UNITED STATES OF AMERICA
BEFORE THE
U.S. DEPARTMENT OF AGRICULTURE (USDA)

Fair and Competitive Livestock and Poultry Markets	Docket No. AMS–FTPP–21–0046

COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute (AAI)[1] submits these comments in response to the USDA's Notice of Proposed Rulemaking on Fair and Competitive Livestock and Poultry Markets (NPRM or Proposed Rule).[2] AAI submits these comments to make four key points:

1. ***The Department should view fairness laws and competition laws as complements; both protect markets, but the latter do so by prohibiting conduct that threatens the competitive process while the former do so by prohibiting market abuses.***
2. ***The Proposed Rule accords with statutory text, legislative history, and Supreme Court precedent because it clarifies that § 202(a) of the Packers and Stockyards Act (PSA) is concerned with both market abuses and competitive injury.***
3. ***The Department is not bound by lower court opinions imposing a competitive injury requirement in § 202(a) cases; those opinions conflict with Supreme Court precedent and with core principles of statutory interpretation.***
4. ***The Department should provide guidance on business justifications in § 202(a) cases:***
    a. ***The Department should specify that business justifications do not excuse per se offenses or deceptive practices.***
    b. ***If business justifications may excuse other unfair conduct, the Department should specify that (1) efficiencies claims are a defense; (2) defendants have the burden to establish efficiencies; (3) defendants must carry a burden of persuasion and not merely a burden of production; (4) any efficiency justifications must be specific, verifiable, and cognizable.***
    c. ***The Department should not invite judges to engage in multi-market balancing.***

[1] AAI is an independent, nonprofit organization whose mission is to promote competition that protects consumers, businesses, and society. *See* Am. Antitrust Inst., Mission & History, http://www.antitrustinstitute.org. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national competition policy. AAI has provided legal and economic analysis, commentary, and testimony on mergers, anticompetitive conduct, and competition policy in the food and agriculture sector since the organization's founding in 1998. *See* Am. Antitrust Inst., Food & Agriculture, https://www.antitrustinstitute.org/issues/food-agriculture/.

[2] Fair and Competitive Livestock and Poultry Markets, 89 Fed. Reg. 53886 (June 28, 2024) (to be codified at 9 C.F.R. pt. 201) [hereinafter NPRM].

I. Fairness Laws and the Antitrust Laws Are Complements

President Biden's Executive Order on Promoting Competition in the American Economy lists the PSA among a subset of "industry-specific fair competition and anti-monopoly laws" that provide "additional protections" on top of those afforded by the federal antitrust laws.[3] Such additional protections are often necessary because the antitrust laws alone do not always ensure healthy market competition. When markets feature persistent structural imbalances among buyers and sellers, bargaining and informational asymmetries, murky contracting standards, or other similar breakdowns, they are vulnerable to strategic behavior by powerful firms.[4] Left to their own devices, these markets will continue to operate, "but with markedly less efficiency and social utility."[5] That is, they will fail to deliver the benefits that ordinarily flow from market competition.

U.S. livestock, meat, and poultry markets epitomize this phenomenon. The federal government has fought to ameliorate persistent market failures for more than a century, but the markets continue to underperform economically. In upstream beef markets, for example, packers' profit margins have increased dramatically while returns to cattle feedlots—a necessary input into beef production—have trended significantly downward at the same time; indeed, feedlots have closed at alarming rates.[6] In the downstream markets, grocery chain-store profits on beef sales have trended significantly upward, yet inflation-adjusted retail beef prices have also trended significantly upward—by over $100/cwt.[7] Together, the inflation-adjusted farm-to-retail price spread for beef, which captures gross revenues for both packers and retailers, has increased from about $225/cwt in the 1990s to about $350/cwt pre-COVID, to about $450/cwt post-COVID.[8]

These trends do not make competitive sense. With soaring packer and retailer revenues, shoppers should be seeing *lower* beef prices and ranchers should be seeing *higher* demand for cattle.[9] How is it that packers and retailers can raise prices to consumers while simultaneously

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[3] Exec. Order No. 14,036, 3 C.F.R. 609 (2021).

[4] Peter C. Carstensen, *The Packers and Stockyards Act: A History of Failure to Date*, 2 CPI ANTITRUST J. 1, 3 (April 2010), https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf; *see also* OFFICE OF INFORMATION & REGULATORY AFFAIRS (OIRA), OFFICE OF MANAGEMENT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON ACCOUNTING FOR COMPETITION EFFECTS WHEN DEVELOPING AND ANALYZING REGULATORY ACTIONS 20–23 (Oct. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf [hereinafter OIRA COMPETITION GUIDANCE] (discussing seven factors that influence market power).

[5] Carstensen, *supra* note 4, at 3; *see also* OIRA COMPETITION GUIDANCE, *supra* note 4, at 20–23.

[6] C. ROBERT TAYLOR, HARVESTED CATTLE, SLAUGHTERED MARKETS? 11–17 (April 2022), *available at* https://www.r-calfusa.com/wp-content/uploads/2022/04/220428-C.-Robert-Taylor-Cattle-Report-Final.pdf.

[7] *Id.*

[8] *Id.* at 11; *see* Brian Deese, Sameera Fazili & Bharat Ramamurti, Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families, Exec. Office of the President, White House Briefing Room Blog (Sept. 18, 2021), https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/ (noting that, during the pandemic, "gross profits for some of the leading beef, poultry, and pork processors [were] at their highest levels in history," that "Q1 2021 and Q2 2021 were the most profitable quarters in history for some of these processors," and that "[n]et income for many of these companies [was] on pace to reach historic highs as well.").

[9] TAYLOR, *supra* note 6, at 17; *see also* Michael Kades, Dep. Ass't Att'y Gen., Dep't of Just., Antitrust Div., Remarks Delivered at R-CALF USA 2024 Annual Conference, Cattle Drives to Captive Supply, Competition in the

reducing returns to their suppliers? According to numerous experts, the data "strongly suggest[]" these dynamics are attributable to "[m]arket power excesses by packers and retailers."[10]

Market power excesses can cause markets to underperform economically with or without accompanying antitrust violations. Because packing and retail markets are perpetually concentrated and oligopolistic, they are rife with strategic bargaining, pricing, and contracting opportunities.[11] To generate supracompetitive profits, powerful firms often can prevent an honest give and take in the marketplace, deprive market participants of the benefit of their bargain, or otherwise "impede[] . . . a well-functioning market" without having to resort to collusion or exclusion.[12] Deception, market manipulation, and check kiting[13] are well-known examples of such market abuses regularly challenged as unfairness violations under the PSA.[14]

To be sure, market power can make it easier for a packer or processor to engage in deceptive, discriminatory, or otherwise unfair conduct. For example, a poultry integrator may get away with knowingly providing sick chicks to a grower if the integrator has a monopoly in the grower's market.[15] But importantly, market power is not a prerequisite. A grower who has been deceptively induced to take on debt to invest in poultry facilities may have little choice but to accept the sick chicks, irrespective of the renderer's market power.[16] Firms that enjoy strong information advantages, bargaining advantages, or other similar kinds of advantages thus have

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Cattle Industry (June 21, 2024), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-kades-delivers-keynote-remarks-cattle-drives ("High beef prices should mean healthy cattle prices. And the reverse is true, too. If there's an oversupply of cattle, you'd expect prices at the store to go down."; "[t]hat change deserves an explanation, but in the last six years I have not heard a benign one.").

[10] TAYLOR, *supra* note 6, at 11; *see also* Deese, Fazili & Ramamurti, *supra* note 8 ("While factors like consumer demand and input costs are affecting the market, it is the lack of competition that enables meat processors to hike prices for meat while increasing their own profitability. That is, if they faced meaningful competition, the processors would simply be able to extract fewer profits if their costs had gone up unexpectedly while keeping prices lower to earn retailers' business.").

[11] PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER 140–43 (2017).

[12] FED.TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness. *See, e.g.*, CARSTENSEN, *supra* note 11, at 140 (discussing the "wide range of exploitive, strategic actions" available to a buyer with power over a supplier, such as paying different prices to favored and disfavored suppliers without a legitimate cost basis for the difference, forcing sellers to accept greater risks or costs without increased compensation, and requiring sellers to provide special services or accept unilateral changes to price and non-price contract terms); Paul Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L.J. 529, 558 (2005) (listing strategic practices implemented by powerful grocery retailers in the United Kingdom, such as demanding payment for access to shelf space, applying different standards to different suppliers, imposing retrospective changes to contract terms, and transferring costs onto suppliers); *see also* OIRA COMPETITION GUIDANCE, *supra* note 4, at 22–23 (noting that firms may also strategically employ hidden-, complex- or "drip"-pricing techniques, purposely create, exploit, or exacerbate information asymmetries, or raise barriers to switching that create lock-in).

[13] Check kiting is the practice of issuing fraudulent checks by drawing from insufficiently funded bank accounts.

[14] *See, e.g.*, *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005) (ruling packer's failure to disclose that it had changed its grading system for hogs, preventing hog producers from being able to compare prices, violated § 202(a)); *Ozark Co. Cattle Co.*, 49 Agric. Dec. at 358–60 (collecting check kiting cases); *National Beef Packing Co. v. Secretary of Agriculture*, 606 F.2d 1167, 1169 (10th Cir. 1979) (upholding § 202(a) violation based on commercial bribery); *Hays Livestock Commission Co. v. Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974) (characterizing refusal to honor draft to pay for livestock as "impediment to competition"); *Capitol Packing Co. v. United States*, 350 F.2d 67, 74–75 (10th Cir. 1965) (finding stockyard's refusal to sell higher-quality meat separately and loaning money to beef packer to be unfair and unjustly discriminatory acts under § 312 of the PSA).

[15] *See* KADES REPORT, *supra* note 13, at 20–22 (discussing bargaining power in poultry tournament system).

[16] *See id.* (examining investment costs in poultry tournament system).

everything they need to successfully employ strategic practices that thwart suppliers' and consumers' ability to make sound, welfare-enhancing selling and buying decisions.[17]

Fairness laws are necessary to fill the gap in antitrust protections created by such market failures. Rather than serving a market-protection function like the antitrust laws, they serve a "market-facilitating function" by rendering strategic and opportunistic practices unlawful and punishable.[18] Fairness laws interdict practices that are harmful to individual market participants and that have a dangerous tendency to distort the individual market transactions on which, collectively, the competitive process depends.[19]

II. Section 202 of the PSA Incorporates Both Competition and Fairness Principles

The principal fairness law that protects livestock, meat, and poultry markets is § 202(a) of the PSA. Congress passed the PSA in 1921 to address persistent market failure in the highly consolidated meatpacking industry, which the antitrust laws had failed to correct on their own.[20] To do so, Congress drew from but also expanded upon language from the Sherman Act, the Federal Trade Commission Act (FTC Act), and the Interstate Commerce Act. Sections 202(a)–(e) prohibit not only anticompetitive conduct that violates antitrust and competition principles but also market abuses that violate fairness principles.[21]

In §§ 202(c)–(e) of the PSA, Congress prohibited practices which "restrain commerce" or "create a monopoly." In § 202(a), it prohibited the use of any "unfair, unjustly discriminatory, or deceptive" practices without reference to whether they tend to restrain commerce or create a monopoly.[22] By omitting these qualifiers and selectively choosing the term "unfair" rather than the FTC Act's narrower term of art, "unfair methods of competition," Congress indicated its intent to prohibit unfair acts without proof of their competitive implications.[23] In doing so, Congress made an important judgment that competition values and fairness values are complementary and that both are necessary to make livestock, meat and poultry markets work the way they should.[24]

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[17] CARSTENSEN, *supra* note 11, at 140–43; *cf.* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 733 (1997) (describing coercion, undue influence, deception, incomplete information, and confusing information as "consumer protection market failures" caused by "impaired decision-making").

[18] Carstensen, *supra* note 4 at 3.

[19] CARSTENSEN, *supra* note 11, at 141 ("Regulating specific actions by powerful buyers imposes on them distinct requirements beyond those that generally apply in the market. . . . This type of regulation … focuses on reducing the abuse of power rather than seeking to eliminate the power itself. The expectation is that the powerful buyer whose buying power is constrained will operate in a reasonable fashion.").

[20] Originally, the Act applied to cattle, sheep, swine, horses, mules, and goats; it was amended in 1935 to cover the poultry industry. 49 Stat. 649 (Aug. 14, 1935).

[21] *See* 7 U.S.C. 192(a); KADES REPORT, *supra* note 13, at 8, 11.

[22] 7 U.S.C. 192(a).

[23] *Been v. O.K. Industries*, 495 F.3d 1217, 1239 (10th Cir. 2007) (Hartz, J., concurring/dissenting); KADES REPORT, *supra* note 13, at 51, 54.

[24] This kind of value-balancing is well within Congress's purview and shows up in many areas of the law. *See, e.g.*, Dodd-Frank Act, 12 U.S.C. 5531(a) (2010) (prohibiting "unfair, deceptive, or abusive act[s] or practice[s]"); The Shipping Act, 46 U.S.C. §§ 1704(d), 1709(a)(1), 1709(b)(4)–(6) (1984) (prohibiting certain trade practices as "unjustly discriminatory or unfair" and certain "unjust or unfair device[s] or mean[s]," "unfair or unjustly

A. The Plain Meaning of the Statutory Text Confirms that § 202(a) Prohibits Market Abuses

The plain meaning of the text of § 202(a) confirms that it prohibits unfair practices and devices without requiring proof of either an actual or probable "anticompetitive effect," as the Sherman Act requires under the rule of reason,[25] or a "method of competition," as the FTC Act requires under the FTC's standalone § 5 authority[26] (hereinafter collectively a "competitive injury"). Section 202(a) contains no language limiting its application to only those acts or devices which cause or threaten competitive injury.[27] Rather, its broader language is most naturally read as prohibiting market abuses in addition to such acts or devices.

Dictionaries published contemporaneously with the PSA's enactment confirm this reading. The words "unfair," "unjustly discriminatory," and "deceptive," without more, did not denote anticompetitive effects or methods of competition. Rather, the definitions of these words clearly contemplated harm to individual market participants. At the time the PSA was passed in 1921, Black's Law Dictionary did not define the word "unfair." It did, however, define "unfair competition" as "[a] term which may be applied generally to all dishonest or fraudulent rivalry in trade and commerce," and which "is particularly applied in the courts of equity . . . to the practice of endeavoring to substitute one's own goods or products in the markets for those of another."[28] It defined "fair" as "[j]ust; equitable; even-handed; equal, as between conflicting interests."[29] Neither "deceptive" nor "discriminatory" nor "unjustly discriminatory" were defined, but "unjust" was defined as "[c]ontrary to right and justice, or to the enjoyment of . . . rights by another, or to the standards of conduct furnished by the laws."[30]

The organization and structure of § 202 also suggest that § 202(a) does not require actual or threatened competitive injury.[31] Specifically, subsections (c) through (e) each contain language limiting their application to acts or devices that have actual or probable anticompetitive effects or otherwise implicate competition—"apportioning the supply"; "restraining commerce"; "creating a monopoly"; "manipulating or controlling prices"—but neither subsection (a) nor subsection (b) contains any such language.[32] Supreme Court precedent dictates that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

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discriminatory methods," and "unfair or unjustly discriminatory practice[s]"); Federal Alcohol Administration Act, 27 U.S.C. § 205 (1936) (defining and prohibiting certain trade practices as "unfair competition"); *see also* KADES REPORT, *supra* note 13, at 54–57.

[25] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.) ("The true test of legality" under the rule of reason requires courts to consider "the nature of the restraint and its effect, actual or probable.").

[26] 15 U.S.C § 45(a)(1); *see* FED TRADE COMM'N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, COMM'N FILE NO. P221202 (2022) [hereinafter SECTION 5 POLICY STATEMENT] ("Conduct must be a 'method of competition' to violate Section 5," meaning it is "undertaken by an actor in the marketplace" and "must implicate competition"; "violations of generally applicable laws by themselves . . . would be unlikely to constitute a method of competition.").

[27] *Wheeler v. Pilgrim's Pride Corp*, 591 F.3d 355, 374 (5th Cir. 2009) (Garza, J. dissenting).

[28] HENRY CAMPBELL BLACK, A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 1185 (1910), *available at* https://books.google.com/books/about/A_Law_Dictionary_Containing_Definitions.html?id=R2c8AAAAIAAJ.

[29] *Id.* at 479.

[30] *Id.* at 1187.

[31] *Wheeler*, 591 F.3d at 371–72 (5th Cir. 2009) (Garza, J. dissenting) (citing 7 U.S.C. § 192).

[32] *Id.* at 374; *see also Been*, 495 F.3d at 1241 (Hartz, J., concurring/dissenting) ("Section 202(a) does not include the phrase 'restraining commerce' that appears in other subsections of § 202.").

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[33] Here, because Congress used competition language in some subsections of § 202, its exclusion of that language from § 202(a) must mean that neither anticompetitive effects nor a method of competition is required by that subsection.[34]

B. The Legislative History Confirms that § 202(a) Prohibits Market Abuses

The legislative history of the PSA accords with the plain meaning of the statutory text. As the Department explains in the NPRM, Congress promulgated the PSA only after the Sherman Act (1890), the Clayton Act and the FTC Act (1914), and a consent decree against the "Big Five" packers (1920) proved insufficient to protect beef and pork producers.[35] It drafted the PSA to go beyond these prior laws and decrees by prohibiting unfair conduct in addition to anticompetitive conduct.[36] As the Department also recognizes, Congress affirmed this dual purpose in the House Report accompanying the 1958 provisions when it explained that the Act was designed "to assure fair competition *and fair trade practices* in livestock marketing," and "to safeguard farmers . . . against receiving less than the true market value of their livestock."[37] The use of the conjunctive "and" between "fair competition" and "fair trade practices" and the specific emphasis on ensuring fair value for livestock strongly suggest Congress was concerned with fairness in addition to, and independent of, competition.[38]

Moreover, Congress drafted the PSA against the backdrop of the FTC Act and the Supreme Court's 1920 opinion in *FTC v. Gratz*. In *Gratz*, the Court placed a limiting gloss on the

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[33] *Russello v. United States*, 464 U.S. 16, 23, (1983).

[34] As the preamble to the Proposed Rule shows, courts that have followed a textualist approach in analyzing the statutory language have reached the same conclusion. NPRM, *supra* note 2, at 53892; *see also Milton Abeles Inc. v. Creekstone Farms Premium Beef LLC.*, 2009 U.S. Dist LEXIS 27647, at *21 (E.D.N.Y. Mar. 30, 2009) (examining Judge Garza's dissent in *Wheeler* and holding that "a party seeking relief under [§202(a)] is not required to demonstrate that a failure to pay for meat or meat products only constitutes a deceptive or unfair practice under the Act if it also adversely affects competition"); *Schumacher v. Tyson Fresh Meats Inc.*, 434 F. Supp. 2d 748, 750–54 (D.S.D. 2006) (finding that § 202 "does not prohibit only those unfair and deceptive practices which adversely affect competition"); *Kinkaid v. John Morrell & Co*., 321 F. Supp. 2d 1090, 1102–03 (N.D. Iowa 2004) (finding that "only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of [§202(a)] must also be 'monopolistic' or 'anticompetitive' to be prohibited"); *Gerace v. Utica Veal Col.*, 580 F.Supp. 1465, 1469–70 (N.D.N.Y. 1984) (noting that § 202(a) lacks the limiting language of § 202(e)).

[35] NPRM, *supra* note 2, at 53889–92; *see* KADES REPORT, *supra* note 13, at 6–10; Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. 91, 93 (2003); CARSTENSEN, *supra* note 11, at 140; William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 WISC. L. REV. 1497, 1506 (2004).

[36] *Wheeler*, 591 F.3d at 382–83 (Garza, J. dissenting) ("The PSA was enacted in 1921 because the antitrust laws and the FTC Act alone were deemed inadequate in dealing with the meat packing industry.") (citing 1 JOHN H. DAVIDSON ET AL., AGRICULTURAL LAW § 3.02, at 187 (1981)).

[37] NPRM, *supra* note 2, at 53890 (quoting H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213) (emphasis added).

[38] The Ninth Circuit cited this two-pronged statutory purpose when it concluded that identical language in § 312 of the PSA, which covers only stockyards and marketing agencies but also prohibits any "unfair, unjustly discriminatory, or deceptive practice or device," requires no proof of competitive injury. *Spencer Livestock Comm'n Co. v. Dep't of Agriculture*, 841 F.2d 1451, 1455 (9th Cir. 1988) ("The primary purpose of the Act was 'to assure fair competition and *fair trade practices* in livestock marketing.' It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.") (quoting H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213) (emphasis in original).

FTC Act's "unfair methods of competition" language, holding that it applied to practices against public policy only if they have a "dangerous tendency unduly to hinder competition or create monopoly."[39] Thus, Congress drafted § 202(a) more broadly than the language interpreted in *Gratz,* prohibiting "*any* unfair . . . practice or device" without the FTC Act's "methods of competition" qualifier. Congress thus signaled that § 202(a)'s prohibition should not be limited to conduct causing a competitive injury.[40]

C. The Supreme Court Has Held that the PSA Protects Against Market Abuses

Although the Supreme Court has not directly decided the question of whether § 202(a) requires proof of a competitive injury, it suggested that competitive injury is not a necessary element of a claim in *Stafford v. Wallace*, a 1922 case upholding the constitutionality of the PSA.[41] The Court found that the Act was designed first to address the "chief evil" presented by "the monopoly of the packers" and second to address "[a]nother evil": market abuses in the meatpacking industry, in the form of "exorbitant charges, duplication of commissions, [and] deceptive practices in respect of prices, in the passage of the livestock through the stockyards."[42]

III. Court Opinions Imposing a Competitive Injury Requirement in § 202(a) Cases Are Incorrect

Despite the statute's plain language and clear evidence of legislative intent, some courts have held that § 202(a) incorporates a competitive-injury requirement. A few go further by requiring an actual or probable anticompetitive effect, like the Sherman Act's rule of reason, citing the PSA's "antitrust pedigree" and "antitrust roots."[43] Courts that impose such extra-statutory limits often quote selectively from the PSA's legislative history and *Stafford v. Wallace*.[44]

A careful review belies the reasoning of these opinions. Panels in the Fifth, Sixth, Tenth, and Eleventh Circuits have failed to grapple meaningfully with the plain meaning of the statutory text and substituted their own policy judgments for those of Congress. Because they conflict with Supreme Court precedent on the PSA and with basic principles of statutory interpretation, the USDA is not bound by these improper rulings. The Proposed Rule correctly hews to the contrary precedent and the well-reasoned dissents in *Wheeler* and *Been*, discussed below.[45]

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[39] *FTC v. Gratz*, 253 U.S. 421, 427 (1920). The majority in *Gratz* ruled over the strong dissent of Justice Brandeis, one of the authors of the FTC Act. *See id.* at 429–442 (1920) (Brandeis, J. dissenting).
[40] *See Been*, 495 F.3d at 1241 (Hartz, J., concurring/dissenting) (noting that [§ 202(a)] does not use the FTC Act's language and reasoning that "[p]erhaps this failure to adopt the language of the FTCA, enacted seven years earlier, was to avoid the narrow construction of the FTCA by the Supreme Court in *Grat[z]*, decided shortly before enactment of the PSA."); *see also Wheeler,* 591 F.3d at 383–84 (Garza, J. dissenting).
[41] 258 U.S. 495, 528 (1922).
[42] *Id.* at 514–15.
[43] *See, e.g.*, *Wheeler*, 591 F.3d at 363; *Been*, 495 F.3d at 1230; *London*, 401 F.3d at 1303.
[44] *See, e.g.*, *London v. Fieldale Farms Corp*., 410 F.3d 1295, 1303 (11th Cir. 2005); *Been*, 495 F.3d at 1241 (Hartz, J. dissenting); *Wheeler* (Garza, J. dissenting).
[45] *See Been*, 495 at 1241 (Hartz, J. dissenting); *Wheeler* (Garza, J. dissenting).

A. The Tenth and Eleventh Circuits: *London* and *Been*

In *London v. Fieldale Farms*, the Eleventh Circuit overturned a jury verdict finding the defendant liable under § 202(a) for terminating grower contracts without economic justification.[46] The Court found that the termination was insufficient to prove a violation because the grower did not present evidence that the termination "adversely affected or was likely to adversely affect competition."[47] Eschewing a plain-language approach, the Eleventh Circuit examined what it considered the PSA's "antitrust roots," citing *Stafford* for the proposition that Congress intended the Act to address the "chief evil"—"monopoly of the packers"—without including the Supreme Court's language addressing the second "evil" of market abuses.[48] It also noted that its decision was driven in part by "[p]olicy considerations," namely that "[f]ailure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who failed to perform as promised."[49]

The Tenth Circuit followed suit in *Been v. O.K. Industries*, in which chicken growers challenged a defendant's contractual provisions as unfair under § 202(a).[50] Although it noted that "nothing in the plain language of § 202(a) indicates that a practice is unfair only if it adversely affects competition or is likely to do so," the Court was persuaded that the Act's legislative history supports finding a § 202(a) violation only if the plaintiff shows "that the practice injures or is likely to injure competition."[51] Like the Eleventh Circuit in *London*, the majority in *Been* also considered its interpretation necessary to avoid a flood of litigation, since "[n]ot to require a showing of competitive injury . . . would make a federal case out of every breach of contract."[52] The court also rejected plaintiffs' argument that its interpretation rendered subsection (a) superfluous, finding instead that it is a "catch-all" provision designed to reach other anticompetitive conduct that (b) through (e) do not reach.[53]

The concern expressed in *London* and *Been*—that failing to require competitive injury would make a PSA violation out of any breach of contract—is improper. Congress made a judgment that certain contract breaches in agricultural markets characterized by pervasive market power should give rise to a cause of action in federal court.[54] It is not for courts to second-guess

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[46] 410 F.3d at 1302–04.
[47] *Id.* at 1305.
[48] *Id.* at 1303.
[49] *Id.* at 1304. Later, in *Pickett v. Tyson Fresh Meats, Inc.*, the Eleventh Circuit relied on its reasoning in *London* to rule that subparagraph § 202(e), like § 202(a), required proof of harm to competition. 420 F.3d 1272, 1279–80 (11th Cir. 2005).
[50] *Been*, 495 F.3d at 1230.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1229.
[54] *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194–95 (1978) (A court's "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting

that decision. The concern is also overblown: § 202(a) does not create a cause of action for standard contract breaches; it reaches only a narrow category of contract breaches that qualify as "unfair, unjustly discriminatory, or deceptive."[55] A qualifying breach may be established under existing precedent or by the Department's exercise of its regulatory authority to define what specific conduct is unfair under § 202(a), as the Department does here in issuing the Proposed Rule. Courts should honor the checks and balances built into the statutory scheme rather than take matters into their own hands.

B. The Fifth Circuit: *Wheeler*

In *Wheeler v. Pilgrim's Pride Corp,* a Fifth Circuit panel, led by Judge Garza, had found that § 202(a) had no competitive injury requirement and that Pilgrim's Pride violated that provision by requiring all but one of its growers to sign contracts and participate in a tournament system, while one grower—the Pilgrim's Pride founder and chairman—had his own, more favorable, arrangement.[56] On rehearing *en banc*, the Fifth Circuit reversed, holding that the plaintiff growers could not establish a violation of § 202(a) without showing "injury, or likely injury, to competition."[57] In reaching this conclusion, the plurality paid little attention to the text of the statute, instead focusing on the legislative history and court interpretations of the Act, which "support[ed] the conclusion that it was designed to combat restraints of trade."[58] It also found persuasive that, after several court opinions finding no violation of § 202(a) without proof of competitive injury, Congress had never amended the PSA.[59]

The *en banc* court in *Wheeler* was sharply divided, with only five of the Fifth Circuit's sixteen judges joining the plurality opinion. Then-Chief Judge Jones, joined by three judges, penned a concurrence, which attempted to correct the plurality's apparent failure to analyze the plain meaning of § 202(a).[60] After finding the term "unfair" ambiguous, Judge Jones examined the Supreme Court's interpretation of "unfair methods of competition" in *Gratz*, which she characterized as an interpretation of the broader term "unfair."[61] "Unfair," she reasoned, "was not an inkblot in 1921," but had already been interpreted by the Court in *Gratz* to require competitive injury, which Congress knew when it adopted that same term in the PSA.[62]

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a statute."); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999) (Courts "will not second-guess such policy choices properly made by the legislative branch."); *Gen Tel. Co. of Southwest v. United States*, 449 F.2d 846, 859 (5th Cir. 1971) ("The wisdom or expediency of a given law or regulation is not open to question in the courts.").

[55] *See, e.g.*, *Machlin Meat Packing* 15 AD 97, 110–11 (1956) (collecting cases and finding that "a deliberate policy of noncompliance," as opposed to "bona fide disputes as to contract terms" can be an unfair and deceptive practice under § 202(a)).

[56] 536 F.3d 455, 456 (5th Cir. 2008), *rev'd* 591 F.3d 355 (2009) (en banc).

[57] 591 F.3d at 363 (en banc).

[58] *Id.* at 361.

[59] *Id.*

[60] *Id.* at 364 (Jones, J. concurring).

[61] *Id.* at 367.

[62] *Id.*

Seven judges dissented, led by Judge Garza. Judge Garza explained that *Gratz* addressed the entire phrase "unfair methods of competition" without examining the meaning of "unfair" on its own.[63] When Congress drafted § 202(a), it avoided using the language the Court interpreted narrowly in *Gratz*, using instead "*any* unfair . . . practice or device," the plain meaning of which contains no reference to competitive injury.[64] Accordingly, *Gratz* is not the proper case to guide courts' interpretation of "unfair" under the PSA.

Judge Jones also wrote that the majority's interpretation would not render superfluous subsections (c) through (e)—all of which, unlike (a) and (b), specifically reference competitive injury. Rather, she concluded that "(a) and (b) are catch-all provisions."[65] Specifically, "[s]ubsections (c), (d), and (e) prohibit specific practices only if they adversely affect competition, while (a) and (b) still deal with the marketplace but in a broader way than (c), (d) and (e)."[66]

Judge Garza countered that this view, too, makes little sense. "If, as the majority holds, subsections (a) and (b) also require the specific prohibited conduct to affect competition, then those subsections are rendered superfluous in their entirety because they would be completely subsumed by subsection (e)," which "prohibits *any* act for the purpose or with the effect of . . . restraining commerce."[67] Rather than construing subsections (a) and (b) as catch-all provisions, Judge Garza reasoned, "it seems quite obvious that subsection (e), which prohibits *any* act for the purpose or with the effect of . . . restraining commerce, is the 'catch-all' for the competitive injury sections."[68] Thus, "writing a competitive injury requirement into subsections (a) and (b) destroys their unique function in the name of creating a 'catch-all' that already exists in subsection (e)."[69]

Finally, Judge Garza explained why Congress's failure to amend the PSA is not in itself persuasive.[70] As the Supreme Court explained in *Zuber v. Allen*, "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."[71] "By giving significance to Congressional silence," Judge Garza warned, "the majority improperly bases its decision on speculation rather than the plain text of the statute."[72]

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[63] *Id.*; *see FTC v. Gratz*, 253 U.S. 421, 427 (1920) (holding that "the first count of the complaint is wholly insufficient to charge respondents with practicing 'unfair *methods of competition in commerce*' within the fair intendment of those words.") (emphasis added).
[64] *Wheeler,* 591 F.3d at 384 (Garza, J. dissenting); *Been,* 495 F.3d at 1241 (Hartz, J., concurring in part and dissenting in part).
[65] *Wheeler,* 591 F.3d at 370 (Jones, J., concurring).
[66] *Id.* at 370.
[67] *Id.* at 375 (Garza, J., dissenting).
[68] *Id.*
[69] *Id.* at 376.
[70] *Id.* at 385.
[71] *Id.* (quoting 396 U.S. at 185 n.21 (1969)).
[72] *Id.*

C. The Sixth Circuit: *Terry*

Finally, the Sixth Circuit in *Terry v. Tyson Farms* repeated the error of its sister circuits in *London, Been,* and *Wheeler*.[73] In *Terry*, a poultry grower alleged that Tyson violated §§ 202(a) and (b) by retaliating against him for organizing chicken growers and filing complaints with the USDA.[74] Specifically, the grower alleged that Tyson failed to allow him to be present at the weighing of his flock, delayed delivery of birds to him, terminated his contract, and prevented the sale of his farm.[75] The Sixth Circuit dismissed the action because the grower made "no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in the poultry industry."[76] Although the question whether § 202(a) requires a competitive injury was a matter of first impression in the Sixth Circuit, the court chose not to independently interpret the statute, instead joining what it described as a "tidal wave" of circuit opinions finding a competitive injury requirement.[77]

The Sixth Circuit's approach amounts to improper bootstrapping. Many of the cases relied on to support the *Terry* court's tidal wave claim simply do not stand for the proposition that § 202(a) requires competitive injury.[78] Some of the cited cases stand for the proposition that competitive injury or a likelihood thereof is *sufficient* to prove a PSA violation, but they do not hold that competitive injury is *necessary*.[79] Others stand for the proposition that competition is

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[73] 604 F.3d 272, 275 (6th Cir. 2009).
[74] *Id.*
[75] *Id.*
[76] *Id.* at 279.
[77] *Id.* at 277 (citing *Wheeler*, 591 F.3d at 355; *Been*, 495 F.3d at 1230; *Pickett*, 420 F.3d at 1280; *London*, 410 F.3d at 1303; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. Lexis 24630, at *11–12 (4th Cir. Oct. 5, 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336–37 (9th Cir. 1980); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369–70 (7th Cir. 1976)).
[78] The courts in *London, Been*, and *Wheeler* similarly claimed judicial consensus based on unsupported or altogether mistaken interpretations of case law. *London*, 410 F.3d at 1303–04 (citing *Farrow*, 760 F.2d at 214; *Pac. Trading Co.*, 547 F.2d at 369–70; *Armour & Co.*, 402 F.2d at 722–23; *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D. Va. 2002); *Philson v. Cold Creek Farm*, 947 F. Supp. 197, 200 (E.D.N.C. 1996); *Philson v. Goldsboro*, 1998 U.S. App. Lexis 24630, at *11-12; *De Jong*, 618 F.2d at 1337); *Been*, 495 F.3d at 1228–29 (citing *Armour*, 402 F.2d at 717; *Glickman*, 187 F.3d at 977; *Parchman v. USDA*, 852 F.2d 858, 864 (6th Cir. 1988); *De Jong*, 618 F.2d at 1337; *London*, 410 F.3d at 1298–1304); *Wheeler*, 591 F.3d at 358–60 (citing *Swift & Co. v. Wallace*, 105 F.2d 848 (7th Cir. 1939); *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961); *Swift & Co. v. United States*, 308 F.2d 849 (7th Cir. 1962); *Armour*, 402 F.2d at 712; *Pac. Trading Co.*, 547 F.2d at 367; *Farrow*, 760 F.2d at 211; *Glickman*, 187 F.3d at 974; *De Jong*, 618 F.2d at 1329; *Been*, 495 F.3d at 1217; *London*, 410 F.3d at 1304; *Pickett*, 420 F.3d at 1272; *Philson v. Goldsboro*, 1998 U.S. App. Lexis 24630). The lack of an actual consensus about the meaning of § 202(a) may also help explain Congress's failure, as observed by the majority in *Wheeler*, to amend the Act to correct any judicial error. *See Wheeler*, 536 F.3d at 361.
[79] See *De Jong*, 618 F.2d at 1336-37 (affirming § 202(a) liability "where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition"); *Farrow*, 760 F.2d at 213 ("[A] practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act . . . even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result."). Reliance on these cases is doubly misleading because both

an important consideration when an unfairness claim is premised on price discrimination, but they do not suggest competitive injury is required for other claims.[80] A few stand for the unremarkable proposition that, even when conduct may potentially harm competition, it still must be unfair, unjustly discriminatory, or deceptive to violate § 202(a).[81] Still others stand for the proposition that a competitive injury must be demonstrated to survive summary judgment if the plaintiff alleges it in her complaint, but they go no further than to apply basic pleading law.[82] Two decisions affirm a lower court's decision without addressing whether § 202(a) requires competitive injury.[83] Finally, one case states that § 202(a) requires competitive injury but goes on to find a violation of § 202(a) without discussing harm to competition.[84]

Because the vast majority of precedent does not hold that § 202(a) requires competitive injury and because Supreme Court precedent and core principles of statutory interpretation

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the Eighth and Ninth Circuits have found violations of § 202 without requiring any proof of competitive injury. *See Holiday Food Service v. USDA*, 820 F.2d 1103, 1104–05 (9th Cir. 1987) (finding commercial bribery to be a deceptive practice under § 202(a) without any discussion of competitive injury); *Bruhn's Freezer Meats v. Department of Agriculture*, 438 F.2d 1332, 1341 (8th Cir. 1971) (finding mislabeling meat grade and switching quality and weights of meat delivered to customers to be unfair and deceptive practices under § 202(a) because "[t]hese practices, if allowed to continue, would undermine public confidence in the meat industry generally and undermine the orderly market practices.").

[80] *See Swift & Co. v. Wallace*, 105 F.2d at 853–55 (vacating USDA holding that packer's preferential discounts and trades were discriminatory under § 202(b) for failing to consider whether packer extended preferential discounts to meet its competition's prices and whether preferential trades were made between or across competing parties); *Armour*, 402 F.2d at 717–23 (requiring government to prove that defendant's coupon program was predatory or otherwise harmed competition to establish the practice was "unfair" under § 202(a)). Here, too, reliance on these cases is doubly misleading because the Seventh Circuit has confirmed that § 202(a) does not require competitive injury. *Wilson & Co. v. Benson*, 286 F.2d at 895 (rejecting defendant's argument that his price-cutting practices could not have violated § 202(a) because they were not anticompetitive, stating that "the language in section 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language.").

[81] *Glickman*,187 F.3d at 977 (reversing Judicial Officer's opinion finding beef packers liable under § 202(a) for right of first refusal based on its potential harm to competition because it was neither unfair nor unjustly discriminatory); *Jackson*, 53 F.3d at 1458 (upholding summary judgment for processor on turkey growers' § 202(a) claim that they were unfairly denied a performance contract because processer's actions were "neither deceptive or injurious to competition, nor were they unfair, unjust, or unreasonable.").

[82] *Griffin*, 183 F. Supp. 2d at 825–28 (granting summary judgment for defendant meatpacker on claims that its vertical integration scheme was "unfair and ha[d] the ***effect*** of manipulating or controlling prices or restraining commerce" because discovery showed *neither* improper purpose *nor* harm to competition) (emphasis in original); *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1327–28 (9th Cir. 1976) (vacating Judicial Officer's holding that dealer/packer's joint ownership was "unfair" because it was based on unsupported allegation that its effect was to monopolize the feeder market by tying purchasers of slaughter and feeder cattle).

[83] *Philson v. Goldsboro*, 1998 U.S. App. LEXIS 24630, at *11–12 (upholding jury instructions requiring proof of competitive injury for a violation of § 202(a) without examining that underlying legal question); *see also M&M Poultry v. Pilgrim's Pride Corp*., 2015 U.S. Dist. LEXIS 195184, at *19–37 (N.D.W.V. Oct. 26, 2015) (examining *Philson v. Goldsboro* but finding § 202(a) does not require competitive harm and calling "misleading" defendants' statement that "eight circuits decided that [§ 202(a)] require[s] an anticompetitive effect"); *Pac. Trading Co.*, 547 F.2d at 368 (7th Cir. 1976) (assuming for purposes of appeal that PSA was violated but affirming dismissal because it conferred no private right of action).

[84] *Philson v. Cold Creek*, 947 F. Supp. at 200–02 (denying packer's motion to dismiss grower's claims that packer provided low-quality stock, failed to properly handle, count, and weigh turkeys, and wrongfully terminated a contract because such actions would violate § 202(a) if they were carried out in an "unfair, discriminatory or deceptive manner," such as in retaliation for growers' complaints).

support this view, the Department is correct to define "unfair" as reaching both competitive injury and market abuses.

IV. The Department Should Provide Guidance on Business-Justification Defenses Under § 202

The NPRM requests public comment on numerous issues involving the role of business justifications under § 202(a).[85] In thinking about defenses to unfairness claims, we encourage the Department to heed lessons from antitrust law's experience with the efficiencies defense. First, the Department should not necessarily entertain business justifications or give them dispositive weight as a defense to an alleged violation of § 202(a). For example, it should not entertain efficiency justifications when defendants violate § 202 by committing per se offenses or offenses involving deception. Second, if or when it does entertain business justifications, the Department should specify that efficiencies are a *defense* and should not be considered as part of the plaintiff's prima facie case; that defendants have the burden of persuasion to prove any efficiencies as a matter of fact; and that any efficiency claims must be specific, verifiable, and cognizable. Finally, the Department should either clarify that multi-market balancing is not permitted or specify the conditions under which out-of-market benefits may offset in-market harms.

A. Background

The evolution of the efficiencies defense in antitrust law is an important cautionary tale for the USDA. For many years, business justifications premised on increased efficiency did not excuse prima facie antitrust violations. The Supreme Court rejected an efficiencies defense because dominant firms' cost-saving measures can generate market power and concentration just as surely as their predatory measures. "We cannot fail to recognize," the Court explained in the 1960s, "Congress' desire to promote competition through the protection of viable, small, locally owned businesses."[86] "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets," but "[i]t resolved these competing considerations in favor of decentralization."[87] Accordingly, the Court concluded, "[p]ossible economies cannot be used as a defense to illegality."[88]

However, after the rise of the law-and-economics movement, many policymakers lost the political appetite to disallow cost-saving measures so that markets could remain decentralized. Efficiency—defined economically as cost savings achieved when the same output is produced using fewer resources or more output is produced using the same resources—was deemed highly

[85] NPRM, *supra* note 2, at 53899.
[86] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).
[87] *Id.*
[88] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

desirable to the economy and given primacy in law and policy.[89] In 1986, the Supreme Court went so far as to suggest it would be "perverse" to hold that antitrust law protects small and locally owned businesses from larger rivals' cost-saving measures, because cost savings facilitate price cutting that "often is the very essence of competition.'"[90] If larger firms were winning the competitive struggle by reducing their costs and charging lower prices, many accepted that there was no cause to prevent any ensuing concentration or preserve any future rivalry from less-efficient competitors.

Perhaps because the efficiencies defense had already been litigated and rejected in binding Supreme Court precedent, efficiency justifications began to permeate antitrust doctrine more insidiously. Instead of treating efficiency claims as a negative or affirmative defense, many courts began injecting them into the plaintiff's prima facie case, effectively raising the bar for establishing an anticompetitive effect.[91] If the plaintiff cannot rule out an efficiency explanation for the challenged conduct at step one of the rule of reason, the thinking went, then the analysis cannot proceed to step two, because any resulting accumulation of market power could simply be the just reward for competing successfully. By 1999, a comprehensive survey of conduct cases showed that 84% of rule of reason claims were dismissed at the first step in the analysis for failure to establish an anticompetitive effect.[92] By 2009, the number had climbed to 97%.[93]

In the domain of merger law, the federal antitrust agencies have properly characterized the efficiencies defense as a "rebuttal argument."[94] There too, however, efficiencies have crept into the plaintiff's prima facie case.[95] In vertical merger cases, as Professor Salop has shown, the elimination of double marginalization among buyers and sellers of inputs often is treated as an "'intrinsic' efficiency justification … used as a ubiquitous justification for weak enforcement."[96] Even in horizontal merger cases, other leading scholars have shown that enforcers make "implicit use of … a standard efficiency credit; a generalized assumption that horizontal mergers typically generate a level of efficiencies that could offset modest increases in market power," which has demonstrably skewed the government's ability to establish a prima facie case using a structural presumption from market-share evidence.[97]

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[89] *See generally* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 130 (3d ed. 1990).
[90] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116, 121 n.17 (1986) (internal citation omitted).
[91] *See, e.g. Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (imposing burden on plaintiff to show that monopolist's conduct was "irrational but for its anticompetitive effect").
[92] Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 (1999)
[93] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).
[94] U.S. DEP'T JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 3.3, at 32 (2023).
[95] This may be attributable to courts drawing from the rule of reason in developing merger standards under the Clayton Act. *See United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990) (employing burden-shifting framework similar to the rule of reason).
[96] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1970 (2018) (citation omitted).
[97] Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much?*

B. Efficiencies May Be Irrelevant or Non-Dispositive

As a threshold matter, any consideration of business justifications generally, or efficiencies specifically, should recognize that § 202(a) reaches conduct that is beyond the scope of the antitrust laws.[98] To be sure, the Department has recognized that "an act or practice's effect on competition can be relevant and, in certain circumstances, even dispositive" of unfairness.[99] But the fact that conduct causes or threatens anticompetitive effects and would violate the antitrust laws is only one way that it may be found unfair under § 202(a). Conduct may also violate § 202(a) because it is a "standalone" unfair method of competition that would violate § 5 of the FTC Act but not the Sherman or Clayton Act,[100] or, as discussed above, because it is a recognized market abuse and injures an individual market participant without otherwise implicating competition.[101] In these instances, both competitive effects and business justifications, including the efficiency defense specifically, may be altogether irrelevant, or at least non-dispositive.

1. Per Se Offenses and Deception

Anticompetitive effects and efficiencies are completely irrelevant in at least two instances. First, regulated entities may violate § 202(a) by engaging in conduct that would constitute a per se violation of the antitrust laws, such as naked bid rigging or market allocation.[102] Although sometimes mischaracterized as a mere evidentiary presumption, the per se rule represents a substantive determination of unreasonableness under the Sherman Act.[103] Accordingly, once a naked per se offense has been established, antitrust plaintiffs are not required to prove anticompetitive effects and defendants are not permitted to assert an efficiency

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Too Little? Getting It Right, 168 U. PENN. L. REV. 1941, 1946–49 (2020) (showing that, over time, as the treatment of efficiencies became more generous, the level of market concentration that signals presumptive harm has increased).

[98] *See supra* Parts I–III.

[99] NPRM, *supra* note 2, at 53887.

[100] *Id.* at 53889. Still other forms of competitive injury may reachable under the PSA even if they are not reachable under the FTC's standalone Section 5 authority. *See id*. (noting that the regulatory scheme for fair competition under the P&S Act is "*at least* as broad" as Section 5) (emphasis added); *accord* Stumo & O'Brien, *supra* note 35, at 94 (noting that the PSA was designed "to be more aggressive than all previous antitrust or trade regulation"); Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* AGRICULTURAL LAW 186–87 (John H. Davison ed., 1981) (same).

[101] NPRM, *supra* note 2, at 53888; *see supra* Parts I–III.

[102] *See, e.g., De Jong*, 618 F.2d at 1335 (examining USDA's allegation that horizontal bid rigging violated § 202(a)); *In re Cattle Antitrust Litig.*, 2020 U.S. Dist. LEXIS 177526, at *18 (D. Minn. Sept. 28, 2020) (examining plaintiff's allegation that conspiracy to artificially depress fed cattle prices was both a per se Sherman Act violation and a § 202(a) violation).

[103] Brief of the United States in Opposition to Certiorari 14, *Lischewski v. United States*, No. 21-852 (U.S. filed March 2022), *available at* https://www.justice.gov/atr/case-document/file/1492061/dl?inline (explaining that "the per se rule is not a rule of evidence" but rather an "interpretation of the Sherman Act to categorically prohibit a certain type of conduct.") (cleaned up).

defense (or any other business justification).[104] The Department, therefore, should specify that efficiencies or other business justifications will not be entertained when defendants violate § 202 by committing offenses that are per se violations of the antitrust laws.

The Department also has determined, in an Interim Final Rule (IFR), that certain market abuses constitute per se violations of § 202(a).[105] For example, it has determined that conduct violating § 409(c) of the PSA, including a delay in payment or attempt to delay payment for livestock purchases by a market agency, dealer, or packer, "is also a 'per se' violation of section 202(a)."[106] Likewise, conduct that constitutes an "unfair practice" under § 410(b) of the PSA, including a delay in payment or attempted delay in payment by a live poultry dealer, is a per se violation.[107] The Department should specify that efficiencies or other business justifications will not be entertained for this set of per se offenses either.

The Department also has taken the position that conduct violating other provisions of the PSA constitutes a per se violation. In March 2024, it published a final rulemaking on Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, which prohibits "[m]arket abuses of discrimination, retaliation, and deception" in livestock and poultry markets.[108] In its response to public comments, the Department stated that it "finds prejudice, disadvantage, or discrimination on the prohibited bases set forth in this final rule to be per se unjust, undue, and unreasonable."[109] Because conduct constituting a market abuse is also unfair under Section 202(a),[110] the Department should specify that efficiencies or other business justifications will not be entertained for these per se offenses.

Second, regulated entities may violate § 202(a) by committing market abuses through deception. Deceptive behavior sometimes may—but does not necessarily always—rise to the level of an antitrust violation.[111] In all circumstances, however, deception "does not raise any

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[104] *Id.* at 9 ("The 'inquiry . . . end[s] once a price-fixing agreement [i]s proved,' with no 'question of reasonableness [left] open to the courts.'") (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), *aff'd* 175 U.S. 211 (1899) and *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).
[105] Unfair Practices and Undue Preferences in Violation of the Packers and Stockyards Act, 81 Fed. Reg. 92703, 92704 (Dec. 20, 2016) [hereinafter "2016 IFR"]; *see also* NPRM, *supra* note 2, at 53888, n.11.
[106] 2016 IFR, *supra* note 105, at 92704.
[107] *Id.* These determinations are buttressed by the plain meaning of § 409(c) and § 410(b), both of which state that the practices "shall be considered an 'unfair practice' in violation" of the Act, and the Department "has adhered to this interpretation of the P&S Act for decades." 7 U.SC. §§ 228b(c), 228b-1(b); NPRM, *supra* note 2, at 53888, n.11.
[108] 89 Fed. Reg. 16092, 16093 (to be codified at 9 C.F.R. pt. 1) (prohibiting as market abuses: (1) the adverse treatment of livestock producers and poultry growers based on race, color, religion, national origin, sex, disability, marital status, or age; (2) discrimination against a livestock and poultry producer cooperative; (3) retaliation against producers or growers for engaging in lawful communications or refusals to communicate, assertion of contractual and Packers & Stockyards Act rights, participation in associations and cooperatives, exploring or entering into a business relationship with a competing packer, swine contractor, or live poultry dealer, and certain other protected activities; (4) employing false or misleading statements or omissions of material information in contract formation, performance, and termination; and (5) providing false or misleading representations regarding refusal to contract).
[109] *Id.* at 16143.
[110] *See* NPRM, *supra* note 2, at 53887 ("The term 'unfair'' applies to . . . conduct that harms market participants (market abuse)[.]").
[111] *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 824–25 (2010).

cognizable efficiency claims."[112] As Arthur Pigou explained as far back as the 1930s, "[a]s a rule . . . the social net product of any dose of resources invested in a deceptive activity is negative. Consequently, . . . absolute prohibition of the activity is required."[113] Accordingly, when a defendant has inflicted either a competitive injury or a market abuse using deception, there is no plausible efficiency explanation as a rule, and the Department should categorically refuse to entertain an efficiency defense.

2. Standalone Unfair Methods of Competition

Even if they are not totally irrelevant, anticompetitive effects and efficiencies claims may be non-dispositive, including in cases involving a competitive injury. As courts have recognized for over a century, conduct may constitute an unfair method of competition under § 5 of the FTC Act, notwithstanding that it does not cause actual or probable anticompetitive effects.[114] As the Second Circuit explained in *Ethyl*, "Section 5 is aimed at conduct, not at the result of such conduct," and, consequently, a business practice may violate § 5 and cause a type of competitive injury not only if it violates the antitrust laws (and thus causes actual or probable anticompetitive effects) but also if it is "collusive, coercive, predatory or exclusionary in character."[115] This includes practices that represent "incipient violations" of the antitrust statutes and "conduct which … is close to a violation or is contrary to their spirit."[116] Because the "character" or "spirit" of a business practice and any cost-savings the practice engenders are incommensurable values, the Department cannot directly weigh them against each other with precision.[117]

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[112] Susan A. Creighton et al., Cheap Exclusion, 72 Antitrust L.J. 975, 977 (2005); *see also* Stucke, *supra* note 111, at 824–25 ("Deception lacks any redeeming economic qualities or cognizable efficiency justifications"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 782b, at 326 (3d ed. 2008) ("There is no redeeming virtue in deception … ."); Harry S. Gerla, Federal Antitrust Law and the Flow of Consumer Information, 42 Syracuse L. Rev. 1029, 1030 (1991) ("False or misleading information is deadweight economic loss, causing injury without any offsetting economic benefit.").

[113] ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 117 (4th ed. 1932).

[114] *See, e.g.*, *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (explaining that "unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws"); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws."). For example, the FTC prosecutes invitations to collude even in instances where the invitation has been definitively rejected and therefore the conduct is incapable of causing an actual or probable anticompetitive effect. *See, e.g.*, *In the Matter of Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 FR 13976, 13978–79 (Mar. 20, 2006) ("[T]he Commission has entered into consent agreements in several cases alleging that an invitation to collude—though unaccepted by the competitor—violated Section 5 of the FTC Act.").

[115] *E. I. Du Pont de Nemours & Co. v. FTC ("Ethyl")*, 729 F.2d 128, 138 (2d Cir. 1984).

[116] *Id.* at 136–37.

[117] *See* FED. TRADE COMM'N, SECTION 5 POLICY STATEMENT, *supra* note 26, at 11 ("If parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well."); *see also generally* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1 (2016).

Although efficiencies may be relevant, they cannot be dispositive when evaluating such practices because it is not clear how efficiencies can be shown to offset incommensurable harms.[118]

C. Defendants Should Have the Burden of Proof to Establish Business Justifications as a Matter of Fact

If the Department does choose to consider efficiencies in § 202 cases, it should treat efficiencies as a *defense*. It should not place a thumb on the scale by requiring the plaintiff to engage in anticipatory pleading that accounts for potential efficiencies claims in its prima facie case. Under antitrust law's rule of reason, once the plaintiff makes out a prima facie case, "then the burden shifts to the defendant to show a procompetitive rationale for the restraint."[119] This showing is meant to require the defendant to prove "procompetitive efficiencies"[120] as a matter of fact, not merely to offer a theory or conjecture.[121]

Antitrust courts are not uniform in characterizing the defendant's burden to establish efficiencies as a burden of persuasion or merely as a burden of production.[122] If the Department chooses to entertain efficiency justifications in § 202(a) cases, it should specify that the defendant must carry a burden of persuasion. Because efficiencies only become relevant after a prima facie violation has been established, it would subordinate the goals of § 202(a) to demand any less. Once unfairness is evident, there is no risk of mistakenly condemning behavior that the statute seeks to protect, and accordingly, there is no reason for solicitude toward unproven efficiencies.

Giving defendants the burden of persuasion also makes sense for two additional reasons. First, *plaintiffs* should not have the burden of persuasion on efficiencies because efficiencies play no role in determining whether conduct is unfair.[123] Second, requiring *defendants* to both

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[118] *See* Allensworth, *supra* note 117, at 65–67; Michael A. Carrier & Mark A. Lemley, *Rules or Reason? The Role of Balancing in Antitrust Law* 29 n.101 (July 15, 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896529 (noting that "balancing can range from relatively easy (harms and benefits having opposite, static effects in the same market) to more challenging (effects in multiple markets or cases involving static and dynamic effects)"). The FTC uses a sliding-scale approach that adjusts for the character of the practice and the severity of threatened injury: "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind." FED. TRADE COMM'N, SECTION 5 POLICY STATEMENT, *supra* note 26, at 11 & n.63 (citing *Fashion Originators' Guild Am. v. Fed. Trade Comm'n (FOGA)*, 312 U.S. 457, 467–68 (1941)). The Department should consider a similar approach when weighing incommensurable harms and benefits in a regulatory setting (but not necessarily in an adjudicative setting). *See infra* Part IV.E.

[119] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

[120] *Id.*

[121] *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 488 (7th Cir. 2020) ("[The] defendant bears the burden of presenting a 'nonpretextual claim' and proving procompetitive justification on the facts."); *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) ("Whether valid business reasons motivated a monopolist's conduct is a question of fact.").

[122] *Compare Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 362 (7th Cir. 1990) (characterizing as burden of persuasion); *Chase Mfg. v. Johns Manville Corp.*, 601 F. Supp. 3d 911,933 (D. Colo. 2022) (same); *with United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (characterizing as burden of production).

[123] The point is self-evident when efficiencies are completely irrelevant or non-dispositive, *see supra* Part IV.A., but

produce evidence and establish the persuasiveness of the evidence as a factual matter accords with the basic purpose of burden-shifting, which is to resolve conflicting views of complex evidence.[124] Defendants should have the burden of production because "the evidence of efficiencies is almost always likely to be in the control of the defendants," and "[t]hey are thus in the best position to come forward with that evidence."[125] They should also have the burden of persuasion because, functionally, "courts often utilize burden shifting to place the burden of persuasion upon the party best capable of producing relevant evidence."[126] Allocating the burden of persuasion to plaintiffs in establishing unfairness and to defendants in establishing business justifications thus gives courts the best chance to resolve complex, competing claims accurately.

D. Efficiency Justifications Should Be Specific, Verifiable, and Cognizable

The Department also should specify that, to carry its burden, a defendant must establish that its claimed efficiency justifications are specific, verifiable, and cognizable. To be specific, the efficiencies must be unable to be achieved through less anticompetitive means.[127] To be verifiable, they must be established using a reliable methodology and reliable evidence, such that the Department or a reviewing court can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each benefits the market or market participants; and why the challenged conduct is reasonably necessary to achieve the claimed efficiencies.[128] To be cognizable, the efficiencies claims must not arise from anticompetitive output reductions, anticompetitive service reductions, or any other worsening of terms with the defendant's trading partners,[129] and they must be nonpretextual.[130] A defendant who has not established specific, verifiable, and cognizable efficiencies has not carried its burden.

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it is also true when conduct is allegedly unfair on grounds that it causes or threatens anticompetitive effects and would violate the antitrust laws. Efficiencies cannot plausibly be part of a plaintiff's prima facie case under the rule of reason because the economic concept did not yet exist when the laws were passed, meaning Congress could not have considered economic efficiency to be an element of a claim. *See* Randy M. Stutz, *Choosing Between Two Meanings of Competition in Antitrust Law*, 53 U. BALT. L. REV. 219, 280 (2024); Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 207 (1987) ("[T]hose enacting the laws—particularly in the case of the Sherman Act—could not have understood the concept as we are now asked to believe they did" because "economists of the day did not yet understand economic efficiency in its current form.").

[124] *See* Carrier & Lemley, *supra* note 118, at 27 ("The key . . . lies in remembering why we are here": "the challenges of assessing . . . complex and conflicting economic evidence[.]").

[125] Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 156 (ABA Section of Antitrust Law 2008).

[126] *Burden of Persuasion*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (LII), https://www.law.cornell.edu/wex/burden_of_persuasion (last visited Aug. 21, 2024).

[127] MERGER GUIDELINES, *supra* note 94, § 3.3; U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36 (2000) [hereinafter "COMPETITOR COLLABORATION GUIDELINES"].

[128] MERGER GUIDELINES, *supra* note 94, § 3.3; COMPETITOR COLLABORATION GUIDELINES, *supra* note 127, § 3.36.

[129] MERGER GUIDELINES, *supra* note 94, § 3.3; COMPETITOR COLLABORATION GUIDELINES, *supra* note 127, § 3.36.

[130] *See Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 488 (7th Cir. 2020) (The "defendant bears the burden of

E. The Department Should Not Encourage Article III Judges to Engage in Multi-Market Balancing

The Department specifically requests comment on whether the proponent of a business justification should have to show it creates benefits in the same market where harm is alleged.[131] For reasons explained below, we believe it is permissible for the USDA, acting in a regulatory capacity, to engage in multi-market balancing, but that federal courts applying § 202 may not engage in multi-market balancing absent clear guidance from the Department. The Department should adjust its guidance on business justifications accordingly.

Under both the Sherman Act and the Clayton Act, the Supreme Court has held that anticompetitive injury in one market will not be tolerated or justified on the basis of claimed benefits to competition in a different market.[132] The reasons for this prohibition against multi-market balancing are both practical and normative: courts are not well equipped to make the value judgments that inhere in choosing whether one group of U.S. citizens should suffer competitive injury in order to make another group of citizens better off, and it would be inappropriate for them to do so in our federal system.

In the Sherman Act context, the Court explained this rationale in *Topco*: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or the courts."[133] In the Clayton Act context, the Court said the same in *Philadelphia National Bank*: "[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and, in any event, has been made for us already, by Congress[.]"[134]

The question whether one group of citizens should be forced to incur an anticompetitive tax so that a different group of citizens may enjoy the benefits of a procompetitive subsidy is invariably a policy question. And, as the Supreme Court has made clear, "[q]uestions of policy are not submitted to judicial determination."[135] Utilitarian tradeoffs of this sort are often

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presenting a 'nonpretextual claim.'"); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (2001) (en banc) (A "procompetitive justification" under the rule of reason is "a nonpretextual claim that [the defendant's] conduct . . . involves, for example, greater efficiency or enhanced consumer appeal.").

[131] NPRM, *supra* note 2, at 53899 (question 6(c)).

[132] *United States v. Topco Assocs*., 405 U.S. 596, 611 (1972); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963).

[133] *Id.*; *see also Broadcast Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1, 34–35 (1979) ("[A] conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not constitute a defense to a violation of the Sherman Act.").

[134] *Phila. Nat'l Bank*, 374 U.S. at 371; *see also* COMPETITOR COLLABORATION GUIDELINES, *supra* note 127, § 2.3, at 6–7; *id.* § 3.32, at 16.

[135] *Maryland v. United States*, 460 U.S. 1001, 1106 (1983); *see also Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting) ("To charge courts with the task of accommodating the incommensurable factors of

necessary and unavoidable, but they must be made by regulatory agencies or Congress.[136] There is widespread agreement on this principle, even among antitrust scholars with widely divergent policy views.[137]

The Department, therefore, should not entrust courts to determine for themselves whether harms inflicted on participants in one market are "offset" by business justifications that benefit participants in a different market. It should either (1) flatly prohibit multi-market balancing in all settings or (2) specify conditions under which out-of-market benefits may offset in-market harms, ensuring that judges are insulated from discretionary decisions that require political judgments and policy determinations.

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Thank you for considering the views of the American Antitrust Institute. Please direct any questions or comments to:

Randy M. Stutz
President
American Antitrust Institute
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

David O. Fisher
Senior Counsel
American Antitrust Institute
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 828-1226
dfisher@antitrustinstitute.org

policy" is to attribute "omnicompetence to judges"; "Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments.").

[136] *See Maricopa Cnty. Med. Soc'y*, 457 U.S. at 354; *cf. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992).

[137] *Compare, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX 79 (1978) ("[T]here is no economics, no social science, no systematized knowledge of any sort that can provide the criteria for making such a trade-off decision."); *id*. at 27 ("[T]here is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition."), *with* Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 246 (1992) ("Given the special complications of an offset defense, including the difficulties of measuring and trading off competitive effects in separate markets, an efficiency defense makes more sense."). *See also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 972a (4th & 5th eds. 2013–20) ("The general argument favoring an efficiency defense does not justify the merger that is prima facie illegal in one market at the same time that it achieves substantial economies in a different market."); JONATHAN BAKER, THE ANTITRUST PARADIGM 191 (2019) (discussing administrability problems and the lack of a coherent limiting principle once analysis moves beyond the market where harm is alleged).