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The Case Against Legislative Reform of U.S. Antitrust Doctrine

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THE CASE AGAINST LEGISLATIVE REFORM OF U.S. ANTITRUST DOCTRINE

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to the

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

(April 17, 2020)

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Hon. David N. Cicilline, Chairman
Hon. F. James Sensenbrenner, Jr., Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Via Email

April 17, 2020

Dear Representatives Cicilline and Sensenbrenner:

Thank you for inviting me to submit comments on the adequacy of existing antitrust laws to address competition issues in digital markets. You have solicited my views on three topics (1) "[t]he adequacy of existing laws that prohibit monopolization and monopolistic conduct," (2) "[t]he adequacy of existing laws that prohibit anti-competitive transactions," and (3) "[w]hether the institutional structure of antitrust enforcement . . . is adequate to promote robust enforcement of the antitrust laws."

I have directed my comments to your first two queries, as my scholarship has focused primarily on the substance of antitrust law and not on the structure of the antitrust enforcement agencies. While I do offer a few thoughts on issues related to private enforcement of the antitrust laws, I have focused primarily on the adequacy of prevailing antitrust doctrines to address monopolistic conduct and anticompetitive transactions.

I understand that your concerns are with competition "in the digital marketplace." Any legislative reform of antitrust doctrines, however, is likely to have effects beyond digital markets. Accordingly, I have addressed:

- how prevailing antitrust doctrines are faring generally,

- whether digital markets require a different approach,
- whether the United States is experiencing a "market power crisis" that warrants reform of the antitrust statutes,
- whether antitrust is hamstrung by its exclusive focus on consumer welfare and would better serve society by precluding "abuse of dominance" or otherwise offering greater protection for competitors, and
- the merits of ten specific reform proposals.

To summarize my views at the outset, I believe the existing antitrust statutes are optimal for addressing monopolistic conduct and potentially anticompetitive transactions.[1] While some aspects of prevailing antitrust doctrine could be improved, the better approach is to rely on the federal courts to bring about such improvements as they adjust doctrines, in light of economic learning and market developments, through the incremental, common law process. As I explain in more detail below, the antitrust statutes impose *standards* crafted by *courts* in an effort to *enhance consumer welfare* by preventing the extension of market power. Statutory reform is likely either to move antitrust's focus from consumer welfare to other ends, to impose inflexible rules rather than standards, or to delegate the implementation of standards to some government agency rather than to politically insulated courts. For reasons I explain below, each of those changes would diminish antitrust's social value. Accordingly, legislative reform of existing antitrust doctrines is unwarranted.

The current antitrust system works to optimize antitrust's effectiveness.

To understand why the current antitrust statutes should be left as they are, it may help to revisit what the antitrust laws do and how they do it. Experience has taught us that market competition is the best way to secure low prices, high-quality goods and services, and product variety. Not only do competitive markets benefit consumers, they also ensure that society's productive resources are put to their highest and best ends.[2] The goal of antitrust, then, is to promote consumer and societal welfare by ensuring that markets remain competitive.[3]

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[1] As I explain below, this does not mean that current doctrines are likely to preclude every instance of anticompetitive behavior. Rather, it means that they are generally calibrated to minimize the social losses from underdeterrence of anticompetitive conduct, overdeterrence of procompetitive behavior, and administration. Optimality, not perfection in terms of precluding all bad behavior, should be the goal.

[2] Under monopoly circumstances, producers seeking to maximize their profits will artificially restrict supply to drive up prices. This means that some goods and services that would generate greater value than they would cost to produce will not be created. The inputs that would have been used to produce those goods and services will be allocated to lower-value uses, resulting in an overall reduction in social welfare. This is the so-called "deadweight loss" of monopoly.

[3] This does not mean that antitrust should be singularly focused on ensuring that markets include large numbers of competitors. In many markets, output will be higher and prices lower if producers are allowed to exploit economies of scale by growing quite large—so large that only a handful of producers, operating at "minimum efficient scale" (the point beyond which an increase in output does

To secure that goal, antitrust polices the situations in which competition breaks down, chiefly monopoly (or monopsony), where there is a single seller (or buyer), and collusion, where nominal competitors agree not to compete. The two primary provisions of the Sherman Act correspond to these two paradigmatic defects in competition: Section 1 aims at collusion, declaring "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... to be illegal"; Section 2 seeks to prevent firms from attaining monopoly power, making it illegal to "monopolize, or attempt to monopolize, or combine or conspire ... to monopolize" any market. Section 7 of the Clayton Act bolsters these provisions by forbidding business combinations (mergers and asset acquisitions) that are likely to cause a substantial lessening of competition in a market.

Given the sparseness of the statutory text (not to mention the fact that a literal reading of some provisions is nonsensical),[4] determining the scope of antitrust's prohibitions has largely been left to the judiciary. Indeed, most commentators view the antitrust statutes as an implicit delegation of authority to the federal courts to craft a common law of competition, one that evolves according to our ever-expanding learning about the effects of different business practices.

The courts have responded by positing (mainly) standards—not rules—for determining the legality of challenged business practices.[5] They have interpreted Section 1 of the Sherman Act to forbid agreements that *unreasonably* restrain trade and Section 2 to condemn *unreasonably* exclusionary unilateral conduct by firms possessing market power.[6] In both cases, reasonableness is determined by assessing the actual or likely effect of the challenged behavior on quality-adjusted market output. For a few business behaviors (e.g., naked price-fixing among competitors), experience has shown that the conduct is always or almost always output-reducing, so such practices are deemed *per se* unreasonable. Such ex ante rules, though, are the exception in antitrust; for the most part, the law consists of ex post standards that require case-by-case assessment. Courts have posited different standards for different types of business behavior, calibrating them (by adjusting the elements of liability, burdens of proof, available defenses, etc.) to reflect judicial experience and economic learning.

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not reduce per unit costs), are able to supply the entire market. In such markets, output would be impeded and prices would rise if the law broke large, efficient producers into smaller, less efficient ones. Antitrust thus embraces an *output-focused* understanding of competition, where markets are deemed more competitive when they produce more of what consumers want, and at lower prices, and less competitive when they produce less, and at higher prices. The ultimate objective of antitrust is to maximize competition, so understood.

[4] Section 1, for example, condemns all "contracts in restraint of trade," which would include most contracts.

[5] Whereas rules specify up front whether a particular action is permitted or forbidden (as with a speed limit), standards are amorphous legal directives whose specific contours are fleshed out on a case-by-case basis after an action is challenged (as with the common law duty to refrain from negligence).

[6] Section 7 of the Clayton Act incorporates a standard in the statutory text, as it condemns business combinations that are likely to "substantially" lessen competition in a market.

In so doing, the courts have been rightly concerned with the *costs* of the standards they set. One set of relevant costs consists of the welfare losses that result when a standard makes a mistake on liability. The behaviors antitrust polices—agreements that restrain trade, single-firm acts that make life hard for rivals, business combinations—can sometimes enhance market output and sometimes reduce it.[7] If a legal standard mistakenly allows conduct that is, on net, anticompetitive, consumers will face higher prices and/or reduced quality, and a deadweight loss will occur. But if the standard wrongly forbids conduct that is, on balance, procompetitive, market output will be lower than it otherwise would be and, again, consumers will suffer. Both false convictions (Type I errors) and false acquittals (Type II errors) generate losses.

In addition to these so-called "error costs," regulating competitive mixed bags entails significant costs of simply deciding whether contemplated or actual conduct is forbidden or permitted. Such "decision costs" must be borne by business planners (who are attempting to avoid liability), by litigating parties (who are trying to prove their case), and by adjudicators (who must decide whether the law has been broken).

Type I error costs, Type II error costs, and decision costs are intertwined. If courts try to reduce the risk of false conviction (Type I error) by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will increase the risk of false acquittal (Type II error). If they ease a plaintiff's burden or cut back on available defenses to reduce false acquittals, they will tend to enhance the social losses from false convictions. And if they make the rule more nuanced in an effort to condemn the bad without chilling the good, thereby reducing error costs overall, they enhance decision costs. As in a game of whack-a-mole, driving down costs in one area will cause them to rise elsewhere.

In light of the inevitable and intertwined costs that will result from any effort to police market power-creating conduct, antitrust standards should be crafted so as to *minimize the sum of error and decision costs*. The institutions charged with crafting antitrust policies—under the status quo, the courts—should not strive to prevent every anticompetitive act, to allow every procompetitive one, or to keep the rules as simple as possible. In keeping with Voltaire's prudent maxim, "the perfect is the enemy of the good," they should eschew perfection along any single dimension in favor of overall optimization. Such an approach ensures that antitrust accomplishes as much good as possible.

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[7] Antitrust is concerned with business behaviors that generate market power: coordinated conduct that leads to collusion and exclusionary actions that create monopoly power. The difficulty is that many acts of coordination between firms enhance market output, and many business practices that usurp business from the actor's rivals, and thus "exclude" them from the market, also generate benefits for consumers. For example, resale price maintenance may facilitate collusion *but may also* encourage dealer-provided services by preventing free-riding; manufacturers' exclusive dealing agreements may raise rivals' costs of distribution *but may also* spur manufacturer investment in distributors by reducing inter-brand free-riding; extremely low prices may drive rivals from the market, *but they also* offer an obvious and immediate benefit to consumers. These are typical of the behaviors antitrust addresses: They involve both upsides and downsides and thus may be, on net, either output-enhancing (procompetitive) or output-reducing (anticompetitive). They are, in short, mixed bags.

As I have elsewhere documented, this prudent approach has largely been embraced by the U.S. Supreme Court in recent years.[8] Time and again, the Court has examined the economic learning on different business practices and crafted "structured" rules of reason aimed at separating the procompetitive wheat from the anticompetitive chaff, while keeping decision costs in check. For some practices (e.g., tying) the legal rules have not caught up with economic understanding, but the system as a whole is sound, and one would certainly expect the doctrine to evolve in a salutary direction. With respect to mergers and other business combinations, the judicial precedents are less sound, largely because few merger decisions are appealed to allow for an updating of controlling precedents in light of current economic understanding. In the merger context, though, the federal enforcement agencies (the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice) have taken the lead in updating the standards so as to minimize the sum of error and decision costs; the agencies' enforcement guidelines, crafted with an eye toward optimizing antitrust interventions and regularly updated to reflect new economic learning, have been extremely influential among the lower courts and have largely remedied the deficiencies in controlling precedents.

To summarize this section, *any* effort to regulate potentially market power-creating conduct (collusion, exclusionary conduct, business combinations) is sure to create some losses in terms of errors (wrongful acquittals of harmful behavior and wrongful convictions of beneficial conduct) and administrative costs. The approach currently prevailing under the federal antitrust laws—an output-focused, standards-based, common law approach under which courts craft policies in light of evolving understandings of economics and with an eye toward minimizing the sum of error and decision costs—is generally working well.

Digital markets do not warrant a different approach.

Some have suggested that the antitrust approach described above is inadequate to address competition concerns in digital markets. My own view is that this is incorrect. It is true that many digital markets combine features that encourage large firms. Because the firms participating in such markets often have high fixed but low marginal costs, digital markets often exhibit economies of scale, so smaller companies have a cost-disadvantage and therefore cannot succeed.[9] Moreover, many digital markets involve direct network effects[10] and/or two-sided markets involving indirect network effects.[11] Network effects, like economies of scale, tend to reward large businesses.

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[8] *See* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B. C. L. REV. 871 (2011).

[9] Economies of scale exist where a firm's long-run average cost drops as it produces more output and/or serves more customers.

[10] Direct network effects exist where a firm's offering is more attractive as it serves more customers, as with an Internet messaging service or social media platform.

[11] A firm participates in a two-sided market when it serves two distinct sets of customers, as when Google provides Internet search services to computer users and places search advertisements for business customers. Indirect network effects exist when the quality of such a firm's offering for one

Big, though, is not inherently bad. To the extent firms participating in digital markets are big because they are more efficient and/or provide offerings that are subject to network effects, efforts to break them up or stunt their growth are likely to reduce consumer welfare.

Moreover, to the extent economies of scale and network effects influence competitive dynamics by rendering certain conduct anti- or procompetitive, *the current antitrust regime can account for that*. Economists understand quite a bit about economies of scale, network effects, and two-sided markets. Under the prevailing antitrust regime, their views are sure to influence both the application and continued calibration of legal standards, and when economic understanding grows or circumstances change, courts may reach different conclusions.

The alternatives to the prevailing antitrust regime are unappealing. Imposing ex ante conduct rules via statute threatens ossification and significant error costs (as inflexible rules routinely misfire, especially in dynamic, technology-driven markets). Creating an agency to oversee competition in digital markets, as some have suggested, risks agency capture and may ironically entrench incumbent firms, which are likely to have an advantage over new entrants in navigating the regulatory arena. The better approach, in my view, is to stay the course.[12]

There is no market power crisis justifying antitrust reform.

A second purported ground for revising the antitrust laws is that the U.S. is currently experiencing some sort of market power crisis. Those asserting that such a crisis exists point to evidence of increasing industrial concentration in the U.S., growing profit margins, reduced venture capital investment (as start-ups throw in the towel knowing that they will be killed off by entrenched incumbents), and a reduction in the share of surplus being paid to laborers (purportedly a reflection of firms' monopsony power). The popular press has jumped on this crisis narrative, with *The Economist*

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set of customers—e.g., businesses buying search ads—depends on the volume of customers on the other side of the market—e.g., search users.

[12] Undoubtedly, some of the antitrust scholars submitting their views on the adequacy of existing antitrust laws will decry the Supreme Court's recent decision in *Ohio v. American Express*, 138 S.Ct. 2274 (2018), as an example of why the prevailing antitrust approach is inadequate to protect competition digital markets. *See*, *e.g.*, Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. TIMES (June 26, 2018). My own view is that the case, which held that showing harm to competition in two-sided transaction markets requires consideration of effects on both sides of the market, reflects economic learning on two-sided markets and is fundamentally sound. (In the interest of space, I will not purport to defend the *American Express* decision here and will instead direct interested readers to the lucid explanation in DAVID S. EVANS & RICHARD SCHMALENSEE, ANTITRUST ANALYSIS OF PLATFORM MARKETS: WHY THE SUPREME COURT GOT IT RIGHT IN *AMERICAN EXPRESS* (Competition Policy International 2019).) But even if subsequent experience and economic learning reveal *American Express* to be infirm, future courts could easily limit the decision to its unique facts and context (credit card payment systems). That is the beauty of the prevailing antitrust regime: Its contours may evolve as economic learning accrues. Statutory rules, by contrast, are fixed until amended.

leading the way in proclaiming that "America needs a giant dose of competition."[13] Examined closely, though, none of the trends cited points to a market power crisis that could be averted or eased by more aggressive antitrust intervention.

Increased Concentration? With respect to increased concentration, the purported evidence concerns growing concentration at the *industry*—not market—level. One widely cited study, conducted in 2016 by the White House Council of Economic Advisers (CEA), examined broad industry sectors reflected in two-digit codes of the North American Industry Classification System (NAICS).[14] Finding that "the majority of industries [saw] increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012," it concluded that this was "suggestive of a decline in competition."[15] A study by *The Economist* reached a similar conclusion. Dividing the American economy into the "900-odd sectors" recognized by four-digit NAICS codes, the study found that two-thirds of the sectors became more concentrated between 1997 and 2012, with the weighted average revenue share of the top four firms in each sector rising from 26% to 32%.[16] Like the CEA study, *The Economist*'s investigation has been widely cited as evidence of a market power crisis in the U.S.

The problem is that these studies of broad industrial sectors say nothing about *market* concentration, much less about the state of *competition* in markets (which may increase along with concentration if larger firms are more efficient and thus more formidable competitors). Antitrust is interested, quite properly, not in industrial concentration but in competition within markets—"ranges of economic activity in which competitive processes determine price and quality."[17] The CEA study looked at concentration in such vast sectors of the economy as "retail trade," "finance and insurance," and "transportation and warehousing." These giant sectors include all sorts of firms that do not compete (e.g., a shoe store in Sheboygan and a grocer in Grand Forks are both part of the retail trade sector, but they don't constrain each other's prices and are thus not in the same market). The fact that the fifty largest companies in all of U.S. retail collectively account for a larger portion of all retail sales today than

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[13] *See Too much of a good thing: Profits are too high. America needs a giant dose of competition*, THE ECONOMIST (Mar. 26, 2016); *The problem with profits: Big firms in the United States have never had it so good. Time for more competition*, THE ECONOMIST (Mar. 26, 2016).

[14] The NAICS is a classification by economic activity of business establishments in the U.S., Canada, and Mexico. The most refined subcategory in the system has six digits (e.g., Breakfast Cereal Manufacturing in the U.S. is 31120). The first two digits designate the largest business sector (e.g., 31 and 32 are all Manufacturing in North America). The third digit designates the subsector; the fourth, the industry group (e.g., 3112 is all Grain and Oilseed Milling); the fifth digit designates the NAICS industries for the continent; and the sixth digit designates the national industries.

[15] Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power* (April 2016), at 4 (available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf).

[16] *Too much of a good thing*, *supra* note 13.

[17] *See* Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74 (Fall 2018).

the top fifty such companies did fifteen years ago tells us precisely *zero* about the state of market competition in any particular market; for the CEA to suggest otherwise was absurd.[18] And the same goes for *The Economist*'s study. Four-digit NAICS sectors are giant swaths like "other food manufacturing" (NAICS 3119), which lumps together "roasted nuts and peanut butter manufacturing" (NAICS 311911), "coffee and tea manufacturing" (NAICS 311920), and "spice and extract manufacturing" (NAICS 311942). Knowing that the four largest companies in all of "other food manufacturing" now earn a larger portion of that giant sector's revenues than the four top companies did fifteen years ago simply says nothing about market concentration.

As Gregory Werden and Luke Froeb have demonstrated, changes in industrial concentration can easily mask changes in market concentration.[19] Suppose that a state had four cities located one hour apart; that each city initially had five locally owned restaurants, with each earning an equivalent share—five percent—of the state's restaurant sales revenue; and that a "sector" was defined to include all the restaurants in the state.[20] The "CR_4" for the sector (i.e., the revenue share of the four largest firms) would be 20%.[21] Now suppose that four national chains bought one of the restaurants in each city, that a fifth chain opened a new restaurant in each city, and that all the restaurant outlets (now 24) continued to earned an equal proportion of the state's restaurant sales revenue (4.167% each). The CR_4 for the sector would have skyrocketed to 83.33% *despite the fact* that competition in each market had increased.

There are good reasons to believe that the situation just described is common in the U.S. A recent study by economists from Princeton University and the Federal Reserve Bank of Richmond documents diverging trends between national and local market concentration.[22] It concludes that while national concentration is increasing, local concentration is not. Indeed, the authors find that "local concentration has been

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[18] Indeed, Professor Carl Shapiro, a past member of President Obama's Council of Economic Advisers, expressed embarrassment that the CEA had "looked at the 50 firm concentration ratio in two digit industries" and explained that he was uncertain as to what "IO [industrial organization] economist would find that informative regarding market power." *See* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 293, 317 (2019) (quoting Shapiro).

[19] See Werden & Froeb, *supra* note 17 ("Simple thought experiments prove that concentration trends for market aggregates are not informative of trends in the underlying markets.").

[20] The sectors in the CEA and *Economist* studies were far broader than this, but this example helps illustrate my point.

[21] The metric used in *The Economist*'s study was the CR_4. The CEA study employed the CR_{50} (the revenue share of the top fifty firms in the sector). The very use of that metric demonstrates why the CEA's findings are not, as the study claims, "suggestive of a decline in competition"; any market with fifty competing firms would be highly competitive!

[22] Esteban Rossi-Hasberg, Pierre-Daniel Sarte, & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, NBER Working Paper 25066 (Sept. 2018) (available at https://www.nber.org/papers/w25066.pdf).

declining rapidly for the last 25 years when we measure concentration at the city, county, or ZIP code level."[23]

Put simply, there is no evidence of a market power crisis resulting from increased industrial concentration. When it comes to market competition, trends in national sector-level concentration are inapposite.

Growing Profit Margins? A second piece of evidence cited by those asserting the existence of a market power crisis is a purported increase in firms' profit margins. The most prominent study documenting such an increase was conducted by Jan De Loecker and Jan Eeckhout. Examining data on U.S. publicly traded companies from 1980 to 2014, the authors concluded that markups—the amount by which prices exceed variable costs—had risen from 18 percent to 67 percent.[24] A widely cited study by the International Monetary Fund (IMF) reached a similar conclusion. Examining U.S. publicly traded companies from 1980 through 2016, the IMF study found that markups increased by a sales-weighted average of 42 percent.[25] Because firms with more market power have a greater ability to raise prices above cost without losing sales to rivals, the authors of these studies infer that greater mark-ups must mean an increase in market power.

But these studies, too, are flawed. For one thing, they used an inappropriate measure of costs in determining what a firm's markups are. Both the De Loecker/Eeckhout study and the IMF investigation estimated markups by comparing a firm's revenue with its "cost of goods sold" (COGS), a metric that includes the cost of raw materials, shipping, storage, direct labor, and factory overhead. The COGS measure excludes a firm's "Selling, General, and Administrative" (SGA) expenses, which include management and marketing costs. Since 1980, management and marketing expenditures have become an increasingly significant portion of firms' costs. To correct the problem caused by use of the COGS metric, economist James Traina reproduced the De Loecker/Eeckhout study using "Operating Expenses" (OPEX) as the measure of firms' costs.[26] Using OPEX, which is COGS plus SGA, Traina found that public company markups increased only modestly since the 1980s and that the the

[23] Esteban Rossi-Hasberg, Pierre-Daniel Sarte, & Nicholas Trachter, *Product Market Concentration Is Decreasing, and It's Because of the Big Guys*, PRO-MARKET (Oct. 16, 2018) (available at https://promarket.org/product-market-concentration-decreasing/).

[24] Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications*, NBER Working Paper 23687 (Aug. 2017) (available at https://www.nber.org/papers/w23687).

[25] Federico J Diez, Daniel Leigh, & Suchanan Tambunlertchai, *Global Market Power and Its Macroeconomic Implications*, IMF Working Paper 18/137 (June 15, 2018), at 8 (available at https://www.imf.org/en/Publications/WP/Issues/2018/06/15/Global-Market-Power-and-its-Macroeconomic-Implications-45975).

[26] James Traina, *Is Aggregate Market Power Increasing? Production Trends Using Financial Statements*, Stigler Center New Working Paper Series No. 17 (Feb. 2018) (available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/workingpapers/17isaggregatemarketpowerincreasing.pdf?la=en&hash=FB051A5CA5C6E30A277318B456EBF0E493A92EB3).

increase was within historical variation (measured markups increased from 1980-2010 about the same amount that they decreased from 1950-1980).

A second problem with viewing these markup studies as evidence of an increase in market power is that growth in variable cost markups since 1980 is largely explained by other factors. To remain viable, firms ultimately must charge prices that cover all their costs—both fixed and variable. Firms with higher fixed costs will therefore tend to charge larger markups over variable cost than will those with lower fixed costs. Since 1980, firms' use of technology—much of which is a fixed cost for a firm—has expanded dramatically. So has regulation, which imposes compliance costs that are akin to fixed costs in that they do not vary directly with the level of output. It is likely, then, that changes in the composition of the economy and the regulatory environment explain a good bit of any growth in markups over variable cost. Indeed, the IMF study found that among the largest markup increases since 1980 were those in the biotechnology, pharmaceutical, and software sectors (which have high fixed costs, given the centrality of intellectual property) and in finance, utilities, and healthcare (which are heavily regulated). It seems, then, that the studies purporting to show an increase in markups over variable costs do not establish a market power crisis that would justify significant change to the U.S. antitrust laws.

Reduced Investment in Innovation? Proponents of reforming the antitrust laws have also pointed to reductions in the level of venture capital investment as indicative of a market power crisis in the U.S. Such investment slowed somewhat after 2015 (though it appears to have rebounded),[27] and some venture capitalists have referred to a "kill zone" around dominant technology firms.[28] The claim is that big technology firms either usurp small firms' innovations or use their power over platforms to force smaller firms that need access to those platforms to sell out at a bargain price. Venture capitalists are less inclined to invest if such outcomes are likely, and innovation therefore suffers.

The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms,[29] and six of those—Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook—are "Big Tech" firms that have been accused of acting like monopolists.

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[27] *See* Felix Richter, *U.S. Venture Capital Funding Reaches Dot Com-Era Level*, STATISTA (July 27, 2019) (available at https://www.statista.com/chart/11443/venture-capital-activity-in-the-us/) (charting VC funding over time).

[28] *See American tech giants are making life tough for startups*, THE ECONOMIST (June 2, 2018) (available at https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups).

[29] In 2018, the top sixteen firms ranked by R&D expenditures (with U.S. firms underscored) were: Amazon ($22.4 billion), Alphabet ($16.2B), Volkswagen ($15.8B), Samsung ($15.3B), Intel ($13.1B), Microsoft ($12.3B), Apple ($11.6B), Roche ($10.8B), Johnson & Johnson ($10.6B), Merck ($10.2B), Toyota ($10B), Novartis ($8.5B), Ford ($8.0B), Facebook ($7.8B), Pfizer ($7.7B), and General Motors ($7.1B). *See* STATISTA, *Ranking of the 20 companies with the highest spending on research and development in 2018* (available at https://www.statista.com/statistics/265645/ranking-of-the-20-companies-with-the-highest-spending-on-research-and-development/).

Moreover, the U.S. is home to half (178 of 356) of the world's so-called "unicorn" companies—i.e., private companies valued at greater than $1 billion. China ranks second with 90, and all of Europe contains a fraction of that number. The U.S. also far outpaces Europe in terms of venture capital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe's 5,017 deals worth $36.3 billion. Finally, the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized *with the goal* of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company's having to incur the significant cost of a public offering.

Falling Labor Share? A fourth trend cited in support of the claim that the U.S. is suffering a market power crisis is the drop in the amount of firm surplus being paid to laborers. Proponents of antitrust reform contend that the labor share is falling because firms have more monopsony power and can reduce wages (or slow wage increases) without fear of losing their workers to competing employers.[30] Lax antitrust enforcement is the purported culprit.

The problem with this reasoning is that a falling labor share is a global phenomenon that is even more pronounced in a number of countries with more aggressive antitrust rules than the U.S. As it turns out, the decrease in the labor share has been comparatively modest in the U.S. compared to the rest of the world; the decline in the labor share from 1975 to 2012 was greater in Japan, Canada, Italy, France, Germany, China, Mexico, and Poland.[31] It is highly unlikely, then, that this phenomenon is evidence of a market power crisis resulting from anemic antitrust rules in the U.S.

Calls to expand antitrust to address non-market power harms or to pursue ends other than consumer welfare are misguided.

In determining the legality of practices alleged to violate the antitrust laws, courts today focus on consumer welfare effects, condemning only those practices that have caused (or that threaten) consumer harm. From the late 1970s until recently, this "consumer welfare standard" enjoyed near-universal support among antitrust commentators across the ideological spectrum. While scholars often disagreed as to whether particular business practices were likely to injure consumers and how liability standards should be calibrated to maximize consumer welfare, nearly all antitrust scholars—conservatives and progressives alike—agreed that promoting consumer welfare is antitrust's exclusive goal.

In recent years, a vocal chorus of commentators—including voices from both the left and the right—has called for abandoning the consumer welfare standard. The commentators maintain that antitrust's focus on consumer welfare prevents it from addressing:

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[30] *See*, *e.g.*, José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration*, NBER Working Paper No. 24147 (2017) (available at https://www.nber.org/papers/w24147.pdf).

[31] *See* Wright et al., *supra* note 18, at 350.

- big companies' ***monopsony power*** over labor and inputs (which tends to drive down prices and therefore may not appear to harm consumers);
- ***reduced innovation*** resulting from "kill zones" around dominant firms (as reduced innovation does not have an immediate effect on price or quantity and is therefore unlikely to register under the consumer welfare standard);
- ***harms, such as reduced privacy, in zero-price markets*** (as defendants can always avoid liability by showing their products are "free" to users); and
- ***non-consumer harms*** that result from companies' being too big (e.g., *job losses* and *community harms* from the failure of small businesses that cannot match their larger rivals' efficiencies, *wealth inequality* that is exacerbated as giant businesses distribute their massive profits to managers and large shareholders, and *harms to democracy* resulting from the fact that big businesses have excessive political influence).

In light of these concerns, some have called for legislative clarification that the antitrust laws are not to be interpreted to pursue consumer welfare exclusively. For example, the Anti-Monopoly and Competition Restoration Act, reportedly being drafted by Senator Elizabeth Warren,[32] declares that the "antitrust laws were not created exclusively to enhance the narrowly defined concept of 'consumer welfare' as articulated by academics such as Robert Bork, or as described by the Supreme Court of the United States in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), and its progeny."[33] The draft legislation also clarifies that "courts have misinterpreted the antitrust laws by adopting the misguided consumer welfare standard,"[34] and it provides that the true purpose of the antitrust laws is to protect "market structures that … restore and protect competition between rivals" for the benefit of "workers, consumers, entrepreneurs, and citizens."[35] Antitrust courts would thus be directed to focus on market structures—not effects—to further the interests of workers, small businesses ("entrepreneurs"), and the democratic process ("citizens"). Proposals to amend the antitrust laws to forbid "abuse of dominance" are similarly likely to redirect antitrust's focus from consumer welfare to the protection of small competitors and other non-consumer interests.

As I explained in more detail in an article entitled *The Limits of Antitrust in the 21st Century*, a copy of which I am submitting along with this letter, jettisoning the consumer welfare standard in favor of the sort of multi-goaled, structural approach embraced by the Anti-Monopoly and Competition Restoration Act is both unnecessary and undesirable. It is unnecessary because each of the "blind spots" identified by critics of the consumer welfare standard is either addressed by the standard, more appropriately addressed by a body of law other than antitrust, or best left unaddressed.

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[32] See Lauren Hirsch, *Elizabeth Warren's antitrust bill would dramatically enhance government control over the biggest US companies*, CNBC (Dec. 7, 2019) (available at https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html).

[33] Anti-Monopoly and Competition Restoration Act of ___ § 2(a)(12) (draft copy of SIL19C37).

[34] *Id*. at § 2(a)(13).

[35] *Id*. at § 2(b).

Monopsony harms to laborers and input providers, reduced innovation, and harms in zero price markets (e.g., privacy limits on free social media platforms) fall into the first category. Anticompetitive harms occasioned by monopsony power, such as artificially low wages that result from an unwarranted no poach agreement, are reachable under the consumer welfare standard because "consumer" refers broadly to a person on the other side of a transaction from the defendant, not necessarily to an end-user consumer.[36] Indeed, the consumer welfare-focused Horizontal Merger Guidelines specifically call for consideration of whether a merger will create monopsony power, which would make no sense if consumers were taken to include only end-user buyers.[37] Those same Guidelines further direct the agencies to consider potential innovation harms when evaluating proposed mergers, proving that such harms also are cognizable under the consumer welfare standard.[38] In fact, of the 164 merger challenges asserted by the Federal Trade Commission between 2004 and 2014, 54 alleged harm to innovation.[39] Non-price harms associated with free services are reachable under the consumer welfare standard because *all* aspects of the transaction—price, quality, accompanying services, etc.—are relevant to the overall surplus consumers enjoy.[40] For this reason, antitrust enforcers have recently affirmed that market power-induced harms to consumer privacy, a matter of service quality, are cognizable under the consumer welfare standard.[41]

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[36] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L. J. 1996, 2000-01 (2018) ("[A]pplying the 'consumer welfare' standard means that a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market."); *id.* at 2001, n. 14 (observing that trading partners "may be suppliers such as workers or farmers who are harmed by the loss of competition when two large buyers merge"); Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 634-35 (2018) ("For the purpose of analyzing wage suppression agreements, the worker stands in the same position on the sell side as the consumer does on the buy side.").

[37] *See* U.S. DEP'T OF JUSTICE & FED. TR. COMM'N, HORIZONTAL MERGER GUIDELINES § 12 (2010).

[38] *Id.* at § 6.4 (2010) (agencies may consider whether a proposed merger is "likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger").

[39] *See* Joshua D. Wright*, Antitrust Provides a More Reasonable Regulatory Framework than Net Neutrality,* George Mason Law & Economics Research Paper No. 17-35, at 11 (August 15, 2017) (available at https://papers.ssrn.com/sol3/abstractid=3020068).

[40] In applying the consumer welfare standard to abrogate the rule of per se illegality for minimum resale price maintenance (RPM), the Supreme Court made clear that the standard is not exclusively price-focused. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). While minimum RPM typically raises consumer prices, *id.* at 895, the Court observed that the practice is nevertheless frequently procompetitive because it induces services that consumers value by more than the incremental price increase. *Id.* at 890-92, 895. In other words, quality effects may trump price effects under the consumer welfare standard.

[41] The U.S. Assistant Attorney General for Antitrust recently explained:

> The goal of antitrust law is to ensure that firms compete through superior pricing, innovation, or quality. Price is therefore only one dimension of competition, and non-

The non-buyer/seller harms emphasized by so-called Neo-Brandeisians[42]—job losses, community impairment, wealth inequality, harms to democracy—fall into the second and third categories: they are better addressed by bodies of law other than antitrust, or best left unremedied.[43] Wealth inequality is better handled through tax and redistribution schemes; harms to democracy, by campaign finance rules and restrictions on lobbying (and, most fundamentally, by limiting discretionary government power so that it cannot be used to procure private advantages for politically connected firms—a key reason not to create a new agency to regulate digital platforms).[44] Job losses and harms to communities from the failure of smaller, less efficient businesses may be somewhat mitigated by job-training programs, community investments, and the relocation of government agencies to economically depressed areas. At the end of the day, though, obsolescence is a consequence of economic development; there will always be some losses when new and better displaces old and less good. Using antitrust to protect economic laggards is sure to reduce welfare in the long run. In the end, then, none of the harms emphasized by critics of the consumer welfare standard justifies abandoning the standard in favor of an approach that would pursue multiple goals.

Not only is it unnecessary to abandon the consumer welfare standard in favor of a multi-goaled public interest standard, doing so would have adverse consequences for consumers and the rule of law. We know this from experience. During the mid-

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> price factors like innovation and quality are especially important in zero-price markets.
>
> Like other features that make a service appealing to a particular consumer, privacy is an important dimension of quality. For example, robust competition can spur companies to offer more or better privacy protections. Without competition, a dominant firm can more easily reduce quality—such as by decreasing privacy protections—without losing a significant number of users.

Makan Delrahim, *"Blind[ing] Me With Science": Antitrust, Data, and Digital Markets*, Remarks at Harvard Law School & Competition Policy International Conference on "Challenges to Antitrust in a Changing Economy" (Nov. 8, 2019) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition).

[42] Neo-Brandeisians, whose moniker is inspired by Justice Louis Brandeis's 1914 essay *A Curse of Bigness*, HARPER'S WKLY. (Jan. 10, 1914) at 18, maintain that there are non-buyer/seller harms that result from firms' getting "too big." They advocate expanding antitrust to condemn bigness per se.

[43] *See generally* JOE KENNEDY, WHY THE CONSUMER WELFARE STANDARD SHOULD REMAIN THE BEDROCK OF ANTITRUST POLICY 14-19 (2018) (available at https://docs.house.gov/meetings/JU/JU05/20181212/108774/HHRG-115-JU05-20181212-SD004.pdf).

[44] The University of Chicago's Stigler Center has recommended the creation of such an agency. *See* STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 100-19 (2019). For more on why that would be a bad idea, see Neil Chilson, *Creating a New Federal Agency to Regulate Big Tech Would Be a Disaster*, WASH. POST (Oct. 30, 2019) (available at https://www.washingtonpost.com/outlook/2019/10/30/creating-new-federal-agency-regulate-big-tech-would-be-disaster/).

Twentieth Century, courts did embrace multiple goals for antitrust.[45] They would often interpret the law to be aimed at promoting consumer welfare by encouraging competition so as to lower prices, enhance quality, etc. But they would sometimes impose liability in the absence of consumer harm—in the face of obvious consumer benefit, even—simply to protect smaller competitors from larger, more efficient rivals.[46]

In *Utah Pie Co. v. Continental Baking Co.*, for example, the Supreme Court upheld a finding of harm to competition when a large, efficient firm entered a market and underpriced a smaller but locally dominant rival.[47] The Court did so *even though* the complaining rival was able to cut its own prices, grow its output, and continue earning profits (albeit at lower margins) on each sale.[48] Reinstating a jury verdict in favor of the rival that was forced to cut its prices, the Court concluded that the jury could have found the requisite harm to competition because "a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will, in time, feel the financial pinch, and will be a less effective competitive force."[49] Thus, consumer concerns *could* be paramount in antitrust cases—*unless* the court decided to eschew consumer benefit to protect a less efficient rival.

In *Brown Shoe Co. v. United States*,[50] the Supreme Court essentially admitted that it could pick and choose whether to put consumers or competitors first. Having conceded that the merger under review could enhance the merged firm's productive efficiency, the Court wrote:

> Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.[51]

As Robert Bork aptly observed, "No matter how many times you read it, that passage states: although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are

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[45] *See* Joshua D. Wright, Elyse Dorsey, Jonathan Klick, & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L. J. 293, 301 (2018) (discussing multi-goaled approach of mid-20th Century antitrust).

[46] *Id.* at 300 (observing that "courts viewed the role of antitrust as serving various—often conflicting and even anticompetitive—socio-political goals").

[47] 386 U.S. 685 (1967).

[48] *Id*. at 689.

[49] *Id*. at 699-700.

[50] 370 U.S. 294 (1962).

[51] *Id*. at 344.

unlawful when small independent stores may be adversely affected."[52] Under such an approach, a court could allow a merger that would benefit consumers by enhancing productive efficiency (if the court followed the first three sentences in the passage above), or it could choose to block the merger (if it followed the last three sentences). Such leeway naturally trickled down to the enforcement agencies, which could articulate grounds for challenging just about any business conduct by emphasizing its adverse effects on either consumers or competitors.

With enforcers and courts free to pick and choose among antitrust's multiple goals in order to condemn or acquit virtually any business behavior, antitrust became less a body of law and more an exercise of raw political power. Bork compared it to the sheriff of a frontier town: "[H]e did not sift the evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people."[53] Even a Supreme Court justice admitted that antitrust had become arbitrary and unprincipled. Dissenting in *Von's Grocery*, a decision that condemned a grocery store merger that generated obvious efficiencies and resulted in a merged firm with a paltry 7.5% market share,[54] Justice Potter Stewart confessed, "The sole consistency that I can find is that, in litigation under [Clayton Act] § 7, the Government always wins."[55]

When government always wins, winning the favor of government officials becomes paramount. For that reason, abandonment of the consumer welfare standard in favor of a multi-goaled public interest standard or "abuse of dominance" approach would promote politicization of the antitrust enforcement agencies.[56] It would also ensure that consumers, widely dispersed and difficult to organize, regularly lose out to firms and organized interest groups, even when the total harms to consumers from an enforcement decision exceed the benefits to the organized interests promoting it. When the benefits of a government action are concentrated on a well-organized few while the costs are spread over a widely dispersed group, government officials tend to defer to the few over the many, even when the total benefits to the few are less than the total costs to the many.[57]

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[52] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 216 (2d ed. 1993).

[53] *Id*. at 6 (Bork attributed this description of then-prevailing antitrust to "a nationally prominent attorney, who subsequently became an Associate Justice of the Supreme Court").

[54] United States v. Von's Grocery Co., 384 U.S. 270, 272-79 (1966)

[55] *Id*. at 301 (Stewart, J., dissenting).

[56] *See* Joshua Wright, Elyse Dorsey & Jan Rybnicek, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, CPI ANTITRUST CHRON. (April 2018), at 3-7.

[57] *Id*. at 4 ("Although such decisions result in net losses to society, private interests can successfully extract these rents because the benefits are concentrated among a small number of organized individuals while the costs are diffused across numerous consumers who individually lack the incentive to organize and protect themselves.")

A multi-goaled antitrust is not needed to address the harms emphasized by critics of the consumer welfare standard. Adopting such an approach would politicize antitrust enforcement decisions and would likely reduce overall social welfare.

Proposed reforms would reduce social welfare.

In addition to calling for antitrust to be refocused away from consumer welfare and toward other ends, whether through adoption of an "abuse of dominance" provision or otherwise, commentators and policy makers have proposed a number of specific antitrust reforms. I will briefly address ten of those proposals here.[58]

1. Shifting the burden of proof on exclusionary conduct

Senator Amy Klobuchar's proposed Anticompetitive Exclusionary Conduct Prevention Act would create a presumption of harm to competition whenever a firm possessing either a market share in excess of 50 percent or "significant market power" takes any action that materially disadvantages, forecloses, or limits the opportunity of one or more of its rivals.[59] The presumption would apply quite often. The market power element would frequently be satisfied, as the proposed act defines market power as the ability to profitably price above cost and would thus sweep in a great many firms (especially those in brand-differentiated markets). The material disadvantage/foreclosure element would be satisfied by any conduct—including price cuts and product improvements—that would usurp business from rivals, thereby "disadvantaging" them and "foreclosing" them from available sales opportunities. The

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[58] I offer here neither an exhaustive list of reform proposals nor a complete analysis of any of the reforms discussed. Among the reform proposals I do not discuss are proposals to abrogate *Ohio v. American Express* (see Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, available at https://equitablegrowth.org/reforming-u-s-antitrust-enforcement-and-competition-policy/), to ban non-compete agreements (*see* Sen. Warren's Anti-Monopoly and Competition Restoration Act § 5), and to preclude excessive pricing by dominant firms, either generally (*see id.* § 6) or in particular contexts (*see* Harry First, *Excessive Drug Pricing as an Antitrust Violation*, 82 ANTITRUST L. J. 701 (2019)). In the interest of time, I will forego discussion of these proposals—all of which are ill-conceived—and direct you to more complete analyses elsewhere. For a defense of *Ohio v. American Express*, *see* Evans & Schmalensee, *supra* note 12. For an explanation of why a ban on non-compete agreements would be detrimental, *see* Camila Ringeling et al., *Noncompete Clauses Used in Employment Contracts: Comment of the Global Antitrust Institute*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534374. I explain why there should be no liability for mere excessive pricing or other forms on non-market power-enhancing surplus extraction on pages 21-26 of *The Limits of Antitrust in the 21st Century*, which I am submitting along with letter.

[59] See Anticompetitive Exclusionary Conduct Prevention Act § 4(a) (amending Clayton Act to make it illegal "to engage in exclusionary conduct that presents an appreciable risk of harming competition," where (1) "exclusionary conduct" is defined as conduct that "(i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the opportunity of 1 or more actual or potential competitors to compete" and (2) exclusionary conduct is presumed "to present an appreciable risk of harming competition" if the actor has a market share exceeding 50 percent or "otherwise has significant market power" in the relevant market, with market power defined as the power to "profitably impose transaction terms" that are more favorable than those attainable in a competitive market).

result of the proposed legislation, then, would be to shift to the defendant the burden of proving the reasonableness of business-usurping conduct anytime the defendant has a greater than 50 percent market share or has built a strong brand that allows it to charge prices substantially above its incremental cost.

This proposed reform would likely increase antitrust's error costs by chilling procompetitive conduct. Any firm selling a brand on which it is able to charge above-cost prices would think twice before embarking on any course of conduct that would enable it to win business from, and thus "materially disadvantage" or "foreclose," its rivals. But most things firms do to win business from their rivals involve sweetening the price/quality combination for consumers. Since anticompetitive exclusionary conduct—even among firms with high market shares and significant profit margins—is less common than procompetitive, consumer-benefitting actions that disadvantage rivals, it makes no sense to require proof of procompetitive effect. Given proof failures—i.e., the situation in which the available evidence does not clearly prove one outcome or its opposite—the burden should always be on the party with the less likely claim.

Current antitrust doctrine allocates proof burdens in this way, requiring the plaintiff to prove anticompetitive effect when procompetitive benefits are likely to dominate (e.g., when the standard rule of reason applies), and the defendant to prove procompetitive benefits when anticompetitive effect is most likely (e.g., when the practice at issue is "inherently suspect" so that the "quick look" rule of reason applies). The current system also allows courts to reallocate proof burdens if economic learning concerning the frequency of pro- or anticompetitive effect suggests they should. Congress should not disrupt this sensible system by imposing an inflexible mandate that the defendant bear the burden of proving reasonableness in a large swath of cases in which conduct is likely procompetitive.

2. General elimination of the market definition requirement

Senator Klobuchar's bill would also remove the requirement to define an antitrust market in any antitrust action unless defining a relevant market was required to establish a presumption or resolve a claim "under a statutory provision that explicitly references relevant market, market concentration, or market share."[60] This provision would effect a near-total elimination of the requirement to define antitrust markets before condemning challenged behavior. In particular, it would eliminate the need to define a relevant market in actions brought under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, none of which "explicitly references" any of the three specified terms.

This proposal is unnecessary and would enhance error costs. As an initial matter, rigorous market definition is not always required in antitrust cases. With practices that are per se illegal, no market definition is required, and with other challenged practices, all that is required is, in the words of the Supreme Court, "an enquiry meet for the case"—i.e., the investigation required to make an informed judgment about the

[60] *See* Anticompetitive Exclusionary Conduct Prevention Act § 6.

likely competitive effect of the practice at issue.[61] Even in merger cases, market definition may not always be required. As the 2010 Horizontal Merger Guidelines explain,

> The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.[62]

Many times, though, defining a market *is* "meet for the case"—meaning that it's necessary to make an informed judgment about whether the defendant has taken some action that threatens to extend its market power.[63] Eliminating the analytical step of defining a market raises the risk of condemning consumer-benefiting conduct that may disadvantage a defendant's rivals but does not threaten to enhance its market power. An across-the-board elimination of the market definition requirement is therefore ill-conceived.

3. Banning mega mergers / restricting large mergers

Under current antitrust doctrine, business combinations are assessed on a case-by-case basis and forbidden only if they are likely to substantially lessen competition in a market. Senator Warren has proposed to eschew such an approach when it comes to "mega mergers," defined as business combinations that exceed certain thresholds in terms of the revenues of the merging parties, the market share of the combined firm, or the concentration of the post-merger market. Specifically, Senator Warren would impose an outright ban on any merger where either (1) both parties earn annual revenues of at least $15 billion or one of the parties has annual revenue of at least $40 billion; (2) the combined firm would have a market share exceeding 45 percent as a seller or 25 percent as a buyer; or (3) the merger would cause the combined firm to have fewer than four competitors possessing a market share of at least 10 percent.[64]

There is no basis in economics for the assumptions underlying this proposed ban. A firm's annual revenues have little if anything to do with its market power, and plenty of mergers have secured consumer benefit despite producing a combined firm with a greater than 45 percent market share or reducing the combined firm's significant (>10% market share) rivals to below four. The sort of ham-fisted ban proposed in Senator Warren's bill is therefore likely to harm consumers by banning a large number of efficiency-enhancing mergers.

Senator Warren's proposal would also heighten the scrutiny of "large mergers," similarly defined in terms of either the parties' annual revenues (one party has $5 billion to $40 billion in annual revenues, or both have revenues between $1 billion and

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[61] *See* California Dental Ass'n v. F.T.C., 526 U.S. 756, 781 (1999).

[62] U.S. DEPT. OF JUSTICE AND FED. TR. COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010).

[63] As I have recently explained, antitrust should condemn only actions that extend market power, not mere exercises of such power. See Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, pp. 21-26 (submitted along with this letter).

[64] *See* Anti-Monopoly and Competition Restoration Act § 4.

$15 billion), the combined firm's market share (10 to 45 percent on the seller side or 10 to 25 percent on the buyer side), or the concentration of the post-merger market (the merger would cause the combined firm to face fewer than five rivals with at least 10 percent market share).[65] These large mergers would be "presumptively unlawful" and could proceed only if the parties proved to the FTC that the merger "w[ould] not substantially harm the competitive process or lessen competition, or tend to create or help maintain a monopoly or monopsony."[66]

This proposal, too, is misguided. Economic learning provides no reason to suspect that any of these triggers—merging parties with significant revenues, a combined market share of 10 percent, or reducing the number of significant rivals to four—makes anticompetitive effect likely. It therefore makes no sense to shift the burden of proof on competitive effect on the grounds the Warren bill proposes.

4. Banning platforms from acting as merchants

One much-heralded proposal for regulating competition in digital markets is to preclude companies that operate platforms—technologies that facilitate interactions between two or more sets of users, such as consumers and providers of goods or services—from participating as sellers on those platforms. Senator Warren, for example, proposed that platform-operating companies with more than $25 billion in annual revenues be precluded from making offerings on their own platforms and that platform companies with revenues between $90 million and $25 billion be subject to a non-discrimination duty that would prevent them from giving their own offerings favorable placement on their platforms.[67] Senator Warren's Anti-Monopoly and Competition Restoration Act would declare "serving as both a platform and a merchant that competes with third-party merchants" to be "a presumptive abuse of market power."[68]

These are radical proposals. As any regular shopper can attest, private label sales by retail platforms are ubiquitous.[69] Consumers love private labels, and the fact that private label sales are common in highly competitive markets suggests that "serving as both a platform and a merchant that competes with third-party merchants" is not some sort of exclusionary strategy.

Senator Warren maintains, however, that structural separation of platforms and commerce is necessary to prevent platform operators from copying attractive offerings, relegating the companies that first made them to a less desirable spot on the platform,

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[65] *See id.* Oddly, Senator Warren's proposal would also deem a merger to be a "large merger" on the basis that one of the parties had been found to have violated the antitrust laws during the last seven years. *Id.*

[66] *Id.*

[67] *See* Elizabeth Warren, *Here's how we can break up Big Tech*, Medium (March 8, 2019) (available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c).

[68] Anti-Monopoly and Competition Restoration Act § 6.

[69] Senator Warren's proposed restrictions would reach traditional retailers. Companies like Kroger, Walmart, and Target would be precluded from selling store brands.

and thereby driving those companies out of business or rendering them less formidable competitors by reducing their sales and scale. This process, she says, will reduce innovation as firms come to expect that their successful innovations will be copied and that their offerings will be moved to a disfavored spot on the platform.

It is doubtful, though, that platforms have much incentive to favor their own offerings in a way that causes consumer harm. At the end of the day, platform businesses want consumers to return to their platforms. They therefore have an interest in prominently displaying the offerings consumers are most likely to value. If a platform favors its own brands and they are somehow less desirable than rival brands (e.g., lower-quality or higher-priced), customers will soon figure that out and search further on the platform (e.g., scroll down). Having to make such extra effort will reduce the attractiveness of the platform and will cause some customers to utilize other platforms, which are readily available. (When it comes to e-commerce, for example, both Target and Walmart offer sizable platforms.) A platform business, then, has little incentive to disadvantage merchants that are more efficient than the platform business could be, especially since it need not compete with those merchants in order to capture a share of their profits; it could do so simply by charging them a higher fee for use of its platform.

This suggests that any merchants that are excluded by a platform's decision to act as a merchant are likely to be less efficient than the platform itself. It is true that a merchant that cannot produce more efficiently than the platform it utilizes cannot undersell the platform and thus may be excluded if its products are harder to find (i.e., customers won't go searching for an offering of equal or less value). But this is simply how competition works: less efficient producers fail.[70] Structural separation of platforms and commerce, then, does not seem necessary to prevent the sort of exclusion that could harm consumers—that of more efficient rivals. To the extent innovation is being harmed by platforms' copying of innovative merchants' designs, that problem is more appropriately addressed through reform of the intellectual property laws, not the antitrust statutes.

Mandating the structural separation of platforms and commerce is not only unnecessary to protect competition, it would also be *destructive* of competition. Private label sales increase competition in product markets and thereby benefit consumers. In response to private label sales, existing merchants often must lower their prices or enhance the quality of their offerings. Consider, for example, the advice offered by Tinuiti, the "largest independent digital marketing agency in North America," on how merchants should respond to Amazon's private label offering, AmazonBasics:

> Surprising and delighting your customers is another way to differentiate your products from AmazonBasics. While private labels are rising in popularity for their price and convenience, not every customer wants the most basic and inexpensive option. Create a higher quality option and

[70] If a merchant and a platform produce a product of equivalent quality for exactly the same cost, the platform, which provides both the product *and* the platform has created more value and would seem deserving of the sale. If a merchant could produce the product more efficiently, it could undersell the platform if it lowered its price to the level of its cost.

> consider bundling it with a free gift or another accessory to stand out from Amazon's version.[71]

This sort of competition is a boon to consumers. It would be a mistake to squelch it with rules mandating the structural separation of platforms and commerce, especially since the competitive risk posed by private label sales is minimal.

5. Enhancing restrictions on vertical restraints by firms with market power

Senator Warren's antitrust proposal would create a difficult-to-rebut presumption of illegality for a number of vertical restraints (i.e., trade-restraining agreements between firms operating at different levels within the same supply chain) imposed by firms with market power.[72] Under Senator Warren's proposal, such firms presumptively abuse their power by engaging in "vertical price-fixing" (where a manufacturer restricts the price downstream dealers like retailers may charge for its product), "exclusive dealing" (where a firm sells its product on the condition that the buyer not purchase the same product from another), and "tying" (where a firm sells its product or service on the condition that the buyer also purchase another of its products or services).[73] Defendant firms could not rebut the presumption of abuse by proving that the practice at issue created procompetitive efficiencies.

This proposal would injure consumers. It is well-understood that the sorts of vertical restraints Senator Warren's proposal would condemn may often enhance market output and leave consumer better off[74] but may also, under certain circumstances, reduce output and harm consumers. The bulk of the empirical evidence on such restraints, however, shows that they usually enhance consumer welfare. In a 2005 paper surveying the empirical evidence on exclusive dealing and other vertical restraints, Francine Lafontaine and Margaret Slade concluded that voluntarily adopted vertical restraints that enhanced manufacturer profits also tended to leave consumers

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[71] Tara Johnson, *What is AmazonBasics?*, Tinuiti Blog (Feb. 15, 2019) (available at https://tinuiti.com/blog/amazon/amazon-basics/).

[72] Senator Warren's proposal defines market power as the ability to charge prices above those that would exist in a competitive market. *See* Anti-Monopoly and Competition Restoration Act § 6. Producers of brand-differentiated products are typically able to sell at prices above marginal cost—the price level that would prevail in a perfectly competitive market—given that some consumers view their brand as "better" than rival brands and will not turn to a substitute in the face of an above-cost price. Thus, "market power," as Senator Warren's proposal defines it, is ubiquitous throughout the economy.

[73] *See id.*

[74] Among other output-enhancing benefits of the practices, vertical price-fixing (more commonly referred to in the antitrust literature and caselaw as resale price maintenance) can enhance market output by encouraging dealer services that consumers value by more than the price increase occasioned by the restraint; exclusive dealing can encourage both manufacturer investments in dealers and dealer efforts to increase sales of manufacturers' brands; and tying arrangements can protect brands by assuring the use of high-quality complements and can eliminate "double marginalization"—the situation where two sellers of complements both exercise market power, each on the assumption that the other will not, and thereby raise prices and reduce sales by more than would occur had they coordinated.

better off, while government interventions to stop the use of vertical restraints impaired consumer welfare.[75] Other investigations of the empirical record on the welfare effects of vertical restraints have reached a similar conclusion.[76] Given that these mixed bag practices appear to be beneficial more often than harmful, it makes no sense to presume their illegality. Rather, the plaintiff should bear the burden of showing an actual anticompetitive effect or, at a minimum, the existence of factors suggesting that the particular restraint under review is more likely to reduce than enhance market output.

6. Banning vertical non-price restraints (abrogating GTE Sylvania)

In addition to heightening restrictions on the vertical practices discussed above, Senator Warren's proposed legislation would declare one vertical restraint—"vertical market allocation"—to be per se illegal under the antitrust laws.[77] The upshot would be to ban any arrangement where a manufacturer limits the distributors of its products to particular territories or groups of customers.

In 1977, the U.S. Supreme Court declared that these sorts of agreements, which were once per se illegal, must be judged on a case-by-case basis under antitrust's rule of reason.[78] It adopted that approach because there are obvious procompetitive benefits from assigning distributors exclusive territories or customer groups: Doing so preserves the distributors' incentives to incur the costs of providing sales-enhancing amenities (attractive showrooms, knowledgeable salespeople, convenient repair services, etc.) by ensuring that customers do not avail themselves of those amenities and then make their purchases from rival distributors who do not offer the amenities and therefore face lower costs. If such "free-riding" were to occur, high-service distributors would cut back on the sales-enhancing amenities they offer, reducing sales of the manufacturer's brand. If a manufacturer has determined that sales of its brand are higher with reduced dealer competition (and why else would it seek to limit such competition, which would seem to lower its distribution costs?), then it must be that the extra point-of-sale services secured by limiting dealer competition are more valuable to

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[75] Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008) ("In general, [then,] the empirical evidence leads one to conclude that consumer well-being tends to be congruent with manufacturer profits, at least with respect to the voluntary adoption of vertical restraints. When the government intervenes and forces firms to adopt (or discontinue the use of) vertical restraints, [in contrast,] it tends to make consumers worse off.").

[76] *See* James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648 (2005) (observing that "there is a paucity of support for the proposition that vertical restraints [or] vertical integration are likely to harm consumers"); Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, in THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76-81 (Konkurrensverket Swedish Competition Authority ed., 2008) (available at http://www.konkurrensverket.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf).

[77] *See* Anti-Monopoly and Competition Restoration Act § 5.

[78] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).

consumers than the price cuts they might enjoy with unfettered dealer competition. Given these pro-consumer, output-enhancing benefits of vertical market allocations, they should not be condemned automatically. Indeed, I am aware of no serious antitrust scholar in favor of restoring the rule of per se illegality for vertical non-price restraints, as Senator Warren's bill would do.

7. Abrogating <u>Trinko</u> (expanding the duty to deal with rivals)

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,[79] the U.S. Supreme Court held that a firm does not have a general antitrust duty to deal with its rivals, even when those rivals need access to its facilities. The Court recognized that there could be antitrust liability for a "unilateral refusal to deal" only in a narrow set of circumstances. It declared that its *Aspen Skiing* decision, which imposed such a duty when the defendant had dealt with the complaining rival in the past and had sacrificed profits in refusing to continue the dealing,[80] was "at or near the outer boundary" of circumstances in which a unilateral refusal to deal could create antitrust liability.

Senator Warren's antitrust reform proposal would overrule *Trinko* by declaring that "denying access to essential facilities" is a presumptive abuse of market power.[81] The bill would define essential facilities to mean "the digital or physical infrastructure [1] materially important for reaching customers or trading partners or for enabling competitors to carry on business and [2] difficult to duplicate due to physical, geographical, legal, technical, or economic constraints."[82]

Imposing a general antitrust duty on firms to share their "materially important" and "difficult to duplicate" assets with their rivals is a bad idea for the reasons set forth in the *Trinko* opinion.[83] First, a rule of forced-sharing would reduce the incentive to create "materially important" assets in the first instance. Why would a firm incur the cost of creating such assets if it must share them with its rivals? Each firm would know that it would be better off letting another firm develop the assets and then demanding access, but in that case the assets would never be created at all. Second, if sharing is required, a court or some other government entity must determine the terms on which it is to occur—i.e., what price should the asset owner be paid?, what level of access must it provide?, etc. Generalist courts lack the expertise to engage in this sort of economic planning. An expert agency might step in to do so, but (1) no single agency would have the expertise to set the terms-of-dealing for all manner of different "essential facilities," and (2) the history of utility regulation shows that agencies with this sort of planning authority are routinely captured by their regulatees.[84] Finally, forcing firms to agree with their rivals about access to essential facilities encourages the sort of competitor contact that facilitates collusion. For all these reasons, it would

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[79] 540 U.S. 398 (2004).

[80] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[81] *See* Anti-Monopoly and Competition Restoration Act § 6.

[82] *Id*.

[83] *See* Trinko, 540 U.S. at 407-08.

[84] *See* THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 167-69 (2017).

be a mistake to saddle firms with a general antitrust duty to share their "materially important" and "difficult to duplicate" assets with their rivals.

8. Abrogating Brooke Group (expanding liability based on low prices)

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[85] the U.S. Supreme Court held that charging low prices cannot give rise to antitrust liability unless (1) the price charged is below the discounter's incremental cost, and (2) it is likely (e.g., because of entry barriers) that the discounter could recoup its losses from below-cost pricing by charging supracompetitive prices once it had driven its rivals from the market. Senator Warren's Anti-Monopoly and Competition Restoration Act would remove both requirements by defining "predatory pricing" to mean

> (i) pricing below the average variable cost of a person, regardless of whether there is a dangerous probability of recouping the investment in below-cost pricing; or (ii) pricing above the average variable cost of a person that has the purpose or effect of excluding competition or harming the competitive process.[86]

This proposal is ill-conceived, for both elements of the *Brooke Group* test are needed to ensure that efforts to preclude anticompetitive discounting do not deny consumers the benefits of legitimate price competition.

Why likelihood of recoupment is important. When the law forbids low prices, consumers miss out on an immediate benefit. The likelihood of recoupment requirement ensures that they suffer that loss for a reason: the avoidance of future supracompetitive pricing. If such pricing is impossible (because the firm charging supracompetitive prices would be underpriced by entrants), then the only thing to be gained from consumers' foregoing the immediate benefit of low prices is easier living for the price-cutter's rivals. Absent a likelihood of recoupment, there is no competitive bird-in-the-bush to justify giving up the bird-in-the-hand of immediate low prices.

Why below-cost pricing is important. Limiting liability for price-cutting to the charging of below-cost prices ensures that the antitrust laws do not chill procompetitive price cuts. Any equally efficient rival could match a discount to an above-cost price, so the only rivals excluded by *Brooke Group*'s below-cost pricing element would be those less efficient than the discounter, and antitrust should not be used to prop up inefficient rivals at the expense of consumers. Although it is theoretically possible for a dominant firm to discount to an above-cost price level in order to *prevent* rivals from attaining equivalent efficiencies (by denying them sales and thus scale) or in order to forestall entry (as in the case of so-called limit pricing), it would be difficult to forbid such anticompetitive instances of above-cost discounting without preventing procompetitive price cuts. The *Brooke Group* Court recognized these points, observing that "the

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[85] 509 U.S. 209, 223 (1993).

[86] *See* Anti-Monopoly and Competition Restoration Act § 6. Senator Klobuchar's Anticompetitive Exclusionary Conduct Prevention Act similarly takes a swipe at *Brooke Group*. It provides that below-cost pricing cannot be required for liability based on exclusionary conduct. *See* Anticompetitive Exclusionary Conduct Prevention Act § 4(a).

exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting."[87]

Because each prong of the *Brooke Group* test plays an important role in ensuring that the policing of low prices does not impair consumer welfare, Congress should resist calls to override the precedent via legislation.

9. Abrogating Twombly (permitting economically implausible claims and conspiracy claims based solely on parallel conduct to proceed to discovery)

Defending an antitrust action can be extraordinarily costly. Defendants typically expect to spend millions of dollars responding to discovery requests and preparing a defense. Given the potential enormity of antitrust damages (often economy-wide overcharges) and the fact that they are automatically trebled, it would be folly for defendants to skimp on defense expenditures. That is true even when the asserted claims are without merit, for the inherent complexity of antitrust cases can lead to mistaken adverse judgments on even frivolous claims. To avoid defense costs and potential liability, defendants often just settle. Knowing as much, plaintiffs' lawyers frequently file meritless antitrust actions for the purpose of extracting a settlement.

To combat such "strike suits," courts need means of weeding out meritless antitrust claims before they force defendants to incur substantial discovery and defense expenses. In *Bell Atlantic Corp. v. Twombly*,[88] the U.S. Supreme Court provided such means by allowing for the dismissal of antitrust conspiracy claims that allege only parallel conduct among the alleged conspirators. *Twombly* disavowed the Court's earlier statement in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[89] That *Conley* statement would appear to allow antitrust conspiracy actions alleging only parallel conduct, for conspiracy is consistent with parallel conduct (i.e., a plaintiff alleging parallel conduct could eventually "prove [a] set of facts" showing actionable conspiracy). Rejecting this permissive approach, the *Twombly* Court held that to survive a motion to dismiss a plaintiff alleging an antitrust conspiracy on the basis of parallel conduct must also set forth facts suggesting that the parallelism is more likely the product of conspiracy than of individual action, so that the asserted conspiracy is not merely possible but plausible.

This is an eminently sensible rule. If plaintiffs can survive a motion to dismiss and saddle defendants with the tremendous costs of antitrust discovery simply by alleging that the defendants acted in the same manner as their rivals and therefore must have conspired, strike suits will abound. Senator Warren's antitrust proposal would achieve

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[87] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

[88] 550 U.S. 544 (2007).

[89] 355 U.S. 41, 45-46 (1957).

that unfortunate result by abrogating *Twombly* to reinstate the *Conley* standard and forbid dismissal of meritless antitrust claims on grounds that the behavior alleged is economically irrational or implausible.[90]

10. Abrogating Credit Suisse (narrowing the scope of implied immunity)

Senator Klobuchar's bill would restrict implied antitrust immunity arising from federal regulation. Under current Supreme Court precedent, conduct is immune from liability under the antitrust laws if (1) it falls squarely within an area regulated by another federal law; (2) an administrative body has legal authority to supervise the practice; (3) that body has, in fact, exercised its regulatory authority; and (4) permitting the antitrust action would risk conflicting guidance, requirements, or standards.[91] Senator Klobuchar's bill would reduce the scope of implied immunity by further requiring that "[f]ederal agency or department rules or regulations, adopted by rulemaking or adjudication, *explicitly require or authorize* the defendant to undertake the conduct."[92] There could be no antitrust immunity for conduct that is actively regulated but not explicitly required or authorized by the regulatory authority.

Shrinking the scope of implied immunity in this fashion would be unwise. Antitrust's ambit is extraordinarily wide. Antitrust regulates all trade-restraining agreements (condemning those that are unreasonable because they create market power) and all single-firm conduct that could exclude rivals (condemning those instances that are unreasonably exclusionary and are committed by firms with market power). Given antitrust's broad reach, its prohibitions are potentially applicable to all sorts of behaviors that are regulated by other bodies of federal law—e.g., environmental, securities, intellectual property, or labor laws. Under current doctrine, antitrust's prohibitions fully apply to these behaviors *unless* they are actively supervised by a legally authorized government body *and* there is an apparent risk that allowing an antitrust challenge to the behaviors could result in conflicting rules. Absent such risk, antitrust is fully operative. When such risk exists, though, antitrust—the residual regulator— defers to the more "focused" regulatory body. Staying antitrust's hand only when the administrative body has explicitly authorized or required the challenged behavior via rulemaking of formal adjudication would permit undue interference with the operation of non-antitrust regulatory protections. Market power is just one of many bases for regulatory intervention. Efforts to reduce it via antitrust should not be allowed to derail other regulatory efforts aimed at other private ordering defects. Under the current approach, Congress can always insert an antitrust savings clause in statutes conferring regulatory authority. The current implied immunity rules therefore strike the proper balance and should not be altered as Senator Klobuchar has proposed.

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[90] Warren proposal Section 10 (providing that "[a] court shall not dismiss a complaint under Rule 12(b)(b)(6) … (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; … or (3) on the ground that the alleged conduct is or would be economically irrational or implausible").

[91] *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 275-77 (2007).

[92] Anticompetitive Exclusionary Conduct Prevention Act § 7 (emphasis added).

Conclusion

Thank you again for the opportunity to express my views on the adequacy of the existing antitrust laws to address monopolistic conduct and potentially anticompetitive transactions. As you can see, I believe that current doctrine—while not perfect—is unlikely to be enhanced by statutory reform.

Throughout your investigation, you have no doubt heard—and will continue to hear—of instances in which the existing doctrines have not worked perfectly to prevent every anticompetitive transaction or unreasonably exclusionary act. I would caution you to remember Voltaire's prudent maxim: The perfect is the enemy of the good. Striving to prevent every anticompetitive act raises the risk of precluding procompetitive conduct. The current antitrust system—a flexible set of standards crafted by apolitical judges and continually honed in light of growing economic learning and evolving business practices—is well-calibrated to maximize antitrust's effectiveness by minimizing the sum of error and decision costs. Such optimality, not perfection in stamping out every anticompetitive act or transaction, should be the goal.

Best wishes to you as you work through these important issues. If I can be of further assistance, please let me know.

Sincerely,

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