July 29, 2020

The Honorable David N. Cicilline
Chairman, House Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

The Honorable F. James Sensenbrenner
Ranking Member, House Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

Dear Chairman Cicilline and Ranking Member Sensenbrenner,

We, the undersigned, write to you regarding your July 29 hearing, "Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google." We also understand that the House Judiciary Committee has launched its own investigation into these companies and are also reviewing whether changes are necessary to existing antitrust laws. This comes as both sides of the aisle are pushing for the weaponization of antitrust, either as a tool to punish corporate actors with whom they disagree or out of a presupposition that big is bad.

We would like to emphasize the need to distinguish between the proper and improper uses of antitrust in approaching discussions of market power, and are concerned that today's hearing could lead to the use of antitrust to address concerns surrounding online content moderation, data privacy, equality, or other socio-political issues that are unrelated to the competitive process.

It is important to consider what is at stake. Using antitrust to achieve policy or political goals would upend more than a century of legal and economic learning and progress. The need to bring coherency to antitrust law through a neutral underlying principle that cannot be weaponized is what led to the adoption of the modern consumer welfare standard.[1] It is broad enough to incorporate a wide variety of evidence and shifting economic circumstances but also clear and objective enough to prevent being subjected to the beliefs of courts and enforcers. Abandoning the consumer welfare standard by giving enforcers a roving mandate would shift antitrust law back to the approach of the 1960s when, in Justice Potter Stewart's words, "[t]he sole consistency that I can find is that, in litigation under [the antitrust laws], the Government always wins."[2]

It is also important to put today's hearing into perspective. The current antitrust debate is relevant to far more than just "Big Tech." The economic consequences of many of the recent proposals would make the American economy and consumers substantially worse off across a wide array of industries. Proposals include aggressive merger prohibitions, inverting the burden of proof, allowing collusion and antitrust exemptions for politically favored firms, and politicizing antitrust enforcement decision-making more generally. Arbitrary or overly-broad antitrust enforcement would hamper our economic recovery and risks job losses—something we can ill-afford as the nation recovers from the COVID-19 economic slow-down.

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[1] See Robert H. Bork, "The Antitrust Paradox: A Policy At War With Itself" (1978).
[2] *United States v. Von's Grocery Co.,* 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

In sum, weaponizing antitrust for broader socioeconomic purposes would fundamentally alter the primary goal of antitrust, undermine the rule of law, and negatively impact consumers. We ask that this letter be entered in the hearing record. We thank you for your oversight of this important issue.

Sincerely,

Ashley Baker
Director of Public Policy
The Committee for Justice

Robert H. Bork, Jr.
President
The Bork Foundation

Ralph Benko
Chairman
The Capitalist League

Wayne Brough
President
Innovation Defense Foundation

Tom Giovanetti
President
Institute for Policy Innovation

Douglas Holtz-Eakin
President
American Action Forum

Karen Kerrigan
President & CEO
Small Business & Entrepreneurship Council

Curt Levey
President
The Committee for Justice

Stephen Moore
Co-Founder
Committee to Unleash Prosperity

Katie McAuliffe
Executive Director
Digital Liberty

Doug McCollough
Director
Lone Star Policy Institute

Lisa B. Nelson
CEO
American Legislative Exchange Council

Grover G. Norquist
President
Americans for Tax Reform

Andrea O'Sullivan
Director, Center for Technology and Innovation
James Madison Institute

Eric Peterson
Director of Policy
Pelican Institute

Steve Pociask
President / CEO
The American Consumer Institute

Thomas A. Schatz
President
Citizens Against Government Waste

Pete Sepp
President
National Taxpayers Union

Josh Withrow
Senior Policy Analyst
FreedomWorks

David Williams
President
Taxpayers Protection Alliance

NOTE: Organizations listed for identification purposes only.