Public Comment on Proposed Merger Guidelines

1. Introduction and Summary

The Internet Accountability Project submits these comments in support of the proposed U.S. DOJ/FTC Merger Guidelines as they apply to Big Tech internet platforms. Founded in 2019, the IAP advocates for policy and legislative efforts aimed at curbing Big Tech's malign influence in our economy and society more broadly.

In our comments we make three observations with respect to the proposed Merger Guidelines:

- The Clayton Act, Section 7 has been misread by the courts and the antitrust agencies tasked with enforcing it. Specifically, the Congress did not establish a 'consumer welfare' standard when it passed the law; indeed, the words 'consumer welfare' are nowhere to be found in the statute. Additionally, Section 7 was and remains an incipiency statute, meaning the government must show only the *likelihood* of harm to competition to prevail in court, not ironclad evidence that the merger will harm competition.
- This misreading of Section 7 was spearheaded by conservative legal scholars and jurists who strayed far from the textualist principles of statutory interpretation they espouse elsewhere. The negative impact of this development is particularly acute with respect to mergers involving internet companies, many of which have sailed through antitrust review absent meaningful scrutiny from the antitrust agencies.
- The decades since antitrust flipped to the consumer welfare standard have not served American citizens and competition in our technology sector well. Laissez faire merger enforcement in the internet sector has eroded conservative values in our communities as well as conservative discourse. Even if the consumer welfare standard reflected in current case law had merit, the standard needs updating to reflect the significant shifts in our economy since it was first adopted into caselaw beginning in the 1970s. Specifically, the existing, narrow consumer welfare standard focused on price and output effects of a given merger misses the mark in the internet sector by a wide margin and fails to take into account how digital markets operate in reality.

Although we do not provide line edits to the proposed Merger Guidelines and do not share some goals in the draft, we support the macro policy goal of fostering competition rather than a narrow consumer welfare standard that is both overly

technocratic and undemocratic. In sum, it is time for the antitrust agencies and the courts to focus less on enabling unfettered industry consolidation by Big Tech and more on enforcing the Clayton Act, Section 7 as enacted by Congress.

2. Clayton Act Section 7: Textualism and Congressional Intent

As conservatives, we support originalism and textualism with respect to statutory interpretation. At her 2020 confirmation hearing to the United States Supreme Court, now Justice Coney Barrett provided the following helpful explanation of each doctrine:

> *"Originalists, like textualists, care about what people understood words to mean at the time that the law was enacted because those people had the authority to make law. They did so through legitimate processes, which included writing down and fixing the law. So "[e]ach textual provision must necessarily bear the meaning attributed to it at the time of its own adoption." And, as with statutes, the law can mean no more or less than that communicated by the language in which it is written. Just as "when a precise statute seems over- or underinclusive in relation to its ultimate aims . . . [a textualist] hews closely to the rules embedded in the enacted text, rather than adjusting that text to make it more consistent with its apparent purposes*."

Applying these principles to Section 7 of the Clayton Act is instructive and supports a conclusion that Congress made a value judgment in favor of competition, not the consumer welfare standard, when it enacted the law in 1914. Section 7 prohibits mergers and acquisitions where *"in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."* Applying textualism to this language first makes clear that a plain reading of Section 7 is at odds with the consumer welfare standard. Second, a plain reading of the statute also points to a standard built around incipient harm to competition in the future, i.e. likelihood as opposed to certainty of harm. As the Supreme Court later explained, "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect 'may be substantially to lessen competition.'" According to the Court, this was because "[t]he grand design of [] Section 7 [] was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach."

Today, the Section 7 standard intended by Congress has been radically rewritten, both with respect to competition as well as incipiency.

The path from a textualist reading of the Clayton Act to the consumer welfare standard is worth tracking in some detail. To summarize, the evolution from 'competition' to 'consumer welfare' as the antitrust standard applicable to mergers

is the result of decades of work by conservative scholars, political appointees, and jurists (with whom we share much common ground regarding other issues). The most notable actor throughout this process was Robert Bork. Importantly, Bork appears to have accomplished this shift without amending the Clayton Act in Congress, or indeed any significant input from lawmakers on Capitol Hill.

In 1966, Robert Bork published his article "*Legislative Intent and the Policy of the Sherman Act*." Bork concluded his somewhat confusing investigation with the assertion that "Congress intended the courts to implement ... only that value we would today call consumer welfare," and although "[t]he legislators did not ... speak of consumer welfare with the precision of a modern economist, ... their meaning was unmistakable." Later on, Bork boldly asserted that, "[t]he legislative history ... contains no colorable support for application by courts of any value premise or policy other than maximization of consumer welfare." Bork would wait until 1978 to fully define consumer welfare, but the process of rewriting the antitrust laws around it began in earnest in this 1966 article.

In the mid-1970s, as the phrase "consumer welfare" was gaining traction in academia, Robert Bork served as the U.S. Solicitor General in the Nixon and Ford administrations. Bork used this DOJ platform to further his argument that the consumer welfare standard was the correct standard in U.S. antitrust law, including both the Sherman and Clayton Acts. In 1977, the Ninth Circuit in *Boddicker v. Arizona State Dental Ass'n*, relying on an amicus brief submitted by Bork as Solicitor General, reasoned that serving the public is the goal of the Sherman Act. The court supported this claim with a footnote that stated: "In an exhaustive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded [that the] 'legislative history [of the Sherman Act] contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.'" In so ruling, the Ninth Circuit effectively equated Bork's 'consumer welfare' with the 'public welfare' without question and without independently sourcing the Congressional record for supporting evidence. As textualists, we are understandably disappointed by this approach, as are several legal scholars who conducted independent research into the Congressional record and agree that Bork's assertions regarding the consumer welfare and Congressional intent were, at best, misplaced.

In 1978, Bork published his landmark antitrust treatise, *The Antitrust Paradox*, in which he further elaborated on the consumer welfare standard. In the book, Bork explained the term consumer welfare as "the greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation. Consumer welfare, as the term is used in antitrust, has no sumptuary or ethical component, but permits consumers to define

by their expression of wants in the marketplace what things they regard as wealth."

In defining the consumer welfare standard, Bork aligned himself with the libertarian views of John Stuart Mill which emphasize maximal individual freedom and a strict, harm-based approach to government intervention. To state, as Bork did, that this alignment had no "ethical component" since it permits consumers freely to define their relationship with the market is a proposition that has not aged well. One need only look at the lack of choice available to consumers in today's internet economy to see that the consumer welfare standard as applied to digital markets has had profound ethical (and indeed sumptuary) effects on society, in particular our nation's children. To be sure, the monopolies behind this ethical morass benefited greatly from the consumer welfare standard, but American consumers have not.

Bork's work in support of the consumer welfare standard reached its zenith in 1979 when, quoting him, the Supreme Court declared that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" In *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, the Court ruled that a "restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." Since then, "consumer welfare" has been the stated goal of U.S. antitrust laws, including the Clayton Act. For Bork, "consumer welfare" was measured primarily according to one single metric, namely price. For this reason, Bork claimed that mergers should be encouraged by the government since large businesses could exploit economies of scale, increase efficiency, and deliver cheaper consumer goods to the market. At first, this theoretical proposition seemed plausible. However, several studies since the 1970s have shown that Bork's theory did not match reality when it came to both price effects and efficiencies resulting from specific mergers.

The arguments we make above are exacerbated in digital mergers. The singular focus on price in the consumer welfare standard, alongside neglect of the incipiency standard in Section 7 cases resulted in mergers in digital markets being afforded de facto antitrust immunity in recent decades. Unfortunately, this myopic approach resulted in hundreds of mergers, many of which may have negatively impacted dimensions of competition beyond price such as innovation and quality, going unexamined by the antitrust agencies. Further, to assert as Bork did that the consumer welfare standard had no "ethical component" since it permits consumers to define their relationship with the market is absurd in this context. One need only look to the effects of rampant consolidation in the internet sector made possible by lax antitrust enforcement to see that the consumer welfare standard as applied to these markets has had profound "ethical" (and even "sumptuary") effects on society, in particular our nation's children. We discuss these effects below.

3. **Neoliberal Antitrust v. Conservative Antitrust**

Recent decades have demonstrated that the consumer welfare standard as applied to the internet has not served American citizens and the 'public welfare' well. In the years since the publication of Bork's Antitrust Paradox, corporate concentration has reshaped our economy and redefined ordinary Americans' role in it. According to a 2018 study, two thirds of all corporate sectors have become more consolidated since 1990. In the internet sector, two companies – Google and Facebook – account for 75% of online digital advertising, thanks in no small part to serial mergers in advertising technology all of which were cleared by the antitrust agencies without a court challenge. Indeed, a recent FTC study estimated that five digital technology companies completed over *600* acquisitions of small startup companies in the decade beginning January 1 2010. This consolidation was enabled in no small part by lax enforcement of Clayton Act, Section 7 by the antitrust agencies.

A growing body of research suggests such consolidation is responsible for a whole host of economic repercussions. Ironically, included in these repercussions are higher prices, something that Bork asserted could not happen because the efficiency gains from consolidated could only result in *lower* prices. The reality of the consumer welfare standard does not, however, end with higher prices and job losses. Perhaps more importantly, the adoption of the standard has fundamentally reoriented what it means to be a citizen of the United States. As the American Conservative has observed, "Whereas prior generations of conservative lawmakers protected the American citizenry as businessmen, entrepreneurs, and growers, Bork led a revolution that sacrificed small businesses and ordinary Americans at the altar of efficiency and cheap goods. With the publication of the Antitrust Paradox 40 years ago, the American citizen was, in a very real sense, reduced to a mere consumer."

This important insight comes to life when applied to the online world and the Big Tech monopolies that dominate it. Where is the benefit to the average American citizen of a merger between social media companies when the buyer is well known for its privacy and takes little care to protect kids from harmful content, but the company being acquired does the opposite? The loss of competition from the acquired company does little to optimize welfare (even under Bork's narrow definition of the term) but the merger would go unchallenged under current law if it does not impact price competition. This cannot be what Congress intended when it passed the Clayton Act into law. Fortunately, a textualist reading of the statute demonstrates that it was not.

For decades, conservatives have stood by while policy makers and jurists have undermined our values through laissez faire antitrust enforcement. The technocratic

Washington DC antitrust establishment has assured us for years now that we need not fear Big Tech consolidation because we need not fear private power, only public power. Afterall, they argue, "Google doesn't have an army." However, recent events have demonstrated why we should fear both public and private tyranny in equal measure. Woke corporatism, cancel culture, crony capitalism, social-media censorship, all these things were made possible by economic concentration in digital markets the likes of which we have not seen since the first Gilded Age. It is time for conservatives to recognize what time it is in America and support efforts to curb Big Tech's economic power, including reinvigorated Section 7 enforcement by the antitrust agencies under the proposed Merger Guidelines.

4. **Restoring the Clayton Act in Digital Markets**

As the sections above demonstrate, it is time for conservative to stand behind the Clayton Act's lost goal of competition. Conservatives are painfully aware of the role played by dominant Big Tech platforms in episodes in throttling legitimate speech and degrading children's lives online. IAP believes there is a direct nexus between these disturbing trends and the absence of competition online and have documented these concerns extensively elsewhere. The purpose of this comment is less to rehash those concerns and more to draw a direct line between them and the lax antitrust enforcement that enabled untold Big Tech consolidation over the past several decades.

Had our nation's antitrust enforcers focused on the Clayton Act's stated goal of competition, and less on illusory efficiencies and a myopic consumer welfare standard, we may not have seen these deleterious effects from Big Tech monopolies. Even within the existing consumer welfare rubric, had the antitrust agencies been more focused on the impact of mergers on variables *other* than price, for example innovation and privacy competition between the merging firms, we may not have reached the point of no return at which Big Tech platforms seem free to internalize a merger's benefits and socialize its negative welfare costs to the rest of society. However, we have reached an end point and it is time to course correct, which is why we support the proposed Merger Guideline's overall policy goals as they relate to Big Tech.

We note that our position is both consistent and bipartisan with our nation's best traditions. As historian Richard Hofstadter has observed, "Americans' sentiment about large organizational units in government and business have generally tracked in parallel. Historically, it is no anomaly that small-government conservatives would find common ground with neo-Brandeisian progressives in resenting the growth and power of giant Big Tech platforms, which are not so easily distinguished from giant governmental agencies."

True to these traditions, most Americans agree with us on this important issue. It is the current extreme libertarian approach to antitrust that runs contrary to our nation's

traditions, not the more principled and conservative approach we espouse which reflects where most Americans stand. Our conclusion is backed up by recent polling data that captured levels of public support for reining in Big Tech including through closer scrutiny of Big Tech mergers. In one poll last year, a bipartisan majority of voters **(64 percent)** agreed the government should more strongly regulate big tech companies because they use their market power to pick winners and losers in the market. Specifically, the polling also found 76 percent of voters agree (by a **+60-point margin)** that the government should take a closer look at mergers made by big tech companies. That includes a **+57-point margin for Independents** (74 percent agreed) and **+47-point margin for Republicans** (69 percent agreed).

It is time for conservatives to acknowledge that state actors like the DOJ and the FTC can and must play a role in preserving marketplace competition through reinvigorated merger enforcement. As Teddy Roosevelt said in the first Gilded Age, “The great corporations which we have grown to speak of rather loosely as trusts are the creatures of the State, and the State not only has the right to control them, but it is in duty bound to control them wherever the need of such control is shown.” Antitrust was a key and proven backstop in protecting the free market from monopolies then as it should be now. Today, Big Tech platforms are powerful in ways beyond even President Roosevelt’s imagination. This power was in no small part made possible by unfettered consolidation in the digital economy enabled by lax antitrust enforcement. For these reasons, IAP supports the proposed Merger Guidelines approach to consolidation in highly concentrated digital markets.