March 24, 2017

M. Irene Omade
GIPSA
United States Department of Agriculture
1400 Independence Avenue, SW
Room 2542A-S
Washington, DC 20250-3613

RE: Comments of the National Pork Producers Council on *Proposed Rule on Unfair Practices and Undue Preferences*, 81 Fed. Reg. 92703 (Dec. 20, 2016)

Dear. Ms. Omade:

We submit these comments on behalf of the National Pork Producers Council (NPPC), on the Grain Inspection, Packers and Stockyards Administration's (GIPSA) *Proposed Rule on Unfair Practices and Undue Preferences* (hereinafter the Proposed Rule).[1] NPPC is a national association representing 43 affiliated state associations and America's pork producers, who annually generate approximately $23 billion in farm gate sales. The U.S. pork industry supports an estimated 550,000 domestic jobs, generates more than $39 billion of gross national product, and exports an increasing volume of product, which in 2016 was valued at more than $6 billion.

NPPC believes that the Proposed Rule should not be adopted because it would impose staggering, destructive, costs on the pork industry.[2] The Proposed Rule would unduly burden the pork industry by interfering with innovative business practices developed in a competitive market. Moreover, to comply with the President's Executive Order on *Reducing Regulation and Controlling Regulatory Costs*, GIPSA must not finalize the Proposed Rule because it imposes significant costs on the pork industry, and no offsetting regulations have been identified for elimination, let alone proposed.

Recognizing the Proposed Rule's unjustifiable costs, it would be arbitrary and capricious for GIPSA to finalize the Proposed Rule when there is no evidence of a structural problem in the pork industry that would inhibit the free play of market forces. GIPSA arbitrarily assumes that the pork, poultry, and beef industries all operate in the same manner despite their significant differences. GIPSA should not impose *ex ante* one-size-fits-all rules that have no relation to the unique structure of each individual sector of the meat industry. Instead, GIPSA should adjudicate disputes on a case-by-case basis and let its reasoned decisions and precedent guide the industry, as the Federal Trade Commission enforces its statutory mandate through adjudicatory proceedings where a full-scale evaluation of challenged conduct in a specific market setting can be undertaken.

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1 81 Fed. Reg. 92,703 (Dec. 20, 2016).

2 Informa Economics, *An Estimate of the Economic Impact of GIPSA's Proposed Rules on the Cattle and Hog Sectors*, at 1-2 (Sept. 2016).

Finally, Section 201.210(b)(1) of the Proposed Rule raises serious constitutional concerns because it unduly restrains protected speech. The Proposed Rule purports to prohibit "retaliatory" speech from packers in advance of its publication and disallows expression based on its content and the viewpoint advanced. Even if retaliatory speech were not subject to First Amendment protection, Section 201.210(b)(1) still could not pass muster under the First Amendment because it is so vague and overbroad that compliance will be nearly impossible.

For all of these reasons, GIPSA should not finalize the Proposed Rule or, at a minimum, GIPSA should exclude the pork industry from the scope of any final rule.

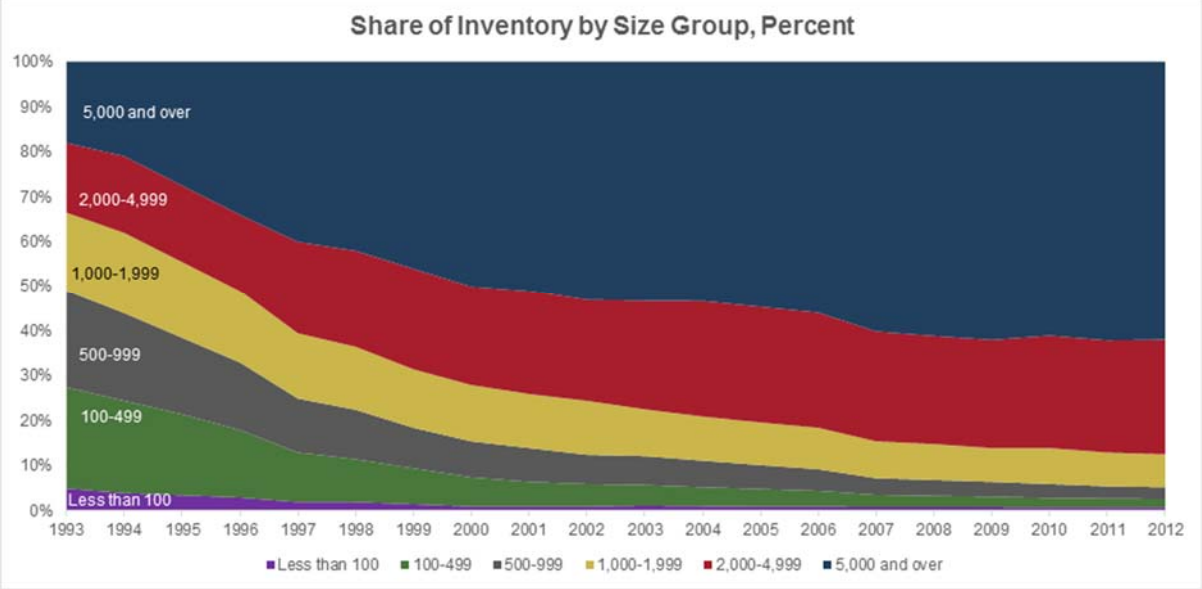
BACKGROUND ON THE PORK INDUSTRY

A. U.S. Pork Industry Location and Ownership Structure

The U.S. pork industry is national in scope, with hogs raised in all 50 states. Commercial hog production is centered, though, in three primary areas: the Cornbelt states, ranging from Nebraska and South Dakota in the west to Ohio in the east; the eastern seaboard, ranging from South Carolina northward to Pennsylvania and centered on a large industry in North Carolina; and the Panhandle region of Texas and Oklahoma.

Based on USDA data, there were 55,882 farms with hog and pig sales as of 2012. The number of hogs owned and produced within these operations is heavily skewed toward large operations that can capture the significant economies of scale that are available by using modern technologies and practices. Of these farms, 21,687 specialized in hog production (meaning 50 percent or more of their income came from hog farming), and these specialized farms accounted for 89 percent of all pork sales. The vast majority of pork consumed by Americans and international customers comes from large, very efficient farms.

Figure 1 – Share of hog and pigs inventory by operations size



Pigs are produced in a variety of ways in the U.S. Some are still produced on diversified farms that involve several enterprises, while others are produced by specialized companies in specialized facilities. Some are produced outdoors in either pasture or woodlands, while others spend their entire lives indoors. Some pigs are from genetic lines known for superior meat quality that provide superior flavor, marbling or other characteristics determined in "white table cloth restaurants," while others are from lines designed to produce lean pork that meets the preferences of health-conscious consumers. Virtually all U.S. pigs are fed diets based on corn and soybean meal, though some regions use other ingredients such as milo, barley, peas, and even peanuts, as well as by-products from ethanol plants, bakeries, cereal makers and others.

The business organizations that produce hogs vary as much as the hogs themselves. These range from 4-H and FFA projects that involve only a few purchased feeder pigs each year to regionally diverse divisions of large production companies. There are sole proprietorships, partnerships, corporations of every type and limited liability companies. The vast majority of hog operations – even large ones – are owned and operated by individual families and usually involve several members of those families.

B. Business Practices in Today's Pork Industry

During the past 30 years, the pork industry has moved from hundreds of thousands of small operations that sold pigs by the pickup or trailer load through auction barns and buying stations to fewer operations that sell pigs by the semi-trailer load directly to packers. This increase in the volume of animals handled by individual operators has led to new business practices in the pork industry. Contract production, open market production and vertically owned production are business choices that depend on factors such as transaction costs, risks, and uncertainty in markets. No single solution is best for all circumstances. Today's demands for higher quality and verified production require improved information through the supply chain. Contracts provide the ability to improve that information.[3]

1. Production Contracts

The 1980s saw the advent of contract production, where the owner of sows would contract with growers to provide buildings, labor, and utilities for a fee. Contract grow-finish facilities were the most common, but contract nurseries and breeding-gestation-farrowing units were also used.

The use of production contracts accomplishes several important goals for hog producers. First, it allows a hog producer to expand rapidly because the hog owner does not have to raise the capital to build all of the needed buildings. Using contracts allows those buildings to be built with the contract grower's capital and credit and to be placed on the contract grower's balance sheet. The trade-off is that the contract grower obtains the opportunity to build equity in capital assets

[3] *See generally* Brian L. Buhr, *Evaluating the Economic Consequences of Proposed Rules for Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Considering the Role of Vertical Coordination in Livestock Market Development* (Nov. 5, 2010) (unpublished comment).

and equipment such as barns, feeders, hog sorters, and other production facilities, with a useful life that, in most cases, goes well beyond the terms of the initial contract.

Second, contracts allow swine production operations to be geographically dispersed, reducing the risk of loss that would exist if all animals were on one site and placing valuable manure nutrients near growing crops. Dispersion of facilities helps swine producers address potential risks such as disease and casualty from weather or fire. Having hog-generated fertilizer available near its point of use reduces transportation costs and risks for the producer and further enhances its value.

Third, the growth of swine production contracts coincided with the development of "separate-site swine production" systems that segregated pigs of differing ages to control disease, increase pig health, and enhance production efficiencies. Production contracts facilitated the widespread adoption of these systems by giving pig owners access to land in different areas. The benefits have been tremendous and have resulted in healthier animals, lower-cost production, higher output, more affordable pork products for U.S. and foreign consumers, and ready access to organic fertilizers that many crop farmers use.[4]

Finally, production contracts allow thousands of rural residents to remain on family farms making a full-time living in agriculture. Production contracts provide repayment assurance for bankers and, in turn, allow growers to finance, upgrade, and modernize buildings. They provide steady sources of income without the grower having to face output or market risk. Once paid for in 8 to 12 years, contract buildings provide substantial cash flow that can provide for building replacement or expansion of facilities. Many growers have eventually become independent hog producers thanks to the opportunity provided by a production contract.

The industry has adopted, in general, a system that pays growers a fixed amount per animal space per year with, in many but not all cases, premiums for performance that exceeds pre-specified levels. Hypothetically, the owner of a 1,000-head finishing barn may receive $36 per pig space per year (i.e., $36,000 annually). In addition, the swine production contract grower may receive a premium if the feed conversion rate is less than 2.9 lbs. of feed per pound of gain or if death losses are less than 2.4 percent of delivered pigs. This payment system guarantees a minimum income level to growers, provides incentives to improve pig performance and, thus, profitability for pig owners, and allows owner flexibility in the timing of placing and marketing pigs without imposing a consequence on the grower. The system has worked very well for swine contractors and swine production contract growers, generating wealth and significant rural economic development and employment opportunities while also allowing family farms to stay in business.

[4] There have been three technological changes that affected this structural change: bio-security, genetics and feeding/nutrition. Bio-security/health led to multi-site production system and genetics led to improved pork quality. Both required coordinated systems to capture their maximum benefits (i.e., knowing which pigs were healthy and which had the best genetics before they were purchased).

2. Marketing Agreements

The other business practice that has developed over the past 25 years is the use of marketing agreements to transfer ownership of pigs from producers to packers. Marketing agreements, like production contracts, have evolved over time to meet the needs of both packers and producers.

Early marketing agreements were offered by packers as a way of securing leaner hogs that would yield higher proportions of saleable cuts. As consumers began demanding lean pork products, packers identified producers who had lean, good cutting hogs. They would offer a premium if the producer would make a long-term (as much as 5 to 7 years in some cases) commitment to sell to that packer. An additional benefit is management and assurance of throughput levels that maximize plant efficiencies. This allows producer-to-consumer price spreads to be as small as possible, keeping producer prices high and/or consumer prices low.

Some marketing agreements have price-stabilizing or risk-mitigating components. Most of these attempt to reduce price variation, preventing steep downturns in revenues and helping manage cash flows. These contracts stabilize producers' financial performance and enhance their access to capital. In addition, they result in a more stable supply of hogs for packers, creating a win-win-win situation for all three parties.

The annual data on the prevalence of marketing contracts for 2002 through 2016 appear in Figure 2.

Figure 2

Figure 2.
Swine Purchase Type Breakdown, 2002-2016

Purchase Type	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Hog/pork market formula	43.4%	39.1%	40.5%	40.9%	37.8%	38.0%	37.6%	43.6%	38.7%	38.4%	40.9%	41.2%	40.9%	43.2%	40.6%
Other market formula	9.3%	7.6%	9.2%	8.8%	8.7%	8.5%	10.0%	6.8%	10.8%	9.8%	7.8%	7.2%	10.5%	8.2%	8.8%
Other purchase arrangement	13.1%	19.0%	18.0%	16.4%	15.7%	14.6%	13.3%	11.8%	13.1%	15.2%	15.4%	14.9%	13.1%	13.0%	15.2%
Packer-sold	2.2%	2.1%	2.1%	2.5%	6.2%	6.5%	6.2%	5.8%	5.6%	4.7%	4.3%	4.0%	4.3%	4.2%	4.3%
Packer-owned	17.4%	18.8%	19.2%	20.5%	22.0%	23.7%	24.3%	25.2%	26.7%	27.7%	28.0%	29.4%	28.6%	28.8%	28.5%
Negotiated/spot	14.7%	13.3%	11.0%	11.0%	9.6%	8.7%	8.7%	6.9%	5.2%	4.2%	3.6%	3.2%	2.7%	2.6%	2.5%
Negotiated formula*															0.6%

*Began reporting in October 2016

There are three noticeable trends in these data. First, the percentage of total supplies that are packer-owned, while it trended upward between 2002 and 2012, has remained relatively stable since 2012.[5]

Second, the percentage of hogs for which prices are negotiated daily has fallen steadily. This decline reflects the rising confidence in mandatory reported prices and the increased transaction costs to both producers and packers of negotiating the price of each load of pigs. Less

[5] This marketplace stability since 2012 is one of a number of significant trends that have developed since GIPSA's initial 2010 proposal that the agency has simply failed to address and account for in this proposed rulemaking.

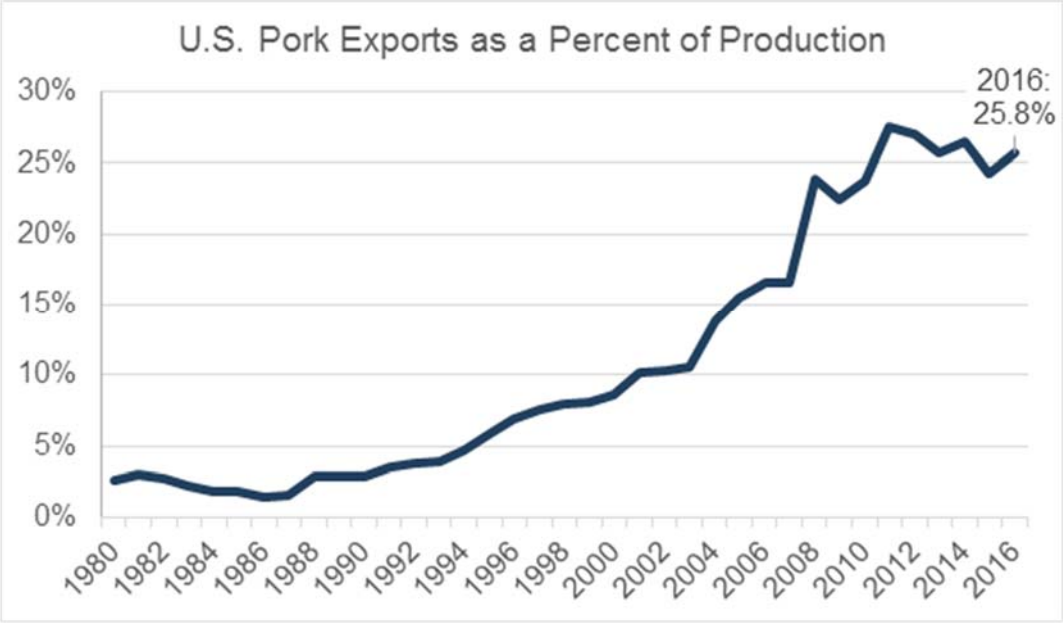
frequent negotiations to determine a differential from the negotiated price result in the same relative price being paid with far less time and effort expended.[6]

Third, there is a smaller but still apparent downtrend in the number of animals priced using "Other purchase arrangement," which is, under today's mandatory price reporting rules, a catch-all category for agreements that do not fit the other three descriptions. The contracts in this category are primarily those that base hog prices on feed costs, or share price deviations outside a prescribed range (i.e., window contracts) or have a set price floor.

C. Increasing Dependence Upon Exports

Another key development over the past 20 years is the emergence of the U.S. as the world's largest exporter of pork and pork variety meats. The U.S. became a net exporter for the first time in 1995 and has steadily increased exports. *See* Figure 3. Pork exports in 2016 accounted for nearly 26 percent of total pork production.[7] These exports are an essential component of the pork industry, and any disruption of the industry could jeopardize the U.S.'s export role.

Figure 3



[6] The use of marketing agreements by swine producers does not necessarily mean that the price of market hogs covered by such agreements is not negotiated between swine producers and packers. Rather, all terms of marketing agreements are heavily negotiated between the parties and, in fact, there may well be significant opportunities available to swine producers to negotiate with multiple packers.

[7] *2016 U.S. Pork Exports Show Impressive Progress*, Pork Checkoff (2016), available at http://www.pork.org/2016-u-s-pork-exports-show-impressive-progress/.

D. Recent Economic Performance of the Production Sector

From 2008 to 2012, the swine industry became more efficient. Hog prices rose in 2010, and the industry as a whole experienced positive profits from 2010 to 2012.[8] After a slight drop-off in 2009 and 2010 from the 2008 peak production level, production levels climbed back to near highs in 2011 and 2012.[9] Overall, the pork industry has been experiencing growth, increased efficiencies, and widespread profits in recent years.

Industry growth also involves new facilities. A renovated plant came online in the fall of 2016 in Missouri, another plant is planned for Minnesota in early 2017, and two more new facilities will open in summer 2017 (Clemens Food Group in Coldwater, Michigan, and Seaboard Triumph Foods in Sioux City, Iowa). By the end of 2018, Prestage Farms will also build a new plant in Wright County, Iowa. These new plants will increase slaughter capacity by approximately 7 percent compared with 2016 numbers, which themselves were at a record high.

COMMENTS ON THE PROPOSED RULE

I. GIPSA SHOULD NOT FINALIZE THE PROPOSED RULE BECAUSE IT WILL IMPOSE MASSIVE AND UNJUSTIFIABLE COSTS ON THE PORK INDUSTRY.

The Proposed Rule should not be finalized because it will impose unjustifiable costs on the pork industry. The pork industry has experienced significant growth in the last decade, and industry members have developed carefully negotiated contracting practices to respond to the market and ensure continued growth. The Proposed Rule would unduly burden the pork industry by allowing GIPSA and the courts to eliminate innovative business practices. Imposing these costs would violate the President's Executive Order to reduce regulatory costs.

A. The Proposed Rule Would Unduly Burden The Pork Industry.

1. *The Proposed Rule Would Limit The Freedom Of Contract Of All Swine Contractors, Packers, And Producers By Not Allowing Different Contract Terms For Different Circumstances.*

The Proposed Rule improperly infringes on the freedom of contract of swine contractors, packers, and producers by forcing them to use the same contract terms for all contracts, undermining the flexibility that currently exists in the marketplace for producers to profitably fill specialized niches of the industry. Proposed Section 201.210(b)(2), for example, would restrict swine contractors' and packers' ability to include certain provisions in contracts that are often appropriate for a particular contractor-producer or contractor-packer relationship and that are acceptable to both parties. For example, to keep potential litigation costs low, both parties might agree that neither party can seek punitive damages, yet proposed Section 201.210(b)(2)(iii) would disallow such a limitation with respect to the swine production contract grower. The absence of

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[8] Pork and Swine Industry Trade Summary, US International Trade Commission, at 13 (Oct. 2014), available at https://www.usitc.gov/publications/332/pork_and_swine_summary_its_11.pdf.

[9] *Id.* at 14.

any complaints regarding the contract provisions listed in Section 201.210(b)(2) belies any argument that such provisions are necessarily unfair, unjustly discriminatory, or deceptive.

Equally concerning is Section 201.211 of the Proposed Rule, which would prevent a packer or swine grower from treating a supplier[10] "more favorably" under a number of circumstances. This provision would prevent the use of contract terms that are narrowly tailored to and most appropriate for a given transaction. The provisions of proposed Section 201.211 are so vague and sweeping that they would force contractors and packers to standardize the terms of all contracts with growers—regardless of the myriad differences among them—solely to avoid litigation.[11] However, narrowly tailored contracts are an essential aspect of the pork industry. For example, a packer will use more beneficial provisions when contracting for hogs needed to fill out a line for a particular day. Although this would be necessary to efficiently fill a packer's needs, the Proposed Rule would essentially prohibit the use of different contract terms to facilitate this practice, thereby causing unnecessary inefficiencies in the market.[12]

GIPSA must tie any regulatory solution to the purpose of the PSA: to address practices that pose a threat to competition.[13] GIPSA does not have the authority or responsibility to supervise the industry. The PSA was not designed to give the Secretary of Agriculture authority to pick and choose which industry practices are acceptable based on a desire to aid specific competitors. Instead, GIPSA is supposed to ensure the market is competitive and allow industry to flexibly operate within that competitive market.

2. The Proposed Rule Would Disrupt Carefully Negotiated Hog Contracts Between Contractors And Producers.

The Proposed Rule tries to eliminate certain provisions from hog contracts without recognizing that those provisions are included only after careful negotiation. Rather than allowing industry members to negotiate provisions through a give and take based on the particular circumstances of a given transaction, GIPSA proposes a sweeping judgment that some contract terms are almost never acceptable. GIPSA has provided no evidence to support this conclusion, nor has GIPSA established that any contractual negotiations adopting such terms are necessarily unfair, unjustly discriminatory, or deceptive. GIPSA has essentially proposed to rewrite private contracts based on its own view of what terms the parties should accept instead of allowing each

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[10] This could be a farmer producing hogs under a production contact to a packer or to a pork producer (swine contractor), a pork producer supplying hogs to a packer under a marketing contract, or any one of a variety of other types of contractual arrangements that have emerged in the pork sector.

[11] For further discussion of the Proposed Rule's vagueness and ambiguity, see *infra* Part II.D.

[12] Although such a practice could potentially qualify for the "legitimate business justification" exception, as discussed in Part II.D below, packers who wish to avoid litigating the definition of this vague and ambiguous provision will be forced to abandon this useful practice altogether.

[13] *See In re Pilgrim's Pride Corp.*, 728 F.3d 457 (5th Cir. 2013); *Wheeler*, 591 F.3d 355 (en banc); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir. 2007); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005); *London*, 410 F.3d at 1303; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 164 F.3d 625, 1998 WL 709324, at *4-5 (4th Cir. 1998) (unpublished table decision); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. 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); and *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976).

party to negotiate the terms that most appropriately meet its actual needs. The disruption to well-established packer/producer/grower relationships would be significant.

An example is proposed Section 201.210(b)(2)(iii), which prohibits any contract term that limits or attempts to limit "[t]he right to pursue all damages available under applicable law."[14] Swine contractors and packers typically bargain for damages limitation provisions because without them, they would be susceptible to claims for lost profits and punitive damages. These costs can be substantial and can jeopardize a contractor's or packer's economic stability. Thus, contractors and packers typically provide more favorable terms for growers or producers in exchange for acceptance of the damages limitation provisions. Similarly, provisions waiving attorneys' fees are also carefully negotiated between parties, and GIPSA should not create a blanket ban on these provisions as currently proposed in Section 201.210(b)(2)(iv). In a functioning market, there is always a trade off when negotiating contracts.

GIPSA issued the Proposed Rule without understanding that contractors, packers, producers, and growers agree to carefully negotiate contractual provisions that benefit all parties. Contractors and packers need reasonable damages limitations and limitations on attorneys' fees to adequately reduce the risks associated with operations. Producers and growers can obtain their own beneficial provisions by accepting some of these proposed terms. GIPSA issued the Proposed Rule without providing any evidence that the targeted contract provisions are necessarily unfair, unjustly discriminatory, or deceptive and without any analysis of the potential harm in adopting a blanket prohibition on these freely negotiated provisions. Such an analysis would have shown that meddling in private contractual relationships is unwarranted and will impose an undue burden on all members of the pork industry.

3. The Proposed Rule Would Improperly Give Courts The Power To Regulate The Meat Industry And Convert Every Breach Of Contract Claim Into A Federal Claim.

Congress passed the PSA to address potential harm to competition, not harm to competitors, yet the Proposed Rule would federalize state contract claims. The PSA was never intended to provide a federal claim for every possible dispute between producers and contractors/packers by rendering the various practices enumerated in the Proposed Rule as necessarily unfair, unjustly discriminatory, or deceptive or as constituting an undue or unreasonable preference or advantage. Congress never intended the PSA to encompass disputes that are more appropriately governed by state law. Indeed, Section 308(b) of the PSA expressly provides that the remedies provided by the PSA "shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies."[15]

[14] 81 Fed. Reg. at 92,722.

[15] 7 U.S.C. § 209(b).

Moreover, courts have routinely held that the PSA was intended to address harms to competition rather than individual disputes between competitors and that it does not create any "entitlement to obtain the same type of contract" as others.[16] As the Eleventh Circuit has recognized, businesses should not face "liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised."[17] And "Congress could not have expected ... that its use of the term [unfair] would occasion a free-ranging inquiry into the equities of business practices."[18]

The Proposed Rule invites the courts to regulate the meat industry in ways that courts have repeatedly refused to do. This judicial regulation threatens to replace the innovative practices that have arisen over time out of specific market conditions and the needs of the industry as a whole. If Congress had intended for plaintiffs' lawyers and judges to regulate the meat industry through litigation, it would never have bothered to create an agency like GIPSA to enforce the PSA in the first place.

B. GIPSA Would Violate The New Administration's Order To Reduce Regulatory Costs If It Finalizes The Proposed Rule.

The Proposed Rule is subject to the President's Executive Order titled *Reducing Regulation and Controlling Regulatory Costs*.[19] Under the Executive Order, the total incremental cost of all new Department of Agriculture regulations for fiscal year 2017 must be zero, and the Department must eliminate two regulations for each new regulation it proposes or promulgates.[20] The Proposed Rule would impose massive costs of at least $1.5 billion on the meat industry.[21] GIPSA must comply with the Executive Order for fiscal year 2017 by either not finalizing the Proposed Rule or by identifying and repealing at least two other regulations that offset its $1.5 billion in costs.

The economic consulting firm Informa Economics conducted a comprehensive analysis of the impact on the beef, pork, and poultry sectors during the 2010 rulemaking proceeding.[22] In 2016, Informa provided an updated version of that study for the beef and pork industries that takes into consideration many of the changes that have occurred in the industry since the comment period closed nearly six years ago.[23] Informa's updated analysis shows that the Proposed Rule would

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16 *Jackson*, 53 F.3d at 1458; see also, *Armour & Co. v. United States*, 480 F.2d 712, 719-720 (7th Cir. 1968) (The PSA is "not intended to protect a business against loss in a competitive market" and GIPSA has no authority to prohibit "spirited competition.").

17 *London*, 410 F.3d at 1304.

18 *Wheeler*, 591 F.3d at 364, 367, 370.

19 Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

20 *Id.* § 2.

21 Informa Economics, *supra* note 2, at 1-2.

22 Informa Economics, An Estimate of the Economic Impact of GIPSA's Proposed Rules (Nov. 8, 2010)

23 Informa Economics, *supra* note 2.

impose additional costs of nearly $200 million in light of these changes, bringing the total cost of the Proposed Rule in the beef and pork industries to nearly $1.5 billion.[24]

Even GIPSA's conservative and flawed cost-benefit analysis proves the Proposed Rule would result in substantial costs to the meat industry. GIPSA's cost-benefit analysis concluded that the annualized costs of the Proposed Rule would be $5.90 million (at a 3 percent discount rate) or $6.54 million (at a 7 percent discount rate).[25] This calculation irrationally excludes direct costs from litigation and indirect costs from changed industry practices. GIPSA inexplicably concludes that "the marginal litigation costs of §§ 201.210 and [201.211] are zero"[26] while simultaneously admitting that it will take courts years to "set[] precedents for the interpretation of the regulations."[27] In a similar self-contradiction, GIPSA argues that the litigation costs of the Interim Final Rule include the litigation costs of the Proposed Rule[28] while recognizing that "even if courts continue to require showing of harm or potential harm to competition in section 202(a) and 202(b) cases, ... firms will likely still incur costs of complying with §§ 201.210 and 201.211."[29] As a result, GIPSA vastly underestimates the direct costs of the Proposed Rule.[30]

Moreover, GIPSA's cost-benefit analysis incorrectly assumed that the Proposed Rule would not "result in a decreased use of AMAs [Alternative Marketing Agreements], use of grower ranking systems or other incentive pay, reduced capital formation, or decreased efficiencies in the meat and poultry industries."[31] In fact, it is "abundantly clear" that the Proposed Rule would lead to a decreased use of AMAs and other changes to business practices.[32] In its cost-benefit analysis for the Interim Final Rule, GIPSA calculated the annual cost of these industry changes: $89.14 million (at a 3 percent discount rate) or $91.48 million (at a 7 percent discount rate).[33] Thus, even GIPSA's extremely conservative calculations show that the Proposed Rule would cost industry almost $100 million per year. On this basis alone, to comply with the President's Executive Order, GIPSA should not finalize the Proposed Rule in the absence of offsetting regulatory repeals.

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24 *Id.* at 1-2, 6.

25 81 Fed. Reg. at 92,716.

26 *Id.* at 92715.

27 *Id.* 92,716.

28 *Id.* at 92,715.

29 *Id.* at 92,717.

30 *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151-52 (D.C. Cir. 2011).

31 81 Fed. Reg. at 92,715

32 Informa Economics, *supra* note 2, at 22, 26.

33 We calculated GIPSA's estimated annual costs resulting solely from changes to industry practices by subtracting the lower boundary of GIPSA's estimated annual costs from the upper boundary. *See* 81 Fed. Reg. at 92,586 (noting that "[i]f the industries do not change any of their current business practices, GIPSA expects additional litigation to be the only costs and the costs of the regulation will be closer to the lower boundary," but if "the industries respond by reducing the use of AMAs and restricting their use of incentive pay, GIPSA expects the costs of the regulations to be closer to the upper boundary").

II. IT WOULD BE ARBITRARY AND CAPRICIOUS FOR GIPSA TO FINALIZE THE PROPOSED RULE.

Besides the unjustifiable costs of the Proposed Rule, GIPSA should not finalize the Proposed Rule because it is arbitrary and capricious. Without any evidence, GIPSA arbitrarily assumes that the same alleged problems arise in the pork, beef, and poultry industries despite the significant differences in each industry's structure and practices. In particular, the Proposed Rule fails to take into account the unique structure of the pork industry, which is simply not affected by the market structural imbalances that the Proposed Rule is purportedly designed to address. Based on faulty assumptions about the pork, poultry, and beef industries, GIPSA arbitrarily and capriciously imposes a one-size-fits-all solution that is inappropriate for the pork industry.

A. No Problem In The Pork Industry Warrants Regulatory Intervention.

The Proposed Rule does not identify any specific instances of pork industry members engaging in unfair, unjustly discriminatory, or deceptive practices or providing any undue or unreasonable preference or advantage. That is because the pork industry does not suffer from any of the structural issues that GIPSA suggests would foster such practices and warrant additional regulation, such as lack of integrator choice, monopoly, or barriers to entry.[34] For example, the opening of a new plant in 2016 along with many more planned for 2017 and 2018 undercuts any suggestion that the pork industry is afflicted with significant barriers to entry.

Furthermore, GIPSA does not identify any specific instances where swine production contract growers or hog producers complained of any unequal bargaining power or other market failures that would justify the Proposed Rule's extreme measures.[35] The Proposed Rule arbitrarily applies stringent restrictions to the pork industry without providing any evidence that the practices it seeks to regulate are occurring in the pork industry. Because the Proposed Rule is not grounded in any data demonstrating a problem, GIPSA would act beyond the bounds of administrative law if it subjected the pork industry to the Proposed Rule.[36]

Indeed, the Proposed Rule appears to only reflect concerns with alleged practices in other sectors, not practices in the pork industry. Imposing an extreme regulatory framework on a sector of the meat industry that is not afflicted with any of the alleged structural issues that the Proposed Rule is purportedly intended to address would be arbitrary and capricious.[37] At a minimum, GIPSA must limit the applicability of any final rule to those industries that GIPSA has specifically identified as having the problems that they seek to cure. The pork industry is not one.

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[34] GIPSA expressed concern over lack of integrator choice, monopoly, and barriers to entry in the Proposed Rule. 81 Fed. Reg. at 92,709-11.

[35] *See Wheeler*, 591 F.3d at 355; *Been*, 495 F.3d at 1230; *London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005)*; *Philson*, 1998 WL 709324, at *4-5; *Jackson*, 53 F.3d at 1458.

[36] *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 347 F.3d 955, 961-62 (D.C. Cir. 2003); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data….").

[37] *Associated Gas Distribs.*, 824 F.2d at 1019.

The Proposed Rule evinces a concern about alleged practices that just do not occur in the pork industry. For example, the Proposed Rule targets alleged unfair practices in production contracts.[38] The types of contract provisions that the Proposed Rule seemingly tries to prohibit, in most cases, simply do not exist in pork contracts. In addition, the Proposed Rule addresses potentially unfair contract provisions related to arbitration, which as explained below are rarely required under pork contracts.[39]

Similarly, the Proposed Rule addresses allegedly unfair venue provisions that rarely appear in pork contracts because of the structure of the industry.[40] The Proposed Rule also would prevent "[r]equiring unreasonable additional capital investments from a poultry grower or swine production contract grower."[41] Because pork contracts are multi-year in duration, the cost of upgrades is typically amortized, and unreasonable requirements for capital investments therefore do not occur.

The Proposed Rule also seeks to eliminate allegedly unfair practices arising from unequal bargaining power.[42] According to GIPSA, this unequal bargaining power stems in part from a lack of choice in packers or swine contractors and size differences between them and producers or growers.[43] While an alleged lack of choice in contractors might be a problem in other sectors, there is ample choice in the swine industry.[44] Moreover, pork producers tend to hold significant bargaining power in negotiations with packers.

Additionally, the Proposed Rule attempts to prevent retaliation or threats of retaliation "in response to lawful communication, association, or assertion of rights by a livestock producer, swine production contract grower, or poultry grower."[45] As the primary association representing pork producers, NPPC is clearly in the best position to know of any behavior along these lines. However, NPPC is unaware of any.

Finally, GIPSA claims the Proposed Rule is designed to address the abuse of market power, but it fails to show that there is market power in the pork industry. The Proposed Rule asserts that market concentration can lead to market power, and it discusses the moderate levels of

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38 The Proposed Rule predominantly discusses contracting practices it seeks to address. 81 Fed. Reg. 92,705-06, 92,708-09.

39 Proposed Section 201.210(b)(2)(i) and (b)(7) both refer to unfairness in arbitration. 81 Fed. Reg. at 92,722-23.

40 *See* proposed Section 201.210(b)(ii). 81 Fed. Reg. at 92,723.

41 Proposed Section 201.210(b)(5); 81 Fed. Reg. at 92,723.

42 For example, the Proposed Rule makes it a violation, without showing harm to competition, to limit by contract certain legal rights and remedies, such as the right to trial by jury, the right to resolve a dispute in the district where the contract performance occurred, and the right to pursue all damages available and seek attorney fees. 81 Fed. Reg. at 92,722.

43 The Proposed Rule points to unequal bargaining power and lack of integrator choice as a source of unfair contract terms. 81 Fed. Reg. at 92,711.

44 *See* James M. MacDonald, *Trends in Agricultural Contracts*, Agricultural & Applied Economics Association, at 5 (2015) (noting poultry growers have fewer options than hog growers in choosing integrators).

45 81 Fed Reg. at 92,722.

concentration in the pork industry.[46] However, the Proposed Rule acknowledges that "Empirical evidence does not show a strong or simple relationship between increases in concentration and increases in market power."[47] GIPSA also admits that the Government Accountability Office generally "found no evidence of market power, or found that the efficiency gains from concentration were larger than the market power effects."[48] The Proposed Rule is predicated on the existence of market power, yet there is no evidence that any market concentration in the pork industry has resulted in market power. The practices that GIPSA identifies to show market concentration, such as compulsory arbitration and limits on damages, also exist in markets without concentration. These practices are normal in a functioning commercial market and provide no proof of market concentration, let alone market power.

B. The Proposed Rule Ignores The Unique Structure Of The Pork Industry.

The Proposed Rule makes no attempt to recognize that there are many differences in the ways that pigs, chicken, and cattle are produced and marketed, lumping all three together and ascribing the same problems and challenges to all three.[49] This one-size-fits-all approach arbitrarily and capriciously adopts an "industry-wide solution for a problem that exists only in isolated pockets."[50] As a result, GIPSA would impose an unnecessary "solution" on the pork industry that would not cure any of the alleged problems the Proposed Rule seeks to address.

The swine, beef, and poultry industries differ in significant ways that GIPSA ignores. The poultry industry is largely vertically integrated from production through processing and uses production contracts to get its birds grown from chicks/poults to slaughter weight. As a result, there is probably little place for marketing agreements in the poultry sector. The cattle industry uses some short-term production agreements for pasturing stocker cattle but generally makes no significant use of production contracts. It does, however, utilize many different marketing agreements as well as differential pricing mechanisms to secure cattle with desired physical, breed, or rearing characteristics.

In contrast to the poultry and beef industries, the pork industry uses both production contracts and marketing agreements but is not vertically integrated like the poultry industry. GIPSA asserts that marketing agreements were used for over 97 percent of hogs sold in 2015.[51]

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46 81 Fed. Reg. at 92,710-11.

47 *Id.*at 92,711.

48 *Id.*

49 For additional information on the industry differences see Clement E. Ward, *Beef, Pork, and Poultry Industry Coordination* (Oklahoma Cooperative Extension Service piece). *See also* GIPSA, 2009 Annual Report, Packers & Stockyards Program, at 43 (March 2010); and GIPSA, 2008 Annual Report, Packers & Stockyards Program, at 42 (March 2009).

50 *Associated Gas Distribs. v. FERC,* 824 F.2d 981, 1019 (D.C. Cir. 1987).

51 81 Fed. Reg. 92,709. This number is incorrect and another example of how GIPSA's Proposed Rule lacks a fundamental understanding of the pork sector. While GIPSA does not cite the source, we believe it was derived from USDA's MPR data. However, that data includes both packer owned hogs (28.8% of hogs in 2015, See Figure 2) as

In 2012, only 43.5 percent of hogs were raised and delivered under production contracts, as compared with 96.4 percent of broilers.[52] Because of their physiology and genetics, weaned pigs, feeder pigs, and market hogs can be shipped hundreds of miles without serious problems. This means that a grower with a good hog barn and good reputation will not be tied to just the nearest swine contractor.

The production contracts used in pork production also differ significantly from those used by poultry and beef production companies. Hog contracts are almost all long-term, often running from 3 to 10 years in length. As described above, hog contract payments can involve objective performance criteria and have, in general, responded flexibly to special circumstances such as differential payments for pigs that are not of top-level health. Hog contracts tend not to include arbitration clauses because it is difficult to find an arbitrator with sufficient expertise in the industry. Because producers are usually within a few hours' drive of a packer, contracts generally provide for venue at the location where performance takes place.

C. <u>The Proposed Rule Is So Vague And Ambiguous That Compliance Will Be Impossible.</u>

The Proposed Rule is also arbitrary and capricious because it is riddled with so many vague and ambiguous provisions that it would leave the industry entirely in the dark as to the practices that are prohibited and those that are permissible. This uncertainty will increase litigation costs as courts and litigants struggle to make sense of how the various vague and ambiguous provisions of the Proposed Rule affect longstanding and well-settled industry practices. This uncertainty will also likely affect the availability of credit throughout the industry, for swine contractors, producers and growers, as lenders seek to mitigate risk created by their inability to know what the short and long term implication of these new rules will be on the viability of swine contractors, pork producers, and growers' business models. The Proposed Rule's vague and ambiguous provisions would create unnecessary uncertainty in the industry and render compliance nearly impossible.

1. *Section 201.210(b) And Section 201.211(e) Fail To Define "Legitimate Business Justification."*

Section 201.210(b) sets out conduct that GIPSA considers unfair, unjustly discriminatory, or deceptive "absent demonstration of a legitimate business justification." Section 201.211(e) says the Secretary will consider whether a packer or swine contractor has a "legitimate business justification" for conduct or actions that may otherwise constitute an undue or unreasonable preference or advantage.[53] Because neither provision defines the term "legitimate business justification," swine contractors and packers are left in the dark about when conduct is justified. Section 201.211(e) also does not specify whether having a "legitimate business justification" is a complete defense. Thus, even if a swine contractor or packer has what it believes to be a

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well as an unknown number of hogs where the producers use futures contracts to manage their overall risk prior to selling the hogs into the market.

[52] *Id.* at 92,708.

[53] 81 Fed. Reg. at 92,722-23.

"legitimate business justification," it will be impossible to know whether it could be subject to liability for the conduct.

2. *Section 201.210(b)(2) Is Unclear Regarding Which Other Contract Provisions Are Prohibited.*

Section 201.210(b)(2) provides that "rights and remedies afforded by law" cannot be limited by contract and lists several specific rights and remedies to which the provision applies.[54] It is unclear from this list what additional contractual provisions could potentially be prohibited under this provision. Of particular concern is whether the Proposed Rule allows for contractual limitations on class actions and equitable remedies, which are frequently found in hog contracts. This lack of clarity will leave swine contractors and packers guessing as to whether to remove such freely negotiated provisions from their contracts or continue adhering to a longstanding industry practice that could potentially expose them to costly litigation.

3. *Section 201.210(b)(2)(iv) Is Unclear Regarding Permissible Limits On Attorneys' Fees.*

Section 201.210(b)(2)(iv) states that a swine contractor cannot limit by contract "the right to seek an award of attorney fees available under applicable law" absent a legitimate business justification.[55] It is unclear whether this provision would prohibit limiting a party's remedies to "reasonable" attorneys' fees. Limiting an award of attorneys' fees to only those that are "reasonable" provides an important protection for parties to a contract in the event that litigation arises from the contractual relationship.

Rules on attorneys' fees also differ from state to state, and state laws differ from applicable federal rules and statutes. Section 201.210(b)(2)(iv) would therefore lead to inconsistent remedies for producers, depending on where they are located. This directly contradicts the Proposed Rule's purported goal of avoiding differential treatment of producers. The inconsistency would also create confusion for swine contractors and packers that operate across state lines.

4. *The Contract Termination Provisions In Section 201.210(b)(6) Do Not Recognize Potential Emergencies For Environmental Or Animal Health Situations.*

Packers must have the right to immediately terminate contracts in cases of emergencies related to environmental protection, animal health, or animal welfare. In these emergencies, there is no need to provide time to cure, and in many cases providing time to cure could actually harm the hogs or result in significant economic losses. Proposed Section 201.210(b)(6) does not include an explicit exception for emergencies. The term "reasonable period of time to remedy"[56] is too vague to provide the necessary assurance that swine contractors and packers may terminate their contracts during emergencies without providing time to cure.

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54 81 Fed. Reg. at 92,722.

55 *Id.*

56 *Id.* at 92,723.

5. *Section 201.211 Does Not Explain What "Similarly Situated" Means.*

Proposed Sections 201.211(a)-(d) prevent swine contractors and packers from treating a swine production contract grower "more favorably as compared to one or more similarly situated" growers. GIPSA does not define "similarly situated" or explain what kinds of differences would justify differential treatment of growers. The ambiguity of this phrase will only be settled through costly litigation as growers and packers or contractors argue about which kinds of growers are "similarly situated." Although Section 202(b) of the PSA only prohibits an "undue or unreasonable preference or advantage," Proposed Section 201.211 does not include any exception for reasonable differences between growers.

6. *Section 201.211(c) Is Unclear Whether A Swine Contractor May Negotiate Payment Terms For Swine Production Contract Growers Based Upon The Market At The Time Of The Contract.*

Payment terms are often negotiated based on current market conditions. The Proposed Rule, however, does not allow differential treatment "for an arbitrary reason unrelated to the livestock or poultry operation."[57] The proposed rule provides no guidance as to the meaning of "arbitrary reason" or what actions are considered "related to" operations and thus permitted. This vagueness would leave swine contractors and packers unclear as to whether they can continue negotiating different payment terms based on differing market conditions in accordance with longstanding industry practice. Requiring the same payment terms for contracts negotiated under different market conditions would create market inefficiencies.

7. *Granting All Producers The Same Delivery Terms In Accordance With Section 201.211(c) Would Be Impossible.*

Different producers have different capacities to meet delivery requirements, and delivery terms are therefore usually narrowly tailored to each individual producer. As with payment terms, it is unclear whether Section 201.211(c) would prohibit delivery terms that take into account each producer's capabilities or whether differential treatment would be considered sufficiently related to swine operations. This ambiguity would force swine contractors and packers to choose between risking liability by continuing their longstanding industry practice of appropriately tailoring delivery terms to the unique capabilities of each individual producer, or employing uniform delivery terms that would lead to market inefficiencies and render contractual performance nearly impossible for swine contractors, packers, and producers alike.

III SECTION 201.210(b)(1) OF THE PROPOSED RULE RAISES SERIOUS CONSTITUTIONAL CONCERNS BECAUSE IT INFRINGES FIRST AMENDMENT RIGHTS.

The Proposed Rule not only raises concerns about arbitrary and capricious agency action, it also raises serious constitutional concerns under the First Amendment. Section 201.210(b)(1) of the Proposed Rule prohibits a "retaliatory action or the threat of retaliatory action in response

[57] *Id.*

to a lawful communication." The regulation further states that "[a] retaliatory action or the threat of retaliatory action against any livestock producer, swine production contract grower, or poultry grower includes, but is not limited to, coercion, intimidation, or unjust discrimination."

These provisions are offensive to the First Amendment in at least four respects. *First*, they constitute a prior restraint that will chill protected speech. *Second* they impermissibly prohibit speech based on the content of the message and viewpoint. *Third* retaliatory speech is not among the categories of historically unprotected speech, and GIPSA does not have the authority to create a new category. *Fourth*, even if retaliatory speech is not subject to First Amendment protection, this Section of the Proposed Rule is still unconstitutionally vague and overbroad.

A. Section 201.210(b)(1) Of The Proposed Rule Constitutes A Prior Restraint On Speech.

The First Amendment prohibits the enactment of laws and regulations "abridging the freedom of speech."[58] A law or regulation of expression aimed at suppressing speech before it is uttered, as opposed to punishment of individuals after the expression has occurred, is a prior restraint.[59] Prior restraints generally come before a court bearing a "heavy presumption against [their] constitutional validity."[60] Laws attempting to regulate coercive and intimidating speech have been struck down as violative of the First Amendment because they constitute a prior restraint on speech.

Two cases are illustrative. In *Organization for a Better Austin v. Keefe*,[61] the Supreme Court considered the validity of an injunction against distribution of leaflets that were allegedly intended to coerce and intimidate an individual. The individual was a real estate broker who was alleged to have engaged in tactics termed "panic peddling" and "block busting." A community organization asked the broker to sign an agreement that he would not solicit real estate business in their community. When the broker refused to sign the agreement, the organization distributed leaflets near his home that were critical of his business and that were designed to cause him to sign the agreement with them. An injunction prohibiting the organization from distributing the leaflets was affirmed by a state appellate court on the ground that the alleged activities were coercive and intimidating, rather than informative, and were therefore not entitled to First Amendment protection.[62]

The Supreme Court rejected the lower court's view that the organization's actions were not entitled to First Amendment protection because "petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement"[63] by

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58 U.S. Const., amend. 1.

59 *Alexander v. United States*, 509 U.S. 544, 566 (1993).

60 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

61 402 U.S. 415 (1971)

62 *Id.* at 418.

63 *Id.*at 419.

use of "coercive and intimidating" speech.[64] The Court explained that just because "the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment."[65] The Court reasoned that using speech to "influence" conduct "is not fundamentally different from the function of a newspaper. ... [S]o long as the means are peaceful, the communication need not meet standards of acceptability."[66] Ultimately, the Court found that the injunction imposed a prior restraint on the organization's speech and publication and vacated the lower court's decision.[67]

Similarly, in *NAACP v. Claiborne Hardware Co.*,[68] the Court, quoting at length from *Keefe*, held that the First Amendment protects a secondary boycott organized by a civil rights group and reversed the lower court's decision imposing a permanent injunction. The Court stated: "Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. ... 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.'"[69] In dissolving the prior restraint, the Court once again confirmed that various forms of retaliatory speech are protected by the First Amendment. Other courts have since reached the same conclusion.[70]

Section 201.210(b)(1), just like the unlawful injunctions struck down in *Keefe* and *Claiborne*, seeks to prohibit packers from using speech to persuade producers and growers to take certain action. The First Amendment does not countenance such censorship.

B. Section 201.210(b)(1) Of The Proposed Rule Imposes Content- And Viewpoint-Based Restrictions On Speech.

Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[71] Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests.[72]

Proposed Section 201.210(b)(1) is a classic example of an unlawful content-based restriction on speech. Laws that "impose[] a financial disincentive only on speech of a particular

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64 *Id.* at 418.

65 *Id.* at 419.

66 *Id.*

67 *Id.* at 419–20.

68 458 U.S. 886 (1982).

69 *Id.* at 910 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

70 *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir.1983) (striking down Montana intimidation statute); *Eagle Point Educ. Ass'n v. Jackson Cty. Sch. Dist. No. 9*, No. 1:12-CV-00846-CL, 2015 WL 4170188, at *1 (D. Or. July 9, 2015) (striking down regulation that infringed on plaintiffs' First Amendment rights to express support for a strike).

71 *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

72 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

content" are "presumptively inconsistent with the First Amendment."[73] Packers that use speech deemed to be coercive, intimidating, or unjustly discriminatory under § 201.210(b)(1) may be subject to a civil penalty of up to $10,000 for each violation.[74] The Proposed Rule thus unapologetically singles out certain topics—that are of public concern[75] and everyday discourse—and burdens particular speech on those topics because of its content. There is perhaps no category of law toward which the Supreme Court has been more hostile.[76]

Proposed Section 201.210(b)(1) is also content-based because it cannot be "justified without reference to the content of the regulated speech."[77] The Proposed Rule seeks to ensure that only non-coercive, non-intimidating, and non-discriminatory speech is used when communicating with producers and growers. As such, the Proposed Rule is plainly aimed at improving the "quality" (as determined by the government) of what packers, contractors, and dealers may say—a goal that is both content-based and, when applied to core First Amendment speech, deeply troubling.[78] "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."[79] The Proposed Rule would turn this hallowed tradition on its head.

Perhaps worst of all, Proposed Section 201.210(b)(1) compels viewpoint discrimination—a particularly suspect form of content discrimination.[80] The Proposed Rule purports to protect the speech of producers and growers, but responsive speech by a packer is prohibited to the extent it could arguably be construed as "coercion, intimidation, or unjust discrimination." Laws giving the government the power to discriminate among who may speak and who may not—based solely on the content of that speech—are anathema to the First Amendment. Because that is exactly what Section 201.210(b)(1) does, it could not survive the most stringent level of judicial review.[81]

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73 *Simon & Schuster*, 502 U.S. at 115–16.

74 7 U.S.C. § 213(b).

75 Speech is of public concern, "at the heart of the First Amendment[]," whenever "it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 451–53 (2001) (internal quotations and citation omitted).

76 *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

77 *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (internal quotation marks and citation omitted).

78 *See, e.g., Davis v. FEC*, 554 U.S. 724, 743 n.8 (2008) ("[I]t would be dangerous for the Government to regulate core political speech for the asserted purpose of improving that speech.").

79 *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

80 *See Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

81 *See e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (regulation of "particular speech because of the topic discussed or the idea or message expressed" is subject to "strict scrutiny").

C. GIPSA Does Not Have The Authority To Create New Categories Of Unprotected Speech.

Retaliatory speech is not subsumed in any existing category of unprotected speech, and GIPSA lacks the authority to create a new one. Speech categories exempted from First Amendment protection are few, narrow, and well-defined. These include obscenity[82] defamation,[83] incitement,[84] or a situation presenting some grave and imminent danger the government has the power to prevent.[85] All other forms of speech—including retaliatory speech, whether coercive, intimidating, or unjustly discriminatory—are protected, and the Supreme Court has been skeptical of attempts to invent other categories.[86]

For example, *Stevens* involved a federal law that criminalized the sale or possession of depictions of unlawful animal cruelty.[87] In defense of the law, the government argued that depictions of unlawful animal cruelty were analogous to child pornography and that the Court should not apply ordinary First Amendment scrutiny.[88] The Supreme Court rejected this argument.

As the Court explained, the federal government does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" on the basis of "an ad hoc balancing of relative social costs and benefits."[89] The appropriate inquiry is whether the category of speech has historically been treated as unprotected.[90] The Supreme Court asked whether depictions of unlawful animal cruelty had been historically unprotected and, finding no such history, applied First Amendment scrutiny.[91] This approach was reaffirmed in *Brown v. Entertainment Merchants*, which invalidated a ban on the sale or rental of violent video games to minors.[92]

The rule is straightforward: unless there is a tradition of treating a category of speech as unprotected, that speech is fully protected. There is no evidence that coercive, intimidating, or unjustly discriminatory speech has been historically unprotected. To the contrary, the First Amendment has long protected various forms of retaliatory speech from officious government meddling.

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82 *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

83 *See, e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

84 *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

85 *See, e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

86 *See*, *United States v. Stevens*, 559 U.S. 460, 472 (2010).

87 *Id.* at 464.

88 *Id.*

89 *Id.* at 470, 472.

90 *Id.* at 472.

91 *Id.*

92 131 S. Ct. 2729, 2734 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.").

D. Section 201.210(b)(1) Of The Proposed Rule Is Unconstitutionally Vague And Overbroad.

Even if retaliatory speech were not entitled to First Amendment protection, Section 201.210(b)(1) of the Proposed Rule would still be unconstitutionally vague and overbroad. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[93] Proposed Section 201.210(b)(1) is unconstitutionally vague because it does not define "coercion," "intimidation," or "unjust discrimination." Nor does the Rule provide any examples of what constitutes these categories of speech. As a result, packers are left to guess if their speech would run afoul of this rule. Because GIPSA claims the authority to determine on an ex post facto basis whether a packer violated the provision,[94] packers are likely to refrain from speaking to avoid the threat of litigation. Permitting GIPSA a virtually unconstrained "chancellor veto" over speech it dislikes renders the provision unconstitutionally vague.[95]

Likewise, Proposed Section 201.210(b)(1) is unconstitutionally overbroad. In the First Amendment context, a law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[96] The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech."[97] The Court went on to explain that "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case-litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[98]

Proposed Section 201.210(b)(1) is overbroad because it appears to prohibit even the peaceful distribution of pamphlets and handbills, which have long been recognized as forms of communication protected by the First Amendment.[99] Thus, packers could be subject to a civil penalty if, for example, they circulated pamphlets to producers and growers critical of certain contractual terms demanded by the latter group. The Proposed Rule should not be finalized until

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93 *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

94 *See* 7 U.S.C. § 213(b) ("Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation.").

95 *See Grayned*, 408 U.S. at 108–09.

96 *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotations and citation omitted).

97 *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

98 *Id.*; *Cf. Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

99 *E.g.*, *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Keefe*, 402 U.S. at 419.

the numerous constitutional defects in Section 201.210(b)(1) are corrected because it is unlikely to survive First Amendment scrutiny as written.

CONCLUSION

The Proposed Rule threatens to impose massive costs on the pork industry by replacing carefully negotiated contracts with standard terms that are unworkable. In addition, the Proposed Rule is arbitrary and capricious because GIPSA has ignored crucial differences among the various sectors of the meat industry and proposed a one-size-fits-all regulation that is inappropriate for the pork industry. Section 201.210(b)(1) of the Proposed Rule also raises serious constitutional concerns under the First Amendment. For all of these reasons, GIPSA should not finalize the Proposed Rule or, at a minimum, GIPSA should exclude the pork industry from any final rule.

Sincerely,

Ken Maschhoff
President
National Pork Producers Council