Testimony on the 'State of Competition in the Digital Marketplace' before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law

James C. Cooper, Antonin Scalia Law School, George Mason University

Joshua D. Wright, Antonin Scalia Law School, George Mason University

John M. Yun, Antonin Scalia Law School, George Mason University

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Prepared Statement of

James C. Cooper
Associate Professor
Antonin Scalia Law School
George Mason University

Joshua D. Wright
University Professor
Antonin Scalia Law School
George Mason University

John M. Yun
Associate Professor
Antonin Scalia Law School
George Mason University

Before the

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial,
and Administrative Law

Investigation into the State of Competition in the Digital Marketplace

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EXECUTIVE SUMMARY

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for offering us the opportunity to submit our written testimony on key antitrust questions involving the digital economy.

The extraordinary success of the digital sector of the domestic economy is indisputable. Digital platforms represent the top companies traded on the United States stock market, with trillions of dollars in aggregate market capitalization. With this level of market success, growth, and influence, it is inevitable that these businesses are increasingly in the forefront of public policy discussions. Most relevant for our purposes are the now-common claims that monopoly power is widespread in the digital economy, that these firms have systematically engaged in anticompetitive conduct, and that digital platforms' exercise of monopoly power has remained unchecked due to gaps in our antitrust laws or lax enforcement of existing laws.

The antitrust laws have a rich history, characterized by their flexibility and ability to adapt over time to changes in the structure of the economy, business models, and consumer preferences. Courts, antitrust scholars, and policymakers broadly agree that the antitrust laws should be interpreted and enforced to serve a uniform purpose: consumer welfare. The modern consumer welfare standard continues to provide a sound and stable intellectual foundation to guide the enforcement of the antitrust laws, including the digital marketplace, and leads us to several important conclusions.

First, the current body of doctrine regarding monopolization is more than sufficient to address the digital marketplace. As such, it is unnecessary to import the European concept of "abuse of dominance" into American antitrust doctrine. Doing so would penalize successful firms and directly harm the competitive process and thereby consumers. Additionally, present-day antitrust doctrine also adequately addresses concerns with platform self-preferencing, which can generate both procompetitive and anticompetitive effects. Finally, conflation of antitrust and privacy policy should be

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avoided because the extent to which privacy serves as a dimension of competition is unclear and data collection can support higher quality products benefitting consumers.

Second, the existing antitrust laws are more than adequate to address horizontal mergers, vertical mergers, and the acquisition of nascent and potential competitors. Trends in rising national concentration do not equate to increases in market power. Those trends often obfuscate decreases in local market concentration and increased efficiency. A knee-jerk reaction to fears of increasing national concentration would be premature and possibly misguided. Specifically, more aggressive scrutiny toward vertical mergers is unwarranted by the evidence. The empirical literature to date simply does not support a presumption that vertical mergers are likely to harm consumers. Similarly, as it relates to nascent and potential competition, the evidence does not suggest that so-called "killer acquisitions," or enforcement involving nascent and potential competition, are blind spots for the agencies. Further, current law offers antitrust enforcers the tools they need to protect the competitive process.

Third, the institutional structure of antitrust enforcement is generally sound, and consequently, does not require any sweeping structural changes. For example, we do not believe that adding additional operating units comprising non-antitrust specialists (e.g., a "technology group") is warranted. Nonetheless, we do recommend some changes within the existing institutional structure that we believe would improve capabilities and transparency. Specifically, we believe that Congress should (1) expand the size and role of Ph.D. economists at both agencies; (2) eliminate the FTC Act's common carrier and non-profit exemptions; (3) formalize clearance agreements between the agencies to provide parties more transparency on which agency is likely to handle a merger or conduct an investigation; and (4) potentially consider dividing enforcement responsibilities between the two agencies to avoid duplication and allow for gains from specialization.

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INTRODUCTION

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for offering us the opportunity to submit our written testimony on key antitrust questions involving the digital economy.[1]

The extraordinary success of the digital sector of the domestic economy is indisputable. Digital platforms represent the top companies traded on the United States stock market, with trillions of dollars in aggregate market capitalization.[2] With this level of market success, growth, and influence, both economically and culturally, it is perhaps inevitable that these businesses are increasingly in the forefront of public policy discussions. Most relevant for our purposes are the now-common claims that these firms have systematically engaged in anticompetitive conduct, or are otherwise insulated from competitive forces, and that digital platforms' exercise of monopoly power has remained

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[1] In this comment, we rely upon the prior work of the Global Antitrust Institute (GAI) on these topics. *See, e.g.*, GAI Comment on The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, The Consumer Welfare Standard in Antitrust Law; GAI Comment on The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers; the GAI Comment on The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Platforms. We also rely on the Prepared Statement of John M. Yun Before the United States Senate, Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Hearing on "Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms," September 24, 2019. We thank Scalia Law student Ethan Hoffman for invaluable research assistance.

[2] The term "platforms" (a.k.a. multisided or two-sided markets) describes firms that have developed a system or network where more than one group (*e.g.*, users, merchants, advertisers) all participate in order to engage in mutually beneficial exchange. While there is no universal definition, Professors Andrei Hagiu and Julian Wright offer a good starting point: Platforms "enable direct interactions between" two or more groups where each group is "affiliated with the platform" in some manner—typically through platform-specific investments. *See* Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162, 163 (2015). Regardless of the precise definition, platforms are principally characterized by cross-group effects, or indirect network effects. These effects occur when the size of one group creates a positive externality on one or more of the other groups on the platform, which, in turn, attracts them to the platform. Some platforms also have direct network effects, which occur when the increase in the size of a given group confers additional benefits to other members of the same group, *e.g.*, telephone systems, fax machines, email, and social media.

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unchecked at least in part due to gaps in our antitrust laws or lax enforcement of existing laws.

We are pleased to provide our views on three important questions concerning the state of competition in the digital marketplace: (1) Are existing antitrust laws that prohibit monopolization and monopolistic conduct adequate for digital platforms?; (2) Are existing laws adequate to prohibit anticompetitive transactions including for vertical and conglomerate mergers, serial acquisitions, data acquisitions, or acquisitions of potential competitors?; and (3) Is the institutional structure of antitrust enforcement—including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—adequate to promote the robust enforcement of the antitrust laws?

We believe that the most direct answer to each of these questions is: "Yes." The antitrust laws have a rich history, characterized by their flexibility and ability to adapt over time to changes in the structure of the economy, business models, and consumer preferences from the passage of the Sherman Act in the late 19th century to today.[3] The modern consumer welfare standard continues to provide a sound and stable intellectual foundation to guide the enforcement of the antitrust laws. Therefore, the current body of doctrine regarding monopolization is sufficient to address the digital marketplace. Further, we believe the existing antitrust laws are more than adequate to address both vertical mergers and the acquisition of nascent and potential competitors—two subjects commonly discussed as potential gaps in antitrust enforcement.

[3] *See, e.g.*, Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZONA STATE L.J. 293, 293 (2019) ("Over the last fifty years, antitrust has developed into a coherent, principled, and workable body of law that contributes positively not only to American competitiveness and societal well-being, but also helps to export the culture of market competition around the world."); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405–06 (2013) (describing the "promotion of economic welfare as the lodestar of antitrust laws" which "restored intellectual coherence to a body of law Robert Bork had famously described as paradoxical").

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Finally, we find that the institutional structure of antitrust enforcement is generally sound, and consequently, we do not recommend any sweeping structural changes. For example, we do not believe that adding additional operating units comprising non-antitrust specialists (e.g., a "technology group") is warranted. Nonetheless, we do recommend some changes within the existing institutional structure that we believe would improve capabilities and transparency. Specifically, we believe that Congress should (1) expand the size and role of Ph.D. economists at both agencies; (2) eliminate the FTC Act's common carrier and non-profit exemptions; (3) formalize clearance agreements between the agencies to provide parties more transparency on which agency is likely to handle a merger or conduct an investigation; and (4) potentially consider dividing enforcement responsibilities between the two agencies to avoid duplication and allow for gains from specialization.

I. THE CONSUMER WELFARE STANDARD

As a threshold matter, we want to lay out what we believe should be the metric for assessing the state of competition in the digital market place: the consumer welfare standard, which is the guiding principle of modern antitrust enforcement.[4] The consumer welfare standard is often misunderstood as a liability standard in individual cases that requires antitrust plaintiffs to demonstrate with precision that harm to consumers arising from the challenged conduct outweighs its benefits. That is incorrect. The consumer welfare standard specifies the objective of antitrust institutions. It demands that substantive and procedural antitrust rules be fashioned to benefit consumers, adopting economic learning and accounting for error costs.[5] This does not mean that the antitrust agencies or private plaintiffs must prove that actual harms outweigh actual benefits in

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[4] *See The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Protection of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Joshua D. Wright).

[5] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

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every case. Rather, courts employ economic theory and judicial experience to create presumptions and procedural rules to truncate the analysis where appropriate to minimize error costs and administrative costs.[6]

These presumptions favor plaintiffs when the type of conduct at issue is likely to harm consumers; when the type of conduct at issue is likely to have a beneficial or neutral effect on consumers, the presumptions favor defendants. For example, in cases involving conduct that is known to "always or almost always" reduce market output or raise market prices to consumers, the rule of per se illegality applies, and there is no need to prove harm.[7] This approach facilitates the prosecution of truly harmful conduct, while reducing costs associated with false positives.[8]

The consumer welfare standard has been widely lauded for bringing coherence and credibility to antitrust law, providing a framework for consistent, economically-sound decision-making, and giving consumers the benefit of lower prices, increased output, higher product quality, and more innovation.[9] By focusing on a single objective measure, the consumer welfare standard disciplines modern antitrust law. Antitrust enforcers and courts under a consumer welfare standard are forced to support their actions with sound economic evidence. This helps to deter arbitrary or politically motivated enforcement actions that would chill aggressive, but beneficial, competitive

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[6] *See, e.g.*, Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 247–49 (2012) (describing the error-cost framework).

[7] *See, e.g.*, Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978); *see also* Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 125, 138 (ABA Section of Antitrust Law 2008) ("For cases falling under the per se rule, plaintiffs needed only to establish concerted action of a kind that fell within one of the recognized per se categories, like price fixing, division of markets, or certain group boycotts. The courts would then presume that such conduct had the requisite unreasonable anticompetitive effect. In evidentiary terms, the per se rule created an irrebuttable presumption of unreasonableness.").

[8] *See* Easterbrook, *supra* note 5, at 14–17.

[9] *See, e.g.*, Wright, *supra* note 4, at 5–9; Wright & Ginsburg, *supra* note 3, at 2406 n. 12 (collecting support for the statement that "there is now widespread agreement that th[e] evolution toward welfare and away from noneconomic considerations has benefitted consumers and the economy more broadly.").

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conduct.[10] Most importantly, the standard helps consumers, which is to say, all Americans.

Antitrust was not always based upon such a clear vision.[11] Prior to the economic revolution in antitrust law, which took hold in the late 1970s, courts applied the Sherman and Clayton Acts incoherently, condemning low prices and protecting less efficient, but politically-favored firms from competition.[12] Abandoning the consumer welfare standard inevitably would harm consumers, lower output, diminish quality, and decrease innovation. The question for proponents of alternative standards is what offsetting benefits, if any, American consumers would receive in exchange for a shift to a standard that unequivocally makes them poorer. We believe the answer is either zero or close to it, and certainly not sufficient to justify the harm done to consumers by abandoning the consumer welfare standard.

In sum, the consumer welfare standard remains the proper antitrust standard to protect the competitive process and, therefore benefit, consumers.[13] It also has the added

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[10] *See* Elyse Dorsey, Jan Rybnicek, & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking*, ANTITRUST CHRON., Apr. 2018, at 1, https://www.competitionpolicyinternational.com/wp-content/uploads/2018/04/CPI-Dorsey-Rybnicek-Wright.pdf.

[11] *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

[12] *See* Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967) (condemning rivals' attempts to compete with Utah Pie by lowering prices); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); *see also* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217–18 (2010) (discussing the assortment of vague and anti-competitive social and political goals that the Court had read into the Sherman Act).

[13] *See, e.g.*, Wright et al., *supra* note 3, at 353 ("Critically, the consumer welfare standard allows antitrust to funnel earlier questions about the ability of less efficient rivals to compete, the viability of small and independent competitors, and the size and influence of firms back to a singular inquiry about whether consumers are harmed.").

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benefit of allowing antitrust analysis to evolve alongside developments in economics to address new types of business models and emerging industries.[14] What the critics propose is a reversion to the empirically discredited approach to antitrust in which size, superior efficiency, or innovation could create liability. Abandoning the consumer welfare standard in favor of the arbitrary and unworkable standards proposed by its critics will not solve any actual competitive problem, but rather will harm competition and consumers. We also do not believe that proposals to "expand" or to effectively abandon the consumer welfare standard to incorporate other objectives beyond those that impact the efficiency of a particular market (namely, price, quantity, quality, and innovation) are beneficial. For all the above reasons, we do not recommend nor support proposals to modify, supplement, or replace the consumer welfare standard with alternative objectives.

II. MONOPOLIZATION

We believe that, as currently interpreted by the courts and employed by the antitrust agencies, the Sherman Act's prohibition of monopolization is adequate to the task of preserving competition in the digital marketplace. Monopolization law has evolved to balance the real threats to consumers from the accrual of monopoly power through means other than "competition on the merits," and the harms that consumers also suffer when firms pull their competitive punches for fear of antitrust liability and treble damages. For example, by not condemning the "[T]he mere possession of

[14] *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). *Ohio v. American Express Co.* illustrates how antitrust jurisprudence is able to adapt to advances in economic research. The Court provided guidance on proper rule of reason antitrust analysis of multisided platforms. Specifically, the Court adopted an "integrated" approach to defining relevant product markets and assessing competitive effects and required consideration of all sides in a plaintiff's *prima facie* case in a burden-shifting scheme. While the decision has attracted some debate with regard to the specific presumptions and burdens of production that will be applied, there is a broad and bipartisan consensus that the appropriate standard is consumer welfare.

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monopoly power, and the concomitant charging of monopoly prices," Section 2 preserves incentives to compete and innovate. As the Supreme Court explains:

> 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*.[15]

Further, we believe that the current monopolization law, as a general matter, provides a good balance of reducing both false positives (Type I errors) and false negatives (Type II errors). For example, in *Microsoft*, the DOJ was able to prove successfully that Microsoft violated Section 2 of the Sherman Act when, inter alia, it employed anticompetitive means to maintain its monopoly in operating systems.[16] More recently, and without endorsing the merits of any particular case, the agencies have had success in bringing monopolization cases. For example, the plaintiffs have prevailed in *McWane*, *Dentsply*, and *Qualcomm*.[17] Additionally, there was a settlement between the FTC and Intel based on monopolization allegations.[18] In private litigation, for instance, Meritor successfully brought a Section 2 claim against Eaton Corp.[19]

Below, we address some suggestions to expand the reach of the current monopolization standards—namely, suggestions to import the European Union's concept of "abuse of dominance;" to have stronger presumptions of harm for large digital

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[15] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[16] U.S. v. Microsoft Corp., 253 F.3d 65 (D.C. Cir. 2001).

[17] McWane, Inc. v. F.T.C., 783 F.3d 814 (11th Cir. 2015); U.S. v. Dentsply Intern., Inc., 399 F.3d 181 (3rd Cir. 2005) (finding a Section 2 violation); F.T.C. v. Qualcomm, Case No. 17-CV-00220-LHK. Note that Commissioner Joshua D. Wright dissented in *McWane*. *See* Dissenting Statement of Commissioner Joshua D. Wright—In the Matter of McWane, Inc., a Corporation, and Star Pipe Products, Ltd., February 6, 2014, https://www.ftc.gov/public-statements/2014/02/dissenting-statement-commissioner-joshua-d-wright-matter-mcwane-inc.

[18] *See* https://www.ftc.gov/news-events/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.

[19] ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3rd Cir. 2012).

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platforms "self-preferencing" their own content; and to use the antitrust laws to address issues surrounding consumer data privacy.

A. Importing Abuse of Dominance

Some commentators have argued that in light of prevailing interpretations, U.S. antitrust law should consider importing the European concept of "abuse of dominance" in order to have a means of prosecuting online platforms for conduct outside of the scope of the Sherman Act.[20] The European approach to abuse of dominance applies a presumption of illegality to a monopolist's conduct if it has the potential or capability to harm competition; places special obligations to prevent dominant firms from raising "artificial" barriers to entry; and explicitly has an objective to also protect rivals.[21] In effect, this approach renders unlawful conduct that harms rivals even without a robust demonstration of harm to competition or consumers. It operates based upon presumptions that self-preferencing, vertical integration, and other vertical conduct harms competition rather than requiring a demonstration. For instance, under this approach, firms with large market shares can incur liability for refusing to grant rivals access to their facilities or to share their intellectual property with them.[22]

Assuming a "dominant" firm came by its large market share lawfully, adopting the theory of abuse of dominance is nothing less perverse than creating liability for competitive success. The antitrust laws were passed to protect the competitive process,

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[20] *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 283 (2017) ("The antitrust agencies and courts should look to European Union abuse of dominance law for a model to emulate. . . Dominant firms can engage in certain types of conduct only if they have credible business reasons for doing so."); *see also* Eleanor M. Fox, *Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide*, 98 NEB. L. REV. 297, 315 (2019) (arguing that "[i]t is time for the United States to stop the big data antitrust abuses" therefore "the United States might wish to take Europe's big data initiatives more seriously.").

[21] *See* Khan & Vaheesan, *supra* note 20.

[22] *See* Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039 (Eur. Ct. Justice) (requiring a firm to license data to its competitors).

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not less efficient competitors.[23] The theory of abuse of dominance does precisely the opposite: It penalizes successful firms for being successful. By burdening successful firms with the duty to treat their rivals with something less than full competitive zeal, the abuse of dominance theory stifles successful firms' incentives to innovate and to compete with their rivals.[24] That is precisely why the Supreme Court has refused to embrace the "essential facilities" doctrine, and has made clear that a dominant firm has no general duty to aid its rivals.[25]

B. Self-Preferencing

Some commentators have also suggested that "self-preferencing" by online merchants raises antitrust issues.[26] For example, some have contended that Amazon would run afoul of Section 2 of the Sherman Act if it were to compete as a merchant in its online marketplace, as it can use other merchants' sales data to identify and copy successful products.[27]

The notion that the antitrust laws should condemn a large digital platform from favoring its own content or products over those of rival suppliers has a degree of superficial appeal. This legal theory is based upon the idea that the platform is both a "host" as well as competitor, which is perceived as a conflict of interest with negative

[23] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).
[24] *See, e.g.*, Joined Cases C-241 & C-242/91 P, Radio Telefis Eireann v. Comm'n of the Eur. Cmtys., 1995 E.C.R. 1-743 (requiring a television station operator to provide a third-party publisher with its broadcast schedule for inclusion in a weekly television guide, a product which did not yet exist on the market when the case was filed).
[25] *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 450 (2009) ("[I]f a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."); *Trinko*, 540 U.S. at 411 ("[W]e do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.").
[26] Examples include Google integrating its own vertical search properties, such as local reviews and maps, with its general search results and Amazon promoting its own private label brands over those from third-party merchants.
[27] *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 780–83, 799 (2017).

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implications for competition. Yet, observing a dominant platform taking actions that disadvantage a rival does not answer the core question in any antitrust inquiry: does the conduct at issue, in this case self-preferencing, harm consumers rather than just rivals.[28] This necessarily follows given that harm to rivals is consistent with both vigorous, procompetitive behavior and anticompetitive conduct. Thus, policies that overly favor competitors over competition is contrary to the antitrust laws and to overall economic efficiency.[29]

Rather, the purpose of the federal antitrust laws is to safeguard the competitive process—not to dictate market outcomes or to protect rivals. Certainly, private label entry and self-preferencing can, under certain circumstances, serve as a basis for an antitrust violation if the entry has no procompetitive justification and is primarily intended to impair the competitive process. This is the theory of harm that was advanced in *U.S. v. Microsoft* and is a plausible and viable theory.[30]

Recently, the U.S. agencies have examined this question in the context of digital platforms. Specifically, the FTC engaged in a two-year investigation into whether Google's practice of promoting its own "vertical search" results (*e.g.*, maps, shopping items with prices, listing of local restaurants with reviews) within its "horizontal search" results page (*i.e.*, the standard "blue links" associated with general search engines) caused harm to consumers.[31] Yet, in 2013, the FTC closed its investigation stating that "quantitative evidence the Commission examined are largely consistent with the

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[28] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[29] *See Trinko*, 540 U.S. at 407–08 ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

[30] U.S. v. Microsoft Corp., 253 F.3d 65 (D.C. Cir. 2001) ("Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful.").

[31] *See, e.g.*, Michael A. Salinger & Robert J. Levinson, *Economics and the FTC's Google Investigation*, 46 REV. INDUS. ORG. 25 (2015); John M. Yun, *Understanding Google's Search Platform and the Implications for Antitrust Analyses*, 14 J. COMPETITION L. & ECON. 311 (2018).

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conclusion that Google likely benefited consumers by prominently displaying its vertical content on its search results page."[32] We believe the Commission correctly weighed the procompetitive benefits to consumers against potential negative effects on competition, using the best evidence and economic analysis available, in closing its investigation without action.

In sum, a monopolization theory based on self-preferencing is a theory that tends to create liability for competition itself. After all, imitating a successful competitor is among the most common forms of competition. Restricting successful companies from entering new markets—without a careful examination of the facts—can only serve to diminish competition (and its attendant advantages of lower prices, greater output, and increased consumer welfare).

C. Employing Antitrust Laws to Deal with Consumer Data Privacy

Some commentators have suggested that platforms that provide ostensibly free services to consumers exercise their monopoly power through collecting increasing amounts of personal data.[33] Although privacy practices by themselves are beyond the scope of the antitrust laws, diminished competition could affect firms' data practices in a

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[32] Fed. Trade Comm'n, Statement Regarding Google's Search Practices, *In re* Google Inc., FTC File No. 111-0163, at 2 (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf.

[33] *See, e.g.*, John M. Newman, *The Myth of Free*, 86 GEO. L. REV. (2017); Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journal Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39 (2019). The recent case against Facebook brought by the Bundeskartellamt (the German competition authority) rests on this theory. In particular, it suggests that Facebook's dominant position allows it to extract concessions from consumers that allow Facebook to collect data about their actions outside of the Facebook platform. These data, in turn, help entrench Facebook's dominant position via network effects. *See* Bundeskartellamt, Feb. 5, 2019, B6-22/16, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 . This case was overturned on appeal. OLG [Düsseldorf Higher Regional Court], Aug. 26, 2019, VI-Kart 1/19 (V), https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2019/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V_.pdf.

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way that negatively impacts consumers and potentially raise antitrust concerns. For example, holding the price and all other attributes of a product constant, an online platform's quality could be said to decrease as the level of privacy it provides falls. That is, lower levels of privacy offered by a platform could be said to raise its quality-adjusted price. Although it is theoretically possible to position a reduction in privacy as competitive harm in an antitrust analysis, there are several potential complications.

First, even if one were to take the analogy between consumer data and price or quality at face value, as a threshold matter, unilateral pricing and quality decisions by a monopolist without some accompanying anticompetitive behavior are not actionable under U.S. antitrust laws.[34] This rationale behind this rule is sound: allowing courts and agencies to second-guess pricing and quality decisions of firms would convert antitrust from an ex post enforcement regime into an ex ante regulatory regime. What is more, it would inject an untenable amount of subjectivity into enforcement decisions; given heterogenous preferences for privacy, what may be serious reduction in privacy to one regulator or judge may represent a consumer benefit to another.[35] The regulatory uncertainty that accompanies subjectivity can lead firms to pull their competitive punches for fear of antitrust liability and accompanying treble damages.[36]

Second, it is unclear how important privacy is as a dimension of competition. It is well-documented that although consumers state a strong preference for privacy, revealed

[34] *See Trinko*, 540 U.S. at 407–08.

[35] *See* James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129, 1145-47 (2013); Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy*, 80 ANTITRUST L.J. 121, 152 (2015); Alessandro Acquisti et al., *Economics of Privacy*, 54 J. ECON. LIT. 442 (2016).

[36] This is a well-known result in the economics of torts. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 224-27 (2004); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986).

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preference suggests that the willingness to pay for privacy is low.[37] The extent to which this so-called "privacy paradox" is driven by rational choice, asymmetric information, or behavioral biases is unclear. Regardless of the answer to this question, that consumers tend to make decisions inconsistent with their stated preferences for privacy suggest that privacy may not be a competitively important dimension of competition.[38]

Third, the analogy of reduced privacy to a higher quality-adjusted price rests on the assumption that other dimensions of quality remain constant as the firm collects and uses more consumer data. However, unlike a price increase (holding quality constant) or a quality decrease (holding price constant), increasing data collection and use does not immediately result in greater profits and reduced consumer welfare. Firms must take actions to convert data into revenue, and these actions are often associated with consumer benefits like improved content or more relevant information to consumers.[39] Because demand for both the underlying product provided by the platform and privacy will vary across the population, the ultimate impact of these forces on consumer welfare is uncertain—some will find the disutility from increased data collection swamps any benefits from better content and more relevant ads, and others will find the opposite.[40] That is, the benefits and costs from personal data collection are inexorably intertwined,

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[37] *See, e.g.*, Acquisti et al., *supra* note 35, at 476-77; Omri Ben-Shahar & Adam Chilton, *Simplification of Privacy Disclosures: An Experimental Test*, 45 J. LEG. STUD. 541 (2016); Matthew B. Kugler & Lior Strahilevitz, *Is Privacy Policy Language Irrelevant to Consumers?*, 45 J. LEG. STUD. 69 (2016).

[38] *See* Alex Marthews & Catherine Tucker, *Privacy Policy and Competition*, ECON. STUD. AT BROOKINGS, December 2019, at 7 ("If consumers do not make choices which accord with their stated privacy preferences and instead choose small convenience benefits or monetary benefits over privacy, then a firm that offers superior privacy protections is unlikely to attract many consumers by virtue of its superior privacy protections.").

[39] *See, e.g.*, Alexander Krzepicki et al., *The Impulse to Condemn the Strange: Assessing Big Data in Antitrust*, ANTITRUST CHRON., Feb. 2020; John M. Yun, *Antitrust After Big Data*, 4 CRITERION J. INNOVATION 407 (2019).

[40] *See* Cooper, *supra* note 35, at 1136–38.

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and consumer tastes for both attributes are heterogenous and potentially correlated in unknown ways.[41]

III. MERGER ANALYSIS

There is a growing belief that the U.S. is facing a significant competition problem; that market power is increasing; and antitrust enforcement has done little to stop this trend. A key catalyst for this current perception is the 2016 White House Council of Economic Advisors (CEA) study.[42] The main conclusion of the CEA study is that "[s]everal indicators suggest that competition may be decreasing in many economic sectors, including . . . increases in industry-specific measures of concentration."[43] Specifically, the CEA study calculates fifty-firm concentration ratios ("CR50"), which is the combined market share of the top fifty firms in a given area of commerce, in thirteen broad sectors including "wholesale trade." Other studies have shown similar metrics purporting to show increases in concentration and market power.[44]

Yet, these broad and highly aggregated measures tell us very little about market power and the type of markets that antitrust is concerned with. In fact, the CEA study acknowledges that "[t]he statistics presented . . . are national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is

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[41] *See* Cooper, *supra* note 35, at 1138-39; *see also* Daniel P. O'Brien & Doug Smith, *Privacy in Online Markets: A Welfare Analysis of Demand Rotations* (Fed. Trade Comm'n, Bureau of Econ., Working Paper No. 323, Jul. 2014), https://www.ftc.gov/system/files/documents/reports/privacy-online-markets-welfare-analysis-demand-rotations/wp323.pdf.

[42] *See, e.g.*, COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4–6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[43] *Id.* at 1.

[44] *See, e.g.*, Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020); Robert E. Hall, *New Evidence on the Markup of Prices over Marginal Costs and the Role of Mega-Firms in the US Economy* 2–3, 16–19 (Nat'l Bureau of Econ. Research, Working Paper No. 24574, 2018), https://www.nber.org/papers/w24574.

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neither a necessary nor sufficient condition to indicate an increase in market power."[45] Further, as Sacher & Yun state:

> Even if it were true that overall concentration in properly measured antitrust markets was increasing, and even if it were also true that many firms were earning a very high return, this is not direct evidence of a decline in competition. In other words, concentration and competition are not the same thing. Competition is about the process. If firms grow organically to have high market shares because they are more efficient, offer low prices, and beneficial new products while—due to economies of scale or networks effects—earn very high returns, then the economy and consumers are better off. In such a situation the market may appear to have high concentration and high profits. However, it is not the high concentration that has led to the high profits. Rather, a few firms grow to positions of leadership and earn high profits either because they reduce costs or provide goods that consumers prefer, or both. Ultimately, market performance is the point of competition, while counting the number of players is not. Thus, an undue focus on concentration is seriously flawed regardless of any shortcomings of the studies at issue.[46]

Work by Professors Luke Froeb & Gregory Werden further disputes whether increases in concentration from broad aggregates has relevance to antitrust market.[47] To illustrate the point, Froeb & Werden show that aggregated measures of concentration such as the Herfindahl-Hirschman Indexes ("HHIs") can increase if more concentrated antitrust markets grow more quickly than less concentrated ones even if there is no actual increase in concentration in these markets. Indeed, there can be increases in concentration in the broad aggregates even if there have been decreases in concentration in the underlying relevant antitrust markets. Further, Professor Carl Shapiro notes that, to the extent increases in concentration in these broad aggregates reflect actual increases in

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[45] *Id.* at 4.

[46] Seth B. Sacher & John M. Yun, *Twelve Fallacies of the "Neo-Antitrust" Movement*, 26 GEO. MASON L. REV. 1491, 1494 (2019).

[47] Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74.

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concentration, it would appear that the increases and levels of concentration are quite modest.[48]

Moreover, there is evidence that the trends in rising national concentration and falling local concentration are best explained by increased competition and technological change, not a rise in market power. Specifically, Rossi-Hansberg et al. find that, while national concentration may be rising, the same does not hold for local concentration.[49] The authors reject the view that market power explains the observed data: "Our findings challenge the view that product-market concentration is increasing in the U.S. … our results should provide pause for policy-makers that worry about increases in market power." To the contrary, the authors find that: "On the whole, and in most industries, large firms are lowering local concentration and, therefore, most likely increasing product market competition."[50] In another study, Hsieh & Rossi-Hansberg find that national concentration is increasing due to efficient and productive firms expanding and creating more competition locally, which ultimately results in more employment.[51] In sum, the data tend to support the hypothesis that changes in market structure are occurring because of increases in efficiency and competition, combined with technological change,

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[48] *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 726–30 (2018).

[49] Esteban Rossi-Hansberg et al., *Diverging Trends in National and Local Concentration*, working paper, April 15, 2020, https://www.princeton.edu/~erossi/DTNLC.pdf, at 2-3 ("Our first fact is that the observed positive trend in market concentration at the national level has been accompanied by a corresponding negative trend in average local market concentration… Furthermore, conditioning on industries where national concentration is rising, industries where local concentration has declined account for the majority of employment overall (72% of employment and 66% of sales) across all major sectors.").

[50] *Id*. at 4.

[51] Chang-Tai Hsieh & Esteban Rossi-Hansberg, *The Industrial Revolution in Services*, working paper, March 17, 2020, https://www.princeton.edu/~erossi/IRS.pdf at 38 ("we find that total employment rises substantially in industries with rising concentration. This evidence is consistent with our view that increasing concentration is driven by forces such as the adoption of new technologies or management practices that ultimately raise aggregate industry TFP [total factor productivity].").

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and not an increase in market power. Changes in antitrust targeting market or sector-level concentration risk sacrificing these gains to competition and consumers.

In the context of this larger debate about concentration and lax antitrust enforcement, in this section, we address two fundamental questions as it relates to merger policy. First, is there a problem with large technology firms, or platforms, vertically integrating or engaging in a vertical merger? Second, is there a problem with large technology platforms purchasing nascent competitors and suppressing competition before they can mature into vibrant competitors? Further, if there is a problem, are the current antitrust laws and the enforcement of those laws sufficient to combat the problem? If not, is there a legislative solution? These are all critical questions given that innovation and incentives to innovate are at the heart of all modern economies. Without sufficient rates of innovation, the wealth of nations lags, and the welfare of all households is adversely affected.

A. Vertical Integration and Mergers

Since the work of Ronald Coase and subsequent work by Oliver Williamson, Benjamin Klein, and others, economists have developed a better understanding of the nature of firms, the transactions that occur within firms, how firms interact with the larger market, and efficiency rationales for vertical integration.[52] Later theoretical work

[52] *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112 (1971); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); Oliver E. Williamson (1983), Credible Commitments: Using Hostages to Support Exchange, 73 AM. ECON. REV. 519 (1983); Benjamin Klein *et al.*, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); Benjamin Klein & Kevin M. Murphy, *Vertical Integration as a Self-Enforcing Contractual Arrangement*, 87 AM. ECON. REV. 415 (1997); Benjamin Klein, *Fisher—General Motors and the Nature of the Firm*, 43 J.L. & ECON. 105 (2000); *see also* Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1985). For a summary of the literature, *see* Timothy Bresnahan & Jonathan Levin, *Vertical Integration and Market Structure*, *in* HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons & John Roberts eds. 2012).

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has developed potentially anticompetitive rationales for vertical integration.[53] Taken together, however, the theoretical literature, without empirical grounding, leaves practitioners, agencies, and courts with ambiguous guidance on the welfare consequences of vertical mergers.[54] This ambiguity is fundamentally driven by the fact that (1) vertical mergers do not involve direct competitors;[55] (2) benefits, such as the elimination of double marginalization, are absolutely central to the welfare assessment of vertical mergers—and cannot be treated as a "second step" or second order concern, as they occasionally are in the assessment of the welfare effects of horizontal mergers; yet (3) there is a concern that vertical integrated firms will increase incentives for the post-merger firm to foreclose competitors.

In contrast, horizontal mergers inherently involve a degree of competitive overlap and an associated loss of at least some degree of rivalry between actual and/or potential competitors. This loss of competition is the basis for the economic models used to predict post-merger price increases and other anticompetitive effects—including merger simulations and, more recently, GUPPIs.[56] Stated somewhat differently, absent efficiencies, entry, and other dynamic considerations, every horizontal merger involves

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[53] *See, e.g.*, Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

[54] *See* David Reiffen & Michael Vita, *Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917 (1995). Scholars have developed vertical arithmetic models, but a consensus has yet to emerge on the value of these tools for practitioners.

[55] Of course, a merger can have both a vertical and horizontal component.

[56] GUPPI is an acronym for "Gross Upward Pricing Pressure Index," which is intended to conceptualize the unilateral effects from mergers on prices from the loss of a rival before adjusting for the effects of entry and efficiencies that put downward pressure on prices. *See* Steven C. Salop & Serge Moresi, *Updating the Merger Guidelines: Comments (Public Comment to Horizontal Merger Guidelines Review Project Nov. 2009)*, https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00032/545095-00032.pdf.

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some, perhaps nominal, loss of rivalry between competitive firms and standard, static, economic models typically will predict an associated price increase.[57]

Because of this theoretical ambiguity for vertical mergers, empirically evaluating the welfare effects of consummated mergers has been and remains an important area of research for guiding antitrust policy. As Lafontaine and Slade state, empirically evaluating vertical mergers allows us to address "what are the consequences of vertical integration for economic outcomes such as prices, quantities, investment, and profits?"[58] These questions are "important ultimately as input into the development of sensible vertical merger policy and related government intervention in vertical relationships."[59] Indeed, "evidence-based antitrust" requires "testing economic theories with economic knowledge and empirical data to support those theories with the best predictive power."[60]

The two most widely cited economic studies that summarize the empirical evidence on vertical integration are Lafontaine & Slade and Cooper et al.[61] After comprehensively reviewing prior vertical integration research, Lafontaine & Slade conclude: "[C]onsistent with the large set of efficiency motives for vertical mergers that we have described so far, the evidence on the consequences of vertical mergers suggests that consumers mostly benefit from mergers that firms undertake voluntarily."[62] Similarly, Cooper et al. conclude: "Overall, we would characterize the empirical literature on vertical restraints/vertical integration as follows: Most studies find evidence that

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[57] *See* Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107 (1990).
[58] *See* Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE 629, 629-30 (2007).
[59] *Id.* at 630.
[60] Wright, *supra* note 6, at 242–43.
[61] Lafontaine & Slade, *supra* note 58; James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005).
[62] Lafontaine & Slade, *supra* note 58, at 663.

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vertical restraints/vertical integration are procompetitive."[63] O'Brien arrives at a similar conclusion: "the empirical literature on [resale price maintenance and exclusive territories], vertical integration, and non-linear contracting suggests that these practices have been used to mitigate double marginalization and induce demand increasing activities by retailers. With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons."[64]

The evidence they summarize remains valuable and should be considered in every discussion regarding vertical mergers. In a 2018 comment to the FTC, the Global Antitrust Institute (GAI) aimed to update the empirical evidence on vertical mergers.[65] Specifically, the GAI examined published research in peer-reviewed journals since 2008 that empirically analyzed the welfare consequences of vertical mergers in the U.S.[66] We found

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[63] Cooper et al., *supra* note 61, at 658.

[64] Daniel O'Brien, *The Antitrust Treatment of Vertical Restraint: Beyond the Possibility Theorems*, *in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 76 (2008), http://www.konkurrensverket.se/globalassets/english/research/report-the-pros-and-cons-of-vertical-restraints-18mb.pdf.

[65] *See* Global Antitrust Institute, Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, (George Mason Law & Econ. Research Paper No. 18-27, Sept. 6, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245940.

[66] The GAI comment did not offer an exhaustive list of the literature but provided more of a snapshot of research available on EconLit and in a general web search. Of the original thirteen papers examined, one should have been omitted: Orley C. Ashenfelter et al., *Efficiencies Brewed: Pricing and Consolidation in the US Beer Industry*, 46 RAND J. ECON. 328 (2015), since it did not involve a vertical component to the examined merger. Further, although some criticized GAI's characterization of Crawford et al.'s study (Gregory S. Crawford et al., *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86 ECONOMETRICA 891 (2018)) as showing positive welfare effects, others have reached the same conclusion about Crawford et al.'s overall findings. For instance, Froeb et al. state: "Crawford et al. (2017) [*sic*]…find that vertical integration between regional sports networks and cable TV distributors results in increased geographic distribution of the networks and a corresponding increase in consumer and total welfare." Luke M. Froeb et al., *Economics at the Antitrust Division: 2017-2018*, 53 REV. INDUS. ORG. 637, 649 (2018). In a later article, the authors of the original Crawford et al. study summarize their results in the following manner:

> We also are able to examine how these two effects [*i.e.*, anticompetitive and procompetitive effects] net out for consumer welfare. We find a fair amount of heterogeneity, with some markets showing complete foreclosure and consumer losses from vertical integration at our point estimates. (However, we are not able to statistically reject the possibility that those individual cases had no consumer harm.) Overall, however, on average across 26 RSNs, we find that there would be a statistically significant positive effect on consumer welfare from vertical integration, despite the incentives for foreclosure that it would create.

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the empirical evidence from 2009-2018 continues to support the conclusions reached by Lafontaine & Slade and by Cooper et al.

Importantly, our position is not that vertical mergers should be considered per se legal. Rather, we conclude simply that the weight of the empirical literature to date simply does not support a presumption that vertical mergers and vertical integration is likely to harm consumers. A legal presumption based upon that empirical assertion would result in more harm than good for consumers and the economy.[67]

B. Acquisition of Potential and Nascent Competitors

Another area of concern, in regard to mergers, is that large technology platforms are purchasing nascent competitors and suppressing competition before they can mature into vibrant competitors. Further, there is a belief that the current antitrust laws and the enforcement of those laws are insufficient to combat the problem.

Before proceeding, it is useful to define and clarify certain concepts. First, what do we mean by "nascent or potential competitors"? Generally speaking, we can consider potential competition as a product that does not yet exist but is predicted to exist or could exist very quickly; thus, it is really a forecast about entry or the threat of entry. Whereas, nascent competition is about a product or technology that exists but has not yet matured

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See Crawford et al., AT&T/Time Warner *and Antitrust Policy Toward Vertical Mergers*, ANTITRUST CHRON., July 2019, at 3. In sum, even with the Ashenfelter et al. correction and classifying Crawford et al. as finding "mixed" welfare effects, the GAI report conclusion holds. We still find the overwhelming majority of studies, considered as a whole, find that vertical mergers do not result in negative welfare effects.

[67] In a recent comment, Beck & Scott Morton (B&SM) have criticized Lafontaine & Slade, Cooper et al., and the GAI interpretation of the empirical evidence. *See* Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence of Vertical Mergers*, Feb. 26, 2020, https://ssrn.com/abstract=3554073. Their main conclusion is "that the empirical evidence evaluated in these articles does not show that vertical mergers are generally procompetitive, or generally anticompetitive" because "many studies cannot determine the net effect of the vertical integration on welfare," and because they disagree with the Lafontaine & Slade, Cooper et al., and GAI interpretation of individual studies. *Id.* at 2–3. We certainly agree with B&SM that studies in this literature find procompetitive, anticompetitive, and mixed results. However, we do not believe that the extant empirical literature—even adopting B&SM's interpretations of individual studies—supports a change in the presumptions regarding vertical mergers.

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into a significant competitor whether within or outside the same relevant market. Like potential competition, nascent competition can be a forecast of entry, repositioning, or expansion, but it also involves a number of other aspects. In particular, it also involves a forecast of future differentiation or development of a product or technology and its level of market success. Finally, a related concept is that of a "killer acquisition." It is the idea that a firm acquires another firm to "eliminate potentially promising, yet likely competing, innovation."[68] It is a term that is effectively capturing the idea of an anticompetitive acquisition of a potential or nascent competitor where the primary intent is to stop a product's development without an offsetting efficiency rationale.

We can broadly place possible post-merger outcomes into three categories: (1) those that are good for consumers, (2) those that have no real impact on consumers, and (3) those that are bad for consumers. How do we measure "good" or "bad" in the realm of antitrust? Again, we base it on the notion of consumer welfare—or surplus. Consumer welfare describes the benefits of a market existing from the perspective of buyers of the good or service.[69] As a consequence, we do not base antitrust assessments of "good" or "bad" acquisitions on how well rivals are predicted to perform post-merger. Moreover, we do not base welfare considerations on exactly who is providing the surplus. For instance, whether four equally sized firms or two leading firms with a handful of smaller rivals are providing the surplus, we assess the performance of the market from the perspective of consumers. Otherwise, we would be accepting a rejected and discarded approach by the courts, practitioners, agencies, and academics, which is call the "structure-conduct-performance" (SCP) paradigm.[70] However, the reality is that we still

[68] Colleen Cunningham et al., *Killer Acquisitions* 1 (Mar. 22, 2019), https://ssrn.com/abstract=3241707.

[69] The textbook treatment of consumer surplus is that it represents the difference between what a consumer is willing to pay and what a consumer actually has to pay, *i.e.*, the market price. Yet consumer surplus is not limited to price *per se* and can capture consumers' valuation of quality (via the willingness-to-pay measure).

[70] The SCP paradigm assumes that there is a reliable relationship between market structure (the number of firms) and competitive intensity. Yet, economic research has rejected this relationship. *See, e.g.*, Harold

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tend to count the number of firms or look at market shares to make inferences regarding the level of consumer benefits in a market; although, this tendency can lead to poor predictions.

1. *Is there a problem with large technology firms purchasing potential and nascent competitors and suppressing competition before they can mature into vibrant competitors?*

In order to address this question, we must assess the counterfactual. What if these large technology firms did not acquire smaller firms such as YouTube or Instagram? What would these respective markets look like? Further, would consumers be better off? Given the nature of the exercise, there will always be some degree of uncertainty as we can never *actually* observe the counterfactual (whether it is allowing or blocking a merger). This fundamental reality clearly makes predictive exercises difficult and, perhaps, gives some license to make unfounded claims that are outside the bounds of likely outcomes. More importantly, the relevant question is not whether the FTC or DOJ got a particular merger right or wrong, but whether or not the agencies are systematically biased in approving anticompetitive mergers (*i.e.*, a Type II error or a false negative) or blocking procompetitive mergers (*i.e.*, a Type I error or a false positive). To our knowledge, there is no study that has shown that the agencies are systematically committing either of these errors.[71]

Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973); Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974); *see also* DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th ed. 2005) (noting "the criticisms of [the SCP] approach are many, but perhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct . . . [t]he barrage of criticism has caused most research in this area to cease").

[71] Some might reference Professor John Kwoka's merger retrospective study, which purportedly showed that agencies approved numerous anticompetitive mergers. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014). The study, however, has a number of shortcomings, which is documented in Michael Vita & David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 361 ANTITRUST L.J. 82 (2018). These problems include, *inter alia*, the fact that

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To illustrate the difficulty in predicting market outcomes, in 1967, the FTC successfully litigated the divestiture of the Clorox Company, and its liquid bleach assets, from Procter & Gamble (P&G), which had purchased Clorox in 1957, based, in part, on the belief that "the merger would seriously diminish potential competition by eliminating Procter as a potential entrant into the industry."[72] In the nearly half-century since that decision, P&G has yet to sell liquid bleach in the United States.

More relevant to the digital economy, Facebook's acquisition of Instagram in 2012 is most likely the most cited example to illustrate the claims that (i) strategic acquisitions have entrenched market power and (ii) competition authorities are systematically missing anticompetitive acquisitions. A review of the evidence, however, suggests a different story. At the time of the purchase, Instagram had zero revenues and a handful of employees.[73] Since Facebook's acquisition, Instagram has grown from 30 million users to well over one billion.[74] During the same period, Facebook grew from approximately 900 million users to over two billion users.[75] This substantial expansion in users and output are the opposite of what we typically consider an anticompetitive outcome. Of course, one could argue that, but for the acquisition, Instagram would have been just as successful, if not more so, and would have remained an independent competitor. While

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the study's merger sample consists primarily of transactions before 2000 and none later than 2006; the majority of the included mergers are a limited representation of the industries evaluated by the antitrust agencies; and the study does not use generally accepted meta-analytic techniques. Even if one were to accept the study's results at face value, it involves an insufficient number of cases and industries to make a claim that the agencies are currently and systematically committing Type I or II errors.

[72] FTC v. Procter & Gamble Co., 87 S.Ct. 1224, 1228 (1967).

[73] *See* Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, RECODE (Apr. 9, 2017), https://www.recode.net/2017/4/9/15235940/facebook-instagram-acquisition-anniversary; Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, DEALBOOK, (Apr. 9, 2012), https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion.

[74] *See* Wagner, *supra* note 73; Ashley Carman, *Instagram Now Has 1 Billion Users Worldwide*, THE VERGE (Jun. 20, 2018), https://www.theverge.com/2018/6/20/17484420/instagram-users-one-billion-count.

[75] *See* STATISTA, *Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2019* (Jan. 2020), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

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this type of "nirvana" counterfactual is frequently asserted,[76] without more it is an insufficient basis upon which retrospectively to condemn an acquisition—let alone justify a systematic overhaul of U.S. antitrust laws. To treat the success and associated exponential output expansion of an acquired product as evidence of an anticompetitive acquisition severely twists the meaning of "anticompetitive." When properly formulated, the central forces driving anticompetitive conduct are reductions in output, quality, innovation, and transfers away from consumers to producers. Facebook's acquisition of Instagram does not fit this profile.

Importantly, if one believes that the post-merger performance of Facebook and Instagram is an example of an anticompetitive outcome, what outcome(s) would be considered procompetitive? Suppose that Facebook discontinued Instagram after a year or so. Would we conclude that Instagram was a poor product, and thus the acquisition was benign, or would we conclude that Facebook engaged in a "killer acquisition" in order to snuff out a promising rival? Similarly, suppose that Instagram grew but lagged behind its prior growth projections. Would we conclude that Instagram was only an average product, and thus the acquisition was benign, or would we conclude that Facebook did not invest enough in the product? In other words, what are we "expecting" to happen for us to conclude that an acquisition was either anticompetitive or procompetitive? Without a firm answer, we cannot reasonably conclude that agencies are making systematic errors. The reality is that the answer "depends" on the particular situation. For instance, an acquisition that results in a discontinued product is not *per se* evidence of either consumer harm or benefit. The answer will depend on the particular circumstances and the potential efficiencies that were gained from the acquisition

[76] *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW ECON 1 (1969). Demsetz called the comparison of market-based outcomes to an idealized regulatory outcome the "nirvana" fallacy. Demsetz warned that, "those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient." *Id.* at 1.

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including integration of intellectual property, the reduction of transaction costs, economies of scope, and better allocation of skilled labor. However, what seems fairly clear is that an acquisition that results in tremendous growth for both the acquiring and acquired product strongly suggests a procompetitive outcome.

Notably, the success of big tech platforms in various markets is not guaranteed. Take for instance Google+, which was launched on June 28, 2011.[77] At the time, Google stated: "We're transforming Google itself into a social destination at a level and scale that we've never attempted—orders of magnitude more investment, in terms of people, than any previous project."[78] According to MIT economist Catherine Tucker, "Google Plus enjoyed the support of over 1,000 employees (including top engineers), as well as CEO support. In theory, Google Plus should have had network effects and consequent critical mass on its side. This is because it was able to 'seed' its initial social network with 90 million users through the integration of other Google services, such as YouTube, in its signup process."[79] Instead, Google+ ceased to operate as a consumer product on April 2, 2019.[80] Google acknowledged that Google+ "has not achieved broad consumer or developer adoption, and has seen limited user interaction with apps. The consumer version of Google+ currently has low usage and engagement: 90 percent of Google+ user sessions are less than five seconds."[81] Put simply, consumers voted with their "feet" (or eyeballs) and directed their attention to other products and platforms. The Google+

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[77] *See* GOOGLE, *Introducing the Google+ Project: Real-life Sharing, Rethought for the Web* (June 28, 2011), https://googleblog.blogspot.com/2011/06/introducing-google-project-real-life.html.

[78] *See* Steven Levy, *Inside Google+ — How the Search Giant Plans to Go Social*, WIRED (June 28, 2011), https://www.wired.com/2011/06/inside-google-plus-social.

[79] Catherine Tucker, *What Have We Learned in the Last Decade? Network Effects and Market Power*, ANTITRUST, Spring 2018, at 78.

[80] *See* GOOGLE, *Shutting down Google+ for Consumer (Personal) Accounts on April 2, 2019* (Jan. 30, 2019), https://support.google.com/plus/answer/9195133?hl=en&ref_topic=9259565.

[81] *See* Ben Smith, *Project Strobe: Protecting Your Data, Improving Our Third-Party APIs, and Sunsetting Consumer Google+* (Oct. 8, 2018), https://www.blog.google/technology/safety-security/project-strobe.

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example further illustrates the difficulty in making predictions about market success and projecting future competitive effects.

Clearly, the acquisition of a potential or nascent competitor can result in an outcome that is harmful to consumers and innovation, yet it can also result in an outcome that unlocks a great deal of consumer value. Beyond the standard efficiencies, a merger could significantly increase the probability that a product or technology develops and/or increases the speed at which the product or technology will arrive. Presumptively declaring that all, or most, acquisitions from large technology firms are harmful to consumers, without sufficient evidence and scholarship to support the claim, can result in significantly lower levels of innovation and consumer welfare. This is not to say that all research indicates that the loss of potential competition is not a problem.

A paper by Cunningham et al. examines the impact of what they label as "killer acquisitions" in the pharmaceutical industry.[82] While their research is limited to the development of drugs, where product development milestones are readily observable[83]—unlike in digital markets, it is certainly the type of research that is needed to help inform policy decisions. Cunningham et al.'s main result is that "Correspondingly, we find projects acquired by an incumbent with an overlapping drug are 28.6% less likely to be continued in the development process compared to drugs that are not acquired."[84] In total, over their sample, they label 6 percent of all pharmaceutical acquisitions as killer

[82] *See* Cunningham et al., *supra* note 68.
[83] The pharmaceutical industry is an easier industry to study, from the perspective of determining substitutability, because there are set categories of pharmaceutical substitutability including the therapeutic class and the mechanism of action. Thus, we can more reliability use functional substitutability to proxy for market-based substitutability, i.e., how consumers actually behave. For other differentiated products, including almost all the products from large technology platforms, this assessment is not as straightforward. For instance, bottled water and tap water are functional substitutes and are composed of the same essential chemical ingredient of H_2O—yet, in an antitrust application, it would not be a stretch to suggest that antitrust agencies would likely consider bottled water in a separate relevant product market than tap water.
[84] *See id.* at 3.

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acquisitions. Yet even with this result, they conclude that "the overall effect on social welfare is ambiguous because these acquisitions may also increase ex-ante incentives for the creation of new drug projects."[85] In other words, new drug development is endogenous to the potential returns from being bought before actual completion of the project. Thus, if the expected payoff from innovation decreases, *e.g.*, a prohibition hindering acquisitions by large pharmaceutical companies, then this will decrease the rate of innovation.

Finally, if we believe that there is a systematic problem with large technology firms routinely purchasing future rivals through acquisitions, then it necessarily follows that we also believe there is routine entry in these digital markets and, consequently, market power is not necessarily durable and is subject to disruption. In other words, if Instagram's product in 2012 represented, or would soon represent, a significant constraint on Facebook, then what makes other differentiated social networks such as LinkedIn, Pinterest, Snapchat, Twitter, TikTok, and YouTube different from Instagram? They must also be considered actual, potential, or nascent competitors to Facebook. Thus, there is a symmetry to the claim that potential and nascent competition acquisitions are systematically anticompetitive, with a belief that new entry can constrain, either in the present or in the future, current market power.

2. *If there is a problem, are the current antitrust laws and the enforcement of those laws sufficient to combat the problem?*

Based on the current evidence and scholarship, we believe the U.S. federal antitrust laws and the enforcement of those laws are sufficient and effective in preventing anticompetitive acquisitions of potential and nascent competitors. In particular, the doctrine of potential competition is well-developed and has a long history in antitrust

[85] *Id.* at 6.

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jurisprudence and agency practice.[86] This is codified in the very first sentence of the U.S. DOJ's and FTC's *Horizontal Merger Guidelines*: "The Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the DOJ/FTC with respect to mergers and acquisitions involving actual or *potential competitors*."[87] This acknowledgement of the importance of future competition is no surprise given that the current antitrust doctrines of potential competition (*El Paso Natural Gas*) and nascent competition (*Microsoft*) were originally developed by the U.S. antitrust agencies.[88]

Even if the doctrines are well-developed, are the antitrust agencies sufficiently diligent in monitoring and, if needed, in bringing enforcement actions? We believe the evidence is in the affirmative based, in part, on active enforcement in this area. For instance, when Nielsen proposed to purchase Arbitron in 2013,[89] the FTC brought a "potential-potential competition" case. This novel theory of harm involved an allegation of future harm based on a product that did not exist; a market that did not exist (i.e., "national syndicated cross-platform audience measurement service");[90] and a lack of commitment from either party that it would enter in the near future. Yet, in 2014, the FTC concluded that Nielsen and Arbitron were the two firms most likely to be potential-potential competitors in this future market. Whatever the merits of the case,[91] it represents the agencies on the frontier of the potential competition doctrine.

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[86] The potential competition doctrine first emerged in a dissent in the 1964 Supreme Court case *United States v. El Paso Natural Gas Co*. *See* William E. Dorigan, *The Potential Competition Doctrine: The Justice Department's Antitrust Weapon under Section 7 of the Clayton Act*, 8 J. MARSHALL J. PRAC. & PROC. 415 (1975).

[87] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010) (emphasis added).

[88] U.S. v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001).

[89] *See* Press Release, Nielsen, Nielsen Acquires Arbitron (Sept. 30, 2013), https://www.nielsen.com/us/en/press-releases/2013/nielsen-acquires-arbitron.

[90] Fed. Trade Comm'n, Statement of the Federal Trade Commission, In the Matter of Nielsen Holdings, N.V. and Arbitron Inc., FTC File No. 131-0058, at 3 (Sept. 20, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncommstmt.pdf.

[91] *See* Dissenting Statement of Commissioner Joshua D. Wright, In the Matter of Nielsen Holdings, N.V. and Arbitron Inc., FTC File No. 131-0058 (Sept. 20, 2013),

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Similarly, in 2013, the FTC brought a number of potential competition cases: *Actavis-Warner Chilcott*, *Mylan-Agila*, and *Polypore-Microporous*. Both the *Actavis* and *Mylan* cases involved the protection of competition in a number of future generic drug markets.[92] *Polypore* was a consummated acquisition that was unwound when the Commission concluded, *inter alia*, that, "Although Microporous was not producing automotive separators at the time of the acquisition, it was preparing to compete actively in this market and was already marketing and testing its products with customers."[93] In 2014, the FTC brought a case involving pharmaceutical companies Endo Health Sciences and Boca Life Science Holdings, where "the FTC's settlement preserves future competition for three generic drugs where the proposed acquisition would eliminate one likely future entrant from a very limited pool of future entrants."[94] In 2015, the FTC challenged Steris Corporation's acquisition of Synergy Health.[95] Specifically, the Commission alleged that the acquisition "would violate the antitrust laws by significantly reducing future competition in regional markets for sterilization of products using radiation, particularly gamma or x-ray radiation."[96] An Ohio district court, however, ultimately disagreed with the FTC and found that the agency had failed to show that Synergy would have entered "but for" the merger.[97] In 2017, the FTC, along with several states, brought a nascent competition case against Mallinckrodt ARD, formerly known as

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https://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/130920nielsenarbitron-jdwstmt.pdf.

[92] *See* Complaint, *In re* Actavis, Inc., FTC File No. 131-0152, Docket No. C-4414 (Sept. 27, 2013); Complaint, *In re* Mylan Inc., FTC File No. 131-0112, Docket No. C-4413 (Sept. 26, 2013).

[93] *See* Complaint, *In re* Polypore International, Inc., FTC File No. 081-0131, Docket No. C-9327, at 4 (Sept. 9, 2008).

[94] *See* Case Summary, *In re* Endo Health Solutions Inc., https://www.ftc.gov/enforcement/cases-proceedings/131-0225/endo-health-solutions-inc-boca-life-science-holdings-llc-boca (last updated Mar. 21, 2014).

[95] *See* Complaint, *In re* Steris Corp., FTC File No. 151-0032, Docket No. C-9365 (May 28, 2015).

[96] Case Summary, *In re* Steris Corp., https://www.ftc.gov/enforcement/cases-proceedings/151-0032/sterissynergy-health-matter (last updated Oct. 7, 2015).

[97] *See* Fed. Trade Comm'n v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio 2015).

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Questcor Pharmaceuticals, alleging that "Questcor illegally acquired the U.S. rights to develop a competing drug, Synacthen Depot. The acquisition stifled competition by preventing any other company from using the Synacthen assets to develop a synthetic ACTH drug, preserving Questcor's monopoly and allowing it to maintain extremely high prices for Acthar."[98] Also in 2017, the FTC blocked the combination of CDK-Auto Mate based, in part, on a theory involving nascent competition: "The complaint alleged harm to current competition, but focused even more sharply on harm to future, or nascent competition. That harm arose from the smaller competitor's substantial efforts to remake itself into a greater competitive threat going forward."[99]

These recent enforcement actions suggest that the agencies are not only active in this area but are also willing to push the bounds of the current potential and nascent competition doctrines. Seeing active enforcement should not come as a surprise given that these cases turn on an assessment of the likelihood of entry. The U.S. agencies are likely the most well-equipped group in the world to assess and forecast entry and its impact on competition. Entry analysis is a part of every agency merger review—whether horizontal or vertical. These are fact-intensive inquires that cannot, and should not, rely on set presumptions regarding the impact of entry on consumer welfare and innovation.

IV. **THE U.S. ANTITRUST AGENCIES**

There are a number of objective reasons to expect the U.S. antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other

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[98] *See* Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants (Jan. 18, 2017), https://www.ftc.gov/enforcement/cases-proceedings/1310172/mallinckrodt-ard-inc-questcor-pharmaceuticals.

[99] D. Bruce Hoffman, Remarks at GCR Live Antitrust in the Digital Economy: Antitrust in the Digital Economy: A Snapshot of FTC Issues 6 (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf

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regulatory agencies and bureaucracies in general. Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. Third, they have a well-defined objective (*i.e.*, the consumer welfare standard). Fourth, although antitrust is considered a form of regulation, it is distinct from some forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. A continuing relationship often leads to "regulatory capture," which can lead to rent-seeking and other welfare dissipating activities.[100]

Although we do not recommend any sweeping changes to the current agency structure, we do believe that some small, but significant, changes within the existing framework could help the agencies in their enforcement of the antitrust laws. First, we believe an increase in funding to the FTC and DOJ's respective antitrust divisions should be seriously considered. In particular, we believe the agencies would benefit from hiring more economists from all fields and expertise (beyond the core of industrial organization) including labor, finance, and econometrics. Each field within economics brings a level of specialized training and the intersection of these fields within the realm of competition enforcement and consumer protection can create enormous synergies.

Relatedly, prioritizing independent economic analysis and its integration into the agencies' enforcement mission is more critical now than ever. Economists in the FTC's Bureau of Economics and the DOJ's Economic Analysis Group have developed world-class expertise in a wide variety of industries including digital markets. Therefore, while agency economists are currently integrated—to a degree—in agency decision-making,

[100] *See, e.g.*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); *see also* James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005) ("That the FTC is an independent and bipartisan agency, however, is likely to limit the ability of an industry to capture it. … Further, the FTC deals with a wide range of industries, making it less likely than agencies that serve only one or a few industries to be subject to capture by any single interest group."); Sacher & Yun, *supra* note 46.

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we believe their roles could be elevated even further.[101] As technology evolves, and the agencies' focus continues to shift to digital markets, privacy regulation, the Internet of Things, and big data, it is more important than ever that rigorous economic analysis anchors the agencies' activities. Historically, when the FTC and DOJ's enforcement priorities have become untethered from economic analysis, they have faltered and been the subject of significant criticism. In contrast, where the agencies have followed this recipe of being mindful of integrating economic thinking and research into its new enforcement and policy endeavors, they have performed well.

Of course, more broadly, agency growth should be done in a deliberate and thoughtful manner as expansion beyond a certain point will result in bureaucratic diseconomies of scale. We support the agencies drawing in expertise to aid them in understanding the technological details of platform industries (e.g., artificial intelligence, machine learning, and algorithmic decision-making), which play an important role in assessing the competitive effects of conduct. At the same time, we worry that adding additional operating units comprising non-antitrust specialists (e.g., a "technology" group) will do more harm than good in helping the agencies pursue their core missions to protect competition and consumers. Such additions inevitably will lead to significantly larger bureaucracies and associated inefficiencies without, perhaps, large offsetting benefits.

We would advocate for greater transparency to the public and policymakers for all major agency decisions—beyond when complaints are issued. Rather, we would like to see detailed statements regarding the particular agency's rationale(s) when cases both close and have a consent agreement. For example, when the FTC closed the Google Search

[101] *See* Statement of Commissioner Joshua D. Wright, On the FTC's Bureau of Economics, Independence, and Agency Performance (Aug. 6, 2015), https://www.ftc.gov/system/files/documents/public_statements/695241/150806bestmtwright.pdf.

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bias investigation in 2013, it issued a closing statement that we believe can serve as a model for future investigations.[102]

We also believe that Congress should eliminates the FTC Act's exemptions for non-profits and common carriers. This stricture on the FTC's jurisdiction serves no purpose and creates ad hoc divisions of industries between the agencies. For example, although the FTC has a great deal of expertise in health care and hospital markets, it is prohibited from reaching mergers or conduct involving non-profit hospitals. Further, although the FTC can investigate acquisitions and conduct by edge providers, the FTC Act does not cover Internet service providers. What is more, as these sectors become increasingly vertically integrated, the FTC is potentially excluded from policing this important industry.

Finally, although we do not believe that there is sufficient evidence to warrant a major restructuring of the antitrust agencies at this time and we believe that the FTC and the Antitrust Division should remain separate, we think that it would be appropriate for the Congress to examine whether housing some missions solely within one agency may help to ameliorate some of the inefficiencies that come along with overlapping jurisdiction between the Antitrust Division and the FTC. For example, Congress could consider allowing the Agencies to formalize clearance agreements to provide parties more transparency on which agency is likely to handle a merger or conduct investigation. More radically, Congress could consider housing the merger review function entirely within one agency, with the other handing conduct investigations.

CONCLUSION

For the reasons explained in this written submission, we find that (1) existing antitrust laws are adequate to assess potential anticompetitive conduct by digital platforms; (2) existing antitrust laws are adequate to prevent anticompetitive transactions

[102] *See* Fed. Trade Comm'n, *supra* note 32, at 3.

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involving vertical mergers and acquisitions of potential and nascent competitors; and (3) the current institutional structure of the antitrust agencies work well in enforcing the U.S. federal antitrust laws as it applies to digital markets.

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