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February 6, 2019

Joseph Simons, Chairman  
The Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century**

Dear Chairman Simons:

The Federal Trade Commission’s (the “Commission’s”) Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century address matters of pivotal importance to the United States economy and consumers. Antitrust policy is at a crossroads: the consumer welfare standard is under attack, proposals to expand the role of antitrust to include non-economic goals gain momentum, competition agencies around world increasingly turn to antitrust to impose limits on intellectual property rights, and the foundational role of economics in antitrust has been contested. Fundamental debates are taking place that will shape the future of antitrust institutions for decades to come.

The American Conservative Union (“ACU”) commends the Commission for undertaking the important task of bringing together practitioners, enforcers, economists, and academics to discuss in a prominent forum the role of competition and consumer protection laws. The scope, breadth, and sheer length of the Commission’s eleven-part series of hearings, which began in September 2018 and has continued over the course of six months, ensures that these hearings and any subsequent Commission report will play a meaningful role in how politicians, government officials, and other key decision makers—both in the United States and around the globe—continue to perceive and implement these bodies of law.

Congress intended the Commission to be the expert body and guiding authority for antitrust law and its development in the United States. That role comes with significant responsibility. To establish a positive influence on the development of antitrust law and policy, the Commission must not only lend its own voice, expertise, and experience to the current debates, but it must also exercise its expertise to ensure the pivotal debates encompass viewpoints that are rooted in sound legal and economic evidence. The Commission hearings are an important platform for those debates. The American Conservative Union believes debate in the marketplace of ideas is vital to the healthy development of American institutions, including its antitrust agencies. A hearing record supported by vigorous debate from the variety of perspectives supported by legal reasoning and economic evidence is critical. Using the Commission’s platform, however, to highlight,

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promote, or provide momentum to unsubstantiated ideas undermines its mission and fails to satisfy the Commission’s responsibility to American consumers as an expert body.

We are concerned the Commission has indicated a willingness to be “open” to radical alternatives to the consumer welfare standard and to provide a significant platform for the promotion of those ideas without sufficient opportunity to debate or rebut them. We are also concerned some Commissioners appear to have their mind made up on the appropriate outcome for the hearings. Even before the hearings began, Commissioner Rohit Chopra published a comment proposing that the Commission increase use of its rulemaking authority to “bolster antitrust enforcement.”<sup>1</sup> At the start of the hearings, Commissioner Rebecca Slaughter announced that, “[i]t is simply not plausible that a meaningful self-examination will lead to the conclusion that nothing should change.”<sup>2</sup>

In your own opening statements as Chairman, you committed to approaching challenges to “the broad antitrust consensus” with “a very open mind,” and “to be influenced by what [is seen and heard] at these hearings.”<sup>3</sup> You appealed to some economic literature suggesting lax antitrust enforcement had led to a more concentrated and less competitive economy as a justification for the hearings, but did not acknowledge that the question itself was the subject of considerable debate among economists.<sup>4</sup> The Commission as an expert body has responsibility to do more than remain open to all ideas and challenges to current antitrust institutions. It also has the responsibilities to ensure that it does not give disproportionate prominence to extremist viewpoints, and to foster a debate capable of producing a record of empirical evidence sufficient to address the key questions.

Senator Orrin Hatch recently expressed a similar concern that the hearing witnesses “have been predominately in favor of changing” the consumer welfare standard, and “those in favor of

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<sup>1</sup> Rohit Chopra, Commissioner, *Comment of Federal Trade Commissioner Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century*, Docket No. FTC-2018-0074 (Sep. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1408196/chopra - comment to hearing 1 9-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf).

<sup>2</sup> Rebecca Kelly Slaughter, Commissioner, *Welcome and Introductory Remarks, Hearing #2 on Competition and Consumer Protection in the 21st Century* (Sep. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1412049/commissioner\\_slaughter\\_opening\\_remarks\\_for\\_ftc\\_competition\\_and\\_consumer\\_protection\\_hearings\\_sept21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1412049/commissioner_slaughter_opening_remarks_for_ftc_competition_and_consumer_protection_hearings_sept21.pdf)

<sup>3</sup> Joseph Simons, Chairman, *Welcome and Introductory Remarks, Hearing #1 on Competition and Consumer Protection in the 21st Century* (Sep. 13, 2018), <https://www.ftc.gov/public-statements/2018/09/prepared-remarks-chairman-joe-simons-hearings-competition-consumer>.

<sup>4</sup> *Id.* (citing *Market Concentration Issues Paper by the Secretariat*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (June 6-8, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf)); see also Gregory J. Werden and Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, VANDERBILT OWEN GRADUATE SCHOOL OF MGMT. No. 3156912 (Apr. 5, 2018), <https://ssrn.com/abstract=3156912>. Joshua D. Wright, Elyse Dorsey, Jonathan Klick, and Jan Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, forthcoming *Arizona State Law Journal* (2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3249524](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524)



the current approach have not had sufficient time to rebut some of the claims being made.”<sup>5</sup> It appears the Commission has bent over backwards to accommodate views critical of the consumer welfare standard, and those that would increase significantly the role of antitrust and government intervention in the lives of Americans. Critical keynote positions and opening addresses – especially in the critical early days of the hearings – have been used largely to provide platforms to speakers advocating substantial expansion of the role of antitrust. Rebuttal witnesses, particularly on the foundational topic regarding the *Role of the Consumer Welfare Standard in U.S. Antitrust Law*, were largely relegated to panelist positions with less time and often outnumbered. For example, despite the fact that the overwhelming majority of both conservative and liberal antitrust experts and practitioners support the consumer welfare standard, the Commission heard from a panel with four of six panelists who rejected it in favor of alternatives.

An uninitiated observer to the hearings might believe that these detractors represent a vociferous majority in the antitrust community. On the contrary, a widespread, bipartisan consensus supports the *traditional* legal and economic approaches being debated at the Commission’s hearings. Tellingly, many of the individuals proposing a radical overhaul of the consumer welfare standard have little practical experience in the antitrust field. By contrast, an overwhelming bipartisan majority of expert practitioners and economists implore that we proceed with caution: the current body of antitrust law arrived at the consumer welfare standard through the application of sound economic analysis to consumer-centric goals.<sup>6</sup> And indeed, the bedrock of the consumer welfare standard involves the core determination whether consumers have been harmed by a particular transaction or behavior.

The Commission’s ultimate goal of contributing to the current antitrust and consumer protection debates cannot be achieved without hearings (and conclusions) that are supported by substantive antitrust facts and analysis. On behalf of the American consumers whom our competition laws are designed to protect, the Commission must ensure that witnesses brought before it are qualified to speak on the issues at hand, and that the record reflects a fair and objective consideration of all legitimate testimony and comments. Finally, the Commission must ensure that any conclusions resulting from the hearings are supported by sound legal and economic evidence.

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<sup>5</sup> *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, Comm. on the Judiciary*, 115th Cong. (Oct. 3, 2018) (Statement of Sen. Hatch, Member, Comm. on the Judiciary), <https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws>.

<sup>6</sup> For example, Professor Carl Shapiro, Ph.D., and American Antitrust Institute President Diana Moss, Ph.D., are among the many liberal thinkers who support maintaining the consumer welfare standard. See Carl Shapiro, *Antitrust in a Time of Populism*, INT’L JOURNAL OF IND. ORG. (Feb. 27, 2018); see also *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt? Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, Comm. on the Judiciary*, 115th Cong. (Dec. 15, 2017) (Diana Moss, Ph.D. Responses to Questions for the Record), <https://www.judiciary.senate.gov/download/moss-responses-to-questions-for-the-record>



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Not only will these measures protect against the Commission reaching a flawed result to achieve the best outcome for consumers; they will also confer credibility on the hearings and generate broader support for their conclusions.

Respectfully,

Daniel Schneider  
Executive Director