Testimony of Minnesota Attorney General Keith Ellison
House Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust

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Chairman Massie, Ranking Member Correa, and members of the subcommittee, my name is Keith Ellison and I serve as Minnesota Attorney General.

I had the honor of serving in the House for 12 years. During that time, I founded the Congressional Antitrust Caucus. Today, protecting fair and competitive markets is a cornerstone of my work as Attorney General.

Examples of unfair coordination and consolidation in our markets are everywhere. From healthcare to big tech to agriculture, anticompetitive behavior does real harm to American consumers, as reduced competition leads to stifled innovation and higher prices. For precisely that reason, I believe it is crucial that state and federal antitrust enforcement focus on the issues that threaten competition in our markets, rather than using antitrust to litigate the culture war issues of the day.

Our antitrust laws prohibit agreements among competitors that unreasonably restrain competition in a given market. A classic example is cartel activity in which competitors agree to fix prices or divide a market amongst themselves.

For federal and state enforcers to prove an antitrust violation like cartel activity, they must prove the existence of an agreement between competing firms. The agreement does not necessarily have to be a formal written document, but there must be an agreement among the competitors on some common course of action. *To be clear*, a group of competitors choosing the same course of action is not enough to prove the existence of an agreement. Courts have long required evidence beyond parallel conduct to establish the existence of an agreement.

There are two types of agreements that antitrust review generally focuses on, “horizontal” and “vertical”. Horizontal agreements are those among competitors at the same level of the supply chain. For example, an agreement among competing gas stations to set the same price for fuel would be a horizontal agreement. Vertical agreements are between firms at different levels of the distribution chain, for example, between a wholesaler and a retailer. Historically, horizontal agreements have been considered more troubling than vertical agreements, but it is possible for either to raise antitrust concerns.

Antitrust enforcers may also scrutinize agreements that feature both vertical and horizontal components. One example of this type of conduct is the “hub-and-spoke" conspiracy. A hub-and-spoke conspiracy takes place when several competing firms make a horizontal agreement to reduce or eliminate competition between one another and facilitate or coordinate that agreement through a relationship at another level of the supply chain, for example, a wholesaler that supplies each of the downstream firms.

In addition to an agreement between competitors, to violate the antitrust laws the agreement must cause harm to competition. These harms often take the form of increased prices, reduced output, or reduced innovation. Not only must the agreement harm competition, the anticompetitive effects of the agreement must outweigh any procompetitive benefits. Private plaintiffs must also prove that the antitrust violation caused harm to them specifically.

I should also note that antitrust enforcers may examine the conduct of a single company, as opposed to activity coordinated among multiple competitors. However, single-firm conduct is generally only subject to antitrust scrutiny when enforcers can prove the company has sufficient market power and also acts to harm competition in a market.

In recent years, some have suggested that ESG — or responsible investing that accounts for the risks of climate change or other environmental, social, and governance factors — may be illegal conspiracies under antitrust law.

Let me state clearly: antitrust law **does not** prohibit businesses or individuals from exercising their First Amendment right to work together to influence legislative or regulatory policy. The Supreme Court made this principle clear more than 60 years ago in a series of decisions that established the *Noerr-Pennington* Doctrine. The Doctrine, which grants antitrust immunity to private parties who work collectively to advocate for passage of certain laws or regulations even if those policies could be considered to have anticompetitive effects, is a well-established part of antitrust law. Companies may work together in attempt to influence public policy.

Antitrust laws also **do not** prohibit businesses from independently choosing to take a similar course of action as a competitor. Nor do they categorically prohibit industry self-regulatory initiatives or shareholders encouraging companies to consider the real risks posed by climate change or other environmental, social, or governance factors.

Crucially, antitrust laws do not prevent companies from reaching the conclusion that their business strategies should account for the urgent need to address climate change or the value of engaging the talents of all Americans in the workplace.

It is also well-accepted that competition within an industry can take place on more fronts than price alone. Quality is an obvious factor that many consumers care deeply about. Likewise, commitments made by industry participants may matter to consumers. For example, the success of the Marine Stewardship Council (MSC) has led to improved sustainability in fisheries. The MSC was founded after the collapse of the Grand Banks cod fishery in the early 1990s resulted in the loss of more than 35,000 jobs. Following MSC's work to highlight the need for sustainability in fisheries, consumers chose sustainable products and industry participants saw the value in offering sustainably sourced fish and seafood. Today, more than 20,000 MSC certified products are available to consumers.

More recently, initiatives focused on the imminent risks of climate change such as the Net Zero Asset Managers Initiative and Climate Action 100+ initiative have

gained momentum in the business community. No doubt, businesses' commitments regarding their work to address the impact of climate change are of interest to a great many consumers. Companies, asset managers and investors retain the ability to determine how to meet the initiatives' goals or determine whether they reach those goals at all. In fact, certain members of these climate initiatives continue to rank among the top financiers of fossil fuel industries globally, clearly demonstrating that companies remain free to conduct their business as they see fit regardless of membership.

As initiatives like Net Zero and Climate Action 100+ have become more well-known, those with competing political agendas have made broad accusations that these initiatives violate the antitrust laws. To the best of my knowledge, no one making these accusations has produced any actual evidence of an agreement among competitors with anticompetitive effects in a market.

As an antitrust enforcer, I consider these unsupported allegations irresponsible. Empty allegations can chill entirely legal business activity and slow vital innovation. Absent an actual agreement to take actions that will harm our markets, companies and investors have every right to choose to make responsible investing commitments. Indeed, in light of the rapidly mounting evidence, businesses and investors should be applauded for considering the impacts of climate change in their planning.

The corporate sector now overwhelmingly recognizes that it is vital to consider climate change, workplace safety, and corruption, among other important risk factors. Of the 250 largest global companies, 96% now issue a sustainability report. They don't do it out of ideology, they do it because it's responsible corporate governance. They don't do it out of altruism, they do it out of their responsibility to shareholders. And shareholders expect it.

Similarly, investor initiatives focused on managing the risks of climate change have gained momentum. According to Morgan Stanley, 95% of institutional asset managers have integrated or are considering integrating some form of

responsible investing into their portfolios. The top reasons they give for doing so are the traditional market concerns of managing risk and maximizing the potential for financial return.

As Attorney General, I also serve on the governing board of the Minnesota State Board of Investment, the SBI. The SBI is a fiduciary for roughly $140 billion of assets, serving more than 840,000 active and retired Minnesota public employees.

At the SBI, we consider all material risks and opportunities – which include environmental, social, and governance factors — and we are one of the highest-performing public pension funds in America. We are proof that responsible investing and high market returns can — and do — go hand in hand.

Institutional investors and financial professionals must continue to have the freedom to weigh the full spectrum of risk to the value of their investments. Both the logic of the market **and the law** support their doing so. Baseless but well-funded accusations to the contrary harm America's economy and prosperity.

Thank you.