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March 25, 2021

The Honorable David N. Cicilline
Chairman
Judiciary Subcommittee on Antitrust,
Commercial and Administrative Law
House of Representatives
Washington, D.C. 20515

The Honorable Ken Buck
Ranking Member
Judiciary Subcommittee on Antitrust,
Commercial and Administrative Law
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman Cicilline, Ranking Member Mr. Buck and members of the Subcommittee:

RE: Comments of Utah Attorney General Sean D. Reyes to the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law

Thank you, Mr. Chairman and members of the Subcommittee for allowing me to submit these written comments regarding antitrust enforcement following the March 18, 2021 hearing on *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power*. The Subcommittee's work as documented in the thorough Majority Staff Report and Recommendations ("Majority Report") demonstrates that there is a broad consensus that too much power has become concentrated in the hands of a few dominant Big Tech platform companies that have monopolies or near monopolies in their various product markets. Such monopolies affect not only price and availability of products and services, they often dictate social policy in areas such as privacy, the free flow of information, and access to marketplaces – policy decisions that are properly the domain of governments that answer to the electorate.

The Subcommittee's careful consideration of a variety of solutions to these problems of monopolization in Big Tech platforms is of paramount importance. Generally speaking, my views align most closely with those articulated by Representative Buck in his "*The Third Way*" minority report ("Minority Report"), and I heartily support the concept that there are many areas for bipartisan cooperation as identified in that report.

I have made antitrust enforcement a priority in Utah since shortly after I became Attorney General in 2013. Prior to that, and while in the private sector, I was a partner in a small venture fund that invested in a number of technology companies. Immediately preceding that, I served as General Counsel for a small, Utah-based technology and media company where I fought anti-competitive behavior by larger, more market dominant companies in the realm of intellectual property enforcement. And before that role, I was a litigation and trial partner in Utah's largest law firm, spending nearly 14 years representing businesses globally, including many in the technology and media industry. As such, I believe I'm well positioned to understand the importance of modernizing our approach to antitrust enforcement in a way that does not result in unintended consequences that harm innovation, particularly among smaller technology companies.

I would like to focus my comments on the importance of state antitrust enforcement and of the partnership between state attorneys general and federal agencies. Broad nonpartisan coalitions of state attorneys general have often worked closely together with our federal counterparts on major antitrust cases, including the Apple / E-books case, the *Ohio v. American Express* case, the current parallel Google litigation with the DOJ (*United States v. Google* and *Colorado v. Google*) and the current parallel Facebook litigation with the FTC (*United States v. Facebook* and *New York v. Facebook*). We also regularly partner with those agencies on merger reviews. Further, the States have the ability to undertake significant matters of national importance independent of our federal colleagues, as we are currently doing in the area of generic drugs and in the *Texas v. Google* case, among other noteworthy enforcement actions.

The state attorneys general are often especially well situated to provide specific assistance to federal enforcement efforts. For example, we frequently have a better understanding of local economic conditions. When defining markets for antitrust analysis, we may have insights that aren't immediately obvious to inside-the-beltway analysts or more macro-focused experts. This is particularly true in the West, where vast spaces can affect geographic market definitions in very significant ways. In fact, there have been instances where my office has helped federal agencies understand that proposed geographic markets definitions based upon presumptions that are valid in highly populated parts of the country may be untenable when applied to our rural areas. Likewise, state attorneys general often have a deeper understanding of our local industries, such as Utah's ski industry or our Silicon Slopes innovation and technology sector, both in terms of the economic realities that apply to and the major players in those industries.

This sort of local knowledge can be particularly helpful to our federal counterparts in the context of merger reviews. One of the great challenges of modern antitrust enforcement is identifying and evaluating mergers that have the effect of limiting competition by allowing the

dominant Big Tech platforms to buy – and in many cases bury – innovative technologies and competing platforms. Frequently, these mergers fall well below Hart-Scott-Rodino thresholds. However, not all of these acquisitions are anticompetitive. In some cases, an innovator starts a company to prove a concept that is only of value to a dominant platform. For that reason, I ***do not*** support the Majority Report's recommendation on page 388 that "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion." Rather, I agree with the Minority Report's recommendation on page 15 that "Congress should look to reinvigorate the antitrust enforcement agencies' ability to conduct proper oversight and bring enforcement cases based on potential competition doctrine." To facilitate effective enforcement, I would like to see a simple notice requirement for these mergers, which would include notice to state attorneys general. Whichever approach is taken, I believe that there is a larger role for state attorneys general to play in helping to evaluate these mergers because of our local knowledge of market realities and ability to reach out to witnesses, including local economists and other academics who may have particularly valuable insights.

The past few years have seen significant attempts at better coordination of efforts by our federal colleagues. In particular, the FTC has made strides in improving coordination on the regional level with state enforcers. These efforts are to be applauded, but more work needs to be done. For example, one change that could improve coordination of federal and state enforcement would be to streamline federal record sharing laws and policies to allow for direct sharing of information with state attorneys general without the need to obtain waivers from the entities providing the information, and to standardize practices between the FTC and DOJ in this area.

Both the Majority Report (at pages 402 through 403) and the Minority Report (at page 8) correctly recognize the need for more financial resources for antitrust enforcement. However, neither adequately addresses the need to enhance resources available to the states. The Minority Report notes that the U.S. government invests around $510 million annually in antitrust enforcement, which is small compared to the resources available to Big Tech. Yet few states can afford more than a tiny fraction of that amount, even proportionate to population; some can only afford to employ a single antitrust attorney. Although I boosted enforcement in Utah from three attorneys to five, we still have only about a million dollars to spend on salaries and infrastructure, with somewhat more than that available for hiring experts and paying costs associated with specific investigations. In a typical year this works out to roughly one-quarter as much spending per capita as the federal government. Because the efforts of state attorneys general directly benefit and supplement federal enforcement efforts, I believe that consideration should be given to law enforcement grants to help states increase antitrust staffing, improve training, and finance expensive investigations. At the least, more money should be made available to allow federal agencies to provide more resources at the request of the states, such as

grants to allow for broader use of federal experts for state investigations even when the federal agencies are not currently investigating the same conduct.

Both the Majority Report and the Minority Report recognize that judicial decisions over time have added requirements not found in the plain language of the federal antitrust laws which have created unworkable barriers to effective antitrust enforcement. For example, both reports challenge the Supreme Court's decision in the *Ohio v. American Express* case, in which my office actively participated. That decision has been widely criticized for its approach to market definition and two sided markets; indeed, twenty-seven prominent antitrust professors filed an amicus brief in support of the states' position and in opposition to the position that the Supreme Court ultimately took. To give another example, the Minority Report at page 12 correctly notes that "[t]he Supreme Court in a series of cases developed predatory pricing doctrine to a point where the evidentiary burden of proof on plaintiffs, including government agencies, has become virtually insurmountable." Since the Sherman Act was passed in 1890 the pendulum of enforcement efficiency has periodically overshot the optimal mark in both directions. However, the answer is not a reflexive legislative reaction. As the Minority Report suggests, with regard to some specific proposals in the Majority Report, more study is necessary to avoid unintended consequences.

More urgently, we need to see if the system – largely based upon judicial interpretation – is capable of timely self-correction. Ranking Minority Member Jim Jordan alluded to this possibility in his letter to Chairman Nadler of October 6, 2020 when he noted that "the Trump Administration and the states are currently investigating Big Tech under existing authority" and suggested that we should see how those investigations play out before refashioning the core antitrust laws. Since then, those investigations have led to the filing of the three Google and two Facebook cases mentioned earlier in this letter, and state investigations are still ongoing with respect to other conduct by Big Tech companies. There are also several private party antitrust cases against Google and Apple based upon how those companies run their mobile device app stores and in particular the ties between those companies' app stores and mandatory use by app developers of payment processing systems owned by those Big Tech companies.

These cases are the real world laboratories that can provide concrete evidence about how adaptable antitrust law is to the need for effective enforcement in the age of Big Tech. Most of these cases will go to trial within the next three years, and the first of these Big Tech trials will commence in only a few weeks (*Epic Games v. Apple*, beginning on May 3rd). It is possible, of course, that Google, Facebook, and/or Apple will show that their conduct in specific instances objectively was not anticompetitive in fact. It is also possible that conduct by those companies will be found to violate antitrust laws as alleged, and that courts will apply adequate remedies to remediate past harms and prevent future harms. However, there is a third possibility that may occur in some cases: The plaintiffs may prove facts against those Big Tech companies that reasonable observers with a knowledge of economics and antitrust principles would consider to be anticompetitive, and yet the outcome is either a victory for the companies based upon arcane court-generated antitrust doctrines, or a hollow victory for the plaintiffs that does not remedy the

violation. If that situation occurs, it will help inform the sort of legislative changes that may ultimately be needed.

I would like to close my comments by mentioning that one way to strengthen the antitrust laws is to carefully consider reducing regulatory barriers to entry, especially in areas of emerging technology. I supported the FTC's 2020 amendments to the Contact Lens Rule specifically because those amendments increase consumer choice. Likewise, I support removal of outdated legal impediments to safe and effective uses of telemedicine. Increasing competition and options for consumers in these areas is especially important to our rural citizens who otherwise have limited choices and sometimes face outright monopolies in their local communities.

Thank you for your consideration of these comments.

Sincerely,

Sean D. Reyes
Utah Attorney General