

**Prepared Statement of Federal Trade Commission  
Acting Chairwoman Rebecca Kelly Slaughter**

**Before the  
Subcommittee on Antitrust, Commercial and Administrative Law  
Of the Judiciary Committee  
United States House of Representatives**

**Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power**

**Washington, D.C.  
March 18, 2021**

Chairman Cicilline, Ranking Member Buck, and members of the Subcommittee, thank you for the invitation to appear before you today. I am Rebecca Kelly Slaughter, Acting Chairwoman of the Federal Trade Commission, and I welcome the opportunity to testify about modernizing and strengthening antitrust laws to better protect our markets and the public from rising monopoly power and anticompetitive mergers.<sup>1</sup>

Promoting competition and protecting consumers is the FTC's mission. Aggressive enforcement, including bold and innovative use of the FTC's existing authority, can and should be complemented by this Committee's work to sharpen antitrust laws and to impose broader market-wide restrictions that address pervasive anticompetitive conduct and conditions. I believe the FTC can play a critical role in restoring competition to markets riddled with anticompetitive conduct and unchecked market power; our ability to do so will be enhanced by the legislative efforts this Committee is undertaking.

The FTC has an obligation to ensure the economic system and markets are not rigged to benefit the big and powerful and against the consumers, workers, and entrepreneurs who rely on competitive and fair markets. Robust antitrust enforcement primes the economy for newcomers so that anyone with a great idea can fully participate in markets free of monopolistic practices.

But current market conditions, including the role of digital platforms, have caused nearly everyone to question whether our competition laws and enforcement approaches are adequate to protect consumers from anticompetitive conduct and mergers. Study after study shows high and increasing market power in a wide range of industries and markets throughout the economy.<sup>2</sup> We have all experienced the sense that we face fewer choices, poorer quality, higher prices and diminished buying power in many aspects of our lives, from cellphones and broadband to healthcare and pharmaceuticals to the food in our refrigerators. We feel the effects of lack of competition in these markets both directly and indirectly.

My responsibility as Acting Chair is to determine where the FTC needs to be doing more to strengthen our antitrust enforcement and when the law has become so cramped that the abuse of market power or risks from greater concentration could go dangerously unchecked despite our best efforts. I want to focus my testimony today on (1) what more the FTC can do right now

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<sup>1</sup> This written statement, my oral presentation and responses to questions are my own, and do not necessarily reflect the views of the Commission or of any other Commissioner.

<sup>2</sup> See Adil Abdela & Marshall Steinbaum, Roosevelt Inst., *The United States Has a Market Concentration Problem* (Sept. 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-US-market-concentration-problem-brief-201809.pdf>; Open Mkts. Inst., *America's Concentration Crisis: An Open Markets Institute Report* (Nov. 29, 2018), <https://concentrationcrisis.openmarketsinstitute.org>; Gustavo Grullon et al., *Are U.S. Industries Becoming More Concentrated?*, 23 Rev. of Fin. 697, 700 (2019), <https://doi.org/10.1093/rof/rfz007> (concluding that “[i]n the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels” and that concentrated industries have higher profit margins without increased operational efficiency). Market concentration also poses risks in labor markets. See José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 Lab. Econ. 101886 (2020), <https://www.sciencedirect.com/science/article/abs/pii/S0927537120300907> (calculating labor market concentration in over 8,000 geographic-occupational U.S. markets and finding that average labor markets are “highly concentrated”).

using our current authority, (2) some of the challenges we face in carrying out our mission given the laws and resourcing we have today, and (3) the legislative and regulatory proposals that have the potential to change the FTC's enforcement dynamic most dramatically.

## I. The FTC Must Push Antitrust Law Forward through Bold Agency Action

It is incumbent on the FTC to deploy the resources and the authority that we have right now to do what we can to address market power, including in its incipiency. The FTC can take concrete steps on behalf of consumers and workers to further the fight against abusive market power: (1) prioritize deterrence as a goal in our case selection and resolution strategies, by recalibrating our tolerance for litigation risk and adopting a settlement policy that fully eliminates the risk of future harm, and (2) use the full range of the FTC's tools to stop unfair methods of competition, including rulemaking and more stand-alone Section 5 enforcement in competition cases.

The need for enforcement is extraordinarily high right now, as evidenced by the FTC's very busy year in 2020. The Commission authorized staff to block or unwind seven mergers,<sup>3</sup> and another eleven deals were abandoned as a result of our investigations and in the face of staff recommendations to block them. The Commission has also taken action against anticompetitive conduct, most recently in our suit against Facebook for illegally maintaining its personal social networking monopoly<sup>4</sup> and in our cases charging pharmaceutical companies for engaging in conduct to prevent generic entry.<sup>5</sup> While there are a number of novel, cutting edge cases in the

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<sup>3</sup> FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-marketbody-worn>; FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-edgewellpersonalcare-companys-acquisition>; FTC Press Release, *FTC Files Suit to Block Joint Venture between Coal Mining Companies Peabody Energy Corporation and Arch Coal* (Feb. 26, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-joint-venture-between-coal-miningcompanies>; FTC Press Release, *FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems* (Feb. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftccommonwealth-pennsylvania-challenge-proposed-merger-two-major>; FTC Press Release, *FTC Sues to Unwind Altria's \$12.8 Billion Investment in Competitor JUUL* (Apr. 1, 2020), <https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitorjuul>; FTC Press Release, *FTC Sues to Block Proposed Acquisition of Two Memphis-Area Hospitals* (Nov. 13, 2020), <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-proposed-acquisition-two-memphis-area-hospitals>; FTC Press Release, *FTC Sues to Block CoStar Group, Inc.'s Proposed Acquisition of Chief Competitor RentPath Holdings, Inc.* (Nov. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-costar-group-incs-proposed-acquisition-chief>; FTC Press Release, *FTC Challenges Hackensack Meridian Health, Inc.'s Proposed Acquisition of Competitor Englewood Healthcare Foundation* (Dec. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-challenges-hackensack-meridian-health-incs-proposed>; FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc>.

<sup>4</sup> FTC Press Release, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

<sup>5</sup> FTC Press Release, *FTC Again Charges Endo and Impax with Illegally Preventing Competition in U.S. Market for Oxymorphone ER* (Jan. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-again-charges-endo-impax-illegally-preventing-competition-us>; FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price*

agency's record over the last several years, there are far too many cases on this list that reflect transactions or conduct that never should have left the boardroom. It is clear we have a deterrence problem.

### **Mergers**

Faced with record level merger filings and markets that are already dangerously concentrated, we must do more to deter anticompetitive transactions. Too often the FTC's win rate is cited as close to 100%, which is interpreted as a sign that the law is exactly where it should be, or perhaps even too favorable to the government. Not only is this untrue,<sup>6</sup> I believe it is also bad math. There are two potential explanations for the FTC's high win-rate statistic, each more plausible than the assessment that the law is working well.

First, the FTC's litigation win rate may mean that the Commission has chosen to bring cases in which we have the greatest confidence of success. It is good to bring cases that we are sure we can win. But, if we are bringing only those cases, that statistically suggests that we are leaving important, while challenging, cases on the table. The FTC has historically had an understandably low appetite for risky litigation, especially where those cases would be expensive to pursue, in part because we want to be careful stewards of federal dollars. However, it is important that we develop a higher tolerance for litigation risk and push the envelope in priority areas where the facts merit doing so and the law would benefit from further development.

Second, I think the FTC's win rate in court reflects aggressive risk taking by defendants as a result of jurisprudence that is so permissive that it incentivizes companies to take a chance by proposing anticompetitive mergers or engaging in anticompetitive conduct. The Commission has spent far too many of our enforcement dollars and limited staff hours preparing to challenge, or actually litigating, mergers that are clearly illegal and should never have gotten out of the boardroom. For example, this past summer, our staff litigated and won a preliminary injunction blocking a clear merger-to-monopoly of coal producers in the Southern Powder River Basin.<sup>7</sup> In 2019, the FTC challenged the acquisition by Illumina, a monopolist, of PacBio, one of the only other firms capable of competing to make next-generation DNA sequencing systems.<sup>8</sup> At the end of 2020, the Commission filed to block four significant mergers. Three of those challenges resulted in the parties abandoning the transactions, including a healthcare merger in Tennessee

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*Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>.

<sup>6</sup> See *FTC v. Thomas Jefferson Univ.*, No. 20-01113, 2020 WL 7227250 (E.D. Pa. Dec. 10, 2020); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir. 2020).

<sup>7</sup> See Fed. Trade Comm'n, *Statement of FTC Bureau of Competition Director Ian Conner on Peabody Energy Corporation and Arch Coal's Abandonment of Their Proposed Joint Venture*, (Sept. 29, 2020), <https://www.ftc.gov/news-events/press-releases/2020/09/statement-ftc-bureau-competition-director-ian-conner-peabody>.

<sup>8</sup> See Fed. Trade Comm'n, *Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California*, (Jan. 2, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/statement-gail-levine-deputy-director-ftc-bureau-competition>.

that would have left the Memphis area with only two hospital systems.<sup>9</sup> Several years ago we had to litigate all the way through trial and appeal a clear merger to monopoly of two healthcare providers in North Dakota.<sup>10</sup> These mergers are only a few of the many data points that suggest a breakdown in the deterrent effect of antitrust enforcement.

While we cannot let up on bringing the obvious cases, we must be bold in bringing cases where success in the courts is not guaranteed. And we need to lay the groundwork to up the odds that new theories and more aggressive enforcement will be successful. For example, I believe it is time to build a new approach to pharmaceutical mergers, and that is why this week the FTC announced that it is initiating a multilateral working group to do just that.<sup>11</sup> The FTC has a well-developed practice of investigating the myriad pharmaceutical mergers we see every year for overlaps in existing and pipeline products, and these competitive concerns are almost always resolved with a divestiture.<sup>12</sup> But given the high volume of pharmaceutical mergers, skyrocketing drug prices and ongoing concerns about anticompetitive conduct in the industry, it is imperative that we rethink our approach toward pharmaceutical merger review. Working hand in hand with international and domestic enforcement partners on this new joint project, we intend to take an aggressive approach to tackling anticompetitive pharmaceutical mergers.

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<sup>9</sup> FTC Press Release, *FTC Sues to Block Proposed Acquisition of Two Memphis-Area Hospitals* (Nov. 13, 2020), <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-proposed-acquisition-two-memphis-area-hospitals>; FTC Press Release, *FTC Sues to Block CoStar Group, Inc.'s Proposed Acquisition of Chief Competitor RentPath Holdings, Inc.* (Nov. 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-costar-group-incs-proposed-acquisition-chief>; FTC Press Release, *FTC Challenges Hackensack Meridian Health, Inc.'s Proposed Acquisition of Competitor Englewood Healthcare Foundation* (Dec. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-challenges-hackensack-meridian-health-incs-proposed>; FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc>.

<sup>10</sup> See FTC Press Release, *After Healthcare System Sanford Health Abandons Acquisition of North Dakota Healthcare Provider Mid Dakota Clinic, FTC Dismisses Case from Administrative Trial Process* (July 9, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/after-healthcare-system-sanford-health-abandons-acquisition-north>.

<sup>11</sup> FTC Press Release, *FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers* (Mar. 16, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>.

<sup>12</sup> See, e.g., *Dissenting Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Bristol-Myers Squibb Company and Celgene Corporation*, Fed. Trade Comm'n (Nov. 15, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1554283/17\\_-\\_final\\_rks\\_bms-celgene\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf); *Statement of the Federal Trade Commission in the Matter of Roche Holding/Spark Therapeutics*, Fed. Trade Comm'n (Dec. 16, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1558049/1910086\\_roche-spark\\_commission\\_statement\\_12-16-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf); *Dissenting Statement of Comm'r Rebecca Kelly Slaughter Regarding the Proposed Acquisition of Allergan plc by AbbVie Inc.*, Fed. Trade Comm'n (May 5, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1574577/191\\_0169\\_dissenting\\_statement\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_in\\_the\\_matter\\_of\\_abbvie\\_and\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf); *Dissenting Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter in the Matter of Pfizer Inc. / Mylan N.V.*, Fed. Trade Comm'n (Oct. 30, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1582382/191\\_0182\\_pfizer-mylan\\_-\\_dissenting\\_statement\\_of\\_commr\\_chopra\\_and\\_slaughter\\_1.pdf](https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_commr_chopra_and_slaughter_1.pdf); see also Markus H. Meier et al., Fed. Trade Comm'n, *Overview of FTC Actions in Pharmaceutical Products and Distribution* (June 2019), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview\\_pharma\\_june\\_2019.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf).

Another area in which we can build to more effective enforcement is vertical mergers.<sup>13</sup> To date, vertical mergers analysis has been too reliant on assumed procompetitive benefits. Furthermore, even where competitive concerns are identified, they have nearly always been remedied by behavioral consent decrees. I do not believe this approach to vertical enforcement is adequately capturing the competitive consequences of these transactions. At the same time, I recognize that there are substantial challenges in litigating vertical mergers.<sup>14</sup> A good starting point to build more effective vertical enforcement would be to reconsider the vertical guidelines issued last year; though the guidelines reasonably reflect past agency practice, they overly emphasize the benefits of vertical mergers, and fail to address a number of important competitive concerns.<sup>15</sup>

In addition to reconsidering agency guidelines, we should not shy away from structural remedies in cases, whether vertical or horizontal. While structural remedies are sometimes decried as a radical approach, they may be better characterized as a conservative resolution. Between structural and behavioral remedies, break-ups can provide a clean separation and a fresh start for a business, while behavioral remedies require ongoing involvement and monitoring by government overseers.

### **Anticompetitive Conduct**

Just as we have seen more proposed mergers in already concentrated markets, we have also seen the need for aggressive conduct enforcement. In addition to the Commission's groundbreaking case against Facebook, filed in parallel with our state partners, we brought cases targeting allegedly anticompetitive conduct by drug-sellers Endo and Impax, as well as the price-spike scheme of Vyera and Martin Shkreli for the life-saving drug Daraprim.<sup>16</sup> Conduct cases are critical, but they are more time-consuming and fact-specific, and sporadic enforcement may limit the deterrent effect.<sup>17</sup> Deterrence for our anticompetitive conduct agenda must mean looking for

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<sup>13</sup> *Dissenting Statement of Comm'r Rebecca Kelly Slaughter In the Matter of Sycamore Partners II L.P., Staples, Inc., and Essendant, Inc.*, File No. 181-0180 (January 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448321/181\\_0180\\_staples\\_essendant\\_slaughter\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf).

<sup>14</sup> *United States v. AT&T Inc.*, 916 F.3d 1029, 1033-34 (D.C. Cir. 2019).

<sup>15</sup> *Dissenting Statement of Comm'r Rebecca Kelly Slaughter in Re FTC-DOJ Vertical Merger Guidelines*, P810034 (June 30, 2020), <https://www.ftc.gov/public-statements/2020/06/dissenting-statementcommissioner-rebecca-kelly-slaughter-re-ftc-doj>.

<sup>16</sup> FTC Press Release, *FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim* (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>; FTC Press Release, *FTC Again Charges Endo and Impax with Illegally Preventing Competition in U.S. Market for Oxymorphone ER* (Jan. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-again-charges-endo-impax-illegally-preventing-competition-us>.

<sup>16</sup> See Jamie Towey & Brad Albert, Fed. Trade Comm'n, *Then, now, and down the road: Trends in pharmaceutical patent settlements after FTC v. Actavis* (May 28, 2019), <https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/then-now-down-road-trends-pharmaceutical-patent>.

<sup>17</sup> The one exception to this may be the Commission's decades of effort devoted to stopping anticompetitive pay-for-delay settlement agreements. See *id.* But, even in that area, it took a very long time to get from the early challenges to a resolution, and we continue to see creative payment arrangements that attempt to work around the existing caselaw.

impact cases with broad application, like Facebook, Vyera and Surescripts.<sup>18</sup> And, as discussed in detail above, we should not be afraid to bring hard or novel cases, to push for a resolution that maximizes deterrence, and to litigate where the best settlement we can achieve does not meet those goals.

In addition to using our familiar tools more strategically to foster deterrence, the FTC needs to dust off some tools that have been languishing too long in the toolbox. Congress intended Section 5 of the FTC Act to apply to market-power abuses that are not captured by the Sherman or Clayton Acts, and we should use this legal authority more frequently on a standalone basis, such as to go after the anticompetitive use of market power that might not rise to the level of gaining or maintaining monopoly power.<sup>19</sup> There also may be instances where Section 5's prohibition on unfair or deceptive acts and practices could be used in competition cases. For example, I believe Section 5 provides the basis for additional counts in the Commission's pending litigation against Martin Shkreli and Vyera Pharmaceuticals to challenge an off-patent drug price spike.<sup>20</sup>

The FTC also has rulemaking authority that it could use to deter and stop anticompetitive conduct.<sup>21</sup> Rulemaking can be used to stop anticompetitive activity that is difficult to litigate on a case-by-case basis. For example, I strongly support the Commission taking up and considering a rulemaking to address unfair and anticompetitive non-compete provisions in employment contracts. That is just one of many good ideas that have been surfaced for competition rulemaking, and I am eager to explore them. Elevating rule-making efforts across our mission is

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<sup>18</sup> FTC Press Release, *FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets* (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

<sup>19</sup> See Jonathan Sallet, *The Federal Trade Commission, Unilateral Conduct, and "Unfair Method of Competition,"* in Albert A. Foer *Liber Amicorum: A Consumer Voice in the Antitrust Arena* (Nicolas Charbit & Sonia Ahmad eds., 2020).

<sup>20</sup> See *Statement of Comm'rs Rohit Chopra and Rebecca Kelly Slaughter regarding Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes* (June 24, 2019), [https://www.ftc.gov/system/files/documents/reports/ftc-report-standalone-section-5-address-high-pharmaceutical-drug-biologic-prices/p180101\\_section\\_5\\_report\\_dissenting\\_statement\\_by\\_chopra\\_and\\_slaughter\\_6-27-19.pdf](https://www.ftc.gov/system/files/documents/reports/ftc-report-standalone-section-5-address-high-pharmaceutical-drug-biologic-prices/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf); *Concurring Statement of Comm'r Rebecca Kelly Slaughter In the Matter of Fed. Trade Comm'n and State of New York v. Vyera Pharmaceuticals, LLC; Phoenixus AG; Martin Shkreli; and Kevin Mulleady* (Jan. 27, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564517/2020\\_01\\_27\\_final\\_rks\\_daraprim\\_concurring\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf).

<sup>21</sup> 15 U.S.C. § 46(g) (authorizing the Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter"). I have written and spoken many times about reinvigorating our rulemaking efforts in consumer protection. See Remarks of Commissioner Rebecca Kelly Slaughter, Algorithms and Economic Justice, UCLA School of Law (Jan. 24, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1564883/remarks\\_of\\_commissioner\\_rebecca\\_kelly\\_slaughter\\_on\\_algorithmic\\_and\\_economic\\_justice\\_01-24-2020.pdf](https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf); Remarks of Commissioner Rebecca Kelly Slaughter, The Near Future of U.S. Privacy Law, Silicon Flatirons—University of Colorado Law School (Sept. 6, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1543396/slaughter\\_silicon\\_flatirons\\_remarks\\_9-6-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf). My colleague Commissioner Chopra and Lina Khan have made a compelling case that rulemaking is also an important element of effective antitrust enforcement. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4>.

a top priority for me and I believe will serve as a force multiplier for FTC enforcement efforts, especially in light of challenging jurisprudence.

## II. Innovative Aggressive Enforcement Still Faces Serious Challenges

While it is my firm belief that the FTC can and will do even more to combat anticompetitive mergers and conduct, each of the efforts described above presents challenges. Potentially more litigation with less certain outcomes requires more resources. This year is already shaping up to be another year with sustained high levels of merger activity and enforcement. Notably, we are experiencing unprecedented levels of merger filings. Last month, February 2021, the FTC and the Department of Justice processed 304 HSR filings, compared to 140 filings in February 2020.<sup>22</sup> In the first five months of this fiscal year, we have already received over 1350 HSR filings, an alarming pace when compared to 848, the average number of filings received in the first five months in the last five years. Many of these deals have required at least a preliminary assessment of competitive risks, adding to existing high demands on our resources.

The Commission greatly appreciates the additional funding it received as part of this year's appropriations, which provided a much-needed boost to our budget and helps address the increasing costs without cutting back on our current staffing or enforcement levels. But we are increasingly concerned about the ever-growing workload in both our competition and consumer protection missions and whether we will have enough resources to keep up with the increasing demand. As I have noted, the Commission is looking for ways to use existing resources more efficiently and effectively, but additional resources would be put to good use and help us to do more to further our mission.

Another pressing problem for the Commission is the ongoing threat from the courts to our authority under Section 13(b) of the FTC Act; a series of bad decisions limit our ability to enjoin illegal conduct and seek monetary redress. Last fall, all five of the sitting Commissioners urged Congress to act quickly to restore Section 13(b) in the face of these challenges.<sup>23</sup> While Section 13(b) is often contemplated in the fraud context, it matters a great deal for antitrust enforcement. In *FTC v. Shire ViroPharma*, a case involving a drug company's alleged abuse of FDA's citizen petition process to delay generic competition, the court held that the FTC can bring enforcement actions under Section 13(b) only when a violation is either ongoing or "impending" at the time the suit is filed.<sup>24</sup> That decision unnecessarily limits the Commission's ability to obtain relief for consumers who have been harmed by unlawful conduct that occurred

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<sup>22</sup> To increase transparency regarding its merger review workload, the FTC publishes the number of monthly HSR filings on its website. Fed. Trade Comm'n, *Premerger Notification Program*, <https://www.ftc.gov/enforcement/premerger-notification-program>. These numbers are preliminary and subject to a year-end audit, and final numbers are published in the FTC/DOJ Annual HSR reports. See Appendix A of each Annual Report, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

<sup>23</sup> Letter from Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips, Rohit Chopra, Rebecca Kelly Slaughter & Christine S. Wilson to Representative Frank Pallone, Jr., Representative Greg Walden, Senator Roger Wicker & Senator Maria Cantwell (Oct. 22, 2020), <https://www.adlawaccess.com/wp-content/uploads/sites/793/2020/10/2020.10.22-FTC-Letter-Section-13b-of-the-FTC-Act.pdf>.

<sup>24</sup> *FTC v. Shire ViroPharma Inc.*, 917 F.3d 147 (3d Cir. 2019).



in the past. And, in *FTC v. AbbVie Inc.*, the Third Circuit cited *Shire ViroPharma* in agreeing incorrectly that the FTC cannot sue under Section 13(b) unless conduct is imminent or ongoing.<sup>25</sup> In its motion to dismiss the Commission’s antitrust complaint, Facebook has cited these decisions and argued that Section 13(b) bars the suit. I hope Congress will act on the Commission’s request and swiftly restore the longstanding interpretation of Section 13(b).

But in addition to these FTC-specific tweaks to the law, I support Congress’s consideration of stronger antitrust laws and, where applicable, market-specific rules.

### **III. Time to Reform Antitrust Laws**

For decades, public and private antitrust enforcers have faced difficult legal hurdles in court that make our jobs increasingly challenging. The antitrust statutes were drafted broadly and with the intent to cover evolving patterns of conduct or market structure in a variety of industries; however, especially in light of recent jurisprudence, the burden on plaintiffs to succeed in court is high. By giving antitrust enforcers, including private parties, the tools needed to address market distortions created by market power, Congress will have profound effects on our ability to win cases and foster deterrence.

At their core, our antitrust laws protect the democratic ideal of fair participation in a free society. I strongly support legislation that will center this democratic ideal in the FTC’s competition enforcement programs. Specifically, I support laws that will facilitate protecting not only consumers but all market participants—workers, entrepreneurs, and independent and small businesses—from monopolistic practices and exclusionary conduct. Robust antitrust law enforcement leads to competitive markets with low prices, more innovation, better conditions of supply, and opportunities to prosper in business (especially small businesses) and as workers.

Several legislative proposals in Congress would materially improve enforcers’ ability to block anticompetitive mergers, including those that are especially resource-intensive to investigate and challenge. Clearer bright-line rules could minimize the need to engage in tortured and expensive efforts to both measure and balance harm and efficiencies, particularly in cases where the facts support a clear theory of harm. Shifting the burden of proof so that the parties that wish to merge must prove that a proposed transaction would not materially harm competition for those transactions would substantially help to deter unlawful mergers. In addition, Congress should right-size the standard for what the DOJ and FTC need to show to prove a merger is unlawful to be more reflective of what would actually protect markets from undue concentration.

The effect of cramped case law has been particularly profound in conduct cases. Under current Section 5 jurisprudence, courts have to consider conduct under the “rule of reason,” a

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<sup>25</sup> *FTC v. AbbVie, Inc.*, 976 F.3d 327 (3d. Cir. 2020) (dicta). The *AbbVie* court also concluded that the Commission could not obtain any monetary relief under Section 13(b) for antitrust violations by the drug company. The court found that the company violated the antitrust laws by engaging in sham litigation to keep out generic competition, but nevertheless reversed the district court’s award of \$448 million meant to repay overcharged consumers. *Id.* at 375-79.

fact-intensive investigation into whether the anticompetitive effects of the conduct outweigh the procompetitive justifications. This has led to an extremely limited application of the antitrust laws. In that vein, there are several Supreme Court decisions that hamstring antitrust enforcement to the detriment of consumers, workers, and entrepreneurs. Congress should consider legislation to correct the problematic aspects of these court decisions.<sup>26</sup>

These types of changes would make a material difference in our enforcement agenda, but they are not mutually exclusive with the broader restrictions on dominant platforms Congress is considering. I firmly believe that effective enforcement is a complement, not an alternative, to thoughtful regulation. That is especially true for regulatory models that cannot be effectuated by *ex post* enforcement actions, even those with the broadest deterrent effect. The FTC has a role to play in establishing appropriate market-wide rules with its competition rulemaking authority, but Congress could also pass such rules by statute. I look forward to working with this Committee and others in Congress to consider the best balance of enforcement and regulatory frameworks to promote competition.

## **Conclusion**

The FTC remains committed to efficiently marshalling its resources in order to protect consumers and promote competition, to anticipate and respond to changes in the marketplace, and to meet current and future challenges. But even our most effective enforcement efforts are no substitute for legislative changes that clean up bad case law, impose clear rules, and consider wider reaching regulatory models for particularly problematic markets. We look forward to continuing to work with the Committee and Congress, and I look forward to answering your questions.

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<sup>26</sup> See, e.g., *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Ohio v. American Express Co.*, 138 S. Ct. 2274, 585 U.S. (2018).