
YALE LAW & POLICY REVIEW

INTER ALIA

Food Price Narratives

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INTRODUCTION

Food is a necessity that all people need to survive. Moreover, according to the United Nations Office of the High Commissioner for Human Rights, there is also a legal right to food.¹ It must be available,² accessible, and adequate.³ To be deemed accessible, both economic and physical access to food must be guaranteed.⁴ “Economic accessibility means that food must be

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1. See Off. High Comm’r Hum. Rts., *The Right to Adequate Food*, U.N. FACT SHEET No. 34, 1, 2 (2010), <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet34en.pdf> [<https://perma.cc/RD7Y-CZNE>] (“The right to food is an inclusive right. It is not simply a right to a minimum ration of calories, proteins, and other specific nutrients. It is a right to all nutritional elements that a person needs to live a healthy and active life, and to the means to access them.”).
2. See *id.* (stating food “from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting, or gathering” is available). Food is also available when it is sold in markets and shops. *Id.*
3. See *id.* at 3 (“Adequacy means that the food must satisfy dietary needs, taking into account the individual’s age, living conditions, health, occupation, sex, etc.”).
4. See *id.* (explaining that physical accessibility, which is outside the scope of this Article, requires access by those who are “physically vulnerable, including

affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicines, or rent.”⁵

Despite the natural and legal rights to food, today’s consumers have been faced with staggering food price inflation. American food prices are up approximately 30 percent when compared with early 2020 reports,⁶ representing at least a forty-year high in both the food index generally and the food at home index specifically.⁷ Of all the food categories, meat, poultry, and protein have seen the largest price increases. In 2020, beef and veal prices increased by 9.6 percent, pork prices by 6.3 percent, and poultry prices by 5.6 percent.⁸ Real (inflation-adjusted) beef prices were at a record high in 2021 and just slightly lower in 2022. These trends have not stopped;

children, the sick, people with disabilities,” and those who reside in remote areas, among others).

5. *Id.* at 2.

6. See Eshe Nelson et al., *Heat, War and Trade Protections Raise Uncertainty for Food Prices*, N.Y. TIMES (Aug. 10, 2023), <https://www.nytimes.com/2023/08/10/business/global-food-prices-volatility.html> [<https://perma.cc/D63N-3FDT>].

7. See U.S. Dep’t of Labor, *Consumer Price Index*, U.S. BUREAU OF LAB. STAT., (stating the Consumer Price Index measures the change in prices paid by consumers for goods and services) (last visited Sept. 21, 2023) <https://www.bls.gov/cpi/> [<https://perma.cc/KB93-E9TF>]; see also U.S. Dep’t of Labor, *TED: The Economics Daily*, U.S. BUREAU OF LAB. STAT. (July 18, 2022), <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm> [<https://perma.cc/A8SA-5923>] (finding that, under the U.S. Bureau of Labor Statistics’ Consumer Price Index (CPI), inflation reached a forty-year high of 9.1 percent in June 2022); U.S. Dep’t of Labor, *TED: The Economics Daily*, U.S. BUREAU OF LAB. STAT. (Aug. 15, 2022), <https://www.bls.gov/opub/ted/2022/consumer-price-index-unchanged-over-the-month-up-8-5-percent-over-the-year-in-july-2022.htm> [<https://perma.cc/T774-U45K>] (stating the food index increased 10.9 percent from January 2021 to January 2022, the largest 12-month increase since the period ending in May 1979, and the food at home index (grocery store or supermarket food purchases) increased 13.1 percent over the same period, the largest 12-month increase since the period ending March 1979).

8. Carolyn Chelius & Matthew MacLachlan, *Retail Food Price Inflation in 2020 Outpaced Historical Average by 75 Percent*, USDA ECON. RSCH. SERV. (2021), <https://www.ers.usda.gov/amber-waves/2021/march/retail-food-price-inflation-in-2020-outpaced-historical-average-by-75-percent/> [<https://perma.cc/L6NM-G6H3>].

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all food prices increased 5.8 percent in 2023, and are predicted to increase another 2.9 percent in 2024, including meat—a staple of the American diet.

Consumers, in turn, are outraged. Their emotions are being fueled by politicians who blame rising profits on a pandemic of greed and collusion and argue that rigid antitrust enforcement is the only solution. The Biden Administration has prioritized curtailing corporate growth as a way to combat high meat prices instead of creating laws and policies that would more quickly lower prices for consumers. According to President Biden, rapid inflation in the meat sector is solely attributable to decades of “rising concentration.”⁹ Lax antitrust enforcement allegedly allowed for mergers and acquisitions to proceed that otherwise should not have been permitted.¹⁰ Through those mergers and acquisitions, a few large companies have come to dominate the market, squeezing out small businesses and entrepreneurs.¹¹ The lack of competition then allegedly allowed these “Big Ag” companies to raise prices, which is now hurting consumers, producers, and the economy.¹²

Yet, there is no evidence of this. The problem with President Biden’s framing of the issue is that American food prices in general, and meat prices in particular, have almost always trended downwards. Moreover,

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9. See Jim Tankersley & Alan Rappeport, *As Prices Rise, Biden Turns to Antitrust Enforcers*, N.Y. TIMES (Dec. 25, 2021), <https://www.nytimes.com/2021/12/25/business/biden-inflation.html> [<https://perma.cc/3WAQ-XB8L>] (“The turn to antitrust levers stems from Mr. Biden’s belief that rising levels of corporate concentration in the U.S. economy have empowered a few large players in each industry to raise prices higher than a more competitive market would allow.”).
 10. *See id.*
 11. See *FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, THE WHITE HOUSE: BRIEFING ROOM STATEMENT AND RELEASES (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/> [<https://perma.cc/CPV4-5ZTX>] (“Four large meat-packing companies control 85 percent of the beef market. In poultry, the top four processing firms control 54 percent of the market. And in pork, the top four processing firms control about 70 percent of the market. The meatpackers and processors buy from farmers and sell to retailers like grocery stores, making them a key bottleneck in the food supply chain.”).
 12. *See id.* (“When dominant middlemen control so much of the supply chain, they can increase their own profits at the expense of both farmers—who make less—and consumers—who pay more.”).

Americans have some of the world’s lowest food prices. If consolidation in the market is really to blame, we would expect to have some evidence of increased prices due to market collusion by now. Yet, prices in constant dollars are not increasing, so consumer surplus is not decreasing, and thus market concentration is not restricting trade. This is contrary to the stories that politicians are telling.

Many economists and Republicans, on the other hand, argue that food price increases have little to do with problems of antitrust enforcement,¹³ and that the Biden Administration’s fixation on market concentration is simply an attempt to mask its own role in increasing the cost of food.¹⁴ To them the real problem is government overreach.¹⁵ By this logic, food prices have increased because of increased consumer demand resulting from the fiscal stimulus, market disruptions resulting from simultaneous supply and demand shocks, and the government’s various, pandemic-prompted market interventions.¹⁶ “What is *not* a plausible explanation [of rising prices],” according to economist Geoffrey Manne, “is increased concentration and the exercise of market power in the food supply chain.”¹⁷

Both these narratives share a common flaw—the absence of consumer welfare from the dialogue. Whether the food price index has increased due

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13. *See, e.g.,* Teaganne Finn, *Liberal Group Points to Meat Companies as Reason for Higher Grocery Store Prices*, NBC NEWS (Sept. 27, 2021), <https://www.nbcnews.com/politics/politics-news/liberal-group-points-meat-companies-reason-higher-grocery-store-prices-n1280119> [<https://perma.cc/7M9R-QTLQ>] (“Republicans have increasingly pointed to consumer prices and inflation as evidence that Democratic economic policies, including pumping trillions of dollars of stimulus into the economy to offset pandemic problems.”); *Beefing up Competition: Examining America’s Food Supply Chain*, 117th Cong. (July 28, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Miller%20-%20Testimony.pdf> [<https://perma.cc/N4N9-VQPH>] (statement of Shane Miller, Group President, Tyson Fresh Meats) (blaming the increase in meat prices on unprecedented market conditions).
 14. *See Reviving Competition, Part 5: Addressing the Effects of Economic Concentration on America’s Food Supply*, 117th Cong. (Jan. 19, 2022), <https://laweconcenter.org/wp-content/uploads/2022/01/Manne-Supply-Chain-Testimony-2021-01-19.pdf> [<https://perma.cc/5WMJ-MW3D>] (statement of Geoffrey A. Manne, Founder & President, Int’l Center for Law and Econ.).
 15. *Id.*
 16. *Id.*
 17. *Id.*

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to consolidation or to the heavy hand of government in the market, the reality is that consumers are paying more for their groceries and meat, poultry, and egg prices are the single largest contributor to the rising cost of food people consume at home.¹⁸ The most fungible part of a family's budget is food.¹⁹ The cause of the food price increases, whether due to consolidation or government overreach, is secondary to the reality that all consumers are paying more for their groceries, especially meat, poultry, and eggs, and that price increases disproportionately impact the most vulnerable sectors of society.²⁰ The emphasis going forward should thus be on how best to prioritize consumer welfare by decreasing the impact food prices have on American consumers.

I. GOVERNMENT RESPONSE TO RISING MEAT PRICES

President Biden blamed concentration in the meat industry for increased food prices as soon as when he was elected.²¹ The Biden

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18. See Brian Deese et al., *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, THE WHITE HOUSE: BRIEFING ROOM STATEMENT AND RELEASES (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/> [<https://perma.cc/A4VV-UA5K>].
 19. See Justine S. Hastings & Jesse M. Shapiro, *Fungibility and Consumer Choice: Evidence from Commodity Price Shocks*, Q J ECON. (June 22, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771414/> [<https://perma.cc/DR6A-URN>]; see also Travis A. Smith, *The Effects of Benefit Timing and Income Fungibility on Food Purchasing Decisions Among Supplemental Nutritional Assistance Support Households*, 98 AM. J. OF AGRIC. & ECON. 564, 565 (2016), <https://www.jstor.org/stable/24739962> [<https://perma.cc/HWG3-98HV>].
 20. See Econ. Rsch. Serv., *Food Prices and Spending*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/food-prices-and-spending/?topicId=2b168260-a717-4708-a264-cb354e815c67> [<https://perma.cc/5Y7C-YLXJ>] (“In 2022, households in the lowest income quintile spent an average of \$5,090 on food (representing 31.2 percent of income), while households in the highest income quintile spent an average of \$15,713 on food (representing 8.0 percent of income).”).
 21. According to the White House, “[d]uring the pandemic, wholesale prices for beef rose much faster than input prices for cattle. That means that the prices

Administration routinely points to meat prices as a good example of “dominant corporations in uncompetitive markets taking advantage of their market power to raise prices while increasing their own profit margins.”²² Even when other factors like increased consumer demand are acknowledged, the inevitable conclusion is that price increases are attributable to a bottleneck in the meat supply chain caused by a lack of competition among meat processors (the monopoly problem). The Biden Administration has relied heavily on these suppositions to deduce that “bold action” is required to “enforce the antitrust laws, boost competition in meat-processing, and push back on the pandemic profiteering that is hurting consumers, farmers, and ranchers across the country.”²³

Consistent with such a declaration, President Biden began mobilizing his executive resources. In late 2021, he directed the USDA to investigate large meatpackers. The USDA is also using \$100 million of the American Rescue Plan’s loan guarantee program to leverage approximately \$1 billion in lending capital to help expand the capacity of small meat processors and distributors pursuant to Biden’s objectives.²⁴ By February 2023, the USDA had already awarded almost \$59 billion in federal grants to independent processors in Idaho, Virginia, South Carolina, South Dakota, and Maryland.²⁵ All of this in addition to the \$500 million from the Meat and Poultry Processing Expansion Program, which is dedicated to helping new entrants

the processors pay to ranchers aren’t increasing, but the prices collected by processors from retailers are going up.” Deese et al., *supra* note 18.

22. Deese et al., *supra* note 18.

23. *Id.*

24. Press Release, U.S. Dep’t of Agric, *USDA Launches Loan Guarantee Program to Create More Market Opportunities, Promote Competition and Strengthen America’s Food Supply Chain* (Dec. 9, 2021), <https://www.usda.gov/media/press-releases/2021/12/09/usda-launches-loan-guarantee-program-create-more-market> [<https://perma.cc/P8RF-3G2F>]; *see also* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1006, 135 Stat. 4 (2021).

25. Adam Goldstein, *USDA Aims to Boost Independent Meat Packers with \$59 Million in Grants*, MARYLAND MATTERS (Feb. 22, 2023), <https://www.marylandmatters.org/2023/02/22/usda-aims-to-boost-independent-meat-packers-with-59-million-in-grants/> [<https://perma.cc/6JQM-MMKB>]; *see also* *USDA Rural Development Meat and Poultry Processing Expansion Program*, UNITED STATES DEP’T OF AGRIC. (Feb. 21, 2023), <https://www.rd.usda.gov/sites/default/files/Meat-and-Poultry-Expansion-Awards-02.21.2023.pdf> [<https://perma.cc/TYN6-FY8V>].

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break into the meatpacking industry to disrupt the largest meat processing companies.²⁶

The Department of Justice has “stepped up [its] efforts to ensure competition and counter anticompetitive practices across all sectors . . . ,” and promises to “continue to vigorously enforce our antitrust . . . laws.”²⁷ As such, the DOJ’s Antitrust Division is coordinating with the USDA to launch a “one-stop shop to report complaints of potential violations of our competition laws, including the Sherman and the Clayton Act, as well as the Packers and Stockyards Act.”²⁸ Attorney General Garland argues that these efforts are necessary because “[t]oo many industries have become too consolidated over time. Too many companies have pursued corporate conduct and more aggressive mergers that have made all of us vulnerable. Against this background, our antitrust efforts cannot and will not slow down.”²⁹ According to Attorney General Garland, rigorous monitoring and antitrust enforcement is justified because multinational meatpackers in particular “suck out all of the wealth of rural America and put it in their corporate coffers.”³⁰

Likewise, there has been no shortage of congressional efforts to limit concentration in the meat industry in recent years. Between 2019 and 2023, there have been at least a dozen attempts at such legislation. In May 2019, Senators Cory Booker (D-NJ) and Jon Tester (D-MT) introduced a new bill, the Food and Agribusiness Merger Moratorium and Antitrust Review Act, to immediately halt food and agriculture-related acquisitions and mergers.³¹ Senator Booker explained that “excessive levels of concentration and market power are devastating our independent family farmers and

26. Press Release, U.S. Dep’t of Agric., *USDA Announces \$500 million For Expanded Meat & Poultry Processing Capacity as a Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System*, UNITED STATES DEP’T OF AGRIC. (July 9, 2021), <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing> [<https://perma.cc/FHR9-FB2F>].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Press Release, Senator Cory Booker, *Booker, Tester Reintroduce Bill to Halt Ag Mergers Immediately, Indefinitely* (May 22, 2019), <https://www.booker.senate.gov/news/press/booker-tester-reintroduce-bill-to-halt-ag-mergers-immediately-indefinitely> [<https://perma.cc/JR7Z-PEA8>].

ranchers . . . [who] are being forced to sell into ever more concentrated marketplaces that unfairly reduce the prices they receive for their crops and livestock, and unfairly increase the cost of inputs.”³² Senator Tester added “[t]his bill will help put family farmers back in control of their futures by improving access to a competitive marketplace. Rural America cannot afford to see multi-national corporations put family farms out of business.”³³

In the summer of 2021, Senator Tester introduced another bill, the Meat Packing Special Investigator Act, which was cosponsored by Senators Chuck Grassley (R-IA) and Mike Rounds (R-SD).³⁴ Under the bill, a newly-appointed special investigator within the U.S. Department of Agriculture (USDA) would coordinate with various other enforcement agencies, like the DOJ, the Federal Trade Commission, and the Department of Homeland Security, to better enforce the Packers and Stockyards Act by investigating anticompetitive practices in the meat industry. The investigator would also enjoy specially-created subpoena powers to collect evidence.³⁵

In November 2021, Senators Tester and Grassley, alongside Senators Deb Fischer (R-NE) and Ron Wyden (D-OR), proposed the Cattle Price Discovery and Transparency Act in an “effort to return fairness to the cattle marketplace dominated by four major meat packers.”³⁶ The bill would require meatpackers to purchase a regional minimum of cattle from local

32. *Id.*

33. *Id.*

34. Meat Packing Special Investigator Act, S.2036, 117th Cong. (2021).

35. *But see* Senator Tommy Tuberville, an Alabama Republican, who argues that adding a special investigator to USDA to focus on competition was just more government. “On the bill, which creates the Office of Special Investigator for competition matters at USDA, I believe the (Agriculture) secretary currently, currently today, has the authority to address these issues, and adding another level of government is not the answer. We need less government, not more,” Tuberville said. Tom Lutney, *Beef Market Challenges Take Center Stage in Congressional Hearings*, BILLINGS GAZETTE (Apr. 26, 2022), https://billingsgazette.com/news/beef-market-challenges-take-center-stage-in-congressional-hearings/article_99e74066-6d8c-5c07-b090-d8d5bfbd47d7.html [<https://perma.cc/EVH9-P63P>].

36. Press Release, Senator Chuck Grassley, Grassley, Fischer, Tester, Wyden Announce Plan To Improve Fairness In Cattle Market (Nov. 9, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-fischer-tester-wyden-announce-plan-to-improve-fairness-in-cattle-market> [<https://perma.cc/8M2F-SD9N>].

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ranchers so ranchers are not left with cattle they cannot sell anywhere.³⁷ The bill would also give the USDA the power to create and maintain a public “contract library” of the contracts made between producers and meatpackers.³⁸

In February 2022, Senator Elizabeth Warren (D-MA) and Representative Mondaire Jones (D-NY) authored a letter to the DOJ asking it to “scrutinize” whether a proposed \$4.5 billion merger between Sanderson Farms and Wayne Farms, the country’s third- and sixth-largest poultry-processing companies, by Cargill and Continental Grain violated any antitrust laws.³⁹ According to the lawmakers, the “proposed mega merger raises significant antitrust concerns in an industry already marked by price fixing, labor violations, and intense consolidation.”⁴⁰

In February 2023, Senator Booker reintroduced a slate of bills “geared towards reforming the country’s agriculture sector,” including the Farm System Reform Act (previously introduced in 2021 with Senators Warren and Bernie Sanders (I-VT)),⁴¹ Industrial Agriculture Accountability Act,

37. “Pork and poultry producers wouldn’t benefit from this bill, however. It’s not because there aren’t problems in those sectors, but because ‘chicken and pork’ are ‘too far gone,’ says the GOP Senate aide, citing how vertically integrated these portions of the market are, where the large companies own and control multiple stages of production, from the hatcheries to the chicken feed mills to the slaughterhouses and marketing. ‘They’re too far consolidated,’ says the aide. ‘There’s not really any turning back.’”

Abby Vesoulis, *Meat Prices Are Going Up. Congress is Trying to Do Something About It*, TIME (Feb. 23, 2022), <https://time.com/6150004/meat-monopolies-congress> [<https://perma.cc/2YJZ-6PAN>].

38. Cattle Price Discovery & Transparency Act of 2022, S. 4030, 117th Cong. (2022). Under § 223(2) of the bill, the publicly available information would, among other things, include: “(A) the type of contract; (B) the duration of the contract; (C) a summary of the contract terms; (D) provisions in the contract that may affect the price of cattle covered in the contract . . . ; [and] (E) the total number of cattle covered by the contract.”

39. Letter from Senator Elizabeth Warren & Congressman Mondaire Jones to The Honorable Jonathan Kanter (Feb. 16, 2022), <https://www.warren.senate.gov/imo/media/doc/2022.02.16%20Letter%20to%20DOJ%20re%20Sanderson-Wayne%20Merger.pdf> [<https://perma.cc/45UG-52DW>].

40. *Id.*

41. Farm System Reform Act of 2021, H.R. 4421, 117th Cong. (2021). In August 2019, a fire broke out in the Tyson Foods beef packing plant in Holcomb, Kansas, which is the country’s second-largest beef packing plant and was responsible for roughly 6% of the country’s total beef slaughter at the time.

Protecting America’s Meatpacking Workers Act, and Protect America’s Children from Toxic Pesticides Act.⁴² According to Senator Booker, our current food system is fragile, but if enacted, these bills “would help mold our food system into one that is more competitive, resilient, humane, and just for everyone.”⁴³ Such efforts are necessary, in part, because “the status quo created by agribusiness special interests is putting all of us at risk.”⁴⁴ The Farm System Reform Act in particular proposes a moratorium on the creation of new or expansion of large factory farms (also known as concentrated animal feeding operations),⁴⁵ the phase-out of the largest factory farms by 2040, a voluntary buyout for farmers who want to transition out of operating these farms, and a strengthening of the Packers and Stockyards Act to protect family farmers and ranchers by “crack[ing] down on the monopolistic practices of meatpackers and corporate integrators.”⁴⁶

Michael Nepveux, *Impacts of the Packing Plant Fire in Kansas*, FARM BUREAU (Sept. 10, 2019), <https://www.fb.org/market-intel/impacts-of-the-packing-plant-fire-in-kansas> [<https://perma.cc/FU69-NCBJ>]. This triggered a rise of 10% in wholesale beef prices, harming restaurant chains, grocery stores, and individual consumers shopping in the meat aisle. *Id.* Further, farmers were stuck with animals that were supposed to be shipped off to meat processors. Such disruption occurs every time a one-off emergency takes place. *Id.*

42. Press Release, Senator Cory Booker, Booker Introduces Package of Bills to Reform U.S. Food System (Feb. 2, 2023), <https://www.booker.senate.gov/news/press/booker-introduces-package-of-bills-to-reform-us-food-system> [<https://perma.cc/5UV7-NVEX>].

43. *Id.*

44. *Id.*

45. *Id.* The bill proposed the use of the Environmental Protection Agency’s definition of large factory farms, or large concentrated animal feeding operations (CAFO). *Id.* The EPA definition provides that large CAFO confines at least 1,000 cattle or cow/calf pairs, 700 mature dairy cattle, 1,000 veal calves, 2,500 swine (weighing over 55 pounds), 10,000 swine (weighing less than 55 pounds), 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 30,000 laying hens or broilers (liquid manure handling systems), 125,000 chickens other than laying hens (other than a liquid manure handling systems), 82,000 laying hens (other than a liquid manure handling systems), 30,000 ducks (other than a liquid manure handling systems), 5,000 ducks (liquid manure handling systems). *Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs*, ENV’T PROT. AGENCY, https://www3.epa.gov/npdes/pubs/sector_table.pdf [<https://perma.cc/64T7-DTXB>].

46. Booker, *supra* note 42.

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Like Biden and his appointees, many members of Congress, either explicitly or implicitly, intentionally or unintentionally, seek to align the interests of consumers with those of small farmers, and convince the public that antitrust is the perfect vehicle to get each party exactly what they want. Despite this portrayal, antitrust enforcement is not the panacea its proponents purport it to be. In fact, there are risks associated with rigid antitrust enforcement. One large and routinely undisclosed risk is an attendant increase in food prices. Given the current crisis in food accessibility, any risk of further increasing food prices for the average consumer should be deemed unacceptable and impermissible. Consequently, it is time to question both this narrative and the role of antitrust.

II. THE MISUSE OF ANTITRUST

The U.S. obsession with protecting small farm profitability is an old one, grounded in the country's nascency. But the reality is antitrust law is not supposed to protect small farms any more than it is meant to punish big business. Instead, the goal of American antitrust law is to advance consumer welfare, not to increase competition for its own sake. The Supreme Court explicitly acknowledged the primacy of the Consumer Welfare Standard in *Reiter v. Sonotone* by citing the principle's founder, Robert Bork, for the proposition that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"⁴⁷ Extensive judicial reliance on *Reiter* since it was decided in 1979 has only solidified the Consumer Welfare Standard's status as antitrust canon.⁴⁸ Under the Consumer Welfare Standard, "conduct that

47. 442 U.S. 330, 343 (1979).

48. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 486 U.S. 85, 107 (1984); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 367 (1982) (Powell, J., dissenting); *Jacobs v. Tempur-Pedic Int'l*, 626 F.3d 1327, 1339 (11th Cir. 2010); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1136-37 (9th Cir. 2004); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 (D.C. Cir. 1995); *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990); *USA Petroleum Co. v. Atl. Richfield Co.*, 859 F.2d 687, 703 (9th Cir. 1988) (Alarcon, J., dissenting); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 566 (7th Cir. 1986); *Westman Comm'n Co. v. Hobart Int'l*, 796 F.2d 1216, 1220 (10th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 228 (D.C. Cir. 1986); *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 521 (9th Cir. 1984); *Marrase v. Interqual, Inc.*, 748 F.2d 373, 387 (7th Cir. 1984); *Indiana Fed'n of Dentists v. FTC*, 745 F.2d 1124, 1140 (7th Cir. 1984); *In re Indus. Gas Antitrust*

makes consumers better off does not violate the antitrust laws; but behavior that impairs consumer welfare does.”⁴⁹

While it is true that antitrust attempts to advance consumer welfare by preserving or increasing competition through antitrust enforcement, this does not necessarily mean that advancing consumer welfare and increasing inefficient competition are synonymous. The consumer welfare model seeks to “make consumers better off, by condemning conduct that raises prices, reduces output, etc.—even if doing so means some less efficient competitors are driven from the market.”⁵⁰ Using antitrust to raise prices for consumers, then, has always been antithetical to the purpose of antitrust law.

There is strong evidence to suggest that some concentration in the meat industry, though harmful to small farmers, is in fact good for consumers.⁵¹

Litig., 681 F.2d 514, 520 (7th Cir. 1982); *Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 482 n.92 (S.D.N.Y. 2012); *United States v. VandeBrake*, 771 F. Supp. 2d 961, 1001 (N.D. Iowa 2011); *United States v. UPM-Kymmene Oyj*, 2003 WL 21781902, *12 (N.D. Ill. 2003); *In re Terazosin Hydrochloride Antitrust Litig.*, 164 F. Supp. 2d 1340, 1348 (S.D. Fla. 2000); *J. Allen Ramey, M.D., Inc. v. Pac. Found. for Med. Care*, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); *Coast Cities Truck Sales v. Navistar Int’l Transp. Co.*, 912 F. Supp. 747, 761 (D.N.J. 1995); *Chicago Prof’l Sports P’ship v. Nat’l Basketball Ass’n*, 874 F. Supp. 844, 861 (N.D. Ill. 1995); *Irvin Indus. v. Goodyear Aerospace Corp.*, 803 F. Supp. 951, 956 (S.D.N.Y. 1992); *Kerasotes Mich. Theaters. v. Nat’l Amusements, Inc.*, 658 F. Supp. 1514, 1520 n.17 (E.D. Mich. 1987); *Machovec v. Council for Nat’l Register of Health Serv. Providers in Psychol.*, 616 F. Supp. 258, 270 (D.C. Va. 1985). *See also* Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust’s Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), <https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model> [<https://perma.cc/M4LF-JH35>] (describing the general sense of consumer primacy over time, even when not framed in terms of the Consumer Welfare Standard).

49. *The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Protection of the S. Comm. on the Judiciary*, 115th Cong. 4 (2017) (statement of Joshua D. Wright, University Professor of Law, Antonin Scalia Law School).
50. *See id.* at 8; Joshua D. Wright, *Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 *Antitrust L.J.* 241, 245-49 (2012).
51. Dalton Whitehead & Yuan H. Brad Kim, *The Impact of COVID 19 on the Meat Supply Chain in the USA: A Review*, 42 *FOOD SCI. OF ANIMAL RES.* 762, 771 (2022) (“Having fewer large-scale operations is more efficient considering the scale and scope economies. The goal of the scale and scope economies is to spread

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The benefits of consolidation are varied. Firms might benefit from enhanced access to research and development, new or needed distribution channels, and/or the reduction of financial risk.⁵² Most often, in the context of food, however, firms are incentivized by the various economies. Merging will often help a firm to streamline operations, and increasing scale can reduce fixed costs. This is especially important in the livestock context, where the scale has already expanded significantly. The production “locus” between 1987 and 2002 “increased by 60 percent in broiler, 100 percent in fed-cattle, 240 percent in dairy, and 2,000 percent in hog production.”⁵³ Consequently, a large, single firm can produce a range of products at lower cost relative to individual firms manufacturing single products or product lines (this is the scope of economies).

Not only are businesses able to use economies of scale to do more with less, but a recent study conducted by economist Sharat Ganapati found that every ten percent increase in national market share by the four largest firms correlated to a one percent increase in real output.⁵⁴ This means that larger companies are better able to increase supply. Likewise, the study found no effect on prices resulting from this increase in concentration—i.e., we get more food for the same cost, and the result is lower prices. This has been true for decades. In 1990, the U.S. Government Accountability Office studied

out the cost of equipment and buildings across a longer time period while in the meantime producing even more product, leading to a lower average cost. The scale economy focuses on creating a larger output to bring in more revenue. The scope economy focuses on having a larger range of products to target more buyers to also increase profits. The consumer benefits from this as if the costs for the production facilities is lower, the prices of the product will be lower. Having many small-scale operations is less efficient as there are higher costs due to there being less opportunity of this scale and scope economy due to less resources being available.”) (internal citations omitted).

52. See Darren Hudson & Cary W. Herndon, *Mergers, Acquisitions, Joint Ventures, and Strategic Alliances in Agricultural Cooperatives*, MISS. STATE UNIV. DEP'T OF AGRIC. ECON. RSCH. REP. 23 (2000), <https://ageconsearch.umn.edu/record/15799/files/rr00-009.pdf> [<https://perma.cc/4UJP-5YYA>].
53. James M. MacDonald & William D. McBride, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, USDA ECON. RSCH. SERV. iii (2009), https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf [<https://perma.cc/MS9G-6AVB>]. Locus statistics represent the midpoint of the range of farm sizes (in terms of annual sales) at which one half of national production comes from larger farms and half from smaller. *Id.* at 5.
54. Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13 AM. ECON. J: MICROECONOMICS 309, 310 (2021).

concentration trends in the food supply chain and found that “[e]mpirical economic literature has not established that concentration in the processing segment of the beef, pork, or dairy sectors . . . has adversely affected commodity or food prices Most of [the thirty-three reviewed studies] found either no evidence of market power, or efficiency effects that were larger than the market power effects of concentration.”⁵⁵

The same holds true regarding today’s ongoing food price inflation. According to the USDA’s Economic Research Service’s 2016-2020 Consumer Price Index (CPI), the “all-food” and “all-items” CPI categories both increased by 7.8%, which was below the 11.9% increase for medical care and the 11.4% increase in housing costs.⁵⁶ Even when accounting for the 2019-2023 CPI, where food rose by 25.0%, all-items by 19.2%, and transportation by 27.1%, the rates do not deviate enough to justify accusing the entire food industry of collusion and profiteering.⁵⁷ In fact, the USDA itself notes that food price inflation actually slowed in 2023 as inflationary factors (including the Coronavirus pandemic, the avian influenza outbreak, and the conflict in Ukraine, among others) began to ease.⁵⁸

If consumer welfare remains the focus of antitrust, then market concentration is not inherently harmful to consumers, as long as they do not have to pay more as a result. Granted, increased competition is generally associated with lower prices and innovation, but having lots of firms in the market is not an economic panacea *per se*. Increasing the number of market competitors cannot be treated as an end unto itself because sometimes consumers’ interests are best served through other means.⁵⁹ In times of

55. US. GOV’T ACCOUNTABILITY OFF., GAO-09-746R, U.S. AGRICULTURE: RETAIL FOOD PRICES GREW FASTER THAN THE PRICES FARMERS RECEIVED FOR AGRICULTURAL COMMODITIES, BUT ECONOMIC RESEARCH HAS NOT ESTABLISHED THAT CONCENTRATION HAS AFFECTED THESE TRENDS 27-28 (2009).

56. USDA ECON. RSCH. SERV., FOOD PRICE INFLATION OVER 2016-2020 EQUAL TO ECONOMY-WIDE INFLATION (2021), <https://web.archive.org/web/20210321070526/https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58350> [<https://perma.cc/3KQ4-73YA>].

57. USDA ECON. RSCH. SERV., U.S. FOOD PRICES ROSE BY 25 PERCENT FROM 2019 TO 2023 (2024), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58350> [<https://perma.cc/FVB7-FSRG>].

58. *Id.*

59. *See, e.g.*, Meilin Ma and Jayson L. Lusk, *Concentration and Resilience in the U.S. Meat Supply Chains* (Nat’l Bureau Econ. Rsch. Paper No. 29103, 2021), <https://www.nber.org/papers/w29103> [<https://perma.cc/9S8E-R6KE>] (finding that a less concentrated meat processing sector would not be less

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grave economic hardship, the public would benefit most from a rigid adherence to the Consumer Welfare Standard, as opposed to increased antitrust enforcement. This would presumptively lower food prices for all consumers and increase economic accessibility, as is consumers' legal right.

To this point, the term "consumer welfare" has served merely as a powerful tool of rhetoric for politicians. Yet, as a practical matter, courts have elected to apply a true consumer welfare standard: one that prioritizes the end-user and their surplus. This is not only important, but also the right approach, because while everyone else in the supply chain is making a business or livelihood decision, poor consumers require food to survive. If antitrust enforcement is used to break up Big Ag, especially out of concerns for "fairness," there will almost certainly be an adverse effect on food prices. This is because if you view Big Ag as a threat to small farmers, then you must also believe that Big Ag creates food prices that are too low and will inevitably force smaller, less efficient, producers out of production.

CONCLUSION

The use of antitrust in the context of food is problematic because it so clearly violates the Consumer Welfare Standard as prescribed by the courts. Ultimately, antitrust rhetoric promoting *ad nauseam* enforcement will not improve consumer welfare. Advancing consumer welfare in the food industry must mean prioritizing lower food prices over some arbitrary threshold of market competition or protecting small farms. Courts can and should begin distinguishing these goals immediately.

vulnerable to the risks of temporary plant shutdowns observed during the height of the pandemic).