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Hearing on Reviving Competition Part 4

21st Century Antitrust Reforms and the American Worker

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* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

Chairman Nadler, Ranking Member Jordan, Chairman Cicilline, Ranking Member Buck, and distinguished members of the Committee, thank you for the opportunity to testify. In recent years, this Committee has played a pivotal role in spurring a rich dialogue on our antitrust laws. It is an honor to appear before you today.

In my opening remarks, I will first provide context for the monopsony and labor issues we will discuss today. Then, I will address antitrust enforcement and proposals that impact labor markets, including occupational licensing, monopsony, and non-compete and no-poach agreements. These issues are important, and worthy of the time we are devoting to them today. Finally, I will briefly touch on procedural irregularities at the Federal Trade Commission that have precluded a robust dialogue on these and other key policy issues among Commissioners, and between Commissioners and stakeholders.

The Big Picture

The U.S. antitrust laws were enacted more than a century ago. The Sherman Act was passed in 1890 and the Clayton Act, which supplemented the Sherman Act, was passed in 1914. Periodically, given the time that has passed since their enactment, commentators question whether those Acts remain capable of addressing issues that arise in new industries and dynamic markets. This question was asked in the 1990s when commentators wondered whether the antitrust laws were suited to address rapidly evolving technology markets. The D.C. Circuit made clear in the *Microsoft* case that the antitrust laws were sufficiently flexible to support a holding that the dominant technology firm of that time had violated the antitrust laws.[1]

Congress asked the question again in 2002 when it created the Antitrust Modernization Commission. As described in the first chapter of the Antitrust Modernization Commission's Report issued in 2007:

> The term 'new economy' can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. For purposes of this Report, the key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those characteristics include innovation, intellectual property, and technological change.[2]

Following an extensive inquiry, the Antitrust Modernization Commission concluded:

> Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in solid economic analysis, openness to new economic learning, and flexibility to enable the courts and the agencies properly to assess competitive issues in new economy industries. Most importantly, commenters

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[1] United States v. Microsoft Corp., 253 F.3d 34, 65-67 (D.C. Cir. 2001).

[2] ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 31 (April 2017), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

> noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist [Carl Shapiro] noted, basic economic principles do not become 'outdated' simply because industries become highly dynamic.[3]

In other words, previous periods of reflection have concluded that the antitrust laws are sufficiently broad and flexible to address the issues of the day, including rapidly evolving tech markets.

In recent years, the same question again has arisen: are our antitrust laws capable of addressing the concerns that have been raised about so-called Big Tech? This time, though, the discussion differs in notable ways.

First, while antitrust issues contribute to this question, the concerns about Big Tech are many and varied. Some observers are concerned about the seemingly limitless collection of consumer data by tech platforms, and the ways in which those data are used, shared, and monetized. Others are concerned about content curation and censorship. And still others are concerned about traditional antitrust issues, including serial acquisitions by large tech companies and refusals to deal with competitors.

Each of these concerns is worthy of discussion. But just because we hold the hammer of antitrust law in our hands does not mean we should treat every concern as a nail, lest we risk bludgeoning our entire economy. The better approach is to disaggregate the varied concerns about the tech sector and address each concern with the appropriate tools. For example, privacy concerns require federal privacy legislation, which I heartily support. And Congress may conclude that content curation concerns require reforms to Section 230.

That leaves the competition concerns. I believe the antitrust laws as currently written are sufficiently broad and flexible to address the competition issues in the dynamic and rapidly evolving tech sector. As noted above, the Department of Justice in the 1990s won its antitrust case against Microsoft, the dominant tech firm of that era. In December 2020, the FTC launched an antitrust challenge against Facebook.[4] Even before that, the FTC initiated an antitrust case against Surescripts, a multi-sided platform that facilitates electronic prescribing, alleging monopolization of two markets.[5] In October 2020, the DOJ and 11 State Attorneys General

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[3] *Id.*

[4] Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

[5] Press Release, Fed. Trade Comm'n, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts illegal monopolization-e-prescription ("The FTC alleges that Surescripts intentionally set out to keep e-prescription routing and eligibility customers on both sides of each market from using additional platforms (a practice known as multihoming) using anticompetitive exclusivity agreements, threats, and other exclusionary tactics.").

brought an antitrust case against Google;[6] State Attorneys General subsequently filed three additional cases against Google.[7] The press has covered reportedly ongoing investigations into other Big Tech companies.[8] The FTC is analyzing transactions made by Amazon, Apple, Facebook, Microsoft, and Google owner Alphabet that fell below pre-merger notification filing thresholds.[9] And the District of Columbia sued Amazon in May.[10] Prudence would dictate allowing these cases and investigations to play out before implementing sweeping legislative reforms.

The second way in which today's iteration of the question differs is this: the doubts that have been raised about the adequacy of our antitrust laws are not limited to dynamic and rapidly evolving markets. Instead, would-be reformers propose sweeping changes to our antitrust laws that would result in a fundamental transformation of our economy. The breadth of their aspirations is confirmed by the sweeping range of topics covered in President Biden's recent Executive Order on competition.[11] The topic of today's hearing – labor and monopsony – highlights just one of those broader goals.

To be clear, the issues we will discuss today are important ones. But we should keep two points in mind during this discussion. First, the antitrust laws ***as they exist today*** embody concepts like monopsony and prohibit anticompetitive agreements like no-poach agreements and unreasonable non-competes. Second, antitrust enforcement ***as it exists today*** supports challenges to anticompetitive conduct that harms labor, middlemen, and other entities beyond the end consumer.

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[6] Complaint, United States et al. v. Google, No. 1:20-cv-03010 (D.D.C. Oct. 20, 2020), https://www.justice.gov/opa/press-release/file/1328941/download.

[7] Complaint, Utah et al. v. Google, No. 3:21-cv-05227 (N.D. Cal. July 7, 2021), https://ag.ny.gov/sites/default/files/utah_v_google.1.complaint_redacted.pdf; Complaint, Colorado et al. v. Google LLC, No. 1:20-cv-03715-APM (D.D.C. Dec. 17. 2020), https://ag.ny.gov/sites/default/files/redacted_complaint_-_colorado_et_al._v._google.pdf; Complaint, Texas et. al v. Google LLC, No. 4:20-cv-00957-SDJ (E.D. Tex. Dec. 16, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216%20COMPLAINT_REDACTED.pdf.

[8] Margaret Harding McGill, *Fall antitrust forecast: Biden raises hammer on Big Tech*, AXIOS (Aug. 30, 2021), https://www.axios.com/antitrust-big-tech-apple-google-amazon-facebook-2e619cf6-2fd9-48be-bc72-0e36cb7fdcfb.html.

[9] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (February 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies. *See also* Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (September 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/ftc-report-on-unreported-acquisitions-by-biggest-tech-companies.

[10] Complaint, District of Columbia v. Amazon, No. 2021 CA 001775 B (D.C. Super. Ct. May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

[11] Exec. Order No. 14,036, 86 Fed. Reg. 36, 987 (July 9, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

I am deeply troubled by proposals to replace modern antitrust enforcement and market forces with government micromanagement. Attempting to regulate the economy into competition, instead of engaging in antitrust enforcement based on sound economic principles, has harmed Americans in the past.[12] This approach will undermine the American economy at the very moment it is struggling to recover from the COVID-19 pandemic. In addition, abandoning fact-based enforcement and sound economic principles for a highly interventionist competition policy that picks winners and losers will create incentives for rent-seeking and regulatory gamesmanship instead of competition and innovation. This result will harm everyone, including American labor.

Today's Antitrust Standards Address Monopsony and Labor Issues

I will discuss occupational licensing, monopsony, and non-compete and no-poach agreements in turn.

<u>Occupational Licensing</u>

States have a legitimate interest in protecting the health, safety, and welfare of their residents, and occupational licensing regimes may help advance these goals. But all too frequently, occupational licensing regimes are used by incumbents – those already licensed in a state – to erect barriers to entry and insulate themselves from competition.[13] Rent-seeking by incumbents limits consumer choice, drives up prices, and may decrease quality.[14]

The FTC has challenged attempts by market incumbents to suppress competition through state boards. For instance, the Commission challenged actions by the North Carolina State Board of Dental Examiners that excluded non-dentist providers of teeth whitening goods and services from selling their products to consumers in North Carolina.[15] In a similar vein, the FTC challenged actions by the South Carolina Board of Dentistry that restricted the delivery of

[12] Christine S. Wilson and Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. OF ANTITRUST ENFORCEMENT 10 (discussing railroad and airline regulations once administered by the Interstate Commerce Commission and the Civil Aeronautics Board and the stunning amnesia regarding the enormous harm those regulations caused to consumers).

[13] *See* Maureen K. Ohlhausen and Greg Luib, *Brother, May I?: The Challenge of Competitor Control Over Market Entry*, 4 JOURNAL OF ANTITRUST ENFORCEMENT 111 (2016).

[14] Paul J. Larkin, Jr., Public Choice Theory and Occupational Licensing, 39 HARVARD J. OF LAW & PUBLIC POLICY 209, 235-238 (2010) (surveying studies that find occupational licensing does not lead to quality improvements or other benefits that offset price increases).

[15] *See* North Carolina State Bd. Dental Examiners v. FTC, 574 U.S. 494 (2015). *see also* National Association of Social Workers, 116 F.T.C. 140 (March 3, 1993) (charging professional association of social workers with engaging in unlawful concerted action by adopting rules to restrain competition within the profession).

preventive dental services by licensed dental hygienists to economically disadvantaged children in South Carolina schools.[16]

In addition to bringing enforcement actions, the FTC has a rich history of analyzing, and seeking to inform policymakers of, the impact of occupational licensing restraints.[17] The agency provides input to courts, legislatures, agencies, and self-regulatory entities on initiatives that may raise barriers to entry, limit choice, or otherwise hinder competition. It is of course appropriate for government bodies to promote goals other than competition, including public health, safety, and security. But through Commission-authorized comments, FTC staff seek to identify the potential harms to competition so that policymakers can weigh those harms against other benefits to consumers and the public interest.

The FTC has submitted literally hundreds of comments and amicus briefs to policymakers across a wide range of industries.[18] For example, the FTC staff consistently has urged state and federal agencies to avoid imposing restrictions on the scope of practice for advanced practice registered nurses and physician assistants unless those restrictions are necessary to address well-founded patient safety concerns.[19]

Developments during the COVID-19 pandemic demonstrated that easing restrictions on occupational licensing can increase the availability of professionals to the benefit of consumers. In particular, the pandemic highlighted the pitfalls of occupational licensing regimes that restrict the mobility of medical professionals and preclude them from providing services within their scope of medical expertise. Both state and federal agencies waived or repealed regulations that

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[16] Complaint, South Carolina State Board of Dentistry, FTC File No. 0210128 (September 15, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/09/socodentistcomp.pdf.

[17] Recently, the Commission examined questions of occupational licensing in detail. In 2017, Acting Chairman Maureen Ohlhausen created an Economic Liberty Task Force to renew the Commission's efforts to address occupational licensing regulations. In 2018, the Economic Liberty Task Force released its report. FTC Staff Paper, Policy Perspectives: Options to Enhance Occupational License Portability (Sept. 2018), https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper.pdf.

[18] For an overview of the advocacy efforts involving occupational licensing and regulation, *see* Prepared Statement of Fed. Trade Comm'n on Competition and the Potential Costs and Benefits of Professional Licensure, before the H. Comm. on Small Bus., 113 Cong. 14 (July 16, 2014), https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

[19] *See, e.g.*, FTC Staff Paper, Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses (March 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; FTC Staff Comment to the Dep't of Veterans Affairs (July 25, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf (supporting proposed rule that would allow APRNs to provide services required by the VA without the oversight of a physician); FTC Staff Comment to the Iowa Dep't of Public Health (Dec. 20, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-professional-licensure-division-iowa-department-public-health-regarding-proposed/v170002_ftc_staff_comment_to_iowa_dept_of_public_health_12-21-16.pdf (regarding the appropriate level of supervision of physician assistants).

constrained the mobility and supply of health care professionals, reducing delays and restrictions on the availability of care.[20]

It was gratifying to see these changes, although unfortunate that a global pandemic was necessary to prompt them. As a society, we can choose to focus on the positive and preserve, even after the pandemic subsides, the enhanced levels of choice and competition in health care now emerging. Legislators and regulators should consider which laws and rules are truly necessary for patients' safety, and which ones create unnecessary barriers to market entry. Specifically, changes made to address COVID-19 give policymakers the opportunity to observe how the absence of these restraints has impacted patients. Moreover, the fact that states have responded differently during the pandemic will enable comparative analyses, highlighting the benefit of states as laboratories of democracy.

Monopsony Resulting From Mergers or Collusive Agreements

A monopoly arises when a market has only one seller but many buyers; conversely, a monopsony arises when a market has many sellers but only one buyer.[21] Both the FTC and DOJ have brought cases premised on monopsony concerns, and litigants in private antitrust cases have prevailed on monopsony allegations. As the following examples demonstrate, monopsony power may serve as the basis for violations of the Clayton Act and the Sherman Act, even when ultimate downstream markets are not impacted. In other words, existing antitrust standards do not preclude cases based on monopsony harms to labor and middlemen.[22]

In the merger context, the 2010 Horizontal Merger Guidelines devote a section to explaining that "[m]ergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market."[23] Notably, the 2010 Horizontal Merger Guidelines provide that monopsony

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[20] Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, 43 Antitrust 14 (Summer 2020), https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic-_and_beyond.pdf (discussing the ways in which both federal and state authorities waived, suspended, and repealed occupational licensing restrictions during the pandemic).

[21] Robert S. Pindyck and Daniel L. Rubinfeld, MICROECONOMICS 349 (7th edition), Instructor's Review Copy (2009).

[22] In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, the Supreme Court vacated a jury verdict finding a Sherman Act Section 2 violation, but made it clear that a monopsony claim did not require a showing of increased prices in a downstream market or even any harm to consumers. 127 S. Ct. 1069, 1076 (2007). ("case does not present . . . a risk of significantly increasing concentration in . . . the market for finished lumber"); *id.* at 1078 ("Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits."). Antitrust analysis and guidance does at times speak generally using specific harms for "simplicity of exposition," but proponents of reform are incorrect to imply the antitrust only evaluates prices effects on a narrow group of downstream consumers. *See, e.g.*, U.S. DEP'T OR JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010) ("For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects.").

[23] *See* U.S. DEP'T OR JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (Aug. 19, 2010).

concerns may arise "even if the merger will not lead to any increase in the price charged by the merged firm for its output."[24]

Applying the Guidelines, the antitrust agencies examine proposed mergers to identify potential monopsony issues. For instance, the FTC recently required global health care company Grifols S.A. to divest blood plasma collection centers in three U.S. cities to resolve charges that Grifols' acquisition of Biotest US Corporation would be anticompetitive.[25] The FTC's analysis stated that Grifols and Biotest were the only two buyers of human source plasma in three U.S. cities, and that these three cities constituted relevant geographic markets because plasma donors typically do not travel more than twenty-five minutes to donate plasma.[26] Absent divestitures, Grifols likely would have been able to exercise monopsony power by unilaterally decreasing donor fees in the three cities.[27]

Also applying the 2010 Horizontal Merger Guidelines, the DOJ filed a complaint against the proposed acquisition by Aetna Inc. of the Prudential Insurance Company of America.[28] The complaint alleged that the acquisition would eliminate head-to-head competition between the parties for the sale of health maintenance organization and HMO-based point-of-service health plans in two relevant geographic markets (Houston and Dallas).[29] This claim rested on the merging parties' role as *sellers* of HMO and HMO-POS services. But for today's purposes, it is notable that the complaint also alleged that the acquisition would enable Aetna to unduly depress physicians' reimbursement rates in those same cities, resulting in a reduction in quantity or a

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[24] *Id.* at Ex. 24.

[25] Press Release, Fed. Trade Comm'n, FTC Requires Grifols S.A. to Divest Assets as Condition of Acquiring Biotest US Corporation (August 1, 2018), https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest.

[26] Analysis of Agreement Containing Consent Orders to Aid Public Comment at 2, Grifols S.A., File No. 181-0081 (Aug. 1, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_analysis.pdf.

[27] The complaint and remedy also addressed the U.S. market for hepatitis B immune globulin ("HBIG"), a plasma-derived injectable medicine that provides hepatitis B antibodies for preventing hepatitis B infections. The proposed acquisition included a significant ownership stake in ADMA Biologics ("ADMA"), which would have allegedly eliminated substantial competition between ADMA, the largest supplier of HBIG, and Grifols, the third-largest supplier. The consent agreement prohibited Grifols from obtaining ownership or control of any ADMA stock. Analysis of Agreement Containing Consent Order to Aid Public Comment, Grifols S.A., File No. 181-0081 (Aug. 1, 2018), https://www.ftc.gov/system/files/documents/cases/181_0081_c4654_grifols-biotest_analysis.pdf.

[28] Complaint, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/complaint-1. Monopsony concerns outside of labor have also been addressed in merger enforcement. In DOJ's challenge of the Charter/Time Warner merger, DOJ alleged that the parties competed as buyers of video content and the merger enhanced the parties' ability to restrain access to these critical inputs for new entrants. Accordingly, the proposed combination was alleged to substantially lessen competition in video programming distribution because of the buying power that could prevent nascent competition from emerging. The settlement prohibited the merged entity from entering into or enforcing any agreement with a programmer that limited or created incentives to limit the programmer's provision of content to certain potential competitors of the parties. United States v. Charter Communications, Inc. et al., Competitive Impact Statement, No. 1:16-cv-00759 (D.D.C. May 10, 2016), https://www.justice.gov/atr/file/844831/download. https://www.justice.gov/atr/file/850161/download.

[29] Complaint ¶ 26, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/complaint-1.

degradation in quality of physicians' services.[30] This allegation focused on the role of the merging parties as *buyers* of physicians' services – in other words, the ability of the entity to exercise monopsony power. The proposed settlement required divestitures of certain assets sufficient to preserve competition both for the sale of HMO and HMO-POS plans and for the purchase of physicians' services in the relevant geographic markets.[31]

Agency challenges premised on monopsony concerns are not limited to mergers. For instance, in 2018, the FTC obtained a settlement with two companies that provided therapist staffing services to home-health agencies. According to the FTC's complaint, the two owners agreed to lower their therapist pay rates to the same level, and they also invited several of their competitors to lower their rates in an attempt to keep therapists from switching to staffing companies that paid more.[32] The complaint charged the staffing agency and the two owners with violating Section 5 of the Federal Trade Commission Act by "unreasonably restraining competition to offer competitive pay rates to therapists," "fixing or decreasing pay rates for therapists," and "depriving therapists the benefits of competition among therapist staffing companies."[33] And the DOJ brought an action against firms that procure billboard leases that had agreed to refrain from bidding on former leases for a year after a conspirator lost or abandoned the space.[34] The challenged agreement was limited to the input market—the procurement of billboard leases—and did not extend to downstream sales where the parties also competed.[35]

Non-Compete Provisions

Non-compete agreements that are unreasonable as to temporal length, subject matter, and/or geographic scope will be found to violate both federal[36] and state antitrust laws. Moreover, state and common law provide rich guidance on this topic. And to date, the economic evidence regarding the impact of non-competes in the labor arena is mixed. For these reasons, I believe we should heed the wise guidance of Justice Brandeis, who noted that "a single

[30] *Id.* at ¶ 33.

[31] Revised Competitive Impact Statement, United States v. Aetna Inc., No. 3-99-CV-398-H (N.D. Tex. June 21, 1999), https://www.justice.gov/atr/case-document/revised-competitive-impact-statement.

[32] *See* Complaint at 3–5, Your Therapy Source, LLC, F.T.C. File No. 171–0134 (2018), https://www.ftc.gov/system/files/documents/cases/1710134_your_therapy_source_complaint_7-31-18.pdf.

[33] *Id.* at 5.

[34] *See* United States v. Brown, 936 F.2d 1042, 1044–45, 1044 n.1, 1050 (9th Cir. 1991) (affirming jury verdict convicting defendants of conspiring to restrain trade in violation of Section 1 of the Sherman Act).

[35] *Id.* at 1045.

[36] Although not involving labor, the FTC recently required merging parties to strike an overly broad non-compete provision from the purchase agreement to remedy concerns regarding the anticompetitive consequences of that provision. Analysis of Agreement Containing Consent Orders to Aid Public Comment, DTE Energy Company et al., No. 191-0068 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/cases/07_dte-enbridge_aapc_redacted.pdf ("Under the terms of the proposed Consent Agreement, and to maintain competition in the affected market post-merger, Respondents are required to strike the Non-Compete from the purchase agreement and are prohibited from entering similarly anticompetitive agreements with their pipeline competitors in this market.").

courageous state may, if its citizens choose, serve as a laboratory" and "[d]enial of the right to experiment may be fraught with serious consequences to the nation."[37]

Studies analyzing the impact of non-competes in the labor arena have revealed mixed results. Some studies have found that non-competes suppress employee wages and mobility. For example, one study found that a ban on non-competes for technology workers increased mobility by 11 percent and new-hire wages by four percent.[38] Another study concluded that moving from the 10th to the 90th percentile in enforceability on non-competes decreased earnings by three to four percent.[39] For low-wage workers, the group that has received the most attention,[40] Michael Lipsitz (of the Federal Trade Commission) and Evan Starr found that Oregon's 2008 ban on non-competes for low-wage workers increased hourly wages by up to roughly three percent.[41]

Other studies have found that non-competes have a beneficial impact on employee wages and other employee benefits. For example, one study concluded that physicians who sign non-competes tend to earn more money.[42] Another study found that non-competes increase incentives for firm-sponsored employee training.[43] And other research has revealed that employee awareness of non-competes before offers are accepted generates higher wages relative to employees without non-competes.[44]

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[37] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.").

[38] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan P. Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (U.S. Census Bureau Center For Econ. Studies Paper No. CES-WP-17-09, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782.

[39] Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (Working Paper, Feb. 17, 2020).

[40] Glenn Kessler, *Biden once again bungles a story about low-wage noncompete agreements*, WASH. POST (July 14, 2021) (quoting President Biden at the competition executive order stating "Or there were clauses in McDonald's contracts: You can't leave Burger King to go to McDonald's. Come on. Is there a trade secret about what's inside that patty?").

[41] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements* (Dec. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

[42] Kurt Lavetti et al., *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J OF HUMAN RES.. 1025 (Feb. 7, 2019), http://kurtlavetti.com/UIPNC_vf.pdf ("Using three years of longitudinal earnings data per physician, we estimate that NCAs increase the annual rate of earnings growth by an average of 8 percentage points in each of the first 4 years of a job, with a cumulative effect of 35 percentage points after 10 years on the job.").

[43] Mark J. Garmaise, *Ties that Truly Bind: Non-competition Agreements, Executive Compensation and Firm Investment*, 27 J. OF LAW, ECON., AND ORG. 2, at 376-425 (August 2011).

[44] Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes in the U.S. Labor Force* (Univ. of Michigan Law & Econ Research Paper No. 18-013, 2019), http://dx.doi.org/10.2139/ssrn.2625714.

It is also important to consider the impact of non-competes on stakeholders other than employees. Non-compete agreements can facilitate innovation by assuring firms that trade secrets and other firm know-how will not be transferred to a rival.[45] One study compared high and low non-compete enforceability regimes and concluded that enforceability facilitates riskier research and development investments.[46] Another study of financial advisors found that ending enforcement of non-competes lowered prices to consumers, but also led to a larger than 40 percent increase in incidents of misconduct because firms were more reluctant to discipline advisors.[47] Non-competes can also help firms and workers match more appropriately based on separation costs.[48]

States have or are moving to adopt laws in this area. In California,[49] North Dakota,[50] and Oklahoma,[51] non-competes are prohibited. And several states have considered or passed legislation that limit non-competes for certain types of employees (e.g., Hawaii,[52] New Mexico,[53] and Oregon[54]). Many states are considering bills or adjusting already passed legislation to address employee non-competes.[55]

Despite mixed evidence on the impact of non-competes and the growing number of states with not just common law but legislation, some commentators continue to advocate for a federal solution. They assert that even when non-competes violate state law, employees who cannot

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[45] OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, 9 (March 2016) https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf ("[N]on-competes can encourage additional economic activity and broader information sharing when trade secrets are significant.").

[46] Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Projects?*35 STRATEGIC MGMT.. J. 1230 (Oct. 17, 2012).

[47] Umit G. Gurun et al., *Unlocking Clients: Non-Compete Agreements in the Financial Advisory Industry*, (Kelley School of Bus. Research Paper No. 18-29, 2019).

[48] OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS, 9 (March 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf ([I]f firms with unusually high separation costs are able to match more appropriately with workers, both worker and firm are better off.).

[49] Cal. Business & Professions Code § 16600.

[50] N.D. Cent. Code § 9-08-06.

[51] OK Stat. § 15- 219A.

[52] Haw. Rev. Stat. § 480-4 (technology business employees).

[53] N.M.S.A. 1978, §§ 24-1I-1-5 (healthcare practitioners).

[54] Or. Rev. Stat. § 653.295 (income threshold).

[55] *What Employers Need to Know About New Non-Compete Legislation in Illinois*, The National Law Review (June 8, 2021), https://www.natlawreview.com/article/what-employers-need-to-know-about-new-non-compete-legislation-illinois ("Following a nationwide trend, Illinois has proposed significant legislation affecting employee restrictive covenants, such as non-compete agreements.").

afford a lawyer may experience an *in terrorem* effect.[56] But state attorneys general are well-positioned to take an active role in this arena, as the New York Attorney General did in its heavily publicized settlement with Jimmy John's.[57]

As Justice Brandeis wrote, "[t]o stay [state-by-state] experimentation in things social and economic is a grave responsibility."[58] The elected officials in each state are best situated to weigh the costs and benefits of non-competes and make decisions tailored to the unique circumstances in their jurisdictions. And as with occupational licensing suspensions during the pandemic, state-by-state changes will provide beneficial opportunities for research in this area. A federal solution at this time is premature.

<u>No-Poach Agreements</u>

Antitrust laws prohibiting price-fixing and market allocation apply to labor markets, including no-poach and similar agreements among competitors to constrain labor. Guidance published jointly by the FTC and the DOJ states clearly that wage-fixing and no-poach agreements may be prosecuted as criminal antitrust violations. Enforcement in this area, including by the state attorneys general, underscores the message to the business community that these agreements will not be condoned.

In 2016, the FTC and the DOJ issued guidance for human resources professionals.[59] The guidance explains that "[n]aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws."[60] The guidance then warns that "the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct."[61] According to the guidance, criminal charges can be brought against both the individuals and the companies involved.[62]

Beyond clear warnings to the business community, the federal antitrust agencies have a history of challenging no-poach and related agreements that harm labor. The FTC's history in

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[56] Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARVARD L. REV. 536, 545 (2018).

[57] Press Release, A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets (June 22, 2016) https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements.

[58] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[59] DEP'T OF JUSTICE, ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[60] *Id.* at 3.

[61] *Id.* at 4.

[62] *Id.*

this area dates back to at least the 1990s. In 1992, the FTC reached a consent with Debes Corp. for entering into agreements to boycott temporary nurses' registries in order to eliminate competition among the nursing homes for the purchase of nursing services, which depressed the price of those services.[63] In 1995, the FTC reached a consent with the Council of Fashion Designers of America and the organization that produces the fashion industry's two major fashion shows for attempting to reduce the fees and other terms of compensation for models.[64] In 2007, the DOJ reach a consent with the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform bill rate for temporary and per diem nurses.[65] And in 2010 and 2014, the DOJ filed civil complaints and reached consents in three cases against eight technology companies – including Apple and Google – for agreeing not to cold call each other's employees and in two of the cases outright agreeing to limit hiring current employees from certain competitors.[66]

More recently, in 2018, the FTC obtained a consent with two companies – including an owner and former owner – that provided therapist staffing services to home-health agencies.[67] The complaint alleged that the companies agreed to lower their therapist pay rates to equal levels and invited several competitors to do the same, all to prevent therapists from switching to staffing companies that paid more.[68] The complaint charged the staffing agency and the two owners with violating Section 5 of the FTC Act by "unreasonably restraining competition to offer competitive pay rates to therapists," "fixing or decreasing pay rates for therapists," and "depriving therapists the benefits of competition among therapist staffing companies."[69] The

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[63] In re Debes Corp., 115 F.T.C. 701 (1992), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf.

[64] Press Release, Fed. Trade Comm'n, Council of Fashion Designers of America (June 9, 1995), https://www.ftc.gov/news-events/press-releases/1995/06/council-fashion-designers-america.

[65] Competitive Impact Statement, Arizona Hospital and Healthcare Association, No. CV07-1030-PHX (Sept. 12, 2007), ("As an immediate consequence of reducing bill rates below the competitive level, AzHHA has also caused the wages paid to temporary nurses to decrease below competitive levels.").

[66] *See* Competitive Impact Statement, United States v. Adobe Sys., Inc., 1:10-cv-01629 (D.D.C. 2010) https://www.justice.gov/atr/case-document/competitive-impact-statement-0; Competitive Impact Statement, United States v. Lucasfilm Ltd., 1:10-cv-02220 (D.D.C. 2010) https://www.justice.gov/atr/case-document/competitive-impact-statement-141; Competitive Impact Statement, United States v. eBay., Inc., 12-CV-05869-EJD-PSG (N.D. Cal. 2014) https://www.justice.gov/atr/case-document/file/494656/download.

[67] Press Release, Fed. Trade Comm'n, Therapist Staffing Company and Two Owners Settle Charges that They Colluded on Rates Paid to Physical Therapists in Dallas/Fort Worth Area (July 31, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/therapist-staffing-company-two-owners-settle-charges-they.

[68] Complaint, Your Therapy Source, LLC, FTC No. C-4689 (Oct. 26, 2019).

[69] *Id.* at ¶ 29.

DOJ followed by indicting one of the former owners as part of this conspiracy and charged him with obstruction of the FTC's proceedings for false and misleading statements.[70]

State attorneys general have also played a key role in challenging unlawful no-poach agreements. Notably, Washington State investigated and reached settlements with seven fast-food corporations (Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, Jimmy John's, and McDonald's) to remove "no-poach provisions" from their franchise agreements that acted as restrictions on low-wage workers.[71] This work caused the companies to end these practices in thousands of locations nationwide.[72] Washington State Attorney General Ferguson continued his efforts against no-poach agreements, which at the time of his June 2020 report on the initiative, had resulted in more than 200 companies at over 197,000 locations nationwide ending these no-poach provisions.[73] The guidance and enforcement history in this area shows that the FTC, the DOJ, and state attorneys general take this conduct and resulting harms to labor markets seriously.

Procedural Irregularities at FTC Preclude Robust Dialogue on Key Policy Issues

The issues that we are discussing today, together with other antitrust reforms under consideration, merit a thoughtful discussion. Traditionally, the FTC has played a significant role in the antitrust policy debate, and has long enjoyed strong bipartisan dialogue on cases and policy issues. Moreover, this dialogue among Commissioners has benefited from the input of stakeholders obtained through hearings, workshops, notice and comment, and 6(b) studies. New agency leadership unfortunately has made meaningful dialogue among Commissioners, and between the Commission and its stakeholders, difficult by:

- Muzzling staff internally and externally;[74]

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[70] Press Release, Dep't of Justice, Antitrust Div., Former Owner of Health Care Staffing Company Indicted for Wage Fixing (Dec. 10, 2020), https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing.

[71] Press Release, Wash. State Office of the Attorney General, AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

[72] *Id.*(Arby's estimated 3,283 locations nationwide, Auntie Anne's estimated 1,229 locations nationwide, Buffalo Wild estimated 1,214 locations nationwide, Carl's Jr. estimated 1,168 locations nationwide, Cinnabon estimated 836 locations nationwide, Jimmy John's estimated 2,774 locations nationwide, and McDonald's estimated 16,193 locations nationwide.).

[73] WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, NO-POACH INITIATIVE 3 (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

[74] *See, e.g.*, Leah Nylen & Betsy Woodruff Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386 ("'For the time being I am putting a moratorium on staff participating in external events,' [FTC Chief of Staff] Howard wrote. The message was sent to the head of the FTC's major offices, including those who oversee all of the agency's economics, antitrust lawyers and consumer protection attorneys. In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances. 'I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due

- Stifling the flow of agency records and information from staff to the Commission;[75]

- Largely abandoning the tradition of comprehensive staff recommendations discussing legal and economic issues, prudential considerations and litigation risks for matters before the Commission;[76]

- Giving minimal notice to Commissioners (and the public) of sweeping policy changes;[77]

to pressing matters at the FTC,' she wrote. … The temporary moratorium on public appearances may hamper efforts to portray the agency as newly transparent."); Christine S. Wilson, Comm'r, Fed Trade Comm'n, Oral Remarks at the Open Commission Meeting (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf ("I benefit greatly from a process that facilitates full consultation with staff, through oral briefings and comprehensive memoranda, as well as a robust dialogue among the Commissioners. News reports have revealed that FTC staff has been muzzled externally – agency personnel are forbidden from appearing at any public events. Unfortunately, it appears that staff is being silenced internally, as well.").

[75] *See, e.g.*, Letter from Commissioner Christine S. Wilson to Clarivate Plc (Sept. 3. 2021), https://www.ftc.gov/system/files/documents/public_statements/1595685/wilson_second_request_copy_letter_clarivate.pdf ("I regret any imposition this request may cause. Unfortunately, I have been unable to obtain a copy of the Second Request from internal sources. As you will understand, as a Commissioner, I am obligated to exercise due oversight of Commission business. Absent receipt of the Second Request issued to your client, I cannot fulfill this role.").

[76] *See, e.g.*, Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf (regarding the omnibus resolutions, "I have not had the benefit of expert staff input on the legal and economic rationales for undertaking these sweeping measures, let alone their potential impacts and consequences."); *id.* at 6 (regarding rulemaking changes: "Additionally, rulemaking efforts are enhanced when the public has the input from expert staff at agencies overseeing the rulemaking process. The FTC has built transparency into our Rules of Practice by requiring that rulemaking staff publish a staff report containing their analysis of the rulemaking record and recommendations as to the form of the final rule. But the new rules eliminate the staff report requirement."); *id.* at 1 ("With sufficient notice, advance planning, input from our knowledgeable staff, and a robust dialogue among my fellow Commissioners, open Commission meetings could facilitate that goal. Unfortunately, today's meeting falls short on all accounts. In fact, I only learned last Thursday of the Chair's intention to hold this meeting. At the same time, I was informed of her intention to hold votes to rescind the Section 5 Policy Statement and to pass several Omnibus Resolutions that would remove from Commission oversight large swaths of Commission business.").

[77] *See, e.g.*, Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf. ("I received this set of resolutions last Friday, giving me fewer than five business days to assess their scope, content, and interaction with other existing Commission resolutions and initiatives."); NetChoice Comment for the Record: FTC Open Meeting (September 15, 2021), https://netchoice.org/testimony/netchoice-comment-for-the-record-ftc-open-meeting-september-15-2021/ ("Before we discuss the issues at hand we must again express our disappointment in the Commission's seeming lack of effort in soliciting public input. Previously public comment was allowed for as little as fifteen days -- again without providing the actual text of the underlying changes. For the Sept 15, 2021 open meeting this window for public comment was less than three business days and only five days total. Moreover, this notice and comment period fell during the Jewish Holy Week. This continued diminution in public comment periods, whether intentional or otherwise, gives the impression that the Commission and its new Chair are not seriously interested in comments from the public.") (internal citation omitted).

- Giving no written explanations for sweeping policy changes until after those changes are implemented;[78]

- Evading meaningful dialogue at the Commission level;[79]

- Voting against notice and comment on major policy changes;[80] and

- Short-circuiting public input by adopting policy statements during ongoing rulemakings that address precisely the topics at issue.[81]

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[78] Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement 1 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf ("Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware"); Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," (July 9, 2021) ("Last week, with next to no notice or public input, the majority withdrew the Commission's 2015 Statement …. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.").

[79] *See, e.g.*, Oral Remarks of Commissioner Christine S. Wilson at the Open Commission Meeting on July 21, 2021, 1 (July 21, 2021), ("The value of these open meetings for Commission decision making, though, is a different matter. To avoid waiver of the Commission's deliberative process privilege, we must avoid both staff input and a dialogue among the Commissioners. Instead, the Chair and Commissioners are limited to delivering monologues with no interaction. The format makes these events more akin to theatre than to the reasoned decision making that should characterize our institution.").

[80] At the September 15, 2021 open meeting Commissioner Phillips made a motion, which failed on a party line vote 3-2, to seek public comment on the proposal to rescind the Vertical Merger Guidelines. At the July 21, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to seek public comment on the proposal to rescind the 1995 Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions. At the July 1, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to publish the proposed changes to Parts 0 and 1 of the Commission's Rules of Practice in the Federal Register to allow for public comment for 45 days and to have the proposed changes to Parts 0 and 1 of the Commission's Rules of Practice become final only after consideration of comments submitted in response to the Federal Register notice. At the July 1, 2021 open meeting Commissioner Wilson made a motion, which failed on a party line vote 3-2, to solicit public comments for a 45-day period and consider the comments submitted in response to the Federal Register notice before rescinding the Statement of Enforcement Principles Regarding Unfair Methods of Competition under Section 5 of the FTC Act.

[81] *See, e.g.*, Oral Remarks of Commissioner Christine S. Wilson on the Open Commission Meeting of September 15, 2021, 2 (Sept . 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf ("Moreover, the majority advances this policy U-turn while the agency has an open rulemaking that covers not just this Rule, but precisely the topics addressed by their Policy Statement. Specifically, at least three of the questions in our federal register notice ask the public for their thoughts on the topics in the Policy Statement. Rather than taking public input into account, though, the majority today apparently will take the matter into its own hands. Unfortunately, this is not the first time that our new leadership has made a policy U-turn during the pendency of a directly relevant rulemaking. Last month, the FTC withdrew guidance on a specific aspect of our merger notification requirements. But we have an open rulemaking on our merger notification requirements, and we solicited public comment on that very aspect of our reporting regime. It's a nuanced issue, so we posed two

These major changes represent a departure from decades of tradition at the agency. The result?

- Stakeholders are deprived of clarity and guidance regarding the FTC's enforcement intentions in both conduct investigations[82] and merger cases.[83] A lack of clarity regarding what constitutes lawful and unlawful behavior harms honest businesses that seek to comply with the law.

- The FTC is diverging from the DOJ with respect to its enforcement intentions, the antithesis of good government.[84] This widening gap gives fodder to those who support the One Agency Act.[85]

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questions with 11 sub-parts. The public's input on that issue, though, is apparently irrelevant.") (internal citations omitted); Dissenting Statement of Commissioner Christine S. Wilson Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf ("I am concerned that the Policy Statement issued by the majority today not only short-circuits our ongoing rulemaking, but seeks to improperly expand our statutory authority – and to do so unilaterally, rather than in concert with other federal agencies with related jurisdiction.") (internal citation omitted).

[82] *See, e.g.*, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf ("In so doing, the majority removed clarity for honest businesses that seek to follow the law, which today's statement addresses only with vague promises that, later, it will 'consider' new guidance or rules. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.").

[83] *See, e.g.*, Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf ("The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement, and to impose punitive penalties on parties proposing mergers that the Majority believes are anticompetitive. The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.") (internal citations omitted).

[84] *Id.* at 5 ("The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program. More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ. Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear") (internal citations omitted).

[85] One Agency Act, S. 633, 117th Cong. § 4 (2021); One Agency Act, H.R.2926, 117th Cong. § 4 (2021) (Chairman Jim Jordan, co-sponsor). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division

- The majority is making fundamental substantive errors in areas in which the Commission supposedly holds expertise.[86] In other words, faulty processes lead to substantive mistakes.

- The FTC's rich bipartisan tradition – which is so important, given our broad statutory mandate, and which took decades to build – has been torn down in a few short months. Unfortunately, I fear that our successors at the agency will have a terrible time restoring the agency's reputation with Congress and the public.

In closing, I thank the Committee for this opportunity to testify, and look forward to answering any questions you may have.

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of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[86] Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/ (describing the FTC majority's description of EDM in its statement repealing the Vertical Merger Guidelines, leading antitrust scholars Herbert Hovenkamp and Carl Shapiro wrote, "[t]his statement is flatly incorrect as a matter of microeconomic theory. EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions. All of this has been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler. None of the conditions cited by the majority are required for EDM to apply, although they are clearly relevant when one is measuring EDM in a specific vertical merger. While EDM does not save every vertical merger, it should be part of any vertical merger inquiry and is not nearly as limited as the majority's statement suggests. In drafting its statement, the majority appears not to have consulted with the FTC's own Bureau of Economics. As a result, we have the spectacle of a federal agency basing its policies on a demonstrably false claim that ignores relevant expertise. Perhaps we are naïve, but we had been hoping that would stop when Donald Trump left office."); *id* (describing Chair Khan's description of antitrust law, the two leading antitrust scholars wrote, "[t]his is baffling. The statutory text prohibits mergers whose effect 'may be substantially to lessen competition, or to tend to create a monopoly.' Consider a merger between two of the smaller firms in a concentrated market. In the absence of any efficiencies, such a merger could well be illegal, by eliminating the direct competition between those two firms (unilateral effects) or by making it easier for the remaining firms to collude (coordinated effects). Suppose, however, that the merger would enable these two smaller firms to achieve economies of scale, with the result that output is higher and prices lower than without the merger. There is no logical sense in which that merger would 'lessen competition,' so the merger cannot violate the statute. The legality of the merger thus must hinge on those efficiencies, yet the new FTC would ignore them. Inexplicably, the Chair also categorically dismisses 'procompetitive effects' in merger analysis. How can that make any sense? If a merger will generate procompetitive effects and thus will promote competition, on what basis can the Chair claim that the merger will substantially lessen competition, a requirement that is explicit in the text of the statute? Indeed, if mergers never produced procompetitive effects they could be condemned under a per se rule, but neither the statutory language nor a century of enforcement history permits that.").