

Congress of the United States

House of Representatives

Washington, DC 20515

July 17, 2023

The Honorable Lina Khan, Chair
The Honorable Rebecca Slaughter, Commissioner
The Honorable Alvaro Bedoya, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chair Khan and Commissioners Slaughter and Bedoya:

The United States benefited from a bipartisan consensus on antitrust policy for decades. During those years, the nation's economic performance has substantially outpaced the rest of the developed world. Today, with less than five percent of the world's population, the United States remains the world's largest economy. There are many reasons for this success, but not the least of which is the United States' sensible, consumer-oriented approach to antitrust enforcement. However, since 2021, the Federal Trade Commission (FTC) has sharply veered from established antitrust policy, toward an anti-consumer, anti-innovation, and anti-American policy that jeopardizes the health of our economy and threatens to increase costs to consumers.

The latest, and most egregious, example of the FTC's rejection of sound antitrust policy was the decision to seek a preliminary injunction against a procompetitive transaction, Microsoft's proposed acquisition of Activision. As Judge Jacqueline Corley of the Northern District of California found, the FTC failed to demonstrate a likelihood that the transaction "...will substantially lessen competition in the video game library subscription and cloud gaming markets"¹ and indeed, the "... evidence points to more consumer access to ... Activision content."² We write to express our concerns, and to urge you to drop this matter and refocus the FTC's resources on work that supports the interests of American consumers.

The FTC's case against Microsoft's acquisition of Activision is the latest in a series of actions that are clearly designed to impede legitimate mergers and acquisitions, while ignoring decades of settled FTC practice across Republican and Democratic administrations. Instead of protecting competition as Congress intended, the FTC has spent taxpayer resources seeking to block a deal that promises to expand consumer choice and insulate a dominant foreign company from competition. It is foundational that federal antitrust laws are intended to protect competition, not competitors, and certainly not dominant foreign competitors. It is therefore unsurprising that the FTC failed to meet an incredibly low threshold to obtain a preliminary injunction based on these facts. The FTC should follow the lead of the many other jurisdictions that have already cleared the merger.

¹ *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-cv-02880-JSC, at 1 (N.D. Cal. July 11, 2023) (denying prelim. inj.).

² *Id.* at 53.

For two decades, Microsoft's Xbox business has been the much smaller challenger in the video game publishing and video game console markets. The addition of Activision's portfolio is intended to help Xbox make these games available to a wider set of consumers, especially those who prefer to play on mobile devices. The value proposition of Activision is the popularity of its titles played on multiple platforms, which Microsoft has every incentive to continue. Increasing the availability of games and strengthening a challenger in these markets clearly benefit video game developers and millions of American consumers. These objectives are precisely what the antitrust laws are intended to protect and promote.

The FTC alleged that Microsoft would be incentivized to withhold access to Activision's popular games. However, Microsoft has made clear that it is "committed to helping bring more games to more people – however they choose to play."³ Further, as regulators in multiple other jurisdictions like the European Union and Japan have already recognized in their approval of the transaction, it would be economically irrational for Microsoft to withhold games such as Call of Duty from rivals and subsequently shrink the size of its consumer base.⁴ Indeed, Microsoft has committed to keep the Call of Duty franchise on rival consoles and game streaming services.

As Judge Corley found, there simply is no legitimate antitrust theory upon which Microsoft's acquisition of Activision should be blocked.⁵ Unprincipled efforts to block such procompetitive transactions appear to reflect the FTC's current disdain for the important role that mergers and acquisitions play in a vibrant, dynamic economy. Rather, the FTC's mounting court losses in merger complaints reflects the misguided view that companies should simply pursue "expansion through internal corporate growth" rather than "through acquisition."⁶

As the FTC continues to suffer defeats in such cases, it demanded a massive budget request totaling \$590 million, which is a \$160 million increase from Fiscal Year 2023.⁷ We cannot help but wonder if the FTC would need increased resources were it not wasting time and money on challenges such as the one it has brought against Microsoft's acquisition of Activision—an acquisition which, according to a federal judge, multiple other antitrust regulators from around the world, and simple common sense—is not anticompetitive.

³ Phil Spencer (@XboxP3), Twitter, (Dec. 6, 2022, 11:12 PM)

<https://twitter.com/XboxP3/status/1600342335845724160?lang=en>

⁴ Matthew Humphries, "[Microsoft Legally Commits to 10 Years of Call of Duty Games on Nintendo Consoles](#)," PC Mag (Feb. 21, 2023); Rory Cocker, "[Feature: Call Of Duty On Nintendo Systems - A Brief History](#)," Nintendo Life (April 8, 2023).


⁵ As two of the country's leading scholars of antitrust enforcement have argued, "vertical integration can spur innovation and greatly benefit consumers;" if the FTC fails to understand that fact, it may "cause real harm." See Carl Shapiro & Herbert Hovenkamp, "[How Will the FTC Evaluate Vertical Mergers?](#)" ProMarket (Sept. 23, 2021).

⁶ See Prepared Remarks of Lina M. Khan, "Remarks of Chair Lina M. Khan As Prepared for Delivery Fordham Annual Conference on Int'l Antitrust Law & Policy," (Sept. 16, 2022), at 6. According to Chair Khan, the lawmakers who promoted early enforcement of the FTC Act shared "a core policy view: that often times business expansion through internal corporate growth is superior to growth through acquisition."

⁷ Federal Trade Comm'n, *Congressional Budget Justification Fiscal Year 2024*.

https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf

Sincerely,



Kelly Armstrong
Member of Congress



James Comer
Chair, Committee on Oversight and Accountability



Larry Bucshon, M.D.
Member of Congress



Ben Cline
Member of Congress



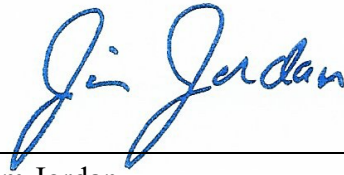
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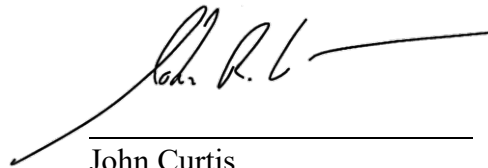
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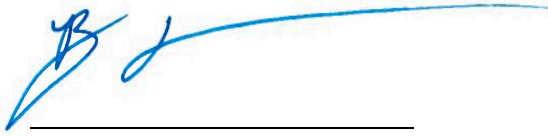
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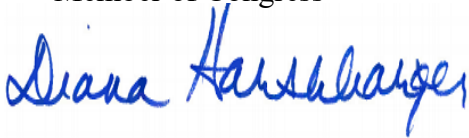
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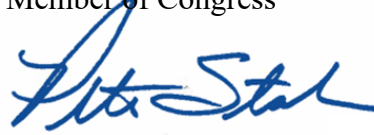
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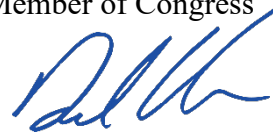
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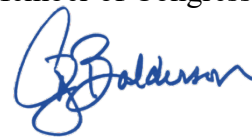
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