate in "fair and open" markets — and do so specifically by reaching beyond "methods of competition" to proscribe "unfair practice[s] as between the packer and the general public, *the packer and the producer*, or the packer and any other agency connected with the marketing of livestock."[22]

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[17] 87 Fed. Reg. at 60,019.

[18] 87 Fed. Reg. at 60,019-20.

[19] Peter Carstensen, *The Packers and Stockyards Act: A History of Failure to Date,* CPI Antitrust J. (April 2010) at 2 ("Congress sought to ensure that the practices of buyers and sellers in livestock (and later poultry) markets were fair, reasonable, and transparent. This goal can best be described as market facilitating regulation.").

[20] *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening,* 2004 Wis. L. Rev. 1497, 1516 (2004) (quoting 61 Cong. Rec. at S2617 (statement of Sen. Kendrick).

[21] *See* William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening,* 2004 Wis. L. Rev. 1497, 1516 (2004) (emphasis added) (quoting 61 Cong. Rec. at S2617 (statement of Sen. Kendrick); 61 Cong. Rec. at H4785 (statement of Rep. Schall) (1921)).

[22] *See id.* (quoting 61 Cong. Rec. at H4785 (statement of Rep. Schall) (1921)).

a) Congress enacted the P&S Act to ensure reasonable and equitable market access for covered producers

As scholars have catalogued and courts have recognized, the drafters of the P&S Act intended for the Act to reach broadly and address conduct not covered by prior antitrust statutes.[23] "Congress intends to exercise in the bill," the Conference Report explained, "the fullest control of packers and stockyards which the Constitution permits."[24] As the Seventh Circuit has summarized, "[t]he legislative history showed Congress understood [the P&S Act's provisions] were broader in scope than antecedent legislation such as the Sherman Antitrust Act, [Section] 2 of the Clayton Act, [Section] 5 of the Federal Trade Commission Act, and [Section] 3 of the Interstate Commerce Act."[25]

In passing the P&S Act, Congress was concerned with both harm to competition broadly and market abuses that harmed covered producers individually.[26] For example, the House Committee on Agriculture report on the P&S Act stated that "the bill should be broad enough to secure proper control of the packer in all his dealings," citing not only "a general course of action for the purpose of destroying competition," but also "isolated instances of unfairness."[27]

The P&S Act sought to solve the "biggest problem" confronting Congress, "to devise a plan by which through fair marketing conditions … *the producer may receive a fair return*" without excessive increases in consumer prices by the packers.[28] Recognizing this purpose, in its first review of the Act, the Supreme Court explained that the P&S Act sought to protect the interests of vulnerable producers, stating:

> [The Act] forbids [packers] to engage in unfair, discriminatory, or deceptive practices in such commerce, or to subject any person to

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[23] Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, in Agricultural law 182, 186 (John H. Davidson ed., 1981) ("The legislative history of the [A]ct shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes."); Rosales, *supra* n. 21 at 1511 ("Congress passed the P&S Act with the clear intention that it was to be more aggressive than previous antitrust regulations--especially in light of the fact that the government had obtained a disappointing consent decree, which only theoretically restricted the Big Five from engaging in certain activity."). *See also* Letter from Farm Action *et al*., *supra* n. 15, attached as Attachment A.

[24] H.R. Rep. No. 67-324, at 3, 5–6 (1921) (Conf. Rep.).

[25] *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962).

[26] *See e.g*., *Mitchell*, 313 U.S. at 94; Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. 91, 91-92 (2003); Rosales, *supra* n. 21 at 1514.

[27] H.R. Rep. No. 66-1297 at 11 (1921).

[28] 61 Cong. Reg. at 2628 (statement of Sen. Capper) (1921).

> unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly….[29]

Although the Court observed that the "chief evil" the Act responded to was "the monopoly of the packers," it made clear that was not the sole focus of the Act. Rather, as the Court explained, Congress also targeted "another evil" — unfair trade practices such as "exorbitant charges, duplication of commissions, [and] deceptive practices in respect to prices."[30] The Court explained that the disproportionate power the consolidated packers and stockyards had relative to producers "create[d] a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner [of the livestock]."[31]

Since then, Congress has repeatedly emphasized the broad scope of the Act and its understanding of Sections 202(a) and 202(b) as prohibiting conduct that inhibits market access for individual producers. The 1935 amendments to the P&S Act, which subjected live poultry dealers to Section 202, were motivated by concern that "[t]he handling of the great volume of live poultry … is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in the producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry."[32] Similarly, in connection with 1958 amendments to the P&S Act, the House Committee Report explained:

> The primary purpose of [the P&S Act] is to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry. *The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock* and to protect consumers against unfair business practices…. *Protection is also provided to members* of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory*, and* monopolistic practices of competitors, large *or small*. …
>
> The act provides that meatpackers subject to its provisions shall not engage in practices that restrain commerce or create a monopoly…. *They are also prohibited from engaging in any unfair, deceptive, or unjustly discriminatory practice or device* in the conduct of their business.[33]

Consistent with these repeated expressions of Congress's will, after the Supreme Court's first discussion of the Act's purpose in *Stafford*, numerous federal courts of appeals recognized that the purposes of the P&S Act include both harm to competition *and* harms to individual

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[29] *Stafford v. Wallace*, 258 U.S. 495, 513 (1922).

[30] *Id.* at 514-15.

[31] *Id.*

[32] Pub. L. No. 74-272, § 501, 49 Stat. 648, 648 (1935).

[33] H.R. Rep. No. 85-1048, at 1–2 (1957) (emphasis added).

producers. For example, the Second Circuit has explained, "[a]s originally enacted in 1921, the purpose of the [P&S Act] was to combat anticompetitive *and* unfair practices in the highly concentrated meat packing industry."[34] The Ninth Circuit has echoed that the Act "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."[35] Similarly, the Seventh Circuit has explained that "[t]he Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen."[36] The Eighth Circuit has agreed: "[T]he purpose of the Act is to assure fair trade practices in the livestock marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock."[37]

3. Section 202's prohibitions cover discrimination based on protected-class or market-vulnerable status, whether or not intentional

The prohibitions of Section 202 extend not only to actions that are intentionally discriminatory, but also to actions that have a disparate impact on covered producers based on their protected-class or market-vulnerable status. In prohibiting regulated entities from subjecting covered producers to prejudice, disadvantage, or discrimination based on their protected-class or market-vulnerable status, Section 202 bans *all forms* of such discrimination. As the Tenth Circuit recognized in 2005: "Nothing in the language of § [202(a)] of the P&S Act . . . requires a showing of wrongful intent. To the contrary, the focus is *solely* on the acts committed or omitted."[38] More to the point, the text of Sections 202(a) and 202(b) — as well as the structure of Section 202 as a whole — makes plain that they prohibit regulated entities from taking actions in livestock markets that have either the purpose *or* the effect of causing an "unjust discrimination" or imposing an "undue or unreasonable prejudice or disadvantage on any particular person or locality."

To begin with Section 202(a), it is notable that this provision does not prohibit regulated entities from *discriminating*; it prohibits regulated entities from "engaging in" any "practice" or "us[ing]" any "device" that is "unjustly discriminatory." When used as an adjective, the word

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[34] *United States v. Perdue Farms, Inc.*, 680 F.2d 277, 280 (2d Cir. 1982) (emphasis added).

[35] *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1455 (9th Cir. 1988). *Accord Beef Neb., Inc. v. United States*, 807 F.2d 712, 718 (8th Cir. 1986) (noting that "the legislative history of § 228(b) [of the P&S Act] is rife with expressions of concern regarding the dangers caused by packers paying for livestock with checks drawn on remote banks"); *United States v. Agriprocessors, Inc.*, No. 08-CR-1324-LRR, 2009 WL 2255728, at *10 (N.D. Iowa July 27, 2009) ("Congress recognized a need to protect the immediate financial interests of livestock producers by, among other things, ensuring that they are paid promptly based on accurate animal weights.") (internal citations and quotations omitted).

[36] *Swift & Co. v. United States,* 393 F.2d 247, 253 (7th Cir. 1968).

[37] *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agric.,* 438 F.2d 1332, 1337 (8th Cir. 1971). *Accord Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717, 718 (10th Cir. 1977) ("One purpose of the Act was to make sure that farmers and ranchers received true market value for their livestock and to protect consumers from unfair practices in the marketing of meat products.").

[38] *See Excel Corp. v. U.S. Dep't of Agric.*, 397 F.3d 1285, 1294 (10th Cir. 2005) (emphasis added).

discriminatory describes an object that "applies or favors discrimination in treatment."[39] As such, a practice or device can be "discriminatory" based on the effect it "applies," or the preference it "favors," or both — but no specific motivation is necessarily implied by the word. This reading of *discriminatory* is confirmed by the fact that a regulated entity violates Section 202(a) by "engaging in" or "using" a proscribed practice or device. To *engage in* an activity is simply "to do" that activity.[40] To *use* a thing is simply "to put [that thing] into action or service."[41] Neither verb implies any willfulness on the part of regulated entities beyond the general intent to perform a "practice" or deploy a "device" in regulated livestock markets. Indeed, even those two terms — *practice* and *device* — eschew any requirement of culpability, encompassing any "actual performance or application"[42] and any "plan, procedure, [or] technique,"[43] respectively.

The text of Section 202(b) — which prohibits regulated entities from "subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect" — is even more emphatic in this vein. The verb *to subject* means "to cause or force [someone] to undergo or endure (something unpleasant, inconvenient or trying)."[44] In Section 202(b), that "something unpleasant" that regulated entities are banned from *either* intentionally forcing *or* simply causing "any particular person or locality" to endure is a "prejudice" or a "disadvantage." As AMS's analysis of this text shows, both of these terms refer purely to an injury to be suffered — being placed "in a more unfavorable position," in the case of prejudice; mere "loss or damage," in the case of disadvantage — and neither implies a culpable state of mind.[45] Finally, the statute proscribes these harms when they are *either* unreasonable *or* undue; in other words, it expressly stretches the range of cognizable harms from those which lack a rational basis to those which are merely excessive or disproportionate.[46]

This intent-avoiding language in Sections 202(a) and 202(b) contrasts sharply with the seemingly intent-embracing language of Sections 202(d) and (e). In those latter provisions,

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[39] *Discriminatory*, Merriam-Webster, https://www.merriam-webster.com/dictionary/discriminatory (last visited Jan. 13, 2023).

[40] *Engage In*, Merriam-Webster, https://www.merriam-webster.com/dictionary/engage%20in (last visited Jan. 13, 2023).

[41] *Use*, Merriam-Webster, https://www.merriam-webster.com/dictionary/use (last visited Jan. 13, 2023).

[42] *Practice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/practice (last visited Jan. 13, 2023).

[43] *Device*, Merriam-Webster, https://www.merriam-webster.com/dictionary/device (last visited Jan. 13, 2023).

[44] *Subject*, Merriam-Webster, https://www.merriam-webster.com/dictionary/subject (last visited Jan. 13, 2023).

[45] 87 Fed. Reg. at 60,015-16.

[46] *See Undue*, Merriam-Webster, https://www.merriam-webster.com/dictionary/undue (last visited Jan. 13, 2023); *Unreasonable*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unreasonable (last visited Jan. 13, 2023).

lawmakers prohibited regulated entities from selling, buying, or otherwise doing any act "for the purpose or with the effect" of, *inter alia*, "manipulating or controlling prices." This phrasing, courts have noted, is paradoxical.[47] On the one hand, it prohibits conduct based on its "effect." On the other hand, the "effect" it proscribes is not an injury, but a willful act: "manipulating or controlling prices."[48] No such paradox or inconsistency is present in Sections 202(a) and (b). As demonstrated above, those provisions use language that carefully avoids any implication of willfulness or culpability — evincing a "sole" focus "on the acts committed or omitted."[49] It is plain, therefore, that Sections 202(a) and 202(b) prohibit regulated entities from taking actions in livestock markets which have either the purpose or the effect of causing the proscribed results of undue prejudice or unjust discrimination.

2. Conclusion

In the last analysis, the provisions of the P&S Act were designed, in the words of Circuit Judge Gardner in *United States v. Donahue Bros.*, to "free [producers] from the fear that the channel through which [their] product passe[s]" might — "through discrimination, exploitation, overreaching, manipulation, or other unfair practices" — deprive them of "a fair return for [their] product."[50] To vindicate this central purpose, lawmakers framed a statute of unprecedented reach and made that reach unequivocal. Sections 202(a) and 202(b) make it unlawful for regulated entities "to engage in or use *any* . . . unjustly discriminatory . . . practice or device" and "to subject *any* particular person or locality to *any* undue or unreasonable prejudice or disadvantage in *any* respect." AMS should interpret the Act to do no less.

The repeated use of "any" in the statute should dispel the notion that applying the plain meaning of the operative terms to ban protected-class and market-vulnerable discrimination would be "absurd" or contrary to legislative intent.[51] As the Supreme Court has repeatedly stated,

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[47] *See* S*chumacher v. Cargill Meat Sols. Corp.*, 515 F.3d 867, 871-72 (8th Cir. 2008).

[48] *See id.* at 871-72.

[49] *See Excel Corp*, 397 F.3d at 1294 (rejecting defendant's argument that violation of § 202(a) required a showing of "wrongful intent" by stating: "Nothing in the language of § 192(a) of the P&S Act . . . requires a showing of wrongful intent. To the contrary, the focus is *solely* on the acts committed or omitted.").

[50] 59 F.2d at 1023.

[51] Formally, a provision's plain meaning leads to "absurd results" if it produces results that "no reasonable person could intend," ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 235-239 (2012) (Section 37 on the Absurdity Doctrine); *see also Sebelius v. Cloer*, 569 U.S. 369, 381 (2013); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring), or, at a minimum, if it produces results that "are demonstrably at odds with the intentions of [the provision's] drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). We note, however, that in in recent decades the Supreme Court has endorsed progressively narrower interpretations of this doctrine. On the one hand, it has made clear that the absurdity doctrine does not permit the courts to "soften the import of Congress' chosen words" simply because "the words lead to a harsh outcome," *Lamie v. U.S. Tr.*, 540 U.S. 526, 528 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."), much less because they lead to outcomes that are merely "anomalous," "odd,"

the natural reading of the word "any" is categorical — meaning "one or some indiscriminately of whatever kind."[52] As such, the use of "any" as a modifier without more restrictive language "le[aves] no basis in the text for limiting the phrase" it modifies.[53] when Congress uses such unambiguously broad provisions, "whether a specific application was anticipated by Congress is irrelevant."[54] For the "presumed point" of such broad provisions, the Court recently emphasized, "is to produce general coverage"[55] — and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[56]

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or "counterintuitive," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). On the other hand, the Court has refused to apply the absurdity doctrine where a plain meaning's effect was flagged or anticipated by the legislative history — and even where contemporaneously-enacted provisions simply show that Congress was "thinking about" the implications embedded in the statutory text. *See Exxon*, 545 at 571 ("This is not a case where one can plausibly say that concerned legislators might not have realized the possible effect of the text they were adopting. Certainly, any competent legislative aide who studied the matter would have flagged this issue if it were a matter of importance to his or her boss, especially in light of the Subcommittee Working Paper. There are any number of reasons why legislators did not spend more time arguing over [the statute], none of which are relevant to our interpretation of what the words of the statute mean."); *Demarest v. Manspeaker*, 498 U.S. 184, 188 (1991) (finding plain meaning of witness-fee provision mandating payment of witness fees to incarcerated witnesses in *habeas* trials not absurd where statutory provisions enacted around the same time explicitly denied payments to prisoners called as witnesses, which showed that "Congress was thinking about incarcerated individuals when it drafted the statute"). All in all, the Court has described the absurdity doctrine as one of last resort — "rarely" to be invoked "to overturn unambiguous legislation." *See Barnhart v. Sigmon Coal Co. Inc.*, 534 U.S. 438, 441 (2002).

[52] *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (Thomas, J.) (citations omitted) (collecting cases supporting proposition that, where Congress uses the modifier "any" without more restrictive language, it "l[eaves] no basis in the text" for limiting the scope of the phrase modified thereby).

[53] *See, e.g.*, *Ali*, 552 U.S. at 219 (holding that Federal Tort Claims Act provision, which barred claims arising from "detention of any goods . . . by any officer of customs or excise or *any* other law enforcement officer," barred claims arising from detention of goods by *all* federal officers, whether or not they enforced customs or excise laws) (emphasis added); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (similar reliance on use of "any" in interpreting use-of-firearm sentence enhancement provision); *United States v. Alvarez–Sanchez*, 511 U.S. 350, 358 (1994) (same, interpreting statute governing admissibility of confessions); *Harrison v. PPG Indus, Inc.*, 446 U.S. 578, 588-89 (1980) (same, interpreting Clean Air Act). *See also Boynton v. Va.*, 364 U.S. 454, 457 (1960) (noting that the P&S Act-analogous provisions in the Interstate Commerce Act "use[] language of the broadest type to bar discriminations of all kinds").

[54] *See Bostock v. Clayton Cnty.,* 140 S. Ct. 1731, 1751 (2020) (quoting *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998)).

[55] *See Bostock*, 140 S. Ct. at 1749 (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 101 (2012)).

[56] *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). *See also Brogan v. United States*, 522 U.S. 398, 403 (1998) (explaining that "the reach of a statute often exceeds the precise evil to be eliminated," and that, accordingly, judges may not "restrict the unqualified language of a statute to the particular evil [they believe] Congress was trying to remedy").

In modifying the Proposed Rule to directly prohibit discrimination based on a covered producer's vulnerability to market abuse or their protected classification, AMS would properly exercise its authority and "apply the broad rule" Congress prescribed.[57]

B. AMS has the authority to elucidate the meaning of Section 202 and identify practices that violate its broad prohibitions on unjustified differential treatment

4. Where Congress has left "ambiguities in statutes within an agency's jurisdiction," courts impute "delegations of authority to the agency to fill the statutory gap in reasonable fashion."[58] The text, structure, and legislative history of the P&S Act indicate that Congress intended for the U.S. Department of Agriculture ("USDA") to specify the meaning of the P&S Act's general prohibitions through litigation and rulemaking, informed by its expertise and its ability to rigorously investigate real-world markets and evolving business practices. Recognizing this delegation of authority, the courts have generally deferred to the USDA's determinations of what practices violate the P&S Act. In effect, this deferential framework gives AMS substantial flexibility — within the broad outlines of the P&S Act laid down by the courts — to decide what facts and evidence are required to demonstrate the elements of a violation of the Act. As we explain more fully below, this flexibility extends to defining the element of "anticompetitive harm" that some courts have required for claims under Section 202. More broadly, it empowers AMS to rationally structure the process for demonstrating a violation of Section 202's prohibitions on unjustified differential treatment based on a producer's market-vulnerable or protected-class status.

1. The text, structure, and legislative history of the P&S Act show that Congress intended for USDA to interpret and administer the Act

The provisions of the P&S Act expressly delegate plenary rulemaking authority[59] and broad administrative powers[60] to the USDA. In crafting this statutory scheme, Congress envisioned an agency that would "keep pace with the changes . . . in industry," accumulate experience, and educate the courts on the "methods [of] distribution and manufacture . . . of the great packers of the country."[61] Toward these ends, the role of the USDA under the P&S Act was molded after the role of the Federal Trade Commission (FTC) under the FTC Act[62] — an agency

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[57] *Cf. Bostock,* 140 S. Ct. at 1749 ("Nor is there any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.").

[58] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

[59] *See* 7 U.S.C. §228(a) ("The Secretary [of Agriculture] may make such rules, regulations, and orders as may be necessary to carry out the provisions" of the Act).

[60] *See* 7 U.S.C. §§ 193, 210, 213(b), 222(b)(2).

[61] *See* Rosales, *supra* n. 21 at 1518 (quoting 61 Cong. Rec. at H1887 (statement of Rep. Anderson)).

[62] *See* Rosales, *supra* n. 21 at 1518.

created by Congress to "maintain [legislative] control" and "guard . . . against judicial encroachment" on the definition of "unfair methods of competition."[63]

Like the FTC under the FTC Act, the USDA was vested with the jurisdiction, power, and duty to conduct quasi-judicial hearings and enforce the P&S Act against all packers, swine contractors, and stockyards which "the Secretary has reason to believe . . . has violated or is violating [the Act]."[64] The powers of the FTC to pursue enforcement investigations, order regulated entities to submit informational reports, and publish advisory opinions and industry reports were likewise "made applicable" to the USDA.[65] In one area, however, Congress deviated from the FTC mold. Where the original FTC Act was arguably silent on the FTC's authority to promulgate legislative rules defining unfair methods of competition,[66] the P&S Act was unequivocal. In Section 407 of the Act, Congress endowed the USDA with plenary authority to "make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act."[67]

Both of these statutes were passed in direct response to what lawmakers perceived to be judicial overreach. The FTC Act was motivated by the Supreme Court's decision in *Standard Oil Co. v. United States*, in which the Court announced that it would evaluate the legality of restraints of trade under the Sherman Act using an open-ended "rule of reason."[68] Legislators

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[63] *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. Penn. J. Bus. L. 645, 655-57 (2017).

[64] *See* 7 U.S.C. § 193 (administrative proceedings against packers and swine contractors); Rosales, *supra* n. 21 at 1518. *See also* 7 U.S.C. §§ 210, 213 (comparable provisions for administrative proceedings against stockyards); 7 U.S.C. § 227(b)(2) (comparable provisions for administrative proceedings against live poultry dealers for certain violations of the statute).

[65] *See* 7 U.S.C. § 222; William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497, 1518 (2004).

[66] *See* ch. 311, § 5, 38 Stat. 719 (Sept. 26, 1914) (codified in 15 U.S.C. § 45); *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 674–75 (D.C. Cir. 1973).

[67] *See* ch. 64, Title IV, § 407(a), 42 Stat. 169 (Aug. 15, 1921) (codified in 7 U.S.C. § 228(a)); ch. 64, Title II, § 203(a), 42 Stat. 161 (Aug. 15, 1921) (codified in 7 U.S.C. § 193(a)); William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 Wis. L. Rev. 1497, 1518 (2004). Lest the authority granted under Section 407 be confused to encompass only procedural rules for administrative hearings, Congress gave the USDA the authority to promulgate such rules separately in Sections 203, 307, 312, and other provisions giving the USDA adjudicative powers. *See* ch. 64, Title IV, §§ 203, 306, 307, 312 (Aug. 15, 1921) (codified in 7 U.S.C. §§ 194, 207, 208, 213).

[68] *See* Press Release, FTC, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca K. Slaughter and Commissioner Alvaro M. Bedoya On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act ("Khan Section 5 Statement"), at 1-2 (Nov. 10, 2022).

widely saw the decision as "a power grab,"[69] and feared that it handed "unchecked discretion to the judiciary"[70] to decide between "good monopolies" and "bad monopolies."[71] Similarly, the P&S Act was passed, in important part, as a response to the judicial approval of a consent decree between the Justice Department and the Big Five packers in 1921.[72] Although the consent decree was sweeping in scope, many in Congress viewed it as both unprincipled and overreaching — enabling the Big Five to deny liability on the one hand, and arrogating to the courts broad powers that not a "syllable of law anywhere" had given to them on the other.[73]

In passing the P&S Act and the FTC Act, Congress sought to reclaim authority over competition policy from the courts in two primary ways — first, by proscribing conduct using new terminology that deviated from existing jurisprudence, and second, by giving that terminology to an expert agency to apply in the first instance. In the FTC Act, Congress intentionally used the term of art "unfair methods of competition" — instead of the common-law term "unfair competition" — to reach beyond existing antitrust laws and prevent the courts from collapsing the new act into existing precedent.[74] Similarly, in the P&S Act, Congress did not "follow the precise language of any law that came before."[75] Nor did it rely exclusively on concepts from existing antitrust caselaw either. Rather, Congress borrowed sweeping utility-regulation and unfairness concepts from the Interstate Commerce Act and the FTC Act (*e.g.*, "unjust discrimination," "undue preferences or prejudices," and "unfair or deceptive practices or devices") to create a "most comprehensive measure," and reach "farther than any previous law in the regulation of private business."[76]

In these ways, Congress sought to give the USDA wide latitude to interpret and administer what legislators called the "more or less definite," yet still "flexible," rules of the P&S Act in a manner that "keep[s] pace with the progress of industry," and is entitled to judicial deference.[77] With the text of Sections 202(a) and 202(b) of the Act, Congress distinguished

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[69] *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. Penn. J. Bus. L. 645, 654-57 (2017).

[70] *See* Khan Section 5 Statement, *supra* n. 68 at 1-2; s*ee also* Neil Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the FTC Act*, 21 B.C. L. REV. 227, 229–240 (1980).

[71] S*ee* Vaheesan, *supra* n. 69 at 654-57.

[72] *See* Rosales, *supra* n. 21 at 1509.

[73] *See id.* at 1509; (quoting 61 Cong. Rec. at H1866 (statement of Rep. Voight)).

[74] *See* FTC, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 1, 3 ("FTC Section 5 Policy Statement") (2022); Khan Section 5 Statement at 1-2.

[75] *See* 87 Fed. Reg. at 60,015. *See also* H.R. Rep. No. 67–77, at 2 (1921).

[76] *See* H.R. Rep. No. 67-77, at 2.

[77] *See* Rosales, *supra* n. 21 at 1509 (quoting 61 Cong. Rec. at H1887 (statement of Rep. Anderson)). *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If Congress has

between *just* and *unjust*, *reasonable* and *unreasonable*, *due* and *undue* differential treatment — and it tasked the USDA with policing the boundary.[78] To fulfill this responsibility, Congress gave the USDA "complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith."[79] To balance these powers, Congress imposed checks to ensure the USDA would be accountable to it,[80] and that the USDA's decisions would be reviewable by federal courts of appeals.[81] In the ensuing years, Congress has conducted vigorous oversight of the USDA's administration of the P&S Act — almost always with the purpose of spurring more effective enforcement of the Act.[82] Through these provisions, the P&S

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explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

[78] *Cf. United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320 (1914) ("[F]rom the beginning the very purpose for which the [Interstate Commerce] Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether . . . preference or discrimination existed."); FTC Section 5 Policy Statement at 3 ("The key function of the FTC in applying its mandate to combat unfair methods of competition, according to Congress, would be to identify *unfair* forms of competition."); Khan Section 5 Statement at 1-2 ("With this text [of Section 5 of the FTC Act], Congress distinguished between fair and unfair methods of competition and tasked the FTC with policing the boundary.").

[79] *See* H.R. Rep. No. 67-77, at 2.

[80] The same requirements to produce reports and conduct investigations at the request of either House of Congress imposed on the FTC under Section 6 of the FTC Act, among others, were imposed on the USDA under Section 402 of the P&S Act. *See* 7 U.S.C. § 222; 15 U.S.C. §§ 46(d), 46(f), 46(h). Notably, Section 402 of the P&S Act provides that the powers and responsibilities of the FTC under the identified provisions of the FTC Act are "made applicable" to the USDA specifically "for the efficient execution of the [Act] and in order [for the USDA] to provide information for the use of Congress."

[81] *See* 7 U.S.C. § 194; 28 U.S.C. § 2342(2).

[82] *See United States v. Perdue Farms, Inc.*, 680 F.2d 277, 282–83 (2d Cir. 1982) (explaining that passage of 1958 amendments to the P&S Act was "prompted by concern that (1) the USDA had not been adequately enforcing the unfair trade provisions of the Act, including § 202" and that one version of the amending bill would have "fully stripped the USDA of its jurisdiction over unfair trade practices . . . and transferred that responsibility to the FTC"); Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 Colum. L. Rev. 1623, 1627 n.32 (1980) ("The 1958 amendments, which culminated in the present jurisdictional allocations [between the FTC and the USDA] have a tangled legislative history. In early 1957, the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary held hearings on the operation of the meatpacking industry and its effect on livestock producers and meat consumers. The Subcommittee concluded that large segments of the industry were escaping effective regulation because the Secretary had failed to adequately enforce the unfair trade practices provisions of the PSA. This realization prompted Sens. O'Mahoney of Wyoming and Watkins of Utah jointly to introduce S. 1356 to amend the PSA. The O'Mahoney-Watkins bill sought to effect a complete transfer of jurisdiction over unfair trade practices committed by packers and live poultry dealers from the Department of Agriculture to the Federal Trade Commission. . . . Meanwhile, in 1957, subcommittees of the House Judiciary and Interstate and Foreign Commerce Committees held joint hearings on bills relating to monopolistic and unfair trade practices in the meatpacking industry. Rep. Celler of New York introduced H.R. 11234 before the Interstate and Foreign Commerce Committee. This bill would have divided jurisdiction over trade practices by giving the Secretary jurisdiction over all sales

Act charged the USDA with, in effect, using its expertise and resources to vindicate the legislative will in the nation's livestock market.[83]

2. The courts have recognized Congress's delegation of legislative authority to the USDA

A large body of judicial precedent affirms the USDA's role in the P&S Act's statutory scheme. Over the years, the courts have consistently held that the USDA's determination that a practice violates the P&S Act deserves "great weight" and "deference."[84] Two reasons have been given for this deference. The first is that "the meaning of [the Act's operative terms] must be determined by the facts of each case."[85] The second is that "the responsibility for efficient regulation of market agencies and packers [under the P&S Act] lies with the Secretary of Agriculture" — who is "charged with enforcing it."[86]

Courts have long recognized that, under the P&S Act, questions regarding "the reach of the statutory words," and the "definition and prescription" of actions that fall within them, are "essentially [questions] of fact and of discretion in technical matters."[87] Moreover, courts have

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of livestock and, in designated cities, live poultry, and giving the Commission jurisdiction over trade practices in connection with sales of all products other than livestock and live poultry.") (internal citations and quotation marks omitted).

[83] *Cf. Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185 (1973) (noting that "Congress has entrusted [USDA] with the responsibility of selecting the means of achieving the statutory policy" of the P&S Act).

[84] *See, e.g.*, *Syverson v. U.S. Dep't of Agric*., 601 F.3d 793, 799–800 (8th Cir. 2010); *Excel Corp.*, 397 F.3d at 1295; *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 930 (10th Cir. 1974); *Brannan v. Stark*, 185 F.2d 871, 875 (D.C. Cir. 1950), *aff'd*, 342 U.S. 451, 72 S. Ct. 433, 96 L. Ed. 497 (1952); *Beef Neb.*, 807 F.2d at 716; *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978); *Donahue Bros.*, 59 F.2d at 1023; *Bowman v. U.S. Dep't of Agric.*, 363 F.2d 81, 84 (5th Cir. 1966); *Rowse v. Platte Valley Livestock, Inc.*, 604 F. Supp. 1463, 1466 (D. Neb. 1985); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980).

[85] *See Hays Livestock*, 398 F.2d at 930 (quoting *Capitol Packing Co. v. United States* 350 F.2d 67, 72 (10th Cir. 1965)). *See also, e.g.*, *Rowse v. Platte Valley Livestock, Inc.*, 604 F. Supp. 1463, 1466 (D. Neb. 1985).

[86] *See Hays Livestock*, 398 F.2d at 930 (quoting *Capitol Packing Co. v. United Capitol Packing Co. v. United States* 350 F.2d 67, 72 (10th Cir. 1965)); *Syverson*, 601 F.3d at 799-800 (citing *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978)) ("Great deference, however, is accorded to the [USDA's] construction of the PSA, given that [it] is charged with enforcing it."); *Aikins v. United States*, 282 F.2d 53, 57 (10th Cir. 1960) ("The responsibility for the efficient regulatory operation of matters falling within the purview of the Packers and Stockyards Act lies solely with the Secretary of Agriculture."). *See also, e.g.*, *Rowse*, 604 F. Supp. at 1466.

[87] *See McCleneghan v. Union Stock Yards Co. of Omaha*, 298 F.2d 659, 666-667, 670 (8th Cir. 1962); *Jackson v. Swift-Eckrich, Inc.*, 836 F. Supp. 1447, 1453 (W.D. Ark. 1993), aff'd, 53 F.3d 1452 (8th Cir. 1995) (finding that the *McCleneghan* court's reasoning as to the scope and deference owed to the USDA under § 307 of the P&S Act was "directly on point" and could not be "distinguish[ed]" in a case dealing with "unjust discrimination" and "undue or unreasonable prejudice or disadvantage" under § 202 of the Act). *See also, e.g.*, *Crain v. Blue Grass Stockyards Co.*, 399 F.2d 868, 874 (6th Cir. 1968) ("Questions as

observed that such questions require "the Secretary's expertise" to answer with uniformity, and are therefore "properly assessed by the Secretary in the first instance."[88] These acknowledgments of the essential "flexibility" that — as explained above — legislators intentionally embodied in the Act's provisions militate strongly in favor of judicial deference to reasonable constructions of the Act by the USDA.[89]

And courts have acted accordingly. In the few cases raising a facial challenge to the statutory validity of a formal USDA rule under the P&S Act, courts have held that "the Secretary's construction of the statute [is] entitled to great weight."[90] Even in the absence of "specific statutory authority," courts have upheld such regulations so long as the "practices at which [they] were directed violated the policy, although not the letter, of the Act."[91]

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to the reasonableness of a rule or regulation [of a stockyard under § 307 of P&S Act] should be referred to the [USDA] unless [it] has already decided a similar question or unless the rule or regulation is arbitrary and unreasonable on its face"); *Kelly v. Union Stockyards & Transit Co. of Chi.*, 190 F.2d 860 (7th Cir. 1951) (finding that "marked similarities" between P&S Act and ICA indicate that, generally, cases where a "rate, rule, or practice is attached as unreasonable or unjustly discriminatory" are likely to involve an inquiry that "is essentially one of fact and discretion in technical matters" requiring USDA's expertise); *Litvak Meat Co. v. Denver Union Stock Yard Co.*, 303 F. Supp. 715, 723 (D. Colo. 1969) ("Questions of reasonableness [under the P&S Act], at least when there is no prior decision on a similar question or the matter is not unreasonable on its face, are for the Secretary."); *Sioux City Stockyards v. United States*, 49 F.Supp. 801, 804 (N.D. Iowa 1943) ("We entertain no doubt that [conduct] within the definition and prescription of [§] 301 and 304 [of the P&S Act are] . . . clearly within the supervisory authority of the Secretary of Agriculture, with a right on his part to determine whether the action of the [stockyard] has been unjust, unreasonable, or discriminatory.").

[88] *See McCleneghan*, 298 F.2d at 666-667, 670; *Jackson v. Swift-Eckrich, Inc.*, 836 F. Supp. 1447, 1453 (W.D. Ark. 1993), aff'd, 53 F.3d 1452 (8th Cir. 1995).

[89] *See* Rosales, *supra* n. 21 ("In these ways, Congress sought to give the USDA wide latitude to interpret and administer what legislators called the "more or less definite," yet still "flexible," rules of the P&S Act in a manner that "keep[s] pace with the progress of industry . . ."") (quoting 61 Cong. Rec. at H1887 (statement of Rep. Anderson); *Chevron,* 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). *Cf. Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (upholding DOL regulation after determining, *inter alia*, that "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which . . . Congress entrusted the agency to work out").

[90] *See United States v. Wehrheim*, 332 F.2d 469, 472 (8th Cir. 1964) (citing *Am. Trucking Ass'ns. v. United States*, 344 U.S. 298 (1953) (interpreting similar language to Section 407 of the P&S Act in the Interstate Commerce Act)).

[91] *See United States v. Wehrheim*, 332 F.2d 469, 472 (8th Cir. 1964) (citing *American Trucking Ass'ns. v. United States*, 344 U.S. 298 (1953) (interpreting similar language to Section 407 of the P&S Act in the Interstate Commerce Act)). *Cf. Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 262 (2016) (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001) and *Chevron,* 467 U.S. at 843 ("[W]here a statute leaves a 'gap' or

In the many more cases dealing with a USDA decision on appeal from administrative proceedings under the Act, judicial review has been "narrowly limited."[92] Although the courts have "correct[ed] errors of law" in the USDA's decisions, they have deferred to the USDA's fact findings and applications of law as long as they have been supported by "such evidence as a reasonable mind might accept as adequate."[93] Importantly, where multiple rational inferences are possible, courts have regularly declined to "substitute [their] judgement for that of the [USDA]" with respect to which inference should be drawn from the evidence.[94]

3. USDA interpretations of the P&S Act regarding differential treatment are specifically entitled to *Chevron* deference

The USDA is entitled to *Chevron* deference with respect to violations of Section 202's prohibitions on "unjust discrimination" and "undue or unreasonable prejudices or disadvantages." The interpretation of such utility-regulation provisions of the P&S Act drawn

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is 'ambiguous,' we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.").

[92] *See Fairbank v. Hardin*, 429 F.2d 264, 266-67 (9th Cir. 1970) ("The scope of judicial review [of USDA's decision under the P&S Act] is narrowly limited to the correction of errors of law and to the examination of the sufficiency of the evidence supporting the factual conclusions.").

[93] *See Farrow v. U.S. Dep't of Agri.*, 760 F.2d 211, 213 (8th Cir. 1985) (quoting *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477 (1951)) ("The findings of the Secretary of Agriculture . . . must be sustained by this court if supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"). *See also, e.g.*, *Syverson*, 601 F.3d at 800 ("The factual findings of the [USDA's] judicial officer will be sustained if they are supported by substantial evidence. Substantial evidence is a deferential review standard, requiring only the presence of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Evidence may be substantial even when two inconsistent conclusions might have been drawn from it.") (internal citations omitted); *Vyn Wyk v. Bergland*, 570 f.2d 701, 704 (8th Cir. 1978) ("The Secretary's interpretation of the facts, to the effect that the defendant engaged in an unjust and unreasonable practice violative of § 208 [of the P&S Act], is to be accorded great deference if the factual findings are supported by substantial evidence."); *Hays Livestock*, 498 F.2d at 931 (same); *Capitol Packing Co. v. United States*, 350 F.2d 67, 72 (10th Cir. 1965) ("Under the Packers and Stockyards Act, the responsibility for efficient regulation of market agencies and packers lies with the Secretary of Agriculture and the Judicial Officer acting in his stead. The proper scope of judicial review is limited to the correction of errors of law and to examination of the sufficiency of the evidence supporting the factual conclusions."); *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451, 1454 (9th Cir. 1988) ("We must uphold the [USDA's] finding as to deception if it is supported by substantial evidence."); *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960) ("The findings and order by the [USDA] must be sustained if supported by substantial evidence on the record as a whole and if not contrary to law.").

[94] *See Lewis v. Butz*, 512 F.2d 681, 683 (8th Cir. 1975) ("This Court may not substitute its judgement for that of the [USDA] as to which of the various inferences may be drawn from the evidence."). *See also, e.g.*, *Fairbank v. Hardin*, 429 F.2d 264, 266-267 (9th Cir. 1970) ("The court must not substitute its judgment for that of the [USDA], as to which of various rational but opposed inferences should be drawn from the evidence."); *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960) ("The court is not to substitute its judgment for that the [USDA} concerning which of various rational but opposed inferences should be drawn from the evidence.").

from the Interstate Commerce Act has consistently been acknowledged as the most flexible, fact-dependent, and expertise-demanding under the Act.[95] Within the scope of these provisions, courts have noted that the USDA enjoys broad discretion to regulate the livestock supply chain to facilitate "the freedom, fairness, integrity, or stability of the market."[96] Even in cases where courts have resisted USDA applications of Section 202 to pursue antitrust causes of action, they have recognized that the P&S Act authorizes the USDA to provide "specialized regulation" for "the many-tiered packing industry," for the "unique problems arising from marketing and distributing livestock and poultry," and for the "special mischiefs and injuries inherent in [that] traffic."[97] Where the USDA has promulgated regulations within those lanes, its "authority to implement and enforce" the Act has been described as "clear," and its determinations have been reviewed with "substantial deference."[98]

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[95] *See, e.g.*, *Kelly v. Union Stockyards & Transit Co. of Chi.*, 190 F.2d 860 (7th Cir. 1951) (finding that "marked similarities" between P&S ActPSA and ICA indicate that, generally, cases where a "rate, rule, or practice is attached as unreasonable or unjustly discriminatory" are likely to involve an inquiry that "is essentially one of fact and discretion in technical matters" requiring USDA's expertise); *Crain v. Blue Grass Stockyards Co.*, 399 F.2d 868, 874 (6th Cir. 1968) ("Questions as to the reasonableness of a rule or regulation [of a stockyard under § 307 of P&S ActPSA] should be referred to the [USDA] unless [it] has already decided a similar question or unless the rule or regulation is arbitrary and unreasonable on its face").

[96] *See Sioux City Stock Yards Co. v. United States*, 49 F. Supp. 801, 806 (N.D. Iowa 1943). *Cf. Burrus v. U.S. Dep't of Agric.*, 575 F.2d 1258, 1258 (8th Cir. 1978) (per curiam) (finding that "no error of law appears and that an opinion [discussing the merits of contentions to the contrary] would be without precedential value" where USDA found parties had violated regulations under § 202 prohibiting the operation of an improperly balanced livestock scale, selling livestock at false and incorrect weights, and collecting money based on false tickets and invoices*); Denver Union Stockyard Co. v. Denver Live Stock Comm'n Co.*, 404 F.2d 1055, 1058 (10th Cir. 1968) ("The defendants assert correctly that pen assignments, use of weigh scales, and auction sales are practices, the control of which has been relegated to the Secretary.").

[97] *See, e.g.*, *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968). In *Armour*, the USDA determined that a meatpacker's "coupon program" constituted predatory pricing in violation of Section 202(a)'s prohibition on "unfair" practices even though the evidence did not "clearly demonstrate" that Armour had engaged in "below cost sales."*See id.* at 713, 715-16. The *Armour* court reversed, holding "that a coupon program *of this nature* does not violate[s] Section 202(a), absent some predatory intent or some likelihood of competitive injury." *See id.* at 717 (emphasis added). Even in reversing the USDA, however, the *Armour* court recognized that the P&S Act was motivated by a "felt need for specialized regulation of the many tiered packing industry" and "its unique problems arising from marketing and distributing livestock and poultry." *See id.* at 721. Further, it acknowledged that even Section 202(a) — on its own — reached beyond the FTC Act where "the special mischiefs and injuries inherent in livestock and poultry traffic" are concerned. *See id.* at 722. *Cf. Crosse & Blackwell Co. v. F.T.C.*, 262 F.2d 600, 604 (4th Cir. 1959) (noting that "[t]he [P&S Act] would never have been adopted," and the "regulatory responsibility [for the Act" would not have been "placed upon the Secretary of Agriculture and removed from the Federal Trade Commission," if "the marketing of livestock and the distribution of meat products did not present problems" that were "peculiar to agriculture" and "were insufficiently met by the antitrust laws of general application").

[98] *See Excel Corp. v. U.S. Dep't of Agri.*, 397 F.3d 1285, 1293, 1295 (10th Cir. 2005). *Cf. McCleneghan v. Union Stock Yards Co. of Omaha*, 298 F.2d 659, 670 (8th Cir. 1962) (Blackmun, J.) (finding that USDA was "clearly within [its] supervisory authority" in determining "whether the action of [a] stockyard

A revised Proposed Rule that prohibits discrimination based on protected-class and market-vulnerable status would be exactly such a regulation. To begin with, it would be promulgated pursuant to the express delegation of rulemaking authority in Section 407 and fill the "gaps" and "interstices" that Congress left in Section 202's utility-regulation provisions. Moreover, it would do so with rules that — as thoroughly explained above — reflect a permissible construction of the statutory text and align with the long-accepted purposes of the statute. Finally, it would fall squarely within the basic "theory" of Congress's legislative scheme that livestock processing is a "business affected with a public use," which the USDA must regulate to ensure reasonable and equitable access to markets for covered producers.[99] The obligations of processors within this scheme are elusive when analyzed from a generalist perspective. They can only be meaningfully elucidated with an "adequate appreciation" of the "intricate facts" of livestock production and marketing — appreciation which is "commonly to be found only in [the USDA]."[100]

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company . . . has been unjust, unreasonable, or discriminatory" under § 305 of P&S Act, 7 U.S.C. § 206); *Jackson v. Swift-Eckrich, Inc.*, 836 F. Supp. 1447, 1453 (W.D. Ark. 1993), aff'd, 53 F.3d 1452 (8th Cir. 1995) (finding that the *McCleneghan* court's reasoning as to the scope and deference owed to the USDA under § 307 of the P&S Act was "directly on point" and could not be "distinguish[ed]" in a case dealing § 202 of the Act).

[99] *See Bruhn's Freezer Meats of Chicago, Inc. v. U. S. Dep't of Agric.*, 438 F.2d 1332, 1339 (8th Cir. 1971) (citing *Truns Pork Stores v. Wallace*, 70 F.2d 688, 689 (2d Cir. 1934)) ("The provisions of the Act, declaring unfair and unjust deceptive practices [under § 202] to be unlawful, were predicated on the theory that the business of the packer *per se* is that which flows from one part of the country to another from the producer of the livestock to the consumer of the meat products"); *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 956 (D.C. Cir. 1966) (quoting Ch. 64, Title I, § 2(b), 42 Stat. 160 (Aug. 15, 1921) (codified in 7 U.S.C. § 183)) (identifying "the purpose of the [P&S Act]" to "prevent economic harm to the growers and the consumers" through abuse by packers and others "of the economic function of the middle man"); 87 Fed. Reg. at 60,023 ("In interpreting the P&S Act, AMS has sought to propose a rule that would remove barriers to market access for producers and growers most vulnerable to being denied access [to markets]."); *Id.* at 60,016 ("The intent of the proposed regulation is to help break down barriers that may serve to exclude or disadvantage certain covered producers, while leaving room for differential treatment based on legitimate business purposes."). *See also Farmers' Livestock Comm'n Co. v. United States*, 54 F.2d 375, 378–79 (E.D. Ill. 1931) (applying § 202 of the P&S Act).

[100] *See McCleneghan v. Union Stock Yards Co. of Omaha*, 298 F.2d 659, 669 (8th Cir. 1962) (Blackmun, J.) (quoting *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922)) ("Whenever a rate, rule, or practice is attached as unreasonable or as unjustly discriminatory, there must be preliminary resort to [the administering agency] . . . because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to [the administering agency]."); *Kelly v. Union Stockyards & Transit Co. of Chicago*, 190 F.2d 860, 863 (7th Cir. 1951) (citing *Great North Ry. v. Merchants Elevator Co.* 259 U.S. 285, 291 (1922) ("The same considerations which prompted the Supreme Court to promulgate the primary jurisdiction doctrine and to hold that, in cases arising under the Interstate Commerce Act, '[w]henever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission', serve with equal vigor to impel a similar conclusion in cases of a like nature arising under the Packers and Stockyards Act.").

4. Conclusion

Against this backdrop, the USDA's interpretation of the P&S Act to prohibit a given type of differential treatment under Sections 202(a) and 202(b) through rulemaking is entitled to *Chevron* deference. It may be reversed only if it contradicts an unambiguous intent of Congress "on the precise question at issue."[101] Accordingly, the fact that some courts have incorporated a requirement to show anticompetitive harm to establish a violation of Section 202 should not change AMS's conclusions in the Proposed Rule. First, as discussed in a comprehensive analysis by the Washington Center for Equitable Growth, only a handful of circuit courts have squarely held that proof of harm to competition is an essential element of a claim under Section 202.[102] These courts did so without the benefit of a formal interpretation of the operative provisions by the USDA,[103] and their decisions were made in the context of the specific facts before them — not a regulation generally.

However, even if these courts do not change their interpretation of the P&S Act following the issuance of a final rule, the Notice makes clear that the Proposed Rule is consistent with their holdings. For the most part, the courts have not defined the concept of "competitive harm" under the Act outside of the limited context of the facts of each case — if there. Moreover, while a handful of decisions have incorporated the market-wide concepts of competitive harm that prevail in antitrust law,[104] others have suggested that the requisite harm can arise from narrower abuses of the competitive process that reduce the prices paid to farmers.[105] In the context of this ambiguity, AMS is the proper "arbiter[] of what practices will impede competition,"[106] and its Notice reasonably and cogently demonstrates that the conduct prohibited under the Proposed Rule "prevents an honest give and take in the market," and "deprives market participants of the benefits of competition."[107]

It is clear, therefore, that AMS has both the statutory authority and the judicial space to go further and rationally streamline the process for demonstrating MVI status and the other elements of discrimination under the Proposed Rule. AMS can identify certain fact situations —

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[101] *See Chevron*, 467 U.S. at 842, 843 n.9.

[102] Michael Kades, *Protecting Livestock Producers and Chicken Growers, Recommendations for Reinvigorating Enforcement of the Packers and Stockyards Act*, Washington Center for Equitable Growth (May 2022) at 33-42, https://equitablegrowth.org/wp-content/uploads/2022/05/050522-packers-stockyards-report.pdf

[103] *See* Letter from Farm Action *et al*., *supra* n. 15, attached as Attachment A.

[104] *See*, *e.g*., *Wheeler v. Pilgrims Pride Corp*., 591 F.3d 355, 362 (5th Cir. 2009) (en banc).

[105] *See*, *e.g*., *Farrow v. USDA*, 760 F.2d 211, 214-15 (8th Cir. 1985).

[106] *See Excel Corp. v. USDA*, 397 F.3d 1285, 1293 (10th Cir. 2005) ("It is clear that Congress and the USDA are the arbiters of what practices will impede competition.").

[107] Kades, supra note 102 at 55 (quoting Federal Trade Commission, "FTC Policy Statement on Unfairness" (1980), available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.); *see also* id at 54-57 (explaining why Section 202 of the P&S Act addresses market abuses).

such as the existence of identified market conditions in a covered producer's locality — as sufficient to qualify a covered producer for MVI status. Moreover, AMS can specify certain ways of evidencing those fact situations — for example, through reliance on a list of localities in which AMS has determined that the required market conditions exist. Finally, AMS can establish not only the standards of proof for claims of discrimination based on MVI-status, but also burden-shifting frameworks to optimize the evidence that claimants must produce to satisfy those standards.

C. AMS should modify the Proposed Rule to give covered producers enforceable and adaptable protections against discrimination based on both protected-class status and market-vulnerable status.

In light of the foregoing discussion of the P&S Act's reach and AMS's authority, Farm Action requests that AMS strengthen and clarify the protections of Section 201.304 of the Proposed Rule in four ways in order to fully safeguard "producers and consumers from economic harm at the hands of middlemen."[108]

1. AMS should clarify that the P&S Act prohibits discrimination based on protected-class status in addition to discrimination based on MVI status

First, in addition to prohibiting discrimination based on MVI status, the proposed § 201.304 should be modified to directly prohibit discrimination based on a covered producer's race, color, national origin, religion, sex, sexual orientation, gender identity, age, disability, marital status, or family status (each, a "protected class"). This modification would eliminate the burden of proving MVI status for producers alleging discrimination based on their status as a member of a protected class. It would also do so in a manner that is consistent with the P&S Act, avoids constitutional pitfalls, and is more assured to reach all forms of discrimination against protected classes of producers.

AMS's notice considers the possibility of identifying historically marginalized groups as examples of MVI-qualified groups, or including a producer's membership in a historically marginalized group as a factor upon which producers can rely to demonstrate their MVI status.[109] While Farm Action appreciates the more tailored nature of this alternative approach, we do not believe it is necessary to ensure robust protections for historically marginalized groups in this context. Moreover, although Farm Action strongly believes AMS would be on firm legal footing were it to pursue such a course, some courts have signaled skepticism of rules that have the effect of differentiating between racial groups.[110]

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[108] *See Cent. Coast Meats, Inc. v. U.S. Dep't of Agric.*, 541 F.2d 1325, 1328 (9th Cir. 1976) (Goodwin, J., dissenting) (citing *Bruhn's Freezer Meats v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1336 (8th Cir. 1971)) ("[The P&S Act] should be liberally construed in order to fully carry out its public purpose: protection of producers and consumers from economic harm at the hands of middlemen.").

[109] 87 Fed. Reg. at 60,029.

[110] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classification, that action is reviewed under strict scrutiny."). *See also Holman v. Vilsack*, 2021 WL 2877915 (W.D. Tenn. July 8, 2021) (finding that USDA's presumption that historically marginalized

Accordingly, we urge AMS to modify Section 201.304(a)(1) to provide that a regulated entity may not subject a covered producer to any prejudice, disadvantage, inhibition of market access, or other adverse action with respect to any matter related to livestock, meats, meat food products, livestock products in unmanufactured form, or live poultry based upon: (i) the covered producer's status as a market vulnerable individual; (ii) the covered producer's status as a cooperative; or (ii) the covered producer's race, color, national religion, religion, sex, sexual orientation, gender identity, age, disability, marital status, or family status.

2. AMS should clarify that covered producers in monopsony or near-monopsony localities are MVI-qualified producers

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Second, to make the prohibition on discrimination based on MVI status more efficacious and avoid imposing undue litigation burdens on covered producers, the proposed § 201.302 should be modified to clarify that covered producers in monopsonized or near-monopsonized local markets are necessarily qualified for MVI status. On the one hand, this would reduce the burden of proof on a category of covered producers whose members clearly "have been subjected to, or are at heightened risk of, adverse treatment" based on their group status instead of their individual qualities. On the other hand, this step would enable AMS to begin charting a path toward a more comprehensive regulatory scheme to identify, qualify, and protect market vulnerable individuals against discrimination.

Across the various livestock sectors, evidence suggests that covered producers who are dependent on one or two processors for access to livestock sales channels "have been subjected to, or are at heightened risk of, adverse treatment" because of their group identity. In explaining why producers from a historically marginalized groups are likely to be "particularly vulnerable to market abuses" in the livestock trade, AMS's notice identified four underlying factors as critical: (1) the relative "size, sales, and incomes" of producers from such groups compared to other producers; (2) their exposure to "concentrated market forces and actors"; (3) their "fewer economic resources" to "counteract" adverse market structures and conditions; and (4) their "isolat[ion]" from relevant economic networks, such as sources of supply, other producers, and distribution channels.[111] As we show below, contract poultry growers and independent producers of fed cattle demonstrate all of these indicia of market vulnerability when they are situated in localities where they are subject to a monopsony or near-monopsony of processors (even if they are not members of historically marginalized groups).

a) Contract Poultry Growers

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farmers were "socially disadvantaged" and qualified for ARPA § 1005 loan program was a racial classification subject to strict scrutiny); *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (same); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021). *Cf. Rothe Dev., Inc. v. United States Dep't of Defense*, 836 F.3d 57 (D.C. Cir. 2016) (finding that Small Business Act, § 637(a)(8), was not subject to strict scrutiny because it "d[id] not instruct the [SBA] to limit the field [of qualified applicants to the SBA's 8(a) loan program] to certain racial groups" or "tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged [so as to qualify for the 8(a) program]").

[111] 87 Fed. Reg. at 60,020-21.

As AMS well knows, the poultry sector has become increasingly concentrated in recent decades and is one of the most vertically integrated parts of the food system.[112] More than 60% of the national poultry market is controlled by just four dealers — and fully one half of growers have a choice of only one or two poultry dealers to work with in their area.[113] Operating within one of these monopsonistic local markets has a directly negative effect on the "relative size, sales, or incomes" of growers. Compared to poultry growers who have access to multiple dealers in their area, AMS has observed that growers operating in monopsony localities receive lower payments for their flocks and are given less favorable terms with respect to contract duration, guaranteed flock placements, hold-up time between flocks, and required capital investments.[114]

In addition to having just one or two buyers, poultry growers in monopsony or near-monopsony localities are further exposed to "concentrated market forces and actors" by virtue of poultry dealers' vertical control over the supply chain. Generally speaking, poultry dealers (called "integrators" in the industry) own and control nearly every aspect of the chicken production process, from genetic lines and hatcheries to feed mills and medication to transportation and processing — essentially every activity except raising the birds.[115] The integrators outsource that part to contract growers. More than 95 percent of the nation's poultry production occurs under contract for integrators.[116] Since there is no open market for live poultry ready for processing, commercial (*i.e.*, non-specialty) poultry growers have no viable alternatives to the contract growing system.[117] In these contractual arrangements, "poultry growers do not

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[112] *See* AMS, Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34,980, 34,982-983 (June 8m 2022) (to be codified at 9 C.F.R. pt. 201).

[113] *See* 87 Fed. Reg 60010, 60011; Farm Action, Comment on Proposed Final Judgments, Stipulations, and Competitive Impact Statement in *United States v. Cargill Meat Solutions Corp., et al.*, Civil Action No. 22-cv-01821, at 21 (Nov. 15, 2022), *available at* https://farmaction.us/wp-content/uploads/2022/11/Farm-Action-Comment-on-Sanderson-Cargill-Wayne-Consent-Decree.pdf; Lina M. Khan, Chair, FTC, Written Submission in Response to Poultry Growing Tournament Systems: Fairness and Related Concerns, at 2, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Comment%20of%20Lina%20M.%20Khan%20on%20USDA%20ANPR%20re%20Poultry%20Growing%20Tournament%20Systems.pdf (last visited Jan. 13, 2023).

[114] 87 Fed. Reg. 34,980, 34,982.

[115] Farm Action Comment on *Cargill et al.*, *supra* n. 113 at 21; Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3-4.

[116] *Broiler Chicken Industry Key Facts 2021*, Nat. Chicken Council, https://www.nationalchickencouncil.org/about-the-industry/statistics/broiler-chicken-industry-key-facts/ (last visited Jan. 11, 2023); Dan Nosowitz, *After a Decade, the USDA 'Addresses' Unfairness in Meat Production*, Mod. Farmer (Jan. 23, 2020), https://modernfarmer.com/2020/01/after-a-decade-the-usda-addresses-unfairness-in-meat-production/; *See* James M. MacDonald, *Technology, Organization, and Financial Performance in U.S. Broiler Production*, USDA Economic Research Service (June 2014).

[117] C. Robert Taylor and David A. Domina, "Restoring Economic Health to Contract Poultry Production," 3, May 13, 2010 (report prepared for Joint DOJ and USDA/GIPSA Public Workshop on Competition Issues in the Poultry Industry).

own the chickens they raise or the food or medicine they use in their trade."[118] The integrators provide these items, "maintaining tight control over the inputs into the chicken-rearing process[.]"[119] When a flock of chickens matures, "the growers return the chickens to the [integrators] for processing."[120] In this context, growers in monopsony or near-monopsony localities are effectively surrounded by "concentrated market forces" — and it shows in the degree of control the integrators exercise over them. Indeed, in 2018, the Inspector General of the Small Business Administration found that contract growers had so little independence from integrators in the operation of their farms that they were effectively employees.[121]

This exposure saps poultry growers of "economic resources" and renders them powerless to "counteract" the monopsony power of poultry dealers. As AMS is aware, integrators have generally opted to compensate growers using a payment scheme known as the "tournament" system. Under this scheme, an integrator is allowed to adjust the price it pays for a grower's chickens up or down based on how — in the integrator's judgment — the grower performed in raising their chickens relative to other growers in the region. This system "enables [integrators] to maintain wide discretion over the prices they pay and keep growers largely in the dark about how those prices are set."[122] In this context, the prices integrators pay to growers tend to vary significantly from year to year, and those fluctuations deeply impact growers' earnings.[123] One study has found that growers lose money two years out of every three,[124] while another found that integrators were setting prices so low that "nearly three quarters of growers whose sole source of income is chicken farming live below the poverty line."[125] Importantly, these impoverishing outcomes have not reflected the fair market value of grower's product, but the ability of integrators to capture that value for themselves: Between 1988 and 2016, the wholesale price of chicken increased by 17.4 cents a pound for consumers — but the average pay of a poultry grower rose by just 2.5 cents a pound.[126]

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[118] Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3-4.

[119] *Id.*

[120] *Id.*

[121] *Evaluation of SBA 7(A) Loans Made to Poultry Farmers*, U.S. Small Bus. Admin. Off. of the Inspector Gen. 7, 9 (Mar. 6, 2018), https://www.sba.gov/document/report-18-13-evaluation-sbas-7a-loans-poultry-farmers.

[122] Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3.

[123] *Id.*

[124] *See generally* Taylor & Domina, *supra* n. 117.

[125] Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3 (citing *The Business of Broilers: Hidden Costs of Putting a Chicken on Every Grill*, Pew Charitable Trs. 1 (Dec. 20, 2013), https://www.pewtrusts.org/en/research-and-analysis/reports/2013/12/20/the-business-of-broilers-hidden-costs-of-putting-a-chicken-on-every-grill).

[126] Isaac Arnsdorf, *Chicken Farmers Thought Trump Was Going to Help Them. Then His Administration Did the Opposite*, ProPublica (June 5, 2019), https://www.propublica.org/article/chicken-farmers-thought-trump-was-going-to-help-them-then-his-administration-did-the-opposite

Even as they have depressed the income of poultry growers through the tournament system, integrators have also used their leverage to force growers "to bear most of the capital costs of production, including land, buildings, and equipment."[127] After entering a contract with an integrator, growers are typically required to incur enormous financial risks to build and repeatedly upgrade facilities to integrators' standards in order to continue receiving flocks.[128] In 2016, the average loan to a beginning poultry grower was $1.4 million.[129] Since the growing facilities built with these loans are highly specialized, their value plummets between 62 percent and 94 percent when a grower loses their integrator contract — making the facilities themselves functionally "worthless," according to a report by the Small Business Administration Inspector General.[130] While growers take on millions of dollars in debt to finance long-term capital investments, most contracts commit integrators to provide them with flocks of chicks only for a very short period — if at all. In 2017, for example, 42 percent of growers were on flock-to-flock contracts that allowed the integrator to stop placing flocks with the grower at any time for any reason. In contrast, only 31% of grower contracts were for a term longer than five years.[131] Even then, almost all growing contracts can be terminated with 90 days' notice.[132] This leaves growers in monopsonized or near-monopsonized localities in a deeply vulnerable position.[133] They must either accept whatever treatment they are given by their integrator — and stay on their integrator's good side — or risk bankruptcy.

In this dependent state, poultry growers in monopsony or near-monopsony localities are both profoundly "isolated" from relevant economic networks and shockingly vulnerable to abuse. Required to use their integrator as both their source of supplies and their distribution channel, the growers are isolated from alternative trading partners. Often bound by non-disclosure agreements in their contracts with integrators, growers are also typically isolated

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[127] Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 4 (citing Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop (May 21, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf.).

[128] *See id.* (also citing *Technology, Organization, and Financial Performance in U.S. Broiler Production*, U.S. Dep't of Agric. Econ. Rsch. Serv., Econ. Info. Bull. No. 126 at 12 (June 2014)); *Evaluation of SBA 7(A) Loans*, *supra* note 121 at 2, 5, 7, 9; Farm Action Comment on *Cargill et al.*, *supra* n. 113 at 21-22.

[129] *Evaluation of SBA 7(A) Loans*, *supra* note 121 at 5.

[130] *Id.* at 8.

[131] Siena Chrisman, *Under Contract: Farmers and the fine print*, viewers guide, Rural Advancement Found. Int'l 17 (2017), https://rafiusa.org/undercontractfilm/wp-content/uploads/2017/01/Under_Contract_Viewers-Guide_2017_ReducedFileSize.pdf.

[132] Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* 20 (Macmillan 2020).

[133] *See* 87 Fed. Reg. 35,005 ("Even where multiple growers are present, there are high costs to switching, owing to the differences in technical specifications that integrators require. The growers likely need to invest in new equipment and learn to apply different operational techniques due to different breeds, target weights and grow-out cycles.").

from each other.[134] Moreover, the near-complete control exercised by integrators over growers, the growing process, and the tournament system creates intractable opacity about actual market prices, the variability of poultry inputs, and the fairness of poultry grading — leaving growers powerless to catch, much less police, unlawful conduct by integrators.[135] As integrators have reportedly used their power over growers to punish those who speak out about industry abuses, poultry growers have even become isolated from law enforcers, public officials, and their own communities.[136]

In conclusion, as FTC Chair Lina Khan has said, "few growers would accept these unfair contract terms, punitive business practices, and substandard economic outcomes if they had meaningful choices."[137] The reason poultry integrators have been able to impose this modern sharecropping system on many poultry growers is because they *did not* have meaningful choices — that is, *because of* their identity as growers in a monopsony or near-monopsony locality.

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[134] *See* 87 Fed. Reg. at 35,007 ("Confidentiality restrictions have historically prevented broiler growers from releasing details of contract pay and performance[.]"); Teachout, *supra* n. 132 at 20 ("The [contract growers], who are already forbidden to talk to each other, know that there is not a single price for a pound of chicken [in an integrator's tournament], but a changing one, and while they can see their own paycheck, they can't compare it to others. . . . It is a structure reminiscent of Jeremy Bentham's panopticon, a vision of a jail designed to maximize control and quell dissent, where a jailer can see all the inmates, but the inmates cannot see each other.").

[135] Farm Action Comment on *Cargill et al.*, *supra* n. 113 at 23; Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3-4.

[136] Farmers have long and repeatedly shared how integrators have "wielded market power to control growers through both the threat of and actual retaliation." *See* Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 3 (citing Transcript of U.S. Dep't of Justice and U.S. Dep't of Agriculture Public Workshop Exploring Competition in Agriculture: Poultry Workshop at 165 (May 21, 2010), https://www.justice.gov/ sites/default/files/atr/legacy/2010/11/04/alabama-agworkshop-transcript.pdf. ("Let me say that numerous growers are not attending these workshops because of being afraid of retaliation on them by their integrator. A grower this morning has already been threatened by his service person if he attends and speaks at this forum."). For example, leading up to a proposed 2010 rule change in the Packers and Stockyards Act, then Attorney General Eric Holder and Secretary of Agriculture Tom Vilsack held a series of hearings across the U.S. to "assess the state of consolidation in agricultural markets." Tyson, Pilgrim's Pride, and others, attempted to prevent contracted farmers from attending hearings or speaking out by threatening retaliation. *E.g.,* Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. L. & Pub. Pol'y 37, 50-51 (2014). In at least one documented instance, Koch Foods followed through on that promise. Isaac Arnsdorf, *How a Top Chicken Company Cut Off Black Farmers, One by One*, ProPublica (June 26, 2019) https://www.propublica.org/article/how-a-top-chicken-company-cut-off-black-farmers-one-by-one (Koch Foods canceled Mississippi contract poultry farmer's contract the same day he testified at a hearing in Alabama).

[137] Khan Comment on Poultry Growing Tournaments, *supra* n. 113 at 4.

b) Independent Fed-Cattle Producers

As AMS is aware, between 1980 and 2020, the four-firm concentration ratio grew from 36 percent to 81 percent in beef packing.[138] The move towards heightened concentration among processors has been accompanied by growing packer control over cattle production and marketing channels. For most of the mid-20th century, producers sold fed cattle[139] primarily through public markets, in which prices were established transparently through open auctions attended by many buyers and many sellers.[140] Since beef packers began consolidating in the 1980s, however, the pool of buyers available to cattle producers has dwindled. Today, as AMS observed in its Notice, "there are commonly only one or two buyers in [many] local geographic markets, and few sellers have the option of selling fed cattle to more than three or four packers."[141]

As a result of this concentration, open, spot-negotiated cash markets for cattle have largely dried up.[142] Bilateral, long-term production and marketing contracts between large packers and large feedlots have taken their place as the primary distribution channel for fed cattle in nearly every part of the country.[143] The Big Four beefpackers (and their predecessor entities)

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[138] 87 Fed. Reg. at 60011

[139] *See* Bill Bullard, CEO, R-CALF USA, Chronically Besieged: The U.S. Live Cattle Industry, Presentation at the Big Ag & Antitrust Conference at Yale Law School 5 (Jan. 16, 2021) *available at* https://www.r-calfusa.com/wp-content/uploads/2021/01/210116-Chronically-Beseiged-The-U.S.-Live-Cattle-Industry-Final.pdf ("There are three distinct segments within the live cattle industry, representing each segment of the cattle's life cycle: The first and largest (by participant volume) is the cow/calf segment that annually births the calves that are sent downstream in the supply chain after they are weaned from their mothers. The second is the backgrounding segment that grows the calves after they are weaned until they reach a weight suitable for grain-based feeding. The last segment is the feedlot segment where lighter-weight, backgrounded calves are fed a high-concentration, grain-based diet for the last several months of their life cycle and then sold to the packer for harvest."). In this comment, we use the term "fed-cattle producers" to refer to operations within the last "feedlot" segment of the live cattle industry.

[140] Lina Khan, *Obama's Game of Chicken,* Wash. Monthly (Nov. 9, 2012), *available at* https://washingtonmonthly.com/2012/11/09/obamas-game-of-chicken/ ("For the most part, [in the mid-twentieth century] farmers were able to sell their products relatively freely on the open market, and prices were established transparently through open bidding, in public auctions attended by many buyers and many sellers."); 87 Fed. Reg at 60011 ("[In 1921,] the Department of Justice (DOJ) brought enforcement cases under the Sherman Act against the packing industry, which resulted in a series of consent decrees (judicially overseen agreements) that restructured the market. The consent decrees, together with the adoption of the P&S Act, reformed market practices by eliminating packer ownership of cattle and their means of transporting it, and reinforced market structures that — for a period of time in the 20th century — secured open, fair marketplaces for all, such as terminal auction yards regulated as stockyards by the Packers and Stockyards Administration of USDA.").

[141] 87 Fed. Reg. at 60011.

[142] *Id.* at 60012.

[143] *Id.* at 60012.

began shifting away from sourcing live cattle through cash market purchases and toward sourcing through contractual arrangements with select feedlots in the 1990s.[144] Today, that shift is almost complete. Between 1995 and 2022, the percentage of cattle sold through forward marketing contracts rose from 18.1 percent to 73 percent.[145] Over the same period, the percentage of cattle sold through negotiated cash trades plummeted from 81.9 percent to about 27 percent.[146] Further, the latest available data suggests that around a third of U.S. cattle are being raised pursuant to dedicated production contracts with packers.[147]

These statistics reflect the state of cattle marketing nationally; however, in three out of the country's five USDA-designated cattle procurement regions, the health of cash markets is substantially worse. In recent years, the percentage of cash-market procurement has reached as low as 12.5 percent of total cattle sales in the Kansas (KS) region, 8.3 percent in the Colorado (CO) region, and an alarming 2.6 percent in the Texas-Oklahoma-New Mexico (TX-OK-NM) region.[148] Only the Iowa-Minnesota (IA-MN) region has reliably maintained cash-market procurement of 50 percent or more of marketed cattle,[149] while the Nebraska (NE) region's percentage has hovered around 30-40 percent.[150]

The transformation of cattle markets over the past four decades along these lines has had consequences for livestock producers of all stripes — but especially negative ones for producers of fed cattle with less than 1,000-head capacity. Between 1980 and 2011, nearly 36,000 small fed-cattle operations — out of a total of 110,000 feedlots of all sizes — exited the market.[151] Since then, such small operations have only disappeared faster; just between 2011 and 2019, the country lost over 49,000 of them.[152] The mass disappearance of such operations has led to a dramatic bifurcation within the fed-cattle segment of the live cattle industry between "small" producers with less than 1,000-head capacity and "large" producers with more than 1,000-head capacity.

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[144] *Id.* at 60012.

[145] 87 Fed. Reg. at 60011-12; Bullard, Chronically Besieged, *supra* n. 139, at 20.

[146] 87 Fed. Reg. at 60011-12; Bullard, Chronically Besieged, *supra* n. 139, at 20.

[147] 87 Fed. Reg. at 60011-12

[148] *See* Letter from Bill Bullard, CEO, R-CALF USA, to William P. Barr, U.S. Att'y Gen. 2 (Mar. 28, 2019), *available at* https://www.r-calfusa.com/wp-content/uploads/2019/03/190328-Letter-to-DOJ-re-National-Beef-and-Iowa-Premium-Beef-Merger.pdf.

[149] *Id.*

[150] *Id.*

[151] Bullard, Chronically Besieged, *supra* n. 139, at 5.

[152] *Id.*

To begin with, the "relative size [and] sales" of small fed-cattle producers have become miniscule compared to other producers. Out of approximately 28,000 feedlot operations left in the United States in 2019, about 26,000 were small producers, but their share of the total volume of cattle marketed by U.S. feedlots was less than 13 percent.[153] In contrast, the remaining 2,000 or so large producers fed over 87 percent of such cattle — and the largest 75 of them alone fed around 34 percent.[154] At the same time, the "relative incomes" of small fed-cattle producers have also diverged from those of other producers. Compared to fed-cattle producers with more than 1,000-head capacity, AMS and industry analysts have observed that small producers generally do not receive forward contracting arrangements from packers; are denied the favorable bonus, financing, and risk-sharing terms that often attend such arrangements; and are required to sell their cattle to packers on at-will cash markets for lower aggregate compensation.[155]

This differential procurement channeling by large packers magnifies the "exposure" of small, independent producers to "concentrated market forces or actors" in monopsony or near-monopsony local markets for fed cattle. Through forward contracting, the largest packers have given large fed-cattle producers guaranteed market access in exchange for a dedicated cattle supply they can use to meet "high probability demand for beef."[156] The institutionalization of these captive-supply relationships over the past two decades has, in effect, partially integrated the largest feedlots with the largest packers.[157] As a result, the regional cash markets — and the small producers who sell on them without a forward contract — have been relegated into an "insurance" or "residual" source of cattle supply for the largest packers, to which they resort only to satisfy "low probability demand" for beef.[158] By controlling a full or near-full supply of cattle through forward contracts at any given time, packers in monopsony or near-monopsony localities wield not just significant buyer power, but also the power to deprive small producers from access to markets at any given time.

This exposure saps independent cattle producers of "economic resources" and renders them powerless to "counteract" the monopsony power of dominant beefpackers. On the one hand, forward arrangements with large feedlots enable the largest packers to hold the majority of

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[153] *Id.*

[154] *Id.*

[155] *See* 87 Fed. Reg. at 60023-24; Diana L. Moss & C. Robert Taylor, *Short Ends of the Stick: The Plight of Growers and Consumers in Concentrated Agricultural Supply Chains*, 2014 Wis. L. Rev. 337, 351-52 (2014); C. Robert Taylor, *Harvested Cattle, Slaughtered Markets*? 2, 3, 27-30, 27 n. 59 (2022), a*vailable at* https://www.r-calfusa.com/wp-content/uploads/2022/04/220428-C.-Robert-Taylor-Cattle-Report-Final.pdf ; Bullard, Chronically Besieged, *supra* n. 139, at 28; Letter from Bill Bullard to William Barr, *supra* n. 148, at 3-5.

[156] *See* Taylor, Slaughtered Markets, *supra* n. 155, at 25-28, 34-36.

[157] *See id.*

[158] *See id.*

the nation's cattle supply captive under contract.[159] This thins out regional cash markets and, in turn, enables packers to manipulate and depress the prices that small producers can get for their cattle.[160] On the other hand, forward arrangements — and attendant financing or risk-sharing provisions — give at least some large feedlots the financial capacity to act as power buyers in upstream markets for backgrounded cows. This tends to raise input costs to levels that are potentially unsustainable for small producers, who must ultimately sell their livestock at depressed cash-market prices.[161] In these ways, the preferential treatment of dominant feeders by the largest beefpackers squeezes the margins of small producers on both sides (input and output) and enables them to control the cattle supply chain even though they do not own it. As a result of this dynamic, the profitability of independent fed-cattle producers has trended downward over the past three decades — going from an average profit of about $50 per head in 1990 to an average loss of about $50 per head in 2021.[162]

In this context of controlled market access and depressed profitability, small fed-cattle producers in monopsony or near-monopsony localities are both profoundly "isolated" from relevant economic networks and shockingly vulnerable to abuse. Required to use their packer as their sole distribution channel, small producers are isolated from alternative trading channels. In highly concentrated local cash markets — and, indeed, in at least one entire procurement region (CO) — opacity about actual market conditions has become entrenched, as the USDA no longer publishes price information because of potential confidentiality concerns.[163] Simultaneously, as packers have reportedly used their power to threaten and intimidate those who speak out about abusive industry practices, small producers have even become isolated from law enforcers and public officials — as amply acknowledged in AMS's notice.[164]

c) Conclusion

In light of the foregoing, AMS should expand the definition of "market vulnerable individual" in Section 201.302 of the Proposed Rule to provide that covered producers subject to monopsony or near-monopsony power in their local livestock market are necessarily MVI-qualified for that reason alone. Specifically, Farm Action recommends that AMS expand the definition of "market vulnerable individual" to provide that covered producers whose geographic location restricts their ability or willingness to sell and transport their livestock to two or fewer regulated entities constitute MVIs for all purposes under Subpart O.

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[159] *See id.* at 20, 25-28, 34-36.

[160] *See id.*

[161] *See* Taylor, Slaughtered Markets, *supra* n. 155, at 25-28, 34-36

[162] *See* Taylor, Slaughtered Markets, *supra* n. 155, at 2.

[163] *See id.* at 21-22; Letter from Bill Bullard to William Barr, *supra* n. 148, at 3 (citing U.S. Gov't Accountability Off., GAO-18-296, Additional Data Analysis Could Enhance Monitoring of U.S. Cattle Market 19 (2018)).

[164] *See* 87 Fed. Reg. at 60013-14.

3. AMS should clarify the procedures for demonstrating MVI status for producers who are not prequalified

Third, Farm Action recommends that AMS clarify the standard of proof for covered producers who wish to demonstrate MVI status. Specifically, we suggest that AMS expand the definition of "market vulnerable individual" in Section 201.302 to specify a non-exclusive list of factors that covered producers can rely upon to demonstrate their MVI status.

In our view, an appropriate starting point for developing such a list would be AMS's analysis of the factors that make individuals participating in agriculture markets from historically marginalized groups "particularly vulnerable to market abuses." In its notice, AMS identifies the following socioeconomic factors as leading to these groups' vulnerability: (1) the "relative size, sales, or incomes" of producers from the group compared to other producers; (2) their exposure to "concentrated market forces and actors"; (3) their "lack of economic resources" to "counteract" adverse market conditions; and (4) their "isolation" from relevant economic networks.[165] To the extent that AMS can give more definite form to these factors — in the sense of identifying the kinds of facts and evidence that producers may use in proving them — they may provide a more viable pathway for covered producers who are not pre-qualified to demonstrate their MVI status.

Farm Action urges AMS to seek, as much as practicable, to develop factors that can be proven with traditional evidentiary methods, that avoid requiring producers to demonstrate antitrust-relevant markets, and that limit the need for microeconomic analysis and expert witnesses generally. Moreover, if AMS determines that certain information in the possession of regulated entities would help producers demonstrate MVI status, we recommend that AMS incorporate that information into the Proposed Rule's recordkeeping requirements. In this regard, Farm Action endorses the recommendations of expanded recordkeeping requirements made by Food & Water Watch in its comment responding to AMS's Notice and encourages AMS to include those recommendations in its Final Rule.

6. AMS should clarify the procedures for demonstrating claims of disparate-treatment and disparate-impact discrimination under the Proposed Rule

7.____

Finally, AMS should consider revising Section 201.304(a)(1) and should incorporate a new subparagraph (3) into Section 201.304(a) to clarify that the regulation bans all forms of discrimination based on a prohibited basis — including disparate treatment and disparate impact — using standards of proof and burden-shifting frameworks that are, as appropriate, analogous to those developed under the Civil Rights Act of 1964 and the Fair Housing Act of 1968.

a) AMS should consider revising Section 201.304(a)(1)

As currently written, Section 201.304(a)(1) uses the verb forms of "prejudice," "disadvantage," "inhibit (market access)" and "take (adverse action)" in a manner that arguably displaces the broad coverage of the intent-neutral language in Section 202(a) and 202(b). As

[165] 87 Fed. Reg. at 60,020-21.

explained above, these sections plainly reach conduct based on purpose *or* effects. Their text distinguishes the subjective actions of regulated entities (*e.g.*, "using a device" or "subjecting person[s] to [something]") from their "discriminatory" nature or the "prejudices" and "disadvantages" they may cause — and then makes the existence of *the latter* determinative. The Proposed Rule, however, may be read to erase this distinction. Section 201.304(a)(1) makes it unlawful for a regulated entity to "prejudice, disadvantage, inhibit market access, or otherwise take adverse action against a covered producer . . . *based upon* the covered producer's status as a market vulnerable individual[.]"[166]

This language could suggest the rule would only prohibit actions that are motivated — at least in part — by a prohibited basis. Although similarly phrased prohibitions in the Civil Rights Act and the Fair Housing Act have historically been construed to reach both disparate-treatment and disparate-impact discrimination, the textual soundness of this construction has been challenged in recent years.[167] Accordingly, Farm Action recommends that AMS modify Section 201.304(a)(1) to use language that tracks the text of Sections 202(a) and 202(b), which might more assuredly reach unlawful discrimination in all its forms.

b) AMS should add a new Subsection (3) to Section 201.304(a)

To align the Proposed Rule with the scope of protections against differential treatment provided by the P&S Act, AMS should add a new Subsection (3) to Section 201.304(a) clarifying that liability may be established under Section 201.304(a)(1) based on either an adverse action's discriminatory intent or a practice's adverse discriminatory effect. Additionally, the new Subsection (3) should identify the burdens of proof and applicable burden-shifting frameworks for each method of establishing liability.

AMS should promulgate a Section 201.304(a)(3)(i) that allows covered producers to establish liability for discriminatory intent through a burden-shifting framework analogous to the *McDonnell-Douglas*[168] framework used in Title VII employment discrimination cases. Under this framework, a covered producer should be able to establish a *prima facie* claim of discrimination under Section 201.304(a)(1) by pleading: (a) that they are a member of a protected-class or a market-vulnerable group; (b) that they were subjected to disparate or adverse treatment within the meaning of Section 201.304(a)(1); and (c) circumstantial facts plausibly suggesting some causal connection between their group identity and the treatment they received. The burden of production should then shift to the regulated entity to show that: (a) discrimination based on one of the prohibited bases was not a motivating factor for the disparate or adverse treatment; and (b) the same decision would have been made regardless of the producer's market-vulnerable or protected-class status.

AMS should also promulgate a Section 201.304(a)(3)(ii) that allows covered producers to establish liability for discriminatory effects through a burden-shifting framework analogous to

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[166] 87 Fed. Reg. at 60,054 (emphasis added).

[167] *See generally Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmitys. Project, Inc.*, 576 U.S. 519, 547 (2015) (Thomas, J., dissenting); *Id.* at 558 (Alito, J., dissenting).

[168] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

the recently proposed HUD Discriminatory Effects Standard.[169] Under this framework, a covered producer should be able to establish a *prima facie* claim of discrimination under Section 201.304(a)(1) by demonstrating that a policy or practice of a regulated entity causes or predictably will cause a discriminatory effect. Once the producer has satisfied this initial burden, the defendant would have the burden of proving both: (a) that the challenged practice is necessary to achieve one or more substantial, legitimate, and nondiscriminatory interest; and (b) that the interest it claims could not be served by another practice that has a less discriminatory effect. In this context, a policy or practice should be considered to have a "discriminatory effect" where it: (a) actually results or predictably will result in a disparate impact on a market vulnerable group or a protected class group; or (b) creates, increases, reinforces, or perpetuates the vulnerability of a market-vulnerable or protected-class group. Moreover, where a legitimate interest for a challenged practice is claimed, it must be supported by evidence and may not be hypothetical or speculative in order to serve as a legally sufficient justification for a discriminatory practice.

II. Farm Action supports AMS's efforts to clarify the scope of improper retaliation under the P&S Act

A. AMS may treat retaliation as discrimination under the P&S Act

Farm Action strongly supports AMS's proposed § 201.304(b) undertaking to regulate retaliatory discrimination as "undue or unreasonabl[y] prejudice[d] or disadvantage[ous]" and "unjust discrimination" under the Packers and Stockyards Act.[170] A fair, functioning, and well-regulated livestock market requires complaints of unlawful and abusive conduct to be heard, and retaliation against market players for engaging in protected expression to bring such conduct to light clearly constitutes undue prejudice and/or unjust discrimination under the Packers and Stockyards Act. USDA's proposal addresses a long-needed gap in enforcement under the P&S Act, and will go a long way to vindicating that statute's goals.

Farm Action also agrees with USDA that such regulation fits comfortably within the ambit of the P&S Act's prohibitions on undue prejudice and unjust discrimination. As the Supreme Court has reasoned in the context of a variety of statutory schemes, "[r]etaliation . . . is a form of 'discrimination' because the complainant is being subjected to differential treatment."[171] Allowing packers to subject market participants to less favorable treatment because of those participants' exercise of free expression weakens healthy competition in the livestock

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[169] Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33590 (June 25, 2021) (to be codified at 24 C.F.R. pt. 100).

[170] 7 U.S.C. §§ 192(a), (b).

[171] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (considering whether retaliation could independently be a form of discrimination for the purposes of Title IX); *see also Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (holding that an employer who retaliates against personnel for filing a complaint of age discrimination commits age discrimination); *Lawrence v. Sol G. Atlas Realty Co., Inc.*, 841 F.3d 81, 85-86 (2d Cir. 2016) (treating retaliation as a form of discrimination that independently gave rise to claims under 42 U.S.C. § 1981, Title VII of the Civil Rights Act, the New York State Human Rights Law, the Fair Labor Standards Act, and the New York Labor Law); *Vega v. Hempstead Union Free School Dist.*, 801 F. 3d 72, 82 (2d Cir. 2015) (retaliation against an employee for raising complaints of discrimination constitutes discrimination under the Equal Protection Clause).

market and rewards large companies' intimidation efforts, greatly undermining the statutory scheme Congress designed.

B. Farm Action suggests clarifying the regulatory burdens of proof to ensure that retaliation can be consistently identified and penalized

Farm Action strongly supports USDA's identification of protected activities that may not be the basis for retaliation by regulated entities in its proposed § 201.304(b)(2). Protecting these activities will greatly strengthen markets regulated by the P&S Act and ensure that USDA and the judiciary are more able to regulate fair competition in these markets by facilitating the disclosure of evidence of abusive and unlawful practices.

Farm Action recommends that USDA consider further developing the procedures for enforcement and the evidentiary burdens on complainants and defendants needed to sustain claims of retaliation. Farm Action recommends that USDA look to evidentiary procedures from other areas of law concerning whistleblowing and retaliation to ensure strong checks against retaliatory conduct in regulated livestock markets.

Specifically, Farm Action recommends that USDA specify in regulations that, once a complainant has made a prima facie showing that a covered producer was subjected to retaliation (such as the conduct codified in proposed § 201.304(b)(3)) after a covered producer engaged in the protected activities in proposed § 201.304(b)(2), the burden of proof shifts to the regulated entity to show by clear and convincing evidence that the regulated entity would have taken the same action in the absence of the producer's participation in protected activities. This approach places the initial burden on plaintiffs or the agency to show that it is reasonably likely that retaliation occurred, but then shifts the burden to the party (the regulated entity) with the best access to proof about the underlying facts, consistent with a public policy regime that disfavors retaliation.[172]

This burden-shifting approach, including the requirement of clear and convincing evidence to rebut a showing of retaliation, builds on the approach codified in a variety of federal whistleblower protection regimes, including the Criminal Antitrust Anti-Retaliation Act; [173] the Whistleblower Protection Act providing labor protections to the federal civil service;[174] the Taxpayer First Act protecting against tax fraud;[175] the Sarbanes-Oxley Act governing financial fraud in publicly traded companies;[176] the Bank Secrecy Act combating money laundering;[177] and laws governing railroad[178] and air safety.[179] While not explicitly articulating a "clear and

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[172] *Cf.*, *e.g.*, Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory,* 44 U. Mich. J. L. Reform 797, 818-825 (2011).

[173] *See* 15 U.S.C. § 7a-3(b)(2)(C).

[174] *See* 5 U.S.C. § 1221(e)(2).

[175] *See* 26 U.S.C. § 7623(d)(2)(B)(iii).

[176] *See* 18 U.S.C. § 1514A(b)(2)(C).

[177] *See* 31 U.S.C. § 5323(g)(3)(A)(i).

[178] *See* 49 U.S.C. § 20109(d)(2)(A)(i).

[179] *See* 49 U.S.C. § 42121(b)(2)(B).

convincing evidence" standard, Department of Labor regulations have similarly adopted a burden-shifting approach to claims of retaliation against government contractor employees for inquiring about, discussing, or disclosing compensation, allowing employers to defend against such claims by "demonstrating" that adverse actions were the result of violations of company policy rather than retaliation.[180]

The burden-shifting standard proposed above would also draw upon one of the core features of Title VII discrimination law, allowing complainants to initiate proceedings without being forced to prove the respondents' state of mind.[181]

III. Farm Action supports AMS's efforts to clarify the P&S Act's prohibitions on deceptive conduct

A. Farm Action encourages AMS to ensure that it is giving the P&S Act's prohibitions broad effect

Farm Action strongly supports AMS's proposed § 201.306 restricting deceptive practices under the P&S Act. Regulations in this area fall well within the core of USDA's authority under the Packers & Stockyards Act prohibiting "deceptive practice[s]" in the marketplace.[182]

However, Farm Action notes a possible discrepancy in the proposed regulation as drafted and the explanation of the rule proffered by the agency in its notice. The regulation as drafted in proposed §§ 201.306(b)-(d) prohibits employing "a pretext, false or misleading statement, or omission of material fact necessary to make a statement not false or misleading." By contrast, AMS describes USDA's general approach to deceptive practices as regulating "representations, omissions, and practices from the perspective of a reasonable party receiving them and determin[ing] if those deceptions affect the conduct or decision of the recipient."[183] It further describes the P&S Act as reaching "beyond common-law fraud" and affirmatively requiring honest dealing and truthfulness in the marketplace.[184]

To the extent that the term "practices" used in the description in AMS's notice encompasses a broader range of deceptive behavior than the rule's current language focusing on "pretext, false or misleading statement, or omission of material fact," Farm Action encourages USDA to broaden the language in draft §§ 201.306(b)-(d) to include prohibiting any practices

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[180] *See* 41 C.F.R. §§ 60-1.4(a)(3), 60-1.26, 60-1.35(a).

[181] *See, e.g., Young v. United Parcel Service, Inc.*, 575 U.S. 206, 206-07, 228-30 (2015) (noting that the relevant evidentiary framework is intended to allow complainants "to show disparate treatment through indirect evidence," providing complainants flexibility to show that adverse actions could be inferred to be discriminatory absent further explanation, and in the context of the Pregnancy Discrimination Act, holding that the required showing was that a complainant belonged to a protected class, sought accommodation, did not receive that accommodation, and that other employees with similar ability received accommodations.).

[182] 7 U.S.C. § 192(a).

[183] 87 Fed. Reg. at 60,033.

[184] *Id.* at 60,034.

likely to mislead a covered producer, acting reasonably under the circumstances, to the producer's detriment.[185]

B. AMS should clarify the application of the P&S Act's deception provisions to common contracting provisions in the cattle market

Farm Action suggests that AMS continue to develop its regulations concerning deceptive practices in the marketplace by addressing common practices in cattle contracting that allow regulated entities to consolidate their power and expand their profit margins while offloading risk to producers. The rise of alternative marketing arrangements (AMAs) in the livestock industry has facilitated such deceptive practices, which should be a more explicit focus of AMS's market integrity efforts.

AMAs tend to take the form of contracts between packers and producers for future delivery of cattle, with a price to be determined at the time of delivery based on contemporaneous prices in the "spot" cash market for cattle, or other contemporaneous prices such as wholesale prices.[186] In theory, such arrangements should allow for producers and packers to rationally contract in ways that evenly distribute the risks to each party of particularly high or low prices at the time of delivery.[187]

In practice, however, AMAs as used today leave packers with a variety of tools to manipulate the prices they pay producers at the time of delivery, allowing them to consistently put a thumb on the scale of having producers assume the downside risks of changes in the spot market. [188] Indeed, recent research found that every one-percent increase in the fraction of cattle purchased under an AMA is associated with a nearly six percent reduction in the cash market

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[185] *Cf.*, *e.g.*, 14 C.F.R. § 399.79(b)(2) (defining deceptive practices in air transportation as those that are "likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service."); James C. Miller III, *FTC Policy Statement on Deception*, Fed. Trade Comm'n 1, 6 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf ("The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment.").

[186] *See*, *e.g.*, C. Robert Taylor, *Risk Shifting via Partial Vertical Integration: Beef Packers' Acquisition of Slaughter Cattle* (Nov. 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276805.

[187] Other theoretical benefits of AMAs include the predictability of available supply for packers and expanded access to credit for producers and feeders. However, many of the supposed benefits of AMAs are either illusory or not unique to the AMA structure. *See* Peter C. Carstensen, *Dr. Pangloss as an Agricultural Economist: The Analytic Failures of The U.S. Beef Supply CHain: Issues and Challenges*, *available at* https://www.r-calfusa.com/wp-content/uploads/2022/03/Carstensen_Beef-Review-Final-1-002.pdf/

[188] *See*, *e.g.*, Tian Xia and Richard J. Sexton, *The Competitive Implications of Top-of-the-Market and Related Contract-Pricing Clauses*, 86. Am. J. Agric. Econ. 124, 124 (2004) (finding that agricultural contracts priced based on future cash market prices "are likely to have anticompetitive consequences when the same buyers who purchase contract cattle . . . also compete to procure cattle in the subsequent spot market," because the contract terms diminish packers' "incentive to compete aggressively in the spot market.").

price for cattle, consistent with packers' incentives and ability to drive cash market prices down when taking delivery of cattle under an AMA.[189]

Cattle sourced under AMAs, in addition to cattle owned by the regulated packer, constitute a packer's "captive supply."[190] Packers' captive supply grants packers significant control over the cash price of beef, allowing them to utilize their "institutionalized…tie between captive and negotiated prices" to "move in or out of the residual non-integrated market depending on captive commitments and anticipated downstream demand for beef."[191] This flexibility–in conjunction with the previously established concentration levels in cattle markets–allows packers to exert substantial influence over the price they pay in the market generally.[192]

Second, spot markets have become so "thin" and uncompetitive that they no longer provide reliable price signals for reference in AMAs. With extremely low volumes of spot market sales reported, packers can exert substantial influence over spot market prices by conducting a small number of sales, lowering spot market prices in order to lower the prices they pay for cattle at the time of delivery.[193] Further, in markets where large packers have minimal competition from other buyers, packers are able to set spot market prices via an "all or nothing" approach, putting out a request for a quantity of cattle at a particular price and forcing producers to either accept or reject the offer without engaging in a competitive negotiation.[194]

Many of the practices that packers engage in when executing and seeking to fulfill AMAs can have the effect of inducing producers to enter into contracts in which producers do not fully appreciate the degree to which packers control the downside risks that the producers are assuming. These practices are deceptive, and AMS should at a minimum seek to clarify that its proposed regulations sanctioning deceptive practices extend to packers' manipulation of spot market prices to lower the price paid to independent producers at the time of delivery.[195]

However, Farm Action notes that these deceptive practices often cannot be easily identified and punished when they occur on a case-by-case basis, particularly when the burden of identifying such manipulation falls on a producer who lacks visibility into the decision-making and motivations of regulated packers. As a result, Farm Action is skeptical that a regime that depends on farmers or regulators to identify price manipulation on a case-by-case basis will effectively prohibit such manipulation. Instead, we recommend that AMS prohibit outright the

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[189] Francisco Garrido, et al., *Buyer Power in the Beef Packing Industry: An Update on Research in Progress* 1, 12-13 (Apr. 13, 2022), http://www.nathanhmiller.org/cattlemarkets.pdf. *See also* Taylor, *supra* n. 187 at 9 (finding that higher rates of captive supply, including contract sales, correlates with higher levels of volatility and risk in the cash markets, consistent with cash markets functioning as "an insurance market for packers" that has transferred risk to producers in captive arrangements without compensating them.).

[190] *See* Taylor, *supra* n. 187 at 2.

[191] *See id.* at 25-26.

[192] *Id.* at 27.

[193] *Id.* at 21-22, 25-26.

[194] *Id.* at 30-31.

[195] Note that price manipulation is also prohibited under 7 U.S.C. § 192(e).

tools that packers can use to manipulate prices while shielding manipulation from scrutiny, by requiring forward livestock contracts to include a firm base price. AMS should also consider prohibiting certain captive supply arrangements, such as those that use formula or basis price forward contracts, and packer-owned cattle.[196]

Notably, DOJ in the *Cargill* case recently found that contracts executed by two major poultry processors using the tournament poultry system were deceptive within the meaning of the P&S Act, because growers were unable to evaluate their likely returns and risks, particularly in a context where poultry processors had the power to influence the likely payouts to growers after contracts were executed.[197] As a remedy, DOJ has essentially proposed that contract poultry growers be paid a firm base price, forbidding the defendant processors from reducing the base payment to poultry growers.[198] AMS should strongly consider treating AMAs without firm base prices as deceptive under the same reasoning that DOJ has adopted in the *Cargill* case.

IV. AMS should clarify the role of litigation costs in its cost-benefit analysis

Farm Action also wishes to comment on AMS's discussion of the costs and benefits of the Proposed Rule, particularly AMS's discussion of potential litigation costs. We note that AMS's proposal expects no "large increases or decreases in litigation from the proposed rule,"[199] but we write separately to emphasize that litigation volume should not be treated in a vacuum as a pure cost. As AMS acknowledges, any increased litigation might be because its proposed rules "offer producers and growers new hope for relief from courts for perceived undue prejudicial, discriminatory, and deceptive practices by regulated entities."[200] Farm Action encourages AMS to be explicit about the fact that reasoned rulemaking requires evaluating *all* the effects of litigation, not just the legal costs borne by regulated entities.

The Supreme Court has recognized in the context of another competition statute that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."[201] As the Court noted, "strong competition depends . . . on compliance with antitrust legislation."[202] In designing a compliance system, "Congress had many means at its disposal to penalize violators," including, for example, implementing a pure system of fines to federal, state, and local governments.[203] Of the mechanisms available to it, "Congress chose to permit" private

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[196] For further recommendations concerning practices that AMS should consider prohibiting as deceptive under the PSA, *see* Letter from R-CALF USA, W. Org. of Res. Councils, and Farm Action to Andrew Green, Senior Advisor for Fair and Competitive Mkts., U.S. Dep't of Agric. (Aug. 30, 2022), *attached as* Attachment B.

[197] *See* Complaint at ¶¶ 49-52, 153-156, 209-212, *United States v. Cargill Meat Solutions Corp. et al.*, No. 1:22-cv-01821 (D. Md. filed July 25, 2022).

[198] *See* Proposed Final Judgment at § IV.C, No. 1:22-cv-01821 (D. Md. filed July 25, 2022).

[199] 87 Fed. Reg. at 60,044.

[200] *Id.*

[201] *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972).

[202] *Id.*

[203] *Id.*

litigants to sue for violations of the antitrust laws, "encourag[ing] these persons to serve as 'private attorneys general.'"[204]

Similarly, the Packers and Stockyards Act relies in part on private litigation as one of the tools to protect competitive markets for livestock. Litigation is a deliberate feature of the statutory scheme, not an ancillary "cost" to be used as a cudgel in cost-benefit accounting to prevent regulatory schemes that vindicate market participants seeking protections from abusive conduct.

Farm Action supports AMS being cognizant of litigation costs by, for example, seeking to provide clear guidance and rules for regulated entities that can help forestall litigation that might arise from unclear language.[205] But cognizance of litigation costs should not translate into prioritizing litigation costs over other considerations in determining the right regulatory scheme.

The mission of AMS is to advance fair competition in livestock markets, not to protect regulated entities from litigation. AMS should not treat litigation costs that result in compensatory awards to market participants subjected to violations of the Packers & Stockyards Act, or changes in behavior by regulated entities to commit fewer violations of the Act, as net costs of the proposed regulation. In private enforcement schemes, litigation is the tool Congress chooses to realize the protections of their laws, and meritorious litigation should not be treated as a net regulatory cost.[206]

V. Farm Action supports proposed § 201.390 concerning severability

Farm Action also briefly notes that AMS's proposal to add § 201.390 to 9 C.F.R. Part 201 is wise; the Proposed Rule covers a number of different individual changes to the regulation of livestock markets, and Farm Action supports AMS's proposal to ensure that those changes are maximally protected even if opponents of the proposal successfully challenge some individual provisions in court.

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[204] *Id.* (citations omitted).

[205] *See* 87 Fed. Reg. at 60,044 ("clarification [of the scope of the Packers & Stockyards Act] could result in a reduction in litigation costs if companies come into compliance without any enforcement action.").

[206] *See also*, *e.g.*, Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54933, 54945 (Sept. 11, 2015) (to be codified at 41 C.F.R. 60) ("It is true that one specific purpose of the Order is to expand protections against pay secrecy policies to individuals and types of activities beyond that protected by the NLRA; otherwise, there would be no need for the Order. As discussed at length in the NPRM and in the preamble here, pay discrimination, as well as the existence of pay secrecy policies, remains widespread despite the protections in the NLRA. To the extent there is an increase in meritorious claims, this would indicate the Order's success at addressing these widespread problems.").

VI. Conclusion

Farm Action is encouraged by AMS's continuing efforts to strengthen antitrust enforcement across our food system by reinvigorating the Packers and Stockyards Act. The Proposed Rule would significantly improve AMS's ability to address discriminatory and retaliatory conduct by covered integrators and packers in poultry and cattle markets, respectively. However, we believe that the rule can and should be strengthened to more effectively accomplish its stated goals by:

- Specifically prohibiting discrimination based on protected class status;
- Clarifying that producers in monopsonistic markets qualify for MVI status;
- Developing clear procedures for identifying additional groups that should be considered market vulnerable
- Requiring that covered packers maintain necessary records to allow AMS to adequately enforce the Proposed Rule
- Ensuring that the burden of proof for complainants allows protected producers to effectively bring cases against covered packers that engage in discriminatory or retaliatory conduct
- Identifying specific practices that foster deception and abuse in these markets and ensuring that protections under the P&S Act are broadly applied
- Clarifying the important role litigation plays in effective enforcement of the P&S Act in the agency's cost-benefit analysis.

Thank you for the opportunity to provide our thoughts on this important matter.

Sincerely,

Joseph Van Wye
Policy and Outreach Director
Farm Action