

**Testimony of Nebraska Attorney General Douglas J. Peterson
Before the
U.S. House of Representatives Subcommittee
on Antitrust, Commercial, and Administrative Law
- Thursday, March 18, 2021 -**

Thank you, Mr. Chairman and members of the Subcommittee, for the invitation to be with you today. I am appreciative of the opportunity to share with you my perspective on how to address monopoly power and revive competition in our modern economy.

Before beginning, however, I want to offer the disclaimer: I am not an antitrust scholar. Unlike the other esteemed witnesses brought before this Subcommittee today – including my colleague from Colorado – you will not find any antitrust treatises or law review articles authored by me. Instead, my views on competition and monopoly power have been fully formed during my tenure as Attorney General for the State of Nebraska. During this time, our office has become increasingly active in exercising our authority to enforce state and federal antitrust law to ensure that Nebraska consumers reap the benefits of a vibrant and competitive marketplace. This in turn has offered me a practical perspective on how competition policy could be improved.

The most obvious examples of our office's efforts are the recent enforcement actions brought – along with dozens of my colleagues – against Facebook and Google for anticompetitive tactics designed to defend their respective monopolies. Like much of the antitrust community, our office has been concerned about how market dynamics in the internet ecosystem – such as economies of scale, indirect and direct network effects, and entrenched incumbents – may deter the innovation that consumers have come to expect. Of course, these concerns were not only heard in Nebraska, but also by elected officials across the country. As a result, dozens of Attorneys General banded together and pooled resources with our federal counterparts to bring two of the largest and most bipartisan enforcement actions since *Microsoft*. These recent actions are instructive of how we might address monopoly power moving forward in two ways.

First, both cases demonstrate the importance of overlapping enforcement authority and the need for robust state enforcement. Antitrust enforcement actions are resource intensive endeavors and require armies of specialized attorneys, combined with both technical and economic experts to be successful. These types of resources are readily available for large corporate defendants but are scarce for state and federal enforcers. As a result, enforcers are most effective when cooperating and coordinating our efforts. Cooperative enforcement was highly effective in past cases, such as *Microsoft* and *Apple E-Books* in which state and federal enforcers came together successfully to take on some of the world's largest

technology companies. The recent enforcement actions against Facebook and Google have sought to replicate those historical examples, and take our cooperation a step further. In addition to synchronizing our efforts with federal agencies, state enforcers have become true partners with our federal counterparts by bringing separate yet coordinated enforcement actions, thus allowing us to bring more expansive and aggressive cases where appropriate.

However, despite our best efforts to make the most of our limited resources, there is still much work to be done. Protecting competition across the American economy is an expansive task. For us to meet this challenge, we require the tools and resources to research markets, investigate anticompetitive conduct, and prosecute violators. I would encourage this Subcommittee to seriously consider proposals to increase resources allocated to the antitrust enforcement community to ensure that agencies have the resources necessary to successfully pursue anticompetitive conduct.

Second, the Sherman Act has been a critical tool for antitrust enforcers to protect competitive markets for more than 100 years. Over the last century, it has offered a sufficiently flexible and adaptable framework for a wide range of cases with a variety of fact patterns. The *Microsoft* case provides the most recent example, and a model for the more recent Facebook and Google cases. In *Microsoft*, the D.C. Court of Appeals endorsed the idea that antitrust harm extends beyond simple price increases on consumers or output reductions; instead, the Sherman Act protects against conduct which hinders or distorts the competitive process. Courts largely understand that offering a “free” product is no exception from antitrust scrutiny or liability and instead focus on broader conceptions of competition, such as quality, consumer choice, and innovation. In doing so, their analysis goes far beyond some price metric produced by an economists’ equation.

Despite the Sherman Act’s effectiveness, the House Judiciary Committee’s Investigation of Competition in Digital Markets provides several policy solutions worthy of further consideration. However, before making any significant legislative changes, the Subcommittee should consider how comprehensive changes to antitrust law will impact the broader economy. Antitrust analysis is critically fact-specific and industry-specific. To adequately explore which legislative reforms are appropriate, this Subcommittee should carefully consider how those reforms would apply to antitrust concerns in other industries and whether additional legislative action may be necessary to address monopolies in the broader economy.

To offer an example, market concentration in agricultural markets is particularly concerning to Nebraskans where agriculture accounts for nearly 34 percent of business sales, 22 percent of gross state product, and nearly a quarter of the state’s jobs. Agricultural markets have become highly concentrated in recent years with only a few companies dominating markets in beef, pork, poultry, grain,

seeds, and pesticides. Much of this market concentration is the result of mergers and acquisitions over decades, which has consolidated market power in the hands of a few major agricultural companies. However, while concentration in agricultural markets is concerning, it is unclear whether the same antitrust reforms for digital markets are those best suited for agricultural markets.

Agricultural markets illustrate just one example of how market concentration in the U.S. economy extends far beyond the internet ecosystem. As such, American consumers would benefit from this Subcommittee's evaluation of how policy prescriptions for digital markets may impact how antitrust law is more broadly applied to different industries. To better tailor these policy solutions, this Subcommittee should encourage federal agencies to conduct additional market research in order to determine if policy solutions crafted for digital markets are broadly applicable.

In closing, I urge the Subcommittee to continue its bipartisan efforts to reach agreement on policy solutions on antitrust and competition issues. This is a momentous moment for antitrust policy in which Congress has the opportunity to erect meaningful and lasting change for the benefit of both consumers and the U.S. economy.

I look forward to your questions and hope to be a resource for the Subcommittee.