INSTITUTE FOR Local Self-Reliance

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 — Topic 1

Dear Chairman Simons and Commissioners:

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.

The Decline of Small Businesses and Startups

Recent scholarship has linked increased consolidation with a broad range of negative economic effects.[1] We wish to draw the FTC's attention in particular to the consequences of the steep drop in the number of small, independent businesses and the declining rate of startups in recent years.[2] Between 2005 and 2015, the number of independent retailers—those with fewer than 100 employees—fell by 85,000.[3] 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.[4] Twenty years ago, small banks and credit unions held nearly half of the banking industry's assets; now they account for only about one-fifth.[5] Similar declines have occurred in most sectors. Not only are

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[1] See, for example: 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with a 15-25% decline in posted wages); Sean F. Ennis et al., Inequality: A Hidden Cost of Market Power (Mar. 6, 2017, unpublished comment), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942791.

[2] 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.

[3] U.S. Census Bureau. Economic Census: 2005–2015, available at https://www.census.gov/programs-surveys/economic-census.html.

[4] *Id.*

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

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.[6] 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.[7]

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. 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.[8] 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.[9] 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 remote regions.[10] 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 choose from than those in South Dakota do.[11] 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.[12]

  Why then are independent pharmacies in decline? 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.[13] North Dakota's pharmacists have to deal with PBMs too, but because they are the only pharmacies in the state, they have leverage to negotiate fairer terms from PBMs. As we have concluded:

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[6] Economic Innovation Group, Dynamism in Retreat: Consequences for Regions, Markets, and Workers (Feb. 2017), available at https://eig.org/dynamism.
[7] *Id.*
[8] Data on the change in number of local pharmacies are from U.S. Census Bureau, Economic Census: 2002 and 2012, available at 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*.
[9] 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.
[10] *Id.*
[11] *Id.*
[12] 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/.
[13] Mitchell, *supra* note 2.

"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."[14]

- *Broadband* — Despite what should be a clear market opportunity for competitors, today large firms offering Internet access operate in many areas without any competition for broadband service.[15] Per FCC statistics, 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, rural cooperatives are demonstrating that they can build networks offering lower prices for faster service than the big providers offer. 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] And, overall, 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. Importantly, the study also documented ways in which the large providers have sought to disrupt the natural mechanisms of the market by refusing key information to consumers. 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.[18]

- *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.[19]

  This same phenomenon is evident in other product categories. 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 concerns about consolidation in the retail sector, especially the impact that this concentration is having on their ability to successfully introduce new products.[20] For small and mid-sized companies that lack a large national advertising budget, a primary way they bring a new

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[14] *Id.*
[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.*
[17] See Co-Mo Connect rural broadband Internet service, available at https://join.co-mo.net/#Products.
[18] 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.
[19] 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/.
[20] 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.

product to market is to launch it with a few small retailers and to grow from there. "If we were owned by a private equity firm with a huge trove of capital, then I suppose we could do it," noted Michael Levins, a 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."[21] Many best-selling books, toys, and other products have started this way and have gone on to reach a mass market. But, as independent retailers disappear, producers are facing the difficult task of trying to launch new products by either securing shelf space at a major chain or finding a way for the item to rank high in Amazon search results — both major hurdles for a new company or product. 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.[22]

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.[23] Their decline may be reducing competition for labor and contributing to slow wage growth.[24] An economy that includes many small businesses also helps ensure that economic opportunities extend to every region. Increasingly, however, 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.[25]

The Limits of the Consumer Welfare Standard

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. As the examples above illustrate, this exclusive focus on efficiency has not served either consumers or competition. We believe antitrust enforcement and the analysis of mergers and suspected anticompetitive conduct needs to focus on market structure, maximizing competition, and ensuring low barriers to entry.

The Need for a Broad Range of Voices and Public Engagement in these Hearings

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.

[21] *Id.*
[22] *Id.*
[23] 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.
[24] Azar et al., *supra* note 1.
[25] Economic Innovation Group, *supra* note 6.

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 major economic shifts and their consequences.

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

Stacy Mitchell
Co-Executive Director
Institute for Local Self-Reliance