COLLUDING TO SAVE THE WORLD: HOW ANTITRUST LAWS DISCOURAGE CORPORATIONS FROM TAKING ACTION ON CLIMATE CHANGE

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"The loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That's long-standing antitrust law."[1] So begins a *USA Today* opinion piece by Makan Delrahim, Assistant Attorney General and head of the Antitrust Division. Delrahim was defending a Department of Justice (DOJ) investigation into four major automakers who had recently announced they would continue to meet California's fuel efficiency standards even as the Trump Administration moved to roll back higher efficiency standards at the federal level.[2] The agreement between the automakers will likely lead to higher prices for consumers, which—regardless of other positive benefits—could be illegal under antitrust law. But should it be?

This debate about the goals of our antitrust laws emerges at a critical inflection point in competition law and corporation law generally. Corporations have emerged as powerful voices for social and political change, flexing lobbying muscle and changing their own behaviors to create policy impact on issues like gun control, anti-discrimination protection, and climate change. This increased action has led to formal acknowledgement that shareholder profit need not be the driving force of corporate decision making, reversing decades of focus on shareholder primacy.[3] At the same time, a growing body of literature critiques

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1. Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA TODAY (Sept. 12, 2019), https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/.
2. Juliet Eilperin & Steven Mufson, *Justice Dept. Launches Antitrust Probe of Automakers Over Their Fuel Efficiency Deal With California*, WASHINGTON POST (Sept. 6, 2019), https://www.washingtonpost.com/climate-environment/justice-dept-launches-antitrust-probe-of-automakers-over-their-fuel-efficiency-deal-with-california/2019/09/06/29a22ee6-d0c7-11e9-b29b-a528dc82154a_story.html.
3. David Gelles & David Yaffe-Ballany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html.

antitrust enforcement as being limited to too narrow a lens.[4] By focusing primarily on consumer welfare—as measured by prices—antitrust regulators ignore both broader, less tangible harms to society and also potential societal benefits that might flow from anticompetitive behavior.

Our antitrust laws must evolve to reflect the changing nature of corporate purpose and corporate social activism. Courts should not so quickly disregard the beneficial goals of business coordination, especially when those goals align with global commitments to address climate change. If our antitrust framework does not change, two types of conduct could be chilled. First, companies could be discouraged from coordinating with competitors to meet sustainability goals, like carbon emissions targets. This type of corporate collaboration on sustainability could be considered either an illegal agreement to fix prices or output. Second, a group of competitors refusing to work with a more polluting competitor could be considered an illegal group boycott. Further, and beyond the scope of this Article, companies with monopoly power could be discouraged from adopting "greener" practices if those commitments have the end result of raising consumer prices or increasing the costs of market entry for competitors.

This Article proceeds as follows. Part I gives a brief overview of corporate social activism and the changing role of the corporation in society. Part II assesses why the changing role of the corporation matters for antitrust enforcement, explaining how corporate coordination has traditionally been scrutinized under competition laws and how corporations have responded to the threat of antitrust regulation. Part III returns to the DOJ investigation into the four automakers as an example of the disconnect between the more recent role of corporate collaboration in society and traditional antitrust enforcement. Part III also highlights the urgency of addressing this conflict in order to successfully respond to the growing and existential threat of climate change. Part IV concludes with a brief proposal for an antitrust framework that could incorporate broader societal effects—both harms and benefits—as part of antitrust enforcement.

I. CORPORATIONS AS VOICES FOR CHANGE

When President Trump announced his intentions to formally withdraw the United States from the Paris Climate Accord, dozens of major companies stepped into the breach, promising to still work toward meeting the Paris emissions

4. *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 (2016) (arguing that the antitrust jurisprudence alignment with the "Chicago school" thinking is ill-equipped to consider economic harms and anti-competitive conduct in the contemporary context of online platforms like Amazon, warranting a return to heightened scrutiny of monopoly conduct). Khan's article is at the heart of a growing movement to revive antitrust enforcement, a movement pedantically derided by critics as "hipster antitrust." *See* David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea,* N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html.

targets.[5] Such a position—business leaders joining concerted international action in rebuke of a sitting President—was once unprecedented. Milton Friedman, the influential architect of free market economic theory, warned that business leaders should not act as "unwitting puppets of the intellectual forces" that promote desirable social ends, such as pollution reduction.[6] Corporate executives were supposed to ignore "the catchwords of the contemporary crop of reformers" and instead focus on "mak[ing] as much money as possible."[7] This shareholder profit paradigm persisted for decades, fueling the conditions that led to the Great Recession[8] and even making for-profit companies liable for *not* putting shareholder profits above all else.[9] But now that obligation is changing, and not a moment too soon.

By the time the Business Roundtable, an association of major company executives, formally acknowledged that corporate purpose needed to consider benefits to communities and employees in addition to shareholders,[10] the writing had been on the wall for quite some time. Corporations were speaking up in previously unexpected ways and focusing on more than just profit, encouraged by major voices in the business community.[11] For example, major tech companies leapt into action when Indiana passed a 2015 bill widely seen as discriminatory against LGBT persons, denouncing the law and threatening boycotts of the state.[12] The cloud-computing giant Salesforce, which had between 2,000 and 3,000 employees in Indiana,[13] exerted significant leverage in forcing an amendment to the law by cancelling all company programs in and travel to Indiana.[14] More corporate boycotts greeted North Carolina and Georgia

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5. Camile Domonoske, *Mayors, Companies Vow to Act on Climate, Even as U.S. Leaves Paris Accord*, NAT'L PUB. RADIO (June 5, 2017), https://www.npr.org/sections/thetwo-way/2017/06/05/531603731/mayors-companies-vow-to-act-on-climate-even-as-u-s-leaves-paris-accord.

6. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), http://umich.edu/~thecore/doc/Friedman.pdf.

7. *Id.*

8. *See generally* Justin Fox, *How Shareholders Are Ruining American Business*, THE ATLANTIC (July/August 2013), https://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/.

9. *See, e.g.*, Jay Coen Gilbert, *What eBay's Court Fight With Craigslist Reveals*, FORBES (Sept. 21, 2010), https://www.forbes.com/sites/csr/2010/09/21/what-ebays-court-fight-with-craigslist-reveals/#3fc5282dd8ba.

10. *See* Gelles & Yaffe-Ballany, *supra* note 3.

11. For example, BlackRock chief Larry Fink, the world's biggest investor, has used an annual letter to CEOs to urge corporations to emphasize "purpose" and *stakeholder* value over short-term shareholder profits. Larry Fink, "Profit and Purpose" Blackrock, https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter.

12. Quentin Hardy, *Tech Executives Pressure Indiana After Passage of Controversial Law*, N.Y. TIMES (March 27, 2015), https://bits.blogs.nytimes.com/2015/03/27/tech-executives-pressure-indiana-after-passage-of-controversial-law/.

13. Arik Hesseldahl, *Salesforce CEO Benioff Takes Stand Against Indiana Anti-Gay Law*, RECODE (Mar. 26, 2015), https://www.vox.com/2015/3/26/11560746/salesforce-ceo-benioff-takes-stand-against-indiana-anti-gay-law.

14. Jeff Swiatek, *Salesforce Packed A Punch in Galvanizing RFRA Opposition*, INDIANAPOLIS STAR (Apr. 2, 2015), https://www.indystar.com/story/money/2015/04/02/salesforce-packed-punch-galvanizing-rfra-opposition/70842680/.

when they passed similar anti-LGBT legislation.[15] Additionally, in the wake of recent mass shootings, Dick's Sporting Goods[16] and Walmart[17] cut back sales of certain firearms and ammunition, arguably doing more in a single decision to address the gun violence epidemic than Congress has been able to do in decades.[18]

The growth of corporate activism can be traced to broader societal changes, such as the increased connectivity of people and markets in the Internet age.[19] At the same time, governmental gridlock and increasing political polarization have undermined the capacity of government institutions to function efficiently and greatly weakened public trust in government.[20] Corporations are filling this gap as traditional government services become increasingly privatized.[21] The growing corporate role in society has fed on itself, with increased stakes and visibility of corporate activism resulting in outsized political power and legal rights. Corporate-associated spending on politics has reached unprecedented, jaw-dropping levels.[22]

It is increasingly clear that America cannot address the existential reality of climate change without corporate buy-in, if not corporate leadership. It is beyond the scope of this Article to discuss the extent of the climate crisis or the necessary corporate response; it is enough to say that each passing week brings bad news about the extent of already irreversible damage from climate change.[23]

While the future costs of climate change will be immense, the costs of acting now to limit warming to habitable levels are also significant, on the measure of $3.5 trillion a year.[24] While governments around the world are expected to lead the necessary spending, a large portion of those costs will inevitably fall on

15. *See* James B. Stewart, *Corporations No Longer Sit Idly By on Discrimination*, N.Y. TIMES (March 31, 2016), https://www.nytimes.com/2016/04/01/business/corporate-north-carolina-perks-up-against-discrimination.html.

16. Tiffany Hsu, *Dick's Sporting Goods Shifts From Guns Even as Sales Suffer*, N.Y. TIMES (March 12, 2019), https://www.nytimes.com/2019/03/12/business/dicks-sporting-goods-stock-gun-control.html.

17. Clare Duffy, *How Walmart Became an Unlikely Champion of Gun Safety*, CNN BUS. (Sept. 4, 2019), https://www.cnn.com/2019/09/04/business/walmart-gun-policy-reactions/index.html.

18. *See* Editorial Board, *Walmart is Acting to Curb Gun Violence. How About Congress?* WASH. POST (Sept. 5, 2019), https://www.washingtonpost.com/opinions/walmart-is-acting-to-curb-gun-violence-how-about-congress/2019/09/05/4f2d7002-cf4c-11e9-b29b-a528dc82154a_story.html; *see also* Alex Rogers, *Congress Rarely Acts On Gun Control Despite Mass Shootings*, CNN (Aug. 5, 2019), https://www.cnn.com/2019/08/04/politics/congress-reaction-mass-shootings/index.html.

19. *See* Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1557–58 (2018).

20. Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RES. CENT. (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/.

21. Lin, supra note 19, at 1559.

22. See *id*. at 1567–73.

23. Research published in late 2019, for example, details the extent of sea level rise by 2050 that is already "baked in," erasing cities that are home to millions. Amy Harder, *The Rising Seas Global Warming Has Already Locked In*, AXIOS (Nov. 6, 2019). https://www.axios.com/rising-seas-global-warming-locked-in-7593594c-34d3-4d1d-a367-b60ddb1ccb24.html.

24. Felix Salmon, *The Cost of Climate Change*, AXIOS (Oct. 14, 2018), https://www.axios.com/climate-change-costs-wealth-carbon-tax-303d7cff-3085-49d9-accb-ec77689b9911.html.

companies, either through direct taxes like a carbon tax or increased costs of compliance, such as ending reliance on coal.[25] Even as global governmental efforts falter,[26] corporations are committing to act, both together[27] and independently.[28] The high costs of corporate climate engagement, both to the companies themselves and to our society,[29] have to be worth the last best chance to mitigate catastrophic climate change.

II. ANTITRUST SCRUTINY OF CORPORATE COLLABORATION

As corporations pursue socially responsible strategies—whether on climate change or other social causes—the threat of antitrust enforcement looms. This threat discourages collaboration among competitors, even to meet goals that are objectively positive for society.[30] Much of this chilling effect comes from the inconsistent and evolving nature of antitrust enforcement and a general lack of bright-line rules.

Section 1 of the Sherman Act, the 1890 seminal antitrust law, prohibits "[e]very contract, combination, . . . or conspiracy in restraint of trade or commerce."[31] Although every competitive action, and certainly every contract and agreement, restrains trade in some manner, courts have enforced section 1 to prevent "unreasonably restrictive" contracts, combinations, and conspiracies.[32] Unreasonable restraints on trade, in turn, include those that "reduce output, raise price, or diminish competition with respect to quality, innovation, or consumer choice."[33] But how those various bad outcomes interact, or when to prioritize lower prices over other antitrust goals, is unsettled and subject to frequent debate.[34]

25. *See, e.g.*, Joseph E. Aldy & Gianfranco Gianfrante, *Future-Proof Your Climate Strategy*, HARV. BUS. REV. (May/June 2019), https://hbr.org/2019/05/future-proof-your-climate-strategy (explaining the urgent need for companies to assess the direct and indirect costs of expected climate mitigation policies).

26. Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?* 46 ECOLOGY L.Q. 865, 867 (2019).

27. Hundreds of companies have joined a coalition of local governments, non-profits, and other entities in announcing commitment to the goals of Paris. WE ARE STILL IN (Last accessed Dec. 9, 2019), https://www.wearestillin.com/.

28. *See, e.g*., Scott Snowden, *Amazon Announces It Will Meet the Terms of the Paris Climate Agreement 10 Years Ahead of Schedule*, FORBES (Sept. 19, 2019), https://www.forbes.com/sites/scottsnowden/2019/09/19/amazon-will-meet-the-terms-of-the-paris-agreement-ahead-of-schedule/#1af0a0275654.

29. *See* Lin, *supra note* 19, at 1582–93 (discussing the "perils" of corporate activism, such as the marginalization of some issues "as a corporate plutocracy picks and prioritizes" causes and the "corrosion" of democratic values).

30. For an extended and well-researched discussion of the antitrust challenges of corporate collaboration, see Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?* 53 AMER. BUS. L.J. 97 (2016).

31. 15 U.S.C. § 1 (2012).

32. *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911).

33. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1264 (2008).

34. *See* Scott, *supra* note 30, at 114–16 (explaining that through the history of antitrust jurisprudence courts have almost arbitrarily weighed and defined the various goals of antitrust policy "as they deem necessary").

Courts apply two different levels of analysis to challenged contracts, combinations, or conspiracies that restrain trade. The first type of analysis categorically rejects certain types of restraint as "per se unlawful" without a more searching inquiry into the economic context of the challenged conduct.[35] The second analysis is under the "rule of reason," a more detailed burden-shifting framework that considers procompetitive benefits of the conduct alongside an economic analysis of the restraint's harmful effects in a given market.[36] Over time, courts have moved towards applying the rule of reason.[37] Nevertheless, uncertainty over whether courts will consider an agreement per se unlawful has significant consequences for corporate collaboration for social good.

Both price-fixing and group boycotts are often considered per se illegal, regardless of ethical merit. While unlawful price-fixing can be as blatant as competitors setting the price of a common good to increase profits, unlawful price-fixing also encompasses "agreements to artificially reduce output," which will in turn raise consumer prices.[38] Professor Inara Scott uses the example of the volatile and scantly regulated coffee market, where coffee farmers could conceivably agree on environmental, labor, and price standards in order to reduce volatility and reduce retail prices.[39] But such agreement, even to reduce prices, is likely to be considered per se illegal price-fixing.[40] Similarly, conservation agreements to harvest fewer fish from a shared area—artificially reducing output—could be considered per se unlawful price-fixing because of the outcome on consumer price, regardless of the conservation goals.[41] Likewise, the laudable policy goals of a group boycott had no impact on its per se illegality in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, where a legal group's refusal to represent indigent defendants until their compensation increased was held unlawful.[42] The protest succeeded in forcing the city government to increase compensation, but they still lost in court: the Supreme Court held that though the rates had been "unreasonably low" and the boycott's cause was "worthwhile," it was nonetheless a classic restraint of trade.[43] In Professor Scott's coffee market example, a cooperative of coffee roasters likely could not refuse to work with a certain roaster in protest of objectionable practices, whether using child labor or wasteful techniques;[44] this kind of group

35. Lemley & Leslie, *supra* note 33, at 1213–14.

36. *Id.* at 1214–15.

37. *See Scott, supra* note 30, at 122. I omit discussion of the "quick look" rule of reason for reasons of brevity, especially given the current tendency to reach complete rule of reason analysis.

38. *Lemley & Leslie, supra* note 33, at 1267.

39. *See Scott, supra* note 30, at 129–30.

40. *Id.*

41. *See* Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 WASH. & LEE L. REV. 3, 41 (2004).

42. 493 U.S. 411, 423 (1990).

43. *Id.* at 421; *see also Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) (describing as attempts to justify ban on competitive bidding because it was beneficial for public safety and professional ethics as a "frontal assault" on the Sherman Act).

44. *See* Scott, *supra* note 30, at 123.

boycott to encourage a competitor to adopt "greener" practices risks per se illegal classification. Because courts cannot even consider the obviously beneficial goals of those types of agreements, corporations would be wise to avoid them entirely.

Even under the rule of reason, corporations face uncertainty over whether courts will consider procompetitive justifications rooted in social benefit. In general, courts applying the rule of reason "have rejected calls for consideration of the social value or purpose of a collective agreement."[45] The Supreme Court has explicitly stated that "good intention" will not "save an otherwise objectionable regulation."[46] For example, though the Court did not reject a mandatory National Collegiate Athletic Association price and broadcast agreement as per se illegal price-fixing, it still refused to consider arguments that the agreement was necessary to benefit society by maintaining the "revered tradition of amateurism in college sports."[47] Courts have also cautioned that industry standards enforced by trade associations must be voluntary and noncoercive in order to survive scrutiny.[48] For example, binding industry standards that punish noncompliance with exclusion would likely be considered an illegal group boycott, especially if the exclusion was for the purpose of punishing the noncomplying member for its unsustainable conduct (consider a trade association removing a label certifying the product as "eco-friendly" after the company's water uses fell out of compliance).[49] Assistant Attorney General Delrahim, Antitrust Division head, squarely reiterates that a redeeming intention cannot justify "collusive means" of enforcing cooperation.[50]

Under either type of antitrust analysis, corporate agreements that have a probable net effect of raising consumer prices or the appearance of a group boycott are likely to be met with substantial antitrust scrutiny, regardless of intent or even positive outcomes. As a result, corporations will likely refrain from socially beneficial cooperation that could raise consumer prices or exclude another competitor.[51]

45. *Id.* at 122.

46. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

47. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

48. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (finding American Gas Association (AGA) and gas utilities' refusal to work with manufacturer who did not meet AGA standards could be an unlawful group boycott where standards were influenced by competitors and not objective enough).

49. *See* Scott, *supra* note 30, at 135–38 (providing several examples of industry standards crafted to avoid per se treatment and the resultant challenges of weakened compliance and flexibility).

50. Delrahim, *supra* note 1.

51. *See* Scott, *supra* note 30, at 136–37 (discussing example of the Worker Rights Consortium making proposed labor standards voluntary after the DOJ scrutiny, resulting in minimal adoption of the labor standards).

III. ANTITRUST SCRUTINY FRUSTRATES CORPORATE ACTION ON CLIMATE CHANGE, FROM DETERGENT TO CARS

The chilling effect of looming antitrust scrutiny is especially concerning when it comes to climate change. Climate change is a unique problem, not only in that it requires uniform, ideally coordinated action, but the positive effects of addressing climate change are uniquely abstract, intangible, and distant. While the costs of climate change to business are not easily predicted,[52] the benefits of slowing or stopping climate change are most easily understood as mitigating expected losses, not generating positive economic gains. For example, limiting carbon emissions does not directly result in cheaper goods, in general.[53] This lack of clear consumer benefits leads to several distinct problems for corporate climate action.

A 2011 European Commission case demonstrates the challenges facing firms that try to raise sustainability standards while still making a profit.[54] Competitors Procter & Gamble (P&G) and Unilever were fined over €300 million for agreeing on price and market share for new, more environmentally sustainable laundry detergent products.[55] The firms had launched a voluntary effort to reduce environmental impacts by reducing packaging material, size, and washing machine energy use by creating a concentrated detergent that worked well in cold water.[56] Worried about a "first mover disadvantage" in a market where consumers did not necessarily understand the benefits of concentrated detergent, the companies coordinated on the new product launches and agreed on ideal pricing.[57] Though reduced energy use and reduced packaging waste are facially beneficial for society, P&G and Unilever ran afoul of competition laws by trying to mitigate—not exploit for profit—the effects of the new products on the market.[58] This example questions the exhaustive focus on consumer price. The P&G and Unilever judgment is an increasingly relevant example as

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52. Ceres, a corporate sustainability advisor and home of the influential Global Reporting Initiative, struggles itself to define the scope of the problem for business, noting that the assets at risk from climate change total somewhere between $4.2 trillion and $43 trillion. HELLE BANK JORGENSEN & FELICIA RESOR, CERES, GETTING CLIMATE SMART: A PRIMER FOR CORPORATE DIRECTORS IN A CHANGING ENVIRONMENT, 3 (May 14, 2018), https://www.ceres.org/resources/reports/getting-climate-smart-primer-corporate-directors-changing-environment?report=view. Further, we can speculate the difficulty of parsing out economic effects on the level of the specificity for a defined market that antitrust analysis typically requires.

53. Despite the positive climate change outcomes of a carbon tax or fee—a popular tool for reducing carbon emissions—there is little question that carbon taxes result in higher consumer prices for energy, if not other goods as well. *See* David Roberts, *The 5 Most Important Questions About Carbon Taxes, Answered*,VOX (June 27, 2019). https://www.vox.com/energy-and-environment/2018/7/20/17584376/carbon-tax-congress-republicans-cost-economy.

54. Jason Clay, *Precompetitive Behaviour—Defining the Boundaries*, THE GUARDIAN (June 2, 2011), https://www.theguardian.com/sustainable-business/precompetitive-behaviour-defining-boundaries; *see also* Scott, *supra* note 30, at 131–33.

55. Clay, *supra* note 54.

56. *Id*.

57. *Id*.

58. *See Scott*, *supra* note 30, at 132–33.

companies make investments and commitments—often with competitors—that raise their own costs even as they help the world address climate change. Will those companies be scrutinized for passing on some of those costs to consumers? Should they be?

In 2019, four automakers—Ford, Volkswagen North America, Honda, and BMW—announced an agreement with California to continue to meet stringent fuel efficiency standards in the future, even as the Trump Administration mulled plans to roll back nationwide standards.[59] California, which can set its own auto emissions standards, has eagerly used its position as a large consumer market with progressive values to advance climate change goals.[60] According to the July 2019 deal, the automakers will produce fleets with an average fuel efficiency of fifty miles per gallon by 2026—nearly the target agreed to during the Obama Administration.[61] The Trump Administration had previously announced plans to freeze fuel efficiency requirements at a thirty-seven miles per gallon fleet average in 2020,[62] setting up a direct conflict.

In September 2019, DOJ trumpeted an antitrust investigation into those four automakers, alleging that the agreement among rivals could violate competition law.[63] Letters from the DOJ asked the four companies to meet with the Antitrust Division regarding the "formation" of the deal.[64] Delrahim doubled down on the probe in congressional testimony[65] and in a *USA Today* op-ed, insisted that the "moral aspirations" of an agreement among competitors do not matter if there are anticompetitive effects.[66] Delrahim warned of consumer harm, via higher prices, that would result from the deal.[67] And higher prices certainly seem like the necessary result of meeting the stricter efficiency standards, regardless of cost savings to the planet or even to the consumer over the long term.[68] President

59. Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal With California, Rebuffing Trump on Proposed Mileage Freeze*, WASHINGTON POST (July 25, 2019), https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/.

60. *See, e.g*, Evan Halper, *How Far Can California Push the Nation—And the World? Jerry Brown's Climate Summit May Provide the Answer*, L.A. TIMES (Sept. 12, 2018), https://www.latimes.com/politics/la-na-pol-climate-summit-preview-20180912-story.html.

61. Eilperin & Dennis, *supra* note 59.

62. Brady Dennis et al., *Trump Administration to Freeze Fuel-Efficiency Requirements in Move Likely to Spur Legal Battle With States*, WASHINGTON POST (Aug. 2, 2018), https://www.washingtonpost.com/national/health-science/2018/08/01/90c818ac-9125-11e8-8322-b5482bf5e0f5_story.html.

63. Eilperin & Mufson, *supra* note 2.

64. David Shepardson, *U.S. Launches Antitrust Probe into California Automaker Agreement*, REUTERS (Sept. 6, 2019), https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG.

65. Harper Neidig, *Trump DOJ Under Fire Over Automaker Probe*, THE HILL (Sept. 26, 2019), https://thehill.com/policy/transportation/463127-trump-doj-under-fire-over-automaker-probe.

66. Delrahim, *supra* note 1.

67. *Id.*

68. Chris Isidore, *Gas Mileage Boost Means Pricier Cars – EPA*, CNN MONEY (Nov. 16, 2011), https://money.cnn.com/2011/11/16/autos/gas_mileage/index.htm.

Trump also focused on consumer price, asserting that the new standards would raise the cost of a car by more than $3,000.[69]

The DOJ probe was widely denounced as political retribution, with no legitimate antitrust case to be made. Nevertheless, the mere threat of antitrust scrutiny can have dangerous effects. Antitrust scholar Herbert Hovenkamp noted that the automaker deal could still constitute an "agreement" under the Sherman Act, even though DOJ would face "significant hurdles" in establishing an antitrust violation.[70] If the automakers "had discussed the [fuel efficiency] standards with one another and then voted to implement them," that would satisfy the first element of an antitrust offense.[71] There are strong arguments that such an agreement among competitors should be legal either as form of political advocacy[72] or by virtue of the state action doctrine, which permits anticompetitive conduct that has been authorized and is supervised by a state.[73] Hovenkamp argued that the automaker agreement would likely be legal because compliance would increase the costs for the *firms* to manufacture cars, but not increase consumer prices.[74] But if the automakers were to instead pass that increased cost on to consumers, that could result in a finding of liability.

It is all too easy to imagine that the four automakers would choose not to internalize the costs of compliance with the fuel efficiency standards, but instead would choose to raise car prices to commensurate with the increased manufacturing costs.[75] And any agreement on car price—even to keep prices the same, as P&G and Unilever did—could easily be considered collusive price-fixing and per se illegal. The Supreme Court has been clear that the "reasonableness" of set prices cannot cure their illegality.[76] Further, the agreement could have the result of deterring a "low-cost, high-emissions entrant

69. Donald Trump (@realDonaldTrump), TWITTER (Aug. 21, 2019, 4:01 PM), https://twitter.com/realDonaldTrump/status/1164311594081247233; Donald Trump (@realDonaldTrump), TWITTER______(Aug. 21, 2019, 3:50 PM), https://twitter.com/realdonaldtrump/status/1164308814759260161.

70. Herbert Hovenkamp, *Are Regulatory Agreements to Address Climate Change Anticompetitive?*, THE REGULATORY REVIEW (Sept. 11, 2019), https://www.theregreview.org/2019/09/11/hovenkamp-are-regulatory-agreements-to-address-climate-change-anticompetitive/.

71. *Id.*

72. The *Noerr-Pennington* doctrine, rooted in the First Amendment "protects concerted efforts to restraint or monopolize trade by petitioning government officials," especially where the conduct is incidental to the effort to influence government action. *See* Noerr-Pennington *and State Action*, 250 Corporate Counsel's Primers NL 1 (2014). Here, for example, the automakers could argue that their agreement was designed to pressure the Trump Administration to abandon the reduction in CAFE standards, making their conduct protected petitioning.

73. *See* Hovenkamp, *supra* note 70.

74. *Id.*

75. While the Trump Administration estimated the manufacturing cost of meeting the original 2025 CAFE standard as $1850–$2260 per vehicle, a trade association pegged the expected cost at just $550 per vehicle. Daniel Sperling, *Trying to Make Sense of Trump's Rollback of Vehicle Standards*, FORBES (Aug 2, 2018), https://www.forbes.com/sites/danielsperling/2018/08/02/trying-to-make-sense-of-trumps-rollback-of-vehicle-standards/#7f704efce71a.

76. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 400–02 (1927).

from entering the market,"[77] which could be considered a per se illegal exclusionary group boycott, even though the agreeing automakers lack market power to enforce a boycott.[78] And even if analyzed under rule of reason, there is no guarantee that the agreement could be successfully defended on the grounds that reducing emissions are good for society. In fact, as explained above, such abstract and distant benefits are exactly the type of justifications courts reject as being too divorced from the goals of antitrust policy.

Even though DOJ quietly dropped the investigation in February 2020,[79] the market results of the probe itself were almost immediate and significant. In October 2019, just weeks after the antitrust investigation began, other major automakers joined the Trump Administration as parties in litigation over California's right to set its own vehicle emissions standards,[80] even though automakers had once stood united behind the Obama Administration's higher fuel efficiency standards.[81] DOJ's abandoned investigation had sent a clear message to automakers: do not collude on car standards that will raise prices for consumers, or you will be investigated. With the threat of antitrust enforcement off the table for now, the Trump Administration finalized its dramatically lower fuel efficiency rule in March 2020.[82]

Despite the naked political motive and the arguably weak legal argument for antitrust enforcement against the four automakers in this case, the specter of antitrust liability will not be limited to the auto industry. At a time when companies are making serious commitments to address climate change, even the most progressive companies are likely to think twice about making commitments with competitors on any industry standard that could lead to higher consumer prices. Companies could be discouraged from moving forward on climate, at a time when bold action is needed most.

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77. Reed Hundt, *Companies Colluding to Fight Climate Change Don't Need to Worry About Antitrust Laws*, WASHINGTON POST (Sept. 11, 2019), https://www.washingtonpost.com/opinions/2019/09/11/companies-colluding-fight-climate-change-dont-need-worry-about-antitrust-laws/.

78. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 296 (1985) (holding that to be per se illegal, the cooperative must have either "market power *or* exclusive access to an element essential to effective competition.") (emphasis added). The Court has since indicated that a showing of market power is "not always necessary for per se condemnation" of a group boycott. C. Paul Rogers III, Consumer Welfare and Group Boycott Law, 62 SMU L. REV. 665, 681 (2009).

79. Coral Davenport, *Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions*, N.Y. TIMES (Feb. 7, 2020), https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html.

80. Coral Davenport & Hiroko Tabuchi, *White House Pressed Car Makers to Join Its Fight Over California Emissions Rules*, N.Y. TIMES (Oct. 30, 2019), https://www.nytimes.com/2019/10/30/climate/general-motors-toyota-emissions-white-house.html.

81. Robinson Meyer, *How the Carmakers Trumped Themselves*, THE ATLANTIC (June 20, 2018) theatlantic.com/science/archive/2018/06/how-the-carmakers-trumped-themselves/562400/.

82. Coral Davenport, *Trump Calls New Fuel Economy Rule a Boon. Some Experts See Steep Costs.*, N.Y. TIMES (March 31, 2020) https://www.nytimes.com/2020/03/31/climate/trump-pollution-rollback.html.

IV. CONCLUSION: AN ANTITRUST FRAMEWORK FOR THE TWENTY-FIRST CENTURY ECONOMY

The threatened antitrust enforcement against the four automakers highlights the disconnect between corporate law and climate reality. An antitrust framework that never permits price increases resulting from coordinated action ignores both the possibility of consumer benefits beyond price as well as the changing nature of corporations. As corporations wrestle with potential legal duties to take environmental outcomes into consideration in corporate decisions,[83] they need to be able to consider a broader definition of consumer welfare. Antitrust law's focus on short-term prices has helped mask long-term consumer harms and broader negative effects on society.[84] At the same time, corporations have been unable to successfully justify agreements that raise prices in order to achieve some societal benefit. Those two blind spots in competition law keep our legal framework stuck in a bygone era, prompting the need for change in at least three ways.

First, and at a minimum, courts need to revisit a jurisprudence that prizes low prices and market "efficiencies" as procompetitive justifications, but rejects justifications of social benefits. Courts must at least allow coordinating firms to offer cognizable counterarguments when their conduct is considered under the rule of reason. This realignment should accompany judicial acknowledgment that "consumer welfare" encompasses more than current or readily predictable price in an isolated market, and instead can include the long-term effects on things like consumer choice, consumer privacy, and local economic vitality.[85]

Second, Congress should pass legislation immunizing corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions.[86] Congress has provided similar exemptions before, permitting specific industries like railroads, insurance companies, and agricultural cooperatives to coordinate on prices and terms of service where regulation was preferable to competition.[87] Allowing companies in the transportation sector—

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83. *See* Jorgensen & Resor, *supra* note 52, at 5 (explaining that evaluating risks of climate change is part of the corporate "duty of care"); *See also* Brian M. Wong & Suz Mac Cormac, *The Climate is Changing: What Every Board Member Needs to Know*, ASS'N OF CORP. COUNSEL (November 2019), https://media2.mofo.com/documents/191101-climate-is-changing.pdf (explaining that a corporate failure to consider climate impact could be a breach of fiduciary duty and urging directors to include climate-related risks in long term planning and disclosure).

84. *See e.g.*, Khan, *supra* note 4, at 766–68 (discussing the network effects of Amazon's e-book pricing on consolidation in the publishing industry and declining media diversity); *id.* at 780–83 (discussing how Amazon's use of consumer data can help it squeeze third-party sellers and direct consumers to new products).

85. *See United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 429 (2d Cir. 1945) (emphasizing the importance of antitrust enforcement to protect small business and local economies "for its own sake and in spite of possible cost.")

86. *See* Hundt, *supra* note 77, who also considers antitrust scrutiny of climate cooperation in the context of the evolving corporate purpose and proposes similar solutions.

87. *See* John Roberti et al., *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, United States Department of Justice Roundtable on Exemptions and Immunities From Antitrust Law, 2 (March 14, 2018), https://www.justice.gov/atr/page/file/1042806/download.

responsible for over 25 percent of U.S. emissions in 2018[88]—to coordinate on environmental efforts would be a common sense step in line with past practice.

Finally, and more broadly, the Securities and Exchange Commission could, on its own[89] or with congressional backing,[90] require companies to disclose progress on environmental efforts and benchmarks that could be set internally or externally.[91] Mandatory environmental reporting, alongside other key metrics on governance and financial issues, would have three important benefits. First, corporate performance could be measured by more than just quarterly earnings, incentivizing longer-term decision making and reflecting the broadening of corporate purpose to include societal and environmental benefits. Second, a government-required environmental disclosure—ideally translated into a comprehensible number or rank—would allow antitrust regulators and consumers alike to track corporate progress on green initiatives, ensuring that any increases in consumer price or exclusionary conduct is more than offset by tangible gains on addressing climate change and replacing the voluntary, often one-sided corporate environmental reports often derided as "greenwashing."[92] Third, greater transparency and real environmental metrics that can be weighed alongside price and other standards could help ensure that corporations are not able to skirt competition laws to their profit, under the guise of fighting climate change. There is widespread discussion and progress on this type of mandatory reporting;[93] any new framework could easily be tailored to enforce antitrust rules for environmental coordination.

Updating antitrust and corporate law in these three ways would encourage much-needed corporate collaboration on climate change, reflect the changing

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88. Jeffrey Rissman, *How To Reach U.S. Net Zero Emissions By 2050: Decarbonizing Transportation*, FORBES (Nov. 11, 2019), https://www.forbes.com/sites/energyinnovation/2019/11/11/how-to-reach-us-net-zero-emissions-by-2050-decarbonizing-transportation/#1f42d50f2040.

89. *See* Jill E. Fisch & Cynthia A. Williams, *Petition to SEC for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure*, 3–6 (October 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf (explaining the statutory authority for the SEC to mandate environmental disclosures).

90. Senator Elizabeth Warren has proposed legislation that would direct the SEC to issue rules requiring climate-related disclosure. Chris Mills Rodrigo, *Warren Reintroduces Bill Mandating Climate Disclosures By Companies*, THE HILL (July 10, 2019), https://thehill.com/policy/energy-environment/452434-warren-reintroduces-climate-disclosure-bill.

91. In January 2020, the SEC again chose not to clarify its vague climate disclosure rules, over the objection of two commissioners. Tom Zanki, *SEC Looks To Give Companies More Leeway With Disclosures*, LAW360 (Feb. 12, 2020), https://www.law360.com/articles/1243434/sec-looks-to-give-companies-more-leeway-with-disclosures.

92. *See* Caitlin M. Ajax and Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"* 45 Ecology L.Q. 703, 711 (2019) (comparing aspirational statements in online corporate social responsibility (CSR) reports—"greenwashing"—with legally actionable language in mandatory financial disclosures). For a more detailed look at greenwashing and the threat it poses to meaningful corporate sustainability efforts, *see* Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. Davis Bus. L.J. 281 (2014).

93. *See*, *e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 Geo. L.J. 923 (2019) (summarizing the history and importance of sustainability disclosure and proposing a detailed model for a mandatory sustainability disclosure to the SEC).

nature of corporate activism, and acknowledge that consumer welfare can and must mean more than low prices. Saving the world may well depend on legalizing and incentivizing this kind of corporate collusion.