

**STATEMENT OF**

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**BEFORE THE**

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ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS**

**HEARING ON**

**“COMPETITION POLICY FOR THE TWENTY-FIRST CENTURY:  
THE CASE FOR ANTITRUST REFORM”**

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Chairwoman Klobuchar, Ranking Member Lee, and Members of the Committee, thank you for inviting me to appear before you today to discuss the state of U.S. antitrust law. My name is Jan Rybnicek. I practice antitrust at the law firm Freshfields Bruckhaus Deringer in Washington, DC. I also am an adjunct professor and senior fellow at the Global Antitrust Institute at the Antonin Scalia Law School at George Mason University, where I teach classes in antitrust law and economics. Previously I had the privilege of working at the Federal Trade Commission where I helped to enforce our nation's antitrust laws. I am grateful to the Committee for holding this hearing and I look forward to sharing my views. For the avoidance of doubt, my views are my own and do not reflect the views of any client or my firm.

Antitrust is in the spotlight like no other time in modern history. I believe there is tremendous value in regularly taking stock of our laws and whether they are living up to their promise. I want to use my remarks to make three points about why I think the antitrust laws are working and what incremental changes could benefit consumers.

- *First*, the American economy is competitive and innovative. It is the envy of the world. And it serves U.S. consumers well. There should be substantial evidence of systematic competitive harm to warrant abandoning decades of judicial and economic experience in favor of dramatically rewriting the antitrust laws. That evidence simply does not exist today.
- *Second*, modern antitrust has developed into a principled body of law. It has been made coherent through the adoption of the consumer welfare standard.

Antitrust enforcers are able to prosecute anticompetitive conduct effectively where appropriate and businesses are able to invest, innovate, and compete on the merits. History teaches us that efforts to undermine the consumer welfare standard would do far more harm than good.

- *Third*, while the antitrust laws generally contribute positively today, there are several common sense initiatives that would help antitrust work even better for consumers. Those include increasing antitrust agency resources and eliminating inefficiencies in our two-agency system that tax consumers.

I want to use the remainder of my time to expand on each of these points.

### 1. **The U.S. Economy is Competitive, Innovative, and Serves Consumers Well**

The recent debate about whether the antitrust laws should fundamentally be rewritten was born out of research suggesting that markets throughout the U.S. economy have become more concentrated over the last several decades and that, as a result, competition has declined.<sup>1</sup> The implication is that lax antitrust enforcement is to blame. While economists across the political spectrum have acknowledged that the link between concentration and competition is tenuous at best,<sup>2</sup> the popular narrative about increasing concentration does not withstand close scrutiny even on its own terms. For one, the initial research, while provocative, does not use classifications that

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<sup>1</sup> See, e.g., Jason Furman, Chairman, President's Council of Econ. Advisers & Peter Orszag, Vice Chairman, Corp. & Inv. Banking at Citi & Non-Resident Fellow in Econ. Studies at the Brookings Inst., Presentation at "A Just Society" Centennial Event in the Honor of Joseph Stiglitz at Columbia University: A Firm-Level Perspective on the Role of Rents in the Rise in Inequality 11 (Oct. 16, 2015), <http://gabriel-zucman.eu/files/teaching/FurmanOrszag15.pdf>.

<sup>2</sup> See, e.g., Steven T. Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 48 (2019).

are meaningful in any antitrust sense.<sup>3</sup> It uses broad sector-level categories to measure concentration across groups of products as diverse as used cars and groceries—items that no one could reasonably consider to be substitutes. So while sector-level concentration may be increasing, that tells us little about the actual state of U.S. competition.

Thankfully competition in the marketplace of ideas is as robust as competition in our actual markets, and the initial research spurred follow-on studies. Those studies have shed more light on what actually may be happening in our economy.<sup>4</sup> The first of these studies shows that while sector-level concentration is increasing at the national level, it actually is *decreasing* at the *local* level.<sup>5</sup> What that means is that national players are expanding into more local markets resulting, in the author’s words, in “more, rather than less, competitive markets.” A related study finds that this expansion is driven by innovations that have made it easier for companies to gain scale and expand across a broader geographic area.<sup>6</sup> In other words, companies are harnessing technology to become more efficient, enabling them to compete in a greater number of local markets where they ultimately are smaller competitors. A third study,

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<sup>3</sup> See, e.g., Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, 33 ANTITRUST 74, 74 (2018).

<sup>4</sup> For additional discussions of the literature, see Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861 (2020).

<sup>5</sup> Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, in 35 NBER MACROECONOMICS ANNUAL 2020 (Martin Eichenbaum & Erik Hurst, eds., forthcoming), preliminary draft available at <https://www.nber.org/chapters/c14475>.

<sup>6</sup> Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, Working Paper (Mar. 17, 2020), <https://www.princeton.edu/~erossi/IRS.pdf>.

just released this year, builds on these papers and actually measures product-level concentration—meaning concentration across products that actually may be substitutes.<sup>7</sup> It shows that not only is sector-level concentration decreasing at the local level but it is decreasing at the product level. Together these studies throw cold water on claims that increasing concentration levels suggest competition is declining in the United States and that overhauling the antitrust laws is necessary.

We should be especially wary of pursuing a massive antitrust overhaul given the actual performance of the United States relative to her global counterparts. The United States has become the unequivocal global leader in innovation across a variety of sectors.<sup>8</sup> It is where the world’s leading innovators have taken root and where the next wave of entrepreneurs are laying the foundation to become disruptors.<sup>9</sup> The United States excels at enabling startups to find capital to support their new ideas and it endorses successful firms that have run the gauntlet of competition in reinvesting their earnings and expanding the markets in which they compete. And while the reasons for this success undoubtedly are complex, it is in part because the U.S. has developed well-defined antitrust laws that protect against anticompetitive conduct while allowing procompetitive conduct to flourish. So while some have observed that competition policy in the United States has diverged significantly from the more

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<sup>7</sup> C. Lanier Benkard, Ali Yurukoglu & Anthony Lee Zhang, *Concentration in Product Markets*, Working Paper (February 2021), <https://web.stanford.edu/~ayurukog/concentration.pdf>.

<sup>8</sup> See, e.g., Jan M. Rybnicek, *Innovation in the United States and Europe*, in THE GAI REPORT ON THE DIGITAL ECONOMY (2020), at <https://gaidigitalreport.com/2020/08/25/innovation-in-the-united-states-and-europe/>.

<sup>9</sup> *Id.* at 471-72 (showing that over half of the world’s so-called “unicorn” firms—private companies valued at \$1 billion or more—originate in the United States).

interventionist approaches in Europe and elsewhere, the more important divergence may be in America's leadership in investment, innovation, and entrepreneurship.

## 2. **The Existing Antitrust Laws Are Adequate For Protecting Competition**

While the antitrust laws today contribute positively to American competitiveness, that has not always been the case. It is easy to forget that there was a time when antitrust employed incoherent doctrines and promoted vague social and political goals that not only failed to promote competition, but in many cases dissuaded competition that would bring consumers lower prices, greater innovation, and other benefits. The consumer welfare standard rescued antitrust and grounded it in a more disciplined and tractable framework.<sup>10</sup> In doing so, it fosters the rule of law and helps prevent arbitrary and politically motivated decisions.

So to what evidence do critics point to support the idea that antitrust is not up to the task of protecting competition? Many of the calls to reform the antitrust laws are premised on the unfounded belief that antitrust enforcers rarely are able to convert the power and credibility of the federal government into litigation victories under the current antitrust framework. But the reality is far different.

Over the last 20 years, the Department of Justice and Federal Trade Commission have prevailed in nearly 85 percent of their merger challenges.<sup>11</sup> That is a record that any litigator would envy. In fact, in most cases the agencies are not even

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<sup>10</sup> See, e.g., Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek & Joshua D. Wright, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 317 (2019).

<sup>11</sup> Jan M. Rybnicek, *Recent Antitrust Proposals Could "Throw Sand in the Gears" of Economic Recovery by Stalling M&A*, CNBC (Feb. 12, 2021), <https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html>.

forced to go to trial because merging parties abandon their deal in the face of a government challenge and the prospect of litigating where the legal standards so clearly favor the plaintiff. And that includes many so-called “potential” or “nascent” competition cases that reform advocates point to as the poster child of the limits of the current antitrust framework because they involve fledgling competitors.<sup>12</sup>

To believe that the antitrust laws are not working in the current context requires you to take the untenable view that the government is infallible and should never lose a case. To be sure, the government win-rate could decline if the agencies brought more cases. But not even that is clear — the Federal Trade Commission just finished its most active year in nearly two decades and saw no decline in performance.<sup>13</sup> Significant changes to the existing antitrust laws should be predicated on showing that antitrust enforcers systematically are losing cases under the current standard that they should win.

### **3. Common Sense Reforms That Could Improve Antitrust Enforcement**

Although the antitrust laws are up to the task of protecting competition in the U.S. economy, antitrust enforcement by no means is perfect. There are several common sense reforms that could benefit consumers. While these proposals are less provocative than many of the recent reforms that have been proposed, they would

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<sup>12</sup> Press Release, U.S. Dep’t of Justice, Antitrust Div., Visa and Plaid Abandon Merger After DOJ Antitrust Division’s Suit to Block (Jan 12, 2021), <https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block#:~:text=Decision%20to%20Terminate%20Deal%20Preserves,their%20planned%20%245.3%20billion%20merger.>

<sup>13</sup> Ian R. Conner, Dir., Bureau of Competition, Fed. Trade Comm’, *A Fiscal Year Like No Other* (Oct. 6, 2020), [https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other.](https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other)

build upon the important foundation that exists today and recognize the need to protect against both anticompetitive conduct and government overreach and error.

- First, we should ensure that the antitrust agencies have adequate resources to carry out their mission of promoting consumer welfare. The staff of the antitrust agencies are talented public servants. We should make sure that we can retain and recruit the best lawyers and economists possible, and that we give them the tools necessary to do their jobs. No one can seriously think that the agencies should permit anticompetitive conduct for lack of resources.
- Second, we should eliminate inefficiencies in our two-agency system. If we were to create a new antitrust system today, it is hard to believe we would vest antitrust enforcement power in two federal authorities. As a practitioner it is difficult to explain to businesses why divergent authorities and procedures are warranted. We should seriously consider proposals that eliminate frictions in that system.
- Third, we should more regularly assess where agency decisions succeeded and where they failed through retrospective analysis. Antitrust has developed over time through an iterative process based on new learning. We should learn from the agencies' successes and failures to improve antitrust enforcement.
- Fourth, we should increase agency transparency. While the American system of antitrust enforcement is far superior to that in Europe in my view, one of the features of the European system is that it requires publication of detailed antitrust enforcement decisions. We should endeavor to do more of that here.

It is critical that antitrust enforcers articulate to the public in clear terms why they make the decisions they do and why those decisions are good for consumers.

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Justice Marshall famously remarked that the antitrust laws are the “Magna Carta of free enterprise,” critical to protecting free markets and advancing economic prosperity.<sup>14</sup> I believe that to be true. But as Justice Scalia later observed, the antitrust laws do so not through government micromanagement of markets that aims to pick winners and losers, but rather by protecting against anticompetitive conduct that harms consumers while otherwise allowing firms to invest, take risk, and either thrive or fail on the merits. Our existing antitrust laws are up to this task.<sup>15</sup>

I look forward to answering any questions.

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<sup>14</sup> United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

<sup>15</sup> Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).