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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Antitrust at a Precipice
Remarks of Commissioner Rebecca Kelly Slaughter¹
As Prepared for Delivery

GCR Interactive: Women in Antitrust
November 17, 2020

Thank you for inviting me today. I appreciate GCR for having the vision to create and support this Women in Antitrust conference year after year. It is a delight to speak at a conference where all of the panel members and speakers are women, a welcome break from the all-too-common “manel.”

We are here on Zoom because our lives have been turned upside down by the COVID-19 pandemic. We know that women have been and continue to be disproportionately affected by the economic consequences of COVID, especially in the job market. The effect is so profound that this economic downturn has been deemed a “she-cession.” Women are leaving the workforce, both involuntarily and voluntarily, at shockingly high rates. This is largely explained by two key factors. First, women make up a significant proportion of workers in “contact intensive” sectors of the economy, such as hospitality, where many businesses have shuttered due to the pandemic. Second, as schools and daycare centers shut down, women have provided the majority of childcare, making it difficult to maintain jobs.²

The statistics are shocking. In September alone, 865,000 women dropped out of the workforce.³ In all, only about half of all jobs lost this year have returned. The picture is even worse for women of color. White men and women have seen about 60% of lost jobs come back, but only 39% of job loss has been regained for Black women. A recent report found that one in four women are considering downsizing their careers or leaving the workforce as a result of the

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

² See, e.g., Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The shecession (she-recession) of 2020: Causes and consequences*, VoxEU (Sept. 22, 2020), <https://voxeu.org/article/shecession-she-recession-2020-causes-and-consequences>; Nicole Bateman & Martha Ross, *Why has COVID-19 been especially harmful for working women*, Brookings Institution (Oct. 2020), <https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/>; Julie Kashen, Sarah Jane Glynn & Amanda Novello, *How COVID-19 Sent Women’s Workforce Progress Backward*, Center for American Progress (Oct. 30, 2020), <https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/>.

³ See Chabeli Carrazana, *865,000 women left the workforce last month*, USA Today (Oct. 11, 2020), <https://www.usatoday.com/story/news/politics/2020/10/11/865-000-women-were-laid-off-last-month/3609016001/>.

damage wrought by COVID-19, and it's the first time in six years that the study has found evidence of women intending to leave their jobs at higher rates than men.⁴

This isn't just statistics; it's personal. I'm sure what I just described resonates with many of you. It resonates for me personally. I had moments this past year, particularly in the spring, where I took a step back and thought, I don't know if I can do this. I have an amazing job that I love and I care about. I enjoy an unusual degree of flexibility in structuring my work schedule. I have a wonderful, supportive, and engaged partner. Nonetheless, the stress and anxiety of trying to do my work, manage our household, supervise distance learning, and keep our family safe felt like too much for me. I wondered if I should just step back and stop working to take care of my family. I have to think that if I am feeling this way—with all of the advantages and privileges that I have at my disposal—it has to be an even more profound feeling for so many other women. I am hanging on, but too many other women are not in the position to do so.

We need to take serious stock of what all of this means. The largescale departure of women from the workforce will have an indelible and compounding effect on the careers and earnings of hundreds of thousands of women—and collaterally on the families and communities that they support. Women have already been climbing a mighty mountain to reach the goal of gender equity on the job and in the labor market; even as we have been making progress on that climb, the mountain has just gotten even higher.

Diversity, Inclusion, and Anti-racism in Antitrust

The challenges of the last year have gone well beyond the “she-cession.” In addition to the economic issues that we're talking about, we cannot forget that eleven million Americans have been diagnosed with COVID. Nearly a quarter million have died so far. On top of that, America has also been confronting the enduring legacy of systemic racism in a more open and pervasive way than we have in a long time—if not ever.

Through it all, women not only have continued to serve as the backbone of their families and communities but also have made significant strides in our profession and in our country despite these intensely difficult times. Though the struggle feels constant these days, we must celebrate when barriers are broken. I want to especially acknowledge the impact of women of color, and particularly our Vice President–Elect, Kamala Harris.

I want to pause for a moment on the Vice President–Elect because her rise is significant in so many ways. She will be the first woman, the first Black person, and the first Indian-American Vice President of our country. And, in case you had not heard by now, she was an intern at the Federal Trade Commission while a student at Howard University.⁵ So she has been a part of this community of women in antitrust for quite some time.

⁴ See McKinsey & LeanIn.Org, *Women in the Workplace 2020*, 6, 9 (Sept. 30, 2020), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf.

⁵ See Mike Swift, Claude Marx & Max Fillion, *VP pick Harris has long regulatory history with Big Tech on privacy*, MLex Watch (Aug. 24, 2020), <https://www.mlexwatch.com/articles/9021/vp-pick-harris-has-long-regulatory-history-with-big-tech-on-privacy>.

Vice President–Elect Harris has been outspoken on competition issues, especially in health care markets. When she was Attorney General of California, her office opened the investigation of market concentration and its effects on prices that was the basis for California’s 2018 case against Sutter Health.⁶ We welcome her experience coming into the White House as we continue to think about where antitrust is and where it needs to go in the future.

The antitrust community as a whole has taken significant steps to recognize the importance of diversity and inclusion, including through professional development and substantive inclusivity. The antitrust community added to its efforts with the inaugural year for the Women.Connected and Diversity.Advanced initiatives supported by the Antitrust Section of the ABA. The two groups sponsored a 21-Day Racial Equity Habit-Building Challenge in August and inducted the first class of the brand new Hall of Fame-inism. This event honored four outstanding and trailblazing women: Deborah Majoras, Lisa Phelan, Bonny Sweeney, and Meg Guerin-Calvert. The OECD has taken a major step toward developing gender inclusive competition policy and has a call out for proposals to explore whether additional relevant features of markets, behaviors of consumers and firms, and more effective competition policy can help to address gender inequality.⁷

These are critical initiatives for advancing gender equity in the profession, but I am also very interested in how antitrust law itself can be used to promote racial inclusion and equity. More specifically, how might antitrust enforcers think creatively about using existing authority to combat systemic racism?

I know that even broaching the subject departs from the way many of us have been trained to think about antitrust law, and that it could generate strong reactions. So, earlier this fall, during the height of the renewed conversation about race and America’s reckoning with racism, I chose to dive into this conversation on that bastion of thoughtful reflection and respectful engagement: Twitter.⁸

My proposal is simple: Antitrust can and should be deployed in the fight against racism. As anticipated, I have received lots of questions and critical feedback. I appreciate and very much welcome that engagement. To me, the objections I have heard start with what I view to be a faulty premise: that antitrust can and should be value-neutral, and therefore social problems like racism do not have a role in antitrust enforcement.

I have two problems with this premise. First, why should antitrust be a value-neutral area of the law when no other area of law enforcement is expected to be value-neutral? We are entirely comfortable with criminal prosecutors explicitly setting out values-based priorities, such as a focus on white-collar crime or violent crime. This is true in civil law enforcement too. At the FTC, within our consumer-protection mission, we have focused on predatory lending as well as discrimination in auto financing—two areas that we know disproportionately harm Black

⁶ See Reed Abelson, *Kamala Harris and the Push to Cut Hospital Bills in California*, N.Y. Times (Nov. 9, 2020), <https://www.nytimes.com/2020/10/06/health/kamala-harris-health-care.html>.

⁷ See OECD, *What’s gender got to do with competition policy?* (Mar. 2, 2018), <https://oecdonthellevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/>.

⁸ Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (Sept. 9, 2020, 2:28PM), <https://twitter.com/RKSlaughterFTC/status/1303762105431207947>.

communities. Yet for some reason we seem to expect antitrust to be the one value-free zone in law enforcement.

The second problem I have with the premise that antitrust should be uniquely value-neutral is that I do not believe antitrust *can* be value-neutral. The concept of value-neutral antitrust enforcement is at best aspirational, not unlike the idea of “race blindness” as a way to eliminate racial discrimination. Antitrust enforcement necessarily addresses fundamental economic and market structures. In the United States, these economic and market structures are historically and presently inequitable. So, when we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity. Our decisions can either reinforce existing structural inequities or work to break them down. I would prefer we choose the latter, and either way, that we make our choice on an informed basis and with open eyes.

I am not suggesting that we pretend that U.S. antitrust law explicitly considers race or racism. I am simply suggesting that we begin to think strategically about using antitrust as a tool for combatting structural racism—a system built on a social construct that favors incumbents. We need to be asking how we can use our enforcement tools to ensure that markets are competitive and inuring to the benefit of historically underrepresented and economically disadvantaged consumers rather than incumbents. We can focus on markets and anticompetitive practices where harm disproportionately falls on people of color. Some examples that are getting increasing attention include the pervasive use of non-compete clauses to limit worker mobility and the lack of access to capital as an entry barrier for Black- and minority-owned business as an entry barrier.⁹

We should start these efforts with data. We should make a concerted effort to collect demographic data where possible in our investigations so that we can understand where and how communities of color are affected. I am confident there are ways to incorporate the questions into our analysis of the competitive effects of mergers and acquisitions as well as conduct matters.

Countering Market Power and Building Back Deterrence

In addition to prioritizing cases that specifically help reduce racial inequity, we can generally work toward a more equitable society by invigorating antitrust enforcement across the board. Doing so will help counter market power that exacerbates inequity throughout the economy.

Studies show high and increasing market power in a number of industries and markets throughout the economy.¹⁰ Digital markets are a key concern, but the scourge of market power

⁹ See Orly Lobel *Gentlemen Prefer Bonds: How Employers Fix the Talent Market* 59 Santa Clara L. Rev. 663 (2020), <https://digitalcommons.law.scu.edu/lawreview/vol59/iss3/7>; Minority Bus. Dev. Agency, Commerce Dep’t, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs* (2010), <https://archive.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>.

¹⁰ See Adil Abdela & Marshall Steinbaum, Roosevelt Institute, *The United States Has a Concentration Problem* (Sept. 2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf>; Open Markets Institute, *America’s Concentration Crisis* (Nov. 29, 2018),

reaches far beyond tech. We have all felt the impact of market power in our daily lives, from cellphones and broadband to healthcare and pharmaceuticals to the food in our refrigerators. Workers also feel the squeeze from concentrated labor markets and conditions that allow employers to impose anticompetitive restrictions on employees and to skirt labor laws by misclassifying their workers as independent contractors rather than as employees.¹¹

Congressional intervention is an essential input to reinvigorating antitrust law. First, Congress should fix bad case law, but, most urgently, I would like to see Congress increase the FTC's funding levels. It is indisputable that FTC funding has not kept pace with the market demands placed on our agency. For example, on the antitrust side, our merger workload is entirely dependent on how many mergers—especially how many competitively problematic mergers—are filed. Merger filings have increased nearly 80% since 2010; over that time period, the FTC budget has increased only 13%, and its employee headcount has decreased. In fact, the FTC had roughly 50% more full-time-employees at beginning of the Reagan Administration than it does today.¹²

One obvious way to increase funding for antitrust enforcement without taking money from somewhere else would be for Congress to increase merger-reporting fees, which have not kept pace with inflation, especially for mega-mergers. Senator Klobuchar, another leading woman in antitrust, has a bipartisan bill to address this disparity.¹³

Turning to the substantive fixes to the law, the recent House Judiciary Report laid out a detailed menu of legislative proposals that extends well beyond digital markets.¹⁴ All of those ideas should be on the table and considered in an effort to amend and modernize antitrust law. But we cannot wait for Congress to act. Instead, it is incumbent on the FTC to deploy the resources and

<https://concentrationcrisis.openmarketsinstitute.org>; Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, 23 Rev. of Fin. 697 (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, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *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.”).

¹¹ See *Cmt. of Comm’r Rebecca Kelly Slaughter on the Dep’t of Labor’s Proposed Rule on Independent Contractor Status under the Fair Labor Standards Act* (Oct. 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582178/comment_of_commissioner_rebecca_kelly_slaughter_on_the_department_of_labor_proposed_rule_on_0.pdf.

¹² See Fed. Trade Comm’n & Dep’t of Justice, *Hart-Scott-Rodino Annual Report Fiscal Year 2019*, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf; Fed. Trade Comm’n, *FTC Appropriation and Full-Time Equivalent (FTE) History* (last visited Nov. 19, 2020), <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

¹³ Merger Filing Fee Modernization Act of 2019, S. 1937, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1937>.

¹⁴ See Staff of Subcomm. on Antitrust, Commercial, and Admin. L. of the H. Comm. on the Judiciary, *Investigation of Competition in Digital Markets* (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

the authority that we have right now to make the best case for why we should get more funding, and to do what we can to arrest market power, including in its incipiency.

The FTC can take a couple of concrete steps on behalf of consumers and workers to further the fight against market power: (1) take a more strategic approach towards our case selection and resolution to foster greater deterrence; and (2) use the full range of the FTC's tools to stop unfair methods of competition, including more stand-alone Section 5 enforcement and competition rulemaking.

First, the agency needs to build back deterrence. This means adapting to new circumstances and looking to see whether our enforcement playbook is adequate to target industries and conduct that pose the most serious threats to competition. I often hear the FTC's win rate 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. I believe this is bad math.

We need to pull back the curtain on this near-100% win-rate statistic to understand what is really going on. I think there are two potential explanations, each more plausible than the assessment that the law is working well. First, the FTC's litigation win rate may mean that we are choosing 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 necessarily means that we are leaving important, while challenging, cases on the table. The FTC has historically had an understandable low appetite for litigation risk, 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.

On top of that, I think the FTC's win rate in court is 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. We are forced to file too many cases against mergers and conduct that should never have gotten out of the boardroom because firms are willing to take a chance at engaging in anticompetitive or monopolistic conduct or proposing mergers that are so clearly anticompetitive.

We spend far too many of our enforcement dollars on mergers that are clearly illegal. For example, this past summer, our staff litigated and won a merger challenge in a clear merger-to-monopoly of coal producers in the Southern Powder River Basin.¹⁵ Earlier this year, 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.¹⁶ We also had to litigate all the way through trial and appeal a clear merger to monopoly of two healthcare

¹⁵ 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>.

¹⁶ 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>.

providers in North Dakota.¹⁷ These mergers are only a few of the many data points that suggest a breakdown in the deterrent effect of antitrust enforcement.

Firms may also calculate that they have little to lose by engaging in anticompetitive conduct. These cases are critical, but they tend to be fewer and farther between, more time-consuming, and very fact-specific; sporadic enforcement may limit the deterrent effect. The one exception to this may be the Commission's decades of effort devoted to stopping anticompetitive pay-for-delay settlement agreements.¹⁸ But, even in that area, it took a very long time get from the early challenges to a resolution. Knowing that, some firms may still determine it is worth the risk.

Let me be clear: I am extraordinarily proud of the work the FTC has done to bring a record-breaking number of cases this past year. Our staff has been working non-stop, night and day, throughout the pandemic, conducting investigations and litigating both merger and conduct cases. I cannot give them enough credit for the way they have adapted to the circumstances and continued to focus on the work in front of them, even as many of them are juggling family and other challenges at the same time.

It is up the leadership of the agency to push forward and challenge underlying assumptions. I also think that where we are today, with this breakdown in deterrence, is the result of 40 years of courts' narrowing case law and periods of time where there the antitrust agencies intentionally took a hands-off approach to market concentration and market power.

We cannot let up on bringing the obvious cases, but we also cannot wait for firms to get the message from them. We cannot proceed with the status quo. It is our obligation to be bold in bringing cases where success in the courts is not guaranteed. Such cases will require the application of antitrust laws to novel markets as well as new and more challenging fact patterns, such as mergers where there are more than four significant firms in the market or where the party being acquired is a nascent or future competitor. Vertical merger enforcement, to date nearly always remedied by behavioral consent decrees, needs to be invigorated and developed through enforcement actions. The FTC should also significantly increase its examination of labor markets for conduct and mergers that harm workers.

Finally, we need to think carefully about when settlement is appropriate and when it is worth it to litigate. I have talked a lot about deterrence in the context of consumer protection cases, but the same principles apply on the competition side.¹⁹ We should seek settlements and enter into them when they will remedy law violations and deter both the violating firm and the market generally

¹⁷ See Press Release, Fed. Trade Comm'n, *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>.

¹⁸ See 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>.

¹⁹ See, e.g., Fed. Trade Comm'n, *Dissenting Statement of Comm'r Rebecca Kelly Slaughter In the Matter of FTC vs. Facebook* (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf.

from breaking the law in the future. But we should not be afraid of litigating where the best settlement we can achieve does not meet those goals.

For example, in the pharmaceutical space, we see multiple large mergers every year, and they are almost always resolved with a divestiture.²⁰ While these divestitures address specific overlapping product lines, they do not often address questions about innovation or investment, or deal with the record of anticompetitive conduct broadly or by the merging firms. In other instances, a merger remedy may be so complicated and involve so many post-divestiture entanglements between the merging parties that even with safeguards in place, it may not be worth the risk of settling.

I am not aware of a case in which we have sued to block a pharmaceutical merger outright or even litigated to get a more effective remedy. Of course, if we go to court more, we might lose more. And it might be a more expensive endeavor. But it would have the effect of signaling to the markets that we are not willing to settle on inadequate terms, and it would help deter bad mergers. If we lose, it will help illuminate for Congress the challenges that we are facing.

In addition to using our familiar tools more strategically, 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 it more frequently on a standalone basis. For example, it could be used to go after the anticompetitive use of market power that does not rise to the level of gaining or maintaining monopoly power.²¹ There also may be instances where Section 5's prohibition on unfair and deceptive acts and practices could be used in competition cases to challenge off-patent drug price spikes where there is substantial consumer injury that cannot be avoided and where there are no offsetting benefits.²²

²⁰ See, e.g., Fed. Trade Comm'n, *Dissenting Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter in the Matter of Pfizer Inc./Mylan N.V.*, (Oct. 30, 2020), <https://www.ftc.gov/public-statements/2020/10/dissenting-statement-commissioner-rohit-chopra-joined-commissioner-rebecca>; Fed. Trade Comm'n, *Dissenting Statement of Comm'r Rebecca Kelly Slaughter Regarding the Proposed Acquisition of Allergan plc by AbbVie Inc.* (May 5, 2020), <https://www.ftc.gov/public-statements/2020/05/dissenting-statement-commissioner-rebecca-kelly-slaughter-regarding>; Fed. Trade Comm'n, *Statement of the Federal Trade Commission in the matter of Roche Holding/Spark Therapeutics*, (Dec. 16, 2019), <https://www.ftc.gov/public-statements/2019/12/statement-federal-trade-commission-matter-roche-holdingspark-therapeutics>; Fed. Trade Comm'n, *Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb Company and Celgene Corporation* (Nov. 15, 2019), <https://www.ftc.gov/public-statements/2019/11/statement-commissioner-rebecca-kelly-slaughter-matter-bristol-myers-squibb>. See also Markus H. Meier, Bradley S. Albert & Kara Monahan, 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.

²¹ 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).

²² See Fed. Trade Comm'n, *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; Phoenix 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; Fed. Trade Comm'n, *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

The FTC also has rulemaking authority that it could use to deter and stop anticompetitive conduct.²³ Commissioner Chopra has written eloquently about how rulemaking is an important complement to case-by-case antitrust enforcement, which can be a protracted and expensive way to gain only incremental, if any, changes to the law.²⁴ 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.

In conclusion, antitrust is at a precipice. The American public wants the antitrust agencies, and other agencies that have competition as part of their mandate, to combat market power throughout the economy—healthcare, telecommunications, agriculture, pharmaceuticals, e-commerce, online search and advertising, and social media, among other areas. The FTC has worked hard to stop anticompetitive mergers and conduct, and now it has the opportunity to take its enforcement mission to the next level in response to increased demand from its clients, the American people.

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.

²³ See 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.”).

²⁴ Rohit Chopra & Lina M. Kahn, *The Case for ‘Unfair Methods of Competition’ Rulemaking*, 87 U. Chi. L. Rev. 357 (2020), <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4>.