Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets

May 15, 2020

Pursuant to the Committee's request for information to aid its inquiry concerning the state of existing antitrust laws, we offer the following joint submission:

We are economists, legal scholars, and practitioners—focused on antitrust law, economics, and policy—who believe in maintaining healthy markets and well-functioning antitrust institutions. We value the important role of antitrust as the "Magna Carta of free enterprise," which sets the rules that govern how firms compete against one another in our modern economy. Many of us have served in antitrust enforcement agencies. Each of us believes it is vital that the antitrust laws promote competitive markets, innovation, and productivity by deterring anticompetitive conduct throughout our economy, including in digital markets.

We write because the modern antitrust debate has become characterized by sustained attacks on the integrity of antitrust institutions and by unsubstantiated dismissals of debate. This atmosphere has led to a variety of proposals for radical changes to the antitrust laws and their enforcement that we believe are unsupported by the evidence, counterproductive to promoting competition and consumer welfare, and offered with an unwarranted degree of certainty.

Vigorous debate and disagreement have long been a hallmark of antitrust scholarship and policy. Competition policy has been formed through an iterative process echoed in the courts' evolving doctrine over more than a century.[1] Today, however, efforts to sidestep the discussion, or to declare it over, and to force hasty and far-reaching changes have come to the fore. These proposals are numerous and include: (1) abandoning the consumer welfare standard;[2] (2) overturning unanimous and supermajority judicial precedents, which are foundational to modern antitrust law;[3] (3) imposing obsolete and arbitrary market share tests to determine the legality of mergers;[4] (4) shifting the burden of proof from plaintiffs to defendants to render large swaths of business behavior

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[1] *See, e.g.*, William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 477 (2003) ("The story of modern U.S. federal enforcement has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.").

[2] *See, e.g.*, Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" in Practice*, CPI ANTITRUST CHRONICLE (2018); Marshall Steinbaum & Maurice Stucke, *The Effective Competition Standard–A New Standard for Antitrust*, 86 U. CHI. L. REV. 595 (2019); Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 4 YALE L.J. FORUM 980 (2018); *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition, and Consumer Rights of the S. Comm. on the Judiciary* 114th Cong. (Dec. 13, 2017) (testimony of Barry Lynn, Exec. Director, Open Markets Inst.).

[3] *See, e.g.*, Jonathan B. Baker, et al., *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 30, 2020) [hereinafter Equitable Growth Letter]; Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong. §4 (2020).

[4] *See, e.g.*, Merger Enforcement Improvement Act, S.306 (2019); *see also* Open Markets Inst., et al., *The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines*, OPEN MARKETS INST. (Feb. 26, 2020).

presumptively unlawful;[5] (5) creating another federal regulator to oversee competition in digital markets;[6] (6) breaking up major tech companies or their products without evidence of antitrust harm or that the remedy would make consumers better off;[7] and (7) imposing a general prohibition on all mergers either involving specific firms or during the current health crisis.[8]

Such proposals would abandon the legal and political traditions that helped transform antitrust from an unprincipled and incoherent body of law, marred by internal contradictions, into a workable system that contributes positively to American competitiveness and consumer welfare. It should be noted that we use the term "consumer welfare" throughout this letter, consistent with modern parlance about competition policy, to include the benefits of competition to the welfare of workers and other input suppliers, as well as consumers. Thus, the consumer welfare standard is not a narrowly circumscribed objective, but rather a prescription for the general social wellbeing generated by the competitive process. By contrast, many of the current proposals would (1) undermine the rule of law; (2) undo the healthy evolution of antitrust law in the courts over time; (3) require antitrust agencies to micromanage the economy by picking winners and losers; (4) abandon a focus on consumer welfare in favor of vague and politically-oriented goals; and (5) undermine successful American businesses and their competitiveness in the global economy at the worst-imaginable time.

The assertions about the state of antitrust law and policy that purportedly justify these radical changes are not supported by the evidence. A more accurate reading of the evidence supports the following view of the American economy and the role of antitrust law:

1. ***The American economy—including the digital sector—is competitive, innovative, and serves consumers well.*** Debate about whether the antitrust laws should be fundamentally re-written originated from a concern that markets have recently become more concentrated and that competition had decreased as a result. The popular narrative, that increases in concentration have caused harm to competition throughout the economy, does not withstand close scrutiny. In reality, most markets in the American economy—including digital markets—are competitive, and thriving, and create huge benefits for consumers.

2. ***Structural changes in the economy have resulted from increased competition.*** The economic data show that *intense* competition, winner-take-all rivalry, and the adoption of new successful technologies in relevant antitrust markets were major economic forces that led to structural changes (*i.e.*, increased national-level concentration) in the economy. The existence of these structural changes does not itself support changes in the law.

3. ***Lax antitrust enforcement has not allowed systematic increases in market power.*** There is little evidence to support the view that anemic antitrust enforcement has led to a systematic rise in

[5] Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong. §4 (2020).

[6] STIGLER COMM. ON DIG. PLATFORMS, STIGLER CTR., FINAL REPORT (2019).

[7] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019).

[8] On April 28, 2020, Sen. Warren and Rep. Ocasio-Cortez announced the "Pandemic Anti-Monopoly Act." *See also id.*

market power in the American economy. The evidence is especially weak as it relates to digital markets.

4. ***Existing antitrust law is adequate for protecting competition in the modern economy.*** Antitrust law has developed incrementally through the common law approach. A strength of antitrust law is that it can incorporate learning about new business practices and economics to protect competition in an evolving economy. The existing antitrust laws and enforcement framework, when correctly applied, are more than adequate to deter anticompetitive conduct today, including in new and growing digital markets.

5. ***History teaches that discarding the modern approach to antitrust would harm consumers.*** Many of the radical reforms being proposed today seek to return antitrust to what it was in the 1960s. But antitrust during that time was based primarily on *per se* rules that prohibited economic analysis and fact-based defenses. This created a body of law, fundamentally marred by internal contradiction, that frequently protected individual competitors over consumers and did not focus on the central goal of protecting competition. Congress has considered and rejected radical proposals to overhaul antitrust in the past and should do so again.

6. ***Common sense reforms should be pursued to improve antitrust enforcement.*** A positive agenda for antitrust reform would pursue common-sense initiatives that build upon prior learning while incorporating advances in industrial organization economics, empirical research, and analytical techniques. These proposals should focus antitrust enforcement on areas that will have the biggest return for consumers and input suppliers, support balanced retrospectives of agency decisions to identify gaps in enforcement, and address any institutional impediments to effective enforcement.

We believe open discussion of existing evidence is necessary to advance contemporary debates about the performance of antitrust institutions in the digital economy. We welcome that discussion. We discuss below various dimensions of antitrust law, economics, and institutions that have been the targets of radical reform proposals. The signatories to this letter hold a steadfast belief that antitrust institutions, including the courts, are up to the task of protecting competition, and that the federal antitrust laws as written are effective in accomplishing that goal. While many signatories have offered diverse proposals to improve the functioning of those institutions—a few of which we share in this letter—we hold the common view that the proposed radical reforms would make consumers worse off in the short run and over the long haul by chilling efficient behavior and stymieing innovation.

I. The Digital Economy is Healthy, Competitive, and Benefits Consumers

We do not recount here the extensive literature calling into question claims that market power and concentration have been systematically increasing, resulting in serious consequences for consumers, workers, innovation, economic inequality, and more.[9] At best, we have an incomplete

[9] For one recent discussion of this literature, see Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020).

and imperfect understanding of recent market trends; there is undoubtedly more research to do. But the weight of the literature today—much of which is no more than a couple of years old and some of which is still in working paper form—does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework. It is certainly not the case that "any conclusion to the contrary reflects either an incomplete or incorrect understanding of economics and the economic literature from the last several decades."[10]

The most recent studies suggest that the observed changes in national-level concentration are brought about by the expansion of more productive large firms into local markets leading to, in these economists' own words, "more, rather than less, competitive markets."[11] Further, despite occasional claims to the contrary, the literature has not uncovered systematic competition problems in digital markets. The best interpretation of existing evidence is that the deployment of new technology by *traditional industries* has increased economies of scale and scope and *enhanced* local competition.[12] None of the economic evidence supports claims about generally enhanced market power in markets inhabited by the companies that *develop* such technological tools.

Prominent economists across the political spectrum have offered similar analyses, all of which serve to call into question the certitude of the assertions underlying the calls for radical antitrust reform.[13]

The digital economy is rife with competition and innovation, and consumers are benefitting in meaningful and remarkable ways from dynamic rivalry among companies big and small. That does not mean the digital economy is, or should be, immune from antitrust scrutiny. But recent scholarship strongly suggests that competition in that sector of the economy has thrived under the existing antitrust laws, which can and should be applied when those laws are violated.

II. The Antitrust Laws As Written Effectively Protect Competition Today

A. The Consumer Welfare Standard Vastly Improved Antitrust

Antitrust has developed into a principled body of law that, on balance, today contributes positively to American competitiveness and societal well-being. That has not always been the case.

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[10] Equitable Growth Letter, *supra* note 3, at 1.

[11] Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, *in* 35 NBER MACROECONOMICS ANNUAL 2020 (Martin Eichenbaum & Erik Hurst eds., forthcoming 2020); *see also* Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services* (Working Paper Mar. 17, 2020).

[12] *See* Rossi-Hansberg, et al., *supra* note 11.

[13] *See e.g.,* David Autor, et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, Q.J. ECON. 4 (*forthcoming*); Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration*, U. CHI. BOOTH SCH. OF BUS. (2018) (showing no significant change in price in concentrated sectors); Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the US Economy*, STANFORD U. (Apr. 27, 2018), at 16; Rossi-Hansberg, et al., *supra* note 11; Sharat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, AM. ECON. J.: MICROECONOMICS (manuscript at 13) (*forthcoming*); Hsieh & Rossi-Hansberg, *supra* note 11.

In some areas of enforcement, antitrust created substantial harms.[14] Prior to the modern era, antitrust often employed incoherent doctrines that promoted vague social and political goals and led to unprincipled and contradictory results.[15] Antitrust not only often failed to promote competition, but it dissuaded competitors from bringing consumers lower prices, greater innovation, and other benefits.

The consumer welfare standard—and with it the integration of economics and antitrust law—guided antitrust out of this quagmire.[16] Through discussion and debate among jurists, scholars, economists, and government enforcers, antitrust law adopted a disciplined method of analyzing competition that is guided by a straightforward question: "Is the challenged conduct likely to make consumers better or worse off?" The consumer welfare standard contemplates the evaluation of alleged anticompetitive behaviors based on tradeoffs tied to the health of the competitive process. It thus dispenses with the need to make distributional choices inherent in selecting among divergent goals in favor of designing and implementing competition policy to prioritize the competitive process, which benefits all Americans.

By grounding antitrust analysis in a disciplined and tractable framework, the consumer welfare standard fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions.[17]

The consumer welfare standard also has the benefit of tethering antitrust outcomes to modern economics. Implementation of the consumer welfare standard by courts and enforcers took the vague concept of "protecting competition" embodied in the antitrust laws and for the first time breathed meaning into it through the common language of economics. This allows for robust scrutiny of a variety of market factors including price, quality, and innovation.

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[14] *See, e.g.*, George Bittlingmayer, *The Stock Market and Early Antitrust Enforcement*, 46 J.L. & ECON. 1 (1993); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[15] Early antitrust decisions often articulated conflicting goals that made it difficult to predict whether, for instance, courts would apply the antitrust laws to protect competition or, instead, to protect competitors from competition. *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Brown Shoe Co. v. United States, 370 U.S. 294 (1962). For further discussion of this topic, see Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405 (2013) ("The Court interpreted the Sherman and Clayton Acts to reflect a hodgepodge of social and political goals, many with an explicitly anticompetitive bent, such as protecting small traders from more efficient rivals. The failure of antitrust law to promote competition and further consumer welfare over this period is unsurprising and inevitable, for the courts and agencies were operating without a coherent answer to the question: 'What are the goals of antitrust?'"); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases. The Court had read into the Sherman Act an assortment of vague and, ironically, anti-competitive social and political goals, such as protecting small traders from their larger, impersonal (and more efficient) rivals.").

[16] *See, e.g.*, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek, & Joshua D. Wright, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L J. 293, 317 (2019).

[17] *See, e.g.*, Ginsburg, *supra* note 15, at 223 ("Economic analysis does not indicate a single indisputable result in every case, but it does significantly constrain the decision making of the Court and thereby narrow the range of plausible outcomes. Economic analysis thus promotes consistency in antitrust jurisprudence.").

As a result, there is broad bipartisan support that protecting consumer welfare (properly defined) through the protection of competition is, and should be, the lodestar of modern antitrust enforcement.[18]

Some of the radical initiatives being pursued to reform antitrust today seek to abandon the consensus that has developed around the benefits of the consumer welfare standard as the guiding principle of antitrust. One need only look to history to see that this would be a bad idea. Doing so would compel regulators and courts to evaluate the multidimensional and diverse effects of business conduct on political power, economic inequality, the environment, rival businesses, profits, and an assortment of other vague factors without the anchor of the focus on the impact on input and output market competition. This would necessarily lead to an incoherent weighing of the diverse effects, and subjective management oversight of the economy by the government and by the courts. It would also encourage rent-seeking by industry participants seeking to curry favor with the antitrust agencies and allow for the antitrust laws to be used as a weapon between rivals.[19]

These alternatives have been tried and they have failed. They were rejected in favor of an evidence-based approach, grounded in modern economics, that focuses on maximizing the welfare of American consumers and through well-functioning competition. They should be rejected again.

B. The Antitrust Laws as Written Provide Federal Enforcers with Adequate Power to Review and Prevent Anticompetitive Mergers

There was a time when antitrust was used to condemn mergers that resulted in only trivial increases in market share, based on arbitrary reasoning and without evidence of likely anticompetitive harm.[20] Reflecting upon the state of antitrust law at that time, Justice Potter Stewart lamented, "[t]he sole consistency that I can find is that, in litigation under [the merger laws], the Government always wins."[21] But today there is broad consensus about the analytical framework and economic toolkit for evaluating whether a merger is likely to substantially lessen competition, including with respect to nascent and potential competition in digital markets.

Proponents of radical reform to antitrust law assert that merger enforcement is broken and that we should fundamentally alter basic tenets of our legal system related to which party bears the burden of proof, for the sole purpose of making it easier for the federal government and private

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[18] *See, e.g.*, A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 742 (2018); *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition, and Consumer Rights of the S. Comm. on the* Judiciary 114th Cong. (Dec. 13, 2017) (testimony of Diana Moss, President, American Antitrust Institute). The Supreme Court endorsed the consumer welfare standard in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'").

[19] Joshua D. Wright, Elyse Dorsey & Jan M. Rybnicek, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, CPI ANTITRUST CHRONICLE (April 2018).

[20] United States v. Von's Grocery Co., 384 U.S. 270 (1966); *see also Investigation into the State of Competition in the Digital Marketplace: Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm on the Judiciary* 116th Cong. 5 (April 17, 2020) (statement of Tad B. Lipsky).

[21] Von's Grocery, 384 U.S. at 301 (Stewart, J., dissenting).

plaintiffs to prevail in merger challenges.[22] But the current Horizontal Merger Guidelines already have burden shifting provisions that are carefully constructed with attention to both evidentiary needs and the economic logic of impact on competition. Injecting new arbitrary criteria for burden shifting can only undermine the focus of merger enforcement on protecting competition and distort efficient business. Further, Supreme Court precedent is already tilted to favor the federal government: Horizontal mergers are presumed anticompetitive when the antitrust agencies can show that the transaction will create "undue concentration" in the relevant market, usually defined as a post-merger market share of greater than 30 percent;[23] the burden then shifts to the merging parties to rebut the presumption.[24] As a recent analysis demonstrates, the presumption is thus a powerful and commonly invoked tool in enforcement practice and is rarely rebutted by parties once invoked.[25]

It makes no sense to infer that antitrust enforcement has been lax from a superficial counting of cases, as many proponents do. The "principal value [of antitrust law] is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law."[26] In any case, it is simply incorrect to assert that enforcement has declined in recent years. Research indicates that merger enforcement has increased relative to merger volume in the past several decades,[27] and there is no evidence that anticompetitive mergers are more likely to pass muster today than in decades past.[28] The claim that antitrust enforcement has been lax, or that anticompetitive mergers have been on the increase, is just not borne out by the evidence.

Indeed, the DOJ and FTC have lost only a handful of cases. Until the FTC's loss in *Evonik/PeroxyChem* earlier this year, it had not lost a merger challenge since 2015 (*Steris/Synergy Health*), and the most recent loss prior to that was in 2011 (*LabCorp/Westcliff Medical*). Similarly, the DOJ has lost only two merger litigations in the last 10 years (*AT&T/Time Warner* and *Sabre/Farelogix*). And counting courtroom wins overlooks the many proposed combinations that are abandoned by the merging parties after the agencies threaten to file suit.[29]

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[22] *See, e.g.*, STIGLER COMM. ON DIG. PLATFORMS, *supra* note 6, at 98.

[23] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[24] United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

[25] *See* Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 201 (2015).

[26] A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 16 (*forthcoming* 2020).

[27] Indeed, controlling for the number of mergers, the likelihood of a merger challenge has more than doubled since 1979. *See* Jeffrey T. Macher & John W. Mayo, *The Evolution of Merger Enforcement Intensity: What Do the Data Show?*, Geo. Ctr. For Bus. & Pub. Pol'y (Nov. 2019); Joshua D. Wright, Toward a Better Understanding of Concentration: Measuring Merger Policy Effectiveness, OECD Hearing on Market Concentration (Jun. 7, 2018), at ¶¶ 39-40.

[28] Of the seven mergers since 2000 highlighted by Professor John E. Kwoka as having erroneously been allowed to go unchallenged by U.S. competition authorities, only one, *Whirlpool/Maytag*, exhibited any post-merger signs of a decrease in competitiveness. *See* Michael Vita & David F. Osinski, *John Kwoka's* Mergers, Merger Control, and Remedies: *A Critical Review*, 82 ANTITRUST L.J. 361, 385 (2018).

[29] In the last year, several mergers have publicly been abandoned in the face of agency opposition, including at least: *Cengage/McGraw Hill, Post-Holding/TreeHouse, Edgewell/Harry's, Johnson & Johnson/Takeda, Fidelity/Stewart, and Sanford Health/Mid Dakota Clinic.*

In light of current antitrust doctrine, related merger review, and the antitrust agencies' enviable win-rate, it is difficult to understand proponents' calls for radical reform to antitrust merger law other than as an effort to increase the agencies' incentives to challenge more mergers, regardless of merit, and without the critical, independent oversight of the federal judiciary.

C. The Antitrust Laws As Written Are Adequate to Prevent Anticompetitive Monopolization, Exclusionary Conduct, and Other Harmful Vertical Conduct

There is no evidence of systematic harm in digital markets arising from lax antitrust enforcement. To the contrary, digital markets are intensely rivalrous and generate substantial long-run economic welfare. Given the demonstrated and well-known salutary effects that digital markets produce for consumers, the burden lies with those proposing radical reforms to address the alleged inadequacies of antitrust's performance in digital markets to substantiate those claims. The evidence does not support the provocative claims made by many reformers.

Contrary to assertions proffered to this Committee, antitrust agencies can and routinely do bring monopolization cases, including in high-tech markets. Among others, the agencies have brought—and won—monopolization claims in *Microsoft*, *McWane, Dentsply,* and *Qualcomm*, and the FTC settled monopolization allegations against Intel in the microprocessor market. And it is by no means certain that the agencies *should* have won all of these cases.[30] At the same time, private litigants (including class action plaintiffs) vigorously employ federal and state antitrust laws. While many scholars contend that such Section 2 claims are virtually unwinnable, focused research has concluded that in reality this widely-held view is inaccurate.[31] And, win or lose, private litigants have brought some of antitrust's defining monopolization and vertical restraint cases over the years (including, *e.g.*, *Leegin*, *Weyerhaeuser*, *Credit Suisse*, *Independent Ink*, *Lepage's*, *Kodak*, *Trinko*, and *Apple v. Pepper*, among many others). In short, plaintiffs can and do successfully prosecute monopolization claims under current antitrust law.

In the area of vertical mergers and vertical restraints, the overwhelming lesson that arises from economic theory and empirical evidence is that while vertical integration can pose competitive risks, it is likely to bring procompetitive benefits to the parties and consumers—or, at the very least, to be competitively neutral. "[T]here is a paucity of support for the proposition that vertical restraints/vertical integration are likely to harm consumers. . . . [V]ertical restraints are likely to be benign or welfare enhancing."[32] As one notable 2008 empirical study concludes, "the empirical

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[30] Indeed, some have argued that several of these cases reflect the agency's litigation advantages and ability to win cases that they should not have on the merits. *See, e.g.*, Richard Epstein, *Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm is an Abuse of Antitrust Theory*, 98 NEB. L. REV. 241 (2019); In the Matter of McWane Inc., Docket No 9351 (Feb. 6, 2014) (Dissenting Statement of Commissioner Joshua D. Wright).

[31] *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U.L. REV. 1269, 1272 (2013) ("[P]rivate antitrust litigation has provided a substantial amount of compensation for victims of anticompetitive behavior. . . . In fact, . . . private enforcement probably deters more anticompetitive behavior than even the [DOJ's] appropriately acclaimed anti-cartel program."). Importantly, "recoveries in rule of reason cases predominated, undermining the widely held view that private plaintiffs rarely obtain meaningful relief unless they are able to pursue a per se theory of liability." *Id.* at 1273.

[32] James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648 (2005).

literature over the last 25 years largely supports" the proposition that "combining substitutes is bad and combining complements is good, unless demonstrated otherwise."[33] Empirical evidence amassed since 2008 continues to support these conclusions.[34] And, more important, despite the limitations of the literature and occasional claims to the contrary, there is *no* viable interpretation of the evidence thus far that would support shifting the burden of proof or adopting the *presumption* that vertical integration is likely to harm consumers.[35]

Taken together, the case-by-case analysis required by current antitrust law is supported by theoretical and empirical evidence. And there has been no evidence presented that vertical mergers and vertical restraints impose a greater competitive threat in digital markets than in other markets. Vertical integration and vertical restraints are often an important part of the normal competitive process in digital markets.[36] Moreover, the existing law is based upon economic tools and methods that are routinely used to evaluate digital markets. Proposals to make vertical restraints presumptively unlawful or to ban vertical mergers or vertical restraints are not well-grounded in sound economics and empirical evidence, and are likely to distort the competitive process to the detriment of economic welfare.

D. No Sound Basis Exists for Abandoning Supreme Court Precedent Simply to Make It Easier for the Government and Private Plaintiffs to Prevail

One of the most troubling aspects of the radical reform agenda is the systematic effort to overturn established case law, and to return antitrust jurisprudence to its incoherent, pre-economic

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[33] Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76–81 (Konkurrensverket Swedish Competition Authority ed., 2008).

[34] *See* Global Antitrust Institute, *Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers* 8 (George Mason Law & Econ. Research Paper No. 18-27, Sept. 6, 2018) (discussing the bulk of the recent empirical papers on vertical mergers since 2008 and finding they "continue to support the conclusion[] . . . that consumers mostly benefit from vertical integration"); Geoffrey A. Manne, Kristian Stout, & Eric Fruits, *The Fatal Economic Flaws of the Contemporary Campaign Against Vertical Integration*, KANSAS L. REV. (*forthcoming* 2020) (manuscript at 23–29) (discussing several additional recent studies and reaching the same conclusion).

[35] *See, e.g.,* Equitable Growth Letter, *supra* note 3, at 14. ("Congress might consider legislation allowing plaintiffs to prevail in exclusionary conduct or merger cases by showing that the challenged conduct increases the risk of competitive harm, instead of the current legal standards, which require, in general, a showing that competitive harm is more likely than not."). In a recent comment, Beck & Scott Morton attempt to support this position by criticizing the interpretation of both the longstanding and newer empirical evidence on vertical mergers. *See* Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence of Vertical Mergers* (Working Paper, Feb. 26, 2020). Their ultimate conclusion is "that the empirical evidence evaluated in these articles does *not* show that vertical mergers are generally procompetitive, or generally anticompetitive. . . . Upon careful inspection, the evidence they provide on the change in welfare due to vertical mergers is decidedly mixed." *Id.* at 2. We agree that the evidence is mixed, even if we disagree on the how precisely it should be characterized. For us, the evidence shows that vertical mergers are "likely to bring procompetitive benefits to the parties and consumers—or, at the very least, to be competitively neutral;" for Beck & Scott Morton, "*many* vertical mergers are harmless or procompetitive, but that is a far weaker statement than presuming *every* or even *most* vertical mergers benefit competition regardless of market structure." *Id.* What is clear, however, is that *neither* characterization suggests that the literature is sufficient to support a change in the presumptions regarding vertical mergers.

[36] *See especially* Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods*, 124 HARV. L. REV. 1861 (2011); David J. Teece, *Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 RES. POL'Y 285 (1986).

era.[37] It is surely correct that, relative to the highly interventionist baseline of antitrust doctrine prior to the 1970s, courts have increased the burdens placed upon antitrust plaintiffs. But it is incorrect to assert that these cases "rely on unsound economic theories or unsupported empirical claims about the competitive effects of certain practices."[38] To the contrary, the economic content of antitrust law has increased manifestly since the 1960s, and it has developed along with the economic literature, regardless of whether the cutting edge of the literature has pushed for or against greater enforcement in various contexts.[39] Prior to the focused introduction of economics to antitrust enforcement in the 1970s, the reliance on *per se* rules and other presumptions against defendants prohibited economic analysis and fact-based defenses. As a result, earlier enforcement relied heavily upon denying firms accused of antitrust violations the right to defend themselves.

While the law is not nearly as monochromatic as critics imply, there is solid economic support for the cases alleged by critics to depart from economic learning. Indeed, it is clear that overturning these cases would be tantamount to overturning the Court's consistent and laudable focus in the modern antitrust era on protecting competition, even where competition may harm the fortunes of specific competitors. Thus: *Pueblo Bowl-O-Mat*[40] is consistent with the proposition that antitrust claims may not be based on conduct that *enhances* competition, even where such conduct adversely affects the business of a particular plaintiff. *Spectrum Sports*[41] holds that liability for attempted monopolization requires proof that challenged exclusionary conduct presents at least a dangerous probability of success. *Brooke Group*[42] holds that claims of predatory pricing require proof that profits sacrificed by a defendant are reasonably likely to be recouped as a result of disciplining or eliminating competition, lest courts inadvertently condemn competition leading to low consumer prices.[43] *Twombly*[44] establishes the sensible rule (and not solely in the antitrust context) that complaints lacking factual allegations sufficient to render the claims plausible, rather than merely conceivable, must be dismissed.[45] *Trinko*[46] takes seriously the notion that antitrust and sectoral regulation are substitutes, and refuses to find an antitrust "duty to deal" based on a regulated monopoly's violation of an administrative rule that would not be actionable in the absence of the

[37] *See, e.g.,* Equitable Growth Letter, *supra* note 3; Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong. §4 (2020).

[38] Equitable Growth Letter, *supra* note 3, at 4.

[39] *See, e.g.*, Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL'Y INT'L (Autumn 2007).

[40] Brunswick Corp. v. Pueblo Bowl -O-Mat, Inc., 429 U.S. 477 (1977).

[41] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

[42] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[43] *See* Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, 1 COMPETITION POL'Y INT'L 115 (2005) (surveying the economic literature of loyalty discount arrangements).

[44] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[45] *See* Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187 (2011).

[46] Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

regulation.[47] And *Amex*[48] incorporates the mainstream and well-established economics of two-sided markets to hold that market definition in such markets entails a different and more complex analysis than for traditional markets.[49]

The economic evidence does not support the claim that the Supreme Court has been "too willing to presume" that monopolies promote innovation. In reality, innovation arises from both small and large firms, and in concentrated and unconcentrated markets, depending on the business environment.[50] The implications of the economic literature on innovation and market structure for competition policy are ambiguous, at best: "The literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role."[51] Accordingly, "[w]elfare and the efficient use of judicial

[47] *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659 (2001); John E. Lopatka & William H. Page, *Bargaining and Monopolization: In Search of the "Boundary of Section 2 Liability" Between* Aspen *and* Trinko, 73 ANTITRUST L.J. 115 (2005); Alan J. Meese, *Property,* Aspen*, and Refusals to Deal*, 73 ANTITRUST L.J. 81 (2005); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749 (1995); Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and* Microsoft, 8 GEO. MASON L. REV. 1 (1999); Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035 (2000); Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469 (2009); Brief for International Center for Law & Economics and Scholars of Law and Economics (Donald J. Boudreaux, Daniel Lyons, Kenneth G. Elzinga, Geoffrey A. Manne, Janice Hauge, Alan J. Meese, Justin (Gus) Hurwitz, Paul H. Rubin, Thomas A. Lambert, Vernon L. Smith, John E. Lopatka, Michael Sykuta) as *Amici Curiae* in Support of Appellant and Reversal, Fed. Trade Comm'n v. Qualcomm, Inc., No. 19-16122 (9th Cir. Aug. 30, 2019).

[48] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[49] *See* Geoffrey A. Manne, *In Defence of the Supreme Court's 'Single Market' Definition in* Ohio v American Express, 7 J. ANTITRUST ENFORCEMENT 104 (2019); Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of* Ohio v. American Express, 54 REV. INDUS. ORG. 717 (2019); DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN AMERICAN EXPRESS (2019); Brief for Antitrust Law & Economics Scholars (Babette E. Boliek, James C. Cooper, Richard A. Epstein, Stephen Haber, Thomas W. Hazlett, Justin (Gus) Hurwitz, Jonathan Klick, Thomas Lambert, Abbott Lipsky, Geoffrey A. Manne, Steven Semeraro, David J. Teece, Joshua D. Wright, Christopher S. Yoo, John M. Yun) as *Amici Curiae* in Support of Respondents, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[50] An important and oft-overlooked literature argues that the key factor affecting innovation is not size, or the extent of "perfect" competition, but the ability of firms to appropriate the value of their investments. *See* David J. Teece, *Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 RES. POL'Y 285 (1986). This is not refuted by more recent work, which purports to find negative innovation effects from mergers, but acknowledges that "[s]ufficient innovation efficiencies overturn the reduction in innovation due to market power, and ultimately also offset the negative impact of a merger on consumer welfare." Giulio Federico, Gregor Langus & Tommaso Valletti, *Horizontal Mergers and Product Innovation*, 59 INT'L. J. INDUS. ORG. 1, 17 (2018).

[51] Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 22 (2007). The modern empirical literature on the relationship between market structure and innovation generates the expected mixed results. *Compare, e.g.*, Ronald L. Geottler and Brett R. Gordon, *Does AMD Spur Intel to Innovate More?*, 119 J. POL. ECON. 1141 (2011) ("Consistent with Schumpeter, we find the rate of innovation would be 4.2 percent higher without AMD present."), *with* Mitsuru Igame & Kosuke Uetake, *Mergers, Innovation, and Entry-Exit Dynamics: Consolidation in the Hard Drive Disk Industry, 1996-2016*, REV. ECON. STUD. (2019) (manuscript at 29) ("[For the hard disk drive (HDD) market,] the current de-facto merger threshold (N =3) is reasonably close to maximizing social welfare. . . . This finding is specific to the [HDD market]; hence, each high-tech industry requires careful modelling and measurement, just like the actual enforcement of antitrust policy proceeds case by case.").

resources would be best served by a policy that presumes that innovation is pro-competitive and condemns innovation by a single firm in only the most extraordinary circumstances."[52]

In sum, radical proposals to overturn broad swaths of modern antitrust doctrine are misguided, unnecessary, and threaten to abandon the rule of law with little to offer in return. Antitrust jurisprudence has evolved over time and through our common law tradition, informed by economic theory and evidence. These proposals to simultaneously overturn decisions to prop up plaintiff win rates without evidence that doing so would improve competition or consumer welfare invite institutions that resemble 1960s antitrust law: bright line prohibitions of myriad forms of business conduct that pose some competitive risk but are more often than not procompetitive. Congress ought to reject the invitations to take the evolution of antitrust doctrine away from the courts and to revert to the competition policy of the 1960s.

III. Congress and the Federal Antitrust Agencies Can Implement Several Common-Sense Reforms to Improve Antitrust Enforcement Immediately

While we believe that modern antitrust has evolved into a body of law that today, on balance, contributes positively to society, we also believe that it is important to regularly take stock and consider ways in which antitrust law can be improved. There are several common-sense reforms that have been proposed by experts across the political spectrum that would arguably strengthen antitrust enforcement and benefit consumers. Although such proposals are not as provocative as the more radical reforms, not all of the signatories to this letter agree with even all of *these* proposals. Nevertheless, we do all agree that these proposals at least build upon, rather than replace, the rigorous evidence-based approach to antitrust that has developed over time. They also take seriously the need to protect against both abuses by private firms as well as government overreach or error. Not all of these proposals are within the purview of Congress directly. But Congress, in its oversight capacity, can help to ensure that the agencies are assessing and adopting enforcement strategies and institutional reforms appropriate to the effective and efficient promotion of competition. A list of the most prominent proposals in this vein includes the following:

1. ***Increasing transparency of agency decision-making:*** Unlike in many jurisdictions, there is no requirement that the FTC and DOJ issue formal decisions rigorously explaining their findings, analysis, and conclusions. Congress could increase transparency by requiring the agencies to issue formal decisions at the conclusion of any significant investigation.[53] Congress could also require the agencies to make available more detailed data from the cases they consider, and charge them with coordinating significant economic research on the data.[54] Such transparency mandates

[52] Richard Gilbert, *Holding Innovation to an Antitrust Standard*, 3 COMP. POL'Y INT'L 46, 50 (2007); *see generally* Teece, *supra* note 50.

[53] *See, e.g.,* THE FED. TRADE COMM'N AT 100 REPORT—INTO OUR 2ND CENTURY: THE CONTINUING PURSUIT OF BETTER PRACTICES 119–20 (Jan. 2009); THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 187 (2008); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 64–5 (2007).

[54] *See, e.g.,* Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 23 (2003).

would enhance agency accountability, increase analytical rigor, aide practitioners to advise businesses, and deter anticompetitive conduct.

2. ***Increasing the use of merger retrospectives:*** Increased transparency would also serve to facilitate retrospective analysis of agency actions by both the agencies themselves and the economics academy. Merger retrospectives are not a silver bullet (as is sometimes asserted), but they are a useful tool for improving DOJ and FTC merger policy because they provide a means of measuring the consequences of agency decision-making in specific cases. Congress could consider mandating the systematic evaluation of merger decisions to help policymakers, the agencies, and the public better understand where enforcement is succeeding and where it can be improved.[55]

3. ***Strengthening the ability to challenge state-sponsored monopolies:*** Some of the most pernicious anticompetitive conduct is mandated by states to serve special interests. Congress should help to reform the state action doctrine, which immunizes certain state conduct from antitrust scrutiny, and to challenge state-based occupational licensing requirements that can use the pretext of health and safety concerns to erect costly barriers that prevent competitive entry.[56]

4. ***Enhancing penalties for criminal cartel conduct***: Perhaps no area of antitrust enforcement provides a bigger return for consumers than cartel prosecution. Congress could provide the DOJ with additional tools to deter cartel conduct by increasing sanctions, including potentially enhanced penalties for individuals who are negligent in ensuring antitrust compliance.[57]

5. ***Protecting workers against anticompetitive conduct in labor markets:*** Just as consumers benefit from competition between firms seeking to sell them products, workers benefit from competition among potential employers seeking to retain their talents. More agency resources could be devoted to protecting workers by identifying and policing anticompetitive no-poach and wage-fixing agreements among competing firms in a relevant labor market.

6. ***Allowing indirect purchasers to sue for antitrust damages:*** Although anticompetitive conduct can harm consumers across different levels of the market, federal antitrust law allows only direct purchasers to sue to recover damages. Congress might consider granting indirect purchasers the ability to sue for antitrust damages, so long as the suit is consolidated in a single forum with direct purchasers' suits. It is possible that such an approach would increase fairness by making whole those who have suffered an injury, and it would reduce duplicative and wasteful litigation by moving towards alignment between federal and state antitrust standing rules.[58]

7. ***Eliminating inefficiencies created by dual-agency enforcement:*** While it offers some benefits, the United States' unique, dual system of federal enforcement has also created a number of

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[55] *See* THE FED. TRADE COMM'N AT 100 REPORT, *supra* note 53, at 149 (reporting on statements supporting merger retrospectives from Joshua Wright, Dennis Carlton, Aviv Nevo, Randy Picker, and David Scheffman, among others).

[56] *See, e.g.*, Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control Over Market Entry*, 4 J. ANTITRUST ENFORCEMENT 111 (2015); James C. Cooper & William E. Kovacic, *U.S. Convergence With International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 BOSTON U.L. REV. 1555 (2010); James C. Cooper, Elyse Dorsey, & Joshua D. Wright, *State Licensing Boards, Antitrust, and Innovation*, REGULATORY TRANSPARENCY PROJECT, FEDERALIST SOCIETY (Nov. 13, 2017).

[57] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 9 COMP. POL'Y INT'L 2 (2010).

[58] *See, e.g.,* ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 265-75 (2007).

inefficiencies that sometimes weaken the agencies and undermine their ability to enforce the antitrust laws. Congress could enhance enforcement efficiency and efficacy by harmonizing the agencies' procedures and by clearly articulating their respective responsibilities, including between consumer protection and antitrust enforcement.[59]

8. ***Increasing the role of economists at the agencies:*** Antitrust has improved dramatically in the modern era in large part because antitrust decisions have become more closely tethered to economics. But the size of the economics staff and their influence within the agencies remains significantly outsized by that of the legal team. The antitrust agencies should allocate their resources to expand the number of economists they employ to adequately staff each investigation and ensure high-quality economic analysis is integrated into all enforcement decisions and the agencies' myriad policy projects.[60]

9. ***Increasing antitrust agency funding:*** To implement many of these proposals, the antitrust agencies may need more funding. Congress should commit to providing the agencies with the resources they need to fulfill their mission of promoting competition and protecting consumers.

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[59] *See, e.g., Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary* 114th Cong. (Jun. 16, 2015) (statement of Abbott B. Lipsky).

[60] *See, e.g.*, Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Statement of Commissioner Joshua D. Wright On the FTC's Bureau of Economics, Independence, and Agency Performance (Aug. 6, 2015).

As noted, we do not all support all of these proposals. But these proposals to improve antitrust are much more likely to be conducive to improved competitiveness and economic welfare over the long run than are the radical proposals that seek to upend current antitrust policy to institute an ends-oriented regime. We welcome the opportunity to discuss these and other common-sense reforms with the Committee.

Respectfully submitted,[61]

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