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Rural Advancement Foundation International - USA (RAFI-USA) is a nonprofit organization that challenges the root causes of unjust food systems, supporting and advocating for economically, racially, and ecologically just farm communities. We envision a thriving, sustainable, and equitable food system: where farmers and farmworkers have dignity and agency; where they are supported by just agricultural policies; and where corporations and institutions are accountable to their community. We work directly with farmers: we help farmers find markets, advocate for and with farmers who are experiencing financial crisis, convene a Farmers of Color Network, work with farmers markets and rural faith communities to increase food access, provide infrastructure and emergency grants to farmers, and help coordinate a seed breeding cooperative. Our recommendations for addressing corporate consolidation within the food system come directly from this work.

Our Challenging Corporate Power Program (formerly known as Contract Agriculture Reform program) has worked primarily with contract poultry growers for more than 30 years to fight for better treatment from, and regulation of, giant meatpacking companies. In that time period we have only seen consolidation (both vertical and horizontal) of industrial animal agriculture get worse. RAFI-USA now works with both contract and independent livestock and poultry producers to reverse the rampant negative effects of corporate concentration across the food system. We are grateful for this opportunity to provide these comments on badly needed improvements to fair competition and antitrust enforcement in today's food system.

Today, a "big four" cluster of giant corporations exert coordinated oligopolistic and oligopsonistic control over every U.S. meat supply chain.[1] These giant meatpacking "integrators" shape the structure and rules of our food system by design to secure the greatest possible profits for themselves, while treating people, land, and animals as disposable units of production in the name of efficiency. Unfortunately, this efficiency cuts two ways; while efficiently producing meat, the industry also efficiently harms farmers and workers, their communities, and the land, air, and water we all rely on.

[1] https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/

Giant meatpacking companies have honed a business model which depresses prices and reaps huge profits by externalizing the costs and risks of its production onto farmers, workers, rural communities, and the environment. The empty grocery shelves caused by the COVID-19 crisis and the supply chain and price disruptions exacerbated by Russia's invasion of Ukraine have made clear, in a way not seen in decades, the need for more resilient regional food systems capable of feeding our nation during times of crisis. Over the past two years, nothing has driven this point home more than the failures of the corporate meat industry. From malware attacks to virus outbreaks to price and wage fixing lawsuits, the meat industry has taught us the same lesson repeatedly: having a highly concentrated meat processing sector makes our food system vulnerable to collapse during a crisis. If there is one crucial lesson to draw from the events of the past two years, it is once again that no single company should be "too big to fail." Redundancy is a key characteristic of resilience: when one component of a system fails, others should be able to fill its function: the more entities available to fill a function, the more resilient the system is. In our food supply chain, corporate consolidation (and the farm consolidation that trend also drives) endangers the resilience of our agricultural supply chains. No single company's continued production or its cessation should endanger the health and wellbeing of huge numbers of people. Sadly, we have already reached this point.

The antitrust lens that has been applied to the agriculture sector over the past 40 years of antitrust enforcement has been woefully shallow in its narrow, national level focus on consumer prices, and the result has been massive downstream harms in the form of thousands upon thousands of lost farms, inequitable environmental harm, and the hollowing out of rural communities throughout the country. It is time that the Federal Trade Commission and Department of Justice reverse course and aggressively enforce fair competition and antitrust laws in ways that protect the bedrock of our food system: our farmers, ranchers, and their communities. We welcome many of the critical questions presented by the FTC and DOJ in this Request for Information, specifically in your agencies' interest in monopsony power and the labor-side effects of corporate concentration. These questions are highly relevant to the concerns of independent and contract livestock producers, who both do not fall under the umbrella of traditional waged labor and are yet impacted by a unique cross-section of the monopsony and labor effects you seek to examine. *Above all, we want to ensure that the FTC and DOJ recognizes and carefully attends to the unique sensitivity of agricultural production to the effects of regional monopsony and oligopsony.*

Themes and Questions

In our comment, we hope to highlight two overarching themes of specific concern to those food system stakeholders who are harmed by the concentrated nature of our nation's food economies. These themes are stated below, along with the corresponding questions within this request for information to which we believe our themes are relevant. Through the case studies and cumulative analysis that follows, we will seek to highlight specific ways that the FTC and DOJ can chart a new course toward food economies that are resilient, fair, and democratized, with footnotes to note relevance to the specific questions highlighted below.

Adopt an Aggressively Holistic Anti-Merger Enforcement Stance
Rather than attempting to apply a narrow analysis of efficiency and national consumer price effects to proposed food system mergers on a case-by-case basis, new merger guidelines should acknowledge that our food economies are already unacceptably concentrated, adopt clear and holistic goals for deconcentrating food economies to an acceptable level of competitive fairness, and presume any proposed mergers to be illegally anti-competitive until fair competition is restored. This theme is relevant to the following questions:

1. Purpose, Harms, and Scope: (b.) What effects should be covered by the term "lessen competition"? (c.) Do the guidelines sufficiently reflect the [Clayton] Act's concern with mergers that "may" substantially lessen competition? (d.) How should the guidelines analyze whether there is a "trend toward concentration in the industry," and what impact should such a trend have on the analysis of an individual transaction? (e.) Do the guidelines sufficiently reflect the observation that assessing the likely effects of a merger "is not the kind of question which is susceptible of a ready and precise answer in most cases"?
5. Presumptions (a.) Do the guidelines adequately identify mergers that are presumptively unlawful under controlling case law? (b.) Does the structural presumption in the guidelines accurately reflect current understanding of the characteristics of mergers that prove to be anticompetitive? Should the guidelines be revised to adjust the stated thresholds, emphasize certain criteria, or include other metrics such as the number of significant competitors as a supplement or alternative to, or even as a replacement for, HHI-based metrics?

Attend to the Unique Vulnerabilities of Farmers and Ranchers to Regional Monopsony
The regional constraints that farmers and ranchers face by virtue of their reliance on long-term land ownership and their production of perishable commodities make them particularly vulnerable to regionalized monopsony power. The permissive nature of merger enforcement policy over the past 40 years has allowed regional monopsony power to become commonplace in food economies, resulting in a wide range of economic, social, and environmental harms. This theme is relevant to the following questions:

3. Coordinated Effects: (b.) Does the guidelines' approach adequately account for the likelihood of coordinated effects in oligopolistic and oligopsonistic market structures? (c.) How have changes in the modern economy affected the incentive and ability of firms to engage in harmful tacit coordination, particularly in oligopolistic and oligopsonistic markets? How

should these changes affect enforcement? (d.) How should the guidelines address the incentive and ability of firms to develop moats around oligopolistic and oligopsonistic market structures by explicit or parallel exclusionary conduct? (e.) Should evidence of conscious parallelism in the relevant market be sufficient to establish that a merger will likely further diminish competition by facilitating oligopolistic post-merger coordination?

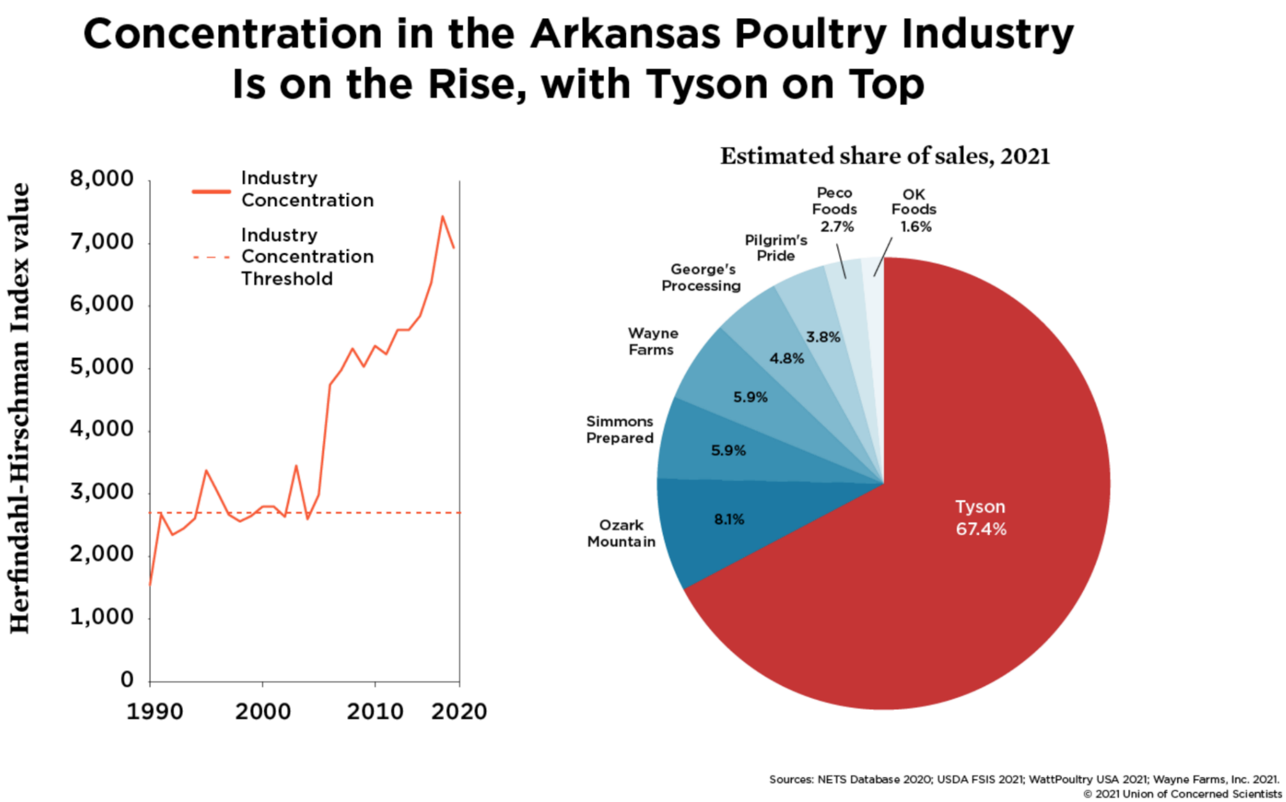
6. Market Definition: (h.) How should markets be defined when the potential harm to competition stems not from the risk of an immediate price increase, but instead from other longer-term or non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers?
9. Monopsony Power and Labor Markets: (b.) How should the guidelines treat a merger that may generate monopsony power, but does not substantially lessen competition in an output market? (c.) Are there specific monopsony situations that the guidelines should address explicitly, such as monopsony power in labor markets? (d.) Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers? (e.) In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider? (g.) In addition to wages, salaries, and other financial compensation, what aspects of workers' terms and conditions of employment should be considered? (h.) How should a labor market be defined in terms of job characteristics, geography, and worker flows? Should the guidelines adopt presumptions around the definition of relevant labor markets based on existing government analyses such as defined commuting zones and labor market areas? How should the guidelines address switching costs and other barriers to changing jobs?

Case Study 1: Arkansas Poultry Industry

Impacts of Regional Monopsony and Tacit Collusion on Contract Poultry Growers

In the wake of last year's acquisition of Sanderson Farms by Cargill/Continental, industry supporters were quick to respond to criticisms of the proposed acquisition by pointing out that the resultant national Herfindahl-Hirschman Index for the U.S. poultry industry would be 1,080,[2] well below the 2,500 HHI threshold over which the FTC and DOJ consider an industry to be highly concentrated.[3] Leaving aside whether the current HHI threshold should be retained, this analysis sidesteps the fact that *regional concentration, rather than national concentration, is the key factor that determines the impact of industry concentration upon farmers and ranchers.* It is vital that any analysis of the impacts of corporate concentration within our food system devote careful attention to regional monopsony power.

A recent report published by the Union of Concerned Scientists[4] on the concentration of the Arkansas poultry industry since the 1980s provides an instructive example of how national consolidation trends in poultry processing are even more pronounced on regional levels. The Arkansas poultry industry is dominated by Tyson Foods, which controls 67% of the state's market today. In 2020, the Arkansas poultry industry had an HHI value of 6,930, and the last time that the sector had an HHI value below the Department of Justice Antitrust Division's 2,500 threshold was in 1994.



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[2] https://www.wattagnet.com/blogs/14-food-safety-and-processing-perspective/post/43457-us-broiler-industry-not-as-concentrated-as-15-years-ago
[3] https://www.justice.gov/atr/herfindahl-hirschman-index
[4] The remainder of this case study heavily relies on the following online report by the Union of Concerned Scientists: "Tyson Spells Trouble for Arkansas," Rebecca Boehm, Published Aug 11, 2021. https://www.ucsusa.org/resources/tyson-spells-trouble#read-online-content

The impacts of this precipitous rise of industry concentration within Arkansas have had profound downstream effects on farm level concentration. UCS found that since 1978, 50% of Arkansas broiler farmers went out of business, even as the state's overall poultry production has more than doubled. The result is a significantly smaller number of very large poultry farms, with their outsized environmental and health impacts, which are increasingly clustered in Arkansas counties with the largest shares of the states' Native American and Hispanic populations.

The regional effects of this high level concentration on poultry growers ability to competitively negotiate their contracts become even more pronounced when analyzed on a county by county level. To understand why this level of regional analysis is necessary, it is vital to understand the practical constraints that limit farmers' ability to negotiate between more than one or two buyers. On average, live chickens are trucked just 34 miles from farms to processing plants to minimize the transportation costs and associated economic losses farmers may incur due to chicken injury or death during transit. This means that the radius within which a poultry grower can practically seek other buyers or contracts is extremely limited, and USDA research shows that "growers facing a single integrator are paid 7–8% less on average."[5] In Arkansas, UCS found that 11 of the state's 14 poultry producing counties had only one integrator available to contract growers, with Tyson being the exclusive option in 7 of those counties. Thus, the vast majority of poultry growers in Arkansas operated within a 100% monopsony environment in practical terms.

In addition to the obvious anti-competitive effects of such monopsony power, the realities of regional agribusiness concentration also create ripe opportunities for tacit collusion between regional players. Over the years that RAFI-USA has spent advocating for contract poultry growers, it has become evident that it is commonplace for such regional monopsonies to operate in conscious parallelism, with integrators refusing to contract with growers in each others' perceived "territory." Thus, even growers that might find themselves within range of more than one processing option must operate functionally under total monopsony, because integrators tacitly collude to limit potential growers' contracting options.

When poultry growers are forced to operate in such monopsonistic markets, with little to no ability to choose between multiple integrators to contract with, their precarity is profound. Knowing that their contract growers' ability to find a different integrator is extremely limited or impossible in such market conditions, integrators like Tyson have free reign to treat growers like they are disposable. In our own decades of organizing poultry growers, RAFI-USA has repeatedly observed integrators coercing growers to accept degraded contract terms or incur further debt loads to finance mandatory infrastructure upgrades though take-it-or-leave-it contract revisions. In cases where growers resist, the lack of competitive options affords dominant integrators the ability to retaliate against resistant growers either in the form of being dropped from their contract, or by delivering poor quality chicks or feed which — because of the tournament payment system[6] — will impact their farm's ability to stay afloat. When poultry growers are cut off or forced underwater, they are left with millions of

[5] https://www.researchgate.net/publication/305948391_Market_Power_in_Poultry_Production_Contracting_Evidence_from_a_Farm_Survey
[6] https://rafi-usa.medium.com/eight-questions-you-might-not-know-you-have-about-the-packers-and-stockyards-act-80b0af5054ea

dollars of debt tied up in specialized, single-function structures which do not have the ability to generate revenue, or contribute to a property's value, in the absence of an active contract. The abandoned poultry houses that litter the rural landscape across the Southeast testify to this pattern.

Key Lessons

- When defining markets in proposed food system mergers, the FTC and DOJ must not neglect to conduct a *region by region* analysis of the potential anti-competitive vulnerabilities and impacts upon regionally constrained farmers and ranchers, especially from monopsony abuses. Farmers and ranchers depend on long-term investment in land and built infrastructure, and cannot simply relocate to access new buyers when facing monopsonistic conditions. When it is assessed that a proposed merger may generate or contribute to a trend toward monopsony power in *any impacted region,* it should be presumed to be anticompetitive and opposed, regardless of whether it may lessen competition in output markets. If we learn anything from the Arkansas poultry experience, it should be that such permissive merger antitrust enforcement may not have resulted in near-term price effects for national consumers — but it did decimate half of Arkansas poultry farms, and that should not have been an acceptable tradeoff. [7]
- The history of merger related antitrust enforcement in relation to the Arkansas poultry industry is a textbook example of enforcement that has ignored the clear spirit of the Clayton Act. That 11 of 14 counties worth of poultry farmers are now operating in a practical 100% monopsony environment is clear evidence that far too many mergers were approved that should have been opposed based on the standard that they "may lessen competition" or would contribute toward a "trend toward concentration in the industry."[8]
- HHI-based metrics are one helpful tool in assessing whether a market is "trending toward concentration," but in this case, the key regional concentration trend was ignored. When considering agribusiness mergers that may affect producers that face hard regional constraints to remaining competitive in the face of monopsony or oligopsony, the FTC and DOJ should oppose mergers that may cause a food system market's HHI to rise above their stated threshold of 2,500[9] *within the relevant region,* and not just nationally.[10]
- The highly regionalized nature of food system concentration, wherein multiple total monopsonies may border one another within a given state, make food system markets highly susceptible to coordinated oligopsonistic effects. The proliferation of algorithmic business intelligence programs within agribusiness industries only compounds and exacerbates this potential. This potential for moat building, tacit coordination, and parallel exclusionary conduct is all well documented and highly prevalent in concentrated agribusiness markets and their potentiality should be centrally considered as potential anticompetitive effects when analyzing proposed mergers in relation to the standards set forth in the Clayton Act. Any evidence of conscious parallelism in a proposed food system merger's market should be

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[7] Relevant to Question 6h, 9b, and 9h.
[8] Relevant to Questions 1b, 1c, 1d, and 5a
[9] Antitrust Division. 2015. Price Fixing, Bid Rigging and Market Allocation Schemes. Washington, DC: Department of Justice. https://www.justice.gov/atr/price-fixing-bid-rigging-and-market-allocation-schemes.
[10] Relevant to Question 5b

sufficient cause to establish that the proposed merger will likely further diminish competition by facilitating oligopolistic post-merger coordination.[11]

- While agricultural producers like contract poultry growers are not a traditional "labor market" in the wage-labor sense, the range of harms that farmers and ranchers can face under monopsony power should receive similar special consideration. The existing merger guidelines do not sufficiently address these harms, and should be reinforced. In the case of contract poultry, integrators are able to arbitrarily hold down grower incomes through poor contract terms that growers have no choice but to take. Major additional signs of an uncompetitive environment should be farm loss trends, prevalence of unfair practice and undue preference violations under the Packers and Stockyards Act, and the degree to which farmers and ranchers are compelled to surrender the independence of their own operation to retain contracts when under threat from monopsony.[12]

[11] Relevant to Questions 3b, 3c, 3d, and 3e
[12] Relevant to Questions 9c, 9d, 9e, and 9g.

Case Study 2: North Carolina Hog Industry

Impacts of Downstream Farm Concentration on Independent Hog Farmers and Frontline Communities

While our examination of the Arkansas poultry industry illustrated how contract producers are impacted by corporate concentration, it is vital to also attend to how independent farmers and ranchers are also impacted by high regional agribusiness consolidation. In this regard, North Carolina's hog industry provides an instructive case study of the adverse downstream effects that runaway corporate concentration can have on the viability of independent and diversified farm viability, racial and environmental equity, and climate resilience.

Before 1980, when Smithfield began its decades long march towards total consolidation within the North Carolina hog industry, hog farming was widely distributed across more than 11,000 farms in nearly every county throughout the state, with the majority (60%) being small diversified farms raising less than 25 hogs annually.[13] These farms had access to a robust array of local auctions at which they could sell their hogs on the spot market. By the year 2000, concentration within the sector had rendered it nearly impossible for such operations to find buyers for their hogs — at that point, the state's only large processing plant, owned by Smithfield, would exclusively buy hogs in 1,000 head lots, with nearly all of its capacity already devoted to processing hogs owned under contract by Smithfield.[14] This effectively squeezed any hog producer unwilling to contract with Smithfield — and transition to a large-scale CAFO model — out of the state's hog industry. Consequently, "from 1989 to 1995, the state saw about 7,000 small hog farmers go out of business, as they were displaced by 700 larger producers with at least 1,000 hogs."[15] Since 2000, concentration within the North Carolina hog industry continued to track with national trends throughout the past two decades. In 2006, Smithfield and Premium Standard Farms agreed to an $810 million merger,[16] leaving Smithfield the sole owner of the only three major pork processing plants in the East — "in Clinton and Tarheel, North Carolina and Smithfield, Virginia" — creating a regional monopsony.[17]

The monopsony effects that unfolded in North Carolina's hog industry are a powerful example of the rampant harm that regional monopsonies can wreak when they escape the scrutiny of an overly national antitrust enforcement focus. Hog production is as regionally anchored and dependent as poultry production: hogs must be sold within a limited time window after having reached market weight before they deteriorate in value, and the farther they must be shipped, the more costs are incurred by producers, whether in dollars, weight loss, or hog mortality.[18] Furthermore, as the major pork corporations consolidated the market, they utilized production contracts that tied hog prices to spot markets in which an ever shrinking number of hogs were sold. Between 1994 and 2016, the

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[13] Furuseth, Owen J. 1997. "Restructuring of Hog Farming in North Carolina : Explosion and Implosion." Professional Geographer 49(4) :397
[14] Bob Edwards, Anthony E. Ladd (2000) ENVIRONMENTAL JUSTICE, SWINE PRODUCTION AND FARM LOSS IN NORTH CAROLINA, Sociological Spectrum, 20:3, 263-290, DOI: 10.1080/027321700405054, 267
[15] Edwards & Ladd, 267
[16] https://www.ncpedia.org/anchor/key-industries-hog-farming
[17] https://ncpolicywatch.com/2020/09/02/court-battle-between-titans-smithfield-and-maxwell-foods-lifts-veil-on-corporate-hog-industry/#:~:text=Smithfield%20owns%20the%20only%20three,hour%20trip%20of%20900%20miles.)
[18] Timothy A. Wise and Sarah E. Trist, "Buyer Power in U.S. Hog Markets: A Critical Review of the Literature" (Medford, MA: Global Development and Environment Institute, 2010), available at http://www.ase.tufts.edu/gdae/Pubs/wp/10-04HogBuyerPower.pdf.

percentage of hogs sold on spot markets fell from 60% to 2%.[19] Andy Green, now Senior Advisor for Fair and Competitive Markets at the USDA, noted in his 2019 Center for American Progress report "A Fair Deal for Farmers" that

> Thin spot markets are more susceptible to price manipulation because the average reported price is more sensitive to any one transaction and to big buyers moving in and out of markets on a weekly basis[20]... There is a sizable body of evidence that shows that pork packers are using their size to exert market power and suppress commodity prices. The most significant study was commissioned by GIPSA and conducted by RTI International.[21] This study, which relied on price data unavailable to the public, found that spot market hog prices varied by as much as 40 percent, and the differences were not fully explained by transportation costs, region, and quality of the product. This variability suggests that these markets are not functioning competitively. In fact, RTI concluded that there was buyer power in live hog markets, though they could not determine whether this market power was derived from the use of contracts. However, RTI International found that an increase of 1 percent in captive supply was associated with a nearly 1 percent decrease in spot market hog prices — a large effect when taking into account the thin margins under which many hog producers operate.[22]

This deterioration of the hog spot market has had a drastic effect on the sales price fraction that hog farmers earn from hogs they produce. According to the National Farmers Union, when American consumers purchased a pound of bacon for $6.49, hog farmers were only earning $1.06 of that overall sale.[23]

Back in North Carolina, the effects of this level of monopsony put crushing pressure on the myriad of small hog farms that had been spread across the state. Smithfield's total domination of the state's hog industry resulted in runaway harms to independent farmers, rural communities, and the environment — and in all cases, communities of color were disproportionately impacted. In 2000, sociologists Bob Edwards and Anthony Ladd analyzed how Smithfield's concentration of North Carolina's hog industry correlated with BIPOC farm loss and environmental racism. They found that as Smithfield drove market concentration of the hog industry, they also drove two parallel trends: the concentration of North Carolina hog farming into large CAFO's that forced thousands of farms out of business, and the disproportionate concentration of both those farm losses and the resultant CAFO and lagoon complex in BIPOC communities:

> Why, in North Carolina, [has] the industry … concentrated in the state's poorest region where the slow-moving, estuarian waterways are more vulnerable to the adverse environmental impacts associated with the waste from more than 10,000,000 swine? … The environmental

[19] Glenn Grimes and Ron Plain, "U.S. Hog Marketing Contract Study" (Columbia, MO: University of Missouri-Columbia, 2009), available at https://ageconsearch.umn.edu/record/92631/files/aewp2009-1.pdf
[20] Grain Inspection, Packers and Stockyards Administration, "Packers and Stockyards Program: 2016 Annual Report."
[21] RTI International, "GIPSA Livestock and Meat Marketing Study, Volume 4: Hog and Pork Industries" (Durham, NC: 2007), available at https://www.gipsa.usda.gov/psp/publication/livemarketstudy/LMMS_Vol_4.pdf.
[22] Green, Andy and Caius Z. Willingham. "A Fair Deal for Farmers." Center for American Progress, 3 Apr. 2019, https://www.americanprogress.org/article/fair-deal-farmers/.
[23] National Farmers Union, "The Farmer's Share," available at https://nfu.org/farmers-share/

> justice issues at stake in the agro-industrialization of swine production and the uneven distribution of farm loss stem in large part from the historical political economy of North Carolina's coastal plain, which has traditionally depended on Black (and poor White) agricultural labor … Eastern North Carolina, the state's most disadvantaged region, has become home to about 95 percent of the state's pork production and thus absorbs the vast majority of whatever negative environmental, economic, or health impacts 10,000,000 hogs bring to the region. Moreover, farm loss has been significantly more pronounced in eastern North Carolina, and increased pork production is directly associated with increased farm loss only within the peripheral and relatively less powerful region of the state …We also found clear evidence that…Black communities, especially those that began the 1980s with higher rates of poverty, have experienced more farm loss since than counties with larger White populations.[24]

Fast forward to the present day, and you will find a North Carolina in which failed antitrust enforcement has allowed Smithfield to externalize its costs, while driving smaller independent processors out of business by limiting the amount of animals the small processors can secure for processing. With the vast majority of hogs being grown under contract, large meatpacking companies have control over the volume that comes to small processors.

> Most of us — we were able to kill a lot of hogs, but once [the large meatpacker] decided to only let us have the 200 pound pigs and down or the 190 pound pigs and down instead of the 250 pound pigs and down — even the barbeque pigs, a 50 lb pig we made money off of, they'd just dig a hole and kill them. Wouldn't even let them into the market. They controlled what the little guys do." - *Former North Carolina Processor*

These same corporations are also able to depress prices for farmers.

> You can tell the major players — you have producers who come in [to the stockyard] who are the guys who own the packing companies. They have trucks there, will buy the pigs, will buy them cheap and process them. [They] will buy all the pigs. Then anything under 200-300 pounds for processing, they'll buy them for cheap." - *North Carolina Independent Hog Farmer*

There are a multitude of farmers or would-be farmers that want to feed and support their local communities through regional supply chains that are independent of the massive meatpackers influence. However, concentration in the processing sector is largely preventing them from doing so. The decades-long vertical takeover of the supply chain by large corporations like Smithfield has hollowed out the infrastructure that would enable small farmers and processors to thrive. It has also created a chicken-and-egg situation in which farmers need more processing options, but new processors may struggle to find sufficient supply from local farmers to attain the volume they need for profitability. Both need more markets, and struggle to compete in a system that gives giant companies the edge both in terms of economies of scale and ruthless externalization of costs. The playing field is nowhere close to even.

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[24] Edwards & Ladd, 284-285

Key Lessons

- The history of the concentration of North Carolina's hog market presents a prime example of how the relevant markets and effects associated with proposed mergers can be conceptualized too narrowly. By removing hog production as an income stream from thousands of diversified North Carolina farms, permissive merger regulatory enforcement enabled catastrophic farm loss, and catalyzed the concentration of large CAFO's with their associated environmental injustices within the state. Smithfield's resultant monopsony had the power to stifle innovation around waste management in favor of their harmful lagoon/sprayfield system[25] and raised prohibitively high barriers to new entrants seeking to raise hogs outside of Smithfield's contracting operations due to their decimation of auction and processing options in the state.[26]
- Specifically, the history of North Carolina's hog industry's consolidation foregrounds a similar lesson to that of the history of Arkansas's poultry industry: that the FTC and DOJ should analyze potential impacts on all farmers and ranchers that might potentially be negatively impacted, just as they would analyze potential labor effects. While in the case of contract poultry, the status of contract growers and waged labor are more analogous, in North Carolina's case, the lesson to be learned is that hog industry consolidation impacted a wide variety of farms beyond those who would be classified as primarily hog producers. The FTC and DOJ should thus analyze the potential anticompetitive effects of all farmers impacted by the regional supply chains in question, irrespective of contract status or production volume.[27]
- This case study also points to the need for a holistic range of new metrics that should be considered alongside HHI-based metrics. The regional industry concentration that was permitted in North Carolina has driven massive environmental harms, and has disproportionately impacted communities of color. From the establishment of the state's Clean Water Responsibility Act CAFO moratorium to the fallout of Hurricane Floyd in 1999, these trends were already well established when an $810 million merger between Smithfield Foods and Premium Standard Farms was approved. Thus, in addition to directing attention at mergers that may contribute to a "trend toward concentration in an industry," the FTC and DOJ should establish metrics that enable assessment of whether mergers may contribute trends toward significant environmental harms and/or racial inequities.[28]
- More broadly, the oligopsony allowed in the hog industry by antitrust regulators on a national level destroyed the U.S. hog spot market, which eliminated fair price discovery in hog markets and curtailed access to regional auctions and processing for any farmers not willing to enter into contracts with a major integrator. The loss of this "ag of the middle" restricts sale opportunities for these farmers to direct-to-consumer marketing, which makes the incorporation of hogs into smaller diversified farming systems more complicated and expensive.[29]

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[25] https://www.propublica.org/article/a-hog-waste-agreement-lacked-teeth-and-some-north-carolinians-say-left-to-suffer
[26] Relevant to Question 6h.
[27] Relevant to Questions 9d, 9e, 9g, and 9h
[28] Relevant to Question 1d and 5b
[29] Relevant to Question 9b and 9c

Concluding Recommendations

In 1963, the U.S. Supreme Court blocked a proposed merger between Philadelphia National Bank and Girard Trust Corn Exchange Bank in the landmark case *United States v. Philadelphia National Bank.* Had the two banks been allowed to merge, the resultant entity would have controlled around 35% of the Philadelphia metropolitan area's total bank assets, consumer deposits, and loans, and the top two banks in the area would have controlled just under 60% of the same.[30] The Supreme Court ruled that the two banks' growth was attributable to an existing trend of consolidation driven by their previous acquisitions and that the resulting market shares and regional oligopoly presented an anticompetitive threat. In his opinion, Justice Brennan argued:

> Intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration...The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.[31]

The precedent that Justice Brennan set in this opinion should instruct and inspire a new approach to antitrust enforcement by the FTC and DOJ with regards to our nation's food economies. The Supreme Court devoted attention to regional impacts, did not get bogged down in overly granular analysis of price effects, and did not require an overly heavy burden of proof. Instead, it prioritized the clear spirit of the Clayton Act — to aggressively respond to the *potential* of competition erosion — and acted decisively to protect those who could be harmed. The anticompetitive trends experienced by the farmers and ranchers featured in the case studies we have presented are both analogous to and more extreme than those forestalled by *United States v. Philadelphia National Bank.* While the effects that farmers and ranchers face are regionally monopsonistic and nationally oligopsonistic, like in Philadelphia, the anticompetitive trends that they contend with are highly regionalized, and as our case studies demonstrate, are often much more extreme.

The FTC and DOJ were given a clear mandate by the Sherman, Clayton, and Federal Trade Commission Acts to block the formation of and deconstruct existing political and economic oligarchies in pursuit of protecting the public from corporations that abuse their power to stifle fair markets, rig the rules in their favor, and subvert the functionality of our democracy. For nearly half a

[30] Phil. Nat'l Bank, 374 U.S. at 363-364
[31] Phil. Nat'l Bank, 374 U.S. at 363-364

century, the dominance of the narrow consumer welfare standard[32] prevalent in federal antitrust enforcement has created a permissive environment for corporations to amass an unacceptable degree of economic and political power. This permissive environment has given the dominant corporations in the food system free reign to horizontally concentrate their industries into oligopolies and oligopsonies, vertically integrate, consolidate, and hollow out their supply chains, suppress the wages available to workers and the prices available to farmers and ranchers, redirect productivity gains into their own corporate profit coffers, and retaliate against anyone who seeks to organize against them. In allowing this, the federal government has harmed the public broadly, and farmers and ranchers and their rural communities specifically, by allowing these corporations to drive catastrophic farm losses and leave our food supply chains so brittle through underinvestment that our food system is left without the resilience to withstand crisis.

It is time for the FTC and DOJ to change course. For years, regulators have attempted to analyze proposed mergers and acquisitions in the food system with a lens that was too nationally shallow and technically granular to prevent the real harms they were commissioned to guard against: an oligarchic food system that holds farmers and ranchers captive within highly effective regionalized monopsonies and exploits the public through national and implicitly coordinated oligopoly. There is no doubt that the FTC and DOJ have, over the years, attempted to assess, with the data then available to them, the competitive effects of many of the mergers that have led us to this point. However, the stated purpose of the Clayton Act is to render illegal mergers whose effects “may be substantially to lessen competition, or to tend to create a monopoly.” The words “may'' and “tend” should be considered heavily meaningful here. The FTC and DOJ have unnecessarily required regulators to attain a higher degree of certainty about the specific predicted effects of proposed mergers than the Clayton act requires in its text.

History has now provided us with more data. Through the case studies we have presented, we have attempted to allow history to give voice to the rampant harms that this permissive federal antitrust regime has enabled. That history makes it clear that the degree of concentration that has been allowed has more than “tended” to “substantially lessen” fair competition for farmers and ranchers. Now it is necessary for the FTC and DOJ to question old assumptions, adopt a new lens on antitrust enforcement that is informed by the last half century of history, and use their authority under existing law to conduct aggressive retrospective reviews of any past mergers that have tended to lessen competitive fairness or have resulted in harms for farmers, ranchers, food system workers, their rural communities, and the land, air, and water they need for life.

Sincerely,

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[32] As described by the Supreme of the United States in Reiter v. Sonotone Corp., 442 U.S. 330 (1979)