**STATEMENT**

**OF**

**JOSHUA D. WRIGHT**[♣]
**UNIVERSITY PROFESSOR**
**ANTONIN SCALIA LAW SCHOOL**
**AT GEORGE MASON UNIVERSITY**

**BEFORE THE**

**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**
**SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY**
**AND CONSUMER PROTECTION**

**HEARING ON**

# "THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW: OUTDATED OR A HARBOR IN A SEA OF DOUBT?"

**WASHINGTON, D.C.**
**DECEMBER 13, 2017**

[♣] University Professor, Antonin Scalia Law School at George Mason University; Executive Director, Global Antitrust Institute; Senior Of Counsel, Wilson Sonsini Goodrich & Rosati PC; former Commissioner, U.S. Federal Trade Commission.

## INTRODUCTION

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Joshua Wright. I am a former Commissioner for the U.S. Federal Trade Commission ("FTC"), and current University Professor at the Antonin Scalia Law School at George Mason University, Executive Director of the Global Antitrust Institute, and Senior Of Counsel at Wilson Sonsini Goodrich & Rosati. Before addressing the subject of today's hearing—the effectiveness of antitrust law's consumer welfare standard—I want to make clear that the views I express here are my own.

The consumer welfare standard has benefitted antitrust jurisprudence and the general public tremendously. This standard was adopted after decades of substantial debate involving some of our most renowned jurists, legal scholars, and economists—including several Nobel laureates. As with any common law area, the developments within antitrust case law and precedent are the result of deep intellectual thought and serious consideration from our full court system. Today, the overwhelming consensus among those who do antitrust for a living—be they established antitrust scholars, practitioners, or law enforcers serving under both Republican and Democratic administrations—is that the consumer welfare standard has served antitrust well, is the best available legal framework, and that abandoning it now will have serious detrimental effects for consumers, the American economy, and international antitrust.

The current debate arises from proposals that antitrust law adopt a standard that would reduce consumer welfare—that is, to diminish the well-being of consumers and their ability to consume everyday goods and services—in exchange for advancing some combination of other, vague goals ranging from increasing fairness, to reducing income inequality, to protecting specific national interests or markets, or to protecting particular jobs. Specifically, critics of the consumer welfare standard have proposed steps including that we ban all vertical mergers, make *per se* unlawful horizontal mergers based solely upon the a firm's size—i.e., return to the 'big-is-bad' enforcement style of early antitrust—and even prohibit Amazon from selling groceries. These proposals come despite that the economic evidence makes quite clear that such moves would make consumers worse off.[1]

[1] *See, e.g.*, Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Buccirossi Paolo ed., 2008); Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201 (2015); Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49, 68 (2010) (referring to the Horizontal Merger Guideline's "express acknowledgment that [the Herfindahl-Hirschman Index] levels are not very helpful diagnostics in these cases"); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 16 (2006), https://www.justice.gov/atr/file/801216/download ("[M]arket concentration may be unimportant under a unilateral effects theory of competitive harm."); DENNIS W. CARTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th ed. 2005) ("[T]he criticisms of [the structure, conduct, performance] approach are many, but perhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct. . . . The barrage of criticism has cause most research in this area to cease."); 4 Timothy J. Muris, Improving the Economic Foundations of Competition Policy, 12 GEO. MASON L. REV. 1, 10 (2003) ("The [structure, conduct, performance] paradigm was overturned because its empirical support evaporated."); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

While I reject these proposals, I believe the current debate is a healthy one and I am pleased to be a part of it. It is always worthwhile to revisit whether antitrust law and antitrust enforcement institutions can better calibrate their missions to serve their purpose of protecting competition. But it is also important to learn from the history of antitrust—including how poorly antitrust performed when its law and institutions were untethered from the consumer welfare standard. It is equally important to understand that abandoning the consumer welfare standard would be a dramatic step backwards from the development of antitrust law and the likely consequences of such a change for consumers and the economy.

There are three points I'd like to highlight in my testimony today.

*First*, the consumer welfare standard offers myriad benefits. It brings coherency and credibility to an area of law once roundly condemned for its internal inconsistencies and incoherent standards. It tethers antitrust analysis and law to economic insights and evidence, thus providing a principled framework for evaluating competitive effects and finding violations. And it provides a disciplined standard—requiring a demonstration of anticompetitive effects—that can be implemented globally to ensure jurisdictions worldwide are not subverting antitrust results to favor domestic firms or to discriminate against U.S. firms. In these ways, the consumer welfare standard fosters a strong rule of law in antitrust cases. The consumer welfare standard's tethering to economic learning also provides an inherent ability for antitrust

law to evolve alongside evolutions in our economic understanding and to address new types of business models and industries that advances in technology and innovation have made possible. The flexible consumer welfare standard provides ample room for current debates.

*Second*, altering the applicable antitrust standard would necessarily entail trading away some amount of consumer welfare in favor of some other—often undefined or ill-defined—values. Consumer welfare is the lodestar of antitrust analysis today: conduct that makes consumers better off does not violate the antitrust laws; but behavior that impairs consumer welfare does. Current proposals to abandon the consumer welfare standard necessarily require antitrust law enforcers and judges to assess how much consumer welfare we are willing to lose to increase such other values—after all, the distinction between the consumer welfare standard and some other standard matters only when there is a conflict, *i.e.*, when conduct is welfare-enhancing or –neutral. This is problematic not only because it means certain reductions to consumer welfare—as it most certainly does—but also because there is little to no evidence to support the promise that "more" antitrust enforcement will deliver the elusive and theoretical "other" benefits promised by critics of the current standard. To my knowledge, those who suggest we need to consider goals other than consumer welfare have failed so far even to recognize there is a tradeoff between achieving these goals and reducing consumer welfare, much less offer a way to reconcile these sometimes conflicting goals.

*Third*, both antitrust skeptics and critics of the current standard share a concern over regulatory capture and industry control of antitrust institutions. Any student of public choice economics shares these concerns. Rejecting the consumer welfare standard in favor of a multi-dimensional alternative would, however, *increase* agency discretion to justify any regulatory decision as consistent with the law. This increases the incentive and ability of rent seeking firms to exert control over agencies. Indeed, history has shown us time and again that establishing amorphous standards in antitrust law and enforcement invite rent seeking, which in turn promotes corporate welfare over consumer welfare—the powerful over the powerless. The clear meaning of the consumer welfare standard fosters the rule of law and allows the courts (and the public) to hold antitrust agencies accountable for their enforcement efforts and to prevent agencies from fostering corporate over consumer welfare.

## I. THE CONSUMER WELFARE STANDARD OFFERS MYRIAD BENEFITS

### A. Bringing Coherency to a Lost and Rambling Area of Law

Prior to the modern era, antitrust jurisprudence was widely acknowledged to be incoherent.[2] Antitrust courts attempted to maximize an array of social and political

[2] *See* BORK, *supra* note 1; Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 178 (2007) (describing the antitrust paradigm of the 1960s and 1970s as "standardless and unduly hostile to business" and the consumer welfare standard as "an immense improvement" over the big is bad era); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases.").

goals, which were often at odds with one another.[3] As a result, none of these goals was particularly well-served, outcomes were largely unpredictable, and antitrust "precedent" was internally inconsistent.[4] In the name of protecting "small dealers and worthy men" or the helpless individual, for instance, the Supreme Court condemned combinations that admittedly would have lowered prices to individual consumers—at least some of whom were also, presumably, "worthy men," and many of whom were certainly helpless individuals.[5] In fact, Supreme Court Justice White, reflecting upon the state of merger law in a 1966 concurrence, noted that the "sole consistency" he could find was "that in litigation under § 7, the Government always wins."[6]

The lack of consistency was not, however, antitrust law's only problem. Antitrust enforcement harmed competition and consumers during this time because it prohibited broad swaths of procompetitive behavior. Many business practices now

---

[3] *See, e.g.*, United States. v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945) (Hand, J.) ("We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. . . . [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the *helplessness of the individual* before them." (emphasis added)); Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962) ("[W]e 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."); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 699 (1967) (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.").

[4] *See* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013); Ginsburg, *supra* note 2, at 217-18.

[5] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); United States. v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945) (antitrust law exists to "put an end to great aggregations of capital because of the helplessness of the individual before them").

[6] United States v. Von's Grocery Co., 384, U.S. 270, 301 (1966) (White, J., concurring).

universally understood to be efficiency enhancing (or competitively neutral) were condemned as *per se* unlawful.[7] For instance, courts once found vertically integrated firms violated the Sherman Act because less efficient rivals were "harmed" by the integrated firm's ability to offer lower prices to consumers.[8] Likewise, mergers involving firms with relatively low market shares were regularly condemned even if—and sometimes because—they would result in lower consumer prices.[9]

The combination of incoherent outcomes and anticompetitive rules was the catalyst for the "antitrust revolution." This revolution was driven by what is often described as the "Chicago School," which rigorously debated both the genesis of this confusion and various solutions designed to foster consumer outcomes in a sound, disciplined way.[10] While there was significant debate over the proper rules and

---

[7] E.g., resale price maintenance, horizontal mergers, vertical mergers, exclusive dealing, tying arrangements, discounts. Most of this conduct is now evaluated under the rule of reason because the economic evidence and theory showed that it was either procompetitive or unlikely to be anticompetitive. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (discussing the vast economic evidence of the potentially procompetitive justifications for resale price maintenance, the Court adopted the rule of reason for vertical price restraint cases (overruling Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911))); *see also* Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015); Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101, 107 (2015).

[8] *See* United States v. New York Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949); *see also* Marc Levinson, *Monopoly in Chains: Antitrust and the Great A&P*, 12 CPI ANTITRUST CHRON. 1 (2011).

[9] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men").

[10] *See*, *e.g.* BORK, *supra* note 1; *see also* Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401 (1965); Ward S. Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417 (1965).

standards, at the heart of these discussions were a few unifying notions: namely, consumer welfare is the appropriate goal, and antitrust decisions should be guided by economic theory, empirical evidence, and the error-cost framework.[11] In other words, antitrust should endeavor to make consumers better off, by condemning conduct that raises prices, reduces output, etc.—even if doing so means some less efficient competitors are driven from the market. Additionally, theories of antitrust harm should be grounded in and consistent with economic theory and the best available empirical evidence. Empirical evidence should guide how we conceive of certain conduct both in general (e.g., whether we should be generally skeptical or supportive of certain conduct because it has frequently been observed to harm or enhance competition), and in specific cases (e.g., whether in the case at hand we observe likely pro- or anticompetitive effects). And in establishing applicable rules and standards, we should consider the relative likelihood of misdiagnosing certain conduct and the commensurate costs of such misdiagnoses. Specifically, as Frank Easterbrook explained, erroneously condemning procompetitive conduct is likely to be much more costly to society than wrongly permitting anticompetitive conduct, because the former would indefinitely chill the condemned firms (and others) from engaging in similarly

[11] *See* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 245-49 (2012).

beneficial conduct, while the latter would likely experience some amount of natural market correction, as monopoly rents attracted competition.[12]

This work overhauled antitrust analysis, providing a coherent—and much-needed—foundation for understanding and analyzing competitive conduct. Following this revolution, the Supreme Court embraced and developed the consumer welfare standard.[13] The Court's adoption of this standard transformed antitrust from a lost and rambling area of law to a coherent, principled tool for advancing consumer outcomes.[14]

### B. Tethering Antitrust Analysis and Outcomes to Economics and Evidence

The Court's adoption of the consumer welfare standard institutionalized the economic approach to antitrust law. Specifically, this standard provides a clear, economically-based rule that when anticompetitive effects outweigh procompetitive benefits, the conduct is unlawful. It also provides concrete guidance for identifying likely or actual competitive effects, helping us to appropriately tailor enforcement efforts. Today, this standard is flexible enough to allow antitrust jurisprudence to

---

[12] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16 (1984).

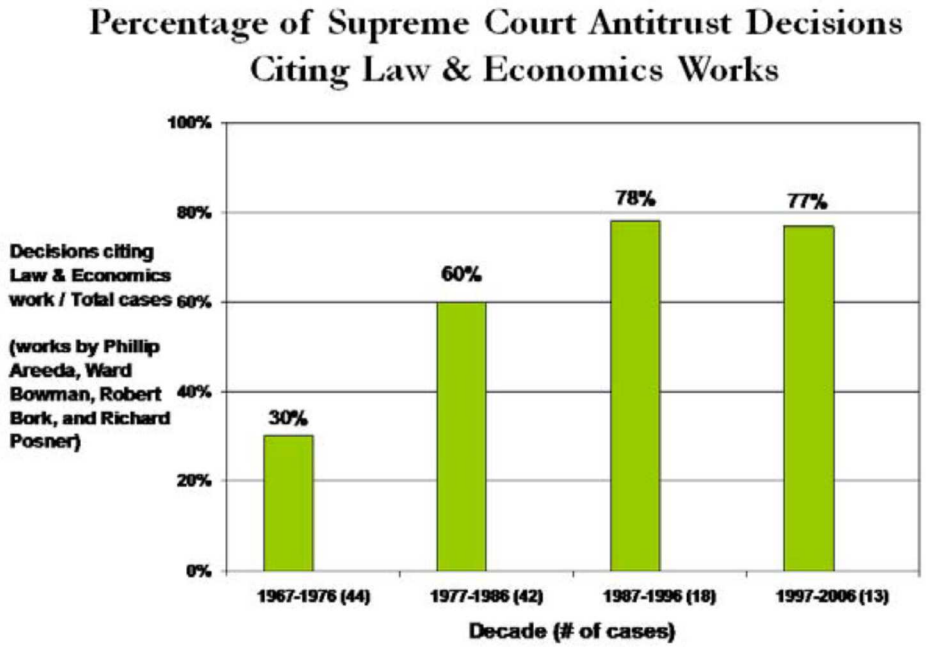
[13] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'").

[14] *See* Deborah Garza, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S. (May 29, 2008), https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the most passionate critics of current enforcement policy recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

evolve alongside our economic understanding and the introduction of new business models and high-tech industries.

As Senior D.C. Circuit Judge and renowned antitrust expert Douglas H. Ginsburg has explained, the Supreme Court's "increasing embrace of the economic approach to antitrust law[]—relative to approaches based upon amorphous sociopolitical goals—limits liability to those relatively few business practices truly inimical to consumers."[15] The Court's embracing of economic teachings can be seen in the significant increase in the number of decisions citing works of law and economics, which increased from just 30% in 1967-1978, to nearly 80% in 1997-2006:

[15] Ginsburg, *supra* note 2, at 219.




[16]

Antitrust economics has developed significantly since the emergence of the Chicago School insights that drove the initial antitrust revolution. Through rigorous scholarship and debate, economic theories and empirics have been honed to more accurately identify the necessary and sufficient conditions for anticompetitive behavior to arise.[17] Antitrust jurisprudence has likewise developed to reflect these economic advances.[18]

---

[16] Ginsburg, *supra* note 1, at 222. Judge Ginsburg defines the "new learning in antitrust law" as works by Phillip Areeda, Ward Bowman, Robert Bork, and Richard Posner. *Id.*

[17] *See, e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REGULATION 325 (2003); Lafontaine & Slade, *supra* note 1, at 391; Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163 (2012).

[18] *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3 (1997); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

Indeed, enforcers and private plaintiffs today have numerous, sophisticated economic tools to evaluate the competitive effects of any given conduct. The FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ", collectively, "Agencies") identified several such tools and their uses in their most recent Horizontal Merger Guidelines.[19] The Agencies routinely employ these tools to understand the likely or actual competitive effects of the conduct before them. This, again, provides parties with clarity as to how Agencies will investigate conduct, and when—and how—they will conclude whether a violation has occurred. These developments in transparency and consistency—fostered by the consumer welfare standard's economic grounding—promote the rule of law in antitrust cases.

### C. Providing an International Framework that Treats Domestic and Foreign Firms Equally

The consumer welfare standard provides a disciplined structure for antitrust cases that compels jurisdictions to treat all defendants equally under the law. Approximately 130 jurisdictions worldwide have active competition laws and enforcement today.[20] Several of these jurisdictions are new to antitrust enforcement or otherwise in the early stages of developing their own antitrust standards to foster competition and the consumer benefits associated with it, such as lower prices, higher

[19] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010).
[20] European Commission, Competition Policy Brief (May 2016) ("In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today."), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf.

quality, and increased innovation.[21] Particularly in such emerging antitrust jurisdictions, there is an appeal to using the antitrust laws not to foster healthy competition writ large, but rather to further non-economic factors, such as increasing "fairness" or the competitiveness of one's national champions. There is significant and widespread concern in the international antitrust community that vague and multi-dimensional antitrust standards might be used to harm competition, and in particular, to target U.S. companies.[22] While the U.S. has to this point actively discouraged other jurisdictions from adopting such non-economic factors, the current assault on the consumer welfare standard would all but destroy the Agencies' credibility in making these arguments.

Already U.S. companies are experiencing the negative effects of foreign jurisdictions misapplying antitrust standards. Indeed, foreign competition regimes are increasingly investigating and finding violations against U.S. companies—especially companies with significant intellectual property ("IP") rights. The consumer welfare standard, however, would impose critical limits upon their ability to do so. This well-

---

[21] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT, at 4 (2014) ("There has been more than a 600% increase in the number of jurisdictions with competition law enforcement since 1990[.]"), https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.

[22] Interview by Recode with President Barack Obama (Feb. 15, 2015), https://www.recode.net/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher, (in discussing data privacy in the United States as compared to Europe, particularly with regard to the EU's investigations into Google and Facebook, President Obama stated "[i]n defense of Google and Facebook, sometimes the European response here is more commercially driven than anything else . . . . sometimes their vendors—their service providers who, you know, can't compete with ours—are essentially trying to set up some roadblocks for our companies to operate effectively there").

developed standard provides clear criteria that foreign agencies must satisfy to establish a violation. As such, it would prevent regimes from finding against U.S. companies simply on the basis of their nationality.

Combined with an increase in international U.S. advocacy in favor of this standard, the consumer welfare standard would thus enhance consumer results globally. The U.S.'s tremendous experience with antitrust enforcement—and particularly the history of mangled enforcement efforts that led directly to the adoption of the consumer welfare standard—is one that the Agencies can and should share more vocally. The Agencies' sharing their deep understanding of the competitive conditions necessary to drive consumer outcomes and avoid anticompetitive ones, and advocating for the consumer welfare standard's myriad benefits, would raise the level of international discourse on these issues and help regimes worldwide to reach better results.

### D. Establishing a Flexible Standard that Encourages Debate and Evolves alongside Economic Developments

Modern antitrust is under constant development. History has demonstrated that the consumer welfare standard is agile enough to accommodate advances in our knowledge of the world around us, developments in new business models, and the emergence of new types of industries. Courts and enforcers have updated the applicable rules and adjusted the tools they use to evaluate allegedly unlawful conduct in response to economic developments. For instance, as noted above the courts

abandoned the rule of *per se* illegality for vertical restraints once economic evidence clearly demonstrated that such restraints are typically procompetitive; opting instead to apply a flexible rule of reason analysis that considers the overwhelmingly beneficial results of most vertical restraints while allowing condemnation of the rare harmful ones.[23]

As a natural extension of evolving along with economic learning, antitrust enforcement today embraces challenges within the consumer welfare framework. It takes seriously critiques and empirical evidence that contradicts our accepted understanding of the relevant issues. And it responds to critiques when they are proven economically and empirically sound to so. The consumer welfare standard thus fosters the development of antitrust jurisprudence in a direction that enhances consumer welfare and consumer outcomes.

## II. CHANGING THE CONSUMER WELFARE STANDARD NECESSARILY REDUCES CONSUMER WELFARE AND CONSUMER OUTCOMES

Abandoning the well-established consumer welfare standard would require trading-off some amount of consumer welfare for some amount of other, yet-to-be-determined values, thereby throwing open the door to uncertainty and to exploitative behavior. U.S. courts and enforcers have spent decades developing the contours of the consumer welfare standard. Today, the boundaries of this standard, and the types of

[23] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Lafontaine & Slade, *supra* note 1, at 398-399.

evidence useful to discerning whether conduct is within or outside of these boundaries, are well established. Conduct that yields overall anticompetitive effects, such as higher consumer prices, lower output or quality, or reduced innovation, are plainly unlawful. Conduct that yields overall procompetitive, or competitively neutral, effects is plainly not.

Consumer welfare would necessarily fall under a standard designed to maximize some other combination of values—the decision to adopt a different standard matters only when the consumer welfare standard and the different standard reach different results in a given case. To be clear, under such a standard, a merger or acquisition that would result in higher prices, lower output, or that ground innovation to a halt would not necessarily run afoul of the antitrust laws. Instead, we would ask *how much* of these consumer harms we are willing to tolerate in exchange for furthering some other set of theoretical goals, like fairness or a reduction in income inequality. Holding aside the lack of any empirical link between antitrust enforcement and this other set of goals,[24] the current invitation to hold out antitrust as the panacea for all sociopolitical issues ranging from inequality to fairness to employment should be rejected on theoretical, historical, and empirical grounds.

[24] *See, e.g.*, JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015); Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. (2018) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888485.

In the light of these very real concerns and certain consumer welfare losses, what does a subjective, multi-prong antitrust standard offer us? Aside from a talking point on how we are making antitrust about (undefined) "fairness" rather than about (well-defined) consumer welfare, proponents of such a change have proffered no actual or likely benefits. At best, they have posited speculative benefits, none of which have been soundly linked to the overall level antitrust enforcement, let alone to the consumer welfare standard itself. Accordingly, it would be imprudent and detrimental to abandon the consumer welfare standard.

## III. RENT SEEKING WOULD THRIVE UNDER A NEW, VAGUE STANDARD

Finally, replacing a clear, well-defined standard with a new, vague one is a recipe for rent seeking. The well-established definitions and boundaries of the consumer welfare standard allow courts to hold enforcers (and private parties) accountable and to prevent misuse of the antitrust laws. Any new standard would take years to establish the concrete guidance the consumer welfare standard already offers.[25] In the meantime, these vague new standards would provide firms leverage over the agencies they do not have today, precisely because the consumer welfare standard's established framework prevents such abuses. To the extent we are concerned that large,

[25] *See* Diana Moss, *Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers*, Am. Antitrust Inst. (Apr. 25, 2017), http://antitrustinstitute.org/content/antitrust-and-inequality-what-antitrust-can-and-should-do-protect-workers ("A new standard would require significant guidance by the enforcement agencies. It would also take years to develop the case law necessary to establish a reliable precedent for judicial review.").

powerful corporations are able to exert undue influence over the agencies today, we would only be exacerbating this concern by adopting ill-defined new standards. In other words, abandoning the consumer welfare standard would revert the antitrust laws to a rent-seeking regime that increases—rather than reduces—corporate welfare.

**CONCLUSION**

The consumer welfare standard is more than flexible enough to expand and contract antitrust enforcement in response to sound evidence. There are plenty of real debates about application that the antitrust community can—and does—have. But evidence is critical. From over 100 years of antitrust enforcement, we have a lot of evidence from which to learn.

Indeed, decades of confusing and conflicting enforcement aimed at maximizing social and political goals over consumer welfare taught us a lot. We learned that these goals harm actual consumers: they diminish competition, which translates to higher prices, reduced output, lowered quality, and less innovation for consumers. We also learned that these goals undermine the rule of law—providing no predictability for parties—which we value so fundamentally in this country, and encourage rent-seeking and a corporate welfare approach. As antitrust enforcement has become an increasingly global effort, we have further learned that attempts to inject sociopolitical goals into antitrust analysis in the U.S. leads other countries to do the same—and to

protect their own national champions at the expense of American businesses and ultimately, American consumers.

This is not the first time the economic framework underlying modern antitrust institutions has been challenged. Under this close scrutiny, the economic approach to antitrust will, again, demonstrate its superiority in fostering consumer outcomes. The recent calls to abandon the consumer welfare standard are not simply about rejecting the Chicago School—or even free market thinking in the antitrust world. Rather, they seek to abdicate the economic approach to antitrust altogether. Both our own history and economics tell us this is a very bad idea.

Thank you for your time. I am happy to answer any questions.