Responses to U.S. Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, Questions for the Record

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Senator Josh Hawley Questions for the Record

1. **During the hearing, you testified that it might be necessary for antitrust enforcement agencies to more greatly emphasize changes in concentration within markets, even markets that do not appear to be presently highly concentrated, when reviewing horizontal mergers. How can antitrust agencies more effectively detect incipient anticompetitive markets before their harmful effects become apparent to Americans?**

   The 2010 Horizontal Merger Guidelines define highly concentrated markets as those with an HHI (Herfindahl-Hirschman Index) greater than 2500, and presumptively anticompetitive mergers as those that result in highly concentrated markets and involve an increase in the HHI of more than 200 points.[1] Recent work by Professors Volker Nocke and Michael Whinston[2] argues that there are both theoretical and empirical bases to conclude that harm from unilateral anticompetitive effects of a merger is most closely linked with changes in the HHI, independent of the level of the HHI. This is particularly likely when mergers typically are not associated with substantial merger-specific efficiencies in the form of large reductions in marginal cost, which would be the conclusion I would draw from the empirical economics literature.[3] Their "results suggest that screens closer in form to the 1968 guidelines than the current ones, emphasizing the change in the Herfindahl index more than its post-merger level, would likely generate higher levels of consumer welfare." One way to detect incipient anticompetitive mergers is to focus on the magnitude of changes in concentration rather than high levels alone.

[1] U. S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines" (8/19/2010), section 5.3. https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2d

[2] Volker Nocke and Michael D. Whinston, "Concentration Screens for Horizontal Mergers," National Bureau of Economic Research Working Paper 27533, July 2020. http://www.nber.org/papers/w27533

[3] See the discussion in Nancy L. Rose and Jonathan Sallet, (2020) "The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right," *University of Pennsylvania Law Review*, 168 (June 2020), 1941-1984 (see 1961-1967); and Herbert Hovenkamp, "Appraising Merger Efficiencies," *George Mason Law Review* 24(2017): 703.

More effective enforcement against acquisitions of potential or nascent competitors is another important tool for detecting and avoiding incipient anticompetitive harm, particularly in markets with few existing competitors and where entry barriers may be significant. Dominant incumbents in these situations will have strong incentives to acquire potential competitors before they become actual competitive threats, and in general, to outbid others for those acquisitions (because doing so protects their monopoly profits). Current case law imposes high burdens on government plaintiffs seeking to block acquisitions of potential competitors, often unreasonably high burdens. Americans are likely to bear the costs of reduced competition for years to come absent legislative intervention to correct this. [4]

2. **During the hearing, you mentioned that "much more aggressive vertical merger enforcement" is required in order to enhance competition in American markets. Is existing federal antitrust law adequate to permit such enforcement?**

Current enforcement practices and case law are not conducive to successfully challenging anticompetitive vertical mergers. "Five Principles for Vertical Merger Enforcement Policy"[5] lays out thoughts on policy directions that could improve enforcement. Recent revisions to the Vertical Merger Guidelines do not rectify that situation, even were courts as deferential to revised vertical merger guidance as they generally have been to horizontal merger enforcement. And given the courts' general skepticism of harm from vertical merger, that may not be a plausible expectation. Legislative action to alter presumptions may be the more effective means to changing enforcement effectiveness; some suggested directions are outlined in a recent submission to the House Judiciary Committee. [6]

What, if any, legislative measures could be taken in response to the longstanding pattern of judicial underenforcement of federal antitrust law?

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[4] See, e.g., C. Scott Hemphill and Tim Wu, "Nascent Competitors," *University of Pennsylvania Law Review,* 168 (2020): 1879-1910.

[5] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, "Five Principles for Vertical Merger Enforcement Policy," *Antitrust,* 33 (Summer 2019): 12-19. https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub

[6] Baker, Jonathan B. and Farrell, Joseph and Gavil, Andrew I. and Gaynor, Martin and Kades, Michael and Katz, Michael L. and Kimmelman, Gene and Melamed, Doug and Rose, Nancy L. and Salop, Steven C. and Scott Morton, Fiona M. and Shapiro, Carl, Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets (April 30, 2020). Howard Law Research Paper, Available at SSRN: https://ssrn.com/abstract=3632532 or http://dx.doi.org/10.2139/ssrn.3632532

Legislative action is needed to restore antitrust enforcement effectiveness after decades of shrinking enforcement resources and developing case law that has narrowed its scope and effectiveness. The first and most significant change would be a substantial increase in the budgets for the DOJ Antitrust Division and the FTC. Action to overrule judicial precedents that have throttled enforcement should be a second priority, particularly with respect to exclusionary conduct and some categories of mergers (such as acquisition of potential or nascent competitors). A number of collaborators and I provided written thoughts on this in a letter submitted to the House Judiciary Committee in April 2020.[7] S. 225, the Competition and Antitrust Law Enforcement Reform Act of 2021 (introduced by Senator Klobuchar for herself and Senators Blumenthal, Booker, Markey, and Schatz) would implement a number of important changes to reset presumptions and shift burdens for antitrust enforcement, as well as restore enforcement budgets and implement a number of priorities for further study.

Senator Booker Questions for the Record

1. You have written about how anticompetitive consolidation and exclusionary conduct has harmed providers of inputs into concentrated markets. One such group of providers is farmers. I am concerned about the impact of corporate concentration in American agriculture. As I've previously written, the situation now resembles a "feudal state, in which small family farmers are given the choice between competing with enormous corporations or working for them through increasingly one-sided contracts."[8] In the poultry industry, for example, "just four companies now control 60 percent of the market. As a result, individual poultry farmers have been driven out of business, and are forced to take on the costs and risks of raising chickens for the parent company without any guarantee of fair compensation."[9] Can you elaborate on the impact that consolidation and other anticompetitive conduct has had on rural communities and farm families?

I have not personally studied agricultural markets, and industrial organization researchers unfortunately have not focused much scholarly attention on documenting consolidation in the agriculture sector and its impacts on farmers, rural communities, and consumers. That said, a wave of collusion cases in animal processing market as well as ongoing mergers in animal processing, seeds, biotechnology, and agricultural

[7] *Id.*
[8] Cory Booker, The American Dream Deferred, BROOKINGS INST. (2018), https://www.brookings.edu/essay/senator- booker-american-dream-deferred.
[9] Id.

equipment raise significant concerns about the competitive landscape, and the fallout from this for farmers and consumers.[10]

2. **Studies have confirmed that corporate concentration has a direct relationship to market power in labor markets. According to one such study, the most concentrated labor markets saw a 15 to 25 percent decline in posted wages over those in less concentrated ones.[11]**

I have spoken out in the past in favor of the Justice Department and the Federal Trade Commission updating their Horizontal Merger Guidelines to expressly include the impact on labor markets, so that the government can better ensure that workers have "meaningful choices that allow them to fairly bargain among potential employers."[12]

a. In light of your scholarship focusing on horizontal mergers—do you think such a revision to the Horizontal Merger Guidelines would be a beneficial change, and, if so, why?

Anticompetitive harm to workers from mergers that reduce labor market competition is prohibited by current antitrust law,[13] and would fall under section 12 of the 2010 Horizontal Merger Guidelines (HMGs), "Mergers of Competing Buyers." While there have not been litigated merger challenges based entirely or largely on such harms, recent empirical work by Elena Prager and Matt Schmitt and by David Arnold[14] document the impact of suggest that some mergers do harm certain classes of workers. Whether such mergers generally also harm product market competition, as in the hospital mergers that Prager and Schmitt study, or may

[10] See, for example, Diana L. Moss, "Consolidation and Competition in the U.S. Seed and Agrochemical Industry," Testimony before the Senate Judiciary Committee, September 20, 2016, https://www.antitrustinstitute.org/wp-content/uploads/2018/08/SJC_Moss-Testimony_9.20.16_F.pdf ; Diana L. Moss, "Consolidation and Concentration in Agricultural Biotechnology: Next Generation Competition Issues," *Competition Policy International,* (January 2020).

[11] José Azar, Ioana Marinescu & Marshall I. Steinbaum, Labor Market Concentration (Nat'l Bureau of Econ. Rsch. Working Paper No. 24,147, Dec. 2017), https://www.nber.org/papers/w24147.

[12] *Supra* note 8.

[13] See Ioana Elena Marinsescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," *Indiana Law Journal,* 94 (2019): 1031-1063; and C. Scott Hemphill and Nancy L. Rose, "Mergers That Harm Sellers," *Yale Law Journal¸* 127 (May 2018): 2078-2109.

[14] Elena Prager and Matt Schmitt, "Employer Consolidation and Wages: Evidence from Hospitals," *American Economic Review,* 111 (February 2021): 397-427, *https://www.aeaweb.org/articles/pdf/doi/10.1257/aer.20190690* ; David Arnold, "Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes," mimeo, April 2, 2021, https://darnold199.github.io/jmp.pdf

harm only labor market competition, is an open empirical question.[15] That matters for enforcement actions, as successfully challenging a merger requires proof of anticompetitive impact in one or more, but not every, market that is harmed. Labor markets that may be most at risk from anticompetitive mergers are likely those in which firms compete for workers but not in product markets, unless the agencies explicitly consider labor market competition in their investigation and litigation decisions.

While I do not believe that changes to the HMGs or case law are *necessary* to challenge anticompetitive mergers on the basis of labor market harms—the agencies and courts can and should take all necessary actions to enforce antitrust laws to protect labor market competition regardless of that—making that explicit in the next revision to the HMGs would increase the visibility of both this potential source of merger harm and the agencies' commitment to investigate and challenge mergers that would reduce labor market competition. This would parallel a similar effort under the Obama Administration to highlight antitrust law's protection of workers against anticompetitive *conduct* such as no-poach agreements among employers, clarified in the 2016 *Antitrust Guidance for Human Resources Professionals.* [16]

b. What other kinds of high-level changes to competition policy would specifically help to strengthen the bargaining position of workers?

Adding substantial resources to the DOJ Antitrust Division and Federal Trade Commission budgets is an important action for increasing enforcement against anticompetitive practices in general, and specifically in labor markets, including mergers. The agencies need to develop investigative screens and tools for assessing anticompetitive labor market impacts, and the first cases brought largely or entirely on the basis of reduced labor market competition may pose unique litigation challenges. Enforcement action likely also would benefit from systematic studies of both merger and conduct impacts on labor markets, similar to the FTC's efforts on documenting impacts of hospital mergers as part of its enforcement re-set after repeated losses in hospital merger challenges. On the conduct side, this could include the effect of non-compete agreements and occupational licensing, in addition to no-poach and wage fixing agreements discussed in the 2016 *Guidance.* This all takes resources away from already starved enforcement budgets.

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[15] See also Nancy L. Rose, "Thinking Through Anticompetitive Effects of Mergers on Workers," Background Paper for the ABA Antitrust Section Spring Meetings Panel on "Beyond No-Poach: Mergers, Monopsony, and Labor Markets," 2019. https://economics.mit.edu/files/20284

[16] Antitrust Guidance for Human Resources Professionals, U.S. Department of Justice and the Federal Trade Commission (Oct. 2016), http://www.justice.gov/atr/file/903511/download [http://perma.cc/UH2J-KXXY]

Recent work by Anna Stansbury and Lawrence Summers[17] suggests that competition policy is unlikely to be the only or most important policy tool for strengthening the position of workers and improving labor market outcomes. Their work argues that reduced worker protection, erosion of collective bargaining, and other declines in worker power are likely more significant contributors to the decline in labor share than are increases in monopoly or monopsony power by the businesses that employ them. This does not let antitrust enforcers off the hook for protecting labor market competition wherever possible. But it does suggest that reliance on more vigorous antitrust enforcement alone will not restore what workers have lost in recent decades.

Senator Tillis QFRs for all witnesses

I. Copyright Piracy and Music Consent Decrees

I regret that I have not studied the facts surrounding the copyright piracy debate nor the ASCAP/BMI consent decrees, their impacts, or the music and performance rights organizations in sufficient detail to have insights into these questions.

III. Patents

I'm a firm believer in strong patent rights. I believe patents are the ultimate inhibitor of anticompetitive and monopolistic behavior. Patents are one of the few ways that individual inventors or small and medium sized enterprises can force larger, market dominant competitors to negotiate. Without a patent, big companies like Google and Facebook would simply copy their competitor's product for free and swallow up and dominate them.

1. **Can you share your views on the role of patents in promoting competition? In particular, I want to hear your thoughts about how patent rights promote the ability of individual inventors and small startups to compete against larger, more dominant market?**

   Patents are government-sanctioned and -established monopolies. At its heart, the patent system reflects a policy tradeoff between the investment incentive effects of property rights to a monopoly rent stream for some period and the social welfare loss and inefficiency that such monopoly creates. The expected gains from appropriate patent protection of true

[17] Anna Stansbury and Lawrence H. Summers, "The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy," *Brookings Papers on Economic Activity,* (Spring 2020). https://www.brookings.edu/wp-content/uploads/2020/12/StansburySummers-Final-web.pdf

innovations creates investment incentives and expected social benefits that ideally outweigh the cost of government-sanctioned monopoly.

2. **What role does strong intellectual property rights play in promoting competition? In other words, I'm curious to hear your thoughts about the nexus between strong, predictable, and enforceable intellectual property rights and the ability of individual inventors and small entities to compete against large market actors.**

   Strong intellectual property rights provide incentives for innovation when the patent system ensures that patent rights are appropriately granted and enforced. But when the patent system allows "weak" patents (monopoly protection for rents that do not accrue from truly innovative activity), rent-seeking activity including litigation by patent assertion entities and others can lead to perverse incentives, and inappropriate exploitation of Standard Essential Patents can result in misalignment of technology contributions and patent rewards, as Carl Shapiro and others have discussed authoritatively.[18]

[18] Carl Shapiro, "Patent Reform: Aligning Reward and Contribution," *Innovation Policy and the Economy,* National Bureau of Economic Research, 8 (2007); Fiona Scott Morton and Carl Shapiro, "Patent Assertions: Are We Any Closer to Aligning Reward to Contribution?," *Innovation Policy and the Economy,* National Bureau of Economic Research, 2016.