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Testimony of Attorney General Phil Weiser, State of Colorado Before the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law

- Thursday, March 18, 2021 –

Mr. Chairman, thank you for the opportunity to appear before the Subcommittee today. I'm very grateful for the invitation to speak on a matter that is so important to the future health of our economy and the protection of innovation—the state of competition in the marketplace.

Over the course of American history, we have learned an important lesson over and over again: protecting competition and creating opportunities for innovation provides considerable benefits for consumers, workers, companies, and the economy overall. The relative lack of competition and rise of market power in our economy today presents a critical challenge for antitrust enforcement and competition policy more generally.[1]

To begin, I would highlight a question I was asked 16 years ago when testifying before another committee of Congress: "how can competition policy protect tomorrow's innovators when we don't know who they are?"[2] When I briefed this Subcommittee in January 2020, during a field hearing in Boulder, Colorado we discussed this challenge in the context of entrepreneurship in the Internet ecosystem.

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[1] This testimony draws on my prior remarks delivered to the George Mason University symposium on antitrust law. *See* Phil Weiser, Colorado Attorney General, Address at the 24th Annual George Mason Law Review Symposium: Meeting this Antitrust Moment (Feb. 16, 2021), https://coag.gov/blog-post/prepared-remarks-attorney-general-phil-weiser-at-george-mason-law-review-24th-annual-antitrust-symposium-feb-16-2021/.

[2] *Competition in the Communications Marketplace: How Technology is Changing the Structure of the Industry, Hearing Before the H. Comm. on Energy & Commerce*, 109th Cong. 117-118 (2005) (question from Rep. Joe Barton, Chairman, H. Comm. on Energy & Commerce) ("[Y]ou talk about allowing the innovation—these entrepreneurial companies that we don't know who they are but we want to protect their right to get into the marketplace to force the big boys to do something, it is very difficult proactively to protect something that doesn't exist. So . . . how do we proactively protect and guarantee entry into a market that we don't even know might exist?").

In the early 2000s, when the Internet was an open field for investment, investors saw considerable opportunities for new entry and innovation. Today, however, investors in some contexts are shying away from investments in firms that threaten dominant Internet platform companies and refer to a "kill zone" for new companies. For antitrust enforcers, such reports raise the question of what, if any, enforcement actions are appropriate to restore competition to the marketplace. For policymakers, such reports and concerns raise a critical question—"how did we get to this point and where do we go from here?"

My testimony will proceed in three parts. First, I will briefly review the state of our economy, noting the concern that the competition is at low levels in a number of sectors. Second, I will review the arc of antitrust law, explaining how the Chicago School of antitrust overshot the mark and advocated for artificial barriers to sound antitrust enforcement.[3] Finally, I will discuss several opportunities for revitalizing antitrust enforcement and competition policy going forward.

I. The State of Our Economy

Over the last several years, both scholars and popular commentators focused on the decrease in competition and the increased level of concentration in the U.S. economy, explaining that such trends adversely impact consumers, workers, and innovation—and even exacerbates income inequality.[4] As Carl Shapiro recently underscored, "evidence that U.S. markets have become more concentrated, evidence that price/cost margins have risen, evidence that entry barriers have become higher, and evidence that corporate profits have risen substantially and are expected to persist" all are causes for concern.[5] Shapiro's observations largely echo those of a 2016 Obama Administration Council of Economic Advisors report, "The Benefits of Competition and Indicators of Market Power."[6] In the years since, concerns about the decline of competition have continued to grow, raising more questions about how the lack of competition harms consumers, workers, and innovators.

For a case in point on the state of increasing marketplace concentration and shrinking levels of competition, consider the airline industry. As a group of commentators related, "between 2005 and 2014, the [U.S. Department of Justice

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[3] The late Bob Pitofsky made this case in a compelling manner. *See* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK (Robert Pitofsky ed. 2008).

[4] Carl Shapiro has catalogued some of this discussion. *See* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT.'L J. INDUS. ORG. 714, 717-19 (2018).

[5] *Id.* at 738.

[6] COUNCIL OF ECON. ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

("DOJ")] Antitrust Division reviewed seven airline mergers. In five of those cases, there were no challenges; in the other two, the Antitrust Division settled. Now, four airlines control almost 70 percent of domestic air travel in the United States."[7] And because consumers are mostly limited to flights available at nearby local airports, this means that, in practice, most consumers are left to choose between a mere two or three airlines when making travel plans.

The lack of airline industry competition means that incumbent firms can afford, in some cases, to treat consumers poorly, recognizing that the relative lack of choice in the marketplace means that there are limited, if any, alternatives for consumers. Indeed, over the course of the pandemic in Colorado, the number one consumer complaint the Colorado Department of Law ("Department") received was (and is) regarding airlines—particularly Frontier Airlines—failing to follow federal consumer protection requirements.[8] The volume of complaints reached such severity that it prompted me to lead a bipartisan coalition of forty state attorneys general to ask Congress to provide for state attorney general oversight and enforcement of federal airline consumer protection laws.[9] I encourage members of this Subcommittee to consider championing that legislative change.

The ability of airlines to treat customers badly and still make a profit is directly related to their industry's lack of competition. As discussed in the next part, there is little to no entry in this sector, in part because incumbent airlines developed a reputation for predation (notably, undercutting the lower prices of entrants until they leave the market). Consequently, airlines not only are able to engage in unfair practices towards consumers, but also can reap profits at their customers' expense due to those practices. Consider that, when aviation fuel prices fell dramatically several years ago, consumers did not see any benefits passed on to them in the form of lower prices. As the *New York Times* put it after analyzing the situation, the airline industry recorded massive profits and all consumers received were "free peanuts."[10]

The airline industry is far from unique. For another example, consider the pharmaceutical industry and the market for insulin. Our Department recently studied this market, asking why insulin prices rose so much faster than the rate of

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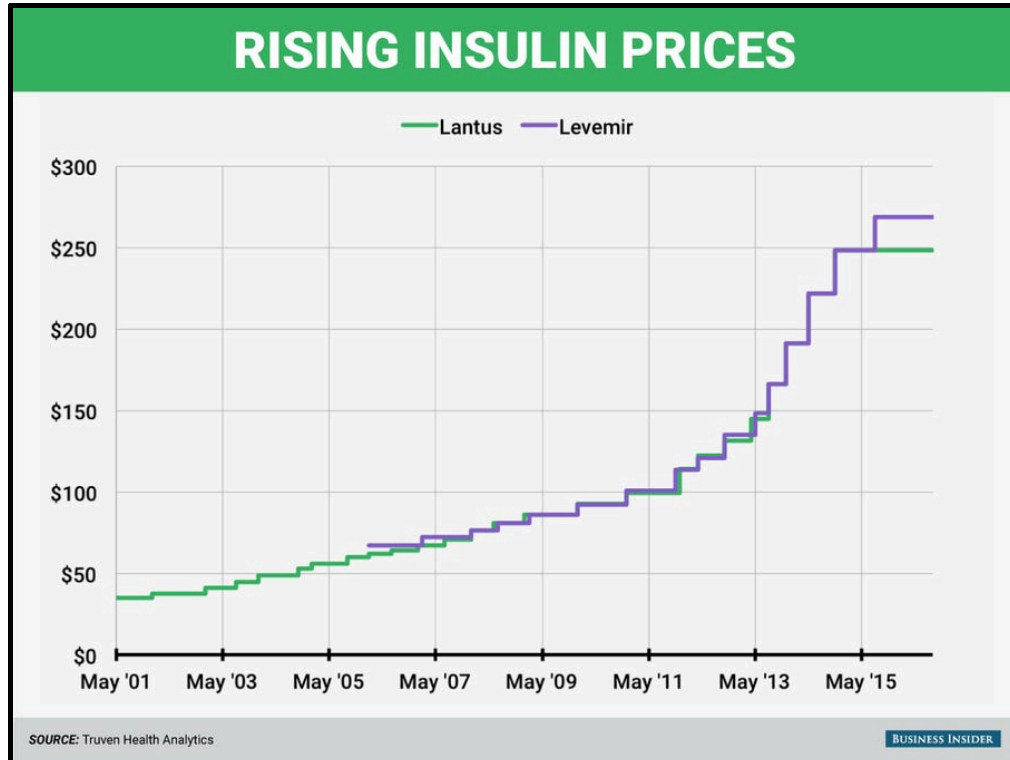
[7] BILL BAER ET AL., RESTORING COMPETITION IN THE UNITED STATES 28 (Nov. 2020), https://faculty.haas.berkeley.edu/shapiro/restoringcompetition.pdf.

[8] *See* Aldo Svaldi, *Frontier, other airlines generated more consumer complaints in Colorado last year than robocalls*, DENVER POST (Mar. 2, 2021), https://www.denverpost.com/2021/03/02/colorado-consumer-complaints-airlines-frontier-robocalls/.

[9] Nat'l Ass'n of Att'ys Gen., Attorneys General Call for New Consumer Protections to Protect Airline Industry Customers (Oct. 2, 2020) https://www.naag.org/policy-letter/attorneys-general-call-for-new-consumer-protections-to-protect-airline-industry-customers/.

[10] Jad Mouawad, *Airlines Reap Record Profits, and Passengers Get Peanuts*, N.Y. TIMES (Feb. 6, 2016) ("A decade of consolidation has reduced the number of airlines competing in many markets, making it easier for dominant carriers to charge more for flights.").

inflation and calling for actions to promote competition.[11] Our central explanation for the rising prices was that, with only three manufacturers in the marketplace, their pricing patterns were troubling at best. Figure 1 below captures the situation between two incumbent firms.[12]



The price growth trend is staggering. Yet, what these numbers do not capture is the impact on people—especially the most vulnerable among us, such as those without health insurance—who end up paying even more for insulin, a drug they depend on daily to live. In our survey of Colorado consumers, we heard from many persons who suffered on account of these rising prices. What most alarmed me was that "40 percent of survey respondents . . . are forced to ration their use of this life-

[11] COLO. DEP'T OF LAW, PRESCRIPTION INSULIN DRUG PRICING REPORT (Nov. 2020), https://coag.gov/app/uploads/2020/11/Insulin-Report-102020.pdf.
[12] Lydia Ramsey Pflanzer, *There's Something Odd About the Way Insulin Prices Change,* BUS. INSIDER (Sept. 17, 2016), https://www.businessinsider.com/rising-insulin-prices-track-competitors-closely-2016-9.

saving product at least once a year"[13] and that in some cases, these persons take even more drastic measures "by fasting as a means of managing their blood sugar levels."[14]

In industries with few competitors, such as the three firms that manufacture insulin in the U.S., a practice of lock-step pricing or tacit collusion is both appealing and feasible to the manufacturers, but harmful to the public. On the front end, our best strategy to prevent such a situation is effective merger control, preventing markets like airlines or pharmaceuticals from becoming overly concentrated.[15] On the back end, competition policy should encourage and enable entry, such as by enacting the patent reforms we advocate for in the insulin report.[16]

And where enforcers identify explicit quid-pro-quo collusion—such as price fixing—it is critical that they take action against these actors. This is exactly what a coalition of state attorneys general are doing now in a case against generic drug companies that raised prices through cartel-like behavior.[17]

Finally, it bears emphasis that increasing industry concentration can also lead to a more difficult environment for entry and innovation where dominant firms control critical inputs necessary for entry. This dynamic can be created or exacerbated by vertical mergers, such as mergers between a producer and a critical distributor of a product. As a result of such mergers, dominant firms can harm competition by gaining control over and then restricting access to a critical input—say, by raising its price, degrading its quality, or restricting its availability to rivals. In some cases, such action can involve foreclosing a distribution channel (for example, limiting access to sales channel). In others, it can involve acquiring a critical component part of a product (for example, a cable company buying video programming that is important to its pay TV competitors).[18]

In 2019, our Department confronted such a concern and took action to protect competition in Colorado's Medicare Advantage market by challenging a vertical merger between UnitedHealth and DaVita. This merger threatened to impair competition by eliminating a competitor's access to a critical input. In the years

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[13] COLO. DEP'T OF LAW, *supra* note 12, at 16.
[14] *Id.* at 2.
[15] Shapiro, *Antitrust in a Time of Populism, supra* note 4, at 738 ("Merger enforcement is especially important since a wide range of interdependent conduct by oligopolists, i.e., conduct whereby the oligopolists refrain from vigorous competition, is not considered to be illegal if it does not involve an agreement among those oligopolists.").
[16] COLO. DEP'T OF LAW, *supra* note 12, at 54-56.
[17] *See, e.g.,* Complaint, Connecticut v. Sandoz, Inc., No. 3:20-802 (D. Conn. June 10, 2020).
[18] The 2020 Vertical Merger Guidelines address both concerns. U.S. DEP'T OF JUSTICE AND FTC, VERTICAL MERGER GUIDELINES 4-8 (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

leading up to the merger, the health insurance provider Humana had entered the Medicare Advantage market in Colorado Springs and eroded the market share of UnitedHealth, the dominant insurer, from approximately 75% to around 50%.[19] Critical to Humana's success in this market was its relationship with DaVita's clinics, which referred patients to Humana's Medicare Advantage offering and might well have ceased to do so in the wake of UnitedHealth's acquisition of DaVita. While the Federal Trade Commission ("FTC") declined to take action to address this competitive harm in Colorado, our Department did so, obtaining a remedy that protected competition in this market, a positive result achieved with the aid of the FTC staff and the support of two FTC commissioners.[20]

Finally, and in an example that is representative of challenges we now see across the economy, consider the case of *Steves and Sons, Inc. v. Jeld-Wen, Inc*,[21] which involves the door manufacturing business. In 2000, this industry was robustly competitive with a large number of door manufacturers able to operate independently and buy critical component parts, including interior molded doorskins. At that time, there were two manufacturers of this important component part, Masonite and JELD-WEN. JELD-WEN, however, was vertically integrated, meaning that it both manufactured doorskins and used them internally to sell finished doors. In 2001, Masonite—including its premier manufacturing plant in Towanda, Pennsylvania—was set to be sold to Premdor, one of the then-independent door manufacturing firms. In response to concerns by independent door manufacturers, the DOJ required the divestiture of the Towanda plant from Premdor and the establishment of a new firm, Craftmaster International, Inc ("CMI"), which would be able and motivated to sell doorskins to independent door manufacturers. And from 2002 to 2012, CMI did just that, continuing the status quo ante before the Masonite-Premdor merger and providing a third rival seller of molded doorskins.

In 2012, JELD-WEN expressed interest in acquiring CMI, but before consummating the deal and approaching the DOJ, it "entered into long-term supply contracts with [independent, standalone door manufacturing firms], knowing that this oft-used tactic would assuage the concerns of the DOJ and the [independent firms] about anticompetitive effects of the merger."[22] JELD-WEN's tactic was successful, as when the DOJ contacted independent firms like Steves, they expressed

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[19] Complaint at ¶¶ 49-50, Colorado *ex rel.* Weiser v. UnitedHealth Grp., Inc., No. 2019CV31424 (Colo. Dist. Ct. June 19, 2019), available at https://coag.gov/app/uploads/2019/06/2019-06-19-08-00-13-United-DaVita-Complaint-final.pdf.

[20] *In re* UnitedHealth Group and DaVita, No. 181-0057 (F.T.C. June 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1529359/181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf [https://perma.cc/JLT5-Y68R] (Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra).

[21] 345 F. Supp.3d 614 (E.D. Va. 2018).

[22] *Id.* at 631.

no concerns regarding the merger, citing the long-term supply agreement. And, once the merger was consummated, JELD-WEN closed one of its existing plants and, notwithstanding declining costs, it proceeded to raise prices to Steves and other independent firms under the supply agreement. JELD-WEN also changed its policy on reimbursing Steves for the cost of doors rendered defective by flawed doorskins. In making these changes, JELD-WEN took advantage of its role as the only supplier of doorskins to independent door manufacturers, even sending Steves a public presentation that Masonite had made to investors stating that it would not sell doorskins to the independent firms.

To address this situation, Steves took the unprecedented step of filing a private antitrust case that challenged the 2012 merger as illegal and called for divestiture of CMI from JELD-WEN; after years of litigation, it gained this relief from the district court and the Fourth Circuit Court of Appeals.[23]

What is unique—unprecedented, really—is that Steves brought a lawsuit and the court ruled that a divestiture was necessary and appropriate. That is extraordinary. What is ordinary, however, is that in many sectors of the economy, only a few firms compete with one another, meaning that any given merger—like the one in this case—can give rise to the ability to exercise market power. And what this case also reveals is how many mergers involve intermediate goods—inputs provided to a downstream firm—whose prices are not transparent to the public. Consequently, when the merger in Steves went through, consumers may see prices for doors rise at Home Depot, etc., but have no idea what spurred that result. In fact, even Home Depot may well not appreciate that the price rise reflected the aggregation of market power in the doorskin market.

II. The Chicago School and Its Wrong Turn

In the 1960s, some commentators and antitrust enforcers glorified the role of small businesses as an end in and of itself, arguing that mergers of any notable size should be barred. In that era, mergers were generally not analyzed based on their likely competitive effects. Consider, for example, *United States v. Von's Grocery Co.*, in which the U.S. Supreme Court enjoined a merger of two grocery chains with a combined market share of just 7.5%.[24] That decision famously represented a "big is bad" attitude and gave rise to the Chicago School of antitrust law, which focused on actual economic consequences and critiqued such decisions.

[23] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397, 2021 WL 630521, at *24 (4th Cir. Feb. 18, 2021) ("In sum, the record supports the district court's findings as to each of the equitable factors . . . . [T]his case is a poster child for divestiture.")
[24] 384 U.S. 270 (1966).

For an early harbinger of the Chicago School critique, consider Justice Stewart's dissent in *Von's Grocery,* which called out the majority opinion for its lack of rigor. For starters, Justice Stewart commented that the opinion made "no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area."[25] Notably, Justice Stewart skewered the majority for adopting a *per se* rule against mergers in the face of any trend towards concentration, ignoring that small businesses were competing effectively against the larger chains and overlooking that there were not significant barriers to entry. Finally, Justice Stewart took a few shots at the majority's overall approach, noting that "the emotional impact of a merger between the third and sixth largest competitors in a given market, however fragmented, is understandable, but that impact cannot substitute for the analysis of the effect of the merger on competition"[26] and "the sole consistency that I can find is that in litigation under [the antitrust laws], the Government always wins."[27]

At its best, the Chicago School critique, which was led in the 1970s and 1980s by scholars such as Richard Posner, highlighted the importance of economic rigor and a focus on market realities. This critique paved the way for the development of the joint horizontal merger guidelines adopted by both the DOJ and FTC in 1992, and revised in 1997 and 2010, which set forth and later refined an economic foundation for merger review.[28] Notably, instead of suggesting that all increases in concentration would violate the antitrust laws, the guidelines adopted the Herfindahl-Hirschman Index ("HHI") as a means of measuring increases in market concentration.[29] Under the 2010 guidelines, for example, a market is highly

[25] *Id*. at 282 (Stewart, J., dissenting).
[26] *Id*. at 304 (Stewart, J., dissenting).
[27] *Id*. at 301 (Stewart, J., dissenting).
[28] *See* U.S. DEP'T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf [2010 MERGER GUIDELINES]; U.S. DEP'T OF JUSTICE AND FTC, HORIZONTAL MERGER GUIDELINES (Revised Apr. 8, 1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf [1997 MERGER GUIDELINES]; U.S. DEP'T OF JUSTICE AND FTC, 1992 MERGER GUIDELINES (Apr. 2, 1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf. The 1992 Merger Guidelines were the first ones jointly adopted by the FTC and DOJ. https://scholarship.law.upenn.edu/faculty_scholarship/1932/.
[29] The 1982 Guidelines were the first to adopt the HHI as a basis for the structural presumption. *See* 1982 MERGER GUIDELINES 12, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf. For a discussion of the role of that presumption, see Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structures, and Burdens of Proof*, 127 YALE L.J. 1996 (2018).

concentrated and mergers presumptively illegal after the market reaches a level of 2500 HHI, reflecting a market of four equally sized rivals.[30]

It is no exaggeration to report that, within a generation, the Chicago School critique transformed antitrust law. By the early 1980s, for example, merger enforcement and the law of vertical restraints—how antitrust law treated agreements between producers and their distributors—evolved greatly from the approach that prevailed in the 1960s. In so doing, it followed the teachings of economics and moved away from rigid formalities and towards a focus on marketplace realities.

Unfortunately, the Chicago School's initial focus on economic rigor and empirical realities morphed into a more ambitious project and took a wrong turn—decrying antitrust enforcement in almost all cases.[31] This project took as its north star the supposition that over-enforcement of the antitrust laws created lasting harms whereas under-enforcement of the antitrust laws would be addressed by the market.[32] This market fundamentalism, however, lacked a basis in sound economics or empirical reality.[33]

Let me provide two examples of market fundamentalism that acted as a brake on sound antitrust enforcement. In the 1990s, the antirust agencies faced increased hostility in the courts in the context of challenges to hospital mergers. The antitrust agencies lost a number of consecutive cases, with the courts taking the position that, in theory, consumers could drive considerable distances to hospitals elsewhere and

[30] *See* 2010 MERGER GUIDELINES, *supra* note 29, at 19; *see also* BAER ET AL., *supra* note 7, at 27 (finding the 2010 Merger Guidelines "raised the market concentration thresholds for presumptively anticompetitive mergers[] to a level that focused enforcement on transactions that would leave no more than four equal-sized competitors post-merger . . . .").

[31] To be sure, it is difficult—and perhaps unfair—to paint all Chicago School scholars with the same brush. Judge Posner, for example, underscored his view that skepticism of aggressive antitrust enforcement is not the same as rejecting any role for antitrust enforcement. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 933 (2001) ("skepticism about unilateral monopolizing actions is not the same as denial.").

[32] This position is identified most prominently with Judge Easterbrook. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31-33 (1984).

[33] For a scathing critique of the Chicago School along these lines, see Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L REV. 1843, 1847 (2020) (" Its followers were libertarians who were committed on ideological grounds to less intervention by the state."); *id.* at 1848 (articulating Chicago School principle that "markets are inherently self-correcting and if left alone, they will work themselves pure."). For an alternative to the Chicago School's concerns with over-enforcement, see JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019).

that would act as a potential brake on price increases.[34] In response, as former FTC Chairman Muris related, some commentators suggested that, in the face of that track record, the FTC should "give up on hospital mergers."[35]

Thankfully, the FTC did not give up on hospital merger enforcement. Instead, the FTC conducted a series of retrospective studies, identified an already consummated merger that appeared quite problematic, and demonstrated the harm to competition in that case (the *Evanston Northwestern* case).[36] After antitrust enforcers changed their approach and presented empirical evidence of a hospital merger that produced a clear showing of price increases, courts re-evaluated their prior rigid formal tests, backed off of the hypothesis that such mergers would not occasion price increases, and condemned a number of hospital mergers as anticompetitive.[37]

In the 1990s, upstart airline companies—known as low cost carriers ("LCCs")—entered into the airline market, providing consumers with choices and lower prices. In the case of American Airlines, the company was a dominant provider of flights between Dallas-Fort Worth and midwestern cites, including Kansas City and Wichita. American Airlines' relatively high prices attracted entry by LCCs, including Vanguard Airlines, Sun Jet International, and Western Pacific. In response, American added flights and lowered their prices so as to match the LCC's rates, until the LCCs exited the market. After doing so, with the two LLCs going out of business, American Airlines reverted to its earlier flight schedules and pricing.[38]

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[34] *See, e.g.*, Jennifer R. Conners, *A Critical Misdiagnosis: How Courts Underestimate the Anticompetitive Implications of Hospital Mergers*, 91 CAL. L. REV. 543, 555–56 & nn.66-68 (2003) (listing cases).

[35] *Assessing Part III Administrative Litigation: Interview with Timothy J. Muris*, 20-SPG ANTITR 6, 10 (2006). Chairman Muris responded to that criticism as follows:

> In 2001 many said, give up on hospital mergers, but I disagreed because health care is such an important part of the economy and because there was evidence of problematic mergers. We began a retrospective study, which sounded simple, but turned out to be hard and complex. We picked several mergers, in part to bring a case or two if we found them, but also to study and report to help the government use the HSR process at some future date.

Id.

[36] Evanston Northwestern Healthcare Corp., FTC Docket No. 9315 (Feb. 10, 2004) (complaint), https://www.ftc.gov/enforcement/cases-proceedings/0110234/evanston-northwestern-healthcare-corporation-enh-medical-group.

[37] *See* FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); FTC v. Penn State Hershey Medical Center, 838 F.3d 327 (3d Cir. 2016).

[38] Laurence Zuckerman & Stephen Labaton, *American Airlines Is the Winner in a U.S. Antitrust Case*, N.Y. TIMES (Apr. 28, 2001), https://www.nytimes.com/2001/04/28/business/american-airlines-is-the-winner-in-a-us-antitrust-case.html.

The unhappy ending of this story is that, in the face of a successful effort by American Airlines to exclude its rivals, the DOJ's lawsuit was rejected by the Tenth Circuit Court of Appeals.[39] In holding that American Airlines did not engage in predatory pricing, even though it ramped up capacity and reduced prices dramatically in response to the entry of a low cost carrier and went back to its old ways after the entrants left the market, the court made a basic economic mistake. In particular, the court concluded that American had not engaged in unlawful below-cost pricing because it failed to consider the opportunity cost of an airplane—that is, the value that the airplane could offer elsewhere—once it was rerouted. With that unfortunate conclusion in hand, the court did not fully wrestle with, as Scott Hemphill and I put it, whether the recoupment test could be satisfied when a firm developed "a reputation for predation by its conduct in one or multiple markets, and thereby deter[ed] entry into and preserve[d] monopoly profits in other markets."[40]

The Tenth Circuit's decision in the American Airlines case followed the logic of a Chicago School-inspired Supreme Court decision, *Brooke Group v. Brown & Williamson Corp.*[41] That case reshaped the law of predatory pricing, with its dictum that such schemes were "rarely tried, and even more rarely successful."[42] As Scott Hemphill and I explained, this conclusion relied on a selective view of the economic literature, "which was contested at the time and which later work has undermined."[43] Nonetheless, it has underpinned and guided a doctrine that has made predatory pricing cases very difficult to win.

III. The Future of Antitrust Enforcement and Competition Policy

The cure for what ails antitrust enforcement and competition policy is what initially propelled the Chicago School critique—attending to economic rigor and empirical realities. It is not an accident that the answer to the courts' formalistic bar to hospital mergers was the evidence that such mergers had led to increased prices for consumers. Similarly, the conclusion in *Steves* was driven by the clear and compelling evidence that, in the aftermath of a merger, the market went from a competitive one to one where two dominant firms acted to exclude rivals.

To revitalize antitrust enforcement, I recommend four related steps.

First, enforcers should bring cases that present empirical evidence and rigorous economic analysis that demonstrates competitive harm in the marketplace.

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[39] *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).
[40] C. Scott Hemphill & Philip J. Weiser, *Beyond* Brooke Group*: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2067 (2018).
[41] 509 U.S. 209 (1993).
[42] *Id.* at 226
[43] Hemphill & Weiser, *supra* note 40, at 2062.

That is exactly what the DOJ did a generation earlier in the *Microsoft* case. In that case, a unanimous D.C. Circuit concluded that Microsoft took a series of actions, including entering into exclusionary contracts, degrading access to its platform, and keeping barriers to entry artificially high, thereby excluding technologies that threatened to erode its operating system monopoly.[44] In the ensuing years after that decision, antitrust enforcers did not bring a comparable case—and the courts rendered a number of decisions that imposed artificial hurdles to antitrust liability.[45]

With today's high level of market concentration and a relative lack of competition in the tech sector, antitrust enforcers are taking up the question I began my testimony with—how to protect tomorrow's innovators when we don't know who they are? One answer to this question is to be vigilant about addressing predatory conduct that undermines the ability of new entrants to compete. As explained in the airline example, consumers are now worse off due to concentration in that industry and a lack of competition—both of which were enabled by permissive merger policy and a lack of predatory pricing enforcement.

In the case of the Internet ecosystem, we witnessed considerable competition in the early 2000s. Google displaced Alta Vista and other search engine rivals. And Facebook displaced MySpace and other personal social networking rivals. During times of competition, firms are on their toes, competing vigorously for customers and developing innovative products and services. By contrast, when firms are established monopolists and able to exclude rivals effectively, they can take customers for granted. In the case of Internet-enabled products and services, this means that dominant Internet platforms adopt privacy policies that both are less customer friendly and limit the rate of innovation by controlling relevant markets.

In the antitrust cases we filed against Google and Facebook, we alleged similar theories to those set forth in the *Microsoft* case. In the case of Google, like the *Microsoft* case before it, our complaint highlighted a series of actions taken by Google

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[44] *United States v. Microsoft Corp*., 253 F.3d 34, 79 (D.C. Cir. 2001) ("[T]he question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue."). For a discussion of this standard, see C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PENN. L. REV. 1879, 1896-1903 (2020).

[45] BAER ET AL., *supra* note 7, at 11 ("the courts increasingly saddle plaintiffs with inappropriate burdens, making it unnecessarily difficult to prove meritorious cases and allowing anticompetitive conduct to escape condemnation") (citing Ohio v. American Express Co., 138 S. Ct. 2274 (2018); Verizon Commc'ns, Inc. v. Trinko, 540 U.S. 398 (2004)); Carl Shapiro, Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets, 33 J. ECON. PERSP. 69, 70 ("The fundamental problem in [the standard for exclusionary conduct under Section 2 of the Sherman Act] is that the Supreme Court has, over the past 40 years, dramatically narrowed [its] reach.").

that sought to defend and entrench its monopolies in search and search advertising. This includes entering into exclusionary contracts and inhibiting the ability of other companies to acquire customers of their own.[46] Like Microsoft in the 1990s, Google today is facing threats to its dominance from adjacent sectors and has responded, not by competing on the merits, but by undermining the ability of rivals to compete.[47] To remedy such conduct and restore competition requires not merely ending the illegal conduct, but taking affirmative steps to "lower the barriers to entry."[48]

The antitrust case Colorado and others states filed against Facebook explains that the company engaged in a campaign of threatening to "buy or bury" its rivals.[49] In particular, the complaint tells the story of how Facebook rivals were given a choice—to be purchased in their infancy or face "the wrath of Mark [Zuckerberg]," meaning a denial of access to critical opportunities (such as the ability to use Facebook to sign in to a service) that could undermine its business model.[50] Facebook's goal, in other words, was to buy upstart rivals before they undermined Facebook's monopoly power or to degrade their ability to compete on the merits. This action is the opposite of what the antitrust laws call for—competition on the merits.

Second, the central challenge for antitrust is to develop more in-depth analyses of how markets are working in practice. Historically, antitrust enforcers under-invested in retrospectives. One opportunity for this Subcommittee is to encourage and enable a more systematic investment in such studies, which could help us better understand how and why competition issues arise in a number of contexts, ranging from agriculture to health care.[51] A very thoughtful report for the incoming Administration recommended such an investment.[52] Indeed, the FTC was originally created with this purpose in mind. Additional funding for the FTC and DOJ, along with a clear mandate and authority for industry studies, is a sound and overdue investment.

Third, as we consider competition policy more broadly, we should not limit ourselves to thinking about antitrust enforcement. The federal government has considerable policy levers to encourage and enable competition. With respect to airlines, for example, airports make leasing decisions on which airlines receive

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[46] Complaint, Colorado v. Google, LLC, No. 1:20-cv-03715 (D.D.C. Dec. 17, 2020).
[47] Carl Shapiro, *Microsoft: A Remedial Failure*, 75 ANTITRUST L.J. 739, 744-46 (2009) (discussing this dynamic in the *Microsoft* case).
[48] *Id.* at 748.
[49] Complaint, New York v. Facebook, Inc., No. 1:20-cv-03589 (D.D.C. Dec. 9, 2020).
[50] *Id.* at ¶ 6.
[51] In a salutary step, the FTC recently announced a retrospective study on the consolidation of physician groups into the health systems. https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers.
[52] BAER ET AL., *supra* note 7, at 37, 39. State attorneys general can also invest in such work, as the State of Colorado did in our study of insulin pricing.

landing gates. With respect to the pharmaceutical industry, certain patent law policies make entry for generic rivals more challenging, particularly for biosimilars. And, in the Internet ecosystem, the question is how interoperability and data portability requirements—long a staple of telecommunications regulations—can be imposed as procompetitive measures outside the litigation context, where these and other options, including divestitures, are available.[53]

Fourth, legislative action is necessary to address the wrong turn called for by the Chicago School. This thinking motivated decisions like *Brooke Group* and has spurred the imposition of artificial and unwarranted obstacles to sound antitrust enforcement. In my view, to enable effective antitrust enforcement, corrective legislative action is clearly warranted to address recent misguided Supreme Court decisions.[54] And complementary consumer protection measures—such as the one I mentioned with respect to airlines—are warranted as well.

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I appreciate this Subcommittee putting a sustained and powerful spotlight on these issues. I welcome your questions and stand ready to support your efforts to revitalize antitrust enforcement and competition policy.

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[53] I discuss the topic of interoperability requirements—with respect to both regulatory and antitrust oversight—in Philip J. Weiser, *Regulating Interoperability: Lessons from* AT&T, Microsoft, *and Beyond*, 76 ANTITRUST L.J. 271 (2009).

[54] The possibility of future such decisions makes the case for action even more compelling. In particular, if the Supreme Court takes certiorari and reverses *Steves*, No. 19-1397, 2021 WL 630521 (4th Cir. Feb. 18, 2021), and *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020), the case for legislative action will become far more compelling.