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OPENING KEYNOTE SPEECH

Richard Powers:

Let me start by saying thank you for inviting me to speak today. I'm excited to be a part of celebrating this year's nominated and winning authors. Through their writing, they have advanced the frontier of antitrust and helped us think more deeply about this important area of law and about the organisation of our economy.

We see a Renaissance of sorts in antitrust, what some people call "an antitrust moment." For many years antitrust has been a relatively narrow technical area. However, antitrust is the topic of best-selling books, conversations in our Congress, and discussions not just in law school classrooms but on front pages and around kitchen tables.

There is a reason for that interest. Americans are taking a hard look at how well our economy delivers, in the words of our Pledge of Allegiance, "liberty and justice for all." When people look at the structure of our economy, they are led quickly to a focus on the importance of the antitrust laws in delivering economic liberty. Big ideas are in play and big changes under consideration, and the "antitrust moment" truly is an exciting time.

I am, at my core, a prosecutor. With that comes profound respect for due process and the means by which law enforcement achieves its ends. That is why I was heartened to hear Attorney General Garland reiterate upon being nominated the famous words of Justice Robert Jackson: "The citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches this task with humility." Justice Jackson emphasised in that speech that among the "best protection against the abuse of power" is "fair play and sportsmanship."

Those hallowed words spoken by Justice Jackson over eighty years ago remain the great distillation on the importance of process for federal prosecutors, who must exercise their discretion on an almost daily basis in fulfilling their duties. During my time as Acting Assistant Attorney General of the Antitrust Division, I have underscored the paramount importance of our processes as we traverse this moment, as we implement change, and as we vigorously enforce our nation's competition laws. Through this, we are transitioning the "antitrust moment" into an "antitrust movement," and in doing so bringing to bear the tremendous power of the prosecutor. I firmly believe that we will be most successful in implementing enduring and beneficial improvements to competition in our economy by coupling aggressive enforcement with a process-driven approach grounded in fairness, predictability, and transparency.

I would like to focus my remarks today on that intersection. How do we advance from policy debates to prosecutorial action, and how do we do so fairly and transparently? I will begin by discussing our public-facing guidance documents, which are a critical tool for providing transparency to the public. I will then talk about law enforcement matters, which themselves reflect how we exercise our discretion. Finally, I will talk about how legal writing helps inform both processes and your work thereby informs ours.

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Let me start with the importance of providing guidance to the public and the benefits of the robust public engagement process that can entail. The Division provides an array of guidance to the public, ranging from speeches and policy statements to business review letters, to formal statements of our enforcement practices.

Why does guidance like this matter? In *The Morality of Law,* Lon Fuller described several principles that are indispensable to the rule of law, including the idea that laws must be publicly accessible, generally applicable, and congruent with enforcement. Effective guidance serves all of these goals. To be sure, guidance does not create or change legal rights, but it can help people understand how the prosecutor will exercise her discretion in enforcing the laws on the books. That's fundamentally fair. That is especially important in an area like antitrust where the laws have been shaped by a long history of common law decisions.

Let me give you some examples from across our enforcement areas.

I will start with criminal. Several years ago, the Division announced a policy change to allow for crediting corporate compliance programs at the charging stage of criminal investigations. As part of the announcement, the Division made public detailed guidance to its prosecutors that assists in their evaluations of these programs in order to determine the degree of credit warranted. That is how guidance should work. If policy changes, guidance about enforcement should change too. Uncertainty doesn't benefit anyone. It makes it harder for good actors to follow the rules and easier for bad ones to feign ignorance when they break them. Transparency is the better approach, for the rule of law and for consumers. Issuing our compliance guidance publicly, for example, lets businesses see the playbook our prosecutors will use when testing their antitrust compliance programs. That helps firms as they implement antitrust compliance programs of their own, which reinforces their ability to detect and report wrongdoing, hopefully before it harms consumers in the first place.

To give another example from our criminal program, in an effort to further transparency about our program and to educate the public, procurement officials, and other stakeholders about the dangers of collusion, the Division provides a variety of resources on our public website. For example, our website includes a Primer about bid-rigging, price-fixing, and market allocation schemes, explaining the red flags to watch for. We also make available a training video, presented by experienced prosecutors, which is aimed at training our law enforcement partners so they can better understand and detect antitrust crimes. In addition, we are increasingly producing blog posts, appearing on podcasts, as I recently did with our partners at the FBI, or posting videos on the Department's YouTube channel. Making all this information available virtually goes a long way toward detecting and stopping antitrust crimes.

As we focus on the value of guidance, I have given particular attention to our business review letter process. That process, enshrined in Department regulations, provides a critical tool for businesses to seek the advice of the Department as to particular conduct at a particular time.

In 2020 a letter was issued to the IEEE-Standard Association that purported to supplement and append a 2015 business review letter duly issued to the IEEE. Although the Department's Business Review Regulations do not provide a process for withdrawal or supplementation, this 2020 letter, issued without any formal investigation, purported to supplement and append the 2015 letter. In order to maintain the integrity of the Division's business review letter process, we removed that 2020 letter from the official file to make it clear that it was not part of the official business review conducted in 2015.

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Some have speculated what this IEEE correction means for the substance of the Division's policy at the intersection of antitrust and intellectual property. To be clear, the removal of the 2020 IEEE letter from the 2015 business review letter was a procedural correction. On the other hand, the Department's action illustrates the importance of clarity, predictability, and transparency in competition agency guidance. Businesses and consumers should be able to rely on that guidance. For example, the Antitrust Guidelines for the Licensing of Intellectual Property, which the Division and FTC revised in 2017, for which the agencies received a Concurrences Antitrust Writing Award, set forth core principles that have guided the agencies' analysis of licensing arrangements for decades. These general principles include that the standard antitrust analysis applies to conduct involving intellectual property, the Agencies do not presume that intellectual property creates meaningful market power in the antitrust context, and intellectual property licensing that allows firms to combine is generally procompetitive.

When the agencies revised the IP Guidelines to account for developments in the law and policy, we sought public comment that benefited the final guidance document. Laying out the framework that agencies will apply in evaluating the conduct of licensors and licensees makes it easier for people to predict how their conduct will be evaluated by the government and perhaps by courts. That promotes clarity, predictability, and transparency. It also encourages procompetitive licensing by providing parties with an objective way to evaluate their own conduct.

As I have mentioned in other public fora, the Division is closely scrutinising its policies at the intersection of intellectual property and antitrust to ensure they best serve competition and consumers. This includes our policies as they relate to standard-essential patents. This review began early in the new administration because we understand the imperative of making our positions clear and transparent, particularly in an area so closely watched that has been subject to so much controversy. The Division's goal is to develop neutral and balanced policies in this area that recognise the importance of both antitrust enforcement and intellectual property protection to our economy. We also plan to work closely with our federal partners at the FTC, Patent and Trademark Office, and National Institute of Standards and Technology to ensure that federal government policies involving patents promote good-faith, procompetitive licensing practices and foster competition.

That brings me to my second point about enforcement. As Justice Jackson's famous speech also explained, "one of the greatest difficulties of the position of prosecutor is that she must pick her cases because no prosecutor can even investigate all of the cases in which she receives complaints." Our case selection and the direction of our scarce investigative resources help drive policy change and signal to the public our priorities. And the outcome of those cases, a public decision issued by a neutral judge or a verdict handed down by a jury, helps advance the law with fairness and transparency. I will take a moment and talk through examples of how our priorities are reflected in our enforcement decisions.

As I've said before and will reiterate again here today, a top priority for the Division is investigating and prosecuting employers who conspire to fix wages and allocate labour markets. That is because economic liberty begins with all workers receiving the benefits of competition for their services. Let me highlight recent steps we have taken in this area that underscore this point. For example, the Division recently obtained an indictment against a company that owns and operates medical care centres "for agreeing with competitors not to solicit senior-level employees." The Division also obtained the indictment of two co-conspirators for agreeing to pay lower reimbursement rates to certain physical therapists

and physical therapist assistants in North Texas. Similarly, the Division obtained the indictment of a healthcare staffing company and its former executive for conspiring with competitors to not hire employees from each other or to raise wages for nurses working in a Las Vegas area school district. Our work protecting competition in the labour markets remains ongoing, and we will continue to devote significant resources to these important priority investigations.

The Division has also pursued criminal cases that touch on many other key sectors of the economy — from generic pharmaceuticals to cancer treatment, from broiler chickens to canned tuna, and from financial services to government procurement. Many of these cases have already resulted in guilty verdicts or guilty pleas and many others are set for trial in the near future. But all of them demonstrate the Division's commitment to detecting, prosecuting, and punishing those who criminally violate the antitrust laws.

Most recently, including announcements from last Friday and actually just earlier this morning, three executives in two companies were charged for a conspiracy to rig bids on defense contracts to provide security services to bases and installations in Belgium. One company has agreed to plead guilty while a second company and the executives, including two former CEOs, were indicted. The investigation is important in several respects. First, it illustrates our commitment – and that of our law enforcement partners – to swiftly investigate and prosecute collusion affecting public procurement both at home and abroad. Indeed, these charges are the first international charges brought by the Procurement Collusion Strike Force. Second, we will continue to hold individuals accountable, and when wrongdoing reaches the "C-Suite," we won't hesitate to charge high-level executives. In fact, the Division's criminal prosecutors are now preparing to try sixteen indicted cases charging eight companies and thirty individuals including six current or former CEOs and presidents.

Again, our prosecutorial decisions reflect the Division's priorities, which we have been very clear about in our public discussions.

On the civil side, our case selection and enforcement practice often reflect the need to apply antitrust laws in novel and changing technological circumstances. For example, as you know, the Division last year filed against Google its most significant Section 2 case in nearly twenty years. The case relates to markets for general search and search advertising that didn't exist just a few decades ago but are now among the most important in our economy. These markets affect a huge range of consumer choices, from taking a vacation to taking a loved one to the doctor. The complaint alleges that Google used anticompetitive tactics to maintain and extend its monopolies in those markets, harming consumers and businesses and threatening economic liberty. Pursuing this case with vigour remains one of our foremost priorities.

In *Visa/Plaid* the Division brought another Section 2 case, this time to challenge a proposed merger in high-tech payment systems. Although the parties ultimately abandoned the transaction, our case demonstrated that the Division takes seriously the importance of nascent competitive threats in fast-moving digital markets. As the D.C. Circuit recognised in *Microsoft*, Section 2 of the Sherman Act makes it unlawful to use exclusionary conduct to create or preserve monopoly power. That includes eliminating competitors by acquiring them before they can disrupt an industry. In fact, this kind of disruption, what antitrust lawyers and economists call "dynamic competition," may be one of the most powerful market forces for disciplining or toppling a monopolist.

Our merger enforcement teams continue to bring cases that the Division believes will preserve competition for American consumers. Two weeks ago, the Division filed our first merger challenge under the new administration, suing to block the $30 billion combination of two of

the three largest global insurance brokering and consulting firms. As Attorney General Garland said in connection with the filing, the case "demonstrates the Department's commitment to stopping harmful consolidation and preserving competition that directly and indirectly benefits Americans across the country." Our experienced team of expert career attorneys and economists is pursuing the case with vigour.

That brings me to my final point: what does the legal writing being celebrated here today have to do with the Division's efforts to advance antitrust policy through guidance and enforcement?

Obviously, guidance and enforcement involve writing in some sense. In fact, some of the writing being celebrated here includes guidance documents and competition advocacy by government enforcers including competition authorities from Mexico, Europe, New Zealand, South Africa, South Korea, and Peru. I know from experience how challenging preparing good public-facing guidance can be.

But legal writing has another fundamental connection to the work of a government enforcer and the values I talked about earlier. Good legal writing, whether it is persuasive commentary or withering criticism, supports good enforcement. Guidance documents are more enduring when they draw on the experience of the bar and the legal academy. Enforcement is more effective with input from people thinking creatively about new problems and new solutions. Our work is easier to understand when it is explained by a thoughtful writer in a good article. When it works best, the dialogue between government enforcers, the bar, and the legal academy is a virtuous cycle. Our work gives rise to comments and criticism. Your work encourages us to reflect on our successes and failures, correct missteps, and pursue new legal theories. The next generation of guidance and enforcement then gives rise to more comments and more criticism.

As Justice Brandeis wrote in his *Gilbert* dissent: "In frank expression of conflicting opinions lies the greatest promise of wisdom in governmental action."

Many of the pieces being celebrated tonight show this process at work. For example, Professors Scott Hemphill and Tim Wu's piece about nascent competitors draws from the work of the Division and the FTC, including speeches from people at both agencies and cases like *Microsoft*, in setting out a framework for protecting nascent competition. If that piece were written today, it might also draw from new enforcement actions brought by the agencies including *Visa/Plaid.*

Other pieces explored our compliance guidelines, wage-fixing cases, and efforts to address Covid-19. Some pushed back on established paradigms, criticise the Division's significant cases and imagined the future of antitrust enforcement in addressing collusion by algorithms or making sense of "big data."

All these articles have contributed to the conversation happening in the United States and around the world about the appropriate role in our society for antitrust enforcement and competition policy more generally. All of these articles have contributed to the antitrust moment and its shift to the antitrust movement.

Thank you to all of the nominees for helping drive the debate forward, to make our work fairer, more predictable, and more transparent. As I started by saying, for our part we remain committed to enforcing our nation's antitrust laws with all that is rightfully expected of us as federal prosecutors.

Thank you.

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CLOSING KEYNOTE SPEECH

Amy Klobuchar:

It is a true honour to be part of this year's Awards Ceremony. I want to thank the George Washington University Competition Law Center and Concurrences Review for recognising these significant contributions to the global competition policy discussion, and of course, I want to congratulate the outstanding writers. This year marks a decade that these awards have helped spotlight issues of great importance to economic growth in the United States and around the world.

Like many of you, I believe that America has a monopoly problem caused by an inability or unwillingness to enforce century-old laws to maintain a competitive economy. To see the effects of this problem look no further than our everyday lives. Why is healthcare so expensive? Why are pharma prices for commonly used insulin more than ten times the price in Canada? Why are cable rates so high? Why do farmers pay so much for seeds and fertiliser? Why don't we have enough privacy protections on social media platforms?

The answer is simple — a lack of competition. We see it in online travel where it seems like there are all of these travel sites that you all go to and try to pick the best deal, but in reality, 90 per cent of them are owned by two companies. Expedia and Booking control 90 per cent of hotel bookings on third-party travel websites. They just have different names.

We see it in everything from cat food to caskets. Americans today understand that there is too much consolidation in this country. They understand that concentrated markets in what has been called "too big to fail" businesses reduce incentives to innovate and discourage investment in startups to challenge entrenched monopolists.

This isn't about punishing success. I was in the private sector for nearly fifteen years. I am a big fan of capitalism.

And this isn't about going after companies just because they're big. This is about actually making capitalism what it should be and allowing for competition in new markets. It is about cracking down on the unfettered growth and abuse of market power and preserving our free-market system and capitalism itself.

In recent years, our economy has seen increasing levels of technological sophistication and rising market concentration, but we haven't changed our laws intended to police market dominance. If anything, the courts have been chipping away at the core of those laws, which has contributed to the steady rise of monopoly power. This is a problem we can't afford to ignore.

The economic prosperity that fuels growth and fosters our country's innovation didn't just happen. It was built on a foundation of open markets and fair competition over the course of American history.

You can go back to the American colonists who fled England seeking religious freedom, political freedom, and — yes — economic freedom from overbearing monopolies. It was those colonists drawn here who dumped all that tea into the Boston Harbor on December 16, 1773. They did this not only to send the message that they wouldn't support taxation without representation but also did it to show that they wouldn't be forced to buy tea from a bloated

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British monopoly like the East India Company which could drive colonial tea merchants out of business.

From the colonists' rejection of monopolies to workers' strikes from Chicago to Texas against monopoly robber barons to the Granger Movement with America's farmers, people all over the country, including in my home state of Minnesota, and from across the political spectrum, that have come together throughout our history to take on monopolies.

But that was a different time in history. In the place of trusts, we now have massive multinational corporations and widespread corporate consolidation. Instead of Rockefeller's sprawling Standard Oil Company, we now have huge horizontally and vertically integrated enterprises from Big Pharma to Amazon. And whereas we once had figures like James J. Hill and E.H. Harriman who tried to corner the railway market by issuing trust certificates, we now have wealthy investors who own stocks in multiple companies in the same industry.

Nowhere do our modern-day competition issues come into sharper focus than with today's Big Tech. These companies have undoubtedly had great success and brought useful innovations to people around the world — I wear a Fitbit; I use an iPhone — but even those we love, these companies' products, where their size and dominance allow them to buy out competitors and put a stranglehold on regulation, we know it is time to change.

To see the power look no further than Australia, which told Facebook and Google they would have to pay for news content, or at least pay something more appropriate. Instead of complying with the rule, Facebook switched off all news on its platform in protest, only reversing course after a few days under immense outside pressure. Google responded by threatening to pull Google Search out of the country, essentially holding it hostage. There was so much international pressure that they didn't follow through on its threat. So if you ask me what a monopoly is, maybe a monopoly is something that can hold an entire industrialised nation hostage.

For years companies like Facebook and Google have said "just trust us," but experience has shown that we can't rely on these companies to protect our personal data or prevent the spread of toxic disinformation or even to compete fairly in the marketplace, and that threatens our democracy as well as our economy.

When you see disinformation that led to horrific events, such as the January 6th insurrection, serial privacy violations, and the abuse of users' data, you can't divorce it from monopoly power. It has become clear that the only thing we can trust is that companies — and we've always known this — will act in their own interest.

A few giant companies in the tech area act as gatekeepers and dominate markets, exclude their rivals, and gobble up other companies. This is not by chance or coincidence. This is a strategy.

Look no further than Mark Zuckerberg's own email discussing Facebook's then-potential acquisition of Instagram: "These businesses are nascent, but the networks are established," he wrote. Now listen to this: "The brands are already meaningful, and if they grow to a large scale, they could be very disruptive to us." Those were his words — "They could be very disruptive to us."

I thought disruption was supposed to be a good thing in the technology industry. Disrupters — that's what they are. If tech markets were more competitive, we would have companies competing to offer consumers new bells and whistles to protect privacy, increase transparency, or prevent the spread of toxic disinformation.

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But Big Tech's grip on markets suppresses the potential of would-be competitors. How would we know what Instagram would be offering, or maybe WhatsApp if they'd had the privacy bells and whistles we want? But Facebook bought them. In Zuckerberg's words, they'd rather buy than compete.

So how do we take on the monopolies of today? It's not destroying them, getting rid of them. Well, we start by rebooting the antitrust movement in the United States. We don't get rid of the companies, but we shed them of the monopoly that surrounds them. That may mean divesting assets. That may mean putting conditions that are actually enforceable on what they do. We need a competition movement grounded in a procompetitive economic agenda. It's not rocket science. All we really need is the political will to get it done.

With Senator Chuck Grassley I introduced bipartisan legislation to ensure that antitrust authorities have much-needed additional resources to enforce the laws on the books. Our Merger Filing Fee Modernisation Act passed out of the Senate Judiciary Committee last month. I was so proud of that work. It is going to add over $100 million to the agencies because you can't take on the biggest monopolies the world has ever known with Band-Aids and duct tape. We are excited to get this passed into law, but it is the bare minimum of what needs to be done.

We also need to update our antitrust laws which have not kept pace with our changing economy. That is why I introduced the Competition and Antitrust Law Enforcement Reform Act. This bill will update our legal standards to help stop harmful consolidation, reinvigorate enforcement against exclusionary conduct, and ensure that the Antitrust Division and FTC have the adequate funding they need to do their jobs.

We know the stakes are high and we know the facts are stark. If we don't act now, the "curse of bigness" that Supreme Court Justice Louis Brandeis warned about will continue to threaten American innovation, our nation's entrepreneurial spirit, the future of our economy, and American consumers.

As another Supreme Court Justice, Thurgood Marshall, said of our antitrust laws, "They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." We cannot and must not forget that.

Thank you, and to our awardees thank you for helping to keep the focus on those freedoms. And, like Walter Mondale, someone who I loved who we lost recently, would always say to me, "Keep up the good work."

Thanks, everyone.

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