

**Written Testimony of John M. Newman**  
**United States Senate**  
**Committee on the Judiciary**  
**Subcommittee on Competition Policy, Antitrust, and Consumer Rights**  
**Hearing on**  
**“Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform”**  
**Tuesday, December 17, 2024, 3:00 P.M.**

Chair Klobuchar, Ranking Member Lee, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify before you today.<sup>1</sup> I believe there is a growing bipartisan consensus in favor of robust antitrust enforcement. And I believe robust antitrust enforcement is absolutely essential to ensuring that the American marketplace is vibrant, open, fair, and free.

### **My Background**

I grew up in Iowa, attended Iowa State University as an undergraduate and then the University of Iowa College of Law. While in law school, I served as a research assistant to one of the world’s leading antitrust experts, Professor Herb Hovenkamp, and interned at the U.S. Department of Justice Antitrust Division. Antitrust law has been my professional life’s work ever since. After returning to the Division as a trial attorney, I moved to the University of Memphis School of Law and then the University of Miami School of Law, where I now focus my research, writing, and teaching on antitrust issues. I also recently served as deputy director of the Federal Trade Commission’s Bureau of Competition, where, among other matters, I oversaw the Bureau’s casework involving Big Tech companies and digital markets.

When I started in this field back in 2010, very few people had ever heard of antitrust. Today, it seems like everyone has. Student interest is off the charts. When I travel back home, friends and family often ask what I think about the latest mega-merger or raise concerns about Big Tech firms’ dominance. Whether they consider themselves Republicans, Democrats, or Independents, all seem to understand the basic reason for having antitrust laws and see a real need for action. I’ve never seen enthusiasm like this before. What sparked it? And what are the areas of new consensus that cross party lines? I see at least four: (1) identifying serious harms in zero-price markets, (2) bringing big cases against Big Tech firms, (3) willingness to block harmful vertical mergers, and (4) awareness of the need to protect agricultural-production and food-supply markets.

#### **1. Zero Prices, Important Harms**

For a long time, the antitrust community had a serious blind spot: markets without prices didn’t seem to be markets at all, and were therefore unworthy of protection. In the late 1990s, for example, federal enforcers cleared merger after merger as the broadcast-radio industry

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<sup>1</sup> David (Didi) Malka and John N. Rincon provided outstanding research assistance that supported the drafting of this testimony.

consolidated.<sup>2</sup> Enforcers looked only for harm to advertisers, ignoring the listening public.<sup>3</sup> In 2012, the FTC unanimously cleared Facebook’s acquisition of Instagram,<sup>4</sup> despite overwhelming evidence—put on full display in a case filed nearly a decade later toward the end of President Trump’s first term—that the deal was anticompetitive. Also in 2012, the late Robert Bork published an editorial arguing that “[t]here is no coherent case for monopolization because a search engine, like Google, is free to consumers.”<sup>5</sup> Soon after, the FTC closed an investigation of Google’s search-related conduct without filing a case.<sup>6</sup>

The first signal of a new approach came in 2019, when then-Assistant Attorney General Makan Delrahim began sounding the alarm about underenforcement in zero-price markets.<sup>7</sup> A salvo of historic lawsuits followed in 2020: the Antitrust Division and a group of state attorneys general sued Google in October,<sup>8</sup> thirty-five more states sued Google in December,<sup>9</sup> and both the Federal Trade Commission and a group of nearly fifty state enforcers sued Facebook that same month.<sup>10</sup>

Zero-price markets may lack prices, but these bipartisan efforts recognize that harm from monopolistic conduct in these markets can be massive. Excessive advertising loads, degraded privacy, and an overly concentrated marketplace for ideas are all serious concerns that antitrust can help address.<sup>11</sup>

## 2. Big Cases Against Big Tech Monopolists

These cases have another thing in common: they’re all big cases against Big Tech monopolists. Rather than focusing narrowly on a single instance or type of conduct, each complaint described a course of conduct by a defendant who wields many levers of control over a broad swaths of competition. This broad focus is important because it can help judges understand the full impact of monopolistic behavior—and craft appropriate, effective remedies.

Winning Sherman Act cases these days is not easy. In fact, the original FTC complaint filed against Facebook under then-Chair Simons was dismissed. In the past, new administrations have sometimes abandoned high-profile enforcement efforts that were brought under previous leadership.<sup>12</sup> But one of the first things Chair Khan did after her confirmation in 2021 was to pick

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<sup>2</sup> John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015).

<sup>3</sup> See Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. 1399 (2011).

<sup>4</sup> Press Release, FTC, FTC Closes Its Investigation into Facebook’s Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), <https://perma.cc/VE9T-2X63>.

<sup>5</sup> Robert H. Bork, Opinion, *Antitrust and Google*, CHI. TRIB., Apr. 6, 2012, <http://perma.cc/XRB2-W4JE>.

<sup>6</sup> Statement of the FTC Regarding Google’s Search Practices, *In re Google Inc.*, FTC File No. 1111-0163 (Jan. 3, 2013), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/statement-commission-regarding-google-search-practices/130103brillgooglesearchstmt.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-google-search-practices/130103brillgooglesearchstmt.pdf)

<sup>7</sup> Makan Delrahim, Assistant Att’y Gen., Remarks at Silicon Flatirons, “I’m Free”: Platforms and Antitrust Enforcement in the Zero-Price Economy (Feb. 11, 2019), <https://www.justice.gov/opa/speech/file/1131006/dl>.

<sup>8</sup> Complaint, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Oct. 20, 2020).

<sup>9</sup> Complaint, *Colorado v. Google LLC*, No. 1:20-cv-03715-APM (D.D.C. Dec. 17, 2020).

<sup>10</sup> Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020); Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-03589 (D.D.C. Dec. 9, 2020).

<sup>11</sup> See John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016).

<sup>12</sup> Edward T. Pound, *Why Baxter Dropped the I.B.M. Suit*, N.Y. TIMES, JAN. 9, 1982.

up that complaint, strengthen it, and refile it—and this time, it survived Facebook’s motion to dismiss.<sup>13</sup> Similarly, DOJ’s 2020 complaint against Google did not miss a beat under the next administration. Instead of dropping or settling the case, the Antitrust Division devoted substantial resources to prosecuting it all the way through trial. Those efforts paid off in the form of a landmark decision finding Google liable for illegal monopolization.<sup>14</sup> The Division’s more recent complaints against Apple and against Google’s advertising-technology practices continue the Big Tech, big case tradition begun during President Trump’s first term in office. So too does the FTC’s complaint against Amazon, which was joined by a bipartisan group of state enforcers.

Many of these cases challenge what are known as “vertical” restraints and conduct by dominant firms. In decades past, it had become somewhat unfashionable to be suspicious of restraints imposed by a dominant firm on a customer or supplier.<sup>15</sup> Modern antitrust economics, however, recognizes that vertical restraints can be quite harmful.<sup>16</sup> Yet there remains work to be done. Looking ahead, vertical restraints that restrict labor freedom and mobility are one area in which antitrust enforcement could have an especially important, beneficial impact. A growing body of economics literature indicates that competition for labor is not as robust as we may have assumed in the past.<sup>17</sup> It follows that restraints in these markets may pose heightened risks of harm.

### 3. Vertical Merger Challenges

And speaking of vertical restraints, another area where a new bipartisan consensus has clearly emerged is the importance of litigating to block vertical mergers and acquisitions. Congress and the U.S. Supreme Court have always been very clear: combinations of suppliers and customers can harm competition and violate the law.<sup>18</sup>

The old consensus was that this type of consolidation was almost never harmful and instead almost always competition-enhancing. Unsurprisingly, then, public law enforcers began to clear virtually all vertical mergers without any conditions. A few deals went through with behavioral “play nice” requirements.<sup>19</sup> But that was it. That hands-off consensus was, unfortunately, also bipartisan: federal antitrust enforcers did not litigate to block a vertical merger or acquisition for nearly forty years, a period that spanned nine presidential administrations.

This cozy status quo was first shaken up in November 2017, when DOJ challenged AT&T’s \$108 billion acquisition of Time Warner, an important supplier of television content.<sup>20</sup> Outside observers wondered whether the challenge was a one-off anomaly, to be followed by a reset back

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<sup>13</sup> *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022).

<sup>14</sup> *United States v. Google LLC*, No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024).

<sup>15</sup> For an argument that vertical restraints should be *per se* legal, see Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division—Part II*, 75 YALE L.J. 373 (1966).

<sup>16</sup> JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* (2019).

<sup>17</sup> See David Card, *Who Set Your Wage?*, 112 AM. ECON. REV. 1075 (2022) (collecting sources).

<sup>18</sup> See *United States v. AT&T Inc.*, 916 F.3d 1029 (D.C. Cir. 2019) (citing *Ford Motor Co. v. United States*, 405 U.S. 562 (1972)); Public Comments of 28 State Attorneys General on Draft Vertical Merger Guidelines (Feb. 26, 2020).

<sup>19</sup> One study identifies a total of 17 such mergers during from 2001 to mid-2015, approximately one per year. See Steven C. Salop & Daniel P. Culley, *Revising the US Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, J. ANTITRUST ENFORCEMENT 1 (2015).

<sup>20</sup> Complaint, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

to the old approach. A few years later, we got an answer: a unanimous, bipartisan vote at the FTC launched that agency's first-in-decades vertical merger challenge to Illumina's acquisition of multi-cancer early-detection test maker GRAIL.<sup>21</sup> That groundbreaking complaint was followed in swift order by complaints challenging NVIDIA's acquisition of Arm<sup>22</sup> and Lockheed Martin's acquisition of Aerojet.<sup>23</sup> Both resulted from bipartisan, unanimous votes. Both were successful, yielding the first blocked vertical mergers in decades. The Antitrust Division followed with a challenge to a vertical tie-up between UnitedHealth Group and Change Healthcare in 2022, and the FTC filed two more challenges to vertical deals in 2023 (Microsoft's acquisition of Activision Blizzard) and 2024 (Tempur Sealy's acquisition of Mattress Firm). Not every challenge met with success: UnitedHealth and Change were allowed to merge, and Microsoft was allowed to buy Activision. But in late 2023, the Fifth Circuit largely upheld the Commission's decision against Illumina and GRAIL, and those companies subsequently unwound their merger.<sup>24</sup> All in all, this a remarkable track record. Achieving an enforcement priority often requires persevering for several years and incurring several losses to secure even a single partial success. Litigating against vertical mergers has already yielded multiple victories in less than a decade.

The new consensus reflects good, sound law. Does it also reflect good law enforcement? Recall that the old hands-off approach rested on three beliefs: vertical combinations (1) are almost never harmful, (2) are almost always beneficial, and (3) at most warrant behavioral "play nice" remedies. Modern economic learning, however, reveals that (1) vertical mergers are more often harmful than previously thought,<sup>25</sup> (2) vertical mergers are less often beneficial than previously believed,<sup>26</sup> and (3) behavioral remedies are less often effective than previously believed.<sup>27</sup>

One way to get at the question is to ask how the companies fared in the wake of a vertical-merger challenge. Where courts sided with the defendants, have the predicted cost savings and quality improvements actually materialize? Conversely, where courts blocked deals, did it spell disaster for the defendants?

- *AT&T/Time Warner*: the district court believed the defendants' claims that they would not withhold or "black out" content from other television providers.<sup>28</sup> Singing from the old hymnal,<sup>29</sup> the court also declared that the acquisition would yield more than \$350 million in cost savings and assumed that the combined company would pass all of those savings on to consumers. But shortly after the companies were allowed to merge, AT&T blacked

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<sup>21</sup> Press Release, FTC, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illumina-proposed-acquisition-cancer-detection-test-maker-grail>.

<sup>22</sup> Press Release, FTC, FTC Sues to Block \$40 Billion Semiconductor Chip Merger (Dec. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger>

<sup>23</sup> Press Release, FTC, FTC Sues to Block Lockheed Martin Corporation's \$4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne>

<sup>24</sup> *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. 2023).

<sup>25</sup> Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018).

<sup>26</sup> John Kwoka & Margaret Slade, *Second Thoughts on Double Marginalization*, 34 ANTITRUST 51 (2020).

<sup>27</sup> Makan Delrahim, Assistant Att'y Gen., Keynote Address at Am. Bar Ass'n Antitrust Fall Forum (Nov. 16, 2017).

<sup>28</sup> *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 251 (D.D.C. 2018) ("[T]he Government has failed to show that the merged entity would have any incentive to foreclose rivals' access to HBO-based promotions.").

<sup>29</sup> *Id.* at 193 n.19 (citing ROBERT H. BORK, THE ANTITRUST PARADOX 227 (2d ed. 1993)).

out Time Warner’s HBO and Cinemax channels for rival Dish’s viewers.<sup>30</sup> And instead of lowering prices, AT&T repeatedly raised prices on its own viewers.<sup>31</sup>

- *UnitedHealth/Change*: the district court rejected DOJ’s theory that the combined company would use data about rivals to advantage itself. This theory is relatively difficult to assess retrospectively from the outside. But it is worth noting that after the companies were allowed to merge, a massive data breach at Change led to a reportedly weeks-long outage of Change’s claims processing system. That, in turn, reportedly left multiple physician practices in desperate financial straits—and gave UnitedHealth an excuse to seek an accelerated takeover of one such practice.<sup>32</sup>
- *Microsoft/Activision Blizzard*: the district court believed the defendants’ claims that the acquisition would “actually lower costs for many game consumers and harm none” and “result in an increased incentive to invest in game development.”<sup>33</sup> But instead of lowering prices, soon after acquiring Activision, Microsoft raised prices for its gaming subscription service to U.S. consumers by nearly 20%.<sup>34</sup> And just three months after the acquisition closed, Microsoft fired nearly 2,000 U.S. workers, primarily at Activision Blizzard, and shut down development of a highly anticipated new gaming franchise.<sup>35</sup>
- *NVIDIA/Arm*: in their response to the FTC’s complaint, NVIDIA and Arm claimed that they needed to merge because “new threats have emerged that . . . challenge Arm’s growth.”<sup>36</sup> But after walking away from their proposed merger, both companies have thrived. NVIDIA has achieved record revenues; its earnings have nearly quintupled since 2022.<sup>37</sup> Arm has similarly soared, launching 2023’s biggest initial public offering<sup>38</sup> and delivering “record revenues” in a recent earnings report.<sup>39</sup>

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<sup>30</sup> Ken Martin, *AT&T’s HBO Goes Dark Due to Dish Standoff*, FOX BUSINESS (Nov. 1, 2018), <https://www.foxbusiness.com/markets/hbo-goes-dark-due-to-standoff-with-dish>

<sup>31</sup> See Josh Kosman,  *DirecTV Monthly Rates Spike After AT&T’s Time Warner Buy*, N.Y. Post (Dec. 15, 2019), <https://nypost.com/2019/12/15/directv-monthly-rates-spike-after-atts-time-warner-buy/>

<sup>32</sup> Maureen Tkacik, *UnitedHealth Exploits an ‘Emergency’ It Created*, AM. PROSPECT, Mar. 10, 2024, <https://prospect.org/health/2024-03-10-unitedhealth-exploits-emergency-change-ransomware-oregon/>.

<sup>33</sup> *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC (N.D. Cal. 2023).

<sup>34</sup> Tom Warren, *Microsoft Is Hiking the Price of Xbox Game Pass Ultimate and Launching a New ‘Standard’ Tier*, THE VERGE, July 9, 2024, <https://www.theverge.com/2024/7/9/24195312/microsoft-xbox-game-pass-ultimate-price-increase-standard-subscription>.

<sup>35</sup> Andrew Webster, *Blizzard Cancels Survival Game Following Layoffs*, THE VERGE, Jan. 25, 2024, <https://www.theverge.com/2024/1/25/24050297/blizzard-survival-game-cancelled-layoffs>

<sup>36</sup> Answer and Defenses of Respondents NVIDIA Corp., SoftBank Grp. Corp., and Arm Ltd., *In re NVIDIA*, No. 9404 (F.T.C. 2021).

<sup>37</sup> Compare Press Release, NVIDIA, NVIDIA Announces Financial Results for Second Quarter Fiscal 2022 (Aug. 18, 2021), <https://nvidianews.nvidia.com/news/nvidia-announces-financial-results-for-second-quarter-fiscal-2022>, with Press Release, NVIDIA, NVIDIA Announces Financial Results for First Quarter Fiscal 2025, <https://nvidianews.nvidia.com/news/nvidia-announces-financial-results-for-first-quarter-fiscal-2025>.

<sup>38</sup> Erin Griffith & Don Clark, *Arm Soars 25% in the Year’s Biggest Initial Public Offering*, N.Y. TIMES, Sept. 14, 2023, <https://www.nytimes.com/2023/09/14/technology/arm-ipo-stock-market.html>

<sup>39</sup> ARM, FYE25 – Q1 SHAREHOLDER LETTER (2024), <https://investors.arm.com/static-files/559eabc5-4dce-4cfe-bfaf-bb19735eeb40>.

- *Lockheed Martin/Aerojet*: after the FTC’s successful challenge, Aerojet located a different acquirer, L3Harris, that offered Aerojet a higher purchase price while presenting far fewer competitive concerns than Lockheed.<sup>40</sup> Meanwhile, Lockheed’s stock price jumped immediately on the news that it was walking away from the challenged acquisition and has climbed nearly 30% since that time.
- *Illumina/GRAIL*: one year after the defendants abandoned their proposed tie-up, GRAIL’s stock price hit an all-time record high. Meanwhile, Exact Sciences, a rival developer that could have been cut off by Illumina post-merger, announced “significant advancements” in its own developmental Cancerguard™ test capabilities.<sup>41</sup> And the American Association for Cancer Research announced new, open funding to support development.<sup>42</sup>

These are not meant to be exhaustive merger retrospectives. But two things are clear. First, when courts allowed challenged mergers to proceed, price *increases* repeatedly materialized instead of predicted cost savings. Second, when deals were blocked, the would-be merging companies did not fail—to the contrary, they appear to have thrived. The new consensus regarding vertical merger litigation rests on good law; it also represents sound law enforcement.

#### 4. The Importance of Agriculture and Food-Supply Markets

As I noted above, I grew up in rural Iowa. My first paid jobs were what we called “picking rock” and “walking beans,” both jobs done by hand for local farmers. In high school, I landed a job working for a company founded by a local farmer. At the time, it was according to some the smallest independent soybean genetic research company in the country. Today, that company doesn’t exist anymore; it got bought up by one of the giants. Local farmers these days are fewer and farther between. The town where I went to middle and high school is slowly dying. Concentrated corporate power isn’t the only reason for that, but it is one reason.

I joined the Antitrust Division’s Transportation, Energy, and Agriculture Section after law school in 2011 in large part because I wanted to try to do something about what I’d seen. Leadership at the time had been making a lot of noise about antitrust and agriculture. They held a big workshop tour. But it turned out to be mostly just talk. During my three years with DOJ, the Division did file one case against a chicken-processing merger, alleging that it would’ve depressed prices paid to farmers. But a month later, DOJ agreed to let the merger stand after the defendants promised to install a “special freezer and deboning equipment” in one of their plants.<sup>43</sup>

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<sup>40</sup> Joe Gould, *Experts Forecast Smooth Path for L3Harris–Aerojet Acquisition*, DEFENSENEWS, Dec. 19, 2022, <https://www.defensenews.com/industry/2022/12/19/experts-forecast-smooth-path-for-l3harris-aerojet-acquisition/>.

<sup>41</sup> Press Release, Exact Sciences, Exact Sciences Unveils Data Showing Promise of Multi-Cancer Early Detection at AACR Special Conference on Liquid Biopsy (Nov. 13, 2024), <https://www.exactsciences.com/newsroom/press-releases/exact-sciences-unveils-data-showing-promise-of-multi-cancer-early-detection-at-aacr>.

<sup>42</sup> Ross Uhrich, *Cancer Screening for All: A Revolutionary Approach to Accessible, Best-in-Class, Multi-Cancer Early Detection*, AM. ASS’N FOR CANCER RES., Sept. 30, 2024, <https://www.aacr.org/blog/2024/09/30/cancer-screening-for-all-a-revolutionary-approach-to-accessible-best-in-class-multi-cancer-early-detection/>.

<sup>43</sup> Press Release, U.S. Dep’t of Justice, Justice Department Reaches Settlement with George’s Inc. (June 23, 2011), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-george-s-inc>.

Fast-forward to 2022: the FTC, along with a bipartisan coalition of states—Iowa among them—filed a big, serious case alleging that chemical giants Syngenta and Corteva have been paying off distributors to keep low-cost pesticides from reaching farmers.<sup>44</sup> Both federal agencies have also been taking action to keep food costs down for consumers. The Antitrust Division filed an important case against a company called Agri Stats, alleging that big meat processors use it as a vehicle for driving up prices of meat to American consumers.<sup>45</sup> And the FTC—along with a bipartisan group of state attorneys general—just successfully blocked the Kroger–Albertsons grocery store mega-merger,<sup>46</sup> which would have driven up grocery prices for American consumers and driven down wages for American workers. Thriving agricultural and food-supply markets are a kitchen-table issue for all Americans. To be clear, the job isn’t done. A lot of work remains to be done in these areas—which is why, from where I sit, this new consensus is an especially welcome one.

Thank you.

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<sup>44</sup> Press Release, FTC, FTC and State Partners Sue Pesticide Giants Syngenta and Corteva for Using Illegal Pay-to-Block Scheme to Inflate Prices for Farmers (Sept. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-state-partners-sue-pesticide-giants-syngenta-corteva-using-illegal-pay-block-scheme-inflate>.

<sup>45</sup> Complaint, *United States v. Agri Stats, Inc.*, No. 0:23-cv-03009 (D. Minn. Sept. 28, 2023).

<sup>46</sup> *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN (D. Or. Dec. 10, 2024).