January 14, 2021

The Honorable Ken Buck
Member, U.S. House of Representatives

The Honorable Andy Biggs
Member, U.S. House of Representatives

The Honorable Matt Gaetz
Member, U.S. House of Representatives

Cc: The Honorable Jim Jordan
Ranking Minority Member, Committee on the Judiciary
U.S. House of Representatives

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Dear Representatives Buck, Biggs, and Gaetz:

We, the undersigned, write with sincere appreciation for your careful attention and participation on the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. We are a group of legal experts, economists, and consumer and taxpayer advocates who believe in the importance of promoting competitive markets and defending the rule of law.[1]

The Subcommittee's 16-month-long investigation on competition in the digital marketplace raises important questions. Unfortunately, the Majority Staff's Report and Recommendations[2] overshoot those questions with recommendations that would radically upend antitrust law from protecting consumers to punishing successful and innovative businesses.[3]

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[1] Note: While signatories herein may prefer various approaches for addressing non-competition concerns about issues such as privacy, online content, liability, and myriad other popular topics associated with technology firms, we uniformly agree that any congressional assessment of issues related to digital markets must be characterized by rigorous economic analysis, productive in promoting competition and consumer welfare, and based on predictable and enforceable standards.

[2] *See Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary*, 116th Cong. (2020), available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[3] *See* "Results-Oriented House Antitrust Report Undermines the Law, Harms Consumers." The Alliance on Antitrust. (October 6, 2020), available at: https://www.allianceonantitrust.org/blog/housejudiciaryantitrustreport. ("While acknowledging the strength and importance of the American digital economy, the report goes on to make claims and offer recommendations that would restrict consumer choice and weaken the American economy. The report reflects a results-oriented approach to antitrust that seeks to weaponize the law to empower those who govern at the expense of the governed, while sacrificing basic economics and the rule of law.")

As we begin a year with a new Congress, a new president, and new challenges in antitrust policy, litigation, and legislation, we would like to take a moment to review some of the Subcommittee's findings, recommendations, and the reports this process produced.

## INTRODUCTION & SUMMARY

As you noted in your separate report, the Majority Staff's recommendations include "sweeping changes" that "could lead to overregulation and carry unintended consequences for the entire economy." In addition to being a self-described "attack on how America has approached antitrust for the past 40 years," the report serves as a Trojan Horse for policies that are, at best, tangentially related to competition law, such as reducing certain procedural obstacles to litigation and banning arbitration clauses to create an easy path for class action lawsuits. The implications of the report extend far beyond just "Big Tech."

We thank you for not signing onto those recommendations and identifying proposals of your own. We agree with the spirit of those alternative proposals but remain concerned that many of them pose a danger to the rule of law and threaten to upend decades of hard-won progress. Furthermore, these recommendations rely on mistaken assumptions made by those arguing in favor of drastic reform proposals.

More specifically, we are concerned that the recommendations identified in the Third Way Report as "Common Ground" would lead to the same outcome as the Majority Report, as these identified proposals would create a license for ideologically-driven mischief, invite "creative lawyering" in the courts, and untether antitrust from a standard that offers an objective and evidence-based framework for analysis.

Ultimately, we worry that both reports support proposals that place government bureaucrats at the heart of decisions regarding the way products are designed, how firms compete, and other questions that have been traditionally left to consumers. And through the adoption of these proposals, conservatives risk playing into the regulation-happy hands[4]

[4] *See, e.g.* "Highlights from AELP Break 'Em Up Clip Round Up." NetChoice. (December 21, 2020), available at: https://www.youtube.com/watch?v=pqwp-7BGHpw&feature=youtu.be. (Wherein Professor Zephyr Teachout and Sen. Bernie Sanders recently discussed many such proposals, stating that "you want to do regulation, nationalization, and break-up all together" and then "appoint federal regulations ready to take action on behalf of workers and consumers" while blaming Ronald Reagan for destroying antitrust "by convincing the country that antitrust was just this little tool used by economists" rather than bending it for sociopolitical purposes.

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of modern progressives and their Neo-Brandeisian agenda to weaponize antitrust to control all sectors of the economy.

## THE REPORTS: CONCERNS AND CONSIDERATIONS FOR FURTHER INQUIRY

The Third Way Report referenced a "need for clarification and expert feedback on majority proposals."[5] We would like to focus primarily on several proposals identified as "Common Ground" between the Majority Report and the Third Way Report as a starting point for such feedback and analysis and continue to provide constructive input.

### I. We disagree with both reports' recommendations to shift the burden of proof for companies pursuing mergers and acquisitions.

Approaches to antitrust enforcement based on presumptions of anticompetitive harm drastically upend core tenets of our legal system by inverting the burden of proof and diminishing the role of the federal judiciary.

Both reports recommend radical changes that would amend Section 7 of the Clayton Act to shift the burden in mergers by placing "the burden of proof upon the merging parties to show that the merger would not reduce competition."

Inverting the basic notion that the government bears the ultimate burden of proof and thereby *creating an end-run-around the consumer welfare standard*, all to solve a problem that does not exist in merger litigation, is not a proposal that should withstand scrutiny by conservatives.[6]

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This discussion is not only revealing of the progressive agenda, but in presenting this historical revisionism, also inadvertently underscores Reagan's correct and prescient observation that "a government can't control the economy without controlling people." *See* Ronald Reagan, *A Time for Choosing* (televised October 27, 1964).)

[5] It is worth noting that earlier last year, as the Subcommittee approached the end of its investigation, a number of prominent antitrust scholars and economists were invited to submit statements. Many of the statements from one side of the debate went uncited and perhaps unconsidered in the drafting of the resulting reports. One can view several of those statements here: https://drive.google.com/drive/folders/1bQ23FcVEJftOv7uJzgbRblK-sS8aeJyU?usp=sharing. (Note: While signatories herein do not necessarily agree with every assertion made in each of these statements—nor do the statements make identical suggestions—we uniformly agree upon the need for an open debate that accounts for all the existing evidence.)

[6] *See generally* Bakst, Daren, and Gabriella Beaumont-Smith. "A Conservative Guide to the Antitrust and Big Tech Debate." The Heritage Foundation. (December 1, 2020), available at:
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## II. The underlying justifications for burden shifting are demonstrably false and will impact competition in every sector.

Both reports justify shifting the evidentiary burden of proof by disparaging M&A reviews by federal agencies during an alleged time of a "mergers and acquisitions buying spree." The Majority Staff points out that since 1998, the four digital platforms examined in the report were able to acquire more than 500 other companies. The report did not point out that this is only an average of less than six mergers or acquisitions per company per year, hardly a buying spree.

Furthermore, according to the Institute for Mergers, Acquisitions, and Alliances, there have been *894,669 worldwide acquisitions since 1998, an average of 40,667 annually*.[7] Thus the four digital platforms examined in the report have *only accounted for .06 percent* of acquisitions.[8]

Despite the small percentage of deals by the firms in question, the Third Way Report raises concerns of widespread lax enforcement of antitrust law, noting that: "Of course, many of these deals were either pro-competitive or competitively benign, but the important point here is that we have no real way of knowing what their competitive effect was because they were not reviewed by the antitrust cops on the beat."

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https://www.heritage.org/technology/report/conservative-guide-the-antitrust-and-big-tech-debate; and Withrow, Josh. "Antitrust Is Not the Remedy to Conservative Concerns about Big Tech." FreedomWorks. (September 15, 2020), available at: https://www.freedomworks.org/content/antitrust-not-remedy-conservative-concerns-about-big-tech. (discusses how, consistent with the points later made in the Heritage backgrounder, "[r]eining in the prior 'rule of reason' standard for antitrust in favor of the present consumer welfare standard was one of the greatest victories of the conservative movement against the administrative leviathan.")

[7] "M&A Statistics - Worldwide, Regions, Industries & Countries." Institute for Mergers, Acquisitions and Alliances (IMAA). (February 10, 2020), available at: https://imaa-institute.org/mergers-and-acquisitions-statistics.

[8] Schatz, Thomas. "House Judiciary Committee Antitrust Report Is Anti-Competitive." Citizens Against Government Waste. (October 7, 2020), available at: https://www.cagw.org/thewastewatcher/house-judiciary-committee-antitrust-report-anti-competitive.

However, under current antitrust law, enforcers have adequate power to intervene.[9] The FTC and the DOJ have only lost four cases in the last decade, and private litigants continue to bring monopolization claims.[10] Outside of the courtroom, multitudes of mergers and anticompetitive actions are prevented by party abandonment out of fear of government action.

The proposed burden shifting provisions would affect a large swarth of deals across other industries, reducing competition while creating greater incentives for the government and private plaintiffs to file suit. It would also create a feeding frenzy for plaintiffs' attorneys.

Both reports begin by recognizing that some of the most groundbreaking and innovative developments spearheading the economy have been in the tech sector. It would be a tragedy to assume anticompetitive conduct and to then apply this misguided view to other sectors across the economy. Yet both reports' sweeping statements about the need for more antitrust enforcement under a wholly modified, unrecognizable antitrust regime poses that exact risk.

## III. Market definition plays a critical role in antitrust analysis.

Both reports recommend that Congress clarify "that market definition is not required for proving an antitrust violation, especially in the presence of direct evidence of market power." But as Andrew Lautz explains:

> *This is a dangerous recommendation, given that some of the more overzealous antitrust challenges in recent years have come as a result of antitrust agencies poorly or inadequately defining the market. Indeed, improper definition of the relevant market was a major theme*

[9] *See, e.g.* Lautz, Andrew. "House Judiciary Report on Tech Features Misguided, Harmful Policy Recommendations." National Taxpayers Union. (October 7, 2020), available at: https://www.ntu.org/publications/detail/house-judiciary-report-on-tech-features-misguided-harmful-policy-recommendations. ("A presumption *might* be *slightly* more understandable if antitrust agencies were *completely* operating in the dark on mergers and acquisitions, but they are not. Under the Hart-Scott-Rodino Act, companies involved in any mergers or acquisitions that meet relatively low dollar thresholds have to report to the antitrust agencies for premerger notification and review. The agencies already have a virtually limitless ability to challenge acquisitions from the large technology companies - and, as the Subcommittee notes, they have declined to do so.") (emphasis in original)

[10] For an explainer on the framework for the evidentiary burden of proof in antitrust litigation, particularly in civil mergers challenges, *See* Baker, Ashley. "Podcast - The Burden of Proof in Competition Law." The Federalist Society. (December 2, 2020), available at: https://fedsoc.org/commentary/podcasts/explainer-episode-19-the-burden-of-proof-in-competition-law.

*of a recently proposed acquisition from the global distribution system company Sabre, of a much smaller travel company. Antitrust agencies must define a relevant market to determine if a merger or acquisition will be anticompetitive, and the Subcommittee is somewhat absurdly suggesting that market definition is not necessary to judge evidence of market power.*[11]

Indeed, as Ronald Coase pointed out: "[I]f an economist finds something - a business practice of one sort or other - that he does not understand, he looks for a monopoly explanation. And as in this field we are rather ignorant, the number of ununderstandable practices tends to be rather large, and the reliance on monopoly explanations frequent."[12]

For instance, in *FTC v. Qualcomm*, the FTC and the district court wrongly defined Qualcomm's market. They mislabeled the company's customers as its competitors. The Ninth Circuit corrected that poor analysis, which would have forced Qualcomm and other innovators in their telecom equipment sector to change lawful business practices and wrongly exposed them to antitrust liability.

Traditionally, market definition is framed around a static product with a distinct type of customer. With advances in technology, this build-and-freeze model breaks down as technologies evolve, and regulators are struggling to apply the correct framework.[13] The correct response to this struggle, however, it not to abandon the practice of defining the relevant market in antitrust analysis. This would lead to inconsistencies in the application of antitrust laws that would negatively impact small companies across all sectors of our economy.

## THE STATE OF THE DEBATE: PUTTING RECENT PROPOSALS INTO PERSPECTIVE

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."

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[11] Lautz, *Id.*

[12] R.H. Coase. "Industrial Organization: A Proposal for Research. Policy Issues and Research Opportunities in Industrial Organization." (p. 67). (Victor R. Fuchs ed.) (1972).

[13] *See, e.g. Statement for the Record on Antitrust, Digital Ad Markets, and the Rule of Law.* The Alliance on Antitrust. (September 15, 2020), available at: https://www.allianceonantitrust.org/blog/7nkf4035eu5zdc83ftr0f4etvj7a0e.

The need to bring coherency to antitrust law through a neutral underlying principle that cannot be weaponized is what led to the adoption of the modern consumer welfare standard.[14] 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.[15]

*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*.[16] Recent proposals would upend decades of progress, returning antitrust to the era of favoring "small dealers and worthy men"[17] regardless of factors such as efficiency, quality, and price.

We 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.

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[14] See Robert H. Bork, "The Antitrust Paradox: A Policy at War with Itself" (1978).

[15] Shifting away from the consumer welfare standard would catapult antitrust law back to the era of the 1960s when, in Justice Potter Stewart's words, "[t]he sole consistency that I can find is that, in litigation under [the antitrust laws], the Government always wins*." United States v. Von's Grocery Co*., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[16] See generally, Wright, Joshua D, and Jan M Rybnicek. "A Time for Choosing: The Conservative Case Against Weaponizing Antitrust." *National Affairs*. (November 2020), available at: https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust. ("The conservative legal movement, powered by the intersection of economic analysis and law, brought the rule of law to the wild and untamed progressive antitrust vision of the 1960s. Grounding antitrust law in a disciplined and tractable framework not only promotes the rule of law while preventing arbitrary and capricious enforcement, it also creates a stable and predictable environment for private actors and firms to invest and innovate. Of course, no doctrine is perfect and today's antitrust is not without its own flaws. But it is tethered to robust economic evidence and common-law developments that promote competitive outcomes and, like the common law, has built-in mechanisms to improve and evolve in response to empirical evidence. But the coherent and principled makeup of antitrust should not and cannot be taken for granted.")

[17] *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 323 (1897).

## CONCLUSION

The House Committee on the Judiciary — and specifically the Subcommittee on Antitrust, Commercial, and Administrative Law — has an important role to play in this discussion. While there are many issues plaguing our society today, we believe that this Committee is equipped to examine antitrust soberly and without misdirection from legitimate anger over other issues which antitrust is not designed to address.

As you rightly note in your report, the Majority Report's current proposal lacks clarity and requires additional refinement. Again, we applaud your work in highlighting important concerns with the Majority's Staff recommendations and championing an alternative course. We hope you will consider our suggestions in refining an alternative.

We look forward to supporting efforts to create strong, evidence-based proposals and stand ready to assist in any way that is helpful. Please feel free to contact us should you have any questions or requests for additional input. We welcome the opportunity to further discuss these views and relevant proposals or assessment.

Sincerely,

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*NOTE: Organizations listed for identification purposes only.*