Prof. Nancy L. Rose[1], Remarks at the American Antitrust Institute's Annual Policy Conference Upon Accepting the Alfred E. Kahn Award for Antitrust Achievement (May 29, 2025)

Thank you, Bill [Baer], for those incredibly generous remarks, for all that you have contributed to effective antitrust enforcement over your career, and for your ongoing friendship and mentorship, which began with the call that led me to join your leadership team in the Antitrust Division and the best 28 months of my professional career. And my deep appreciation to the many DOJ career civil servants and others, some here today, who I had the privilege of working with in that role.

Thank you also to AAI, which has been a vibrant voice for effective antitrust enforcement for decades. I am grateful to Diana Moss, who invited me to join the Advisory Council when I returned to academia after my service at DOJ, to Randy Stutz for his thoughtful and impassioned leadership of the organization today, and to all of the AAI staff and affiliates I've interacted with over the years. I have learned much from my participation in AAI events and committees, and from so many of the people in this room.

When Randy called me and started talking about the Alfred Kahn award, I have to admit I was only half-listening, trying to figure out who he was going to ask me to introduce as this year's recipient. I was completely unprepared for that to be me. After listening to Bill's introduction, I'm even less sure about that!

I am deeply honored to receive this award, which I see as recognition of not only my personal contributions but also the contributions made by the many economists—dare I say "technocrats," after the morning panel—who have worked tirelessly to advance antitrust enforcement, and who I have learned from, been inspired by, and worked with. I can't help but call out Steve Salop, a former recipient of this award here today, who I co-taught my first PhD class on regulation and antitrust with in 1986, and who I have been learning from—and sometimes arguing with—ever since.

I am especially moved to receive an award that carries the name of Alfred Kahn. Fred Kahn's regulation text is a large part of the reason that I became an economist.[2] In 1979, I was nearing the end of my junior year in college, my government major nearly complete and on track to apply to law school, when I took a course in regulatory economics —and my mind was blown. Discovering an economic framework to analyze regulation, deregulation, and its interplay with antitrust, and seeing what Fred had just accomplished at the CAB turned out to be what an undergraduate policy wonk had unknowingly been looking for. I added seven more economics classes and an economics major my senior year, and went to work after graduation as a staff economist—unheard of in those days—

[1] Charles P. Kindleberger Professor of Applied Economics, MIT Department of Economics; Visiting Scholar, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School; Former Deputy Assistant Attorney General for Economic Analysis, US Department of Justice Antitrust Division.
[2] Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions,* Vol 1 & 2, New York: Wiley, 1970, 1971.

for a DC law firm doing regulatory agency work. After a few months, I realized that my passion was for the economics side of the work, not the law. (I think among friends we might agree that Administrative Procedures Act law is perhaps not the most exciting area of law…. who knows how things might have turned out if that early exposure had been to antitrust?) I applied to Economics PhD programs, and ending up at MIT to work with Paul Joskow. In academic genealogy, I think this makes me Fred Kahn's granddaughter—Fred was Paul's undergraduate advisor at Cornell. I still remember the thrill from meeting Fred at the first academic conference I attended as an assistant professor.

As I reflected on Fred's long and varied career in public service, and his reputation for frank speech, I wondered what his example would suggest for my remarks today. On the one hand, the work we do in pursuit of effective antitrust enforcement is essential to protect the competitive markets that have been the bedrock of our economy and its success, and I always am delighted to expound on that. As I have been telling students since 1986, if you're dismayed by the prospect or record of economic regulation, you should be enthusiastic about antitrust… regulation is what you wind up with when you've allowed markets to concentrate and calcify by failing to protect the competitive process.

On the other hand, I find it increasingly difficult to focus on the antitrust lane when the foundations of our democracy are being dismantled by an authoritarian regime that

- rejects the rule of law;
- deploys the power of government to punish its perceived adversaries AND emasculate civil society institutions including the Press, the Bar, and higher education;
- substitutes political ideology for scientific facts;
- and brutalizes those it does not value, from the most recent immigrants to the longest-serving career civil servants.

Without the rule of law, public enforcement of antitrust may become another tool of political pressure, corruption, extortion, or oppression. We saw what that could look like in alleged DOJ actions during the first Trump Administration, including the 2019 investigation of automakers who agreed with the state of California to abide by vehicle emissions rules more stringent than the Administration wanted, and Second Request investigations of ten separate cannabis industry

mergers, none of which led to merger challenges.[3] I fear that in today's political environment, the pressure is undoubtedly even greater, and we already have seen some slippage in that direction.[4]

I deeply regret that a previous commitment in Chicago puts me on a plane rather than listening to the next panel, which I hope will provide us with concrete ideas for how to increase our support for the rule of law in antitrust enforcement—and perhaps more broadly. I hope that economics and economists will be part of that solution, just as I think we have been in helping to advance a constructive enforcement agenda.

So let me close with just a few thoughts on that. There has been considerable debate over the previous hours and during the past decade over the appropriate role of economics in antitrust, and some have argued that economics has been given too large a role in enforcement decisions. You might have been tempted to accept that as a message of this morning's first panel. But I think that is misguided and short-sighted. Economics can—and I would argue does—provide a framework for rigorous analysis of potential competitive harm. Its toolkit provides the means to help distinguish benign conduct from that which threatens competition. And by focusing us on the welfare of trading partners, both upstream and down, it keeps attention on competition, pushing back against the use of antitrust for political pursuits. I was especially encouraged to see Assistant Attorney General Slater restore the economics leadership in the Antitrust Division to a DAAG position, an important signal of the role of economics and EAG in the Division's enforcement mission.

Over my 40-year career in teaching and research on antitrust and regulation, breakthroughs in industrial organization (IO) and related economics fields have advanced the enforcement agenda in countless ways. Insights from applied game theory gave us new tools for merger analysis and transformed competitive theories of harm in coordinated effects, vertical mergers, and exclusionary conduct, among others. The structural econometrics modeling revolution in IO created new tools for merger simulation, including estimation of demand and auction markets. Economists have helped advance new theories of harm and developed methods to assess their significance—such as

---

[3] The DOJ Office of the Inspector General report "did not identify evidence of improper political influence in the Antitrust Division's decision to initiate a preliminary investigation [in August 2019 of four auto manufacturers] that was sufficient to warrant the OIG expanding its review of the allegations." US Department of Justice, Office of the Inspector General, Oversight and Review Division, "Preliminary Review of Allegations Concerning the Antitrust Division's Handling of the Automakers Investigation," 24-079, July 2024. https://oig.justice.gov/sites/default/files/reports/24-079.pdf Reading the details in that report may not entirely assuage one's concerns about the role of political pressure. Whistleblower allegations regarding the cannabis investigations were the subject of House Judiciary Committee hearings in June 2020; see a discussion and copy of the letter released by the DOJ Office of Professional Responsibility in Ryan Goodman, "11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr—and Office of Professional Responsibility's Opinion," *Just Security,* June 26, 2020, https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibilitys-letter/ .

[4] See, for example, Aaron Edlin and Carl Shapiro, "The FTC is Threatening Free Speech," *Promarket*, May 1, 2025, https://www.promarket.org/2025/05/01/the-ftc-is-threatening-free-speech/.

raising rivals' costs and vertical foreclosure, bargaining leverage, and innovation harms, among many others. Insights from behavioral economics have altered our understanding of markets in essential ways, as we saw in the Google search case. Advances in experimental methods allow us to test the effects of policies the world has not yet provided, providing insights into search market remedies. And empirical analyses –such as merger retrospectives and industry studies--help shape enforcement, from identifying blind spots, to guiding approaches used in investigations, to refining policy benchmarks.

Let me provide three quick examples of these contributions.

1) Demand estimation and merger simulation. The empirical revolution in modern industrial organization, which took off in the 1980s, has provided a wealth of tools for modeling firm decision-making and market outcomes. Perhaps none have had as much impact on the academy and on antitrust enforcement as demand estimation for differentiated product markets. Where we have the appropriate data and model of competition, this enables enforcers to ascertain the closeness of competition between merging firms, and quantify the upward pricing pressure that will result from the merger— both the unilateral effects on the merging firms, but, if we are interested, the knock-on impact as rivals respond to those higher prices. This method has been used with immense success by the agencies, such as the 2016 Aetna-Humana health insurance litigation I got to work on while at DOJ, and the more recent challenge DOJ brought against the American-JetBlue Northeast Alliance in 2021.[5] DOJ economic experts were able to successfully explain the method to the judges in each case, and use the results to illustrate the considerable harm to consumers that would result if the merger were allowed to proceed.

2) Labor market and other upstream harms: While we use "consumer welfare standard" as a convenient shorthand to mean we do not consider the profits of firms engaging in the alleged anticompetitive conduct, it has never meant that antitrust enforcement relies on tracing the impact of such conduct through the entire economy to a measured adverse effect on the final customer. As Scott Hemphill and I wrote in 2018,[6] there is both legal precedent and sound economic rationale for putting upstream harms from anticompetitive actions on the same footing as downstream harm. When I was at DOJ, the Division had filed and settled merger challenges in animal processing and health insurance mergers based on upstream harm to farmers or health care providers, respectively.[7] But there was, among many enforcers, some reluctance to litigate a

[5] US et al. v Aetna et al., No. *1:16-cv-01494-JDB* (D.D.C. Jan. 23, 2017); US v American Airlines Group, Inc, 675 F. Supp. 3d 65 (D. Mass. 2023).
[6] C. Scott Hemphill and Nancy L. Rose, "Mergers that Harm Sellers," *Yale Law Journal,* 2018, http://hdl.handle.net/20.500.13051/10335
[7] See the discussion in Hemphill and Rose, 2018.

challenge based on upstream harm—perhaps out of fear that proving upstream price reductions would empower the defense to claim that DOJ documented for the court the efficiency that makes the merger pro competitive. This argument topped my list of things to work on when I returned to academia from DOJ, and resulted in my paper with Scott, which argued that not only did such harms not meet the resource saving definition of an efficiency, but that as an economic and legal matter, they were an additional merger harm, and firms could not claim a harm in one market as a benefit in another. A flood of academic work documenting failures of competition in labor markets, including by Ioana Marinescu, who is here today,[8] complemented our effort. And the theory has been embraced by enforcers around the world. An immensely gratifying result of this evolution was Judge Pan's 2022 opinion in the publishers merger litigation,[9] which upheld a DOJ challenge based entirely on upstream harm to authors of anticipated top selling books, and without any hand-wringing over its novelty.

3) Insights from merger retrospective analyses. We sometimes turn to merger retrospectives for insight on whether enforcement standards are "too lax," or perhaps more effectively, for whether realized efficiencies from consummated mergers are indeed sufficient to offset anticipated market power effects.[10] Perhaps my favorite example of an especially insightful retrospective comes from Nathan Miller's and Matthew Weinberg's analysis of the MillerCoors joint venture (JV). In their 2017 paper,[11] they observe that, despite widespread agreement that the JV realized substantial efficiencies in transportation and distribution of Coors beers, prices for ABI and MillerCoors appear to increase following the JV. They estimate a structural model of that segment of the beer industry, and use it to evaluate alternative explanations for this set of facts. Their results point to the conclusion that, despite realized efficiencies sufficient to offset the unilateral market power effects for Miller and Coors products, the merger appears to have facilitated more effective coordination of prices between ABI and MillerCoors, resulting in higher post-merger prices. Results like these— and similar work underway by Marc Remer and Reed Orchinik in airline markets[12]—help refocus enforcers on the

[8] For example, Jose A. Azar, Steven T. Berry, Ioana Marinescu, "Estimating Labor Market Power," *National Bureau of Economic Research Working Paper 30365,* August 2022; Elena Prager and Matt Schmitt, "Employer Consolidation and Wages: Evidence from Hospitals," *American Economic Review,* February 2021, 111: 397-427; David Arnold, "Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes," October 29, 2021.

[9] *U.S. v. Bertelsmann SE et al.,* 646 F Supp 3d 1 (D.D.C. November 15, 2022).

[10] See the discussion in Nancy L. Rose and Jonathan Sallet, "The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right," *University of Pennsylvania Law Review,* 168 (2020) 1941.

[11] Nathan H. Miller and Matthew C. Weinberg, "Understanding the Price Effects of the MillerCoors Joint Venture," *Econometrica,* 85 (November 2017) 1763.

[12] Marc Remer and Reed Orchinik, "Multimarket Contact and Prices: Evidence from an Airline Merger Wave," MIT Sloan Research Paper 7158-24, December 2024.

importance of considering coordinated effects in merger challenges. Ongoing work by Miller, Weinberg, and others to develop tools enforcers can use to try to measure these potential effects holds promise. [13] While the development of merger challenges based on unilateral effects was an enormous advance in competition enforcement, so too will be returning a rigorous assessment of coordinated effects as an equally important consideration.

Although I think economics has made major contributions to antitrust enforcement, particularly in recent decades, it may have the most to offer in times like these. Investigations and enforcement actions grounded in the rigorous assessment of competitive harm are far less likely to succumb to the political misuse of antitrust. If enforcers give favored companies a pass on anticompetitive conduct, private actions supported by economic evidence of these harms may provide a substitute path. And while the possibility for government misuse by imposing investigatory and legal costs on target firms may be difficult to preclude, if challenges are pursued, rigorous frameworks may assist judges in distinguishing valid competitive objections from pretextual or baldly political cases. I wish I could say I am optimistic for the future. But while I cannot say that, I am hopeful that economics will play a role in helping antitrust to advance the protection of competition and weather the current storm.

[13] E.g., Nathan H. Miller, Gloria Sheu and Matthew C. Weinberg, "Oligopolistic Price Leadership and Mergers: The United States Beer Industry," *American Economic Review,* 111 (October 2021) 3123; Ryan Mansley, Nathan H. Miller, Gloria Sheu and Matthew C. Weinberg, "A price leadership model for merger analysis," *International Journal of Industrial Organization,* 89 (July 2023) 102975.