BEFORE THE SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

HEARING
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"Competition Policy for the Twenty-First Century: The Case for Antitrust Reform"

TESTIMONY OF ASHLEY BAKER
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Chairwoman Klobuchar, Ranking Member Lee, and Members of the Subcommittee,

I am grateful for the opportunity to present my views before the Subcommittee as it begins to consider legislative initiatives with respect to the nation's competition policy.

The Senate Committee on the Judiciary—and specifically this Subcommittee—has an important role to play. While there are many issues and regulatory questions surrounding the technology sector, this Subcommittee is equipped to examine antitrust soberly and without misdirection from legitimate anger over other issues which antitrust is not designed to address.

Any congressional assessment of issues related to our antitrust laws should be characterized by rigorous economic analysis, productive in promoting competition and consumer welfare, and based on predictable and enforceable standards. I would like to encourage the Subcommittee to continue in this effort and to reclaim this debate from the politicized approach that seeks to transform our antitrust laws and refocus the conversation on enforcement, market analysis, and the core purpose of antitrust.

A few principles I would like to touch on in my written statement are as follows:

It is important to understand what was built – and why – before tearing it down.

In *The Antitrust Paradox*, Robert Bork argued that Congress enacted the Sherman Act as a "consumer welfare prescription." In short, Section 1 of the Sherman Act prohibits activities that restrain trade if those restraints are unreasonably restrictive of competition in a relevant market.

However, the *actual language* of Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." But really, under that plain reading of the text, most things are illegal. Shoes sold in pairs are just one example.

Courts came to recognize that not every restraint can be illegal because even a simple contract between two parties technically restrains trade at some level. This realization first occurred right after the Act's passage, during the era between 1890 and around 1914, and it is something that courts struggled with for the better portion of the 20th century. Antitrust law was particularly rudderless in the mid-20th century.

Eventually, in the 1970s, courts came to interpret the Sherman Act to only apply to "unreasonable restraints," and in 1979, only a year after the *Antitrust Paradox* was published,

the Court explicitly acknowledged that the Sherman Act was enacted as a “consumer welfare prescription.”

The consumer welfare standard uses economics to reliably predict when conduct is likely to harm consumers as a result of harm to competition. It is broad enough to incorporate a wide variety of evidence and shifting economic circumstances but also clear and objective enough to prevent being subjected to the beliefs of courts and enforcers. In doing so it honors the principle of the rule of law.

Antitrust should protect competition, not competitors.

In the United States, our antitrust laws protect the competitive process not the competitor. Harming one’s competitors is not an antitrust violation. Outcompeting competitors is how competition works, and *profit-seeking motives alone do not establish antitrust liability*.

There is no affirmative duty to assist rivals.

Recently, we have witnessed a push for Congress to override the Supreme Court’s unanimous decision in *Verizon Communications Inc. v. Trinko*. For several decades, courts have been very skeptical of claims that a monopolist’s refusal to deal with another company, usually a competitor, is exclusionary conduct. Typically, even a monopolist has no duty to deal with its competitors.

An antitrust duty to deal would also reduce incentive to create. As Justice Antonin Scalia, writing for the majority, famously explained:

> *“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”*

It is easy to see that an antitrust duty to deal is “at the outer boundary of Section 2 liability” for good reason. So, what explains the renewed interest by Congress? One need only to look across the street for a possible explanation. In orders issued in late December, the justices asked the then-Acting U.S. Solicitor General to file a brief expressing the views of the United States in *Comcast Corp. v. Viamedia Inc*.

If granted, this case could present a rare opportunity for the Supreme Court to reconsider the contours of *Aspen Skiing's* duty-to-deal test. That is, unless Congress were to nullify the case it relies upon by overriding *Trinko*, at which point the issue would be moot. Congress should wait to see what course of action the Supreme Court takes in deciding whether to grant the case, particularly given the many important issues before this Congress, and the fact that the Court is a more appropriate venue.

Antitrust law should not undermine property rights.

Patents are one of the greatest anti-monopoly devices ever created. It allows a single inventor, usually someone out of left-field, to disrupt an entire industry and tear down established companies with a property right in a new innovation.

Patents and other forms of intellectual property are frequently described as incentives to innovate, but this disruptive effect is often overlooked. Of course, this effect is only plausible with a strong system of intellectual property rights that treats patents and copyrights as property rights under the Constitution.

Any legislative proposal should specify that applying for or enforcing a patent, trademark or copyright is not exclusionary conduct, nor is it part of a course of conduct that establishes conduct.

Presumptions of anticompetitive harm offend the rule of law.

Approaches to antitrust enforcement based on presumptions of anticompetitive harm drastically upend core tenets of our legal system by inverting the burden of proof while undermining the consumer welfare standard and harming the U.S. innovation economy.[1]

Under current antitrust law, enforcers have adequate power to intervene. Additionally, the FTC and the DOJ have only lost four cases in the last decade, and private litigants continue to bring monopolization claims. Inverting the basic notion that the government bears the ultimate burden of proof all to solve a problem in merger litigation that has little supporting evidence, should particularly not withstand scrutiny by conservatives.

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[1] Testimony of Patricia Nakache before the Senate Judiciary Committee's hearing on Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms, available at https://nvca.org/wp-content/uploads/2019/09/Testimony-of-Patricia-Nakache-SJC-as-submitted-9-23-19.pdf

Shifting the evidentiary burden could also destroy the incentive for government agencies to actively measure anticompetitive effects while the defendant would need to clearly document pro-competitive benefits. This would not only be unfairly burdensome for the defendant, but it would make it impossible to win on an efficiencies defense as it is impossible to weigh pro-competitive benefits against that which is not identified.

This does not solve any real or perceived problem. If there is an underenforcement problem in competition law, it is not being caused by a litigation crisis in which the government is having trouble winning cases. So why change the underlying legal standard?

Burden-shifting proposals would have a chilling effect on the investment ecosystem.

Venture capital fuels high-growth startups that transform the economy and make the world a better place. This effect was certainly felt this year, as two of the more recent examples of initial public offerings ("IPOs") include Zoom and Moderna.

For many VC-backed companies, however, acquisition becomes the preferred exit strategy. Ultimately, approximately 10 times as many startups are acquired than complete an IPO, with 836 venture-backed companies having been acquired in 2019, whereas 82 went public.[2]

Despite the importance of this economic activity, the U.S. share of global VC has fallen more than 30% (from 84% to 52%) in the last 15 years.[3] While the U.S. has traditionally been the world leader in VC, other countries have realized the immense benefits of venture capital investment in spurring economic growth, and are now competing with the U.S.

When faced with burdensome policies, new market entrants tend to migrate to friendlier regulatory environments. This is particularly bad timing for policymakers to make it more difficult for companies to acquire startups that view acquisition as an exit strategy. Shifting the burden of proof away from the government and to the defendant would do exactly that. Adapting an *ex-post* merger review framework would also have this effect.

Putting competition concerns into perspective.

[2] "NVCA Yearbook," National Venture Capital Association (March 2020) at 22-23, https://nvca.org/wp-content/uploads/2020/03/NVCA-2020-Yearbook_PUBLIC-DATA-PACK.pdf
[3] Id. at 13.

> *"It is difficult to imagine that in an open society such as this one with multiple information services, a single company could seize sufficient control of information transmission so as to constitute a threat to the underpinnings of a free society. But such a scenario is a realistic (and perhaps probable) outcome."*

This is not a description of the threats posed by 'Big Tech' firms today. To the contrary, these lines were written in 1997 and appear in an amicus brief in *U.S. v. Microsoft* filed by a lawyer working for one of Microsoft's competitors. History may not repeat itself, but often it rhymes.

Microsoft's demise was ultimately its inability to innovate and to enter the mobile market. And yet Microsoft still dominates PC operating systems and productivity software, but operating systems are no longer the way to dominate tech. Other companies ultimately outperform companies such as Microsoft not by overcoming barriers and competing with the company by offering a directly analogous alternative product, but instead by making their underlying competitive assets irrelevant.

In other words, the most successful new companies do not often seek to reproduce existing ones, and due to advances in technology large firms can no longer maintain dominance through the traditional build-and-freeze model.

Conclusion:

During the 1986 Supreme Court confirmation hearings for then-Judge Antonin Scalia, he was asked about his views on antitrust. "In law school, I never understood [antitrust law]," Scalia explained, "I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then." It makes a lot more sense now.

The consumer welfare standard has greatly benefited antitrust and is underappreciated as a significant narrowing of federal government power in the last half century and a major victory for the conservative legal movement.

Recent proposals would upend decades of progress, returning antitrust to the era of favoring "small dealers and worthy men" regardless of factors such as efficiency, quality, and price. I fear that today, both sides of the aisle are pushing for the weaponization of antitrust, either as a tool to punish corporate actors with whom they disagree or out of a presupposition that big is bad. Unfortunately, the antitrust debate has begun to devolve into a litany of unrelated and often contradictory concerns, unsubstantiated and dismissive attacks, and seemingly a presumption

that any market-related complaint that can be made on the internet can also be cured by the panacea of antitrust.

This highly-charged atmosphere has led to radical proposals that run contrary to economic evidence and endanger significant advances made in antitrust scholarship. The adverse effects of such changes would reach well beyond today's target du jour to firms in all sectors of our economy.

Thank you again. I look forward to supporting efforts to create strong, evidence-based proposals and stand ready to assist in any way that is helpful.

As always, please feel free to reach out should you have any questions or requests for additional input. I welcome the opportunity to further discuss these views and relevant proposals or assessment.

Sincerely,

Ashley Baker
Director of Public Policy
The Committee for Justice