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UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

**Statement of Commissioner Alvaro M. Bedoya, Federal Trade Commission**

**Before the U.S. House of Representatives Energy & Commerce Committee  
Subcommittee on Innovation, Data & Commerce  
for the Hearing:**

**“The Fiscal Year 2025 Federal Trade Commission Budget”**

**July 9, 2024**

Chair Khan’s written testimony offers an excellent overview of the Commission’s work across its consumer protection and competition missions. In this written testimony, I will underscore four areas of the Commission’s work that may be of interest to the Subcommittee: (1) protecting teen mental health online; (2) ensuring fairness in algorithmic decision-making; (3) protecting competition in labor markets; and (4) eliminating pharmacy and food deserts in rural and urban America.

I am deeply grateful for the Subcommittee’s ongoing support for the FTC. My hope is that our combined testimony will help make clear the contributions of the FTC to the people of this country, and the central role of our staff in these achievements.

To be clear, the views in this testimony are solely my own, and my descriptions of corporate actions should be understood to represent conduct *alleged* to have occurred in FTC actions or elsewhere in public documents.

## 1. The FTC is using all its tools to protect kids' and teens' mental health online.

We are in the middle of a youth mental health emergency.<sup>1</sup> Suicide is now the second leading cause of death for children 10 to 14 years of age.<sup>2</sup> Parents and experts increasingly point to social media as a key contributor to this crisis. While the peer-reviewed research is not uniform and suggests a complex relationship between social media use and teen mental health, the *existing* research has been enough for the U.S. Surgeon General Vivek Murthy to issue two separate advisories warning that while all uses of social media do not hurt everyone, *some* uses of social media likely do harm certain groups of young people,<sup>3</sup> and that “we do not have enough evidence to conclude that [social media] is sufficiently safe” for teenagers to use in the way that they currently do.<sup>4</sup>

Beyond any expert's opinion, I find teenagers' *own* reports about social media use even more concerning. One in three teens say they use social media or video sites “almost constantly.”

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<sup>1</sup> Deepa Shivaram, *Pediatricians Say the Mental Health Crisis Among Kids Has Become a National Emergency*, NPR (Oct. 20, 2021), <https://www.npr.org/2021/10/20/1047624943/pediatricians-call-mental-health-crisis-amongkids-a-national-emergency>; Janelle Chavez, *Children's mental health tops list of parent worries, survey finds*, CNN (Jan 31, 2023), <https://www.cnn.com/2023/01/31/health/mental-health-parenting-survey/index.html> (“Even before the pandemic, we were seeing skyrocketing numbers of kids and adolescents dealing with mental health issues, and that has increased exponentially since the pandemic.”).

<sup>2</sup> Centers for Disease Control and Prevention (CDC), *Facts About Suicide*, CDC INJURY CENTER: SUICIDE PREVENTION (accessed Feb. 2, 2023), <https://www.cdc.gov/suicide/facts/index.html>.

<sup>3</sup> OFFICE OF THE SURGEON GENERAL, SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY (2023) at 4, <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> [hereinafter SURGEON GENERAL, SOCIAL MEDIA AND YOUTH MENTAL HEALTH] (“the current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents”); OFFICE OF THE SURGEON GENERAL, PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY (2021) at 25-28, <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-healthadvisory.pdf>.

<sup>4</sup> SURGEON GENERAL, SOCIAL MEDIA AND YOUTH MENTAL HEALTH, *supra* note 3, at 4.

About the same number say that that’s too much. Yet more than half say that they would not know how to stop.<sup>5</sup>

In response to a recent survey, a 14-year-old named Hannah said: “I always want it near me . . . when I’m sitting on the sofa, I just scroll.”

Lara, age 13, said: “I kind of wanted to have more time to do stuff other than just go on my phone . . . [but] it didn’t work, I kept turning it off and then going back and still using it.”

Otto, 15: “Sometimes I’ll go on it at like 11pm and won’t go off it until six in the morning.”

Jack, 14: “Once you start, you can’t stop.”<sup>6</sup>

We live in an attention economy. In that economy, tech companies use every means available to get, hold, and profit off of teenagers’ attention. It should surprise no one if that economy hurts those teenagers’ mental health.

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<sup>5</sup> Emily A. Vogels, Risa Gelles-Watnick, & Navid Massarat, *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022> (“Fully 35% of teens say they are using at least one of [YouTube, TikTok, Instagram, Snapchat and Facebook] ‘almost constantly.’”); *id.* (“about a third of teens (36%) say they spend too much time on social media”); *id.* (“Asked about the idea of giving up social media, 54% of teens say it would be at least somewhat hard to give it up”).

<sup>6</sup> 5RIGHTS FOUND., PATHWAYS: HOW DIGITAL DESIGN PUTS CHILDREN AT RISK 52-53: Designers (2021), <https://5rightsfoundation.com/uploads/Pathways-how-digital-design-puts-children-at-risk.pdf> [hereinafter PATHWAYS REPORT].

FTC staff is using a range of tools to address and understand this crisis. In addition to the actions outlined below, I currently serve as the FTC representative on President Biden’s Kids Online Health and Safety Task Force, and look forward to when the Task Force’s work on this topic can be shared more broadly.<sup>7</sup>

**a. The FTC has sued companies that allow harassment of teens online.**

Research suggests online harassment helps drive some harms to teen mental health online.<sup>8</sup> The Commission is already using its unfairness authority to stop teen harassment online.

A little over a year ago, the FTC brought and settled an action against the makers of the videogame Fortnite. Among other things, the FTC alleged that by default, Fortnite let strangers speak to kids playing online via a live audio connection.<sup>9</sup>

This is what one parent wrote on the FTC’s webpage: “My 13 year old son plays fortnite [sic] and he has been having people sending him awful messages on the game telling him to kill

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<sup>7</sup> *FACT SHEET: Biden-Harris Administration Announces Actions to Protect Youth Mental Health, Safety & Privacy Online*, THE WHITE HOUSE (May 23, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/23/fact-sheet-biden-harris-administration-announces-actions-to-protect-youth-mental-health-safety-privacy-online/>.

<sup>8</sup> Yvonne Kelly et al., *Social Media Use and Adolescent Mental Health: Findings from the UK Millennium Cohort Study*, 6 THE LANCET 59, 59 (2018), <https://www.thelancet.com/action/showPdf?pii=S2589-5370%2818%2930060-9> (“Greater social media use related to online harassment, poor sleep, low self-esteem and poor body image; in turn these related to higher depressive symptom scores.”).

<sup>9</sup> Complaint for Permanent Injunction, Civil Penalties, and Other Relief, *United States v. Epic Games, Inc.*, No. 5:22-CV-00518 (E.D.N.C. Dec. 19, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2223087EpicGamesComplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesComplaint.pdf); Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *Epic Games, Inc.*, No. 5:22-CV-00518-BO (E.D.N.C. Dec. 19, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2223087EpicGamesSettlement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2223087EpicGamesSettlement.pdf).

himself and to die.”<sup>10</sup> As we described in our complaint, another parent emailed the makers of Fortnite to say that, “[t]his morning, while on Fortnite, my 9 year old son had . . . someone he doesn’t know in real life, but has been playing with for months[] tell him that he was going to kill himself tonight. It shook him to the core.”<sup>11</sup>

Critically, the settlement in the *Fortnite* case required the company to adopt strong privacy default settings for children and teens, ensuring that voice and text communications are turned off by default.<sup>12</sup>

**b. The FTC’s proposed update to kids’ privacy rules may also help limit constant nudges that keep kids’ online for longer than they want.**

Designers use every means at their disposal to maximize the amount of time kids spend online. In the words of one engineer: “Companies make their money from attention. Reducing attention will reduce revenue. If you are a designer working in an attention business, you will design for attention.”<sup>13</sup> Push notifications are one tool in that design arsenal.

In December, the FTC proposed an update to its rules enforcing the Children’s Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501, et. seq., the federal privacy law protecting kids under 13. We have proposed changes that would place new restrictions on the use and disclosure of children’s personal information and further limit the ability of companies to

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<sup>10</sup> Lesley Fair, *Record-Setting FTC Settlements with Fortnite Owner Epic Games Are the Latest “Battle Royale” Against Violations of Kids’ Privacy and Use of Digital Dark Patterns*, FTC: BUS. BLOG (Dec. 19, 2022), <https://www.ftc.gov/business-guidance/blog/2022/12/record-setting-ftc-settlements-fortnite-owner-epic-games-arelatest-battle-royale-against-violations>.

<sup>11</sup> Complaint for Permanent Injunction, Civil Penalties, and Other Relief, *supra* note 9, at para. 41.

<sup>12</sup> Stipulated Order for Permanent Injunction and Civil Penalty Judgment, *supra* note 9.

<sup>13</sup> PATHWAYS REPORT, *supra* note 6, at 24.

condition access to services on monetizing children’s data. The proposal broadly aims to shift the burden from parents to providers to ensure that digital services are safe and secure for children.

Amongst the changes to the rule we put out for public comment was a proposal to limit nudges to kids to stay online. Under the proposal, website or online service operators covered by COPPA would be prohibited from using online contact information and persistent identifiers collected under COPPA’s multiple contact and support for the internal operations exceptions to send push notifications to children to prompt or encourage them to use their service more. Operators that use personal information collected from a child to prompt or encourage use of their service would also be required to flag such usage in their COPPA-required direct and online notices.<sup>14</sup>

**c. The FTC is seeking to expand its in-house expertise to include pediatricians, psychologists, and other youth development experts.**

When the FTC was created in 1914, Congress deliberately sought to create an agency that would closely study complex issues, develop expertise on them, and use that knowledge to inform Congress and its own enforcement decisions.<sup>15</sup> Over the years, the Commission has looked at its own expertise and strategically expanded it. In 1954, the Commission expanded its Division of Economics into a full bureau.<sup>16</sup> We now employ over 80 full time Ph.D. economists

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<sup>14</sup> Children’s Online Privacy Protection Rule, 89 Fed. Reg. 2034, 2049-50, 2053, 2059 (Jan 11, 2024).

<sup>15</sup> See generally H.R. REP. NO. 63-533 (1914); S. REP. NO. 63-597 (1914).

<sup>16</sup> Tim Muris, Chairman, Fed. Trade Comm’n, Remarks at FTC History: Bureau of Economics, Contributions to Law Enforcement, Research, and Economic Knowledge and Policy, at 10 (Sept. 4, 2003), [https://www.ftc.gov/sites/default/files/documents/public\\_events/roundtable-former-directors-bureau-economics/directorstablegood.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/roundtable-former-directors-bureau-economics/directorstablegood.pdf).

whose research is frequently cited in enforcement briefs, court decisions, Presidential reports, and academic scholarship.

In 2011, the Commission appointed its first Chief Technologist. A dozen years later, the FTC now boasts a full team of technologists who work alongside our investigators, paralegals, attorneys, and economists to help us detect and understand complex and hard-to-find technological harms.

The FTC is now seeking to expand its expertise to include in-house youth development experts who can help us assess allegations of mental health harms against kids and teens online, combat deceptive design techniques deployed against children, and broadly help us understand how the online attention economy may be hurting young people online.

## **2. The FTC is using its authority to stop unfair algorithms that hurt people.**

Some time ago, an 11-year-old girl walked into a Rite Aid pharmacy. She was stopped, accused of wrongdoing, and searched. But she had done nothing wrong. The girl was so distraught that her mother reported having to take time off work to console her.<sup>17</sup>

It wasn't just that girl. Many other customers – people picking up their prescriptions and over-the-counter medications or other health aids – were also stopped, accused of shoplifting,

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<sup>17</sup> Complaint for Permanent Injunction and Other Relief at para. 91, Fed. Trade Comm'n v. Rite Aid Corp., 2:23-cv-05023 (E.D. Pa. Dec. 19, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023190\\_riteaid\\_complaint\\_filed.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_riteaid_complaint_filed.pdf).

searched, detained, and in some instances expelled from Rite Aid. Sometimes, these humiliations occurred in front of their coworkers, employers, children, and others.<sup>18</sup>

But again, these people had done nothing wrong; *none* of these people had shoplifted. What had happened was that Rite Aid had secretly deployed a face surveillance system to scan the faces of people visiting its stores to identify suspected shoplifters and “persons of interest” based on images that staff had uploaded into the system.<sup>19</sup>

That system failed frequently and spectacularly; the system falsely flagged people on thousands of occasions.<sup>20</sup> In one instance, Rite Aid employees called the police on a customer because the technology generated an alert against an image that was later described as depicting “a white lady with blonde hair.” The customer in question was Black.<sup>21</sup> All this happened despite the fact it has been clear *for years* that facial recognition systems can perform less effectively for people with darker skin and women.<sup>22</sup> Rite Aid nonetheless failed to take even the most basic precautions.

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<sup>18</sup> *Id.* at para. 88.

<sup>19</sup> *Id.* at para. 3.

<sup>20</sup> *Id.* at para. 31.

<sup>21</sup> *Id.* at para. 48.

<sup>22</sup> See, e.g., PATRICK GROTHOR ET AL., NAT’L INST. OF STANDARDS AND TECHN., FACE RECOGNITION VENDOR TEST PART 3: DEMOGRAPHIC EFFECTS (2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> (finding “empirical evidence for the existence of demographic differentials in the majority of contemporary face recognition algorithms that we evaluated.”); CYNTHIA M. COOK ET AL., DEMOGRAPHIC EFFECTS IN FACIAL RECOGNITION AND THEIR DEPENDENCE ON IMAGE ACQUISITION: AN EVALUATION OF ELEVEN COMMERCIAL SYSTEMS, IEEE TRANSACTIONS ON BIOMETRICS, BEHAVIOR AND IDENTITY SCIENCE (2019), <https://mdtf.org/publications/demographic-effects-image-acquisition.pdf> (finding that demographics affected the confidence scores that algorithms assigned to a given match, with incorrect scores being more common for women, younger people, and subjects with darker skin); Krishnapriya K. S. et al., *Characterizing the Variability in Face Recognition Accuracy Relative to Race*, THE COMP. VISION FOUND., [https://openaccess.thecvf.com/content\\_CVPRW\\_2019/papers/BEFA/S\\_Characterizing\\_the\\_Variability\\_in\\_Face\\_Recognition\\_Accuracy\\_Relative\\_to\\_Race\\_CVPRW\\_2019\\_paper.pdf](https://openaccess.thecvf.com/content_CVPRW_2019/papers/BEFA/S_Characterizing_the_Variability_in_Face_Recognition_Accuracy_Relative_to_Race_CVPRW_2019_paper.pdf) (last visited July 5, 2024) (finding algorithms produced higher confidence in true positive matches for men over women). See also Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1, 8 (2018), <https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> (finding that all tested facial analysis tools



On December 19, 2023, the Commission charged Rite Aid with engaging in unfair acts or practices in violation of section 5 of the FTC Act, 15 U.S.C. §§ 45(a), (n), and entered into a proposed settlement with the company to stop the conduct.<sup>23</sup> For me, there are at least three important takeaways from this action and settlement.

**a. The FTC will not hesitate to ban companies from using unfair algorithms that substantially injure people.**

The FTC’s settlement with Rite Aid flat-out bans Rite Aid from using face surveillance for five years and requires deletion of biometric data collected in connection with the operation of the system.<sup>24</sup> Going forward, if Rite Aid decides to take up such a system in the future, the Order requires a bevy of protections, including robust testing for statistically significant bias on the basis of race, ethnicity, gender, sex, age, or disability – acting alone or in combination,<sup>25</sup> as well as an ongoing opportunity for FTC staff to engage in compliance monitoring.<sup>26</sup> I believe the *Rite Aid* investigation and settlement offers a strong baseline for future actions to stop unfair algorithms that substantially injure people.

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designed to classify faces by gender perform better on male faces than female faces, better on lighter faces than darker faces, and worst on darker female faces). *See also* CLARE GARVIE, CENTER ON PRIVACY & TECHNOLOGY AT GEORGETOWN LAW, A FORENSIC WITHOUT THE SCIENCE: FACE RECOGNITION IN U.S. CRIMINAL INVESTIGATIONS 21 (2022), [https://mcusercontent.com/672aa4fbde73b1a49df5cf61f/files/2c2dd6de-d325-335d-5d4e-84066159df71/Forensic\\_Without\\_the\\_Science\\_Face\\_Recognition\\_in\\_U.S.\\_Criminal\\_Investigations.pdf](https://mcusercontent.com/672aa4fbde73b1a49df5cf61f/files/2c2dd6de-d325-335d-5d4e-84066159df71/Forensic_Without_the_Science_Face_Recognition_in_U.S._Criminal_Investigations.pdf) (surveying research and concluding that “[r]egardless of what differential is discovered, each of these studies underscores a key weakness in the reliability of a face recognition search—that the accuracy of a given search can change depending on the demographic of the person....”).

<sup>23</sup> Complaint for Permanent Injunction and Other Relief, *supra* note 17, ¶¶ 142, 148; Exhibit A: [Proposed] Stipulated Order for Permanent Injunction and Other Relief, Fed. Trade Comm’n v. Rite Aid Corp., 2:23-cv-05023 (E.D. Pa. Dec. 19, 2023), ECF. No. 2-2. The settlement was finalized in March of this year. Stipulated Order for Permanent Injunction and Other Relief, *Rite Aid Corp.*, 2:23-cv-05023 (E.D. Pa. Feb. 26, 2024).

<sup>24</sup> Decision and Order at 6-7, *Rite Aid Corporation*, FTC Docket No. C-4308 (Dec. 19, 2023) (Provision I).

<sup>25</sup> *Id.* at 7-13 (Provision III).

<sup>26</sup> *Id.* at 25-6, 27-8 (Provisions XIV & XVI).

**b. I believe that the kind of conduct at issue in *Rite Aid* may be pervasive.**

The harms uncovered in the *Rite Aid* investigation are part of a much broader trend of algorithmic unfairness – a trend in which new technologies amplify old harms. We see it in hiring when employers develop résumé screening models, trained on their predominantly male workforce, that spuriously reject women.<sup>27</sup> We see it in housing when advertising platforms steer housing ads away from people based on their sex and estimated race or ethnicity.<sup>28</sup> And we see it in credit when a lender’s pricing models charge applicants who attended a Historically Black College or University higher rates for refinancing a student loan than similarly situated applicants who did not.<sup>29</sup>

Algorithmic unfairness hurts people invisibly, at scale, and because of *who they are*. In other words, it hurts people in a way that is unavoidable.

**c. Companies should take steps to ensure that their algorithms will not substantially injure people.**

Industry should carefully consider how and when people can be enrolled in an automated decision-making system, particularly when that system can substantially injure them. It is my view that Section 5 of the FTC Act requires companies using technology to automate important

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<sup>27</sup> Jeffrey Dastin, *Insight - Amazon scraps secret AI recruiting tool that showed bias against women*, REUTERS (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scrapssecret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

<sup>28</sup> Press Release, Dep’t of Just., Justice Department and Meta Platforms Inc. Reach Key Agreement as They Implement Groundbreaking Resolution to Address Discriminatory Delivery of Housing Advertisements (Jan. 9, 2023), <https://www.justice.gov/opa/pr/justice-department-and-meta-platforms-inc-reach-key-agreement-they-implement-groundbreaking>.

<sup>29</sup> STUDENT BORROWER PROT. CTR., EDUCATIONAL REDLINING 10 (2020), <https://protectborrowers.org/wpcontent/uploads/2020/02/Education-RedliningReport.pdf>.

decisions about people’s lives – decisions that could cause them substantial injury – to take reasonable measures to identify and prevent foreseeable harms.

**3. The new Merger Guidelines will help ensure that employers *compete* for Americans’ labor.**

Three years ago, following a recent wave of the COVID-19 pandemic, Nila Payton, an administrative assistant at the pathology department of a major university hospital, told her manager that she and her colleagues needed better personal protective equipment. She also thought they should get hazard pay. Her manager turned down both of her requests. In Ms. Payton’s words, “[m]y manager told me that because I work in healthcare, I signed up for this and I should stop complaining.”

So, Ms. Payton decided it was time for a new job. Ms. Payton ran a search for administrative jobs offered by other employers. It was promising at first: 800 jobs were offered in the area. Then Ms. Payton eliminated the part-time posts and those that paid the same or less than her current job. She filtered out the night shift jobs; she was the mother of two boys, her youngest in preschool, and she couldn’t be away from them at night. Then Ms. Payton eliminated the jobs that would require her to have a car – she didn’t have one. After all of that, there were only two jobs left. So, Ms. Payton stayed in her job.

*It wasn't always this way*, she told a subcommittee of the U.S. House of Representatives. There used to be countless hospitals in the region. One by one, they had almost all merged. Now, said Ms. Payton, “[t]here is almost nowhere else to work if you are a healthcare worker.”<sup>30</sup>

A lot of people equate “antitrust” with “anti-monopoly,” with *seller* power. But from the very beginning, in 1890, the congressmen who passed the Sherman Act also had *monopsony*, or *buyer* power, in their sights. They were specifically worried about combinations of companies who could control the price at which they bought *labor*. Senator John Sherman made this clear on the floor of the Senate when he denounced the trusts for “command[ing] the price of labor without fear of strikes.”<sup>31</sup>

Yet in the 134 years since the passage of the Sherman Act, and the 110 years since the passage of the Clayton Act, federal antitrust enforcers have stopped only one merger because of its impact on competition in the labor market.<sup>32</sup>

In December 2023, the FTC and the Department of Justice issued revised merger guidelines that will help law enforcers block mergers that allow companies to “command the price of labor without fear of strikes.”<sup>33</sup> They guidelines do this by drawing on existing research

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<sup>30</sup> Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary, 117th Cong. 38–42 (2021) (statement of Nila Payton).

<sup>31</sup> 21 CONG. REC. 2457 (March 21, 1890) (remarks of Sen. John Sherman of Ohio) (emphasis added).

<sup>32</sup> U.S. v. Bertelsmann SE, No. 1:21-cv-02886, 2021 WL 5105483, at \*79-80 (D.D.C. Nov. 2, 2021).

<sup>33</sup> See generally U.S. DEP’T OF JUST. & . TRADE COMM’N, MERGER GUIDELINES (2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023\\_merger\\_guidelines\\_final\\_12.18.2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf).

and practice to highlight considerations that may be appropriate in merger investigations involving a labor market. I want to highlight four of these contributions.

**a. The guidelines recognize the reality of job searches and how they affect labor markets.**

I can buy a toaster in five minutes. It can be shipped to me from any part of the country. I can order it day or night. And the toaster does not care what bread it toasts or when it toasts it.

Job searches can take months. Interviews may involve taking time off work or lining up backup childcare. As with Ms. Payton, choosing a job is not just a matter of money; the right job requires the right commute, hours that work with school schedules, and decent health insurance. And even if both a company and an applicant agree that the applicant is fully qualified, either of them may decide, for any number of reasons, to walk away.

The 2023 guidelines recognize that as a result of switching costs, individual worker needs, and the need for a mutual match, the level of concentration at which competition concerns arise may be lower in labor markets as compared to seller markets. They also recognize that labor markets may be narrower than other markets.<sup>34</sup>

**b. The guidelines recognize the expertise provided by workers and labor unions.**

Workers and their representatives in labor unions can help agency staff understand benefits and non-wage compensation, scheduling and job assignments, and the individualized

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<sup>34</sup> *Id.* at 27.

needs that workers bring to the table. They can also help our agencies understand the industries in which they work. Indeed, the agencies often interview union representatives as part of a merger review.

Yet, as of 2010, the sources of evidence identified in the guidelines' appendix only referred to “customers, industry participants, and observers,” lumping working people in with “suppliers” and making no direct mention of workers or labor organizations.<sup>35</sup> The 2023 guidelines expressly recognize workers and labor unions as valuable sources of evidence, correcting for these omissions.<sup>36</sup>

**c. The guidelines clarify that purported benefits to consumer markets won't offset a substantial lessening of competition in labor markets.**

The Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in any line of commerce and in any section of the country.<sup>37</sup> If a transaction will substantially lessen competition in a labor market, that transaction cannot be saved by purported benefits to product markets. In other words, a merger that may substantially lessen competition for workers will not be immunized by a prediction that predicted savings from a merger will be passed on to consumers.

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<sup>35</sup> U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), [https://www.ftc.gov/system/files/documents/public\\_statements/804291/100819hmg.pdf](https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf).

<sup>36</sup> U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 33, at 34.

<sup>37</sup> 15 U.S.C. § 18.

**d. The guidelines recognize that certain anticompetitive labor practices may signal dominance in a labor market.**

A company with labor market power may use that power to set wages. That company may also use that power to change the terms of a worker’s job for their own benefit, even if those terms are anticompetitive. In 2022, the Treasury Department repeatedly affirmed the idea that certain anticompetitive labor practices, such as the use of non-compete agreements or worker misclassification, may be considered evidence of labor market power.<sup>38</sup>

The guidelines recognize this fact, explaining that to assess dominance in labor markets, the agencies often examine not just the merging firms’ power to cut or freeze wages, but also their ability to exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

Merger analysis is often described as overly technical and arcane. It doesn’t need to be. What our merger guidelines make clear is that when workplace injuries increase, or companies start breaking labor laws, and *their workers have nowhere else to go* – antitrust enforcers may look at this kind of simple, directly observable evidence when considering a merger of one company with another.<sup>39</sup>

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<sup>38</sup> U.S. DEP’T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION at ii (2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf>; *id.* at 12 (“The ability of a firm to misclassify workers without successful pushback from employees (who clearly would have an incentive to not be misclassified) can itself be viewed as a demonstration of the market power firms have over workers.”).

<sup>39</sup> U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 33, at 27.

**4. I am deeply concerned about the spread of pharmacy and food deserts in rural and urban America.**

A family walks into a pharmacy in West Virginia. Their young child has cancer. The pharmacist has the child's medicine behind the counter, ready to dispense. But when that pharmacist calls the pharmacy benefit manager, or "PBM," for the family's insurance company, they are denied authorization to dispense that medicine. Instead, they are told that the medication can only be dispensed by the PBM's mail order specialty pharmacy. The family has to go home and wait two weeks to receive the medicine for their child in the mail.

Thanks to the family's pharmacist, who spent almost an hour on the phone with the PBM and then contacted the state's Insurance Commissioner, that family was able to get the cancer medication within hours of first being denied.<sup>40</sup>

People say independent pharmacies are a "critical part" of the healthcare infrastructure. In many parts of rural and urban America, independent pharmacies are *the* healthcare infrastructure, full stop. They are the one place where you can visit in person with a medical professional who can answer your questions, get you your meds, give you a flu shot or a COVID vaccine, and provide a whole variety of other clinical services.

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<sup>40</sup> After the pharmacist contacted the Office of the West Virginia Insurance Commissioner, the matter was escalated to the insurer's management team and within a few hours the local pharmacist was authorized to dispense the prescription. Press Release, West Virginia Offices of the Insurance Commissioner, Insured Receives Urgently Needed Medication (Aug. 9, 2021), [https://www.wvinsurance.gov/Portals/0/pdf/pressrelease/Drug%20Complaint%20Press%20Release%20Draft%208.8.2021-FINAL%20\(1\).pdf?ver=2021-08-10-092804-300](https://www.wvinsurance.gov/Portals/0/pdf/pressrelease/Drug%20Complaint%20Press%20Release%20Draft%208.8.2021-FINAL%20(1).pdf?ver=2021-08-10-092804-300).



And yet, independent pharmacies are shutting down one after another. From 2003 to 2018, over 1,230 independent, rural pharmacies reportedly closed their doors.<sup>41</sup> In that same time, 630 rural ZIP codes lost their only pharmacy.<sup>42</sup> That included 28 ZIP codes in Oklahoma, 32 ZIP codes in Minnesota, and 46 ZIP codes in Texas, that did not have a single pharmacy as of 2018.<sup>43</sup>

These closures are also happening in cities, creating pharmacy deserts where low-income people, who rely on walking and public transportation, have nowhere to go to get their medicine. A recent study of the 30 biggest cities in the country found that Black and Latino neighborhoods were consistently less likely to have a pharmacy.<sup>44</sup>

Like independent pharmacists, independent grocers are struggling to survive in the face of consolidation. Many independent grocers allege that consolidation in food supply chains, along with growing market power by big box retailers, tilt the playing field in favor of their larger, wealthier competitors.<sup>45</sup> Similar to independent pharmacists, they also are

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<sup>41</sup> Abiodun Salako, Fred Ullrich, Keith Mueller, *Update: Independently Owned Pharmacy Closures in Rural America, 2003-2018*, at 1 (July 2018), RUPRI Center for Rural Health Policy Analysis, University of Iowa College of Public Health, <https://rupri-public-health.uiowa.edu/publications/policybriefs/2018/2018%20Pharmacy%20Closures.pdf>.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.*

<sup>44</sup> Jenny S. Guadamuz et al., *Fewer Pharmacies in Black and Hispanic/Latino Neighborhoods Compared with White or Diverse Neighborhoods, 2007-15*, 40:5 HEALTH AFF. 802 (May 2021), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.01699>.

<sup>45</sup> See, e.g., *Ending Hunger in America: Food Insecurity in Rural America: Hearing Before the H. Comm. on Rules*, 117th Cong. (2021), <https://www.youtube.com/watch?v=ACQp7q0refA&t=2220s> (oral testimony of R.F. Buche, President, Buche Foods); *Beefing up Competition: Examining America's Food Supply Chain: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (written testimony of David Smith, President and CEO, Associated Wholesale Grocers); *Beefing up Competition: Examining America's Food Supply Chain: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021), [https://www.senate.gov/isvp/?auto\\_play=false&comm=judiciary&file\\_name=judiciary072821p&poster=https://www.judiciary.senate.gov/assets/images/video-poster.png&stt=](https://www.senate.gov/isvp/?auto_play=false&comm=judiciary&file_name=judiciary072821p&poster=https://www.judiciary.senate.gov/assets/images/video-poster.png&stt=) (oral testimony of David Smith, President and CEO, Associated Wholesale Grocers, at 1:16:30).

disproportionately more likely to serve lower income areas that wealthier grocery chains do not.<sup>46</sup>

The FTC recently completed a food supply chain study, which explored some of the challenges facing independent grocers.<sup>47</sup> It is currently conducting a separate study into the role that PBMs have in competition among independent and vertically-integrated chain pharmacies.<sup>48</sup> My colleagues and I have separately reiterated our willingness to renew enforcement of the Robinson-Patman Act, a 1936 law aimed at providing a level playing field for small retailers.<sup>49</sup>

I am deeply concerned about the failure of independent pharmacies and groceries across rural and urban America. I have spent much of my time as a commissioner trying to understand this crisis, and have visited with small business owners in Louisiana, Oklahoma, Pennsylvania, Utah, South Dakota, Tennessee, and West Virginia, to discuss this problem. I would be glad to discuss any of these efforts in my oral testimony.

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<sup>46</sup> Clare Cho & Richard Volpe, USDA Econ. Research Serv., *Independent Grocery Stores in the Changing Landscape of the U.S. Food Retail Industry*, USDA ECON. RESEARCH REPORT NO. 240 at 1 (2017), <https://www.ers.usda.gov/publications/pub-details/?pubid=85782>; see also Katharine Yang Bao et al., *Urban Food Accessibility and Diversity: Exploring the Role of Small Non-Chain Grocers*, 125 APPLIED GEOGRAPHY (2020) at 26-27.

<sup>47</sup> FED. TRADE COMM’N, FEEDING AMERICA IN A TIME OF CRISIS (2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p162318supplychainreport2024.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p162318supplychainreport2024.pdf).

<sup>48</sup> FED. TRADE COMM’N, ORDER TO FILE A SPECIAL REPORT (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221200PBMMoelOrder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221200PBMMoelOrder.pdf).

<sup>49</sup> FED. TRADE COMM’N, POLICY STATEMENT OF THE FEDERAL TRADE COMMISSION ON REBATES AND FEES IN EXCHANGE FOR EXCLUDING LOWER-COST DRUG PRODUCTS 5 (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commis-sion%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commis-sion%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf).