STATEMENT OF

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ON

BEEFING UP COMPETITION: EXAMINING AMERICA'S FOOD SUPPLY CHAIN

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Chairman Durbin, Ranking Member Grassley, Chairwoman Klobuchar, Ranking Member Lee, Committee Members, thank you for the opportunity to appear before you today to discuss how competition problems in the food supply chain can impact consumers.

The American economy is suffering under the weight of excessive market concentration across numerous sectors.

There is a profound imbalance of power in the marketplace. Increasing concentration and consolidation is leaving consumers with fewer choices and less leverage. Sellers of essential products and services are increasingly able to offer consumers one choice – take it or leave it. Consumer spending is the engine that drives the economy, yet consumers are being denied a fair voice.

The trend toward higher corporate concentration is occurring throughout the economy. According to one study, there have been marked increases in corporate concentration, as measured by the Herfindahl-Hirschman Index, in 75 percent of the industrial sectors, over the past two decades, with the average concentration level close to doubling.[1]

Since our founding 85 years ago, Consumer Reports has emphasized, as a key part of our mission to work for a marketplace that is fair and just for all, the fundamental importance of competition for ensuring a marketplace that works for consumers. Competition empowers consumers with the leverage of choice, the ability to go elsewhere for a better deal. That motivates businesses to be responsive to consumers' interests, with more affordability, better quality, and new innovative thinking.

That is why we have been strong and consistent supporters of the antitrust laws as an essential protector of competition, and strong and consistent advocates for keeping them strong.

[1] Gustavo Grullon, Are US Industries Becoming More Concentrated? *Review of Finance*, Oxford University Press, July 2019, https://academic.oup.com/rof/article/23/4/697/5477414.

In recent years, we have been active in advocating for stronger protections for competition, in enforcement and in legislative reform, in a number of industries, and broadly across the economy. In any marketplace, effective competition fosters consumer benefits in the form of a greater variety of higher quality and more affordable products and services, increased innovation, and greater attention to other aspects that consumers value, including safety.

And nowhere is it more important that consumers can have confidence in the quality, variety, and safety of the products they purchase than in the food they eat.

Food is essential to everyone. But many consumers, particularly in remote rural and marginalized urban areas, lack food options that are accessible and affordable – a problem aggravated by over-concentration in grocery retail that has created "food deserts."[2]

Concerns about the ill effects of over-concentrated agriculture markets often come to the attention of policymakers from the producers – the farmers and ranchers who must sell their produce and livestock to a dwindling number of increasingly large and powerful outlets. But this is also a concern for consumers. For the marketplace to bring meaningful options to consumers, there need to be meaningful options at all parts of the input, production, distribution, and marketing chain, from farm to table. For the marketplace to work for consumers, it has to be working for businesses that seek to reach them. It has to be working for everyone.

That's why monopsony power, market power on the buyer side, can be as harmful as monopoly power, market power on the seller side. When corporate packers and processors in a concentrated buyer marketplace can exert excessive pressure on producers of livestock and poultry and produce to sell at ever-lower prices, at the risk of being cut off, that creates excessive pressure on producers to cut corners on their costs, which can impair quality, variety, and safety, and can nip innovation in the bud.

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[2] *See, e.g.,* Wesley R. Dean, et al, The Possibilities and Limits of Personal Agency: The Walmart that Got Away and Other Narratives of Food Acquisition in Rural Texas, https://www.tandfonline.com/doi/abs/10.1080/15528014.2016.1145006?journalCode=rffc20&.

Some might naively reason that consumers should be pleased that a packer or processor – or high-volume wholesaler or retailer – is using its power to bring down the prices it pays – doesn't that mean consumers also pay less? But it doesn't work that way. Market power flexes its muscle to take from everyone, in all directions. Indeed, over-concentration makes a market more conducive to collusion and price-fixing, as evidenced by recent criminal prosecutions and private lawsuits involving tuna,[3] pork,[4] chicken,[5] and peanuts.[6]

Farmers and ranchers also confront an over-concentrated marketplace when they go to buy the inputs they need – seed and genetics, fertilizer and chemicals, feed and additives, and farm equipment. All these critical input markets have become more concentrated in recent years. Farm equipment manufacturers are making it even worse, by restricting the ability of farmers and ranchers to get their equipment affordably and conveniently repaired.

Agriculture is the cornerstone of America's rural economy. Unfortunately, agricultural producers, squeezed on both sides by over-concentrated market power, are finding it increasingly challenging to survive and thrive. This has contributed to an economic decline in Rural America, and suppressed the growth of independent businesses that would help revitalize it.

A prominent example is beef packing, where market concentration has led to dramatic restrictions in how ranchers can market their cattle.

Two short generations ago, the top four packers accounted for roughly a third of the market.[7] There were lots of other packers, and ranchers had many options. Typically, cattle were sold on the cash market, also called the spot market, where prices were determined on the day of sale based on competitive

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[3] Former Bumble Bee CEO Sentenced to Prison for Fixing Prices of Canned Tuna, DOJ press release, June 16, 2020, https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna.
[4] Jennifer Shike, JBS USA Settles Third Pork Price-Fixing Lawsuit, Farm Journal, April 20, 2021, https://www.porkbusiness.com/news/industry/jbs-usa-settles-third-pork-price-fixing-lawsuit.
[5] One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and Is Sentenced to a $107 Million Criminal Fine, DOJ press release, Feb. 23, 2021, https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million.
[6] Sam Bloch, Peanut farmers advance in price-fixing lawsuit against Big Shell, The Counter, Dec. 14, 2020, https://thecounter.org/price-fixing-peanut-farmers-lawsuit-georgia-antitrust-adm/.
[7] USDA, Packers and Stockyards Statistical Report, 2006 Reporting Year, May 2008, p. 44.

bidding. A feedlot might have a dozen or more packers show up to bid against each other.[8] Many cattle were sold at live auction, with open bidding, the most competitive kind of market there is. In a cash market, both sides had to be ready for some healthy give and take, but it was balanced, and it worked.

Today, after a cascade of mergers, the top four beef packers – Tyson, Cargill, and two Brazil-owned corporations, JBS USA and National – control 85 percent of the market between them.[9]

Similar consolidation has taken place in pork, and in poultry.

These packers are multi-billion-dollar giants. And with fewer competitors to worry about, their buyers are better able to stay out of each other's way and avoid competing. They don't have to actually agree to collude. They can use what the DOJ-FTC Horizontal Merger Guidelines refer to as "accommodating reactions."[10] They all know, and they all know that they all know; they don't have to say it to each other outright. (And sometimes they may actually be agreeing to collude.[11])

But either way, the effect is the same – meaningful competition evaporates.

Today, on the day a feedlot is ready to sell its cattle, it may be visited by one single buyer, for a single packer, with one offer. No auction.[12] No bidding. No negotiation. Take it – or leave it.[13] And the vast majority of cattle are now

[8] Rancher Mike Callicrate recalls that 20 packers would show up at his feedlot in the late 1970s. What's the Beef? How the Beef Packing Cartel Hurts Producers and Consumers and How Independent Cattle Producers and Processors Can Help Restore Competition and Choice, Interview, American Antitrust Institute, July 13, 2021, at minute 5:50, https://www.antitrustinstitute.org/work-product/whats-the-beef-how-the-beef-packing-cartel-hurts-producers-and-consumers-and-how-independent-processors-can-help-restore-competition-and-choice/.

[9] USDA, Packers and Stockyards Division, Annual Report 2019, p. 9. https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2019.pdf.

[10] Horizontal Merger Guidelines, section 7.

[11] *See, e.g.,* Jacob Bunge and Brent Kendall, Justice Department Issues Subpoenas to Beef-Processing Giants, Wall St. J., June 5, 2020, https://www.wsj.com/articles/justice-department-issues-subpoenas-to-beef-processing-giants-11591371745.

[12] Based a 2014 USDA investigation, as of that year, only about 1 percent of fed cattle marketed in the U.S. are procured through livestock auctions. USDA GIPSA, Investigation of Beef Packers' Use of Alternative Marketing Arrangements, July 2014, p. 12.

[13] *See* Mike Callicrate interview, note 8, supra; Stephanie Paige Ogburn, Cattlemen struggle against giant meatpackers and economic squeezes, High Country News, March 21, 2011, https://www.hcn.org/issues/43.5/cattlemen-struggle-against-giant-meatpackers-and-economic-squeezes.

purchased in advance through long-term exclusive contracts, at pre-arranged prices, giving the packers a "captive supply" and increasing their control over producers.[14]

The packers' lopsided bargaining muscle is further exacerbated by the fact that selling cattle is extremely time-sensitive. Cattle, like other agricultural commodities, are perishable. The cattle ready for sale have been carefully fed and nurtured to be at their peak on the scheduled sale date. A rancher can't afford to just hold them back for the next sale date and wait to see if a better offer comes along then.[15]

When farmers and ranchers get squeezed like this, not only are they pressured to cut corners. Ultimately, many may decide they simply can't make a go of it, that it isn't worth trying. When that happens, their exit can diminish what's available to consumers.

And it potentially cuts off prospects for better consumer choices in the future. The farmers and ranchers most likely to be disfavored and run off by the major established outlets – the packers, processors, and high-volume wholesalers and retailers – are the ones seeking to adopt innovative methods that don't fit the current business model dictated by the downstream powers.

Packers with market power can also use exclusionary arrangements to impede the ability of smaller, innovative packers to sell downstream to high-volume distributors and retailers – including packers who want to give greater attention to quality than is possible with massive-scale assembly line processes. And with the independents subdued or eliminated, the dominant packers have less of their own incentive to innovate.

In addition to these usual kinds of harm to consumers and the marketplace that result from insufficient competition, which we are used to discussing in

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[14] *See, e.g.,* Amelia Pollard, 'Big Four' Meatpackers Are Crushing Small Ranchers, The American Prospect, June 9, 2021, https://prospect.org/power/big-four-meatpackers-crushing-small-ranchers/.
[15] *See* Ogburn, note 13, supra.

antitrust and competition policy circles, more acute vulnerabilities in an over-concentrated food supply chain have recently come into stark relief.

- Last year, COVID outbreaks caused widespread meat-packing plant shutdowns, with ripple effects up and down the supply chain. Consumers found empty shelves at the grocery store, while producers were forced to kill off millions of animals that could not be brought to slaughter.[16]

- This spring, a ransomware cyber-attack forced Brazil-based JBS Foods, one of the four top beef packers, to shut down all of its U.S. plants temporarily.[17] Those plants account for a quarter of all beef sold in the United States.

In these instances, the lack of alternatives available to absorb the shock exposed dangerous vulnerabilities created by over-reliance on just one or a very few suppliers of critical products and inputs. These critical vulnerabilities had been woefully underappreciated in the quest to reduce the values of competition to just economic efficiency.

And when it's the food supply chain that is disrupted, it can be literally a matter of life and death, for many, many consumers.

The situation is particularly dire for Americans living in remote rural and marginalized urban communities who already did not have the same access to food options. Before COVID hit, there were already 35 million Americans who were food insecure – meaning they did not have reliable access to affordable, nutritious

[16] *See, e.g.,* National Institutes of Health, Meat Production and Supply Chain Under COVID-19 Scenario: Current Trends and Future Prospects, May 7, 2021, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8137951/#B7; Federal Reserve Bank of Kansas City, COVID-19 Disruptions in the U.S. Meat Supply Chain: The emergence of COVID-19 in the United States has created substantial challenges for all segments of the meat supply chain, but especially for producers and consumers, July 31, 2020, https://www.kansascityfed.org/agriculture/ag-outlooks/COVID-19-US-Meat-Supply-Chain/, July 31, 2020; Michael Corkery and David Yaffe-Bellany, The Food Chain's Weakest Link: Slaughterhouses, New York Times, April 18, 2020, https://www.nytimes.com/2020/04/18/business/coronavirus-meat-slaughterhouses.html.

[17] *See* Fabiana Batista et al, All of JBS's U.S. Beef Plants Were Forced Shut by Cyberattack, Bloomberg, June 1, 2021, https://www.bloomberg.com/news/articles/2021-05-31/meat-is-latest-cyber-victim-as-hackers-hit-top-supplier-jbs; Sara Morrison, Ransomware attack hits another massive, crucial industry: Meat, Vox, June 10, 2021, https://www.vox.com/recode/2021/6/1/22463179/jbs-foods-ransomware-attack-meat-hackers.

food.[18] During COVID, that number jumped by half, to an estimated 54 million, of whom over 18 million were children.[19]

So there are unique aspects to agriculture not present in other sectors.

But many of the competition problems we see in the food supply chain are the same kinds of problems we see in other concentrated sectors in our economy. And they will benefit from the same reforms to antitrust law and enforcement.

We have previously indicated our support for S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021, introduced by Senator Klobuchar and others on this Committee. Two of its proposed reforms are especially worth highlighting here.

- One proposal would reinvigorate the prohibition against anticompetitive mergers, by clarifying the legal standard to be more consistent with Congress's intent to stop harmful concentration trends before it is too late,[20] and adding some specific threshold triggers for the largest mergers, which would have to be affirmatively justified as not creating an appreciable risk of materially lessening competition, or tending to create a monopoly or monopsony.

- The other proposal would strengthen the prohibition against anticompetitive exclusionary conduct by a dominant corporation to freeze out competitors – to sabotage their ability to compete, cutting off access to critical supplies or customers or means of distribution. This proposal would clarify that the prohibition reaches all situations where the corporation has sufficient market power to harm competition, not just an already-baked-in monopoly.

These and other proposals in the Klobuchar bill are sound and well-considered, based on established principles of antitrust and competition. They

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[18] USDA, Economic Research Service, Food Security in the U.S., 2019, https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics/.
[19] True Cost of Food: Measuring What Matters to Transform the U.S. Food System, Rockefeller Foundation, July 2021, https://www.rockefellerfoundation.org/wp-content/uploads/2021/07/True-Cost-of-Food-Full-Report-Final.pdf.
[20] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

would help promote a fairer, more competitive, better functioning marketplace in agriculture as they would in other sectors. Importantly, the bill adds explicit references to monopsony power into the antitrust statutes.

We have also been supporting S. 228, the Merger Filing Fee Modernization Act, introduced by Senators Klobuchar, Grassley, and Durbin to strengthen antitrust enforcement resources by increasing pre-merger filing fees for the largest corporate mergers. It has already passed the Senate, and we are looking forward to seeing it pass in the House as well.

And the TEAM Act, S. 2039, introduced last month by Senators Lee and Grassley, contains a number of well-thought and constructive proposals, which we hope will also be part of the discussions leading to a bipartisan consensus on moving forward with legislation to strengthen antitrust enforcement and competition for the benefit of consumers, businesses, workers, and the economy.

Finally, we are aware of efforts underway at USDA to examine food supply chain resilience and security, at the request of the President. And more recently, the President's Executive Order on Promoting Competition in the American Economy calls on USDA to consider a number of measures to improve the competitive functioning of the agricultural supply chain and the marketplaces that constitute it, including reinvigorating the Packers and Stockyards Act's prohibitions against unfair practices. This hearing will help inform USDA in these efforts.

Improving competition, in the food supply chain as in other marketplaces, can give consumers more and better food choices, at more affordable prices, and will spur more innovation to create even better food choices. And it can give us a more reliable and resilient food supply chain that can better weather the storms, foreseen and unforeseen.

Thank you again for the opportunity to be here before you today. I would be happy to answer any questions.