# Public Roundtable Discussion Series on Regulation & Antitrust Law

Session One: Roundtable on Exemptions and Immunities from Antitrust Laws

*Wednesday, March 14, 2018*

## TRANSCRIPT PART ONE

**MAKAN DELRAHIM**: Good morning. Thank you all for being here today. I am Makan Delrahim. I have the great privilege of being the Assistant Attorney General for the Antitrust Division. And welcome to the Great Hall of the Justice Department. We are launching today, as you know, the Division's series of roundtables on competition and deregulation.

I'm starting out by asking for some leniency from my friends at the Federal Trade Commission. I hear they come down pretty hard on deceptive claims in advertising, and I see that our first so-called roundtable discussion is being held at an unmistakably square table here.

I'm joined at the table by several attorneys from the Antitrust Division here at the Justice Department. Seated to my left is Douglas Rathbun, an Attorney Advisor in our policy section, and Bob Potter, who is our Chief for the Competition Policy and Advocacy Section. We also have Rene Augustine, Senior Counsel in the Front Office, and the great Daniel Haar, who is the Assistant Section Chief for the Competition Policy Section, formerly with our Appellate Section.

I'd like to thank all of our panelists and their organizations for their participation on the panels today. It's an honor to see so many great thinkers in the areas of antitrust competition and regulation here today. Let me also thank everyone who has made a written submission for the record to add great value to these discussions.

Today's roundtable will focus on antitrust exemptions and immunities. The next roundtable, which will be held April 26th, will examine antitrust consent decrees. And the third, on May 31st, will assess the consumer costs of anticompetitive regulations. I invite everyone in attendance today to join us for as many sessions in these series of roundtables as possible, because I anticipate a very productive discussion of these important topics that affect all of us.

If you take a moment to look at the cast aluminum statue of Lady Justice behind me, in this room, do you notice something unique about her, as compared with most representations of Lady Justice? She has no blindfold. This reminds us that today, we should keep our eyes open and remain vigilant in continuing to assess the appropriate application of our nation's antitrust laws.

In the antitrust world, we're fortunate to have durable laws, along with a great body of legal precedent. Over the years, we have seen advancements in our economic analysis, as applied to antitrust cases. We also have an ever-changing landscape in business and innovation. Today, we are here to evaluate the circumstances when our antitrust laws should or should not be applied. Free market competition is, of course, fundamental to the success of the American economy. As Justice Thurgood Marshall said, "Antitrust laws are the Magna Carta of free enterprise. 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."

The enforcement of the antitrust laws is, at its core, intended to ensure competition in the marketplace, to promote consumer welfare. Not long ago, I saw a news story about a pet boa

constrictor that escaped from its cage. The neighbors were terrorized by the roving, yet elusive boa, whose exact whereabouts were unknown. This scenario reminded me a bit of where we find ourselves today. When regulation replaces antitrust enforcement, the regulations, and those regulators, become stealthy and disruptive forces that can interfere with the competitive marketplace. And like the boa constrictor, they can slowly and painfully squeeze competition from the free market. I'll stop short of pointing out that the boa constrictor, in the end, swallow their prey whole.

With this in mind, it's our view that we should proceed with heavy skepticism whenever we see regulation replacing vigorous enforcement of the antitrust laws. Sound competitive analysis, not special treatment for particular industries or entities, should take precedence. Much as private restraint on competition can be harmful to consumers, government limitations and competition are equally harmful to consumers.

This series of roundtables will allow us to explore the relationship between competition and regulation, and its implication for antitrust enforcement policy. These conversations will help the Department pursue effective and appropriate competition policy, and identify related regulatory burdens on the American economy. Without a doubt, early and appropriate enforcement of the antitrust laws should protect the competitive process and minimize the need for regulatory intervention.

We will discuss restraints, in the form of exemptions and immunities, from our antitrust laws today, in certain sectors of the economy. The exemptions from the antitrust laws have a real cost to consumers where they're not needed or no longer appropriate. When I served on the Antitrust Modernization Commission, back in 2007, we concluded that, "As a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition, when the beneficiaries of an exemption likely appreciate reduced market pressures, consumers and the U.S. economy generally bear the harm. When an industry is given an antitrust exemption or immunity, competition is replaced by government regulation. This notion, despite an accumulation of exemptions and immunities in the law over the years, goes back many decades. One of my legal heroes, the great Justice Jackson, who previously served here in the Department, had this insight over 80 years ago: "Every step to weaken the antitrust laws, or to suspend them in any field, or to permit price fixing, is a certain, even if unknowing, step to government control."

In the first discussion session today, we'll examine the impact of express statutory exemptions from the antitrust laws. We'll explore how segments of the economy, with express exemptions, may be unique, review justifications for those exemptions, and determine whether they are and continue to be warranted. We'll also evaluate whether such exemptions harm consumers.

In this second session, we will look at how implied immunities and exemptions have affected antitrust enforcement. We'll examine the appropriate roles of the courts in creating immunities, and the exemptions from the antitrust laws, as opposed to Congress doing them. We will discuss whether the implied repeal doctrine in *Credit Suisse* helps or hampers competition. And finally, we'll examine whether the state action doctrine, in its current form, strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate

commerce. We'll assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the Dormant Commerce Clause can or should provide a meaningful limit on a state's ability to reduce competition involving interstate commerce.

Now for the logistics. I'll ask each of our panelists to provide a brief opening statement, immediately after I introduce them. At the conclusion of the opening statements, we'll begin with our series of three 30-minute discussion sessions. After the first session, we'll have a 10 minute break. The next two sessions will be followed by a brief wrap-up.

Let me turn to our panelists. Thank you, once again, for your willingness to participate today, and to share your views on these important issues. We appreciate your time and your views. And as you know, from the organizations that were invited today, we covered almost the whole spectrum, or the whole circle of spectrum, of antitrust and regulatory views, all of whom we value, and we believe will lead to a better result. Should there be recommendations for changes down the road, we will incorporate a lot of the comments that have been provided to us in these roundtables.

Let me first begin on my left. We'll hear from John Roberti, who's representing the American Bar Association's Section of Antitrust Law. He's a partner at the law firm Allen and Overy. He focuses on civil antitrust litigation and investigations. He serves on the counsel of the ABA's Antitrust Section. He worked at the Federal Trade Commission, in the Anti-Competitive Practices Division of the Bureau of Competition from 2001 to 2005, and earned his JD from NYU, and his bachelor's from Brown. John?

**JOHN ROBERTI**: Mr. Assistant Attorney General, it's really a great honor to be here. Thank you for inviting me in, and the section is delighted to participate. Before I begin, I just want to say, the comments and views that I'm going to express are my own, and don't necessarily represent the views of the section, or my firm.

I'm going to confine my remarks largely to discussion of statutory exemptions, although I'm looking forward to a very robust discussion on the panels, two and three, today. In general, antitrust exemptions arise for three main reasons. And Assistant Attorney General Delrahim's remarks touched on these points, I think.

First, many organizations or industries seeking to obtain or maintain an exemption argue that an exemption is warranted because facially anti-competitive activity is actually pro-competitive, or otherwise beneficial. This is an old and antiquated justification. Antitrust jurisprudence, in the wake of *Continental TV v. GTE Sylvania* has undermined much of this justification.

Over the last 30 years or longer, courts have widened the use of the rule of reason in antitrust cases, opening the door for many restraints on trade, that could be justified on pro-competitive grounds, to be analyzed on their merits, rather than be found to be, per se, unlawful. Thus, if we look at any new exemptions-- I think this justification will not be valid.

Second, we often hear that anti-competitive conduct will be exempted when a value greater than competition is in play. For example, there are exemptions for petitioning the legislation, courts, or administrative bodies to change or interpret laws, or to allow for activity that would violate the antitrust laws if done by private actors alone. This is protected by the Noerr-Pennington Doctrine, for example. The State Action Doctrine, of which we'll have a robust discussion, is also another example. The basis is relatively uncontroversial. The key issue there is the scope, and how it's enforced.

Third, and I think most importantly, many exemptions were justified originally, under the theory that in certain industries, regulation was preferable to competition. Or there were natural monopolies that needed to be controlled. Take an example of the railroads. The insurance industry, the ocean shippers, certain agricultural cooperatives, have all been granted statutory immunities to do things like set prices, agree to common terms of service, and form joint ventures in industry. In large part, these exemptions arose out of late 19th and early 20th century economic theories about the benevolent cartel. Economic theory has evolved to reject this foundation. I believe the consensus view is that consumers benefit more when competitors freely compete, and that economic regulation is better suited to preserving a competitive marketplace than to structuring the market around deliberately anti-competitive cartels.

So, regardless of the original justifications for giving exemption, antitrust exemptions are here to stay, or they seem to be. But there are a few common problems.

First, we find that exemptions are often broader than they need to be. Again, Assistant Attorney General Delrahim referenced the AMC report. I think that was a key finding. And I think we'll hear others speak to that today.

But there's also a problem of stickiness, meaning that, when exemptions are ill-considered, they're very difficult to remove. Antitrust exemptions create a classic public choice problem. They create a concentrated group of industry beneficiaries, who benefit greatly from their special privileges, while consumers suffer higher prices diffuse. So they may be harmed individually, only in small amounts. Therefore, these individuals are unlikely to exert much effort for the repeal of existing laws, even if the law's macroeconomic harm is significant.

On the other hand, to be fair to the exempt industries, removing the exemption would require a fundamental change in the way that they have built their businesses and made their expenditures, making a rapid removal of exemptions very difficult to implement. This problem of stickiness is evidenced by the fact that many of the existing exemptions were passed nearly 100 years ago, and still exist today, even after economic theory has moved away from the theoretical foundations on which they were originally built.

Turning to the ABA Antitrust Section. The Section has offered a four prong test to determine whether exemptions are appropriate. First, Congress should grant antitrust exemptions and immunities rarely, and only after rigorous consideration of the impact of the proposed exemption or immunity on consumer welfare. Second, Congress should only grant those exemptions and immunities that are drafted narrowly, so the competition is reduced only to the minimum extent necessary to achieve the intended goal. Third, Congress should enact antitrust exemptions and

immunities only when the proposed exemption or immunity achieves a congressional goal that significantly outweighs the aims of the antitrust laws in a particular situation. And finally, no exemption or immunity should be granted unless it contains a sunset provision.

The four prongs have consistently guided the section's analysis of proposed antitrust exemptions in recent years, and this Section has weighed in on several occasions using this analysis. We believe the prongs also provide important policy guidance.

However well-intentioned antitrust exemptions may be, most of them threaten to institutionalize anti-competitive conduct, often in sweeping ways that could be addressed better through more narrowly tailored reforms that do not otherwise conflict with the modern pro-competitive trust of the antitrust laws. As such, my view is most of the existing exemptions run afoul of at least one of the Section's four parts. But because exemptions are sticky and difficult to remove, and particularly so, because exemptions are difficult to remove, we believe any new proposals for exemptions should be treated with great caution.

Again, I very much appreciate the opportunity to participate today. Thank you.

**MAKAN DELRAHIM**: Thank you, Mr. Roberti. Representing the American Antitrust Institute is Diana Moss, the President of the AAI since 2015. Dr. Moss's work spans both antitrust regulation, with antitrust expertise in electricity, petroleum, agriculture, airlines, telecommunications, and health care. Before joining AAI in 2001, Dr. Moss was at the Federal Energy Regulatory Commission from 1989 to 1994, in previously in private practice. She holds a master's degree from the University of Denver, and a PhD from the Colorado School of Mines. In addition to Mrs. Moss, Randy Stutz, who was the associate general counsel of AAI, will also be joining us. He joined the AAI after some time in private practice, holds a law degree from Catholic University, and a bachelor's degree from Washington University in St. Louis. Diana, are you ready?

**DIANA MOSS**: Ready. Thank you very much, Assistant Attorney General, Mr. Delrahim. And thanks to the Division staff for your foresight and your hard work in putting these roundtables together. It's a pleasure and an honor to be here.

AAI's 20 year history of research, education, and advocacy highlights our organization's position that many immunities and exemptions from the antitrust laws are either unnecessary or harmful to competition. We have consistently supported and defended the Supreme Court's admonition that exemptions and immunities should be strictly construed, disfavored, with a heavy emphasis on the importance and indispensable role of antitrust policy in the maintenance of a free economy.

We would like to note, for the record, the thoughtful and enduring recommendations from the Antitrust Modernization Commission report, which identified 30 statutory and applied immunities and exemptions that were on the books.

With that said, I'd like to run through a list of what we think are very good reasons to be very skeptical of immunities and exemptions. I think, first and foremost, the concern is that

immunities and exemptions shield certain types of anti-competitive conduct, such as exclusionary behavior or collusive behavior, without fully promoting the goals that they are intended to achieve, whether that be a public interest benefit, or a public benefits type of target.

And I would put an exclamation point next to the notion that the anti-competitive conduct that immunities and exemptions may be shielding should be evaluated fully under a consumer welfare standard, that includes price effects, but also non-price effects, such as quality, service, innovation, and choice.

The second takeaway is that many immunities and exemptions are outdated. They are based on the goals and the values of a bygone era, where there were different trading models in place. There were different market structures, technologies, incentives. Examples would be the immunization of export cartels under Webb-Pomerene and the immunization of large, vertically integrated cooperatives under Capper-Volstead. That is a bygone era.

Third, many immunities and exemptions are really not based on clear market failures, such as natural monopoly, or regulatory regimes that have workforce-worn competition, which is really the ultimate test of whether an immunity or an exemption is called for.

And I would add that many of the effects of immunities and exemptions have been exacerbated by consolidation and high levels of concentration in some of the industries that we see today. For example, we see immunity for airline alliances and rail shipping rate agreements.

Another takeaway is that immunities and exemptions disrupt the very important natural complementarity between antitrust and regulation. There are things that regulation can reach to, that antitrust can reach to, that regulation cannot and vice versa-- there are types of conduct that regulation can reach to that antitrust cannot. We see complementarity in antitrust and regulatory remedies.

But perhaps most important, the role of antitrust serves very much in the capacity of law enforcement, to deter anti-competitive behavior. That's a very, very different animal than regulation, which is designed to promote a public interest standard under a set of rule makings and initiatives that are designed to implement the underlying laws. They're very, very different, but they serve in a complimentary capacity. Immunities and exemptions can disrupt that.

I would also add that judicially created immunities have very much been at odds, in some cases, with market developments. Filed Rate Doctrine, for example, in the wholesale electricity markets, is very much at odds with what is now a market based system, where the Commission does not review rates and does not oversee the rates that are charged. Same thing on the *Trinko* immunity, where the nascent development of local competition in telecom markets was really disrupted by a finding that the FCC was an effective steward of the antitrust function. I would close by saying that there has never been any systematic analysis of how immunities and exemptions have created conflicts, gaps, or chilled pro-competitive incentives. There has been no harmonization of the various implied immunities, expressed immunities, and exemptions, to determine which are really necessary, which conflict, and which create perverse incentives.

And then, I would close by saying, the record on sunset provisions has been very poor. Sunset provisions are vitally important, but have been largely overlooked in the construction of various immunities and exemptions, particularly the express exemptions. And that is something that we believe public policy should be paying very close attention to. With that, I will turn it over to Randy on my left.

**MAKAN DELRAHIM**: Let me just say that there might be some different views on whether *Trinko* actually provides any immunities, or it was an interpretation, under Section 2, of whether or not violations of the FCC creates any liability under Section 2, because Congress had a savings clause in there. That was actually somewhat careful, drafting that. I don't know if I would call *Trinko* an immunity from the antitrust laws. But we'll leave that for debate later. Randy?

**RANDY STUTZ**: Well, thank you. Let me echo Diana's thanks, and reiterate our appreciation for the opportunity to be here, and commend the Antitrust Division for hosting this event.

I'm going to focus narrowly on state action. And I think it was a wise decision to single out that topic for this as a separate discussion. There's been a lot happening there. AAI's basic view is that the Supreme Court has really taken us in the right direction in its two most recent Supreme Court cases, *Phoebe Putney* and *Dental Examiners*, which requires strict application of the Midcal factors, clear articulation and active supervision.

The court has really fine-tuned its core distinctions in the state action context, which have come to revolve around the public or private character of conduct being challenged, rather than any formalistic labels given to the agency that happens to be the defendant. The Midcal test, as it's now formulated, in light of these cases, really goes a long way, or perhaps all of the way, to ensuring that states can be held fully politically accountable when they make the sovereign decision to impose the anti-competitive regulation. And it does that by removing any doubt about the state's intent to displace competition, in favor of anti-competitive regulation, and about the state's responsibility in terms of how its regulatory regime is actually executed.

I think, unless we're willing to alter the basic calculus, in terms of how much respect we're willing to afford to each of the competing values that are at stake in the state action context, which are our values in honoring federalism, while also promoting competition. I think full political accountability, when states do displace competition, is really the most that we can aspire to under the existing framework.

And I think in light of the Supreme Court's recent cases, courts, the lower courts, really are better positioned than ever before to parse the public-private distinction correctly and accurately.

But one thing I think we need to pay attention to, in our new environment, as our legal rules have become better and more precise, I think we're going to encounter more administrative problems in actually applying the state action doctrine in practice. I want to focus on two points in that respect.

Number one, the Midcal inquiry has always been heavily fact driven. But after *Phoebe Putney* and *Dental Examiners*, both, it's going to be even more fact driven. In litigating state action questions, it's inevitably going to require discovery. It might have to be revisited at successive stages of litigation, whether on a motion to dismiss and summary judgment and trial, and so forth. And so our new system is going to add cost and delay on both sides.

And the second point, which is related to the first, the fact driven nature of the Midcal test, and the contingent nature, in terms of knowing whether immunity will actually apply, whether a court will ultimately hold conduct immune, creates a lot of uncertainty before the fact. And I think that uncertainty is something that policymakers are going to need to pay attention to. It also affects both sides. It affects states, when they're making a decision, whether to impose anti-competitive regulation. And it also affects plaintiffs, deciding whether to bring even a meritorious case, when there's going to be, perhaps, a protracted immunity defense before one ever gets to the merits. So I think for now, I'll stop there. Hopefully, we can discuss more of this later this afternoon. Thank you again for the opportunity to be here.

**MAKAN DELRAHIM**: Thank you very much. Next, we have, representing Public Knowledge, Mr. John Birkmeyer. He's a senior counsel, who specializes in telecommunications, internet, and intellectual property issues at Public Knowledge. His work includes advocating on behalf of diverse stakeholders on shaping emerging digital policies. He holds a J.D. from the University of Colorado, and a bachelor's from Colorado State University.

**JOHN BERGMAYER**: Thank you all for having me. It's an honor. Sometimes, antitrust and regulation are seen as two different ways of achieving the same or similar goals. But this is an incomplete understanding, and a proper grasp of the complementary role these approaches play can help us understand why antitrust should only step aside in case of a clear incompatibility.

In short, antitrust seeks to protect consumers by preserving competition within a given marketplace. But it is regulation that helps structure those markets to begin with, and it pushes markets to achieve outcomes that even vigorous competition alone would not provide.

At the most basic level, regulations define the existence and scope of property rights, which contractual terms courts will or will not enforce, and the possible corporate forms a business may take. Even tax and monetary policies shape what activities a business might find profitable. But of course, these are not what people typically think of when they think of regulation. Most people think of government rules that are designed to promote safety, such as aviation and food safety rules, or that are designed to require businesses to internalize externalities, such as various proposals for a carbon tax.

At Public Knowledge, we have a lot of experience with the FCC. And there are FCC rules that manage almost every category of regulation. There are FCC rules designed to protect aviation safety, by requiring that radio towers be properly marked. In deciding whether to grant satellite communication licenses, the FCC considers whether licensees would contribute to the problem of orbital debris. The FCC administers exclusive spectrum licenses, which while not fully **property**, share some characteristics of property, such as excludability and transferability.

The FCC also helps promote values that, in the minds of the drafters of the Communications Act, the market alone would not provide. The FCC's broadcast rules promote localism in the creation of children's programming. And broadcasters are required to provide certain public service messages, such as weather emergency alerts, and participate in the emergency broadcast system. Telephone companies are required to provide 911 service, and universal service policies promote access to low-income families in areas that might be uneconomical to otherwise provide service to.

In video, FCC rules govern broadcast coverage by cable systems and limit programming exclusives. And the FCC's common carrier rules for networks, now applicable only to the telephone network, unfortunately, in Public Knowledge's view, not only protect network users from monopolistic network operators, but from other goals, such as the free flow of information.

And seen in this way, both regulation and antitrust enforcement promote the general welfare, but in different ways. One by preserving the benefits of markets. The other by creating markets defining rules and promoting non-market outcomes.

That is not to say that regulatory agencies do not have the promotion of competition in their mandates. The FCC incorporates competition principles into its public interest standard, for instance. Regulators may have a mandate to promote new competition. For instance, not only does the Department of Transportation pursue public interest goals, like air service to smaller markets, but it is charged with, and I quote from the statute, "Encouraging entry into air transportation markets by new and existing air carriers, and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." And competition principles similarly inform drug securities and other areas of regulation.

At times, however, the methods of antitrust and the methods of regulation can be orthogonal. It can be easier to regulate a highly concentrated market. Or regulation might actually require that competitors work together on certain initiatives, in ways that otherwise might be seen as collusive. At times antitrust authorities may even be called on to provide their competition expertise to help regulatory agencies improve the rules when they're no longer serving their intended purpose.

But in general, only when there are genuine conflicts between regulatory duties and antitrust should antitrust step aside. Given the different purposes and methods of antitrust regulation, we support reading cases like *Credit Suisse* and *Trinko* narrowly. The fact that an industry is regulated does not provide it with a general immunity from antitrust laws. And even when an agency has the authority to prohibit a certain activity, using its regulatory power, but expressly chooses not to, antitrust authorities should intervene if necessary.

Congress itself has created the potential for an enforcement gap, such as with the common carrier exemption, that limits FTC oversight of some entities, we would advocate for repeal. And we're also skeptical of creating antitrust exemptions or immunities to accomplish public interest goals, especially when there are better means to achieve the same ends.

These issues should be settled by the law, and by what best protects consumers, and not informal notions of which agency has dibs, or fear of treading on someone else's turf. A gun shy application of the antitrust laws can allow a regulated company to slip through the cracks. The FCC's recent reversals on business data services and net neutrality policies, and other matters, illustrate the potential for a regulatory gap. The FCC has justified its de-regulatory policies, in part, by pointing to antitrust. FCC Chairman Ajit Pai has said that, "I think the antitrust and consumer protection authorities stand at the vanguard, to make sure that consumers and competition are protected."

Especially when regulators point to antitrust, antitrust authorities must not read doctrines like those articulated in *Credit Suisse* as standing in the way of protecting consumers and competition. Thank you.

**MAKAN DELRAHIM**: Thank you very much, Mr. Birkmeyer. Continuing on, and representing the Open Markets institute, is Mrs. Lina Kahn, Director of Legal Policy at OMI. She researches antitrust law, competition policy, and identifies potential legal reforms, with a recent focus on technology platforms. She received a BA Magna Cum Laude from Williams College, and a JD from Yale Law School. Mrs. Kahn?

**LINA KAHN**: Thank you to you, AAG Delrahim, and your staff for putting this together. Open Markets Institute is thoroughly honored to be part of this discussion on antitrust exemptions and immunities. Like many others here, we think they should be disfavored, and granted rarely, in narrow cases, following close study and analysis. In many instances, exempt students serve concentrated private interests, at the expense of the public interests, which generally, we believe, is best protected through robust competition. The fact that exemptions have concentrated private benefits and diffused public costs means that they are very sticky, and very difficult to repeal. Statutes like the McCarran-Ferguson Act exemplify overly broad exemptions that are undermining the public and competition, and should be repealed.

We agree with several of the AMC recommendations, including the need for Congress to create a full public record on any existing or proposed immunity that it considers. That said, we think it's important to acknowledge that exemptions, in select and narrow instances, can promote the broader public interest, especially when it comes to enabling players with no significant market power to engage in collective activity, as a way of creating countervailing power, and of enabling forms of organization the Congress has sought to protect. Two exemptions that I'll be discussing in that vein are the Capper-Volstead Act and the exemption for collective activity by a waiver, as defined under Section Six of the Clayton Act.

We think, in both of these instances, certain industry trends have undermined the original purpose of these exemptions, and that they should be revisited to ensure that they are protecting the intended populations. The Capper-Volstead Act was passed by Congress in 1922, to empower farmers to organize ag cooperatives. Efforts to organize operatives took off in the late 1800s, as farmers confronted the rise of local railroad monopolies, and growing consolidation among food processors. By immunizing certain activities undertaken by farmers collectively, Capper-Volstead enabled farmers to bargain, and sought to redress the effects of monopsony power. As the House report stated at the time, instead of granting a class privilege, the act aims

to equalize existing privileges by changing the law applicable to the ordinary business corporation, so the farmers can take advantage of it.

And for decades, the law helped level the playing field between farmers and concentrated middlemen, and ultimately helped secure the food supply. Today, however, that co-op landscape looks very different. In recent decades, the cooperative movement has been co-opted by dominant companies that prey off of the very small scale producers that they're meant to protect.

One example has occurred in the dairy industry, where we've seen the Dairy Farmers of America morph into an agribusiness giant in its own right, which has become vertically integrated, and is not able to faithfully bargain on behalf of the members it sought to protect. So we think Capper-Volstead is a good example of a case where an exemption that was passed in good faith, and could have a lot of benefits to still provide, is no longer providing those benefits, due to certain changes in industries.

The other instance that I'll be focusing on is the labor exemption. In this case, we've seen a dramatic shift in employment practices, the rise of the fissured economy, and increased reliance on independent contracting arrangements over traditional forms of employment, has given rise to a whole class of workers that are no longer protected. This has resulted in instances where organizing efforts by, for example, low income truck drivers, has been the target of antitrust action.

So in both these instances, industry trends have rendered these exemptions inadequate, and we think that facts should guide both enforcement, and should be a basis for revisiting the scope of these exemptions.

On implied immunities and exemptions, we're concerned about the potential scope of *Trinko*. We believe that it should be read narrowly, as a limit to refusal to deal claims under Section Two. We believe there's a good reason to doubt the Court's suggested assumption that agencies can adequately police antitrust problems. And we think it's not sufficient to consider whether Congress provided for a particular activity to be governed by a regulatory framework. We think it's really vital to also consider the goals of that regulatory framework, and whether that framework is compatible with, or even seeks to promote, competition. So I'll leave it there, and I really look forward to the rest of the discussion.

**MAKAN DELRAHIM**: Thank you very much, Mrs. Kahn. Representing Consumers Union, the Advocacy Division of Consumer Reports, we have our good friend and former alumnus from the Antitrust Division, George Slover. George serves as the Senior Policy Counsel at the Consumer Union, where he works on competition policy, regulatory policy, and other consumer protection policy issues. Previously, he spent 11 years in our Competition Policy and Advocacy Section at the Antitrust Division. I had the great pleasure of serving with him, the last tour I had here as a Deputy. And he had two stints at the House Judiciary Committee. He holds a J.D. and a Master's in public administration from the University of Texas at Austin. Mr. Slover?

**GEORGE SLOVER**: Thank you. Very pleased to be here, and honored. At Consumers Union, we value the antitrust laws, first and foremost, for what they do for consumers. Competition

gives us choice, which gives us leverage, which makes businesses pay more attention, and all the benefits that flow from that, for quality, variety, affordability, innovation. We need choice, up and down the supply chain – for everyone to have a chance to make a living, by contributing products, services, ideas, and labor.

Antitrust can't solve everything. Some protections won't be delivered by competition, like safety. Competition and regulation need to work hand in hand. As the AMC put it, the antitrust laws stand as a bulwark to protect free market competition. But a bulwark loses its strength if it becomes riddled with gaps.

There are some who'd like a gap for their own activities, although they don't want one for anyone they do business with. The courts have been strong about protecting this bulwark on their end. In fact, the law is well-settled in this area. It has not changed since the AMC restated and endorsed it. For federal regulation to create implied immunity, there has to be clear repugnancy with antitrust – so that it's essentially impossible to apply both without creating chaos. And we're only even asking this question where Congress has decided that comprehensive and detailed market regulation is needed to cure a dysfunctional marketplace – right down to pricing and terms-of-service minutia.

There's some free-wheeling dicta in *Trinko* about whether the 1996 Telecom Act might have created implied immunity, were it not for that antitrust savings clause. I was antitrust counsel at House Judiciary when that savings clause was written, and I was here at the Division, in an office right off that balcony, to help see it through. The history leading up to the Telecom Act, eight decades, back to the first Sherman Act case against Ma Bell, gave us a sense that a savings clause might be a good idea, just in case. But we don't want one everywhere.

The bedrock standard should remain "demonstrated clear repugnancy." The standard *Credit Suisse* exactingly followed. So we mostly just need the courts to stay the course and continue to follow well-established law.

The greater risk of new gaps comes from Congress. I've spent most of my career helping try to stop them. Sometimes, they *were* stopped. Sometimes, reined in, so they wouldn't shield conduct that might actually violate the antitrust laws. And sometimes they got through.

These exemptions came in two kinds. The first kind came from industry. "Our noble efforts to improve the world are being thwarted by a wrong-headed antitrust persecution."

The second kind was born in a Congressional office. "We'd like to enlist industry as our partner, in an urgent national endeavor, and we need to guarantee they can combine their ideas and talents without being punished."

As a general matter, neither rationale holds up. The exemption is not needed to achieve the laudable or urgent goals, and it risks giving cover to some extraneous scheme.

The effort to scale back the insurance exemption had been underway for years well before I got to the committee in 1990, and still is today. There it stands, as it did in 1945. Its main

justification, then and now, is so the insurance industry can continue to act as if the antitrust laws don't exist, subject to the boycott exception.

Keeping out new exemptions requires constant vigilance. We need a champion in Congress with leverage to stop them. In the House, that's the chair of the Judiciary Committee, with support from committee members in both parties and from House leadership. In the Senate, it's generally the chair and ranking member of the Antitrust Subcommittee, though in the Senate, it's easier for someone else to step up and also be a champion.

We've been fortunate, over the years, to have those champions. But we can't take that for granted. We all need to help build public awareness of the importance of antitrust, and to explain it in plain English. And we need to stay constructively engaged with Congress, with our champions, and with others we can help educate. Thank you.

**MAKAN DELRAHIM**: Thank you very much, Mr. Slover. Next, representing the Association of Corporate Counsel, is Mrs. Glynis Lloyd-Bell, Senior Corporate Counsel at Cisco Systems for the past 10 years. She is responsible for multibillion global sales agreements with U.S. service providers. Prior to Cisco, she was Assistant General Counsel at the U.S. General Services Administration. She holds a J.D. from Duke University, and a bachelor's from University of Illinois. Thank you very much for being here, Mrs. Bell.

**GLYNIS LLOYD-BELL**: Thank you. Thank you for inviting us to share our views. Please note at the beginning, the views I'm expressing here today are not the view of Cisco Systems.

The Association of Corporate Counsel is a global Bar Association for in-house counsel. It has more than 40,000 members, who work for more than 10,000 organizations in 85 countries. Our members work for businesses of all sizes, across all industries. So when it comes to antitrust matters, our members and their employers have been on both sides of the issues. As in-house counsel, our members are often charged with maintaining corporate compliance with antitrust rules, and providing proactive advice on business transactions and acquisitions, in order to avoid antitrust violations.

With respect to antitrust exemptions and immunities, the Association takes no express position on continuing or discontinuing any industry specific exemptions or immunities. Many of our members work in industries that are currently exempt, while others work in industries that might stand to benefit from the termination of exemptions.

However, all of our members do have a common interest in preventing disruptive regulatory changes that leave companies guessing as to what is legal and what is not. If we are examining the entities and exemptions, with a view to potentially eliminating some, we do urge that any process be undertaken deliberately and cautiously. Any changes should be enacted with enough transition time to permit companies to develop compliance processes that address antitrust requirements.

Turning to the state action doctrine, we do have an interest in how the antitrust immunity is applied to the state regulatory boards, going forward from the *North Carolina State Board of*

*Dental Examiners* decision. We strongly reject any suggestion that the state action doctrine's active supervision requirement should be eliminated, with the view that if anything, it might benefit from being strengthened.

For in-house counsel, the limits that many state bar associations put on the practice of law by out-of-state attorneys can be onerous, and have an anti-competitive tendency. These regulations do limit in-house attorneys' ability to move easily between jobs in different jurisdictions, without greatly contributing to the protection of the public interest.

While self-regulation of the legal industry is generally beneficial, we do think the states display some anti-competitive tendencies against attorneys licensed in other states. We are concerned by the state bar associations' reluctance to allow innovative legal services that may not fit the traditional mold of services provided by a law firm. This can affect consumer access to legal services in general,

We believe the requirements enunciated in *North Carolina State Board of Dental Examiners* should be consistently enforced against state regulatory boards that are comprised of market participants. We would like to see more guidance on what constitutes active state supervision.

In the context of state bar associations, the state Supreme Court is generally charged with supervising the regulatory functions of the state bar. But it's unclear to what degree the state supreme courts supervise the decisions of the bar associations.

It would be beneficial to the legal industry overall if there were additional guidance on the meaning of active supervision in the Bar Association state supreme court context. There have been various proposals for reform of occupational licensing in nonprofessional industries. But we would urge the federal government not to overlook the potential issues within the legal industry itself. We really appreciate the opportunity to participate in the roundtable, and we look forward to continuing the dialogue on these and other antitrust issues. Thank you.

**MAKAN DELRAHIM**: Thank you, Mrs. Bell. Isn't it interesting that some of the seminal antitrust cases we've had have involved bar associations, and attorneys, and restraints by them? We've recently filed an amicus, or statement of interest, in a Florida Bar Association case, in what's called a TIKD case, where the Bar Association was trying to restrain certain folks from practicing, from being able to engage in the business as an unauthorized practice of law. And we expressed some view on that second prong of the state action doctrine in that case. But it continues to be a challenge, and my guess is, not only for lawyers, but other professional organizations, who try to limit competition by new entrants, whether it's new technology entrance, or new market players. We're going to be vigilantly looking at those, for exactly the reasons that you mentioned.

Next, representing the United States Chamber of Commerce, is Mr. Craig Wolf, President and CEO of the Wine and Spirit Wholesalers of America since 2006. Mr. Wolf advocates for wholesalers' interests with state and federal elected officials, media regulators, and the law enforcement community. Previously, he held the position of that same organization's General Counsel. And before that, I had the great privilege of working with him at the Senate Judiciary

Committee. Prior to that, he was here at the Justice Department's Criminal Division, and was an Assistant State's Attorney. He received his law degree from the University of Baltimore, and his bachelor's from Dickinson College. Mr. Wolf?

**CRAIG WOLF**: Thank you very much, Assistant Attorney General Delrahim, getting a little heavy there, and the Antitrust Division, for putting this together. I believe the most effective government policies are those that are informed by careful consideration of the competing perspectives of those who will be directly impacted by those policies. So we appreciate the opportunity to be here. I am-- my name is Craig Wolf. I'm the President of the White and Spirits Wholesalers, which is a trade association whose members distribute more than 80% of all wine and spirits sold at wholesale in the United States. WSW is a member of the Chamber of Commerce, and I will be presenting the views of the Chamber, as well as those of my association, which has a unique perspective on the issues to be discussed today.

The Chamber believes in market competition that yields self-regulated markets, and is generally not supportive of immunities or exemptions from antitrust law. It recognizes that exemptions exist, has no expressed interest in reviewing those exemptions, but is hesitant to support additional exemptions.

With respect to immunities, the Chamber recognizes that the state action doctrine can shield anti-competitive regulation, which can lead to market distortions. So it is generally supportive of the narrowing of its interpretation to permit excessive regulation, which could lead to fewer market participants and pre-determined market outcomes.

The Chamber also has raised concerns with the interface between U.S. antitrust laws, the Foreign Sovereign Immunity Act, the act of state doctrine, and claims of foreign sovereign compulsion, and generally believes companies operating in foreign markets should be subject to the laws and regulations of the countries in which they operate.

The Chamber believes that U.S. antitrust authorities should investigate, and where appropriate, bring cases against any commercial competitor in the market, state owned, supported, or private, and that the courts need to limit the application of the act of state doctrine, granting of comity where deference results in immunity.

For companies finding themselves under scrutiny in a foreign market, the foreign sovereign compulsion defense may arise. And while the Chamber has sympathies for companies caught trying to comply with potentially conflicting legal regimes, the courts must evaluate the assertion of such events very carefully.

The Chamber also believes that the Foreign Trade and Antitrust Improvements Act is in need of clarity. Import commerce should fall within the scope of U.S. antitrust laws, and the harmed U.S. consumers should be within the reach of remedy.

Like the Chamber, WSWA generally supports the longstanding presumption that competition yields the best allocation of economic resources, the lowest prices, the highest quality, and the most innovation. However, we believe alcohol— and I think historic history has held out that

alcohol is unique, and the goal of unrestrained competitive forces to achieve the lowest prices must be balanced with competing public safety concerns.

We believe that the state-based regulatory system successfully and effectively balances regulation with competition, promoting a dynamic and diverse purchasing environment, while protecting citizens from the potentially harmful effects of alcohol. The laws and regulations governing the production, distribution, and sale of beverage alcohol do not benefit from any expressed statutory exemption, nor do they enjoy implied immunities from the antitrust laws.

But the fundamental tenant of primacy of state regulation is strengthened in the context of state beverage alcohol regulations. The adoption of the 21st Amendment reflected recognition by Congress, and the states. The difficult problem of regulating alcohol, a socially controversial product that could be misused, required that states be granted sweeping authority to develop comprehensive, magical solutions to protect their citizens. As a result, many state beverage alcohol laws and regulations promote a level playing field, by prohibiting below cost pricing, predatory pricing, and price discrimination. Those policy goals are consistent, and do not conflict with the principles embedded in the federal antitrust laws.

When a state's regulatory requirements directly conflict with expressed federal policies, those regulations will only prevail when the interests implicated by the state regulation are closely related to the interest reserved for the states under the 21st Amendment.

The state action immunity doctrine, which also rests on principles of federalism and state sovereignty, functions to ensure that state imposed constraints on competition are the subject of clearly articulated state policies, supervised by state officials who are not themselves market participants, which I think you just talked about in the Florida case.

The Dormant Commerce Clause limits the state's ability to discriminate between in-state and out-of-state producers. However, the Supreme Court has made it clear that the 21st Amendment grants the states virtually complete control over how to structure the liquor distribution system, and that a state mandated three tier system of distribution is unquestionably legitimate.

Now the regulatory systems developed in the states to manage beverage alcohol have created the most innovative, dynamic, and competitive alcohol marketplace in the world today, offering consumers a wide array of brands from across the world. This demonstrates how strong state laws governing production, distribution, and retail, can provide benefits to consumers, while satisfying important policy interests of the state in ensuring a level playing field for market participants.

We encourage the Department of Justice to recognize that beverage alcohol is historically and constitutionally unique, and requires a balancing of interests between competition and public safety. Thank you.

**MAKAN DELRAHIM**: Thank you. Representing the Heritage Foundation is Mr. Alden Abbott, Senior Legal Fellow, and the Deputy Director since 2014. He previously served as the Director of Patent and Antitrust Strategy for BlackBerry Corporation, and served as the Federal Trade

Commission Associate Director of the Bureau of Competition and Deputy Director of the Office of International Affairs. At the Department of Commerce, he served as the Acting General Counsel and Chief Counsel for the National Telecommunications Information Administration. And he was here at the Justice Department, in the Office of Legal Counsel, as well as the Antitrust Division Special Assistant to the Assistant Attorney General. Mr. Abbott holds a law degree from Harvard Law School, a master's in economics from Georgetown University, and a BA from the University of Virginia. Mr. Abbott?

**ALDEN ABBOTT**: Thank you very much, Assistant Attorney General Delrahim. Great to be back at the Main Justice Building. Thanks for inviting me again to speak today. Views I express today are solely attributable to me, and do not necessarily represent the views of the Heritage Foundation.

As has already been discussed, an economy based on vigorous competition, protected by our antitrust laws, does the best job of promoting consumer welfare in a vibrant, growing economy. This conclusion is supported by expert economic studies, both domestic and international. And most of our economy is based on such a competitive model.

Now, antitrust it is a key component of a competitive, free market system. As Assistant Attorney General Delrahim already mentioned, quoting the famous line by the Supreme Court Justice Thurgood Marshall, the antitrust laws are the Magna Carta of free enterprise. I certainly subscribe to that.

Now, therefore, laws or regulations authorizing departures from the competitive model and antitrust laws should generally be disfavored. And proponents of such departures should bear a heavy burden of demonstrating, with robust empirical support, why such a regime is necessary. Now, Congress, over the years, has adopted a wide range of measures that partially or fully immunize certain sectors of the American economy from antitrust review. Collectively, these sectors cover a substantial volume of commerce.

Now, heavy regulations, state and federal, may, in certain circumstances, have public interest justifications. However, it is a breeding ground for anti-competitive activity. Indeed, complex regulatory schemes, even when entirely well-intentioned, may seriously distort the competitive process. In particular, antitrust exemptions tend to foster legal cartels. Both economic theory and inheritance research support the proposition that statutory antitrust exemptions do undermine competition, and most importantly, consumer welfare.

Now, as already mentioned, antitrust law today takes into account economic efficiency, and should not be viewed as an impediment to economically desirable forms of collaboration by firms in exempt industries.

Finally, foreign jurisdictions are broadening the scope of their antitrust laws and subjecting to antitrust scrutiny formerly exempt sectors. This should help invigorate the competitive process overseas. It would be quite ironic if the U.S. government, which has argued strenuously, in multiple forms, about the benefits of antitrust to foreign economies, should, like the physician

who fails to take the medicine he or she prescribes, fail to heed the implications of the argument for American law.

I might add, for example, that the European Commission aggressively pursues anti-competitive activity by regulated entities and by state owned entities. Whether development of a market participant exception to the American State Action doctrine would be advisable is something that may merit consideration.

So in sum, I believe it's important to consider whether to continue the existence of individual antitrust exemptions, in their current form, fosters a goal of a strong, innovative American economy, or instead undermines it. Thank you very much.

**MAKAN DELRAHIM**: Thank you. And of course, you and Mr. Wolf both mentioned the Foreign Compulsion doctrine, which is the subject of the Supreme Court's review of the Vitamin C case that the Division and Department have been involved in. And I believe that the arguments are April 24th. So next month. And hopefully, later this year, we'll have some further narrowing of that doctrine.

Thank you, everybody, for participating, and those opening statements. We look forward to the robust discussions throughout the day. We'll have some of my other colleagues, basically following the instructions of Bob here. Along those is Barry Nigro, one of our Deputy Assistant Attorney Generals, Andrew Finch, who's our Principal Deputy Assistant Attorney General, and Roger Alford, who's our Deputy for International. From the Front Office, we'll rotate through. We have a couple of minor matters, some of which are going to trial next week, that we have to attend to. But this is important, and we'll rotate through here throughout the day.

So with that, if I could introduce to you, Barry Nigro, who is one of our Civil Deputies. And I'll excuse myself briefly, and I'll see you guys later. Thank you so much, for those statements, and for the discussion. Thank you.

**BARRY NIGRO**: Thank you, Makan. So this will begin our first session, which will be a discussion session. And I guess, should I call it a square table, not a roundtable? And that will focus on statutory exemptions from the antitrust laws. We'll want to talk about what the impact of these exemptions is. Are they justified? And what's the effect on consumer welfare? Is it positive or negative? So with that, I invite our panelists to start the discussion.

**BOB POTTER**: Why don't I just kick it off with the first question? A number of people have mentioned the problem of the stickiness of antitrust exemptions. Does anybody have a solution to that, that they want to proffer? John, I know you, that was a concern of yours.

**JOHN ROBERTI**: Bob, it is, I think, a really, very difficult problem. Because I think, as I've listened to all the remarks today, there seemed to be many areas where we're in wild agreement. And I think the problem comes in when you start practically applying these principles. We submitted a statement that's a little longer than what I've read. As part of that, we tried to find an exemption that we liked, that would fit all four of the ABA's prongs. And we couldn't do it.

So, I think we've set up a nice regime to talk about, well, new exemptions shouldn't be coming in. The problem that you have when you take something away, when people have planned and invested, is that you create very significant market disruptions, business practices fundamentally have to change.

I think, and I'll defer a little bit to my colleague from the Association of Corporate Counsel. But as a lawyer who counsels clients on compliance, I will tell you, it is very, very difficult. You can't stop on a dime and change business practices. So if you are going to pull out exemptions, there does have to be a very deliberate process. I think the solution has to be a reduction of, I think time is important. Setting sunsets, but setting them sufficiently far in the future, so people can plan, is important.

I think there also has to be some scaling back. Where you have a full exemption, maybe you can define areas where you would have safe harbors. And again, I would refer folks to comments the ABA has done on the McCarron-Ferguson Act, which talks about how to scale back that exemption.

**BARRY NIGRO**: George?

**GEORGE SLOVER**: So I think the goal should be to ultimately get rid of as many of them as we can. But I do think there is a problem, the potential disruption and uncertainty which comes up. Particularly, we saw it with the insurance exemption, which has been around for 3/4 of a century. And one of the initial things that the Judiciary Committee tried to do there was to create a transition period for the sort of cutting-edge issue, which was trending, projecting the actual real data into the future, and using joint predictions of what the future would look like to set rates based on those predictions.

And so there was, I believe it was a three-year transition period. It was not satisfactory to the industry. That exemption is still around. But I think a transition period like that makes sense, which I think John has essentially suggested as a possibility.

Another thing that I think might be useful-- oh, and I wanted to preface my remarks. Now that I'm off the page, I would like to make the same disclaimer that everybody else has made, that I'm not necessarily talking for Consumers Union, although my views are certainly informed by my mission there.

So, one of the other things that I think might be useful is a period of injunction only, where you're fully subject to the antitrust laws, but you can't be sued, except for injunctive relief. Both the enforcement actions and private actions would be limited that way. And then maybe a vigorous period of business reviews, to try to sort things out. You know, come one, come all. Give us your concerns. Let us help you figure them out, where the lines might be under the antitrust laws. An education process for the industry. And I think if everybody undertook that in good faith, it wouldn't have to be that long a period.

**BARRY NIGRO**: Diana?

**DIANA MOSS**: Just a quick comment. These are great. It's a great question, and good comments from John and from George. I wanted to make the point that on the stickiness issue, technical coordination is really important. And I would give two examples of the importance of working with sector regulators. So obviously, DOJ puts in comments on requests for immunity for the airline alliances, and we just saw the Delta Aeromexico case go through, where it was conditionally, immunity was conditionally approved, but subject to a sunset provision, as they all are, but are rarely enforced by the DOT.

But a five year period, which clearly, from a sector regulator's technical knowledge, was enough time to provide the ability for the parties involved to plan capacity expansion, and that sort of thing.

The other example I would offer is FERC's granting of market-based rates, which are presumably immunized under the File Rate Doctrine. Those rate reviews should occur every three years, and FERC does these rate reviews, to determine whether those parties possess market power or not, and whether they should be granted market based authority again.

So some of these are very technical issues. And so coordination with the sector regulators is important.

**BARRY NIGRO**: You mentioned the DOT example, and the five year sunset. Do people have thoughts on legislation that would sunset all, or most, existing antitrust exemptions, with a provision that allows them to be re-instituted in some form in five years? So there wouldn't be an instant sunset, but there'd be a five year lag, and then allow Congress to reconsider whether an exemption is appropriate, or necessary. Because I think, Diana, in your original comments, you mentioned how many of these exemptions have outlived their useful life. What about a global sunset provision, or legislation?

**CRAIG WOLF**: Wouldn't that be painting with a pretty broad brush? I mean, if you're saying something about every one of them getting a sunset provision, how do you individually look at each of different provisions and exemptions, make a decision about whether it's appropriate in this case for that case? Obviously, there's a lot of cynicism about the exemptions at this table. I understand that. But I think, if you don't have a chance to look at each industry separately, or each exemption separately, I think you're going to be potentially painting with too broad a brush.

**GEORGE SLOVER**: I think, for the reasons just stated, I think it would be very difficult, in practice, to harness the resources of Congress and everybody else to look at every exemption at one time. But I think starting down that road is a good idea.

**BARRY NIGRO**: So one of the challenges, I imagine, would be identifying a vehicle for giving consumers a greater voice. Industry, obviously, is always well represented when exemptions are at stake. But sometimes, the consumer voice can be diffuse and more difficult to organize. Do you have any thoughts on how to better represent the consumers? I know a number of the organizations here do that. But is there more that can be done to give them a greater voice in this process?

**JOHN BERGMAYER**: Sure. I guess I can deal with that. What we find is, a lot of times, the consumer groups-- on some issues in particular, it's hard to be taken as seriously as some of the industry groups. We don't have a lot of campaign contributions, and we don't have the same level of lobbying muscle. We might have two public interest advocates walking the halls on the hill, versus two per member of Congress for the industry on the other side. So I would say that the most effective strategy has typically been for public interest groups to work in coalition with as many partners as possible, with groups like American Antitrust, or something like that. Because that way, at least we can have a force magnification effect. I think, with some of these issues, where you have this classic concentrated benefit diffuse costs, the diffuse costs are felt by consumers, very often. Ultimately, they're paying higher prices or what have you,

But very often, you have trade associations that have an interest in this. And it's just a matter of getting the trade associations willing to spend the political capital necessary to put their reputation on the line, and perhaps make a few enemies, over an issue which might not be that material a difference.

And you hope that that's one thing where the reputation economy, and the repeating players aspect of Washington DC, makes it sort of worthwhile for those alliances to happen, so that can continue to be a beneficial alliance.

**DIANA MOSS**: Just a couple of thoughts on this. I really think there are three important things here. One is what John just reference, which is coalition building in the consumer community. We're finding that to be a very effective way to amplify the voices of the consumer.

But I also think it's important, when reaching out and getting the consumer perspective, to emphasize all the ways in which consumer welfare can be harmed by the shields that are put up by immunities and exemptions. And that's not just price effects. But as I said earlier, it's non-price effects. It's choice. It's variety. It's innovation. I think the consumer voice can be really effectively harnessed by connecting the dots on all of the aspects of consumer welfare that are potentially affected.

And then, finally, I would add, sometimes, not always, sometimes, there's a little bit of a tension in the consumer community, favoring certain types of regulatory approaches to achieve certain goals. AAI, as a competition advocacy organization, is obviously, our sights are set, ultimately, on the consumer. But we're very much advocates of vigorous enforcement in promoting competitive markets, so that consumers can benefit. And that means not a lot of regulation, between competition and the consumer.

**BARRY NIGRO**: Lina?

**LINA KAHN**: Sure. I'll mostly echo what John and Diana said. Our group really focuses on public education, and connecting the dots, ensuring that consumers and the public are able to understand what the pocketbook impacts of some of these exemptions are. So we do a lot of advocacy and storytelling, and also engage with other advocacy groups in this space, who are in the consumer protection space, who are not as attuned to, or familiar with antitrust issues. So I

think a lot more coalition building, which we've started to see in the last couple of years more, should hopefully help in this vain, too.

**GEORGE SLOVER**: I would just echo what everybody has said, but also add that for consumer groups, particularly one like ours, we're involved in a lot of different issues, as they affect consumers in the marketplace. And just to pick one that I mentioned, safety. We have to sort of, like you all do, figure out how you're going to allocate your resources, and what's the hottest fire that needs to be put out? And so it can be a challenge to talk about having a free market economy, supported by a set of laws that most people don't really understand that well, as one of those top priorities. So the challenge for us is to look for opportunities where the impact on consumers is clear, and to talk about it clearly, and in plain English, and to get the word out to as many people as we can, in Congress, in the press, with other coalition groups. And so that's a constant effort.

But I would echo what Lina just said, too, which is that there is a new reawakening of appreciation for the importance of the antitrust laws, and the importance of competition, and why we need to have them strong and vigorously enforced. And I think we need to take advantage of where we find ourselves now, and use that.

**BOB POTTER**: Lina, we've been- there's been a lot of agreement around the table. But I think you suggested something that I don't know that a lot of other people around the table necessarily agree with, which is, you pointed out that countervailing power, in your view, would be appropriate as a rationale for enacting antitrust exemptions. I think, is that accurate?

**LINA KAHN**: Yes. Generally, we very much disfavor exemptions. But I do think there could be select instances, I think, in the labor context, we would support that. I think Capper-Volstead, when it was passed, was potentially justified. But I think it is no longer serving its purposes. So I think there should be an inquiry looking at whether it should be modified to ensure it is protecting the right population, or done away with. But I think that's an example of an instance where countervailing power was a justification. But it's no longer serving that purpose.

There was actually an exemption introduced last week, by Representative Cicilline, in the context of the news and media space, where publishers would be able to potentially join together when negotiating with advertisers. And I think that situation has arisen, in part, because there is a feeling among publishers that the current marketplace is not really competitive.

And so I think understanding that monopsony concerns and buyer power concerns can be a situation that motivates, and kind of opens the door to discussion of exemptions. It's just worth recognizing, if only to, then, ensure that monopsony and buyer power concerns are being addressed. Because I think that often is a jumping point for more lobbying and organizing for these kinds of exemptions. So I think it's just something to be aware of.

**BOB POTTER**: John, as I read your written submission, I think that you disagree with that.

**JOHN ROBERTI**: I think that's accurate. I guess, again, speaking just for myself, my view on this would be, if there is some sort of dysfunction in the market, which is causing too much

power, concentrated in one place, that's best remedied through direct enforcement, rather than through, what would be, effectively, regulation, or some exemptions from the antitrust laws that would allow collusion, to do to balance that countervailing power. If there is countervailing power, let's bring a Section Two suit, and let's get that countervailing power fixed.

**LINA KAHN**: We totally, sorry, just to clarify-- we agree that enforcement is the best way to address this. I'm just pointing out that this is often a way that these things get introduced. And so I think they should be targeted through enforcement, rather than, say, allowing new exemptions.

**BARRY NIGRO**: George?

**GEORGE SLOVER**: So, I think Lina has identified a problem, that we agree with, too. And in our written statement, we flagged it as well. I also agree with what seems to be the consensus, that the best way to deal with the market power on one side is not to create market power on the other side. Because then you have a term that I think was coined here someplace, many years ago, the “sumo wrestler” situation, where you have one big guy, and you want to do battle against that big guy with another big guy. And then they end up shaking hands and figuring out a way to work together, and everybody else gets sat on instead.

So I think, hopefully, the, for example, the gig economy, and the movement to rendering people independent contractors, or telling them they're independent contractors, when they're really not, is a problem that hopefully can be addressed in the labor laws, and won't have to be addressed in the antitrust laws.

**BARRY NIGRO**: The sumo wrestler argument is one we hear a lot, when people are trying to justify mergers. So, we need to get bigger in order to compete with our bigger competitor. So it's something that's familiar to us.

**JOHN BERGMAYER**: Yeah. That was my--

**BARRY NIGRO**: John?

**JOHN BERGMAYER**: That was my point, exactly, which is that it's not just in, "Hey, please create an exemption for me, because there's all this market. power on the other side." Even when my problems might not actually be caused by the market power on the other side. There might be more, other fundamental issues to be addressed. But in merger after merger that Public Knowledge has worked on, that comes up as an example. And it's just, even-- and it might even actually, technically, be true in a narrow sense, that it will help the new, merged company strike better deals with these other big parties. I think one problem with that is not only the sumo wrestler problem. But it's a principle that has no end to it. It's just an argument, essentially, for continuing to have concentration on all sides, until there's just one big company.

**DIANA MOSS**: Can I just make one comment, just from a broader policy perspective? I don't think you can have it both ways. If we're going to explore policy initiatives and approaches to dealing with 30 immunities and exemptions sitting on the books, then you don't get to say, at the

same time, "Well, here's a carve out. We need an immunity here. Here's a carve out. We need an immunity here" for two reasons.

One is, it's a carve out. And instead of-- it disrupts a coherent, holistic, policy approach to dealing with what are too many immunities and exemptions on the book.

Number two, if the litmus test is, you've got to have a market failure, a clear market failure, or you have a regime which has a societal goal that is not promoting consumer welfare, then you're thinking about immunities and exemptions. But I can't, sitting here today, really think of that many examples, where those two conditions hold. Market failure are clearly a societal goal that trumps consumer welfare.

So to have a coherent policy approach, I think those are important metrics or factors to follow. And of course, you don't want the sumo wrestler thing happening on immunities and exemptions. Much like you guys at DOJ and at FTC don't accept those rationales for merging companies, that we need to get bigger so we can compete more with our bigger competitors. Nor would you give out an immunity and exemption to create countervailing market power, to deal with what should be an enforcement problem, and more vigorous enforcement.

**BARRY NIGRO**: Lina, and then John.

**LINA KAHN**: So, just to quickly follow up, to repeat, we disfavor exemptions and immunities. We don't think that the proposal that was offered last week is something that is, by any means, an ideal scenario. And we don't think that's the way to go.

But I think the reality on the ground is that many members of Congress are also now new to antitrust, and they're newly starting to pay attention to these issues. And the issues that they hear are often times in response to concentration problems. And so to them, they might be sympathetic to kinds of exemptions and immunities that instead should be targeted through exemptions, but if they don't-- that should instead be targeted through enforcement.

But if they don't feel like they have the tools to force that to happen, then I can see a situation where they increasingly go down this road. So I think it's good to be aware of that, and to maybe use that to then make sure that we focus on enforcement and situations where we're seeing these kinds of inequalities.

**JOHN BERGMAYER**: Thank you, and Bob, a very-- when I spoke before, I talked about one side of the equation, which is, if you see a market failure, let's enforce. There's also another side of the equation, which is, there actually are ways to fix the countervailing power, short of an exemption. And just thinking about the monopsony point, just listening to others and thinking about the monopsony point, there's really good guidelines on joint buying, in the health care context, that, frankly, I think a lot of practitioners are using to advise their clients in other industries as well. We're not telling them that there's an immunity. But we're saying, "Look. The agencies have said, this is what a safe harbor will look like in the health care context. They're likely to think about it in the same way. And if you set yourselves up in a way that falls within those guidelines, your risk is going to be pretty low."

So, you can solve it, I think, on both sides.

**BARRY NIGRO**: Any other thoughts? Alden? Craig?

Yeah. I think now is a good time to transition. So we'll take a 10 minute break. Roger will come up, and he will moderate the second session. So let's break for 10 minutes, and re-gather at 11:40. Thank you.