# 1NC

## 1NC — Off

### 1NC — T

#### Private sector means all non-governmental persons or entities, including non-profits

Senate Report 95 (Senate Report. 104-1, “UNFUNDED MANDATE REFORM ACT OF 1995,” <https://www.congress.gov/congressional-report/104th-congress/senate-report/1> , date accessed 9/10/21)

"Private sector" is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

#### A topical aff could change a universally-applied standard, like the CWS [Consumer Welfare Standard]

Phillips 18, commissioner on the Federal Trade Commission. (Noah J. November 1, 2018, Before the Federal Trade Commission, “Competition and Consumer Protection in the 21st Century,” <https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf>)

Our second topic today is the consumer welfare standard. And I think most folks even out in the public know, this is the standard that we use across the board, mergers and conduct in courts and at agencies, to judge anticompetitive conduct. It is not only a standard that we in the U.S. apply, it is a standard that is used by competition agencies around the world. It is an economically-grounded standard, and it requires that there be harm to consumers for conduct to be condemned. Mere harm to competitors is considered insufficient. So let me repeat that again. There has to be harm to consumers, not just competitors. The reason that is so, the reason harm to competitors is considered insufficient is because sometimes a less-efficient firm losing sales or market share to a cheaper, more innovative or efficient rival, can be and often is consistent with vibrant competition and with outcomes that benefit consumers. Courts and agencies have embraced this standard for decades. Today, there are two very important discussions going on about the consumer welfare standard, and they are happening simultaneously. And I think it is important that we understand that there are two conversations going on. One is a continuing discussion about how we apply the standard, regarding whether enforcement is at the appropriate level, whether it is properly targeted. This is an introspective question on some level, in which scholars, economists, practitioners, and enforcers all ask ourselves, are we bringing the right kinds of cases? Are we using the right kinds of evidence? Should we be doing more or less in certain places? The antitrust bar, the business community, and others benefit from this ongoing and active analysis. The second discussion happening now, and the one on which today’s consumer welfare standard panels will focus, is whether the standard is itself the right metric we ought to use in antitrust enforcement and in antitrust law; some argue that enforcement under the consumer welfare standard has failed because of the law, and accordingly, that we should reform the law.

#### Violation: the aff applies exclusively to conduct in the tech segment of the private sector.

#### Vote neg:

#### FIRST---limits and ground---the number of potential subsets is infinite---any industry, product, single companies, individuals---undermines clash. Only big affs have link uniqueness.

#### SECOND----precision---our interp has intent to define, exclude and is in legislative context.

### 1NC — CP

#### The United States federal government should stop the push for Buy American and European Digital Sovereignty as pet the Moghior evidence.

#### The United States federal government should —

#### Establish tax credits to incentivise climate action

#### Create a United States State Department Office of Subnational Diplomacy

#### Announce and enforce a nationally determined contribution of achieving emissions reductions 50% below 2005 levels by 2030

#### Disclose climate risks to investors

#### Aid in financing climate goals in developing countries

#### In coordination with the U.K. government, advance campaigns for sector-focused decarbonization

#### Fund research and development of green technology.

#### The United States federal government should, in cooperation with other global governments and political and social scientists, establish rules, boundaries, and guides for the power structures of the internet.

#### First plank solves US-EU coop — kicking it also acts as a massive alt cause

Cosmina Moghior 21, Denton Fellow with the Transatlantic Leadership program at the Center for European Policy Analysis, Protectionism Threatens To Torpedo The Transatlantic Technology Alliance, CEPA, <https://cepa.org/protectionism-threatens-to-torpedo-the-transatlantic-technology-alliance/>

On a broad level, the U.S. and Europe agree on the need for new regulations to limit dangers from the authoritarian digital model. They want to reign in tech monopolies. They want to protect privacy. They want to combat disinformation that threatens democracy.

On a practical level, both favors strengthened export controls of dangerous technology. A good example of cooperation concerns semiconductors. While the US is leading in most stages of the semiconductor supply chain, the Dutch company ASML dominates lithography equipment production. Even under President Trump, the Dutch government agreed to stop ASML from selling its most advanced machines to China.

Unfortunately, though, protectionism threatens to undermine future progress. The Biden Administration’s massive infrastructure plan and new “Supply Chain Disruptions Task Force” aim to keep innovation and production of leading-edge technology at home, making the U.S. a technological leader. Biden’s Buy America Executive Order (EO) encourages domestic procurement of “goods, products, materials, and services from sources that help the American businesses compete in strategic industries and help America’s workers thrive”. The Federal Acquisition Regulatory Council is developing recommendations to extend requirements to information technology.

The U.S. is pouring public money into strategic digital industries. In a rare bipartisan vote, Congress approved $52 billion in subsidies in June for chip research and manufacturing. States from Wisconsin, Texas, and Nevada are showering tax benefits on digital tech giants including Amazon, Apple, and Google to build factories and data centers.

Europe similarly is determined to build its own tech capacities. It promotes the concept of digital sovereignty aimed at providing the continent the capacity to make “autonomous technological choices.” Several projects promote domestic production of critical technologies ranging from next-generation mobile phone production to quantum computing. Public funds already are being spent on the

European cloud computing project GAIA-X aims to break the U.S. stranglehold on cloud computing. While Europe insists that its actions are not protectionist, designed instead to promote and safeguard European values, GAIA-X aims to ensure data protection and limit access of U.S. intelligence to European data. U.S. tech giants including Amazon, Google, and Microsoft have been invited to join, but are banned from joining the board.

The U.S. is home to the world’s largest Internet companies and fears that European regulatory measures will discriminate against them. Plans for a European “digital” tax – put on hold to secure a global corporate tax reform – would disproportionately impact American companies that provide digital services in Europe. A separate Digital Markets Act proposal under consideration at the European Parliament addresses unfair practices of the so-called “gatekeepers,” that operate “core platform services.” Most of the targeted companies will likely be American, beginning with giants Google, Apple, Facebook, and Amazon.

Europe and the U.S. need to step back from pursuing their protectionist instincts, which threatens to allow China’s increasing inroads into the digital market. Beijing is making investments on all continents on projects ranging from education to critical infrastructure. Many countries are turning to China for support and guidance on technological development while the U.S. and the EU focus on their domestic anxieties and ambitions.

A transatlantic tech alliance could provide the blueprint for offering a viable alternative to Chinese inroads in the developing world. Europe and the U.S. need to coordinate against the export of authoritarian practices on the Internet. They can only do this by dropping the push for Buy American and European Digital Sovereignty.

#### Next planks solve climate — the counterplan’s key to global modelling.

Hultman & Gross 21 — Nathan; Director of the Center for Global Sustainability and Associate Professor at the University of Maryland School of Public Policy. Samantha; fellow and director of the Energy Security and Climate Initiative. (“How the United States can return to credible climate leadership” Brookings Institute. March 1, 2021. <https://www.brookings.edu/research/us-action-is-the-lynchpin-for-successful-international-climate-policy-in-2021/>)

POLICY RECOMMENDATIONS

Against this backdrop, the United States can and should re-engage fully with the international community to support global action. To do so, it must act in five linked ways.

Embed climate action into U.S. society. The core project for the United States this year, and for years to come, is [to develop and implement a national climate strategy that brings to bear all possible areas of policy action](https://www.americaisallin.com/wp-content/uploads/2021/02/all-in-national-climate-strategy.pdf). In many ways the U.S. is playing catch-up, but one important advantage developed during the Trump years. As the federal government dismantled its climate efforts, the subnational community substantially increased its climate commitments. As a result, the United States has highly motivated and experienced actors outside the federal government. Federal action to catalyze and encourage these local efforts will be a key part of a bottom-up climate strategy, enabling more robust policy through oscillating political cycles at the national level.

Subnational actions are key, but some actions must take place at the federal level. New legislation is a first potential contributor. Given the current makeup of Congress, actions rooted in tax credits, investment, and stimulus are likely to have some traction in the near term. Other policies will have to be evaluated in light of their potential support. A second possible contributor is administrative actions that can be implemented by the executive branch, including regulatory actions under existing laws. Such administrative actions are less durable than legislative outcomes, but remain on the table as options.

Advance subnational diplomacy. While not all countries are structured like the United States, bottom-up leadership and implementation are central to success in some form in all countries. The United States can use its non-federal actors in its diplomatic efforts to support and bolster climate action around the world. For this, U.S. cities, states, and businesses can collaborate with their counterparts in other countries to discuss opportunities and strategies, supported by the U.S. diplomatic effort. Such efforts could take place through a [U.S. State Department Office of Subnational Diplomacy](https://www.brookings.edu/research/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state/), as recommended by Anthony F. Pipa and Max Bouchet in their brief for this series.

Announce an ambitious yet credible U.S. nationally determined contribution. As a central pillar of the Paris Agreement, countries around the world regularly offer their NDCs and report on progress. Each country’s NDC is viewed as an indicator of the country’s overall climate ambition. The U.S. target will likely have an outsized impact on overall global action this year. [President Biden has committed to offer the next U.S. NDC at a leaders’ meeting](https://www.eenews.net/stories/1063723747) that he will host on Earth Day, April 22. In parallel with developing the national climate strategy, Washington [will be undertaking an assessment of the possible emissions reductions](https://www.brookings.edu/research/building-an-ambitious-and-robust-us-climate-target/) associated with such a strategy. International perception of the U.S. domestic commitment is important; the commitment must be seen as sufficiently ambitious to unlock the other diplomatic opportunities available to the United States. The goal of achieving emissions reductions of approximately 50% below 2005 levels by 2030 is receiving a great deal of attention, but is highly ambitious for the United States. Achieving such a target would be a challenge, but the whole-of-society approach described above could improve the probability of reaching such a goal.

Revisit U.S. domestic financial regulations and international climate finance. Mobilizing new sources of finance to support a rapid economic and technological transition is central to addressing climate change. Here too, the United States provides an important link between domestic and international actions. Domestically, the U.S. financial system leads the world, but [U.S. financial regulations do a poor job of requiring disclosure of climate-related risk](https://www.brookings.edu/research/flying-blind-what-do-investors-really-know-about-climate-change-risks-in-the-u-s-equity-and-municipal-debt-markets/), including the physical risks associated with climate change. Recent movement toward addressing these issues can be accelerated. For example, the Federal Reserve recently joined the Network for Greening the Financial System and Treasury Secretary Janet Yellen made clear in her confirmation hearing that she believes climate change is a risk to the financial system. Through its outsized influence on the global financial system, the United States can encourage greener investment. Greater disclosure of climate risks would allow investors to direct funds to low-carbon and resilient assets, potentially moving the needle in areas where policy lags behind.

The United States must also exercise leadership in marshalling the financing that developing countries, especially the larger emitters, will need to raise their climate ambition, and to help poor and vulnerable countries adapt to the already evident impacts of climate change. This includes ensuring that developed countries live up to their commitment to mobilize $100 billion per year in climate finance, a central tenet of the climate accords. For the United States, meeting its commitment to the Green Climate Fund, established under the U.N. climate framework a decade ago, will be an immediate litmus test. The United States must also play a leadership role in unleashing the potential of the International Monetary Fund and the multilateral development banks in supporting more ambitious climate action. These institutions can play a role beyond their own financing by [catalyzing private investment](https://view.flipdocs.com/?ID=10025597_345534#370) through reducing and sharing risk. The COVID-19 pandemic provides an opportunity to “build back better” by tackling the interrelated challenges of job growth, climate change, pollution, and [biodiversity](https://www.brookings.edu/research/preventing-pandemics-through-biodiversity-conservation-and-smart-wildlife-trade-regulation/).

Support international efforts and national strategies. The United States can employ its substantial foreign policy apparatus to engage with key countries, partners, and allies around the world. In doing this, the United States can first communicate how it will achieve its own ambitious goals, then seek to understand how other countries anticipate delivering on their own goals and work with them bilaterally or multilaterally to support their national climate strategies. Finally, it can work with partners around the world to ensure that there is broad support for a strong outcome at the climate conference later this year.

Fundamentally, the climate challenge requires pushing the technological frontier in a dozen key sectors, from electricity to cars to building materials. [In every sector the challenge is different](https://www.brookings.edu/research/accelerating-the-low-carbon-transition/), and in every sector there are different arrays of international partners, such as national and subnational governments and pioneering firms. The United States should ally with the U.K. government as it advances key “campaigns” that reflect this sector-focused approach to deep decarbonization. The effort should identify a few sectors, such as cars and electricity, where the United States is at the frontier and can particularly shape the global effort.

#### Final plank solves digital interdependence — their evidence

1AC Morningstar, 21 (Richard Morningstar, Chairman at the Atlantic Council Global Energy Center, Former U.S. Ambassador to the European Union and Azerbaijan, February, 2-9-2021, "Prospects for Transatlantic Climate and Energy Cooperation", accessed 10-13-2021, https://www.wilsoncenter.org/article/prospects-transatlantic-climate-and-energy-cooperation) jcw

The Internet itself is power, nevertheless, for those who possess authority over it, their power is never shared, but it is increased after every new subscriber. The internet, with its own rules, turns out to be a government of the virtual world, as it has the same propensity of working. It has minimized conventional tools, and usual intellectual approaches, and maximized the futuristic desires of human beings while connecting them and bringing them closer, as shown in the following table.

**[TABLE OMITTED]**

The table above suggests that the internet does not remain a mere tool of information technology, but it is government itself, where the only differentiating function is virtuality. Yet, it has all the essentials of governance.

Moreover, internet governance bears the following characteristics following the lines of the governance of a physical world. Like a liberal economy, the internet is based on rules.

1. The Internet has a global administration that governs, i.e., the mainframe.

2. It has its decision-making processes to define the input and yield the output.

3. The Internet has its terms of use, and a violation of these terms automatically becomes illegal.

4. It has its mission which, largely, is to facilitate the consumer through any possible and virtually legal way.

5. The internet is based on common economic principles which give rise to more complex business models.

6. The internet is communication that can be ceased for those who violate the rules, and the flow of information can be shut down at any time.

After much advancement in the field of information technology, we may still be at the beginning of the internet era, as it is opening new horizons for the ordinary public to get more from the deepening of virtual interdependence, i.e., mobile connectivity, fast-changing and impacting social media, growing innovative ideas in terms of technology, handling cybercrime, and new transportation, housing, and education platforms like Uber, Careem, Airbnb, EdX, Coursera,etc. (Naughton, 2016).

Conclusion

The 21st century is the age of information technology, which provides a borderless field to virtuality. The consequential subjects of this virtual age, however, can only be studied concerning the internet, which is the greatest tool of connectivity and interdependence. The internet has become so powerful that no activity is beyond its reach now. So, the power paradigms amid modern-day socio-political conflicts, their continuous and rapid transformation and the growing interdependence as a tool to part the distances between social, technological systems and communities, all should now be defined by nature and structure of the internet. However, the political domains of today require a much deeper study of the internet. Moreover, defining internet power structures is an uncharted territory, which needs extensive insights from political and social scientists.

### 1NC — T

#### Prohibitions are exclusively injunctions not remedies

James S. Liebman 90, Associate Professor of Law. Columbia University School of Law, “Desegregating Politics: "All-Out" School Desegregation Explained,” 90 Colum. L. Rev. 1463, Lexis

4. The Prohibition Theory. -- The Prohibition theory is a theory of right with almost no theory of remedy. Accepting the Correctivists' view of official racial discrimination as a prohibited deviation from interpersonal norms, the Prohibition theory limits the remedial object when courts confront the wrong to henceforth prohibiting its recurrence. Taking to heart the Correction theory's private-law understanding of the violation and its antipathy to redistribution, the Prohibition theory deploys the remedy exclusively against those harms that are redressable without cost or benefit to anyone besides identifiable wrongdoers and the identifiably wronged. Then, taking to heart the difficulties of individually identifying the wrongdoers and especially the wronged and of directing an affirmative injunction at those persons but no others, the theory concludes that the best the courts can do is to issue a negative injunction forbidding the identified wrongdoers to err again in the future. 288

[\*1525] Prohibitory theory can be reached by a different route: The theory tracks the outdated equitable principle that a violation of a right will be prohibited via negative injunction, but that restoration of the status quo ante generally will not be ordered via mandatory injunction. 289

#### They violate---1AC Kirwood says the aff imposes remedies and damages. Solvency evidence defines the plan, so they’re stuck with it.

#### Voting issue---it’s extra-T, gives them huge solvency boosters and remedies should be neg ground vs injunctions affs.

### 1NC — DA

#### FTC fraud prevention is funded now---unexpected demands trade off

Bilirakis et al. 21 (Gus Michael Bilirakis is an American lawyer and politician serving as the U.S. Representative for Florida's 12th congressional district since 2013; Hon. Noah Joshua Phillips is a Commissioner at the Federal Trade Commission; Hon. Lina Khan is the Chair of the Federal Trade Commission, “Transforming the FTC: Legislation to Modernize Consumer Protection,” *Committee on Energy and Commerce*, 6/28/21, <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-transforming-the-ftc-legislation-to-modernize-consumer>)

Gus Bilirakis (3:12:44): Thank you. Our committee has worked extensively in a bipartisan manner to protect consumers from fraud and scams. Mr. Carter's Combating Pandemic Scams Act was enacted at the beginning of the year thanks to all of our leadership here. Representive Blunt Rochester's Fraud and Scam Reduction Act, as well as Representative Kelly's Protecting Seniors from Emergency Scams Act both cleared our chamber with bipartisan support this year. My bill, HR 2672, the FTC Reports Act, would require the FTC to report on fraud against our seniors. Commissioner Philips, how important is the work the FTC staff does to protect Americans from scams? Noah Josuha Phillips (3:13:33): Congressman, thank you for your question. The work we do to protect American consumers against frauds and scams, is our bread and butter as an agency. There is no work that makes me feel better as a commissioner, when we watch our ability to find bad guys, or taking money from American consumers, dipping into their life savings, and get that money back to them. So the work that you have done on the committee to provide funding, to provide tools for us to go after scam artists, is critical. And I think that needs to continue with the agency. Gus Bilirakis (3:14:05): Thank you, and Chair Khan, again, as you pursue other initiatives, when staff and resources be shifted away from the fraud program, which is so essential in preventing bad actors from harming our constituents? That's the question, please. Lina Khan (3:14:22): Sorry, could you repeat the question - when should services be shifted... Gus Bilirakis (3:14:26): Yes, of course. As you pursue other initiatives, when staff and resources be shifted away from your fraud program, which is so essential in preventing bad actors from harming our constituents? Lina Khan (3:14:40): Well, of course, we're always limited by the appropriations bills when it comes to thinking through how we're delegating resources across the agency. In certain instances, I think there are exigent needs that can arise in certain aspects. Gus Bilirakis (3:14:54): But you don't anticipate moving money from the fraud program, is that correct? Lina Khan (3:15:00): Not especially, but I mean, I think overall, we are trying to look through the prism of managerial efficiency and trying to understand how we can best use our resources, especially given some of the exigent circumstances and so we'll be continuing to make those determinations. Gus Bilirakis (3:15:15): I suggest that you not because this is such a very important program. Commissioner Wilson, can you elaborate on why the FTC Reports Act would also prove beneficial to increasing much needed transparency and the flow of information within the commission?

#### Unplanned expanded enforcement drains finite resources from existing priorities

Dafny 21, Professor of Business Administration at the Harvard Business School and the John F. Kennedy School of Government, and former Deputy Director for Healthcare and Antitrust in the Bureau of Economics at the Federal Trade Commission. Professor Dafny’s research focuses on competition in health care markets, and the intersection of industry and public policy. (Leemore, “The Covid-19 Pandemic Should Not Delay Actions to Prevent Anticompetitive Consolidation in US Health Care Markets,” *Pro Market*, <https://promarket.org/2021/06/10/covid-pandemic-consolidation-pandemic-monopoly/>)

However, as Commissioner Rebecca Slaughter, the current acting FTC chair has noted, these efforts have “faced resistance, with two of these recent victories only coming after district court setbacks.” Blocking a horizontal merger, even when it appears to be an “open and shut” case to a layperson, requires extraordinary resources, including large investigation and litigation teams, as well as economic and other subject matter experts who must analyze the transaction, lay out the case for blocking the merger, and rebut arguments advanced by Defendants’ attorneys and experts. To pick a recent example, consider the proposed merger of two hospital systems in the Memphis area, which the FTC filed to block in November 2020. Based on the FTC’s complaint, the merger would have reduced the number of competing systems from four to three and created a system with over a 50 percent market share. In the face of litigation, the parties abandoned the deal—consistent with this being a straightforward case. Although the FTC prevailed without a trial, it took nearly a year from the merger announcement to the abandonment. Over that period, the FTC likely devoted thousands of staff hours to the investigation and lawsuit and expended substantial taxpayer resources on expert witnesses. The higher the payoff from the merger for the merging parties—and the payoff in the case of an increase in market power can be substantial—the greater the incentive for defendants to invest extraordinary resources to fight a merger challenge. Even if there is only a middling (and in some cases, small) chance of getting a merger through, it may well be in the parties’ interest to see if they can prevail, absorbing the agencies’ (i.e., DOJ and FTC’s) scarce resources in that attempt and preventing them from devoting those resources to investigate other transactions or anticompetitive practices. The substantial resources required to challenge transactions, paired with stagnating enforcement budgets, may explain why authorities have elected not to challenge some horizontal transactions they would likely have challenged in previous eras. Using data on a wide range of industries, antitrust scholar John Kwoka documents that enforcers rarely raise concerns about changes in market structure that used to draw scrutiny—that is, mergers that yield five or more market participants.

#### Countering fraud is central to every element of terror operations

Perri 10, J.D., CFE, CPA(Frank, “The Fraud-Terror Link: Terrorists are Committing Fraud to Fund Their Activities,” Fraud Magazine, <https://www.fraud-magazine.com/article.aspx?id=4294967888>)

The threat of terrorism has become the principal security concern in the United States since 9/11. Some might perceive that fraud isn’t linked to terrorism because white-collar crime issues are more the province of organized crime, but that perception is misguided. Terrorists derive funding from a variety of criminal activities ranging in scale and sophistication – from low-level crime to organized narcotics smuggling and fraud. CFEs need to know the latest links between fraud and terror. Credit card fraud, wire fraud, mortgage fraud, charitable donation fraud, insurance fraud, identity theft, money laundering, immigration fraud, and tax evasion are just some of the types of fraud commonly used to fund terrorist cells. Such groups will also use shell companies to receive and distribute illicit funds. On the surface, these companies might engage in legitimate activities to establish a positive reputation in the business community. Financing is required not just to fund specific terrorist operations but to meet the broader organizational costs of developing and maintaining a terrorist organization and to create an enabling environment necessary to sustain their activities. The direct costs of mounting individual attacks have been relatively low considering the damage they can yield. “Part of the problem is that it takes so little to finance an operation,” said Gary LaFree, director of the University of Maryland’s National Consortium for the Study of Terrorism and Responses to Terrorism.2 For example, the 2005 London bombings cost about $15,600.3 The 2000 bombing of the USS Cole is estimated to have cost between $5,000 and $10,000.4 Al-Qaida’s entire 9/11 operation cost between $400,000 and $500,000, according to the final report of the National Commission on Terrorist Attacks Upon the United States.5 Terrorist groups require significant funds to create and maintain an infrastructure of organizational support, sustain an ideology of terrorism through propaganda, and finance the ostensibly legitimate activities needed to provide a veil of legitimacy for their shell companies.6 However, don’t think that only large operations are needed for terrorists to carry out attacks; small semi-autonomous cells in many countries are often just as capable of conducting disruptive activities without extensive outside financial help – they just conduct smaller-scale frauds.7 Even though the nexus between fraud and terrorism is undisputed, there’s concern at state and local levels that law enforcement professionals lack specialized knowledge on how to detect the fraud-terror link because they’re more apt to investigate and prosecute violent crimes.8 A critical lack of awareness about terrorists’ links to fraud schemes is undermining the fight against terrorism. Fraud analysis must be central, not peripheral, in understanding the patterns of terrorist behavior.9

#### Nuclear war---cash is key

Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University (Dr. Peter J., “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>)

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

### 1NC — T

#### ‘Scope’ is the extent of the area dealt with or relevant to the core laws

Oxford Languages ND, “scope,” shorturl.at/wCDY3

scope

the extent of the area or subject matter that something deals with or to which it is relevant.

"we widened the scope of our investigation"

#### It’s bounded by exemptions and immunities

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Expand’ must make more expansive---NOT merely clarify existing principles

Terry J. Hatter, Jr. 90, Judge, US District Court, California Central, “In re Eastport Assoc.,” 114 B.R. 686, Lexis

[\*\*10] Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. HN7 Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal. App. 3d 202, 211, 221 Cal. Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that "the bill would expand the definition of development moratorium." Senate Bill 186, Stats. 1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal. App. 3d 15, 22, 239 Cal. Rptr. 272, 276 (1987). By its ordinary meaning, the term "expand" indicates a change in the law, rather than a restatement of existing [\*\*11] law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### The aff intensifies application of antitrust for already covered activities by establishing a new mechanism for enforcement — it does not curtail an immunity or exemption to the core antitrust laws

#### Vote negative — eliminating exemptions and immunities is the most predictable limit on the topic, setting a baseline for prep while allowing for unique innovation on both sides and focusing debates on the balance between antitrust and regulation

## 1NC — Convergence

### 1NC — AT: EU

#### Broadly, alt causes outweigh their internal

Politico 21, (Where Europe and the US don’t see eye to eye, https://www.politico.eu/article/europe-us-trade-coronavirus-vaccines-data-china-russia-artificial-intelligence-farming-carbon/)

With eight days of glad-handing, photo ops and fanfare, Joe Biden and his team are hoping his trip to Europe will reboot transatlantic relations.

That won’t be easy.

Even though Biden’s election might have swung Washington’s needle closer to the EU playbook, the U.S. and Europe remain split on many policy issues key in Brussels and EU capitals. The two sides are at odds on everything from lingering Trump-era trade tariffs to taxing America’s tech giants to making farming more environmentally sustainable.

Here’s POLITICO’s rundown of the policy disputes that could prove problematic.

1. The tariff trade war

The new president has left much of Donald Trump’s trade policy untouched, including tariffs on steel and a blockade of the World Trade Organization’s court system. Biden’s drive for a “Buy American” policy, favoring U.S. companies in major public tenders, is one of the reasons Brussels is preparing a new legal tool to ensure reciprocity in big public contracts. After dithering for almost a decade, the EU is finally moving on plans to bolster the EU’s industrial champions that could be harmful for U.S. companies. Brussels and Washington have agreed to call temporary tariff truces on both steel and aluminum duties and Airbus-Boeing tariffs. But resolving these long-standing trade disputes will be the true test for the renewed transatlantic love declarations.

2. Waiving vaccine patents

Intellectual property rights are likely off the agenda after the U.S. threw the EU under the bus in May. Washington’s about-turn to support a waiver on patent protections for coronavirus vaccines blindsided many and left the EU scrambling to defend its continued opposition to a similar waiver proposal at the WTO. The aim of Washington’s plan? To allow wider production of coronavirus vaccines, unhindered by patent protections. The EU argues it won’t work, and that factors such as manufacturing are the limiting factor. But there are cracks in EU solidarity, with Italy and Belgium indicating support for a waiver. Officially, the EU is standing firm as one of the few WTO participants delaying detailed discussions on the proposal. On Friday, it presented a counter-proposal that sidesteps calls for a waiver in favor of clarifying existing provisions that allow countries to force individual vaccine makers to share patents during health emergencies.

3. Transferring everyone’s data

It’s been almost a year since the EU’s top court annulled a data flows deal with the U.S. called Privacy Shield due to fears of American surveillance practices. It’s the second time Europe’s top judges have killed such an agreement, and the pressure is mounting to get it right this time. Brussels and Washington don’t see eye-to-eye on how to fix the agreement so that it meets Europe’s high privacy standards, but Biden is keen to use this trip to push for a high-level political agreement with Commission boss Ursula von der Leyen. The goal is to lay the groundwork for a new transatlantic data transfer deal. The stakes are high. Privacy Shield underpinned billions of dollars in EU-U.S. digital trade, and companies on both sides of the Atlantic have been pushing hard for a replacement agreement for almost a year. Political deal or not, major hurdles remain over possible limits on how U.S. national security agencies can access EU citizens’ data.

4. Trade with China

Nobody mention the China deal. The EU in December struck an investment deal with Beijing, handing a big reputational win to China just as it dismantled freedoms in Hong Kong, locked up hundreds of thousands of Uyghurs without trial and withheld crucial information on the origins of the coronavirus outbreak. The timing of the deal was more than awkward for the Biden administration, which was not yet sworn in but broke its silence to warn the EU about its Sino embrace. The deal is now on ice amid objections from the European Parliament. But that doesn’t mean Washington and Brussels are on the same page when it comes to trade with their common rival. While the U.S. has banned imports of products from the Xinjiang region over slave-labor concerns, the EU has no such restrictions. The U.S. also continues to block reforms to the World Trade Organization that the EU sees as key to tackling Beijing’s state-capitalism model. Pharmaceutical companies are heavily reliant on U.S. sales to keep the industry healthy | George Frey/Getty Images

5. The cost of drugs

The U.S. has frequently complained that Europe pays too little for drugs, leaving pharmaceutical companies heavily reliant on U.S. sales to keep the industry healthy. With the U.S. pharma lobby having the ear of lawmakers, companies have remained sheltered from any effort to standardize drug pricing negotiations on the basis of how much added value new treatments actually provide. So-called health technology assessments have been commonplace in Europe for over two decades and are credited with preventing drug prices from spiraling and keeping health systems affordable. Biden has promised to tackle drug prices, and progressive Democrats have drafted a bill that would give the federal government the power to negotiate prices over insurance companies — but it’s already facing opposition from the president’s party. A group of House Democrats wants to see more moderate reforms that would preserve America’s “invaluable innovation ecosystem.” The divide could provide drugmakers with their escape from a bill considered by the industry as a worst-case scenario for U.S. drug pricing, and continue to drive a wedge between transatlantic allies.

6. Taxing Big Tech

There’s less than a month to go before negotiators are expected to reach a global deal to revamp the world’s tax regime. After the Biden administration unveiled new proposals — targeting the world’s top 100 companies, and not just Silicon Valley’s biggest names — the mood music changed on getting a deal over the line. Europeans, particularly France, are eager to include all the Big Tech companies, and are willing to reach a compromise with the U.S. on which other companies should also be included in the revamp. But nothing is certain. U.S. officials released — and quickly postponed — billions of dollars’ worth of retaliatory tariffs on countries, including many in Europe, that had imposed their own national digital services taxes. Those domestic regimes are still in place until a global deal is done. The European Commission is also about to release its own digital levy that could complicate the final days of negotiations. U.S. lawmakers’ eyes are so fixed on international negotiations for a multinational corporate tax that most have overlooked the digital tax that EU policymakers will separately propose. Brussels insists the EU initiative, expected in July, is no big deal. But among those who have noticed it stateside, there’s concern it could upend a global compromise. The EU wants to create a global golden standard for safe AI, but the U.S. is unlikely to swallow a rulebook drafted in Brussels | David McNew/AFP via Getty Images

7. Getting ahead of artificial intelligence

Europe has been courting the Biden administration since last year when it comes to agreeing on controls on artificial intelligence, but the silence from Washington is starting to get awkward. The EU wants to create a global golden standard for safe AI. But the U.S., which is home to the world’s biggest AI companies, is unlikely to swallow a global rulebook drafted in Brussels. According to the Commission’s top digital Commissioner Margrethe Vestager, the EU-U.S. summit will kick start a transatlantic initiative meant to boost tech cooperation, dubbed the Trade and Technology Council. But an “AI Accord,” pitched by Commission President Ursula von der Leyen in December, has yet to elicit an official response from Washington. There is increasing anxiety on both sides of the Atlantic over what AI technologies can do in the hands of authoritarian states such as China, and the U.S. and EU agree that technologies should be developed based on democratic values. But what that means in practice is unclear. In April, the European Commission proposed the world’s first AI law, to regulate AI uses most likely to harm people. Meanwhile, the U.S. remains loath to regulate its tech giants.

#### Antitrust is just one of many disagreements.

Atkinson 9-17-2021, president of the Information Technology and Innovation Foundation (ITIF), a leading think tank for science and technology policy (Robert, “How to improve transatlantic relations without caving to Europe on technology and trade,” <https://thehill.com/opinion/technology/572707-how-to-improve-transatlantic-relations-without-caving-to-europe-on>)

Washington and Brussels later this month will send senior delegations of economic and trade ministers to the first meeting of a new U.S.-EU Trade and Technology Council, dubbed the “TTC.” Their goal, as the name suggests, is to foster high-level cooperation on trade and technology issues of mutual interest. Given the long-simmering tensions between the two governments on matters such as digital taxation, cross-border data flows, antitrust, and more, such an effort is overdue. Whether the United States and European Union succeed in using the TTC to rebuild the transatlantic relationship holds broad implications, because the alternative — strained engagement between major trading partners — would contribute to the global fragmentation of the digital economy. And worse, it would be a strategic gift to China, because it would represent a fatal dissolution of a key alliance needed to limit China’s technology mercantilism and counter its digital authoritarianism. Forward-looking policymakers on both sides of the Atlantic need to recognize this and redouble their efforts to build a better, stronger, and deeper digital-trading relationship. But to do that, U.S. and EU negotiators will need to meet in the middle on some critical issues. The White House should not define success as increasing cooperation for its own sake — particularly if the price of comity is embracing the EU’s precautionary approach to regulating competition and technological innovation. The administration’s emissaries should instead focus on advancing key U.S. economic interests in ways that also maintain cordial relations with Europe. For example, no matter how desperately the Biden administration’s trade negotiators may hope to restore harmonious transatlantic relations after watching in dismay as they deteriorated during the Trump administration, the United States cannot agree to a digital services tax or acquiesce to discriminatory regulation of internet platforms, as the European Commission seeks to do with its proposed Digital Markets Act. Either of those would skewer America’s leading technology companies (and kill U.S. jobs) and fundamentally alter longstanding regulatory principles at the expense of innovation and growth. By contrast, the administration and Congress could, and should, meet the EU somewhere in the middle on data protection — not by emulating its heavy-handed General Data Protection Regulation, but by passing a national privacy law that establishes a common set of protections across state lines while improving transparency and enforcement. That would hopefully persuade the EU to support robust cross-border data flows, while at the same time defending America’s pro-innovation regulatory system. The most glaring differences between the United States and the European Union on digital economy issues stem from the fact that technology policy in the EU is motivated largely by social policy concerns — from data privacy rights to the potential for algorithmic bias — and it views the proper role of government as one of regulating and restraining digital companies and technologies to ensure they cause no harm. In contrast, the United States has long acted on the view that government is the one that should do no harm — and, where it can, it should support technological innovation. As such, the Biden team should ensure that talks cover how to foster the growth of technologies such as quantum computing and artificial intelligence. Besides, social concerns such as privacy, bias, and other related issues are best addressed at the national or regional level, not in bilateral or multilateral trade talks.

#### Trade war is an alt cause and takes out uniqueness — 1AC Lancieri — “With a trade war between the EU and the US looming after a series of trade sanctions, 113 increased strains”

#### No globalization impact — interdependence doesn’t solve war

White 13, Emeritus Professor of Strategic Studies at the Strategic and Defence Studies Centre of the Australian National University. (Hugh, “China: Power and Ambition,” *The China Choice: Why We Should Share Power*, pg. 51-53, Oxford University Press)

Certainly, the more countries trade and invest with one another, the greater the economic cost of conflict and the stronger the incentive to keep the peace. America and China today are more interdependent economically than any two comparably powerful states have ever been before, and this will certainly restrain ambition and rivalry on both sides. The question is whether the restraints will prove stronger than the pressures going the other way. If interdependence does trump strategic and political ambition, we should be seeing it happening between the United States and China now – but we have not seen much evidence of that yet. So far the two countries seem to be acting very much as strong states in the past have acted as relative power shifts from one to the other. Pessimists like John Mearsheimer and Niall Ferguson remind us that before war broke out in 1914, the great powers of Europe had grown more economically interdependent than they had ever been before, and than they would be again for almost a century.12

The lesson to draw is that interdependence increases the incentive for leaders to subordinate political ambitions and ignore nationalist sentiments, but it does not remove the need for them to take these bold and [politically] politicaly risky steps. The hard choices still have to be made. It is easy for leaders to see that economic interests require them to compromise their countries’ aspirations for international status and power, but it is harder for them to acknowledge that to their people, and harder still to put their economic interests ahead of strategic and political ones when a choice has to be made. In fact, most often people see it as shameful to put economic concerns first when issues of power and status are engaged. What president would tell the American people that their country will compromise its position on an issue like Taiwan in order to protect America’s economic interests? What Chinese leader could make the same argument to the Chinese people? When a choice has to be made, especially when it has to be made in the glare of an international crisis, it is very hard to put economics first.

In some ways the obvious importance of economic interdependence increases rather than limits the risk that rivalry will escalate, because of the way it can affect one country’s view of the other’s priorities. There seems to be a pattern here: each side believes that the imperatives of interdependence will press more heavily on the other. That inclines both governments to assume that the other will compromise to protect the economic relationship, so they do not have to do so. In Washington they expect China to back down from its challenge to America once Beijing understands the economic risks of rivalry. In Beijing they think America will blink. That makes both of them less inclined to compromise their own position – which makes escalation more likely.

Ultimately, faith in the power of interdependence boils down to faith in the power of money to trump other emotions and motivations. That is a risky proposition. We cannot assume that Chinese leaders will always choose rationally to maximise China’s objective benefits. They are no less liable than the leaders of any other country to allow what may be, or may seem to us to be, irrational desires for status and influence to trump the rational calculations of national interest.

Economics is important, but money isn’t everything. Countries, like people, want to be rich, but they also want to be safe and to feel good about themselves. For countries, as for individuals, aspirations for security and identity often compete with material interests, and often win. America’s and China’s divergent visions touch on very deep issues of national identity in both countries, which can easily seem to outweigh economic imperatives when the crunch comes. And there is always something a little strange about the assumption, implicit in the interdependence argument, that our economic desires will suppress the urge to strategic and political competition when our desire to avoid the horrors of war will not.

### 1NC — AT: Climate

#### No warming impact.

Ord 20, research fellow at the Future of Humanity Institute at Oxford University, has advised the World Health Organization, the World Bank, the World Economic Forum, and the UK Prime Minister’s Office and Cabinet Office. (Toby, “4. Anthropogenic Risks”, *The Precipice: Existential Risk and the Future of Humanity*, Oxford)

Major effects of climate change include reduced agricultural yields, sea level rises, water scarcity, increased tropical diseases, ocean acidification and the collapse of the Gulf Stream. While extremely important when assessing the overall risks of climate change, none of these threaten extinction or irrevocable collapse.

Crops are very sensitive to reductions in temperature (due to frosts), but less sensitive to increases. By all appearances we would still have food to support civilization.85 Even if sea levels rose hundreds of meters (over centuries), most of the Earth’s land area would remain. Similarly, while some areas might conceivably become uninhabitable due to water scarcity, other areas will have increased rainfall. More areas may become susceptible to tropical diseases, but we need only look to the tropics to see civilization flourish despite this. The main effect of a collapse of the system of Atlantic Ocean currents that includes the Gulf Stream is a 2°C cooling of Europe—something that poses no permanent threat to global civilization.

From an existential risk perspective, a more serious concern is that the high temperatures (and the rapidity of their change) might cause a large loss of biodiversity and subsequent ecosystem collapse. While the pathway is not entirely clear, a large enough collapse of ecosystems across the globe could perhaps threaten human extinction. The idea that climate change could cause widespread extinctions has some good theoretical support.86 Yet the evidence is mixed. For when we look at many of the past cases of extremely high global temperatures or extremely rapid warming we don’t see a corresponding loss of biodiversity.87

So the most important known effect of climate change from the perspective of direct existential risk is probably the most obvious: heat stress. We need an environment cooler than our body temperature to be able to rid ourselves of waste heat and stay alive. More precisely, we need to be able to lose heat by sweating, which depends on the humidity as well as the temperature.

A landmark paper by Steven Sherwood and Matthew Huber showed that with sufficient warming there would be parts of the world whose temperature and humidity combine to exceed the level where humans could survive without air conditioning.88 With 12°C of warming, a very large land area—where more than half of all people currently live and where much of our food is grown—would exceed this level at some point during a typical year. Sherwood and Huber suggest that such areas would be uninhabitable. This may not quite be true (particularly if air conditioning is possible during the hottest months), but their habitability is at least in question.

However, substantial regions would also remain below this threshold. Even with an extreme 20°C of warming there would be many coastal areas (and some elevated regions) that would have no days above the temperature/humidity threshold.89 So there would remain large areas in which humanity and civilization could continue. A world with 20°C of warming would be an unparalleled human and environmental tragedy, forcing mass migration and perhaps starvation too. This is reason enough to do our utmost to prevent anything like that from ever happening. However, our present task is identifying existential risks to humanity and it is hard to see how any realistic level of heat stress could pose such a risk. So the runaway and moist greenhouse effects remain the only known mechanisms through which climate change could directly cause our extinction or irrevocable collapse.

## 1NC — Competition

### 1NC — Turn

#### US tech leadership is secure, BUT antitrust cedes it.

Abbott 21, JD, MA, Senior Research Fellow at the Mercatus Center focusing on antitrust, formerly served as the Federal Trade Commission’s General Counsel. (Alden, *et al*, 3-10-2021, “Aligning Intellectual Property, Antitrust, and National Security Policy”, *Regulatory Transparency Project of the Federalist Society*, pg. 2-5, <https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-SecurityPolicy.pdf>)

II. The United States Plays a Critical Role in 5G Standards Development

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

III. Overly Aggressive Antitrust Enforcement Hinders American Technological Leadership and Threatens National Security

As companies from around the world develop the technology and standards for 5G mobile devices and networks, American companies are under threat by aggressive antitrust enforcement that ultimately redounds to the benefit of these foreign companies, which are economic competitors in countries that are also military competitors of the U.S. Over the past five years, foreign governments, particularly in Asia, have subjected U.S. companies to antitrust investigations that failed to follow basic norms of the rule of law, such as providing basic due process protections.14 These antitrust investigations were a thinly-disguised effort by these countries to force the transfer of U.S. patented technology to their own domestic companies, or to insulate their domestic companies from American competition. In recent years, Chinese, Korean, and Taiwanese antitrust authorities have brought nearly 30 investigations against 60 foreign companies across a range of industries, including manufacturing, life sciences, and technology.15

Antitrust challenges undermine intellectual property rights by forcing companies to license their products on non-market-based terms. One prominent example in U.S. history is when the Department of Justice wrung a concession from AT&T to license royalty-free the entire portfolio of 8,600 patents held by Bell Labs in a 1956 antitrust consent decree with the company.16 Today, the White House Office of Trade and Manufacturing Policy has observed that “China uses the Antimonopoly Law of the People’s Republic of China not just to foster competition but also to force foreign companies to make concessions such as reduced prices and below-market royalty rates for licensed technology.”17 Companies have also complained about poor policy guidance and procedural protections under China’s competition laws.18 Others have complained about China’s use of its competition laws to promote policy objectives rather than protect competition and advance consumer welfare.19 In one example, companies raised concerns with Article 7 of China’s State Administration of Industry Commerce (SAIC) 2015 Rules on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights.20 Under this provision, intellectual property constitutes an “essential facility,” which could allow parties to raise abuse of intellectual property rights claims against patent owners for a unilateral refusal to license their patents.21

Predatory antitrust enforcement actions threaten the ability of U.S. companies to continue to be leaders in 5G technological development. China and other nations with similarly restrictive regulatory frameworks can weaken the ability of the United States to compete in global markets by exacting high monetary penalties from U.S. intellectual property owners or forcing the transfer of their intellectual property to domestic commercial rivals. As a penalty for violations of its competition laws, China can impose exorbitant fines that range up to 10% of a foreign company’s entire revenue in the prior year.22 This is not a legal rule observed in the breach; it has already resulted in fines just shy of $1 billion.23

Another way in which courts in China and other foreign countries are harming U.S. companies is through the use of anti-suit injunctions. One example of this is in the recent patent infringement lawsuit brought by InterDigital, an American high-tech company that has developed key technologies in wireless telecommunication, against Chinese company Xiaomi. In June 2020, Xiaomi filed a lawsuit in the Wuhan Intermediate Court in China requesting that the court set global licensing rates for InterDigital’s patents on standardized technologies. In July 2020, InterDigital sued Xiaomi in India for infringement of InterDigital’s Indian patents. The Wuhan Intermediate Court then ordered InterDigital to stop its lawsuit with its request for an injunction in India. The Chinese court further prohibited InterDigital from suing Xiaomi and requesting an injunction or damages in the form of reasonable licensing rates, or even to enforce a previously-issued injunction, in any other country. If InterDigital does not comply with this worldwide injunction against pursuing legal relief for the violation of its patents in any other country, the company faces a significant fine in China. The type of judicial order issued by the Wuhan court is known as an anti-suit injunction and its purpose is to force an intellectual property dispute to play out solely in a Chinese court at the behest of the Chinese government. These court orders demonstrate China’s desire to become the source of 5G innovation and to dictate the licensing terms of the technology, and the anti-suit injunctions hamstring U.S. companies like InterDigital from enforcing their intellectual property rights anywhere in the world.

The unfair use of antitrust enforcement and related legal actions like anti-suit injunctions to weaken U.S. intellectual property rights around the world risks diminishing U.S. global competitiveness in critical technologies like 5G, and further empowers China and others to expand their influence over the evolving 5G technological ecosystem. To the extent the U.S. cedes its dominance in 5G standards development, China will continue its focused efforts to fill that void. Huawei, a China-based company, has increased its R&D spending while growing its share of patents on the standardized technologies comprising 5G.24 The President’s Council on Science and Technology issued a report concluding that Chinese actions in the semiconductor industry, which include a range of policies backed by over $100 billion in government funds, threaten U.S. leadership in the industry and present risks to U.S. national security.25 China’s “Made in China 2025” plan called for China to become a leader in 5G technology, including in the development of the standards for the technology, by 2020.26 The plan expressly favors Chinese domestic producers, calling for raising the domestic content of core components in high-tech industries like 5G to 70% by 2025.27

This issue, however, extends far beyond simply the ability and willingness of U.S. companies to engage in the requisite R&D to participate in the 5G race. Reduced U.S. influence on 5G standard-setting would force the U.S. government to rely on untrusted foreign companies for its 5G product supply. The Department of the Treasury has expressed concern about the “well-known” U.S. national security risks posed by Huawei and other Chinese telecommunications companies.28

#### Cracking down on Big Tech splinters America’s top innovators and dampens innovation across all sectors

Mitchell 21, JD, former Research Associate at the Mercatus Center at George Mason University. (Trace, 3-3-2021, "Weaponizing Antitrust to Attack Big Tech Is a Bad Idea", *Morning Consult*, <https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/>)

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses. And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water. Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic. In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks. These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want. You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem. The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger. But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options. We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort. Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers. Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come. But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to. Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed. As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer. By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much. And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally. But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Platform separation creates a duty to supply rivals---that collapses innovation and hampers efficiencies.

Dolmans 19, lawyers at Cleary Gottlieb Steen & Hamilton LLP (Maurits & Tobias Pesch, October 2019, “Should We Disrupt Antitrust Law?”, *Competition Law & Policy Debate*, Volume 5 Issue 2, Accessible at: https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf)

Individual proposals also raise questions. Take the ban on self-preferencing, for example. It would hamper vertical integration which is presumptively efficient, eliminate synergies, and create a duty to supply rivals. Platforms compete on quality, and users can and do switch if self-preferencing reduces relative platform quality. Search services, for instance, compete by showing their own results in response to queries that users put to them. Claiming that they must show results from rival services is like saying a newspaper favors itself by publishing sports articles by its own writers, rather than articles from rival sports magazines. If the essential facilities test under Bronner is considered too rigid, why not stick with the rule of reason set out in the Microsoft case that “the burden of proof of the existence of the circumstances that constitute an infringement of Article [102] EC is borne by the Commission,” and “it is for the dominant undertaking … to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.”64 A ban on self-preferencing goes too far. “Competition law is about preserving independent rivalry between competitors, not competitors cooperating with each other. Second, a duty to supply interferes with property rights and the right to choose one’s trading partners. Third, obligations to supply may diminish the incentives of both the company subject to the obligation and companies benefiting from it from competing and innovating. Fourth, in industries with fast innovation cycles, such as the technology sector, a duty to integrate rivals into constantly evolving technologies and products may delay – or preclude entirely – new developments.” 65

#### Antitrust collapses the only firms willing to work with the DoD, cedes market share to China, and enables espionage — turns Sitaraman

Bateman 19, Senior Fellow, Carnegie Endowment for International Peace. (Jon, 10-22-2019, “The Antitrust Threat to National Security”, *Wall Street Journal*, <https://www.wsj.com/articles/the-antitrust-threat-to-national-security-11571784197>

But there are dangers in restructuring any U.S. industry. One of the most serious remains largely unrecognized: national-security risk. Despite their faults, tech companies contribute directly to American military and intelligence operations. Their titanic scale can itself be an asset. Any responsible antitrust debate must address the national security risks of breaking up Big Tech—and the parallel risks of keeping these companies intact.

Consider cloud computing. The Defense Department is planning a massive global cloud called JEDI. Unlike corporate clouds, the “war cloud” must support life-or-death missions on austere battlefields despite virtual or physical onslaughts. The Pentagon found only two eligible bidders: Amazon and [Microsoft](https://quotes.wsj.com/MSFT). Three defense secretaries, a federal judge and the Government Accountability Office have upheld this bidding process.

It is no coincidence the two eligible bidders have a combined market value of $1.9 trillion. Vast resources were needed to fund global networks of hardened data centers linked by undersea cables. The U.S. military’s unique demands required companies of unique scale. Yet one JEDI bidder faces a concerted breakup campaign (Amazon), and the other was nearly dissolved in 2001 (Microsoft).

Scale also matters in intelligence collection. The Foreign Intelligence Surveillance Act compels U.S. companies to hand over data on suspected foreign agents. U.S. intelligence analysts increasingly rely on FISA to monitor terrorist communications or warn of cyberattacks. Tech giants have particular FISA value because their sheer popularity attracts users from around the world, including hostile actors. The largest tech companies provide some of the fastest-growing intelligence streams.

Splitting up Big Tech would reduce its intelligence value. First, smaller companies would lose global market share to foreign rivals such as Alibaba or Baidu, which can ignore FISA. Small U.S. sites can’t leverage the “network effect,” a gravitational force that helps large sites stay dominant. Intelligence collected from small sites would also be less useful. They see only narrow slices of online activity, whereas tech giants track users across sprawling internet ecosystems. Dismantling these ecosystems would put greater burden on intelligence agencies to “connect the dots” of potential threats.

#### Independently, leaving Big Tech alone is necessary to successful development of AI

Foster & Arnold 20, \*Dakota Foster, Visiting Researcher, Georgetown’s Center for Security and Emerging Technology; B.A., Amherst College; \*\*Zachary Arnold, Research Fellow, Georgetown’s Center for Security and Emerging Technology; J.D., Yale Law School; (May 2020, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI”, *Georgetown Center for Security and Emerging Technology Issue Brief*, <https://cset.georgetown.edu/publication/antitrust-and-artificial-intelligence-how-breaking-up-big-tech-could-affect-pentagons-access-to-ai/>

Today, the private sector dominates this domain of AI innovation. Other actors, including government funders and academic researchers, play an important role—especially in basic research—but at the application stage, the private sector generally consolidates critical inputs of data, computing power, and human capital, then applies them to real-world needs. In some cases, such as with Project Maven—where Google built AI-enabled image recognition programs for the Pentagon—the Pentagon is the customer; more often, AI products and conceptual breakthroughs developed by the private sector, from autonomous vehicles to image and speech recognition platforms, are (or could be) adapted for national security use.

Because most U.S. AI innovation currently occurs in the private sector, and at least some of this innovation pertains to the Pentagon, the Pentagon needs the private sector.22 Large tech companies, from Google, Apple and Amazon to slightly lower-profile giants such as IBM, Intel and Qualcomm, form the foundation of the private-sector AI innovation ecosystem. For example, Google, Facebook, Microsoft, Apple, and Amazon generate the most AI patents with a “significant competitive impact” worldwide, according to analysis by economic consultancy EconSight.23 The McKinsey Global Institute reports that large, digitally oriented tech companies worldwide spent $20-$30 billion on AI in 2016, 90 percent of which went toward R&D and deployment; for comparison, the Pentagon plans to spend $4 billion on AI and machine learning R&D in FY2020.24 Private-sector AI companies are especially dominant in applied research and experimental development.25

AI innovation would presumably continue in some form without Big Tech, but the data indicates that breaking up the largest tech companies would fundamentally change the broader AI innovation ecosystem. Such action would create unpredictable, but likely significant, trickle-down effects on AI applications in specific domains, including national security.

Shifting Incentives

In order to use AI for America’s strategic advantage, the Pentagon requires more than an innovative private sector. It must induce private companies to build defense-relevant AI products, acquire those AI innovations through procurement, and prevent those same products from diffusing to U.S. adversaries. In other technological domains, such as aerospace, the Pentagon has long relied on the private sector for procurement and holds significant leverage over industry. Its sheer scale and budget make it the defense industry’s primary consumer. In 2017, for example, 70 percent of Lockheed Martin’s sales went to the U.S. federal government.26 Historically, this financial leverage has incentivized companies to meet the Pentagon’s demands and build to its requirements.27

But these incentives do not exist with AI: while AI is a priority for the Pentagon, the Pentagon is not a priority for AI companies. In general, the largest U.S. tech companies do not rely on government contracts and have relatively little need for Pentagon funding.28 As a result, their research and products do not reflect defense priorities, and they have relatively little incentive to engage deeply in the government procurement process. Even in a future, AI-centric world, we expect large-scale, commercially oriented tech companies to play a critical role in AI innovation, and the Pentagon to remain a minor customer. As such, the Pentagon may rely on other firms —from defense-focused startups to traditional defense contractors—to translate general AI advances into defense-relevant products.

The Pentagon’s access to these cutting-edge, national security-relevant AI products hinges on private sector cooperation. This willingness will drive whether it sells to the Pentagon, shapes its technologies in accordance with DOD priorities, and complies with DOD terms of acquisition—including, potentially, by safeguarding the same products from U.S. competitors and adversaries.29 We need to understand how antitrust enforcement might affect these dynamics, as well as private-sector innovation more broadly.

# 2NC

## T — Exemptions

#### We are the most predictable — I’ll insert this list

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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#### This dispute is the core of the topic.

Barak Orbach 14, Professor of Law, The University of Arizona College of Law, “The Implied Antitrust Immunity,” 7/1/14, https://awa2015.concurrences.com/IMG/pdf/ssrn-id2447718.pdf

Introduction

An important question antitrust courts have always been grappling with, is whether a federal regulatory scheme regulating a business activity impliedly precludes the application of antitrust law.2 [FOOTNOTE 2 BEGINS] 2 See, e.g., Donald F. Turner, The Scope of Antitrust and Other Economic Regulatory Policies, 82 HARV. L. REV. 1207, 1207 (1969) (“A pervasive and overriding issue of domestic economic regulatory policy is when and to what extent we should rely on free competitive markets and antitrust, and when and to what extent we should resort instead to regulation.”) [FOOTNOTE 2 ENDS] The argument, first introduced shortly after the enactment of the Sherman Act,3 is that the mere existence of a special regulatory scheme impliedly precludes the application of antitrust law. The persistent use of the argument contributed to the rise of the “implied antitrust immunity” doctrine, which in the past was also known as the “implied repeal doctrine” and today is also known as the “implied preclusion doctrine.”4

During its first seven decades, the implied immunity doctrine was largely an application of the presumption against implied repeals, which treats lawmaking as a rationalizable process and attempts to reconcile inconsistencies between statutes. 5 In the early 1960s, with no meaningful changes in its framing, the antitrust immunity departed from canon of statutory construction replacing the deference to legislative choices with a commitment to competition policy. In Philadelphia National Bank (“PNB”), Justice William Brennan’s clerk, Richard Posner, 6 gave new life to the immunity using the traditional wording of the presumption but stressing that the existence of “broad [regulatory] powers to enforce of the competitive standard” is the key criterion courts should consider when they evaluate “plain repugnancy.”7

During the five decades that have followed PNB, the implied immunity has considerably evolved, transforming from a presumption against implied repeals of antitrust law into a flexible evaluative framework whose underlying premises tilt its outcomes toward preclusion of antitrust law. Offering immunity from antitrust laws to regulated industries, the implied immunity is exceptionally important. Its interpretation influences the scope of antitrust law, giving courts the power to strike the balance between antitrust and other national economic policies. Notwithstanding, the doctrine, its transformation, and applications by courts are poorly understood. 8 This Article seeks to clarify the functions of the implied immunity, its structure, premises, and flaws.

#### Creating a new prohibition within antitrust’s existing ambit changes how antitrust answers existing questions, but does not affect what questions it asks, or about whom---that’s not an expansion of scope.

Ida E. Wendt 13, Lecturer of European Law in the Department of International and European Law at Maastricht University, the Netherlands, “Article 101(1) TFEU and Its Field of Application With Regard to Professional Self-Regulation,” EU Competition Law and Liberal Professions: An Uneasy Relationship?, vol. 2, Brill, 01/01/2013, pp. 183–317 DOI.org (Crossref), doi:10.1163/9789004214514

In ruling firmly on the two concepts of restriction of competition and ancillary restriction the Court in Wouters demonstrated that it is not 1022 willing to accept a prima facie exception from the scope of application of Article 101(1) TFEU for the liberal professions. However, while the facts of that case did not reveal commercial net effects as required by the ancillary restraints doctrine, the Court used a similar sounding reference to the “overall context in which the decision of the association of undertakings was taken or produces its effects” to nevertheless come to the final finding that the professional regulation at stake did not infringe Article 101(1) TFEU.

The following three sub-sections will scrutinise more carefully the approach that the Court adopted with (what is here referred to as) the Wouters proviso (paragraphs 97-110 of the judgment). In particular the stake will be to verify the extent to which it sets out a valid method of limiting the substantive scope of Article 101(1) TFEU. The expression ‘Wouters proviso’ will be used as shorthand for identifying this passage of the judgment. It will be more fully introduced in the following. 1023 Subsequently, a comparison will be made with the case Gøttrup-Klim v DLG1024 with which the Court explicitly credits the approach of its Wouters proviso. Section 4.3. finally will explore the limits of both the ancillary restraints doctrine and the Wouters proviso.

4.1. The Wouters proviso introduced

The Wouters judgment was bound to cause manifold comments for the unusual distinction it draws within the framework of the first paragraph of Article 101 TFEU: on the one hand, and as has been explained above, the Court found that the professional regulation at stake was clearly restrictive of competition by object and thus came within the scope of Article 101(1) TFEU. On the other, the Court found that the professional regulation did not fall within the prohibition laid down in that article, and hence did not infringe the article. This differentiation between, first, the constituent 1025 elements of Article 101(1) TFEU (which, according to its wording, result in the prohibition of all agreements or decisions meeting those elements) and, second, the reach of the article’s prohibition recalls the clear bifurcated structure of Article 101 TFEU, according to which the prohibition of the first paragraph may be inapplicable under certain conditions. As the legal representative of Mr Wouters before the Court of Justice rightly pointed out:

After finding that the regulation had restrictive effects on competition and affected trade between Member States, [the Court] could have confirmed that the regulation at issue came within the scope of the first paragraph of Article [101], and have left it to the Commission to ascertain whether the regulation qualified for an exemption under the third paragraph of Article [101 TFEU] (the regulation had been notified by the NOvA to the Commission for an exemption).1026

The startling effect of the Court’s approach in Wouters is that, while it did not have recourse to Article 101(3) TFEU, it still granted an “escape route”1027 for the professional regulation by using the same mechanism as Article 101(3) TFEU, namely not to apply the prohibition of Article 101(1) TFEU. Starting from the overall context that must be taken into account “for the purpose of application” of Article 101(1) TFEU , the Court 1028 reasoned that the effects restrictive of competition were inherent in the pursuit of the objectives of the professional regulation. Thus, the Court 1029 first of all counted the objectives pursued by the professional regulation as part of the “overall context in which the decision of association of undertakings was taken or produces its effects”. These objectives were acknowledged by the Court to be “connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”.1030

#### The set of prohibited conduct is not coextensive with the set of conduct ‘within the scope’---here’s a picture!

Ida E. Wendt 13, Lecturer of European Law in the Department of International and European Law at Maastricht University, the Netherlands, “Article 101(1) TFEU and Its Field of Application With Regard to Professional Self-Regulation,” EU Competition Law and Liberal Professions: An Uneasy Relationship?, vol. 2, Brill, 01/01/2013, pp. 183–317 DOI.org (Crossref), doi:10.1163/9789004214514

Comparing the cases Gøttrup-Klim v DLG and Wouters seems to reveal a number of similarities, at least at fist sight. First of all, both cases concern provisions adopted by an association of undertakings that prohibit their members to adopt a certain conduct. Second, in dogmatic terms both cases exclude the disputed restrictive rules from the scope of Article 101(1) TFEU rather than trying to justify or exempt their restrictions under the third paragraph of Article 101 TFEU. A third similarity is the adoption of a larger perspective beyond the specific negative impact of the self- regulatory measures at stake. In both cases certain beneficial aspects were considered that the associations in question pursued.

However, while in Gøttrup-Klim v DLG the Court minutely examined all relevant factors to give a full appreciation of the competitive benefits and the associated harms of the measure at stake to eventually come to a positive conclusion, the application of the concept of ancillary restraints in Wouters revealed negative net effects on competition. It is noteworthy that the 1048 Wouters proviso in para. 109 reinforces the finding that the absolute prohibition of multi-disciplinary partnerships between lawyers and accountants is clearly restrictive of competition. This means that, different from Gøttrup-Klim v DLG, the Court in Wouters did not disqualify the rules of the association of undertakings from being restrictive of competition. Thus, based on the respective facts in Gøttrup-Klim v DLG and Wouters the Court came to opposite results in assessing the substantive concept of restriction of competition in Article 101(1) TFEU. The conclusion to be drawn at this point therefore is that with the salvation of the challenged NOvA regulation the Court in Wouters went beyond the dogmatics of the Gøttrup-Klim v DLG decision and earlier case law: the disputed NOvA provisions were not the least restrictive means to serve a legitimate commercial aim and thus did clearly not meet the first and third condition of the DLG-test on ancillary restraints.

The following section will turn to critically scrutinise which broader perspective the Court exactly adopted with the Wouters proviso, and in particular which criteria the Court applied to come to the final finding that the NOvA regulation did not infringe Article 101(1) TFEU.

4.2.2. Beyond ancillary restraints: limiting the reach of the prohibition of Article 101(1) TFEU

So far it has become clear that by salvaging the NOvA rules the Court in Wouters was bound to step outside the system of Article 101 TFEU, and in particular outside the concept of restriction of competition and the interpretation thereof, if it did not intend to leave it to the Commission to ascertain whether the disputed regulation qualified for an exemption under the third paragraph of Article 101 TFEU. However, by referring to 1049 Gøttrup-Klim v DLG the Court in Wouters presented its findings in paragraphs 97-110 as if they stayed within the boundaries of the ancillary restraints test. On face value it appears that the patterns of the two decisions indeed resemble each other, namely insofar as they employ a similar language:

DLG: ... it would not seem that restrictions laid down in the statutes [...] go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers1050;

Wouters: ...it does not appear that the effects restrictive of competition [...] resulting [...] from a regulation [...] go beyond what is necessary in order to ensure the proper practice of the legal profession.1051

However, while both decisions respectively refer to the ‘proper functioning’ and the ‘proper practice’, these two references are different in character. To begin with, the proper functioning of the purchase cooperative in Gøttrup-Klim v DLG had been defined in commercial terms (namely to maintain its contractual power) – as one can actually expect within the frame of Article 101(1) TFEU. More particularly, the proper functioning in DLG refers to that of the association in question as the author of the restrictive rules. Conversely, in Wouters the proper practice refers to the activity of the members of the association in question (namely by referring to the “proper practice of the legal profession”1052). Re- applying this logic to the case of Gøttrup-Klim v DLG would read as the ‘proper practice of the agricultural profession or sector’. Clearly, this was not the point of reference of the Court in Gøttrup-Klim v DLG.

The resulting shift in reference – i.e. from the ‘proper functioning’ of the author of restrictive self-regulatory rules in Gøttrup-Klim v DLG to the ‘proper functioning’ of the regulated activity in Wouters – can be explained by the different characters of the two associations at hand. The DLG was considered to exercise an economic activity itself, whereas the NOvA did not qualify as an undertaking for lack of an economic activity independent of that of its members. As a consequence, the DLG had a commercial 1053 relationship towards its members. By accepting the ancillarity of the 1054 DLG statutes the Court actually provided for a ‘right of (commercial) self- protection’ of the DLG against its dissident members. Conversely, while 1055 the NOvA very well interfered with the economic activity of others – as was DLG – it did not regulate for its own economic activity as DLG had been doing. Since the ‘proper functioning’ of the NOvA itself could 1056 thus not be decisive in commercial terms, it could not be the linchpin for the Wouters proviso. The focus thus naturally turned to the regulated activity as the subject of the competition law scrutiny. However, as becomes apparent from the Court’s reasoning preceding the Wouters proviso, the reference to ‘properness’ did not concern the proper economic practice of the legal profession, as that would have resulted in accepting the ancillary restraints defence as suggested by the government of Luxembourg. Therefore, the Wouters proviso could not but exceed the 1057 limits of the purely commercial purpose that the ancillary restraints doctrine sets.1058

The fundamentally different character of the Wouters proviso can be revealed by analysing the exact connection that the Court established between the two cases. To start with, it needs to be pointed out that the Wouters proviso did not actually refer to paragraph 40 of Gøttrup-Klim v DLG as reproduced above, but to paragraph 35 of that judgment. While there is no substantive difference between the two passages, they differ in that paragraph 35 carries an ‘addendum’ that is crucial in tracing the logic of the Wouters proviso: “So, in order to escape the prohibition laid down in Article [101(1) TFEU], the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers” (emphasis added). By referencing in particular the opening of paragraph 35 of Gøttrup-Klim v DLG the Wouters proviso diverts the attention from the concept of restriction of competition toward the agreement or decision escaping the prohibition of Article 101(1) TFEU. In Gøttrup-Klim v DLG these two ideas stand for the same, since a measure not restricting competition is not within the substantive scope of Article 101(1) TFEU and thus necessarily ‘escapes’ the prohibition laid down therein. The NOvA regulation, however, clearly came within the substantive scope of Article 101(1) TFEU, as the Court has underlined in Wouters.1059

Consequently, the Court’s reference to paragraph 35 of Gøttrup-Klim v DLG deludes into thinking that the concept of ancillary restraints would (also) offer a plain escape route from the prohibition laid down in Article 101(1) TFEU “despite the effects restrictive of competition”.1060 This reference thus leads to believe that the Wouters proviso would be an application of the concept of ancillary restraints – which, however, constitutes in turn a finetuned interpretation of the substantive element of Article 101(1) TFEU of restriction of competition. This misguidance of 1061 the Wouters proviso is provoked by taking paragraph 35 of Gøttrup-Klim v DLG out of its context. The ensuing result is twofold: first of all, Gøttrup- Klim v DLG is presented to formulate a more sweeping rule than it actually does, namely to limit the reach of the prohibition of Article 101(1) TFEU, rather than to refine the concept of restriction of competition. Secondly, 1062 safeguarding a clear competition restrictive measure that is proved not to qualify as an ancillary restraint, and which is not tested under Article 101(3) TFEU or Article 106(2) TFEU, constitutes a contra legem interpretation of Article 101(1) TFEU since that article states that all agreements, decisions and concerted practices shall be prohibited as incompatible with the internal market.

A picture containing graphical user interface

Description automatically generated

In order to grasp the precise twist that the Wouters proviso applies to the scope of Article 101(1) TFEU it shall be further contrasted with the concept of ancillary restraints. The result of that exercise will allow to assess whether the Wouters proviso, by limiting the reach of the prohibition of Article 101(1) TFEU, establishes a sector specific exception or actually leads to a more principled exception from the article’s scope.

A shift in paradigm: ‘proper’ commercialisation of professional services

As set out earlier particular types of restrictions may not be prohibited under Article 101(1) TFEU if, in accordance with the first criterion of the ancillary restraints doctrine, they are necessary for the commercialisation of a particular type of product or service. This criterion was not met in Wouters as the commercialisation of legal services does not necessitate the unqualified prohibition of multi-disciplinary partnerships. The Court nonetheless recognised that limiting that commercialisation can be justified. Hence, squaring the prominent formulation of the Wouters proviso with the first criterion of the ancillary restraints doctrine reveals that the Wouters proviso cannot but mean to stipulate that it is the ‘proper’ commercialisation of legal service that necessitated the disputed type of restriction. To build a legal reasoning on some thought of ‘proper commercialisation’ almost has a moralising overtone. At this juncture it becomes clear that the Wouters proviso accepts as legitimate a main operation that pursues an aim other than to increase commercial net effects across the market. The concrete consideration of the Court in this respect will be scrutinised shortly below. Suffice it to state for now that the stance of the Court represents a deflection of the economic objective of Article 101(1) TFEU toward non-commercial considerations. A concept of properness thus determines a standard that is not anchored in the actual wording or objective of Article 101(1) TFEU and hence marks more than a simple shift in reference point.

#### Scope is jurisdictional---it’s totally independent from whether a substantive evaluation will end up prohibiting the conduct.

Ida E. Wendt 13, Lecturer of European Law in the Department of International and European Law at Maastricht University, the Netherlands, “Article 101(1) TFEU and Its Field of Application With Regard to Professional Self-Regulation,” EU Competition Law and Liberal Professions: An Uneasy Relationship?, vol. 2, Brill, 01/01/2013, pp. 183–317 DOI.org (Crossref), doi:10.1163/9789004214514

This is the reason why the scope of Article 101(1) TFEU is drafted to include associations of undertakings. Its aim is to effectively cover conduct that may have similar effects on competition like, but does not originate from, direct collusion between a multitude of undertakings. Put in the words of AG Léger in Wouters, Article 101(1) TFEU:

[S]eeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct on the market. To ensure that this principle is effective, Article [101(1) TFEU] covers not only direct methods of coordinating conduct between undertakings (agreements and concerted practices) but also institutionalised forms of cooperation, that is to say, situations in which economic operators act through a collective structure or a common body.641

As with undertakings, no specific definition of ‘association’ exists in the Treaty. “As a general rule, an association consists of undertakings of the same general type and makes itself responsible for representing and defending their common interests vis-a-vis other economic operators, government bodies and the public in general.” This statement first of all 642 reflects that the concept of association is an accessory one. This means that without economically active members (i.e. undertakings) a collective body will not qualify as association of undertakings for the purpose of competition law. In symmetry with the functional approach that the Union Courts and the Commission apply to the concept of ‘undertaking’, the concept of ‘association’ equally is a relative one. A body may thus qualify as an association of undertakings when carrying out some of its functions, but not when performing others. Secondly, an association is usually 643 determined by some organisational structures, which in practical terms are necessary to materialise the more legal requirement flowing from the case law of vertical influence on the behaviour of the association’s members.644 This means that an association is an entity legally separate from its members. However, it does not have to have a legal personality, or even any formal constitution. Still, some rules on the decision making within 645 the association, and in particular on the appointment to the governing body, are usually to be found either in statutes or the constitution of an association – or even in statutory provisions in case a professional association is established by State legislation.646

Broadly speaking the classification as an association of undertakings in the sense of competition law depends on the objectives, tasks, rules and powers that determine its potential to influence and/ or control the behaviour of its members. The objectives of an association, e.g. a trade association, normally take some form of economic or commercial purpose. It is not necessary, however, that they be explicitly defined as pursuing the economic interests of the association’s members or that the association itself has an economic motive. Even a non-profit-making collective body can qualify as association of undertakings for the purpose of Article 101(1) TFEU.647 This is a logical consequence from the fact that an association usually does not exercise an economic activity – if it was, it would qualify as an undertaking, i.e. as an addressee of competition law in any event. Again a broad interpretation of the concept of association is justified by the fact that at this juncture we are still concerned with the jurisdictional scope of Article 101(1) TFEU, the width of which does not prejudge the result of the substantive competition law assessment that will be conducted at a later stage. Moreover, and as will be explained in greater detail below in section A.1.2., it is salient that an association is in the position to influence the conduct of its members by assuming the task and/ or 648 powers to adopt measures that help to eliminate uncertainties inherent in the competitive situation, e.g. by disseminating information amongst the members, in particular about prices, or by defining standards of business conduct. The dissemination of such information or standards will significantly facilitate the business planning of the fellow members to an association. It is such vertical coordination of economic behaviour that 649 Article 101(1) TFEU aims to prohibit.

#### Prefer our ev. It’s from the ABA Antitrust Section’s Committee on Exemptions and Immunities, which literally wrote an authoritative text called “Handbook on the Scope of Antitrust!” It’s the T evidence gold standard.

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

I. Current State of Exemptions and Immunities Committee

Even though we are a relatively small Committee, we address important policy issues that might not otherwise be addressed by the Antitrust Section. While we often work on issues alongside the Legislation Committee, our scope reaches judicial, as well as statutory exemptions. Our Committee is the one place within the Section that focuses on the concerns that may lead Congress or the courts to carve out certain conduct from traditional antitrust proscriptions.

In the 2017-2018 program year, we drafted and submitted four in-depth Section Comments at the request of the Council; produced six committee programs; published three newsletters; completed one ABA Handbook and are well underway on a second one; cosponsored two Spring Meeting Programs; co-sponsored one podcast; and participated in a Women in Leadership videoconference.

In the 2018-19 program year, we will chair an approved Spring Meeting Program; are cosponsoring a second approved Program; and we have been asked to revisit one of the Comments that we produced in the previous year. We are also working on committee programs, podcasts, and publications.

Perhaps most importantly, we are proud of our diversity achievements. In 2017-18, one of the E&I Co-Chairs was a woman for the first time, and our Young Lawyer Representative was LGBTQ for the first time. This year, we continue with a woman Co-Chair, a woman YLR, and we have added the first Vice Chair from the state of South Carolina on any Section Committee.

A. Scope of Charter: What is Role of Committee?

The Exemptions and Immunities Committee is chartered to address judicially created immunities from the antitrust laws, such as the Noerr-Pennington doctrine, state action, implied immunities, and filed rate doctrines, as well as statutory exemptions, including, among others, the McCarran-Ferguson and Capper-Volstead Acts. The Committee also addresses international issues, such as the Foreign Trade Antitrust Improvements Act (“FTAIA”), and other doctrines, such as antitrust preemption and primary jurisdiction, that affect the application and extent of the antitrust laws. The Committee strives to be the first and best resource for information on the fundamental question of defining the scope of the antitrust laws.

However, another key function of this Committee is an administrative role, rather than as a programming committee. This Committee serves as the de facto institutional memory before legislators and agencies for the Section's position on exemptions and immunities. The Section needs to have one place to look for what it has said in the past on exemption proposals, as well as commentary on DOJ or FTC attempts to narrow or expand exemptions. We believe this Committee has already served in that role and should serve in that role in the future. We want to improve on this function for the Section. We should have a Vice Chair designated as the point person to track prior comments and catalog the specific issues that have been raised. At the same time, we could develop a more standardized response. A related project would be a retrospective study of exemptions and their impact. We would join with International Task Force in its study of the impact of exemptions in other countries.

In short, the Committee should standardize the analysis of exemption proposals and reach out on the international front to catalog the differences in exemptions in different areas of the world.

B. Description of Reflective Evaluation of Membership Levels, Diversity, and Growth

The Committee currently has nearly 300 members, a 20% increase in membership in the last two years. Our members include government antitrust officials, private practitioners, corporate counsel and academics, and some practitioners based outside the United States. This variety of members ensures diverse views on the scope, applicability and appropriateness of antitrust exemptions and immunities.

Although other committees are larger, our Committee tends to include lawyers who specialize in specific antitrust issues. As most members of the Committee are members of other Section committees, the Committee may not be the primary committee that draws members into the Section. We believe that tracking the key issues surrounding the scope of the antitrust laws draws members of broader committees to also join E&I, and thus must continue to be a high priority for the Section.

#### They’re premier in the field

Jonathan B. Baker 19, Research Professor of Law, American University Washington College of Law, “Market Power in an Era of Antitrust,” The Antitrust Paradigm: Restoring a Competitive Economy, 2019, pp. 11–31

Antitrust norms, especially the objection to collusive conduct, are consistently endorsed and upheld by enforcers and courts, regardless of political affiliation.12 These norms have spread throughout the world, particularly since the 1990s, with the aid of a growing global antitrust community. Annual attendance at the spring meeting of the American Bar Association’s Section of Antitrust Law— the premier gathering in the field— now exceeds 3,000, a threefold increase over the low ebb in the late 1980s. Several new academic journals dedicated to antitrust law, economics, and policy were launched in the last decade.

#### Overlimiting is impossible — our list breaks down into a coherent set of themes that conveniently organize NEG prep.

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Chapter 1: Introduction,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, pp. 1–12

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities-: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

The U.S. Constitution limits antitrust in two ways. First, the Constitution sets the power of Congress to regulate interstate commerce, the power on which federal antitrust laws are predicated. Under current constitutional law, as explained in Chapter II.A.l, the issue of whether the application of federal antitrust law in a particular instance will violate the Commerce Clause is not raised particularly often. While in principle an antitrust claim might be dismissed because the challenged conduct is local, and while there have been some recent indications that Commercej Clause limits could become somewhat more demanding in antitrust,37 the conduct ordinarily must be highly isolated and economically insignificant to fall outside of Congress’s commerce power.

Second, antitrust can be limited where it would violate defendants’! constitutional rights. Prominently, a pair of related rules—the “state action” doctrine, or Parker immunity, and the Noerr-Pennington immunity—preclude antitrust enforcement against political activities. I The state action rule protects state governments from liability when they act in their sovereign capacities, and largely frees them to restrain trade within their own borders, so long as they do not indiscriminately authorize private trade restraints without government oversight. The Noerr doctrine protects private persons when they participate in the political process, even if the government action that they request would be anticompetitive.

As explained in Chapter. V.B, there is some-controversy among commentators as to whether the political immunities are themselves rules of constitutional law—limits without which antitrust would violate the Constitution—or merely judicial constructions, of the antitrust, statutes. 1 Still, even if the political immunities are not themselves constitutionally required, ^"substantive rulesl of constitutional law plainly ido limit antitrust directly. Notably, antitrust enforcement against “expressive” 1 conduct and the conduct of religious organizations can violate the First Amendment.38

Next, the language of the federal antitrust laws imposes several j scope limits. Each of the major antitrust statutes applies only to “trade or commerce,”39 and that phrase has been held to exclude gratuitous or j charitable conduct and other conduct not involving the exchange of goods or services for consideration.40 The Sherman Act likewise applies only to “persons,” and while that term is construed broadly under the Sherman Act, it has some exceptions, notably for the federal government and its instrumentalities.41 Stricter limits appear in the Clayton, i Robinson-Patman, and Federal Trade Commission Acts (FTC Act), and these limits are quite complex. The Robinson-Patman Act and two of the Clayton Act’s substantive provisions, the limit on tying and exclusive dealing arrangements in section 3 and the limit on interlocking directorates in section 8, apply only to persons “engaged in commerce.”42 The Federal Trade Commission Act is subject to a few special peculiar scope limits of its own.43

Finally, in several distinct ways the language of other federal statutes can limit the scope of the federal antitrust laws. First, approximately three dozen statutes explicitly limit antitrust as it would otherwise apply in particular contexts. Statutory exemptions tend to concern either (1) industries that are already regulated by some agency, like insurers excepted by the McCarran-Ferguson Act, by virtue of their being regulated by state insurance commissioners,44 or ocean shipping firms regulated by the Federal Maritime Commission,45 or (2) specific kinds of conduct that Congress has chosen from time to time to favor with special freedom to collaborate, like technological research and development,46 the graduate medical resident program,47 or production joint ventures among competing newspapers.48

Second, the courts have sometimes held that other federal laws implicitly limit antitrust. This impulse is expressed in three different judge-made doctrines. Under the doctrine of “implied repeal,” the language of some federal statute may be so plainly inconsistent with the applicability of antitrust in a given case that courts will find that Congress implicitly stated an intent to repeal antitrust as to that case.49 (A closely related rule, called the “federal instrumentality” doctrine, holds that a defendant acting pursuant to a command or explicit approval of the federal government cannot violate antitrust law.) Traditionally, implied repeal was strongly disfavored, and though it has been applied somewhat more freely in recent decades, it still appears almost exclusively in two areas: federally regulated, exchange-listed securities, and labor union activities.50 Under the “filed rate” or Keogh doctrine, where Congress gives a regulatory agency authority to receive filed tariffs setting the rates that regulated firms may charge, courts hold that Congress intended to bar money damages for any harm caused by those rates.51 And under the rule of “primary jurisdiction,” antitrust courts will sometimes defer to the statutory authority of a federal agency to resolve matters entrusted to it by Congress, before proceeding to resolve antitrust issues.

## CP — Advantage

## Advantage 2

#### No warming impact.

Shellenberger 19, Founder of the Breakthrough Institute, Time Magazine “Hero of the Environment,” Green Book Award Winner, and author; citing the IPCC. (Michael, 11/25/19, "Why Apocalyptic Claims About Climate Change Are Wrong", *Forbes*, <https://www.forbes.com/sites/michaelshellenberger/2019/11/25/why-everything-they-say-about-climate-change-is-wrong/#226a30e612d6>)

With that out of the way, let’s look whether the science supports what’s being said.

First, no credible scientific body has ever said climate change threatens the collapse of civilization much less the extinction of the human species. “‘Our children are going to die in the next 10 to 20 years.’ What’s the scientific basis for these claims?” BBC’s Andrew Neil asked a visibly uncomfortable XR spokesperson last month.

“These claims have been disputed, admittedly,” she said. “There are some scientists who are agreeing and some who are saying it’s not true. But the overall issue is that these deaths are going to happen.”

“But most scientists don’t agree with this,” said Neil. “I looked through IPCC reports and see no reference to billions of people going to die, or children in 20 years. How would they die?”

“Mass migration around the world already taking place due to prolonged drought in countries, particularly in South Asia. There are wildfires in Indonesia, the Amazon rainforest, Siberia, the Arctic,” she said. But in saying so, the XR spokesperson had grossly misrepresented the science. “There is robust evidence of disasters displacing people worldwide,” notes IPCC, “but limited evidence that climate change or sea-level rise is the direct cause” What about “mass migration”? “The majority of resultant population movements tend to occur within the borders of affected countries," says IPCC.

It’s not like climate doesn’t matter. It’s that climate change is outweighed by other factors. Earlier this year, researchers found that climate “has affected organized armed conflict within countries. However, other drivers, such as low socioeconomic development and low capabilities of the state, are judged to be substantially more influential.”

Last January, after climate scientists criticized Rep. Ocasio-Cortez for saying the world would end in 12 years, her spokesperson said "We can quibble about the phraseology, whether it's existential or cataclysmic.” He added, “We're seeing lots of [climate change-related] problems that are already impacting lives."

That last part may be true, but it’s also true that economic development has made us less vulnerable, which is why there was a 99.7% decline in the death toll from natural disasters since its peak in 1931.

In 1931, 3.7 million people died from natural disasters. In 2018, just 11,000 did. And that decline occurred over a period when the global population quadrupled.

What about sea level rise? IPCC estimates sea level could rise two feet (0.6 meters) by 2100. Does that sound apocalyptic or even “unmanageable”?

Consider that one-third of the Netherlands is below sea level, and some areas are seven meters below sea level. You might object that Netherlands is rich while Bangladesh is poor. But the Netherlands adapted to living below sea level 400 years ago. Technology has improved a bit since then.

What about claims of crop failure, famine, and mass death? That’s science fiction, not science. Humans today produce enough food for 10 billion people, or 25% more than we need, and scientific bodies predict increases in that share, not declines.

The United Nations Food and Agriculture Organization (FAO) forecasts crop yields increasing 30% by 2050. And the poorest parts of the world, like sub-Saharan Africa, are expected to see increases of 80 to 90%.

Nobody is suggesting climate change won’t negatively impact crop yields. It could. But such declines should be put in perspective. Wheat yields increased 100 to 300% around the world since the 1960s, while a study of 30 models found that yields would decline by 6% for every one degree Celsius increase in temperature.

Rates of future yield growth depend far more on whether poor nations get access to tractors, irrigation, and fertilizer than on climate change, says FAO.

#### Their models are wrong, and innovation and adaptation solve

O'Brien 19, professor of economics, emeritus, at Lehigh University. (Anthony Patrick, 10-19-2019, "Your View by Lehigh professor: ‘Climate change is not going to kill us’", *The Morning Call*, https://www.mcall.com/opinion/mc-opi-climate-change-existential-threat-20191019-kdluxxt45vfdhkfavdppz2yjaa-story.html)

Some scientists take issue with the National Climate Assessment and argue that the cost of climate change will eventually run into the trillions of dollars. They could be right, but there are three reasons to question any long-range forecast of the climate (or the economy, or anything else):

1) the unavoidable imprecision in the models used; 2) the neglect of market adjustments; and 3) the neglect of technological change.

First, if you’ll pardon a little geek speak, the world is nonlinear (straight-line projections don’t work) and stochastic (or uncertain). So assumptions about initial conditions and the estimated parameters of models matter a lot. Years ago, economist Paul Samuelson of MIT showed that in building nonlinear models of the business cycle, small changes in a model’s parameters would result in forecasts that the economy would either grow smoothly with mild recessions (great) or would experience increasingly severe recessions (uh-oh).

Edward Lorenz, also of MIT, applied similar reasoning to climate models, concluding: “In view of the inevitable inaccuracy and incompleteness of weather observations, precise very long-range forecasting would seem to be non-existent.”

These insights into the nature of nonlinear, stochastic models became the foundation for a branch of math called chaos theory. In short, there are good reasons that economists can’t accurately forecast when the next recession will begin and meteorologists can’t accurately forecast whether the coming winter will be snowy or dry. And the further in the future the forecast, the more skeptical you should be.

Forecasts of conditions 70 years in the future? Whether rosy or gloomy, there’s no good reason to believe them.

Models of climate change also ignore the role of the market adjustments that are already occurring. Consumers worried about climate change have been eating less beef, buying more products made from recycled materials, and buying more from companies that are operating in an environmentally friendly way. As always in a market system, companies are more than happy to adapt to changing consumer preferences.

Finally, the National Climate Assessment and similar forecasts assume essentially no technological progress in energy efficiency, sequestering carbon or other ways of lessening climate change. No technological progress over 70 years in an area attracting as much research attention from business, government and universities as climate change does? Not likely.

# 1NR

## Advantage 1

#### US tech sector is dominant---only antitrust crushes it

Moore 8-6-2021, MA, economics, syndicated columnist. (Stephen, "Moore: US tech sector keeps besting the world", *Boston Herald*, <https://www.bostonherald.com/2021/08/06/moore-us-tech-sector-keeps-besting-the-world/>)

Take a bow, America. It’s official and irrefutable: The U.S. is blowing out the rest of the world in tech leadership. No other country in the world comes anywhere close in tech innovation and the dominance of our made-in-America 21st-century companies. The Nasdaq index of once-small technology companies reached 15,000 last week. Only a few years ago, that index stood at 5,000. Yes, these companies have tripled in their market cap value — and that doesn’t include the dividends that have been paid out to large and mom-and-pop shareholders in America and across the planet. We are told constantly that China is catching up and achieving remarkable digital-age leaps forward in biotechnology, artificial intelligence, green energy, robotics, 5G technologies and microchips. The value of America’s 12 most valuable companies today in terms of stock valuation is well over $10 trillion. Those red, white and blue companies from Silicon Valley to the “Silicon Slopes” of Utah to Boston to northwest Arkansas are worth roughly as much as all of the Chinese publicly traded companies combined. Firms such as Google — many of which didn’t even exist 30 years ago — have made millionaires off your next-door neighbor. Ordinary people are getting rich beyond anyone’s imagination 50 years ago, thanks to American innovation and inventiveness. Risk-taking, old-fashioned can-doism is a hallmark of this unrivaled success story that has never been matched anywhere at any time in world history. Almost all of this is a tribute to American financial markets that allocate capital in hyperefficient ways. Capitalists doing a spectacular job of allocating capital efficiently is our secret sauce to financial and technological success. I am always mystified when highly successful Wall Street investors can’t explain how it is they add value and sometimes concede that they are just unnecessary middlemen. Even Warren Buffett, one of the greatest of all time, expresses guilt about his billions, as if he and other great financiers are economic parasites. No. Steering financial resources to winners like Google, not losers like Solyndra, makes everyone in America richer. Meanwhile, few politicians have any clue of how capital markets create wealth and jobs and shared prosperity in America. If they did, they would appreciate that without capitalists and capital, there is no enterprise — no material progress. They would instantly understand the economic ~~lunacy~~ of increasing taxes on capital gains and dividends, wealth taxes, and, worst of all, death taxes that threaten the future survival of family-owned businesses. Cutting, not raising, the U.S. capital gains tax would be far wiser if we want America to maintain and widen our competitive lead and keep winning globally. The arrogant fools in the administration of President Biden believe that to keep America No. 1 technologically, we need to have a multibillion-dollar government-run slush fund with the politicians picking winners and losers with other people’s money. China does this, and so does Japan, and it has never worked. One of the most famous stories of government-as-investment banker was when the Tokyo government’s brain trust recommended that Honda not get in the business of making cars. Here in the U.S., the political class has made a $150 billion bet on wind and solar power since the late 1970s, and in return, that has produced only a small sliver of our energy needs. Even more inexplicable is the movement in America coming from senators such as Democrat Elizabeth Warren on the left and Josh Hawley of Missouri on the right to break up our tech companies. Why? Because, evidently, they are too good at what they do. They make too much money. They have too many customers and too many advertisers. Put aside for a moment the rancid political persuasions of some of these leftist Silicon Valley CEOs. Somehow, the left and right agree that building a superior product and even crafting entire new industries is a punishable offense. God forbid. The rest of the world — the Chinese, Indians, Japanese and especially the technologically inferior Europeans — would love to hobble American titans and tax away their profits. The role of the U.S. government should be to repel the foreign attacks. Crazily, the Biden administration has given the green light to foreigners pillaging American companies. This doesn’t put America first. So, can America’s tech dominance continue to blow away the foreign competition for decades to come? Bet on it. That is, unless we are foolish enough to decapitate our own industries through regulation, antitrust policies and raising tax rates on success. The challenge for U.S. supremacy is coming from Washington, D.C., not China.

#### American defense innovation is peerless.

Gholz 6-24-2021, Eugene, Associate Professor of Political Science at the University of Notre Dame. Harvey M. Sapolsky, Professor of Public Policy and Organization, Emeritus, at the Massachusetts Institute of Technology (MIT) and the former Director of the MIT Security Studies Program. ("The defense innovation machine: Why the U.S. will remain on the cutting edge", *Journal of Strategic Studies*, <https://doi.org/10.1080/01402390.2021.1917392>)

Here we examine these concerns that the American military advantage in the Post-Cold War era has dissipated in large part because the Defense Department lags behind in developing advanced technologies. Our judgment is that the American defense research and development system, as honed during the Cold War and expanded since, is fully capable of handling any military challenge. It is a gigantic technology-generating, innovation-producing, war-fighting machine. U.S. ‘hard’ innovation capabilities – ‘input and infrastructure factors’ like R&D facilities, human capital, access to foreign technology, and availability of funding – far outstrip those of its potential rivals, even though those factors are the ones often thought of as easier for catch-up countries to obtain.3 Despite warnings that the United States no longer spends enough on R&D and that Chinese R&D spending is surging, the reality is that the United States dramatically leads in military innovation investment. In functional terms, the United States dominates all other countries, including China, in ‘input factors,’ starting with resource allocations to defense research and development. More important, we believe that the American defense technology system is pushed toward innovation by specific contextual factors, the ‘soft’ categories of attributes and capabilities, that cannot readily transfer to likely rivals.4 First, the political culture of the United States values technology strongly: technology is assumed to be the solution to most problems, including military ones. American culture also has a strong casualty aversion driven by an economy traditionally burdened by labor scarcity and by responsive political institutions that encourage the substitution of capital for labor to keep its own people out of harm’s way.5 The All-Volunteer Force reflects this by making military service voluntary and thus making military service expensive for government and service personnel lives ever-more-valuable and in need of husbanding. Second, competition is deeply engrained in defense, as it is in most of American society, stimulating new ideas and providing a diversity of approaches to any problem, in case one technology trajectory does not work out as hoped. Competition extends among the various military services and agencies, which each seek to propose solutions to the nation’s strategic problems, and among firms with different design-team philosophies. Third, the United States also welcomes foreign ideas much more readily than other countries, given U.S. openness to immigration, especially among the highly skilled and technically expert. Finally, a Cold-War organizational innovation in the United States created special public-private hybrid organizations, Federally-Funded Research and Development Centers (FFRDCs) that offer unbiased technical advice and a mechanism for the accumulation of knowledge – a unique social, relational system for institutional memory and systems integration capability that generally works very well. Other nations, with different divisions between the public and the private and dramatically different governance institutions, cannot easily copy these capabilities. These soft innovation factors particularly emphasize American advantages in the functional category of institutional factors – norms of seeing technology as a solution, trying hard to minimise casualties, using innovation as a means of competition among organizations, and welcoming foreign ideas. The institutional factors draw from the particular American mix of organizations, notably independent military services with strong identities, competitive firms in the defense industry that readily form networks or teams of suppliers even as each maintains its own core competencies and technical habits, and FFRDCs that help keep systems integration efforts honest and less parochial and that help preserve knowledge of false-start technology trajectories and craft skills that enable high-tech systems to function well.6 Because of the robustness of America’s input factors and the difficulty of copying its unique institutional factors, we conclude that the American defense innovation system will remain at the cutting edge and will not be surpassed by a potential international rival. In the final section, we explain why American leaders are so nervous anyway.

#### Venture capital, investment, and tech firms are thriving.

Jaffer 10-11-2021, \*Jamil N. Jaffer, former Chief Counsel and Senior Advisor to the U.S. Senate Foreign Relations Committee and currently serves as the Founder and Executive Director of the National Security Institute at George Mason University's Antonin Scalia Law School. \*\*Joshua D. Wright, former Commissioner of the Federal Trade Commission (FTC) and currently serves as the Executive Director of the Global Antitrust Institute and University Professor at George Mason University's Antonin Scalia Law School. ("We need to protect American innovation in the competition with China", *Newsweek*, <https://www.newsweek.com/we-need-protect-american-innovation-competition-china-opinion-1636706>)

The United States is home to companies that make up substantially more than half of the market value of the top 100 global public companies. Technology makes up more than a third of America's contribution to that market value, at nearly $8 trillion. According to the World Bank, the innovation-based digital economy grew more than twice as fast as the overall GDP between 2004 and 2019. In the U.S., the digital economy has grown more than three times as fast as the overall U.S. economy since 2005. This torrid growth increases domestic employment and labor productivity. All of this redounds directly to U.S. national security—economic security is national security.

America's economic future depends not on big manufacturing, but on technology and innovation. Where steel plants and manufacturing plants once stood, we now see software development and chip design labs, cloud computing nodes and supply distribution centers. All this has happened specifically in the United States precisely because the government allowed resources to flow to their most productive uses and at times helped prime the pump with basic research funding.

The U.S., unlike some European nations, has avoided creating a vast web of bureaucracy and heavy-handed government regulation. While there are some pockets of innovation in Europe, the regulatory environments in France, Germany and Spain make them much less attractive to cutting-edge companies. Venture capital investment in the U.S. is more than three times larger than in the EU. For all of its foibles, America remains a good bet for innovative companies.

Our relatively laissez-faire economic policy has also created a robust startup community. It supports strong venture capital funding, like Andreessen Horowitz' investments in the burgeoning crypto industry and social media app Clubhouse. It also has helped the U.S. become the world leader in startup acquisitions.

Current U.S. economic policy has also created long-term growth opportunities in the public markets. American tech companies, for example, make up four of the five most valuable public companies based on market capitalization. Larger technology companies like Illumina may very well be able to fund smaller ones like Grail. They can identify opportunities to leverage economies of scale, make important innovations, such as new ways to screen for cancer, and bring new technology like multi-cancer early detection tests to market. This is a good thing.

#### Big Tech drives innovation dominance now.

Pethokoukis 10-13-2021, Dewitt Wallace Fellow at the American Enterprise Institute, 2002 Jeopardy! champion, (James Pethokoukis, "So Big Tech massively investing in itself is worrisome now?", *American Enterprise Institute*, https://www.aei.org/economics/so-big-tech-massively-investing-in-itself-is-worrisome-now/)

Of course, the level of Big Tech spending on new investment and R&D is where my imaginary world and our real one part ways. Here’s Shira Ovide from the New York Times:

I have watched, mouth agape, as America’s five biggest tech superstars — Apple, Microsoft, Google, Amazon and Facebook — have splurged on big-ticket investments in their businesses. That includes specialized equipment to assemble iPhones, hulking computer hubs and undersea internet cables that zip YouTube videos to your phone, and the warehouses for Amazon workers to assemble and ship orders. What the companies spend on physical assets that last for years — capital expenditures, for you wonks — is one of the best glimpses at how Big Tech leverages success into even more success. The combined profits of these five companies climbed more than 25 percent in the most recent year, according to financial statements. The tech giants have the cash and the permission from their investors to spend almost whatever it takes to stay on top. It’s an advantage that few companies can match.

Wait, so if these super-valuable companies didn’t massively invest in their businesses, their critics would express alarm. But they do invest massively in their businesses — yet I guess that’s supposed to be alarming, too? One can’t help but be reminded of — and see the wisdom in — the philosophical underpinning of American competition law: Antitrust exists to protect competition, not competitors — even if those competitors are feisty upstarts or merely entrepreneurs with big dreams. As antitrust experts John W. Mayo and Mark Whitener explained in The Washington Post last year:

[Antitrust] recognizes that the potential for economic rewards is what incentivizes investment and risk-taking. The resulting competition for marketplace supremacy can be fierce, and weaker firms often fail along the way. Those left standing should not be punished for their success — even if only one survives. As the Supreme Court said more than 50 years ago, monopolies should be targets of antitrust enforcement only when there is “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” Antitrust doesn’t condemn a firm for developing a universally popular search engine, ketchup or pharmaceutical drug, even if that success leads to market dominance. It’s how a monopoly is obtained or preserved that matters — not its mere existence.

And given the current hostility to Big Tech in Washington, it’s pretty obvious that the dominance is being maintained more by providing value to consumers rather than by exploiting America’s political system like a bunch of crony capitalists. Wall Street banks frequently release reports highlighting the very real antitrust and regulatory risks to Alphabet, Amazon, Apple, and Facebook. But I would note that those companies frequently occupy the top spots in lists of the most innovative firms in America and the world. (For example: here, here, and here.) Same with R&D spending. They seem to be staying on top by mostly doing things the right way. And if you have a problem with that, too, then you really have slipped into “big is bad because big is bad” territory.

#### Thumpers are all talk. Data about actual enforcement proves it’s in steady decline.

Wait and Roter 2-1-2022, \*JD, former Federal Trade Commission (FTC) lawyer advises deal makers and litigants, \*\*JD, associate in the Washington, DC office where she is a member of the Antitrust and Competition group at NRF (Amanda and Leslie, “Data On Biden's Tough Antitrust Stance Paints Subtler Picture,” *Law 360*)

U.S. antitrust authorities have publicly decried the growth of dominant companies and have announced initiatives to increase merger enforcement and conduct more rigorous merger reviews. But looking behind the rhetoric to the data shows that enforcement may not be increasing as much as companies may fear — at least not yet.

What we are seeing, however, are administrative and substantive changes that are leading to longer and more burdensome reviews.

The Rhetoric

This past year has heralded an evolution in competition policy as antitrust law remained a prominent part of public discourse. On July 9, 2021, President Joe Biden signed a sweeping executive order that called for antitrust agencies to more aggressively scrutinize proposed mergers and acquisitions in certain major sectors, including energy, health care and technology.[1]

Multiple bills were introduced in Congress and in state legislatures that, if passed, would significantly alter antitrust law and affect its enforcement.[2] Most significantly, new leadership took office at both of the U.S. antitrust agencies, with Lina Khan becoming chair of the Federal Trade Commission and Jonathan Kanter heading the Antitrust Division of the U.S. Department of Justice.

We have already seen sweeping changes in antitrust enforcement practices. Even before Khan's confirmation to the FTC, both the FTC and DOJ indefinitely suspended grants of early terminations of the Hart-Scott-Rodino Act waiting period in February 2021.[3]

Once Khan assumed office in June 2021, the FTC rescinded numerous other long-standing merger enforcement policies and implemented new protocols. For example, in August 2021, the FTC began issuing preconsummation warning letters to parties in several transactions in which it did not complete its investigation within the HSR waiting period.[4]

The agency also announced that it was broadening the scope of second requests, which could include investigating noncompetition concerns,[5] rescinded its adherence to the vertical merger guidelines and other informal agency guidance,[6] and announced more stringent requirements on parties obtaining consent decrees.[7]

While the DOJ has not implemented the same new practices adopted by the FTC, the division is signaling a move toward more aggressive merger enforcement. Together with the FTC, the DOJ launched a public review of the horizontal merger guidelines to inform their consideration of potential revisions and updates.[8]

Further, Kanter recently stated in remarks to the New York State Bar Association's antitrust law section that "merger remedies short of blocking a transaction too often miss the mark."[9] He advised that "full weight must be given to preserving competition that already exists in a market," which "will often mean that we cannot accept anything less than an injunction blocking the merger — full stop."[10]

The Data

Yet with all this attention to antitrust merger enforcement, we are not seeing a commensurate increase in enforcement. At least not yet.

Mergers and acquisition activity that is reportable to the FTC and DOJ pursuant to the HSR Act has increased dramatically over the past decade. According to the FTC and DOJ's HSR annual reports, the number of adjusted transactions reported under the HSR Act increased from 1,414 in fiscal year 2011 to 2,030 in fiscal year 2019, seeing a decline during the fiscal year 2020 pandemic, and then rebounding to 3,644 in fiscal year 2021.[11]

Yet, the number of mergers challenged as a percentage of these reported transactions has remained fairly consistent at about 2% to 3% of all adjusted reported transactions over the past 10 years. In fact, the number of challenged transactions appears to have actually decreased in fiscal year 2021 — both in terms of the number of transactions challenged and as a percentage of the adjusted reported transactions.

By our count, the FTC challenged only 15 transactions in fiscal year 2021 — about half of the number of challenges the year before — whereas the DOJ challenged about the same number of transactions — 14 or 15 — as the prior year.

#### Western tech is exiting China now [Post-Dates Sitaraman by a good bit, and the relevant law pushing exit started Nov 1]

Soo 11-3-2021 (Zen, “EXPLAINER: Why are foreign tech firms pulling out of China?,” *ABC News*, <https://abcnews.go.com/Technology/wireStory/explainer-foreign-tech-firms-pulling-china-80942558>)

Yahoo Inc. is leaving the China market, suspending its services there as of Monday amid what it says is an “increasingly challenging” business and legal environment. Foreign technology firms have been pulling out or downsizing their operations in mainland China as a strict data privacy law specifying how companies collect and store data takes effect. Such companies have decided the regulatory uncertainty and reputational risks outweigh the advantages of staying in the huge market. WHICH FOREIGN TECHNOLOGY COMPANIES HAVE RECENTLY DOWNSIZED OPERATIONS OR LEFT CHINA? Yahoo Inc. said in a statement Tuesday its services in China stopped as of Nov. 1. Users visiting the Engadget China site run by Yahoo this week find a popup notice saying the site will not publish any new content. Last month, Microsoft’s professional networking platform LinkedIn said it would shutter the Chinese version of its site this year and replace it with a jobs board with no social networking functions. Epic Games, which operates the popular video game Fortnite, also says it will pull the game out of the China market as of Nov. 15. The game was launched in China via a partnership with the China's largest gaming company, Tencent, which owns a 40% stake in Epic. WHY ARE COMPANIES LEAVING CHINA NOW? The Personal Information Protection Law that took effect on Nov. 1 limits the amount of information companies are allowed to gather and sets standards for how it must be stored. Companies must get users' consent to collect, use or share data and provide ways for users to opt out of data-sharing. Companies also must get permission to send users' personal information abroad. The new law raises costs of compliance and adds to uncertainty for Western companies operating in China. Companies caught flouting the rules could be fined up to 50 million yuan ($7.8 million) or 5% of their yearly revenue. Chinese regulators have cracked down on technology companies, seeking to curb their influence and address complaints that some companies misuse data and engage in other tactics that hurt consumers' interests. The downsizing and departures also come as U.S. and China tussle over technology and trade. Washington has imposed restrictions on telecoms equipment giant Huawei and other Chinese tech companies, alleging they have ties with China’s military and government. Local companies are also feeling the heat, with e-commerce companies like Alibaba facing fines. Regulators are investigating some companies and have imposed strict rules that affect gaming firms like NetEase and Tencent. WHAT OTHER HURDLES DO FOREIGN TECH COMPANIES FACE IN CHINA? China operates what is known as a “Great Firewall” which uses laws and technologies to enforce censorship. Content and keywords deemed politically sensitive or inappropriate must be scrubbed from the internet. Companies must police their own platforms, deleting posts and making sensitive keywords unsearchable. Western social media networks such as Facebook and Twitter have long been blocked by the Great Firewall and are generally not accessible for people in mainland China. “China has installed a very draconian policy governing internet operators, telling them what to do and especially what not to do,” said Francis Lun, CEO of GEO Securities Limited in Hong Kong. “I think the question comes down to why bother (operating as a foreign company in China) with such a limited return, and such heavy liability,” he said. Michael Norris, a research strategy manager at the Shanghai-based consultancy AgencyChina said compliance costs will rise further.

#### The plan’s precedent binds future courts, creates regulatory uncertainty, and stifles innovation

Huddleston 20, JD, Former Director of Technology and Innovation Policy at the American Action Forum. (Jennifer, 12-18-2020, "Antitrust Actions Beyond the Federal Government: The Potential Impact of State and Private Litigation", *AAF*, <https://www.americanactionforum.org/insight/antitrust-actions-beyond-the-federal-government-the-potential-impact-of-state-and-private-litigation/>)

With a growing number of likely divergent claims, the current tech antitrust battles could continue for some time and lead to more confusion around the application of antitrust to this dynamic sector of economy. This may appear to be a short term problem, but uncertainty around the application of competition policy could impact numerous sectors of the economy. Regulators already appear to be increasing scrutiny of acquisitions related to the technology sector well-beyond the tech giants. Multiple court cases with a wide-range of theories that do not follow traditional antitrust applications could further the uncertainty or thought that previously justified actions might be subject to greater scrutiny. If a court chooses to embrace the creative and expansive theories at the center of these state-led cases, it could set precedent that changes the application of antitrust law in the future not only for the technology industry, but in many other areas of the economy as well. Regardless of the impact of these cases—and there is reason to think that these antitrust actions would not remedy the underlying policy concerns—the uncertainty and broad reach created by these competing state cases would likely stifle economic growth and innovation.

#### Enforcement deters innovation in unrelated industries.

Crews and Young 19, \*Wayne Crews is Vice President for Policy and Senior Fellow. \*Ryan Young is a Senior Fellow at the Competitive Enterprise Institute (CEI). His research focuses on regulatory reform, trade policy, antitrust regulation, and other issues. (4-16-2019, “The Case against Antitrust Law,” *Competitive Enterprise Institute,* [https://cei.org/studies/the-case-against-antitrust-law)](about:blank)

More to the point, does the short-term benefit come at a greater long-term cost? An enforcement action now could have a deterrent effect on future mergers, contracts, and innovations, including in unrelated industries. The consumer harm from these could well exceed the short-term benefits of a short-term improvement on market outcomes—assuming that regulators are consistently capable of such a feat.

#### Mergers and Acquisitions are key to start-ups and innovation

Feiner 7-24, news associate @ CNBC. (Lauren, 7-24-2021, “Start-ups will suffer from antitrust bills meant to target Big Tech, VCs charge”, CNBC, <https://www.cnbc.com/2021/07/24/vcs-start-ups-will-suffer-from-antitrust-bills-targeting-big-tech.html>)

Many lawmakers are eager to rein in the power of the largest tech companies: Amazon, Apple, Facebook and Google. But some of their proposals could actually hurt the smaller companies they’re meant to protect, venture capitalists warned CNBC. VCs are particularly concerned about efforts in Congress to restrict mergers and acquisitions by dominant platforms. Some of those proposals would work by shifting the burden of proof onto those firms in merger cases to show their deals would not harm competition. While proponents argue such bills would prevent so-called killer acquisitions where big companies scoop up potential rivals before they can grow — Facebook’s $1 billion acquisition of Instagram is a common example — tech investors say they’re more concerned with how the bills could squash the buying market for start-ups and discourage further innovation. Of course, venture capitalists and the groups that represent them have an interest in maintaining a relatively easy route to exiting their investments. A trade group representing VCs, the National Venture Capital Association, counts venture arms of several Big Tech firms among its members. (Comcast, the owner of CNBC parent company NBCUniversal, is also a member.) But their concerns highlight how changes to antitrust law will have an impact far beyond the largest companies and how smaller players may have to adjust if they’re passed. Why start-ups get acquired When venture capitalists invest in a start-up, their goal is to make a large return on their spend. While most start-ups fail, VCs bank on the minority having large enough exits to justify their rest of their investments. An exit can occur through one of two means: through an acquisition or by going public. When either of these events occurs, investors are able to recoup at least some of their money, and in the best case scenario, reap major windfalls. About ten times as many start-ups exit through acquisitions as through going public, according to the NVCA. Venture capitalists say that number shows just how important it is to keep the merger path clear. The top five tech firms aren’t the only ones scooping up tech deals. Amazon, Apple, Facebook, Google and Microsoft have accounted for about 4.5% of the value of all tech deals in the U.S. since 2010, according to public data compiled by Dealogic. Reform advocates have pointed to some acquisitions, like that of Instagram by Facebook, as examples of companies selling before they have the chance to become standalone rivals to larger firms. But VCs say that’s often not the case. “They all think they could be public companies one day, but the realities are, it’s not realistic for most of these companies to achieve the size and scale to survive the public markets as of today,” said Michael Brown, general partner at Battery Ventures. While going public is a often the goal, VCs say it can be impractical for start-ups for various reasons. First, some start-ups may simply not have a product or service that works long-term as a standalone business. That doesn’t mean their technology or talent isn’t valuable, but just means it could be most successful within a larger business. Kate Mitchell, co-founder and partner at Scale Venture Partners, gave the example of a company called Pavilion Technologies that made predictive technology for manufacturers and agriculture, which sold to manufacturing company Rockwell Automation in 2007. “That’s a company that just couldn’t get to escape velocity,” she said of Pavilion. “Because they were selling globally to large plants, we couldn’t figure out how to sell the technology cost effectively.” It was still a useful technology, but needed the infrastructure of a larger business to accelerate further, she said. After Rockwell acquired it, it became incorporated into its offerings and several employees stayed for years. Sometimes, she said, an acquisition is a last resort before bankruptcy, and at least helps investors get some of their money back. “It is better that they’re sold for even 80 cents on the dollar than that they go bankrupt,” she said. In addition, going public can be difficult. The IPO process is expensive and VCs said that small cap companies often struggle on the public market in part because of the lack of analyst coverage of such businesses. Clate Mask, co-founder and CEO of venture-funded email marketing and sales platform Keap, said greater merger restrictions on the largest companies would likely “change the calculus” for start-ups. But the shift would not be between getting and acquired and going public. Instead, he said, it could make entrepreneurs think harder about whether to raise venture funding at all. “When you have capital behind you, you can think and operate differently,” he said, adding that entrepreneurs can take more risks with that backing. Loss of investment and innovation Several VCs told CNBC they were worried about the trickle-down effect that merger restrictions on the largest firms would have on the entire entrepreneurial ecosystem. Their fear is that if companies no longer have enough viable exit paths, institutional investors that back VCs — like endowments and pension funds — will shift their money elsewhere. In turn, VCs will have fewer funds to dole out to entrepreneurs, who may see less reason to take the risk of starting a new company. The ultimate concern is for a loss of innovation, they say, which is exactly what lawmakers are hoping to fend off with merger restrictions on the largest buyers. “If you restrict the potential to generate exciting rewards and returns from investment, entrepreneurs could find other things to do with their time,” said Patricia Nakache, general partner at Trinity Ventures. Nakache said placing restrictions on the largest tech firms’ ability to make acquisitions could actually discourage entrepreneurs from building companies that compete with their core businesses. That’s because many entrepreneurs like having a back-up plan incorporating possible acquirers if they can’t go public. With greater uncertainty about whether the Big Tech companies could be potential buyers, they may seek to build businesses outside of the largest players’ core offerings, she said. VCs also warned that without the biggest players in the mix, sale prices for start-ups would drop significantly. But outside the industry, some believe these concerns won’t be as bad as VCs fear. “These sorts of laws, if they work as intended, you’re going to have a more competitive marketplace generally, so there’s going to be more potential buyers,” said Michael Kades, director of markets and competition policy at the non-profit Washington Center for Equitable Growth. “I get it if you’re at the VC today, what you’re concerned about is the next couple of years or what your company can get, but increasing the number of potential buyers for firms ... also means that there’s still a very thriving market for these sorts of acquisitions, just not by dominant firms.” Bhaskar Chakravorti, dean of global business at Tufts University’s Fletcher School, said while venture capitalists are probably right that acquisition prices could slide under new merger restrictions, entrepreneurs will still have a drive to innovate. “Ultimately people are going to adapt and yes, some of the valuations, some of the bidding may be stunted. Some of the acquisitions may go for ten, 20% less,” he said. “But ultimately, I don’t think it’s going to make that much of a difference because entrepreneurs are going to go after ideas, they’re going to build them, they’re going to put together teams, and venture money needs a place to invest.” Kades agreed that good ideas will still likely get funding even if the largest firms can’t bid on them or would have a harder time completing an acquisition. Restricting mergers from those companies is about “trying to limit the anticompetitive premium,” he said. Shifting capital VCs are also concerned the new rules could accelerate the shift of venture investment outside the U.S. Mitchell said while other countries including Canada have been adding incentives for entrepreneurs to come and stay in their borders, regulations under consideration in the U.S. will push them away. “We would be making it difficult just at a time when everyone else is trying to make it attractive” to be an entrepreneur in their country, she said. According to the NVCA, the U.S. has seen its share of global venture capital fall from 84% to 52% in the last 15 years. That’s why lawmakers shouldn’t rest on their laurels that U.S. venture capital can keep up with the rest of the world under new arduous regulations, VCs contend. But Chakravorti disagreed the merger laws would push investment outside the U.S., as many alternatives are worse. “There are very few alternative locations,” he said. Exits in China would come with heightened scrutiny, and Europe is known for a more heavy-handed approach on business regulation. Still, Brown said, should stricter merger laws pass, he would have to consider casting a wider net for potential buyers when it comes time to exit an investment. That could include more international buyers than he’d otherwise consider. Nakache said should merger reforms pass, she may consider investing more heavily in start-ups whose potential acquirers wouldn’t be impacted by the laws. For example, if enterprise platforms like Salesforce or Oracle didn’t meet the threshold for stricter merger enforcement, VCs might shift spending from areas like search and social media to software as a service. Open to some reforms Some of the VCs interviewed by CNBC felt existing antitrust laws were adequate, but others acknowledged that reforms outside of mergers could be beneficial. Restrictions on platforms leveraging data they collect to compete with businesses that rely on them is one example that could help level the playing field if done correctly, Nakache suggested. Mitchell said the most helpful change would be to create more consistency in enforcement of the antitrust laws, particularly from one administration to the next. Mask, the Keap CEO, said he’s not opposed to Congress taking some action to curb Big Tech companies’ power, but that most entrepreneurs recognize those firms overall “are good for the ecosystem.” “Those Big Tech companies are helpful in driving a lot of the momentum of the overall sector,” he said. “And I think to have them broken up in some kind of extreme aggressive way I’m not sure is a great thing either.”