FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

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8:30 a.m.

Mike and Josie Harper Center, Hixson-Lied Auditorium
Creighton University
602 N. 20th Street
Omaha, Nebraska 68102

FEDERAL TRADE COMMISSION

I N D E X

P R O C E E D I N G S

(8:30 a.m.)

WELCOME

MR. HAMBURGER: Good morning. My name is Jacob Hamburger. I'm an attorney in the Office of Policy Planning at the Federal Trade Commission. I first want to thank our hosts at Creighton University School of Law for helping us put together today's hearing. I would also like to extend a warm welcome to everyone joining us here in person and also those joining us by webcast.

Before we kick things off, I have a few announcements. First, please silence your cell phones and other devices. If an emergency requires you to leave the conference area but remain in the building, please follow the instructions provided. If an emergency requires an evacuation of the building, an alarm will sound. Everyone should leave the building in an orderly manner. If you notice any suspicious activity, please alert building security.

Actions that interfere or attempt to interfere with the commencement or conduct of the hearing or the audience's ability to observe the event, including attempts to address the speakers

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This event will be photographed, webcast, and recorded. By participating, you agree your image and anything that you say or submit may be posted indefinitely at FTC.gov, on regulations.gov, or on one of the Commission's publicly available social media sites.

Question cards are available in the hallway on the information tables immediately outside of the auditorium. Staff will be available to collect your question cards and provide them to the moderators to pose to the panelists. Please pass your cards to the end of the aisle to be collected.

For those of you on Twitter, you can follow the conversation using the hashtag #FTCHearings. Restrooms are located outside the back of the auditorium and to the left.

And with all that said, I would like to now introduce Dr. Thomas Murray, Provost of Creighton University, who will be providing opening remarks.

(Applause.)

OPENING REMARKS

DR. MURRAY: Thank you, Mr. Hamburger, for your kind introduction. And certainly on behalf of Creighton University, I want to extend a warm welcome to all who have come to participate in these hearings today, along with those who may be listening on the internet.

We are particularly pleased to welcome staff members from the Federal Trade Commission as well as representatives from several state attorney general offices from across the country, including Doug Peterson, the Attorney General from the State of Nebraska. We're honored by your presence and thank you all for your public service.

Creighton University is known for its distinctive offerings and a complex campus, including nine schools and colleges. We are now recognized by the Carnegie Classification of Institutions of Higher Education as a doctoral professional university. We have a long history of delving deep into the liberal arts, placing an emphasis on research and scholarship, and forming the next generation of leaders in professional and health occupations.

Our new Carnegie classification signals

what we at Creighton have already known, namely that we are a top-flight research institution and at its heart continues to be driven by a teacher/scholar educational model grounded in the liberal arts and humanities. And Professor Morse is an exemplar of our teacher/scholar model from the School of Law.

As a university, processes of learning, sharing, and growing knowledge are at the core of what we do. For this reason, we are pleased to host these hearings which involve similar processes. Today, informed, interested, and engaged leaders will assemble to share their experiences, knowledge, and insights about important problems facing us today.

The information developed will assist those engaged in policymaking, regulatory design, law enforcement efforts to fulfill their duties more effectively. This is important work, and we are very grateful to be a part of it.

The Federal Trade Commission is now in its 105th year as bipartisan and independent agency devoted to the dual missions of consumer protection and promoting fair competition, successfully filling this mission -- which President Franklin Roosevelt

once described as one designed “to insist on greater application of the Golden Rule” in the conduct of commercial life -- is an exercise in discretionary judgment. That judgment must be informed by deep knowledge of the marketplace, consumer needs, and the impacts of the regulatory policies.

Commercial life has always been dynamic, and in recent years especially so. Keeping abreast of current issues and conditions requires investment in new learning. Accordingly, hearings like this provide important foundation for the FTC's work.

At the state level, attorneys general and their staffs are pursuing similar missions in challenging unfair practices and protecting the competitive environment. We look forward to hearing their insights and approaches in these efforts which reflect strong federal tradition of the states as laboratories of democracy and testing grounds for innovation. There is much we can learn from each other through this hearing today.

Again, on behalf of Creighton University, welcome to our campus and thank you all for joining us. We hope you enjoy the events of the day and profit from them. We also hope that you are able to enjoy the beauty of our campus and experience warm

hospitality in the Omaha area during your visit. Thank you very much.

(Applause.)

CONSUMER PROTECTION ENFORCEMENT AND POLICY (PANEL A)

MR. SMITH: So thank you all for being here. I'm Andrew Smith, the Director of the Bureau of Consumer Protection at the Federal Trade Commission, and I am really honored to be able to represent the FTC on this panel with our state AG partners, law enforcement partners.

So, first, my disclaimer. I speak only for myself, not for the Commission or for any individual Commissioner, but the good news for all of you is that I don't contemplate doing very much talking here because we have such distinguished panelists who have important messages to deliver.

I do want to -- just a housekeeping matter, if you have questions, raise your hand and they will -- the staff will bring a question card to you, and then we will collect the question cards and present them to the panelists.

So introductions. To my immediate left is my comoderator, Ed Morse. He's a Professor of Law and the McGrath North Mullin & Kratz Endowed Chair of Business Law here at Creighton Law School.

To his left is Jason Ravnsborg, the Attorney General of South Dakota. General Ravnsborg is currently a lieutenant colonel in the United States

Army Reserves. He has been deployed to Germany, Iraq, and Afghanistan in support of operations Enduring Freedom and Iraqi Freedom and was awarded the bronze star. Prior to his election, General Ravnsborg was simultaneously in private practice as well as a part-time deputy state's attorney for Union County, South Dakota.

Next to General Ravnsborg is Ben Wiseman, the Director of the Office of Consumer Protection at the Office of the Attorney General for the District of Columbia. Before directing that, the Office of Consumer Protection, Ben was an Assistant Attorney General, and previously he worked at the preeminent law firm in Washington, D.C. So that's a joke for all of you. You have to the read your bios because you'll see that Ben and I came from the same law firm.

(Laughter.)

MR. SMITH: That would be Covington & Burling.

Next to Ben is Jeff Mateer. Jeff is the First Assistant Attorney General of Texas. Prior to his appointment in March of 2016, he served as General Counsel of the First Liberty Institute for six years and was in private practice for 19 years.

And next to Jeff is Kaitlin Caruso, Deputy

Director of the New Jersey Attorney General's Division of Consumer Affairs. Prior to working for the Division of Consumer Affairs, Kaitlin also chaired the Strategic Advocacy Committee at the New York City Law Department. And she also has worked in the Illinois Attorney General's Office and the New York City Council.

So we are really lucky to have such distinguished panelists, and with that, I will turn it over to General Ravnsborg, and we'll see if we have slides. So do we have slides for General Ravnsborg or not? Here we go. Perfect. I think that's the clicker.

GEN. RAVNSBORG: Good morning. I am General Ravnsborg, as they said. I am very happy to be with you, and I made my presentation on a blend of my life. As you heard, I'm also a lieutenant colonel in the Army Reserves. In the last two weeks, I've actually been in this state, been down in Fremont. I've got units all across Nebraska, all the way up to North Dakota, South Dakota, and Missouri as well. And in the military, we talk a lot about being proactive, not reactive. So that's a theme of my presentation here, briefly.

Reactive or proactive, the key is to be

active as we tackle these different consumer affairs. So as you most know, at consumer protection, we're mostly in the reactive model. Consumers have an issue; consumers call us or email us, telling us what their issues are, and we take action to try and assist them.

In fact, we had a recent one which I thought was kind of humorous in a sense but sadly it was true. Somebody called in and says I paid two guys in a white truck to put asphalt on my driveway and then it rained, and now I realize it was just black paint. So obviously we were in reactive mode trying help them with that situation.

Proactive is where we want to be. We see the issue and we start planning. You know, a few calls come to the Consumer Protection Division, but not widespread yet, so when I came in, I said, well, I'd like to get more information out there. There are various scams and scandals that are going on; we need to inform the public better. I was on a public broadcasting program and they called in with a lot of questions. I took that where I couldn't answer all the questions over the course of the hour. We just ran out of time.

So we've developed a "Five on Friday." So

they get five minutes with me and they put me on camera, and it goes out over Facebook and Twitter and everything else to answer questions all across our state and all the various things of consumer protection to criminal to -- we have a very big pipeline issue that's going on this morning, so we'll see, I'm sure I'll get questions about that this coming Friday. But we try to be more informative to the public and try and be more accessible.

Obviously, if we start seeing more information similar to the same, then we try to get information out. In fact, I talked to your Attorney General here, Doug Peterson, as you had the floods. I mentioned I was in the Reserves. Well, I'm over in Fremont, which was basically an island for a little while, and he told me about how they were taking advantage of people and sadly in their worst and lowest moments trying to scam them out of money: "Help with us the flood." Well, it really wasn't help that was going to the flood. It was people that were being scammed.

And so some of those floods were in the southern part of my state as well, and so we are trying to get information out and share information to be proactive and get that message out to people. And

obviously it gives you more time to plan.

So NAAG, the National Association of Attorney Generals. I think when we are being proactive, then we can work together, we are the most effective. NAAG brings the attorney generals together in a bipartisan manner to support a number of different causes. We get -- every week, we get different sign-on letters and things, but you have to have one Republican and one Democrat to be eligible to push that issue forward.

And so we've been identifying various issues and moving forward with those different solutions in trying to build a consensus and, you know, that's not necessarily easy in this partisan environment that we have nowadays. And so one of the biggest issues of consumer protection that we have been working on comes from my senior senator, Senator John Thune. It's called the TRACED Act, Telephone Robocall Abuse Criminal Enforcement and Deterrence Act.

What it is is taking on robocalls. It gives more power back to the FCC, supported by all 50 attorney generals. I mean, I think they were pretty much shocked that we could get all 50 to agree on any given topic nowadays, but everybody has had the abusive robocalls. I learned that 29 percent of all

phone calls come from robocalls, and now it is supposed to go up to 45 percent. I think this has been a very positive issue. We are addressing -- 97 to 1 it passed the Senate. And, again, I think that's quite remarkable in this day and age that 97 out of 100 would vote for it.

But we live in a virtual society. Developing at the speed of technology allows -- business and business models are evolving and developing more quickly than ever so we can share information and get the word out. We are tasked with protecting rights to privacy and the security to our public. Developments can happen so quickly that proactive can become reactive before you even know it.

It brings us back to just being active, and we'd ask that people continue to share information amongst yourselves, let us know what scams and scandals are out there. We have been working very positively, like I said, with the other offices. I have been encouraged by that as I've come in in January of this year, and I guess the combined power of all of the AGs individually, NAAG, and the FTC can give us the best chance to address a lot of these various consumer protection issues to keep the public safe.

And as we are coming up, we are going to have a number of fairs and stuff in our state, and so we have consumer protection booths and stuff out there and trying to just get the word out any way we can. So we are very -- try to be very accessible. I like that in South Dakota and in the Midwest especially that we had a pretty contested primary last year of our governor's race and they're like, well, we don't really know him or her. Well, I said, well, just turn around, you can talk to them. And I think we have been pretty accessible in our state, and that's what I have tried to be, that you can get out and talk to people and actually meet the people that represent you and are trying to do the things they do to keep you safe.

So feel free to come up and talk with me later, and I look forward to a good conference here. Thank you.

(Applause.)

MR. WISEMAN: Thank you, good morning. Thank you, General. My name is Ben Wiseman, and I am the Director of the Office of Consumer Protection for the Office of the Attorney General for the District of Columbia. On behalf of Attorney General Karl Racine, I'd like to thank FTC for the opportunity

to contribute to these hearings and to the Creighton University School of Law for hosting us today.

Before I address the topics that were set aside for today's hearing, I want to say a few words about our office. Attorney General Racine is the first elected Attorney General of the District of Columbia, and when he came into office in 2015, one of his top priorities was to establish a standalone office of consumer protection to protect the 700,000 residents in our nation's capital.

And as a state attorney general office, we see a wide and broad range of issues that we have to address: student loan debt issues, to predatory lending, dealing with illegal debt collection, shoddy contractors, slum lords, housing discrimination. But one of the most noticeable trends that we've seen in recent years is the unavoidable presence of the internet and in particular tech platforms in our residents' lives, and that's why privacy and consumer protection issues surrounding tech platforms has become one of Attorney General Racine's top priorities.

I'm going to spend the time today that I have for these remarks addressing two issues. The first is the intersection of data privacy, equality,

and opportunity. And the second issue, which is somewhat related, is consumer protection issues as to tech platforms and the sharing economy space.

As to the first issue, privacy as a civil rights issue, the current conversation around privacy is largely focused on transparency and individual consumer rights. And in many ways, this makes sense. As a result of the massive data breaches like Equifax, revelations about how our data is being collected and misused, like in the Facebook/Cambridge Analytica incident, consumers are rightly concerned about what information is being collected about them, how that information is being used, and how they can control that information, and that this focus on individual rights -- the right to delete, the right to know, the right to opt out -- has both guided enforcement in the privacy space as well as recent legislative efforts that we've seen throughout the country.

But a framework that focuses exclusively on providing consumers with more disclosures or more control over their data will primarily benefit only the most sophisticated consumers, those who have the knowledge and the time to read the fine print and to exercise those rights. And we believe that a broader focus is needed to make sure we're protecting our most

vulnerable residents.

The internet has become an unavoidable sphere of life for both workers as well as consumers, and there are serious concerns as we see the same marginalization, redlining, limiting of life opportunities in the online world that we already have seen in the offline world. And just for a few examples, we've seen evidence of housing discrimination in targeted advertising on social media platforms. We have seen predictive hiring tools that can lead to bias in hiring practices, even when the algorithms are set to control for categories like race and gender. And beyond the fact that vulnerable populations are being targeted online, they also feel the effects of privacy violations more acutely, like a data breach that affects or a stolen identity, than the rest of the population.

So what can the FTC and state law enforcement do to address these issues? First, as a general matter, we should broaden the focus of our privacy conversation to be more inclusive and to consider how to protect opportunities and life opportunities in the digital age, and the Commission's 2016 big data report went a long way toward broadening that conversation.

Second, fill the transparency and information gaps by using available investigative tools when appropriate. One of the biggest channels that we have when addressing this issue as a civil rights issue in this space is the lack of information, including about how algorithms work and what their results are.

And, finally, third, which has been discussed at these hearings, is using new legal theories and considering the application of an unfairness theory to address certain privacy harms.

And moving on to the second topic I'd like to touch on, tech platforms that operate within the sharing or gig economy, in the past three years, our office has initiated a number of lawsuits, as well as investigations, involving sharing economy companies, and we have three general observations that we'd like to share about our experience in this space.

First, although such companies do not fit easily within states' regulatory regimes, we've found that the longstanding consumer protection principles that guide our enforcement actions still apply. Indeed, much of the unlawful conduct that we have seen fits well within the traditional consumer protection framework: false advertising, failing to disclose

material facts, negative option marketing making it difficult for consumers to cancel services.

Second, when startups in the sharing economy launch, they're often focused solely on rapid growth to achieve a market share, and this comes at the expense of consumer relations and compliance with the law. So what we have seen is we have seen companies that engage in conduct that violates our consumer protection laws until they have obtained a significant share of the market, at which point they can hire lawyers and start to focus on compliance.

Third, in addition to protecting consumers, we also need to be extremely mindful that we are protecting sharing economy workers. There have been instances of companies using deceptive advertisements and false promises to induce workers to sign up for their platforms, and we know the companies are collecting massive amounts of data on their workers, including extremely sensitive data, and it's important that those companies take reasonable steps to protect that data and prevent it from misuse.

So as the sharing economy continues to evolve and grow its influence, both for consumers as well as our workforce, I think we can all expect that the FTC and state attorneys general should expect more

enforcement in this area. I want to be respectful of our limited time today, so I will end my remarks there. Thank you.

(Applause.)

MR. MATEER: Good morning. I'm Jeff Mateer, the First Assistant Attorney General of Texas, on behalf of Texas Attorney General Ken Paxton. I appreciate the opportunity to be here today to discuss these important issues as we seek to protect consumers in the age of big tech. While we share the concerns regarding data privacy and antitrust that today's presenters have and will discuss, during my short presentation, I'd like to highlight another concern for your consideration that we believe falls within the traditional role of state attorneys general.

Without a doubt, big tech companies are unique for the ways that they have leveraged technology to change the way that many people interact and do business. They've led to innovation, improving the way we do business and improving the lives of the consumers. For that, those companies should be applauded. But like other businesses, these companies have legal responsibilities. Like other businesses, they must avoid false, misleading, and deceptive trade practices.

The relevant question for state enforcers that I would like us to spend a few minutes examining is whether big tech companies are complying with state deceptive trade practices laws. Or more specifically, framing the issue, are big tech companies misleading users as to whether they are truly viewpoint-neutral as they have represented?

First, I think we must begin with an examination of the representations these big tech companies have made. Big tech companies have repeatedly represented themselves as providing a level playing field, open to all political viewpoints and free of bias and restrictions on the basis of policy preferences. In fact, this free speech ideal was instilled in the DNA of the Silicon Valley startups from the very beginning.

First, from Google's founders, "Google's atmosphere of creativity and challenge ... help us provide unbiased, accurate and free access to information for those who rely on us around the world."

From Facebook's founder, "[Facebook is a tool to create] a more honest and transparent dialogue around government. [The result will be] better solutions to some of the biggest problems of our

time."

And from a former Twitter CEO, "[Twitter is] the free speech wing of the free speech party." Moreover, these representations and commitments made at the founding of these companies have continued up until the present. First from Google's CEO, Sundar Pichai, "I lead this company without political bias and work to ensure that our products continue to operate that way. To do otherwise would go against core principles in our business interests. We are a company that provides platforms for diverse perspectives and opinions."

From Facebook CEO and Founder Mark Zuckerberg, "I am very committed to making sure that Facebook is a platform for all ideas. That is a very important founding principle of what we do. We're proud of the discourse and the different ideas that people can share on the service, and that is something that as long as I am running the company I am committed to making sure is the case."

And then finally, from Twitter CEO Jack Dorsey, "Let me be clear about one important and foundational fact. Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our

rules. We believe strongly in being impartial, and we strive to enforce our rules impartially. We do not shadow ban anyone based on political ideology. In fact, from a simple business perspective, and to serve the public conversation, Twitter is incentivized to keep all voices on the platform."

Traditional consumer protection law protects internet users. It ensures even-handed implementation and application of terms of service and public representations. The question is, are the big tech companies living up to the representations that they made at their founding and that they continue to make up until this day.

Evidence suggests that the big tech companies may not be living up to those representations. And hundreds, perhaps thousands, maybe tens of thousands of examples seem to suggest that they are not living up to this representation. Obviously, I've got a limited amount of time today and can't go through thousands nor hundreds, but I do have one example for each of the companies with the limited time that we have today.

First, Google. Google recently censored the Claremont Institute's ad for their 40th anniversary gala dinner with Secretary of State Mike Pompeo. The

Claremont Institute recently had initiated a campaign intended for citizens to discuss what it means to be an American. Google determined that Claremont violated Google's policy on “race and ethnicity and personalized advertising,” and the gala advertisements were banned by Google.

Claremont spent hours on the phone with Google, only to be told that there would not be an appeal. It was only after Claremont went public with Google's censorship that Google's Washington office contacted Claremont, said a mistake had occurred and restored their ability to run these gala advertisements. Unfortunately, that’s not the only example involving Google.

With regard to Facebook, Facebook prevented a user from sharing a column that appeared in the "New York Post" by Award-winning Columnist Selena Zito, entitled “Why Trump Supporters won't Care about Cohen and Manafort.” Zito later explained the article was based on my conversation with Trump voters. It had no expletives, conspiracy theories, hate speech, or sexual language. What sort of algorithm would find it, much less censor it, yet Facebook gave her no reason why it would censor a story before it removed the links. And, again, that’s just one of many

examples where Facebook has banned or limited.

Next, Twitter. In this report conducted by "VICE News," certainly not a conservative news source, Twitter limited the visibility of prominent Republicans in showing search results through a technique known as shadow banning. These are just a few of many examples we've collected and that continue even up until the very present.

Wrapping up, big tech companies have the same responsibilities to their users as traditional businesses. Consumer protection laws allow state attorneys general to prevent and address misleading and deceptive trade practices. The issue is not whether these companies are protected by the First Amendment. Social media and search companies are and do have First Amendment rights. They have the same free speech rights as the rest of us, but like any other business, these companies must be transparent and truthful about their product. Whether you're "brick and mortar" or "click and mortar" you have to be forthright with your customers about your terms of service, you have to be forthright in making representations and living up to those representations. That is what consumer protection is all about.

This responsibility is no different than the principles you have heard and will hear today about calling for transparencies in these companies' data collection and safeguarding practices. I would encourage everyone here to consider whether consumer protection laws provide useful guidance to social media companies about the rights of consumers and the responsibilities of those companies that transmit an incredibly large amount of information to millions of viewers through their powerful platforms.

If these companies are not living up to their commitments, to their terms of service, to their representations, regarding being open to all political viewpoints and free of bias and restrictions on the basis of policy preferences, then they should be held accountable for their false and misleading deceptive trade practices. I look forward to any questions that you might have. Thank you.

(Applause.)

MS. CARUSO: All right. Good morning, everyone. I am Kaitlin Caruso. I'm Deputy Director for Policy and Strategic Planning at the New Jersey Division of Consumer Affairs, which is part of the Attorney General's Office. The I want to thank the Commission again for inviting and bringing us all here

today, to Creighton for hosting us all, and I also want to commend the Commission for taking the time to critically examine your approach and look at the challenges that all of our offices are facing.

Before I go too far, I should also note, the thoughts that I offer today are mine and should not necessarily be attributed to the General or to my office more broadly. That being said, cybersecurity and privacy issues are a key priority for New Jersey. General Grewal is learning -- he is working to strengthen the state's cybersecurity standards and protections statewide. In fact, earlier this year, he announced a new division in the Division of Law called the Data Privacy and Cybersecurity Section. We're also active on several major data and privacy matters.

The reason we're all here, cybersecurity, privacy, and big data present novel questions of rights, remedies, and interpretations for all of our respective laws. Without minimizing the significance of those standards and questions, we also need to not overreact and assume that everything must be remade in order for us to respond meaningly. The story of American commerce and its regulation is one of consistent disruption and evolution, as Irene Liu, I think, pointed out in the AI and algorithms panel back

in November, there is always a new paradigm shift, and there will always be a new next big thing.

That's precisely why we all rely on the broad and flexible tools that we do in consumer protection. Of course as Hearing Question 5 alludes to, sometimes specialized additional tools are incredibly helpful as we face any problem, and new problems can push us to remove unnecessary obstacles to effective oversight and enforcement. I think robocalling and the TRACED Act is a particularly painful example that may come to mind for everybody in this room, but generally it's not clear that the challenges that we're currently facing necessitate or even yet support a wholesale disruption of our existing set of consumer protection tools or of our cooperative federalist framework for enforcement here.

I want to touch on the latter point briefly first. Question 10 for these hearings asks about "the interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices." To me, this raises two key questions: What does the law look like once we've harmonized it, and what does that harmonization mean for our enforcement system as a whole?

On substance, if the general idea is to

encourage state and federal regulators to stay aware of each other's actions and to look at the cohesive whole when they're making these choices, we entirely agree. But too often in this context, harmonization efforts skew toward locking in the lowest common denominator and precluding more protective standards, especially at the state level.

Indeed, some of the responses to these hearings, I think, have showed that impulse. The comments submitted by student loan servicers, for example, have pushed very strongly for broad preemption of crucial state enforcement actions across the country. Federal protections here should be an important floor and not a ceiling.

As for system effects, if harmonization imposes a single uniform standard or limits state enforcement, it undermines responsiveness and enforcement for our system overall. State AGs play a distinct, critical role in consumer protection because our offices are often first to learn about new scams and abuses because we're close to the ground, and we can often adapt and even regulate more nimbly when that's needed.

Now, some state and local laws actually already reflect parts or interpretations of the FTC

Act and its regulations. In New Jersey, for example, our law governing mortuary sciences incorporates some of the FTC's disclosure requirements around funeral goods and services, but absent preemptive conflict, the choice of whether state law tracks federal law in this area should lie primarily with the state. The FTC should not seek to force uniformity across states that have diverse populations and economies and equities. The variation that exists, for example with how we construct our remedies, actually can make enforcement and deterrence more effective, especially when multiple offices are cooperating.

The Federal Government can and should ensure that no one in the country remains unprotected, but should not wipe out the diversity, particularly where state standards can be more protective. I would argue that’s equally true for data privacy and regulation. I think notably even the variety of panelists in Hearing 9 seemed to largely agree that the several state standards around data breach and notification and disclosure have ultimately proved to be manageable and that they move the market in important ways by pushing toward public disclosure and also requiring companies to internalize some of the costs of their behavior. Few seem to see an urgent need to eliminate

our patchwork of regulation now, despite years of earlier assistance from many quarters.

Even so, though, many of those same concerns are crucially animating the discussion around data security and privacy standards now, but merely noting that there are or there may be multiple regimes barely suggests -- and certainly doesn't show -- that the actual result will be impracticability.

I'd also like to take a moment just to talk about cooperation. Chairman Simons has noted how much he values partnering with the states. We certainly agree. We're glad to hear that, and as one example, I particularly wanted to commend the FTC for partnering with our office in the Vizio smart TV enforcement action. I did note some concerns that were voiced at Hearing 1 about how our joint claims of consumer harm in the Vizio matter match up with the FTC's consumer injury standard, but I think Vizio really highlights that there's more to consumer injury than just readily quantifiable individual economic harm.

Dignitary and nonmonetary harms are real, and as Daniel Solove, I believe, testified the first hearing day, spillover effects from one bad deed can affect consumers broadly and also affect other businesses. For example, it can kill off consumer

trust in an entire sector.

That reality supports, I think, both a comprehensive view of what consumer injury means in this space, and it also shows the importance of civil penalties as an enforcement tool. Sometimes the harm done by bad conduct is just not simply a multiple of individual damages, and civil penalties can critically force companies to internalize the cost of their behavior.

We would accordingly view it as beneficial for the FTC to have broader civil penalty authority, so long as that doesn't impinge on the states' ability to use our own civil penalties -- authorities as well.

Finally I think Vizio is a good example of one additional question that's posed for these hearings, that of "new developments in markets and business-to-business or business-to-consumer relationships." Specifically, Vizio highlights the increasing hybridization of those relationships. And I think Ben alluded to this as well, but in effect, oftentimes a single person is both the consumer in that, for example, they downloaded the app, but they're also the product. They are generating the data that's going to be turned around and sold to third parties. Those retail and business-to-business

transactions then become really inextricably intertwined in a way that all of our offices have to adapt and respond to.

I think it's clear from there's a 29-attorney-general joint comment submitted for these hearings, the free market alone is insufficient to protect this sensitive consumer data that's often generated from these retail transactions. Enforcement by the FTC and by the states is crucial to protect vulnerable consumers' reasonable beliefs about what they're getting themselves into, and this is particularly true when I think, as we heard in Hearing 9, best practices are increasingly pushing industry to make crucial security features either seamless or entirely invisible to improve uptake. That means consumers are going to increasingly and reasonably presume those protections are built in for them.

To quickly sum up, I don't want to underestimate either the novelty or the importance of the issues raised by the questions of cybersecurity privacy, and big data. That's obviously why we're here. And there are significant concerns beyond what I've had time to raise. I think the equity and antidiscrimination concerns that Ben highlighted are particularly of concern to us as well, but my much

more modest point is just that it doesn't seem, at least not yet, that these questions really oblige us to throw out everything that's come before.

The cases that FTC and the states continue to bring show that there is much that we can and will keep doing, even as we look for ways to strengthen our enforcement efforts. Thank you so much, and I look forward to the conversation.

(Applause.)

MR. MORSE: Well, thank you very much to our panelists. We have a lot of material to chew on, and I'd like to, I guess, follow up first with a question that comes from the floor, one comment you made, Ms. Caruso, involved the issue of preemption and federal and state roles. And the question raised here involves the impact of Section 230 of the Communications Decency Act. And for our panelists, have any of you experienced frustration or challenges to your enforcement efforts as a result of this rule?

MS. CARUSO: Do you want me to start?

MR. MORSE: Yeah, you may start.

MS. CARUSO: So I think, yes, it's certainly something that we have to take into consideration, right? Whenever there's an internet-based business, whether it's a platform business or, you know, any

site that facilitates external content being posted, it's something that we do have to take into consideration. You know, I think we've seen recently in the area of sex trafficking that it has proved amendable in certain regards, but it does pose, I think, significant limits.

That being said, I think it bears noting that it doesn't fully immunize wrongdoing, right? So there have been a number of enforcement actions in various contexts against sites that have chosen to cultivate, actively engage with, you know, really develop some of the dangerous or harmful material that they have put out into public view. So it's not full immunity, but it absolutely is a hurdle that we have to take into consideration when we're considering an online enforcement action.

MR. MATEER: Yeah, and I'll just add, I mean, I think to underscore the point, it is not full immunity, and I think a textual analysis of the statute, it is not as broad as perhaps some have said. And I think it's something that we are going to see litigated, but I think if you are a textualist and you look at the actual language of the statute, it's not as broad as perhaps folks have been saying.

MR. WISEMAN: And the only thing I'd add is

that the attorneys general on a bipartisan basis have spoken out on this issue through letters to Congress, to agencies, to the administration, so there is a deep public record of the attorneys general taking positions on a bipartisan basis on that issue.

GEN. RAVNSBORG: I mean, that's along the lines of what I was going to say. I think there's about 40 attorney generals that are onboard, at least, and working actively to pursue this and make some upgrades in Congress.

MR. SMITH: Ben, you talked about issues surrounding inequality and fairness, and you talked about, for example, algorithms that target housing advertisements and issues about predictive algorithms used in the employment context. So we do have antidiscrimination laws that I think address both of those areas. Are those laws inadequate to the task, and should we be thinking more broadly about discrimination?

MR. WISEMAN: So I think as I mentioned in my remarks, I think that consideration of new legal theories and the use of new legal theories will be helpful in this, but I think the main hurdle that we're facing in addressing this issue is a transparency issue, and especially as to targeted

advertising. There's very little transparency as to how ads related to lending or insurance or housing or education, how those ads are distributed. And there's been recent -- and this may be a legislative fix, but I think that once there is more transparency in this space so we understand how these algorithms work, what the results are, we'll be in a better opportunity to take more enforcement actions on it, using the legal tools that we have, but also needing to consider new legal tools to address these harms.

MR. SMITH: So this is a quick followup -- and I'd like if others have thoughts on this, it would be great if you could address it -- but this may be a little too esoteric, but do you think that this is a privacy issue? Or would it be more appropriately dealt with through existing fair lending, fair housing, EEO-type laws?

MR. WISEMAN: So I would just argue that it's an issue that is so impactful on consumers' lives that we shouldn't cabin it to just a privacy issue or just a discrimination issue and that it should be viewed as something that all the available tools that we have in our consumer protection toolkit should be used to address something like this.

I don't know if that answered the question

directly, but...

MR. SMITH: No, it did. I mean, so this is an issue that I sometimes struggle with because we hear a lot about potential privacy harms, and this is more and more frequently mentioned, this sort of algorithmic bias, and it seems to me as though we do have laws that address that. Whether those laws are adequate or not is a good question to be asking. But we don't typically treat it as a privacy issue but as, you know, something that -- as an antidiscrimination issue.

MR. WISEMAN: Just going back to the other point, you know, the way this data is collected, how it's collected and how it's used, the transparency and the information gaps that we face as state law enforcement, I think that is where you'll see more of the privacy aspect of this.

MR. SMITH: Okay, Kaitlin, you had a thought on that as well?

MS. CARUSO: Well, I was going to say, I think I was just going to echo where Ben was going, which is it does become a privacy issue. I think in some instances in particular it's not always clear why some of these entities need some of the information about -- or why they would aggregate it with an eye

toward identifying ethnic affinity, for example, racial affinity, that kind of behavior. And so I think this goes back to one of the larger themes of these hearings, which is, you know, one of the questions around privacy is not just -- and security actually as well -- is not just how you protect information you have, but what information are you choosing to solicit and keep and why?

MR. MORSE: Just as a general question, this seems to be an area also with where there are potential tradeoffs, these new uses of data. For example, credit analysis and credit scoring has a potential really to give many benefits to consumers that might not otherwise have been able to access credit under more traditional models.

Do you see this as an area to tread lightly? And is that an area maybe that deserves federal attention more than state attention in light of the interjurisdictional dimensions of it? Maybe, Ms. Caruso, since you love state action, I will let you start.

MS. CARUSO: Fair enough. So I think, you know, you're exactly right that there is a tension and there is a fine line to be walking here when we're looking at potential tools that can expand access for

folks that traditionally would have less access to, you know, credit, for example, I think is one clear one.

That being said, you know, it is still true that if you are going to lend money to somebody in New Jersey, I don't think it's unreasonable for it to be incumbent on you to figure out what the protections are that apply to that person, especially given that in these spaces, you know, scaling up thoughtfully from their perspective is perhaps not the worst idea for consumer protection, so obliging them to take account of the consequences of the data that they are using.

Not all of the information that they're using that they can use to predict -- to create thoughtful, predictive models will wind up being necessarily a proxy for race or gender or the other things -- the other categories that we're particularly concerned about, but certainly some of the information can. And so I don't think it's unreasonable to expect them to be thoughtful and aware that there are particularly disparate impact and discrimination standards that will apply to them as they move throughout the country.

MR. MORSE: Do any of you have trouble --

when you're looking at these issues, do you have trouble accessing the algorithms? I mean, how does one assess? Many of them, I assume, are trade secrets, right?

MR. WISEMAN: Yes. I would just say yes. And there's also an information gap, a technological gap between the companies that are using these algorithms and law enforcement.

MR. SMITH: So, okay, one question in that regard is, why do we care how the black box does what it does?

MR. MATEER: Because of the results.

MR. SMITH: If you're looking at the output, though.

MR. MATEER: Why are we getting -- I mean, the issue has been raised, the issues I've raised. Why is it repeatedly happening over and over again? You know, we see examples where -- I mean, in the case of the issues that I've raised where you've got people's tweets or their posts or their ads being excluded, taken down for some reason, and then the companies seem to always respond like they did in the case of Claremont. That could easily be Creighton. It could be Creighton. I mean, what's the difference between Creighton and Claremont?

And then you ask why? And they said, well, it's the algorithm, like, it's that some celestial body out there, it's an algorithm, and we're sorry. And now Google is apparently or somebody is checking us right now as we speak. The black box is working.

GEN. RAVNSBORG: And recording, probably.

MR. MATEER: But -- yeah, that's good. But -- and so I think that's the question. Why does it matter is because what we have. The Claremont example, to me, is the most recent perfect one, is because the response is, oh, that was a mistake. Why was it a mistake? What is wrong?

So I think to me, transparency -- look, Google, Facebook, Twitter want to have policies, and the folks who go online are informed and they're transparent and there's buy-in and there's informed consent, then God bless them, and they can do that. But they need to be honest with what they're doing.

And when you have someone like Claremont who tries to do it and just because they went public, how many people are banned and don't even know it? So I think that's -- so that's the question. I mean, why? Because they can't explain how it works. You know, we've never gotten a satisfactory answer other than it was a mistake, we're sorry.

MR. MORSE: So in response to that, I guess if you're going to intervene in those areas, what kind of remedy would you like to see? Would you like to see greater transparency in terms of rules? Rules of engagement, rules of conduct, sort of editorial policy? Or would you like to see a process, if you're excluded, or both?

MR. MATEER: Well, I think that's it. And my understanding is, I believe Facebook may be taking steps to do that, which we encourage them to do it. I think a lot of this is, we do encourage the companies to self-regulate, and as my 100-year-old grandmother would say, the proof is in the pudding, and the proof will be that we don't get over and over again almost on a daily basis Franklin Graham being banned from Facebook, I mean, or Creighton University not being able to post an ad on Google.

I think the proof will be -- the proof will be -- if they say -- if not, then I think the states, the Federal Government, us as enforcers are going to have to seek those type of results.

MR. MORSE: Okay.

GEN. RAVNSBORG: I guess I would add to that. You know, I would say both. We would like transparency but also to know what the rules are, and

I think any time in any organization you want to know what the rules are, and then, you know, if they make a mistake or if it's part of the algorithm, you know, what are they going to do to go forward and change it or make an improvement upon it? So I think good communication is also essential.

MR. MORSE: As enforcers, I noticed Mr. Mateer, you were looking at many channels for communications coming from these organizations. Oftentimes, we think of the terms of service and all of those documents that we, as consumers, don't read. And I wondered if, from the panel, what kinds of channels are you looking at in terms of regulatory enforcement activities? Are you limiting that -- are you primarily focusing on those documents that define the terms of service, which, as Mr. Wiseman says, probably won't help the most vulnerable, in fact, most of us, because we won't read them, or are you going beyond that? Do you see any other examples of that?

MR. MATEER: I mean, I think you can go beyond. I mean, I think it does start with the terms of service. I think they need to live up to the things that they're representing. I think, as General Ravnsborg said, that you've got to have informed consent, that people would need to understand. But I

also think when someone goes before Congress and says something and makes a commitment, just like if a business made a commitment publicly, makes a public representation, then I think our state deceptive trade practices acts do apply. Businesses can't make representations and not live up to them and that we would have enforcement authority in those areas.

MR. SMITH: So I want to shift gears just a bit. Several of you talked about your partnership with the Federal Trade Commission, and we very much appreciate the good relationship that we have had over many, many years and many, many administrations and, you know, our sort of -- it's routine cooperation now in sweeps and in, you know, large law enforcement initiatives with respect to, you know, robocalling and small business fraud, and also individual cases like Vizio that Kaitlin mentioned. And General Ravnsborg also discussed taking a proactive role in educating consumers, where the FTC is very active.

So is the partnership working the way that you think that it should? Are there things that we ought to be doing that we're not? Are there things that we're doing that we should refrain from?

GEN. RAVNSBORG: Well, I guess I would say first that I think it is working. I do think we have

good partnerships and good communication, also. And I think, as you had mentioned, in many administrations, I think the nice part of the FTC of going between Republican and Democrat and back and forth that they always have a consistent mission and message and that they're always helpful, I would say, to people across partisan lines. And I appreciate that because that's not always the case in all agencies, and there is always more that we can do, but I think you're doing a good job and we have a good relationship.

MR. WISEMAN: I would agree and, you know, one area where states have really benefitted from the relationship with the FTC is to narrow that technological or specialist gap. The FTC has technologists on staff and has great resources. In our state, we're fortunate enough to be able to hire technologists and other resources to help us in these cases where there are complicated questions. Many states don't necessarily have those resources, and the relationship with the FTC has been very valuable to the states from a resources perspective.

MR. MATEER: And I'd agree. I think because of the national presence when you have a national issue, when you have something like robocalls, I think the partnership with the FTC is very important. And I

think like all relationships communication is the key, that we're talking to each other and that we're gaining from your wisdom and you're gaining from our wisdom.

I think Kaitlin made some great points. I mean, at the end of the day, our office -- offices -- are probably more directly in contact with citizens in our states, that just when you have a state like Texas and we have offices, you know, throughout the state and receiving complaints, I mean, I think we are sort of, you know, at ground zero in working on these issues. But I think communication is the key, and I think anything we can do to foster that communication I think will lead to good results.

MS. CARUSO: I would generally agree. I think particularly where an issue -- a matter is going to be complicated in terms of scope and scale and is going to affect an entire region or a multistate area, it's especially crucial for that cooperation to be in place, but we really value the partnership we've had. And I think Ben is exactly right that the FTC's willingness to share its expertise and resources is really incredibly helpful across the country.

MR. SMITH: And how about the relation -- so we have regional offices near to all of you -- Dallas,

New York, Chicago. Are your relationships with our regional offices what you think what they ought to be? I mean, have you had -- do you have good relationships? Do you cooperate on common ground conferences and things like that?

MR. MATEER: I mean, I think the Texas -- the office, I think we work well together.

MR. SMITH: You also have tools at your disposal that we don't. So I'm thinking particularly what comes to mind is charity fraud, and you have the ability to get cy pres settlements and distribute money to recover -- recovered money to other charities that are consistent with the program that the money was supposed to go to in the first place. We can't do that.

Another area, though, is civil penalties. We don't have civil penalty authority under our organic statute; many of you do. Do you think that there are certain types of violations, for example privacy and data security, that lend themselves better to the use of civil penalties?

MR. MATEER: I mean, absolutely. Because I think in some of these areas, measuring the harm to the consumer, ultimately consumers are harmed; other businesses are potentially harmed. It's difficult

sometimes, and I think our state legislatures have given us that authority in state law so that civil penalties are very, very important.

MR. WISEMAN: Yeah, I think we would agree with Jeff, that there has to be more, this has to be more than just the cost of doing business for companies. There has to be some deterrence effect, and civil penalties can be very valuable in creating a deterrence.

GEN. RAVNSBORG: And I've always believed that the more tools in the tool chest may be one way to get their attention better than another.

MS. CARUSO: I'd share their comments.

MR. MORSE: You mentioned the role of NAAG. Is there also coordination on an office-by-office basis across state lines when you have a jurisdictional issue? How often does that happen?

GEN. RAVNSBORG: All the time. I guess when I took office, the very first thing I did was I tried to meet all the attorney generals at least around me first, and then we branched out from there. But, yeah, there's issues that come up all the time in many different areas, and I think it's good to have good cooperation and communication. We've worked with Texas on a number of issues and a number of the other

states, and so I think that we do have good communication. We may be a small state, but we're still very active.

MR. MATEER: Yeah, I mean, I think an example, I mean, Ben and Kaitlin and with my Consumer Chief, Paul Singer, is here, I mean, they work together. I mean, sometimes I think they see them more than they see their offices back, but, no, there's a lot of cooperation among the states and, quite frankly, across party lines on these issues.

MR. SMITH: So this has been a terrific discussion. We are just about at the end of our time, but I want to thank all of our panelists for your contribution. Thank you so much.

(Applause.)

MR. SMITH: And I think we'll take five minutes and be back here at 9:35.

(Brief recess.)

CONSUMER PROTECTION ENFORCEMENT AND POLICY (PANEL B)

MR. MORSE: Good morning, everyone, and welcome to our second panel on consumer protection enforcement and policy. I am Ed Morse. I teach here at Creighton University School of Law, and I'm joined by my comoderator, Andrew Smith, who is the Director of the Bureau of Consumer Protection with the FTC.

And our panelists on the second panel are, beginning to my left, Matthew du Mee, who is from the Office of the Attorney General for Arizona. He is the Unit Chief Counsel for the Consumer Litigation Unit, and he previously worked as an associate with Perkins Coie and clerked for the Arizona Supreme Court.

Immediately to his left is Crystal Utley Secoy. She is a Special Assistant Attorney General in the Mississippi Attorney General's Consumer Protection Division. Crystal leads and participates in civil investigations and litigation relating to privacy, antitrust, and utilities. She also assists General Hood regarding policy issues and served as the Attorney General's legislative liaison.

And, finally, to her left, is John Abel. He is a Senior Deputy Attorney General in the Pennsylvania Office of Attorney General's Bureau of Consumer Protection. He's also served in that

office's Torts Litigation Section, both in Harrisburg and Norristown, in addition to several years in private practice.

So as with our previous panel, we're going to hear from each of our panelists, and then we're going to have an opportunity for questions and answers. There will be an FTC staff member available. If you have a question, we'd like you to write those down and submit them, and we will pose those to the panelists as appropriate.

So let's begin with Mr. du Mee.

MR. DU MEE: Thank you very much. Could I have a clicker there for my PowerPoint? Thank you.

So one thing that my office has really focused on, Attorney General Brnovich's office, has been restitution, and so I want to just take a few minutes to put in a plug for why it's so important and to commend the FTC for its efforts in this area.

The FTC in the last three years has secured over $6 billion in refunds for consumers, which is really a remarkable number. A lot of that is the Volkswagen settlement, but there still have been many, many settlements where the FTC has gotten money back to consumers, sent checks back to consumers. That's clearly been a point of emphasis for the Commission,

and we want to commend the Commission for doing that.

In addition, Attorney General Mark Brnovich's office has secured a record-breaking amount of restitution recently as well, over 65 million. Again, a chunk of that is certainly Volkswagen, but we've had many other cases where we really focused on restitution, made that a priority, and been able to achieve settlements more quickly for consumers.

And I think from the Attorney General's perspective, restitution is a top priority because it's something that in many cases only the AG's office can really do well for consumers. In some cases, we do have class action attorneys but AGs are uniquely positioned to be able to get that restitution faster in some cases for consumers and get an even better result.

There are also some data breach cases in which restitution or some sort of payments to consumers may be appropriate. So one interesting example of that just in the past couple of years is the Uber data breach case where Uber driver data was breached, and the states reached a settlement with Uber. And some of the states, Arizona included, elected to give a payment to drivers as part of the settlement in recognition that drivers are the ones

whose data was breached so drivers are the ones who should receive some sort of compensation as part of that.

That's, of course, not possible in every single data breach case, and the value of different types of data varies as well. It's a complicated topic, but it's something that should be considered as part of the process and shouldn't just -- we shouldn't have an assumption that a data breach case is necessarily just a civil penalties case or something that's too difficult to think about the effect on consumers.

Remedies. Since one of the topics is whether the FTC should have some kind of civil penalty authority, civil penalties are certainly a very powerful tool. Civil penalties are definitely appropriate in many of the cases that our office and other offices look at, but they should be used wisely. They're a very big stick.

For example, in Arizona, a civil penalty can be up to $10,000 per violation. When a company is engaged even in just, you know, 10,000 violations, that can be an enormous number, and now we're talking about hundreds of millions of dollars, in some cases billions of dollars theoretically. That can be very,

very difficult for companies to deal with when they're looking at that kind of liability and trying to figure out what to do.

And so I think that the approach that we've used that has been very effective is using civil penalties to facilitate speedy restitution settlements. And the best example I have of that is the Theranos case. In Theranos, as most people know, there was a blood-testing company that came actually to Arizona first. They started in California but set up in a bunch of Walgreens in Arizona and said, we can test your blood with just a pinprick.

And now there's going to be a movie and documentary and a bunch of other things about this, but at the time, it was revolutionary and everybody said you'd be able to get just a whole blood test off of a little pinprick. And they set up these testing centers, but then they started invalidating tests and sending people void test results or corrected test results. And as we dug into it, we found out the company -- the testing wasn't reliable at all and the results were all over the map.

So when we came to this company and were investigating it, the walls were starting to close in in terms of class action attorneys, in terms of

Walgreens going after them, securities actions. And so our pitch to the company, as we were getting ready to sue them, was, look, we can sue you and, you know, we'd be able to get all of these civil penalties because we're sure we can prove that it was willful and knowing that you did all these things, or you could provide restitution to consumers.

And so our offer to them was, if you give restitution where you pay back all Arizona consumers everything that they paid out of pocket for these unreliable tests, then we're willing to compromise on civil penalties. So in the end, they paid out about $5 million to Arizona consumers. We just literally mailed checks to everybody in the database for the amount that they paid, but in return, we took about $200,000 in civil penalties.

I'm sure we probably could have gotten a lot more in that case if we'd litigated it to the end, but as many of you know, about a year later, Theranos didn't exist anymore, and, you know, the securities people and the investors and Walgreens and the class action attorneys as well, everybody else has come up pretty much empty-handed. So I think that's an approach that should be examined by the FTC.

And then one other issue, I think this is an

issue that we raised in a comment to the FTC, that the FTC should reconsider its policy on suspended judgments. Currently, I know the policy is if there's an inability to pay, then the FTC will announce a judgment in the full amount but say, look, that's all suspended because you can't pay anything and maybe somebody will have to pay $10,000 or something.

I believe that suspending judgments based on inability to pay creates perverse incentives. If somebody steals a bunch of money from consumers and spends it all, they don't have to pay anything in a judgment, but if they steal a bunch of money from consumers and keep it all, then they actually have to pay it back to consumers.

And in particular, I think we're concerned when we see restitution being suspended. If somebody took, let's say, a million dollars from consumers and they don't have any of it left, they still owe consumers a million dollars. That shouldn't be permanently suspended because they have the inability to pay right now, especially because things change and sometimes we've had judgments where years down the line somebody now has money and, you know, doesn't want to have this judgment on record anymore and will pay off our office.

So we would recommend instead that especially when it comes to restitution that you don't suspend and give up those claims permanently but say, look, you know, we understand you might not be able to pay this judgment right now or we might not be able to enforce it against you for now, but we'll continue to try to do so, and maybe something will change in the future, because the consumers' money has not -- should not just be thrown away because the person doesn't have the ability to pay it right now.

The more just result is to have a judgment where it's difficult to collect but at least you still have a judgment on file that potentially you can collect at some point for consumers rather than letting somebody completely off the hook because they were smart enough to spend all the money that they unlawfully took. So those are some of the recommendations that we have and the things for consideration, and I appreciate everybody's time.

(Applause.)

MS. UTLEY SECOY: Hey, there. I am Crystal Utley Secoy on behalf of the Attorney General of Mississippi, Jim Hood. I would like to again thank the FTC for holding this hearing and inviting us and thank Creighton University for hosting us. The

attorneys general have a strong working relationship with the FTC and a strong consumer protection mission, as you've heard this morning. I think the first panel did a great job describing consumer protection within our various offices.

The FTC has been a wonderful, accessible partner to the states in consumer protection, telemarketing, and antitrust enforcement. Collaboration with the Federal Trade Commission and the National Association of Attorneys General is very valuable on matters of national impact -- we've discussed it a little bit, but I just want to get that on record -- yet it is very important that states maintain our independent ability to protect consumer privacy, particularly for local and regional matters that are not on the FTC's radar.

And I think the fact that AGs are able to coordinate on privacy enforcement shows that slight differences in state law are very manageable. Our investigators are on the ground prosecuting identity theft, which is often a result of these data breaches. So any federal legislation on data breach notification and data security should recognize this important role and not hinder states that are helping their residents.

Data breaches often due to fishing expeditions and large tech platforms who turn a blind eye to misuses and mislead consumers regarding their privacy policies are the biggest data security problems that we see and are likewise our top privacy concerns. So as Matthew mentioned, civil penalties are an important enforcement tool, and our privacy laws, frankly, need some teeth to them.

In Mississippi, we have authority under the Mississippi Consumer Protection Act to impose civil penalties in the amount of 10,000 per violation if a person knowingly and willfully commits an unfair trade practice. We may also impose the same amount of penalties if someone violates an injunction. We also can impose criminal penalties under the act starting at $1,000, yet third and subsequent convictions constitute a felony.

According to our state data breach notification law, failure to provide notice after a data breach is a violation of the Consumer Protection Act on its own, aside from any unfair or deceptive practice that may have been associated with that. So in the EU, organizations can be fined up to 4 percent of their revenue for breaching the GDPR or 20 million euro, whichever is greater.

A great analogy that I've heard is that platforms are essentially online neighborhoods that the entities oversee and that we must take precaution and maintain them just as we do in the physical world. They must proactively do more with existing technology available to them, rather than rely on the notice and takedown approach which relies on user reports and has allowed a great deal of harm, including counterfeiting and piracy, human trafficking, spying, privacy violations, illegal drugs, financial crimes, and more.

Platforms must take proactive steps to implement security in its culture. The industry has the means and expertise to accomplish these goals, yet action is needed. If data security and responsibility toward consumer online privacy does not improve, I expect that U.S. enforcers will increasingly utilize their current civil penalties and more.

Fortunately, we don't have to reinvent the wheel. The EU and California have made great strides lately in this regard, and I would like to quickly touch upon some top privacy principles. You all forgive me for reading, I just want to make sure I don't miss anything.

Prompt notification to consumers of a data breach; clear and informed opt-in, not opt-out,

including disclosure of the type of data; lawful reason for collecting, sharing, and selling that data and how it is going to be used; the ability to easily withdraw consent and have your data transferred or deleted; only collecting data absolutely necessary for that stated purpose and keeping it in an identifiable form only as long as absolutely necessary; designating a qualified person like a chief information officer for medium and large entities; proactively, regularly monitoring content on platforms and third parties -- those include apps, vendors, and advertisers; and take action.

State or federal law should include specific penalties and requirements related to platforms and other entities who turn a blind eye. Please share intelligence with other platforms and with law enforcement. You know, come to us. Don't wait for us to come to you.

Explain privacy policies and cybersecurity in an understandable, noticeable, and accurate manner, including the rights and methods to withdraw consent and to transport or delete data; and notify consumers when the policy or use of data changes.

Transparent and responsible algorithm use. And we've heard about that a little bit earlier this

morning. Cybersecurity that is sufficient to prevent unauthorized access and keeping records of all of this, of the consent, data processed, and the content and third-party monitoring.

So one question we've heard from academics that Congress needs to consider is whether a specific federal/private cause of action is appropriate in the wake of these data breaches and data abuses. We're also vigilant of the increased use of artificial intelligence and algorithmic decision-making and how they impact consumers. General Hood maintained in our 2013 Google investigation that companies must be transparent regarding what goes into the algorithm, what control they have over it, and they must be responsible for their influence over those outcomes.

Lastly, we are doing everything we can to stop illegal and annoying robocalls, including collaboration between state and federal government and industry, and we all need to do the same in the area of privacy and data. These FTC hearings are an indication that enforcers are gathering every tool we have to address this situation. Thank you.

(Applause.)

MR. ABEL: All right, good morning, everyone. My name is John Abel. I am the Senior

Deputy Attorney General in the Pennsylvania Attorney General's Office. On behalf of Attorney General Josh Shapiro, I would like, along with my fellow panel members, to thank the Commission for scheduling these hearings and for the University's hospitality in hosting this event.

The Commission has, in our view, appropriately scheduled these hearings to look at consumer protection issues and data and privacy security as we make our way through the rest of this century, having two decades in under our belt. So my comments will reflect a little bit of a look back as well as a look forward as we try to anticipate and address current, as well as perspective emerging issues, in this particular arena.

I do want to comment and reiterate that at least for Pennsylvania we've long had, I believe, a productive and helpful relationship with the Commission. I was asked earlier how is your relationship with your regional office? I can tell for Pennsylvania they are, again, very accessible. For some reason, Pennsylvania is paired up with the Cleveland office, so we have to call west when we want to reach someone at the Commission, but they've always been extremely responsive, and I would also add that,

personally speaking, I find the educational materials very, very helpful as they come out from the Commission.

As we gaze into the crystal ball trying to anticipate what we'll see for the rest of this century, I want to harken back to the 19th century and use as sort of a guiding principle two quotations from Justice Brandeis that -- for the law students or the lawyers in the room, we're probably familiar with both of these.

The first one I have up on the screen, and I won't read, you know, word for word, but I think what the Justice was saying here in this famous law review article is that privacy matters. It was probably one of the first sort of acknowledgments that there is sort of a zone of the consumer's world that should be deemed private, and that's true now more than it was in 1890, be it consumers' financial information or what we have coined PII, personal identification information, or shopping and user habits, where consumers click, what they click on the worldwide web. All of this, in a sense, should be appropriately viewed as part and parcel of that consumer's privacy sphere.

As a general rule, consumers have a right to

expect that their private, personal, and financial information will, in fact, be kept private and not shared with others or used by others for commercial purposes without the consumer's informed consent. I think that's trying to take this 1890 thought and apply it here in 2019.

Secondly, I will look to Justice Brandeis in a dissent in 1932 for another principle that I think underlies a lot of the discussions here this morning, which is this famous quote about the states being laboratories of democracy and the important role that state AGs have in protecting our own citizens from practices that may violate or impair that expectation of privacy in consumer data.

We derive -- sort of the bedrock of this interest derives for many of our jurisdictions from the common law, parens patriae powers that we have as the state AG coming from our traditional police powers to protect the public health and safety of our citizenry as well as statutory powers, created by UDAPs throughout the country.

So we again would reiterate that we have to maintain a space here as the AGs, again, because we are really the ones on the front line. I mean, we have regional offices in Pennsylvania, so we're the

ones that consumers come in, we talk to them and we hear from them online, we hear from them complaints, we hear them from outreaches. So I think, you know, this is probably the first touchpoint for most consumers is their local state AG offices. So we're often in a good position to respond nimbly and quickly to local practices as well as practices of a nationwide scope. So we're the ones that hear about consumers when they perceive there to be a whittling away of their privacy rights.

The state AGs oftentimes with, you know, maybe a couple or much broader base of AGs work very closely together in a timely manner in order to respond quickly to these kinds of concerns. It might be a data breach in which we reach out to the company immediately to find out the information about the scope of the breach, what's been breached, what's being done to help consumers, so we can again sort of act as that nexus to consumers to provide information as the facts become known.

The states have -- our individual UDAPs differ in some important ways from the Federal Trade Commission Act. We, in Pennsylvania, do have the authority to seek civil penalties in privacy cases. We have similar formulations for civil penalties as

our sister states. We believe that's an important deterrent function to send a signal that certain conduct is illegal and will not be tolerated.

We, in Pennsylvania, have a very flexible standard. Our UDAP has 21 different ways that you can engage in unfair deceptive acts or practices, concluding with what we often call the catchall, engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. We follow FTC precedent to mean that that does not require an intent to deceive, it does not require damages, it does not require reliance, as you might think, in a common law fraud action. All that needs to be shown is that the acts or practices at issue could be interpreted in a misleading way.

So we rely very heavily on our own individual UDAPs and the cases that construe that in order to proceed in these privacy cases. We also have an unfairness prong, and I think this was touched upon earlier. You know, in Pennsylvania, an act can be illegal not only because it's deceptive but because it's unfair. And at least in Pennsylvania, we maintain in our core cases that we follow what I'll call the old cigarette rule that was at one time in

play with respect to what would be deemed unfair. And, you know, this is a fluid definition that includes conduct that is immoral, unethical, oppressive, or unscrupulous or violates public policy.

So we had a recent case in Pennsylvania with a hospital data breach or private action that did sort of, as a backdrop of the common law, recognize there is a duty under certain circumstances to protect consumers' financial information. So I think particularly when we work in junction with the Commission, the Commission as I understand has -- since the 1980s -- has a different definition of "unfairness" that's more of a cost/benefit, but we would contend in Pennsylvania that we, in fact, are using the cigarette rule, the S&H green stamps test of what is being deemed unfair.

That is one way to approach data privacy, along with the deceptive theory, which means if a company has a privacy policy or other public representations that they're going to protect consumer data and when, in fact, they do not that would be a basis for the attorneys general individually or collectively to begin a further inquiry.

So we do believe that we need penalties, we need restitution, injunctive relief, as has been

commented. Part of the goal here is, you know, certainly to have monies paid but to effectuate a change in culture and business practices, to make sure consumer protection and consumer privacy is a priority, you know, not only from a budgetary or an expenditure standpoint, but from a managerial standpoint, within the so-called C-suite, that this is recognized as something that has to be prioritized in order to ensure that consumer data, consumer information is properly protected. And we think that's a very important part of the whole discussion as we move forward through the balance of this century. So thank you.

(Applause.)

MR. MORSE: Well, thank you, everyone. We heard a lot about enforcement and penalty issues. A couple of questions in that area. First of all, how are you faring about collecting the judgments that you get or agreements from restitution? And, second, how do those collections relate to other obligations that these firms may have, like are you utilizing your tax collection mechanisms to help -- that expertise to help enforce those judgments? And then how do those two prioritize each other? You have a government debt in one case that goes to the Treasury and another debt

that may be best for consumers. So how do your states prioritize those two if there is not enough resources to go around?

MR. DU MEE: Well, one thing that we've noticed is in our restitution focus, we still, as we've gotten more focused on collecting restitution for all consumers, still been able to get a substantial amount of civil penalties and actually collect more, because we are saying in a lot of these cases, Theranos being a very notable example, you must pay us the money up front before we sign the judgment because we thought, and we were right, that Theranos may have some money issues. So we try to make that a condition of our settlements whenever possible if the person or the company has assets, that they pay up front, and that's just part of the settlement bargain.

And since we've done that, we've been able to have a lot better collection rate because that's much more effective than saying, okay, you have to pay one year down the line or two years down the line or even in some cases you have to pay within five days of the judgment, and the judgment finally gets entered, and then all of a sudden, the person doesn't have the ability to pay anymore or they won't pay us, and then we have to go through the collection process.

So that's one method that I would really encourage is saying, look, if you're going to settle, then you at least need to put up the money up front so we can be sure that we're going get it to consumers and not just get an empty judgment.

MS. UTLEY SECOY: Right, I would agree. Particularly with our larger matters, the money is paid at the beginning of the settlement.

MR. MORSE: But I assume not everyone's a public company like Theranos where you've got resources there. In some cases, the resources may be gone, and so how do you -- in those cases, what do you do?

MR. DU MEE: Well, so we've done payment plans with companies and with individuals. One thing that we commonly do is we go after companies and the individuals who ran the company, because we have the ability to do that under the Arizona Consumer Fraud Act, and I think against most of the UDAP statutes because as long as you can show those individuals also committed the acts or practices you're talking about, and so then, therefore, in situations where the company is gone or going under but the individual still has resources sometimes you're still able to work out a deal.

And then in some cases neither the company nor the individuals have money anymore, and in some of those cases, the right result, we've found, is to enter into a judgment where they're still obligated to pay that amount, but we may not be able to collect it from them because ultimately in litigation, that's the same thing that we could get at the end of the line. So that's the best use of state resources, I think in those cases.

MS. UTLEY SECOY: And you can do some kind of, you know, financial discovery. If they make a claim that they are not able to pay or they're insolvent, you know, they can demonstrate that. But fortunately we all have the ability to require injunctive relief and really go after systemic change and improving conduct going forward, which is very important to us all.

MR. ABEL: And I would say personally, and again not speaking for the Office as a policy, but I think personally what we try to do in the regions is to ensure if there's limited dollars coming in that they would be applied first to restitution. That's -- you know, that money should go first back out to consumers.

We do try to strive to have the judgments

entered as of record in the local courthouse so if the responder or defendant wins the lottery, wants to get a loan, that the judgment will be there. And often -- not often, but there's been an occasion where we've been able to recover monies as part of an existing judgment on that.

You know, we seek to do our due diligence before we do a payment plan. You know, I think my experience has been that, you know, I'd almost rather get money up front because payment plans can require a lot of time to keep them current. I mean, you really spit up a lot of time keeping folks current. So, you know, I've kind of reached the conclusion oftentimes you're better getting the money up front and then getting this injunctive relief, which is just as important, so we've now fenced in their business practices so the idea is there will be no victims again in the future going forward.

MR. SMITH: So I wanted to talk a little bit about -- and I think there may be a question in here, too -- about Matthew's comments with respect to the FTC's policy regarding suspended judgments. I don't know that it's so much a policy as a practice. Every once in a while over the years commissioners have raised questions about suspending judgments for

ability to pay, and in many cases we don't do it. So, for example, when we have a contemnor and we're bringing a contempt action, we wouldn't suspend that judgment. We would litigate to the bitter end.

But it sounds like your policies are not -- or at least your practices -- are not really all that different than ours. What we want is cash on the barrelhead so that we can get that money back to consumers. We don't want to have to litigate for two years and at the end of it have a smaller pot of money than when we started. Where we do suspend judgments, we require financial statements that we then vet, of course, and we look at all the assets that are available and consider what we would be able to reach in litigation versus what's sort of -- what would be protected from the FTC, for example, homestead exemptions and the like.

So what we want to get is the most money back for consumers as fast as we can, and we don't like payment plans. We will do it every once in a while, but only because -- I mean, typically, it's because of liquidity reasons, you know, they have to sell assets. And so we might give them a couple of months to do that, but there's not, you know, any -- nothing like, you know, you get to pay over 36 months,

things like that. So I don't think that there's all that much daylight between us, but there is -- but this is an issue that we are constantly looking at.

And with respect to the perverse incentives, one of the things that we have found -- and maybe here's the question -- one of the things that we've found in our cases is that our measure of relief, our measure of restitution is the top-line gross revenue, you know, how much you made. Let's say it is dietary supplements and you made $10 million selling dietary supplements. We look at your top line minus any refunds, and what we find is that fraud can be very expensive, that you have -- if you're employing a call center or you're employing a payment processor or a robocalling platform or, you know, other types of service providers, that that's where the money gets chewed up.

Sometimes it is people who are just spending money, like you say the perverse incentive, spending money as quickly as they get it, but a lot of times it's actually the cost of the business that uses up the money, and that's why at the FTC we're very focused on these facilitators, the payment processors, the call centers and the like.

So have you -- in your cases, have you found

that -- essentially that fraud can be expensive?

MR. DU MEE: Yeah, sometimes it is, and sometimes it’s just very difficult without a full -- the financial records of the company to figure out where all the money went, because we’ll very often get the claim that, well, we just spent all the money to keep the lights on along the way, but sometimes when you drag all of the financial statements out into the light, suddenly that’s not quite as clear as it appeared to be.

I think that those points are fair points, and I think that the main concern that we have because we’ve suspended civil penalties in cases as well, but when it comes to suspending payments for restitution and to say these people will never be paid back, no matter what happens, even if the person wins the lottery or becomes a successful businessperson down the road, because at the moment they don't have the ability to pay, that's not the same judgment that you get at the end in litigation.

And so, you know, I think that’s the area where we have more of a concern, and I’m glad to hear that the FTC is looking at it and it’s something that’s being considered because that's an area where I think that there is a little bit of a difference

between our two offices. And we would encourage the FTC to closely examine that policy and really consider in each case whether it's an appropriate policy.

MR. MORSE: Would anyone else like to comment?

MS. UTLEY SECOY: I mean, I'm sure there are instances where the fraud and deceptive behavior is part of a complex business structure, but, you know, illegal robocalls are cheap. Incredibly cheap for them to orchestrate that. Just one caveat there.

MR. ABEL: Yeah, and in Pennsylvania we've, you know, again looked to some of these other actors as well. You might call them the enablers or whatever you want to call them, but under either aid and abet or facilitate the fraud, our law merely requires that the company participate in a fraudulent act or trade or commerce. So that could mean some company besides the one that has the high touch with the consumer. That could be someone that is, you know, helping to facilitate through payment processing or some other way, so I think it is an important point to kind of look past the most -- the immediate target to other potential targets that may be out there in the entire web of the operation.

MR. MORSE: Well, of course not all the

actors are fraudulent. Sometimes they just have bad data security practices. And one of the remedies that I know the FTC has sometimes imposed is audit and monitoring over a considerable period. So I would like to open that up as is that something that your offices are doing when you apply a UDAP statute, and then if Mr. Smith would like to comment about that practice, maybe that would be appropriate.

MS. UTLEY SECOY: I think monitoring, going forward, is definitely a tool that we use, particularly in privacy matters, so we definitely utilize that.

MR. MORSE: Is that something routine that you would impose when you saw a bad actor in terms of just sloppy data security practices.

MS. UTLEY SECOY: We want to make sure that they are implementing the actual injunctive relief that they are agreeing to. And like you said, I mean, you know, with data security, sometimes it is, you know, a failure to patch software, you know, it's not always intentional. And that's why we really encourage companies to come to us when they realize they've experienced a breach so that we can work with them instead of us finding out about it later through the media.

MR. MORSE: But are you doing that yourself, or are you outsourcing the compliance?

MS. UTLEY SECOY: Well, some settlements include reporting to the office, and then in other matters you have, you know, claims administrators, or both.

MR. ABEL: I think we've done it both ways. I'm trying to think in the privacy arena. I know just in terms of multistates in general we've had an independent, outside monitor come in and then report to the states. And then we've had another model is that there is an internal monitoring process that they then report to the states on what steps they've taken to comply with the injunctive provision.

So I see it as a helpful complement to the range of remedies that are available. I would be candid and say I think that's probably something that we can probably do a little bit more work in to make it meaningful monitoring and meaningful auditing so that we are, in fact, keeping an eye that the company is committing themselves and living up to the representations and assurances they did in the settlement. I think it's something we could probably continue to look at.

MR. DU MEE: I think monitoring can have a

role, but there are some concerns, too, that are not easily identified when you first look at the issue. One is that if it's monitoring from an attorney general perspective. We don't have the capabilities to really -- you know, so let's say the monitoring is, well, we're making sure the algorithm is appropriate, like we don't understand the algorithm without additional technical expertise. So either we need to get somebody from the outside who has the expertise or we need to hire somebody inside because otherwise the monitoring report and test is sort of a waste of time.

There's also a concern sometimes where if you are requiring a company to hire an expensive monitor and when it is from the outside it can be very expensive, then now you're taking money away potentially from civil penalties or restitution or other remedies that may be more appropriate because there is only a finite amount of dollars to go around, so there are some concerns.

And also I think the last one is that in a lot of cases, especially when it's a major company that's had a data breach, there already are a lot of really powerful market incentives to not ever do this again because the shareholders will destroy you and, you know, the board of directors will fire you. And

so I think that, you know, there is probably a reason we haven't seen a lot of companies that have had a major data breach have another major data breach after that, which is they've already in a lot of these cases cleaned up their act and improved their procedures.

That's not always true, but I think it's at least worth looking before you put in a monitor to see are the procedures that they've already put in place sufficient to where we can focus more on what remedies can we get for states and for consumers instead of spending a lot of money to appoint an outside monitor.

MS. UTLEY SECOY: And if I could add, you know, one option is to require a third-party audit, and that -- in my personal opinion, that's something that large companies should be doing anyway. And I think that it's probably cheaper to hire an auditor, you know, to get cybersecurity insurance and all of that than deal with the data breach after the fact.

MR. MORSE: Andrew, last word?

MR. SMITH: Yes. Well, obviously, our data security orders generally include an audit requirement, and, you know, we heard in one of the earlier iterations of these hearings -- we had two days on data security, and one of the things that we seemed to hear from almost every panelist was that

companies don't have enough incentive to spend on data security.

And that's sort of what I heard you saying, too, John, that this needs to be a managerial priority. Data security needs to get the highest attention at the company. And that's one of the functions that these audit reports provide. I mean, one is they do provide the FTC with some visibility into the company. They do require that a qualified third party come in and review, at least at that snapshot in time, that the company is in compliance with the various requirements of the order, but they also require that board have visibility into this and that this report be made to the board.

And we are now in the process of revising our Data Safeguarding Rule under the Gramm-Leach-Bliley Act. So this is the safeguards rule for financial institutions, and I think state AGs are able to enforce it as well. And we -- and one of the new requirements that we are considering is a direct board reporting requirement, that there be an individual, a qualified individual, as you said, Crystal, who is appointed to oversee, who owns the data security program, and that person has a direct reporting line to the board or to a committee of the board.

And that's all an effort, along with these audit requirements, to have data security get the attention of the highest managers in the company so that adequate resources are devoted to data security.

MR. MORSE: Kind of moving data more along the lines of money and how we look at the financial controls, we look at data controls in the same way.

MR. SMITH: Right, right. That's what our Commissioner Swindle years and years ago, 20 years ago. Commissioner Swindle said that you need to treat information like money.

MR. MORSE: All right. Well, I think we've reached our appointed hour, and yet the conversation could go on and on. So thank you to everyone for your contributions and thank you for being such a good audience.

We'll adjourn for a short break and then return for more fun. Thank you.

(Applause.)

(Recess.)

ANTITRUST ENFORCEMENT AND POLICY (PANEL A)

MS. MACKEY: It's time for us to start, so if everybody could please sit down. We have such limited time that I want to make sure we get to use all of the time that we have. So welcome back. We are so happy that you're here today, and welcome to our panelists. It's such a pleasure to have you here.

When I start the introductions, I'll keep them pretty short because I'd much rather hear from them, and we do have the bios that you can get from the top where you came in if you'd like to read a bit more about our esteemed panelists.

And one thing I wanted to mention before I get into introducing our panelists is that there are question cards that will be passed around by FTC staff. If you see them, just raise your hand. They will give you a question card; they will collect them; they'll bring them down to Irina and myself, and we will work those questions in as appropriate, although Irina and I also have a lot of questions, so we'll try to balance it all out.

So Irina Fox, to my left, is joining me as comoderator today. She is here at Creighton University as Associate Professor at the University School of Law. And prior to joining the faculty, she

practiced at Latham & Watkins in San Francisco.

To Irina's left is General Landry. He is Attorney General for Louisiana. He previously served in the U.S. House of Representatives and is a veteran of Desert Storm.

General Peterson, who may not need a whole lot of introduction as we are in his home state and he's kind to welcome us, he is, as I just said, the Attorney General of Nebraska. And prior to being elected Attorney General, he spent 24 years in civil litigation practice.

And, finally, but not least, is General Slatery, who is the Attorney General from Tennessee. Prior to his appointment as Attorney General, he was appointed to the Tennessee Supreme Court in 2014, he served as counsel to Governor Bill Haslam -- I'm afraid I might have butchered his name, and I'm sorry for that if I did -- from 2011 to 2014.

So we will start this session with the generals having a chance to give their remarks, and then we'll move into questions. So before we get going, just remember there will be question cards, and we ask you to fill those in.

And, first, General Landry.

GEN. LANDRY: Well, thank you. I want to

thank the FTC and General Peterson for his leadership in hosting this is important discussion. You know, there are many who may question why we are here, and I believe that we are here because there is a disruption in our virtual marketplace, in a virtual commodity exchange.

And so you begin and you say, well, you know, what exactly are you talking about, what is a commodity? And I would say that, you know, you start with a definition of a commodity. So in economics, commodity is a good or service that has full or substantial fungibility, and the wide ability of a commodity benefits to the consumer welfare.

Commodities are vital to a functioning, stable society and thus they have societal importance. Would we allow one person or one company to achieve monopolistic or super-monopolistic market share over oil, electricity, grain, beef, or poultry? Certainly not without great regulatory scrutiny. So what I will submit to you today is that digital advertising has become a commodity.

And while you think about that for a minute, let me take you back to before the invention of radio or television. The single source of content at that time was print. Print media, newspapers were it.

They were king of information. So would we in this country at that time have allowed one person or one company to control the supply of print ink that was used to print newspapers? Maybe, but then would we have allowed that same person or same company to also consolidate the print paper market? Well, maybe that's starting to have some concern. And then, last, would we have allowed that same person or company to then purchase and consolidate the manufacturing of the printing presses? I would say that the answer to that is no because somewhere along those lines we would have either disallowed the mergers or the consolidations or eventually broken that company up.

You know, so while conducting that exercise, it's important to recognize that there are only so many print pages, but online it's way more expansive. It's limitless. So as online content increased, the volume of places where you could place ads started to make ads commoditized. During this time, the evolution of digital advertising took on the same free market principles that other commodities enjoyed. It was supply-and-demand-based, right, the way the free market is supposed to work.

So let's show you that ecosystem. So this is the ad tech ecosystem, and as illustrated here, we

see that there is a supply side, and on the supply side are publishers whose content drives the success of the internet. The demand side are those who wish to sell a good, a service, a product -- the advertisers. The two needs are supposed to meet at the exchange where the price is based upon supply of ad space versus the demand. Simple? Right.

Yes, except with the advent of programmatic advertising, advertisers could now target consumers like never before because companies like Google could index consumers through their search history and website visits that Google mined from the consumer. The key about search dominance and why it's so important is because it is what has allowed programmatic advertising to flourish and why the industry switched to Google, because they had the data to target consumers.

If you were an advertiser, Google could tell you that Jeff Landry was looking for tennis shoes, a hunting trip, a certain specific vacation spot. It allowed advertisers to say we don't have to guess anymore. We go to Google, buy advertising on their platform because they can tell us who searched for our good, service, or product. Display advertising online thus became completely commoditized at that point.

Digital programmatic advertising became bought and sold on an exchange just like a commodity, except the big difference is that it is wholly unregulated. Practically everything the SEC wouldn't allow on a commodities exchange happens every day in Google's digital advertising space.

So let me show you Google's dominance. Here, Google's internet domination in regards to advertising began to take shape at this point, and, of course, these are some examples of it. One company, Google, controls everything in this sphere. They control the entire pipeline.

So let me overlay from the first slide, which is the ad tech ecosystem to show you the ad eco tech system today, and take a look at Google's fingerprints at each particular step. They control the demand side, they can control the sell side. They control the exchange, the platform that no publishers dare use because Google has anticompetitive means to make it too inefficient and too inconvenient for them to do otherwise.

So Google owns many of the ad networks. They actually buy in the system that they control. Historically, the auction has taken place as a two-stage process: first bid price and second bid

price. Google reserves the last look in the process, which is a competitive advantage. They keep the buyers and sellers in the dark. I mean, think about placing the Chicago mercantile in the dark and letting one person own it and not letting farmers and ranchers know what Tyson wants to pay, right? With the demand and the supply, it wouldn't work. We wouldn't allow it.

Google gets to pick the winners and losers because the system is rigged in their favor and ripe with conflicts. Continuing down this road will kill online publishing, or Google will control who stays and who goes. How is that for fulfilling the internet promise of an open place for ideas debate in content?

You know, the internet was said to be revolutionizing because it enhanced and expanded human contact, a place for ideas and conversations to take place, a place that people could find infinite amounts of information on particular subject matter. It enhanced the exchange of ideas in a freedom to effectively and efficiently publish content. If we don't act today, that dream of the internet will perish. Thank you.

(Applause.)

MS. MACKEY: General Peterson.

GEN. PETERSON: Thank you, Sarah. On behalf of the State of Nebraska, I want to welcome everyone here. I want to thank the FTC for really an extensive effort to study this issue. Dating back to September of last year, you've been having hearings, and obviously looking at your webpage, you've got an extensive amount of information with regards to the technology, the impact on market and consumers. So I want to thank the FTC for being willing to come to Omaha for this final one to meet with attorney generals.

I also want to thank Creighton University for their beautiful facilities and making this available to us. Creighton University is one of the crown jewels for the State of Nebraska and they represent the State so well.

And, finally, I want to thank the NAAG staff -- Emily, Abby, and all of you -- for the work that you've put into this. I know you've been a behind-the-scenes effort, so I really appreciate that.

Welcome to Nebraska. I love our slogan. For some of you, this is the first time, but our tourism slogan is "honestly, it's not for everyone."

(Laughter.)

GEN. PETERSON: And I love the beauty of

that. And I love being a Nebraskan. And, honestly, I hope you enjoy your time here. It is a great community.

I think it's important to just reiterate, which I think many people have spoken about, how important it has been. I mean, the states have had over 100 years of experience working in the antitrust area in our own state laws, but we've found the most effective -- some of the most effective efforts have been joint efforts among the states and the FTC. And so many people have mentioned how important that is. I just want to reiterate that.

We've had some good successes lately. We had the Questcor pharma effort where we were able to get a $100 million settlement where they were monopolizing a particular drug. That's one good example. I know there's been several merger evaluations where both the FTC and the state, particularly in the hospital settings and the medical settings, which I think have been really important. I think that's a much stronger team when you have the FTC and the states working together to protect consumers.

One a little bit more relevant, and it's not the FTC but the Department of Justice, I think the

Microsoft case is also a very good example of states working with federal authorities to protect the people we are elected to serve.

I want to talk a little bit just about -- my main thoughts are going to deal with the concept of enforcement, but I do want to talk about this digital economy. Many have referred to it as the fourth industrial revolution. And I think that history and that label is important because when you go back and you look at the second industrial revolution in the 1800s, that was at the same time the Sherman Act was being developed, and concerns of concentrated power and corporations were being addressed.

And from that, one of the most significant results was the Standard Oil case. When you look at the third industrial revolution which is identified in the ‘60s with telecommunications and the onset of computers and the impact that that had, once again you had another important groundbreaking case in that particular industrial revolution, the AT&T case and also the IBM case.

So identifying industrial revolutions, onsets, and how they look different, well, if this is the fourth industrial revolution, I think we have some history to say that the government does have a role in

making sure that the industrial revolution is a competitive industrial revolution and that both the competitive free market elements are protected and consumers are protected. So that's why both from a consumer protection standpoint and from a standpoint of antitrust I think it's very important that both the states and the FTC take our enforcement responsibilities very seriously.

This digital economy is a fascinating economy. It moves very, very quickly. For a guy who barely got through COBOL training in college, I can still remember sitting in that room punching these cards, going, what in the heck am I doing. But it's really advanced quite a bit since 1980.

The accumulation and concentration and monetization has quickly accelerated. We have the internet of things to gather data exponentially strengthened by the network effect and monetized in numerous platforms. It's interesting when you talk about the internet of things. To be honest with you, I was about to bring to this hearing a 20-inch doll. I thought it might be a little creepy as I walked the streets of Omaha with a 20-inch doll. But what's fascinating about the internet of things and this new industrial revolution is the fact that so much

information is being gathered in so many different ways. And it's really creepy to a certain extent.

This doll had inside it, if we were to do an autopsy of the doll here on this stage, we would open it and there's a listening device. On the box it says, “Let's party.” I thought, oh, that's great, a 20-inch doll, let's party. I don't get the marketing concept, but I do understand that information is being gathered. And that's why I think we have to really be well aware of the importance of data because it all feeds into artificial intelligence, and feeding information becomes really the oil or the fuel that makes artificial intelligence work.

And I don't think it's a surprise that these industries are geared towards artificial intelligence. Larry Page, the Alphabet CEO, back in October of 2000 said artificial intelligence will be the ultimate version of Google. We’re nowhere near doing that now; however, we are incrementally closer to that and that is basically what we work on. He followed that comment up 16 years later on April 18, 2016. He said, we've been building the best AI team and tools for years, and recent breakthroughs will allow us to do even more. We will move from mobile first to an AI first world.

Basically the concept in the industry is he who masters the data masters not only the digital economy but has the power to influence institutions far beyond commerce. Last June, at our national meeting in Portland, Oregon, we had a panel in a closed session speaking to attorney generals and staff about where this data collection is going and how broad its scope, and it raised a tremendous amount of concern with regards to consumer protection and antitrust.

But even beyond that, as I was walking out, and frankly I think it was quite an eye-opening meeting, but as I was walking out with Senator -- Senator, I don't hang out with senators. As I was walking with Attorney General Lisa Madigan from Illinois, she said, Doug, I think this has one of the -- poses one of biggest threats to our democracy.

And I thought, you know, as I'm sitting there, I was thinking, am I over-reading the potential impact? And when Lisa, who she and I, you know, probably didn't agree on certain political issues but certainly understood our roles as AGs, for her to say that, it kind of confirmed to me that maybe I wasn't overthinking this. And as I've researched in this area over the last year, I think the scope and power

of data is so far-reaching that it’s imperative that we, as attorney generals and as the FTC and the Department of Justice, take this very, very seriously.

One of the things that's obviously occurring here is they’re developing super profiles, constantly developing the data, which I’m going to refer to them as the data barons. It’s simply -- it’s gone far beyond just buying preferences. Today, a person carrying certain phones will have their geographical location taken every six seconds. Voice-activated systems like Alexa will gather data from the home -- every internet search, every purchase, personal health information provided on apps, new information sources, photos, friends, likes. The data obtained seems endless, and the quantity and the quality is the holy grail to the data barons.

If this data is the oil of the digital economy, the problem is that they’re drilling from each one of us through opaque notices and take-it-or-leave-it usage agreements. Most importantly, it’s monetized by the barons without compensating the provider of the data. In other words, they’re drilling each of our personal data fields every second, but they’re not paying a dime.

Additionally, this data-gathering is not

limited to adults, but it's also being pursued with children through benign-platform learning programs offered to students through school systems and apps that are clearly designed to appeal to children.

This, as both a father and a grandfather, this is where it gets creepy, that they are so aggressive in gathering this information and they'll look at all kinds of ways to do it. So the question becomes how do the antitrust laws apply to this. I've seen and followed for the last year a lot of law review articles, conferences, news articles, trade articles on this whole issue of whether or not the consumer welfare standard in our current laws is suited enough to deal with the magnitude and the complexity of the data economy, and I think it is.

I think the consensus is that the focus on consumer pricing in and of itself is far too limited. I believe the consumer welfare standard is adaptable to this new tech platform economy. There are several areas where consumer welfare is harmed in the areas of consumer choice, product quality, variety, innovation. There are factors of market manipulation, consumer manipulation breaches of consumer privacy, and other anticompetitive behaviors.

Absent strong federal engagement, these

practices will go unabated to the harms of the consumer and the market. I see my time's up. I just want to close by saying that this enforcement responsibility that we have is a critical responsibility that we have statutorily, and I think the expectations of our citizens is rightfully designed for us to move forward.

Tim Wu, in his book “Curse of Bigness,” summarized Teddy Roosevelt's concerns about concentrated monopoly power. He said, “Concentrated private power can serve as a threat to the constitutional design, and the enforcement of the antitrust law can provide a final check on private power. This by itself provides an independent rationale for enforcement of the antitrust laws.”

We have to maintain a competitive environment, and I think what we need to do as attorney generals is I think to steal a motto from a company, I think we need to move fast, I think we need to be very thorough and thoughtful, and I think once we gather the information necessary, we have to consider whether or not to break things. Thank you.

MS. MACKEY: Thank you.

(Applause.)

MS. MACKEY: General Slatery.

GEN. SLATERY: I, too, want to thank the FTC for organizing these hearings and having them in Omaha. And I also want to thank Creighton University. This is a fabulous facility, and I look forward to seeing more of it.

I would like to follow up on some of the comments that General Peterson made. You know, the tech platforms that we're talking about, they were small companies. They've quickly grown into some of the biggest companies in the world. Google has a market capitalization of about 750 billion. Facebook has a market capitalization of about 502 billion. So they are huge companies.

And I'd like to talk about three topics briefly. One is data; the second is market concentration; and the third is regulatory reform. And just some brief points on each one. You know, the tech platforms, their fortunes are built upon the data that they receive. They get it from users like us, they get it from internet service providers, and they market it to advertisers, to developers. And so their business is the accumulation of data. So in order to grow their business, they've got to grow that data, and that's their model. It not going to change, notwithstanding whatever promises they might make with

respect to regulatory reform. They've got to increase that data.

The key question for -- at least in our minds are for enforcers -- who owns that data? Is it the consumer, the user who goes online and provides the information, or if you've got a doll like Doug has, you know, you're talking to the doll. Whose data is that? So does it belong to the tech companies who accumulate it, or does it belong to the individual users and only available to the platforms if the users consent to that?

Now, Tennessee's position is pretty clear. We think the individuals own their own data. And if a platform or internet service provider wants to use that data, obtain that data, then they need to do that with full disclosure in transparent agreement and obtain the consent of the consumer.

Now, the tech platforms would probably say, well, all users are consumers, they click the terms of service, and, therefore, we have their consent. But let's not talk ourselves into believing that that's either full disclosure or informed consent. It is neither.

And to illustrate that, the State of Maine just recently passed a law that required ISPs to get a

consumer’s consent before obtaining data. And that law was passed on a bipartisan basis. It was unanimously approved by the state senate. And they went further than California's law, which gives the consumer the right to opt out. And I'm sure it wouldn't surprise me if the law is going to be challenged in court, but what won't be challenged is the concern and the consumer sentiment expressed in that legislation.

So market concentration, Google has approximately 92 percent of the worldwide internet searches in 2017. The next closest competitor has about 2.5 percent. Facebook has 2 billion-plus users. And potential competitors like YouTube and Instagram have been absorbed into the dominant platforms. Opportunities for new market participants to scale up and compete with these platforms are increasingly limited.

I'm not telling you anything you don't already know, but interestingly, the "Wall Street Journal," in an op ed piece just yesterday, said that those barriers are perhaps too high and should be looked at. So the extreme concentration in the technology industry is bad for the consumer, and in our opinion it's bad for America. The concentration

has stifled innovation with market distortions and research and development as entrepreneurs avoid competing with Google and Facebook and other tech giants. So we need to do something about that.

And General Peterson just mentioned the consumer welfare standard, and I would agree with him from an antitrust standpoint. I think the jurisprudence is already there. Assistant Attorney General Makan Delrahim recently noted that the consumer welfare standard considers effects on quantity, quality, consumer choice, and innovation. And these aspects of the standards must be emphasized and not take a backseat to just price increases. And he confirmed this position as recently as yesterday in a speech in Tel Aviv.

The zero-price platforms like Google and Facebook, even on those and the privacy that are provided by services, they're key measures of product quality for users in a market that allowed more innovation and competition, that consumers would have considerably more choice about the degree of privacy that they would allow. Perhaps they would even be paid for some of the data that they're providing, but as it stands in this market, with this extreme concentration, the consumers have little meaningful

choice beyond just getting on the internet and participating in the first place.

So that takes us to regulatory responses. I think this is going to be a very delicate situation to address. These are complex businesses. I think the regulators -- if you impose a substantial, costly burden on entering the market -- you're going to exclude the new companies because they don't have the money to comply with a high regulatory cost. The result of that basically will backfire. The incumbent companies will have an even more entrenched position.

So requests for regulation from the incumbents are, in my opinion, somewhat circumspect. This high regulation -- intense regulation -- may just result in them having an even stronger position. And we are concerned about the data sets on which the leading platforms have built their dominance. And as General Peterson said, that was done at the expense of consumers.

In many cases, it appears that the user data was collected under opaque terms that did not allow users to make a knowing decision to turn over their data, or that the user data was collected and used in ways that violated the site's own terms of use, or that user data was collected without any notice to the

user that this collection was happening. Users are in the dark as to who has access to their data. Not a person in this room knows how their data is being used, much less the value that it has in the hands of these tech companies.

The leading incumbents, they leverage their collections of data in anticompetitive ways, too. I think the classic anticompetitive moves are acquiring young companies who are a threat to their competition, but because they can recognize trends in the searches and information and data they collect, they can pinpoint these companies and make an equity investment in them initially. They can use that to perform their due diligence and determine whether they want to acquire the company and then make a bid.

And then the companies also, they take advantage of their position. They either take the information or they just do it through acquisitions. So we have companies now that entrepreneurs are building companies to sell to Google and Facebook. They're not building to scale; they're building to sale, which hurts the consumers because it takes away the innovation in the marketplaces.

So moving ahead, structural change driven by the government may well be necessary. And we

recognize a few things in the comments, which I would ask for their serious consideration by the FTC, the comments by the AGs -- I think approximately 40 signed off on the comments -- but working around the edges of regulation is probably not going to help.

Fines, they're an appropriate remedy, but frankly they're basically a cost of business that can easily be passed along to the consumers. I don't think the European Union has obtained any significant success by using them, although they fined Google, I think, a total of 9.3 billion three times since 2017. But very little change occurs as a result, and we need more substantial changes.

And so with that, I would again recommend our more detailed comments and thank you for the opportunity to speak.

(Applause.)

MS. MACKEY: Thank you very much.

MS. FOX: I have a question for General Landry if you don't mind.

GEN. LANDRY: Sure.

MS. FOX: It's a followup on something you said. You mentioned that the internet has this great theoretical potential as an exchange of ideas, so it has potential for enhancing consumer welfare. For

example, Google's accumulation of data from your searches for the past so many years allows Google to create more targeted content on its platforms and theoretically could lower prices for consumers, but you also highlighted various dangers of high concentration.

So how do you envision the appropriate remedies for handling a situation like the one that we're facing with Google? Do you think that the federal government is better equipped in handling this, and how do you see the states' role in creating these remedies.

GEN. LANDRY: That's kind of more than one question. First of all, let me start from the last part. Look, states have had a long history of protecting the consumer and weighing in antitrust and consumer protection areas, and so there is absolutely a part for states to play. And that part can be independent of federal agencies or it can be in coordination with federal regulatory agencies.

So in working again from backwards towards your first question, you know, there continues to be this question of consumer welfare, and we seem to be fixated on price, right, but price is not everything inside the consumer welfare dimension. It's

multidimensional. We can take it back to the Standard Oil case in which prices of kerosene at that time were at an all-time low. But the question becomes do we want monopolistic or super-monopolistic power concentrated in one particular area because I think that General Peterson quoted Teddy Roosevelt very eloquently. I think it's as important today as when he said it in the early 1900s, because what can happen is corporate power can become greater than government power, and at that point, it becomes greater than democracy itself.

And so what we're dealing here with is information, and that information is almost commoditized now. And so the exchange of that information needs to be more transparent.

MS. MACKEY: Thank you. Would anyone else like to add on to that question, because we do want to engage.

MR. SLATERY: Well, I'll talk about price just a little bit. I think when you talk about just consumer prices for goods, you really narrow down the discussion. I think if we're going to talk about consumer welfare in terms of price you need to look at a lot of other areas. For instance, you know, what are consumers paying, you know, for all of that by

giving all this data. They're getting very little value back. Let's look at that transaction.

So I think it's a broader discussion, but I think as Makan Delrahim has said, it should encompass more than just price, but even price is something we ought to talk about.

MS. MACKEY: All right. So I'm going to pose the next question and start with General Peterson, and if anybody else wants to address it, too. General, you talked about the industrial revolutions that we've been through and that there's always been a need for the Government to kind of step up and see what we can do to improve competition and make sure that everyone is working in a manner that enhances competition and consumers.

We've also talked a lot on this panel and the earlier panels about personal information and privacy, and those have been mentioned, and you threw in a creepy doll, made more creepy by the thought of an autopsy here, but how does all the data and the privacy and the personal information, how do we use that to inform or change our analysis when we're talking about competition law?

And when we're talking about mergers, we're talking about other areas of enforcement, other areas

of competition law.

MR. PETERSON: Well, one of the things is --I think it's important to understand what is the end game by some of these large data companies, and the end game expressed by Mr. Page is they want to dominate in the area of artificial intelligence. So in light of that, they need this data, and one of my concerns is historically through merger and acquisition analysis, either by the states or by the FTC, we've wanted to assume that good free market competition will balance things out and that it will be an even playing field and so we don't have to intervene. Or we want to trust the representations made by the corporations that they will have compliance.

But I think you go back to 2007 and look at DoubleClick and the representations made there and the assumptions that the market would balance things out in competition, that was not the case. I think the one dissent foresaw the challenges of allowing Google and DoubleClick to merge. I think the same thing with AdMob in 2010, and you look at Google's acquisition of that and, now, how they take that in and have the dominance that they do have in the ad tech ecosystem.

All of that tells me that we can't rely upon

free markets or representations to simply provide the competitive field that antitrust is supposed to protect. And so when we look at the prior industrial age evaluations of history, I think it tells us that there's a point in time when government needs to step in and say we're going to protect competition.

MS. MACKEY: Thank you.

GEN. LANDRY: Well, I would say, you know, when we talk about data and privacy, sometimes I think we get confused, or certainly laymen get confused, as to if it's data protection, right? So we're not talking about whether the data that's being housed, say like in a bank, that banks have on you, is protected from breaches, like, say, the Equifax breach.

This is basically a consolidation of data on you, and is there a property right? Does the individual have an actual property right to that data? Is there a quid pro quo that is going between the consumer and that platform that is actually gathering that particular data?

GEN. SLATERY: In the M&A field, one of the suggestions in the letter that I referenced is to have the FTC have pre-notice or pre-approval requirements for these acquisitions. I mean, if you look back at,

you know, the acquisition of YouTube or Instagram, you know, those would be looked at completely differently now than they were back then. And with these tech platforms, things move so quickly, you're not aware of some of the acquisitions, especially the smaller ones that don't hit the Hart-Scott-Rodino threshold.

MS. FOX: Thank you very much.

GEN. PETERSON: One other thing I do think is important to mention as our time is getting a little thin, is that, you know, yesterday led by Attorney General Paxton from Texas and Attorney General Miller from Iowa, there was a letter submitted to the FTC where, if I did my math correctly, there were 43 AGs that signed on to this concern. So this isn't just three old guys in ties telling you that they're worried.

(Laughter.)

MS. MACKEY: I think General Landry signed on to that, too.

(Laughter.)

GEN. PETERSON: I mean, it's a broad-scope concern. It's a bipartisan concern. And I think that really needs to be recognized by the industry.

MS. FOX: Thank you.

General Slatery, something you mentioned

earlier, and we have a question from the audience, do we need to rethink what “free” means when it comes to digital platforms and services? So we just talked about prices, and maybe you can expand when we talk about “free” exactly what that means.

GEN. SLATERY: Well, it's not free in the traditional sense, that's for sure because they’re providing some really great services and we're not paying for them, but at the same time, they're taking their data and monetizing it to a great extent. So there's -- I read an article recently that was particularly on point on this, and basically it says, you know, it's not free, we're just paying for it in a different way. So it's not free. We’re paying for it in a different way.

GEN. PETERSON: Yeah, the old adage, if you get the product for free, you are the product, and I think that really is true here. And the other thing that's just kind of an irony of all this, some of this information that they're taking is actually using up your cell phone minutes. And so you're actually being charged for some of this through your telephone, your cell phone provider. And so I use the analogy of putting an oil drill in your backyard just pulling out all this information. They’re not only not paying

rent, but actually it's costing you a little bit.

GEN. SLATERY: Plus you're expending labor. You're the one producing the videos and posting all this and all the data and information. I mean, you're expending services, too.

GEN. PETERSON: And privacy is a cost, too. I mean, giving up privacy is a cost that you're not being compensated for.

MS. FOX: Right. Thank you.

And one more quick question from the audience. What are the chances that the tech industry is right and regulators do not understand how data technologies function and that the market has already adopted so regulation would actually stifle small, innovative companies who target Facebook, Google, et cetera for acquisitions?

GEN. LANDRY: I mean, look, I think if I had to bet on the free market and supply and demand economics, I'd bet on it instead of betting on them. I don't think that those fundamentals have changed. You know, that seems to always be something to try to cloud the discussion. Anytime someone says, oh, times have changed, the fundamentals don't change, right? And so I believe the laws that have been put in place since -- that were basically predicated on the first

industrial revolution as General Peterson said, and were utilized in the second industrial revolution, right, to break up companies like Standard Oil and to threaten things like U.S. Steel. What we saw is that actually those companies -- when companies reach that size -- that monopolistic and super-monopolistic control over a particular sector -- that they become inefficient rather than efficient. And that when competition is not injected into that industry, that really you stifle innovation rather than allow it to flourish.

GEN. PETERSON: Yeah, and I would say to that I agree with Herbert's comment about regulation. I think the European circumstances -- and I admire the European Commission for what they've done -- but I don't think simply looking and bringing the big players to DC and saying let's hammer out some regulations is, I think, the big companies win out of that and small companies lose.

I also think fines in a lot of ways are like kicking the gorilla in the shins, it didn't really work. So I think a lot of concepts of remedy can't really be evaluated until we have a full and complete discovery process, and then we'll know what makes most sense. But I think we're capable of doing that, and

when I say we, I'm talking state and federal authorities. I think we're capable of doing that. And we can't really grasp the remedy model until we fully understand the extent of evidence we're able to discover.

MS. MACKEY: And I hate to say it, but our time is up. Can I give you ten seconds, General Slatery? Do you want 10 seconds or 15 to finish up?

GEN. SLATERY: No, I'm fine.

MS. MACKEY: I know it's not a lot, but I just also know that we have to move on to the next panel. And I really wanted to say thank you for joining us and your wisdom that you've shared with us and a round of applause for our panelists. Thank you.

(Applause.)

MS. MACKEY: We will have about a four-minute break so that we can shift to the next panel, so thank you.

(Brief recess.)

ANTITRUST ENFORCEMENT AND POLICY (PANEL B)

MR. HAMBURGER: Well, welcome, everyone, to Panel 4 and our second panel with the states focusing on antitrust enforcement and policy. Our panelists today reflect some of the different areas of enforcement activity and policy by the states. They will highlight some of the issues that they are involved with in addition to some of the state and federal cooperation efforts that have taken place over the last few years.

As I mentioned earlier this morning, my name is Jacob Hamburger. I'm an attorney in the Office of Policy Planning at the Federal Trade Commission. To my left is Diana Thomas. She's joining me as comoderator. Diana is an Associate Professor of Economics and the Director of the Institute of Economic Inquiry at the Heider College of Business here at Creighton.

Next to her is Eric Newman. Eric is Chief Litigation Counsel for the Antitrust Division of the Washington State Attorney General's Office. Max Miller is an Assistant Attorney General for Antitrust in the Iowa Attorney General’s Office. Next to him is David Sonnenreich. He is a Deputy Attorney General and the Director of the Antitrust Section of the Utah

Attorney General's Office. And last but not least is Sarah Oxenham Allen. She is the Senior Assistant Attorney General and Unit Manager of the Antitrust Unit at the Virginia Attorney General's Office. She's also here as Chair of NAAG's Antitrust Multistate Task Force.

So thank you everyone for being here today. We'll start the session by giving everyone an opportunity to present first, and then we'll move into a brief discussion period. I do want to remind our in-person audience that we have question cards available, so please do send up any questions you may have for us and we'll address them during our discussion period. So please ask away and hand your cards to FTC staff that is walking down the aisles.

So to kick things off, let's start with Eric Newman.

MR. NEWMAN: Good morning. I'm Eric Newman. As Jacob mentioned, I am the Chief Litigation Counsel for the Antitrust Division for the State of Washington. And, first, I want to thank Creighton and the FTC for having us here today. I was pretty excited to get invited here and come to talk to you a little bit about my personal thoughts -- not the State of Washington's or the Attorney General's Office's

thoughts -- on labor enforcement in the antitrust world.

And I think that we probably got -- I got invited to do this particular panel because this has been somewhat of an area of interest for the Washington State Attorney General's Office, working especially in closing the wage gap and protecting lower income workers. And we've done that in a number of ways. And I want to talk to you a little bit about some of the ideas that we've had and the work that we're doing, both things that we have been doing, things that we are doing now, and things that we'd like to look at in the future.

With respect to the things that we have been doing, if you work in the antitrust world, you've probably heard a lot about our no-poach investigations or investigation into no-poach provisions in -- the word went right out of my head -- in franchise agreements, sorry. And it is something that we had some interest in and lot of other states did, too, so we certainly did not work alone in this area. But our approach has been to eliminate these no-poach provisions and franchise agreements.

And, particularly, we started with quick-serve restaurants or fast food restaurants. We

started that investigation about a year ago. I feel like it has been really successful, and working with other states, we have eliminated these provisions as far as we know and we're still dotting some Is and cross some Ts, but as far as we know, we have eliminated these provisions from all quick-serve restaurants that have a location in Washington. And every company that had a location in Washington, we have eliminated them nationwide. So those provisions just aren't being used anymore.

We've expanded our investigation into other industries, and at this point we've entered into assurances of discontinuance with more than 60 companies who were previously using these provisions that are no longer. There was one company that fought back a little bit, and so we filed suit last October against a company called Jersey Mike’s that makes sandwiches.

Jersey Mike’s has since eliminated these provisions from their franchise agreements, but the litigation is still ongoing, and frustratingly slowly, but it is ongoing. We're in the discovery phase. We are past the motion-to-dismiss phase where the judge left on the table both the per se and the quick look claims. So I feel like that suit is going quite well.

As far as what we are working on now is expanding our investigation into the noncompete world in a couple different ways. One, we worked with the Washington State Legislature, and in this last session, we passed a -- the Legislature passed a statute that outlaws noncompete provisions for employees who make less than a $100,000 a year. So those have been eliminated in Washington or will be eliminated when the law takes effect on the 1st of January of next year.

In addition, we have started an investigation into three companies that we have found had what we feel to be particularly egregious abuses of noncompete provisions. Just last week, we sent out CIDs to these three companies, and I can't talk a lot about that case other than the fact that we are moving forward in the noncompete world.

And then the last thing that we are interested in but haven't taken action at this point, we're particularly interested in looking at the monopsony effect of mergers on the labor market and especially in isolated labor markets and smaller communities where the two big employers are getting together and creating a monopsony for labor, especially skilled labor within their industry. So

just something that we're interested in in the future, and we'd love to hear from our sister states or from the FTC on ideas that you might have in that world as we move forward. Thanks very much for having me.

MR. HAMBURGER: Thank you.

(Applause.)

MR. HAMBURGER: Max.

MR. MILLER: Yes, thank you. Well, Max Miller is my name, and I'm with the Office of the Iowa Attorney General, and I'm here today to talk a little bit about what we're seeing in the agricultural industries and particularly how it relates to antitrust. But I'd first like to just say on behalf of myself and on behalf of Tom Miller, Attorney General of Iowa, thank you to the Federal Trade Commission for organizing this event to hear the perspective of the state attorneys general offices.

And I'd also like to say a special thank you to Creighton University for hosting this event today. You know, I grew up just outside of Omaha in a small agricultural community, and so I've been well familiar with Creighton's academic institution for my -- or as an academic institution for my entire life. And I'd also just like to say with General Peterson noting that, you know, Nebraska is not for everyone, I'm

descended from Nebraskans, and so even though I'm an Iowan through and through, I like to think that Nebraska is for me, too.

And I just want to say before I begin just a quick note that the views I express today are my own and do not necessarily represent the views of Attorney General Miller or the Office of the Iowa Attorney General's Office.

I'd like to begin with a quick discussion of the importance of agriculture to the development of antitrust policy. Agriculture and antitrust have been intertwined since before the passage of the Sherman Act. Following the Civil War, farmers organized across the country to call for regulation of monopolistic industries and to address the problem of corporate power. Known as the Granger Movement, these farmers took aim at limiting the market power of agricultural middlemen. Political newspapers like St. Paul, Minnesota's aptly named "The Anti-Monopolist," emerged to advance the work of the Grangers and pushed new laws to address the power of railroads, grain elevators, and banks.

On April 16th, 1888, supported by the farmers of the state, the Iowa Legislature became the first in the nation to pass an antitrust statute. It

was called An Act for the Punishment of Pools, Trusts, and Conspiracies, and it outlawed agreements to fix the price or reduce the output of commodities.

Other Midwestern states soon followed suit, and shortly thereafter came the Sherman Act, which was passed almost unanimously by Congress. Without America's farmers, we might not have had the antitrust statutes that we have today.

So how have farmers fared under the antitrust laws that they helped to create? Well, one measure of the health of our agricultural economy is to look at farmers' share of the food retail dollar. This is every dollar that's spent on food, the percentage that goes back to the farmers. Alongside the enactment and enforcement of our antitrust laws on both the state and the federal level, the farmers' share of the food retail dollar remained relatively consistent at about 40 cents per every dollar spent for much of the 20th century.

But starting in the late 1970s, that share started to decline. And in 2017, farmers now just earn less than 15 cents of every dollar spent on food. One of the key factors in this decline is the weakening of our antitrust enforcement, which has allowed for extreme concentration in agricultural

markets. Concentration in these markets has occurred on both the input and the output side of the farm, effectively squeezing farmers from both ends.

Recent mergers on the input side involve Dow and DuPont, Bayer and Monsanto, ChemChina and Syngenta. And this followed another string of mergers which eliminated conspirators like DeKalb and Pioneer from the input market. This recent string has had the impact of reducing the Big Six in the seed industry to just three.

And as a side note, I would just note it remains to be seen what the BASF divestiture is in the Bayer/Monsanto merger, what kind of an impact it will have on these markets, but currently only two competitors, Bayer Monsanto and DowDuPont, now effectively control over 78 percent of the corn seed market and 66 percent of the soybean seed market.

For comparison, as recently as 1997, the top seven seed companies competed for only a 68 percent share of the seed market. Similar concentration trends can also be seen in the fertilizer industry, which is another major input for agriculture.

On the production side, the situation is looking just as dire. Four companies control 90 percent of the global grain trade. Only four

companies control 79 percent of beef processing, 65 percent of pork processing, and 57 percent of chicken processing in the United States. Approximately half of all chicken producers are located in regions with only one or two processing plants nearby. Only two companies, Dean Foods and Dairy Farmers of America, control almost 60 percent of the milk supply in the United States. And in some states, their control exceeds 80 percent.

As these output side markets slide into monopsony power, we increase the possibility of both tacit and active price collusion, driving farm incomes down. In recent years, lawsuits have been filed against the beef, pork, chicken, and dairy processors alleging both price manipulation and output manipulation, which is are the clearest harms articulated by our antitrust laws.

This concentration has had a profound impact on farmers' bottom lines. Between 2000 and 2017, seed prices, fertilizer prices, pesticides, they've seen increases of over 200 percent. Meanwhile, farmers have seen declining prices paid for their production. Since 2012, wheat, corn, and soybean prices have been in steady decline. The stranglehold of a few companies on the processing of livestock forces

producers out of competitive cash markets and into forward contracts which are favorable to the processors.

Virtually all broiler chickens are now produced on a contract basis. Beef and pork are trending in this direction. Virtually all broiler chickens are now produced on a contract -- sorry. This increase of monopsony power jeopardizes the economic well-being of America's livestock producers by eliminating competitive markets for their products.

This trend of rising input costs and falling output prices has lowered and sometimes eliminated farmers' profit margins, leading to a greater chance of hardship and even bankruptcy. On average, dairy producers spend $1.92 to produce a gallon of milk, but they receive just $1.32 when they sell it to processors. The economics of this is clearly unsustainable, and it's forced thousands of dairy farms to close each year.

In 1992, there were 130,000 licensed dairy farms in the United States. Today, less than 38,000 remain. The trend is clear across the agricultural industry. Delinquencies are up on farm loans to their highest point in nine years, and for the first time since the Louisiana Purchase the total number of farms

in the United States will drop below 2 million.

The decimation of the small family farm not only impacts the economic well-being of those individuals who run those farms, but it weakens the rural communities that depend on them and in turn threatens the economic fabric upon which our republic depends. If you were to drive around Iowa, it wouldn't be long before you find yourself behind a vehicle with a black-and-gold sticker that says ANF. This stands for America Needs Farmers, and it was coined by legendary Hawkeye football coach Hayden Fry during the last farm crisis.

Although I wholeheartedly agree with the intended sentiment of those stickers, every time that I see one, I can't help but think that should stand for Antitrust Needs Farmers. After all, it was America's farmers who inspired us to pass the first antitrust statutes, but ironically it is perhaps they who today are suffering the most under the yoke of concentrated corporate power.

As antitrust enforcers, we need to listen to our farmers again. We need to hear their stories of corporate abuses of power in these agricultural markets. And if the current approaches to antitrust are failing our farmers, we need to reform our

antitrust laws to restore competition to America's agricultural economy. Thank you.

(Applause.)

MR. HAMBURGER: All right. Well, Max, thank you very much.

Let's turn to David.

MR. SONNENREICH: Thank you. My name is David Sonnenreich. I am the Director of the Antitrust Section of the Utah Attorney General's Office. I'm the cochair of the National Association of Attorney Generals Technology Industry Working Group. On behalf of the State of Utah Attorney General Reyes and I hope the National Association of Attorney Generals, I would like to thank the FTC and Creighton University for this opportunity to address you today. However, the views I express today, unless otherwise stated, are my own.

Unlike Eric and Max with their specific and I think fascinating topics, I have a rather more prosaic and general one, which is cooperation between state and federal enforcers and particularly with regard to the relationship between the attorney generals' offices and the FTC. Now, this is a very good relationship. I want to emphasize from the beginning that this relationship for the most part

works very, very well. However, it's not a perfect relationship. If it were a perfect relationship, I'd be back home in Salt Lake City right now.

There are things we can do to improve. The states have a long history being valuable partners with the Federal Government and federal agencies in both merger and competition investigations and enforcement actions. We have a great working relationship most of the time, but both partners can do more to maximize the effectiveness of that relationship. We appreciate this hearing as a tangible demonstration of the desire by both the FTC and the state attorneys general for closer coordination and cooperation.

So what can the states bring to the table in this partnership? Well, despite sincere efforts by our federal colleagues, sometimes states do feel that we're a bit of junior partners instead of equals in specific interactions, that there's a lack of understanding that we can bring additional skill sets and resources to the table that are unique to our states.

The reality is that our offices have well trained, very skilled attorneys, often with specialized experience in a lot of fields, and not

just the people who have master's degrees in economics, the people who have backgrounds in finance, but also people who have expertise in medicine, in agriculture, in a wide variety of specific fields, and often a lot of experience, for example, as prosecutors, white collar crime prosecutors who go into antitrust, people who have done securities enforcement work. And those are resources that I think we can share and benefit from sharing.

Likewise, many states have investigative staff, including trained law enforcement, that can help with field work and can provide additional support when you're trying to analyze a situation. There are areas where we've been very successful. We have a longstanding role working together, for example in identifying proper local divestitures in merger cases. And we do a very good job, I think, overall of identifying those situations where a local market needs to have a specific divestiture and often the FTC works very closely with us on those and asks our opinions and we really appreciate that.

States can also be particularly helpful in many cases in defining geographic markets, too. This is a situation where there are local variations that may not be obvious to the FTC and your really

excellent economic analysts, but sometimes you don't know about situations in our parts of the world and the country that are really very important to us.

I could give Utah's specific examples where the economic definition of the geographic market was based upon sort of the East Coast, Atlantic Corridor realities and was either overinclusive in some cases or underinclusive of the real market that we perceived in Utah and how that caused us to have enforcement issues that we then had to deal with sort of on our own.

By working together, we can get better understandings of these localized things. It can be as simple, by the way, as a mountain pass that closes for four months of the year. Do you think two communities actually are in commerce with each other? I can tell you they don't trade. People just don't go from one to the other because for four months of the year you can't get there.

So let me also add a new and emerging area for us to work together. This is in the National Association of Attorney Generals comment letter that was just circulated. We discussed the fact that there are many mergers and acquisitions that fall below HSR reporting thresholds. And the reason for -- and yet

they may have serious potential down-the-road anticompetitive effects.

Often it's hard to understand what is the startup company doing and why are they trying to do it? Well, we have on-the-ground knowledge. We often know these people personally. We've often rubbed shoulders with the people who are developing these technologies and can explain to you what their business model is and why it is, what it is, and whether that merger may be anticompetitive or may be a procompetitive thing where they're helping to plug in a hole and improve a product. So we think we can be really of great help and support in that way.

Now, while states have an interest in nationally significant mergers in general, have been involved in some major national mergers, many states, including Utah, at least informally tend to prioritize mergers that have unique effects on their local markets, and that's largely, of course, a resource issue.

The Federal Government, FTC can ask states to take the lead in joint, local, or regional antitrust cases working together. We're prepared to do that and we're prepared to take a larger role in some of those cases when they have specifically local

impacts. Often both the FTC and DOJ give us the benefit of your specialized knowledge which can be of great assistance, in particular in analyzing specific industries. And it's been really helpful over the years.

Some examples have been in the hospital merger industry, in the funeral homes industry. The DOJ had a concrete and aggregate initiative for a number of years. These things have provided the expertise that we in the states don't have, and we're able to use to bring local enforcement actions, either jointly or on our own. And we very much appreciate those kinds of cooperation.

I'd like to close with four specific tools for better coordination that we would suggest. The first involves the newly created FTC Technology Task Force and working more closely with our newly created Antitrust Technology Industry Working Group that I mentioned earlier that, along with Kim Van Winkle of Texas, I cochair.

The second has to do with sharing education research, including symposia and training. In fact, these FTC hearings on competition in the 21st century are a great shared resource. You've developed a great database of ideas and thoughts and input for us all to

benefit from. But as we work to understand the challenges unique to mergers and enforcement actions with technology platforms and big data, I think there's room for us to get together academically and learn from each other and learn from academics and third-person sources together.

The third one is to continue the very valuable Common Ground regional conferences the FTC has been starting and especially in the Western/Northwestern region -- I've participated in those with Karen Berg. The team up there is a great team. That's a great way for us to learn a lot more about the practical ways, the day-to-day, the real mechanics of cooperation.

You know, you have protocol for coordination and merger investigations. It's largely aspirational in nature. It talks about we should look into this, we should work together on this, we should do this this way. The "how do we do it" is best done sitting around a table, talking one to one with the people that we actually interface with.

Finally, the fourth thing is to revitalize the Joint Enforcement Committee, which has been somewhat inactive in recent years, with an emphasis on two things: improving the effectiveness of our

collaboration and streamlining our processes. For example, our 712 process can be streamlined in my opinion, especially when multiple states are trying at the same time to be involved in an investigation.

So those are some ways that are really concrete that I think we can improve what is already an excellent working relationship, a positive working relationship for the consumers. And in conclusion, I'd just like to say, as the emerging digital world of technology platforms and big data brings new challenges to antitrust enforcement, the states' attorneys general stand ready to renew and strengthen our longstanding partnership and commitment with our federal colleagues. Thank you.

(Applause.)

MR. HAMBURGER: Thank you very much.

Sarah?

MS. OXENHAM ALLEN: Good morning, or good afternoon. First, I'd like to thank the FTC for inviting me to speak today at these important hearings. I think these have really served a great purpose. And to Creighton University, thank you for hosting us. And although I am currently the NAAG Antitrust Task Force Chair, my comments here today are my own opinions and do not necessarily represent the

views of NAAG itself or of any particular attorney general.

And I'd like to just put in a plug for the more inclusive Virginia state motto which is "Virginia is for Lovers," which includes everyone.

(Laughter.)

MS. OXENHAM ALLEN: I am here today to discuss occupational licensing by states, which is really -- will going from David speaking about how we all get along and ways we can improve that relationship, and occupational licensing by states is kind of the one area where we don't get along and where the states are actually on the opposite side of the issue from the FTC often.

Since the Supreme Court's decision in North Carolina Dental in 2015, as well as the Council of Economic Advisors report that same year, there has been an increased national focus on occupational licensing. There have also been increased antitrust lawsuits filed against state licensing boards, and not just the boards but their individual board members, claiming that the boards have restricted competition beyond their statutory authority. And because most states don't yet have an active supervision statute or scheme, these boards can't claim automatic state

action immunity against these lawsuits.

But an oft-cited statistic in this national discussion about occupational licensing is that only 5 percent of U.S. workers were required to hold an occupational license in the 1950s, while today that percentage has grown to over 23 percent of full-time workers. However, I believe that statistic is somewhat misleading. In 1957, the U.S. Census reported that approximately 9.5 percent of men and 5.8 percent of women had four-year college degrees. While in 2017, that number had increased to about a third, or 33.4 percent, of total U.S. adults. Which is the highest number ever cited for this statistic.

Because the demand by workers for jobs that require that extra education and training they've gotten is significantly higher now, as well as the advent of many new allied health professions, for instance, it makes sense that the number of licensed workers has increased accordingly. But that is not to say that there is no room for improvement among the states.

Although the national average of licensed workers is about 23 percent of the workforce, as I mentioned, the range among the states varies pretty greatly from South Carolina, the state with the lowest

percentage of licensed workers at just over 12 percent, to Iowa, which is the highest and requires a third of its workers to be licensed. I am relieved to note that my state of Virginia is on the lower end with only 17 percent of its workers requiring licenses.

And most of the attention around occupational licensing these days seems to be targeted at reducing the number of professions that require a license, which is a worthy goal. Commentators often focus on occupations like hair-braiding and florists and question why they need licenses. However, that is an area where state AG antitrust attorneys like myself have the least amount of influence. The decision of whether to require a license for a profession is made by our sovereign legislatures, and although I may get asked to advise on procedures that the new board might use, I am not asked about whether it will unduly restrict competition to require licenses for that profession in the first place. That is a decision that is simply above my pay grade.

In addition, most of the antitrust cases that have been filed since NC Dental are against more traditional boards where licenses are required in every state, like boards of medicine, dentistry, and

real estate appraisers. In most of the cases, the central question is not whether the occupation should be licensed but whether the board has exceeded its authority in interpreting its statutory scope of practice too narrowly and has taken steps to keep out potential unlicensed competitors for some of the services the board members provide. That was the case in NC Dental itself, with nonlicensed teeth whiteners, as well as in the Texas Teladoc case, where the board tried to restrict telemedicine services, and in my own case of Virginia that was brought against our Board of Medicine by a chiropractor.

Unfortunately, it is when the FTC actually opens an investigation of a state agency or board or brings a lawsuit against it when the FTC and state AG antitrust attorneys are no longer on the same side. In most states, these state agencies and boards are our clients, and we must give them antitrust advice and potentially defend them in antitrust lawsuits.

What is visible to the FTC is when we act in a defensive posture to represent our state boards. But the dynamic is not just adversarial. What is not visible to the FTC is the pre-investigation or pre-litigation advice we sometimes give to our agencies and boards to prevent actions that unduly

restrain competition. That is where we stay more closely aligned with the FTC's competition philosophies.

But as with all defense attorneys, however, we can't always guarantee that our clients will take or even ask for our advice. Therefore, I believe it may be most helpful if the states and the FTC could develop some way to cooperate in that pre-investigation, pre-litigation advice stage in order to prevent unnecessary competitive restrictions.

There would be a few issues to think through, such as not painting a big target on the back of a state board that didn't take the FTC's or the AG's advice. But in the end, I believe we're both on the side of ensuring that consumers have access to professional services in as open a market as possible while also ensuring that their safety and health are protected. Thank you.

(Applause.)

MS. THOMAS: I'd like to start us off with a question just from the audience, and this is for Mr. Miller. Given the concentration in the ag. industry, how can and should existing antitrust jurisprudence be used to address and perhaps remedy the problem and reverse the trend that you're seeing?

MR. MILLER: Well, I mean the most important one, I think, is on the merger review side. Obviously -- one thing that I find most interesting about any industry when it comes to antitrust is that once you allow one big merger through, it inevitably happens that more dominos start falling. And so it's almost like that first decision, like, you know, I mentioned, of course, in mine the Big Six of the seed industry. You know, there were some earlier mergers that allowed Pioneer and DeKalb to basically disappear as competitors from the markets, but then I believe it was ChemChina/Syngenta that was the first merger, the first domino to fall, like in that industry, and then that encouraged Dow/DuPont to merge, and then, of course, Bayer and Monsanto merge.

And so, to me, taking a very skeptical approach to the mergers and the efficiencies that are claimed during that merger process and using -- and then as far as the current jurisprudence goes, you know, it seems to me very clear that while antitrust theoretically takes in more than price, that that is where the analysis tends to go. And the main reason for this is because of the importance of economists in the process, and that economists often want to disregard other considerations other than price. They

want things to be quantifiable so that they can fit it into a model that can be done. And price is the easiest, I guess, factor that can enter into it.

But I think when we're taking an approach to merger review, we do need to be thinking of consumer welfare in a much broader sense and looking to that power that is created from a merger and potentially even the power that just the existence of that new power dynamic in that market, the tendency that it will have to increase further concentration in those markets by other dominos falling.

MR. HAMBURGER: Thanks, Max. Kind of to follow up on that question, does Iowa -- does your state consider any public interest factors or any other factors like that in its analysis? Can you describe those a little?

MR. MILLER: Well, you know, I don't want to get into any, like, kind of specific cases or anything like that. You know, I personally, like, you know, as kind of the first level of review, obviously, like, within any kind of an office, there's going to be multiple, you know, levels of kind of looking at an issue.

You know, I certainly will give some credit to public interest concerns, you know, and thinking

about those issues and thinking about how that fits into the current jurisprudence, but also thinking, too, if there's an opportunity in these cases to perhaps push for more of like a public interest kind of consideration within the analysis. You know, is there something about this particular merger that would allow for us to consider these factors that might be outside of what's kind of become the trend over the last 40 years in antitrust of how to look at these mergers? Maybe it's outside of that, but maybe it has particular relevance to this particular set of facts and circumstances.

MR. HAMBURGER: Great.

And, Eric, this is a similar question for you. When considering some of the labor issues going on in Washington, are there any non-antitrust and public interest considerations that you guys have going into your cases?

MR. NEWMAN: Like Max, I don't want to talk about specific cases, but a couple of things. So we have -- for the size of our state, we have a pretty big antitrust division. We have spots for 12 lawyers -- we don't have 12 lawyers at the moment -- so we have a pretty big antitrust division. And then we have a much bigger separate consumer protection

division. And we work together a lot and think about problems and whether it is a consumer protection problem or an antitrust problem. So that helps a lot.

As far as the general public interest, I feel like we have a very forward-thinking attorney general. It's interesting, before he went to law school, he was a professional chess player, which is an interesting piece of trivia about him, but it comes out in the way he thinks about things. So he really does think three, four, five moves ahead in everything that we're doing. So I think that the public interest effect is definitely something that comes in to play.

MR. HAMBURGER: Great. And I do have another question for you, Eric. This is also from the audience. So state AGs in Washington and other states have raised concerns about the anticompetitive effects of labor noncompete agreements, like you said. Should the FTC explore enforcement, rulemaking, or policy at the federal level?

And this is I guess a two-part question. Can you explain the benefits in your experience of maybe addressing these issues via litigation versus rulemaking versus legislation?

MR. NEWMAN: Sure. So I said in my opening comments that we have started an investigation into

noncompetes in Washington, and it is really to get to the heart of the matter. But like I said, we also just had a statute passed that made them illegal for low-wage workers and really up to $100,000 a year. So I think that is a really effective way of getting in front of it obviously, is just outlawing it completely.

But I think that attorneys general, because there is only -- often only one decision-maker, the attorney general, we could be a lot more nimble in the way we approach things, and sometimes it's hard to get a legislature together or FTC Commissioners together on a point where we can use the court system to help out, especially in the most egregious circumstances, while the slow wheels of the bigger institution turn.

MR. HAMBURGER: Great.

MS. THOMAS: I have a question for Sarah just about the -- you know, in the wake of this push for a greater focus on occupational licensing from the national level, I'm just wondering what sort of procedures have been implemented in different states maybe that you have seen that may be useful in kind of remedying this problem of having business have such a strong hand in ensuring greater levels of occupational licensing.

So I know, you know, in Nebraska, there's this law that I'm sure you've heard of that requires a review of occupational licensing. And then I know in North Carolina, the dental board, the composition of the board was changed to include fewer practitioners or licensed professionals so that their interests aren't overly represented, I guess.

MS. OXENHAM ALLEN: Yes. Well, in my own state of Virginia I have not advocated changing the composition of the board because the vast majority of the work that a board does doesn't impact competition, and you'd like to have the expertise of the active market participants in those cases. So, to me, that wouldn't be a favored approach.

Connecticut has changed it so all their health board decisions are advisory only and that it would take an actual state employee to actually officially implement their advisory opinions. So that's one way to keep the expertise, but take away or add, sorry, add some kind of active supervision.

Regular sunrise and sunset reviews of licensing boards is definitely something that could be beneficial. Virginia, I hate to tell a bad story about Virginia, but Virginia recently added a licensing requirement for polysomnographists, which

are -- is a fancy term for the sleep study technicians. They are required to have a license, and that is something that probably could have benefitted from a sunrise study to determine if licensing was really required here or if something less restrictive like certification or registration would have been better or something not at all.

Colorado's Department of Regulatory Agencies, or DORA, is often held up as good example of an agency that conducts regular sunset reviews of its regulatory boards. And I believe California also is required to do that. And then other states like Arizona, as you mentioned Nebraska, Rhode Island, Michigan, have taken on looking at their current licensing boards and seeing whether they're still required and have delicensed several occupations in those states.

A lot of states have gotten rid of hair braiding like Virginia did. And Mississippi passed part of the ALEC -- model ALEC or Institute for Justice bill that would require the legislature to look at the -- rank the restriction alternatives from least restrictive open market competition to most restrictive licensing and try and take the least restrictive route they can while still accomplishing

their health and safety goals. So they're trying. Very few have actually implemented active supervision, though.

MR. HAMBURGER: Great. Thanks, Sarah.

So I do want to ask you, David, a quick question, but I think this might be something that everyone on the panel can ask -- or can answer. And this is from the audience.

Are state attorneys general expanding their efforts on antitrust? And how can federal enforcers support your enforcement efforts?

MR. SONNENREICH: I would say that we are focusing our efforts on antitrust, and in particular industries, we've really made a really hard push, particularly in pharmaceuticals, and the best way to support that effort is through some of the sorts of coordination I was discussing.

I also think that states' attorneys general are more willing than in the past to bring cases on our own. So I would say those are two of the ways.

MR. HAMBURGER: Great.

Anyone else?

MS. OXENHAM ALLEN: Yeah, I'd like to add that, you know, we have our Suboxone product top case that the states are doing alone without the FTC or

DOJ. We have the generic drugs price-fixing case, which some of you may recently have seen on “60 Minutes.” Nine states and D.C. yesterday filed a complaint to stop the T-Mobile/Sprint merger, and that's being done independently of DOJ.

So I would say absolutely we are stepping up our own enforcement efforts. We have single states like Washington that's doing a lot of work, especially in the no-poach area. And California with its Sutter Health case. And we have our committees, like the Technology Industry Working Group, but we also have a Labor and Antitrust Committee that’s looking at some of the issues that were discussed by Max and Eric. And so I think it's an exciting time to be in the states.

MR. HAMBURGER: Great. Thanks, Sarah.

Well, we have a couple minutes left. And as much as it disappoints me, we are running out of time. So I do want to give you guys a couple of minutes, maybe a minute each, for closing remarks. And we'll just go down the line, maybe starting with Eric, if you have anything left.

MR. NEWMAN: I don't have anything in particular, but Washington has really enjoyed reaching out to other states and sharing information and

sharing case thoughts. And we're very open to receiving them as well. If you have thoughts, especially I'm particularly interested in the labor sphere, if you have thoughts about cases, I want to hear them. I'm going to be here for the rest of the day, and I'm easy to find if you're looking for me.

Otherwise, you know, I've been with the Attorney General's Office for about 18 months now, and I feel like I've started to build some relationships. I know Max really well now, as well as Sarah really well. David I've gotten to know a little bit. But those connections are hugely valuable, and I hope that we can reach out and connect with the FTC, too.

For the most part we're all on the same side here, and I really hope we can work together and that people are more willing to reach out and connect on case ideas or resources.

MR. HAMBURGER: Max.

MR. MILLER: Yeah, well, first off, just thank you again for organizing this panel and for having me on it. And I guess I would just note that I think this is a very exciting time for antitrust. I think there's a renewed interest in this, a crossover, there's a grassroots interest in antitrust in a way that we haven't seen for pretty much the past century.

And so I think that for especially people that are specialized in this field, the last 40 years have had a particular way of thinking, I think there needs to be an openness to the idea that there's perhaps a democratic upswell of asking for antitrust enforcers and the supposed experts in the antitrust field to reconsider the way that we approach antitrust and to make sure that we are actually protecting consumers and protecting the markets in this country with our antitrust policy.

MR. HAMBURGER: Great. Thanks, Max.

MR. SONNENREICH: I'd like to simply say that in the area of coordination and cooperation that states, although we're different sovereigns with different laws, work very hard to work well together and in particular because of the great leadership of the National Association of Attorney Generals who do a lot to help us find ways to work within those structures. And thank you.

MS. OXENHAM ALLEN: And in that context, I would like to particularly thank Emily Myers, our Antitrust Counsel at NAAG, and Abby Simpson, our Consumers Protection Counsel at NAAG. And Karen Berg at the FTC is our state liaison, and she has been for years and does a great job. So thank you very much.

MR. HAMBURGER: Well, I'll let her know. And we're just in the closing seconds here, so I just want to take the opportunity to thank everyone for being on the panel today. Thank you, Creighton, for hosting us. And with that, we're going to go to lunch. And we're going to reconvene at 12:15 [sic]. Thank you very much.

(Luncheon recess.)

CONSUMER PROTECTION REMEDIES:

ECONOMIC & LEGAL CONSIDERATIONS

DR. COOPER: Hi, welcome back from lunch. Glad to start the first of two afternoon panels. I'm James Cooper. I'm the Deputy Director for Economic Analysis in the Bureau of Consumer Protection and professor on leave from George Mason's Antonin Scalia Law School.

Today, we're going to -- this panel here today, we're going to talk about remedies. The FTC, as many of you who may or may not be students of the FTC know, we're kind of an odd creature legally. We have the ability, we have an administrative -- we can sue people and sue parties, and charge them administratively, have an administrative hearing from which we can get injunctive relief, but no monetary remedies unless the order is violated.

We also have the power to go into Federal Court under 13(b) and get an injunction, and we're going to talk a little bit more about some of the legal questions that have arisen recently on that. We have the ability to get civil penalty authorities for some statutes that we enforce. And we're going to delve into a lot more detail about the FTC structure later in the panel.

But the point here is to kind of lay out the framework that the FTC is kind of this odd amalgamation of the ability to address marketplace harms, we have a strange tool kit, to say the least. And recently, and why this is an important panel, is that there have been several court decisions that have come down recently that have questioned some of our ability to get remedies in Federal Court. So it has had us thinking a lot about the question of remedies internally, and while we're here also to, as part of these hearings, to discuss it with the outside world.

So on this panel, I see us as having three tasks. Now, in the morning we've really -- with the fantastic panels in the morning with the State Attorneys General, we have looked at the practical. We've looked at how things are actually done and we're going to -- I am lucky here to have a panel of myself, an economist, and two and a half -- I'll call Gus a half economist. He's not part of the guild because he doesn't have the Ph.D., but steeped in econ and a Master's.

So we're going to move from the practical to the real world to really a little more of the theory world. But I think that's really important because I think the economics of understanding the role of

remedies and how economists think through this and how we think about ideas of deterrence in an economic framework are really important to inform as we think about the future of the FTC's remedial authority.

So as I said, I think we have three tasks. First we're going to start off and look really at kind of the economic theory behind deterrence, behind sanctions, the role that sanctions play from an economic standpoint.

Next, we're going to turn to and look apart from public enforcement of the law and how that shapes behavior, look at how markets shape behavior. So what role do markets play and how do they penalize companies and actors who engage in harmful conduct.

And then, finally, after the first two parts of this, after laying the groundwork of kind of the theory and some of the empirics behind the economics of remedies and deterrence, we're going to take those principles and then apply them to the FTC, and we're going to talk about the structure of the FTC and some of the recent legal -- some of the recent court decisions that have brought into question some of the FTC's ability to get relief in Federal Courts and think more generally, if we were going to start from the ground up, how might we want to think about the

FTC's remedial powers.

So like I said, we have a great panel to discuss this. To my immediate left here, Murat Mungan is my colleague at Scalia Law School. He is a professor of law there. He's widely published and a leading expert in the theory of optimal deterrence of criminal law.

Next to Murat is John Klick. John is at the University of Pennsylvania Law School. John is also the Erasmus Chair of Empirical Legal Studies at University in Rotterdam. John is one of the leading experts of empirical law and economics in the country. So John is going to help us with that piece of the puzzle.

And then, finally, at the end of the panel is Gus Hurwitz. Gus is a professor at the Nebraska College of Law, right down the road, where he's also the Co-Director of the Space, Cyber and Telecommunications Law Program and the Director of Law and Economics Programs for the International Center for Law and Economics. How many times can I say law and economics in one sentence?

MR. HURWITZ: You did it economically.

DR. COOPER: Can you say it too many times? That's the question.

So anyway, we have a fantastic panel. I can't think of three people more qualified to discuss this, and I'm really happy to be able to moderate this.

So let me turn it over to Murat who's going to walk us through some of the basic economic theory of liability and deterrence to help us kind of lay the groundwork for this. So, Murat, take it away.

DR. MUNGAN: Thanks, James.

As James mentioned, I'm going to be talking about the theoretical economic literature on optimal liability and deterrence. I should say it is more of an introduction to this literature because there has been a thousand articles -- maybe thousands of articles on this issue. So I'm just going to try to give the basics of the model so that it might provide us a starting point for discussing issues related to optimal deterrence.

So our starting point will be Gary Becker's 1968 article published in the Journal of Political Economics where he makes a very basic, basic point, which is that punishment or liability affects a potential offenders's incentives and, therefore, his likelihood of committing an illegal act.

So the way we try to affect these incentives

are through two main components. These are the probability of punishment and the severity of punishment. And together, these two components create what you could call an expected cost of engaging in an illegal act. You are going to be punished with the probability of p in this model and you are going to be punished with the severity of s, so the multiplication of these gives us the expected cost which is denoted ps.

If you have a cost of compliance with the law which exceeds the expected cost of not complying with the law, then according to Becker's model, you're basically going to not comply with the law. That is to say, if the cost of compliance is too high, then you're not going to comply with the law. So what Becker's insight is is that by adjusting these two variables, the probability of punishment and the severity of punishment, we can adjust the proportion of potential offenders who will eventually commit the illegal act.

So in Becker's model, we make a number of simplifying assumptions, among which risk neutrality plays an important role. If we assume risk neutrality, the proportion of offenders will be a function of the expected sanction. So the way we can

think about this is that different entities might have different costs of complying with the law. They might have different technologies available to them and, therefore, it might make it easier or harder for them to comply with the law or they may simply find themselves in different situations, which makes it more costly or less costly for them to comply with the law.

So in this basic model, we can calculate the proportion of offenders who have a cost of compliance that exceeds the expected cost of punishment and, basically, with that calculation, we can get the proportion of potential offenders that will commit the offense. In this basic model, I'm going to denote this as one minus capital F of ps, which is on the slide there on the very bottom. That's basically the proportion of individuals who commit the act. By varying p and s, we are going to be able to vary F of p times s and, therefore, the proportion of offenders that will eventually emerge in the given market.

Now, with this observation, we want to ask the crucial question: What is the optimal liability? What is the optimal liability structure? Under what circumstances do we want firms to commit the illegal act and under what circumstances do we not want them

to? Or stated differently, under what circumstances do we want firms to comply with a given regulation?

In order to answer this question, we need to bring in an additional variable, namely, the harm associated with noncompliance. When I talk about the harm, I'm not talking about the private harm to the company. I'm talking about the overall harm to society. And this variable is quite important because it's going to tell us or it's going to affect what degree of enforcement is optimal.

So given a harm associated with noncompliance, we want to set p and s at the optimal level. How do we do that? We want to select p and s such that people will comply with the law only if the cost of compliance is lower than the harm associated with the act. You can find this type of statement also in various torts cases. It is called the learned hand formula. Or a very similar version of it is called learned hand formula. It's a very intuitive idea that you can find in many different places.

So, basically, if we want to write this in symbols, we want compliance if the benefit, b, is smaller than h, and we can basically achieve this result by setting the expected sanction, p times s, equal to the harm because, remember, people comply if

their benefits or their cost of compliance with the law is smaller than the expected sanction.

So this is the standard formula that comes out of Becker's model. We want to set the harm equal to the expected cost of noncompliance. And, remember, the expected cost of noncompliance has two components, p times s, so we want to set that equal to the harm from crime. Now, given this observation, if we assume that the probability of detection is exogenous, is fixed, we can set it through the actions of some other agency, we want to figure out what the optimal sanction is. Then we do a very simple manipulation to this formula that we have on there, which says h equals p times s, and we get that the optimal sanction, the severity of the sanction, the monetary damages that we want to impose on the firm, is going to equal h over p.

What does this tell us? It tells us to take the social cost of noncompliance, h, and multiply it with the inverse of the probability of detection. So if the probability of detection is low, then we want to set a very high sanction. If the harm associated with noncompliance is high, then we want to set a high sanction.

Now, something that is crucial about this

formula, let me go back a second, something that is crucial about this formula is that you don't see any reference to the benefit of the individual. You only see two things there, and that is h and p. The harm associated with noncompliance and the probability of detection. That is to say, we don't need to make any inquiries as to what benefit the firm reaps from engaging in this type of act in order to calculate the optimal sanctions.

And why is that? Because this sanction that we calculated, the optimum sanction, basically forces the firm to internalize the costs associated with these actions, much like a Pigovian tax and the economics literature that preceded this analysis and that's one of the nice things about this optimal sanction. It requires very little information. You only need to look at two things.

Now, this was the case of what I call an exogenous probability of detection. We took the probability of detection as given and asked what is the optimal sanction. Now, we can change this question slightly and ask whether we could do better if we could set the probability of detection, also. That is to say, we're not only going to set the severity of the sanction damages, but we're also going

to vary the probability of detection, for instance, by conducting more frequent audits and so on, we could alter this variable.

But, of course, doing so is costly. It's not cheap to go and do audits and, therefore, we need to figure out how we might want to trade off these costs against the costs of noncompliance. So in order to do that, I'm going to give you a very, very simple example to give us a starting point. Suppose that the harm in question is noted by $10. You can multiply this number with anything you want. Make it $10 million if you want. It's just a simple example.

So suppose that the harm is $10 and you can hire either ten full-time inspectors at a cost of $1 million, in which case the probability of detection, say, will be 1. That is to say you will detect all instances of noncompliance. Or you can hire one full-time inspector in which case the probability of detection will be 10 percent or you can hire one part-time inspector in which the probability of detection will be 1 in 1,000.

Now, which do we want to do and how do we choose among these three options? Well, that depends on what sanction we impose under each regime. That is to say, suppose we pick the first regime where we hire

10 full-time inspectors and we get a probability of 1, what do we set the sanction as? That is dependent. The sanction that we're going to choose will depend on the probability that we choose.

So, in this example, we could choose the first option, ten full-time inspectors, which will result in a probability of 1, in which case we would want to set the sanction to $10 because then only people with benefits from engaging in the act which exceed $10 will engage in the act and that exceeds the social harm from the act and we want that to happen, and the others will be deterred and that would be the perfect solution. So we would want to set the sanction at $10 if we were to choose the first option.

In the second option, the probability of enforcement goes down to 10 percent; therefore, we need to adjust the sanction up to $100 to get optimal deterrence, p times s equals 10 again. So just to remind you, in the first case, we set a sanction of $10; in the second option, we increased it to $100; and in the third option, where there is only a probability of 1 in a 1,000, we need to set a sanction of $10,000 in order to get optimal deterrence. So you can see the inverse with the probability of detection.

In all of these cases, we will have optimal deterrence. Only people with benefits that exceed $10 will engage in the act. But one of them is very costly and the other two are relatively less costly and the third one is the cheapest option. Why? Because they have different enforcement costs. The first option requires a million dollars to achieve such enforcement; the last option requires only $1,000. It's the cheapest option.

So this is basically Becker's main insight, one of the two main insights that he has in the article. It suggests that the optimal sanction regime or the optimal punishment regime is one where you have very low probabilities of enforcement and very high sanctions. So this is one of the results that come out of Becker's model, when you have endogenous probabilities of detection and when you can choose the probability of detection as low as you could possibly imagine. So that's one result.

Now, of course, the implication of this is that you want to set the probability equal to, say, one in a billion or something like that and then multiply it with a sanction that's even a higher crazy -- some weird number that I can't pronounce. Now, if we do that though, most people won't be able to pay

this. So the sanction won't be a feasible sanction. To account for this problem, what Becker did in his model is basically he said exogenously, you know, set a fixed maximum sanction. So you can't exert more than the wealth of the entity that you are facing and, therefore, there is a maximum sanction involved.

Now, given that maximum sanction, what does the optimal solution look like? Now, Becker also answered that question. Let me see where that is here. Becker answered that question, I'm not going to give you the full-blown result, I'm just going to demonstrate it through an example.

Now, suppose in our modified example, that the maximum an entity can pay is $1,000, and the harm is still $10 and suppose that we can set the probability of detection freely. That is to say we can select any number to be our probability of detection, but the higher it is, the more costs we have to incur. In that case, do we want to set the probability of detection at a level that will give us the first best level of deterrence? That is to say, do we want to deter all people who have benefits lower than the harms that they will cause by engaging in the illegal activity? Becker's analysis answers this question negatively. It basically tells us, no, we

want a lower level of detection.

And why is that? The reason is, basically stated, when you have optimal deterrence, people who have a benefit of, say, $9.99 are deterred from engaging in the activity. And their costs -- the costs that they would generate by engaging in the activity would be basically 1 cent. It doesn't pay off too much to deter these guys because the gains that you get from each individual is very, very small. However, reducing the probability of detection slightly can generate a lot of savings. Because those are not very small when you are talking about reducing the probability of detection from, say, 20 percent to 19 percent. That could be a lot of savings.

Therefore, on the margin, the benefits that you get from reducing the probability of detection outweigh the costs that you get from underdeterrence. And that's Becker's second main result. When you can set the probability of detection and the sanction endogenously and there is a maximum sanction that you have to play with, then you want to have underdeterrence as a result. That is to say, in the end, you will have some people who have benefits that are lower than the harms that they cause by engaging in the activity that, in fact, engage in the activity.

Now, these were the basic results that you get from the Beckerian model. And I want to highlight some of the results just to give you a recap, and then I'll finish up. The optimal sanction with exogenous probability of detection is basically the harm times the inverse of the probability of detection. Under what circumstances is this result important?

Now, I've given you two different problems, one with an exogenous probability, one with an endogenous problem. So you might ask me which one should we care about? Why are we talking about two different models, which one is more important? That depends on the context. It depends on whether you, as the decision-maker, have the ability to adjust both s and p simultaneously and, also, whether you have the ability to adjust p, across different industries, across different enforcement schemes simultaneously or separately. So if you can adjust them separately, you would be playing with an endogenous model.

But if you have to adjust them together, that is to say there is some general level of enforcement that you engage in, you try to detect wrongdoings generally, but you don't specify which type of wrongdoings you're investing and detecting, in that case, you're more likely talking about an

exogenous probability model. In those cases, the optimal sanction may not even be the maximum one. That is to say, you do not need to leave every corporation bankrupt as a result of their wrongdoings. You might find a sanction that's very low if the probability is high, in fact. So that model provides a more realistic optimal sanction that people generally talk about. The endogenous one might become important when on the margin you can adjust the probability of detection.

Now, a few other things that I wanted to mention. I briefly touched on the idea that the optimal sanction does not depend on the benefit of the individual corporation. Suppose that you want to have, for whatever reason, you want to have a sanction scheme that depends on the corporation's benefit. What would the optimal sanction scheme look like? Well, Becker's insight still holds. We want to have people with benefits that are smaller than the harms that they cause socially to not engage in the act. So we want to deter them. So we need to set expected sanctions that are greater than their benefits. If we can observe their benefits, we can find the minimum sanction that will achieve this result.

For the other firms, though, that have

benefits that are greater than the harms, we should simply excuse them. We should not punish them at all because it is good for them to engage in this behavior because the costs that they would have to incur in order to comply would be greater than the social harms that they cause. If you are interested in distributional impacts, you could get the harm that the firm is causing by engaging in this activity, take it from them, and distribute it to whoever might be harmed from it. So that would be a solution under those circumstances.

Now, another question that comes up, I know James is interested in this question, is whether we may ever want to completely deter certain conduct. That could be the case, for instance, if the benefits that any of the firms that you're interested in, the highest benefit that is receivable by them is still lower than the social cost of the conduct. In those cases, the optimal or the first best level of deterrence would be full deterrence. That is to say we would not want to see any of this conduct taking place at all. But, still, if you follow Becker's formula, you will get that result.

Why? Because you're causing the firm to internalize the cost of its actions, and if you set

the sanction properly, you should not see any firms engaging in this behavior if your assumption that their benefits are smaller than the harm is, in fact, correct. So you do not need to deviate from the optimal sanction just because you believe that this behavior should be deterred completely for purposes of achieving efficiency.

So I believe those are the main results that I wanted to talk about. I also wanted to touch on some issues related to implicit assumptions that are made in the model. I basically touched on the idea that we are using risk neutrality. When you deviate from that assumption, one of the results that emerges is that you don't want to have a very low probability, a very high sanction scheme, because that artificially generates risk for firms. And if firms are risk-averse, they want to stay away from it and, therefore, there are risk-bearing costs that you could avoid by increasing the probability and reducing the sanction. That is one of the results that emerges.

Another assumption that we're making is there are no type 1 errors. Now, there are type 1 and type 2 errors unless they are defined. They don't need to make sense to anybody. So let me define it very quickly. In this context, I'm referring to type

1 errors as basically finding liability when there should not exist any. So you're punishing the wrong person. That's a type 1 error.

There are costs to such type 1 errors because even by remaining innocent you could be punished. There is little reason for you to not engage in the illegal activity and, therefore, you might as well engage in the illegal activity. In such circumstances, the way you think about sanctions might differ and you might want to, for instance, base the sanction level, the severity of the sanction on the weight of the evidence that you have against the entity that you're looking at.

These are some takeaways that come out of this model and the model can be extended in many other ways, but I don't want to take too much more time on this simple modeling issue. So I'll just leave it to you to decide what we talk about next.

DR. COOPER: Okay, that's great. That's my job as the moderator. So thanks, Murat. That's really helpful for laying the groundwork.

Before we move on to John while -- and I'll throw this out to anyone here on the panel, but Murat if you wanted to respond. It related to a couple of the last points you had in the slides about -- you

know, when I think about the Bob Kuder article, the classic article about sanctions versus prices, so there are some times where we decide as a society we're going to say certain behavior is off limits and we are going to sanction it. Other times, though, we're okay with just pricing harm. Right? And this goes -- you often hear the mantra, well, you know, we just don't want this to be the cost of doing business for a firm that's engaging in some kind of conduct that's harmful.

But as an economist, I think often like that's exactly what we want to do. It should be a cost of doing business and if the value is greater than the harm they create, we want them to do that because on that it's beneficial.

So my question here is, you know, when do we want something to be just the price of doing business versus when should we think about sanctions, you know, sanctioning behavior completely, setting remedies to completely -- you know, have complete deterrence and what role does information play in this? Because one of the things, as you walk through the model, you talked a little bit about type 1 and type 2 errors, but we were really kind of assuming that the agency or the fact finder, whoever is assessing the harm or the

damages or the sanction, is doing it accurately.

So what role does information play when we think about that? So I'll throw that out to anyone. Murat, you can have the right of first refusal or you can kick it on down.

DR. MUNGAN: So basically, if we look at the simple model that I -- I tried to touch on this in my comments, but if we look at the simple model, it tells us that if you set the optimal sanction properly, it doesn't matter whether you view this as a price or a sanction. Because if the harms are so high that you don't want anybody to engage in such behavior, this will show up in the optimal sanction in the form of a prohibitively high sanction such that when you impose that sanction nobody will engage in the act.

DR. COOPER: So if you stick with harm-based penalties, as long as for the entire population of potential offenders, the benefits or the value that they create is going to be less than the harm, as long as you price it at harm, you'll get none of that behavior?

DR. MUNGAN: Yes, exactly, yeah. So you basically, you don't have to alter anything. Now, if it is the case, though, that the maximal sanction, that is to say the well-being or the wealth, the

entirety of the wealth of the offender, is so low that even if you take all of its wealth it will still engage in that behavior, then you might want to try different things. You might want to have ex ante monitoring for instance, or something like that, to make sure that they cannot engage in the behavior in the first place.

DR. COOPER: Okay.

DR. MUNGAN: Or you might have like some attempt stage at which you interfere before the harm can be delivered because you suspect that the entity is going to engage in seriously harmful behavior from which it cannot be deterred because its wealth is so little. In those cases, you may need to try some alternative intervention methods. But beyond that, beyond that low maximal sanction problem, I don't see a reason as to why you might want to distinguish between prices and sanctions, unlike in the torts literature where you might want to distinguish between them. Because what you're referring to is basically the distinction between a property rule and a liability rule.

DR. COOPER: Yes.

DR. MUNGAN: And when you give a property rule, when you allow the person to own his rights

through a property rule, you basically give him more bargaining power. And when you give him more -- because you give him the property rule and then he can go and negotiate with the person who is trying to violate his property rule and extract more of the rents that he has associated with that right.

Now, if you do this, the person will have ex ante a higher incentive to be the owner of that right. If you want to incentivize people to, you know, maybe the owner of those rights by engaging in a certain behavior, then you might want to distinguish between property rules and liability rules. But in this context, I don't see that there's much of a distinction.

DR. COOPER: Okay.

John, do you want to jump in?

DR. KLICK: Yeah. So, I'm going to echo most of what Murat said. But The way you framed of it of, you know, some people thinking we don't want punishments to just be the price of doing business, I think at root there it is some potentially incomplete thinking about what social harms are, right? So as Murat said, if we've measured the social harms accurately, making punishments being the price of doing business is exactly what we want.

So in the law and economics literature, one of the examples that's actually sort of invoked for we don't want punishments to be just the price of doing business, is this famous Israeli day care business where this sort of experiment was run where, you know, a day care operated in sort of the normal course of business and as often happens in day cares, you had parents sort of showing up late sometimes to pick up their kids. So what the experiment that they ran was they implemented essentially a fine, right? So if you are late to pick up your kids, you have to pay sort of more money.

And the model Murat sort of suggested, you know, would say, oh, if we fine people, we're going to see less showing up late. But, in fact, what happened was more people showed up lately because they treated it as the price of doing business, right? So that's often given as sort of the counterexample to the law of economics sort of approach of deterrence. But I think it shows sort of a problem with not thinking of harm sufficiently, right?

So if the Israeli day care example had actually priced out what is the harm of showing up late, so the cost of the workers having to stay late or things like that, if they had actually priced it at

the actual harm, it no longer matters if anyone shows up late, right? Because we've actually gotten to the point where if the benefit of me showing up late is less than the cost to you to stick around with my kid, you know, it's a sort of a win-win circumstance.

So I really do think a lot of this kind of thinking, James, comes back to people not sufficiently thinking through what are the actual harms and let's make sure our punishments align and fully capture the harms. And then once we've got that handled, it absolutely is better if we've got, you know, people treating this as a cost of doing business.

DR. COOPER: Gus, did you want to add something?

MR. HURWITZ: Yeah. To build on this, any compliance cost, any sanction is ultimately going to be reflected as a cost of doing business. So one example people like to talk about is saying we don't want to fine the companies when it's management doing something bad so let's talk about disbarment as a sanction. If you are a CEO, you do something bad, you can't be a CEO for the next five years, you can't work in this industry for the rest of your life, whatever.

Well, CEOs know that that is a potential thing they could face so what are they going to do?

They are going to say, hey, this is a risk I face, you need to pay me more in order to accept that risk. So the firm is paying the CEO more, that's a cost that's ultimately going to be passed on at some portion of the incidence to consumers. So there's going to be consumer harm or there's going to be an increase of price that gets absorbed as a cost of doing business almost no matter what the sanction is.

It's really worth going back to the insurance crisis of the 1980s when theories of strict liability were allowing recovery of nonpecuniary damages. One of the things that we saw was companies were being required to insure uninsurable risk. So their prices were going up. So lots of companies offering socially valuable things, some purely recreational, downhill skiing, some more generally applicable, any product relating to children, it is impossible to insure infants against loss of their life or for a firm to do that. So you had companies going out of business or not offering socially valuable products because the cost of offering them exceeded what risk they were able to bear even though there were socially valuable benefits to them.

DR. COOPER: Thanks, Gus.

What I want to do now is switch gears a bit

and turn it over to John. Murat did a really good job of walking us through public enforcement. You know, how do we think -- what's the role of the Government in setting sanctions and the probability of detection in order to deter net harmful behavior.

But in addition to the sanctions the Government can impose, there are certainly market-based sanctions as well to deter net harmful behavior. But in addition to the sanctions the Government can impose, there are certainly market-based sanctions as well. So I want to turn it over to John to talk a little bit about the role the market can play in disciplining firms. In fact, we heard a little about that this morning. I don't know if it's the first or second panel about -- in the data security context that often you see that there may be one big incident, but there's not a second one because the share price tanks or the market disciplines the firm or they get rid of the CEO or the people who were misfeasant.

So, John, if you can talk about, you know, the role of the marketplace, what some of the data tell us about this.

DR. KLICK: Sure, and I'm actually -- I'm not going to take quite a discrete jump from Murat. I'm going to sort of ease in transitionally. So when

Murat presented sort of the theoretical framework or when any of us sort of teaches this sort of thing in a college class, often, the response is a little bit of an eye roll and sort of saying, well, you know, this is great on the blackboard, but, of course, people aren't robots, people don't respond the way the math necessarily sort of suggests that they do.

So before I get into the market effects, I'd just like to talk a little bit about sort of what we know or what we think we know sort of empirically about deterrence in general and then move into what role the market plays in that.

So in terms of kind of what we know relative to Murat's model, what we know empirically -- so Murat's model, if you recall, you can sort of adjust the severity of the sanction, you can adjust the probability of a sanction, you know, either one of those things, and he told you how to do it sort of optimally. But sort of a necessary condition for the model to have its conclusions hold, its welfare conclusions hold, it's got to be the case that people actually do react, right? People do react to changes in probabilities of sanctions and severity of sanctions.

And, you know, it turns out we actually do

know, at least in general, we know quite a lot about this statistically or empirically in sort of the economics literature or the law and economics literature. Now, unfortunately, for our context, a lot of it that we know is in sort of the criminal context and the individual criminal context. So we can sort of discuss whether those results sort of extrapolate or how we would think about whether they extrapolate to the cases of a noncriminal sort of context, regulatory context, where the actors are maybe firms rather than individuals.

But I do think it's sort of worthwhile, at least, to kind of get past your suspicions about whether people actually do respond to these sorts of changes. You know, it turns out there is a long literature sort of looking at, for example, what happens when you increase enforcement through hiring more police, for example. This literature is actually quite sophisticated by now, sort of focusing on what we economists call natural experiments, so situations where there's sort of an exogenous or a random/semi-random increase in policing and sort of see what happens to sort of people's criminal activities.

We've got some work looking, for example, at the border of our campus at the University of

Pennsylvania. At the University of Pennsylvania, we have our own police force. That police force can arrest people on our campus, they can take people to jail, basically, but they cannot do this off the campus, right? So we've got a lot more police per unit of space than the City of Philadelphia does. So it's basically as though on one side of the block, basically, you've got a much higher probability of detection of crime than on sort of the other side of the street.

And if Murat's model is valid, is sort of a valid description of human behavior, what we should see is sort of less criminal infractions on the University of Pennsylvania side of the street versus the Philadelphia side of the street. And that's exactly what we find. It turns out you can't explain it through different populations on either side. Essentially in West Philadelphia, at least for a number of blocks, it's still mostly University of Pennsylvania students and workers and things like that. You can't explain it through sort of, you know, a different environment, you can't explain it through anything, quite frankly, other than the different levels of police.

We have got sort of other research, I and

sort of other people are looking at, for example, what happens in cities when you get a big explosion of police coverage in parts of the city versus other parts of the city. So for example, after terrorists attack, if Washington, D.C. puts more police around the White House and Capitol Hill and the Smithsonians and things like that, but doesn't increase police protection around the Zoo, what do we see? And what we see is where there's more police, you see a significant decline in crime.

So like I said, whether this sort of translates over into the purely regulatory context is potentially an open question. But, you know, perhaps we do have some noncriminal quasi-regulatory evidence, you know, as well. So Murat sort of noted that his crime model, or as he presented it, his deterrence model, you could import it into the torts context, the accidents context, when we see sort of higher in this case, not higher probability, but in this case higher sanctions, do we see people sort of acting more carefully, things like that? And it turns out there's quite a lot of evidence that, in fact, that's true.

One of my favorite papers is a fairly new paper by Michael Frakes at Duke Law School and Jonathan Gruber, a health economist at MIT, where they

look at medical malpractice rules. So over the last number of years a number of states have capped liability for medical malpractice. And, you know, lots of people have looked at, well, what happens to mistakes, medical mistakes, doctor mistakes, state to state, you know, as a function of these rules. But what the Frakes and Gruber paper does is sort of an even better comparison. They look at VA hospitals and VA hospitals are particularly interesting because VA hospitals are exempt from the state tort rules for at least veterans. But it turns out that in VA hospitals, veterans families can also get care, but for the veterans families you do have the state rules applying.

So there you've got same setting, same doctors, largely speaking, the same populations, but the veteran walks in the door versus the veteran's spouse walks in the door and it turns out what Frakes and Gruber find is that there are fewer mistakes, for example, for the spouse if the state has a background rule of a lot of liability. Or you see more mistakes if the background rule is sort of less liability as compared to what's going on, say, in other states or as compared to what's going on with respect to the veterans in the veterans hospital.

So although it may not seem completely intuitive or obvious to you that people do respond to these kinds of costs and benefits that come about through these kind of deterrence policy variables, it turns out that in most of the empirical examinations, in fact, people do.

So Murat's model or Becker's model or Beckerian's model or whatever you want to call it is not some theoretical or mathematical curiosity. You know, it turns out that people really do respond to these costs in this way.

That said, we do still have the question of does that kind of evidence translate over into the firm context? Does it translate over into the regulatory context? And it turns out there's much less empirical analysis in this context. So I don't want to say, you know, people have looked into it and not found it. It's just, in general, people have not looked into it quite as well, certainly not for consumer protection contexts. They have maybe in some other regulatory areas.

So we do have this question just because you find the empirical evidence of Murat's model in some contexts, maybe we don't see it in other contexts. And the fact that the other contexts that we want to

apply it in maybe differs because it's maybe firms making decisions as opposed to individuals, I suppose we could intuitively spin that both of ways. We might think of firms as being more calculating and things like that.

On the other hand, you know, firms are collections of people and the people don't directly themselves bear the cost of Murat's penalty. So we could tell stories in either direction that maybe what we see in the police context or in the torts context may apply even more so in the firm context or might apply less so. Unfortunately, we just don't have sort of the scope or the scale of the empirical evidence in that area.

Okay. That said, as James suggested, there also is sort of another set of incentives that apply in the firm context, i.e., the market incentives that maybe are more powerful than they would be in the individual setting, in torts or crime. And it turns out we do have some evidence with respect to what happens to firms from a market perspective. How do shareholders respond to firms getting hit with penalties or getting discovered having engaged in some sort of legal infractions and things like that? It turns out that there is actually a distribution of

results that maybe gives us some insights as to what kind of remedies or in what sort of setting may be more or less effective.

So to give you sort of an idea of the distribution or the disparity of results that people see, there's a guy, Jonathan Karpoff, who's done quite a lot in this area. And the general approach is to do an econometric analysis known as an event study. So an event study is just basically looking at how a firm's stock price or stock returns vary with the market in sort of a normal period and then see how that stock price diverges in a period when a particular event occurs. So in this context, the event might be a regulatory penalty or some kind of corporate scandal or something along those lines.

So Karpoff has done this with various co-authors for lots of different regulatory infractions. And it's sort of interesting, particularly given sort of our earlier discussion of the cost of doing business and how fines might, whether we want them to or not, might be seen as just sort of a cost of doing business. In one of Jonathan Karpoff's earliest papers, he and another guy named John Lott, looked at what happens to firms where the EPA discovers some sort of environmental infraction

and then sort of comes through with a fine for that infraction.

And in the EPA context, what Karpoff and Lott found, in general, was that the stock market reaction to the EPA's sanctions pretty much exactly equaled the cost of the sanction, right? If the EPA fine was $50 million, what they tended to find is is that stock prices moved in the direction of a loss of, you know, capitalization of $50 million. So it quite literally looked like a one-for-one. Every dollar we pay in fine we lose in terms of stock price.

This is interestingly contrasted with what Karpoff found later for SEC violations. If the SEC sort of hits somebody, a firm with some fines for accounting irregularities or something like that, what Karpoff found, in general, was that the stock market reaction was actually an order of magnitude larger than the fine. So if the fine were a million dollars, they found sort of a $10 million stock market reaction.

What that tells us in sort of the context of how the market is sort of incentivizing on its own independently of fines is an interesting sort of question. At least one hypotheses could be if the fine is revealing something that's potentially

worrisome about the trustworthiness of a company, as an accounting irregularity might or something like that, then what it appears as though the market might be doing is they are sort of inferring, well, if this had been hidden to us, what else is being hidden from us?

Whereas in the EPA context perhaps what investors are simply saying is, look, whatever generated the problem wasn't sort of necessarily a problem from the shareholder's perspective, it might be a societal sort of problem, but from a shareholder's perspective, perhaps this is, if anything, a benefit if we get away from it, so to speak. Right?

So what the Karpoff result -- and he's got other papers in other contexts. I believe there's some work in the Foreign Corrupt Practices Act area whereas if a firm gets hit with a Foreign Corrupt Practices Act violation, but really the violation is simply about, you know, to do a job in China, a bribe was required, shareholders sort of view that as a cost of doing business. And if they get fined, so be it. Whereas if it turns out that the Foreign Corrupt Practices Act violation also discovers that this had been hidden in sort of sketchy bookkeeping and

accounting, there's a much bigger sort of effect. So what the market sort of penalty for what we might think of as socially bad actions might well depend very much on what kind of socially bad action that it is.

What all this means in the context of sort of Murat's model or more generally our sort of question of deterrence is, at least in some circumstances, we might be able to sort of rely at least partially on some investor-induced corrections and that would sort of suggest in those settings, you know, perhaps the role of regulation is more one of discovery and publicity, rather than necessarily having the remedy itself or having the penalty itself. But it's going to depend potentially on what we view as the social harm, right?

So in the EPA context, if we think that the harm is largely going to be unrelated to the shareholders, then there's the necessary point where the regulator needs to sort of inflict some penalty. Whereas if it's in the SEC context where, quite frankly, what the SEC is sort of purporting to protect is the investors themselves, well, then perhaps, informing the investors might well be sufficient.

On that point -- and this is what I'll end

on because I know in this sort of space, information and privacy questions have been -- have abounded even on sort of earlier panels. It is interesting people have done stock market reaction type studies to data breaches and things like that. And almost uniformly what the studies find is that the stock market reactions are basically equal to the size of any remediation cost, right? So whether it be a fine or whether it be paying for credit tracking and things like that, that appears to be what the stock market capitalizes in, rather than something broader, right?

If you think that people are thinking, oh, geez, if we know this company is not so careful with our data, once we're aware of this, we're going to flee this company, that appears to not be happening and it certainly doesn't appear to be what the market sort of expects it to be. So, you know, knowing that can also inform how we think of remedies in that context as well.

DR. COOPER: All right. Thanks, John.

Well, I want to follow up a little bit -- and, again, this is -- I'll give John -- you get the right of first refusal, but if Gus or Murat want to jump in. I mean, we've been talking about, to this point, about mostly the corporate entity or the firm

as the defendant here in our model. And so one model, especially when you're talking about the stock market studies, is that the firm violates the law, the market punishes them, and what they do internally to deal with that is another matter. Do they fire the CEO? Do they fire everyone involved, clean house? Do they restructure?

Another model though -- so one is let the market discipline the firm and let the firm sort out the function internally and punish the personnel involved if they were -- you know, for mis or malfeasance. Another model, though, is to have the regulator itself not just punish the firm, but punish the individual. So we're talking about individual liability or even more -- say even maybe in restructuring -- reaching into the firm and kind of restructuring the way they are set up because maybe they did not deal with this environmental accident or this data security accident as they should so we need to make sure their reporting structures are a certain way.

So what are the tradeoffs there between one model, let the market punish the firm, let the firm figure it out, versus let the Government kind of piercing the corporate veil and getting involved with

individual liability or restructuring the firm to some extent or kind of meddling in the internal governance of the firm? Those are two different models and they are not necessarily mutually exclusive. But where would one be appropriate and the other not?

DR. KLICK: Yes, so it's interesting. I think, again, as with a lot of these questions, we've got to come back what is the harm that we think we are either trying to remediate or to avoid. So it's interesting in the Karpoff study on the EPA, they also looked at sort of post-EPA fine and stock market reaction, what happened to the actors within the firm, and basically what they found was nothing. There was no systematic relationship between EPA fines and removal of officers, directors, et cetera, et cetera. And so that really does go to the cost of doing business sort of model.

So if we are relying on the shareholders to sort of respond appropriately, if they view, you know, what happened as actually not -- you know, a fine, maybe we would have preferred to not get caught, but we don't necessarily would have -- we wouldn't necessarily have preferred to not engage in the violation in the first part, we might not be able to rely on, in that situation, the firms to be able to

fix things because from their perspective, hey, you know, we did the right thing for our shareholders, right? So in that instance, there may be a stronger argument for having some outside interference there.

Interestingly enough, in the SEC or financial context, what Karpoff found is when the SEC moved against someone, in general, there was systematic then removal of people from the firms, right? So in that instance, if the harm that we're primarily thinking about is two shareholders and the shareholders are the ones reacting, it seems as though it's all working out. In that context, we might think, well, geez, if the shareholders are the ones that we want to protect anyway and, you know, they and the firm may actually have better information or a better idea on kind of what is the right solution, then maybe everything is sort of being handled there interestingly.

There is one -- and I don't know if this exactly answers your question, but maybe it's relevant. There is another study that looks at sort of a similar sort of thing. What happens to people who are on boards of firms that get hit with either, say, private shareholder litigation versus SEC actions. And what this study found is that if I'm on

a board of a firm that gets hit with SEC actions, you know, A, I often lose my board seat and, B, I have a hard time getting board seats in the future on other related firms, and so the SEC's action seems to be enough to get shareholders to sort of move in the right direction.

Whereas when it comes to private securities litigation, what this study found is not only do board members tend to not lose their board seats when they are the subject of private securities litigation, it actually looks as though their prospects in the future get better. So there are subtle differences depending on the setting and depending on what kind of actions we're talking about. And so, as with most things in life, it's complicated, we can't give the simple one size fits all answer.

DR. COOPER: Which is good because it keeps people like us in business, the complicated questions.

So now that we've definitely laid the groundwork with this first principle to think about, to think about optimal liability, optimal deterrence, now I want to turn the discussion and focus it more narrowly on the FTC. And to lead off this discussion, I'm going to turn it over to Gus to talk about what are the sources, how can the FTC -- what are the

remedies available to it, both equitable and the difference between the equitable remedies and the ability to get civil penalties, and some of the recent challenges that the FTC has faced in court. So I'll leave it to you, Gus, to lead off our last part of our discussion here.

MR. HURWITZ: Okay. Let's talk about 13(b) baby, let's talk about FTC.

DR. COOPER: Now, before we get into that, I've got to --

MR. HURWITZ: I got a laugh from that one.

DR. COOPER: Let me also remind everyone that I think Jacob is walking around. If you have questions, I've gotten a few already, but if you have questions for panelists, please make sure to hand them off to Jacob.

MR. HURWITZ: So I shall endeavor to parsimony. That is a fraught exercise, however. First, thanks to the Commission for having me here, and I also need to say thanks to the Blue Jays for allowing a Cornhusker into their building. And, also, I'd like to commend the FTC for bringing the hearings out of D.C. and out here to Nebraska and really out here to anywhere other than D.C. for awhile. And it's nice for a change. I'm usually the lawyer playing an

economist on panels and this time I'm the quasi-economist who gets to play a lawyer. So it's a nice inversion for me.

I should also note that I, through my affiliation with the International Center of Law and Economics, have submitted and am submitting numerous comments into the Commission's competition hearings and proceedings.

Okay. So I'm going to assume generally that we understand a fair amount about the FTC's and other state consumer protection authorities' consumer processing remedies provisions. As James alluded to, there are many of them. And I think the best way, easiest way to describe them is to say that they're a total mess. They have accreted to the Commission over the years through different sources of statutory authority for different purposes, different amendments intended to address different things, different statutory authority intended to address narrow concerns that frequently have been expanded by the Commission or the courts to address broad concerns.

So, generally, Section 19 of the FTC Act, for instance, is one of the core remedial provisions that allows the Commission, following the adjudication and issuance of a cease-and-desist order, to go to the

Article 3 courts and get such relief as the court finds necessary. And this statute, this section expressly allows rescission, refunds and damages to be awarded by the court.

13(b), which is the main section that I'll be talking about, is for proceedings that the Commission initiates in Article 3 courts. Initially intended to allow the Commission to get a temporary injunction during the pendency of an administrative proceeding, but it also allows for permanent injunctions, which have been interpreted in interesting ways -- I'll come back to that -- and this applies both to unfair methods of competition and to UDAP claims.

There are also provisions under the Clayton Act for unfair methods of competition, not UDAP, Federal Tort Claims Act provisions, and several other various acts that give the Commission particular remedial authority.

But let's focus on 13(b), and depending on time, possibly turn to some general thoughts. 13(b), Section 13 was added to the FTC Act in 1973, primarily as a means for the Commission to go to court, while it was going through an administrative hearing, in order to go against a company that had violated the FTC Act

on the concern that company's hearings can take a very long time and during that long time all of that company's assets can disappear. So the Commission didn't have any effective remedies. So these injunctions can be used to temporarily enjoin the problematic conduct and to enjoin the company from basically losing all of its assets.

In the 1980s, a group of savvy -- that's an interesting word, savvy, does it mean wise or smart, I'm not going to say -- lawyers at the Commission realized, hey, we can use Section 13(b) even more broadly because it also includes this permanent injunction authority. And, initially, this was used in competition cases, but increasingly in UDAP cases.

And one of the earliest cases that the Commission brought using 13(b) authority, this is a 1982 Fifth Circuit case, really brought a new attraction to 13(b) for the Commission. The Fifth Circuit noted that 13(b) carries with it the authorization for the District Court to exercise the full range of equitable remedies traditionally available to it. Since then, eight other circuits have had similar holdings. So, basically, what this says is when the FTC goes to court under 13(b), seeking a permanent injunction, they can also, and

this is pretty standard language, ask the court to award any other equitable relief the court deems appropriate and the court can use that broadly.

So equitable relief, what does this mean? So a common law court sitting in equity could order almost any remedy that the judges thought was necessary in order to equitably do justice, to make the parties whole, to make the wrongdoers feel wrong and bad about what they have done. This includes restitution, recision, injunctions, disgorgement. These are all traditional common law equitable remedies.

Now, equity, law, I'm a law professor. I'm hoping that for the most of you who are lawyers, this is kind of making you fear that I'm going to say Erie and the Federal Rules of Civil Procedure and things like that. I just said, Erie, there is no federal common law. Federal Rules of Procedure, 1938. We have unified civil courts that address both questions of equity and law. In the post Erie era, post Federal Rules of Civil Procedure era, basically, early mid-century in the Supreme Court, there was a lot of discussion about what's the role of equity in the common law, increasingly, statutory law courts, of the United States.

One of the most important first cases, Guaranty Trust, 1945, established this idea of equitable remedial rights doctrine and this was reflected in the 1946 Porter case where the court said, "Unless provided by statute, all the inherent equitable powers of the district courts are available." And this was reaffirmed a couple of years later in 1950 in the Mitchell case, unless a statute, in so many words or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction remains. So if the statute doesn't clearly strip the court of authority to employ equitable remedies, the Supreme Court mid-century said, yeah, judges can use these remedies.

The 1973 amendments to the FTC Act that gave us 13(b) said the courts can issue injunctions, temporary injunctions, permanent injunctions, and that's traditional equitable relief. So the courts broadly, starting in the 1980s, said, hey, the door's open to equitable remedies, following Porter, following Mitchell. Nothing in the statute clearly removes equitable remedies from the courts. So they're available to the courts.

The FTC routinely uses 13(b) to obtain

hundreds of millions or even billions of dollars a year in remedies. And this is really a cornerstone tool for the FTC, nowadays, primarily because it doesn't have much other authority to get money, to get damages out of companies that have violated the FTC Act, at least not without going through the process of a fully adjudicated claim or some settlement that is subsequently violated and that first bite at the apple leads to a second set of enforceable consequences.

Deep breath. What's going on lately? So the 1980s era was a very different era than the one that we find ourselves in today. It was the era that brought us cases like Chevron, it was the era that fell on the heels of Bell Aerospace and the Chenery doctrine, State Farm, broad judicial deference to agencies. There is a lot of discussion today especially about Chevron, but a lot of discussion today about have we given agencies too much, too broad power? What are the due process, what are the fair notice concerns and implications of how this power is being used?

We are operating in a different environment and, frankly, I don't think that the FTC is fully aware of the judicial reception that they are likely to receive, especially at the Supreme Court. I think

I can count five, likely six justices at least, that would be quite hostile to a lot of the FTC's interpretation of its enforcement authority. And that could trickle down, that could also affect state attorneys general and state consumer protection authorities.

A couple of examples. Most recently, the Third Circuit in the Shire case, rejected the FTC's efforts to use 13(b). This is in the context of unfair methods of competition. But the court said that 13(b) can only be used to enjoin conduct that is occurring or is about to occur, pointing to the clear language of the statute. And expressly, looking at the statutory history and saying the purpose of 13(b) was to facilitate FTC administrative enforcement not to create a new form of action or an avenue for FTC to seek relief. It cannot -- the key issue in Shire was whether the FTC could look to past conduct or hypothetical future conduct. And the court said it cannot be used to take action against long past conduct or hypothetical conduct.

In footnote 19 -- it's always the footnotes -- the court says, "We also reject the FTC's stand-alone claim for equitable monetary relief. Assuming relief is available under Section 13(b), the FTC must

still meet the ‘is or is about to’ requirement.” So one strike against the FTC’s broad use of this authority.

You all or many of you might be familiar with the Kokesh case. This is an SEC case. We have heard about the SEC and some of its similar authorities. This is a 2017 Supreme Court case. The SEC has long used an equitable disgorgement tool as a primary remedy with some similarities to Section 13(b). In Kokesh, the court said that this is a penalty, subject to a statutory limitation -- statutory -- a statute of limitations. Statute, statute, statute. We’re in law not equity.

And in a unanimous opinion, where several of the Justices during oral argument seemed overtly hostile to SEC practice, the court said this form of equitable relief was not available to the SEC. The court did distinguish Porter noting that, “When an individual is made to pay noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty.” So if we are talking about noncompensatory damages, we’re not in equity.

To the extent that 13(b) is used for pure disgorgement, perhaps there’s some wiggle room for

equitable relief in the traditional 13(b) context. That said, over the last year and a half, two years, there have been a number of cases where Kokesh has been raised, and at the District Court level, the FTC has been reasonably successful at distinguishing 13(b) from Kokesh. That's not surprising because District Courts are generally not going to overturn 30 years of Circuit Court precedent. There are, however, Circuit Court cases -- both the Seventh and Ninth Circuits are looking at this, and it will be really important to follow how these cases develop.

As a bonus case, I'm not going to talk a great deal about this, but we have the LabMD case where the Eleventh Circuit Court of Appeals rejected an FTC effort to impose a consent decree or use a consent decree to impose data security requirements on a firm, largely on grounds that echoed fair notice, due process concerns saying that the standards the FTC was trying to enforce were too ambiguous for the court to understand how to implement. Query, if the court can't figure it out how can the firm? That's where the fair notice hook is.

So a few general observations from this. Courts have been increasingly hostile to broad grants of authority where there's limited process required

for its use, and especially where that -- use of that authority is backed by substantial sanctions. That's not just about the FTC. That's more generally the current administrative law moment that we're operating in.

Much of the FTC's authority, including its 13(b) authority, including some of its argued uses for its unfairness authority, are based in the 1970s, 1980s era precedent, and it really hasn't been litigated much. The Commission has, I will say, for whatever reason -- question mark -- been very good at avoiding Article 3 courts and it will be increasingly interesting to see how the Commission fares as it proceeds into Article 3 courts.

To put a very fine point on this, and this is largely my own normative view and assessment of the matter, the Supreme Court is not likely to look favorably upon any agency trying to set broad federal policies with respect to developing areas of broad economic, social, political importance. For the FTC, for other states' consumers protection authorities, figuring out what we do about privacy, figuring out what we do about the tech sector, these are incredibly broad questions, hard, difficult questions.

I would say if the FTC, in particular, tries

to establish federal policy in this area, there will not be a warm reception at the Supreme Court. That is the job of Congress, not a federal agency, operating under century-old legal authority.

Now, clearly into the realm of general observations, I'm just going to make two general observations, one tying the economic and the legal discussions together. Generally, the economic optimal deterrence theory uses penalties of some sort as a lever to affect the quantities, the volume of given types of conduct. Generally, economics does not differentiate between compensation, fines, taxes, penalties, sanctions. The law does. And Kokesh makes this very clear, that this is a minefield that the lawyers need to be aware of as we try and implement the economic theory.

More generally, when we're talking about questions like compensatory damages, should there be a civil penalty authority, I actually think that's the less important question for the Commission to be focusing on. The Commission, today, does have broad authority to get fines using 13(b), and arguably, other reputational mechanisms. The extent, the mechanism, the measure, the nature of the penalties, they matter far less I think to me, personally, to

industry, I think, and I'm pretty confident the courts, than the process behind them.

You should always be asking, what's the purpose of this penalty? What's the harm that we're trying to correct? How does this penalty go to remedying that harm? Especially in the context, for instance, of data security where the problem more often than not is a very difficult immature set of technologies. It is very frequently not that firms aren't trying to do security well, it's that it's unreasonably hard for them to do security well.

The Commission's goal should be to improve the overall quality of the ecosystem and inform the broader policy discussions, the Congressional discussions and the like, than try to be single-handed cop on the beat. Always avoid the mentality of the beatings will continue until conduct improves. That don't fly. That violates all sorts of concepts of due process, fair notice, basic legal principles, and as we continue away from the broad deference era, as we continue away from the equitable remedies era, these are going to be harder limitations for agencies to address. Thank you.

DR. COOPER: Thanks, Gus.

I want to, in our waning moments here, I

want to weave in a very relevant question we got from the audience. You had said that, you know, from an economics perspective, we just put that S up there. The S is the sanction. What you call it legally doesn't really matter. But as you point out, because we're also all lawyers on the panel here, when we put our lawyer hat on, it really does matter, as the Supreme Court pointed out in Kokesh and other areas.

The Commission has a long-standing, but kind of bipartisan consensus around saying that we should have -- the FTC should have civil penalty authority. You seem a little more sanguine about that. I mean, so do you think -- in some ways, it seems like -- I would see two potential benefits from civil penalty authority. One, we just would get rid of the whole 13(b) morass that we may be in now. And, two, their equitable remedies seem to have -- equitable remedies are based on a kind of consumer/fraudster relationship or consumer/firm relationship where money has flowed from the computer to the firm for bad reasons and now we're going to get that money back, whether you call it disgorgement, whether you call it restitution, what you put on it. That makes sense in maybe 90 percent of the contexts when we talk about deception.

But in something like data security where I

engaged in poor data security that created harm, and let's assume we can monetize it, it could be directly monetizable, but there's some large amount of harm from the data breach. But that doesn't fit into the equity puzzle because there's nothing to be disgorged, especially it's a nonconsumer-facing firm. You could maybe take away the benefits, which often could be negligible -- in fact, that's often the part of a data security case under unfairness, would be that, well -- and get by not -- and only if you would have spent just an extra tiny amount, you could have prevented the data breach. So the benefit to the firm is tiny, maybe you can disgorge the benefit, but you can't reach the harm. That's legal. Those are damages that flowed.

So would that be -- those are two reasons I would put out on the table that civil penalty authority kind of makes sense. I just wanted to get your reaction because you seemed a little indifferent to it.

MR. HURWITZ: So I'm not going to touch the specific data security example beyond saying I think that that characterization of it is dangerous and wrong. I've written extensively on this and submitted comments, including in this proceeding, that discuss

my views on this. The damages of most data security incidents are very difficult to figure out. There are broad ranges of estimates. It's dynamic. They are changing over time. And the ex-post evaluation of, well, if you had just done this one thing, you could have stopped this, that's --

DR. COOPER: Well, I would agree with that. I was just saying those are just --

MR. HURWITZ: Yes.

DR. COOPER: Let's assume -- let's leave aside the liability part of it and -- leave aside the liability part of it and let's assume that we can somehow -- like it's a big data breach where lots of credit cards were -- we can trace it, we can say cost a billion dollars. And we know -- know that, and I'll concede to you all the problems that you just --

MR. HURWITZ: Outstanding, he conceded. You all heard that.

DR. COOPER: I speak for myself and not the Commission or the federal --

MR. HURWITZ: So I thought I had you there. So my view is I think it would be fine for the Commission to have I'll even say broad civil penalty authority. I think, in many senses, it would make a lot more -- in many ways, it would make a lot more

sense if we were building up the Commission from the ground, if this were a green field, if we were doing this all over, yeah, civil penalty authority I think with some safeguards is fine, dot, dot, dot, but asterisk, star, provided that there be some basic checks that are compliant with widely-held norms of due process and fair notice, governing how it uses that authority.

DR. COOPER: Thanks.

So I wanted to -- we spent a lot of time talking about remedies. Gus, you spent a lot of time talking about 13(b). But, of course, we have the other side of the house, the administrative litigation. I will throw it out to you, Gus, kind of the right of first refusal, but John and Murat, feel free to jump in as well.

So we have this one procedure where, as you alluded to, the first bite of the apple is free. We take you -- we have administrative litigation and you get an order that says, don't violate the law again and often fencing in relief that's kind of related to not violating the law again. And if you do violate the law again, then we can get large civil penalties, you know, $44,000 per violation or something like that, very large. So that's a model where, you know,

you have first violation penalty is zero, or whatever the cost of the injunctive relief is, which probably varies by firm, but it's not a monetary remedy, and then it can ramp up to gigantic potential, you know, kill the firm type remedies. Not that I think it's ever been used that way, but they can be, in theory, quite large.

And when should we think about -- when is it appropriate, I mean, when does a model like that make sense from maybe an optimal liability or optimal returns perspective? And, again, I'll throw it to Gus or John or Murat.

MR. HURWITZ: So I'll start. The reason that we're all here today in this year with all these hearings, that there are Congressional hearings, that there are state AG various suits and activities, is because we're all worried about privacy, security, big tech, a bunch of really hard new economy policy issues. That's what we're talking about.

The hard question is, how do we figure out what the rules should be? We have a couple of different mechanisms for this. We've got Congress can do this. Congress doesn't have enough data perhaps to do this. We've got the courts can go through a common law process that takes generations, too slow. We've

got agencies. Agencies can do things through adjudication.

I think when we're in an era of uncertain hard policy questions, there is a strong argument for a Commission, an agency like the FTC, to have broad authority to figure things out. The question is what do we do with what it figures out. Does the Commission figure out the policy moving forward that's binding on everyone else or does the Commission deal with one-off cases, building up data evidence that can then feed into a broader policy discussion and legislative process. I think that that latter is a pretty good approach.

And then we're into a question of the Commission's own fines and remedies. And we are in a paucity of notice. Firms don't know what the rules are. So it doesn't make sense to say we're going to penalize you possibly existentially for something that no one knows if it's right or wrong because this is a changing industry, changing norms, changing values. So instead, we're going to enter in a one-off decree with you saying, this is problematic conduct, don't do it. And Congress might change the rules later, as we say, okay, actually, we've rethought this. But you, as a single firm, can enter into the settlement with

us.

I think that that makes a great deal of sense so long as the Commission isn't trying to say, and we're going to use this as a define the entire industry's set of norms and standards.

DR. COOPER: Okay. John, Murat, do you want to weigh in on this? You know, one thing that we -- unfortunately, we're running short of time. But one thing that we haven't gotten to, but I think maybe now is -- we may fit in is the role of information.

Throughout, we've kind of touched on it a little bit, but the ability of the regulator -- in this case, the FTC or whoever it may be -- to set down -- you know, we kind of assumed that the actors know where the line between legal and illegal is or know what -- or that the regulators can actually estimate the harm, when we think that there actually -- that the regulators may not be good at estimating the harm or may not be -- or not good at finding out where the line between illegal or legal should be or telegraphing that to the rest of industry -- does a situation -- because one of the -- kind of a standard result in a lot of the tort models is that, at least for in a range of a sufficiently low variance that even if you have symmetric errors in enforcement,

you're going to end up with over-deterrence because the risks are not -- the costs of being wrong on one side is not equal to the costs of being wrong on the other.

So with that in the background, I mean, something like the FTC's administrative one free bite of the apple, but then once you now know the rule, you're on the hook for potentially very large sanctions. Does it fit into that model or do you have any thoughts?

DR. KLICK: Yes, we are almost out of time. But, you know, if you take Murat's model and add uncertainty and things like that, you're right, you can get sort of very different welfare implications. The one thing I would say, though, is even if there are some positives to this one free bite rule, the penalty on the second bite actually should still be a function of harm, right, and it's not as though we should then expand it to we blow everything up because we warned you. No, it still should be tied to harm.

But the benefit of doing it in sort of these two stages might be to say, hey, firm, this is how we're going to think about harm, right, and it avoids that uncertainty, but it doesn't make sense to then jump to, and now we're going to blow everything up.

DR. COOPER: Murat, do you want to have a final word here?

DR. MUNGAN: Just to put it in economic terms, so in the model that we talked about, it was assumed that there is an act that is illegal and there is an act that is legal. But this is not very clear in practice. So when this is not clear, the types of errors that you're talking about may lead firms or other actors to behave as if they're paranoid about what they're doing because they might fear that they're going to be punished for behavior that they think is benign. So they might withdraw from engaging in procompetitive behavior thinking that they might be subject to liability if they act aggressively on competitive dimensions. And this is a very big cost that can be generated if you don't engage in this type of -- what did you call it?

DR. COOPER: I think we call it the one -- that's what we call it internally, the one free bite at the apple.

DR. MUNGAN: Excellent terminology, yeah. If you don't engage in that kind of behavior or that kind of punishment scheme, then you might have these paranoia problems. Like we credit Becker for this model, but way before that Bentimus (phonetic)

actually made this point, that such punishment schemes can cause paranoia and harm to society.

DR. COOPER: All right. That's a great way to end it. Punishment schemes create paranoia in society. So, anyway, we could go on another three hours so John misses his plane. But, anyway, join me in thanking the panel for such a great discussion.

And we'll be back in 15 minutes.

(Applause.)

REVISITING "THE LIMITS OF ANTITRUST"

MR. SAYYED: All right. I think we're going to go ahead and start for those of you still here. I've told the panel a few things. We're probably speaking mostly to the livestream audience or the audience on livestream.

So we've got a great panel here, final panel of our sessions to think big thoughts and discuss what really is this question of sensitivity, the Type I and Type II era in thinking about error cost minimization in antitrust cases or decisions. We focused it around now Judge Easterbrook, then just Professor Easterbrook's, famous article, "The Limits of Antitrust."

So let me introduce myself and the panel. I'm Bilal Sayyed, the Director of the Office of Policy Planning. And then to, I guess, running down the table here: Thom Lambert from the University of Missouri; Alan Devlin, formerly of the FTC but now with Latham & Watkins; John Thorne, maybe one the best antitrust litigators out there and sort of present at all the interesting antitrust cases, it appears; Bob Litan, formerly of the Justice Department's Antitrust Division, a few other places, presently at Korein Tillery, a law firm -- good law firm located near here

in Chicago; and last but not least, and actually representing a very important perspective on this question, Steve Cernak, now of counsel at Schiff Hardin but spent over two decades at General Motors really, you know, sort of providing real guidance to real people on real issues, and I think can offer in some ways a unique perspective. John, of course, was in-house at Verizon and its predecessors and can do the same.

We have an hour and 45 minutes. We're going to use every minute of it. I'm going to try to stay out of the way of the panelists. So, with that, I'm going to turn it over to Thom to start, get us going and we'll go.

MR. LAMBERT: All right. Well, thank you very much for inviting me to join this thing today, Bilal. Over the course of 14 hearings, we've heard about a number of novel anticompetitive concerns: competition softening due to institutional investing; monopsony power in labor markets; various threats from digital platforms.

In this last panel, I'm going to step back and consider a couple of big-picture questions: first, what are antitrust limits in addressing these and similar harms; and then, secondly, how should the

enforcement agencies act in light of those limits. As Bilal mentioned, the springboard for this conversation is Judge Easterbrook's 1984 article, “The Limits of Antitrust.” It was actually delivered as a lecture at the University of Texas Law School, without a doubt one of the most influential antitrust articles and probably one of the most influential law review articles ever that's been cited more than 700 times in law journals.

Its key idea, the notion that antitrust rules should be designed so as to minimize the sum of error and decision costs really explains, I think, a lot of the Supreme Court's recent antitrust decisions. I had an article in the Boston College Law Review a few years back where I tried to show that each of the Roberts Court’s decisions could be explained in terms of this insight.

So what I want to do in my opening remarks -- that’s the benefit of going first, you get to sort of set the stage. I want to break down Judge Easterbrook's prescriptions into what I think are three key parts and then assess for each part whether and how it should be tweaked in light of developments in economics, our understanding of economics, and also changes in market structures.

So the three parts are these, what I call the Voltaire point, the incommensurate harms point, and then the screening mechanisms point. So let's starts with the Voltaire point. Now, to get your head around this point, you have to go back to basics. And this may be quite familiar to people in this room and the hard core antitrusters, but it never hurts to go back to basics.

Antitrust domain, that is what it addresses, is business behaviors that generate market power, either coordinated conduct that leads to collusion, or exclusionary acts that may create monopoly power.

The problem is that many acts of coordination between firms enhance output, market output, and many business practices that usurp business from the perpetrator's rivals thereby excluding them from the market also generate benefits for consumers.

So resale price maintenance, for instance, may facilitate collusion, but it may also encourage dealer-provided services by eliminating free riding. Manufacturers' exclusive dealing agreements may raise rivals' costs of distribution, but they may also reduce interbrand free riding and thereby encourage manufacturers to invest in their distributors. Very

low prices may injure rivals and drive them from the market, but they offer benefit to the consumers.

Now, these are typical of the behaviors that antitrust addresses. They are what I would call mixed bag behaviors. They have some good sides and some bad sides. They may be on net procompetitive, or output-enhancing, or anticompetitive, output-reducing.

Now, any time you are regulating a mixed bag, there are going to be some costs -- some inevitable costs here. This picture that you see on the screen is the picture that you get if you Google and hit Google images for, “I made a mistake.” Right?

So one form of inevitable costs in regulating a mixed bag is mistakes. You may accidentally preclude something that's output-enhancing, it's welfare-enhancing. So economists call these false convictions Type I errors. If you do that, then society loses out on the benefit of that efficient practice.

On the other hand, you may make a mistake in the opposite direction; that is, you fail to condemn some anticompetitive, output-reducing harm. This would be sort of called Type II error. And, of course, if you do that then market power exists or persists, meaning that consumers pay more or quality

is reduced, et cetera. So the sum of these false convictions, false acquittals, the sum of losses from mistakes we call error costs.

Now, another set of inevitable costs, any time you regulate mixed bags, is just the cost of trying to figure out what's allowed and what's not allowed. Decision costs. These decision costs are costs that must be borne by business planners as they are deciding what they can and can't do, and by adjudicators when they're trying to decide whether the law has, in fact, been complied with.

Now, the tricky thing is that antitrusters find themselves in the position of this guy here in the picture playing whack-a-mole. I didn't actually know that whack-a-mole was a real game. I thought it was just a metaphor, but apparently it is a real game. And the idea, of course, is that you smack down a mole in one spot and it just pops up in another spot.

Well, these three sets of costs that I've discussed -- false conviction error costs, false acquittal error costs, decision costs -- interact in this way. If you try to avoid false convictions by reducing the scope of a prohibition, then you risk false acquittals. If you try to reduce false acquittals by expanding the scope of a prohibition,

then you risk false convictions. If you try to eliminate both of these mistakes at the same time by, say, adding more affirmative defenses or more elements to the liability test, et cetera, then you raise the cost of deciding whether something is legal or not. So you raise decision costs.

Any time you try for perfection on one of these ends, you are going to create costs elsewhere in the system. So this is not something that's specific to antitrust. It exists with regulation generally. Folks may recognize this fellow. This is Paul Volcker. He is the guy who came up with this very famous now rule that we refer to as the Volcker rule. The rule was one that lots of people got behind, including the “Wall Street Journal,” which is rarely a fan of financial regulations.

But the Volcker rule said if you are a federally insured bank you are not allowed to engage in proprietary securities trading to try to earn a profit. Lots of people thought that was a really good idea.

Well, the problem is that these federally insured banks need to engage in hedging transactions. It’s going to protect their liquidity, et cetera. It's very difficult to distinguish between just a

risky proprietary speculative trade and a hedging transaction. And so if you want to write a rule that's going to eliminate the bad but not catch the good, it's going to be a complicated rule.

When the Volcker rule was actually written, it ended up being 1,077 pages long. And that is not to disparage the Volcker rule. It's just to point out the inexorability of the tension between false convictions, false acquittals and decision costs.

All right. So what should we do about this? This is the picture that you get if you Google "my blanket is too small." I've recently had this happen to me visiting my parents. I don't know if in the olden days apparently people were shorter, but all the blankets in my parents house are too small. And when I got there, I find that I can't cover everything I want to cover. If I pull it up to cover my chest, my feet are going to be exposed. If I cover my feet, my chest is going to be exposed. I'm not going to be happy. I can't get perfection, but what I have learned is I can arrange the blanket in such a way as to cover more of me than otherwise would be covered. I can turn it diagonally and I won't get everything but I'll get more. All right?

So what we should do here in light of these

limits of antitrust is optimize. Don't try to catch all the bad or let through all the good or keep the rule as simple as possible, but instead try to minimize the sum of these three inevitable costs, false convictions, false acquittals and decision costs.

So that brings me to the name of this first point, the Voltaire point. What Easterbrook was basically saying is this: Perfect is the enemy of the good. Don't seek perfection along any of these dimensions; instead try to optimize, not maximize, anything. Craft your liability rules so as to minimize sum of decision and error costs.

All right. So what do we make of this Voltaire point since 1984? Well, in my opinion, this is still fully applicable. There have been no developments since 1984 that have changed the mixed bag nature of antitrust behavior or the inexorability of the tension between efforts to reduce the three sorts of costs.

We do have a better understanding of the circumstances in which certain business practices may be pro or anticompetitive, and that may help us come up with more nuanced rules. But the tension between these efforts to reduce error costs and decision costs

still exist, and I think that the advice to try to minimize decision error cost is still very excellent advice.

That brings me then to Judge Easterbrook's second point, the incommensurate harms point. Now, remember that antitrust rules may err in two directions: wrongly forbid output-enhancing behaviors; wrongly deter -- or, sorry, wrongly allow output-reducing behaviors; Type I errors and Type II errors.

Both of these are harmful and dangerous and both of these critters that you see on the screen are harmful and dangerous. I live with one and I can tell you that the only reason he doesn't kill me is because he's too small. They're dangerous.

But their dangers are of different magnitudes. All right? So Judge Easterbrook says false acquittals allowing anticompetitive conduct are not as -- it’s not as bad as a false conviction condemning procompetitive conduct. A couple reasons for this: One, if you allow anticompetitive conduct there will be a market-wide adverse effect, whereas if you condemn procompetitive behavior you're condemning that behavior in all parts of the economy, not just in individual markets. So there’s economy-wide harm.

A second difference here is that false acquittals tend to be self-correcting. The result is, you know, higher prices in the market. Higher price invites entry, and so market power tends to self-correct, whereas false convictions are durable. They require some sort of court decision to overturn the bad rule.

Now, how has this incommensurate harms point fared? Well, I would say that this point has fared less well than the Voltaire point. It's basically too categorical. Many anticompetitive harms are self-correcting. Collusion, for example, is hard to maintain and it invites entry.

On the other hand, we've seen that many forms of exclusionary conduct don't self-correct so easily. Some actions by a dominant firm to keep its rivals from attaining the efficiency necessary to enter and underprice the dominant firm can last perpetually, especially in markets that are subject to large economies of scale and network effects. And, of course, we're seeing lots of those markets these days.

So my panelists here, copanelist, Alan Devlin, has made an excellent point on this and I assume he's going to talk more about it. So I'll just move on.

The third point that Judge Easterbrook made was really one about administrative efficiency. Remember that the goal is to craft antitrust rules to minimize the sum of error and decision costs with an understanding that Type I errors are typically more costly than Type II errors.

So to accomplish this goal in an efficient mechanism, Easterbrook says that we should adopt some screening mechanisms; that is rules of thumb that are designed to weed out antitrust actions that are likely to entail high error and decision costs.

And he suggested these five screening mechanisms: Does the defendant have market power? If not, the challenge practice is unlikely to create anticompetitive harms.

Would the challenge practice increase the defendant's profits by reducing competition? If not, then antitrust liability isn't really needed to deter inefficiency.

Is the vertical practice widely adopted throughout the industry? Easterbrook says here that for most vertical practices anticompetitive harm can result only if the practice is widely adopted. So if it's not widely adopted by industry participants, don't worry about it.

Is the defendant's output and market share falling? Remember to exercise market power, output is constrained so that price rises. So if we don't see an output reduction by the defendant, then most likely this is not an anticompetitive harm.

And then finally is the plaintiff a customer or a competitor? Customers are hurt by reductions in competition. Competitors tend to be helped by reductions in competition. So if a competitor is complaining, it’s probably the case that the challenged practice is actually increasing competition, which is obviously detrimental to competitors.

Now, how have these screening mechanisms fared? Well, I think one and two have fared pretty well. I won't say anything more about those. The law pretty much follows these two things. I inadvertently failed to turn number five yellow instead of green because I don't think it's actually a great screening mechanism, but it's not a terrible screening mechanism.

It is possible, of course, to have anticompetitive action that harms competitors and also consumers. Unreasonably exclusionary conduct is harmful to competitors but it also hurts consumers. I

think where concerns are raised is when you see a competitor complaining but no consumers are complaining. The competitor may well be complaining of an increase in competition.

Now, I would add an additional screen. And this is it. Is there another body of law capable of addressing the anticompetitive harm at issue? It seems to me that a number of recent intellectual property cases involving antitrust probably wouldn't pass muster under this screen.

So the agencies have pursued actions saying that antitrust is violated when a holder of a standard essential patent seeks an injunction or an exclusion order. Well, patent law can address that issue in granting an injunction or an exclusion order under the Tariff Act. The court is to take account of the public interest. And one of the things the court will look at is whether there's been anticompetitive holdup, et cetera. I don't think antitrust adds much value here.

Another rule that can be discerned from the actions of the agencies is that antitrust is violated when the holder of a standard essential patent seeks to negotiate, renegotiate royalties. And, again, the concern is holdup.

Well, we've got entire swaths of contract law that are designed to deal with economic duress resulting from things like holdup. Contract law is fully capable in my opinion of addressing this issue. And most recently, of course, we've got the Qualcomm decision. One of the holdings in the Qualcomm decision -- we'll see if it stands or not, but one of the things that was ruled is that antitrust is violated when the holder of a standard essential patent who has once licensed to a rival stops doing so or refuses to license to other rivals. There's a holding that you have an antitrust duty to deal with your rivals.

Again, this issue I believe could be handled by contract and has been handled by contract. Standard essential patent holders are entering into contracts with standard-setting organizations. Those contracts can be enforced by third-party beneficiaries.

And so, again, I think this is an area where contract law could step in and solve the problem and adding antitrust with its potential for treble damages in private actions is likely to screw up the system to create greater error costs -- to create particularly great error costs.

I am out of time there, so I'm going to skip.

MR. SAYYED: No, keep going. You can keep going.

MR. THORNE: Oh, all right. Quickly. I'm going to set my friend here up to swat me down.

One last point. Alan, in his very excellent article, has said, you know, maybe agency should be subject to a lower evidentiary burden. And he says that when you've got a public enforcement action, things are different than when you have private antitrust litigation. So on the one hand the public enforcers have better incentives. They're pursuing the public interest, not private gain, which may involve a reduction in competition or it may be a strike suit by a plaintiff's lawyer.

They also tend to have superior expertise than private litigants. And so if the agency is saying this is anticompetitive, courts should maybe defer a little bit more to those judgments. I'm a little bit nervous about stacking the deck in favor of the agencies for a couple reasons. And I generally agree with those points, but I've got a couple of concerns.

One concern is that this expertise that I

believe the agencies really do have can sometimes breed overconfidence or -- I hate to use the word, but maybe hubris. This is a very elegant formula. This is the formula for MHHI-Delta, which is a metric that's designed to figure out whether common ownership by institutional investors has the effect of softening competition in the market. It's beautiful. It's really elegant. I like it a lot.

A number of prominent antitrust theorists are proposing a rule that we should basically use this formula to restructure the mutual fund industry and effectively adopt a rule that says institutional investors can invest in only one firm per concentrated industry.

Well, that would radically revamp the mutual fund industry. It would effectively end index investing. Do these, you know, planners who have come up with this very elegant formula really know that the world would be a better place if we revamp the entire industry in that way? I don't think they do.

I think they need to be reminded of Hayek's insight that, you know, the knowledge to order an economy is not really given to anyone in its totality. And what is his classic saying, "The curious task of economics is to demonstrate to men how little they

really know about what they imagine they can design." So that's one concern, that expertise can actually lead to excessive aggression.

Another concern here is just a basic public choice concern. So these two economists, this is James Buchanan and Gordon Tullock, two of the fathers of public choice economics. And I just put a picture up there because I like the scotch glass.

But, you know, an insight of public choice is that government officials, everybody operating the public space, we're all rational self-interest maximizers. And I believe that many times enforcers and the academics who berate them have personal incentives that may favor overly aggressive antitrust enforcement.

So antitrust officials stand to benefit from a big antitrust. Your job is more important if you're overseeing a big antitrust enterprise. When you leave the agency, your skill set is going to be more valuable if antitrust is really big.

Officials also sort of want to do something. You know, there's a lot of popular sentiment now that something must be done about the rise of the tech platforms, et cetera. And so we run the risk of that interventionist syllogism, you know, something must be

done; this is something; therefore this must be done.

And then finally, you know, academics are -- all of the sudden antitrust academics are superstars. You know, people are getting written up in fawning reports in “The New Republic” and the “New York Times.” But you don't get your profile in “The New Republic” for cautioning or suggesting a cautious approach.

If you want to make a name for yourself as an antitrust academic, be aggressive. And so I think there's a lot of forces that are pushing toward an aggressive, big antitrust. And for that reason, I would be reluctant to stack the deck in favor of the antitrust enforcement agencies.

Thank you.

MR. DEVLIN: Thank you, Thom, for the kind words and fascinating remarks. And, Bilal, thank you for inviting me to this panel. And it’s a particular honor to speak with such a distinguished group here and especially on so important a topic.

Before I kick off, as you won't be surprised to hear, I’d implore that all of you treat my remarks as personal and in no way to be imputed to my colleagues at Latham & Watkins or to any of our clients. I speak only for myself.

So you might be thinking at first blush that antitrust error decision theory, it sounds awfully technical. And, of course, it is, but it's also profound and goes right to the heart of competition policy.

So if we're going to have a serious conversation about the future of antitrust, its various successes and possible deficiencies over the past few decades, and perhaps most importantly its capacity for successfully determining and resolving contemporary issues that are substantiated, well, then, we have to talk about antitrust error.

So one interesting thing we spend some time with our strange world of competition law is that one encounters almost an illusion of mathematical precision. We do have a technical field of objective economics brought to bear on problems, but I think it's worth reiterating that antitrust lies on a foundation that involves value determinations that are in many respects contestable.

And so the fact we're actually seeing a resurge in political view today is, to my mind, not the least bit surprising. The only surprising part is that it's taken so long to reemerge. And it's healthy. It forces us to confront the uncomfortable

truths if they exist and to look closely at premises underlying our position. So this is all a healthy thing, and I commend the FTC for holding the hearings to explore all of these foundational questions anew.

So when we talk about antitrust error, I think I'd like to start off with something provocative and then I'll heavily qualify. So I'm going to say that antitrust is political. Competition lawyers bristle at that suggestion because it impugns the integrity of their beloved practice, and it is, of course, through that modern antitrust -- at least in the United States -- involves the application of a robust theory and framework from the industrial organization literature pursuant to an objective standard.

And by "political" in no way am I referring to some kind of executive interference or a melding of overriding and incommensurate objectives such as, for example, employment or other issues that might bring to bear.

So in that respect, the way people react negatively to the suggestion of political content of antitrust is both understandable and correct. Nevertheless, the fact of antitrust itself implies the antecedent resolution of some core societal questions

about how we organize economic activity. And as a field of policy, it requires valued determinations. Those value determinations, as I mentioned, are contestable, and therein I believe lies the root of much of the capacity for error and disagreements at the margin that characterize much of our fields and the ongoing debate today.

So we talk about the existence of antitrust law. What does that even imply? Well, just as a threshold matter, it implies the fact that we've chosen to use a capitalistic market system. If you end up embracing communism or socialism -- and by socialism I mean state ownership of the means of production, there you could crowd out any role for markets and there's no or little role for competition and hence no need for antitrust.

So the fact that we have antitrust means we've already made some determinations about the utility of markets to deliver superior outcomes. However, by the same token, the fact that we have antitrust laws also demonstrates the fallibility of markets because if they self-corrected perfectly and quickly we would have no need or occasion for antitrust law itself.

So I think it's worth just before getting

into the specifics of a decision theory and error to just explore these background themes just a little bit. And I think there's a spectrum of political views and priors that inform decision-making. And if we were to start at one end of the spectrum, there are those, of course, of a particular political persuasion who take issue or distrust markets. Distrust is probably the better way to put it. They may be suspicious about profit maximization incentives. They may question the neoclassical proxy between utility and ability and willingness to pay. They may doubt the efficacy of the market and its ability to self-correct.

So there are, of course, a wide variety of views of -- you know, people accept some of these views, all of them, and some a lot and some little. I'm not talking about any one particular person. What I am suggesting, however, for someone who looks at markets that way one is immediately attracted to a competition policy that differs from the Chicago School brigade, for example.

So one, in interpreting and informing antitrust under that view, might immediately start thinking about, well, if we don't trust market processes perhaps we don’t trust market outcomes. We

won't treat them as sacrosanct. So one starts to think about regulating prices or prohibiting excessively high prices, something that overseas jurisdictions often do but the United States does not.

And they may seek not simply to preserve existing competition but to intervene to increase it or even maximize it. One phenomenon -- one application of that principle involves, for example, calls to break up large companies regardless of whether there was an elimination of competition but simply to preserve a market structure that's competitive. Right? So we see that.

And finally one might see a view that antitrust should intervene to protect against accumulations of economic power regardless of whether they flow from l0st competition. So think of the banking crisis ‘08, too big to fail, was that an antitrust failure or not?

And, of course, for free marketeers and the Chicago School brigade, they couldn’t look at the world more differently. Markets solve information problems that stymie effective government intervention, profit maximization, incentives, direct capital and investment towards productive applications that the state could never

hope to identify and recreate. And the competition is the magic sauce that brings it all together.

So we have, as I said, this wide spectrum. The problem is that differences of opinion as to the efficacy and reliability of markets invade every aspect of antitrust analysis from the existence, durability, or susceptibility of market power to erosion, to the relationship between industry structure and incentives to innovate, to entry barriers, to capital market efficiency, and the relationship between static and dynamic efficiencies.

These are all tremendously important. We don't have very good answers to them. By that I mean as a matter of broad prescription over an entire economy, the economic literature, just under my understanding is not there yet. We do know quite a lot about specific markets but for broad prescriptions, widespread disagreement.

So how do we deal with this universe of the unknown that characterizes much of antitrust? Well, therein lies decision theory, and that's why this panel is so important. I'm looking forward to hearing the thoughts of my copanelists on this.

Decision theory has to do -- and I want to clarify -- with uncertainty, not probabilities. By

uncertainty, I mean we simply don't know. For an antitrust enforcer peering into the void of the unknown, you immediately encounter a quandary. What are you supposed to do?

Well, you might start by thinking the first rule of medicine is do no harm. And so an antitrust enforcer facing uncertainty may decide simply not to act. And the result of that inaction, of course, is the elimination of Type I errors or false convictions, but it invites a great many of surely unacceptable number of Type II errors, thus eliminating the function of antitrust.

Alternatively, one might say we'll prohibit every practice -- we'll prohibit every practice unless it's shown to us to be affirmatively procompetitive in a demonstrative way and we'll flip the error costs accordingly. Neither is particularly satisfying or or satisfactory.

So what to do? Frank Easterbrook gave us a terrific way to think about this in 1985. And what he said is we should eliminate -- excuse me, not eliminate. We wish we could eliminate. We should minimize the sum of error costs Type I, Type II, plus enforcement costs.

And critical to his prescription was the

proposition that Type I errors are worse than Type II as Type I errors, a legal rule that mistakenly condemns procompetitive behavior is apt to be perpetual and it’s not subject to erosion by market pressures.

Conversely, markets susceptible to and left with anticompetitive restraints will over time break down as super-competitive rents drawing entry. So that was his account. And the fact that we're having this panel speaks to its impact. It certainly has -- and its controversial nature, too, because much of that thesis, I think, informs criticisms we’re getting today about how antitrust hasn’t done enough. So this topic couldn’t be more timely. And as I said, I think it's a nice capstone to all the good hearings you’ve held to date.

So the Supreme Court, just to spend a minute at the following observation really just to talk about how significant Easterbrook's article was, look at the 1986 decision in Matsushita. The Supreme Court observed that intervening, you know, to prevent potentially low-cost behavior involved errors that were prohibitively expensive and couldn't be -- or they counseled heavily against the introduction of liability. And those themes have developed over time.

In 2004, the late Justice Scalia observed that the potential for false positives weighs against an undue expansion Section 2 liability. Twombly, the pleading standard case, is all about error, having to pay costs for something you shouldn't have to face. And we saw a variety of decisions actually the same year in Credit Suisse and in Weyerhaeuser, again, where the role of error loomed large.

So obviously the Section 2 report that the DOJ came out with under Bush II maybe was a high point or low point depending on one's perspective on all of this for the role of error under Easterbrook's thesis.

So that brings me to Easterbrook's famous article. And if we were here to simply say he had it perfect, truly nothing would have changed. I do think, useful as it was, it was incomplete. And I want to spend just a few minutes talking about some of the ways in which the application decision theory can be revisited and refined.

First of all, as a threshold matter, it doesn't matter if one Type I error is more socially costly than one Type II error. We need to consider the total sum of all error costs. So if your chosen intervention policy reduces 10 Type II costs or errors for every Type I error, you presumably have a problem.

And that observation also pulls in the following point, which is we might -- when we think in a nuanced way about error observed that the propensity and significance of error change depending on whether you're talking about an intervention decision and idiosyncratic facts that are unlikely to be repeated certainly en masse on the one hand versus a rule of broad application that was likely to affect a wide swath of behavior. So that's a significant point. So that's first.

Second, there's a suggestion running throughout the decision of antitrust error literature that a Type I error, the false conviction, results in the total loss of social value associated with the erroneously condemned procompetitive behavior. That overstates the significance of the Type I error problem, and that's a thought that I think will recur here that a single-minded focus in minimizing Type I errors is uncritical in my opinion.

So the actual truth of the matter is the social cost for an erroneously condemned restraint is the difference between the condemned restraints and the next best alternative available to firms. The difference between those two can be small in some circumstances, even negative, as you can imagine that

a firm denied a preferred restraint or acquisition may, as Easterbrook said, through natural experimentation find something better. So that's something to bear in mind.

Now, a bigger issue -- and this looms large in Judge Easterbrook's analysis -- is that Type I errors are unlikely to self-correct. Well, that's an interesting observation and we can debate it, but I think that's far less obvious than Judge Easterbrook presented to us.

If you look at bad precedence -- and there have been many of them. They've been reserved left and right, not always quickly but en masse. I mean, we look at Legion in 2007 overruling Dr. Miles. We had State Oil versus Khan 10 years before. We stayed away 10 years before overruling Albrecht. We saw the Supreme Court in BMI limit the role of the per se rule. We saw, of course, Arnold, Schwinn overruled, and the famous GTE Sylvania case in the '70s. And so those are just a variety of examples.

Now, you might say that those reversals came far too late and not quickly enough. But just bear in mind that some are the most egregious errors one could say were quickly limited. If you look at the Dr. Miles decision itself in 1911, it was effectively

eliminated in 1919 by the Supreme Court's Colgate decision. The per se rule against product time today exists on paper because of Jefferson Parish, 1984. It effectively defined the per se rule.

And then most importantly, I think this gets lost. The fact that you end up with a bad precedent doesn't mean that the agencies themselves have to prioritize enforcing them. If we look at the 1960 Supreme Court merger law, which still holds as binding law of the land, it looks like a different alien world compared to the 2010 merger guidelines.

If you look at the Robinson-Patman Act, I doubt you'll find many prominent advocates for renewed enforcement of that particular statute at the agencies. And the Supreme Court, I think it was in 1972, and Sperry Hutchinson observed that the FTC's standalone Section 5 authority goes way beyond the Sherman Act. It said, in fact, it can condemn behavior that violates neither the letter nor the spirit of the antitrust laws. Nevertheless, over time as a general matter, the FTC has been quite circumspect about employing that authority, and when it has employed it, it's been quite controversial.

So for all those reasons, I find the Type I error focus has been overweighted in this calculus and

that we may want to revisit this somewhat more critically.

Rounding out this critique, I want to make one particular observation, which is that the whole conversation on Type I errors is that are they worse than Type II, is in some respects getting the tradeoff wrong. We care about both. It really does matter. A Type II error means that antitrust has failed to do its job. And, you know, effective exclusionary practices that are allowed to endure are truly problematic.

And by the same token, a Type I error that condemns a procompetitive practice turns antitrust on its head. So to really talk about which one is worse in my view is not the right way to think about the question. What we should really be thinking about is institutionally how to tackle particular practices.

And if you look at the actual substantive rules of antitrust liability, they reflect this tradeoff, as I think is suggested and should be conduct-specific. But if you look at the per se rule, the whole premise of the per se rule is that courts and agencies are better at fixing anticompetitive problems than markets are. And I think that's uncontroversial for those particular examples.

Even cartels take time to break down.

If you look at the quick look, same premise. Right? We're going to look at facially anticompetitive behavior, but we'll limit the propensity for error by allowing the defendant to articulate a plausible procompetitive rationale that will trigger the full root of reason. And if we think about the root of reason, what does that actually say? That's a full legal recognition that the markets may be able to figure this out more reliably than we can.

That's why if you even acknowledge that there's been a particular practice such as product tying, in the absence of market power you think that the market will self-correct or eliminate any propensity for harm before it fully takes root.

So what I'd call for in summation is to get away from this proposition that decision theory means that we should bring no cases at all because we care about Type I or lots of cases because let's worry more about Type II. I'd call for a more nuanced and discerning and discriminating inquiry under this. And I've got some other observations we can discuss later about how the agencies might think about acting or not acting in particular circumstances to discern more information.

And just on one final note because I believe I'm out of time, I very much appreciate the opportunity to talk with you further about the interesting question of whether the agency should enjoy some measure of deference.

Let me just say first of all I find it a hugely important feature of the U.S. system that the agencies must prove up their cases from scratch in court because it brings a disciplinary effect that's absent elsewhere and it's obvious in the practice of law.

So in no way am I suggesting that the agencies should be relieved of their obligation to prove up a case. Rather, I'm thinking of something -- at least I was thinking of something a little bit more nuanced, which was if you think of the well established law that consumers have referred antitrust plaintiffs and were more skeptical about competitor lawsuits, well, maybe we want to think the same way about agencies. And agencies to some degree already do enjoy a major of deference. And that's particularly true of administrative proceedings at the FTC under Part 3 where the standard employed by the appellate court is on factual and economic matters quite deferential. So thank you very much, and I'll

pass it on to John.

MR. THORNE: I'll take the clicker. And one of the buttons makes it go. There we go. Bilal, FTC, Creighton, thank you so much for inviting me here. It's an honor to be on this panel. And this is something that is personal to me.

In the nature of disclaimer, some people who read my resume think, well, he's the pro-monopoly guy on the panel. It is true that I worked for a long time for one of the broken-up pieces of th Bell system trying to put it back together and succeeded in part. It's true that I have done pro-defendant cases -- Discon, Trinko, Twombly -- but it's also true that I've worked on a lot of plaintiff stuff. I just want to mention that.

My firm, for example, has still the U.S. record for the largest antitrust plaintiffs jury award, $1.3 billion actually paid in Conwood versus U.S. Tobacco. We were on the winning side -- my firm was on the winning side of Ohio against American Express for the defendant, and also Pepper against Apple for the plaintiff. We're working with the California Attorney General on the Sutter Health case.

So, disclaimer, everything I say is my own. It's not -- please don't think any client agrees with

me or anybody else from my firm because they probably don’t. Special shout out thank you to the state AG enforcers in the audience. I won't call you out by name except for Nebraska, but eight of you supported the petitioner in Trinko. Thank you. Thirteen states and D.C. and Puerto Rico supported the respondent. So the states were split on Trinko. But, anyway, the -- thanks again for having me here.

I'm not going to say too much about Frank Easterbrook's article because much was said before, except I think it's pretty cool how he dissects the rule of reason analysis. He calls it empty. And there’s a great quote that you can use in many other places besides antitrust about when everything is relevant, nothing is dispositive.

So he proposes -- and a couple of the panelists have talked about this -- five particular filters. If I were coloring these in like Thom did, I'd color the first one, market power, green. The defendant or defendants should possess market power. That's very important. It's a one-directional filter for excluding challenges. Having market power is necessary; it's not sufficient. Having it could well be the result of conduct that everybody wants more of: investment, new products, good service, low prices.

So you don't condemn those behaviors if they result in market power. And it's been said, most often market power is temporary, not durable. A profitable business will attract new entry.

I would also color green the concept that the profits should depend on monopoly and not be -- the conduct not be naturally self-effacing or self-disciplining over time. I won't elaborate that very much, but the concept that some kinds of problems are flashes in the pan, not durable.

If you've got, for example, a manufacturer that puts restraints on distribution, the manufacturer actually is incented to make as much money as it can and it wants distribution to be efficient. And restraints on distribution presumably are making the manufacturer more money, and often it's true that the manufacturer is aligned with the ultimate customer in wanting some accommodation of price and better service. And, you know, often if that's not right, somebody will come in with a better model and you don't have to worry about it.

So I think Easterbrook's second filter about whether something is going to be competed away or depending on monopoly, that's still correct as a principle.

Thom had said that the third filter, widespread -- the option of identical practices. And the way I read Judge Frank Easterbrook on this point is if you see something happening in competitive markets all over the place, and now a monopolist is doing it, too, you presume that the widespread adoption of that practice is probably a good thing or otherwise the competitive firm subject to full competitive discipline wouldn't be doing it.

I think that's a very green principle for distinguishing good from bad. A clever thing in Frank Easterbrook's article at this point is he talks about exceptions. You know, often you see a practice out there and it can harm competition or competitors or consumers, but he says we don't live by existence theorems. It’s an echo to Justice Holmes’ idea that the 14th Amendment didn't enact Mr. Spencer's social status, or in the common law where Holmes says the life of the law has not been logic; it's been experience.

Existence theorems, the possibility of harm shouldn't make you disregard the fact that if something's widely in use by competitor firms it's probably a good thing, and to deny a monopoly the opportunity to do the same thing is likely going to

impose extra costs on the monopoly that will be flowed through to the customer.

His fourth filter, in addition to looking at price effects, look at output. If something doesn't decrease output then that's a surrogate for is something harmful? And that's a logically good thing to do. It turns out to be really hard in practice to look at relative output.

I was at an ABA antitrust spring meeting many years ago and I saw a panel that turned out to be very fun. There was the general counsel at Qualcomm. He had no idea what was about to happen. And Fiona Scott Morton -- and they were sitting side by side -- and the general counsel of Qualcomm made the perfectly sound point that, you know, thanks to my chips and my inventions, look at how the cell phone market has exploded in output. And you can take the fact that output has gone up as a result of my invention as proof I've done something procompetitive.

Fiona Scott Morton looked at him sideways and said, well, what is the but-for world? Would it have grown even more? Anyway, a hard question to ask sometimes looking at it from the output lens.

And then the last of Easterbrook's filters, the identity of the plaintiff. I actually think you

should be skeptical of everybody. But you have to find truth and good ideas where you can. The Old Testament says, “follow the prophets but don't follow the false prophets.” So which is which and when are they true prophets? It's hard to discern, and I think that's in some ways not a useful filter.

So what I take away from Frank Easterbrook's article, as his conclusion, and then I’m going to talk about how it's been implemented, it's a radical idea. It’s we should have rules of per se legality, which what most examples of a practice are procompetitive or neutral, the rules should have the same structure although the opposite bent as those that apply when almost all examples were anticompetitive. So you’ve got things that are per se illegal because almost always they’re bad, they’re equally important. Find some things that are per se lawful as Easterbrook explains. If you have a strong presumption of legality that makes it possible for counsel to state that some things don’t create risks of liability. So that’s an idea that’s been implemented over time and with some success.

I’ve worked on three examples of that. I mentioned Discon, Trinko, and Twombly. Discon, for those of you who don't remember that case, NYNEX

against Discon, NYNEX was the petitioner. A nine-to-zero decision written by Justice Breyer said it was okay for NYNEX to switch suppliers. They had gone from supplier -- I forget -- Discon to Supplier B, whoever B was. But they switched suppliers. And they did it in a way that was alleged to violate a state rule limiting the market power of NYNEX. So state law existed to keep NYNEX's monopoly in check.

And NYNEX was alleged to have violated the state law holding its monopoly in check by switching suppliers. And Justice Breyer said, no, no, no. As a matter of antitrust, you can switch suppliers and we don't care whether you broke a rule. Nine to zero.

And it was at the motion-to-dismiss stage. It didn't depend on the particular parties, NYNEX or Discon. It was categorical. Any state of facts that fit the pattern, you want to switch suppliers, you can do that, per se legal.

Trinko you know well. You don't have to share something you've built with rivals in general. We'll come back to exceptions and limits of that.

The Twombly case was an antitrust case about the Baby Bell companies not entering into one another's markets. You've got to plead enough to say

that's sufficiently suspicious to justify the cost. So I've seen this idea. Some things are per se legal. There are going to be some limits to those.

So as a descriptive matter, not necessarily normative, how might this idea of per se legality be implemented? I would summarize ways it could and in part has been implemented as five freedoms. There's a basic freedom to cut price. Brooke Group categorically says at least out of some measure of incremental costs, firms, even monopolies, can cut price.

Now, why would that be a good thing? Why is it good for a monopolist? Let me try to defend this freedom of why is it good for a monopolist to be allowed to cut prices? Well, because you want -- more people benefit by definition if it's a monopoly and there's less market discipline to bring the price down. So if a monopolist offers you a price cut, say yes, we welcome it.

Similar to that but much less well adopted in the courts, a freedom to package products at a discount. I think this follows from Frank Easterbrook's insight that if you see a practice widely adopted by competitor firms, it must have some benefit out there. And then if you condemn that same

practice here, the idea of putting together a discounted package, you condemn that behavior when it's a monopolist. You're going to lose something because you would lose something if the competitor firms were prohibited from that.

I have seen in my life that a lot of innovation proceeds from combinations of products. You take chicken nuggets, add a carton of milk and a toy; you have a happy meal.

In the LePage's/3M case decided first in the District Court in the Third Circuit, cert not granted because the government didn't help. But in the 3M case, I understand as an outsider that 3M's discounts on the package were actually a management tool to try to overcome silos within its conglomerate business and to promote internal cross-selling from one business to another. So if you want to offer your customer a discount on this product, you hade to sell the -- you had to help the other guy sell the other products.

Freedom to innovate. Does that actually need a defense? Greg Sidak, one of Judge Posner's first law clerks -- first year Posner was on the Court -- wrote an article about predatory innovation. I won't say any more that that.

Freedom to increase efficiency. There are

many new examples where you might be seeking a freedom to increase efficiency, say, in the sharing economy or some of the tech platforms. Older examples of this, kind of a neat, stark example, Honeywell/GE merger. In the U.S., that was seen as creating efficiencies. It got cleared.

In Europe, the same efficiency was viewed as harm to competitors. How are competitors going to deal with this more efficient animal, and it was condemned. Discon, switching suppliers is a kind of categorical efficiency.

And then finally the freedom to make investments to build stuff without being forced to share it with rivals. Defense of that, I could go on at length since I was one of the counsel of record for Trinko in that case.

But the two main ones are because you want to promote people building stuff. I'm saying it in a colloquial way, but if you -- if you force the incumbent to share facilities, you deter them from building or keeping those facilities up. But you also deter the best kind of rival that is going to build its own competing facilities. Because some -- in telephone they were called CLECs, itty-bitty telephone companies trying to build pipes sort of from place to

place to compete with the incumbents.

If you tell them you got an option, you can sync expensive fiber under the streets of New York or you can piggyback on somebody else's stuff. But piggybacking is always less risky and it's hard for the facility's building rival to make a living. And, of course, as many people will note, judges and at one time lay juries are not very good at setting price in terms of forced dealing.

So I don't want to leave this on a, well, here are all the cool things a monopoly should be allowed to do. I think there's a strong case that the same economic freedoms to be promoted with Easterbrook's ideas also require energetic law enforcement.

And so the prior panel talked -- quoted Gary Becker, an important price theorist. I want to quote the price theorist from South Africa, Desmond Tutu, who said, "The price of freedom is eternal vigilance. Economic freedom does not sustain itself; it must be actively promoted and defended."

So a test case for how much energy you want to put into defending economic freedoms -- and I thought of this before Makan Delrahim last week put these out for public comment because Randy Picker has

a good article on the subject, but the ASCAP/BMI consent decrees. Everybody knows what that is. These are the music publishing companies that most of a century ago put together all their licenses into a package, and if you wanted to play the music, you had to deal with ASCAP or BMI. And if you wanted to get your music licensed, you're a music songwriter, you had to deal with ASCAP and BMI.

And this was a hard case. It is a hard case. This has two judges in the Southern District of New York with rate courts setting the price, periodically adjusting the price and the terms under these consent decrees.

My friend, Randy Picker, said this is a -- this is a way to look at how much do you care; how much energy are you willing to put into disciplining something that’s probably good, but -- and any time you get competitors joining together to set package prices, it's problematic. So do you care enough to put the energy in?

And I was pleased that last week Makan Delrahim put these out for public comment. So it is a timely thing. But Makan’s personal hero, he said in several speeches, is a former assistant attorney general, then solicitor general, then attorney

general, then Justice Robert H. Jackson.

And Makan almost has a meme of “so what would Robert Jackson do?” And I thought, well, what did Robert Jackson do? Surprise, he was there for ASCAP/BMI and he wrestled with the problem presented by aggregations of competing license holders for blanket license. He wrestled with this, what to do. And his deputies at the time were Thurman Arnold and -- I’ve got a lot of notes on this, I’m not going to read them all to you, though. Andrew W. Bennett was Jackson's special assistant.

And there was a case that lingered in limbo. And initially Jackson said if you can settle it, fine, but I don't want to actually bring a case. Jackson's fear in the era when these decrees were put into place is that the antitrust laws represent an effort to avoid detailed government regulation by keeping competition, not regulators, in control of price.

He was very concerned about using antitrust aggressively but to avoid something that looked regulatory. So he stewed on this. And I sent a young lawyer to the National Archives and we dug out all the papers. And it turns out there is a typewritten manuscript of Jackson's entire career. And he’s got a chapter on ASCAP/BMI typewritten with his hand

corrections to whoever the typist must have been transcribing it.

He worried about whether this was a good idea or not. But in the end he came down with, yeah, yeah, we should bring -- and he brought a criminal case. He brought a criminal case. And he brought ASCAP and BMI to the table and they signed these decrees. So that's -- that’s an outer limit of what can be achieved but with energy put in to effect a regime that at least Jackson thought was a good place.

So one last major idea here, which is some people think the Trinco case stopped Section 2 enforcement. And haven't seen that and I think it’s wrong. And I want to give three examples.

Example one is Trinco is not an obstacle to Section 2 cases where the monopolist is affirmatively disrupting a rival's distribution. And one example is I mentioned the Conwood case where U.S. Tobacco had, through contract or through practices apart from contract, gone into retail locations and targeted the shelf space needed by the rival smokeless tobacco. U.S. Tobacco had the cool monopoly brands, and the rival, Conwood, needed shelf space. And there was a lot of shelf space available. I mean, not that much. It was convenience stores. But there's gum and

there's lottery tickets and there's the sodas, many different places.

If U.S. Tobacco had needed more shelf space for its products, it could have just gotten whatever shelf space -- you know, lots of good shelf space. That's not what they wanted. They wanted the shelf space used by the small rival and basically -- maybe it’s a bad pun, snuffed out the rival.

I had a case about a month ago decided at the motion-to-dismiss stage in Chicago. I won't bore you with details. But there the district judge said that antitrust claims against a monopolist for depriving distribution of a rival, that’s a good Section 2 claim that goes forward.

I'll note that Justice Neil Gorsuch has a decision from when he was a judge in the 10th Circuit that also says exclusive dealing arrangements, arrangements that interfere with distribution, state valid Section 2 claims; a case called Novell. He was also on the trial team that won the Conwood verdict.

A second example is Trinco is not an obstacle to enforcement against antirival discrimination. So, for example, Trinco would not have been an obstacle to the Bell breakup case nor to Otter Tail, a similar case. Both of those cases

involved discrimination in dealing, not forced dealing under new terms. Voluntary terms offered to some but denied to rivals.

Einer Elhauge has a very good Stanford Law Review Article that goes through all of the prior Supreme Court decisions on this and describes that antirival discrimination existed in all of the Supreme Court's decisions that affirmed antitrust liability for refusal to deal.

Third example is that Trinco is not the last word. Trinco does not bar common law development of the Sherman Act. The Sherman Act is not a nose of wax. It's subject to constraints of stare decisis necessary to protecting investment-backed expectations. It's subject to the need for stability in the law. But it is adjustable in light of experience.

And so if you reread Trinco, reread Justice Scalia's decision for the Court, the first thing to notice is the repeated use of the word "recognize." Our decisions have not recognized a duty to deal in these circumstances. He talks about the essential facilities doctrine that have been adopted by some of the lower courts. He says the essential facilities doctrine is not a recognized doctrine of this Court.

But he doesn't stop there. He doesn't say, well, Trinko's complaint doesn't succeed so he didn't stop there. There's a whole second section that follows that where he asks the question, should we in this case recognize a greater duty to deal? And he concludes, nope, not never, no how. He doesn't say that. He says the Court finds no need to recognize a broader duty in this circumstance, and then he gives reasons for it. But the possibility of expansion or contraction is plain on the decision.

So one last -- one last thought about Trinco because I just like it. It turned out the Trinco plaintiffs' facts were all wrong. There was a little non-antitrust piece in the case. We went back to District Court, we did discovery. If the plaintiffs had known, they would have picked a different plaintiff. The wrong class rep. Their facts were backwards and wrong.

And so I asked for my attorney's fees. I said, you know, we went to the Supreme Court and back; we need -- you know, we've got to get paid for this. And the district judge seemed kind of interested in the attorney's fees idea, and the plaintiff said, no, we will not give a nickel to your client; we'll write a check to charity.

And so I went -- Bill Barr was general counsel of Verizon at the time. I went back to Barr and said so we got this check for charity; that's what Trinco gave us. And at Barr's inspiration, part of the check went to support an inner city education charity that he was familiar with. The rest of this check, blank check, and there was a little tiny school being started up in Southeast Washington, D.C. to serve kids that would have no real opportunity. And we started the school with that. So a happy ending -- two happy endings to Trinco, 9-0, and then we started the school with the proceeds of the losing party.

MR. LITAN: Wow. All the thanks to everybody inviting me. I have learned an incredible amount from my fellow panelists, and I'm sure I'll learn a lot more from Steve. Standard disclaimer, I'm with a plaintiffs' law firm in St. Louis and Chicago, Korein Tillery. The remarks are my own.

The other thing is that I submitted some long -- unconscionably long written testimony to the FTC, which I'll revise and I guess will be part of the public record. These PowerPoints are based on that. That testimony was based in turn on a longer paper that I did for the Progressive Policy Institute called "A Scalpel, Not an Axe," which sort of summarizes my

approach to life; which is if you see a problem and you can solve it by a targeted intervention, do that rather than swing an axe. You only swing an axe if it's absolutely necessary and the target intervention will not work. And I think that's true here, and I'll point out a couple of problems that I think are targets.

The final introductory point is that I'm going to talk about not only things that the FTC can or should do, but also some legislative tweaks that I think would help the situation for the problems that I'm going to identify. And I am going the use the Easterbrook framework but we're going to skip through a lot of slides here because we know what the Easterbrook framework was. That slide summarizes it in a slightly different way.

The focus of my remarks are going to be on key changes since he wrote it, very briefly on the change in the law since he wrote it, and then much more emphasis -- because I'm also an economist in addition to being a lawyer -- I'm going to focus on some economic changes which are in three bags, to use Thom's metaphor. Some are bad, some are good, and others are mixed. And I'm going to talk about what those changes imply for Easterbrook's framework.

So let's begin with the legal change. The most important is that Easterbrook and the Chicago School largely won since he wrote the article. Now, the reason I say largely is that the way I actually read the law under the Sherman Act -- and I'm heavily influenced by the Microsoft decision that came down en banc, I think it was 9-0 by the D.C. Circuit. And they used what I call a structured rule of reason.

And this has been repeated in a number of cases; in fact, most recently in the Qualcomm case, Lucy Koh, Judge, used the same three-part thing. There was a case against the NCAA for fixing financial aid packages that I followed heavily. And that was a Section 1 case, not a Section 2. But, again, the judge there, Judge Wilken, used the same three-part analysis which I'll get to in a minute. And so that's the first thing that's changed.

The second is that judges and economists are better at implementing the structured rule of reason than I think Easterbrook feared that they could.

And, finally, this is just a note, since he wrote, basically vertical and conglomerate mergers have been pretty much always approved.

So let's go to the first economic change. Is this working?

MR. SAYYED: I think the green button.

MR. LITAN: Green button? Oh, yeah, okay. Okay. So the bad news from the economy point of view is that we've had a dramatic drop in what economists call the secular rate of productivity growth. So in the good old days from '48 to '73, productivity, which is basically the growth in output per unit of labor input, that grew at about 3 percent a year and wages grew at about 3 percent a year in real terms.

In the last decade or probably a little more, we're down to about 1 percent. Now, there's been a brief uptick in the last quarter or two, but there's been no real sea change in the secular growth of productivity.

Now, why is this bad? It's that on average productivity growth determines average wage growth. And there's been increased income inequality, which is not good, but on the average the decline in productivity is not good.

And that -- when I say business dynamism, I also include -- I included in things like that, the drop in the startup rate. There used to be about 600,000 startups a year. There are now about 400,000 since the Great Recession.

Now, what's the good news? The good news

that I have highlighted in my paper are all the upsides of the internet. And I won't go through all of them because they have been written about all over. And of course we've had a lot of great medical advancements since 1984.

The mixed news is globalization. And what we have learned, of course, is that there are winners and losers. I'm a free trader and an unabashed free trader. I realize that I'm out of step with both political parties right now, which have backed away from globalization and free trade. I'll talk about the implications of that for antitrust, which people have not recognized. And then, of course, there are all the dark sides of the internet.

So the question is, has less competition contributed to any of these changes? Now, there is a narrative out there that the economy has become a lot more concentrated at the national level. If you look at all these industries, broadly defined, a lot of critics of what's going on say the economy is less dynamic because there's been a lot of concentration or increase in concentration.

The second point here is really important. Defining broad industries, as what's called the two-digit level of the standard codes that are used to

define industries. They're not the same as relevant antitrust markets. This is really important. Carl Shapiro, who used to be a chief economist with the Antitrust Division, wrote a really important paper a year and a half ago where he goes through proxies for antitrust markets. And what he points out is, number one, a lot of the antitrust markets are local; they're not national.

So if you think about banking, a lot of financial services, in fact most services, doctor services, things like that, retail, wholesale, a lot of it, the competition if you're going to have an antitrust case, is at the local level. It is not at the national level.

And when he looks at the local level, he finds no increase in concentration. That's really important. You can't overgeneralize. And then the second thing he finds when he breaks down the industries is that there has been a minor increase in concentration in some industries at the national level, but they were already unconcentrated to begin with so that the delta is not that great.

So I think you really need to -- when you look at this populist narrative that's out there, you have to dissect it in antitrust terms. And even

though you may say we're a bunch of nerds and a bunch of wonks, that’s the way the law is structured. It’s to look at these markets where competition actually takes place and the economy is not as out of control as a lot of the narratives suggest.

Moreover, even if you look at the national level, you find that in concentrated industries productivity has increased faster in concentrated than unconcentrated industries. So concentration is not necessarily so bad even at the national level, which is not an antitrust market.

And in my own research that I have done with Ian Hathaway of Brookings, we’ve looked at the startup decline, which is another measure, as I told you, of business dynamics, and we found that it's not industry concentration that is driving it. It's the age of the firm, in other words, if you're a new firm competing against a really older firm you’ll have a much tougher time generally competing.

And, secondly, we’ve had a slowdown in the growth of the labor force. And we did a cross-sectional analysis and it turns out the cities that are growing most rapidly, startups are doing relatively okay. Cities that are not growing rapidly, startups have basically fallen through the floor.

And so this largely explains the startup decline, not the so-called increasing national concentration. In fact, the CEA in 2016 under President Obama, not under President Trump, basically said that there were government barriers to entry, not private ones, and that the -- a lot of these other causes of the startup decline have not been well explained. But they did not single out concentration. And if you look at the public narrative, they say it's concentration that's driving the startup decline. That is simply not true.

Now, there is a part of the public narrative that is true. And that is if you looked at corporate profits, there is a cause for concern. Number one is the share of profits and the share of GDP has gone up on a secular basis from roughly 8 percent to a roughly 12 percent of GDP. There's been an increase in inequality in profits, so the firms that are doing really, really well are doing great. And there are a lot of people -- a lot of firms down there at the bottom that aren't doing so well. That parallels what's going on with workers as well.

So the question is what's causing this increase in inequality? And I'm just going to single out three things. It's not been as well studied as

personal inequality, income inequality. But I think one is the rise of big tech. They're making a lot of money because of network effects. Number two, there's been rising profits to intellectual property. Look at big pharma, all right? We have patent protection that basically is protecting a lot of monopoly profit.

And, third -- and this has not been well commented on -- is that there are a lot of collusive profits out there. I mean, one of the biggest surprises to me personally when I came to the Antitrust Division was how many conspiracies there were. And as an economist, I just sort of believed that, you know, General Electric being convicted for price fixing in 1958, it wasn't going on anymore. And then I come to the division and I find that there's a lot of price fixing.

And one of the reasons we found out is that my boss then, Ann Begeman, who was Assistant Attorney General, introduced a new leniency policy in 1984 which basically said that if you were the first person in a cartel to come in and confess, you got off scot-free. But if you're the second one, we threw you in jail. All right?

Well, guess what that did? That induced a lot more people to come in and confess to the Justice

Department. And it turns out if you look at the data, there has been roughly between 40 and 60 price-fixing conspiracies that have been uncovered and prosecuted in the last decade or so. And a lot of that, I would argue, is due to the change in the leniency policy. So that's a very important thing.

The other thing I want to highlight about profits and sort of what's going on in economies is the so-called kill zone around the tech platforms. Now, in my PPI paper, I did not give this as much attention as I now appreciate. I think there is something to this story that you don't see as much BC and startup activity around the big tech companies because they're afraid of getting killed. And I think that's something to worry about. So I'm going to talk about how to fix that in a minute.

So the implications for antitrust enforcement. The first thing is -- I'm not going to spend a lot of --time, but for Section 1, which is basically price fixing and so forth, technology can facilitate collusion. And if you look at a lot of the business that our firm does and other firms do in terms of litigation against big banks, it's all been facilitated by chat rooms, which is basically innovation of technology. And people have stupidly

participated in these things and said a lot of bad things that have gotten them in trouble.

Now, Bill Kovacic, who used to be a Commissioner at the FTC, has just written an article which basically urges the Commission that when you look at a merger and if either of the parties has been engaged in cartel activity in the past, that ought to count against them. Whatever you do, that ought to be a negative. And I actually think that's a very good idea because that means that there's proclivities to engage or convert tacit collusion into overt conclusion.

Now, what's the implication for Section 2? Even if the probabilities of the errors have not changed, I would argue the costs of being wrong have risen. So those two cats in your story, in that picture, Thom, I think the lion looks worse. The lion looks worse for instances where you don't do anything. All right? And a perfect example I'm going to give is the AT&T breakup. And I learned a lot of this when I was at the Justice Department. You may have known it when you were already there.

This story has really stuck with me. We had a big supplier of fiber optic cable come and talk to us and they basically said, look, AT&T and Bell Labs

had invented fiber optic cable but they didn't lay it because they already had the copper in the ground; they had no incentive to put it down.

You broke up AT&T and now you have Sprint and you had MCI competing against them. They're huge customers of fiber optics. The supplier then starts selling a ton of fiber optics. We then basically get the backbone of the internet because AT&T followed after the breakup. They put in fiber optics.

And I would argue that because of the AT&T break up, we got the internet a lot faster than we would have otherwise. And, therefore, a lot of the digital platforms that we're talking about today, they came a lot faster than would have been true otherwise. That is a huge benefit to innovation from the AT&T breakup that a lot of people have not recognized.

And so when we look at the dominant platforms today, which are due to network effects and scale economies, we have to think about -- we have to think about that if there are abuses, they can do bad things because AT&T did bad things. And if we hadn't broken them up we wouldn't have gotten a lot of the good things from them.

Here's another point I want to leave you with: Go back to that free trade point that I talked

about, which is the backlash to globalization. People have not thought this through. If it's going to be a lot harder for imports to come in and it's going to be a lot harder for foreign firms to invest in the United States, that means there's going to be less competitive pressure in America. Other things being equal, that means we're going to have to emphasize a lot more aggressive antitrust enforcement because we can't count on the foreigners to discipline us as much as used to be the case. So I think in combination of those things argue for tipping the balance, if you will, to worry more about Section 2 abuses.

In my paper, I say that largely the current law is okay. The Microsoft case, the Qualcomm case, are okay. The FTC has done a lot of work in pay-for-delay cases in the pharma situations. But the one change that I do suggest -- and I have had enough experience with it -- is that the one thing I would do if I were God, I would say that exclusive dealing, which was the core of the Microsoft case, both the first one and the second one, first one was ended in a consent decree, it was the core of what was going on in Qualcomm, I would say that there is no justification for exclusive dealing if you're a monopolist. I would make it a per se offense. I

think we have enough experience to know that. And I would try to get that in court. If you can't do it, let's change the law.

I'm going to -- what else would I do? I'm not going to go through all the alternatives for addressing the threats to innovation, the kill zone. But I very much like an idea that Hal Singer has proposed, which is to go outside of the antitrust courts, which can take a long time to prosecute Section 2 cases.

Why not set up an administrative process that basically does this: It says if you're a tech platform and if you discriminate, which is one of your categories, John, if you -- you know, you're talking about the Trinko cases. If you discriminate and you're a platform and you discriminate against a rival and the effects of that are material, that ought to be stopped. And we shouldn't wait for a Section 2 case which could take seven years to fix and the poor rival is out of business. We ought to be able to stop that at the ALJ stage and get it stopped right away.

And you could have ALJs at the FTC administer this. So this is a change in the law that could speed up things and stop abuses before they cause a lot of damage.

Now, I have a lot of other slides. I'm not -- I've run out of time. I'm not going to talk about those. I do want to end with a couple of points. There are people that have adhered to this narrative, the populist narrative that we ought to therefore fundamentally change antitrust law, throw out consumer welfare standard and go back to the original purpose of the antitrust laws, which Louis Brandeis talked about, which was to protect small business, protect democracy from excessive concentration and so forth.

Bork and the Chicago School basically revolted against that and they said that even though that stuff may be in the legislative history, although Bork didn't even concede that, it is in the legislative history. But even if it were in the legislative history, the Chicago School says there's no way to administer it. There's no way to balance the economics versus the politics, what metrics were used and so forth. And I am very persuaded by that argument.

If we go back to reintroducing effects on small business and throw in effects of politics and so forth, we're going to get ad hoc decisions made by judges. There's going to be no guidance for business. I think it's a very bad direction to move. So I am

not a neo-Brandeisian for that reason because it's basically unadministerable.

And I will close by saying don't forget the attorney generals out there, the state attorney generals. They uncover things that sometimes the feds do not. It was brought up earlier today. They found generic price fixing in the drug industry. They found the no-poaching agreements; good for them. They should stay in business.

And, finally, I know this is self-promoting, but we shouldn't forget private antitrust enforcement. All right? Congress provided treble damages for a reason. They wanted an additional layer of deterrence and also compensation. Attorney generals will not get all -- always get all your money back for you. You need private plaintiff lawsuits, especially class actions, because that is a practical way -- is going to be the way you're going to get your money back. There’s a new study out by the American Antitrust Institute which points out that just in this past decade alone $18 billion was recovered by private plaintiffs’ attorneys for consumers, and that's something that we should not forget. I'm done and I'll pass the baton.

MR. CERNAK: All right. Let me add my

thanks to everyone else's here, to Bilal and the FTC for inviting me here and actually for holding all of these hearings. I think this was a great idea. And in particular, I think it was a great idea to get out of Washington and come visit us in the Midwest here. So, thanks for that.

Like the others, I'll also offer the usual disclaimer that my presentation here will be my thoughts, not necessarily the thoughts of any past, current or future employer or clients.

So for this panel we've been asked to revisit now Judge Frank Easterbrook's seminal 1984 article, "Limits of Antitrust." Is it still an appropriate guide to antitrust enforcement both for the FTC and U.S. courts? Or like many of the rest of us 35 years later, is it a little creeky and perhaps ready to be thanked for its fine service and then retired for something else shiny and new?

In my view, the underlying motivating factor for Easterbrook's limits remains at least as true today as back in 1984. And I think something at least like its focus on the cost of action and information should continue to drive antitrust enforcement and litigation. Perhaps there can be a more nuanced view of the Type I and Type II errors for particular

situations given the development of our learning, such as Alan has discussed here today and in an earlier paper.

But the underlying rationale for these heuristics, the antitrust enforcers and courts, should show some humility about why, when, and how often they intrude into the market and take steps to first do no harm, I think is just as true and important today as it was 35 years ago.

So let's take a closer look at limits of antitrust to try and make explicit the underlying admonition that antitrust courts and enforcers should be humble about the good that they can accomplish. In the first sentence of the paper, Easterbrook says that antitrust's goal is to perfect the operation of competitive markets. The problem he says is that in the real world competition is messy. It's not like the atomistic competition of an econ textbook. There's plenty of cooperation in various forms, much of which nobody would call anticompetitive, such as all the cooperation that goes on within a single firm.

I would also add all the examples of joint ventures that have gone on and continue in an industry where I'm still active; that is the automotive industry. But if cooperation within a firm seems

benign at worst, and agreement on future prices is definitely bad, what about all the combinations of cooperation and competition in between?

As Easterbrook describes it, are 10-year exclusive dealing contracts between oil companies and service stations too long? Too short? Just right? Does it matter whether there are two oil companies or 20, 200 stations or 20,000?

And to make matters worse for the poor judge or enforcer, although perhaps providing some comfort that others are equally confused, it's not like the actions of each market participant are always well thought out or straight out of an MBA business strategy class. As Easterbrook puts it, firms try dozens of practices. Most of them are flops and the firms must try something else or disappear.

I can distinctly remember early in my career sitting in a meeting where the division that I was working for decided it needed more revenue this quarter and so needed to raise prices. I expected to see the elasticity estimate on the next PowerPoint slide. But instead the assumption was that the market was perfectly inelastic at least over this time range and no sales would be lost and the entire price increase would be paid by the customers.

When I asked how this could be, the manager acknowledged the probability that some sales would be lost. But he had no idea how many, no time to figure it out, and so this estimate was the best that he could do with the limited information that he had available, and limited time that he had available.

So if the competitive process and the antitrust judge or enforcer -- the competitive process that the antitrust judge or enforcer is meant to perfect is complex, and if even market participants can't always figure it out, then what's a poor judge or enforcer to do?

As Easterbrook points out in the context of antitrust litigation, the judge knows even less about the business than the lawyers hired by the companies and yet has to make a decision. So Easterbrook implicitly suggests that the judge or enforcement leader should have the humility to admit that she might not be able to divine the perfectly correct answer and instead “employ some presumption and filters that will help separate pro and anticompetitive explanations,” and reduce the cost of the decision process and of any mistakes.

Now, when I speak of the humility that underlies Easterbrook' limits, I think there are at

least three strains or varieties of humility to keep in mind. The first two have been covered extensively elsewhere, including by some great thinkers of the last few hundred years. So I intend to focus more on the third.

But first, there is the humility to accept that it can be impossible to gather all the knowledge necessary to fully understand the complex markets involved in any antitrust question as well as to confidently predict all the primary, secondary, and some important tertiary effects, whether intended or unintended, of any intervention into that market.

Easterbrook makes this clear in “Limits” the judge knows even less about the business than the lawyers, and others like Hayek in his 1974 “Pretense of Knowledge” speech, upon winning the Nobel Prize in economics, have covered this ground extensively.

I will just note that Hayek also provides helpful advice to governments that sounds remarkably similar to Easterbrook's, when near the end of the speech he says, “If man is not to do more harm than good in his efforts to improve the social order, he will have to learn that in this, as in all other fields where essential complexity of an organized kind prevails, he cannot acquire the full knowledge which

would make mastery of the events possible. He will therefore have to use what knowledge he can achieve, not to shape the results as a craftsman shapes his handiwork, but rather to cultivate a growth by providing the appropriate environment, in the manner in which a gardener does this for his plants."

Second, there's the humility to recognize that any judge or enforcer, like any other human being, is subject to her own biases and predilections whether based on experience or the institutional framework within which she works.

Yes, markets and their participants might not always act in ways that we like, but enforcers are not perfect, either. Again, this idea is not new. Sorry, I didn't realize that was going to be a controversial point. It's not new. It dates back to at least Madison's remark in Federalist 51, "If men are angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." And it goes all the way up through Bill Kovacic's application to antitrust agencies in a 2016 article. Agency leaders are not angels. Sorry, Bilal.

A new article from Thibault Schrepel, "Antitrust Without Romance," more than ably covers

this concept and the application of public choice thinking of James Buchanan and others to antitrust enforcement.

So I want to spend a little more time on what I call the third type of humility, the recognition that we are not the first ones to face some of these questions and, in fact, though the particulars might be a little different, we might be able to learn something from those who came before us.

I think this humility is at least implicit in “Limits” when you see the presumptions, filters, and focus on error costs as simply distillations of learning from past experiences.

Now, I often see this failure to appreciate history in my clients. Like those manufacturers who are convinced that this issue of poor customer service and other brand-destroying actions by distributors -- yeah, and low resale prices, too -- all began with the internet. I'm sure the heads of the Dr. Miles Company would have had something to say about that.

But I think we can also see this failure, this lack of humility, in some, but not all, of the reactions to the currently wildly successful companies that have built up huge market shares and seem to be indestructible. Is the right action a breakup of a

successful company? Drastic changes to how investors invest in companies in the same industry? Or might better action with fewer negative unintended consequences be to ensure that competitors of these behemoths are able to compete to better serve customers and try to wrest away any market power?

I was reminded of this lesson just last week as I drove past a Baby's “R” Us store. I didn’t drive past too closely because the parking lot was walled off while the bankrupt former category killer Toys "R" Us sells off all the land and buildings.

Now, a favorite historic example in response to current fears of unbeatable alleged monopolists is A&P, or the Great Atlantic & Pacific Tea Company. It was the original supermarket, huge market share, vertically integrated, “sapping the civic life of local communities.” That’s a quote from representative Wright Patman, who was inspired to draft the Robinson-Patman Act. They went from 16,000 stores in 1930 to a quarter of that number 20 years later; to competitive irrelevance shortly thereafter, and then later out of business. I won't go into any great detail. This is detailed elsewhere, especially in a paper by former FTC Chairman Tim Muris.

But given my background, I want to relate a

couple other examples. First, consider this quote from a U.S. senator: "It is evident that businesses grown to such an extent, mergers have been taking place with such rapidity and economic powers being concentrated in fewer and fewer hands to such a degree that the legislative and executive power of this nation should come quickly to an understanding as to a formula for clarifying the antitrust laws by which we can stabilize our economy."

Now, is this is a quote from somebody running for or supporting a candidate for President in 2020? No, that's Senator Joseph O. Mahoney, Democrat from Wyoming, on November 8, 1955, as he's kicking off 18 days of hearings into the antitrust issues raised by the operations of General Motors Corporation.

So, GM, that vertically integrated company with over 50 percent of the light duty vehicle market at the time; GM with a dominant share of the refrigerator business through its Frigidaire subsidiary; GM, with its Electro-Motive division subsidiary having sold more than 60 percent of the locomotives operating at that time; GM, the company which hasn't made a refrigerator or locomotive in decades and declared bankruptcy in 2009.

Now, there was plenty of talk at these

hearings back in 1955 from both senators and experts alike about GM's dominance and ability to head off meaningful entry. One expert predicted that it may turn out that Chrysler Corporation's entry in 1923 is the last successful one. Almost two years to the day later, a small foreign entrant established a small U.S. sales subsidiary in California; you may have heard of Toyota. Just as an aside, keep in mind these predictions from the 1955 hearings as different hearings get underway.

Just one more example from the automotive industry but one very appropriate for an FTC hearing like this looking into actions from 35 years ago. At the beginning of my talk, I mentioned joint ventures in the automotive industry. One of the biggest JVs started business 35 years ago. In 1984, New United Motor Manufacturing, Inc., started production of small cars in Fremont, California. NUMMI was a production joint venture of General Motors and Toyota designed to produce small cars, help GM learn the mysteries of Toyota's high quality, low-cost production methods, and convince Toyota that such methods could be implemented by U.S. workers.

It almost didn't happen. The FTC barely approved the joint venture the prior year with one of

the dissenting Commissioners asking if this joint venture between the first and third largest automobile companies does not violate the antitrust laws, what does the Commission think will?

But approve it the FTC did, although with some conditions, including an ongoing requirement to annually share with the Commission compliance staff certain documents regarding the interaction amongst the companies. I know. I collected and shared those documents with the FTC staff, who always seemed to spend less time with me in suburban Detroit than he did with Toyota and NUMMI staff in Northern California.

Now, in many ways NUMMI was a great success. GM did learn much about the Toyota production system. Those efficiencies have now spread throughout the company and really the industry. Toyota was convinced that its methods could work in the U.S. and now makes over a million vehicles here.

But in other ways, NUMMI was a failure. It never made much money, if any, in any given year for its parents. The vehicles that it produced for GM were never great sellers by industry standards.

But perhaps most pertinent for antitrust purposes is what didn't happen. The cooperation of

the two companies did not bring about decreased output, increased prices or any other negative effect on competition.

As Kathy Fenton said in a 2005 antitrust law journal article, “A whole new generation of antitrust lawyers by that time could ask what was the big deal?”

Now, all of this talk about history and humility doesn't mean that the FTC or a hypothetical judge should be frightened into inaction. After all, even “The Limits of Antitrust” recognizes legitimate antitrust actions. Nor do I think the exact rules described in “Limits” cannot be adjusted. I mean, it was published in the Texas Law Review, not inscribed on stone tablets.

And while I think much can and should be learned from history, I don't think it's sufficient for me to say, “But, but, but, A&P,” and consider that the argument is done. As Jonathan Baker has pointed out, the high market shares of such past giants as GM, RCA, and Xerox did persist for quite some time.

Antitrust law should consider if it knows whether the persistence of such high shares shows the willingness and ability of these successful competitors to continue to meet the desires of consumers, or instead the blocking of the rise of

effective new competitors.

In doing so, antitrust scholars should rely not just on theories of potential anticompetitive conduct but on empirical work like the early Chicago School did to give us the confidence to implement the theories.

So in the end, I think the right approach to both adjustments to a “Limits” approach, and to antitrust enforcement itself, is to echo Former Acting FTC Chairman Maureen Ohlhausen, “A respectful regulatory humility to what we know and can improve by intervention in a market.”

If antitrust law is meant to ensure that the market aspects of democratic capitalism persist, a system that some have said has lengthened the life span, made the elimination of poverty and famine thinkable, and enlarged the range of human choice, then we should be confident that we have learned something in the intervening 35 years before we make any changes.

So what do we know now that Easterbrook didn't know then about the complex interactions of customers, suppliers, and competitors; about human beings, whether actual or potential buyers, sellers, investors, or enforcers and how they react to various

incentives; about technology diffusion or when R&D is successful?

I think the enduring legacy of “The Limits of Antitrust” should not be its answers to questions like these but ensuring that we, practitioners, judges and enforcement agencies, ask those questions anew to see if we can now come up with better answers. Thanks.

MR. SAYYED: All right. Thank you all. I want to do two things. I want to give hopefully everybody a chance to maybe comment on what they’ve heard. And then I have one question from the audience, so I want to ask that. And then we're going to go overtime but that may be all we have time for.

So, Thom, I'll start with you if you want to comment on anything you’ve heard, take your time.

MR. LAMBERT: Actually, I think I’ll just pass.

MR. SAYYED: Okay, okay.

MR. DEVLIN: I think it speaks to the extent of the problem and the magnitude of the difficulties involved that I haven't heard a crisp answer throughout this discussion about whether the core focus in favor of minimizing Type I, accepting Type II, should be revisited, let alone rejected.

I haven't heard people be particularly specific about that or comfortable with it. I think in error cost as with antitrust application more generally, the devil is in the details. And what I'd like and I think hopefully we all can agree on, is as the industrial organization literature becomes increasingly refined over time and as investigations are -- if they're not already there, optimized, the sphere of uncertainty should shrink and reducing this problem we have to grapple with.

But as I said and referred to earlier, I do think that there's an opportunity for the Commission to think thoughtfully about error in some marginal decisions, and just if you give me 30 seconds I'll run through this one point and then pass the baton back along.

But in certain circumstances you can imagine not intervening to challenge, for example, a merger in the presence of uncertainty and taking advantage of retrospective studies much as the Commission did in the early 2000s with hospital mergers to more specifically understand the nature of competitive effects.

And on the other hand, you could also imagine circumstances, again, subject to error in

which parties claim changing industry conditions require a combination. And if you don't have the requisite certainty that that competition is going to be displaced naturally, in theory the Commission could wait to see what happens in the industry and then revisit the determination in the future.

So there are ways to be thoughtful about how to reduce uncertainty through intervention decisions. Pass it along.

MR. THORNE: Again, I very much appreciate the chance to be here. I thought of lots more things to say but I'm going to pass it down the other way and wait for the exciting question.

MR. SAYYED: And as for you two?

MR. LITAN: Well, I'll say something exciting I didn't get a chance to in my opening remarks, which is really a piggyback off a point that Alan said. He suggested we ought to go back retrospectively and, you know, see what happened in various things, mergers and so forth.

One of the things I have in my written testimony is that I urge the FTC -- and this is a headline that I buried -- I urge the FTC to reexamine the Facebook-Instagram merger. And -- not just through ex-post analysis, although you could because I

cite in my testimony the GM-DuPont case in 1957 when the Supreme Court looked at an acquisition by DuPont, a 23 percent share of the votes of GM. They acquired that stock in 1917 and 1919. Yet in 1956, the Supreme Court ordered the divestiture of those shares. And it did it on an antitrust theory.

And I point out in my written testimony how that precedent is not necessarily on all four squares with revisiting an entire merger. It's not the same as buying 23 percent interest. It's true that we had an entire merger between Facebook and Instagram. Nonetheless, that case does stand for the proposition you can go back and look at something again. And I would argue that even at the time back in 2012 there was reason to believe that Instagram could have been a rival social network to Facebook. It was already way ahead on a mobile platform; Facebook was not there. And so I urge that -- I'm not saying that they should be undone. But I'm saying that at least it ought to be looked at.

MR. SAYYED: Okay.

MR. CERNAK: Nothing further here, Bilal.

MR. SAYYED: So let me -- I'm going to ask the one question. I may return to Bob's point because I want to ask about Facebook-Instagram. But here's

the question, and it goes to John's point, although everyone, I think, can answer. And this is with respect to the five freedoms.

Is the freedom to increase efficiency absolute? That is, does it outweigh potential anticompetitive harms that may be the result of the efficiency? If not, if it's not an absolute freedom, then what is the appropriate balance?

MR. THORNE: Big question. Every freedom that I can think of, the freedom to speak and publish and assemble and vote, is qualified in different ways. The right to cut price is limited to -- down to your -- some measure of incremental cost.

I think there could be -- there could be situations where efficiency is bad. I can't think of any right now. And the normal suspicion of efficiencies, like A&P, a supermarket, or Walmart comes into a neighborhood with more products, lower price. Usually efficiency is such a good thing that the Easterbrook idea, even if there is an existence theorem that says there could be some durable harm to competition by letting this additional efficiency in, that's so rare that I would follow the Easterbrook-Holmes idea, you know, don't worry about the logic. Your experiences of efficiency is good.

If you condemn it a little bit, you're going to condemn it a lot because Bob's firm will sue you for being efficient. Not that that's bad to sue people, but --

MR. LITAN: No, we won't because we won't make any money doing it.

MR. THORNE: But it's hard to think what the limits are, but in general I think every freedom has necessary limits. And then details matter a lot. It may depend what somebody thinks is an efficiency.

In merger cases, for example, people are properly skeptical of efficiencies, but super aggressive -- Joel Klein, when he ran the antitrust division, brought the Microsoft case with you, Bob, he let go of the Bell Atlantic/NYNEX merger because we established there were going to be serious efficiencies, which actually we achieved after.

MR. DEVLIN: And just add, I agree with all of that. But, you know, to condemn a company, even a monopolist, for achieving superior efficiencies and bringing greater price pressure to bear on its rivals, though within theoretical construct could be consistent with some effective exclusion, in practicality, I mean, how does one implement that rule?

And I think the Supreme Court has spoken about that several times now in various iterations of the same problem. In Weyerhaeuser, the Supreme Court, for example, said the ability of trying to look at above costs, how to treat pricing or buying, said it's just beyond the ability of the judicial court to control.

So how do you actually implement that? So I think it's a nice example of this decision theory because the dangers of getting around are so high.

MR. THORNE: My friend, Dennis Carlton, who was for a while the head of the antitrust division economics group, taught me that even a perfect monopolist will pass through some of its variable cost savings because it sells more; it makes more profit. If it passes through some of its cost savings, so to tell a monopolist, no, you're efficient enough, don't achieve any more cost savings, means consumers are going to be denied a price cut.

MR. LAMBERT: I think maybe implicit in that question, something about the goals of the antitrust. And I think the question is sort of asking what about the small dealers and worthy men who are driven out by efficient practices?

You know, there seems to be some value lost

in that and is that something that antitrust should take account of? And my response to that is I think the same as Bob's, which is to say that if antitrust has these incommensurate goals, protect consumer welfare and protect small dealers and worthy men, it becomes really indeterminate and it becomes, you know, when Bork started his antitrust paradox book by saying that antitrust, when it was pursuing all these multiple goals, was in the nature of an old west sheriff who didn't sift evidence but just walked down the street and every so often pistol-whipped people.

And it sort of becomes like that because the enforcers then can say, well, we're going to bring this enforcement action because we're concerned about small dealers and worthy men. And we're going to bring this one because we're concerned about consumer welfare. And to me that's just an excessive amount of discretionary power.

And so I would answer the question that efficiency should trump.

MR. LITAN: Can I just add one thing that makes it highly relevant to a policy discussion? There is a proposal out there that was offered in 2017, although I haven't seen much reference to it since, which is to change Section 7 standards for

mergers. And that's to add all these other factors to, you know, the criteria for whether or not a merger lessens competition. There's a proposal, well, you should add, well, effects on unemployment, effects on wages.

By the way, you can account effects on wages under existing rubric, under the existing law. They will add employment. And that's a critical one. And if you're going to have to balance the employment effects against the effect on consumers, that means almost by definition you're going to have to deny a merger that could lead to job cuts, which are unfortunately an efficiency and which means you would you basically prohibit efficiencies from being realized.

And I actually think that's very bad policy. And I don't know how you devise a rule to balance, you know, employment versus consumers. I don't see how any judges would be consistent on that. And so therefore I am not in favor of legislatively doing that. But there are some very well known people out there who are urging this.

MR. THORNE: There is one other countervailing factor that happens. This is a more general point about buyer discipline. Sometimes in

mergers you look, well, will the buyers support number 2, number 3, to make sure that the new larger firm isn't locking them in in some way.

It's a sad thing when anybody goes out of business to a more efficient firm. But often in local markets in particular people will pay more because they just want to support the local business. I shop at a bookstore that would charge me more than Amazon to keep -- I want to prop it up. It's a good place. I like the people. Bakeries, other kinds of small businesses. That's not a universal fix but it's a countervailing fact that buyers will often come to the rescue.

MR. SAYYED: Steven?

MR. CERNAK: No. I agree with Alan. I guess we could imagine some theoretical case where that would be true. But I don't know that we have the ability to actually find it in the real world.

MR. SAYYED: So let me follow up on something Bob said, although it's not -- it's an extension. One thing that, you know, occurs to me when we talk about balancing or taking into account different factors such as employment concerns, accepting all the comments, one thing that I haven't seen discussed much, although maybe it's implicit in

granting courts or agencies discretion to balance multiple factors, is, you know, what does the agency do when we tell a party that, look, we're going to challenge your merger because it's anticompetitive; we think prices will rise or innovation will slow.

And parties say to us or maybe to the courts, well, you know, we'll commit to hiring an extra thousand people for a certain period of time. You know, how do we respond to that? And should we respond? How do we make that tradeoff? And that -- you know, you see that outside of the antitrust agencies in some form in other regulatory agencies, whether it's at the state level or the federal level, where, you know, parties ask the agency to balance multiple factors. And you get results that probably have longer term anticompetitive effects and, you know, maybe some short-term positive effects but are not really sustainable.

But let me ask a little bit about the Facebook-Instagram example or transactions like that. It's sort of a question I have is when people ask us to relook at a consummated merger five or more years after the fact, what is it they're asking us to do? Are they asking us -- or what should they be asking us to do or what should we do? Should we go back and

say, look, to use a rough example, in 2010, we got it wrong based on the evidence we had in 2010. Or, well, now it's roughly 2020, let's take the market as it is and let's say, well, geez, Instagram, for example, has done very well. It would be nice to have two firms instead of one.

You know, there's been, I assume, changes in the running of a merged firm that would not have occurred sort of separately or if the firms were operating separately. So what are we -- what should we be looking at or how do we make those tradeoffs?

MR. LITAN: Okay. I'll start off. I've thought a lot about that. So let's take your example. Should we look at 2010 or 2020? Right? So if you look at 2020 and you take basically a retrospective look, the great risk using the Easterbrook error cost phenomenon is that are you then going to send a message to firms that when they acquire somebody they shouldn't invest in the acquired firm for fear of building them up into a big deal because then they will be snatched away? All right? That's not a good signal to send. Although acquiring firms can prevent that by integrating the acquired firm and make the omelet so that you can't unscramble the egg. That's a way around that.

But nonetheless, having retrospective look in 2020 runs that danger especially if you keep them separate, which is what Facebook did with Instagram. And many people speculated that they did that because they wanted a safety net in case Facebook somehow didn't do well. At least they could then ride the Instagram horse, and that's why they kept them separate.

GM, by the way, that law, that GM-DuPont case, stands for the proposition that you can do the retrospective analysis, all right, because they actually looked at what happened in the 1940s and 1950s shockingly. I wouldn't do that. I would say that if you're going to relook at something, you go back and you go back to that particular point in time and say, you know, essentially did we make a mistake?

And I actually do think that the critics who say that Instagram was a rival, potential rival, of Facebook are right because the standard critique of the -- or the Facebook defenders will say, look, Instagram at the time only had eight employees; they had no revenues. All right?

MR. SAYYED: Mm-hmm.

MR. LITAN: So they're a nothing company. How can they be a threat? The problem is that

Facebook paid a billion dollars for those eight people, all right? And Instagram was all over the mobile phone system, all right? And Facebook was not.

Now, what I urge in my paper is that if you don't go back and you challenge Facebook, which you may not for -- I can understand for some reasons. I think you should because I think the billion dollars is still a lot of money. All right. Even though Everett Dirksen is not alive, a billion dollars is still a lot of money.

And at a minimum in the future in other mergers you ought to think a little bit more imaginatively about if the acquired firm really could be a competitor, all right? And if you use a little bit more imagination, it didn't take that much in the case of Instagram. In the future, you wouldn't allow such mergers.

MR. DEVLIN: Just to add to that, two thoughts, actually. First, on your preliminary or first remark about how to deal with merging parties throughout the noncompetition related virtue as part of the deal to get the challenge put to bed. I would say soliciting or accepting those kinds of contributions to satisfy a competition issue poisons the integrity of the antitrust enterprise. And I

categorically have an issue with that. I think that's something to value what we have here.

And I think modern antitrust under both agencies has -- both federal agencies has a strong tradition in that respect and has done much to help convince other agencies around the world to, if not fall in line, at least to hear us out on that.

Second, I'm not going to talk about any specific consummated merger for reasons you can probably understand given where I work. But what I would say is that there's an odd ambiguity in the law in that the DuPont decision you're referring to, I believe the language you used was whether there's a reasonable prospect, "at the time of suit."

MR. LITAN: Right.

MR. DEVLIN: A proposition that if you took literally means that we could trace back to acquisitions centuries ago or decades ago and, through an elaborate spider web exercise, show a problem today. And you don't have to be, I think, an economist to figure out that there could be dangers of pursuing that line.

But putting all that aside, I mean, remember the Evanston FTC matter where they concluded there was, in fact, a Section 7 violation based on

post-acquisition evidence but they couldn't unscramble the eggs. There was still great value to that decision in figuring out the antitrust economics brought to bear to help you to try to, you know, decide matters more precisely in the future.

So value in and of that in itself, and plus realistically 10 years later, in fast-moving markets, so difficult to recreate in the but-for world. So I'll stop there.

MR. SAYYED: Anybody else?

(No response.)

MR. SAYYED: I'll make one point. When we concluded, there was often talk about the hospital merger retrospectives that were done -- initiated by Muris when he was chair, and Joe was bureau director. They were done as enforcement matters, not -- you know, not studies. And there were, you know, four to six -- four or six transactions looked at. One we challenged. One the Commission issued a closing -- sort of a closing statement on or a statement that explained why they didn't proceed. And then there were at least, I think, two, maybe more, where, you know, the evidence was -- or the data, let's say, was not only inconclusive but difficult to work with.

And, you know, antitrust is generally a

predictive and probabilistic effort. It shouldn't surprise people that we -- that the agencies get decisions wrong. But people should recognize, I think, that those wrong decisions go both ways.

And there -- we -- as a matter of course, we don't look at transactions we challenged and ask whether we should have challenged them and then say well, geez, maybe not. And that's something as we try to put greater formal structure around the merger, retrospective work we do, is to sort of think about what we're learning from that. Right? Because it is somewhat biased if we're only looking at transactions that were challenged or that we consider should have been challenged.

So with that, I'll close the panel. I have a few minutes of closing remarks, but maybe I'll just take a minute to let people get out of the hot lights and then I'll stand up and do it. And I say thank you. It was, I thought, a great discussion and obviously could have used four more hours.

(Applause.)

CLOSING REMARKS

MR. SAYYED: There's more light here so I'm going to do this here. I may or may not go over the 15 minutes. It depends if I say everything I wrote down or scribbled down.

First, Howard Shelanski gave great closing remarks on the first day of our hearing sessions. And, you know, they're worth sort of listening to again. And I'm going to try not to make the points he made. I'm really going to do two things. I really want to thank lots of people and I want to do it by name.

Now, that's a reason for people to turn off, so I'm going to say -- and I'm also going to try to discuss some of the things worth thinking about in terms of output from these sessions as I talk about at least the folks in OPP.

So, first, you know, thank you to all the participants. We've had -- I think the count is 393 unique, non-FTC participants in these sessions. We honestly did not target that. When I heard we were at 393, I said, man, if I can get like two more hours I could get us to 400. But 393 is pretty good and we thank them. A lot of people put a lot of work into it. And, you know, we're going to take everybody's

comments at the sessions seriously.

I want to thank the law schools that we went out to. You know, the staff at those law schools helped us a lot. It is difficult to leave our own building, and all the law schools made it relatively easy.

There was a question I saw in somebody's Twitter feed as to why we went out to law schools and also why the sessions were cosponsored with law schools. We went out to law schools because we wanted to involve or make interaction between panelists and students more likely and easier to do. We just wanted to show to students, at least the potential to show to students who are not especially interested in antitrust or focused on antitrust and consumer protection, that there are a lot of interesting issues, and, you know, maybe introduce people to something they wouldn't otherwise think about.

They were cosponsored with the schools because the schools put a lot of effort into what we did. We drew on their faculty, we drew on the staff, and so we just felt it should be considered cobranded and cosponsored.

I want to say thank you to the people outside the FTC who came to all these sessions. I

mean -- or, you know, helped us with these sessions, the AV team, Yorktel, the court reporters, right? All of that made it easy for us to get these sessions out, make them available to people who could not be here, who could not travel, who could look at it at their leisure.

Of course I want to thank FTC personnel, of course, outside of OPP. The bureau directors, heads of the different offices. So in particular Andrew Smith, Bruce Hoffman, Bruce Kobayashi, Alden Abbott and Randy Tritell, who made their staff available to us to participate in these sessions to make them better.

The point of these sessions, these hearings, is -- this is not really a policy discussion or it’s not intended to be a policy discussion. It is intended to influence the enforcement mission of the Commission. And so we are not going to do anything without the involvement of the relevant bureaus and other people, right? We are in a sense -- and I'll talk a little bit about the output. We're not going to describe the issues in our output. We are -- we are doing this to improve the enforcement mission of the agency. That's something OPP should be involved in. And we’ve got -- we’ve got a lot of smart people

who can do that.

Of course, the biggest thanks should go to the personnel of the Office of the Executive Director, Dave Robbins, who's the head, who, you know, provided a lot of sound and good useful advice when we hit rough spots. He was especially good at clarifying some -- what appeared to be difficult decisions in very simple ways.

Pat Bak and Monique Fortenberry, his deputies, and Gretchen Kohl, who are with us all the way through; you know, the OPP staff originally said, you know, how can we do this on the pace you want to do it?

I think people may have forgotten that between September 15 and roughly November 15th, we did a substantial amount of hearings and then had sort of the same effort in the March/April months when we returned from the forced vacation.

Kathy -- oh, I should not forget Alex Iglesias, also in the OED office, who was often with us and helped tremendously. Of course, many other people helped but I like to call out some people by name. Catherine MacFarlane and Peter Kaplan in the press office, OPA's team helping us get the word out on these sessions. Mitch Katz came today because he

couldn't travel with us. April Tabor in the Secretary's Office and the Records Office, for handling comments we received and making them accessible to the public.

I'll remind everyone that the comment period closes 11:59 p.m. on June 30. We really want the comments. We've gotten a lot of good comments and, you know, we'll take more. We're reading all of them.

Bruce Jennings, who's really run sort of the video feed, some of the IT efforts we've done, you know, making last-minute changes. We thought we couldn't -- well, today we made some changes, you know, five minutes before the sessions began. And, you know, these things take time or raise the potential for things to go badly wrong. But Bruce and his team was able to make those changes to accommodate everyone without any issues.

All the Commissioners and their offices for supporting this effort, and I think conveying the importance of it in their public remarks when they spoke to other groups. I'll talk a little about the Chairman later.

Of course the staff of the Commission, most involved in these sessions and the substance. In the Bureau of Economics, Dan Hosken and Dave Schmidt ran,

prepared the content for the merger retrospective hearing. The Chairman considers that the most important hearing because of the questions about whether we're getting merger enforcement and merger policy correct.

You know, we've collectively been asked to think about a couple of things, but basically how would we continue to evaluate and implement a merger retrospective program that, you know, just becomes not only a core part of the Commission's mission because the Bureau of Economics staff does them continuously, but, you know, what kind of resources should be devoted to it to answer these questions about are we getting merger policy and merger enforcement decisions correct.

In the Office of International Affairs, Molly Askin and Deon Woods Bell, they took the lead in running the -- what I'll call the international sessions we held in late march, bringing in a lot of non-U.S. colleagues to think about how the FTC could work more effectively to identify, investigate and prohibit anticompetitive conduct and deceptive acts and practices with our non-U.S. colleagues.

Since I'm talking about OEA, I'd also call out Maria Coppola for helping us bring in folks from

outside the U.S. to comment and participate in our substantive sessions with respect to issues they were facing outside the U.S. but that we were also considering in the U.S.

In the Bureau of Consumer Protection, we worked especially closely with Jim Trilling, Elisa Jillson and Jared Ho, and Maneesha Mithal from DPIP on the privacy and data security sessions. I mean, they conceived the substantive content there. They ran them with an assist from OPP, the Bureau of Economics, and their colleague, James Cooper. You know, those are two important topics. We couldn't have done it without them, and they ran with those after we sort of proposed the idea of doing sessions on those.

I skipped but -- so now I want to do now the Office of Congressional Relations, you know, who provided a lot of outreach to Congress to explain why we were doing these things and the importance of these things and why they were relevant to that work.

Also within BCP, since I mentioned DPIP just a moment ago, Mary Engle and Kristin Williams developed the substantive portion of our broadband hearing that focused on deceptive conduct in broadband markets. That’s something that we needed their help to do and they stepped up.

So now I'm going to turn to OPP. First I want to thank some previous directors who were supportive of this effort and provided advice on this effort and how to do it. Most important, Susan DeSanti, Maureen Ohlhausen, who directed OPP some time ago, and Andy Gavil, and also two-time Acting Director Tara Koslov. They all had positive reaction to this and helped guide our both process or planning and substance.

I want to call especially -- I want to call attention especially to Susan DeSanti. You know, way back in '95 she took Bob's Pitofsky's vision of reestablishing and reinvigorating the Commission's use of hearings, workshops, and conferences to evaluate and address topical and long-term issues in both antitrust and consumer protection and made it work. She did it for Pitofsky. She then did it for Chairman Muris with the healthcare hearings and IP hearings. And she did it later for Chairman Leibowitz.

I did not have a full appreciation for the value of her unique value in these things until I sat down and had to think about both how I would think about using my time as director of OPP and also specifically with these sessions.

I'd also say, you know, she had a

significant and important role in the 2007 report of the Antitrust Modernization Commission. You know, these things should not be overlooked. And that report in particular as well is an important report and it shouldn't gather dust on people's bookshelves. I think AAG Delrahim was a member of that Commission and I think has tried to implement or advocate for some of its reforms. But I think more can be done with it. And I think, you know, the business and public interest community should think about that and look back at that and potentially propose some more focus on some of those things.

Now, within OPP, this was an all-office project. Everyone within OPP worked on this matter and had at least one substantive hearing to develop content on and devise a framework, notwithstanding that they also had other work to do, both work that was in the pipeline and work that we do in the ordinary course.

Now, you might ask to what point did we do this? And I'm going to come to that in a minute. So I'm going to take this alphabetically, I'm going to give you a few words about each person. Katie Ambrogi helped finalize the hearing session on privacy, big data, and competition. And then she immediately

turned to developing -- helping develop next week's workshop on Certificates of Public Advantage. And, you know, again, great contribution on both of those things. We've asked her as the work on the COPA workshop maybe winds down to think about whether there's a reason to revisit issues either discussed or that were -- or to identify new issues in the healthcare area, whether we should revisit and redo something like the 2002-2003 healthcare hearings and the 2004 report.

OPP has done a few smaller healthcare workshops since then, most recently 2014-2015. But healthcare is so important and there are new issues both with the changes made in response to the Affordable Care Act in particular and changes in response to some changes in that it may be worth just thinking about returning to some old issues and thinking about new issues.

Bill Adkinson, he took the lead within OPP on the sessions on vertical mergers, common ownership, and monopsony; had a strong role on the platform topic. These are all topics on which additional guidance of the public may be helpful and clarity on the FTC's enforcement position might be useful. And Bill is taking the lead again within OPP in our effort

to see if we can provide that guidance.

Bill, along with Derek Moore, is a go-to person on their sharing economy stuff. And you know, we still continue to look at advocacy opportunities in that area, or even enforcement opportunities in that area. So I'd encourage people to, you know, come in and talk to us if they see something in that space that they think will be of interest to us.

I want to note that the sharing economy work builds on the work of the E-commerce Task Force initiated by then OPP director and now Senator Ted Cruz. We're thinking of taking a look at how some of those markets have developed since our initial look at them -- initial look at the 8 or so -- 8 to 10 markets we looked at back in 2002. So if people have continued interest in those specific markets, we'd be interested in hearing how those markets have developed.

Ellen Connelly along with Karen Goldman were tasked with developing the substantive content for our sessions on algorithms, artificial intelligence, and predictive analytics.

Now, I think this is the most important topic that we are thinking about because of its long-term impact on business and maybe consumer even

decision-making. And we're at a very early stage in thinking about how and whether, you know, antitrust or consumer protection law or practice needs to sort of change.

So Ellen, you know, with Karen, has been asked to really return to some very basic questions really, right? Does the use of these techniques require the FTC to rethink the application of its core Section 5 statements with respect to unfair methods of competition, which is a fairly new statement, deception and unfairness.

Now, Section 5 is perceived to be quite broad and flexible. I think many people have made that point in our hearings. But, in fact, those -- particularly the last two statements but now maybe even moreso the section -- the statement on unfair methods of competition, those really define the scope of how we apply Section 5 in the vast majority of what we do. And we ought to think carefully about whether AI, machine learning, big data, and the way they impact decision-making -- business decision-making, marketing, we ought to think really hard about whether we need to do -- maybe let's say a fundamental rethinking of how we apply those statements.

Now, we may not need to. But we ought to

think about it because there's been a lot of sort of casual, I think, references to using Section 5 to do all sorts of things. But that's an area where there's some long-term -- maybe some long-term implications to how the Commission looks at decisions and markets.

Karen Goldman, working with Ellen, as I mentioned, developed the content for those hearings. Karen is a Ph.D. in neuroscience, and so we've asked her to take a very deep dive into the science -- I think that's the right word -- of AI and machine learning, machine decision-making. And so as we -- as a Commission, as a staff, you know, just know more about, you know, what is it that we need to know as we make our investigation and enforcement choices, right? If we don't understand the technology or the science, maybe even the art of AI, we just may incorrectly either handicap or overextend our enforcement efforts.

So, you know, there's two -- I've read two types of literature in this space. One is very high-level surface analysis that says AI is very interesting, has benefits and problems, and then, you know, very technical textbook-oriented discussions that maybe only someone in the field can understand and use.

We need to develop something, again, in

conjunction with the staff that gives the staff an understanding of what matters and what doesn't matter with these -- with this science, with these techniques, to our investigation or enforcement efforts, and also develop sort of a common language so when people come in to see us we know what they're talking about or maybe they know what we're talking about.

Just as an aside, Karen has probably the best paper on telehealth that I have ever read and we have put it aside for a little bit while we're finalizing our work product in this effort. But it's something we're going to get out because telehealth, the promise of telehealth, is large, and impediments to its growth may be significant and problematic, particularly -- and particularly harmful to consumers in rural areas or less populated areas where access to medical care is much, much harder. So that's an area of real interest to us.

Again, so if people are -- have advocacy opportunities, they ought to bring them to us if they have any matters that may suggest enforcement look is appropriate, we ask people to bring them us to.

Elizabeth Gillen, who while devoted full-time to the Qualcomm case, helped develop with

Suzanne Munck and our former colleague John Dubiansky the IP hearings -- the IP component of these hearings. As John mentioned to me at lunch earlier, we've done -- the Commission has done a lot of work in IP over the last 17 years. But we don't want that work or our interest to go stale. So we are thinking about other areas where there's an IP competition overlap where we can bring -- you know, sort of competition framework to tough issues.

One of the issues some of us are particularly interested in because it relates to the platform issues we have been asked to think about is copyright and antitrust issues. It's not an area the Commission has been especially active in. But in October -- in our October two-day session on IP, we spent a little time on copyright issues. So it's an area we're thinking about how to develop.

Elizabeth is also working on -- with some others, but right now sort of maybe the primary, thinking about how to further develop our Noerr-Pennington efforts. The Commission has brought -- has recently, let's say, focused on Noerr-Pennington issues associated with IP rights.

Elizabeth, with her background, is, you know, well-suited to help advance that thinking. But

we're thinking more broadly. One of the things we're especially interested in -- when I say we, I often mean me, but -- or, you know, at least a group of us in OPP. I should have said I'm not speaking for the Commission with respect to these things, but these are things we're developing for presentation to the Chair and Commissioners.

One of the things we're really interested in is further developing the law with respect to sham and/or serial petitioning. You know, if you know of efforts to use government process, particularly repeated attempts to use government process to exclude competition, we want to know about it because those may be opportunities for us to even make amicus filings or consider whether our colleagues in the anticompetitive practices division, or shop of BC, would be interested in further review.

Now, you know, First Amendment rights to petition are important. But, again, speaking for myself, they should not be read so -- they should not be so broadly deferential to anticompetitive conduct by firms and competitors. I might say we don't -- as an antitrust agency we don't need to fetishize the First Amendment. We ought to think hard about where it is being used inappropriately to exclude firms.

Now, since I mentioned IP, I want to mention John Dubiansky. John left the Commission -- left OPP in October to go back into private practice in-house. But he had an important role in identifying new issues where there was an IP antitrust innovation overlap that, you know, we're thinking hard about how we might develop, you know, I'd say most of the policy positions. But that might be of interest to other agencies in the Federal Government and also third parties.

Of course, Suzanne Munck, who is both a deputy in OPP and the Commission's chief IP counsel, took the lead role in developing the IP content that you saw in those two days and additional IP content that you didn't see that we sort of put on hold because of the forced vacation.

She also took the lead in the broadband hearing session. So, you know, between Suzanne, Elizabeth and maybe someone to be named later, we're going to further develop these IP topics into a forward-looking IP agenda that doesn't discard what the Commission has done in the past. I don't -- neither I nor other relevant people at the Commission, don't believe it needs to be discarded or changed. But we want to build on it and we want to look for new

areas. So Suzanne, Elizabeth -- Suzanne, Elizabeth, and as I said, hopefully somebody else are sort of in charge of doing that. So we welcome, again, submissions on, you know, what are new areas we should be thinking about.

I mentioned the copyright antitrust issue. It's something we -- you know, we'd like to spend some time thinking about.

Dan Gilman took the lead in developing the content and substance of the privacy, big data and competition hearing. This is a tough task. You know, it was initially conceived as intended to focus on basically the fact that there are tradeoffs between greater or lesser privacy rights and lesser or greater competition or innovation in specific markets, or even more generally in the economy, current markets or in future markets.

We're going to do that. But, you know, as we thought about this more, we thought, well, we really need to focus on how we will identify and measure and make those tradeoffs in both our policy and really importantly maybe in our enforcement efforts.

You know, our enforcement decisions in mergers or conduct occurring in the tech industry or

industries where data is an important asset, I think it is going to require us to at least think about how we identify harms related to privacy concerns or security concerns. And even in the absence of legislative direction, we just need to think about how we make these tradeoffs. You know, privacy is equality in a sense. So we've got to think about how we make these tradeoffs, how we implement them, how we measure them, how we identify them.

It's a tough task but I think we need to do it rather than sort of ignore it, and we need to give guidance and we need to say something that, you know, people can react to and tell us where we got it wrong or where we got it right.

Part of this effort just has to include a better understanding and explication of harms associated with privacy values and preferences, both expressed and revealed preferences. I mean, how do we take account, particularly in the predictive antitrust work we do of potential harms in those space. And maybe we'll conclude we don't or we can't or it's not the right tool, but I think we've got to think hard about it.

And the same with, you know, how do we evaluate efficiencies that relate to those topics?

How do we define markets where those values may be important. I'll give you an example that I think is relevant. You know, two -- and, you know, this is a hypothetical.

I use two very different companies for two very different things. One has data on my purchases, one has data on my friends, family and relationships that I interact with. Well, if those two companies propose to merge, you know, should I be concerned? Should the agency be concerned that one efficiency justification for that transaction is to better market what I like to friends of mine?

Well, I can think of lots of situations where me or other people might be concerned about that. And I think we ought to think hard about how do we think about that in the merger context. Again, we might conclude that I'm wrong or that it's not something we would use, but, you know, people -- you know, protection of personal information probably matters to a lot of people. And so if transactions are going to affect that, or the -- it seems like something we've got to wrap our arms around.

Elizabeth Jex with Stephanie Wilkinson developed the content and substance of our sessions on nascent competition. Now, this is an area where

there's significant interest and attention. We had, I think, two important questions going into the session that we wanted public comment on. We wanted to see if we were thinking about it right. First, is there a sufficient and appropriate legal framework to effectively challenge and identify, challenge and prevent acquisitions or conduct that would result in the anticompetitive elimination of a nascent competitor or competitor in a nascent market? And does that take account of the procompetitive effects of the combination of what may be complementary strengths of an established and nascent competitor?

All right. And then the second question we went into was, you know -- to this was do we have the tools -- the resources, the tools, the knowledge, to identify and remedy conduct or transactions that are at least potentially -- may potentially have a material anticompetitive effect or a positive competitive effect? Right? How do we measure -- do we -- can we identify situations where nascent competition -- or the elimination of nascent competition would be an anticompetitive problem or would lead to positive effects.

And, of course, we do it all the time, but there's a real question of whether we're doing it

correctly, and I think this is the reason people are saying the agency needs to have, you know, more technologists, right? Well, we have a pretty good understanding of many markets that we deal with, but, you know, I think we're thinking about whether we need other resources.

So Elizabeth, you know, brings along experience with the pharmaceutical mergers to this issue. And I think what I took from the discussions, again speaking only for myself, is that there is a clear legal framework within Section 7 and Section 2 of the Sherman Act to challenge those transactions or conduct where we can, you know, marshal sufficient evidence to show there might be an effect. But you know, we'd like comment on that. I could be wrong and there may need to be improvements.

Now, we ought to be able to -- we ought to consider carefully whether the courts are or would analyze these questions with a clear understanding of how Section 2 or Section 7 would apply. And that's something I think we are -- well, we're both considering it and whether specific guidance from us would be valuable for the development of the law in this area.

Now, the second question is harder, right?

Predicting the potential effects of conduct on mergers is tough all the time. And so some of the issues that might dog us with respect to nascent markets or nascent competitors are just the same types of things that affect all -- or come up in all our investigations. But, you know, we're thinking about whether different resources, more knowledge, is needed.

You know, as an example of the different considerations that are relevant -- the factual considerations, you know, I direct people to former Chairman Muris' statement in the Genzyme/Novazyme transaction. It's about 16 years old and it's in the pharmaceutical industry. But I think, you know, what the Chairman -- what the then Chairman tried to explain there is still relevant and should be -- you know, should be used as we think about these other -- these newer tech issues.

Stephanie Wilkinson also worked on the nascent competition topic, putting aside for a short time sort of almost the sole responsibility for carrying out and developing the upcoming workshop on Certificates of Public Advantage.

You know, that effort, which we drew on other people in OPP and particularly as we got closer

to it, BE and also BC, it is important -- and, you know, we didn’t want to let it slide while we did this sort of new thing. That effort -- that COPA project was announced in November of 2017, and, you know, honestly it was delayed a little bit by these -- by the resources we devoted to this hearing session. But Stephanie, you know, carried the ball a long way on her own.

And as you might know, next week, June 18, we're doing a full day on COPA with economists and state enforcement officials, folks who have been involved with either monitoring, or I'll call it sort of evaluating the operation of hospitals after they were in this case granted immunity or protected by state action immunity from a challenge because of the Certificate of Public Advantage.

So Katie Ambrogi helped when she was able to get -- when we finished the big data privacy competition session. And Stephanie deserves a lot of credit for really continuing that work so that when we were done today we didn't look out and say, all right, where's the other work, right?

Okay. Ruth Yodaiken joined OPP about six months ago from DPIP and she’s taken a leadership role in our broadband hearings; helped develop those, and

more importantly is helping us develop a strong basis to advance our involvement in privacy and data security questions.

We have two computer science Ph.D. students with us over the summer, and she's working with them to think about a lot of these technology issues that folks suggest we, you know, should be thinking about or don't know enough about. And that's going to be important. We're going to continue with that at least as long as I'm director. We're going to try to have computer scientists either under contract or on a fellowship with us, or maybe even working on sort of some of their Ph.D. work, you know, that's applicable to what we do.

I know very little about technology, but I want to at least respect the idea that computer scientists and others can help us in our case selection and enforcement efforts. And, you know, we've started that within OPP; certainly other parts of the agency have been doing it a long time.

Sarah Mackey joined us from the General Counsel's Office last summer to fill the big loss of Tara Koslov going up to the Chair's office. She was originally slated to help run these hearings. I'm no administrator. You know, so keep the hearings and the

work product moving forward and on track while I kibitzed with everybody. But she has taken, you know, a real role in the substance, particularly on the AG -- the hearings this morning.

She has also taken the lead or been given sort of the responsibility to restructure and reinvigorate the Economic Liberty Task Force that then acting Chairman Ohlhausen announced. We're going to pick right up with that again and, you know, those issues will get some play in the future, particularly as they relate to state action issues and barriers to, you know, employment.

Derek Moore, he's really been a linchpin in our hearings effort over the past year. He's been a valuable resource to everybody within OPP and has, you know, had a leadership role in developing the content with respect to all our merger-related sessions, our labor-related sessions, and most importantly our platform sessions.

He's got on his plate primary responsibility within OPP, but we're -- and we're working on this with BC, BE, folks in the General Counsel's Office, on how to evaluate conduct of platforms under Section 2, Section 7, and of course maybe even Section 1.

We're working closely with the Technology

Task Force on this. There are a lot of theories out there about how conduct by -- conduct by and the business decisions of large platform companies may affect actual or future competitors. It's important for us to consider whether those theories are relevant to thinking about how -- whether competition is affected; whether consumers are harmed. And, you know, Derek is taking the lead on that.

You know, we've heard a lot of theories sort of in the abstract without a lot of evidence. We're not duplicating the work of the Technology Task Force, which is going to be looking at enforcement opportunities. But we think some real guidance on the application of Section 1, Section 2, Section 7, maybe some others, on conduct or acquisitions by, you know, large platform firms is necessary.

There's a lot of proposals about how to -- how to or whether to regulate, break up, develop different standards for relatively small number of platform companies, whether new agencies need to be created to evaluate their conduct or the effects of their conduct, the transactions.

You know, we think -- and by we, I mean me, a handful of others, think, you know, somebody has just got to put pen to paper and say here's how that

conduct would be evaluated under the laws; here's how -- you know, here's what a good case would look like; here's what we need to bring a good case, and then see if there really are these limitations either in existing law or in agency design that would require these changes that people have proposed.

You know, it's just we, I think, you know, should make sure when people come to us and say, do you support this legislation or this idea or this kind of case, that we both have a good response to that and also that we give guidance to parties, either the firms themselves or their suppliers or their customers as to what -- you know, what the antitrust laws can and can't do.

Personally, I'm skeptical that the laws cannot reach the conduct that's problematic, but we've got lots of people who say something different. And, you know, we're going to -- and of course what I think doesn't really matter. But we're going to think hard about that and we're going to try to make a case one way or the other for either the laws as they exist or the laws as they should develop.

And one thing, you know, this will do is maybe help us identify areas where our amicus program should be directed, right? Where and how should we

seek to influence the development of the law?

I think the last person besides Joe that I'll thank, Jacob Hamburger. He's the newest -- he's the youngest attorney in OPP and he joined us last year, just shy of a year ago. He's been invaluable in our efforts to pull the substance of these hearings together and to make sure they ran smoothly and were accessible to everybody. Look, everyone within OPP was necessary to pull this together, but I think it would have been impossible to do without Jacob's help.

So let me see. In discussing each of these individuals I tried to give some guidance on what our output might be; also on what other things we're thinking about. But there's a lot of interest in that. And, you know, we've not really talked much about it.

So I wanted to take this opportunity. I want to -- I mean, I'm grateful for the interest and I wanted to be, you know, somewhat responsive to the questions. I think there's a couple other ways to think about what we're going to do -- I mean, what we're aiming to do, right?

Our output is going to be forward-looking. We're not in a position to evaluate whether, you know, the past administration or the past five

administrations got antitrust enforcement or consumer protection enforcement decisions correct. We don't have those resources, and honestly I don't think it's a strong use of our time.

What we are doing is intended to be forward-looking. How will it influence the enforcement mission of the Commission going forward, or development of law in the courts?

Now, in just about every -- prior to just about every hearing session we sought comment on a few, sometimes a lot of questions. You know, we chose those questions or prepared those questions because we thought they were especially relevant to the topic. We're going to try to provide a response to those questions. In some areas this is going to be very difficult because it's a developing area. But, you know, we put those questions out for comment for a reason. And I think rather than ignore them we need to try to answer them.

And so that -- you know, if you wonder what the content is going to look like, look at those questions and we're going to try to answer them. You know, timing, some are in a sense more important than others, and so we may not get to all of them as quickly as might be necessary given, you know, the

fact that issues confront -- you know, come to us without regard to our work schedule. But we're going to -- if you want to know what we're going to do and what we're focused on, just look at those questions. I mean, I considered just putting the burden on the commenters, but that doesn't sound too right. So we're going to try to answer them.

I want to touch on a few things that I did not -- that did not make it into the hearings but which we remain interested in. I mentioned earlier we are moving forward with, you know, consideration of how to further advance the Commission's long-term interest in -- well, my interest, hopefully the Commission's interest, in narrowing the Noerr-Pennington exception to Section 1 or Section 2.

You know, I was part of that effort when I worked for Tim Muris. The Chairman was part of that effort. I think the -- as much as I like the folks who finalized the Noerr-Pennington report in 2006, I think it was a lost opportunity. We want to do for Noerr-Pennington what the Commission's actions over the past 15 years have done for the state action doctrine, right? Provided real -- more clarity to when immunity applies. And that was a long-term effort, but the trigger for the most recent

decade-plus efforts was the state action task force that Tim Muris and Ted Cruz set up. We want to do the same -- have the same effect on the Noerr-Pennington side

In addition, notwithstanding all these good results, the Commission has had on state action, and the division has also been part of that, there are a number of other areas with respect to state action that we want to explore where the courts, would like more clarification. And hopefully at least, again, in my view, we can narrow the use of state authority to limit competition or exclude competitors -- I mean the use of state authority, whether direct or granted to market participants to disadvantage competitors, particularly new entrants, is, I think, a serious problem. I think Bob referred to it in his slides. CEA referred to it a few years ago. It's a serious problem in the U.S. economy. And we are interested in narrowing the use of state or government authority to limit competition.

And I'd say small cases, you know, cases built on even what appear to be relatively stupid regulations that limit competition, sometimes make good law. So if you have -- if you are an entity that is disadvantaged by the actions of a state board,

particularly a state board made up of market participants, we want to know about it. You know, we -- it's a significant area of concern that outside of the antitrust community doesn't get enough attention as affecting the economy and the economic opportunities available to -- I'll say individuals.

So I want to say one more thing before I say a few words about the Chairman. Fifty years ago the Nader Report and Kirkpatrick Report heavily criticized the FTC as an institution. Both reports criticized the FTC as an institution focused on trivial matters.

Now, in response to those criticisms, a year later, then FTC Chairman Caspar Weinberger created the current structure of the FTC, collapsing multiple divisions and bureaus into the Bureau of Competition and the Bureau of Consumer Protection. The Bureau of Economics was not substantially restructured.

Well, one of the important questions we did not discuss during these hearings was whether the current structure of the Commission is the best structure given current issues, right? We've probably all seen, you know, suggestions that we substantially increase our use of technologists and create a Bureau of Technology; that what is now a division of privacy become a Bureau of Privacy or even be spun out of the

Commission to a separate agency.

Well, with the 50th anniversary of Weinberger's restructuring approaching this topic, I think worth considering, you know, the structure of the agency, is it the right structure? Does it allow for -- I think what a couple of Commissioners have said we need to do, which is make sure the BC side and BCP side are talking to each other on specific cases.

Now, I can tell you in the big cases in matters that, you know, do raise issues on both sides, they often do and -- going back some time now, you know, the Commission's investigation into search investigation of Google, you know, raised -- did draw on resources of both bureaus. That's not a unique situation but it's one that at least for the investigation and the outcome is public.

So it's not a new issue. The bureaus do talk to each other. But it is worth thinking about whether there's enough interaction there to deal with new issues and whether the current structure either supports that or doesn't. I mean, these are, again, my views, things I think are worth thinking about.

Okay. So, finally, you know, we couldn't have done this undertaking without Joe's support; we can't finish it without the Chairman's support. Oh, I

should mention two other people. You know, these things were -- the idea of this came up really in conversations between myself, Joe, Joe's former professor, and also our former colleague at the FTC, Tom Krattenmaker, and I think one of John's now current colleagues, Jeff Long.

So, you know, credit for lots of folks. But Joe, you know, deserves the real credit for moving forward with this and in this way, right? Now, Joe, I'm sure undoubtedly does not agree with all the policies or policy preferences of past chairmen or past Commissioners or decisions of past Commissions, right? I mean, that should not be a surprise.

It's not meant to signal anything, right? And he undoubtedly has views on many of the questions Congress is considering or that interest groups or other interested parties propose to us, propose to Congress.

But rather than implement his own policy preferences as chair, because he's the chair, he chose a much harder and much -- but longer lasting approach, right, to, you know, recognizing that there were real questions about antitrust and consumer protection enforcement, particularly with respect to privacy and data security issues, and that the consensus that

existed maybe for a quarter century, plus or minus, bipartisan approach to antitrust, had broken down. He thought it important to think long-term and really try to identify and develop response to these questions, response to the fraying of this consensus.

He wanted to do it based on empirical evidence, on an open process. And he said -- you know, he's given us sort of -- the OPP the opportunity to sort of do it. It's a much different approach than he could have taken. And it's, I think, consistent with what most affected parties want, an open, fair, transparent and explainable process, and one that hopefully will lead to consistency in application of the law over time, right?

I mean, he should be recognized, I think, really for pursuing this path rather than what I'd call the somewhat head-spinning and whipsaw approach adopted by other agency or executive branch department heads in -- you know, in any administration. It is -- what he's asked us to do, chosen to do, is much more likely to have long-term beneficial effects on competition, on innovation and economic growth than, you know, this just rapid, unsubstantiated changes in policies across, you know, different -- that occurs in some agencies.

So, you know, we were going to call these hearings the Pitofsky Hearings II because of Joe's both affection for Robert Pitofsky and to recognize that these really were in the mold of what he did, but of course we settled on the much less personal title.

But I hope if the FTC does this again, hopefully we do it well enough that people will consider doing it again, you know, that somebody thinks to call those second sessions the Simons Hearings II because he's devoted a lot of time to this, given a lot of support to it when he could have, you know, done something different that would have been easier.

So with that, I'll say we're done with the hearings and we're going to turn our full attention to our output. And we welcome continued comments from everybody. The only reason we've set a deadline on them is, you know, we want them to come in so we can rely on them. All right. So I'm sorry I went on very long. But thank you.

(Applause.)

(Hearing concluded at 6:04 p.m.)

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