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# Testimony of Attorney General Phil Weiser, State of Colorado Before the U.S. House of Representatives Subcommittee on Antitrust, Commercial, and Administrative Law

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Mr. Chairman, Ranking Member Buck, and Members of the Subcommittee, thank you for the opportunity to appear before you all today. In addition to my prepared remarks filed with the Subcommittee staff, I'm grateful for the invitation to personally address you on a matter that is very important to the future health of our economy and the protection of innovation—the state of competition in the U.S. economy.

Let me begin with a question I was asked 16 years ago when testifying before a prior Congress: "how can competition policy protect tomorrow's innovators when we don't know who they are?" When I briefed this Subcommittee in January 2020 at its Boulder, Colorado field hearing, we discussed this challenge in the context of entrepreneurship in the Internet ecosystem. In the early 2000s, when the Internet was an open field, investors saw considerable opportunities for new entry and innovation. Today, however, investors in some contexts shy away from investments in firms that threaten dominant Internet platform companies.

For antitrust enforcers, such reports raise the question of what, if any, enforcement actions are appropriate to restore competition to the marketplace. For policymakers, such reports and concerns raise an especially critical question—"how did we get to this point and where do we go from here?"

The short answer on how we arrived at this place is that, in some markets, economies of scale, network effects, and entrenched incumbents—aided by permissive merger policy—have lessened competition and contributed to a rise in market power. To be sure, many markets function in a healthy manner with more and more competition. Consider, for example, the number of video streaming services consumers may now choose from. In other sectors—airlines and pharmaceuticals, for example—there is too little competition and consumers are worse off as a result. This

underscores a key point for this Subcommittee—we cannot paint all markets with too broad a brush.

As an example of the decline of competition I have in mind, consider the airline industry. On account of a series of mergers, "four airlines [now] control almost 70 percent of domestic air travel in the United States." Moreover, this industry witnessed a successful effort by American Airlines in the 1990s to stomp out rivals through predatory pricing—and a mistaken court decision that failed to recognize this anticompetitive harm. In part because of that failure, we have seen little, if any, entry into the airline industry over the last twenty years.

For consumers, the decrease in competition and increase in airline industry market power hit them in their pocketbooks. Consider, for example, when fuel prices fell dramatically several years ago, consumers saw no benefits passed on to them in the form of lower air travel prices. Rather, as the *New York Times* put it, the airline industry recorded massive profits due to the fuel savings, yet all that consumers received were "free peanuts."

The impact of decreased competition in airlines not only means higher prices for consumers, but also that airlines can treat them poorly, recognizing that the lack of relative choice in the marketplace means consumers have no alternatives.

In Colorado, over the course of the pandemic, the number one complaint the Colorado Department of Law ("Department") received from consumers is against airlines. These complaints—particularly focused against Frontier Airlines—stem from a failure to follow federal consumer protection requirements. That's why I led a bipartisan coalition of forty state attorneys general to ask Congress to provide for state attorney general oversight and enforcement of federal airline consumer protection laws. I, and my state attorney general colleagues, urge Congress to make this important policy change.

Given the increased concentration in many sectors of our economy, an obvious response would be to conduct retrospective analyses that would ask what mergers triggered what anticompetitive results, when, and why. Federal antitrust authorities, however, rarely conduct such inquiries. The exception to this rule is the Federal Trade Commission's ("FTC") retrospective inquiry into hospital mergers in the face of a losing streak in the 1990s that led many to conclude that the FTC should "give up on hospital mergers." That retrospective led the FTC to identify a promising case—the *Evanston Northwestern* case—that demonstrated how hospital mergers can harm patients. And on account of the empirical evidence developed in that case, which clearly demonstrated the impact of price increases, courts re-evaluated their prior rigid formal tests, backed off of the hypothesis that such mergers would not increase prices, and condemned a number of hospital mergers as anticompetitive.

In the face of decreased competition and increased market power in many sectors, a critical question is why have courts often shown a reluctance to enforce the antitrust laws effectively. The short answer is that the Chicago School—a name given to a set of scholars who, starting in the 1970s, offered a critique of the antitrust laws—overshot the mark and focused solely on asserted risks of over-enforcing the antitrust laws. This critique was misguided, as it failed to take account of the risks of underenforcement. Nonetheless, the Chicago School approach continues to be very influential in the courts, providing an easy response to antitrust cases: bend over backwards to avoid findings of liability. That mindset, for example, explains the failure of the courts to recognize the effective predation strategy by American Airlines in the 1990s.

To revitalize antitrust enforcement and enhance competition policy, I recommend four important steps.

First, enforcers must bring cases that present empirical evidence and rigorous economic analysis of competitive harm in the marketplace. That is exactly what the U.S. Department of Justice ("DOJ") did a generation ago in the *Microsoft* case. In the *Microsoft* case, a unanimous D.C. Circuit concluded that the company took a series of actions, including entering into exclusionary contracts, degrading access to its platform, and keeping barriers to entry artificially high, thereby excluding technologies that threatened to erode its operating system monopoly.

In the antitrust cases our Department and other states filed against Google and Facebook, we alleged harms similar to that of *Microsoft*. In the case against Google, we explain in our complaint that Google acted to protect its monopolies in search and search advertising, including entering into exclusionary contracts and inhibiting the ability of other companies to acquire customers of their own. Like Microsoft in the 1990s, Google now faces threats to its dominance from adjacent sectors and has responded, not by competing on the merits, but by undermining the ability of rivals to compete. Remedying such conduct and restoring competition requires not merely ending the illegal conduct, but also taking affirmative steps to "lower the barriers to entry."

The antitrust case Colorado and other states filed against Facebook challenges its pattern of threatening to "buy or bury" its rivals. In particular, our complaint tells the story of how Facebook rivals were given a choice—to be purchased in their infancy or face "the wrath of Mark [Zuckerberg]," meaning a denial of access to critical opportunities (such as the ability to use Facebook to sign in to a service) that could undermine its business. Facebook's goal, in other words, was to buy upstart rivals before they undermined Facebook's monopoly power or to degrade their ability to compete on the merits. That action is the opposite of what our antitrust laws are designed to protect—competition on the merits.

Second, we can revitalize antitrust enforcement by developing more in-depth analyses of how markets work in practice. As I explained previously, antitrust enforcers have historically under-invested in retrospectives. One opportunity for this Subcommittee is to encourage and enable a more systematic investment in such studies, which could help antitrust enforcers better understand how and why competition issues arise in various contexts, ranging from agriculture to health care. Indeed, the FTC was originally created with this purpose in mind. Additional funding and resources for the FTC and DOJ Antitrust Division, as well as a clear mandate and authority for industry studies, is a sound and overdue investment by the Congress.

Third, as we consider competition policy more broadly, we should not limit ourselves to thinking about antitrust enforcement. The federal government can utilize considerable policy levers to encourage and enable competition. With respect to airlines, for example, airports make leasing decisions on which airlines receive landing gates. With respect to the pharmaceutical industry, certain patent law policies make entry for generic rivals more challenging, particularly for biosimilars. And, in the Internet ecosystem, the question is now asked whether interoperability and data portability requirements—long a staple of telecommunications regulations—are appropriate procompetitive measures to be imposed by a regulatory body.

Finally, legislative action is necessary to address the wrong turn called for by the Chicago School. In particular, a series of wrongly decided Supreme Court decisions can and should be overturned by statute. Moreover, as suggested earlier, I recommend that this Congress champion related consumer protection measures as well.

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We live in an important moment for antitrust enforcement and competition policy leadership. To meet this moment, this Subcommittee is well situated to strengthen our antitrust laws, support effective antitrust enforcement, and enhance competition policy and consumer protection more generally.

I welcome your questions and stand ready to support your efforts in promoting greater competition and standing up for consumers.