

**DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION**



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**STATEMENT OF**

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DEPARTMENT OF JUSTICE ANTITRUST DIVISION**

**BEFORE THE**

**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COMPETITION POLICY, ANTITRUST, AND CONSUMER RIGHTS**

**FOR A HEARING TITLED**

**“OVERSIGHT OF FEDERAL ENFORCEMENT OF THE ANTITRUST LAWS”**

**PRESENTED**

**SEPTEMBER 20, 2022**

Chairwoman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, I am pleased to appear before you today on behalf of the Antitrust Division of the Department of Justice. I want to thank members of this Committee for their public support of the Antitrust Division's work and legislative proposals to strengthen antitrust enforcement. These efforts are vital to our economy and our democracy because competitive markets drive economic opportunity.

Every day, I am humbled and inspired by the dedication, talent, and commitment of the people at the Antitrust Division. I consider it an honor of a lifetime to work at their side. They have my unwavering respect and support.

I am pleased to report that the Antitrust Division is delivering results at historic levels and our return on the investment from American taxpayers and Congress is billions of dollars. This is not theoretical. We are talking about taxpayer investment in infrastructure, consumer prices, and so much more. The industries that are benefitting from the competition we protect are as diverse as ocean shipping, health care, technology, household goods, farming, and so much more.

Since I was confirmed in November 2021, the Division has filed civil lawsuits to challenge or obtained merger abandonments in six cases.<sup>1</sup> Several other transactions were abandoned after parties were informed they would receive Second Requests, which indicate the beginning of an in-depth merger review by the Division. We currently have pending seven civil antitrust lawsuits, the largest number of civil cases in litigation in decades.<sup>2</sup> We will litigate more merger trials this year than in any fiscal year on record. Notably, this litigation occurs against the backdrop of nearly 3,000 notified transactions in FY 2022—which follows FY 2021 as the largest number of filings any year since the reporting thresholds were adjusted in 2000.<sup>3</sup>

In addition, the Division's prosecutors are actively litigating 19 criminal cases, 18 of which are awaiting trial. We ended FY 2021 with 146 pending grand jury investigations, the most in 30 years. Since its inception in November 2019, the Antitrust Division's Procurement Collusion Strike Force has opened more than 60 criminal investigations and trained more than

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<sup>1</sup> *United States v. United States Sugar Corp.*, No. 1:21-cv-01644 (D. Del. 2022); *United States, et al, v. UnitedHealth Group Incorporated, et al*, No. 1:22-cv-00481 (D.D.C. 2022); *United States v. Crane Composites, Inc., et al*, No. 1:22-cv-01401 (N.D. Ill. 2022); *United States v. Booz Allen Hamilton Inc., et al*, No. 1:22-cv-01603 (D. Md. 2022); Press Release, U.S. Dep't of Justice, Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue (Mar. 29, 2022), <https://www.justice.gov/opa/pr/verzatec-abandons-proposed-acquisition-crane-composites-following-justice-department-suit>; Press Release, U.S. Dep't of Justice, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022), <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

<sup>2</sup> *United States v. United States Sugar Corp.*, No. 1:21-cv-01644 (D. Del. 2022); *United States, et al, v. UnitedHealth Group Incorporated, et al*, No. 1:22-cv-00481 (D.D.C. 2022); *United States v. Booz Allen Hamilton Inc., et al*, No. 1:22-cv-01603 (D. Md. 2022); *United States v. American Airlines Group, Inc., & JetBlue Airways Corp.*, No. 1:21-cv-11558 (D. Mass. Sept. 21, 2021); *United States v. Bertelsmann SE & Co. KGaA, et al*, No. 1:21-cv-02886 (D.D.C. 2021); *United States, et al., v. Google L.L.C.*, No. 1:20-cv-03010-APM (D.D.C. Oct. 20, 2020); *U.S. v. Assa Abloy*, No. 1:22-cv-02791 (D.D.C. Sep. 15, 2022).

<sup>3</sup> *Premerger Notification Program*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited Sept. 13, 2022).

23,000 people on the risks that collusion poses in public procurement. In that time, the PCSF and the Antitrust Division have prosecuted over 30 companies and individuals involving over \$350 million worth of government contracts, and they continue to leverage interagency coordination to investigate and prosecute procurement-related crimes. Although we cannot put a precise price tag on deterrence, the OECD estimates that bid rigging and other collusion increases procurement prices by as much as 20 percent.<sup>4</sup> This means that the United States could stand to save billions just by eliminating bid rigging, price fixing, and other collusive schemes that target government purchases. The Division has prosecuted anticompetitive crimes in industries ranging from construction, defense contracting, transportation, poultry, aerospace, and health care. In addition to the funds the Division saves the federal government through the elimination of anticompetitive conduct in procurement, the penalties the Division receives through antitrust prosecutions serve the American people in other important ways: the Division is a critical contributor to the Crime Victims Fund.<sup>5</sup>

The Division's investment in labor market competition protects students and athletes too. Early last year, the Department, with assistance from the Division, filed a brief in support of college athletes in a landmark antitrust case against the NCAA. There, the Department urged the Supreme Court to condemn certain anticompetitive limits on compensation for deserving college athletes. And in July, the Division filed a statement of interest and argued in a hearing that the scope of a federal antitrust exemption for schools that use a common methodology to calculate financial aid must be construed narrowly and that any agreement on how to calculate financial aid that exceeds the boundaries of the so-called 568 exemption would be naked price-fixing that hurts students and their families.<sup>6</sup> We also have sought to protect minor league baseball teams and their communities by filing a statement of interest in June regarding the Major League Baseball exemption.<sup>7</sup>

Anticompetitive conduct is felt acutely in rural communities. That is why I think our recent lawsuit against a human resource consulting company, its president, and three chicken processors to protect poultry processing plant workers was so important.<sup>8</sup> As a result of the Division's investigation, the processors are returning \$85 million collectively to processing plant workers and have agreed to 10 years of corporate monitorship. The president of the human resources consulting company is banned from the industry. The Division also deployed the Packers and Stockyards Act for the first time in recent memory to challenge the processors' deceptive conduct with respect to growers. In so doing, the Division is shifting bargaining power back toward farmers.

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<sup>4</sup> *Fighting Bid Rigging in Public Procurement*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm> (“The elimination of bid rigging could help reduce procurement prices by 20% or more.”) (last visited Sept. 13, 2022).

<sup>5</sup> *Crime Victims Fund*, OFFICE FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/about/crime-victims-fund> (last updated Sept. 7, 2022).

<sup>6</sup> Statement of Interest of the United States, *Henry, et al. v. Brown University, et al.*, No. 1:22-cv-00125 (D.C. Cir. Jan. 9, 2022).

<sup>7</sup> Statement of Interest of the United States, *Nostalgic Partners, LLC, et al. v. The Office of The Commissioner of Baseball*, No. 1:21-cv-10876-ALC (S.D.N.Y. June 15, 2022).

<sup>8</sup> Press Release, U.S. Dep't of Justice, *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers* (July 25, 2022), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy>.

Antitrust violations hurt U.S. businesses. Whether it's a commodity like refined sugar,<sup>9</sup> or a differentiated product like pebbled fiberglass reinforced plastic wall panels,<sup>10</sup> mergers in already concentrated industries remove competition from the market—competition necessary to safeguard against skyrocketing prices, deteriorating quality and drying up innovation. Conduct that violates the antitrust laws may also exacerbate supply chain fragility. That is why we challenged recent proposed mergers in container handling equipment<sup>11</sup>, insulated container boxes, and refrigerated shipping containers.<sup>12</sup>

While I am proud of the work we are doing, we can and must do more. We have the will to fully address the competition challenges facing the American people, but we are also facing some of the best-resourced companies in history, at a time of historic deal volume. And even though the economy expanded enormously through 2021, the Antitrust Division ended that fiscal year with 352 fewer employees than in 1979.

We need your help and support. Congress can take some simple steps that would pay massive dividends in protecting and promoting competition. Passing each of the following pieces of legislation would enable the Division to better do its job protecting Americans from anticompetitive conduct.

- Merger Filing Fee Modernization Act, introduced by Senators Klobuchar and Grassley, which would update merger filing fees for the first time in over twenty years, better facilitating funding the Division's merger enforcement program and enabling other funds to be expended elsewhere;
- State Antitrust Enforcement Venue Act, cosponsored by Senators Lee, Klobuchar, Blumenthal, Hawley, Leahy, and Cruz, which would harmonize the treatment of the Multi-District Litigation process for antitrust cases filed by state attorneys general with those filed by federal agencies;
- Foreign Merger Subsidies Disclosure Act, introduced by Senator Cotton, which would require disclosure of foreign government subsidies by foreign adversaries such as China and Russia in the premerger notification process; and
- American Innovation and Choice Online Act, introduced by Senators Klobuchar and Grassley, which would enhance the ability of the DOJ, Federal Trade

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<sup>9</sup> Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block U.S. Sugar's Proposed Acquisition of Imperial Sugar* (Nov. 23, 2021), <https://www.justice.gov/opa/pr/justice-department-sues-block-us-sugar-s-proposed-acquisition-imperial-sugar>.

<sup>10</sup> Press Release, U.S. Dep't of Justice, *Verzatec Abandons Proposed Acquisition of Crane Composites Following Justice Department Suit to Block* (May 26, 2022), <https://www.justice.gov/opa/pr/verzatec-abandons-proposed-acquisition-crane-composites-following-justice-department-suit>.

<sup>11</sup> Press Release, U.S. Dep't of Justice, *Shipping Equipment Giants Cargotec and Konecranes Abandon Merger After Justice Department Threatens to Sue* (Mar. 29, 2022), <https://www.justice.gov/opa/pr/verzatec-abandons-proposed-acquisition-crane-composites-following-justice-department-suit>.

<sup>12</sup> Press Release, U.S. Dep't of Justice, *Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation* (Aug. 25, 2022), <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

Commission, and State Attorneys General to challenge harmful anticompetitive conduct and restore competition in digital markets more efficiently.

## **Merger Enforcement**

Given the record number of merger filings in FY 2021, it is no surprise that the Antitrust Division has been incredibly busy investigating possible anticompetitive transactions. One of my highest priorities was to increase the Division's capacity to block more illegal mergers if that is where the facts and the law lead. Litigating mergers is no simple task. It takes up enormous resources, requiring the Division's staff to face down the most well-resourced and well-represented companies in the world. This body and the public should take heart that the Division's staff works tirelessly to protect the public and give meaning to Congress's intent when it passed the Sherman, Clayton, and Anti-Merger Acts.

Sometimes the mere prospect of litigation is enough for parties to abandon an anticompetitive transaction, which conserves resources and taxpayer dollars. Merging parties have abandoned their transactions in the face of Antitrust Division scrutiny five times in the past 12 months alone. For example, in our recent investigation of a merger between competing container handling equipment companies, the parties abandoned the transaction one day after we informed them that their settlement proposal was inadequate to address the Division's competitive concerns about the deal.<sup>13</sup> The combination of these firms would have been the culmination of decades of consolidation — and the companies proposed to accomplish it by extracting and retaining the strongest parts of both businesses and selling off the least desirable assets to placate the department. Inadequate settlements deserve skepticism and, in recent matters, the Division has shown it is not afraid to look critically at transactions between competitors.

The Division has also shown skepticism towards state-owned entities whose incentives and market activity, including proposed mergers and acquisitions, could result in increased power over global supply chains. For example, only three weeks ago, in response to the Antitrust Division's investigation, two of the world's four suppliers of insulated container boxes and refrigerated shipping containers abandoned a deal that would have consolidated control of over 90 percent of insulated container box and refrigerated shipping container worldwide production in Chinese state-owned or state-controlled entities.<sup>14</sup>

In some cases, the Division must pursue litigation to block anticompetitive mergers. Just last month, we went to trial to challenge two unlawful mergers: book publishing behemoth Random House's proposed acquisition of Simon and Schuster, and United Health Group's proposed acquisition of Change Healthcare, a transaction that would harm competition in both commercial health insurance and the technology used to process insurance claims.

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<sup>13</sup> *Supra* note 13; For examples of other mergers that were abandoned when the Division began to scrutinize them, *see supra* note 12 and *supra* note 14.

<sup>14</sup> *Supra* note 14.

I want to spend a moment on the importance of bringing difficult antitrust cases. Improvements to antitrust enforcement will not happen if the Antitrust Division is unwilling to challenge aggressively anticompetitive conduct and unlawful market consolidation. I am committed to bringing difficult cases, and as I have mentioned, the Antitrust Division is building a team of litigators that are ready for the challenge.

The Division is working together with the FTC to strengthen our Merger Guidelines to be more faithful to the law and to address mounting concerns about underenforcement and rising consolidation and concentration across our economy. As part of that process, we sought public input on modernizing our guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets.<sup>15</sup> We received over 5,000 written submissions, in contrast to around a hundred received in the last review in 2010. Those 5,000 comments overwhelmingly supported stronger enforcement. In an effort to reach a broader set of stakeholders, the Division and the Federal Trade Commission also organized four virtual listening forums, which we opened to the public to discuss key industries, including food and agriculture, health care, media and entertainment, and technology.<sup>16</sup> I personally attended each session.

## **Criminal Enforcement**

### *Recent Highlights of the Antitrust Division's Criminal Program*

The Antitrust Division is doing important work protecting American taxpayers through our criminal enforcement program. For example, in June 2021, a security services firm pled guilty for its role to rig bids, allocate customers, and fix prices in a conspiracy that targeted, among other things, a contract at a U.S. Army base worth \$77M.<sup>17</sup> Two executives later pleaded guilty for their involvement in the conspiracy. Earlier this year, a former engineering executive was convicted after trial of bid-rigging and fraud that targeted the North Carolina Department of Transportation.<sup>18</sup> And earlier this spring, a former employee of the U.S. Department of Energy was convicted after trial of conspiracy to defraud the United States in connection with the operation of the Strategic Petroleum Reserve and of making false statements to federal agents.<sup>19</sup> Also, this spring, a former CalTrans employee pleaded guilty for conspiring with contractors and

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<sup>15</sup> Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.

<sup>16</sup> Press Release, U.S. Dep't of Justice, *Justice Department and FTC Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions* (Mar. 17, 2022), <https://www.justice.gov/opa/pr/justice-department-and-ftc-launch-listening-forums-firsthand-effects-mergers-and-acquisitions>.

<sup>17</sup> Press Release, U.S. Dep't of Justice, *Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement* (June 25, 2021), <https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting>.

<sup>18</sup> Press Release, U.S. Dep't of Justice, *Former Engineering Executive Convicted of Rigging Bids and Defrauding North Carolina Department of Transportation* (Feb. 1, 2022), <https://www.justice.gov/opa/pr/former-engineering-executive-convicted-rigging-bids-and-defrauding-north-carolina-department>.

<sup>19</sup> Press Release, U.S. Dep't of Justice, *Guilty Verdict Returned Against a Former Employee of the Department of Energy's Strategic Petroleum Reserve in Connection with a Scheme to Defraud the United States* (May 19, 2022), <https://www.justice.gov/usao-edla/pr/guilty-verdict-returned-against-former-employee-department-energy-s-strategic-petroleum>.

others to rig bids on state government contracts as well as to bribery concerning programs receiving federal funds.<sup>20</sup> These cases demonstrate the Division’s commitment to holding companies and individuals accountable when they cheat the government procurement process.

Our appellate team has done important work preserving convictions secured at trial. This spring, the Second Circuit affirmed the conviction of a former JP Morgan trader convicted of conspiring to fix prices and rig bids in connection with trading in the foreign currency exchange market. And, the Supreme Court denied a petition for certiorari of the former CEO of Bumble Bee Tuna, whose price fixing conviction was previously affirmed by the Ninth Circuit.

Also, in the wake of persistent price increases initially stemming from supply chain disruptions caused by the COVID-19 global pandemic, in February the Antitrust Division and the FBI developed an initiative to deter, detect, and prosecute those who would exploit supply chain disruptions to engage in collusive conduct.<sup>21</sup> The Antitrust Division has also formed a working group focusing on global supply chain collusion with its global partners in Australia, Canada, New Zealand and the United Kingdom.

The Division also continues to lead the Procurement Collusion Strike Force (PCSF), an interagency group of enforcers combatting anti-competitive conspiracies that target government spending on goods and services at all levels, including the billions of dollars at risk from collusion and bid-rigging on projects funded by the \$1.2 trillion Investment in Infrastructure and Jobs Act.

#### *Detering, Detecting and Prosecuting Collusion in Labor Markets*

One area where we have been particularly active is prosecution of criminal conspiracies among employers. Labor market competition is essential to a properly functioning market-based economy. Free market competition for workers can mean the difference between saving for a home, sending kids to college, and leaving a toxic workplace, or being forced to stay. It also means free market competition for entrepreneurs, small business owners, and honest businesses of all kinds who compete to attract and retain talented workers. The Division views rooting out collusion in labor markets to be part of its mission to deter, detect, and prosecute cartels more generally. Accordingly, the Division has invested substantial time and resources required to ensure vigorous competition in labor markets.

Criminal conspiracies in labor markets include wage fixing and allocation agreements that limit worker mobility or suppress wages. Wage fixing is fixing the price paid for labor. Agreements between competitors not to solicit or hire each other’s employees—sometimes referred to as “no poach” agreements—are market allocation agreements in labor markets. To be sure, wage fixing agreements and labor market allocation agreements are just as irredeemable as agreements to fix product prices and allocate product markets. Outside of the reach of a labor

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<sup>20</sup> Press Release, U.S. Dep’t of Justice, Former Caltrans Contract Manager Pleads Guilty to Bid Rigging and Bribery (Apr. 11, 2022), <https://www.justice.gov/opa/pr/former-caltrans-contract-manager-pleads-guilty-bid-rigging-and-bribery>.

<sup>21</sup> Press Release, U.S. Dep’t of Justice, Department of Justice Announces Initiative to Protect Americans from Collusive Schemes Amid Supply Chain Disruptions (Feb. 17, 2022), <https://www.justice.gov/opa/pr/department-justice-announces-initiative-protect-americans-collusive-schemes-amid-supply-chain>.

exemption, agreements by employers to restrict labor market competition is entitled to no special treatment under the U.S. antitrust laws. We will continue to prosecute collusion in labor markets that serves no other purpose than to cheat workers of competitive wages, benefits, and other terms of employment.

In the last two years, the Division has brought six criminal cases alleging collusion in labor markets. The juries in our first labor market prosecutions acquitted the defendants of the antitrust charges but convicted a defendant in one of the cases for obstructing an investigation into the same conduct by the Federal Trade Commission. I am incredibly proud of the teams that tried these cases. In both cases, the courts denied the defendants' motions to dismiss, reaffirming the core principle of our labor market prosecutions: that labor market collusion is a felony under the Sherman Act. As one court explained: "employees are no less entitled to the protection of the Sherman Act than are consumers"<sup>22</sup> and "anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services."<sup>23</sup>

Bringing tough cases, when warranted by the facts and the law and consistent with the Principles of Federal Prosecution, matters because it ensures we are fulfilling our mission to stamp out anticompetitive conduct and protect workers from collusion. That is the essence of deterrence.

### **Strengthening Antitrust Enforcement Through Partnerships**

Another critical part of strengthening antitrust enforcement to address the harmful effects of consolidation and other anticompetitive conduct is to continue to build and expand the Antitrust Division's partnerships with competition enforcers both domestically and abroad. This is why the Antitrust Division and Federal Trade Commission, this Spring, hosted the first ever Enforcers Summit in Washington, D.C., which was webcast to the public. The Enforcers Summit brought together enforcers from 24 countries and 14 U.S. states, including the District of Columbia, to discuss strategies for bolstering competition in today's global marketplace.<sup>24</sup> The dialogue focused on merger reform and lessons from interagency cooperation. We received very positive feedback on the Summit and we hope to make this Summit a more regular part of the Antitrust Division's engagement. We also value the FTC's collaboration on the Summit and in so many other areas of cooperation including engagement with state and international enforcers.

#### *State Enforcement Partners*

The Enforcers' Summit underscores that the Antitrust Division values our partnerships with State Attorneys General, particularly in matters with local market impacts. Agriculture and

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<sup>22</sup> *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021); *United States v. Rodgers*, No. CV 4:20-CR-00358, 2022 WL 889942 (E.D. Tex. Mar. 25, 2022).

<sup>23</sup> *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759 (D. Colo. Jan. 28, 2022).

<sup>24</sup> *Spring 2020 Enforcers Summit*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/events/spring-2022-enforcers-summit> (last updated Apr. 14, 2022).



healthcare consolidation, in particular, can have significant adverse impacts in local markets, and cooperation with States in these matters can be essential.

Working in cooperation with State Attorneys General has many benefits for antitrust enforcement in general: it increases the opportunities for a uniform response by the Antitrust Division and the States in merger and conduct investigations. It also provides opportunities for all government enforcers to speak with one voice on how we view enforcement issues and priorities, such as merger enforcement and labor matters. At the end of the day, Congress set up a system of multiple antitrust enforcers in order to better protect competition at both the national and local level and we are committed to making that process work. That is why we support the State Antitrust Enforcement Venue Act of 2021, which would harmonize the treatment of venue for antitrust cases filed by state attorneys general with those filed by federal agencies.<sup>25</sup> And it is why we support allowing disclosure of information obtained pursuant to the HSR Act to State enforcers.

In particular, the Division is committed to improving our process of working with the States and to building out our State Relations team. We have brought on a recent former NAAG Antitrust Taskforce Chair to help us better understand how the States work with each other and with the Division and to understand where the sticking points are for a successful collaboration. I am personally committed to improving the Division's relationship with the States and welcome opportunities to work with our valuable State partners. Even when the Division is not in a joint matter with the States, the Division seeks to amplify the States' enforcement goals, as we have recently done through our amicus brief to the DC Circuit in the States' Facebook case and our Statement of Interest to the DC Superior Court in DC's case against Amazon.<sup>26</sup>

### *Interagency Cooperation*

Consistent with the President's Executive Order on Competition, which called for a "whole of government" enforcement approach, the Antitrust Division is committed to working across government agencies to share our expertise and encourage interagency dialogue on matters that affect competition. During FY 2021 and FY 2022, the Antitrust Division trained a half dozen agencies, including the U.S. Department of Labor, U.S. Department of Agriculture (USDA), Health and Human Service (HHS) and Bureau of Ocean Energy Management, on antitrust law principles and how competition can be affected by government regulation.<sup>27</sup>

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<sup>25</sup> Letter from Peter S. Hyun, Acting Asst. Att'y Gen., Office of Leg. Affairs, U.S. Dep't of Justice, to House and Senate Committees on the Judiciary (June 2, 2022), <https://www.justice.gov/ola/page/file/1527201/download>.

<sup>26</sup> Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *State of New York v. Facebook, Inc.*, No. 21-7078 (D.C. Cir. Jan. 28, 2022); Statement of Interest of The United States of America in Support of Plaintiff's Motion for Reconsideration, *District of Columbia v. Amazon.com, Inc.*, No. 2021-C.A.-001775-B (D.C. Super. Ct.).

<sup>27</sup> Press Release, U.S. Dep't of Justice, Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), <https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers>; Memorandum of Understanding Between the Antitrust Division, Department of Justice and the Federal Trade Commission and the Department of Agriculture Relative to Cooperation with Respect to Monitoring Competitive Conditions in the Agriculture Marketplace (Aug. 31, 1999), <https://www.justice.gov/atr/memorandum-understanding-between-antitrust-division-department-justice-and-federal-trade>; Press Release, U.S. Dep't of Justice, Justice Department and National Labor Relations Board Announce Partnership to Protect Workers (July 26, 2022),

In our efforts to protect labor markets, we are fortunate to have great partners in the Department of Labor and National Labor Relations Board (NLRB), with whom we recently signed Memoranda of Understanding, and Treasury, with whom we collaborated on a recent report surveying the state of labor market competition. Earlier this year, we filed briefs before both the NLRB and a District Court in Nevada in support of our goal of protecting and expanding competition in labor markets. The Nevada brief reaffirmed that the Sherman Act applies to labor non-competes just as much as any other agreements not to compete, including prohibiting such agreements *per se* if they are not reasonably necessary to achieve another business goal. The NLRB brief expressed our strong support for the Board’s effort to reduce worker misclassification, which can cause significant harm not only to workers but also to competition in the labor markets in which those workers seek to earn a living.

Partnerships pay off. Consistent with a memorandum of understanding we have with USDA, the lawsuit we filed in July against poultry processors who conspired to exchange wage information was the result of a USDA referral. Our partnership with the USDA has enabled us to better protect farmers and ensure that Americans benefit from healthy and affordable food to provide their families. And earlier this year, the Antitrust Division worked together with USDA to create a complaint portal (Farmerfairness.gov), that accepts complaints about potentially anticompetitive practices in the meat and poultry industries that harm farmers and increase prices for consumers.<sup>28</sup> The agencies meet periodically to address the complaints received through the portal. The agencies have received over 100 complaints to date and we are hard at work investigating.

We are also leveraging partnerships and the combined abilities of multiple agencies to protect taxpayer dollars at risk from criminal schemes and conspiracies through the Procurement Collusion Strike Force, the Department’s coordinated, national response to bid rigging, price fixing, and other collusive crimes that target government spending on goods and services at all levels—local, state, and federal. Working together, a team of nearly 700 federal agents, investigators, analysts, auditors, and prosecutors, drawn from the Antitrust Division, U.S. Attorney’s Offices, and seven national partner law enforcement agencies, have formed a partnership to increase awareness and deterrence, enhance detection, and where appropriate, investigate and prosecute schemes that go after the taxpayers’ money. The PCSF is a whole-of-government response to this problem, which costs us—all of us—hundreds of millions each year.

The Department regularly engages with the U.S. Patent and Trademark Office, the National Institute of Standards and Technology (NIST), and the International Trade Administration (ITA) on matters that affect competition and intellectual property. It was through this collaboration that we arrived at the decision in June to withdraw the 2019 Policy Statement

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<https://www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers>; Press Release, U.S. Dep’t of Justice, Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry (Feb. 28, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership>.

<sup>28</sup> Press Release, U.S. Dep’t of Justice, Justice Department and U.S. Department of Agriculture Launch Online Tool Allowing Farmers, Ranchers to Report Anticompetitive Practices (Feb. 3, 2022), <https://www.justice.gov/opa/pr/justice-department-and-us-department-agriculture-launch-online-tool-allowing-farmers-ranchers>.

on Remedies for Standards-Essential Patents as the best course of action to promote both competition and innovation in the standards ecosystem. I believe this regular engagement with regulatory agencies promotes a whole of government approach to promoting competition and it will continue to enhance the Antitrust Division's antitrust enforcement capabilities now and in the future.

### *International Cooperation*

A regular dialogue with our international enforcement partners is also important because the markets and competitors affecting U.S. businesses and consumers are increasingly international in scope. Parties and potential evidence increasingly are located abroad, which adds complexity, and ultimately cost, to the pursuit of the Antitrust Division's enforcement matters, making for a generally more difficult investigatory process and increasing the need for international cooperation. In any given year, the Division works on dozens of investigations that involve cooperation with other competition agencies. In FY 2022, for example, when the Division reviewed the proposed merger of Cargotec and Konecranes, we worked closely with competition agencies in a number of jurisdictions, including Australia, the European Union, Israel, New Zealand, and the United Kingdom.

The Division supports expanding the Department's ability to cooperate with international antitrust enforcers by exchanging merger-related information with foreign antitrust enforcement agencies. Today, the Department is required to rely on parties to waive confidentiality requirements before being able to cooperate on mergers that have international competitive implications. Together with the passage of the Foreign Merger Subsidies Disclosure Act, the Division could do more to prevent anticompetitive transactions that have an international component.

## **Preventing Abusive Behavior in Digital Markets**

### *Revitalizing Section 2*

The Division is making it a priority to revitalize monopolization enforcement. This is an area where unfortunately there has been a growing divide between antitrust doctrine and market realities. Until the Division brought its Google monopolization suit in 2020, approximately 20 years had passed between the filing of major DOJ monopolization cases, even as competition languished in vital industries. The result is that there is a dearth of Section 2 case law addressing modern markets, despite the myriad ways in which the digital revolution has transformed our entire economy.<sup>29</sup>

We intend to fix that. Senator Sherman warned that “if the concentrated powers of [a monopoly] are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government.” Yet we now know many such people who enjoy power over key markets, causing

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<sup>29</sup> Jonathan Kanter, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks to the New York State Bar Ass’n Antitrust Sec. (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.

tremendous damage to our small businesses, the free flow of news and information, and the competitiveness and vitality of our national economy.<sup>30</sup>

### *Disincentivizing “Moat Building”*

The problem of monopoly power is especially acute in digital markets. As the Internet has become increasingly central to our nation’s economic, social and political life, the rise of dominant, gatekeeping platforms has come to impose an increasingly severe threat to open markets and competition, with risks for consumers, businesses, innovation, resiliency, global competitiveness, and our democracy.<sup>31</sup>

Such gatekeeping firms often seek to reinforce and protect their dominance by building competitive “moats.” Through acquisitions of nascent competitors, self-preferencing in vertical supply chains, and webs of one-sided agreements imposed on trading partners, firms can create kill zones around their core monopolies, suppressing innovation and preventing the emergence of new business models and new competition.<sup>32</sup>

### *Division Advocacy – Google, Facebook, Apple, AICOA, Open App Markets Act*

The Division is fighting back against these practices on multiple fronts to ensure a resilient and competitive digital ecosystem. First, where appropriate, we are challenging anticompetitive practices directly in court, as in our ongoing Google case, which is set to go to trial in 2023.<sup>33</sup>

In our Section 2 investigations and cases throughout the digital economy, we are taking a broad view and an aggressive posture in identifying harms to the competitive process as a whole, including harms to privacy, innovation, and other important equities that go beyond price. I believe investigating and bringing such cases is not only important on its own merits; it also enables judges to wrestle with the realities of today’s markets and update antitrust law to be fit for purpose in the modern economy.

Second, we are working with the courts to update and interpret the law in a manner faithful to Congress’s original intent. As passed, Section 2 of the Sherman Act was a broad prescription intended to prevent the unlawful acquisition, maintenance and extension of monopoly power in all its forms. Sometimes, however, courts have taken a restrictive view of the law that we believe inconsistent with the text of the law and the intent of Congress.

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<sup>30</sup> Jonathan Kanter, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote at the University of Chicago Stigler Center (Apr. 21, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler>.

<sup>31</sup> Letter from Peter S. Hyun, Acting Asst. Att’y Gen., Office of Leg. Affairs, U.S. Dep’t of Justice, to House and Senate Committees on the Judiciary (Mar. 28, 2022), <https://www.justice.gov/ola/page/file/1488736/download>.

<sup>32</sup> Jonathan Kanter, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote at CRA Conference (Mar. 31, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference>.

<sup>33</sup> Press Release, U.S. Dep’t of Justice, Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

When that has happened, we have filed briefs expressing our own views, as we did in both the *Apple v. Epic* case in the 9th Circuit<sup>34</sup> and the *New York v. Facebook* case currently on appeal to the D.C. Circuit.<sup>35</sup> In both those briefs, we urged the courts to correct misinterpretations of Section 2 made by the courts below that would hamper enforcement of the antitrust laws if adopted more broadly.

Finally, we are working with Congress to amend the antitrust laws to address the threats posed by the largest digital giants to competition, innovation, and our democracy. Earlier this year, the Department of Justice as a whole wrote to this Committee to express our strong support for Senator Klobuchar and Senator Grassley's American Innovation and Choice Online Act, which I understand is currently awaiting a floor vote in the full Senate.

I see this legislation as a tremendously important step. Our future global competitiveness depends, in part, on the ability of our innovators, entrepreneurs, journalists and citizens to access markets free from unfair gatekeeping by dominant incumbents. By identifying and prohibiting the worst kinds of discriminatory and self-preferencing conduct, the bill would enhance the ability of the DOJ to challenge that conduct effectively and restore competition in digital markets. I strongly support these objectives and encourage both the Committee and Congress to work to finalize this legislation and pass it into law.<sup>36</sup>

I would also note the importance of the Open App Markets Act, which seeks to ensure that independent app developers are able to compete on fair and equal terms and to prohibit the worst types of anticompetitive conduct by the gatekeeper firms that own and operate the largest app stores and mobile platforms. While the growth of the mobile app ecosystem over the past fifteen years has brought enormous benefits to American consumers, the continued viability of this ecosystem is threatened by the increasing power held by a handful of dominant digital gatekeepers, who are able to use their control over app stores and mobile operating systems to pick winners and losers, extract above-market fees, and favor their own apps in ways that harm competition and sap incentives to innovate. The Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.

We look forward to working with members of this committee and Congress to strengthen antitrust enforcement. That includes offering strong support for the pending Merger Fee Modernization Act. If enacted, it would significantly increase the Division's share of merger fee collections in fiscal year 2024. But the availability of more filing fees, if appropriated, simply helps us keep up with corporate mergers. To address anticompetitive conduct throughout critical sectors of our economy, including digital markets, we need increased appropriations above the merger fee estimate as well. We would also benefit from tools to protect competition in the digital economy that would clarify the path to bringing meritorious cases.

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<sup>34</sup> Brief for the United States of America as Amicus Curiae in Support of Neither Party, *Epic Games, Inc. v. Apple, Inc.*, No. 21-16506 (9th Cir. Dec. 8, 2021).

<sup>35</sup> Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *State of New York v. Facebook, Inc.*, No. 21-7078 (D.C. Cir. Jan. 28, 2022).

<sup>36</sup> *Id.*