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Small Town, Big Rules: Leveraging Hart-Scott-Rodino to Protect Local Markets

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INTRODUCTION

In an era of deep political divides, one issue is gaining cachet across party lines: the need to protect and empower local communities through antitrust laws.[1] Meanwhile, legal scholarship is demonstrating that the original intent of the antitrust laws was, at least in part, localist—that is, antitrust enforcement should protect small businesses from being outcompeted by large corporations, promote local ownership, and encourage community involvement in economic planning.[2] And, as evidenced by its February 2024 challenge to the Kroger-Albertsons merger, the Federal Trade Commission's (the "FTC") appetite for blocking mergers to protect local communities is increasing as well.

However, the FTC has not yet pursued this localist justification to its fullest extent, and legislative dysfunction makes it improbable that Congress will enact new antitrust laws in the near future,[3] much less laws specifically implicating localist concerns. With this in mind, this Essay aims to outline a regulation that effectively leverages the FTC's broad rulemaking authority to regulate competition in service of localism in a manner that places no outsized burden on the FTC, aligns with the FTC's broader objective of fostering competitive markets, and is effective—not a mere line easily overcome by corporations.

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1. *See* Nicholas Short, Sophie Hill & Jacob R. Brown, What Is Ideological Capture and How Do We Measure It?: Using Antitrust Reform to Understand Expert-Public Cleavages 23-24 (May 31, 2024) (unpublished manuscript), https://nick-short.com/wp-content/uploads/2024/05/Short-Hill-and-Brown-What-is-Ideological-Capture.pdf [https://perma.cc/NA2T-BSR5] (providing polling data that Republicans and Democrats agree that antitrust merger policies should consider local community interests); Jonathan Baker, *Finding Common Ground Among Antitrust Reformers*, 84 ANTITRUST L.J. 705, 750 (2022) (noting that the neo-Brandeisian school and the post-Chicagoan school both agree that enforcement attention should identify harms to small businesses).

2. *See* Basel J. Musharbash & Daniel A. Hanley, Toward a Merger Enforcement Policy that Enforces the Law: The Original Meaning and Purpose of Section 7 of the Clayton Act 78-79 (Aug. 1, 2024) (unpublished manuscript), https://ssrn.com/abstract=4745310 [https://perma.cc/29PC-D7S4].

3. *See* Brad Stone, *The Bipartisan Big Tech Antitrust Bill Falls Victim to Political Gridlock*, BLOOMBERG (Aug. 22, 2022), https://www.bloomberg.com/news/newsletters/2022-08-22/tech-antitrust-bill-from-klobuchar-grassley-gets-stuck-in-dc-limbo [https://perma.cc/7Z3K-YWRH].

The FTC's merger review process provides the best avenue to achieve this goal. Not only does it allow the FTC to review mergers before they irreversibly change local markets, but it is also practical because the FTC has broad discretion over the structure of its premerger notification process. Accordingly, this Essay will discuss two possible innovations to the FTC's merger review process that would allow it to identify and resolve antitrust problems within local communities.

First, the FTC could change the *depth* of information it requires regarding localized impacts (e.g., information segmented by neighborhood). Second, the FTC could change the *breadth* of information it requires (e.g., localized premerger pricing strategies). These proposed changes would transfer much of the administrative burden to corporations, promote local competition, and facilitate bringing more challenges like the Kroger-Albertsons complaint against mergers that harm local communities.

I. THE MERGER REVIEW PROCESS TODAY

The FTC's merger review process can be a powerful weapon when wielded effectively. Because it is frequently impossible to "unscramble" an illegal merger, the FTC is authorized to review mergers for their anticompetitive effects before they are consummated.[4] While Section 7 of the Clayton Act governs substantive merger law,[5] the Hart-Scott-Rodino ("HSR") Act provides the procedural framework of the merger review process. The HSR Act requires prospective merging companies above a certain size to notify the government of their intention to merge before closing the deal through a "premerger notification form."[6] Although the HSR Act allows antitrust enforcement agencies to review mergers ex ante, it does not provide them the ability to directly block the merger. Instead, the agency (typically the FTC) must either negotiate a settlement between the merging parties or seek a court injunction to stop the deal.[7]

The HSR premerger notification form's Item 4(c) already requires that merging companies provide "all studies, surveys, analyses and reports" prepared by a company for the purpose of evaluating an acquisition with

4. *See* Andrew G. Howell, Note, *Why Premerger Review Needed Reform—And Still Does*, 43 WM. & MARY L. REV. 1703, 1714-15 (2002) (describing the legislative impetus behind the Hart-Scott-Rodino Act).

5. 15 U.S.C. § 18 (2018).

6. *Id.* § 18a.

7. *See id.* §§ 25, 53.

respect to "market shares, competition, competitors, markets, [and] potential for sales growth or expansion into product or geographic markets" to the evaluating agency.[8] Furthermore, the HSR form's Item 7(c) requires a company to disclose information about the relevant geographic markets in which it operates.[9]

But this is not enough to protect localist concerns. Companies must provide their own internal analyses of their local market share *only if* they were used in the course of conducting a merger.[10] These internal analyses were instrumental in challenging the supermarket chain Kroger-Albertsons merger. Given that supermarket competition primarily takes place at the local level, the merging companies' internal documents focused their competitive analysis on "a radius of several miles around each store."[11] In similar cases where the merging entities have not considered this impact, the FTC would be left in the dark.

Nowhere is this clearer than in labor markets. Given that labor markets are fair game for antitrust law, even at the conservative Roberts Court,[12] enforcement agencies are beginning to bring more complaints on labor theories of antitrust.[13] Corporations are unlikely to analyze their

8. 16 C.F.R. pt. 803, app. B (2024).

9. *Id.*

10. *Id.*

11. Complaint at 20, *In re* Kroger Co., No. D-9428 (F.T.C. Feb. 26, 2024) [hereinafter Kroger-Albertsons Complaint].

12. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 108-09 (Kavanaugh, J., concurring).

13. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES § 2.10 (2023) ("The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms."); *see also, e.g.*, Complaint at 17, United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1 (D.D.C. 2022) (No. 21-2886-FYP) [hereinafter Penguin Random House Complaint] ("The head-to-head competition between Defendants has allowed authors of anticipated top-selling books to secure higher advances and other favorable terms."); Kroger-Albertsons Complaint, *supra* note 11, at 15 ("The proposed acquisition would eliminate [union-labor] competition, likely leading to lower wages and reduced benefits, opportunities, and quality of workplace conditions and protections for thousands of Respondents' employees. . . . Union grocery labor is a relevant market in which to analyze the probable effects of the proposed acquisition.").

acquisitions' impact on worker welfare when they merge. This creates a dilemma for enforcement agencies that seek to ensure fairness in local labor competition. To ensure the fair disposition of HSR forms, the FTC will need more information when it believes that the labor market might be impacted—but corporations need not provide them any information on the impact unless the corporation has itself considered it. Sometimes, these situations are obvious—like when Penguin Random House applies to merge with Simon & Schuster, thus cornering the market for authors.[14] But that is not common. The FTC needs more information to properly protect worker welfare in local communities.

True, Item 7(c)'s requirements do provide the FTC with information about the geographic market in which the merging companies operate. But these geographic markets can be misleading.[15] State-level and even city-level data do not tell the whole story in many industries, from retail grocery to healthcare to education. If a monopolist retail grocer's workforce goes on strike, for instance, entire neighborhoods may be subject to a food desert. Only localized geographic data can ensure that the FTC remains alert to these dangers in the enforcement process.

II. PROPOSALS TO BOLSTER THE MERGER REVIEW PROCESS

A. Require Companies to Provide Data that Allows the FTC to Review a Merger's Impact on Local Communities

The FTC should consider enhancing the depth of information it receives during the premerger notification process by requiring that prospective merging companies submit information regarding their impact on localized markets. This requirement would provide the FTC with insights tailored to assessing how mergers and acquisitions could potentially monopolize *specific* local communities—either through stifling competition in the goods or labor markets or through decreasing consumer choice. The HSR Act gives considerable discretion to the FTC in determining how to structure the premerger notification process. The FTC's mandate extends to requiring that the premerger notification "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition

14. Penguin Random House Complaint, *supra* note 13, at 17.

15. *See* Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717, 1750-53 (2022).

may . . . violate the antitrust laws."[16] The FTC may thus require companies to submit data in a form that antitrust enforcers are better able to use.

Although the FTC collects certain latitude-longitude information, numerous other geographic delineations could be more beneficial to the FTC than this raw data.[17] For example, in 1980, the United States Department of Agriculture's Economic Research Service released "Commuting Zones," which are meant to identify the local economies where people live and work.[18] Commuting Zones are more focused on the connectivity of rural places than most other regionalizations, partly because they include smaller and more remote locations.[19] Although they are meant to measure labor markets, Commuting Zones have been used to measure localized markets for healthcare[20] and energy.[21] In fact, the FTC has considered using them to evaluate labor competition.[22] The FTC can require that, before submitting the HSR form, companies themselves process their data—whether this be the number of facilities, revenue, labor costs, or even

16. 15 U.S.C. § 18a(d)(1) (2018).

17. *See generally* Christopher S. Fowler & Leif Jensen, *Bridging the Gap Between Geographic Concept and the Data We Have: The Case of Labor Markets in the USA*, 52 ENV'T & PLAN. A: ECON. & SPACE 1395 (2020). The data that Fowler & Jensen use are available at *Data*, PENN. STATE UNIV.: LABOR-SHEDS FOR REG'L ANALYSIS, https://sites.psu.edu/psucz/data [https://perma.cc/869S-YA5U].

18. *Commuting Zones and Labor Market Areas*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas [https://perma.cc/3H5V-P6TZ] (Mar. 26, 2019). Although the Economic Research Service last updated the Commuting Zones in 2000, researchers have updated them more recently. *See*, *e.g.*, Christopher S. Fowler, Danielle C. Rhubart & Leif Jensen, *Reassessing and Revising Commuting Zones for 2010: History, Assessment, and Updates for U.S. 'Labor-Sheds' 1990–2010*, 35 POPULATION RSCH. & POL'Y REV. 263 (2016); Christopher S. Fowler, *New Commuting Zone Delineation for the U.S. Based on 2020 Data*, SCI. DATA (Sept. 6, 2024), https://www.nature.com/articles/s41597-024-03829-5 [https://perma.cc/4W2P-MEMG].

19. Fowler & Jensen, *supra* note 17, at 1397.

20. *See* Craig Garthwaite, Tal Gross & Matthew J. Notowidigdo, *Hospitals as Insurers of Last Resort*, AM. ECON. J.: APPLIED ECON., Jan. 2018, at 1, 3.

21. *See* Daniel Kraynak, *The Local Economic and Welfare Consequences of Demand Shocks for Coal Country* 8 (Nov. 2023) (unpublished manuscript), https://ssrn.com/abstract=4283327 [https://perma.cc/3KFY-243T].

22. *See* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42185 (proposed June 29, 2023).

supplier diversity—using Commuting Zones. This would allow the FTC to shift its limited resources from further processing the data provided to them by these large companies—who, frankly, have the capacity to process it themselves—towards closer scrutiny or more speedy processing. This would also allow companies whose mergers do not pose a substantial threat to competition to more readily prove their innocuousness.

But this can get tricky. Take, for example, Pharmacy A, a chain of 1,000 stores on the West Coast. Pharmacy A is looking to expand and buys Pharmacy B, a chain of 1,000 stores on the East Coast. Let's presume that this merger is *completely* fine—it does not meaningfully impact prices or wages in local markets. It also does not impact local autonomy or control: Pharmacy B was run out of New York City; its stores in Alpharetta, Georgia, were never locally owned. In Pharmacy A's first HSR request, it should not have to face the burden of submitting information and analyses for two thousand markets.

There are two ways that the FTC could assuage this burden. First, not all industries would be subject to this type of disclosure. The FTC already has a list of industries from whom localized data would be more helpful in evaluating mergers, ostensibly because previous antitrust concerns have been raised in similar mergers.[23] This does some preliminary, if rudimentary, risk-based screening. But a pharmacy merger would immediately be suspect under this line of scrutiny, so this would not do much good for Pharmacy A.

Second, the FTC could establish threshold criteria that trigger the need for a detailed local market analysis. For example, if the combined market share of the merging companies in any localized market exceeds a certain percentage (e.g., forty percent), a more detailed submission would be required for *that* market. Only after determining that, for instance, Pharmacy A and Pharmacy B would have an outsized market share in the Atlanta metropolitan area would a more granular neighborhood-level analysis be necessary. Furthermore, the FTC might require that a merging company provide information specifically on communities that history has taught are especially vulnerable to merger costs, such as low-income urban neighborhoods and remote rural communities,[24] so that no market is left

23. *See id.* at 42201.

24. *See* Leslie, *supra* note 15, at 1719-20. The impact of race in antitrust law is certainly important, but it is unclear whether the FTC has the power to engage in race-conscious antitrust enforcement. Thus, I focus on race-neutral antitrust enforcement, which would likely have downstream effects on racial inequality in, for instance, access to food.

behind. Thus, a pharmacy with 2,000 stores would probably only have to submit information for a few of the markets it will operate in.

Another idea is that the FTC could pursue some form of sampling approach. Instead of analyzing all 2,000 markets, the FTC could request a representative sample of markets (both geographic and by market type), whereby it could assess potential impact without requiring exhaustive data on every single market. The primary issues here are that it is unclear what a representative sample would look like, and it is also unclear how the FTC would be able to trust that the data provided by a company is representative of the markets that it is planning to enter. Perhaps a random sample of markets would be best here, coupled with further requests when a merging company is moving into a historically vulnerable market.

B. Require Companies to Provide Additional Data Regarding a Merger's Impact on Local Communities

The FTC should also consider targeting the breadth of information it receives during the premerger notification process by requiring that merging companies submit additional metrics for evaluating the local market impacts of proposed mergers. Here, the FTC could get creative. Take, for instance, pricing strategies in local markets. Imagine three pharmacy chains with stores in Baltimore. Pharmacy A primarily operates in low-income, majority-Black neighborhoods; Pharmacy B operates in middle-income university neighborhoods; and Pharmacy C operates throughout the city. Pharmacy C applies with the FTC to buy out Pharmacy A for reasons unrelated to their competition in Baltimore. Pharmacy C would still be required to submit any of its Maryland office's internal analyses that discuss strategies to compete with either Pharmacy A or Pharmacy B—even if these analyses were not reviewed as part of the merger. This requirement might allow the FTC to drill down on any expected changes due to the merger if it believes that the merger might be litigated. And even if the FTC does not view blocking this merger as a beneficial use of resources, it can refer it to the Maryland Attorney General's Office for closer analysis. Requiring that this information be provided early would be instrumental in ensuring the speedy disposition of merger applications, as the HSR Act intended.

C. Challenges

Given that these modifications would bring more mergers under FTC scrutiny, the agency should expect some legal challenges to this new regime. First, some have argued that the HSR Act does not provide the FTC unlimited

discretion in determining the premerger notification guidelines.[25] As it stands today, "necessary and appropriate" authority—the type of authority that the HSR Act grants—is a capacious grant of authority.[26] But it may still require that the FTC consider the costs of compliance weighed against the benefits of providing this information.[27] If companies find providing this information to be burdensome, this could present a challenge to the FTC's rulemaking authority.

There are two responses to the problem of compliance costs. First, the comment period required by the Administrative Procedure Act should allow companies to air their grievances and suggest alternative measures that could lighten the burden of providing this information.[28] Second, many companies already process the information that the FTC would require.[29] They simply do not yet provide it to the FTC during the premerger notification process.

Given the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[30] some have worried that courts may limit the FTC's rulemaking authority. Overturning *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[31] *Loper Bright* now requires that courts exercise "independent judgment in determining the meaning of statutory provisions."[32] Even if *Loper Bright* limits the FTC—and many are skeptical that the decision will have such an impact on antitrust enforcement as its regulatory framework largely predates *Chevron*[33]—this is probably not an important concern for

25. *See* Justin (Gus) Hurwitz, *Premerger Notification Proposal Faces a Rocky Path*, REGUL. REV. (Aug. 28, 2023), https://www.theregreview.org/2023/08/28/hurwitz-premerger-notification-proposal-faces-a-rocky-path [https://perma.cc/EJX9-YN98].

26. Michigan v. EPA, 576 U.S. 743, 752 (2015).

27. *See id.* at 759.

28. 5 U.S.C. § 553 (2018).

29. Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42201 (proposed June 29, 2023) ("[B]usinesses often track sales at the local level in the ordinary course of business for these sectors.").

30. 144 S. Ct. 2244 (2024).

31. 467 U.S. 837 (1984).

32. 144 S. Ct. at 2262.

33. *See, e.g.*, Fred Ashton, Loper Bright *and the FTC*, AM. ACTION F. (July 24, 2024), https://www.americanactionforum.org/insight/loper-bright-and-the-ftc [https://perma.cc/NPY8-PMSC] ("Courts have sparingly applied *Chevron* to matters of competition and antitrust.").

this set of proposals. Although some, in predicting *Loper Bright*'s influence on the FTC, have noted that the most recent challenge to an FTC rule promulgated under the HSR Act cited *Chevron*,[34] the court's reasoning was not cabined to *Chevron* deference. In *Pharmaceutical Research and Manufacturers of America v. FTC*, the D.C. Circuit considered a challenge to a rule requiring pharmaceutical manufacturers to report their patent rights.[35] In finding that the FTC had such authority, it relied on affirmative expressions of legislative intent to show that the Commission's regulation was congruent with Congress's goals of ensuring that the antitrust laws could be enforced prophylactically.[36] As the district court in that case found, the legislative history showed only Congress's concern that *small businesses* not be burdened by the notification process.[37]

This argument is even more powerful with these proposed regulations. If prophylaxis was the primary goal of Congress in passing the HSR Act, as the literature contends,[38] then it becomes difficult to argue that Congress' *explicit* grant of authority in the HSR Act does not empower the FTC to collect data "in such form" as it chooses.[39] Congress was most concerned with the burden on *the agencies*, not the burden on business and, in fact, rejected an amendment considering the burden of producing documents.[40] Given that this Essay's proposed regulations also hope to "improve enforcement efficacy and save resources wasted in post-merger

34. Leon B. Greenfield et al., *Antitrust Updates: The FTC's Non-Compete Rule and the Impact of* Loper Bright *on Federal Antitrust Enforcement*, WILMERHALE (July 8, 2024), https://www.wilmerhale.com/insights/client-alerts/20240708-antitrust-updates-the-ftcs-noncompete-rule-and-the-impact-of-loper-bright-on-federal-antitrust-enforcement [https://perma.cc/GD2Y-8QYZ].

35. Pharm. Rsch. & Mfrs. of Am. v. FTC, 790 F.3d 198, 200 (D.C. Cir. 2015).

36. *Id*. at 206.

37. Pharm. Rsch. & Mfrs. of Am. v. FTC, 44 F. Supp. 3d 95, 119-22 (D.D.C. 2014).

38. *See, e.g.*, Earl W. Kintner, Joseph P. Griffin & David B. Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 5 (1977) ("[The HSR Act] was a direct response to the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Union Oil Co.*, holding that under the [Antitrust Civil Process Act of 1962], the Justice Department could not use its [power to issue civil investigative demands] to investigate a proposed but unconsummated merger or acquisition." (footnote omitted)).

39. 15 U.S.C. § 18a(d)(1) (2018).

40. Kintner, Griffin & Goldston, *supra* note 38, at 14 & n.82.

enforcement proceedings" by providing more data earlier,[41] a challenge to the FTC's authority to promulgate a rule seems destined to fail even under *Loper Bright*.

The FTC may also expect a challenge to the proposed rule as arbitrary and capricious under the Administrative Procedure Act.[42] But a rule is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider."[43] The arbitrary-and-capricious standard cannot be used to impose the Chicago School belief that only consumer welfare should motivate antitrust enforcement because, whatever one's view on whether antitrust enforcement *should* consider local markets, Congress certainly evinced some intent that it should. In providing the FTC with the authority to tailor the premerger notification process to enforce the antitrust laws, the HSR Act allows the FTC to request localized information.

CONCLUSION

The renewal of antitrust localism has excited many policymakers working in the field. With this resurgence in mind, this Essay has proposed two reforms to the FTC's premerger review process that leverage the agency's existing authority to promote local competition without placing an undue administrative burden on the already outgunned agency. These proposed reforms would shift the burden to corporations, strengthen local competition, and support future challenges to mergers that harm local markets. As mergers from supermarkets to hospitals continue to impact local communities for the worse, the need for such reforms is becoming all the more obvious.

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41. *Pharm. Research & Mfrs.*, 790 F.3d at 206 (citing H.R. REP. NO. 94-1373, at 8-10 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2637, 2640).

42. *See, e.g.*, Am. Hosp. Ass'n, Comment Letter on Proposed Rule on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules (Sept. 5, 2023), https://www.regulations.gov/comment/FTC-2023-0040-0606 [https://perma.cc/9P2A-TJ3J] (expressing opposition to a proposed change in premerger notification requirements on the grounds that "it is an arbitrary and capricious regulation"); Tomer D. Elkayam, *Federal Trade Commission Proposed Rules Shake Up M&A Market*, LOY. U. CHI.: INSIDE COMPLIANCE (Sept. 28, 2023), https://blogs.luc.edu/compliance/?p=5542 [https://perma.cc/S8BL-FRHB] (discussing the same objection).

43. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).