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Abstract

COVID-19 not only affected every hospital bed in the nation—if not the world; it also affected nearly every dinner table in America and beyond. Supply chain disruptions caused by the pandemic highlighted deep-seated problems with how we get our meat, and how difficult we make it for American farmers to sell to the family next door. Within a few months of the first reported case in the US, hundreds of workers from just two meat-processing plants on American shores became infected with COVID-19, and imports from around the world came to a standstill as factories and shipping companies were forced to shut down. Instantaneously, the US supply of meat seemed to contract, flying off supermarket shelves as Americans began to shelter in place. Meanwhile, nationwide closures of restaurants and school cafeterias posed serious problems for farmers who were forced to cull and dispose of their herds, unable to get them processed at commercial butchers that were either closed or backlogged. In a nation that raises more than 94 million heads of cattle alone, we somehow found ourselves in a meat shortage in 2020, with grocery store shelves looking as “patchy and unpredictable as those in the former Soviet bloc”. This article analyzes the state of American agriculture as it pertains to the meat industry, using the beef sector as a case study. This article also proposes potential solutions that should be considered in any stimulus package seeking to create long-term, impactful growth in rural America, where one in five Americans live.

Keywords

Meat industry, Covid-19, Meat processing, Localized economies

Disciplines

Agricultural Economics | Agriculture Law | Food and Drug Law

WHERE'S THE BEEF? MEAT SHORTAGES, FARMER NEEDS, AND LONG-TERM RECOVERY POLICIES IN A PANDEMIC ERA

*Kim Vu-Dinh**

“I aimed at the public’s heart, and by accident I hit it in the stomach.”

Upton Sinclair

Abstract

COVID-19 not only affected every hospital bed in the nation--if not the world; it also affected nearly every dinner table in America and beyond. Supply chain disruptions caused by the pandemic highlighted deep-seated problems with how we get our meat, and how difficult we make it for American farmers to sell to the family next door. Within a few months of the first reported case in the US, hundreds of workers from just two meat-processing plants on American shores became infected with COVID-19, and imports from around the world came to a standstill as factories and shipping companies were forced to shut down. Instantaneously, the US supply of meat seemed to contract, flying off supermarket shelves as Americans began to shelter in place. Meanwhile, nationwide closures of restaurants and school cafeterias posed serious problems for farmers who were forced to cull and dispose of their herds, unable to get them processed at commercial butchers that were either closed or backlogged. In a nation that raises more than 94 million heads of cattle alone,¹ we somehow found ourselves in a meat shortage in 2020, with grocery store shelves looking as “patchy

* Associate Professor of Law, Mitchell Hamline School of Law. The Author wishes to thank all those who gave crucial feedback, specifically, Professor Kristen Minton, Professor Emma Scott, Professor Jonathan Brown, and Professor and Deputy Director of the Federal Trade Commission Bureau of Competition John Newman; and the Arkansas farmers and ranchers who entrusted me with their stories. This Article was drafted with the assistance of a grant from the University of Arkansas at Little Rock William H. Bowen School of Law. I would like to dedicate this article to my father, Dr. Minh Vu Dinh, whose lifelong career of serving diverse and disenfranchised communities has been an inspiration to my own profession as a lawyer and educator.

¹ Cattle, United States Dept. of Agriculture and National Agricultural Statistics Service, (Jan. 31, 2020), https://www.nass.usda.gov/Publications/Todays_Reports/reports/catl0120.pdf.

and unpredictable as those in the former Soviet bloc”.² This article analyzes the state of American agriculture as it pertains to the meat industry, using the beef sector as a case study. This article also proposes potential solutions that should be considered in any stimulus package seeking to create long-term, impactful growth in rural America, where one in five Americans live.

I. Introduction

The supply chain for meat has been brittle in the US for decades, ripe for fracture by a pivotal event such as the coronavirus pandemic, thanks to a perfect, rural storm of unfettered agribusiness conglomerates, a myriad of meat inspection regulations ensnaring small ranchers, and a primitive tech infrastructure in rural America. The first case of COVID-19 in the United States was recorded on January 20, 2020 and roughly six months later, a staggering 4.1 million cases and 145,000 deaths were reported within US borders.³ The virus infected Americans of every walk of life, no less so in rural areas. Within three months of the first report of COVID in the US, 115 meat and poultry processing plants in 19 different states reported infections, with at least 4,913 infected workers.⁴ Official information from the federal government was fraught; while the US Center for Disease Control (CDC) reported 5,000 cases from slaughterhouses in those early months,⁵ others reported 11,000 cases in Tyson plants alone.⁶ Still others estimated infections in meat processing plants to be 10 times CDC estimates.⁷ As of March 2021, at least 57,526 meatpacking workers were infected, resulting in at least 284 deaths.⁸

² Michael Pollan, *The Sickness in Our Food Supply*, THE NEW YORK REVIEW (June 11, 2020), <https://www.nybooks.com/articles/2020/06/11/covid-19-sickness-food-supply/>.

³ Center for Disease Control website is available at <https://www.cdc.gov/covid-data-tracker/#cases>.

⁴ Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020*, Center for Disease Control and Prevention (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e3.htm#suggestedcitation>.

⁵ *Id.*

⁶ Taylor Telford, *The meat industry is trying to get back to normal. But workers are still getting sick — and shortages may get worse*, WASH POST, May 25, 2020.

⁷ Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FOOD AND ENVIRONMENT REPORTING NETWORK, May 2020, <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>.

⁸ Mike Dorning and Michael Hirtzer, *USDA Watchdog Probes Covid Safety Measures for Meat Inspectors*, BLOOMBERG, Mar. 5, 2021, citing Telford, at FN 7.

Approximately one in twelve infection cases in the early months of the pandemic were tied to meatpacking.⁹ Suddenly, a spotlight was aimed at the meat industry's cramped workplaces, long hours, and other archaic practices that have prevailed for decades.¹⁰

Meanwhile, back at the ranch, as the few, large-scale meat processing plants were forced to close, animals could not be butchered quickly enough,¹¹ forcing farmers to cull and discard millions of animals. By April of 2020,¹² 10 million chickens were killed and disposed of, and 10 million pigs in May.¹³ U.S. meat production declined by 20%,¹⁴ and supermarkets began rationing purchases.¹⁵

⁹ *Id.*

¹⁰ Sociologist Lourdes Gouveia, University of Nebraska Omaha who has studied the meatpacking industry for more than 30 years asserts the outbreaks merely revealed longstanding conditions have create dangerous conditions for meatpackers across the nation. Oliver Laughland and Amanda Holpuch, *'We're modern slaves': How meat plant workers became the new frontline in COVID-19 war*, THE GUARDIAN, May 2020.

¹¹ Wesley F. Peterson, *Coronavirus Food Assistance Program (CFPAP) Payments for Nebraska Livestock Producers*, Cornhusker Economics. Jul 15, 2020, at 1.

¹² Sophie Kevany, *Millions of farm animals culled as US food supply chain chokes up*, THE GUARDIAN, Apr. 29, 2020.

¹³ *See, id.*, Kevany. "The National Pork Producers Council has estimated as many as 10 million hogs will be euthanized by the end of the summer because of coronavirus-related disruptions in meat processing. In Minnesota, the situation is already dire — with an average of 2,000 pigs a day being killed, according to the state agriculture department. About 90,000 pigs have been euthanized in the state in the past six weeks," Holly Bailey, *Being a pig farmer was already hard. Then came coronavirus*, WASH POST, May 21, 2020.

¹⁴ Alexia Elejalde-Ruiz, *Higher meat prices, fewer choices at supermarkets as slaughterhouses close over COVID-19 cases. For farmers, 'some tough choices' ahead*, CHIC. TRIB, Apr. 24, 2020.

¹⁵ Laura Reiley, *Tyson says nation's pork production is down 50%, despite Trump's order to keep meat plants open: Numbers raise doubts about effectiveness of recent executive order*, WASH. POST, May 4, 2020. The pandemic seemed first precipitate panic buying of protein, which some predicted would be followed by a decrease in demand as Americans tighten their belts contemplating unemployment. Noting the impact on AR's rural economy, likely followed by a market contraction as unemployment continues. John Anderson, Alvaro Durand-Morat, Wayne Miller, Jennie Popp, Daniel Rainey, Ron Rainey, Scott Stiles, and Brad Watkins, *COVID-19 Impacts on Arkansas' Agricultural and Rural Economies*, (2020), https://www.uaex.edu/life-skills-wellness/health/covid19/COVID-19_Impacts_on_Ag_and_Rural_Economy.pdf at 2, 4-5.

Grocery sales increased 99% in March as shoppers panic-purchased, and decreased a month later, still 25% higher in April as compared to the previous year.¹⁶ Amidst the closures mandated by local authorities following the viral outbreak amongst workers, John Tyson of the Tyson Foods, one of the largest meat companies with over 140,000 workers,¹⁷ ran a letter in the New York Times and several other newspapers on Apr. 26, 2020,¹⁸ bemoaning the closures as a national security issue, stating the nation was “perilously close to the edge in terms of our meat supply”. Days after the publication of the letter, former President Trump invoked the Defense Protection Act to keep meat processors open, against the mandates of local public health officials.¹⁹ (Curiously enough, at one point Trump refused to invoke the DPA to address the shortage of personal protective gear for health care professionals.)²⁰

Yet despite popular belief, the halt of meat processing domestically was not quite responsible for the empty supermarket shelves. In fact, the demand for meat from restaurants and schools decreased by 68% in March and 50% in April²¹ compared to the previous year, which should have compensated for the decline in meat processing. Indeed, in the same month Tyson penned the letter published in the NY Times, his company sent 1200 tons of pork to China, part of the 129,000 total tons exported by all American farmers and meat processors.²² In fact, Smithfield’s—one of the largest meatpacking companies on US shores—is owned by a Chinese parent company.²³ In short, while Americans rely on imports for 15% of food consumption,²⁴ 3.05 billion pounds of which is from beef consumption, and 3.02 pounds of cattle alone raised in America is consumed on foreign shores.

¹⁶ Robert Johansson, *Will COVID-19 Threaten Availability and Affordability of our Food?* U.S. Department of Agriculture website, Apr 16, 2020, <https://www.usda.gov/media/blog/2020/04/16/will-covid-19-threaten-availability-and-affordability-our-food>.

¹⁷ *Quarterly Report June 27, 2020*, [www.sec.gov. UNITED STATES SECURITIES AND EXCHANGE COMMISSION](https://www.sec.gov/ix?doc=/Archives/edgar/data/100493/000010049320000103/tsn2020q310q.htm), <https://www.sec.gov/ix?doc=/Archives/edgar/data/100493/000010049320000103/tsn2020q310q.htm>.

¹⁸ Tyson Advertisement, WASH POST, Apr. 26, 2020, https://www.washingtonpost.com/context/tyson-ad/86b9290d-115b-4628-ad80-0e679dcd2669/?itid=lk_inline_manual_2.

¹⁹ Taylor Telford, Kimberly Kindy, and Jacob Bogage, *Trump orders meat plants to stay open in pandemic*, WASH. POST, Apr. 29, 2020.

²⁰ Ayesha Rascoe, *Trump Resists Using Wartime Law To Get, Distribute Coronavirus Supplies*, NPR Mar. 25, 2020.

²¹ *Id.*, Johansson.

²² Michael Corkery and David Yaffe-Bellany, *As Meat Plants Stayed Open to Feed Americans, Exports to China Surged*, NY TIMES, June 16, 2020,

²³ *Id.*

²⁴ Johansson, *supra* note 16.

Thus, even while shortages were hitting the grocery stores and schools, processors continued to stock their frozen meat reserves in the US; indeed in that same period from March to April of 2020, red meat and poultry products in cold storage increased by 40 million pounds, for a total of 2.5 billion pounds.²⁵ The problem is not rooted in ranches in the US, but rather, those located thousands of miles away, and the industry's entrenched relationship with overseas markets.

This begs the question: where's the beef? Was there actually a meat shortage? If not, where was the beef going? Was the shortage just a blip caused by the pandemic?

I argue that the fracture in the meat supply chain observed in this past year was not a direct result of the pandemic, but rather a function of a long-standing fissure caused by decades of market domination by behemoth food corporations. The cumulative conglomeration has almost obliterated the free market, which is slowly being revived by the growing popularity of locavore culture and tastes for sustainable agriculture. However, should the nation continue to allow the "economic kings"²⁶ to continue to rule the roost, agribusiness monopolies will continue 1) to dominate the access to agricultural inputs, 2) define and dominate access to markets, and 3) influence the reaches and bounds of regulatory restrictions on small meat processors and small farmers. At stake are the livelihoods of most farmers, our children's school lunches, and our dinner tables.

In this article I will focus on the impediments preventing most American ranchers from thriving, leaving the US with a vulnerable meat supply chain that truly does have the potential of impacting national security. In Part I, I summarize the history of American agribusiness, and the significance and relevance of the agricultural economy. In Part II, I survey the infrastructural barriers to small and medium farm growth that have grown exponentially since the 1980's. In Part III, I propose potential solutions in policy and programming. Lastly, I conclude with a recommended path forward.

²⁵ Kyle Bagenstose, *As leaders warned of US meat shortages, overseas exports of pork and beef continued*, USA TODAY, Jun. 16, 2020.

²⁶ "In arguing for the Sherman Act, Senator Sherman warned of the danger of economic kings who could oppress American economic freedom as much as the kind of England had oppressed political freedom in the days before the American revolution," Peter Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: the Case for Change in Public Policy*, 2000 Wisc. L. Rev 531, citing Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 180 (1954).

II. Background: The Farm Problem, the Reality of Rural America, and the Impact of Small Farms

Rural America once enjoyed a greater share of this nation's wealth until massive conglomerations eviscerated rural jobs.²⁷ Small and mid-size agricultural businesses have the potential thrive, and provide a more diverse market of products and services—even more so and better than can multimillion dollar food and farm businesses. Cheaper farm products from these monopolies have come at a larger cost to the American economy—weaker rural economies with fewer jobs, fewer choices for the consumer, and an unhealthy reliance on four major meat producers. To understand the potential solutions to the broken meat supply chain requires a fundamental recognition of the high capacity of agricultural America. Only then can we start to understand the scope of the impact that agricultural monopolies have and what is truly at stake.

There is a dominant narrative portraying rural America as a charity case. This concept has often been referred to as *The Farm Problem*, a term coined by Congress in the context of passing farm bills, based on the perception that the demand for farm products is inelastic, while the supply increases with the constant advent of new agricultural technology.²⁸ This model assumes a decrease in income for farms over time.²⁹ Popular lore also portrays a somewhat pathetic image of rural America, as a sparsely populated region cursed by stagnation, a dwindling population dominated by poor, older white farmers, stuck in their ways and increasingly irrelevant, immune to innovation and unsavvy to the ways of the world, insistent on living amongst politically like-minded people.³⁰

About one in five individuals, or 60 million people, live in rural America,³¹ an area that comprises 97% of the nation's land.³² Certainly, this is far different

²⁷ Brian Feldman, *The Real Reason Middle America Should Be Angry*, Wash. Monthly, Mar. 2016. See also, Lilian Salerno, *Want to rescue rural America? Bust monopolies*, Wash Post, Apr. 20, 2017.

²⁸ John M. Crespi and Stephan Marette, *A Theory for Why Large Farms need Small Farms*, (Iowa State Univ. Ctr. for Agric. and Rural Dev., Working Paper No. 20-WP 599, 2020).

²⁹ *Id.*, Crespi.

³⁰ See, Christopher Ingraham, *The harmful, popular misconceptions about rural America*, WASH. POST, Jan. 3, 2020. The article author, who hails from Minnesota, wrote a book contrasting numerous stereotypes of rural America against the evidence that contradicts them.

³¹ The Census Bureau defines “rural” by low-density housing, which factors population thresholds, density, distance and land use. America Counts Staff, *One in Five Americans Live in Rural Areas*, US Census Bureau (Aug. 9, 2017), <https://www.census.gov/library/stories/2017/08/rural-america.html>.

³² *Id.*

from a century ago, when over half of the nation lived in rural America.³³ But this is where the accuracy of popular imagery ends. The population of rural America is growing, and becoming increasingly more diverse. Since 1970, the population of rural areas is not shrinking—indeed it has grown by 10%.³⁴ It is also becoming increasingly diverse; from 2000-2010, about 83% of the region's population growth is comprised by people of color, who now make up about 20% of the region.³⁵ In 2010-2016, immigrants comprised 37% of the population growth. In a 2018 survey of 6,251 individuals conducted by the Pew Research Center, 52% of the respondents indicated that diversity is important to them, and 62% indicated that it is not important for them to live amongst politically like-minded people.

Rural America is also becoming more attractive to urbanites. In the same Pew study, 30% of urban residents who were interested in relocating said they would move to a rural area if they could, (contrast this with 20% of rural residents who had a desire to relocate who would be willing to move to urban areas.) Another study reflected a rural “brain gain” of individuals in aged 30-64, looking for a simpler way of life and lower cost of living.³⁶ And while the poverty rates of rural, suburban and urban areas were similar (18%, 14% and 17% respectively), since 2000 the rate of increase in poverty is significantly lower in rural areas—a 31% increase in urban areas, 51% increase in suburban areas, and 23% increase in rural areas.³⁷ And, despite the political beliefs that divide many urban communities from rural ones, the Pew Research revealed that the majority of urban and suburban residents agree with the idea that rural America does not receive its fair share of federal dollars.³⁸

³³ Michael Ratcliffe, Charlynn Burd, Kelly Holder, and Alison Fields, *Defining Rural at the U.S. Census Bureau*, American Community Survey and Geography Brief, US Census Bureau (Dec. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/acs/acsgeo-1.pdf>.

³⁴ *A Few Things to Know About Rural America*, The Aspen Inst., (May 2020) <https://www.aspeninstitute.org/wp-content/uploads/2020/05/A-Few-Things-To-Know-CSG-Brief-Update.pdf>.

³⁵ *Id.*, Aspen, citing Kenneth Johnson, *Where is 'rural America' and what does it look like?* THE CONVERSATION (Feb 20, 2017).

³⁶ Aspen, *supra* note 36.

³⁷ Kim Parker, Juliana Menasce Horowitz, Anna Brown, Richard Fry, D'Vera Cohn, and Ruth Igielnik, *What Unites and Divides Urban, Suburban and Rural Communities*, Pew Research Center, (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/what-unites-and-divides-urban-suburban-and-rural-communities/>.

³⁸ *Id.* (“About seven in ten rural residents (71%) and somewhat narrower majorities in suburban (61%) and urban (57%) communities, say rural areas receive less than their fair share of federal dollars. These views don't vary considerably across demographic or partisan lines.”).

Rural America also hosts innovation at a similar rate as urban areas. In a 2020 study conducted out of Penn State University, social scientists took an unconventional approach to measuring innovation in the US. Instead of looking at research and development spending, employment of scientists and engineers, and patents, as is customary in defining whether a region is considered to facilitate innovation, the study's authors instead looked at the "spillover theory of entrepreneurship" which takes into consideration opportunities for networking facilitated by geographic proximity of different industries.³⁹ The authors then took quantitative measurements of improvements in products, services, and processes resulting in an increase in various areas such as: economic efficiency, income, profit, and product output, in 381 industries.⁴⁰ What they found in their data was that rural areas were comparable to urban areas as facilitators of innovation, contradicting popular belief and earlier studies using more the more typical innovation measurement factors. The more important drivers in innovation, they concluded, was the presence of varying industries in one geographic place, such as suppliers, manufacturers, and customers, more so than the number of PhD's, scientists, or research funds.⁴¹ "...[I]nnovation occurs not only in labs, or cities, but also in more remote and sometimes rural regions."⁴² This study has attracted the attention the business community, and including well-respected business journals such as Forbes magazine.⁴³

Also contrary to popular belief,⁴⁴ small farms are still imperative to the American rural fabric, even in the context of ever-growing scale economies and the rise of the monolithic factory farm.⁴⁵ In fact, the number of small, family farms is about the same now as it was in the 1980's, and the average size of a farm (400 acres) has not much changed in last 50 years.⁴⁶ Small farms produce 26% of the value of total farm production, make up half of all land in US, and still comprise 90% of all US farms.⁴⁷ Small-scale cow-calf operations (defined as operations with fewer than 100 beef cows) make up 90% of all farms with beef cows and 45%

³⁹ Stephan J. Goetz, and Yicheol Han, *Latent Innovation in Local Economies*, at 3 (2020), <https://pennstate.pure.elsevier.com/en/publications/latent-innovation-in-local-economies>.

⁴⁰ Goetz, *supra* note 39, at 5, 15.

⁴¹ Goetz, *supra* note 39, at 15.

⁴² Goetz, *supra* note 39, at 17.

⁴³ Adi Gaskell, *Are Rural Communities (Untapped) Hotbeds of Innovation?*, FORBES, Jan. 16, 2020.

⁴⁴ Crespi, *supra* note 28, at 6 (statement of Bernie Sanders) ("Storefronts are empty and farmers have been forced to sell their land that has been kept in families for generations to massive corporations.").

⁴⁵ Crespi, *supra* note 28, at 6, (citing Tweeten 1984, Tweeten and Amponsah 1996, Hoppe and Newton 2018).

⁴⁶ Crespi, *supra* note 28, at 6.

⁴⁷ *Id.*

of total US beef production.⁴⁸ Amongst these farms, 80% of these households have diversified income; that is to say that producers on operations with fewer than 50 beef cows devoted an average of 28.9 percent of their total work time to the cow-calf logistics, and operations with 50 to 99 beef cows devoted an average of 47.3 percent of their work time to logistics.⁴⁹ USDA's National Agricultural Statistics Service revealed that 88% of U.S. family farms are small farms (defined as having gross cash farm cash income (GCFI) of less than \$350,000 annually).⁵⁰ While their contribution to total agricultural sales is small relative to their number, small family farms account for 58 percent of all direct farm sales to consumers.⁵¹

The charity case imagery depicted by the Farm Problem narrative is further contradicted by income and output data: Fruit and meat—the fast growing segments of the agricultural economy—receive far less federal support than the slower income growth crops such as rice and wheat.⁵² In short, small farm owners are busy entrepreneurs, juggling multiple professions to provide food, fuel, and fiber, incorporating a growingly diverse labor force. The Farm Problem narrative fails to reflect that the demand for American farm products has yet to become inelastic. The removal of trade barriers has increased demand for an ever-growing supply resulting from agricultural technology,⁵³ and the US Census estimates agricultural exports to comprise 15% of the share total exports in 2008, worth \$150 billion according to the USDA.⁵⁴ The demand for American agriculture continues to grow overseas, and our own domestic demand is barely even touched by our own farmers.

It is clear that agricultural America has the capacity to become a robust provider of employment once again. Most land continues to be held by small farms, the demand for American agricultural products is not inelastic with a growing international market, and rural America does not reject innovation. Rather, it is the deliberate, monopolistic behavior of a handful of agribusinesses that has eviscerated economic opportunity in a manner that is neither efficient nor provides

⁴⁸ USDA, *Small-scale U.S. Cow-calf Operations*, at i (Apr. 2011), www.aphis.usda.gov/animal_health/nahms/smallscale/downloads/Small_scale_beef.pdf.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Staff Writer, *USDA: 97 percent of U.S. farms are family-owned*, AGWEEK (Mar. 17, 2015), <https://www.agweek.com/business/agriculture/3794493-usda-97-percent-us-farms-are-family-owned> (citing USDA 2012 statistics).

⁵² COUNCIL OF ECON. ADVISERS, *STRENGTHENING THE RURAL ECONOMY—THE CURRENT STATE OF RURAL AMERICA* 3 (date), <https://obamawhitehouse.archives.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/executive-summary>.

⁵³ *Id.*

⁵⁴ *Id.*

meaningful wealth on a macroeconomic level. This is well-illustrated in the meat industry.

III. The Making of a Brittle Supply Chain

A. History of Agribusiness Monopolies and the Beef Paradox

The ever-growing demand brought about by international trade should have created opportunity for all farms; however, it did little to stabilize the rural workforce. In fact, such growth was accompanied by shrinking employment opportunities on large farms. In 1900, approximately 41% of the American labor force was based in farming; by 2000, that number shrank to 2%.⁵⁵ This devolution is intricately linked to the change in antitrust regulation and can be explained through the history of the meatpacking industry.

In the early 1900's, the meatpacking industry was dominated by five companies (the "Big 5"), that achieved market dominance, becoming suppliers and sellers to their client farmers. This came to an end in 1919 when they were broken up by federal regulators through Clayton Act.⁵⁶ Congress kept a close eye on agribusinesses and just a few years later, it passed the 1921 Packers and Stockyards Act, also known as the "Farmer and Rancher Bill of Rights", which made it illegal for big meatpackers to 1) pay farmers less than market value, or 2) favor one farmer over another for non-market-based reasons.⁵⁷ These swift and strong moves were not without teeth, and due to enforcement from 1919-1976, the market share of big 5 went from 55% to 20%.⁵⁸

The era of enforcement not only ended in 1980, but in a sense reversed. Under the Reagan administration, economists from the Chicago School of Economics re-characterized the priorities of the US Department of Justice's antitrust division to "consumer welfare" and "efficiency considerations", over the priorities of open competition and open markets, in what former Grain Inspection, Packers and Stockyard Act (GIPSA) Administrator J. Dudley Butler referred to as the "no regulations" era.⁵⁹ This was a break from the Sherman Antitrust Act of 1890 which sought to protect market competition, and which in fact never even included the word "consumer" in the entirety its text. Indeed, even the Supreme

⁵⁵ *Id.* at 2.

⁵⁶ Lina Khan, *Obama's Game of Chicken*, WASH MONTHLY (Nov/Dec 2012), <https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Khan, *supra* note 56. See also *supra* note 3 (citing Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Wiley, 2011)). See also *infra*, note 65, at 562.

Court in the 1960's characterized the purpose of antitrust law as protecting "competition, not competitors".⁶⁰ The new era of antitrust regulation resulted in multiple agribusiness mergers being permitted by regulators, in the name of lower prices for the "consumer" as the companies conglomerations amassed an economy of scale.⁶¹ In this new context, survival in agribusiness almost required increased specialization, with little variation in business models possible in order to be price competitive with the conglomerates.⁶² Within one year into the Reagan presidency, the third largest meatpacker, Cargill, merged with the fifth largest Spencer Beef without issue, as part of what USDA economists referred to as "merger mania", increasing the market share of the Big Four from 35.7% to 71.6% in the ten year period from 1980-1990.⁶³ Today, roughly 85% of the industry is dominated by the Big Four--Tyson Foods Inc., JBS SA, Cargill Inc. and National Beef Inc.⁶⁴

This direction in the food and farm industries did not change course under subsequent administrations of either political party. Under the Obama administration, Kraft merged with Heinz, JBS merged with Cargill's Pork business, and Bayer merged with Monsanto.⁶⁵ ConAgra and Cargill were permitted to merge their wheat mills into Ardent Mills, one of the milling industry's biggest merger in over a decade.⁶⁶ The same administration pulled back from enforcement of the Country of Origin Labeling (COOL), which would have allowed independent farmers and ranchers to better compete within the consolidated meat industry.⁶⁷ Former President Obama also declined to use the power of the Grain Inspection, Packers and Stockyard Administration (GIPSA) which was created via the Packers and Stockyards Act of 1921 (PSA), and could have prohibited meatpackers from owning or financing custom feedlots and vice versa, amongst other things.⁶⁸

⁶⁰ Pollan, *supra* note 2; Kelsea Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. Rev. 611, 616 (2013) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

⁶¹ COUNCIL OF ECON. ADVISERS, *supra* note 53; Khan, *supra* note 54.

⁶² Pollan, *supra* note 2 (citing Lynn, *supra* note 1).

⁶³ Khan, *supra* note 56; *See infra* note 65; *See infra* note 69, at 562.

⁶⁴ David McLaughlin, *Meatpacking Giants Face U.S. Antitrust Inquiry Amid Shutdowns*, BLOOMBERG (May 7, 2020), <https://www.bnnbloomberg.ca/meatpacking-giants-face-u-s-antitrust-inquiry-amid-shutdowns-1.1433245>.

⁶⁵ Douglas, *supra* note 7, at 81.

⁶⁶ Owen Fletcher & Ben Fox Rubin, *ConAgra, Cargill, CHS Set Flour-Milling Venture*, WALL ST. J., Mar. 5, 2013.

⁶⁷ Douglas, *supra* note 7, at 81. *See also* Press Release, USDA, Statement from Agriculture Secretary Tom Vilsack on the Country of Origin Labeling Requirements for Beef and Pork (Dec. 18, 2015) (on file with author).

⁶⁸ Douglas, *supra* note 7, at 80. *See also* Bill Bullard, *Under Siege: The US Live Cattle Industry*, 58 S.D.L. REV. 560, at 562-563 (providing a detailed description of the vertical integration present in the live cattle industry, and the unsuccessful

GIPSA was established as a standalone agency in 1994 to administer the PSA,⁶⁹ but not until the Obama presidency did the agency attempt to issue regulations for the administration, which was only finally accomplished at the tail end of the Obama Presidency.⁷⁰ GIPSA would have given the administration the authority to crack down on the manner in which the large corporate meatpackers defined market practices of small and mid-sized ranchers. Even after overcoming the bipartisan obstacles to the promulgation of the rules (147 members of Congress, including 25 Democrats opposed the rules), a rider was then added in 2011 which removed funding for enforcement, effectively nullifying the Act and rules altogether.⁷¹

Under Trump, though his administration overpaid farmers for losses during his trade wars,⁷² nothing was done to address long-term problem of enforcement of small farm market protections. Not only did the administration make no effort to fund GIPSA enforcement, which was abolished by the administration in 2017, ostensibly transferring regulatory authority to the Fair Trade Practices programs within USDA,⁷³ it also severely cut funding to the USDA altogether.⁷⁴ This in turn was intended to reduce the number of inspectors needed to properly police the largest meat processing facilities, an agency Trump characterized as being guilty of “inspection overkill.”⁷⁵

Unsurprisingly, conglomeration stifled the diversification of the market. Most meat processors today operate under the *contracting model*, in which farmers buy all components from a single supplier that then buys the end product, and

attempts of legislators in 2002 to curb vertical integration by prohibiting meatpacker ownership of the cattle for more than 14 days before slaughter).

⁶⁹ Duke Environmental Law and Policy Clinic, Environmental Protection Clinic Yale Law School, Yale School of Forestry and Environmental Studies, Harvard Law School Food Law and Policy Clinic, *DIVERSIFIED AGRIC. ECONOMIES*, Mar. 2018 (citing *History and Mission Statement, U.S. Dep’t of Agric., Agric. Marketing Service*, www.farbillaw.org/wp-content/uploads/2018/03/FBLE_Diversified-Agricultural-Economies_Final.pdf).

⁷⁰ Bullard, *supra* note 68.

⁷¹ As of the writing of this work, not even a page on USDA’s website is dedicated to GIPSA. See, <https://www.gipsa.usda.gov/>.

⁷² Dorning, *supra* note 8 (citing Joseph Janzen & Nathan Hendricks, *Are Farmers Made Whole by Trade Aid?*).

⁷³ Harvard, p. 12.

⁷⁴ Zoe Willingham, *10 Ways the Trump Administration Has Failed Rural America (and 10 Ways To Overcome It)*, CENTER FOR AMERICAN PROGRESS (Oct. 5, 2020), <https://www.americanprogress.org/issues/economy/reports/2020/10/05/491101/10-ways-trump-administration-failed-rural-america-10-ways-overcome/>.

⁷⁵ Emily Ziemski, *Beef Recalls Are At An All-Time High. Is It The Meat Or Is It Us?*, HUFFPOST (Nov. 19, 2019), https://www.huffpost.com/entry/ground-beef-recalls-food-poisoning_1_5dc980e6e4b00927b2371a9a.

processes the meat.⁷⁶ In the chicken industry, meat processors are even more integrally woven into the market as sellers of chicks, feed, and buyers of the finalized product, enabling processors to strong-arm farmers out of voicing complaints to federal authorities.⁷⁷ The scarcity of processors means farmers can only raise what they know can be processed at the few number of meat processors that exist.⁷⁸

The contracting model was originally adopted to swiftly meet the rising demand for meat immediately after WWII. Today, under an environment of deregulation, the contracting model is not just the norm, but the only method of survival of most farmers who do not have non-farm streams of income. Combined with the practice of specialization targeting large, single markets, this results in a supply chain characterized by some as “brittle,”⁷⁹ i.e., vulnerable to shattering if one element of the chain becomes fraught.

Today, after decades of consolidation, four companies control over 80% of the meat processing industry, and about 50 businesses have 98% of the market share.⁸⁰ Each plant can process 10,000 hogs a day, or 4% of the nation’s food supply.⁸¹ According to the Institute for Agriculture and Trade Policy, a farm advocacy group, “When you get to this kind of size, it increases risk,” said Ben Lilliston of the Institute; “When something goes wrong in a really big plant like this, you have a really big problem. These are vulnerable systems.”⁸²

In this supply chain, during a pandemic, American farmers were forced to cull and discard their own animals,⁸³ even though school children still needed to

⁷⁶ Khan, *supra* note 53.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Pollan, *supra* note 2, at 3 (“The president and America’s meat eaters, not to mention its meat-plant workers, would never have found themselves in this predicament if not for the concentration of the meat industry, which has given us a supply chain so brittle that the closure of a single plant can cause havoc at every step, from farm to supermarket.”).

⁸⁰ Michael Corkery & David Yaffe-Bellany, *The Food Chain’s Weakest Link: Slaughterhouses*, N.Y. TIMES, Apr. 18, 2020, <https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html>.

⁸¹ Jacob Bunge, *Is Your Burger a Matter of National Security?*, WALL ST. J: WSJ PODCASTS (Apr. 30, 2020), <https://www.wsj.com/podcasts/the-journal/is-your-burger-a-matter-of-national-security/63a31916-e0b2-43b5-bbb0-b42ee2631742>.

⁸² Corkery, *supra* note 71 (citing data compiled by Panjiva, the supply chain research unit of S&P Global Market Intelligence, and the Department of Agriculture).

⁸³ In one instance a chicken farmer whose supply chain was schools did not have required grading equipment or packaging required for retail sales to supermarkets. Claire Kelloway, *Why are Farmers Destroying Food While Grocery Stores Are*

eat, albeit while being home-schooled, even though a funding stream has long existed to meet that demand. Ninety-five percent of schools participate in the National School Lunch Program, which heavily subsidizes lunches of approximately 30 million children from low-income households (130-185% of the federal poverty level), in about 100,000 schools, and children are charged no more than \$0.40 per lunch (2014-1015 school year).⁸⁴ Thus, the money to buy proteins unused by the restaurant industry and shut-down schools was there; the demand still existed despite school closures, but without the proper grading equipment or packaging, farmers who normally sold to school systems could not adjust to sell small scale quantities, even if federal funds under the program were to recalibrate effectively to feed these same children.⁸⁵

This supply chain frailty is particularly evident in the beef ranching. There is a paradox in the American beef industry. One might conjecture that the growth of exports came about by necessity, once agricultural technology created an excess supply that fully met the domestic demand. However, the import/export figures tell a different story. In 2019, the United States imported 3.057 billion pounds of beef annually⁸⁶ mostly from Australia, New Zealand, Canada, Mexico, Brazil.⁸⁷ Also in that same year, the nation's ranchers exported 3.026 billion pounds of beef, mostly to Japan, South Korea, and Hong Kong.⁸⁸ This trend, of the US importing more beef than it exports, is not an isolated incident and can be observed every year since 2006 (with one exception in 2018).⁸⁹ In 2015, imports exceeded exports by over a billion pounds of beef.⁹⁰ In short, the domestic market for beef could absorb all of domestic supply; local demand is solid, and the diverse international markets make beef a strong commodity.⁹¹

Empty?, WASH. MTHLY. (Apr. 28, 2020),
<https://washingtonmonthly.com/2020/04/28/why-are-farmers-destroying-food-while-grocery-stores-are-empty/>.

⁸⁴ Food Research & Action Center, *Facts – National School Lunch Program*, FRAC (Nov. 2016), <https://frac.org/wp-content/uploads/cnnslp.pdf>.

⁸⁵ Kelloway, *supra* note 75.

⁸⁶ *Total U.S. beef and veal imports and exports from 2006 to 2021 (in million pounds)**, STATISTA (Feb. 24, 2021),
<https://www.statista.com/statistics/194702/us-total-beef-and-veal-imports-and-exports-since-2001/>.

⁸⁷ *U.S. Beef Imports: Ranking Of Countries*, BEEF2LIVE (Oct. 31, 2021),
<https://beef2live.com/story-beef-imports-ranking-countries-0-116237>.

⁸⁸ STATISTA, *supra* note 87.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Amanda Radke, *Cattle Futures 101: Fundamentals of Industry Marketing Tool Explained*, TRI-STATE LIVESTOCK NEWS (Aug. 1, 2018),
<https://www.tsln.com/news/cattle-futures-101-fundamentals-of-industry-marketing-tool-explained/>. “With more beef supplying the market, it would be

Thus, contrary to the farm problem narrative, the demand for agricultural products is not inelastic, even as agricultural technology grows. Demand grew as international markets did, and suppliers changed to meet this massive potential, but at the cost of local markets, and local mouths. The lack of meat on grocery store shelves in 2020 had little to do with the closure of the Tyson plants—slated to export the vast majority of their products anyhow—and everything to do with neglected local markets.

B. The Innards of Meat Processing in America

Repairing this system requires a fundamental understanding of the mechanics of the meat processing industry. The USDA regulates meat processing in all states, even where the meat will be sold within the state only.⁹² It promulgates rules under the Federal Meat Inspection Act (FMIA) of 1906,⁹³ which was passed in response to a combination of “muckraking” journalism at the time and the depictions of the industry in Upton Sinclair’s novel *The Jungle*.⁹⁴ Prior to the FMIA, there was no legal authority for the federal government to interfere with meatpacking practices.⁹⁵ In 1957, Congress passed the Poultry Products Inspection

natural to assume beef prices would drop; however, beef demand is robust. US domestic beef consumption was a record 56.6 lbs. per capita in 2017 and beef exports have increased by double digits for two consecutive years. The USDA forecasts that Americans will eat a record 222 pounds of red meat and poultry in 2018, and cheap corn prices are contributing to the large supply of meat hitting retail shelves... We’ve got a great demand for beef, both domestically and around the world,’ said Mark Preston, co-owner of Huron Continental Marketing in Huron, S.D. ‘This has been huge in beef prices, as well as helping to hold together prices of the producers has received. Overall, I think we are actually holding together a lot better than I expected compared to last year.’ Though only 10% of production in the world, US beef is 35% of international market.

⁹² Elizabeth R. Rumley & James Wilkerson, *Meat Processing Laws in the United States: A State Compilation*, NAT’L AGRIC. LAW CENTER ([last visited date]), https://nationalaglawcenter.org/state-compilations/meatprocessing/#_ftn1. Even if a state decides to open a meat inspection program, it can only do so at the leisure of the USDA and its standards must comply with the USDA’s.

⁹³ Federal Meat Inspection Act of 1906, Pub. L. No. 59-382.

⁹⁴ David Greenberg, *How Teddy Roosevelt Invented Spin*, ATLANTIC (Jan. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/01/how-teddy-roosevelt-invented-spin/426699/>.

⁹⁵ *Id.* In response to *The Jungle*, Theodore Roosevelt sent in inspectors to verify whether Sinclair’s claims were true. Though inspectors deemed to be exaggerated, they did confirm the presence of serious problems in the meat packing process, and also acknowledged that the federal government had no authority to compel correction.

Act.⁹⁶ All livestock not under the purview of the FMIA or the PPIA are inspected by the Food and Drug Administration (FDA) under the Food, Drug and Cosmetic Act (1938), and the USDA is authorized to inspect these remaining species under the Agricultural Marketing Act (1929). The USDA's inspections are conducted by their Food and Safety Inspection Services (FSIS).

Meat can be processed (meaning butchered) via two primary methods: 1) in a USDA processing plant, or 2) in a custom processing plant. In a USDA processing plant, law mandates that there is a USDA inspector observing every phase, from the time an animal exits the transport trailer, to the time its meat is packaged. If the meat is to be sold commercially (for example, restaurants, grocery, food pantry) it must be slaughtered and butchered in a USDA processing plant. Though the amount of meat consumed in the US has increased by 13% per person since 1980, the number of inspector positions has not increased, and unsurprisingly, the level of burnout is high and as of 2019, there were 700 vacancies for 7800 inspector positions nationwide.⁹⁷ Each position is required to conduct numerous inspections a day in varying locations, and complaints of poor administration in the system are rife.⁹⁸

If the meat is intended for “personal use”, i.e. raised or hunted by a household for household consumption, it can be butchered (but not slaughtered) at a “custom exempt” processor (custom butcher or custom processor), whose site is inspected “periodically” by the USDA or USDA-approved inspector, minimum once a year for sanitations and proper labeling, and record-keeping. Custom processors do not have daily inspections and the meat and poultry products are not inspected for disease or quality.⁹⁹ Some states allow a version of commercial sale in the custom processing system; the most common example being if a farmer sell a cow before slaughter, those customers are considered owners and can have a custom butcher slaughter the meat, but the animal cannot be sold to more than four

⁹⁶ Poultry Products Inspection Act of 1957, Pub. L. No. 85-172, as amended.

⁹⁷ Brett Bachman & Samantha Stokes, *Critics worry about food safety as federal meat inspectors face work overload, burnout*, COUNTER (Sept. 20, 2019), <https://thecounter.org/federal-meat-inspectors-overload-burnout-fsis/>. There are 700 vacancies for 7800 positions as a USDA meat inspector. There have been the same number of inspector positions since the 1980's, despite an increase in meat consumption, with 193 pounds per person consumed in 1980, to 219.5 pounds per person in 2018.

⁹⁸ *See, e.g. Id.* (examples abound of poor administration of the USDA meat inspection program). For example, five days of 16.5 hours shifts are common, with 18 plants of coverage required in one day.

⁹⁹ *FSIS Guideline for Determining Whether a Livestock Slaughter or Processing Firm is Exempt from the Inspection Requirements of the Federal Meat Inspection Act*, FSIS 2-3, (May 24, 2018), <https://www.fsis.usda.gov/sites/default/files/import/Compliance-Guideline-Livestock-Exemptions.pdf>.

different customers prior to slaughter, and those customers must live within the state in which the animals are raised.¹⁰⁰

There are some exceptions to these two pathways. For instance, recent regulatory changes now allow food companies to self-inspection in large part. Self-inspection by the processors themselves is allowed for poultry; and, though this is not in promulgated rules for beef, Tyson just recently requested a waiver to allow for self-inspection similar to how it is done in the hog and poultry industry.¹⁰¹ In late 2019, the USDA promulgated recent changes to the law allow hog sellers to increase line speeds and conduct portions of the inspection process themselves, reducing the number of USDA inspectors per transaction by 40%.¹⁰² However, a US District Court eliminated the ability of pork processors to set their own line speeds by May of 2021, and Secretary Vilsack informed the pork processors that

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² For a discussion on how the New Swine Slaughter Inspection System (NSIS) gives the option of certain aspects of the inspection process to be handed over to employees, see *USDA Announces Proposed Rule to Modernize Swine Inspection*, U.S. DEP'T OF AGRIC. (Jan. 19, 2018), <https://www.usda.gov/media/press-releases/2018/01/19/usda-announces-proposed-rule-modernize-swine-inspection>. See also *Modernization of Swine Slaughter Inspection*, 84 Fed. Reg. 52300-52349 (Oct. 1, 2019). Specifically, it made slaughterhouses to conduct ante- and post-mortem sorting, reduced number of FSIS online inspectors (by 40% acc'g to plaintiffs, Shaffer), and increased maximum line speeds. The line speed provision was vacated Apr 1, 2021 in D. Ct. in Minn., thereby reducing the number of inspectors at a plant. See Chuck Jolley, *What's behind the New Swine Slaughter Inspection System?*, FOOD SAFETY NEWS (Jan. 10, 2020), <https://www.foodsafetynews.com/2020/01/whats-behind-the-new-swine-slaughter-inspection-system/>. This will take the place of traditional, external regulation by The Food Safety and Inspection Service (FSIS). Poultry plants are also allowed similar exemptions since the late 1990's; in 2014, the Obama administration finalized a rule allowing poultry plants to opt into the alternative inspection system, and now Tyson has applied for exemptions allowing self-inspect exemptions in beef plants, which was granted in March 2020. See Suzy Khimm, *Tyson wants fewer government inspectors in one of its beef plants. Food safety advocates are raising alarms*, NBC NEWS (Aug 14, 2019), <https://www.nbcnews.com/politics/white-house/tyson-wants-fewer-government-inspectors-one-its-beef-plants-food-n1041966>; see also Tom Polansek, *Tyson Foods workers to replace some federal inspectors at U.S. beef plant*, REUTERS (Oct 27., 2020), <https://www.reuters.com/article/tyson-foods-beef-inspections/tyson-foods-workers-to-replace-some-federal-inspectors-at-u-s-beef-plant-idUSL1N2HI2Y4>.

the agency would not appeal the decision.¹⁰³ However, the processors themselves have proceeded to file an appeal without the agency's support, and at the time of this writing, the Circuit Court has yet to decide.¹⁰⁴ Ironically, due to the number of staff required for self-inspections, this practice is common *only* in large scale operations, who, because they process the most amount meat, arguably need third party inspection the most.

Another exception is in states with a state certification program. In these facilities, inspections are undertaken by state employees, and the inspection process and standards must be at least as stringent as those of the USDA.¹⁰⁵ Meat in these facilities can be sold commercially, do not limit sales to be in quarter portions of an animal as is the case for custom processors, but can only be sold within state lines.¹⁰⁶ A permutation of this is a facility operating under the Talmadge-Aiken / Cross-Utilization plants.¹⁰⁷ These facilities are USDA inspected plants that are staffed by inspectors who are state employees, and are inspected daily by a trained Meat & Poultry Inspector.¹⁰⁸ Animals are checked for disease before and after slaughter and condemned by a veterinarian if necessary.¹⁰⁹

Meat can also be processed through the "retail exempt" exception. An example of this is a grocery store that has staff butcher frozen and fresh meats; however, the meat must be slaughtered in a USDA facility, and the butchers must follow USDA procedures.¹¹⁰

None of these regulations, however, are enforced overseas on foreign vendors. International beef producers need only "[meet] the requirements of the inspection system that the United States Department of Agriculture (USDA), Food Safety and Inspection Service (FSIS) determines equivalent to the United States inspection system and, therefore, eligible to export meat, poultry, or egg products

¹⁰³ Dan Flynn, *Letter from The Editor: Pork producers strike back*, Food Safety News (June 7, 2021), <https://www.foodsafetynews.com/2021/06/letter-from-the-editor-pork-producers-strike-back/>.

¹⁰⁴ *Id.*

¹⁰⁵ FSIS Directive, STATE COOPERATIVE INSPECTION PROGRAMS, Nov 16, 2004, https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/5720.2.pdf, at 2.

¹⁰⁶ *Id.*

¹⁰⁷ USDA-FOOD SAFETY AND INSPECTION SERVICE (December 2018), <www.usda.gov/sites/default/files/documents/usda-fsis-shutdown-plan.pdf>, at 24-26.

¹⁰⁸ *Id.*

¹⁰⁹ Jared Cates, *What is the PRIME Act?* Carolina Farm Stewardship Association, <www.carolinafarmstewards.org/what-is-the-prime-act/>.

¹¹⁰ *CRASH COURSE: Meat processing 101 What Are The Rules?* Niche Meat Processing, https://www.nichemeatprocessing.org/wp-content/uploads/2016/08/CrashCourseTwo.Final_revised_10.1.pdf.

to the United States.”¹¹¹ Thus, the USDA entrusts enforcement of USDA-like regulations to the governments of Costa Rica, Croatia, Nicaragua, Mexico, and Brazil, to name a few.¹¹² In 2020, the United States was one of the top four importers of Brazilian beef, at almost 60,000 metric tons of beef, up over 53% from the previous year.¹¹³ In 2018, the United States imported 500 million pounds of beef from Mexico.¹¹⁴

This myriad of counter-intuitive regulations on large meat operations and international producers is not without consequences. According to the US News & World Report’s 2020 list of “10 Most Corrupt Countries” in the world, Mexico ranked #2 and Brazil #7.¹¹⁵ This perception of corruption was actualized in the case of Brazil and Mexico; in 2017, numerous Brazilian meat inspectors of US-bound beef were caught for bribery, bringing about a ban of Brazilian imports which was lifted in 2020.¹¹⁶ But even under the ban, raw pork and beef extracts were still imported from Brazil.¹¹⁷ In 2011, Tyson paid a \$4 million criminal penalty for its role in bribing publicly-employed meat processing plant inspectors in Mexico.¹¹⁸

The loosening of regulations caused bellyaches on US shores as well. Starting in 2016 (approximately 2 years after the Obama administration allowed for partial self-inspection of swine), meat recalls began to spike; by 2019, 34 recalls were issued on 17 million pounds of meat, for a multitude of reasons, including the discovery of foreign objects such as metal and plastic embedded in meat.¹¹⁹

¹¹¹ *Eligible Foreign Establishments*, FSIS USDA website, <https://www.fsis.usda.gov/wps/portal/fsis/topics/international-affairs/importing-products/eligible-countries-products-foreign-establishments/eligible-foreign-establishments>.

¹¹² *Id.*

¹¹³ Greg Henderson, *Brazilian Beef Exports At Record Levels*, DROVERS (Jan 11, 2021) <www.drovers.com/news/industry/brazilian-beef-exports-record-levels>.

¹¹⁴ Jason Beaubien, *Why There's So Much Beef Being Sent Between The U.S. And Mexico*, National Public Radio (Nov 28, 2018), <www.npr.org/2018/11/28/671675948/why-theres-so-much-beef-being-sent-between-the-u-s-and-mexico>.

¹¹⁵ Horus Alas, *The 10 Most Corrupt Countries, Ranked by Perception*, US NEWS AND WORLD REPORT (Apr 13, 2021) www.usnews.com/news/best-countries/articles/10-most-corrupt-countries-ranked-by-perception.

¹¹⁶ Nathan Owens, *Brazil's beef gets cool U.S. reaction*, ARKANSAS DEMOCRAT-GAZETTE, Feb 29, 2020.

¹¹⁷ *Id.*

¹¹⁸ United States Department of Justice Press Release, *Tyson Foods Inc. Agrees to Pay \$4 Million Criminal Penalty to Resolve Foreign Bribery Allegations*, Feb 10, 2011, <https://www.justice.gov/opa/pr/tyson-foods-inc-agrees-pay-4-million-criminal-penalty-resolve-foreign-bribery-allegations>.

¹¹⁹ Kimberly Kindy, *Processed meat recalls rise dramatically as consumers bite down on metal, plastic and glass*, WASH POST, Dec 13, 2019,

Ironically the small calf-cow, US-based operation is the most heavily regulated and inspected by USDA, much more so than either 1) large operations such as Tyson, who self-inspect a significant portion of their processing, or 2) international operations in countries such as Mexico and Brazil, whose inspection process doesn't involve a USDA inspector at all. Meanwhile, calf-cow operators must wait patiently for their turn in a third-party USDA plant, unless it is one of the 27 states with a USDA-compliant state inspection program.¹²⁰ For some farmers, this can mean battling for an appointment at a processor, and then transporting cattle a hundred miles away from their farms.¹²¹ For others, this means building one's own slaughterhouse which can cost upwards of \$7 million.¹²²

C. Why does the US import more beef than in exports?

Though varying in numbers, the data available is consistent in showing that the US exports more beef than it imports. Some estimate that roughly 8-10% of beef consumed in the US comes from other countries, while 11-14% of beef produced in the US is exported.¹²³ The USDA estimates a range of between 8-20% of total US meat supplies are from foreign sources.¹²⁴ The numbers are even higher for pork (24% of production), chicken (16%).¹²⁵ And that is where the consistency ends.

https://www.washingtonpost.com/national/processed-meat-recalls-rise-dramatically-as-consumers-bite-down-on-metal-plastic-and-glass/2019/12/20/c6b670c6-15d6-11ea-8406-df3c54b3253e_story.html.

¹²⁰ National Agricultural Law Center Staff, *Meat Processing Laws in the United States A State Compilation*, National Ag Law Blog, <https://nationalaglawcenter.org/state-compilations/meatprocessing/#:~:text=Currently%2C%2027%20states%20have%20chosen,a%20poultry%20state%20inspection%20program>.

¹²¹ One farmer in Georgia hauled his cattle, sheep, hogs and poultry 100 miles to the closest federally inspected slaughterhouse until he decided to build his own slaughterhouse and plant for a cost of \$7 million. See, Abbie Fentress Swanson, *Small Meat Producers Take Their Slaughterhouse Gripes To Congress*, *The Salt – What's On Your Plate*, National Public Radio (Oct 15, 2015), <www.npr.org/sections/thesalt/2015/10/15/448942740/small-meat-producers-take-their-slaughterhouse-gripes-to-congress>.

¹²² *Id.*

¹²³ James Andrews, *Imports and Exports: The Global Beef Trade*, *FOOD SAFETY NEWS* (Nov 18, 2013).

¹²⁴ The variation in the this figure comes from the fact that data collected is only clear for meat that is imported directly as meat. Kenneth Mathews, Rachel Johnson, and Keithly Jones, *How Much US Meat Comes From Foreign Sources?* USDA Economic Research Service, Sept 20, 2012.

¹²⁵ Bagenstose, *supra* note 25, citing USDA data.

Some explain away this conundrum by arguing that “our cattle is just too fat” and requires lean, grass-fed beef from other countries (such as Canada, Mexico, Australia, New Zealand, and Central and South American countries such as Nicaragua, Brazil and Uruguay) to be mixed with it to produce ground beef for the taste buds of the American public.¹²⁶

Others still argue that there are parts of a cow or beef that command a higher price elsewhere than in the US.¹²⁷ These parts are often referred to as variety parts or offal, and refer to edible byproducts of beef such as livers, hearts, tongues, tails, kidneys, brains, sweetbreads (the thymus and/or pancreas gland, depending on an animal’s age), tripe (stomach), melt (spleen), chitterlings and natural casings (intestines), fries (testicles), rinds, head meat, lips, fats and other trimmings, blood, and certain bones.¹²⁸ These parts comprise about 12% of a beef or cow by weight.¹²⁹

“The job of markets is to seek out the highest value for products produced and encourage the most efficient use of resources to facilitate that production,” according to Derrell Peel, Oklahoma State University Extension livestock marketing specialist.¹³⁰ One such example is the beef heart, which according to these sources supposedly commands a higher price in Peru but could only be sold in the US for use in hot dogs or dog food.¹³¹ Cow tongue is another oft argued example that is sold to Japan for \$6 a pound, or chuck roll, which is popular in Asia, but all for much less in the US.¹³² “To turn a profit,” explains Joe Schuele, communications director for the U.S. Meat Export Federation, “that product needs to find a home that values it the most.”¹³³

However, variety parts comprise just a fraction of exports by revenue and by volume. In 2012, variety parts comprised only 12% of export revenue.¹³⁴ At

¹²⁶ Andrews, *supra* note 123.

¹²⁷ Staff, *Why Does the US Both Import and Export Beef*, Beef Magazine Online (June 11, 2010), <www.beefmagazine.com/cowcalfweekly/0611-why-does-us-import-export-beef>.

¹²⁸ Daniel L. Marti, Rachel J. Johnson, and Kenneth H. Mathews, Jr., *Where’s the (Not) Meat? Byproducts from Beef and Pork Production, A Report from the Economic Research Service, USDA*, https://www.ers.usda.gov/webdocs/outlooks/37427/8801_ldpm20901.pdf?v=116, at p. 21.

¹²⁹ *Id.*

¹³⁰ Staff, Beef Mag, *supra* note 127.

¹³¹ Andrews, *supra* note 123.

¹³² Andrews, *supra* note 123.

¹³³ Andrews, *supra* note 123.

¹³⁴ “Total U.S. beef exports in 2012 set a new record at \$5.51 billion. Beef offal represented 12.8 percent (\$703.1 million) of that. It also accounted for 28.4 percent of the total volume of beef exports (321,772 metric tons or 709.4 million

most, the USDA has reported that variety parts comprised on average 16% of total beef exports for 2000-2010.¹³⁵ This might suggest that the variety parts are worth so much as to make it worthwhile to ship the entire animal overseas as live cattle. However, this does not seem to be the case: in 2020, about 320,000 live cattle were exported, versus the 2.1 million live cattle imported.¹³⁶ Thus, the explanation that variety parts are worth more elsewhere doesn't jive with the fact that such parts comprise a small percentage of exports by income, and that in fact the vast majority of the beef exported are parts that would be consumed in the US just as readily. This belies the argument that the bulk of imported beef is lean meat to mix with ground beef to appease a finicky American stomach, and the bulk of exports is variety meat to increase the value of variety parts that have little value here.

The bottom line is that the paradox is still strange and unexplained: US meat companies produced the most beef in the world, and compositely were the third largest exporter by volume, while US consumers comprised the second largest importer of beef by volume.¹³⁷

D. Was America Ever Really at Risk of Meat Shortage?

In response to the mandatory closure of processing plants by local officials due to COVID outbreaks amongst workers in the spring of 2019, Kenneth Sullivan, CEO of Smithfield Foods, largest pork company in the US, cried that such closures were "pushing our country perilously close to the edge in terms of our meat supply." His claims were consistent with the cries of John Tyson in his full page ad in the Washington Post and the New York Times, who in similar dramatic fashion wrote "Our plans must remain operational so that we can supply food to our families in America."

These claims appear to be dubious. Investigative reporters at the USA TODAY Show reviewed federal data disclosing that despite decreases in production in the six week period starting in mid-March of 2020, hundreds of millions of pounds of meat continued to be exported, in excess of the amount lost

pounds)." Ron Hays, *Beef Variety Meats- Worth Their Weight in Gold Overseas (Almost)*, Oklahoma Farm Report, June 24, 2013.

¹³⁵ Daniel L. Marti, Rachel J. Johnson & Kenneth H. Mathews, Jr., ERS, USDA, Where's the (Not) Meat? Byproducts from Beef and Pork Production 21, https://www.ers.usda.gov/webdocs/outlooks/37427/8801_ldpm20901.pdf?v=116.

¹³⁶ Economic Research Service, USDA, *Cattle: Annual and cumulative year-to-date US trade—All years and countries*, USDA, Livestock and Meat International Trade Data, <https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/#Annual%20and%20Cumulative%20Year-to-Date%20U.S.%20Livestock%20and%20Meat%20Trade%20by%20Country>.

¹³⁷ Foreign Agricultural Service, USDA, 2020 U.S. Agric. Exp. Y.B. 3 (2020), www.fas.usda.gov/sites/default/files/inline-files/2020-ag-export-yearbook.pdf.

by decreased production (compared to 2019 data).¹³⁸ In fact, critics pointed out that the meat industry never drew down meat supplies sitting in cold storage warehouses, which ultimately would have been the marker of a serious decrease in supply.¹³⁹ On the contrary, in that same period from March to April, red meat and poultry products in cold storage increased by 40 million pounds, for a total of 2.5 billion pounds accordingly to USDA data reviewed by USA Today.¹⁴⁰

In response, Big Beef advocates became disgruntled. Some economists argued the industry had little choice in order to maintain long-term trade relationships, and was needed lest “companies lose a profit motive to slaughter more animals.”¹⁴¹ “Food supply chains are complex and products for one market cannot always be immediately reconfigured for another,” explained Keira Lombardo, Executive Vice President of Corporate Affairs and Compliance for Smithfield.¹⁴² Consistent with industry representatives, Glyn Tonsor, Professor of Agricultural Economics at Kansas State University argued, “I think those considering restricting exports overestimate the extent it would increase domestic consumption and underestimate the adverse economic impact.”¹⁴³

Other industry leaders argued that keeping the plants open was necessary to ensure serious shortages never occurred.¹⁴⁴ Sarah Little, of the North American Meat Institute argued, “While there was less variety to consumers, or certain regional areas may have experienced shortages of meat, it wasn’t a widespread shortage...It never got to a point where we thought Americans would not have access to food. That is never something our companies would want to see. And that’s why it was so important to be able to continue operations.”

These assertions are contradicted by the hard data. According to USDA, beef and pork production declined by 171 million pounds from March 20-April 24 when the order to keep plants open was in place, using 2019 data as the litmus of production; but the industry continued to export 646 million pounds in the same time span.¹⁴⁵ Meat expert and Professor at the University of Delaware Roger Horowitz replied with the obvious observations that Americans would somehow manage to consume parts headed elsewhere: “Export restrictions could hurt profits, but not American consumers.”¹⁴⁶

¹³⁸ Bagenstose, *supra* note 25.

¹³⁹ Bagenstose, *supra* note 25.

¹⁴⁰ Bagenstose, *supra* note 25.

¹⁴¹ Bagenstose, *supra* note 25.

¹⁴² Bagenstose, *supra* note 25.

¹⁴³ Bagenstose, *supra* note 25.

¹⁴⁴ Interview with Sarah Little, spokesperson for North American Meat Institute, Bagenstose, *supra* note 25.

¹⁴⁵ Bagenstose, *supra* note 25.

¹⁴⁶ Bagenstose, *supra* note 25.

E. The Heart of the Matter: Global Conglomeration

Indeed, revenue statistics support Horowitz' assertion. In 2017, beef exports to NAFTA nations Mexico and Canada were valued at \$1.8 billion, approximately 25% of the total beef market.¹⁴⁷ Smithfield, Tyson, Cargill are now global operations, with operations in multiple countries, whose priorities are defined by their shareholders, and 25% of their profits are tied to foreign relationships. Smithfield is owned by WH Group, a Chinese company. And Cargill, one of the largest beef producers in the world, is a joint venture with an Australian beef processor, and has extensive operations in Canada.¹⁴⁸ Tyson Foods also has an international footprint with operations and joint ventures based out of China and India to include Thailand, Malaysia, Australia, South Korea, Netherlands, and Brazil.¹⁴⁹

These three processors had a substantial financial motive to convince their American consumer base and publicly elected officials that keeping meat plants open was in the national interests of the US as a nation—even if at the cost of their workers lives. Given the ownership structure and size of the foreign investments of these few companies, it is difficult to digest their claims of patriotic fervor to feed American stomachs. The industry had sufficient freezer reserves, that they continued to stock while their plants were closed, while meat supplies in the grocery stores waivered. One might ponder if the Big Four manipulated grocery store supply for dramatic effect, while they simultaneously raised prices. It should come as no surprise if on-going investigations by the Department of Justice result in a lawsuits against the meatpackers for gouging.

IV. Solutions

The neglect of our domestic market is not a just a minor byproduct of a highly efficient capitalism; rather, it is a result of vertical integration of an entire industry by half a dozen multinational companies that have met little opposition from US regulators, and instead, have had the generous assistance of US lawmakers. Because of it, American consumers are dangerously vulnerable to capricious price setting, there are fewer stateside jobs available, and fewer

¹⁴⁷ KathrynAnn H. Fields, et al., *International beef trade: A value proposition*, ANIMAL FRONTIERS (July 2018).

¹⁴⁸ Cargill, Beef Business, <https://www.cargill.com/meat-poultry/beef-business> (last visited Oct 9, 2021).

¹⁴⁹ Press Release, *Tyson Foods Announces Plans for Additional Production Facilities for its International Business*, Nov. 20, 2020, <https://www.tysonfoods.com/news/news-releases/2020/11/tyson-foods-announces-plans-additional-production-facilities-its>.

consumer choices. In fact, these multi-national companies also control our access to any meat at all—which truly is a national security issue.

I propose that meaningful solutions require 1) looking at regulations that hinder small farmers and 2) funding policies and programs that support them. Ideally this would result in a network of various types of processing operations for small and medium sized farms, and a variety of capacity-building resources to help market and deliver. Doing so is the only way to restore a truly competitive free market environment. In the next sections I will first survey the efforts made thus far to support farmers, and then I will lay out potential solutions that fall into either of these categories.

A. What the CARES Act and American Relief Plan Act did for Farmers

Though the coronavirus pandemic highlighted the dangers of a brittle meat supply chain, the relief packages passed by Congress thus far have done little to address the underlying problems causing the meat shortages in the first place. On March 27, 2020, under the Trump administration, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). In the CARES Act Congress allocated \$2.2 trillion, with a supplemental \$484 billion, to aid in the economic recovery needed in the wake of the pandemic.¹⁵⁰ It provided \$150 billion for states, and \$30 billion for localities, but only 500,000 or larger.¹⁵¹ Sadly, most farms are in towns of less than 500,000, and in fact, most of rural America has towns have a population of less than 5,000, and will not see that funding for local government.¹⁵²

After a month bickering with the US Small Business Administration (SBA),¹⁵³ Congress did however provide \$350 billion in low-interest Paycheck Protection Program loans (up to \$10 mill per business) for companies with under

¹⁵⁰ Bryce Oates, *New Stimulus Package Passed by Senate Missed the Mark, Rural Advocates Say*, THE DAILY YONDER (Apr. 22, 2020).

¹⁵¹ Olugbenga Ajilore, *Rural America Is Starting To Feel the Impact of the Coronavirus*, Center for American Progress (Apr. 28, 2020) <https://www.americanprogress.org/issues/economy/reports/2020/04/28/484016/rural-america-starting-feel-impact-coronavirus/>.

¹⁵² Amel Toukabri & Lauren Medina, *America: A Nation of Small Towns - Latest City and Town Population Estimates of the Decade Show Three-Fourths of the Nation's Incorporated Places Have Fewer Than 5,000 People*, U.S. Census Bureau (May 21, 2020), <https://www.census.gov/library/stories/2020/05/america-a-nation-of-small-towns.html>.

¹⁵³ Lynne Curry, *After 30 years of being shut out, the Small Business Administration just allowed farmers to apply for economic disaster loans*, THE COUNTER, (May 11, 2020, 1:36 PM), <https://thecounter.org/small-business-administration-sba-farmers-economic-disaster-relief-loans-covid-19-cares/>.

500 employees through the Small Business Administration, and Economic Injury Disaster Loans (up to \$10,000 per business); farmers were eligible in both programs.¹⁵⁴ Importantly, if the loan is used for payroll, rent, or mortgage payments, it is completely forgiven, effectively making it a grant.¹⁵⁵ Some components of the law specifically addressed rural issues: \$100 mill to expand rural broadband,¹⁵⁶ and \$9.5 billion for payments to agriculture producers impacted by the coronavirus, including specialty crop producers and livestock farmers.¹⁵⁷ Debt relief was available to home mortgages guaranteed by the Rural Development Housing Program.¹⁵⁸ This marked the first time in 30 years that farmers were able to apply for economic disaster loans from the SBA.¹⁵⁹

The Act also provided \$6.5 billion¹⁶⁰ to replenish the Commodity Credit Corporation, a government-owned corporation under the purview of the USDA to fund and support farm income and agricultural commodity pricing.¹⁶¹ The CARES Act also provided an additional \$450 million for the emergency food assistance program (TEFAP), on top of the \$400 million provided in the Phase II bill, for food funding to go to state agencies.¹⁶² The Food Safety and Inspection Services were allocated \$33 million, and about \$35 billion was allocated for food programs such as the Supplemental Nutrition Assistance Program.¹⁶³ Funding was also allocated to provide testing and personal protection equipment for meat processors, and assist rural healthcare.

Under the Biden administration, Congress passed a \$1.9 trillion COVID relief package referred to as the American Rescue Plan Act¹⁶⁴ in March of 2021,

¹⁵⁴ Staff, *How the CARES Act helps rural Ohio*, DELPHOS HERALD (Apr. 8, 2020, 2:58 PM), <https://delphosherald.com/MobileContent/Default/Local-Coronavirus-Coverage/Article/How-the-CARES-Act-helps-rural-Ohio/-3/1240/212241>.

¹⁵⁵ *Id.*

¹⁵⁶ \$100 million in ReConnect grants are included to promote expanded network coverage so rural communities can continue to work even when under shelter-in-place orders, *id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Curry, *supra* note 117.

¹⁶⁰ Office of Inspector General, USDA, *USDA Coronavirus Disease 2019 Funding*, <https://www.usda.gov/oig/reports/usda-coronavirus-disease-2019-funding>.

¹⁶¹ Commodity Credit Corporation, U.S. DEPARTMENT OF AGRICULTURAL, <https://www.usda.gov/ccc>.

¹⁶² *Additional Information on FY 2020 Funding Sources for TEFAP*, Food and Nutrition Service, USDA, <https://www.fns.usda.gov/tefap/additional-information-fy-2020-funding-sources>.

¹⁶³ *Id.*

¹⁶⁴ American Rescue Plan Act of 2021 Public Law No: 117-2.

with \$22.7 billion dedicated to agriculture and nutrition.¹⁶⁵ Under the plan the same programs were re-funded, (housing debt relief, nutrition, rural healthcare), and with some additions relevant to rural America.¹⁶⁶ Funding was carved out specifically to assist farmers from communities of color with debt relief, pay for small scale processors, and for additional funds to expand FSIS inspections of COVID-related work conditions and animals.¹⁶⁷ The 2021 package specifically allowed for towns and localities with a population of less than 500,000 inhabitants to be eligible.¹⁶⁸

B. What CARES Act and American Relief Plan Act Left Behind

1. No Relief for Borrowers of USDA Small Business Loan Program

While the CARES Act and the American Relief Plan Act provided debt relief for loans guaranteed by the US Small Business Administration (SBA), no relief was provided for entrepreneurs who borrowed loans guaranteed by the USDA. The USDA's Intermediary Relending Program (IRP) and the Rural Microentrepreneur Assistance Program (RMAP) are two loan programs narrowly tailored to address the unique challenges faced by agricultural America. The IRP provides low interest loans (1%) to third party lenders that are nonprofits, cooperatives, federally-recognized tribes, or public agencies, and service small businesses in small towns (population of less than 50,000).¹⁶⁹ The RMAP is a loan program targeting small businesses with 10 or fewer employees in small towns.¹⁷⁰

Both of these programs fill a niche mostly unmet by the conventional lending market, which prioritizes large loans (in order to maximize service fees and

¹⁶⁵ John Newton, *What's in the American Rescue Plan Act of 2021 for Agriculture?*, MARKET INTEL BLOG, (Mar. 8, 2021), <https://www.fb.org/market-intel/whats-in-the-american-rescue-plan-act-of-2021-for-agriculture>.

¹⁶⁶ P. Scott Shearer, *Biden signs \$1.9T COVID-relief package*, NATIONAL HOG FARMER (Mar. 12, 2021), <https://www.nationalhogfarmer.com/agenda/biden-signs-19t-covid-relief-package>.

¹⁶⁷ *Id.*; see also Newton, *supra* note 165.

¹⁶⁸ Olivia Weeks, *Unlike Previous Stimulus Package, Relief Funding Will Reach Every U.S. County*, DAILY YONDER (Mar. 11, 2021), <https://dailyyonder.com/unlike-previous-stimulus-package-relief-funding-will-reach-every-u-s-county/2021/03/11/>.

¹⁶⁹ Intermediary Relending Program, Rural Development, USDA, <https://www.rd.usda.gov/programs-services/intermediary-relending-program>.

¹⁷⁰ Rural Microentrepreneur Assistance Program, Rural Development, USDA, <https://www.rd.usda.gov/programs-services/rural-microentrepreneur-assistance-program>.

portfolio size per transaction). Indeed, IRP and RMAP serve the smallest of businesses who were most economically vulnerable to the closures needed to curb the dangers of the coronavirus epidemic. Nowhere in the CARES Act, its supplement, nor in the American Relief Plan were these programs addressed.

a. No Systemic Cures of Supply Chain Problems

Nor was there any initiative to curb the market grip of the Big Four meatpackers. Despite the fact that federal authorities have begun investigations of meat industry labor practices,¹⁷¹ the issues at the heart of the meat supply chain problem persist—a supply chain dominated by a handful of meat processors whose massive economies of scale dictate systemic norms. Though funding for more inspections was allocated by both aid packages, the fact of the matter remains that there are insufficient numbers of meat processors, and the inspection process is fraught with weaknesses. Even before the pandemic, there were hundreds of vacancies for USDA inspectors (a position with a six figure salary). An influx of money for additional positions will not likely sway applicants to a job requiring travel to 18 locations per day, and often described as “burn-out”.¹⁷²

Furthermore, such funds do not create more meat processors. The Strengthening Local Processing Act was a bi-partisan initiative introduced to the House by Representative Pelligree (D - ME) and Fortenberry (R – Nebraska) in September of 2020.¹⁷³ The bill sought to allocate funds to achieve the following goals: “support the health and safety of plant employees, suppliers, and customers; support increased processing capacity; and otherwise support the resilience of the small meat and poultry processing sector in the future.”¹⁷⁴ It sought to provide training resources for processors to build capacity and gain federal certification programs, and made funds available to convert to a USDA processing plant (for equipment, additional labor, consulting expertise, business plan development, and a variety of items). Funds would also have been available to develop a new small or very small processing plant. Grants could not exceed \$500,000 per grantee, and priority would have been given to applicants located where no processor existed in a 200 mile radius, applicants with less than 150 employees, and applicants who are minority-owned businesses.¹⁷⁵ It did not pass in 2020, but was been re-introduced

¹⁷¹ Rachel Treisman, *Meatpacking Companies, OSHA Face Investigation Over Coronavirus In Plants*, NPR (Feb. 1, 2021), <https://www.upr.org/post/meatpacking-companies-osha-face-investigation-over-coronavirus-plants#stream/0>.

¹⁷² Bachman and Stokes, *supra* note 90.

¹⁷³ Strengthening Local Processing Act, H.R.8431, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/8431/actions?r=91&s=1>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

in February of 2021 by Representative Tina Smith (D – Minn) and Senator John Thune (R-SD) with bipartisan support.¹⁷⁶

A less potent permutation of this bill is the RAMP-Up Act, a feature of the CARES Act package passed in December of 2020.¹⁷⁷ It dedicated \$80 million to create a grant program to help custom processors become USDA processors from 2021-2023, with grant amounts not to exceed \$100,000, and unlike the Strengthening Local Processing Act, the grant recipient must provide matching funds in 2022 and 2023.¹⁷⁸ Matching funds can be provided in any non-federal form (such as a bank loan), but it is unclear at the time of writing whether closing on a bank loan of this type is too burdensome for the typical custom processor.¹⁷⁹ It is also difficult to determine whether \$100,000 is sufficient to bring custom processors to USDA standard. While better than nothing, the RAMP-Up does not fund start-up processors, the match requirement could be burdensome on small processors, and it is unclear whether the amount offered is enough.¹⁸⁰

C. Proposed Solutions

What the food supply chain, and particularly the meat supply chain need to become robust requires, a three-pronged approach: 1) protect competition through antitrust enforcement, 2) improve slaughterhouse regulatory structure and procedures, and 3) facilitate competition by stimulating small, local markets.

1. Better Antitrust Protections

An obvious solution would be to reign in the trade practices of the Big Four, which have clearly have stifled the market. Both existing and new statutory authority could be used to revitalize and protect competition in agribusiness. In June of 2020, the antitrust division of the Department of Justice (DOJ) commenced investigations into antitrust practices of the Big Four,¹⁸¹ but the direction of these efforts is unclear at the current time. The current administration could start where the Obama administration left off, with rules promulgated at the end of Obama's

¹⁷⁶ *Id.*

¹⁷⁷ See, Candace Krebs, *Ag briefs: COVID-19 relief package includes grant funding to improve meatpacking plants*, AG JOURNAL (Dec 30, 2020). See also, *supra* at note 130 (bill text).

¹⁷⁸ RAMP-UP Act, H.R. 7490, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7490/text>.

¹⁷⁹ *Id.*

¹⁸⁰ RAMP-UP Act, H.R. 7490, 116th Cong. (2020).

¹⁸¹ Jacob Bunge and Brent Kendall, *Justice Department Issues Subpoenas to Beef-Processing Giants*, WALL ST J. (June 5, 2020), <https://www.wsj.com/articles/justice-department-issues-subpoenas-to-beef-processing-giants-11591371745>.

term under GIPSA and the PSA. The rider de-funding enforcement should be repealed, enabling the USDA to crack down on the manner in which the large corporate meatpackers dictate market practices of small and mid-sized ranchers (starting with the Big Four practice of controlling input costs and output pricing).

The idea of strengthening the PSA already has Congressional support. In 2019, as part of his Presidential bid, Senator Corey Booker (D – NJ) introduced the Farm System Reform Act,¹⁸² which was read twice and referred to committee in January 2020, and its companion bill in the House, H.R. 6718 – Farm System Reform Act of 2020 was introduced by Representative Khana (D-CA) in May 2020 and most recently referred to subcommittee in August of 2020, and was reintroduced in 2021-2022, sitting in committee at the time of this writing.¹⁸³ In the wake of labor violations and supply chain disruption rampant in the meat industry, it has been re-introduced with renewed interest in 2020 and 2021. Both versions of the bill had three goals: “To place a moratorium on large concentrated animal feeding operations, to strengthen the Packers and Stockyards Act of 1921, to require country of origin labeling on beef, pork, and dairy products, and for other purposes.”¹⁸⁴ In effect, the bill sought to not only put a stop to any new factory farms from being created, it also made such farms illegal by 2040, and sought to create a \$100 billion fund to help farms transition out of factory farm practices.¹⁸⁵

The distrust of the Big Four meatpackers has bi-partisan interest. In April 2020, Senators Josh Hawley (R-Mo) and Tammy Baldwin (D-Wis) requested the

¹⁸² Farm System Reform Act of 2019, S. 3221, 116th Cong. (2020). *See also*, *Booker Unveils Bill to Reform Farm System*, Cory Booker Website (Dec. 16, 2019), <https://www.booker.senate.gov/news/press/booker-unveils-bill-to-reform-farm-system>.

¹⁸³ Farm System Act of 2019, S. 3221, 116 Cong. (as referred to by Comm. on Agric., Nutrition, and Forestry, Jan. 21, 2020). *See also*, J. Edward Moreno, *Booker renews push to phase out factory farming by 2040 after pandemic hits meatpacking plants*, THE HILL (May 7, 2020), <https://thehill.com/homenews/senate/496661-booker-renews-push-to-phase-out-factory-farming-by-2040-after-pandemic-hits>. It was re-introduced in the 2021-2022 session by Senator Booker in July of 2021, <https://www.congress.gov/bill/117th-congress/senate-bill/2332>.

¹⁸⁴ Farm System Reform Act of 2019, S. 3221, 116th Cong. (2020).

¹⁸⁵ The bill defined factory farms, or “concentrated animal feeding operations” (CAFO’s) as operations with any of the following: 700 mature dairy cows, milked or dry; 1,000 veal calves; 1,000 cattle (including heifers, steers, bulls, cows, and calves) other than mature dairy cows or veal calves; 2,500 swine, each weighing not less than 55 pounds; 10,000 swine, each weighing not more than 55 pounds; 500 horses; 10,000 sheep or lambs; 55,000 turkeys; 30,000 laying hens or broilers; 5,000 ducks; 125,000 chickens (other than laying hens); 82,000 laying hens; or 30,000 ducks. Farm System Reform Act of 2019, S. 3221, 116th Cong. (2020). *See also*, Moreno *supra* note 140, at p. 15.

Federal Trade Commission (FTC) to open an antitrust investigation into the meat processing industry,¹⁸⁶ as did the Attorneys General of 11 different states,¹⁸⁷ which resulted in subpoenas being issued to the Big Four in May 2020.¹⁸⁸ This follows a 2017 criminal case against Pilgrim's Pride, a factory chicken producer, in which the company pled guilty to price fixing from 2012-2017, and was ordered to pay a fine in excess of \$100 million.¹⁸⁹

The DOJ's efforts begin on the tail of a class action of note. In 2019, class action plaintiffs, led by Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) filed a civil suit against multiple defendants including the Big Four who operate under the contract pricing model.¹⁹⁰ In a 121 page complaint, the plaintiffs argue that defendants have forced reduced pricing by closing plants for weeks, in order to create panic amongst the ranchers, which would then enable defendants to compel buying terms to their own advantage, even as market prices for their product would rise.¹⁹¹ Plaintiffs also argued that defendants would import cattle from Mexico and Canada, even at a loss, in order to compel plaintiffs to comply with defendants' desired contract terms.¹⁹² Plaintiffs have offered an abundance of witness accounts, trade records, and economic evidence.¹⁹³ Given the concurrent DOJ investigation, the FTC has plenty of fodder to begin their investigation.

With a new presidential administration also brings new possibilities in agency enforcement. With the recent appointment of former Columbia Law

¹⁸⁶ *Senators Hawley, Baldwin Ask FTC to Open Antitrust Investigation into Meatpackers Amid Plant Closures*, Josh Hawley's Website (Apr. 29, 2020), <https://www.hawley.senate.gov/senators-hawley-baldwin-ask-ftc-open-antitrust-investigation-meatpackers-amid-plant-closures>. *See also*, Alex Gangitano, *Justice Department investigating meat price increases: report*, THE HILL (May 26, 2020), <https://thehill.com/legal/499620-justice-department-investigating-meat-price-increases-report>.

¹⁸⁷ David McLaughlin, *Meatpacking Giants Face U.S. Antitrust Inquiry Amid Shutdowns*, BLOOMBERG (May 7, 2020), <https://www.bloomberg.com/news/articles/2020-05-08/meatpacking-giants-face-u-s-antitrust-inquiry-amid-shutdowns>.

¹⁸⁸ *Id.*

¹⁸⁹ Press Release, *One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a \$107 Million Criminal Fine* (Feb. 23, 2021) (on file with U.S. Dep't of Just. Off. of Pub. Aff.).

¹⁹⁰ *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. Tyson Foods, Inc.*, No. 1:19-cv-02726, (N.D. Ill. 2019), <https://www.classaction.org/media/ranchers-cattlemen-action-legal-fund-united-stockgrowers-of-america-v-tyson-foods-inc-et-al.pdf>.

¹⁹¹ *Id.* at 89-99.

¹⁹² *Id.* at 37-38.

¹⁹³ *Id.* at 1-2.

Professor Lina Khan to the Federal Trade Commission, (in effecting replacing her former mentor, Rohit Chopra) affected ranchers have an opportunity. Khan began researching anti-monopoly issues shortly after college when she began to work at the New America Foundation in the Open Markets Program.¹⁹⁴ She continued her research in antitrust and published a student note on the monopolistic implications of Amazon, which gained attention in legal, business, and popular circles.¹⁹⁵ But her interest in the field is not limited to tech: two years after college she penned an article published by the Washington Monthly detailing the antitrust practices of chicken producers and bemoaning the lost opportunity of the Obama administration to curtail the industry abuses.¹⁹⁶ During the confirmation hearings, and she received bipartisan praise, including from Senator Cruz, who stated, “I look forward to working with you.”¹⁹⁷ Though she would be merely one of five commissioners, she hold the position of Chair,¹⁹⁸ and Khan’s firm knowledge base on antitrust, even in the context of agribusiness, bodes well for the FTC investigation.

2. Improve Regulation and Infrastructure for Small Processors

As argued in previous sections of this article, it is the small, independent farmer and the small, independent processor who are the most regulated; often, small processors cannot afford to qualify for inspection waivers as do the Big Four. USDA certification can be unwieldy and too complicated to overcome without costly third party expertise. Expansion to make the trouble worth it is also costly. So too is the start-up cost of becoming a USDA processor. All of this forces independent farmers to transport their animals hundreds of miles, if they can even get into a USDA processor.

¹⁹⁴ David Streitfeld, *Amazon’s Antagonist Has a Breakthrough Idea*, NY Times (Sept. 7, 2019), <https://www.nytimes.com/cdn.ampproject.org/c/s/www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.amp.html>.

¹⁹⁵ *Id.*

¹⁹⁶ Lina Khan, *Obama’s Game of Chicken*, WASH. MONTHLY (NOV./DEC. 2012), <https://washingtonmonthly.com/magazine/novdec-2012/obamas-game-of-chicken/>.

¹⁹⁷ Ryan Tracy, *FTC Nominee Khan Signals Support for Aggressive Approach on Big Tech*, WALL ST. J. (Apr. 21, 2021), <https://www.wsj.com/articles/ftc-nominee-khan-signals-support-for-aggressive-approach-on-big-tech-11619029550>.

¹⁹⁸ Press Release, Lina M. Khan Sworn in as Chair of the FTC (June 15, 2021) (on file with FTC).

A. Pass the Strengthening Local Processing Act

The lowest hanging fruit would be for Congress to pass the Strengthening Local Processing Act, which could help existing custom processors overcome the hurdles of becoming USDA certified, and help pay for site expansion. The funds could also be used as seed money for new, small processors, who could use the grant funds to leverage a loan either through SBA, the USDA's Intermediary Relending Program, or its Rural Microentrepreneur Assistance Program (RMAP). The seed fund identified for the SLP Act is the nimble Commodity Credit Corporation, which was just replenished under the American Rescue Plan Act and has a broad range of activities it can fund. Estimates to start a small processor range from \$1 -7 mill.¹⁹⁹

While some states have gone to creative lengths to use the flexible components of their CARES Act allocations to fund the expansion of small processors,²⁰⁰ and the RAMP-Up Act seeks to aid custom processors who want to convert to USDA, the allocated amounts using broadly earmarked CARES Act funds or the \$100,00 from the RAMP-Up Act does not create a long-term solution of creating a vibrant network of small local processors, and states would be better off with a federal line item dedicated to the dual purpose of not only building capacity for existing processors, but also providing seed funds for the development of new processors. This would be more effective than the current RAMP-Up Act, which requires one-to-one match, is disbursed in amounts that might not be effective, and can only be used by existing processors.

As recently as July 2021, federal authorities committed to spending \$500 million to encourage the construction of smaller USDA processing plants, and another \$150 million to support existing smaller plants hit recently with unexpected costs.²⁰¹ In unveiling the program, U.S. Agriculture Secretary Tom Vilsack

¹⁹⁹ See also, Lucy Newlin, *So you want to build a slaughter plant?* HIGH PLAINS J. (DEC. 31, 2020) (estimating a plant requiring between 3000-4000 sq. ft, \$400 per sq. ft, resulting \$1.2 million for a 3000 sq. ft plant).

²⁰⁰ In Arkansas, the legislature created the \$5 million to create the Arkansas Meat and Poultry Processing Grant Program. The funds were allocated to it under the under section 601(a) of the Social Security Act, as added by 5001 of the CARES Act which allowed for a broad spectrum of uses related to the effects of COVID-19. Dep't of Treasury, *Coronavirus Relief Fund for States, Tribal Governments, and Certain Eligible Local Governments*, Fed. Reg. (Jan. 15, 2021), <https://www.federalregister.gov/documents/2021/01/15/2021-00827/coronavirus-relief-fund-for-states-tribal-governments-and-certain-eligible-local-governments#:~:text=Section%20601%20of%20the%20Social,tribal%20governments%2C%20and%20certain%20local>.

²⁰¹ David Pitt, *USDA unveils plan to help build small meat processing plants*, ASSOCIATED PRESS (July 9, 2021), <https://apnews.com/article/joe-biden-business->

announced, “This is a once in a generation opportunity to transform the food system so it is more resilient to shocks, delivers greater value to growers and workers, and offers consumers an affordable selection of healthy food produced and sourced locally and regionally by farmers and processors from diverse backgrounds.”

B. Pass the PRIME Act

Congress could also pass the PRIME Act. This bi-partisan bill was first introduced in 2015,²⁰² then again in 2017,²⁰³ and again in 2019, when it died.²⁰⁴ But interest and support for this bill persists: in May 2020, Farm and Ranch Freedom Alliance (FARFA) wrote letter to House Agriculture Committee asking for movement.²⁰⁵ As explained earlier in this article, any meat for sale that is not owned by the consumer before slaughter must be processed at a slaughterhouse that is certified and under inspection either by the USDA, or by a state-certified processor whose standards must be at least equivalent to the USDA process. This prevents custom processors from butchering any meat that is sold or distributed to the general public. Should a state attempt to enable a custom butcher to process commercially, the USDA will take over all inspections for that state, as it threatened to do in Maine when it attempted to pass one such law.²⁰⁶

The PRIME Act would “exempt from inspection the slaughter of animals and the preparation of carcasses conducted at a custom slaughter facility,” so long as the meat is sold under one of the following conditions: 1) directly to household consumers within the state; or restaurants, hotels, boarding houses, grocery stores, or other establishments located in such State that are either a) involved in the preparation of meals served directly to consumers; or b) sell meat and meat food products directly to consumers in the State.²⁰⁷ Essentially, it allows custom exempt processors to butcher commercial meat so long as the supply chain is a short one. The Act does not make waiver of regulation mandatory, it merely removes the USDA’s authority to regulate custom processors so long as state laws comply with the PRIME Act conditions. At the time of writing, the Act has broad support; 43

health-coronavirus-pandemic-meat-processing-ca27a1c8c38a1b83c7dbea7620d7b24f.

²⁰² PRIME Act, H.R. 3187, 114th Cong. (2015).

²⁰³ PRIME Act, H.R. 2657, 115th Cong. (2017).

²⁰⁴ PRIME Act, H.R. 2859, 116th Cong. (2019).

²⁰⁵ Charles Wallace, *Letter urges passage of the PRIME Act*, Wall St. J (May 15, 2020), https://www.wlj.net/top_headlines/letter-urges-passage-of-the-prime-act/article_efd52d04-96e5-11ea-be6e-67948d60714f.html.

²⁰⁶ Dan Flynn, *USDA ready to take over meat, poultry inspections in Maine*, FSN FOOD SAFETY NEWS Sept. 9, 2017, <www.foodsafetynews.com/2017/09/usda-ready-to-take-over-meat-poultry-inspections-in-maine/>.

²⁰⁷ H.R.2859 — 116th Congress (2019-2020).

bi-partisan (34 R's, 8 D's, 1 L) co-sponsors in house, up from 21 total in 2015 and 23 total in 2017; (The Act never received votes in these two previous versions.²⁰⁸

Proponents argue that the Act could help facilitate new markets over time in the same manner in which farmers' markets have slowly become ubiquitous.²⁰⁹ The impact however, could be more immediate in some states. For instance, Arkansas, is ranked 10th in the nation for its beef inventory, with its value of livestock at 25th in the nation (cattle and calves at 510,641,000 pounds of production).²¹⁰ Yet, it has only 3 USDA processors but 40 custom processors.²¹¹ Its USDA processors have the capacity to process approximately 5,000, of the almost 1,000,000 heads of cattle, leaving ranchers little other choice but to transport almost 1,000,000 heads cattle out-of-state for processing.²¹²

Critics cry food safety. Though most pork producers export the majority of their products overseas, the National Pork Producers Council, the political action committee often accused of primarily representing the interests of the large corporate hog farms,²¹³ has opposed the PRIME Act in the name of food safety.²¹⁴ Proponents, however, argue "because custom slaughterhouses handle a tiny fraction of the number of animals, they can provide greater quality control... There

²⁰⁸ *Id.*

²⁰⁹ Bob Delmore, a professor of animal sciences at Colorado State University, have likened the potential impact of the PRIME Act on the meat market to the evolve similarly the evolution of farmers' markets. "Passage of the PRIME Act may not have a drastic immediate impact, Delmore said, but over time it could help establish a new market within the food industry not unlike farmers' markets have done over the past few decades," Stephen Miller, *Amid Covid-19 bottleneck in meat industry, PRIME Act gains support, Food and Environment Reporting Network*, June 3, 2020, https://thefern.org/ag_insider/amid-covid-19-bottleneck-in-meat-industry-prime-act-gains-support/.

²¹⁰ Staff Writer, *Arkansas: \$5 Million Available for New State Meat and Poultry Processing Grant Program*, NASDA blog article, Aug 25, 2020, <https://www.nasda.org/news/arkansas-5-million-available-for-new-state-meat-and-poultry-processing-grant-program#:~:text=There%20are%20currently%20three%20local,custom%2Dexempt%20processors%20in%20Arkansas.>

²¹¹ *Id.*

²¹² *Where's the Beef?* Published Report, UALR Clinic, <<https://drive.google.com/file/d/1mYq71B-O2q82LuRCDEk6oIrNyy64HifH/view>>

²¹³ Danny Vinik, *A \$60 million pork kickback?* POLITICO (Aug. 30, 2015) <<https://www.politico.com/agenda/story/2015/08/a-60-million-pork-kickback-000210/>>.

²¹⁴ *PRIME Act*, The National Pork Producers Council website, <https://nppc.org/issues/issue/prime-act/>, accessed on May 31, 2021.

have been few – if any – recalls. (USDA does not provide specific data on recalls from small plants, but we have been unable to identify any reports.)”²¹⁵

The dubiousness of the claim that regulation arises from concern over food safety is further underscored by the way in which commercially raised exotic animals are regulated. Exotic animals are federally defined as reindeer, elk, deer, antelope, water buffalo, bison, buffalo, or yak, and their processing is not regulated by the USDA, but rather the Federal Meat Inspection Act (FMIA).²¹⁶ Federal regulations allow for these animals to be processed in a manner similar to the custom exempt procedures for conventional farm-raised animals (cattle, sheep, pork, etc.); in this scenario, the animals can be butchered by a small processor ante-mortem.²¹⁷ Meat safety inspectors need not be present during the execution or processing of the animal, but the processing business itself is inspected semi-annually,²¹⁸ and the farms that produce the exotic animals are also inspected by a federal authority authorized to do so.²¹⁹

From 1997 to 2003, according to the North American Elk Breeders Association there was a growth of elk from 20,000 heads to 110,000, on 2300 farms.²²⁰ Similar levels of growth in the commercial deer population were reported by the National Deer Farmer’s Association, in an even shorter span of time: from 44,000 heads in 1992 to 126,000 heads four years later in 1996, to 550,000 heads in 2003.²²¹ Commercial bison grew at around 30% per year with 30,000 in 1972, to 250,000 in 1997.²²² This is not an insignificant amount of meat that is butchered under these significantly relaxed federal regulations, and is a meat industry that has only continued to grow steadily since the 1970’s.

Small farmers and ranchers of traditional livestock and poultry should be availed of the same opportunities available to our exotic game meat producers. Doing so would provide more income opportunities, a more diversified market of meats, and a more stable meat supply chain, values currently recognized by Secretary Vilsack.

²¹⁵ Support H.R. 2859/S.1620, *the PRIME Act Fact Sheet*, Farm and Ranch Freedom website, <http://farmandranchfreedom.org/wp-content/uploads/2020/05/PRIME-Act-Fact-Sheet-May-2020.pdf?emci=7bf835ad-19a5-ea11-9b05-00155d0394bb&emdi=2e706896-ada5-ea11-9b05-00155d0394bb&ceid=616075>, accessed on May 31, 2021.

²¹⁶ 9 C.F.R. § 352.1(k).

²¹⁷ 9 C.F.R. § 352.2

²¹⁸ 9 C.F.R. § 352.3

²¹⁹ 9 C.F.R. § 352.4

²²⁰ Patrice Klein, *Game Meat: A Complex Food Safety and Animal Health Issue*, FOOD SAFETY MAGAZINE (Dec. 1, 2004).

²²¹ *Id.*

²²² *Id.*

C. More States Should Create State-Certified Meat

Twenty-three states do not have a state meat inspection program.²²³ This leaves independent ranchers to fend for themselves and compete with the USDA meat processors themselves, most of whom prioritize their own cattle first.²²⁴ Over thirty years ago, the nation hosted 1,750 USDA processors, but today that number is 808, and given the working conditions, it seems unlikely to increase despite the added funding to increase inspectors.²²⁵ Wyoming does not even have a single USDA processor within its borders, and only 27 state inspectors for its state-certified processors,²²⁶ which process 2/3 of the states' beef output; the last third must be transported to Colorado.²²⁷

While interstate commerce laws currently prohibit interstate sales of state-inspected beef, Congressional will appears to support changing that. Congress has twice introduced the New Markets for State-Inspected Meat and Poultry Act, once in 2018 and another in 2021,²²⁸ and a similar bill, Direct Interstate Retail Exemption for Certain Transactions (DIRECT) Act,²²⁹ in the House. These Acts would enable farmers to sell meats processed in a state-certified facility across state lines. A state with its own inspection program and the passage of these two acts would essentially relieve pressure on the USDA inspectors who could then focus where they are needed the most—the Big Four processors.

D. Explore and Legislate Innovations in Inspections

As of now, inspectors in the state and USDA certified programs must be physically present at all stages of the process, from the second the cattle leave their

²²³ *Supra* note 120, National Agricultural Law Center Staff, at note 107.

²²⁴ Lauren Etter, *Have Knife, Will Travel: A Slaughterhouse on Wheels*, Wall St J (Sept. 5, 2008), <https://www.wsj.com/articles/SB122054916174600403>.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Nick Reynolds, *The next big market for Wyoming beef? Wyoming*, CASPER STAR TRIB, Dec 29, 2020. *See also*, Senator Cheri Steinmetz, *Beefing up Wyoming's economy*, POWELL TRIB, June 25, 2020.

²²⁸ *Cheney Re-Introduces Bill To Open New Markets For State-Inspected Meat*, Liz Cheney website Mar 22, 2021, accessed on May 31, 2021, <https://cheney.house.gov/2021/03/22/cheney-re-introduces-bill-to-open-new-markets-for-state-inspected-meat/>.

²²⁹ H.R. 547 (IH) - Direct Interstate Retail Exemption for Certain Transactions Act (2021).

transport trailers to the end-state of packaged meat. Often times, they are only there for an hour or so and can miss vital events, resulting in recalls. In 2019, there were at least 116 recalls of meat and poultry, and over a hundred a year since at least 2016.²³⁰ Burnout rates are high, and the inspectors must regularly travel on a daily basis. Should more processors obtain USDA certification, this likely will only worsen.

Other nations have shared these same challenges and have pioneered possible tech-based solutions. In Sweden, though responsible for only 3.5% of Sweden's red meat production, small slaughterhouses comprised 26% of the nation's federal inspection time.²³¹ A recent study was conducted using high grade video to inspect post-mortem pork from 400 pigs being processed in a small plant. The cameras were high grade and produced augmented video of lesions on tails, and other physically visible issues of concern. Such video would then trigger a visit from a live vet.²³² To compare the effectiveness of the video program, a live inspector then conducted an in-person inspection on the same 400 pigs to determine if anything was missed.²³³ The results revealed no differences in pulled specimens, and the authors of the study recommended adoption of the tech-based inspection process for small slaughterhouses, where numbers of animals are lower and transportation is more difficult. The authors also argued that the video method reduced infections (because the method reduced manual handling which can serve as opportunities for contamination), and saved on costs.²³⁴ This method is also being explored in the European Union.²³⁵

In Canada, video inspections can be used only under special circumstances, for instance if the animal is injured and must be slaughtered immediately.²³⁶ In US, video is only being used as a supplement to in-person inspection, and the content monitoring is handled and overseen by the meat processor itself rather than the

²³⁰ Carla Gillespie, *2020 Meat and Poultry Recalls Hit All-Time Low*, FOOD POISONING BULLETIN (Dec. 22, 2020), <https://foodpoisoningbulletin.com/2020/2020-meat-and-poultry-recalls-hit-all-time-low/>.

²³¹ Viktor Almqvist, Charlotte Berg & Jan Hultgren, *Reliability of remote post-mortem veterinary meat inspections in pigs using augmented-reality live-stream video software*, FOOD CONTROL, July 2021, at 2.

²³² *Id.* at 1.

²³³ C.R. Craigie et al., *A review of the development and use of video image analysis (VIA) for beef carcass evaluation as an alternative to the current EUROP system and other subjective systems*, 92 MEAT SCI. 307, (2012).

²³⁴ Almqvist et al., *supra* note 231, at 1.

²³⁵ Craigie et al., *supra* note 233.

²³⁶ This is already done in Canada under limited circumstances (such as an emergency, animal cannot be transported, and other special circumstances).

USDA.²³⁷ The USDA has made it clear that video by the processor will not replace FSIS in-person inspections.

Given the poor administration of the current USDA inspection program resulting in hundreds of inspector vacancies a year, the USDA should consider such innovations. This would require incorporation of highly augmented video technology, handled and operated by the USDA, and not by the processors themselves—as is currently the case in the US. This method might also be better suited for smaller processors, who already do not share the same volume and accompanying risks as the Big Four.

The study from Sweden seems the most insightful to the problems faced here and the data appears detailed. The USDA should fund a similar study of its own to verify findings and consider amending the USDA and FSIS to allow ante- and post-mortem inspections using technology explored in other Western nations with high standards in meat quality. (The EU is widely recognized as having extremely high standards, and some critics point out that the EU has even higher standards and food safety protections than the US.)²³⁸

3. Facilitate Growth of Localized Economies

While funding the capacity-building of existing processors and funding new processors would be significant and important steps, this cannot happen in a silo. Congress should consider incisive ways of supporting local farmers that facilitates them to thrive. Under CARES, Congress funded the Market Facilitation Act which did little to facilitate capacity building, but rather made cash payments to farmers affected by the Trump administration's decision to impose tariffs on US trading partners, and merely served as a band-aid to a bleeding rural economy.²³⁹

²³⁷ *USDA Issues Guidance on Video Monitoring*, QUALITY ASSURANCE MAG. (Aug. 31, 2011), <https://www.qualityassurancemag.com/article/qa-083111-usda-issues-guidance-on-video-monitoring/>.

²³⁸ Eco-Watch has pointed out that while the US allows the use of beef hormones, antibiotics, and antiseptic washes, and gestation crates, these practices are all banned in the EU. Laura Beans, *13 Ways the EU Beats the U.S. on Food Safety*, ECOWATCH BLOG (Jan. 20, 2014), <https://www.ecowatch.com/13-ways-the-eu-beats-the-u-s-on-food-safety-1881850175.html>.

²³⁹ “Agriculture Secretary Sonny Perdue announced May 23, 2019 that USDA would again provide aid to assist farmers hurt by trade disruptions prompted by unjustified foreign retaliatory tariffs on their products through MFP. President Trump authorized USDA to provide up to \$14.5 billion in direct payments through MFP for 2019 to assist impacted producers, which is in line with the estimated impacts of the retaliatory tariffs on – and non-tariff barriers to exports of – U.S. agricultural goods,” *Market Facilitation Program*, U.S.D.A. (2019), <https://www.farmers.gov/manage/mfp>

Essentially, the Act created payments to farmers in lieu of the income they might have received if all was well with China.²⁴⁰ It did nothing to facilitate the creation of new trading partners or a new customer base.²⁴¹

A. Create Tax Incentives for On-shoring/Re-shoring

A more long-term solution would be to create meaningful incentives for diversification of supply chains. Nationwide, in a variety of industries, there is renewed interest in bringing off-shore production back to the US (referred to as *on-shoring*), or at least nearer to the US (referred to as *near-shoring* or *re-shoring*).²⁴² In May of 2020, international accounting firm McKinsey and Co reported that 93% of its client executives either had begun, or expressed an interest in completely overhauling its supply chain.²⁴³ While the trade war did little to spur growth of domestic manufacturing, it did make American businesses realize the importance of diversifying supply chains. This was a talking point in President Biden's campaign, and in Sept 2020, he began proposing the elimination of offshore tax loopholes and the imposition of penalty taxes for manufactured goods and services based overseas.²⁴⁴ His administration released a detailed plan in April 2021, which, thus far seems to incentivize bringing manufacturing back to US, and clean energy production and storage, but nothing involving re-shoring agriculture and protein sources.²⁴⁵ Consistent with the other recommendations in this article, President

[<https://www.farmers.gov/archived/mfp>]. Also happened via CARES Act through CFAP Payments (Corona Food Assistance Payments), Peterson.

²⁴⁰ Steve Karnowski, *How the Trump administration's 2018 trade aid package works*, AP NEWS (July 3, 2019),

<https://apnews.com/article/0e3b297efa1a4b279b2ea558a903fade>.

²⁴¹ *FSA Handbook: Market Facilitation Program*, U.S.D.A. (Dec. 10, 2019),

https://www.fsa.usda.gov/Internet/FSA_File/1-mfp_r00_a05.pdf.

²⁴² See Mike Cherney, *Firms Want to Adjust Supply Chains Post-Pandemic, But Changes Take Time*, WALL ST. J. (Dec. 27, 2020),

<https://www.wsj.com/articles/firms-want-to-adjust-supply-chains-post-pandemic-but-changes-take-time-11609081200>. About a fourth of the companies surveyed by the Institute for Supply Management reported a plan to “reshore” or “nearshore” some or most of their operations. McKinsey & Co reported that 93% of its client executives reported an interest in an overhaul of their supply chains.

²⁴³ *Id.*

²⁴⁴ Christina Wilkie, *Biden proposes a tax penalty for offshoring and new credits for manufacturing investments*, CNBC (Sep. 9, 2020, 5:41 AM),

<https://www.cnbc.com/2020/09/09/biden-proposes-tax-penalty-for-offshoring-tax-credit-for-us-investment.html>.

²⁴⁵ *Executive Summary and Introduction*, U.S. DEP'T OF THE TREASURY: THE MADE IN AMERICA TAX PLAN, 1-2 (Apr. 2021),

https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf.

Biden should complement his tax penalties for off-shoring, with tax credits or other incentives for re-shoring.

B. Fund Programs and Provide Tax Incentives that Support Infrastructure for Local Sales in All Areas

A winner in the Big Four meat debacle has been the local farm. As trips to the grocery store became perceived as a risk for infection in a pandemic era, the open air of the local farm became more appealing. One nonprofit, sustainable farm manager observed, “In times of crisis, our customers are our biggest allies. None of these changes will matter if people do not commit to learning about and supporting their local famers. That could mean buying from a co-operative, shopping at your famer’s market or using a farm-to-door delivery service.”²⁴⁶

Small farms around the nation pivoted, and found their products in demand. In Kansas, a small-town minister thought to start a Facebook page that could serve as a virtual farmer’s market.²⁴⁷ The page quickly accumulated 150,000 users, and farms report a steady stream of new customers on their farms, eager to avoid crowded grocery stores.²⁴⁸ Other farmers have found much needed help from online platforms that enable them to customize and deliver orders more easily to those wanting to shelter in place.²⁴⁹

“Reducing profit shifting and eliminating incentives to offshore investment. The enactment of a country-by-country minimum tax aims to substantially curtail profit shifting by U.S. multinational corporations. By tackling the profit shifting of foreign multinational companies out of the U.S. tax base, the plan works to level the playing field between multinational companies headquartered in the United States and foreign countries. The President’s plan would also eliminate the tax laws embedded in the 2017 TCJA that incentivize the offshoring of assets.” The plan would remove a number of offshore tax benefits that currently exist, and repeal export preferences. *See id.*, at 13.

²⁴⁶ Donna Kilpatrick, *A farming revolution is what we need in this crisis*, FINANCIAL TIMES (Sep. 30, 2020), <https://www.ft.com/content/b5d5019d-9335-4cad-a3ad-9752b3938946>.

²⁴⁷ Chris Oberholtz & Savannah Rudicel, *'Shop Kansas Farms' Facebook group creates virtual farmer's market for entire state*, KCTV5 (May 21, 2020), https://www.kctv5.com/news/kctv5_news_this_morning/shop-kansas-farms-facebook-group-creates-virtual-farmer-s-market-for-entire-state/article_9bffdd22-9b4b-11ea-95c2-632e7c2567e4.html.

²⁴⁸ *Id.*

²⁴⁹ *See* Brianna Baker, *Once-Struggling New Jersey Farm Offers Bounty of Vegetables and More to Social-Distancing Customers*, NEXT CITY (Apr. 16, 2020). One farm used an online platform that helps community supported agriculture farms shift to home delivery with more customization options, in order to better compete with grocery delivery services like Amazon, HelloFresh and

The USDA began funding the Local Food Promotion Program (LFPP) to support projects that “develop, coordinate and expand local and regional food business enterprises that engage as intermediaries in indirect producer to consumer marketing to help increase access to and availability of locally and regionally produced agricultural products.”²⁵⁰ The funds can be used as early as planning stages, or expansion stages of an already-formed organization such as a food council, a CSA network, and many other types of agricultural business or cooperative.²⁵¹

Also important is the capacity of farmers to accept food stamps and SNAP benefits for payment, a process which can be technical and cumbersome and too intimidating for some farmers, and can require technical assistance in the implementation stage.²⁵² Members of Congress introduced (July 2020) and reintroduced (Feb 2021) a bill to improve the technological capacity of the online SNAP program, that would earmark funds to not only create a platform, but also technical assistance programming to accommodate small retailers, farmers, and consumers.²⁵³ Some of these efforts specifically addressed the challenges of accepting benefits at farmers markets.²⁵⁴ It did not, however, leave committee.²⁵⁵ Congress should consider funding this bill and also expanding the reach of such

Imperfect Produce. *See also* Margaret Milligan, *Buy Fresh Buy Local Nebraska Working Together for Local Food*, CORNHUSKER ECONOMICS (Jan. 20, 2021). In Nebraska, the state’s university-hosted online marketing campaign for in-state sourcing and has become the go-to resource for consumers, restaurants, grocery stores and institutions alike for local sourcing. In Kansas, a small-town minister started a Facebook page to promote local produce during the pandemic that grew to 150,000 users, Oberholtz et al., *supra* note 247.

²⁵⁰ *Local Food Promotion Program*, U.S.D.A., <https://www.ams.usda.gov/services/grants/lfpp>.

²⁵¹ *Id.*

²⁵² *See generally* Kate Cole, Molly McNees, Karen Kinney, Kari Fisher, & James W. Krieger, *Increasing Access to Farmers Markets for Beneficiaries of Nutrition Assistance: Evaluation of the Farmers Market Access Project*, PREVENTING CHRONIC DISEASE, Oct. 3, 2013.

²⁵³ Bridget Goldschmidt, *Indy Grocers Cheer Legislation to Grow SNAP Online Purchasing*, PROGRESSIVE GROCER (Feb. 11, 2021), <https://progressivegrocer.com/indy-grocers-cheer-legislation-grow-snap-online-purchasing>.

²⁵⁴ Senator Gillibrand sought to provide “non-traditional retailers” such as farmers markets with wireless, mobile technology that can process SNAP payments. *Priorities for a Strong Farm Bill*, KIRSTEN GILLIBRAND: UNITED STATES SENATOR FOR NEW YORK, <https://www.gillibrand.senate.gov/agenda/priorities-for-a-strong-farm-bill>.

²⁵⁵ S. 313, 117th Cong. (2021-2022), available at <https://www.congress.gov/bill/117th-congress/senate-bill/313>.

programming to facilitate sales with and without SNAP benefits. This would not only facilitate low-income households buying fruits and vegetables and local meats, studies have reflected that doing so it would also simultaneously expand a farmer's customer base.

The USDA should target these proven tools and bring them to small farmers, by subsidizing purchase of platforms, and providing technical assistance and the technical literacy needed to train farmers how to use and optimize these platforms, develop strategies, and build brand.

Currently, the SBA funds a Small Business Development Center out of at least one in each state, housed in colleges, universities, community colleges, vocational schools, chambers of commerce and economic development corporations.²⁵⁶ These centers house business and marketing experts whose services are available to the general public, either at cost or no cost.²⁵⁷ The federal government also funds land grant extension colleges focused on tech and outreach to farmers, also at no cost to the farmer.²⁵⁸ Congress could use these two existing mediums to connect farmers to the tech tools necessary to build a local customer base.

Congress should also provide tax incentives to support the growth of delivery and pick-up options for customers (Community Supported Agriculture (CSA)).²⁵⁹ Online sales have skyrocketed in the pandemic, and many business experts project that this trend will last beyond the pandemic,²⁶⁰ particularly for groceries.²⁶¹ Congress could also provide incentives to existing large retailers to provide space for purchase and pick-up, or even just pick-up space for local farmers. For the fiscal year 2016, Congress funded the Healthy Food Financing Initiative with \$22 million to create more farmers markets, and to bring new grocery

²⁵⁶ Office of Small Business Development Centers, US Small Business Administration (last visited on June 1, 2021), <https://www.sba.gov/about-sba/sba-locations/headquarters-offices/office-small-business-development-centers>.

²⁵⁷ America's SBDC (last visited on May 31, 2021), <https://americassbdc.org/>.

²⁵⁸ USDA, *Extension*, National Institute of Food and Agriculture (last visited on May 31, 2021), [https://nifa.usda.gov/extension#:~:text=Through%20extension%2C%20land%2Dgrant%20institutions,%2C%20ranches%2C%20and%20rural%20business](https://nifa.usda.gov/extension#:~:text=Through%20extension%2C%20land%2Dgrant%20institutions,%2C%20ranches%2C%20and%20rural%20business.).

²⁵⁹ Baker, Milligan, and Rudicel, *supra* notes 247, 249.

²⁶⁰ See, Caroline Jansen, *After COVID-19, is curbside delivery here to stay?*, RETAIL DIVE (May 14, 2020), <https://www.retaildive.com/news/after-covid-19-is-curbside-delivery-here-to-stay/577937/>.

²⁶¹ Catherine Douglas Moran, *Grocery pickup is here to stay. Here's how it's evolving*, Grocery Dive (October 26, 2020), <https://www.grocerydive.com/news/grocery-pickup-is-here-to-stay-heres-how-its-evolving/587702/>.

to underserved areas.²⁶² But studies reflect that decreasing creating new supermarkets did not result in a high adoption rate of the supermarket as the primary shopping venue, suggesting that behavior rather than convenience is the more crucial factor to grocery purchases.²⁶³ Creating new real estate projects for an unknown market can be complicated and risky, and expensive; less risky would be to provide funding or tax credits to existing retail operations present in low income neighborhoods. In some states, Dollar General franchises have begun selling fresh produce and other grocery items since 2019, in 9000 of its 16,500 locations, and reports in 2020 a “substantial cost benefit” from this move.²⁶⁴ Perhaps a strategic plan with funded incentives targeting these mega-retailers based in tens of thousands of low-income neighborhoods could distribute fresh, local foods more effectively and systematically, at a lower cost and with lower risk than building entirely new grocery stores.

C. Invest in Rural Entrepreneur Development Programming

Clearly, there is a market for rural goods and services, that is unmet. Equally clear is the existence of rural entrepreneurial talent, as was revealed in the Penn State study. Furthermore, rural firm entry is strongly influenced by home town; From an Iowa State study, 37% of rural businesses were started in rural entrepreneur’s home county, compared to 19% of urban entrepreneurs who started their business in their home towns.²⁶⁵ The data on this is consistent even internationally; according to a study in Portugal, rural entrepreneurs are willing to pay more than three times labor costs to remain in his home area.²⁶⁶ Two programs that would support more rural entrepreneurship and strengthen existing entrepreneurship are 1) Grow Your Own Programs that inspire and excite local minds,²⁶⁷ and 2) programming helping businesses transition to new owner, a

²⁶² Office of Community Services, *CED Healthy Food Financing Initiative FY 2016*, US Department of Health and Human Services (last visited May 31, 2021), <https://www.acf.hhs.gov/archive/ocs/programs/community-economic-development/healthy-foodfinancing#:~:text=In%20fiscal%20year%202015%2C%20the,to%20certified%20Community%20Development%20Entities.>

²⁶³ Madhumita Gosh-Dastidar et al., *Does Opening a Supermarket in a Food Desert Change the Food Environment?*, *Health Place*, 2017, 46: 249-256, at P. 12 (of pdf). This result was consistent with other studies cited.

²⁶⁴ Aine Cain, *Dollar General's push to fill stores with fresh produce and frozen-food options gives the chain a big box feel*, *BUS INSIDER*, Aug 23, 2020.

²⁶⁵ Georgeanne Artz, Zizhen Guo & Peter Orazem, *Location, location, location: place-specific human capital, rural firm entry and firm survival* (2018), p. 8.

²⁶⁶ *Id.*, at 10.

²⁶⁷ *Id.*, at 14.

common obstacle for aging rural business owners.²⁶⁸ It would behoove Congress to recognize these opportunities for commerce and invest in supporting in rural entrepreneurial training and education.

D. Reinstate the COOL Act

In today's supermarkets, grass-fed meat products labeled "Product of USA" could very well be comprised of cows raised abroad.²⁶⁹ This is because the "Product of the USA" designation could mean that cuts of meat from other countries could have been cut into smaller pieces by a US-based processor.²⁷⁰ One provision of Senator Booker's Farm System Reform Act mandates the reinstatement of regulation which would require labels to state the country of origin on beef, pork, and dairy products packaging (COOL Act). While the FSR Act may come up against political opposition, the COOL Act alone has the potential, in this post-COVID era, to pass as a free-standing bill. Now that the pandemic highlighted

²⁶⁸ *Id.*, at 14. "We find that a main impediment for business transition is the ability to find a successor with the requisite location-specific skill set to take over the business. Family members are the most obvious successors. Children or other family members of rural entrepreneurs can acquire the social capital, resources and specific knowledge of how to run the firm profitably (Westhead, 2003). Yet, the grown children of rural family-owned operations often have established careers and little interest in succeeding their parents in running a "small-town" business. In the United States, about 30 percent of family businesses are transferred to second generation family ownership and only 13 percent survive to 3rd generation (Battisti & Okamuro, 2010).

An alternative to family succession is transfer to an employee of the business (or a group of employees). Transition to employee-ownership retains the firm-specific human capital embodied in the firm's workforce and may increase the probability that the business will continue to exist in its current location, benefitting both the employees themselves and the local community (Dickstein, 1991; Reynolds 2009). Furthermore, in the U.S., selling to employees provides a tax benefit to the owners (the Internal Revenue Code Section 1042 rollover) provides a tax benefit to the owners (the Internal Revenue Code Section 1042 rollover). Absent a family or employee heir, finding a successor may be facilitated through matching programs such as AgLink. AgLink is designed to match retiring farmers who do not have an heir to continue the family farm business, with beginning farmers who do not own land. A similar program for non-farm rural businesses, coupled with an apprenticeship program that would give the successor time to build skills and equity in the business would be an additional way to address the thin markets problem for rural businesses."

²⁶⁹ Deena Shanker, *Most Grass-fed Beef Labeled 'Product of USA' Is Imported*, BLOOMBERG (May 23, 2019).

²⁷⁰ *Id.*

the fraught nature of the meat supply chain, the time appears to be right to introduce legislation that would support local agriculture, especially in such a low-cost manner as imposing and enforcing labeling requirements.

E. Support Broadband Expansion

At the heart of all of the reform measures proposed thus far is a basic necessity that has yet to be met in an effective way, and that is rural broadband. *Broadband* has come to be defined as internet service with a minimum download speed of 25 megabites per second (mbps), and a minimum upload speed of 3 mbps.²⁷¹ It can be delivered via power lines, cable, fiber optics, wireless, dedicated service lines or satellite.²⁷² Seventeen million rural residents (26.4% of all rural residents) do not have access to broadband, and comprise 80% of all Americans who lack sufficient broadband,²⁷³ making it impossible for them to enjoy evolutions such as remote learning, telemedicine, and improved emergency services. Lack of broadband can make real estate unmarketable.²⁷⁴

Lack of broadband makes it exceedingly difficult to explore new markets and diversify income opportunities and new industries,²⁷⁵ no less so in

²⁷¹ Tyler Cooper, *The FCC Definition of Broadband: Analysis and History*, BroadbandNow (Feb. 10, 2018), <https://broadbandnow.com/report/fcc-broadband-definition/>.

²⁷² FCC, *Getting Broadband Q&A*, Federal Communications Commission (March 11, 2020), <https://www.fcc.gov/consumers/guides/getting-broadbandqa#:~:text=What%20is%20broadband%3F,%22dial%2Dup%22%20services.>

²⁷³ Yulong Chen, Liyuan Ma, & Peter Orasze, *Does Rural Broadband Expansion Encourage Firm Entry?* AGRICULTURAL POLICY REVIEW, citing a 2019 FCC report.

²⁷⁴ Spencer Lee, *Rural America Faces Roadblocks in Joining the Internet Highway*, Capstone, CUNY, Craig Newmark Graduate School of Journalism (2019), at 1. “When you’re selling a house in a rural area, and there is no broadband connection, and people find that out, they don’t offer less money for your home. They walk away,” chair of the Duanesburg Broadband Committee.

²⁷⁵ “Increased broadband access can create opportunities for talented young professionals to work in rural communities, enable increased economic growth and employment, and provide increased access to education and health care. If rural areas are expected to compete with urban areas socially and economically by remaining a viable option to live and work, broadband access is critical.” Amie Alexander, *Utility Law – All Hands on Deck Bringing Broadband Home to Rural Arkansas*, 40 U. ARK. LITTLE ROCK L. REV. 401, at 406, citing Diane K. McLaughlin, Carla M. Shoff, & Mary Ann Demi, *Influence of Perceptions of Current and Future Community, on Residential Aspirations of Rural Youth*, 79 RURAL SOC. 453, 453-54 (2014). See also, doi/10.1111/ruso.12044/full, and

agriculture,²⁷⁶ where it has been used to assist with remote irrigation in Nebraska, monitoring temperatures in livestock buildings nationwide, or track rainfall in the next county over, information upon which million and billion dollar agriculture decisions are made.²⁷⁷ Broadband has shown net increase in firm entry in construction, manufacturing, wholesale trade, real estate, arts and entertainment.²⁷⁸ Broadband has become so much a part of modern life that it has been analogized to rural electrification,²⁷⁹ or what the railroad was a century ago.²⁸⁰ And, as was the case with all of the aforementioned technologies, the challenges to bringing broadband to rural America is based in the sheer size of the nation—the distances and topography over which the technology must travel to be delivered.²⁸¹

Efforts at bringing broadband to rural America are not new, but have yet to be effective. The Rural Broadband and Broadband Loan Guarantee Program of the USDA was available as far back as 2000, but was ineffective in that it allocated a disproportionate amount of funds to urban areas.²⁸² Seven years later, the Rural Broadband Improvement Act of 2007 was introduced to expand how many underserved rural areas could receive federal funding for broadband, but it did not pass.²⁸³

One of the boldest proposals was the Rural Broadband Initiative Act of 2015, which would have created an Office of Rural Broadband Initiatives within the Department of Agriculture and charged with the following tasks: (1) developing

Edward J. Sholinsky, Note, Blocking Access to the Information Superhighway: Regulating the Internet Out of the Reach of Low-Income Americans, 38 RUTGERS L.J. 321, 323 (2006) (“If the digital divide grows, many of the less privileged will continue to fall behind economically, educationally, and socially.”).

²⁷⁶ Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, CITYLAB (Feb. 19, 2020), available at <https://www.citylab.com/equity/2020/02/internet-access-rural-broadband-digital-divide-map-fccdata/606424/>.

²⁷⁷ Douglas Burns, *Billion-Dollar Decisions Depend on Rural Broadband*, THE DAILY YONDER (Feb. 4, 2009), available at <https://dailyyonder.com/billion-dollar-decisions-depend-rural-broadband/2009/02/04/>.

²⁷⁸ Chen et al., *supra* note 274, at 2.

²⁷⁹ Lee, *supra* note 274, at 5, and Alexander, *supra* note 275.

²⁸⁰ Burns, *supra* note 277.

²⁸¹ Brian Witkowski, *Bridging the Digital Divide: Improving Broadband Access for Rural Americans*, 13 PUB. INT. L. REP. 170, 174 (2008).

²⁸² Alexander at 411, citing Rural Broadband Access Loan and Loan Guarantee Program 101, U.S. DEP'T AGRIC. RURAL DEV., <https://www.rd.usda.gov/programs-services/rural-broadband-access-loan-and-loan-guarantee>.

²⁸³ Rural Broadband Improvement Act, H.R. 2035, 110th Cong. (1st Sess. 2007).

a comprehensive strategic vision; (2) conducting rural outreach; (3) administering rural broadband grant and loan programs; and (4) coordinating federal resources for state, regional, and local governments to assist rural areas.²⁸⁴ Though there has been bipartisan support for the issue,²⁸⁵ the bill died in committee.²⁸⁶

In 2016, under the Trump era of decreased regulatory burdens and incentives for additional private capital investment, the moment seemed ripe,²⁸⁷ and the Rural Digital Opportunity Fund in 2019 was introduced, proposing \$20.4 billion, and \$60 billion before that.²⁸⁸ But again, the program rollout has been fairly ineffective, focusing on individual rural households, who have been found to be less likely to adopt broadband service because of extra 10% cost (as opposed to rural businesses who would have made better program targets for the Fund).²⁸⁹

The CARES Act did commit \$100 mill for rural broadband expansion in small towns and rural communities.²⁹⁰ But the impediments from the private sector remain. After all, broadband would bring higher speed connection to remote families for far less than they are paying currently, and would cost providers millions, if not billions of dollars, time, and effort, to build the physical infrastructure. Indeed even when infrastructure costs have been reduced significantly, the private sector has passed up the federal funds.²⁹¹

²⁸⁴ Alexander, *supra* note 214, at 411-12.

²⁸⁵ Alexander, *supra* note 214, at 412. “Senator John Boozman, a U.S. Senator for the state of Arkansas, is a co-chair of the Senate Broadband Caucus and has been an advocate for rural America receiving broadband access. Senator Boozman, along with fifty-two other senators, demonstrated a strong bi-partisan commitment to rural broadband infrastructure by sending a letter to President Trump that urged him to prioritize policies that ‘reduce barriers to investment in communications infrastructure and streamline the deployment process’ for rural Americans.”

²⁸⁶ Alexander, *supra* note 214, at 411-12.

²⁸⁷ U.S. DEP'T OF AGRIC., REPORT TO THE PRESIDENT OF THE UNITED STATES FROM THE TASK FORCE ON AGRICULTURE AND RURAL PROSPERITY (2017).

²⁸⁸ Chen, *supra* note 212, at 1.

²⁸⁹ Chen, *supra* note 212, at 2.

²⁹⁰ Department of Agriculture; Rural Utilities Service; Broadband Pilot (ReConnect) Program, 85 Fed. Reg. 20,240 (April 10, 2020).

²⁹¹ Alexander, *supra* note 214, at 415. “When telecommunications companies characterized pole attachment rates as the barrier to rural broadband deployment, the cooperatives offered free attachment in exchange for the attaching entities’ commitment to broadband service deployment in cooperative territories by 2020, but entities refused. The cooperatives argued that customer density, not attachment rates, is the primary determinant of whether rural areas have broadband access,” Alexander, *supra* note 214, at 415, citing Second Reply Comments of Ark. Elec.

Nor have internet providers had to face market competition typical in other industries with an unmet need. After one small town municipality in North Carolina invested in broadband, private sector providers lobbied state legislatures to pass statutes prohibiting public entities from becoming broadband providers, referred to as Level Playing Field laws²⁹². This resulted in 20 states prohibiting municipal broadband,²⁹³ and subsequently, former President Obama asked for an opinion from the Federal Communications Commission on whether this was allowable; the FCC then kicked it to Congress,²⁹⁴ and Supreme Court issued an order delegating that decision to the states (in a case in which Missouri prohibited a locality from setting up its own broadband; this order was made despite language in the Telecommunications Act of 1996 preventing states from making such a prohibition).²⁹⁵ Such acts, in effect, not only prohibit municipalities from addressing an unmet need in which the private sector has shown no interest, they also remove the ability for attractive public financing (such as bond financing) to offset costs.²⁹⁶

There exists a bi-partisan agreement that rural broadband is an issue; there must also be a bi-partisan recognition that the public sector must be allowed to be a market participant, especially when the private sector refuses to, even when hundreds of millions of free federal dollars are being presented to them. State legislatures must repeal these laws, or litigation should be explored challenging

Coop. Corp. at 7, In re Ark. Pub. Serv. Comm'n Pole Attachment Amendment Rules, No. 15-019-R (Aug. 18, 2015).

²⁹² *Small America v. Big Internet*, PLANET MONEY (May 29, 2020), <https://www.npr.org/transcripts/865908114>.

²⁹³ Tyler Cooper, *Municipal Broadband Is Restricted In 18 States Across The U.S.*, BROADBANDNOW (May 3, 2021), <https://broadbandnow.com/report/municipal-broadband-roadblocks/>. Since then at least one state, Arkansas, has repealed their version of the Level Playing Field Act, John Bryan, *Arkansas Legislature Passes Bill to Ease Local Government Expansion of Broadband Access*, JD SUPRA (Feb. 16, 2021), <https://www.jdsupra.com/legalnews/arkansas-legislature-passes-bill-to-6070668/>, as has Tennessee, Authority of Elec. Coop. to Provide Broadband Internet Serv., Op. Att'y Gen No. 14-33 (Tenn 2014) (citing TENN. CODE ANN. S. 65-25-204(a)). Andy Sher, *Tennessee's Rural Electric Cooperatives Can offer Video services under amended broadband bill*, TIMES FREE PRESS (Mar 9, 2017).

²⁹⁴ Alexander, *supra* note 216, at 417.

²⁹⁵ P.L. 104-104. Statutory language clearly states: “[N]o state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

²⁹⁶ Alexander, *supra* note 216, at 417-18, citing Justin C. Mankin, *A Call for Competitive Broadband Reform in Arkansas*, 68 ARK. L. REV. 829, 848 (2015) at 853.

them through antitrust arguments. Rural America needs true training and opportunity in tech literacy,²⁹⁷ and opportunities to expand markets, and build farm capacity; and corporate private interests should not be allowed to interfere. Only then could local economies attract tech professionals, which would only increase the potential for innovation by facilitating a mingling of professionals from disparate fields, which has been proven as being crucial in fostering innovation, even more so than aggregating scientists, and PhD's in one locale.²⁹⁸

V. Conclusion

Now more than ever, in a post-COVID world is the time to support and nurture the growth of localized markets in rural America. COVID has been a “bittersweet boom” for local farmers with CSA subscription business model; Households fearful of contracting the virus have gravitated towards local subscriptions in order to avoid high concentrations of people,²⁹⁹ and the data seems clear that some habits are here to stay, bringing convenience and better health to American families, and stronger livelihoods to American farmers and rural communities. Though beyond the scope of this article, but worth mentioning, are the environmental benefits of localized economies, in which land use of firmly agricultural communities is maximized, (as opposed to creating farmland by destroying rainforests and other properties crucial to human survival).³⁰⁰ The reduction of food miles also has a positive environmental impact by reducing fossil fuel consumption for food delivery,³⁰¹ which in turn reduces spoilage and waste.³⁰²

While international markets create viable sources of revenue, and should not be abandoned as export targets, Americans are more mindful than ever of the

²⁹⁷ Arlie Hochschild, *The Coders of Kentucky*, NY TIMES (Sept. 21, 2018), <https://www.nytimes.com/2018/09/21/opinion/sunday/silicon-valley-tech.html>.

²⁹⁸ Goetz, *supra* note 36, at 18.

²⁹⁹ Baker, *supra* note 259, *See also*, Milligan, *supra* note 251.

³⁰⁰ Bret C. Birdsong, From “Food Miles” to “Moneyball”: How We Should Be Thinking About Food and Climate, 65 ME. L. REV. 409 (2013), 414-415, 418-419. “Intensification is the production of more food from the same amount of land through more intensive use of fertilizers and other technology. Under this archetypical approach, we could meet increased future demand solely by improving the productivity of existing cultivated land, and would not require placing new land into production.” While author talks about intensification through use of fertilizers, in the US we are not even meeting maximum capacity before fertilizers because of our failing meat processing infrastructure.

³⁰¹ Pollan, *supra* note 2.

³⁰² Without a highly robust cold chain for long-distance transport, the risk of food spoilage is significant; fish can spoil in a few hours, and vegetables less than two days. *See, John M. Mandyck and Eric B. Schultz, Food Foolish (2015), 35-53.*

sources of their food, and the inherent safety in redundancy.³⁰³ Certainly the efficiencies of economies of scale have produced the most food possible for the lowest dollar amount, but as food journalists have observed, “There will always be a tradeoff between efficiency and resilience (not to mention ethics); the food industry opted for the former, and we are now paying the price.”³⁰⁴ Given the food insecurity issues created by this monolithic system, we must ask ourselves what that efficiency is really worth in the long run.

The Biden administration and Congress should take advantage of the opportunities for national growth presented by the new markets of localized, rural economies that have pivoted to become increasingly relevant in the post-pandemic world. Congress should protect small farmers and processors from the myriad of punitive regulations, and monopolistic trade practices of the meatpacking industry. Congress should also invest in supporting rural America’s capacity-building potential by providing the regulatory relief and financing needed to modernize its technology and diversify the market of farmers and meatpackers. In an era fraught with political partisanship, supporting rural capacity is one issue that has regularly attracted bipartisan support. Meaty collaboration on these issues would undoubtedly be fruitful.

³⁰³ Pollan writes, “Imagine how different the story would be if there were still tens of thousands of chicken and pig farmers bringing their animals to hundreds of regional slaughterhouses. An outbreak at any one of them would barely disturb the system; it certainly wouldn’t be front-page news. Meat would probably be more expensive, but the redundancy would render the system more resilient, making breakdowns in the national supply chain unlikely. Successive administrations allowed the industry to consolidate because the efficiencies promised to make meat cheaper for the consumer, which it did. It also gave us an industry so powerful it can enlist the president of the United States in its efforts to bring local health authorities to heel and force reluctant and frightened workers back onto the line.” Pollan, *supra* note 2, at 4.

³⁰⁴ Pollan, *supra* note 3, at 4.