

Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

August 20, 2018

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201 — Comments on Topic 1

The Institute for Local Self-Reliance (ILSR), a public interest research and advocacy organization founded in 1974, is pleased to submit these comments in connection with the Federal Trade Commission’s upcoming Hearings on Competition and Consumer Protection in the 21st Century. In addition to offering comments on Topic 1, ILSR has separately submitted comments on Topic 3.

We commend the FTC for undertaking these hearings and gathering input from experts and citizens as it examines changes in the economy since the Pitofsky hearings and reviews its enforcement and policy agenda. These hearings present a critical opportunity for the commission to examine the implications of growing concentration across many sectors of the economy, the increasingly dominant role of technology platforms in commerce, and the need for changes in competition policy and enforcement.

1. Small businesses and startups have declined sharply and evidence suggests that this drop is at least partly due to anticompetitive behavior by dominant corporations.

Small businesses and startups have declined dramatically since 1995, and we encourage the FTC, as part of these hearings, to examine how antitrust policy and enforcement has contributed to this drop and the consequences for competition, the economy, workers, and consumers. Between 2005 and 2015, the number of independent retailers—those with fewer than 100 employees—fell by 85,000.¹ Relative to population, that is a loss of more than one in five. Small manufacturers likewise saw their ranks shrink by over 35,000 firms.² Twenty years ago, small banks and credit

¹ U.S. Census Bureau. Economic Census: 2005–2015, available at <https://www.census.gov/programs-surveys/economic-census.html>.

² *Id.*

unions held nearly half of the banking industry's assets; now they account for only about one-fifth.³ Similar declines have occurred in most sectors.

Not only are existing businesses closing; it also appears to have become much harder to start a business than it once was. The number of new firms launched each year has fallen by nearly two-thirds since 1980.⁴ Research also shows that this trend is not limited to any region; business dynamism has declined in every state and in all but a handful of U.S. metropolitan areas.⁵

ILSR's research suggests that this loss of market diversity and dynamism is owed, at least in part, to the anticompetitive and exclusionary practices of dominant corporations.⁶ Our research has found that small businesses deliver distinct consumer and market benefits, including, in some sectors, lower prices and superior outcomes, and yet they are continuing to lose market share. For example:

Pharmacy — Independent pharmacies have been rapidly declining in number and market share across most of the United States.⁷ It is commonly assumed that the reason for this decline is that these small businesses cannot compete with the prices and convenience offered by large chain pharmacies. North Dakota provides a way to test this assumption. In 1963, the state enacted a law stipulating that a drugstore may operate in the state only if it is owned by a pharmacist. As a result, virtually every pharmacy in North Dakota is a locally owned, independent drugstore.

In a 2014 study, ILSR found that North Dakota has among the lowest prescription drug prices in the country and that the state is unparalleled in the level of pharmacy access and competition.⁸ North Dakota has more pharmacy locations per capita than any other state — 30 percent more than the national average — and they are remarkably prevalent even in remote regions.⁹ North Dakota's rural census tracts are 51 percent more likely to have a pharmacy than those in South Dakota, while North Dakota's urban residents have a greater number of competing pharmacies to

³ Calculations based on data in Fed. Deposit Ins. Corp., Statistics on Depository Institutions Report, available at <https://www5.fdic.gov/sdi/main.asp>

⁴ Economic Innovation Group, Dynamism in Retreat: Consequences for Regions, Markets, and Workers (Feb. 2017), available at <https://eig.org/dynamism>.

⁵ *Id.*

⁶ Stacy Mitchell, The View from the Shop—Antitrust and the Decline of America's Independent Businesses (Nov. 17, 2016, *The Antitrust Bulletin*), available at <https://doi.org/10.1177/0003603X16676139>.

⁷ Data on the change in number of local pharmacies are from U.S. Census Bureau, Economic Census: 2002 and 2012, available at <https://www.census.gov/programs-surveys/economic-census.html>. Prescription drug market share figures are derived from Nat'l Ass'n of Chain Drug Stores, *Fact Book 2013–2014*, and Nat'l Community Pharmacist Ass'n, *2013 Digest*.

⁸ Olivia LaVecchia and Stacy Mitchell, North Dakota's Pharmacy Ownership Law: Ensuring Access, Competitive Prices, and Quality Care (Oct. 2014, ILSR), available at https://ilsr.org/wp-content/uploads/2014/10/ND_Pharmacy_Ownership_Report.pdf.

⁹ *Id.*

choose from than those in South Dakota do.¹⁰ Our findings align with data from other sources, including *Consumer Reports*, showing that locally owned pharmacies generally provide better care and lower prices than chains like CVS.¹¹

Why then are independent pharmacies in decline everywhere else? If they're so competitive in North Dakota, then why not in New York and Nebraska? Our analysis suggests that the answer lies with the nation's dominant pharmacy benefit management companies (PBMs), such as CVS Health, and the ways these companies use their market power to exclude independent pharmacies in favor of their own retail pharmacies.¹² North Dakota's pharmacists have to deal with PBMs too, but because they are the only pharmacies in the state, they cannot be excluded from insurers' networks, and they have more leverage to negotiate fairer terms from the PBMs.

As we have concluded: "The state's pharmacy ownership law has, in effect, filled the vacuum left by the failure of antitrust policy to promote and maintain an open and competitive market."¹³ Federal enforcers have not only failed to police anticompetitive practices by the PBMs, but on several occasions the FTC has issued letters actively opposing state legislation to regulate PBMs and prevent anticompetitive conflicts of interest in how they manage benefits.¹⁴

Broadband — Today large firms offering Internet access operate in many areas without any competition for broadband service.¹⁵ According to data from the Federal Communications Commission, at least 30 million Americans can solely access broadband from Comcast and another 38 million solely from Charter, the two largest cable companies in America.¹⁶ Meanwhile, small rural cooperatives are demonstrating that they can build networks offering

¹⁰ *Id.*

¹¹ Lisa Gill, Shop Around for Lower Drug Prices (April 5, 2018, *Consumer Reports*), available at <https://www.consumerreports.org/drug-prices/shop-around-for-better-drug-prices/>.

¹² Mitchell, *supra* note 6.

¹³ *Id.*

¹⁴ The FTC has issued numerous comment letters opposing state bills to regulate PBMs. See, e.g., FTC Staff Comment to Hon. Terry G. Kilgore Concerning Virginia House Bill No. 945 to Regulate the Contractual Relationship Between Pharmacy Benefit Managers and Both Health Benefit Plans and Pharmacies Federal Trade Commission (Oct. 2, 2006), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon-terry-g.kilgore-concerning-virginia-house-bill-no.945-regulate-contractual-relationship-between-pharmacy-benefit-managers-and-both-health-benefit/v060018.pdf; FTC Staff Comment to the Honorable James L. Seward Concerning New York Senate Bill 58 on Pharmacy Benefit Managers (Mar. 31, 2009), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-james-l.seward-concerning-new-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf; FTC Staff Letter to the Honorable Mark Formby, Mississippi House of Representatives, Concerning Mississippi Senate Bill 2445 and the Regulation of Pharmacy Benefit Managers (Mar. 22, 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-honorable-mark-formby-mississippi-house-representatives-concerning-mississippi/110322mississippipbm.pdf.

¹⁵ H. Trostle and Christopher Mitchell, Profiles of Monopoly: Big Cable and Telecom (July 2018, ILSR) <https://ilsr.org/wp-content/uploads/2018/07/profiles-of-monopoly-2018.pdf>.

¹⁶ *Id.*

lower prices for faster service (without public subsidies) than the big providers offer (often with public subsidies to serve rural areas). For instance, Missouri's Co-Mo offers prices lower than in most metro regions — 100 Mbps symmetrical for \$49.95 and 1 gigabit symmetrical for \$79.95.¹⁷ In fact, on average, small municipal fiber networks provide the least expensive broadband in their communities, according to a study from the Berkman Klein Center for Internet & Society at Harvard University.¹⁸

In an apparent effort to undermine competition from these local providers, including by creating a strong deterrent to the formation of similar cooperative and municipal broadband networks, the dominant providers have at times dramatically cut their rates in what appears to be below-cost pricing with a predatory intent. In Monticello, Minn., for example, Charter began offering a service package that it priced at \$145 per month in neighboring communities at just \$60 per month in an apparent bid to push local Fibernet Monticello out of the market.¹⁹

The Berkman Klein Center study also documents the ways in which the large providers have sought to disrupt the natural mechanisms of the market by refusing key information to consumers.²⁰ Furthermore, in nearly half of U.S. states, if a community wants to create its own broadband network to provide better service and meaningful competition, it will find state laws, often drafted and passed with support from dominant cable and telephone companies, that either prevent it or discourage it from investing in its own service.²¹

Retail — Small businesses support innovation and consumer choice in part by creating diverse pathways to market and thus a wide array of opportunities for new products to find an audience. This is particularly significant in the retail sector, where independent retailers play an outsized role in identifying and introducing new products to consumers. This has been well documented in the book industry, where market research has found that readers browsing in a local bookstore “discover” new books at about three times the rate they do while shopping on Amazon.²²

¹⁷ See Co-Mo Connect rural broadband Internet service, available at <https://join.co-mo.net/#Products>.

¹⁸ David Talbot, Kira Hessekiel, and Danielle Kehl, Community-Owned Fiber Networks: Value Leaders in America, Berkman Klein Center (Jan. 10, 2018), available at <https://cyber.harvard.edu/publications/2018/01/communityfiber>

¹⁹ Christopher Mitchell, Charter Fights Dirty to Kill Competition in Monticello, Institute for Local Self-Reliance, Mar. 8, 2012, available at <https://www.muninetworks.org/content/charter-fights-dirty-kill-competition-monticello>

²⁰ Talbot, et. al., *supra* note 18.

²¹ See Baller Stokes & Lide, State Restrictions on Community Broadband Services or Other Public Communications Initiatives (Aug. 1, 2018), available at <http://www.baller.com/wp-content/uploads/BallerStokesLideStateBarriers8-1-18.pdf>.

²² See market research data by Codex Group, as cited in Laura Owen, Why Online Book Discovery is Broken (and How to Fix It) (Jan. 17, 2013, Gigaom), available at <https://gigaom.com/2013/01/17/why-online-book-discovery-is-broken-and-how-to-fix-it/>.

This same phenomenon is evident in other product categories too. In a series of interviews we conducted in 2016 with small and mid-sized manufacturers — including recognized brands in apparel, shoes, sporting goods, and toys — all expressed deep concern about how consolidation in the retail sector is negatively impacting their companies, particularly their ability to develop and introduce new products.²³ For companies that lack a large national advertising budget, a primary way that they bring a new product to market is to launch it with a small retailers and expand from there. Many best-selling books, toys, and other products have started this way and have gone on to reach a mass market.

“If we were owned by a private equity firm with a huge trove of capital, then I suppose we could do it [without local retailers],” noted Michael Levins, a 20-year veteran of the toy industry, in reference to his effort to launch a new toy brand. But, lacking that level of capital, he explained, “The cheapest way for us to build a brand is to work closely with [local toy] stores. They are in a much better position as small retailers to do that boot-strapping.”²⁴

As independent retailers disappear, the number of pathways to market is shrinking. Producers are facing the difficult task of trying to launch new products by either securing shelf space at a major chain such as Walmart or finding a way for the item to rank high in Amazon search results — both nearly insurmountable hurdles for a new product from a small or medium company. An especially troubling aspect of this harm is that it is nearly impossible for consumers (and policymakers) to detect or measure. “As a consumer, how would you even know that something was missing?” noted a representative of a game and puzzle company, who said concentration in toy retailing has resulted in reduced product development at his firm.²⁵

2. The disappearance of small businesses and startups not only negatively impacts competition and consumers; it has broader economic and civic consequences.

In addition to these market and consumer impacts, the decline of small businesses has broader economic, social, and civic consequences. New and young firms, for example, are a primary source of net job growth.²⁶ Recent scholarship suggests their decline may be reducing

²³ Olivia LaVecchia and Stacy Mitchell, Amazon’s Stranglehold: How the Company’s Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities (Nov. 2016, ILSR, pages 25-28), available at https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jason Wiens and Chris Jackson, The Importance of Young Firms for Economic Growth (Sept. 13, 2015, Entrep. Policy Dig., Kauffman Found.), available at <https://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/the-importance-of-young-firms-for-economic-growth>.

competition for labor and contributing to slow wage growth and rising inequality.²⁷ An economy that includes many small businesses also helps ensure that economic opportunities extend to every region. Increasingly, the U.S. is marked by a stark geographic disparity, with a few metropolitan areas benefitting from growth, while many other cities and regions fall behind.²⁸

3. The consumer welfare standard provides an inadequate framework for protecting and promoting competition and the public interest.

In recent decades, competition policy and antitrust enforcement have tended to discount the harmful effects of consolidation on the grounds that bigger companies deliver greater efficiencies and therefore, enhance consumer welfare. This approach has several shortcomings. For one, by treating citizens exclusively as consumers, it fails to account for and address harms that affect people as producers of value (as workers, farmers, business owners, and so on). Starting a business has long been a significant pathway for people to reach the middle class. As noted above, new and growing small businesses also play a critical role in job creation and competition for labor that helps ensure a fair market wage for workers. Indeed, recent scholarship has linked consolidation and the decline of small businesses to rising inequality.²⁹ In other words, the consumer welfare standard has not protected the overall economic interests of Americans.

Second, the consumer welfare standard relies heavily on predictions of future price impacts that are not necessarily reliable.³⁰ And, as the pharmacy, broadband, and retail examples above illustrate, this framework defaults to assumptions about scale that fail to capture the complex ecology of industries and the distinct benefits that smaller-scale enterprises deliver. Allowing small competitors to be excluded from the market solely because they lack the financial resources or market power of their big rivals is not a pro-competitive policy.

We believe the public interest would be better served by an antitrust enforcement standard that emphasizes market structure, maximizing competition, and ensuring low barriers to entry.

4. The FTC's hearings present an important opportunity for a broad range of voices to provide input and engage in this process.

²⁷ Jose Azar et al., Labor Market Concentration (Dec. 2017, Nat'l Bureau of Econ. Research, Working Paper No. 24147), available at <http://www.nber.org/papers/w24147> (concluding going from the 25th percentile to the 75th percentile in the labor market concentration is associated with a 15-25% decline in posted wages).

²⁸ Economic Innovation Group, *supra* note 4.

²⁹ Holger M. Mueller, Paige P. Ouimet, and Elena Simintzi, Wage Inequality and Firm Growth, LIS Working Paper 632, (March 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540321.

³⁰ John Kwoka and Marc Jarsulic, "Evidence-Based Policy in Antitrust: The Need for Ongoing Merger Retrospectives," ProMarket (April 20, 2017).

Finally, as the Commission considers the format and content of these hearings, we encourage it to include a broad range of stakeholders as witnesses, including representatives of small businesses and workers. We also encourage the Commission to hold a significant share of these hearings outside of Washington, D.C., in cities across the country.

The overarching purpose of these hearings is of critical concern to Americans, and the topics identified by the Commission represent issues that are affecting many communities. Indeed, questions of market concentration, the accountability of tech platforms, and other topics are now frequently front-page news. We believe that the success of these hearings in providing meaningful guidance to the FTC's policymaking and enforcement will be significantly enhanced by a process that invites diverse input and engages citizens broadly. Moreover, we believe that such a process can play an important role in strengthening citizens' faith in government agencies to effectively grapple with the causes of increased economic concentration and the consequences many are experiencing in their own lives and communities.

Thank you for the opportunity to submit these comments in advance of the Commission's upcoming hearings. We believe these hearings are critically important, and we look forward to following and contributing to the Commission's process in the coming months. We would welcome the opportunity to answer questions, provide additional information, or discuss these issues with the Commissioners and staff. I can be reached via email (smitchell@ilsr.org) or phone (207-989-8500).

Sincerely,

/s/ Stacy Mitchell

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