Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets

April 30, 2020

Introduction and Summary

We appreciate the opportunity to comment on the state of antitrust law and commend the Committee for its bipartisan investigation into digital markets. This important investigation promises to help us better understand, protect, and promote competition in digital markets.

We are concerned that market power is on the rise in the U.S. economy generally, including in the digital markets that are the Committee's focus. Growing market power harms consumers and workers, slows innovation, and limits productivity growth. Courts have contributed to increased monopoly power through decisions that have weakened the prohibitions against anticompetitive exclusionary conduct and anticompetitive mergers. The circumscribed state of the law and insufficient resources have resulted in insufficiently aggressive government enforcement. And when enforcers do bring meritorious cases, their success has been hampered by serious deficiencies in the contemporary judicial interpretation of the antitrust statutes.

In short, economic research establishes that market power is now a serious problem, and that current antitrust doctrines are too limited to protect competition adequately, making it needlessly difficult to stop anticompetitive conduct in digital markets.

The antitrust laws, as interpreted and enforced today, are inadequate to confront and deter growing market power in the U.S. economy and unnecessarily limit the ability of antitrust enforcers to address anticompetitive conduct in the digital markets that the Committee is investigating. For the reasons set forth below, we believe than any conclusion to the contrary reflects either an incomplete or incorrect understanding of economics and the economic literature from the last several decades.

On similar occasions in the past, most notably in 1914 and 1950, Congress acted to correct the direction that the courts had taken by strengthening the antitrust laws. It is once again time for Congress to step in. In broad overview, Congress should update the antitrust laws to:

- Correct flawed judicial rules that reflect unsound economic theories or unsupported empirical claims
- Clarify that the antitrust laws protect against competitive harms from the loss of potential and nascent competition, especially harms to innovation
- Incorporate presumptions that better reflect the likelihood that certain practices harm competition
- Recognize that under some circumstances conduct that creates a risk of substantial harm should be unlawful even if the harm cannot be shown to be more likely than not
- Alter substantive legal standards and the allocation of pleading, production, and proof burdens to reduce barriers to demonstrating meritorious cases

Congress also should improve the effectiveness of antitrust enforcement by increasing the resources available to the federal antitrust enforcement agencies and increasing penalties.

Our discussion below identifies the problems and proposals for correcting them. The signatories to this letter strongly believe that antitrust enforcement has become too lax, in large part because of the courts, and that Congress must act to correct this problem. Specific variations on this theme are described below, although not all of the signatories agree on all the variations.[1] We hope the Committee will respond to these concerns with appropriate legislation, and we would be happy to work with the Committee to help develop legislative language.

Background on Growing Market Power

Effective antitrust enforcement helps protect and foster competitive markets, and thus helps ensure competitive prices for products and services, spurs innovation, and provides a business environment conducive to entrepreneurial activity. Notwithstanding our well-developed antitrust laws and extensive enforcement institutions, today's U.S. economy suffers from growing market power, in both product markets and labor markets.[2] The direct victims include consumers and other exploited buyers, and workers, farmers and other exploited suppliers. In addition, growing market power slows the rate of innovation and productivity growth in the economy as a whole.[3]

Overly lenient antitrust rules in the areas of primary concern to the Committee—mergers and monopolization (which usually involves exclusionary conduct)—have likely contributed substantially to our market power problem.[4] Market power is on the rise in a number of major

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[1] By signing this statement, a signatory does not necessarily endorse every specific conclusion reached in the statement or stated in a document referenced in the statement.

[2] *See generally* JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019); Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, in VISION 2020: EVIDENCE FOR A STRONGER ECONOMY (Washington Center for Equitable Growth, 2020); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69 (2019). These sources also explain why benign explanations for the economic evidence of growing market power are insufficient. On labor market power, see Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537 (2018).

[3] *See generally*, Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED (Josh Lerner & Scott Stern, eds. 2012); Nicholas Bloom & John Van Reenen, *Why Do Management Practices Differ Across Firms and Countries?* 24 J. ECON. PERSP. 203 (2010); Thomas J. Holmes & James A. Schmitz Jr., *Competition and Productivity: A Review of Evidence*, 2 ANN'L REV. ECON. 619 (2010); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L. J. 575 (2007).

[4] Because the Committee's request focused on exclusionary conducts and mergers, we do not discuss problems with antitrust enforcement involving collusive conduct, such as horizontal agreements, other than as facilitated by merger.

industries, including, for example, airlines,[5] brewing,[6] and hospitals,[7] where multiple horizontal mergers that were allowed to proceed without antitrust challenge have markedly increased concentration in important markets and facilitated the exercise of market power.[8] Exclusionary conduct by dominant companies that stifles competition from actual and potential rivals—including nascent rivals with capabilities for challenging a dominant firm's market power and firms with competing R&D efforts—impairs what is often the most important economic force creating competitive pressure for dominant firms.[9] Although government monopolization cases have never been common in the modern era,[10] they have become even less common in recent years, even though market power has been on the rise.[11] According to its workload reports, the

[5] *E.g.*, Federico Ciliberto & Jonathan W. Williams*, Does Multimarket Contact Facilitate Tacit Collusion? Inference on Conduct Parameters in the Airline Industry*, 45 RAND J. Econ. 764 (2014); Gaurab Aryal, Federico Ciliberto & Benjamin T. Leyden, Public Communication and Collusion in the Airline Industry (Becker Friedman Inst., Working Paper No. 2018-11, 2018); Severin Borenstein & Nancy L. Rose*, How Airline Markets Work . . . Or Do They? Regulatory Reform in the Airline Industry*, *in* ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? 63 (Nancy L. Rose, ed. 2014).

[6] *E.g.*, Nathan H. Miller & Matthew C. Weinberg, U*nderstanding the Price Effects of the MillerCoors Joint Venture*, 85 ECONOMETRICA 1763 (2017); Nathan H. Miller, Gloria Sheu & Matthew C. Weinberg, Oligopolistic Price Leadership and Mergers: The United States Beer Industry (Working Paper 2019), available at https://ssrn.com/abstract=3239248. Although a large number of craft brewers have entered in recent years, they cannot easily and inexpensively expand output, so the craft brewing sector remains too small to undermine the market power of the large brewers that account for most of the beer sold.

[7] *E.g.*, Martin Gaynor, Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive

Conduct in Health Care Markets (Testimony before the H. Comm. on the Judiciary, March 7, 2019); Zack Cooper, Stuart Craig, Martin Gaynor & John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured,* 134 Q. J. ECON. 51 (2019); Matt Schmitt, *Multimarket Contact in the Hospital Industry*, 10 AM. ECON. J. ECON. POL'Y 361 (2018); David M. Cutler & Fiona Scott Morton. *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASS'N. 1964 (2013); Leemore Dafny, Kate Ho & Robin S. Lee, The Price Effects of Cross-Market Hospital Mergers (NBER Working Paper No. 22106 2016).

[8] The economic literature, including the studies referenced *supra* notes 5-7 establishes that firms are exercising market power in these and other industries through evidence independent of concentration trends in those industries. Put differently, the evidence that market power is on the rise is neither based exclusively nor primarily on evidence about trends in market concentration. We do not rely on evidence about concentration trends in the economy as a whole, which is less reliable than evidence about trends in concentration in particular markets.

[9] On the feasibility and profitability of exclusionary conduct generally see Fiona Scott Morton, Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects 19-24 (Washington Center for Equitable Growth, 2019), https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/; Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

[10] By one count, the two federal enforcement agencies collectively brought 20 monopolization or attempt to monopolize cases between 1977 and 2000, or less than one per year. By contrast, between 1961 and 1976 the agencies brought 48 cases, or 3 per year. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 449 tbl. 4 (2003).

[11] The number of civil non-merger cases brought by the federal enforcement agencies has been declining. One study finds that the annual average fell from 10.8 cases between 1999 and 2008 to 7.5 cases between 2009 and 2018 — and that most of these cases challenge collusive agreements, not exclusionary conduct. Michael Kades, State of Federal Antitrust Enforcement Fig. 10 (Washington Center for Equitable Growth 2019), https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true. Although trends in the number of cases may have multiple interpretations in the abstract, declining case counts in an

Antitrust Division of the U.S. Department of Justice has brought just a single case under Section 2 of the Sherman Act during this century.[12]

Growing market power is a concern in the digital marketplaces that are the focus of the Committee's investigation.[13] Platforms are often insulated from platform competition to a substantial extent by substantial scale economies in supply and demand (network effects) combined with customer switching costs.[14] The financial markets appear to value many large platforms at levels reflecting an expectation that they will earn substantial rents from the exercise of market power for an extended period of time. Moreover, the economic studies indicating that market power has grown over time suggest that it has increased particularly among firms that extensively employ information technology, both in information technology industries themselves and elsewhere in the economy.[15]

Large online platforms often exist in winner-take-all and winner-take-most markets. In those markets, there are likely to be long periods where a firm has a monopoly or dominant position, which makes anticompetitive conduct more dangerous.[16] Exclusionary conduct and mergers involving online platforms, particularly dominant ones, can harm competition among platforms and harm competition among users on platforms. Large online platforms are often prolific acquirers of other firms, including firms that might otherwise have become platform rivals or could facilitate the entry of such rivals.[17]

Antitrust law and enforcement have failed to respond to growing market power in substantial part because many key antitrust precedents—particularly those precedents governing exclusionary conduct—rely on unsound economic theories or unsupported empirical claims about the competitive effects of certain practices. In part for this reason, the antitrust rules constructed by the courts reflect a systematically skewed error cost balance: they are too

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environment of rising market power indicate that enforcement has not stepped up to address the market power problem.

[12] Scott Morton, supra note 9 at Fig. 1. Although some exclusionary conduct cases may be brought under Section 1 of the Sherman Act, which bars unreasonable restraints of trade, the vast majority involve agreements between competitors and not exclusionary conduct. Moreover, the number of Justice Department civil Section 1 cases has been falling as well. *See* Kades, *supra* note 11.

[13] Our reasons for concern about the conduct of digital platforms and their exercise of market power, set forth in this paragraph and the next, do not include their mere size.

[14] *See* Report of the Digital Competition Expert Panel, Unlocking digital competition 35 ¶¶ 1.81-1.88 (2019), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schwitzer, Competition Policy for the digital era, 21-22, 36, 90 (European Union 2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Stigler Center for the study of the Economy and the State, Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, 4, 6, 13-17, 40, 66 (Stigler Center July 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

[15] Baker, *supra* note 2 at 18-20.

[16] *See generally* Stigler Center, *supra* note 14.

[17] *See* Stigler Center, *supra* note 14 at 53 n.110, 66-67.

concerned to avoid both chilling procompetitive conduct and the high costs of litigation, and too dismissive of the costs of *failing* to deter harmful conduct. Excessively permissive precedents and unsound or unsupported economic claims have, in turn, encouraged overly cautious enforcement policies and overly demanding proof requirements and have discouraged government enforcers and private plaintiffs from bringing meritorious exclusionary conduct cases.[18] These developments have likely contributed to an increased incidence and exercise of market power across the U.S. economy.

Overly lenient antitrust rules have been defended with reference to mistaken and unjustified assumptions—including erroneous claims that markets self-correct quickly, monopolies best promote innovation, firms with monopoly power can obtain only a single monopoly profit, vertical restraints and mergers almost invariably benefit competition even in oligopoly markets, courts and enforcers are manipulated by complaining competitors, and courts cannot tell whether exclusionary conduct harms competition or benefits it. Each of those mistaken assumptions leads courts to underestimate the likelihood antitrust violations and the resulting harm.[19] The evidence shows, in contrast to these mistaken assumptions, that:[20]

- Without legal intervention, markets often take a long time to correct anticompetitive activity
- Monopolies can and often do stifle innovation
- A monopolist can often earn additional profits by extending its monopoly into related markets, or by using exclusionary conduct to preserve market power in its primary market
- Vertical restraints and mergers, particularly in oligopoly markets, deserve no presumption that they improve competition—in many cases they can harm competition[21]
- Both the enforcement agencies and the courts understand that competitors may have ulterior motives, and they can judge them; the more likely danger is that generalist judges with limited antitrust experience or expertise are too willing to accept the self-serving testimony of defendants over documents and economic reasoning[22]

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[18] Moreover, the adoption of more lenient antitrust rules has not simplified antitrust litigation.

[19] For an example, *see* Michael Kades, Underestimating the cost of underenforcing U.S. antitrust laws (Washington Center for Equitable Growth 2019) (discussing history of antitrust litigation challenging reverse-payments settlements), https://equitablegrowth.org/competitive-edge-underestimating-the-cost-of-underenforcing-u-s-antitrust-laws/.

[20] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right,* 80 ANTITRUST L.J. 1 (2015).

[21] Marissa Beck & Fiona M. Scott Morton, Evaluating the Evidence on Vertical Mergers (2020), https://ssrn.com/abstract=3554073, survey the literature on vertical mergers and explain why the older studies of the consequences of vertical conduct surveyed in Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007), do not support a claim that vertical integration should be presumed to benefit competition.

[22] *United States v. AT&T, Inc.,* 310 F. Supp. 3d 166, 204 (dismissing companies' internal documents) (D.D.C. 2018), aff'd 916 F.3d 1029 (D.C. Cir. 2019); *id.* at 211 (accepting credibility of defendants' witnesses); *New York v.*

In the next two sections, we identify specific problems with antitrust statutes and precedents involving monopolization and mergers that Congress could usefully address. We also point out ways the institutional structure of antitrust enforcement could be improved to enhance enforcement.

Legal Rules

The antitrust case law recognizes that anticompetitive exclusion, by a dominant firm or otherwise, is a serious problem when demonstrated.[23] The prohibitions against anticompetitive mergers are also well-established.

The courts nonetheless have thrown up inappropriate hurdles that limit the practical scope of the antitrust laws' application to anticompetitive exclusionary conduct, including monopolization, and to anticompetitive mergers. As Howard Law Professor Andrew Gavil explains with respect to the monopolization statute, "Section 2 [of the Sherman Act] has been largely circumscribed to the point where major government prosecutions are rare, and few private challenges succeed."[24]

Over time, the courts have become hospitable to horizontal mergers in all but the most concentrated oligopoly markets, leading government enforcers to do the same.[25] Over the past two decades, the courts have generally decided litigated merger cases in favor of government enforcers,[26] but troubling aspects of the reasoning in four very recent government merger

Deutsche Telekom AG, 2020 WL 635499 at *41-*42 (D.D.C. 2018) (rejecting documentary evidence and accepting self-interested testimony of defendants). Other courts have questioned the credibility of defendant witnesses, *e.g.,* U.S. v. Sabre Corp., 2020 WL 1855433 (D. Del. 2020), and the Supreme Court has cautioned against uncritical judicial acceptance of defendant witness testimony in antitrust cases. United States v. Gypsum Co., 333 U.S. 364, 396 (1948) ("Where such testimony is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."). We are concerned that some judges, in making credibility determinations, may be improperly influenced by the erroneous assumption that the enforcement agencies systematically bring cases at the instigation of rivals, which may be inefficient or unsuccessful, seeking to manipulate the judicial system for their private advantage. Baker, *supra* note 20 at 25-29. More generally with respect to monopolization, excluded fringe and potential rivals to dominant firms are systematically disadvantaged by the litigation process, biasing judicial outcomes to favor dominant firms. Erik Hovenkamp & Steven C. Salop, Asymmetric Stakes in Antitrust Litigation (Working Paper 2020), https://ssrn.com/abstract=3563843. In general, dominant firms have more to gain by defending their profits from exercising market power than small rivals have to gain by protecting their ability to earn (smaller) competitive profits.

[23] Baker, *supra* note 9 at 535-43.

[24] Andrew Gavil, Competitive Edge: Crafting a monopolization law for our time, (March 27, 2019), https://equitablegrowth.org/competitive-edge-crafting-a-monopolization-law-for-our-time/.

[25] *See* William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 143-44 (2009) (describing the relaxation of the threshold number of significant post-merger competitors prompting agency scrutiny of horizontal mergers from the 1960s through the 2000s, influenced by changing judicial standards); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 24-33 (2015) (describing changes over time in the likelihood of FTC enforcement by concentration level).

[26] This success rate may reflect overly cautious case selection by enforcers too concerned with litigation risk and is unlikely to reflect a change in the judicial attitude toward mergers generally. An unsuccessful Justice Department merger challenge on a unilateral effects theory in 2004 likely discouraged that agency from litigating again under

losses—three of which involve digital markets[27]—call into question whether the courts can be relied upon to evaluate mergers appropriately to protect competition, both generally and in the digital markets of particular concern to the Committee.

We divide the legal hurdles into three categories: those mainly restricting exclusionary conduct cases, those mainly restricting merger cases, and those importantly restricting both. Although this list is not exhaustive (there are other legal hurdles we have not mentioned) we see these errors as particularly important.

Exclusionary Conduct

Several legal developments limit meritorious cases challenging exclusionary conduct that harms competition.[28]

- Courts have nearly eliminated challenges to unilateral refusals to deal[29] and predatory pricing claims.[30]
- The courts have created a gap between Sections 1 and 2 of the Sherman Act that insulates anticompetitive single-firm, exclusionary-conduct from condemnation when the excluding firms do not satisfy the high market share threshold that

that theory for nearly a decade. The high agency success rate may also reflect a willingness of some merging firms to litigate even when they are likely to lose, as the firms may choose to do when they perceive a large private benefit of winning. When the agencies spend resources on those cases, they cannot take on more aggressive challenges.

[27] Government enforcers lost merger challenges in three digital market cases. *United States v. AT&T, Inc.*, 310 F. Supp. 3d 166 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (2019); *New York v. Deutsche Telekom AG,* 2020 WL 635499 (D.D.C. 2018); *U.S. v. Sabre Corp*., 2020 WL 1855433 (D. Del. 2020). They also lost a merger challenge in *Federal Trade Commission v. RAG-Stiftung*, 2020 WL 532980 (D.D.C. 2020).

[28] The Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong. addresses some of these problems. This statement focuses on the adequacy of legal rules and institutions, and not specific legislative proposals for reform.

[29] *Trinko,* 540 U.S. 398 at 407-08 (explaining that the Court is "very cautious" in recognizing exceptions to a firm's unilateral right to refuse to deal with rivals, and terming the holding in *Aspen Skiing* as a "limited exception" that is "at or near the outer boundary" of Section 2 enforcement). *See also Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 448-51 (2009)*; Novell, Inc. v. Microsoft Corp*., 731 F.3d 1064, 1072-73 (10th Cir. 2013) (Gorsuch, J.) (indicating that "today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid" and defending a "presumption of legality" for unilateral conduct). Under today's standards, it is at least questionable whether the government would have been successful in breaking-up AT&T's phone monopoly in the 1980s. Howard Shelanski, *The Case for Rebalancing Antirust and Regulation,* 109 MICH. L. REV. 683, 684 (2011).

[30] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 223 (1993) (asserting that permitting predatory pricing enforcement based on above cost prices would create "intolerable risks of chilling legitimate price-cutting"); *id.* at 227 (expressing skepticism about the difficulty of establishing below-cost pricing and recoupment); *id.* at 227 (rejecting a finding of likelihood of recoupment on the facts, colored by the "general implausibility" of predatory pricing, without considering the possibility recognized in the economics literature that predators could recoup in multiple markets other than the one where predation occurred). *See* C. Scott Hemphill & Philip J. Weiser,

Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing, 127 YALE L. J. 2048, 2049 (2018) (describing "serious criticism" of both the below-cost pricing requirement and recoupment requirement for predatory pricing).

courts usually employ for establishing monopoly power in a monopolization case or establishing dangerous probability of success for attempted monopolization (including monopoly leveraging).[31]

- The U.S. Supreme Court has been too willing to presume that monopolies promote innovation, failing to recognize that because monopolies gained or maintained through exclusionary conduct push other innovators out of the market, those monopolies are much more likely to diminish than to increase innovation overall.[32]

Multiple legal developments have unnecessarily and without adequate economic justification increased the burden on plaintiffs to prove meritorious exclusionary conduct cases.

- Plaintiffs challenging the conduct of transaction platforms face unnecessary demands in proving their cases, and when creating this problem, the Supreme Court exacerbated it by not clearly specifying the limits of the transaction platform category.[33]
- The Supreme Court has suggested that proof of anticompetitive effects requires the demonstration of a reduction in output, even though a reduction in output may be more difficult to prove than an increase in price, and even though it is not necessary for conduct to harm competition among platforms.[34]
- Courts have treated exclusionary vertical conduct as presumptively procompetitive, even in settings such as oligopoly markets and markets with dominant firms where it is well-established that vertical restraints can harm competition, with the practical effect of raising the plaintiff's burden.[35]

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[31] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See generally* Gavil, *supra* note 24. Courts often require a 70% share for finding monopoly power in a monopolization case, and a 50% share with a prospect of achieving a 70% share for finding dangerous probability of success in an attempted monopolization case. ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 640 (3d ed. 2017).

[32] *See Trinko*, 540 U.S. 398 at 407 (construing the Sherman Act to "safeguard the incentive to innovate" by firms exercising monopoly power). The Court does not appear to recognize, as discussed *supra* note 3 and accompanying text, that competition generally spurs innovation and productivity while market power gained through exclusionary conduct inhibits it.

[33] *Ohio v. American Express Co*., 138 S.Ct. 2274, 2285 n.7, 2287 (2018) (requiring plaintiffs to prove that a vertical restraint imposed by a transaction platform harms competition in a market encompassing both sides of the platform, and rejecting proof by direct evidence by requiring market definition to evaluate defendant market power). *See* Michael L. Katz, *Ohio v. American Express: Assessing the Threat to Antitrust Enforcement*, 3:2 CPI ANTITRUST CHRONICLE (June 2019) (describing adverse consequence threatened by the Court's vague definition of transaction platform).

[34] *American Express*, 138 S.Ct. at 2288. *See generally*, Michael L. Katz & A. Douglas Melamed, Competition Law as Common Law: American Express and the Evolution of Antitrust (U. Penn. L. Rev, forthcoming) (explaining why output is a poor proxy for economic welfare in platform antitrust cases). The discussion of this point in *American Express* does not appear to be limited to evaluating the conduct of transaction platforms.

[35] *See* Gavil et al., *supra* note 31, at 913-15. *Cf. American Express*, 138 S. Ct. at 2297 (Breyer, J., dissenting) (indicating that the majority "seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890").

- In some cases, courts decline to condemn exclusionary conduct that harms competition on balance if the conduct benefits competition in any way, or plausibly could do so, regardless of the magnitude of the competitive benefit,[36] either on the ground that any justification is sufficient or by applying analytical approaches for evaluating reasonableness in ways that have the same practical effect.[37]

<u>Mergers</u>

Various legal developments limit the success of meritorious merger challenges and the willingness of plaintiffs to bring such cases.

- Plaintiffs face a higher practical burden when challenging anticompetitive horizontal mergers because the structural presumption[38] has been eroded by the courts,[39] effectively insulating horizontal mergers from challenge in markets with more than a handful of rivals.[40]
- Courts have, in some cases, been wary of finding anticompetitive effects that are (and perhaps must be) demonstrated primarily or entirely with qualitative evidence, such as a reduction in potential competition or innovation.[41]

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[36] *See American Express*, 138 S. Ct. at 2284 (explaining that under the rule of reason, if defendant successfully demonstrates a procompetitive rationale for a restraint, defendant prevails (without comparing harms and benefits) unless plaintiff can show that the efficiencies can reasonably be achieved through less anticompetitive means); *Novell*, 731 F.3d at 1072 (defining anticompetitive conduct in a monopolization case by asking "whether, based on the evidence and experience derived from past cases, the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power"); *id.* at 1075 (explaining that in a monopolization case based on a unilateral refusal to deal with a competitor, "the monopolist's conduct must be irrational but for its anticompetitive effect").

[37] *See, e.g., Viamedia, Inc. v. Comcast Corp.* 951 F.3d 429, 461-62 (7th Cir. 2020) (declining to follow *Novell* in employing a standard characterized as "essentially" a "no economic sense" test to the extent that standard precludes comparing competitive harms with competitive benefits). The "no economic sense" standard is controversial even apart from whether courts have applied it properly. *Compare* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006), *and* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004) *with* A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006), *and* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The ''No Economic Sense'' Test*, 73 ANTITRUST L.J. 413 (2006).

[38] When courts presume that a horizontal merger harms competition from a significant increase in concentration in a highly concentrated market, they are applying the "structural presumption."

[39] *E.g., United States v. Baker Hughes, Inc.*, 908 F. 2d 981, 984 (D.C. Cir. 1990) (describing concentration as simply "a convenient starting point" for a "totality-of-the-circumstances" analysis); *id.* at 991-92 (explicitly disclaiming a requirement that defendants make a "clear showing" to rebut the inference of competitive harm).

[40] *See supra* note 25 and accompanying text.

[41] *E.g., United States v. AT&T Inc.,* 310 F. Supp. 3d 161, 242-49 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) (rejecting theory that merger would stifle innovation from virtual cable providers); ; *Federal Trade Commission\v. v. Steris*, 133 F. Supp.3d 962, 978 (N.D. Ohio 2015) (requiring government to prove that, absent the merger, the potential competitor "probably would have entered" the market).

- Courts have, in some cases, raised the practical burden on plaintiffs challenging anticompetitive mergers by accepting self-interested testimony of defendants' executives inconsistent with economic reasoning and documentary evidence.[42]
- Courts have insulated acquisitions of potential rivals by dominant firms from challenge by limiting such cases to acquisitions of firms that demonstrably plan to enter the market in which the acquiring firm competes within a relatively short period of time.[43]
- Courts have further insulated acquisitions of potential rivals by dominant firms from challenge by interpreting the Clayton Act not to reach acquisitions when the likelihood of competitive success for the acquired firm is less than 50 percent, regardless of the size of the potential competitive benefit from that success.[44]
- The market definition rules governing transaction platforms in the wake of a recent Supreme Court decision involving vertical restraints[45] have been interpreted to bar a challenge to a transaction platform's acquisition of a non-platform rival.[46]

<u>Exclusionary Conduct and Mergers</u>

Other legal developments limit both meritorious exclusionary conduct and merger cases.

- Courts have discouraged meritorious challenges to exclusionary vertical conduct, including vertical mergers, by systematically favoring defendants in vertical restraints litigation.[47]
- The Supreme Court has suggested that market definition is required, and direct evidence is insufficient for proving market power, in exclusionary vertical restraints cases.[48]

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[42] *See, e.g.,* Brief for 27 Antitrust Scholars as Amici Curiae in Support of Neither Party, *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) (No. 18-5214). *See also supra* note 22.

[43] *E.g., FTC v. Steris Corp*., 133 F. Supp. 3d 962 (N.D. Ohio 2015). *Cf.* Darren Bush & Salvatore Massa, Rethinking the Potential Competition Doctrine, 4 Wis. L. Rev. 1035 (2004) (arguing for resurrecting the potential competition doctrine).

[44] Doni Bloomfield, Getting to "May Be": Probability, Potential Competition, and the Clayton Act (unpublished manuscript 2020). *Cf.* Report of the Digital Competition Expert Panel, Unlocking digital competition 100-101 (2019) (recommending "balance of harms" approach), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel. These legal rules also make it difficult for enforcers to challenge and deter serial acquisitions, no single one of which meets today's demanding standards but which collectively eliminate competition.

[45] *Ohio v. American Express Co*., 138 S.Ct. 2274 (2018).

[46] *U.S. v. Sabre Corp.,* 2020 WL 1855433 (D. Del. 2020). *See* Randy M. Stutz, We've Seen Enough: It Is Time to Abandon Amex and Start Over on Two-Sided Markets (Am. Antitrust Inst. 2020), https://www.antitrustinstitute.org/work-product/aai-says-its-time-to-cancel-amex-sabre-farelogix-opinion-makes-a-mockery-of-market-definition/.

[47] *See, e.g.,* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991).

[48] *Supra* note 33.

- Courts have expanded their ability to grant defendants immunity from the antitrust laws.[49]
- Courts increasingly view an industry's technological progress, with products improving and output increasing over time, as justification for declining to find an antitrust violation,[50] without always asking whether the industry would perform even better were competition not impeded by the challenged conduct.[51]

<u>Consequences for Competition and Antitrust in Digital Markets</u>

While these troubling judicial rules and decisions impede effective antitrust enforcement generally, they do so particularly with respect to protecting competition in the digital marketplace. Anticompetitive harm in these markets will often involve eliminating nascent or potential competitors, diminishing quality, or suppressing innovation—all of which are precisely the areas where courts have expressed skepticism. In many cases, current legal doctrine will give dominant platforms the effective license to harm competition by engaging in unilateral refusals to deal, predatory pricing, and exclusionary vertical conduct.

Beyond the specific hurdles that limit refusal-to-deal and predatory pricing claims,[52] some courts require the plaintiff to prove that the exclusionary conduct has literally no actual or plausible benefit to competition. And the Supreme Court has at least suggested that a plaintiff must demonstrate an output reduction to prove anticompetitive effects and cannot rely exclusively on direct evidence to prove market power. Collectively these rules promise to raise substantially the practical burden faced by plaintiffs seeking to challenge anticompetitive exclusionary conduct by platforms, thereby diminishing deterrence of anticompetitive conduct.[53]

In addition, platforms may acquire nascent rivals with only limited concern for antitrust challenge. These acquisitions eliminate firms that could someday offer products or services in direct competition with those sold by incumbent firms. The acquired firms might, for example,

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[49] *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (upholding dismissal of proposed class action because the securities laws implicitly precluded the application of the antitrust laws to the alleged conduct). *See* Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L. J. 1922, 1943 (2018) (explaining that *Credit Suisse* "went beyond prior implied immunity cases to establish a rule that blocks some claims even when they rely on legitimate antitrust principles, are consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme").

[50] *See New York v. Deutsche Telekom AG*, 2020 WL 635499 at *46 (D.D.C. 2018) (observing that "[s]everal federal courts have recognized that certain markets should be characterized as dynamic by reason of constant innovation and other rapid changes, and that analysis of antitrust effects of specific transactions in such markets warrants more particularized consideration than courts accord under traditional economic analysis, to that extent counseling greater caution in judicial intervention").

[51] *Cf.* Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, *in* 20 INNOVATION POLICY AND THE ECONOMY 125, 155-56 (Josh Lerner & Scott Stern, eds. 2020) (discussing the "fallacy" of inferring the absence of exclusionary conduct from the presence of market improvements).

[52] *Supra* notes 29 & 32 and accompanying text.

[53] In addition, platforms may use arbitration provisions in their contracts with users to insulate themselves from meritorious antitrust cases.

already have such products under development, have R&D efforts underway to create such products, have the capability to do so, or know the market well through the production of complementary products. But all such acquisitions would be difficult to challenge under current legal doctrine, even where the nascent rival would dramatically disrupt the market and enhance competition substantially if it succeeded.[54]

Resources and Institutions

Our antitrust enforcement institutions, like the courts, need to do more to address the challenge of growing market power in the U.S. economy. One challenge is resources. Between 2008 and 2019, the economy has grown twice as fast as resources provided to the Antitrust Division and the Federal Trade Commission, [55] even as the market power problem has been on the rise. Other enforcers cannot be expected to pick up the slack because most state enforcement agencies are small, and private enforcement has been constrained by Congress and the courts.[56] Limited federal agency resources pose a particular problem for merger enforcement because private plaintiffs and the states rarely find it cost effective to challenge anticompetitive mergers.

At times, moreover, the Department of Justice has abetted a judicial retrenchment in antitrust law governing exclusionary conduct by dominant firms through its guidance and advocacy. One example is the Section 2 report, issued by DOJ near the end of the George W. Bush administration.[57] Among other things, the report suggested that unilateral refusals to deal by dominant firms should be treated as virtually legal per se—thereby encouraging firms to undertake such conduct and courts to permit it, even when competition is harmed.

During the current administration, moreover, the Justice Department has filed amicus briefs advocating a standard for evaluating exclusionary conduct cases that courts have interpreted as insulating that conduct unless plaintiff can prove it has literally no actual or plausible benefit to competition.[58] And DOJ has, through another amicus brief, come close to denying any role for

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[54] *Supra* note 44 and accompanying text.

[55] Kades, *supra* note 11. Alternatively, in real terms, "[t]he antitrust enforcement agencies had slightly fewer resources in 2018 ($471 million) as they did nearly 20 years earlier, in 2001 ($491 million). *Id.* at Fig. 11. Congress, at the request of this committee, did increase FTC appropriations by $40 million dollar for fiscal year 2020.

[56] One constraint on private enforcement is a Supreme Court decision allowing firms to require by contract separate arbitration for each individual plaintiff. *Am. Express Co. v. Italian Colors Rest.* 570 U.S. 228 (2013). They also include decisions raising barriers to class actions. *E.g., Comcast Corp. v. Behrend,* 569 U.S. 27 (2013).

[57] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), www.justice.gov/atr/public/reports/236681.pdf, *withdrawn*, Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law. This report was not joined by the FTC and it was withdrawn at the start of the Obama administration.

[58] *E.g.,* Brief for the United States as Amicus Curiae in Support of Neither Party at 15, *Viamedia, Inc. v. Comcast Corp.* 951 F.3d 429, 461-62 (7th Cir. 2020), https://www.justice.gov/atr/case/viamedia-inc-v-comcast-corp-et-al (advocating that the court "follow *Novell* and hold that satisfying the "no economic sense" test is necessary to bring a Section 2 refusal-to-deal case" because that test "helps ensure that a refusal to deal with a competitor does not violate Section 2 if 'valid business reasons exist for that refusal.'").

antitrust enforcement when firms contributing patents to industry standards are found to monopolize markets by evading a commitment to license on reasonable terms.[59]
In both settings, DOJ's amicus briefs encouraged courts to adopt legal rules that would raise barriers to plaintiffs seeking to prove meritorious cases. To take its position in the case involving maintenance of monopoly by evading a licensing commitment and excluding rivals, the Justice Department undertook an unusual and uncompelled intervention in an appeal of an FTC enforcement action after the Federal Trade Commission had prevailed in the district court.

Both the Federal Trade Commission and the Justice Department have at times abetted the judicial retrenchment in antitrust law, particularly as it applies to the conduct of high-tech platforms, by declining to challenge (or in some cases even investigate) nearly all of the large number of platform acquisitions of arguably nascent competitors,[60] and declining to challenge platform conduct that has been the subject of enforcement actions by sophisticated competition agencies abroad. Without regard to the merits of any individual decision, this systematic pattern of enforcement avoidance suggests that until now, the agencies have been too cautious in their enforcement posture toward Internet platforms. We hope that recent agency institutional commitments, such as the FTC's creation of the Technology Division and the agencies' public acknowledgement of investigations, presage an increased enforcement effort.

The Role of Congress

To address growing market power, remedy existing competitive problems, and deter new competitive harms, action is required. For the past 40 years, the courts have imposed a policy judgment that is too accommodating to anticompetitive conduct and too dismissive of the harm that conduct can cause. But Congress need not be a silent partner in protecting competition. It can and should revise the antitrust laws so they are no longer inconsistent with modern economic thinking, correct the skewed error cost balance in existing judicial interpretations, and ensure that our antitrust enforcement institutions are properly funded and designed to succeed.

Congress has corrected the trajectory of court decisions in the past. In 1914, amid concerns about the limitations of Sherman Act interpretation and enforcement, Congress strengthened the antitrust laws by enacting the Clayton and Federal Trade Commission Acts. In 1950, through the Cellar-Kefauver Act, Congress closed loopholes in the primary merger control statute, Section 7 of the Clayton Act, and encouraged courts and enforcers to view mergers more skeptically.[61]

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[59] Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *FTC v. Qualcomm Inc.,* 411 F.Supp.3d 658 (N.D. Calif.), *appeal filed and stay granted*, 935 F.3d 752 (9th Cir. 2019), https://www.justice.gov/atr/case-document/file/1199191/download. *See also* Makan Delrahim, Assistant Att'y Gen., Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law (Nov. 10, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.

[60] *But see* Final Judgment, United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. 2011) (accepting consent settlement resolving competitive issues raised by Google's acquisition of ITA); Press Release, U.S. Department of Justice, Antitrust Division, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 1995), https://www.justice.gov/archive/atr/public/press_releases/2008/239167.htm.

[61] In addition, in 1936 Congress sought to protect rivals and suppliers from the exclusionary consequences of the exercise of market power by supermarkets and other retail chains by enacting the Robinson-Patman Act. *Cf.* Daniel

Once again, Congress has an historic opportunity to identify adverse trends in judicial interpretation of the antitrust and correct problems—not just by overriding damaging precedents, but also by reshaping the antitrust laws more broadly to enhance deterrence of anticompetitive conduct.

With respect to the Committee's particular interest in protecting and fostering competition among online platforms, a number of reforms could be considered. We do not collectively or unanimously endorse any of these, though some of us have done so in other contexts.

Congress could correct various flawed judicial rules, including those noted above, that inappropriately circumscribe antitrust enforcement.[62] Congress also could act affirmatively to enhance deterrence of anticompetitive conduct, either by amending the existing antitrust statutes or enacting new ones. For instance, Congress could codify that, in an antitrust case, direct proof of anticompetitive effects can satisfy the plaintiff's initial burden, without need for circumstantial proof such as inferences made by defining markets and calculating market shares.[63]

Congress also could clarify that the antitrust laws protect potential and nascent competition. In addition, 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. Or Congress could specify presumptions of competitive harm that, for example, would apply in evaluating a dominant firm's exclusionary conduct or acquisitions.[64]

Congress also can enhance the deterrence of anticompetitive exclusion and mergers by increasing enforcement resources, through appropriations, and by increasing penalties. Some of us have proposed still other institutional reforms that Congress might consider, including lowering the threshold for pre-merger notifications to help address insufficient deterrence of anticompetitive acquisitions, particularly by dominant firms acquiring nascent rivals, and creating a specialized trial court for antitrust litigation.[65]

A. Crane, Antitrust Antitextualism, Notre Dame L, Rev. (forthcoming), working paper available at https://ssrn.com/abstract=3561870 (explaining that when the courts have departed from the text and original meaning of the antitrust statutes, they have done so consistently in the direction of reading the antitrust statutes in favor of big business).

[62] *See supra* notes 29-51 and accompanying text.

[63] For further discussion, see Andrew I. Gavil & Steven C. Salop, Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct (U. Penn. L. Rev., forthcoming), working paper available at https://scholarship.law.georgetown.edu/facpub/2218/.

[64] For further discussion of possible presumptions of competitive harm Congress might consider, see Baker, *supra* note 2; Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12 (2019); Gavil & Salop, *supra,* note 63.

[65] *See* Stigler Center, *supra* note 14, Jonathan B. Baker & Fiona Scott Morton, Confronting Rising Market Power (Economists for Inclusive Prosperity Policy Brief, 2019), https://econfip.org/policy-brief/confronting-rising-market-power/#.

We are grateful that the Committee has joined the conversation about how to protect competition in today's U.S. economy, and particularly competition among or on digital platforms. We would be happy to assist the Committee in developing detailed legislative proposals or other initiatives to strengthen the antitrust laws and antitrust enforcement.

Respectfully submitted:[66]

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[66] We are each joining this statement in our individual capacities and have identified our institutional affiliations for identification purposes only.