PROPOSALS TO STRENGTHEN THE ANTITRUST LAWS AND RESTORE COMPETITION ONLINE

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

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HOUSE OF REPRESENTATIVES

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PROPOSALS TO STRENGTHEN THE ANTITRUST LAWS AND RESTORE COMPETITION ONLINE

THURSDAY, OCTOBER 1, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 1:06 p.m., in Room 2141, Rayburn Office Building, Hon. David Cicilline [chairman of the subcommittee] presiding.

Present: Representatives Cicilline, Nadler, Johnson of Georgia, Raskin, Jayapal, Demings, Scanlon, Neguse, McBath, Sensenbrenner, Jordan, Buck, Armstrong, and Steube.

Staff present: David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Cierra Fontenot, Staff Assistant; John Williams; Phillip Berenbroick, Counsel; Catherine Larson, Special Assistant; Anna Lenhart, Technologist; Amanda Lewis, Counsel, Antitrust, Commercial, and Administrative Law; Joseph Van Wye, Professional Staff Member, Antitrust, Commercial, and Administrative Law; Lina Khan, Counsel, Antitrust, Commercial, and Administrative Law; Slade Bond, Chief Counsel, Antitrust, Commercial, and Administrative Law; Chris Hixon, Minority Staff Director; Tyler Grimm, Minority Chief Counsel for Policy and Strategy; Ella Yates, Minority Director of Member Services and Coalitions; Douglas Geho, Minority Chief Counsel for Administrative Law; and Kiley Bidelman, Minority Clerk.

Mr. CICILLINE [presiding]. The subcommittee will come to order. Without objection, the chair is authorized to declare a recess at any time.

We welcome everyone to today's hearing to explore Proposals to Strengthen Antitrust Laws and Restore Competition Online.

Before I begin, I would like to remind members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to members and staff as quickly as we can.

I would also like to remind all members that guidance from the Office of the Attending Physician states that face coverings are required for all meetings in an enclosed space, such as committee hearings. I expect all members on both sides of the aisle to wear a mask except when you are speaking.

I now recognize myself for an opening statement.

Since June 2019, the Antitrust Subcommittee has conducted a bipartisan investigation into the state of competition in digital markets. From the beginning of this process, we promised to perform a top-to-bottom review, including examination of the business practices and dominance of the largest technology platforms: Amazon, Apple, Google, and Facebook. Over the past 15 months, we have collected nearly 1.3 million internal documents and communications, a hearing record that totals 1,800 pages, testimony from 30 witnesses, submissions from more than 40 antitrust experts of every political persuasion, and interviews with more than 240 market participants, former employees of the investigated platforms, and other interested parties. Similar to prior congressional investigations, we did not set out with any preordained outcome in mind, and we have followed the facts. We have also worked to preserve bipartisan cooperation throughout this process. As my colleague and friend, Ken Buck, said before our last hearing, and I quote, "This is the most bipartisan effort I have been involved with in 5-and-a-half years in Congress." Let us continue our work in the same spirit during today's hearing, the 7th and final hearing that we will hold to conclude the subcommittee's investigation.

At our last hearing in July, we took the testimony of the chief executive officers of the four leading digital platforms: Jeff Bezos, Tim Cook, Mark Zuckerberg, and Sundar Pichai. For almost 6 hours, we pressed them for answers about their business practices, including about the evidence we uncovered that they have exploited, entrenched, and expanded their power in anti-competitive and abusive ways. To put it simply, their answers were evasive, they were nonresponsive, and they raised new questions about whether they believe their companies are beyond oversight. These four corporations differ in important ways, but our investigation has identified three problems that each present.

First, each platform now serves as a gatekeeper over a key channel of distribution. By controlling access to markets, these giants are able to pick winners and losers throughout our economy. Not only do they wield tremendous power, but they are also able to abuse it by charging exorbitant fees, imposing oppressive contracts, and extracting valuable personal data from the people and businesses that rely on them. Second, each platform uses their gatekeeper position to protect their own power. By controlling the infrastructure of the digital age, they have surveilled other businesses to identify potential rivals and ultimately bought out, copied, or cut off their competitive threats. Third, these platforms have abused and, it seems, will continue to abuse their control to expand their power in the marketplace. Whether it is through self-preferencing, predatory pricing, or requiring users to buy additional products, the dominant platforms have used their power in destructive ways in order to grow even bigger.

Each of these American companies have contributed immense technological breakthroughs and economic value to our country over the past several decades. They were founded on shoestring budgets in dorm rooms and garages and are a testament to our core values as a country. But in an effort to promote and continue this new economy, Congress and antitrust forces allow these firms to regulate themselves with little oversight. As a result, the internet has become highly concentrated, less open, and more hostile to innovation and entrepreneurship. To put it simply, these once scrappy underdog startups have grown into the kinds of monopolies we last saw more than a century ago during the time of oil barons and railroad tycoons. We stand at a crossroads, there is no doubt about that. As part of this hearing, we will discuss paths forward for addressing these competition problems.

Today's hearing also concerns broader questions about the overall rise of market power in our economy and potential solutions to arrest this concerning trend. In March, Subcommittee Ranking Member Sensenbrenner and I sent bipartisan requests for submissions from antitrust and competition policy experts with a diverse range of views on these matters. We requested comments on several questions as part of our review, including whether existing laws and enforcement levels are adequate to prohibit monopolization and anti-competitive mergers and acquisitions in today's economy. In response, we received 38 submissions from dozens of leading experts, including several of the witnesses testifying at today's hearing, which we have made public in connection with today's hearing. We are joined today by several leading experts in this field who will offer their thoughts on potential remedies for the problems that we have identified over the past 15 months.

In closing, I thank our esteemed witnesses for their testimony at today's hearing. And before I conclude, I just want to take a brief moment to recognize the outstanding career of the ranking member of the subcommittee, my friend and colleague, Jim Sensenbrenner. It has been a tremendous pleasure working with you this Congress. As part of your distinguished career, you have left an indelible mark on this committee, on the United States Congress, and on our country. You have never hesitated to work across party lines in the service of hardworking Americans, which is a quality that I hope endures on this subcommittee in your absence following your retirement from the Congress. As an incoming chairman, I looked to you for leadership at the beginning of the Congress. You have been a great source for advice and wisdom to me over the past 2 years. I thank you for your friendship and for your incredible service to this committee and to our country. And with that, it is my great privilege to recognize the ranking member of the subcommittee for purposes of making his opening statement. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman, and thank you for your wonderful words. Looking back at 42 years, you know, I have tried my best to identify issues, seeing where bipartisan agreement can be made, and then moving forward. And during my chairmanship, we were tremendously productive on a bipartisan basis, and since then I have kind of picked and chosen my issues, and this has been one of them.

This investigation has been very informative for us to better understand the tech ecosystem. When we began this process more than a year ago, I was very interested to learn about some of the country's largest and most successful companies. These companies—Google, Facebook, Amazon, and Apple—are ubiquitous in today's America, but grasping their influence in size and, more importantly, what they do with that influence in size was something that Congress needed to examine. Examination on the state of antitrust in the state of the tech world is wrapping up, and we have heard from academics, enforcers, competitors, and notably the big four tech companies themselves. The record is extensive. So we find ourselves today hearing from a panel of witnesses who will tell us exactly what we should do about all this. The size of this panel reflects the diverse opinions of what is to be done.

At our last hearing, I didn't believe we needed to change the country's antitrust laws or abandon the consumer welfare standard. It has been my experience after 42 years in Congress that this body is ill-suited to micromanage the economy, and probably even worse at predicting what it will look like in the future. I remain skeptical of proposals that break up these companies, mandate a one-size-fits-all data standard, or create a government-run "public option." It appears to me that this would ultimately stifle innovation and be more harmful to consumers. The question we should be answering is whether the law is inefficient to protect the consumer.

I believe the American people have been well served by our antitrust framework for decades. By contrast, I don't think that overly-burdensome regulations that break up these companies or having the government insert itself in their operations is the right course of action. Where we need to see improvement is in the enforcement of existing law. However, it should be noted that enforcement is starting to work. For more than a year, the DOJ and FTC have been conducting their own antitrust investigations into the big tech companies. It is being reported that as a result of this investigation, DOJ is readying a case against Google. Let us keep in mind as we consider whether a drastic overhaul of antitrust is warranted to meet the goals of the consumer welfare standard.

I do want to take a moment to thank Chairman Cicilline for the courtesies that he extended to me during this process in an effort to keep this investigation bipartisan. I do truly believe in the friendship we have developed, and while we ultimately disagree on the future of antitrust laws and the tech companies, I can say that it has been a pleasure to know you and to work with you on this. I also want the record to reflect that the next time we go to dinner, it is Chairman Cicilline's turn to buy, and I yield back.

Mr. CICILLINE. Thank you, Mr. Ranking Member. I now recognize the chairman of the full committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman, for holding today's hearing. It has been a pleasure to take part in this historic and bipartisan process. As we approach the final months of this session, I want to take a moment to reflect on the subcommittee's substantial efforts during this Congress.

The subcommittee has taken a number of concrete steps forward in support of its critical mission to promote open and fair markets for the American people with an appropriate focus on consumers and workers as well as small- and medium-sized businesses who are struggling to stay afloat. During the 116th Congress, we have favorably reported out of the Judiciary Committee nearly a dozen bipartisan bills developed by the Antitrust Subcommittee, all of which passed with unanimous support. These include a bipartisan package of bills that ban various types of anti-competitive conduct by branded drug companies, which are vital to stop the skyrocketing cost of prescription drugs. We were able to enact one of these bills, the CREATES Act, into law last year. This act, which was sponsored by Subcommittee Chairman Cicilline and Senator Patrick Leahy, will cut drug prices by billions of dollars by removing entry barriers for generic competitors.

Over the past year, we have also enacted several other important laws that originated with this subcommittee, including laws to ensure that small businesses, veterans, and consumers have access to a fresh start through the bankruptcy system. This work is more important than ever as our Nation continues to grapple with the devastating economic effects of the COVID–19 pandemic. We also passed out of the House for the very first time the Forced Arbitration Injustice Repeal Act, or the FAIR Act, which restores the rights of every American and small business to their day in court by ending forced arbitration. This important legislation was championed by Courts and Intellectual Property Subcommittee Chairman Johnson. Just 2 days ago, the Judiciary committee voted out a bill that I sponsored to help address the student loan debt crisis. That legislation makes student loan debt dischargeable in bankruptcy, fixing a great injustice that burdens millions of Americans. I am deeply proud of these efforts, and I look forward to continuing our work towards enacting laws that will promote competition, access to the courts, and a fair bankruptcy process, among the subcommittee's other important work.

Turning to today's hearing, over the past 15 months, the Antitrust Subcommittee has undertaken a historic bipartisan investigation of competition in the digital marketplace. As I made clear at the subcommittee's last hearing, I had significant concerns about consolidation and its harmful effects. The investigational record bore this out. Each of the major companies that were part of this investigation in its own way exerts dominant control in the digital marketplace that has been cause for great concern. As we approach the end of this investigation, with the benefit of our six hearings and substantial record, my belief that we must modernize and reinvigorate enforcement of the antitrust laws is stronger than ever. We must modernize our antitrust laws to meet the challenges of our modern economy. We must ensure that our enforcement agencies have the tools, resources, and the will to vigorously enforce the law to protect consumers and promote competition.

This investigation has also made clear to me that beyond fixing the antitrust laws, we must use our oversight authority to shore up the antitrust enforcement agencies' ability and will to enforce those laws. In some instances, the lack of enforcement may come down to a lack of will. Our antitrust enforcers should not pull

punches. We must ensure that the leadership at these agencies is committed to robust enforcement. It is also important to adequately staff and resource the agencies as antitrust cases have become more resource intensive and agency staff are faced with investigating some of the wealthiest companies of all time.

I look forward to hearing from our witnesses and to discussing how we can work together on these important matters going forward. I thank the chairman for holding this hearing and for his leadership of this important investigation. I also want to thank the ranking member, Mr. Sensenbrenner, the chairman emeritus of the full committee, for his many years of service to this committee and to the House. He will be sorely missed next Congress. With that, I yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman, and I now recognize the ranking member of the full committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chairman. Big Tech is out to get conservatives. That is not a suspicion. That is not a hunch. It is a fact. I said that 2 months ago at our last hearing. It is every bit as true today. Democrats have said that they want to take a serious look at the size, power, and influence of these companies. They have refused our repeated requests that this include an evaluation of how platforms are censoring speech. Maybe it is because the left isn't being censored. We never hear about *Mother Jones* being demonetized. We don't hear about Young Turks' videos being taken down. We don't hear about the *Daily Coast* being censored. Nope, this only happens to conservatives.

Google tried to demonetize The Federalist. Amazon censors the Family Research Council. YouTube blocks videos from Senator Blackburn. Twitter censors the President, but they let the leader of Iran post a statement where he says they will strike a blow against American citizens. At the last hearing, our concerns were dismissed as "conspiracy theories," despite this mounting evidence of biased actions against conservatives. Even though you are seeking to radically rewrite antitrust laws, Silicon Valley continues to use its power to carry your water. In fact, the vast majority of political contributions from the very firms you are targeting go to Democrats. You have even denied Republicans, and, more importantly, the American people the opportunity to hear from Twitter at the last hearing held by this subcommittee. Twitter, I will remind you, shadow banned four members of Congress. Four hundred thirty-five in the House, 100 in the Senate, 535. Four, only four, four conservative Republicans get shadow banned by Twitter, but when we asked you to bring them in, you said, nope, can't do that.

The root cause of Big Tech censoring conservatives lies with the defects in how the law governing liability online has been applied and interpreted. Rather than stimulating open debate and free exchange of ideas, Section 230 of the Communications Decency Act has given license to platforms to target particular viewpoints, particularly, as I pointed out, those of conservatives. In fact, the "otherwise objectionable provision" has been abused by the platforms as a catch-all term used to discriminate against any content they find disagreeable.

Congress has an obligation to ensure that the rules in place governing accountability online and providing protections for the moderation of content are applied fairly and without undue bias against certain ideologies. Today, a dozen Republican members of this committee introduced legislation to update the liability platforms could face when they insert their own opinionated editorial decisions into what content stays up and what content comes down. Our bill amends the Communications Decency Act 230 to provide needed clarifications and transparent rules of the road. Importantly, we replace the vague "otherwise objectionable category" with narrowly-tailored categories, and make clear that decisions to remove or restrict content are immune from liability only in certain specific instances, that reasons for these editorial decisions must be made on an objectively-reasonable basis, not the subjective standard that is in current law. The legislation also makes clear that decisions to remove content must actually be done in good faith based on predictable criteria.

Under the new law, platforms would be required to have publicly-available terms of service that state plainly how content modernization decisions are being made. And if content is taken down, the platform now must supply the provider of that content with notice explaining the basis for restricting the censorship and provide them with an opportunity to respond. This is commonsense reform, and I hope, as the ranking member mentioned, I hope we can move on in a bipartisan basis. Free speech should not be a Republican or Democrat issue. It is a matter at the very heart of our democracy, and I look forward to today's discussion.

I want to thank our witnesses for appearing, and I, too, want to thank Ranking Member Sensenbrenner, former Chairman Sensenbrenner, for his decades of work in the United States Congress for the American people. With that, I yield back.

Mr. CICILLINE. The gentleman yields back. It is now my pleasure to introduce today's witnesses.

Our first witness is Bill Baer. Mr. Baer is a Visiting Fellow in Governance Studies at the Brookings Institution. He is the only person to have led antitrust enforcement at both U.S. antitrust agencies as Assistant Attorney General from 2013 to 2016, and director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999. Mr. Baer was twice named the best competition lawyer in the world by the Global Competition Review, and by the National Law Journal as one of the decade's most influential lawyers. He received the FTC's Miles W. Kirkpatrick Lifetime Achievement Award in 2015. Mr. Baer received his B.A. from Lawrence University and his J.D. from Stanford Law School where he served as senior article editor of the Stanford Law Review.

Our second witness is Zephyr Teachout. She is an Associate Professor of Law at Fordham University. Professor Teachout is an expert on antitrust, election, and constitutional law. She was the first director of the Sunlight Foundation and serves on the board of the Open Markets Institute. She has written dozens of law review articles and two books, including Corruption in America: From Ben Franklin's Snuff Box to Citizens United. Professor Teachout received her B.A. from Yale University and her J.D. from Duke Law School.

Our third witness is Michael Kades, the Director of Markets and Competition Policy at the Washington Center for Equitable Growth. Prior to joining Equitable Growth, Mr. Kades served as an attorney at the Federal Trade Commission for 20 years. During his time at the Commission, he was also an attorney advisor to Chairman Jon Leibowitz and the deputy trial counsel. Mr. Kades is a graduate of Yale University and the University of Wisconsin Law School.

Sabeel Rahman, our 4th witness, is the president of Demos. Demos is a group dedicated to fighting for a just, inclusive, multiracial democracy. Mr. Rahman is also an associate professor of law at Brooklyn Law School. His writings on democracy, economic power, and inequality have been published in The Atlantic, The New Republic, the Boston Review, Dissent, and The Washington Post. His first book, Democracy Against Domination, won the Dahl Prize for scholarship on the subject of democracy. Professor Rahman received his master's degree from the University of Oxford and both his law degree and doctorate from Harvard University.

The fifth witness at our hearing today is Christopher Yoo, Professor of Law, Communication, Computer, and Information Science at the University of Pennsylvania Law School. He is a frequently-cited scholar on administrative and regulatory law, with his primary research focusing on ways to connect more people to the internet, the internet's routing architecture, and network neutrality. He has written more than 100 scholarly works and regularly testifies before Congress, the FCC, the FTC, and the Department of Justice. Professor Yoo received his A.B. from Harvard University and his J.D. from Northwestern Law School.

Rachel Bovard, our sixth witness, is the Senior Director of Policy at the Conservative Policy Institute. She has more than 10 years of experience working in policy in Washington, D.C. In 2006, she served as Senator Rand Paul's legislative director. She went on to work on the Senate Steering Committee under both Senator Pat Toomey and Senator Mike Lee as policy director. She has also served as Director of Policy Services for the Heritage Foundation, and in 2013, she was named one of the National Journal's Most Influential Women in Washington Under 35. Ms. Bovard received her B.A. from Grove City College and her master's from George Washington University.

Our seventh witness, Tad Lipsky, is the Assistant Professor and Director of the Competition Advocacy Program at the Global Antitrust Institute at Antonin Scalia Law School. Prior to joining the Global Antitrust Institute, Professor Lipsky served as acting director of the FTC's Bureau of Competition from February 2017 to July 2017. Over his storied career in antitrust law, Professor Lipsky has served as the Coca-Cola Company's chief antitrust lawyer, the first international officer of the American Bar Association Section on Antitrust Law, and as the co-chair of the International Competition Policy Working Group of the U.S. Chamber of Commerce. Professor Lipsky received his master's and J.D. from Stanford University.

Our last witness, Sally Hubbard, is the Director of Enforcement Strategy at the Open Markets Institute. Prior to her time with Open Markets, Ms. Hubbard was the senior editor of antitrust enforcement and regulation of tech platforms at the Capitol Forum.

She has also spent 7 years as the Assistant Attorney General at the New York State Office of the Attorney General's Antitrust Bureau. Ms. Hubbard earned her bachelor of arts at the College of William and Mary and her J.D. at New York University School of Law.

So as you can see, we have a very distinguished panel, and I am grateful for their presence today. We welcome all of you and thank you for your participation. And I will begin by swearing in our witnesses, and I ask our witnesses testifying in person to rise, and ask our witnesses testifying remotely to turn on their audio and make sure I can see your face and your raised hand while I administer the oath.

Do each of you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

[A chorus of ayes.]

Mr. CICILLINE. Thank you. Let the record show the witnesses answered in the affirmative. Thank you all. You may be seated.

Please note that your written statement will be entered into the record in their entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light in Webex as well as before you. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired. I would also remind you that you are the only ones from your respective companies invited to testify today, and, in accordance with normal House practice and Section G of the House Remote Committee Proceedings Regulations, I will assume that your sworn testimony is your own. Please let me know if at any point the hearing you wish to mute yourself so you can confer with your counselor or other individuals.

Mr. Baer, you may begin.

TESTIMONIES OF WILLIAM BAER, VISITING FELLOW, GOVERNING STUDIES, BROOKINGS INSTITUTE; ZEPHYR TEACHOUT, ASSOCIATE PROFESSOR OF LAW, FORDHAM UNIVERSITY SCHOOL OF LAW; MICHAEL KADES, DIRECTOR OF MARKETS AND COMPETITION POLICY, WASHINGTON CENTER FOR EQUITABLE GROWTH; SABEEL RAHMAN, PRESIDENT, DEMOS; CHRISTOPHER YOO, JOHN H. CHESTNUT PROFESSOR OF LAW, COMMUNICATION, AND INFORMATION SCIENCE, UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL; RACHEL BOVARD, SENIOR DIRECTOR OF POLICY, CONSERVATIVE PARTNERSHIP INSTITUTE; TAD LIPSKY, ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY; AND SALLY HUBBARD, DIRECTOR OF ENFORCEMENT STRATEGY, OPEN MARKETS INSTITUTE

TESTIMONY OF WILLIAM BAER

Mr. BAER. Thank you, Chairman Cicilline, Chairman Nadler, Ranking Members Sensenbrenner and Jordan. I appreciate the opportunity to appear today, and thank you for the courage and tenacity this subcommittee has shown in tackling the role of antitrust law in the 21st century. I bring the perspective of someone

who has been privileged to serve on the front lines of antitrust enforcement in four different Administrations, twice at the FTC, and most recently as head of antitrust at the Department of Justice. That experience teaches me that in many cases, our antitrust laws have been successful and forces for good. But too often antitrust jurisprudence has fallen short and failed to protect consumers and competition as much as it can and as it should.

My submission makes four basic points. Antitrust enforcement does need to be based on an analytically sound, fact-based framework, but we can't let the perfect be the enemy of the good, and many courts have held enforcement to an effective standard of proof that is unrealistic and inconsistent with the plain language of our antitrust statutes. If the courts are unwilling to step back from this overreach, legislation may well be needed to reset the balance. And finally, I do believe more resources are needed if antitrust enforcement is to fulfill its role as the economic cop on the beat.

Now, I was on the scene in the 70s as The Chicago School came to narrow dramatically the focus of antitrust, mostly to price fixing and a few mergers to monopoly or near monopoly. The Chicago School, as former FTC chair, Robert Pitofsky, put it, it really overshot the mark. We went from a place in the 1960s when Supreme Court Justice Stewart complained that the only consistency he could find in Supreme Court antitrust decisions was that the government always wins. We went from there to a 25-year dark age where the government invariably lost. Now, we moved the needle somewhat in the 90s, convincing the courts to block merger consolidations involving office supply superstores, drug wholesalers, and the sustained efforts by the government to challenge behavior by Microsoft and Toys "R" Us that limited competitive opportunities for rivals. These modest successes have continued over the last couple of decades as some courts have recognized the anti-competitive impact of hospital consolidation and anti-competitive agreements involving pay-for-delay understandings between generic manufacturers and brand names. But looking back at the cases where the government prevailed in the last couple of decades helps explain why concentration and market power have actually increased. Invariably when the government won an antitrust challenge, the government's evidence was overwhelming.

Merger to monopoly or near monopoly are transparently bad conduct by dominant firms. In close cases, the government typically lost, or enforcers never brought, the case in the first place out of fear that the courts would rule against and make more bad law. How did we get there? In my view, the fear of getting it wrong warped antitrust enforcement. Antitrust jurisprudence today is too cautious, too worried about the effects of over enforcement, so-called Type I errors. Bias against enforcement has caused many courts to demand a level of proof that is often unattainable. That chills enforcement, limits our ability to challenge conduct or acquisitions of potential rivals, especially in the tech sector where firms benefiting from network effects can acquire enduring market power.

So what do I think we should do about it? I think we need to modify current law to direct the courts and the antitrust enforcers

to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power. Modest changes will suffice by incorporating presumptions that certain behaviors are likely to reduce competition, making it clear that showing a risk of reduction of competition is sufficient; emphasizing that anti-competitive effects include price and quality and innovation competition; and legislating to overrule recent problematic court decisions.

Congress could make a meaningful difference. And we need to consider forward-looking rules and legislation that will enhance competition. We have precedent for that. The 2004 FCC rule allowing consumers to port their phone numbers to competing carriers gave consumers the economic power to reward those with lower prices and better service. It forced incumbent carriers to compete like never before. Those sorts of tools—portability and interoperability—can help restore markets to a competitive equilibrium. Congress also needs to fund antitrust enforcement. Today we spend about 18 percent less than we did 10 years ago, despite increasing concentration, a growing number of dominant firms, and a much, much larger economy. We need funding both to bring enforcement actions and to allow for after-action studies of what happened in markets where the agency decided not to bring enforcement actions, or where the courts rejected an antitrust challenge.

We can do more and we can do better, and thank you again for the opportunity to be here today.

[The statement of Mr. Baer follows:]

Testimony of Bill Baer
Visiting Fellow, Governance Studies, The Brookings Institution

Hearing on "Proposals to Strengthen the Antitrust Laws and Restore Competition Online"

Before the United States House of Representatives
Committee on the Judiciary,
Subcommittee on Antitrust, Commercial, and Administrative Law

October 1, 2020[1]

[1] This testimony was originally submitted to the Subcommittee on May 19, 2020.

Dear Chairman Cicilline and Ranking Member Sensenbrenner,

Thanks to you both and to the other members of the Subcommittee on Antitrust, Commercial, and Administrative Law for the opportunity to testify on whether our existing antitrust laws, enforcement policies, judicial interpretation, and funding are up to the challenges posed by competition in the digital marketplace and elsewhere in our economy.

By way of brief background, antitrust has been the principal focus of my career. On three different occasions, I served in the U.S. antitrust enforcement agencies: from 1975 to 1980 in various positions at the Federal Trade Commission; from 1995 to 1999 as Director of the Bureau of Competition at the FTC; and from 2013 to 2017 at the Justice Department where I was Assistant Attorney General for Antitrust for three-plus years and then Acting Associate Attorney General from April 2016 until January 2017. When not in public service, I was a partner at Arnold & Porter in Washington, D.C. Since January of this year, I have been a Visiting Fellow at the Brookings Institution.

I write from the perspective of someone privileged to have served on the front lines of antitrust enforcement. I have seen where enforcement has been successful and a force for good. I have also seen where antitrust, for reasons I will discuss, has fallen short and failed to protect consumers and competition as much as it can and should.

My submission makes four basic points: (1) to be effective and embraced by the courts, antitrust enforcement needs to be based on an analytically sound, fact-based framework; (2) but we cannot let the perfect be the enemy of the good, and many courts hold enforcement to an effective standard of proof that is unrealistic and inconsistent with the plain language of our antitrust statutes; (3) the antitrust agencies should be advocates for a more robust approach to enforcement, but if the courts are unwilling to step back from bias against the risk of over-enforcement, legislation may be the only way of resetting the balance; and (4) more resources are needed if antitrust enforcement is to fulfill its role as the economic cop on the beat.

I begin with my views on certain positive aspects of modern antitrust enforcement. The criticism voiced by many in the late 1960s, 70s, and 80s was that antitrust lacked a consistent analytical framework and failed to apply advances in industrial organization economics to determine what behaviors threatened injury to competition and consumers. Justice Stewart's famous 1966 dissent in *Von's Grocery* ("The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins.") succinctly captured that critique.[2] Bork's "Antitrust Paradox" and other Chicago School devotees elaborated on it in the 1970s and 80s.[3]

What resulted was more rigor in antitrust analysis, enforcement, and judicial decision-making. Enforcers and the courts disciplined themselves to make sure that each enforcement action told a credible story of economic harm from the behavior being challenged. The antitrust agencies developed enforcement guidelines for mergers, intellectual property licensing, defense industry consolation, competitor collaborations, innovation, among others, that explained when certain behaviors and mergers caused or risked injury to competition and consumers.[4] And over time, the courts welcomed at least the merger guidelines as providing helpful explanations of how our antitrust laws should be applied in a late 20th and early 21st century economy.

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[2] *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). https://tile.loc.gov/storage-services/service/ll/usrep/usrep384/usrep384270/usrep384270.pdf.

[3] Bork, Robert H. *The Antitrust Paradox: A Policy at War with Itself.* Free Press, 1978.

[4] "Antitrust Enforcement Guidelines for International Operations." U.S. Department of Justice and Federal Trade Commission, April 1995. https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations.

The executive and legislative branches, whether led by Republicans or Democrats, were mostly on the same page. As a result, for the last 30 years or so, antitrust enforcement has been largely nonpartisan, driven by the widely shared view that harm to consumers and competition should be the predicate for challenging conduct. And that is a good thing. Analytically sound and fact-based antitrust enforcement, as I testified at my nomination hearing before the Senate Judiciary Committee in 2012, provides the public, the business community, the courts, and the legislative branch with some assurance that it is the merits that count—not political ideology, whim, or the desire to pick winners and losers in the economy.[5] And it helps explain why there have been only modest pendulum swings in competition enforcement over the last few decades. Consistency and predictability enhance the credibility of antitrust enforcement.

That said, looking back at the application of that rough consensus gives cause for concern. The legitimate goal of analytically sound and fact-based enforcement has morphed into an overly cautious approach by the courts and to some extent by the enforcers themselves. In the 1980s and through the mid-1990s, the courts seemed hostile to most government challenges. Few mergers were blocked. Challenges to unilateral conduct by dominant firms were infrequently brought and rarely successful. Consolidation increased to worrisome levels across many sectors of the economy, including hospitals, retail, manufacturing, telecommunications, insurance, and the travel industry. Vertical relationships between upstream suppliers and downstream distributors began to be treated as invariably efficient and procompetitive. We went from an antitrust culture where "the government always wins" to one where enforcers almost always lost, or where fear of losing caused the government not to act at all.

That turned around to some modest extent in the late 1990s, as the government succeeded in convincing the courts to block consolidation among office supply superstores and drug wholesalers and to sustain challenges to efforts by firms like Microsoft and Toys R Us to dominate markets by limiting opportunities for rivals to compete.[6] Those modest successes continued over the last two decades, as the courts came to appreciate the anticompetitive impact of hospital consolidation and "pay for delay" agreements between brand name and generic pharma manufacturers.

But looking back at the cases where the government prevailed in the last 20-plus years helps explain why concentration in markets has increased and why that long-standing consensus on enforcement is under attack. Invariably, in those cases where the government won an antitrust challenge, the government's evidence was overwhelming. It was clear-cut. Mergers blocked by the courts involved horizontal mergers to monopoly or near monopoly. Anticompetitive conduct challenges were less frequent and less often successful. In close cases, the government typically lost or the enforcers never brought the case in the first place, out of fear that the courts would rule against and as a result make it harder to win the next case.

Why? In my view, the fear of getting it wrong warped antitrust enforcement. That is my fundamental concern with the state of antitrust enforcement today. It is too cautious, too worried about adverse effects of "over enforcement" (so called Type I errors). The attitude that any uncertainty should result in inaction has caused many courts to demand a level of proof that is often unattainable. Judge Easterbrook in 1984 articulated the view that underenforcement was much preferred to the risk associated with antitrust enforcement that challenged conduct that risked harm to competition and consumers but where we lacked a near certainty that the harm was there.[7]

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[5] Nomination of William Joseph Baer, of Maryland, Nominee to be Assistant Attorney General, Antitrust Division, U.S. Department of Justice: Hearing before the Judiciary Subcommittee on Antitrust, Senate, 112th Cong. (2012).
[6] *United States v. Microsoft Corporation,* 253 F.3d 34 (D.C. Cir. 2001);
Toys "R" Us, Inc. v. Federal Trade Commission, 221 F.3d 928 (7th Cir. 2000).
[7] Easterbrook, Frank H. "Limits of Antitrust." 63 Texas Law Review 1 (1984).
https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles.

That overly cautious approach has largely defined antitrust enforcement for the last three decades. And, as Bob Pitofsky and his co-contributors explained in his 2008 book "How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on Antitrust," the result is that too much current or potential future conduct that poses antitrust risk has gone unchallenged by enforcers or unremedied by the courts.[8]

We need to promote innovation, reward success, protect intellectual property, and allow mergers and acquisitions that will make markets more efficient. Those are givens. But we should not succumb to the frequently made argument that the threat of a government antitrust challenge will cause firms not to invest in new ideas or strive to be successful if, in individual cases, the government challenges and the courts find certain behavior or a proposed acquisition to be injurious to consumers and competition. There is no evidence to support the view that enforcers should act and courts should find a violation only when shown clear and compelling evidence of antitrust harm.

Indeed, the effort to avoid Type I errors has had the practical and perverse effect of raising the burden of proof in an antitrust challenge. Black letter law says that, in a civil antitrust case, the government or a private plaintiff must prove a violation by a *preponderance of the evidence*. That simply means showing that something is more likely than not. But many courts seem to require a much higher level of certainty.

Take, for example, a government merger challenge under the Clayton Act.[9] Section 7 requires the government to show that the proposed transaction "*may* be substantially to lessen competition, or *tend* to create a monopoly." Read literally, the burden on the plaintiff is merely to show, by a preponderance of the evidence, there is a risk that competition will be lessened. Indeed, in a Federal Trade Commission preliminary injunction proceeding, the required showing is even less. Yet, that is not how most courts analyze the facts and law when refusing to enjoin mergers challenged by antitrust enforcers.

Last month, a district court judge in Delaware decided a DOJ merger challenge to the acquisition of Farelogix by Sabre.[10] Both firms are involved in the sale of seats on airplanes, albeit their roles and business models differ. The court refused to enjoin the transaction. It did so despite finding that:

- The two firms saw each other as competitors, key competitors in many respects;
- Indeed, Farelogic was uniquely positioned to offer airlines and passengers a competitive alternative to booking through Sabre;
- Sworn testimony by Sabre's executives that Farelogix was not a competitor and that the acquisition was not intended to eliminate a competitor were not credible; its documents showed otherwise;
- If the merger was allowed, "Sabre will have the incentive to raise prices, reduce the availability of [Farelogix's products], and stifle innovation."[11]

How did the court square its refusal to enjoin the transaction with these findings? It simply raised the government's burden of proof, concluding that DOJ had not proven that the merger "*will*" harm competition. That approach does not square with the plain language of the Clayton Act. The statute, as noted above, speaks in terms of transactions which "may" lessen competition in a significant way or "tend" a market toward monopolization. Yet, court decisions like *Sabre* mean the government effectively has to show it "will" injure competition. A look at other court merger decisions in recent years finds a similar

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[8] Pitofsky, Robert. *How the Chicago School Overshot the Mark: the Effect of Conservative Economic Analysis on U.S. Antitrust.* Oxford University Press, 2008.
[9] Clayton Act, 15 U.S.C. § 12. https://www.law.cornell.edu/uscode/text/15/12.
[10] *U.S. v. Sabre Corp.*, 2020 WL 1855433 (D. Del. 2020).
[11] *Ibid, p. 3* (Stark, L.P.).

tendency to ignore the Clayton Act mandate to prevent against risks to future competition and to hold the government to a near impossible standard.

Reversing that trend and avoiding risks that acquisitions may reduce competition will go a long way towards addressing criticism of the effectiveness of merger enforcement in the U.S. It will avoid creeping increases in competition in antitrust markets. And it will empower the enforcement agencies to be more assertive in challenging acquisitions of nascent competitors, potential entrants, and those in vertical relationships where the combination risks reduction in competition.

That same bias against the risk of over-enforcement has resulted in court hostility to monopolization challenges under Section 2 of the Sherman Act. As well put in the Joint Response to this Subcommittee by twelve experienced antitrust scholars and former public servants, "[the antitrust laws, *as interpreted and enforced today*, are inadequate to confront and deter growing market power in the U.S. economy… [emphasis added]."[12] We need, as they argue, to take a fresh look at behavior by dominant firms that has the purpose and effect of limiting the ability of actual or would-be competitors to offer meaningful alternatives to those with monopoly or near-monopoly power. That concern manifests itself increasingly in high tech markets, where network effects make it more likely that the market will "tip" in the direction of one provider. Antitrust enforcement needs to be able to examine and challenge conduct that on balance allows dominant firms to unfairly maintain or enhance their market power.

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents, and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC Horizontal Merger Guidelines have, as I noted earlier, over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines—indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

So, I think the Subcommittee is doing the right thing by taking a hard look at changes to current law that will encourage the courts and empower the antitrust enforcers to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power. These changes need not be dramatic. By incorporating presumptions that certain behaviors are likely to reduce competition, by making it clearer that showing a risk of a reduction in competition is sufficient, and by emphasizing that anticompetitive effects are not limited to price effects and include quality and innovation competition, Congress can make a meaningful difference.

The other thing Congress can and should do is provide adequate resources to the antitrust enforcement agencies. Today, we are not doing that, not by a longshot. A recent report by Michael Kades of the Washington Center for Equitable Growth found that, in real dollar terms, we are spending 18 percent less

[12] Baker, Jonathan B., et al. Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, 116th Cong. (2020). https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

on antitrust enforcement than in 2000.[13] Officials at the Antitrust Division tell me the organization ended fiscal year 2019 with just 594 employees, compared to 795 employees at the same time 10 years earlier. This, as Kades notes, is occurring in the context of significant growth in the economy over that same time.

The dollars and resources need to be increased for a number of reasons. First, as I have discussed, the courts today place a high burden on the government to prove an antitrust violation. That means the enforcers need to devote significant resources to investigating and proving their cases, including extensive document reviews, witness interviews, depositions, and expert opinion—industrial organization economists and others. It is time-consuming; it is expensive; and it is resource-intensive. As an example, in 2016, the Antitrust Division challenged two proposed mergers that would have dramatically consolidated the health insurance industry: Anthem's proposed acquisition of Cigna and Aetna's effort to acquire Humana.[14] We successfully persuaded the courts to enjoin both deals, but getting there required the commitment of 25 to 30 percent of the Division's professional staff. My colleagues in the FTC's Bureau of Competition were similarly constrained as they litigated in multiple forums during that same time. That inevitably meant other matters were understaffed. That is no way to ensure adequate enforcement.

But second, more resources would allow for after-action studies of what happened in markets where the agencies decided not to bring enforcement actions or where the courts rejected an antitrust challenge. Developing that data would allow the antitrust enforcers to demonstrate to the courts what happens when there is under-enforcement. I urge the Subcommittee to consider carefully the submission of former FTC Chairman Tim Muris where he details how a series of retrospective studies by FTC economists during his tenure allowed the agency to persuade the courts that hospital consolidation in local markets across the country had resulted in significant increases in costs. The antitrust enforcers need more resources to develop the evidence needed to persuade the courts that antitrust enforcement can and does make a positive difference.

I applaud the Subcommittee's effort to shine a spotlight on the state of antitrust enforcement today and assess whether and what changes are needed to maintain and enhance competition in our economy. That inquiry is more vital today as we confront and fight our way out of the COVID-19 pandemic.[15] I appreciate the opportunity to support that effort and stand ready to assist the Subcommittee going forward.

Respectfully submitted.

Bill Baer
Visiting Fellow
The Brookings Institution

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[13] Kades, Michael. "The state of U.S. federal antitrust enforcement." Washington Center for Equitable Growth, September 17, 2019. https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/.
[14] *United States and Plaintiff States v. Anthem, Inc., and Cigna Corp.* No. 1:16-cv-01493, ECF No. 411 (D.D.C. 2016). https://www.justice.gov/atr/case-document/file/971316/download.
[15] Baer, Bill. "Why we need antitrust enforcement during the COVID-19 pandemic." The Brookings Institution, *TechTank*, April 22, 2020. https://www.brookings.edu/blog/techtank/2020/04/22/why-we-need-antitrust-enforcement-during-the-covid-19-pandemic/.

Mr. CICILLINE. Thank you, Mr. Baer. I now recognize Professor Teachout for 5 minutes. Could you please turn on your microphone?

TESTIMONY OF ZEPHYR TEACHOUT

Ms. TEACHOUT. Chairman Cicilline, Ranking Member Sensenbrenner, and members of the subcommittee, thank you for the opportunity to testify at this historic hearing. My expertise is in the law of democracy, so I will speak to the essential nature of what you are doing to protect our democracy.

Antitrust laws, and strong antitrust laws, are essential for freedom and for a thriving economy. The highly-concentrated Big Tech marketplaces and the existing abuses of Big Tech, enabled by their dominant positions, poses a major democratic threat. It is quintessentially a congressional job to respond to this threat. For nearly 40 years, the Supreme Court, not Congress, has been the primary institution rewriting American antitrust laws. The Court is detached from the realities of business and power, unaccountable to the public, and Congress has essentially allowed them to take the reins, gutting popular laws with their own judge-made theories, and allowing this massive growth of concentrated power. This has to change. Congress, not the Supreme Court, must be the body responsible for defining the scope of those laws. The Sherman Act, the Clayton Act, and our other antitrust laws are not constitutional provisions over which Congress must defer interpretations to the Court. They are Federal laws passed by this body, and when they're misinterpreted by courts, Congress must act.

There are several particular cases that I and others highlight in my written submission that are ripe for direct congressional overturning, but it is not sufficient to pick a handful of cases. This body must recognize its central role in making economic policy and play an ongoing role in the kind of investigations that it has just conducted, overseeing agencies and continually re-examining antitrust laws. Senator Phil Hart went to his death bed working on antitrust legislation. Up until the 1980s, this body understood that economic policy and anti-corruption policy required ongoing anti-monopoly vigilance.

Second, it will not be sufficient to overturn those laws. Significant new legislation is required, as your investigation revealed. Key parts of Big Tech companies have become a kind of essential public infrastructure. The economy and public life would come crashing to a halt if they were suddenly removed. No merchant, politician, political activist, or journalist can thrive without them, and no individual can. They play a grossly outsized role in the basic functions of our society and have become unelected, unaccountable, and self-serving heads of planned economies planned by them. This is a deeply problematic infrastructure because they are riven with conflicts of interest. They own platforms and compete on the platforms, so Congress should pass a law—people often talk about this in terms of structural separation—delineating single-line-of-business rules for the very biggest tech companies. This single-line-of-business rule kind of law exists throughout our Nation's history, and it would lead to things like Amazon, for instance, being prohibited from being involved in fulfillment or shipping, a

distinct line of business. Facebook could not also be engaged in Facebook Messenger. Google should not be owning YouTube.

Finally, I want to applaud this subcommittee for a riveting and critically-important investigation, and argue that Congress must continue with this kind of investigation, and not just this committee. This should be the beginning of the golden age of congressional investigations where committees use their investigative power to reveal abuses and address them. As Big Tech companies become more powerful, they are building direct political power. Big Tech, as you know, is the biggest lobbyist in D.C., and Congress must stand up to these new robber barons to protect our public institutions, to restore democratic and economic freedoms, and build a thriving, fair, and free country. Thank you.

[The statement of Ms. Teachout follows:]

Testimony of Zephyr Teachout, Fordham Law School

United States House of Representatives Committee on the Judiciary

Subcommittee on Antitrust, Commercial and Administrative Law

Judiciary Committee Investigation into Competition in Digital Markets
Washington, D.C.

October 1, 2020

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the opportunity to give this testimony.

Since the early days of this country, corporations and corporate powers were always carefully checked by the government, and people well aware of the democratic dangers associated with unfettered corporate activity and expansion. In fact, almost two hundred years ago the Supreme Court explained that:

> The continued existence of a government, would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations.[1]

We have long understood that antitrust is an essential democracy-protection tool. As Former Supreme Court Justice Douglas wrote in an opinion over 70 years ago, one of the key goals of antitrust law is to protect against tyranny: "The philosophy of the Sherman Act" is that a few men should not be allowed to gather sufficient private power to control others. "For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy."[2]

Big tech, as currently structured, epitomizes this threat of private power. Facebook and Google, private companies with toxic business models, have enormous control over our communications infrastructure. Amazon has a chokehold on e-commerce. Apple leverages its power over an entire generation of innovative startups and budding entrepreneurs. Tech companies increasingly control key parts of cities' public transportation networks. These tech behemoths are directly governing more and more parts of our society, and simultaneously lobbying the formal government to gain even more control. They constitute a direct threat to our democracy by wielding centralized and unaccountable power. The outsized power of big tech has

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[1] *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837)
[2] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (Douglas, J., dissenting).

only been exacerbated by the pandemic; big tech companies make billions by extracting tolls from small businesses that are left to collapse by the wayside.

As Senator Alpheus Felch explained all the way back in 1844 lawmakers are vested with the duty of protecting democracy by passing laws designed "to prevent monopolies, and to confine these powerful bodies strictly within their proper sphere."[3] That's what people elect representatives to do: write rules of the road that make a thriving and fair economy possible, and protect against monopolists and tyrants. Congress's inaction in this area for forty years bears some of the blame, because antimonopoly policy is a quintessentially Congressional job.

You will hear testimony today about the importance of agencies using their existing enforcement power. I fervently agree with and second this testimony. But while agencies bear some responsibility for their own passivity, and must do more to engage in greater enforcement and rule-making, Congress is ultimately responsible for the structure of the economy and democracy.

This testimony will focus on three actions Congress should take immediately:

(1) Overturn via legislation bad Supreme Court precedent and reassert Congressional supremacy over the Supreme Court in antitrust policy.
(2) Legislate break ups and mandate structural separations or line of business laws in the digital economy.
(3) Use its investigative powers to their fullest extent.

1. Reassert Congressional supremacy in the relationship between Courts and Congress in Antitrust Policy

Congress must overturn via legislation bad Supreme Court decisions, and reassert Congressional supremacy over economic policy. The Sherman Act, the Clayton Act, and our antitrust laws are not Constitutional provisions over which Congress must defer interpretation to the Supreme Court. They are federal laws, passed by this body, and when they are misinterpreted by courts, Congress must act. For 40 years it has failed to do so, and stood by while the Supreme Court rewrote federal antitrust policy.

For example, in a trio of cases the Supreme Court reinterpreted the law in a way that essentially ripped apart our existing predatory pricing laws.[4] Congress did not act. There were no hearings on these cases and no legislative action. Anti-predatory behavior laws are a key tool for reigning in the abuses of Amazon, Google, and Facebook.[5]

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[3] *Bank of Michigan v Niles*, 1 Doug 401, 408-10 (Mich 1844).
[4] *Brooke Group*, *Matsushita*, and *Weyerhauser Co.*

Another example is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 in (2004) and *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 555 U.S. 438 (2009), in which the Supreme Court invented new massive barriers to bringing refusal-to-deal claims, barriers that could not be found in legislative history. Again, Congress stood by and allowed the judicial re-write, and big tech companies rushed into the void, abusing the new, Supreme Court-created standard.

In 2007 the Supreme Court shifted the burden in antitrust litigation back from plaintiffs to defendants in cases where parties are challenging exclusionary and restrictive trade practices.[6] Congress did nothing, although as the dissenting Justice Stevens decried, the decision was not rooted in Congressional history.[7]

Most recently, in 2018, the Supreme Court held that gag orders on merchants who contract with credit card providers---where American Express prevented merchants from steering consumers to cheaper credit options--was not anticompetitive.[8] The case represented bad logic, bad precedent, and the creation of a manufactured concept nowhere found in our legislative history--the "two sided market." The case created a major deterrence for any anticompetitive lawsuit against Google, Facebook, or Amazon.

Twenty four years ago, then-Judge Scalia, in his answered questions in his nominating hearing, joked that: "I never understood [antitrust law]. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then."

His later jurisprudence revealed that this joke represented a real belief. Over the next several decades, Justice Scalia one of the voices, and often the leading voice, in a Court who actively sought to replace congressional judgment with judicial visions. In 1968, in a 7-1 decision the Court clearly held "that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices

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[5] Questioning by Congresswoman Scanlon at your hearing showed that Amazon was prepared to lose $200 million in a predatory strategy to sink Diapers.com, then its main competitor in the baby care area. While that acquisition requires investigation under the current, Court-created standard, if *Brooke Group et al* had come out differently, Amazon might have been deterred from this acquisition in the first place. See also: https://academic.oup.com/antitrust/article/7/2/203/5321201

[6] As Justice Stevens explained in his dissent in that case "This case is a poor vehicle for the Court's new pleading rule, for we have observed that in antitrust cases, where the proof is largely in the hands of the alleged conspirators, … ***dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly***. Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that ***Congress intended to encourage, rather than discourage, private enforcement*** of the law. ***It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.***"

[7] *In Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[8] *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

by the monopolist."[9] But by 2009 the Court, led by Scalia, essentially overturned its own precedent in holding that "Simply possessing monopoly power and charging monopoly prices does not violate § 2."[10]

Such decisions demonstrate that the Court has arrogated to itself the power to decide the shape of our economy, in a power grab that only this body can remedy. Congress must act to overturn these decisions, and to take responsibility for the structure of our economy and democracy.

2. Pass Laws Requiring Structural Separation/Line of Business Laws

Amazon, Google, Facebook and Apple control market access to central parts of our economy, and directly compete with businesses that use their markets. These platforms abuse their chokepoint power to demand high private taxes from suppliers, copy, kill or acquire competitors, and then use their ill-gotten profits to subsidize adventures into new markets where they repeat their abuse of power strategies.

Your investigation revealed what Amazon sellers have long suspected: that sellers have to use the "Fulfillment by Amazon" service in order to get preferred treatment on the marketplace. This use of its dual role as platform and warehouse/shipping company has allowed Amazon to charge enormous fees--an average of 30% per sale--to its sellers.

Congresswoman McBath's questioning to Tim Cook about why Apple removed parental control competitors from the App Store when it introduced Screen Time (an affiliated clone) was just one example of the dangers of this conflict of interest. While Cook said that Apple was "concerned, congresswoman, about the privacy and security of kids." Congresswoman McBath pointed out that Apple let the independents return without privacy changes, suggesting that the privacy justification was a pretext for removing a rival. Without structural separation, this kind of behavior-- preferring your own affiliate to others--will always be a problem. Google has no business owning Youtube, or Google Flights, or Google Shopping; Amazon has no business running its own private label on its platform; Apple should not be competing with Apps that depend upon it.

Congress should pass a structural separation law delineating a clear "single line of business" rule for any large data company, using revenue, role in data collection and sale, and consumer footprint. For instance, it could draw of the kind of framework used in California's recent AB-1790, which used the following definition: "An online e-commerce marketplace with more than 200,000,000 active customer accounts that, in whole or in part, offers to customers for sale goods or services sold by companies that are not owned by the online e-commerce marketplace."

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[9] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 497-499 (1968).
[10] *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 447-48 (2009).

'Line of business' restrictions have a long history in American corporate and antitrust laws. Glass Steagall is perhaps the best known of these federal restrictions, but by no means the only one. The Public Utility Holding Company Act prohibits companies subject to the Act from making corporate acquisitions unless the SEC proactively approves, taking the public interest into account; instead of a pro-merger default, the PUHC has a default of merger skepticism.[11] In the telecommunications industry, Congress used to prohibit telephone companies from providing video programming in their local telephone territories.[12]

To be clear, structural separation alone is not sufficient to deal with the particular algorithmic pathologies of big tech and the ways in which targeted advertising distorts the public sphere. As I argued in my prior submission, Congress should also ban targeted advertising for essential public infrastructure, with a full recognition of the unique obligation it has to protect the communications sphere, and the long history of laws designed to support a robust public sphere. However, structural separation is a necessary part of any solution.

3. More Congressional Investigations

The CEO hearing of this subcommittee was a paradigm for what Congressional hearings should be. You were prepared, serious, and detailed, and brought forward important testimony because of the deep investigative work of the last year. Your investigation showed what a serious, demanding, unafraid assertion of public power over abusive companies looks like. And it shouldn't just be the antitrust subcommittee. The labor committee should bring in Uber and Lyft in for tough questioning about how they use psychological techniques and big data on drivers, and how pay and prices are calculated. The small business committee (perhaps in conjunction with this committee) should interrogate Postmates, GrubHub, DoorDash, and UberEats about the evidence that they have been charging restaurants exorbitant commission fees, stealing tips, creating impostor restaurant websites, and draining revenue from restaurants facing a global pandemic.

While Congressional leaders may have worried in the past about whether the Supreme Court would permit this kind of investigation, in *Trump v. Mazars* this summer, the Court gave Congress a green light for investigations into big corporations. Justice John Roberts made clear that Congress is at the peak of its power when investigating economic behavior in service of prospective legislation. The Court says Congress' power to investigate corporate actors in the process of understanding how it should respond legislatively is "broad" and "indispensable." Investigations are necessary for wise and effective legislation. It is the job of Congress to stand between private tyrants and the people, and in service of that job, it must investigate rigorously.

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[11] https://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch687.pdf

[12] Cable Communications Policy Act of 1984, 613, Pub. L. No. 98-549, 98 Stat. 2779, 2785 (1984), codified before repeal at 47 U.S.C. 533(b) (1994).

I teach at Fordham Law School, and have written two books and dozens of articles on the intersection of private law and the law of democracy. My anti-corruption research has been cited in state and federal courts as well as in the Supreme Court. I am affiliated with the American Economic Liberties Project (AELP). This testimony was prepared in consultation with AELP and Shaoul Sussman of the Institute for Local Self-Reliance.

Mr. CICILLINE. Thank you, Professor Teachout. I now recognize Mr. Kades for 5 minutes.

TESTIMONY OF MICHAEL KADES

Mr. KADES. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, Full Committee Chairman Nadler, Full Committee Ranking Member Jordan, and the members of the subcommittee for the opportunity to testify to you on this important issue. And I would like to share the commendations that my colleague, Bill Baer, who also gave me my first promotion—probably his biggest mistake—that this committee really needs to be commended for taking on this topic, proceeding despite the politics, in a bipartisan way. And it is really a testament to the strength of this Nation and democracy.

The challenges we face are not limited to one or two companies. The filing of one or two cases will not solve problems in digital marketplaces. This committee has an ongoing important role in promoting competition in digital markets, and so there are three issues I urge you to consider as the committee moves forward. First, we need legislative reform, not just enforcement actions. Over the past 40 years, showing an almost neurotic fear of over enforcement, the courts have increased the burdens on plaintiffs and narrowed the scope of the antitrust laws. Both economic research and empirical results a result discredit that approach.

As the letter I, along with 11 other economists and lawyers, submitted to this committee concludes, the antitrust laws, as interpreted and enforced today, unnecessarily limit the ability to address the anti-competitive conduct in digital marketplaces that this committee has investigated. So, for example, under current case law, it is arguable that the government could not have successfully pursued its claim that led to the breakup of the AT&T phone monopoly in the 80s, perhaps the most significant monopolization case in the history of the U.S. and maybe the world. Something is simply wrong when judicial decisions implicitly undermine basic competition principles. Just yesterday, the Third Circuit Court of Appeals found that the Federal Trade Commission is powerless to punish monopolists, despite agreeing that a defendant in the case, a branded pharmaceutical manufacturer, had violated the FTC Act and delayed lower-cost generic competition. The court blithely concluded that the FTC could not obtain an injunction to stop the conduct in the future, nor could it recover the nearly half a billion dollars that the company earned by violating the law. Again, something is wrong when the courts decide there are no repercussions for violating the antitrust laws.

We know how the courts are interpreting the antitrust laws, but, as Professor Teachout just mentioned, it is up to Congress to decide whether that is correct. But unless Congress acts, it is accepting the judicial view that the antitrust laws have little power to stop or deter anti-competitive conduct, whether it be in the pharmaceutical industry, digital markets, or anywhere else in the economy. Two bills introduced by Senator Amy Klobuchar, the Anti-Competitive Exclusionary Conduct Prevention Act and the Consolidation, Prevention and Competition Promotion Act, embody reforms that would allow Congress to restore the strength of the anti-

trust laws. None of this is to suggest that the government should just get a pass from prosecuting antitrust violations against digital platforms. To the contrary, antitrust enforcers have a duty to attack monopoly power where they find it, despite these challenges.

This leads me to my second point. A key remedy in an antitrust case involving digital platforms needs to be that once a violation has occurred, the remedy needs to eliminate the network effects that create entry barriers, and I talk about this more fully in my statement. But that means when we think about remedy, prohibiting conduct, penalizing the companies, even breaking them up, all may not be sufficient to restore competition, so that is the challenge the enforcers will have going forward. Finally, I want to commend also the committee for thinking broadly about solving competition. This is not just about competition, antitrust enforcement, or regulation. We need both tools, as my colleague, Sally Hubbard, reminds me often. So this committee is correct to be considering both regulatory tools as part of that solution. Protecting competition in digital marketplaces requires that the laws efficiently distinguish between pro- and anti-competitive conduct, remedies that deal with the underlying structural problems causing the anti-competitive activity, and a combination of antitrust enforcement of regulations so that markets deliver the results that benefit us all.

And I have 9 seconds. I just want to say to Ranking Member Sensenbrenner, one of my favorite things was, as I would drive to clerk for Judge Reynolds back in the early 90s through your district, and I would complain about the traffic, he would always explain to me, we don't complain about that traffic because we like James Sensenbrenner even when we don't agree with him. So I thought this was an appropriate time to share that story with you.

[The statement of Mr. Kades follows:]

Washington Center for Equitable Growth

Michael Kades

Director, Markets and Competition Policy

Washington Center for Equitable Growth

"Proposals to Strengthen the Antitrust Laws and Restore Competition Online"

Subcommittee on Antitrust, Commercial, and Administrative Law

October 1, 2020

Thank you Chairman Cicilline and Ranking Member Sensenbrenner and full committee Chairman Nadler and full committee Ranking Member Jordan for the honor of testifying before this Subcommittee on competition and digital markets.

I am the Director of Markets and Competition Policy at the Washington Center for Equitable Growth. We seek to advance evidence-backed ideas and policies that promote strong, stable, and broad-based economic growth. The exploitation of monopoly power across the U.S. economy threatens innovation, stifles growth, and exacerbates inequality.

Digital marketplaces play an increasingly important role in the economic life of every American. The novel coronavirus pandemic has only increased their significance. The Judiciary Committee should be commended for conducting a bipartisan investigation into the state of competition in online markets and issuing its report.

I encourage the Committee not to stop with the report. The challenges we face are not limited to one or two companies. The filing of one or two cases will not solve our problems. The committee has an important role to play in promoting competition in digital markets. There are three issues, I urge you to consider as you move forward.

Legislative Reforms

First, we need legislation, not just enforcement actions. This may sound obvious, but legal requirements should efficiently distinguish procompetitive conduct from anticompetitive conduct. Over the past 40 years, however, the federal courts, showing an almost neurotic fear of overenforcement, have increased burdens on plaintiffs in antitrust cases and narrowed the scope of antitrust law.

One example underscores this point. Arguably, the most significant monopolization case in U.S. history was the government's successful break-up of the American Telegraph and Telephone Company in the 1980s. Under current case law, it is questionable that the government could pursue its claim under today's standards. This development should shock every member of Congress. But it is of particular concern because the central issue in AT&T was its refusal to connect its long-distance competitor MCI to local phone exchanges—in other words, freezing out competitors—one of the major concerns raised in the course of the Committee's investigation. My written testimony includes a letter I signed with 11 other economists and lawyers. (see Appendix A). All of them have served in the

government. Many of them have defended companies in antitrust investigations. And all of them agree that:

> the antitrust laws, as interpreted and enforced today, are inadequate to confront and deter growing market power in the U.S. economy and unnecessarily limit the ability of antitrust enforcers to address anticompetitive conduct in the digital markets that the Committee is investigating.

That letter I signed provides a number of suggested reforms to restore the vitality of the antitrust laws, which

- Nullify existing precedent that limits antitrust actions,
- Clarify that the antitrust laws protect potential competition,
- Establish legal rules that, in appropriate cases, require defendants to prove their conduct does not harm competition, and
- Increase penalties and enforcement resources

The courts have made it abundantly clear that they believe the antitrust laws have little role to play in promoting competition because the market can fix itself. And, therefore, do no harm is the prevailing approach. Unless Congress takes a different view by passing legislation, dominant firms will have little concern about the antitrust laws limiting their conduct.

Remedies that address entry barriers: Interoperability

None of this is to suggest that the government should shy away from prosecuting antitrust violations against digital platforms. To the contrary, the antitrust enforcement agencies have a duty to attack monopoly power where they find it and to advocate for courts to update and modify their doctrines to conform to modern economic theory.

This leads me to my second point. Remedying antitrust violations in digital markets will be challenging. As this committee has heard consistently, whether it be a social network such as Facebook, an online marketplace such as Amazon, an App Store, or Google's search product and online advertising eco-system, network effects are a fact of life. The more people using a digital platform, the more valuable it is. In turn, the markets tend to tip toward a single firm.

These dynamics make anticompetitive conduct more likely to be successful and it will often target small, nascent, or potential competitors. This makes it harder to challenge conduct and to develop remedies that will restore competition. Moreover, once an antitrust violation has occurred—once a company has obtained or maintained a dominant position through exclusionary conduct—restoring competition and preventing future violations requires a remedy that diminishes those entry barriers. As result, simply banning conduct, financially penalizing a company, or even breaking up a company may not be sufficient.

Interoperability, which broadly defined means requiring connections between platforms can be an effective tool to diminish entry barriers. (See Appendix B). For a social network, interoperability is likely a necessary, but not necessarily a sufficient, condition for an effective remedy to an antitrust violation. Users will not switch to a new social network until their friends and families have switched.

Interoperability causes network effects to occur at the market level – where they are available to nascent and potential competitors – instead of the firm level where they only advantage the incumbent. Interoperability allows someone who is not a member of the dominant social network to continue to communicate with friends or families on that platform. Just like a person with Verizon can text a person with T-Mobile, interoperability would allow a person on one social network to share posts and pictures) with a friend on another social network. This remedy could be ordered in addition to other relief such as a divestiture, and indeed could be complementary to it, or stand on its own.

Without interoperability, it would be difficult to undo the damage done by excluding competition, and the dominant firm has the same incentives to find new way to prevent competition.

Regulations that Promote Competition

Third, the Committee should focus broadly on the goals of promoting competition and not narrowly on specific tools. Strong antitrust enforcement is an important tool, but it is not the only tool. Laws and regulations can also promote competition. Reports from the U. K.'s Competition and Markets Authority, the Stigler Center, the European Union, and the Shorenstein Center all conclude that the solutions are not a choice between antitrust enforcement and regulation but rather both. Regulations, broadly understood, can establish marketplace rules that promote competition and ensure that competition occurs on dimensions that consumers value, such as quality, rather than deceiving or steering consumers into

making poor choices. Regulations can also limit the harms that fall outside of traditional competition concerns such as labor, the environment, and speech issues.

I do not mean old-fashioned, utility-style regulation but regulations that level the playing field, promote entry, and increase competition. The Carterfone rule created competition in the sale of phones, fax machines, and modems. The Hatch-Waxman Act created vibrant price competition in pharmaceutical markets that saves consumers tens of billions of dollars every year.

Focused regulation can often reach important issues, such as privacy and protecting consumers' data, more efficiently and quickly than litigation-based antitrust enforcement. As the committee considers how to promote and protect competition in digital markets, it is good to remember that the greatest successes in competition policy have typically come when antitrust enforcement and regulation complement each other as they did in eliminating AT&T's phone service monopoly. That approach is likely to apply with equal force to today's challenges in digital markets.

Protecting competition in digital markets requires laws that efficiently distinguish pro and anticompetitive conduct, remedies that address the underlying network dynamics, and a combination of antitrust enforcement and regulation so that markets the deliver the results that benefit us all.

Thank You, and I look forward to answering your questions.

Appendix A

Joint response to the house judiciary committee on the state of antitrust law and implications for protecting competition in digital markets

Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets

April 30, 2020

Introduction and Summary

We appreciate the opportunity to comment on the state of antitrust law and commend the Committee for its bipartisan investigation into digital markets. This important investigation promises to help us better understand, protect, and promote competition in digital markets.

We are concerned that market power is on the rise in the U.S. economy generally, including in the digital markets that are the Committee's focus. Growing market power harms consumers and workers, slows innovation, and limits productivity growth. Courts have contributed to increased monopoly power through decisions that have weakened the prohibitions against anticompetitive exclusionary conduct and anticompetitive mergers. The circumscribed state of the law and insufficient resources have resulted in insufficiently aggressive government enforcement. And when enforcers do bring meritorious cases, their success has been hampered by serious deficiencies in the contemporary judicial interpretation of the antitrust statutes.

In short, economic research establishes that market power is now a serious problem, and that current antitrust doctrines are too limited to protect competition adequately, making it needlessly difficult to stop anticompetitive conduct in digital markets.

The antitrust laws, as interpreted and enforced today, are inadequate to confront and deter growing market power in the U.S. economy and unnecessarily limit the ability of antitrust enforcers to address anticompetitive conduct in the digital markets that the Committee is investigating. For the reasons set forth below, we believe than any conclusion to the contrary reflects either an incomplete or incorrect understanding of economics and the economic literature from the last several decades.

On similar occasions in the past, most notably in 1914 and 1950, Congress acted to correct the direction that the courts had taken by strengthening the antitrust laws. It is once again time for Congress to step in. In broad overview, Congress should update the antitrust laws to:

- Correct flawed judicial rules that reflect unsound economic theories or unsupported empirical claims
- Clarify that the antitrust laws protect against competitive harms from the loss of potential and nascent competition, especially harms to innovation
- Incorporate presumptions that better reflect the likelihood that certain practices harm competition
- Recognize that under some circumstances conduct that creates a risk of substantial harm should be unlawful even if the harm cannot be shown to be more likely than not
- Alter substantive legal standards and the allocation of pleading, production, and proof burdens to reduce barriers to demonstrating meritorious cases

Congress also should improve the effectiveness of antitrust enforcement by increasing the resources available to the federal antitrust enforcement agencies and increasing penalties.

Our discussion below identifies the problems and proposals for correcting them. The signatories to this letter strongly believe that antitrust enforcement has become too lax, in large part because of the courts, and that Congress must act to correct this problem. Specific variations on this theme are described below, although not all of the signatories agree on all the variations.[1] We hope the Committee will respond to these concerns with appropriate legislation, and we would be happy to work with the Committee to help develop legislative language.

Background on Growing Market Power

Effective antitrust enforcement helps protect and foster competitive markets, and thus helps ensure competitive prices for products and services, spurs innovation, and provides a business environment conducive to entrepreneurial activity. Notwithstanding our well-developed antitrust laws and extensive enforcement institutions, today's U.S. economy suffers from growing market power, in both product markets and labor markets.[2] The direct victims include consumers and other exploited buyers, and workers, farmers and other exploited suppliers. In addition, growing market power slows the rate of innovation and productivity growth in the economy as a whole.[3]

Overly lenient antitrust rules in the areas of primary concern to the Committee—mergers and monopolization (which usually involves exclusionary conduct)—have likely contributed substantially to our market power problem.[4] Market power is on the rise in a number of major

[1] By signing this statement, a signatory does not necessarily endorse every specific conclusion reached in the statement or stated in a document referenced in the statement.

[2] *See generally* JONATHAN B. BAKER, THE ANTITRUST PARADIGM (2019); Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, in VISION 2020: EVIDENCE FOR A STRONGER ECONOMY (Washington Center for Equitable Growth, 2020); Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69 (2019). These sources also explain why benign explanations for the economic evidence of growing market power are insufficient. On labor market power, see Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537 (2018).

[3] *See generally*, Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED (Josh Lerner & Scott Stern, eds. 2012); Nicholas Bloom & John Van Reenen, *Why Do Management Practices Differ Across Firms and Countries?* 24 J. ECON. PERSP. 203 (2010); Thomas J. Holmes & James A. Schmitz Jr., *Competition and Productivity: A Review of Evidence*, 2 ANN'L REV. ECON. 619 (2010); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L. J. 575 (2007).

[4] Because the Committee's request focused on exclusionary conducts and mergers, we do not discuss problems with antitrust enforcement involving collusive conduct, such as horizontal agreements, other than as facilitated by merger.

industries, including, for example, airlines,[5] brewing,[6] and hospitals,[7] where multiple horizontal mergers that were allowed to proceed without antitrust challenge have markedly increased concentration in important markets and facilitated the exercise of market power.[8] Exclusionary conduct by dominant companies that stifles competition from actual and potential rivals—including nascent rivals with capabilities for challenging a dominant firm's market power and firms with competing R&D efforts—impairs what is often the most important economic force creating competitive pressure for dominant firms.[9] Although government monopolization cases have never been common in the modern era,[10] they have become even less common in recent years, even though market power has been on the rise.[11] According to its workload reports, the

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[5] *E.g.*, Federico Ciliberto & Jonathan W. Williams, *Does Multimarket Contact Facilitate Tacit Collusion? Inference on Conduct Parameters in the Airline Industry*, 45 RAND J. Econ. 764 (2014); Gaurab Aryal, Federico Ciliberto & Benjamin T. Leyden, Public Communication and Collusion in the Airline Industry (Becker Friedman Inst., Working Paper No. 2018-11, 2018); Severin Borenstein & Nancy L. Rose, *How Airline Markets Work . . . Or Do They? Regulatory Reform in the Airline Industry*, *in* ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? 63 (Nancy L. Rose, ed. 2014).

[6] *E.g.*, Nathan H. Miller & Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 ECONOMETRICA 1763 (2017); Nathan H. Miller, Gloria Sheu & Matthew C. Weinberg, Oligopolistic Price Leadership and Mergers: The United States Beer Industry (Working Paper 2019), available at https://ssrn.com/abstract=3239248. Although a large number of craft brewers have entered in recent years, they cannot easily and inexpensively expand output, so the craft brewing sector remains too small to undermine the market power of the large brewers that account for most of the beer sold.

[7] *E.g.*, Martin Gaynor, Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive

Conduct in Health Care Markets (Testimony before the H. Comm. on the Judiciary, March 7, 2019); Zack Cooper, Stuart Craig, Martin Gaynor & John Van Reenen, *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q. J. ECON. 51 (2019); Matt Schmitt, *Multimarket Contact in the Hospital Industry*, 10 AM. ECON. J. ECON. POL'Y 361 (2018); David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASS'N. 1964 (2013); Leemore Dafny, Kate Ho & Robin S. Lee, The Price Effects of Cross-Market Hospital Mergers (NBER Working Paper No. 22106 2016).

[8] The economic literature, including the studies referenced *supra* notes 5-7 establishes that firms are exercising market power in these and other industries through evidence independent of concentration trends in those industries. Put differently, the evidence that market power is on the rise is neither based exclusively nor primarily on evidence about trends in market concentration. We do not rely on evidence about concentration trends in the economy as a whole, which is less reliable than evidence about trends in concentration in particular markets.

[9] On the feasibility and profitability of exclusionary conduct generally see Fiona Scott Morton, Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects 19-24 (Washington Center for Equitable Growth, 2019), https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/; Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

[10] By one count, the two federal enforcement agencies collectively brought 20 monopolization or attempt to monopolize cases between 1977 and 2000, or less than one per year. By contrast, between 1961 and 1976 the agencies brought 48 cases, or 3 per year. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 449 tbl. 4 (2003).

[11] The number of civil non-merger cases brought by the federal enforcement agencies has been declining. One study finds that the annual average fell from 10.8 cases between 1999 and 2008 to 7.5 cases between 2009 and 2018 — and that most of these cases challenge collusive agreements, not exclusionary conduct. Michael Kades, State of Federal Antitrust Enforcement Fig. 10 (Washington Center for Equitable Growth 2019), https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true. Although trends in the number of cases may have multiple interpretations in the abstract, declining case counts in an

Antitrust Division of the U.S. Department of Justice has brought just a single case under Section 2 of the Sherman Act during this century.[12]

Growing market power is a concern in the digital marketplaces that are the focus of the Committee's investigation.[13] Platforms are often insulated from platform competition to a substantial extent by substantial scale economies in supply and demand (network effects) combined with customer switching costs.[14] The financial markets appear to value many large platforms at levels reflecting an expectation that they will earn substantial rents from the exercise of market power for an extended period of time. Moreover, the economic studies indicating that market power has grown over time suggest that it has increased particularly among firms that extensively employ information technology, both in information technology industries themselves and elsewhere in the economy.[15]

Large online platforms often exist in winner-take-all and winner-take-most markets. In those markets, there are likely to be long periods where a firm has a monopoly or dominant position, which makes anticompetitive conduct more dangerous.[16] Exclusionary conduct and mergers involving online platforms, particularly dominant ones, can harm competition among platforms and harm competition among users on platforms. Large online platforms are often prolific acquirers of other firms, including firms that might otherwise have become platform rivals or could facilitate the entry of such rivals.[17]

Antitrust law and enforcement have failed to respond to growing market power in substantial part because many key antitrust precedents—particularly those precedents governing exclusionary conduct—rely on unsound economic theories or unsupported empirical claims about the competitive effects of certain practices. In part for this reason, the antitrust rules constructed by the courts reflect a systematically skewed error cost balance: they are too

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environment of rising market power indicate that enforcement has not stepped up to address the market power problem.

[12] Scott Morton, supra note 9 at Fig. 1. Although some exclusionary conduct cases may be brought under Section 1 of the Sherman Act, which bars unreasonable restraints of trade, the vast majority involve agreements between competitors and not exclusionary conduct. Moreover, the number of Justice Department civil Section 1 cases has been falling as well. *See* Kades, *supra* note 11.

[13] Our reasons for concern about the conduct of digital platforms and their exercise of market power, set forth in this paragraph and the next, do not include their mere size.

[14] *See* Report of the Digital Competition Expert Panel, Unlocking digital competition 35 ¶¶ 1.81-1.88 (2019), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel; Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schwitzer, Competition Policy for the digital era, 21-22, 36, 90 (European Union 2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; Stigler Center for the study of the Economy and the State, Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, 4, 6, 13-17, 40, 66 (Stigler Center July 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

[15] Baker, *supra* note 2 at 18-20.

[16] *See generally* Stigler Center, *supra* note 14.

[17] *See* Stigler Center, *supra* note 14 at 53 n.110, 66-67.

concerned to avoid both chilling procompetitive conduct and the high costs of litigation, and too dismissive of the costs of *failing* to deter harmful conduct. Excessively permissive precedents and unsound or unsupported economic claims have, in turn, encouraged overly cautious enforcement policies and overly demanding proof requirements and have discouraged government enforcers and private plaintiffs from bringing meritorious exclusionary conduct cases.[18] These developments have likely contributed to an increased incidence and exercise of market power across the U.S. economy.

Overly lenient antitrust rules have been defended with reference to mistaken and unjustified assumptions—including erroneous claims that markets self-correct quickly, monopolies best promote innovation, firms with monopoly power can obtain only a single monopoly profit, vertical restraints and mergers almost invariably benefit competition even in oligopoly markets, courts and enforcers are manipulated by complaining competitors, and courts cannot tell whether exclusionary conduct harms competition or benefits it. Each of those mistaken assumptions leads courts to underestimate the likelihood antitrust violations and the resulting harm.[19] The evidence shows, in contrast to these mistaken assumptions, that:[20]

- Without legal intervention, markets often take a long time to correct anticompetitive activity
- Monopolies can and often do stifle innovation
- A monopolist can often earn additional profits by extending its monopoly into related markets, or by using exclusionary conduct to preserve market power in its primary market
- Vertical restraints and mergers, particularly in oligopoly markets, deserve no presumption that they improve competition—in many cases they can harm competition[21]
- Both the enforcement agencies and the courts understand that competitors may have ulterior motives, and they can judge them; the more likely danger is that generalist judges with limited antitrust experience or expertise are too willing to accept the self-serving testimony of defendants over documents and economic reasoning[22]

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[18] Moreover, the adoption of more lenient antitrust rules has not simplified antitrust litigation.

[19] For an example, *see* Michael Kades, Underestimating the cost of underenforcing U.S. antitrust laws (Washington Center for Equitable Growth 2019) (discussing history of antitrust litigation challenging reverse-payments settlements), https://equitablegrowth.org/competitive-edge-underestimating-the-cost-of-underenforcing-u-s-antitrust-laws/.

[20] Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015).

[21] Marissa Beck & Fiona M. Scott Morton, Evaluating the Evidence on Vertical Mergers (2020), https://ssrn.com/abstract=3554073, survey the literature on vertical mergers and explain why the older studies of the consequences of vertical conduct surveyed in Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007), do not support a claim that vertical integration should be presumed to benefit competition.

[22] *United States v. AT&T, Inc.*, 310 F. Supp. 3d 166, 204 (dismissing companies' internal documents) (D.D.C. 2018), aff'd 916 F.3d 1029 (D.C. Cir. 2019); *id.* at 211 (accepting credibility of defendants' witnesses); *New York v.*

In the next two sections, we identify specific problems with antitrust statutes and precedents involving monopolization and mergers that Congress could usefully address. We also point out ways the institutional structure of antitrust enforcement could be improved to enhance enforcement.

Legal Rules

The antitrust case law recognizes that anticompetitive exclusion, by a dominant firm or otherwise, is a serious problem when demonstrated.[23] The prohibitions against anticompetitive mergers are also well-established.

The courts nonetheless have thrown up inappropriate hurdles that limit the practical scope of the antitrust laws' application to anticompetitive exclusionary conduct, including monopolization, and to anticompetitive mergers. As Howard Law Professor Andrew Gavil explains with respect to the monopolization statute, "Section 2 [of the Sherman Act] has been largely circumscribed to the point where major government prosecutions are rare, and few private challenges succeed."[24]

Over time, the courts have become hospitable to horizontal mergers in all but the most concentrated oligopoly markets, leading government enforcers to do the same.[25] Over the past two decades, the courts have generally decided litigated merger cases in favor of government enforcers,[26] but troubling aspects of the reasoning in four very recent government merger

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Deutsche Telekom AG, 2020 WL 635499 at *41-*42 (D.D.C. 2018) (rejecting documentary evidence and accepting self-interested testimony of defendants). Other courts have questioned the credibility of defendant witnesses, *e.g.*, U.S. v. Sabre Corp., 2020 WL 1855433 (D. Del. 2020), and the Supreme Court has cautioned against uncritical judicial acceptance of defendant witness testimony in antitrust cases. United States v. Gypsum Co., 333 U.S. 364, 396 (1948) ("Where such testimony is in conflict with contemporaneous documents, we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."). We are concerned that some judges, in making credibility determinations, may be improperly influenced by the erroneous assumption that the enforcement agencies systematically bring cases at the instigation of rivals, which may be inefficient or unsuccessful, seeking to manipulate the judicial system for their private advantage. Baker, *supra* note 20 at 25-29. More generally with respect to monopolization, excluded fringe and potential rivals to dominant firms are systematically disadvantaged by the litigation process, biasing judicial outcomes to favor dominant firms. Erik Hovenkamp & Steven C. Salop, Asymmetric Stakes in Antitrust Litigation (Working Paper 2020), https://ssrn.com/abstract=3563843. In general, dominant firms have more to gain by defending their profits from exercising market power than small rivals have to gain by protecting their ability to earn (smaller) competitive profits.

[23] Baker, *supra* note 9 at 535-43.

[24] Andrew Gavil, Competitive Edge: Crafting a monopolization law for our time, (March 27, 2019), https://equitablegrowth.org/competitive-edge-crafting-a-monopolization-law-for-our-time/.

[25] *See* William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 143-44 (2009) (describing the relaxation of the threshold number of significant post-merger competitors prompting agency scrutiny of horizontal mergers from the 1960s through the 2000s, influenced by changing judicial standards); JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 24-33 (2015) (describing changes over time in the likelihood of FTC enforcement by concentration level).

[26] This success rate may reflect overly cautious case selection by enforcers too concerned with litigation risk and is unlikely to reflect a change in the judicial attitude toward mergers generally. An unsuccessful Justice Department merger challenge on a unilateral effects theory in 2004 likely discouraged that agency from litigating again under

losses—three of which involve digital markets[27]—call into question whether the courts can be relied upon to evaluate mergers appropriately to protect competition, both generally and in the digital markets of particular concern to the Committee.

We divide the legal hurdles into three categories: those mainly restricting exclusionary conduct cases, those mainly restricting merger cases, and those importantly restricting both. Although this list is not exhaustive (there are other legal hurdles we have not mentioned) we see these errors as particularly important.

Exclusionary Conduct

Several legal developments limit meritorious cases challenging exclusionary conduct that harms competition.[28]

- Courts have nearly eliminated challenges to unilateral refusals to deal[29] and predatory pricing claims.[30]
- The courts have created a gap between Sections 1 and 2 of the Sherman Act that insulates anticompetitive single-firm, exclusionary-conduct from condemnation when the excluding firms do not satisfy the high market share threshold that

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that theory for nearly a decade. The high agency success rate may also reflect a willingness of some merging firms to litigate even when they are likely to lose, as the firms may choose to do when they perceive a large private benefit of winning. When the agencies spend resources on those cases, they cannot take on more aggressive challenges.

[27] Government enforcers lost merger challenges in three digital market cases. *United States v. AT&T, Inc.*, 310 F. Supp. 3d 166 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (2019); *New York v. Deutsche Telekom AG*, 2020 WL 635499 (D.D.C. 2018); *U.S. v. Sabre Corp.*, 2020 WL 1855433 (D. Del. 2020). They also lost a merger challenge in *Federal Trade Commission v. RAG-Stiftung*, 2020 WL 532980 (D.D.C. 2020).

[28] The Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong. addresses some of these problems. This statement focuses on the adequacy of legal rules and institutions, and not specific legislative proposals for reform.

[29] *Trinko*, 540 U.S. 398 at 407-08 (explaining that the Court is "very cautious" in recognizing exceptions to a firm's unilateral right to refuse to deal with rivals, and terming the holding in *Aspen Skiing* as a "limited exception" that is "at or near the outer boundary" of Section 2 enforcement). *See also Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 448-51 (2009); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072-73 (10th Cir. 2013) (Gorsuch, J.) (indicating that "today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid" and defending a "presumption of legality" for unilateral conduct). Under today's standards, it is at least questionable whether the government would have been successful in breaking-up AT&T's phone monopoly in the 1980s. Howard Shelanski, *The Case for Rebalancing Antirust and Regulation*, 109 MICH. L. REV. 683, 684 (2011).

[30] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (asserting that permitting predatory pricing enforcement based on above cost prices would create "intolerable risks of chilling legitimate price-cutting"); *id.* at 227 (expressing skepticism about the difficulty of establishing below-cost pricing and recoupment); *id.* at 227 (rejecting a finding of likelihood of recoupment on the facts, colored by the "general implausibility" of predatory pricing, without considering the possibility recognized in the economics literature that predators could recoup in multiple markets other than the one where predation occurred). *See* C. Scott Hemphill & Philip J. Weiser,

Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing, 127 YALE L. J. 2048, 2049 (2018) (describing "serious criticism" of both the below-cost pricing requirement and recoupment requirement for predatory pricing).

courts usually employ for establishing monopoly power in a monopolization case or establishing dangerous probability of success for attempted monopolization (including monopoly leveraging).[31]

- The U.S. Supreme Court has been too willing to presume that monopolies promote innovation, failing to recognize that because monopolies gained or maintained through exclusionary conduct push other innovators out of the market, those monopolies are much more likely to diminish than to increase innovation overall.[32]

Multiple legal developments have unnecessarily and without adequate economic justification increased the burden on plaintiffs to prove meritorious exclusionary conduct cases.

- Plaintiffs challenging the conduct of transaction platforms face unnecessary demands in proving their cases, and when creating this problem, the Supreme Court exacerbated it by not clearly specifying the limits of the transaction platform category.[33]
- The Supreme Court has suggested that proof of anticompetitive effects requires the demonstration of a reduction in output, even though a reduction in output may be more difficult to prove than an increase in price, and even though it is not necessary for conduct to harm competition among platforms.[34]
- Courts have treated exclusionary vertical conduct as presumptively procompetitive, even in settings such as oligopoly markets and markets with dominant firms where it is well-established that vertical restraints can harm competition, with the practical effect of raising the plaintiff's burden.[35]

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[31] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See generally* Gavil, *supra* note 24. Courts often require a 70% share for finding monopoly power in a monopolization case, and a 50% share with a prospect of achieving a 70% share for finding dangerous probability of success in an attempted monopolization case. ANDREW I. GAVIL, WILLIAM E. KOVACIC, JONATHAN B. BAKER & JOSHUA D. WRIGHT, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 640 (3d ed. 2017).

[32] *See Trinko*, 540 U.S. 398 at 407 (construing the Sherman Act to "safeguard the incentive to innovate" by firms exercising monopoly power). The Court does not appear to recognize, as discussed *supra* note 3 and accompanying text, that competition generally spurs innovation and productivity while market power gained through exclusionary conduct inhibits it.

[33] *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2285 n.7, 2287 (2018) (requiring plaintiffs to prove that a vertical restraint imposed by a transaction platform harms competition in a market encompassing both sides of the platform, and rejecting proof by direct evidence by requiring market definition to evaluate defendant market power). *See* Michael L. Katz, *Ohio v. American Express: Assessing the Threat to Antitrust Enforcement*, 3:2 CPI ANTITRUST CHRONICLE (June 2019) (describing adverse consequence threatened by the Court's vague definition of transaction platform).

[34] *American Express*, 138 S.Ct. at 2288. *See generally*, Michael L. Katz & A. Douglas Melamed, Competition Law as Common Law: American Express and the Evolution of Antitrust (U. Penn. L. Rev, forthcoming) (explaining why output is a poor proxy for economic welfare in platform antitrust cases). The discussion of this point in *American Express* does not appear to be limited to evaluating the conduct of transaction platforms.

[35] *See* Gavil et al., *supra* note 31, at 913-15. *Cf. American Express*, 138 S. Ct. at 2297 (Breyer, J., dissenting) (indicating that the majority "seems categorically to exempt vertical restraints from the ordinary "rule of reason" analysis that has applied to them since the Sherman Act's enactment in 1890").

- In some cases, courts decline to condemn exclusionary conduct that harms competition on balance if the conduct benefits competition in any way, or plausibly could do so, regardless of the magnitude of the competitive benefit,[36] either on the ground that any justification is sufficient or by applying analytical approaches for evaluating reasonableness in ways that have the same practical effect.[37]

Mergers

Various legal developments limit the success of meritorious merger challenges and the willingness of plaintiffs to bring such cases.

- Plaintiffs face a higher practical burden when challenging anticompetitive horizontal mergers because the structural presumption[38] has been eroded by the courts,[39] effectively insulating horizontal mergers from challenge in markets with more than a handful of rivals.[40]
- Courts have, in some cases, been wary of finding anticompetitive effects that are (and perhaps must be) demonstrated primarily or entirely with qualitative evidence, such as a reduction in potential competition or innovation.[41]

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[36] *See American Express*, 138 S. Ct. at 2284 (explaining that under the rule of reason, if defendant successfully demonstrates a procompetitive rationale for a restraint, defendant prevails (without comparing harms and benefits) unless plaintiff can show that the efficiencies can reasonably be achieved through less anticompetitive means); *Novell*, 731 F.3d at 1072 (defining anticompetitive conduct in a monopolization case by asking "whether, based on the evidence and experience derived from past cases, the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power"); *id.* at 1075 (explaining that in a monopolization case based on a unilateral refusal to deal with a competitor, "the monopolist's conduct must be irrational but for its anticompetitive effect").

[37] *See, e.g., Viamedia, Inc. v. Comcast Corp.* 951 F.3d 429, 461-62 (7th Cir. 2020) (declining to follow *Novell* in employing a standard characterized as "essentially" a "no economic sense" test to the extent that standard precludes comparing competitive harms with competitive benefits). The "no economic sense" standard is controversial even apart from whether courts have applied it properly. *Compare* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006), *and* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004) *with* A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006), *and* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006).

[38] When courts presume that a horizontal merger harms competition from a significant increase in concentration in a highly concentrated market, they are applying the "structural presumption."

[39] *E.g., United States v. Baker Hughes, Inc.*, 908 F. 2d 981, 984 (D.C. Cir. 1990) (describing concentration as simply "a convenient starting point" for a "totality-of-the-circumstances" analysis); *id.* at 991-92 (explicitly disclaiming a requirement that defendants make a "clear showing" to rebut the inference of competitive harm).

[40] *See supra* note 25 and accompanying text.

[41] *E.g., United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 242-49 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) (rejecting theory that merger would stifle innovation from virtual cable providers); ; *Federal Trade Commission\v. v. Steris*, 133 F. Supp.3d 962, 978 (N.D. Ohio 2015) (requiring government to prove that, absent the merger, the potential competitor "probably would have entered" the market).

- Courts have, in some cases, raised the practical burden on plaintiffs challenging anticompetitive mergers by accepting self-interested testimony of defendants' executives inconsistent with economic reasoning and documentary evidence.[42]
- Courts have insulated acquisitions of potential rivals by dominant firms from challenge by limiting such cases to acquisitions of firms that demonstrably plan to enter the market in which the acquiring firm competes within a relatively short period of time.[43]
- Courts have further insulated acquisitions of potential rivals by dominant firms from challenge by interpreting the Clayton Act not to reach acquisitions when the likelihood of competitive success for the acquired firm is less than 50 percent, regardless of the size of the potential competitive benefit from that success.[44]
- The market definition rules governing transaction platforms in the wake of a recent Supreme Court decision involving vertical restraints[45] have been interpreted to bar a challenge to a transaction platform's acquisition of a non-platform rival.[46]

Exclusionary Conduct and Mergers

Other legal developments limit both meritorious exclusionary conduct and merger cases.

- Courts have discouraged meritorious challenges to exclusionary vertical conduct, including vertical mergers, by systematically favoring defendants in vertical restraints litigation.[47]
- The Supreme Court has suggested that market definition is required, and direct evidence is insufficient for proving market power, in exclusionary vertical restraints cases.[48]

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[42] *See, e.g.*, Brief for 27 Antitrust Scholars as Amici Curiae in Support of Neither Party, *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019) (No. 18-5214). *See also supra* note 22.

[43] *E.g., FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015). *Cf.* Darren Bush & Salvatore Massa, Rethinking the Potential Competition Doctrine, 4 Wis. L. Rev. 1035 (2004) (arguing for resurrecting the potential competition doctrine).

[44] Doni Bloomfield, Getting to "May Be": Probability, Potential Competition, and the Clayton Act (unpublished manuscript 2020). *Cf.* Report of the Digital Competition Expert Panel, Unlocking digital competition 100-101 (2019) (recommending "balance of harms" approach), https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel. These legal rules also make it difficult for enforcers to challenge and deter serial acquisitions, no single one of which meets today's demanding standards but which collectively eliminate competition.

[45] *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

[46] *U.S. v. Sabre Corp.*, 2020 WL 1855433 (D. Del. 2020). *See* Randy M. Stutz, We've Seen Enough: It Is Time to Abandon Amex and Start Over on Two-Sided Markets (Am. Antitrust Inst. 2020), https://www.antitrustinstitute.org/work-product/aai-says-its-time-to-cancel-amex-sabre-farelogix-opinion-makes-a-mockery-of-market-definition/.

[47] *See, e.g.*, Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L.J. 67 (1991).

[48] *Supra* note 33.

- Courts have expanded their ability to grant defendants immunity from the antitrust laws.[49]
- Courts increasingly view an industry's technological progress, with products improving and output increasing over time, as justification for declining to find an antitrust violation,[50] without always asking whether the industry would perform even better were competition not impeded by the challenged conduct.[51]

Consequences for Competition and Antitrust in Digital Markets

While these troubling judicial rules and decisions impede effective antitrust enforcement generally, they do so particularly with respect to protecting competition in the digital marketplace. Anticompetitive harm in these markets will often involve eliminating nascent or potential competitors, diminishing quality, or suppressing innovation—all of which are precisely the areas where courts have expressed skepticism. In many cases, current legal doctrine will give dominant platforms the effective license to harm competition by engaging in unilateral refusals to deal, predatory pricing, and exclusionary vertical conduct.

Beyond the specific hurdles that limit refusal-to-deal and predatory pricing claims,[52] some courts require the plaintiff to prove that the exclusionary conduct has literally no actual or plausible benefit to competition. And the Supreme Court has at least suggested that a plaintiff must demonstrate an output reduction to prove anticompetitive effects and cannot rely exclusively on direct evidence to prove market power. Collectively these rules promise to raise substantially the practical burden faced by plaintiffs seeking to challenge anticompetitive exclusionary conduct by platforms, thereby diminishing deterrence of anticompetitive conduct.[53]

In addition, platforms may acquire nascent rivals with only limited concern for antitrust challenge. These acquisitions eliminate firms that could someday offer products or services in direct competition with those sold by incumbent firms. The acquired firms might, for example,

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[49] *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (upholding dismissal of proposed class action because the securities laws implicitly precluded the application of the antitrust laws to the alleged conduct). *See* Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L. J. 1922, 1943 (2018) (explaining that *Credit Suisse* "went beyond prior implied immunity cases to establish a rule that blocks some claims even when they rely on legitimate antitrust principles, are consistent with securities laws, and, correctly read, would not interfere with the applicable regulatory scheme").

[50] *See New York v. Deutsche Telekom AG*, 2020 WL 635499 at *46 (D.D.C. 2018) (observing that "[s]everal federal courts have recognized that certain markets should be characterized as dynamic by reason of constant innovation and other rapid changes, and that analysis of antitrust effects of specific transactions in such markets warrants more particularized consideration than courts accord under traditional economic analysis, to that extent counseling greater caution in judicial intervention").

[51] *Cf.* Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, *in* 20 INNOVATION POLICY AND THE ECONOMY 125, 155-56 (Josh Lerner & Scott Stern, eds. 2020) (discussing the "fallacy" of inferring the absence of exclusionary conduct from the presence of market improvements).

[52] *Supra* notes 29 & 32 and accompanying text.

[53] In addition, platforms may use arbitration provisions in their contracts with users to insulate themselves from meritorious antitrust cases.

already have such products under development, have R&D efforts underway to create such products, have the capability to do so, or know the market well through the production of complementary products. But all such acquisitions would be difficult to challenge under current legal doctrine, even where the nascent rival would dramatically disrupt the market and enhance competition substantially if it succeeded.[54]

Resources and Institutions

Our antitrust enforcement institutions, like the courts, need to do more to address the challenge of growing market power in the U.S. economy. One challenge is resources. Between 2008 and 2019, the economy has grown twice as fast as resources provided to the Antitrust Division and the Federal Trade Commission, [55] even as the market power problem has been on the rise. Other enforcers cannot be expected to pick up the slack because most state enforcement agencies are small, and private enforcement has been constrained by Congress and the courts.[56] Limited federal agency resources pose a particular problem for merger enforcement because private plaintiffs and the states rarely find it cost effective to challenge anticompetitive mergers.

At times, moreover, the Department of Justice has abetted a judicial retrenchment in antitrust law governing exclusionary conduct by dominant firms through its guidance and advocacy. One example is the Section 2 report, issued by DOJ near the end of the George W. Bush administration.[57] Among other things, the report suggested that unilateral refusals to deal by dominant firms should be treated as virtually legal per se—thereby encouraging firms to undertake such conduct and courts to permit it, even when competition is harmed.

During the current administration, moreover, the Justice Department has filed amicus briefs advocating a standard for evaluating exclusionary conduct cases that courts have interpreted as insulating that conduct unless plaintiff can prove it has literally no actual or plausible benefit to competition.[58] And DOJ has, through another amicus brief, come close to denying any role for

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[54] *Supra* note 44 and accompanying text.

[55] Kades, *supra* note 11. Alternatively, in real terms, "[t]he antitrust enforcement agencies had slightly fewer resources in 2018 ($471 million) as they did nearly 20 years earlier, in 2001 ($491 million). *Id.* at Fig. 11. Congress, at the request of this committee, did increase FTC appropriations by $40 million dollar for fiscal year 2020.

[56] One constraint on private enforcement is a Supreme Court decision allowing firms to require by contract separate arbitration for each individual plaintiff. *Am. Express Co. v. Italian Colors Rest.* 570 U.S. 228 (2013). They also include decisions raising barriers to class actions. *E.g., Comcast Corp. v. Behrend,* 569 U.S. 27 (2013).

[57] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), www.justice.gov/atr/public/reports/236681.pdf, *withdrawn*, Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law. This report was not joined by the FTC and it was withdrawn at the start of the Obama administration.

[58] *E.g.*, Brief for the United States as Amicus Curiae in Support of Neither Party at 15, *Viamedia, Inc. v. Comcast Corp.* 951 F.3d 429, 461-62 (7th Cir. 2020), https://www.justice.gov/atr/case/viamedia-inc-v-comcast-corp-et-al (advocating that the court "follow *Novell* and hold that satisfying the "no economic sense" test is necessary to bring a Section 2 refusal-to-deal case" because that test "helps ensure that a refusal to deal with a competitor does not violate Section 2 if 'valid business reasons exist for that refusal.'").

antitrust enforcement when firms contributing patents to industry standards are found to monopolize markets by evading a commitment to license on reasonable terms.[59]
In both settings, DOJ's amicus briefs encouraged courts to adopt legal rules that would raise barriers to plaintiffs seeking to prove meritorious cases. To take its position in the case involving maintenance of monopoly by evading a licensing commitment and excluding rivals, the Justice Department undertook an unusual and uncompelled intervention in an appeal of an FTC enforcement action after the Federal Trade Commission had prevailed in the district court.

Both the Federal Trade Commission and the Justice Department have at times abetted the judicial retrenchment in antitrust law, particularly as it applies to the conduct of high-tech platforms, by declining to challenge (or in some cases even investigate) nearly all of the large number of platform acquisitions of arguably nascent competitors,[60] and declining to challenge platform conduct that has been the subject of enforcement actions by sophisticated competition agencies abroad. Without regard to the merits of any individual decision, this systematic pattern of enforcement avoidance suggests that until now, the agencies have been too cautious in their enforcement posture toward Internet platforms. We hope that recent agency institutional commitments, such as the FTC's creation of the Technology Division and the agencies' public acknowledgement of investigations, presage an increased enforcement effort.

The Role of Congress

To address growing market power, remedy existing competitive problems, and deter new competitive harms, action is required. For the past 40 years, the courts have imposed a policy judgment that is too accommodating to anticompetitive conduct and too dismissive of the harm that conduct can cause. But Congress need not be a silent partner in protecting competition. It can and should revise the antitrust laws so they are no longer inconsistent with modern economic thinking, correct the skewed error cost balance in existing judicial interpretations, and ensure that our antitrust enforcement institutions are properly funded and designed to succeed.

Congress has corrected the trajectory of court decisions in the past. In 1914, amid concerns about the limitations of Sherman Act interpretation and enforcement, Congress strengthened the antitrust laws by enacting the Clayton and Federal Trade Commission Acts. In 1950, through the Cellar-Kefauver Act, Congress closed loopholes in the primary merger control statute, Section 7 of the Clayton Act, and encouraged courts and enforcers to view mergers more skeptically.[61]

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[59] Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *FTC v. Qualcomm Inc.*, 411 F.Supp.3d 658 (N.D. Calif.), *appeal filed and stay granted*, 935 F.3d 752 (9th Cir. 2019), https://www.justice.gov/atr/case-document/file/1199191/download. *See also* Makan Delrahim, Assistant Att'y Gen., Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law (Nov. 10, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.

[60] *But see* Final Judgment, United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. 2011) (accepting consent settlement resolving competitive issues raised by Google's acquisition of ITA); Press Release, U.S. Department of Justice, Antitrust Division, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 1995), https://www.justice.gov/archive/atr/public/press_releases/2008/239167.htm.

[61] In addition, in 1936 Congress sought to protect rivals and suppliers from the exclusionary consequences of the exercise of market power by supermarkets and other retail chains by enacting the Robinson-Patman Act. *Cf.* Daniel

Once again, Congress has an historic opportunity to identify adverse trends in judicial interpretation of the antitrust and correct problems—not just by overriding damaging precedents, but also by reshaping the antitrust laws more broadly to enhance deterrence of anticompetitive conduct.

With respect to the Committee's particular interest in protecting and fostering competition among online platforms, a number of reforms could be considered. We do not collectively or unanimously endorse any of these, though some of us have done so in other contexts.

Congress could correct various flawed judicial rules, including those noted above, that inappropriately circumscribe antitrust enforcement.[62] Congress also could act affirmatively to enhance deterrence of anticompetitive conduct, either by amending the existing antitrust statutes or enacting new ones. For instance, Congress could codify that, in an antitrust case, direct proof of anticompetitive effects can satisfy the plaintiff's initial burden, without need for circumstantial proof such as inferences made by defining markets and calculating market shares.[63]

Congress also could clarify that the antitrust laws protect potential and nascent competition. In addition, Congress might consider legislation allowing plaintiffs to prevail in exclusionary conduct or merger cases by showing that the challenged conduct increases the risk of competitive harm, instead of the current legal standards, which require, in general, a showing that competitive harm is more likely than not. Or Congress could specify presumptions of competitive harm that, for example, would apply in evaluating a dominant firm's exclusionary conduct or acquisitions.[64]

Congress also can enhance the deterrence of anticompetitive exclusion and mergers by increasing enforcement resources, through appropriations, and by increasing penalties. Some of us have proposed still other institutional reforms that Congress might consider, including lowering the threshold for pre-merger notifications to help address insufficient deterrence of anticompetitive acquisitions, particularly by dominant firms acquiring nascent rivals, and creating a specialized trial court for antitrust litigation.[65]

A. Crane, Antitrust Antitextualism, Notre Dame L. Rev. (forthcoming), working paper available at https://ssrn.com/abstract=3561870 (explaining that when the courts have departed from the text and original meaning of the antitrust statutes, they have done so consistently in the direction of reading the antitrust statutes in favor of big business).

[62] *See supra* notes 29-51 and accompanying text.

[63] For further discussion, see Andrew I. Gavil & Steven C. Salop, Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct (U. Penn. L. Rev., forthcoming), working paper available at https://scholarship.law.georgetown.edu/facpub/2218/.

[64] For further discussion of possible presumptions of competitive harm Congress might consider, see Baker, *supra* note 2; Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12 (2019); Gavil & Salop, *supra*, note 63.

[65] *See* Stigler Center, *supra* note 14, Jonathan B. Baker & Fiona Scott Morton, Confronting Rising Market Power (Economists for Inclusive Prosperity Policy Brief, 2019), https://econfip.org/policy-brief/confronting-rising-market-power/#.

We are grateful that the Committee has joined the conversation about how to protect competition in today's U.S. economy, and particularly competition among or on digital platforms. We would be happy to assist the Committee in developing detailed legislative proposals or other initiatives to strengthen the antitrust laws and antitrust enforcement.

Respectfully submitted:[66]

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[66] We are each joining this statement in our individual capacities and have identified our institutional affiliations for identification purposes only.

Appendix B

Interoperability as a competition remedy for digital networks

Interoperability as a competition remedy for digital networks

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September 2020

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Introduction

Today in the United States, antitrust enforcers, academics, policy makers, and the press are focused on large technology companies, such as Google, Facebook, Amazon, and Apple. There is vigorous discussion and speculation over whether these platforms have become monopolies and whether they have violated, or are violating, the antitrust laws. Voices in the media have called for a wide variety of remedies for big tech harms running from break ups to bright-line rules for mergers to eliminating certain kinds of contracts to regulators with various powers.[2] Experience with even the most successful monopoly prosecutions such as AT&T and Microsoft, however, teaches us that developing an effective remedy is difficult; courts, for a variety of reasons, are poorly suited for the task. A break-up requires balancing competing interests, overseeing commercial relationships, and being flexible enough to respond to unforeseen market circumstances. And, in most cases, a court must design a case-specific remedy from the ground up.

For antitrust enforcement to be effective at protecting competition, it is not enough to be successful on liability. Before embarking on what Professor Wu calls battleship cases,[3] we need to maximize the chances that the remedy being sought would be effective. This approach may seem like putting the cart before the horse but think of it as saying we should have a design for the cart before we decide what horses to use. An effective remedy starts with understanding why the anticompetitive conduct occurred and was effective. In digital platform markets we see a common pattern. The monopolist operates in a market with significant network effects, scale and scope economies, and low distribution costs. Therefore, the competition that matters most is often *for* the market not *within* the market. Anticompetitive conduct is more likely to succeed. And, the harm to consumers is greater because the market tends to be winner-take-all, or most, (it "tips").

The tipping caused by network effects need not be permanent. Repeated periods of competition *for* the market provide significant benefits to consumers and therefore should be a focus of antitrust enforcement. Often by the time the pattern becomes evident, however, the market has tipped, meaning all or most customers and other "sides" of the platform use it

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[2] *See* Elizabeth Warren, "It's Time to Break Up Amazon, Google and Facebook "Medium (March 8, 2019). https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c; Sally Hubbard, Statement to House Judiciary Committee, (April 17, 2020) on behalf of Open Markets Institute and others. https://openmarketsinstitute.org/wp-content/uploads/2020/04/OMI-House-Letter-4.17.20.pdf

[3] Tim Wu "The Curse of Bigness: Antitrust in the new gilded age" 2018.

exclusively, rivals exit or become niche providers, and market power is established. These network effects become high barriers to entry so that it is harder for subsequent entrants to succeed, and therefore fewer of them will try. In these conditions, it may be challenging for an antitrust authority to devise a remedy that will restore the lost competition. A successful remedy will neutralize or significantly reduce the barrier to entry caused by network effects that the incumbent employed to protect its monopoly.

In this article we argue addressing entry barriers created by network effects is critical to remedying a monopolization violation in a social network market (e.g. Facebook). For a social network, interoperability is likely a necessary, but not necessarily a sufficient, condition for an effective remedy. Mandatory interoperability based on robust and effective rules could overcome the network effects that protect the incumbent from entry, maximizing the potential for new entrants to enter at minimal cost, compete in the market, and take share from the incumbent. This remedy could be ordered in addition to other relief such as a divestiture, and indeed could be complementary to it, or stand on its own. In today's internet-based network markets, interoperability carries no incremental costs such as dedicated wires and machines that were true of the telecom interoperability of past decades. Its main cost is the establishment of an open standard to exchange commonly used functionalities (e.g. text, images) of social networks.

Interoperability could be a remedy in a case where the defendant's refusal to interconnect with a rival was illegal. But interoperability could be an appropriate remedy in any situation in which the dominant firm has exploited network effects by violating the antitrust laws. For example, if a firm illegally protected its monopoly through serial acquisitions, network effects and susceptibility towards tipping made the serial acquisition strategy effective Interoperability will make the serial acquisition strategy less effective, should it be tried again. New entry is more likely because the network effect would not be a barrier to entry.

Although interoperability as concept is straightforward, effectively implementing it raises challenges for the adjudicative process. A successful interoperability remedy requires more than the technical capability for users to communicate across platforms; it must balance the needs of multiple actors, promote entry, enhance the user experience (including protecting privacy) and not be manipulated by the defendant. The remedy must include provisions that will deter the defendant from violating the order, require standards that many entrants can meet, and not favor

large incumbents. The process for determining whether the defendant has violated the order must be fast enough to provide relief to a harmed competitor before it fails, and the penalties must be significant enough that the defendant will be worse off for having violated the remedy order.

Creating a technical committee overseen by the antitrust enforcer is the most promising option to solve these implementation challenges.[4] Such a committee could adopt workable standards, revise them on a regular basis, and adapt to changes in technology or deal with technical challenges. It would include representatives of all relevant industry segments, but the antitrust enforcer would control the decision-making to prevent capture by the defendant. Parties could appeal those decisions to the courts, but those appeals would likely be less frequent and burdensome than if a court had to resolve every issue.

Developing an effective interoperability scheme from scratch will be challenging in the context of adjudication. Remedy details will be technical, but important, and time will be short. Moreover, interoperability affects multiple parties, not simply the litigants, which the court will want to consider. The adversarial process is poorly suited to addressing these tasks. The two sides may not adequately represent the full range of interests. And, the defendant platform has incentives to push for standards that protect its monopoly position. The government or plaintiff is likely to be focused on the broadest order, while the defendant has incentives to fight a war of attrition on every detail. The court has other matters to turn to and is not fundamentally constituted to engage in ongoing regulation. Judge Greene's oversight of the AT&T break-up, although admirable, reveals the challenges facing a court tasked with implementing a significant remedy.

A Federal Trade Commission rulemaking can address these limitations and improve the remedy process. By developing a default order on interoperability, a rulemaking could provide the foundation for a remedy in monopolization cases involving strong network effects. Although each case is different, certain remedy principles are particularly effective for harm caused by a platform that is dominant and protected by strong network effects. An FTC default relief order can be designed around these similarities to take advantage of basic principles and avoid re-inventing the

[4] Because we address rulemaking, for simplicity, we focus on the FTC as the enforcer as a remedy in administrative legislation. As we discuss later, however, a court could rely on the rule as a basis for remedy in a federal action. In that case, the DOJ would have oversight of the technical committee, *see infra* at page 35.

wheel when these cases arise. The FTC could require the order be the starting point in administrative cases, and courts could adopt it when they believed it facilitated effective remedies.

The adjudicator would modify the default order to suit the situation presented by that particular case. In this way the order provides a useful base that can be adjusted as necessary, saving the court time and effort and improving the likelihood that the relief would be effective. Of course, a federal court could ignore the default order if it thought a different remedy would be more effective at restoring competition. Nevertheless, especially given the complexity of the issues, in appropriate cases, the government's request to use the default order would likely help focus remedy issues and give the factfinder (whether the Commission or a federal court) comfort that its remedy is based on reasoned principles. As a result, courts and the Commission would be more efficient in deciding remedies in individual cases and more likely to undertake the task. And, the existence of such an order might make a court more willing to order preliminary relief.[5] The proposed rule would avoid many of the objections raised to FTC competition rulemaking because it is procedural and would apply only after a finding of liability.

Facebook provides an example that lets us explore the challenges of designing an effective remedy. The alleged anticompetitive conduct includes exclusion of social network rivals, acquisition of multiple potential and nascent competitors, and misleading and deceptive privacy policies that raised rivals' costs.[6] According to critics of Facebook, the purpose of the anticompetitive acquisition strategy was to remove those nascent competitors just as they were about to create competition for the market.

A rule would offer a default structure for remedying a monopolization or attempted monopolization (or, technically, conspiracy to monopolize) violation found by the FTC when the defendant benefits from strong network effects that impede entry, it could also be adopted by a court in litigation brought by the FTC, DOJ, or state enforcers. It could also provide guidance in any case in which interoperability could address network-created entry effects. And, it provides a model that regulators might consider as well.

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[5] Conceivably, the Commission could issue guidelines to try to achieve the same goals. Rulemaking, however, has at least two advantages. A rule would apply as the mandatory starting point in administrative litigation. And, a rule would likely receive more weight from courts.

[6] Fiona M. Scott Morton and David C. Dinielli, "Roadmap for a Digital Advertising Monopolization Case Against Google" Omidyar (May 20, 2020). https://www.omidyar.com/sites/default/files/Roadmap%20for%20a%20Case%20Against%20Google.pdf

The article assumes that Facebook has been found liable in a monopolization case in order to explore these remedy issues. Suppose the FTC brings an antitrust case against Facebook in the near future. Further suppose that it successfully proves that Facebook engaged in illegal monopolization in violation of Section 5 of the FTC Act.[7] The elements of such a case have been explained elsewhere, but we briefly review the type of facts the government might show here.[8] Facebook acquired a series of rivals that threatened its monopoly in social networks, for example Instagram and WhatsApp.[9] In addition, Facebook engaged in exclusionary conduct by denying interoperability to potential social network competitors that began as applications (complements) on its platform but which Facebook judged carried the risk of becoming substitutes.[10] Lastly, Facebook foreclosed its rivals in digital display advertising, the publishers. It did this by misleading and deceiving both users and publishers about the extent of its data harvesting, which it carried out in a way that raised the costs of its rivals, independent publishers, and drove advertisers away from them to Facebook.[11] Assume the evidence shows that these actions were carried out and formed an active strategy to exclude or acquire rivals. In carrying out these anticompetitive actions, Facebook created and maintained its monopoly power and reduced competition in social networks and in display advertising. The harms from the conduct include higher prices paid by advertisers (and passed through to consumers), fewer publisher users and lower ad prices leading to less publisher content, and lower quality and less innovation in social networks.[12] We assume going forward that

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[7] Any violation of the Sherman Act is a violation of Section 5 of the FTC Act, which prohibits unfair methods of competition. In this article, violation of Section 5 means conduct that violates Section Two of the Sherman Act. It does not refer to a "stand alone Section 5 violation," conduct that escapes condemnation under Section 2 of the Sherman Act but violates Section 5 of the Federal Trade Commission Act. Maureen Ohlhausen. "Section 5 of the FTC Act: principles of navigation." *Journal of Antitrust Enforcement* 2.1 at 1-24 (2013).

[8] C. Scott Hemphill, C. Scott and Tim Wu, *Nascent* Competitors, University of Pennsylvania Law Review, Forthcoming (2020). https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3665&context=faculty_scholarship; Dinelli and Scott Morton *supra* n. 6; Ohlhausen, *supra*, n. 7. "Section 5 of the FTC Act: principles of navigation." *Journal of Antitrust Enforcement* 2.1 at 1-24 (2014).

[9] Competition and Markets Authority, Online Platforms and Digital Advertising: Market Study Interim Report (Hereinafter CMA Interim Report) 44-46 & Box 2.4 (2019). Available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf

[10] CMA Interim Report *id* at 104. 'Twitter axes Vine video service' BBC (October 27, 2016). See section 3.c. of this paper for further discussion.

[11] Dinielli and Scott Morton, *supra* n. 6 at 20-21.

[12] For a comprehensive discussion of harms caused by big tech companies, see Fiona Scott Morton and David C. Dinielli, *supra* n 6, at 31.

the FTC demonstrates these points to the satisfaction of the court and Facebook is found to have violated Section 5 of the Federal Trade Commission Act.

If the FTC were to establish that Facebook's acquisitions and exclusion of nascent competitors allowed it to maintain an illegal monopoly, would interoperability be part of an effective remedy? And how could an administrative rule lay the groundwork for that effective remedy? Looking forward, a successful remedy restores that lost competition; it creates the greatest opportunity for new competitors to quickly enter the market and provide alternatives for users. But network effects make entry harder because users are unlikely to leave Facebook until a critical mass of their friends leave. Interoperability eliminates that barrier; the network effects would no longer be firm-specific but apply at the market level. As a result, the past exclusion would be less protective, and competition would more likely be restored through entry. And Facebook would be less likely to try to exclude competitors in the future because the entry barriers will have fallen. For the purposes of discussing the remedy, we use the example of acquisition of nascent competitors. But, interoperability, and, therefore, the benefits of the rulemaking, would also apply whenever a digital platform employed exclusionary conduct more generally to illegally monopolize the market.

The remainder of the article describes the general competitive concerns that arise in digital platform markets with strong network effects, explains how requiring interoperability can remedy illegal monopolization by creating the potential for disruptive competition to arise and thrive, addresses how to make an interoperability requirement effective, discusses the problems or dangers of relying solely on adjudication for developing remedies for complex monopolization violations, and explores how rulemaking could ameliorate this challenges., including a proposed draft rule.

1. **Lowering entry barriers: the challenge for remedies in digital platform markets.**

There is little doubt that society has benefited greatly from digital platforms: "The speed, scale, and scope of the internet, and of the ever-more powerful technologies it has spawned, have been of unprecedented value to human society."[13] Digital markets, however, also pose challenges for antitrust enforcement. They combine economies of scale, economies of scope, and network effects.[14] As a result, they have high barriers to entry and are susceptible to a winner-take-all (or most) dynamic.

Anticompetitive conduct is more likely to be profitable in digital markets. Because of the high entry barriers, a dominant firm faces fewer threats, and the potential for tipping increases the rewards for successful exclusionary conduct. Moreover, there may be long periods of time between competitive threats. The remedy must both "prevent a recurrence of the violation" and "eliminate its consequences."[15] Those dynamics have implications for remedy as well. Unless the remedy lowers the entry barriers, the remedy will not restore competition or prevent future anticompetitive conduct. The dominant firm will have the same incentives and ability to create and protect a monopoly. Traditional remedies, including penalties or prohibitions on the specific conduct are unlikely to remedy a violation. Even divestiture, alone, may not be sufficient to fully restore the lost competition.

a. **Network effects and potential for tipping markets and creating entry barriers.**

Although economies of scale, economies of scope, and network effects can lower prices and raise quality, they also make it easier to harm competition and erect entry barriers.[16] Strong network effects are of particular concern due to the market power they create.[17] Network effects

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[13] *Center for the study of the Economy and that State, Committee for the Study of Digital Platforms, "Market Structure and Antitrust Subcommittee"* Stigler Center July, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf (hereinafter *Stigler Report*).

[14] For a comprehensive discussion on how digital platforms leverage these characteristics to propagate and maintain their monopoly, see *Stigler Report*, *id.* Although many industries have some of these characteristics, digital marketplaces are unique in the degree of the characteristics and their combination.

[15] *National Soc. Of Professional Engineers v. United States*, 435 U.S. 679 (1978); *see also Ford Motor Company v. United States*, 405 U.S. 562, 573 (1972) ()("The remedy should "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.");. The other two are stop the illegal conduct and end the illegal monopoly. *See United States v. Microsoft*, 263 F,3d 34, 103 (2001).

[16] *Stigler Report, supra* n. 13 at 13-17.

[17] *United States v.* Microsoft *Corporation, 253 F.3d 34 (D.C. Cir. 2001).*

occur when the more people use a platform, the more valuable the platform's services become.[18] The entry barriers created by network effects make it more difficult for an entrant to come along and attract consumers and advertisers with higher quality and/or lower prices.

Digital platform markets are often susceptible to "tipping" or winner-take-most scenarios.[19] As one platform gains a slight advantage, that advantage reinforces itself and leads to dominance. Take the example of a social networking site. The more people who use it, the more friends a new user finds on it, which makes it more valuable to her. New users therefore tend to join the largest network. Even if there are multiple competitors initially, this dynamic makes it likely that the market will "tip" so that a large fraction of users is on one platform. It is easy to see that anticompetitive conduct at the right time in such a market can have a very high payoff. Not only is the entrant excluded, but it faces higher entry barriers to returning or growing later.

"Instead of the day-to-day competition *in* a market (such as Ford, General Motors, Honda, Volkswagen, and Toyota all competing to win each customer) the meaningful competition is *for* the market (such as more than a decade ago when Google.com dethroned AltaVista.com or Facebook.com overtook Myspace.com)."[20] When network effects are strong, anticompetitive conduct by a dominant firm is more likely to feature conduct (including acquisitions) that eliminates or limits existing or potential competitors. Although the elimination of potential or nascent threats that might not raise issues in traditional markets, it can be far more concerning in a market with strong network effects. If General Motors acquires a small start-up that designs and manufacturers transmissions, it may be unlikely to affect competition between GM, Toyota, Ford,

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[18] Report of the Digital Competition Expert Panel, "Unlocking digital Competition," at 35 ¶1.80. (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (hereinafter U.K. Competition Report).

[19] *U.K. Competition Report, id.* at 4; Jacques Cremer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *"Competition Policy for the digital era,"* at 20 (European Union 2019). *https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (hereinafter "EC Competition Report)*

[20] Michael Kades, "A Consistent if not Unified Vision: A Summary of the Stigler, UK Competition and EC Competition Reports" at 4, Submission to 2019 American Bar Association Antitrust Fall Forum Tech Summit, at https://equitablegrowth.org/wp-content/uploads/2019/11/Michael-Kades-A-Consistent-if-not-Unified-Vision.pdf

and other manufacturers. In contrast, if Myspace had acquired Facebook in 2004 (when Myspace had 5 million users and Facebook had 70k), social networking would look far different today.[21]

In a digital market with strong network effects, nascent or potential competitors "may be the most important source of competition faced by the incumbent firm."[22] These companies enter because they have a product that is sufficiently attractive to consumers that they can overcome the incumbent's network effects and create their own successful network. Such an entrant, whether it succeeds or fails, puts competitive pressure on the incumbent to improve its product. That pressure will be stronger the more likely the entrant is to succeed. Therefore, acquisition of such companies poses a threat to competition.

In this situation, the incumbent's deployment of the underlying network effects as a barrier to entry creates a challenge for an effective remedy. Ideally, the remedy will allow future innovator or disruptive competitors to succeed or fail on the competitive merits of their technology, business model, and user experience, and not because of the incumbent's conduct. Is the new technology superior or the new platform more attractive? If so, it will enter because it expects consumers to adopt its platform – rather than being kept out by the entry barrier. Restoring competition requires that nascent or potential competitors not fail simply because they could not break-through the incumbent's network advantage, and thereby not reach viable scale, despite having an attractive product.

As long as the entry barriers remain high, exclusionary conduct is likely to recur, and it will be a challenge to create potential competition. Because entry barriers and the potential for tipping made the anticompetitive conduct attractive and successful, lowering the entry barriers are critical for a successful remedy. It will make it easier for potential competition to thrive and develop and reduces the value of excluding competition

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[21] Sam Thielman, "Myspace: site that once could have bought Facebook Acquired by Time Inc.," The Guardian, (Feb 11, 2016) https://www.theguardian.com/technology/2016/feb/11/myspace-time-inc-facebook-acquisition-ownership In 2004, Facebook had 70,000 users. Alyson Shontell, "*As a two month start up, Facebook had a staggering 90 million monthly page views*," Business Insider (August 20, 2012). https://www.businessinsider.com/facebooks-traffic-and-pitch-deck-from-april-2004-2012-8. In 2004, Myspace was by 2006, responsible for approximately 80 percent of all traffic related to social networking sites. Elise Moreau, "*Is Myspace dead*", Lifewire. (January 20, 2020) https://www.lifewire.com/is-myspace-dead-3486012.

[22] *Stigler Report*, *supra* n. 13, at 67.

b. Traditional remedies alone may not fully restore the lost competition or prevent future violations

The courts have "large discretion to model their judgments to fit the exigencies of the particular case."[23] Many traditional remedies, however, are unlikely to achieve those goals. Remedial action will often come too late for the targets of the anticompetitive conduct. Stopping the particular anticompetitive behavior may accomplish little if the monopolist already has successfully eliminated the threat and is protected from all but the most unusual entrants by entry barriers, nor will it necessarily be obvious where the next competitive threat will arise. A monopolist that eliminated potential competitors by serial acquisition today may employ a different strategy in the future. Given the existing market power, excluding or limiting competition by different means will still be an attractive strategy.

Divestitures are an obvious option and may be fairly straightforward and administrable. For example, the court could order divestiture of a social network that operates its own interface with its own network effects. Alternatively, the court could restrict the defendant platform from additional acquisitions or require prior approval of any future acquisition unless the acquired company is not a potential or nascent threat to the platform. The AT&T consent went even further and imposed a line of business restriction that limited the regional Bell companies' activities.[24] This is another option in the Facebook case. Yet in the AT&T case, the court devoted substantial time and effort enforcing the restriction, and today's high-tech industries are arguably just as complicated, if not more. More importantly, line of business remedies or restrictions on further acquisitions may not diminish the defendant's existing market power. A divestiture may reduce the existing market power of the dominant network but not eliminate the market power due to network effects that was achieved through anticompetitive conduct. And, alone, divestiture may not prevent future tipping. Thus, divestitures, on their own, risk being insufficient to fully restore the lost competition.

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[23] *Ford Motor Company, supra* n. 14. At 64 (*quotations omitted)*; *see also* Chicago Bridge & Iron Co. v. Federal Trade *Commission,* 534 F.3d 410, 441 *quoting Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428 (1961) ("The Commission is "'clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist.'").

[24] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom Maryland v. United States, 460 U.S. 1001 (1983).

In the case of Facebook, the most intuitive remedy is to directly undo the illegal conduct by requiring a divestiture of Instagram, WhatsApp, and any other anticompetitive acquisitions. A court must be convinced that such a remedy would restore the lost competition, which means that the divested businesses can operate effectively at a reasonable level of quality. For example, for some years after the Instagram and WhatsApp acquisitions, those companies were held and operated separately, which would likely have enabled a clean divestiture during that period.[25] When the news came that the FTC would/might open an investigation into the company concerning these acquisitions, however, Mark Zuckerberg ordered employees to integrate the functions of all three platforms within a year.[26] If Facebook employees began "scrambling the eggs," as it is known, in January 2019, then by the time any current government case is resolved, one should expect the backend functions of the three platforms to be fully integrated, making a breakup messier and costlier. A possible solution to this problem is to give the current version of the backend software and data to all divested businesses (because software and data can be duplicated cheaply). A second problem is the underlying ad monetization function that generates the advertising revenue for two of the three social networks (the third network appears to be cross-subsidized by the others).[27] This functionality must be deployed for each divested platform in order for it to have a revenue source and viability. And in general, the divested platforms must not only be viable competitors but put real competitive pressure on Facebook. A court would need to wrestle with all of these issues if it required divestiture.

2. Interoperability as a Remedy

Lowering entry barriers is likely to be critical to remedy monopolization violations in any digital market, but the approach may be different for a social network, control of an app store, a marketplace, or digital advertising. Interoperability eliminates or lowers the entry barrier, which is the anticompetitive advantage the platform has maintained and exploited. Users will not switch to a new social network until their friends and families have switched. It allows someone who is not a member of the dominant social network to continue to communicate with friends or families on

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[25] Mike Isaac, *When Zuckerberg asserted control, Instagram's founders chafed.* N.Y. Times (September 25, 2018), https://www.nytimes.com/2018/09/25/technology/instagram-cofounders-resign-zuckerberg.html

[26] *Id.*

[27] Jeff Horwitz and Kirsten Grind, *WhatsApp backs off controversial plan to sell ads*, Wall Street Journal (January 16, 2020) https://www.wsj.com/articles/whatsapp-backs-off-controversial-plan-to-sell-ads-11579207682

that platform. Therefore, people could switch to new social networks without losing their connections. Using Facebook.com as an example, because Facebook.com would be required to interoperate with other platforms, consumers who would rather not be a Facebook.com user can easily leave to join a rival. Facebook.com would have lost the benefit of its anticompetitive conduct.

Interoperability causes network effects to occur at the market level – where they are available to nascent and potential competitors – instead of the firm level where they only advantage the incumbent. An example that helps build intuition is the phone system. Imagine if an entering phone company, e.g. DISH, was not permitted to interconnect with Verizon, AT&T, and T-Mobile. Obviously, a DISH phone would be much less useful than a Verizon phone under those conditions and DISH would have a difficult time attracting customers. A requirement that the existing phone companies interoperate with DISH would significantly lower entry barriers for the entrant. Such interoperability requires an incumbent network to share its illegally acquired monopoly advantage to help the entry and growth of competitors.

a. The Telephone as an Example of Successful Interoperability

We continue with the telephone analogy to expand our argument. In its early days, AT&T built its monopoly by refusing to connect independent local phone companies. Smaller rival phone networks had low value if they could not connect their users to the large network, and this handicap forced those independent competitors to sell themselves to AT&T -- which generated one large monopoly.[28] Another setting where a dominant network may engage in exclusion by refusing to interoperate is when a popular complement arrives and threatens to grow into a substitute. AT&T's refusal to connect MCI to its exchanges over a half-century later was a central allegation in the government's case that led to the break-up of AT&T.[29] Often its claimed reasons for refusing to connect were clearly pretextual, as in the famous Hush-A-Phone case where the product was a simple rubber attachment placed on the handset.[30] Facebook's treatment of Vine

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[28] Steve Coll, The Deal of the Century: The Break-Up of AT&T, 58 (Anthem 1986). This pattern of behavior matches Facebook conduct described in the CMA Interim report, *supra* n. 9.

[29] Coll, *id*,.28, at 264.

[30] Hush a phone v. AT&T case about third party's right to attach devices to the Bell system. AT&T argued: "It would be extremely difficult to furnish 'good' telephone service if telephone users were free to attach to the equipment, or use with it, all of the numerous kinds of foreign attachments that are marketed by persons who have no responsibility for the quality of telephone service but are primarily interested in exploiting their products."

raises similar issues.[31] Twitter bought Vine in 2013 when it was an application that ran on top of Facebook. Vine allowed users to post six-second videos and share them with their Facebook friends– until Facebook cut off Vine's access, with Mark Zuckerberg's express approval.[32] Vine eventually failed. The concern is that Facebook cut off Vine, as opposed to other apps, because it saw Vine as a nascent competitor and knew that without access to Facebook's large network, Vine would lose customers and users.[33] Facebook's justification for cutting off Vine – that it was duplicative of what Facebook offered[34] – echoes the argument that AT&T used to oppose MCI's interconnection efforts on the ground (among others) that its additional microwave systems would be "*wasteful duplication*" of telecommunication services.[35] AT&T refused to interconnect MCI's long distance service with AT&T local phone exchanges.[36]

Now consider a hypothetical example. Suppose that Verizon, AT&T, T-Mobile, and Sprint each ran incompatible wireless services: Verizon customers could only phone other Verizon users and not T-Mobile or AT&T users. Note that these services are horizontal competitors and direct substitutes. In this world the wireless industry would have very different competitive dynamics. Users would want to connect with work, family, and friends that might be spread across other wireless networks. Users would therefore tend to find the smallest network worse than larger ones. High income users might carry two phones, but most people would not want to do that. New users would tend to buy a phone from the largest network, making it larger still. The market could very well tip to an effective monopoly of one firm - primarily because of this network effect. Instead of having four national wireless services, without interoperability we might well have ended up with only one.

Luckily, the US does not regulate phones as we do social media networks, but rather requires interoperability among carriers. Standards of interoperability allow each carrier's customers to interconnect with all other carriers. This interoperability breaks the power of network

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[31] CMA Interim Report, *supra* n. 9.

[32] Adi Robertson, "Mark Zuckerberg personally approved cutting off Vine's friend-finding feature," The Verge, Dec. 5, 2018. https://www.theverge.com/2018/12/5/18127202/mark-zuckerberg-facebook-vine-friends-api-block-parliament-documents

[33] *See* CMA Interim Report, *supra* n. 9, at 104 ¶¶ 3.153-3.155.

[34] https://developers.facebook.com/blog/post/2013/01/25/clarifying-our-platform-policies/

[35] *MCI Communications Corp. v. American Tel. &Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

[36] *Id.*

effects. A Verizon user does not care *per se* how many other Verizon users there are because she can phone Sprint and AT&T users just as easily as other Verizon users. Rather, the network effects occur at the level of the market; she cares how many other users have *phones* because she can call them all and therefore benefits from the total number of people on the system. A new phone entrant takes advantage of network effects established at the level of the market, not the level of the company.

b. Email as an example of successful interoperability

When interoperability works, it is seamless. Everybody uses email. We send and receive messages all over the world. An email can be sent successfully from a desktop computer, a laptop, a phone, or even a watch without regard to the receiver's device or ISP. An email message crosses any number of networks and computers, different countries, and languages. Interoperability is what allows this communication to occur.[37]

> "Email is an open, interoperable protocol. Someone can use Google's service, spin up a server of her own, or send messages through Microsoft's enterprise software. And yet all of these people can communicate seamlessly."[38]

Interoperability existed for email before the internet or the web was a commercial success, which is fortunate. Entrants that wanted to compete with America Online (remember them?) would have had a much greater challenge if AOL members could only have received email from each other and not from the entrant. The standards enabling this interoperability are created by the Internet Engineering Task Force, an SSO, and updated regularly in order to incorporate technological change while maintaining the ability of any interested party to interconnect with any of the vast number of email users. Those users are free to change email providers according to the monetary price (formerly positive but now often zero) and quality (data harvesting, storage, spam filters, etc.) those providers offer, which encourages providers to compete for users.

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[37] Becky Chao and Russ Schulman, "Promoting Platform interoperability," New American Foundation (2020) https://www.newamerica.org/oti/reports/promoting-platform-interoperability/

[38] Alexis Madrigal, "Email is Still the Best Thing on the Internet," The Atlantic (August 14, 2014), https://www.theatlantic.com/technology/archive/2014/08/why-email-will-never-die/375973/

c. **The costs of an interoperability requirement are likely to be low**

One might worry that the required standards for interoperability among social networks would cause reduced innovation. We believe the opposite is more likely. The ability of the consumer to easily leave a social network, provides a strong financial incentive for that platform to improve its user experience in ways that do not involve the standard. Participating social networks would be free to innovate in any way on their own platforms. A post could have functionality specific to the platform on which it was created that goes beyond the standard. Such incremental functionality (e.g. location tags, emojis, stickers, polls, music + lyrics, animations including GIFs, etc.) would not be passed outside the network, so it would be one way for platforms to differentiate and attract users.[39] Users who cared greatly about these features would choose a platform on that basis. They would be free to make this choice because they could communicate at a basic level with all their friends on other participating social networks. Under the remedy we propose, no rival social network would be *required* to interoperate with Facebook.com. An entrant with amazing innovations that judged it could succeed without interoperability could choose that path and simply compete as a stand-alone entity.

Unlike the familiar AT&T example, there would be no cost to interconnection in the digital platform context. The standard is simply a way to present and transfer information that is already being presented and transferred. No wire needs to be connected to achieve it, nor do machines need to be co-located, or special workers employed. Transferring digital files has almost zero cost, but regardless of that cost, Facebook would be transferring those files to serve its users in any case. Facebook might need to pay some costs to redesign the format in which it transfers text and images, but if it has been found liable for monopolization by a court, it is expected that a remedy will have costs. The real cost of ongoing interoperability to Facebook.com is the possibility that it loses customers once the barriers to entry fall. But that risk is what every firm faces in a competitive market and represents a benefit to consumers.

[39] For example, Twitter uses hashtags to allow people to follow topics of interest. Under an interoperability standard, Facebook.com would have to allow a twitter user to make a friend request of a Facebook user, even if the Twitter user is not on Facebook.com. If the request is accepted, the tweets would appear on the Facebook user's news feed, but Twitter would not have to share the functionality of hashtags, and Facebook would not have to share the functionality of Facebook.com's marketplace or stories.

Interoperability would be far less costly for Facebook to implement up front than a breakup because no change would be needed in the way Facebook runs internally. Interoperability could only benefit consumers because the main change it makes is to increase choice. For this reason, interoperability is not very risky for consumers. Facebook would join the group of industry participants, consumer representatives, technology experts, and potential entrants developing the standard. After implementation, when a user posted content, Facebook would deliver it both internally and to the external platforms on which its users had already identified friends. (The receiving platforms would deliver the content to the individual accounts.) Facebook.com would accept incoming messages that adhered to the technical standard and would deliver them to the correct accounts. Interoperability could also be combined with divestiture, allowing Instagram and WhatsApp to participate in the standard as independent companies. Indeed, a divestiture would benefit consumers more with such interoperability. If a divestiture caused the failure of one or more of the social media sites, but interoperability was present, other entering sites would create competition, making divestiture a less risky solution.

Interoperability is particularly attractive as a policy solution because its cost to Facebook will scale to the level of Facebook's (poor) performance. Facebook will no doubt argue during litigation that it does not have a monopoly position because it engaged in anticompetitive conduct, but rather because it has a superior product. Interoperability will give it a chance to prove that. To the extent that Facebook.com has many users because those users love the interface and the privacy protections, entry by competing sites will not succeed in attracting many users. To the extent that users are unhappy with Facebook.com's services but stay on the site because of network effects, then entering sites will experience strong demand and Facebook.com will lose many customers. Therefore, the extent to which interoperability punishes Facebook financially will be scaled to the harm Facebook imposed on users.

d. Interoperability is a long-established remedy

The history of AT&T is again instructive about how interoperability can be managed to benefit consumers. In 1913, the government's settlement with AT&T required AT&T to connect its long distance service with the remaining, independent local telephone companies.[40] The Federal

[40] John E. Nuechterlein and Phillip J. Weiser, Digital Crossroads at 5 (MIT Press 2d. 2013); Tim Wu, The Master Switch: the rise and fall of information empires 55-56 (Vintage 2011).

Communications Commission later developed[41] the Part 68 Rules that required AT&T to interconnect any device that satisfied the rule's technical specifications.[42] Interconnection caused innovation by leading to the development of new technologies such as modems and fax machines.[43] The AT&T consent decree in 1982 forbade the regional Bell companies from favoring AT&T in the access to local exchanges; each regional Bell had to interoperate with long distance carriers without discrimination.[44]

And, regional Bell companies, initially, could not offer mobile or cellular services outside their local regions. Because no single carrier could create its own national network, they had to interoperate to create a national network. In the AT&T court's view, limiting the reach of the regional Bell companies was critical to creating a national telecommunication network.[45] If a regional Bell company could enter and obtain control over a neighboring local exchange, it would have an incentive to undermine the national network and develop an alternative that it controlled.[46] Interoperability is such a central feature of phone service that we do not think about it. But it exists in large part due to regulatory and judicial decisions that protected and promoted it.

3. A successful interoperability order requires both strong substantive requirements and effective procedures.

As a principle, the role of interoperability in lowering entry barriers and restoring potential competition is straightforward. Implementing interoperability raises a number of issues, both substantively—what the scope of the requirements should be—and procedurally—how to make sure the remedy is flexible enough to accommodate changes and effective enough to deter obstructionist conduct. This section explores existing interoperability among social network

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[41] *See Id.* at 43.

[42] *Id.*

[43] In 1968, the Federal Communications Commission, in what was known as the "Carterfone rules", made an order that non-Bell equipment could be attached to AT&T's telephone system. See In re Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420, Federal Communications Commission, 1968. This case was a progeny of the 1956 D.C. Circuit order that allowed noise reduction systems developed at firms other than Bell to attach to the Bell telephone system. See Hush-A-Phone Corp. v. U.S., 238 F.2d 266, D.C. Circuit, 1956 *See* Wu, *supra* n. 40, at 189-90.

[44] Joseph D. Kearney, "From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene," *50 Hastings L.J.* 1395, 1412 (1999).

[45] United States v. Western Elec. Co., 627 F. Supp. 1090, 1108 (DDC 1986).

[46] *Id.*

platforms, describes the contours of what functions should be interoperable as a remedy, and concludes by addressing how to make the remedy effective.

a. Existing Interoperability

The current situation in social media is the opposite of what we enjoy today in email and mobile phones. Social networks have a similar importance to society as phones did in the last century. Unlike AT&T, which was heavily regulated, Facebook sets its own prices, amplifies users' posts if that benefits Facebook, and controls the amount and type of advertising. There has generally been very little interoperability in social media over the last two decades. By this, we mean that a user of Myspace would post on that platform, and only other users of Myspace would see the content. Likewise, a post of a Facebook.com user who was an offline friend of the Myspace user would not be delivered to the account of the Myspace user, but only to online "friends" on Facebook.com. Unlike Verizon and T-Mobile, the networks could not connect their users. Other networks such as Google+, Orkut, Hi5, Tumblr, Friendster, Bebo, and Foursquare show vanishingly little interoperability.[47] A near zero level of interoperability is likely inefficient. Users would gain from being able to communicate with all their (chosen) friends by sending a message through whatever network those friends are using, just as they do with email today.

Interestingly, however, such interoperability has existed for some pairs of networks during some time periods, so we know it is both technologically possible and not costly. We can also infer that consumers value such interoperability. Indeed, Facebook.com itself (and some other social networks) has, at times, allowed consumers to post content from other social media platforms onto its own. In the case of Facebook.com, this functionality was enabled through the 'Public Actions' API which, tellingly, did not enable Facebook users to post content *from* Facebook.com out onto other social media platforms.[48] This asymmetry probably led to greater

[47] There were, however, third party applications like 'Flirtable' that connected users across Hi5, Myspace, Orkut, Bebo. BusinessWire, 'Frengo Connects Users Across Myspace, Facebook, hi5, Orkut and Bebo Social Networks," BusinessWire May 6, 2008. Available at https://www.businesswire.com/news/home/20080506005549/en/Frengo-Connects-Users-MySpace-Facebook-hi5-Orkut

[48] Facebook deprecated this API in 2018. See New Facebook Platform Product Changes and Policy Updates. Available at https://developers.facebook.com/ads/blog/post/2018/04/24/platform-product-changes/

and more varied content being shared on Facebook.com compared to the social media platforms from which content is shared, according to the UK's Competition and Markets Authority.[49]

The lack of interoperability between networks is likely to be one cause of consumer multi-homing, the practice of one person using multiple social networks. For instance, 97% of Instagram's audience also visited Facebook.com, as did 95% of Snapchat's audience. In contrast, only 66% of Facebook.com's audience also used Instagram while 68% used Snapchat.[50] This asymmetric level of interoperability between Facebook.com and other social networks persists in current interactions Facebook has with other platforms. For instance while TikTok and LinkedIn users can cross-post material onto Facebook.com, it is impossible, without the use of third party Apps, for Facebook.com users to share their material on TikTok or LinkedIn.[51]

We see from the fact that Facebook.com and other social networks can interoperate with other sites when it is in their individual interest that an interoperability requirement is technologically feasible. Another current example of interoperability is Shazam, which interoperates with multiple other apps including SnapChat.[52] Zoom interoperates with Microsoft Outlook.[53] Password lockboxes like LastPass interoperate with all the browsers (even those browsers have integrated a similar feature). The barrier to interoperability in social media is not fundamentally technological, it is commercial.

b. The Idea

The interoperability we propose is basic, which means it applies to functionalities that are well-enough established to permit a useful and popular standard to be developed. Keeping interoperability simple allows social networks to innovate on dimensions of their service that they think will attract users. We give an example to motivate the discussion below. Suppose the technical committee developed a standard for transferring text, calendars, images, and video. Network A might have a feature that allows users to make text bold and flashing, but these features

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[49] CMA Interim Report, *supra* n. 9, at 104-105.

[50] CMA Interim Report, *supra* n. 9, at 93 (Quantifying the traffic effect of FB's asymmetric interoperability).

[51] CMA Interim Report, *supra* n. 9, at 105.

[52] https://support.apple.com/en-us/HT210237

[53] Sometimes interoperability is used to drive users to the rival service. For example, when Zoom interoperates with Google Calendar, the Google Calendar automatically displays the link for its own Google Meet application at the top of the entry, even when the organizer is setting up the meeting in Zoom.

are not in the standard, which is plain text. When a message in flashing bold is sent by a user on A to her friends, those on network A will see the full effect; those on networks B and C will see plain text. Users of networks B and C, however, would receive A's posts such as a photo and plain text saying, "Lee's wedding was beautiful." Network A might have a feature that alerts a user's friends on her birthday. If that feature is not in the standard, friends on Networks B and C will not receive those alerts about birthdays of friends on network A. Senders who wanted to serve followers across all networks could take care to design their posts to stay within the standard. For example, institutions like schools could design their notifications (e.g. field trip forms, snow day alerts) to conform to the standard so that parents would all receive the same information no matter their home networks. Thus, the standard would allow all users to receive useful information about their friends on other networks through the most common functionalities. The technical committee would update the standard regularly and could add more features as desired.

With interoperability of this kind, a user could choose the social network she preferred to join according to its features, user interface, privacy policies and more. In addition, the technical standard would be supplemented with further conduct conditions. Under interoperability, a user would be entitled to send and receive friend requests from outside her network. She could accept or deny each friend request. Subsequently, her own social network would be required to pass her posts to her friends' networks, and their networks would display her posts to her previously-designated friends. Similarly, her home social network would be required to pass through posts from off-network friends to her as it would for posts from her friends on her home network. Social networks would not be permitted to discriminate against content from off-network friends. For example, suppose an incoming post violated the terms of service of the social network (e.g. it was an incitement to violence). If the policy of the home network is to remove all such posts, it should remove the incoming as well as local posts of that sort.[54] Under the standard, social networks would be free to have their own different terms of service, but would not be permitted to remove,

[54] We do not see a First Amendment issue. Interoperability requires a platform to deliver a post to a member of its social network, which the member previously agreed to accept. Interoperability would not require the social network to allow the post to spread across its network, so it does not infringe on the First Amendment rights of the social network. The network could apply whatever terms of service to what can be shared as long it does not discriminate against competitors.

promote, suppress, or otherwise handle content from other networks any differently than posts originating on their own networks.[55]

We provide an illustrative example of how an interoperability remedy would function should the government prevail in a case against Facebook. Suppose a new platform entered that was run by Consumers' Union (publisher of the well-known Consumer Reports service), charged a monthly subscription fee, collected no data about its users, and showed no advertising. A user of the Consumers' Union site could make "friend requests" of their relatives, friends, schools, and so forth who are users of Facebook.com.[56] Facebook would be required to pass on those friend requests, explain that the potential friend is located outside of Facebook.com on the Consumers' Union site, and allow the Facebook.com user to agree to be friends if they so choose. After that point, when either friend posted content consistent with the standard, those posts would flow to the other platform and be delivered to (all) the user's designated friends on that platform according to the algorithm employed by the home network. Users would gain from the ability to communicate with all friends regardless of platform, making interoperability, as with the telephone, a consumer benefit.

In this way a user could belong to a non-Facebook.com social network, and if her child's school maintained a Facebook.com page, she could still receive notifications, photos, calendars, etc., from the school. Facebook would have to compete to gain or keep that parent as a user of Facebook.com based on the quality of the user interface, privacy protections, advertising policies, quality of news, and so forth. Facebook could not keep the parent by effectively denying her access to the school calendar if she left the platform. If she did not like Facebook's policy concerning lies in political ads, for example, she could move her account to a rival social network without losing touch with the school.

We imagine that a popular type of entering social network would be those geared to parents choosing a site for their children. Parents might be very interested in a platform that was

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[55] The rule would provide the agency overseeing interoperability with the power to stop the defendant from, for example, using an "algorithm" to promote content that has the differentiated features of its own platform, thereby downgrading all content from rival platforms. Regulating this type of attempted evasion of interoperability would be an ongoing activity for the agency, one that a court would likely prefer to outsource.

[56] To make such a request, the user would need to have a personal identifier (email or phone number) and a network identifier (perhaps a name). Or the requester could be required only to have a personal identifier. The former would be more secure; the latter would make interoperability easier to achieve.

especially strict about the types of content, ads, and news that could be circulated among users. While a social network with no ads would likely require a subscription as an alternate revenue source, an ad-supported platform for children could differentiate itself by showing ads that met certain suitability criteria. One could imagine a company like Walt Disney Corporation entering with a social networking site of this type and using their existing entertainment content as a feature.

Successful interoperability would turn this sector from a monopoly into a vibrantly competitive market, with social media sites for all types of users. Sites might specialize in particular types of content moderation desired by users. For example, a site might market to Christian conservatives and both show content attractive to that group as well as remove content its members find unacceptable. Another site might partner with the Washington Post and only show news from that source along with ads. Some sites might be very strict about dangerous or hateful content and market themselves to families. Affinity groups of all kinds might want to run social media networks and include in them the kinds of features and content those users most value.[57] Rather than complaining that Facebook.com does not show the type of content they want, users could simply leave the social network for one they like better. In this setting each user would choose a social network in part based on its rules about their own speech as well as on the basis of how well the platform shields them from, or exposes them to, speech of others. Interoperability directly increases consumer choice and therefore consumer welfare for these reasons.

c. What a successful Interoperability Order requires

A successful Interoperability Order (IO) will require strong procedures and conditions in order to prevent the (liable) dominant defendant from continuing to exclude potential competitors. The rule we set forth below is designed for an environment where the dominant firm has market power and profit, interoperability will reduce that market power and profit, and so the agency must expect the dominant firm to be working in every way it can to obstruct the standard and the conduct rules.

The standard would be created and imposed on Facebook as part of the remedy for its violation of the antitrust laws. However, interoperability necessarily involves another party. We

[57] E.g. AARP, the NRA, the Sierra Club, music fan groups, universities, etc.

envision the standard embodied in a royalty free license offered - under the rule - to compliant platforms who wish to participate. We describe the conditions for both parts of the remedy below.

The technical standard for the interoperability of networks would need to be established so that platforms could carry out basic functions such as sharing text, calendar, photos, and videos. As in the case of the telephone, a standards body of industry participants, consumer representatives, technical experts, and government representatives can be created to design it. Facebook and potential competitors would be invited to participate. The standard would need to be updated regularly to handle new features in the market that had become common enough to deserve inclusion in the standard. For example, if such a standard existed today, perhaps such a committee would meet to consider whether GIFs should be included. Because only a small set of functionalities are controlled by the standard, every other aspect of the platform could be designed in any way the platform thought would benefit it, thereby allowing differentiation that appeals to users as described above. These could include better layout of the page, better suggestions for people you might know, stricter privacy protections, etc. Such differentiation and innovation by platforms would let them compete for share within the market. But participating licensed platforms would be required to use the standard technology to transfer covered content.

Beyond technical standards, the government and the interoperability committee would set the conduct requirements rival platforms must satisfy to participate in the standard. For example, a platform that wanted to license the standard would have to demonstrate it was in compliance with all relevant laws, especially laws controlling privacy and data access, had appropriate governance and training, and might need to submit some element of its code for review before it could obtain a license from the FTC. Once a platform obtained a license, it would be required to interoperate using the standards in the license with all other license holders and the defendant platform and not evade this interoperability requirement. The license terms would require non-discrimination as between content originating on rival platforms versus the home platform. Rival platforms would be free to leave the standard at any time.

Privacy protection on a social network would work as it does now. Each platform would set a policy and each user would need to agree to that policy if she wanted to open an account. A key aspect of privacy protection concerns the exposure users have to users on the networks their friends belong to. We are particularly concerned about a user who values privacy but has friends

on networks with more lax privacy rules that aggressively monetize users. A user of a strict social network might be concerned about her privacy should she send a post for display on a lax social network. Under the license, social networks would not be permitted to store information contained in incoming posts on their users' friends, learn from that data in any way, or monetize those friends in any way. A network would simply deliver the information to the friend only. Only the receiving person could decide to share the content further on her own social network.

While participation in the interoperability standard would be mandatory for Facebook, it would be optional for all other platforms. Existing platforms, e.g. LinkedIn or Twitter, would not be required to participate, nor would we necessarily expect them to want to.[58] Their existence, despite Facebook's dominance, indicates that they are not dependent on interconnection with Facebook for success. If an existing platform wishes to license the standard, it is welcome to do that of course. A new entering platform would likely want to interoperate with Facebook in order to attract users by offering them the types of features mentioned above. Critically, such a participating platform would be required to interoperate *with any other platform complying with the standard.* If this condition is not in place, then entering platforms would each have a bridge to Facebook.com, but not to each other, which would make for a dysfunctional market.

Interoperability is therefore designed to be symmetric under the license; a network that benefits from its users' posts flowing to and from the dominant social network also most provide interoperability to all other licensees. Thus, if there were an entering platform run by AARP and another by the NBA and another by Disney, and all three of those entrants chose to operate under the standard, their users could not only connect to friends on Facebook.com, but the AARP users could "friend" users of the Disney and the NBA platform as well as users on Facebook.com, and vice versa. Reciprocity will help new networks launch and flourish. Users will be able to freely move across social networks without losing connections (access to friends) on other platforms. Consumers can choose networks in response to the features and policies they like best, thus stimulating competition that benefits them

As mentioned above, some have raised concerns that too much interoperability could undermine innovation. In their recent report, the Competition and Markets Authority recognized

[58] The CMA notes that the social media platforms it surveyed did not want interoperability. However, as we explain above, this is not a surprise as we would expect the social media that has survived today to have a different strategy than a new entrant responding to interoperability. CMA Interim Report, ¶ 8.65.

both the benefits and costs of interoperability.[59] On the one hand, interoperability reduces network effects as an entry barrier.[60] But, as we described above, standardization can promote innovation "in the non-standardized functionality."[61] On the other hand, there could be less innovation on the functionality that is incorporated into the standard.[62] This latter concern is theoretically correct, but we judge its magnitude to be far outweighed by the innovation generated by entrants competing for users in the market. For incumbents, stoking fears of interoperability provides an easy way to oppose rules that could increase competition. AT&T's statements to this effect provide an instructive comparison.[63] In telephones, the AT&T order spurred, rather than limited, innovation. Similarly, in the EU's case, Microsoft's competitors argued that Microsoft should have to provide detailed technical information on its interfaces, which would help competitors design code to interoperate with Windows. In response, Microsoft argued that releasing such information would discourage it from innovating. The EU weighed the requirements impact on the whole industry to innovate against the impact on Microsoft's own incentives and rejected Microsoft's argument:

> "a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including MS)"[64]

The Commission's parenthetical mention of Microsoft is insightful. Even as to the dominant firm, interoperability has ambiguous effects. Mandatory interoperability may decrease the dominant platform's incentive to innovate. Innovations on functions that are part of the interoperability rule have to be shared with competitors. The dominant firm could worry that if it innovates on functions not part of the standard, those technical committee could sweep them into the

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[59] CMA Interim Report, *supra* n 9, at 247-25 ¶¶ 6.76-6.88 and Appendix K.

[60] *Id.*, "Appendix W: assessment of pro-competition interventions in social media," at W5 ¶ 27. https://assets.publishing.service.gov.uk/media/5efb5fcbd3bf7f769a4e776b/Appendix_W_-_Interventions_in_Social_Media_v.3.pdf

[61] These are the types of features that can be substantial and disruptive or more modest. For some examples, *see, supra,* pp. 20-23.

[62] *Id.*

[63] In the 1940's, AT&T ran advertisements stipulating that, "it takes a totally unified system to make it all work. One system. AT&T." AT&T would later argue in the Caterfone case that its absolute control over all equipment on the network was necessary for the efficient functioning of its telephone system (a familiar stance it had taken in the Hush-a-phone case, two decades earlier). Fortunately, the FCC rejected AT&T's rules and arguments as "unduly discriminatory."

[64] *Microsoft Corp. v. Commission of the European Union*, Case T-201/04, at ¶ 706 (2007).

interoperability rule, allowing competitors to free ride on the dominant firm's innovation. At the same, even if it knows that innovations could become part of the interoperability rule, the dominant firm still has incentive to innovate. Because interoperability minimizes network-created entry barriers, the dominant firm faces increased competitive pressure. If it does not innovate, someone else might. Innovating quickly allows the social network to reap the greatest benefits before such innovations might be included in revisions to the standard.

Regardless, interoperability as a remedy to an antitrust violation is particularly unlikely to deter innovation. The remedy is being applied in a setting where the incumbent platform has been found to have anticompetitively stifled competition, which likely means innovation has also been retarded. As discussed below, the process for developing the interoperability standard involves all affected parties, with a particular emphasis on entrants. A competitor worried about losing its innovative edge is always free to choose not to participate in the standard.

4. Adjudication alone is poorly suited for developing an interoperability remedy

Although the concept of interoperability is straightforward, implementation requires careful attention to detail. The dominant platform could intentionally make interconnection difficult. When its competitors complained, the platform would claim it was a technical, not competitive, issue. Microsoft took such an approach in defending its conduct, claiming it would be nearly technologically impossible to separate its browser from its operating system.[65] As one government enforcer characterized AT&T's defense, it warned a break-up of the Bell system would "silence the dial tone across America."[66] As in those cases, sometimes (maybe often) such arguments will be pretextual, but other times they may be legitimate. A process involving experts and a government agency with discretion will expedite review of these issues.

In the social network context, there will likely be ample disputes. For example, the defendant platform rejects interoperability with an entrant because it claims the entrant traffics in hateful and deceptive information, which the defendant's platform forbids (leaving aside that this is the opposite of the current Facebook situation). The entrant responds that it does not allow such information to be posted and retorts that the defendant discriminates against the posts of the

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[65] *United States v.* Microsoft *Corporation,* 253 F.3d 34 (D.C. Cir. 2001).

[66] Interview by Michael Kades with Phil Verveer, former prosecutor in United States v. AT&T, United States Department of Justice, Antitrust Division (May 29, 2020).

entrant's members. Or, the defendant platform cuts off a competitor platform because the defendant claims the competitor keeps violating privacy protections or other standards. The competitor disagrees and says it is being cut off because it is gaining users and is a threat to the defendant's profit. Those are simply examples of the types of disputes one would expect to see. In all likelihood, there will be unforeseen issues that will arise as market conditions change.

The point is not that those issues make a remedy impossible. Rather, they foreshadow the issues with which a court overseeing a remedy will grapple. Interoperability will affect competitors, content suppliers, and users, while the relief must be flexible enough to address unknown future developments. For example, although the AT&T consent directly addressed mobile phone service, it is doubtful anyone understood that mobile phones would eventually replace landlines or the full scope of the coming digitization of telecommunications. These types of issues are the very ones with which adversarial adjudication process struggles.

a. Challenges of Antitrust Litigation Generally

Antitrust cases are difficult, complicated, and time consuming, particularly when the focus is on exclusionary conduct and monopolization theories. Moreover, a victory on liability does not help the harmed consumers in a monopolization case if the remedy fails. But liability is a necessary precondition for seeking a remedy. Unsurprisingly, litigators and courts focus on liability first and foremost, and remedy can become an afterthought during litigation. As a result, having spent years on liability, the process begins all over again. And, when a court tries to circumvent that process, as in *Microsoft,* by streamlining the process by not having an additional evidentiary hearing, it may find its relief overturned.[67]

Remedies fail frequently in antitrust cases even in more straightforward situations than a monopolization case presents. In merger cases, the government has a well-defined goal: restore the competition that otherwise would be lost. In theory, a divestiture should remedy an otherwise anticompetitive merger if the divested assets are an ongoing business and the buyer is financially sound and competent. But the execution is more challenging. In a number of recent cases, a

[67] *United States v. Microsoft*, 253 F.3d 34, 183 (DC Cir. 2001) ("In sum, the District Court erred when it resolved the parties' remedies-phase factual disputes by consulting only the evidence introduced during trial and plaintiffs' remedies phase submissions, without considering the evidence Microsoft sought to introduce.").

buyer, despite the government's vetting, failed.[68] And, a number of studies find that mergers were anticompetitive despite government-required divestitures.[69] The monopoly context is far more challenging. Even a break-up is not simply cutting a company in two. The remedy must define how the new companies interact with each other and others in the marketplace.

b. Lessons from AT&T Remedy litigation.

A remedy that is designed to last for years in a technology market will be complicated to administer. The government and AT&T had spent years, on-and-off-again, negotiating the break-up remedy before submitting the settlement to the court in 1982. The ultimate consent decree was effective, "premised on an articulable economic theory," and administered by the court.[70] Judge Greene proved that the approach "can be a defensible judicial enterprise." Even so, over the next 15-plus years, Judge Greene would issue hundreds of orders implementing and interpreting the agreed upon settlement.[71] Only the Telecommunications Act of 1996 ended the judicial oversight.

The implementation of the AT&T settlement, which was largely successful, underscores the challenges that a court faces. The court had to moderate among a cacophony of conflicting interested parties. Over 100 parties had intervened in the settlement and could have overwhelmed the court with requests for oversight and relief. At the same time, the court also created a waiver procedure that allowed parties to seek modification or relief from the order's line of business prohibitions: Within four months, "the RBOCs [Regional Bell Companies] had filed nine requests for waivers."[72]

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[68] Jeff Wells, "Brief: Lawsuits between Dollar Tree and Dollar Express expose problems underlying 2015 deal," Grocery Dive (June 8 2017) (Failed divestiture in Dollar Tree's acquisition of Family Dollar); https://www.grocerydive.com/news/grocery--lawsuits-between-dollar-tree-and-dollar-express-expose-problems-underlying-/535024/; Anna Marum, "Failed divestiture: Albertsons is bidding on 36 Haggen stores, including some it used to own," OregonLive (Nov. 10, 2015) (Failed divestiture in Albertson acquisition of Safeway). https://www.oregonlive.com/window-shop/2015/11/albertsons_bids_on_36_haggen_s.html; Brent Kendall and Jacqueline Palank, "How the FTC's Hertz Antitrust Fix Went Flat," Wall Street Journal (Dec. 8, 2013) (Failed divestiture in Hertz Global Holdings acquisition of Dollar Thrifty). https://www.wsj.com/articles/how-the-ftc8217s-hertz-antitrust-fix-went-flat-1386547951

[69] John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 158 (MIT 2015).

[70] Joseph D. Kearney, *supra* n. 44, at 1402 (1999).

[71] *Id.* at 1400 n.1 (1999).

[72] *Id.* at 441424.

The demands of overseeing the consent were beyond the capacity of the court, even for the focused and diligent Judge Greene. He created a process that delegated oversight to the Department of Justice's Antitrust Division. Rather than appealing to the court for enforcement in the first instance, interested parties would have to ask the Department of Justice to enforce the order.[73] Similarly, Judge Greene channeled waiver requests from the RBOCs , through the Department of Justice. Petitions for modification were also filed with the Department of Justice. It would publish the request, allow public comment, consult with interested parties, and conduct analysis. Only then would the court consider the request.[74] Examining Judge Greene's approach is useful because it provides guidance on what procedures can work. Our proposed rule is a similar, but more structured approach than the ad hoc process Judge Green developed for himself.

Judge Greene, as a practical matter, relied on the Antitrust Division in much the same way that an agency such as the Federal Communication Commission or the Federal Trade Commission relies on professional staff. A judge with two law clerks simply cannot manage an order that affects hundreds of individual parties differently and involves complicated waiver requests without additional help.[75] Judge Greene's solution was necessary, creative, and largely successful. But it required the court to use resources from the Antitrust Division to be successful, an idea our proposed rule adopts.

c. Lessons from Microsoft Remedy Litigation

In contrast, the remedy in the *Microsoft* case was less successful on its own terms. Although successfully bringing the case itself may have deterred future anticompetitive activity, the remedies provisions did not lead to increased competition. A full discussion of the *Microsoft* remedy is beyond the scope of this article.[76] At issue in *Microsoft* was whether Microsoft had illegally maintained its monopoly for Intel-based operating systems. A network effect – the "applications barrier to entry" – gave Windows protection from competition. An operating system has more value when many software developers write programs to run on it, but those developers are attracted by users, who are themselves attracted by developers, creating the virtuous circle that

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[73] *Id.*

[74] *Id.* at 1426.

[75] Interview with Phillip Verveer (May 28, 2020).

[76] For a general discussion of the *Microsoft* Antitrust cases, *see* Andrew w. Gavil and Harry First, "The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century, (MIT 2014).

characterizes network effects. The threat Microsoft faced from the Java middleware was that it would create interoperability between applications and rival operating systems. Instead of writing software for each operating system, a developer would write for Java middleware -- which was capable of running on each operating system. An analogous situation applied to servers. In addition to other relief that barred several practices Microsoft had used to suppress competitors, the final settlements required Microsoft to allow interoperability with middleware and servers.[77] The settlement also created a three-person technical committee to oversee compliance with the provisions.

The interoperability provision had little impact for a number of reasons, providing lessons for the future.[78] Instead of considering how to lower entry barriers new operating systems faced, , the court focused too narrowly on protecting middleware because Microsoft had suppressed the threat from middleware:[79]

> "The idea that the only appropriate remedy in the case should be directed at middleware seems curiously misplaced. Conduct directed at middleware wasn't a competitive problem for its own sake in the plaintiffs' monopolization but was of concern because it maintained the applications barrier to entry into the market for operating systems. By the time of the remedy, however, middleware was not a threat it had been nor could it have been. Rather, the court should have been "looking broadly for ways to lower the applications barrier to entry,"[80]

The court should have focused on provisions that would have lowered the barriers to entry facing the most likely threats at the time of the settlement: Apple and Linux. Arguably, the interoperability requirements applied too narrowly, did not lower entry barriers, and did not spur new potential threats to the Windows operating system.[81]

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[77] Andy Gavil and Harry First, "The Durable Meaning of the *Microsoft Antitrust Litigation*," 2006 Utah L. rev. 679, 73032 (2006).

[78] *See* Herbert Hovenkamp, "The Antitrust Enterprise: Principle and Execution 298 (2005) (citations omitted).

[79] *Id.* at 758.

[80] *Id.*

[81] *See*, Carl *Shapiro*, "Microsoft: A Remedy Failure, 75 Antitrust Law Journal 739, 758 (2009).

The interoperability provisions regarding servers and PCs was one area where compliance became an issue. Microsoft initially refused to use Adobe Acrobat to image the necessary protocols and continually missed its deadlines to produce the protocols. The Technical Committee was unable to resolve issues. Eventually, the judge extended the length of the decree because Microsoft had not complied with these interoperability requirements.[82] It was not until the last report to the court before the final judgement would expire on May 12, 2011, that the plaintiffs were satisfied that Microsoft's interoperability procedures were sufficiently complete.

This example demonstrates that remedy challenges increase when the parties remain adverse as in *Microsoft*. Though the trial court found a violation in 2000 and adopted the plaintiffs' proposed divestiture, the Court of Appeals rejected the remedy and criticized the lower court for deferring to the plaintiffs. Another two years of litigation and settlement negotiations would occur before the settlement was entered, and almost another decade before Microsoft fully complied with its requirements.

5. FTC rulemaking would improve remedies

Our rulemaking proposal builds on lessons from Judge Greene's handling of the AT&T cases and Judge Kollar-Kotelly's approach in the Microsoft case, but adds three important features. To deal with both the volume and complexity of issues, the AT&T court relied on the Antitrust Division to be a gatekeeper. Rather than rely on the *sui generis* process that developed in the AT&T case and the somewhat more formal Technical Committee in Microsoft, we propose formalizing the process so that the contours of the remedy would be known at the beginning of any case. Historically, the most effective competition rules are those that "ease barriers to market entry in related or even new markets unknown at the time of entry."[83]

The standing default rule creates a technical committee to set the standard needed for the case at hand, and to monitor compliance with that standard.[84] This committee is akin to a standard setting organization, except that it is overseen by the FTC to ensure it focuses on entry and competition and to prevent capture by dominant firms. The technical issues involving

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[82] *See Generally,* Gavil and First, *supra* n. 77.

[84] The defendant would have to fund the cost of the committee, including the salaries of the members. In terms of compliance, if a company has a complaint, it would raise it with the FTC, and the FTC would determine whether to deal with it directly or refer it to the technical committee.

interoperability are likely to be too time consuming and difficult for an agency to handle by itself. Standard setting organizations are common in the economy and they ensure interoperability of everything from cell phones to mechanical parts such as screws to computer memory chips and computers. Of course, standard setting organizations can be abused.[85] Therefore, the composition and oversight of the standard setting body is critical to define in any FTC rule.

Because, in our setting, interoperability is a remedy for illegal conduct, it must be a *constant working assumption of the agency and the court* that the defendant does not wish interoperability, has market power, and will attempt to defeat interoperability and associated entry. Thus, in our hypothetical example, the body that creates the particular interoperability standard will include industry participants, and it must include Facebook, but it must not be manipulated by Facebook in a way that allows Facebook to maintain its market power. Under our proposal, we limit the competitive dangers because the FTC understands the defendant's strategy (it prevailed in the litigation), would be the final decision maker, and has substantial experience in assessing the competitive impact of Standard Setting Organizations. The technical committee in the proposal is a more robust and formal version of that developed in the Microsoft case and would be better placed to develop standards quickly.

Second, the rule incorporates strong penalty provisions. The markets for which this rule is designed are subject to tipping, which means that further anticompetitive conduct at just the right moment can maintain market power. The remedy structure must be responsive enough, and include a large enough penalty, to deter anticompetitive conduct. The remedy procedure must be fast enough that an Order violation cannot achieve its goals before the Commission makes a finding, so that the defendant will be unlikely to profit from the violation. Our draft rule provides what we believe would effectively deter order violation.

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[85] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); Am. Soc'y of Mech. Engr's v. Hydrolevel Corp., 456 U.S. 556 (1982); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). When the standard incorporates intellectual property, there is a danger of hold-up. The standard covers a patent or patents where the patent holder did not disclose the patent, falsely promised to license the patent on reasonable terms, changes its mind on licensing terms, or otherwise abuses the power it has after the standard is adopted. For a more in-depth discussion, *see* Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights "Standard Essential Patent Disputes and Antitrust Law" (Washington, D.C. July 30, 3013). https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730standardessentialpatents.pdf

We understand that there are unresolved legal issues such as how one determines what is a violation (is it by day, by user, etc.) or addresses areas with contrary authority (whether the FTC can assess fines and what counts as equitable relief). And, one case explicitly rejects the FTC's ability to obtain monetary penalties in its internal adjudication process.[86] Some of the issues would be less significant if a court adopted the rule as a framework and explicitly ordered the types of fines proposed in the rule or adjusted them according to relevant case facts. In a rulemaking, the Federal Trade Commission could and should consider these issues. We do not delve into the legal issues regarding monetary relief here. The point, rather, is that the most effective approach will have a mechanism that deters the defendant platform relying on the lack of consequence to achieve its goals.[87]

Third, we propose that the FTC use its rulemaking authority to design a default order. The FTC could use this order in its own administrative litigation or offer it as a starting point for remedies in federal court litigation. The FTC could define the situations, such as the Facebook example here, where divestiture or other remedies are, alone, unlikely to be sufficient to fully restore the lost competition. Given the growth of digital platforms of all kinds, it seems likely that the agencies will continue to encounter defendants that have network effects and therefore designing such a rule would have a long-term payoff. The rulemaking process allows input from all parties potentially affected, potential competitors, content providers, and individuals. The Commission, unlike a court in litigation, can survey all evidence, including academic and technical literature, not just what meets the standards of the rules of evidence. A rule can address nuances including how to fine-tune enforcement mechanisms.

Rulemaking provides a tool that can be used instead of, or in conjunction with, ordering a break-up, and the Commission or a court can better tailor such a rule to limit any unintended costs, according to the case at hand.[88] Having a remedy in its toolkit that removes network effects at the level of the company - and instead makes them operate at the level of the market, available to all - will be of tremendous benefit to future consumers.

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[86] *See Heater v. Federal Trade Commission*, 503 F.2d 321 (9th Circuit 1974).

[87] Congress could explicitly create a procedure for the FTC to assess fines or seek fines. *See e.g.* Monopolization Deterrence Act of 2019, S. 2237, 116 Cong. § 1 (2019).

[88] *See* Jonathan Baker, "The Sherman Act section 1 dilemmas: parallel pricing, the oligopoly problem, and contemporary economic theory," 38 Antitrust Bul. 143, 209, (1993).

a. Benefits of Rule Making

Rulemaking has several benefits over developing a remedy during litigation. One instance of rulemaking is likely to be less burdensome and time-consuming than litigating the same remedy issues in every case with network effects.[89] The rulemaking process allows input from all parties potentially affected in future cases like entrepreneurs, content providers, and consumers. The Commission, unlike a court in litigation, can survey all evidence, including academic and technical literature, not just what meets the standards of the rules of evidence. Because a rulemaking is not adversarial, it will be easier for the FTC to identify areas of consensus. The rulemaking process is likely to develop a better outcome.

The rule would improve decision-making in the FTC adjudication. The default rule would be binding on the Administrative Law Judge as a starting point and would provide a framework to work through the complicated issues that arise in crafting a remedy. For each case, the ALJ, and then the Commission, would have to decide whether the provisions address the issue and how they must be tailored to fit the specific issues of the case. The ALJ's initial decision could focus on the important areas of contention. In turn, the initial decision is more likely to be helpful to the Commission by focusing on the most important areas of contention. Enshrining a default order in the Commission's litigation procedures would be more effective than issuing guidance or a policy statement on remedy. Further, guidance or a policy statement would have less weight and formality than a rule.

The rule would function differently in federal court where the Commission would ask the court to enter the order with the same basic structure (technology committee, decision by the Commission, and stiff penalties). The order would largely be the same, but there would be some differences. For example, the Commission would ask for the court to include the stated penalties for order violations. If the court adopted the penalty provision (or some variant thereof), the Commission would later have the ability to seek penalties in the event of an order violation. The Department of Justice, in a monopolization case addressing a social network, could also build its relief from the default rule and ask the court to enter it as an order. In that situation, the Antitrust Division would be designated to oversee the technology committee.

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[89] *See id.* at 215.

The court would be free to ignore the order, adopt it, or modify it. But many courts would likely use it as a starting point. Rulemaking is a multiparty process, which would make it more likely that the provisions would be effective and less likely that they would have unintended negative consequences. The rule's mere existence would make the remedy process more manageable and alleviate the challenges of the court attempting to craft and monitor a remedy on its own relying solely on the adjudicative process. The Department of Justice, states attorney generals, and private plaintiffs could also offer the rule as a starting point for developing a remedy.

The principles developed in the rulemaking could also form the basis for seeking preliminary relief. In the context of nascent and potential competitors, preliminary relief may be the only realistic way to protect the harmed competitors. The rulemaking would help focus the Commission and other enforcers on the most important principles for relief, allowing them to quickly propose preliminary relief in a variety of situations.

b. FTC Authority for Rule Making

Section 6(g) of the Federal Trade Commission Act gives the FTC the authority to issue rules and procedures "for the purpose of carrying out the provisions" of the FTC Act. Existing caselaw interprets this mandate broadly, upholding the FTC's right to issue substantive rules.[90] Many have advocated that competition rulemaking could improve antitrust enforcement. Current Federal Trade Commissioner Rohit Chopra and Lina Khan argue that rulemaking has three main benefits over adjudication: the Commission can "issue clear rules to give market participants clear notice about what the law is, helping ensure that enforcement is predictable," "relieve antitrust enforcement of steep costs and prolonged trials," and provide "a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy."[91] In May 2009, Professor Hemphill suggested rulemaking as a better approach than adjudication for addressing pay-for-delay (or reverse-payment) settlements.[92] Earlier, Professor Baker advocated rulemaking to stop "practices

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[90] *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 698 (DC Cir. 1973).

[91] Rohit Chopra and Lina M. Khan, "The Case for 'Unfair Methods of Competition 'Rulemaking, 87 U. Chi. L. Rev. 357, 367-68 (2020).

[92] C. Scott Hemphill, "An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition," 109 Colum. L. Rev. 629 (2009).

facilitating oligopoly coordination."[93] Professor Daniel Crane has also advocated for competition rulemaking.[94] Although much discussed, the Commission has issued only one competition rule (to prevent discriminatory practices in the sale of men's and boy's pants to retailers).[95] The Commission never enforced the rule and withdrew it in the 1990s.[96]

Others, however, have raised concerns about rulemaking. According to Federal Trade Commissioner Phillips, the current Supreme Court could decide any rule declaring an act or practice an unfair method of competition would be unconstitutional under the nondelegation doctrine.[97]

Our proposed rule avoids those controversies. Our rule is different because it is purely procedural, no different than the FTC's rules of practice, which determine how the Commission operates and how it adjudicates cases. It would not declare conduct illegal and it would not institute general rules that regulate all companies in the market. It would define one method by which the Commission would address certain types of violations. The Commission would still have to find a violation. Even then, the order would not be binding. The default order would simply provide a starting point for how the Commission would address remedy.

c. Rule-Making Process

It is unlikely that the rule could be challenged until it was applied in a specific case because no one would have standing. To challenge an agency rule, the plaintiff must allege it has suffered injury in fact that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or

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[93] *See* Baker, *supra* n.88, at 207.

[94] Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement,* Oxford, Oxford University Press, 141-143, (2011).

[95] Trade Regulation Rule on Discriminatory Practices in Men's and Boy's Tailored Clothing Industry, https://books.google.com/books?id=g-ji6XC6r48C&pg=PA1&lpg=PA1&dq=federal+Trade+Commission+rule+mens+and+boys+pants&source=bl&ots=T-TNvURSxg&sig=ACfU3U3giHEusyUG1XagKhWEN7NVj9TsWQ&hl=en&sa=X&ved=2ahUKEwid0ei1v4PqAhW9SjABHR4WCi0Q6AEwAnoECAUQAQ#v=onepage&q=federal%20Trade%20Commission%20rule%20mens%20and%20boys%20pants&f=false

[96] Comments of Commissioner Noah J. Phillips Commissioner Noah J. Phillips, remarks at FTC Workshop on Non competes at pp 220; https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf

[97] *Id.* at pp 216-222.

hypothetical."[98] Until the Commission determines a company has violated the Federal Trade Commission Act, it has not suffered any harm. Nor is a company likely to argue that it is in imminent danger because its current behavior violates the law.

When the rule has been applied in a specific case, it will likely have been tailored to the specific circumstances. The review would focus on the actual order issued in the case, which would depend on the record in the specific case. Nevertheless, we consider whether the rule would be upheld on its own, which could occur in two situations. First, if a court found standing. Second, in a particular litigation, a party might challenge the default order under the Administrative Procedure Act (APA) and argue that because the default order is inappropriate, the specific remedy must be vacated. In our view, in either situation a court would likely uphold the rule.

The validity of the proposed rule would depend on whether it satisfies the requirements of the APA. Notice and Comment rulemaking is well established under the APA and gives the Commission flexibility in developing a rule. At a minimum, the Commission would need to issue a Notice of Proposed Rule Making, take comments, and issue a final rule that includes a statement of the rule's purpose and the basis for the rule.[99] The Commission could hold workshops or even a hearing if it felt that would be helpful.

A court can vacate the rule if it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law,"[100] "is in excess of statutory jurisdiction, or authority, or limitation, or short of statutory rights"[101] or "without observance of procedure required by law."[102] These concerns are unlikely to be valid in our setting. Although there is dispute as to how stringent judicial review under the APA is, courts do not second guess the agency's determination. As long as the FTC's rule reflects the evidence in the record, employs acceptable reasoning, addresses concerns, and considers alternatives, the rule should not be found to be arbitrary and capricious.

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[98] *Bloomberg L.P. v. Commodities Future Trading Commission*, 949 F. Supp. 2d. 91, 115 (DDC 2013) (internal quotations omitted).

[99] 5 U.S.C. §553.

[100] 5 U.S.C. § 706(2)(A). While other statutory bases for objecting to the rulemaking exist, they either do not apply to Notice and Comment rulemaking (section 2(c) and 2(F)) or are easily satisfied. As long as the agency follows the procedures identified in the APA, the agency has complied with the requirements under Section 2(B) that the rule making is not contrary "To constitutional right, power, privilege, or immunity." *Vt. Yankee Nuclear Power Corp v. Nat. Res. Def.* Council, 435 U.S. 519, 542 n. 16 (1978).

[101] 5 U.S.C. § 706(2)(C).

[102] 5 U.S.C. § 706(2)(D).

As the discussion above illustrates, there is already a rich academic and policy discussion on the types of anticompetitive harms that can occur in digital markets and how to address them.[103]

The rule could not be "in excess of statutory jurisdiction, or authority, or limitation, or short of statutory rights."[104] This factor often depends on whether an agency receives *Chevron* deference. Here, however, regardless of the amount of deference, a court is unlikely to hold that any agency exceeds its statutory rights to make procedural rules to manage its adjudicative process. The rule simply organizes how the Commission addresses remedy in a particular class of cases in administrative litigation. It has no binding effect on federal cases, although a federal court could choose to adopt the rule in whole or in part. During the rule-making process itself, the Commission should consider whether assigning burdens of persuasion or production would transform a procedural rule into a substantive one.

A third objection would be that the Commission acted "without observance of procedure required by law."[105] The type of rule proposed here is unlikely to raise such concerns. The rule does not regulate conduct in the first instance. It applies only after a finding that the respondent violated the Federal Trade Commission Act. Further, it does not limit respondent's rights to argue for different relief.

As to the specific order in a case or the implementation of the order, the dominant firm could appeal the Commission's decision (and might be likely to do so), but an appellate court would interfere only if "there is no reasonable relation between the remedy and the violation."[106] If the case was in federal court, the court could order a similar process. If the dominant firm disagrees with a decision of the interoperability committee, the FTC would review and make a recommendation to the court, and then the court would resolve the issue.[107] Compared to leaving the decision to the incumbent or an incumbent-dominated organization, the proposed process is more likely to develop a standard that maximizes benefits and minimizes costs.

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[103] *See supra*, nn. 13-22.
[104] 5 U.S.C. § 706(2)(C).
[105] 5 U.S.C. § 706(2)(D).
[106] See *Atlantic Refinery Co. v. Federal Trade Commission*, 381 U.S. 357, 376 (1965),
[107] These procedures are similar to Judge Green's approach in AT&T, *see, supra, nn. 71-74*.

d. Draft Rule

We provide a draft of an interoperability rule as a concrete example of the principles we have discussed. In order for this desirable remedy to be a possibility in the event that the court finds Facebook liable, the FTC would want the capability to administer the adoption of interoperability to a defendant and an industry. If the FTC has such a capability in place, it can offer interoperability to the court as a potentially effective and predictable remedy. Enforcement will benefit if the FTC adopts an Interoperability Order immediately.

Upon a finding that,

(1) the defendant has been found liable for violating Section 5 of the Federal Trade Commission Act by engaging in conduct that violates Section 2 of Sherman Act,

(2) the defendant's product or service experiences strong network effects and these are a barrier to entrants, and

(3) the market has tipped, competition has been suppressed to the detriment of consumers, and the harm cannot easily be restored because past nascent or potential entrants no longer exist or are severely weakened.

The Federal Trade Commission shall presumptively adopt the following provisions to establish interoperability as the best chance of restoring the lost competition in a way that benefits consumers.

a) The Federal Trade Commission will create an interoperability committee. This committee will determine the standard for interoperability plus relevant accompanying privacy standards. Such committee will include the defendant, potential entrants, industry participants, independent technical experts chosen by the FTC, and representatives of the FTC. The standard will be chosen to facilitate entry as well as a positive user experience. The committee will not adopt technical standards that maintain market power of the defendant. The FTC will make the final determination of the standard in its sole discretion.

b) An entrant that wishes to use the standard must obtain a license from the FTC. Such a license is royalty free and may be obtained on demonstrating to the FTC that

the applicant complies with all relevant US laws, maintains privacy rules of the standard, and will adhere to the interoperability rules set forth below.

c) The defendant will be required to use the interoperability standard. The defendant may not interoperate on the included functionality except through the formal standard. Other competitors who choose to license the standard must offer interoperability using the standard with the defendant and all other licensees without discrimination among them.

d) The FTC, (or the Court) in its sole discretion, may revoke the license of any licensee if that licensee systematically violates consumer protection or privacy laws. Any offending licensee may be fined up to $19,000 multiplied by the total number of users on the offending site multiplied by the number of days of the violations, for privacy violations such as analyzing the data of, or otherwise monetizing, the off-platform contacts of its users.[108]

e) The FTC will establish a procedure for evaluating the conduct of any platform's violation of the interoperability standard. Such a procedure must be prompt or network effects will impair competition. Upon credible report of lack of interoperability, the FTC will investigate and interview the offending platform within 24 hours. The FTC will determine if a platform is at fault within the subsequent 3 days and order compliance within an additional 24 hours. Thus, interoperability will be restored promptly.

f) Compliance of the defendant requires significant penalties due to the strength of network effects and the lucrative nature of a monopoly position. If the defendant fails to comply with the interoperability standard, entrants will not be able to offer quality service because the majority of users will still be on the defendant's platform. Entrants will not grow, and the defendant's market power and position will be retained. Thus, if the FTC finds failure to comply with interoperability, it has the power to levy a fine of 1% of the platform's annual revenue for each day of noncompliance, beginning on the

[108] "Sole discretion" applies to the relationship between the FTC and interoperability committee. The FTC's decision would be subject to judicial review under the Administrative Procedure Act if it was an FTC adjudication and would have to be approved by the court in a federal court action.

day the conduct was reported and ending on the day it was corrected.[109] Determination of whether this fine is warranted and the extent of its duration shall be at the sole discretion of the FTC. The amount of the fine shall be large enough to deprive the defendant of any revenue earned as a result of the violation in order to deter future violations.

g) If the period without interoperability causes any significant harm to competition, the defendant or licensee with market power shall be fined an additional sum representing treble the gains from the conduct. This provision is designed to deter the incumbent from targeted short periods of interoperability that would eliminate or severely hobble rivals. A failure of interoperability at a critical moment (perhaps during an important holiday or event) could set back entrants and prolong monopoly profits by the defendant. The FTC shall estimate the impact of the conduct on the preservation of monopoly profits using the best available existing economic tools. Those tools will necessarily be imperfect, but this uncertainty shall not be a barrier to levying a fine of treble the estimated gains to the incumbent from the conduct. The FTC shall further have the power to order the removal of the CEO or other executive who ordered the conduct.

h) The Commission will order additional relief that is necessary to remedy the violations.

In any matter, the respondent before the Federal Trade Commission may request modification, changes, additions, or deletions for the standard order. The Commission Judge shall grant such proposals if it (a) would not diminish competition and serve some legitimate purpose or (b) would more effectively restore competition. The Commission shall not modify the standard order if such modification would allow the respondent to maintain its monopoly by means other than competition on the merits, including increasing the respondent's ability to discriminate against, or deny access to the respondent's platform to, potential or nascent competitors.

6. Conclusion

The proposed rule we put forward in this paper causes the network effects of a particular product, e.g. social media networks, to be experienced at the level of the market as a whole, not

[109] As discussed above, whether the FTC has the power to impose fines in administrative litigation is beyond the scope of the article, *see* discussion, *supra* n. 86-87.

the level of one company. The rule lowers entry barriers to rival firms as well as raising the benefit that consumers get from the product, as it will connect them to more users. Application of the rule should generate a vibrant social network market where users can choose among many differentiated providers competing on dimensions of importance to them, such as the safety of the content or the user interface. While we have proposed our interoperability remedy as a rule for the FTC to adopt through its rule-making process, we want to stress that we view the rule as having much more general applicability. We chose this framing for the paper because of the possibility that the FTC's investigation of Facebook could lead to litigation (unknown at the time of writing), in which case the agency would need a practical remedy. An interoperability rule provides a possible solution to that problem. Further, in the context of litigation, interoperability is an issue precisely because there has been a violation of law, and the court or factfinder has an obligation to remedy the harm. Concerns about the need for the requirement or that it may be overly broad are less relevant than in other contexts such as legislation or regulation.

But our rule could form a model for those contexts as well. A legislature could pass a law similar to our rule that would open up the social media sector so that it resembles the email and telephone networks. A regulator, either in the digital or telecommunications area, might adopt such a rule to advance the public interest, or be instructed by a legislature to do so, but it would depend on the regulators' authority. If the regulator had authority over only a limited set of digital platforms judged to have gatekeeper status, it might to have to approach the problem through a license scheme that requires reciprocal interoperability with all other license holders, as we propose here.[110] A mechanism that has attracted a great deal of policy attention lately is the UK's Market Investigation tool. This tool permits the CMA to investigate an industry and, if it determines that competition is not working well in that industry, mandate changes to fix those flaws. If a Market Investigation of the social network industry found that it lacked competition and dynamism due to high entry barriers, mandatory interoperability imposed by the competition authority would be an attractive solution.

[110] This tension is raised in Amelia Fletcher, "Market Investigations for Digital Platforms: Panacea or Complement?" UEA CCP working paper August 2020

Mr. CICILLINE. Thank you, Mr. Kades. I now recognize Professor Rahman for 5 minutes.

TESTIMONY OF SABEEL RAHMAN

Mr. RAHMAN. Thank you Chairman Cicilline, Ranking Member Sensenbrenner, members of the subcommittee and the full committee. I'm grateful for this opportunity to participate in this hearing with you all on this critical issue of reinvigorating our competition policy in the online economy. As president of Demos, we're focused very much on this idea of how we build an inclusive and equitable democracy and economy, and the work of this subcommittee is critical to that vision.

Tech platforms are our modern infrastructure like roads, bridges, telecom, and it poses unique regulatory and policy challenges that this committee in its recommendations will have to consider. In short, as some of our colleagues have already mentioned, we will have to engage both break ups as well as regulatory tools, and I'll talk about that in these next few minutes.

So if we think about the physical infrastructure of our ordinary life—roads, telecom, bridges, electric utilities—there are some basic rules of the road that we need for that to actually serve the goals of economic innovation, serving consumers and communities, and ensuring that all of us are able to benefit in the growth of our economy. We need to make sure that these infrastructures don't discriminate on the basis of price, on basis of race. We need to ensure that they don't self-deal. The kinds of interests that Professor Teachout mentioned are a big problem. We also need to make sure that our basic infrastructure isn't toxic, right? We wouldn't want people who drive on the roads to then get sick from driving on those roads. And we want to make sure that they don't entrench themselves, that the fact that one highway exists doesn't mean that we can't build another faster highway that shortens time on the route. These are the kinds of challenges that we actually face in the digital environment.

So let me give two quick examples highlighted by the work of this subcommittee. If we take Amazon, for example, we've seen in the hearings of this subcommittee over these last few months how Amazon has leveraged its dominance over online retail transactions to undercut its competitors, to engage in predatory pricing, and to stifle innovation. This impact is not just on the economy and on growth, it also has a particularly hard-felt impact on black, brown indigenous communities when you think about the impacts on small businesses, for example. That market dominance has then, in turn, also enabled Amazon to pressure State and local governments for more favorable regulatory treatment and subsidies and to avoid the kinds of liabilities for its workplace safety, particularly at a time where we see black and brown essential workers facing astronomically high injury rates double the industry average, and where Amazon warehouses have themselves become hot spots for COVID transmission.

Facebook offers another example. With the election rapidly approaching, we've seen the dangers of an ad-based, data-mining-based business model where an online information platform like Facebook uses algorithms that maximize user attention in order to

sell targeted ads. That essentially means that our information infrastructure of Facebook is actually incentivized to allow the rapid spread of toxic misinformation, disinformation, hate speech, attacks on black and brown speakers, in particular. Here, too we see the burden is felt disproportionately on black and brown communities.

The policy response to this type of problem has to grapple with the fact that, in some ways, we want infrastructure to enable communication, to enable new innovation. That infrastructure has to serve all of us for the economy as a whole rather than being a basis for the kind of entrenchment that Professor Teachout mentioned. So I want to suggest in this last minute and a half briefly some of the policy strategies that this committee should consider.

First, we need to include structural separations and breakups as part of the policy toolkit. Congress can legislate standards to this effect. It can also reinvigorate the enforcement powers of agencies, like the FTC, to pursue the kinds of functional separations, line-of-business separations, that will be important. Second, we need to complement breakups and structural separations with regulatory standards and public standards that enforce those basic rules of the road for our digital infrastructure. That means standards for non-discrimination and for portability, labor and consumer protection standards, basic rules of the road that we see in all other parts of the economy that we need to bring to the digital space. Third, there might be instances where we might want public provision, as has been mentioned already, in order to ensure fair and equal access and to provide the kind of competitive pressure that is sometimes lacking in these markets. These are all familiar and doable policies. They are, in fact, common in our history and our tradition going back a century ago and over the years. And, in fact, the use of these tools has enabled the kinds of innovation and dynamism that has brought the gains of many of these last few decades of economic growth.

As my time is winding down, I'll just note that these policies, these strategies are central to rebuilding our economy in this moment of crisis. These policies will be essential as we move forward out of the current crisis that we're in. Thank you very much, and I yield back.

[The statement of Mr. Rahman follows:]

Dēmos

Written testimony of K. Sabeel Rahman
President
Dēmos

Before the US House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

October 1, 2020

PREPARED REMARKS

Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee for the opportunity to testify today.

My name is K. Sabeel Rahman and I am President of Dēmos. Dēmos is a dynamic "think-and-do" tank that powers the movement for a just, inclusive, multiracial democracy. Our name—meaning "the people"—is the root word of democracy, and it reminds us that the promise of a truly inclusive democracy demands that we ensure that "we the people" can exercise real power over our political and economic futures—and that we must dismantle those systemic forms of racism that exclude Black and brown communities from that shared future.

I want to thank the Committee for its leadership in convening these hearings on the vital issue of the need to strengthen antitrust laws and promote competition in the online economy. In this moment of deepening economic inequality and escalating crises of disinformation, the long-term vitality of our democracy and our economy depend on a reinvigorated approach to anti-monopoly policy, particularly in context of dominant technology platforms like Amazon, Alphabet, Facebook, and Apple.

As these hearings have highlighted, these dominant tech firms now possess a concentrated economic power that threatens economic well-being and innovation, and undermines democratic ideals.

We have seen how Amazon has, for example, leveraged its dominance over online retail transactions to undercut competitors and engage in predatory pricing.[1] That same market dominance has enabled Amazon to pressure state and local governments for more favorable

[1] See e.g. Lina Khan, Amazon's Antitrust Paradox, Yale Law Journal 126:3 (2017).

regulatory treatment and subsidies, even as it undermines enforcement of workplace safety laws that would protect Amazon workers—particularly Black and Latinx "essential" workers, who face astronomically high injury rates more than double the industry average,[2] and that have become hotspots for COVID-19 transmission.[3]

In this era of continued quarantine, we see Google's growing dominance over public education in an era when COVID-19 has driven a shift to remote learning.[4]

And with the election rapidly approaching, we have also seen the dangers of the ad-based and data-mining business model of online information platforms like Facebook. Facebook's algorithms—designed to maximize user attention in order to sell targeted ads—fuel the rampant spread of misinformation in ways that alter the dynamics of the 2020 elections,[5] exacerbate the dangers of voter suppression,[6] while also accelerating the spread of extremism, racial violence, and hate speech.[7] Here too it is often Black and brown communities that frequently bear the brunt of harassment, hate speech, and voter suppression that Facebook's corporate policies enable to flourish on its platform.[8]

The question now is *how* Congress and our federal government must respond to these various challenges.

In this testimony this afternoon, I will make the case that these many different problems share a common root: the problem of unchecked private control over essential social, economic, and political infrastructure. Tech platforms like Facebook, Google, Amazon, and Apple represent essential infrastructure just like the railroads, bridges, and telegraph lines of a century ago. This poses unique challenges for public policy.

I will also argue today that we have a robust and historically-effective policy toolkit to address the problem of private control over infrastructure. Limiting this problematic form of private

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[2] Athena coalition, Packaging Pain: Workplace Injuries in Amazon's Empire, December 2019 (online at: https://s27147.pcdn.co/wp -content/uploads/NELP-Report-Amazon-Packaging-Pain.pdf)

[3] Ahiza García-Hodges, Jo Ling Kent and Ezra Kaplan, Amazon warehouse in Minnesota had more than 80 COVID-19 cases, NBC News, June 23, 2020 (online at: https://www.nbcnews.com/tech/tech-news/amazon-warehouse-minnesota-had-more-80-covid-19-cases-n1231937)

[4] Ainsley Harris, How Google Classroom became teachers' go-to tool—and why it's fallen short, Fast Company, September 9, 2020 (online at: https://www.fastcompany.com/90541246/how-google-classroom-became-teachers-go-to-tool-and-why-its-fallen-short)

[5] Donnie O'Sullivan and Brian Fung, Facebook will limit some advertising in the week before the US election -- but it will let politicians run ads with lies, CNN Business, September 3, 2020 (online at: https://www.cnn.com/2020/09/03/tech/facebook-political-ads-election/index.html)

[6] Shannon Bond, Civil Rights Groups Say If Facebook Won't Act On Election Misinformation, They Will, NPR, September 25, 2020 (online at: https://www.npr.org/2020/09/25/916782712/civil-rights-groups-say-if-facebook-wont-act-on-election-misinformation-they-wil).

[7] See Siva Vaidhyanathan, Anti-Social Media: How Facebook Disconnects Us and Undermines Democracy, Oxford University Press, 2018.

[8] Scott Shane and Sheera Frenkel, Russian 2016 Influence Operation Targeted African-Americans on Social Media, New York Times, December 18, 2018 (Online at: https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html).

power requires rediscovering familiar but forgotten tools, including antitrust law, public utility-style regulation, and a willingness to consider cases where public control of key infrastructure would benefit the public rather than private provision. Reviving and deploying these policy interventions will be critical to secure an equitable economy and an inclusive democracy in the years ahead.

The policy problem: Unchecked power over essential infrastructure

We are used to thinking of infrastructure in physical terms: roads, bridges, railroads, power lines, sewer systems. But infrastructure can also be economic—think for example about systems of financing and credit essential to businesses and households, or to how the COVID-19 pandemic has reminded us how critical child care and healthcare infrastructure is for supporting families and workers and businesses alike. Infrastructure can also be digital. The conduits of commerce are increasingly online through retail platforms like Amazon. The infrastructure of information now depends on web services like Amazon's AWS or online media platforms like Facebook or YouTube.

We can think of infrastructure as those goods and services that have three key characteristics. First, these are goods and services that have *economies of scale*: there are efficiencies to be gained by consolidation and unification; a digital or telecom network that covers the whole country is more valuable than one that is limited to just one neighborhood. Their social value hinges on these goods and services being available at scale to as many users as possible.

Second, these are goods and services that open up a wide range of *downstream uses* and capabilities.[9] Think of the economic and social activity made possible by railroads, the telegraph, and now, online media platforms. Infrastructural goods and services are prerequisites for a wide range of uses and activities.

Finally, because of both the scale and necessity of these goods and services, infrastructure also creates a risk of *vulnerability*. Whenever a good or service is necessary and irreplaceable, everyone who uses it relies on its provider and is vulnerable to provider decisions that affect access to or quality of the essential good or service. As a result, a firm that controls infrastructure holds arbitrary power over everyone who depends on that infrastructure. This control can have tremendous impacts on equity, inclusion, and democracy. Overly restrictive or extractive control over infrastructure can transform it from an empowering foundation to a "bottleneck", constraining who can use these vital goods and services, widening inequality and disparities in well-being and inclusion.[10]

Today's online giants represent a digital infrastructure upon which our economy and our democracy depend—and which creates specific power imbalances that public policy must

[9] See Brett Frischmann, Infrastructure: The Social Value of Shared Resources, Oxford University Press, 2013.
[10] See e.g., Joseph Fishkin, Bottlenecks: A Theory of Equal Opportunity, Oxford University Press, 2013.

remedy. There are three specific types of infrastructural power that any policy agenda must attend to.[11]

- Transmission power: This type of infrastructural power stems from private control over the transmission of goods, services, or information. Consider how Amazon's command of a shipping and logistics system enables Amazon to manipulate the flow of goods, and to mine troves of consumer data. That manipulation and data can then be used to choke out competitors, alter prices, and influence search results in ways that maximize Amazon's own profits, leaving entire economic sectors, from book publishing to apparel manufacture, at the whim of Amazon's decisions.

- Gateway power: Another kind of infrastructural power arises when firms control gateways to information or other critical goods and services. For example, access to the internet is increasingly mediated through the gateway of Google Search. By controlling the point of entry, Google heavily influences the types of information and commerce that people are able to access. As a result, even small and hidden changes to the algorithms of Google Search can make or break news media, entertainment outlets, and other content producers. At the same time, people using Google Search navigate the landscape constructed by these algorithms, which aim to maximize company profits, not to provide the most accurate information or news.

- Scoring power: A third type of infrastructural power is scoring power, exerted by ratings systems, indices, and ranking databases.[12] These scoring systems appear objective and neutral but are grounded in data and analytics that reproduce existing patterns of racial, gender, and economic bias. For example, private credit reporting agencies like Experian, TransUnion and Equifax produce credit reports and scores used for lending, insurance, and employment decisions, yet these scores rank and categorize consumers on the basis of borrowing and payment behavior that is shaped by immense racial wealth disparities, which are themselves the products of centuries of discriminatory public policies.[13] As a result, evaluations of credit history make Black and brown consumers appear less worthy of affordable credit, insurance, and employment opportunities, reproducing historic discrimination.[14] Similarly the scoring systems and algorithms that shape the flow of information, ads, and commerce on Facebook, YouTube or Amazon magnify these racial disparities and can induce highly problematic forms of targeting and filtering of information flows.

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[11] K. Sabeel Rahman, The New Octopus, Logic Magazine (2018) (online at: https://logicmag.io/scale/the-new-octopus/)

[12] See e.g. Danielle K. Citron & Frank A. Pasquale, The Scored Society: Due Process for Automated Predictions, Washington Law Review 89 (2014); Pasquale, Black Box Society, Harvard University Press, 2015.

[13] Amy Traub, Establish a Public Credit Registry, Demos (2019) (online at: https://www.demos.org/policy-briefs/establish-public-credit-registry)

[14] National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination, May 2016 (online at: https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf)

These three forms of infrastructural power create an urgent problem for public policy. Conventionally, we fear that government regulation might "interfere" with otherwise free markets—but that viewpoint misunderstands the reality we are in. In truth, we live in an economy that is already heavily governed and regulated by *private* actors—tech giants like Facebook, Alphabet, and Amazon (as well as dominant "offline" firms as well in sectors like pharmaceuticals, finance, and food production). Yet unlike governmental regulators, the decisions made by private firms with infrastructural power are not subject to mechanisms for democratic representation, participation, or public accountability.[15] Absent a government check on this tremendous concentration of private power, vital infrastructure will increasingly be subverted to private profit rather than meeting public needs.

This is why we need the kind of revived antitrust policies that this Committee is considering.

Reviving and adapting a policy toolkit: Breakups, Public obligations, and Public options

While today's tech giants are a 21st century phenomenon, the policy problems they pose are long-standing ones, familiar to our history of economic regulation. A century ago, the rise of industrial monopolies in railroads, telecommunications, finance, and other sectors sparked a wave of policy innovation leading to vital legislative and regulatory interventions like the Sherman Antitrust Act and the rise of public utility commissions at the state and federal level. These innovations were designed to address the problem of private control over infrastructure—the same kinds of problems that today's tech giants pose. The proposals you have heard over the course of these hearings, while adapted to our modern context, are in fact a revived form of long-standing traditions in American law and public policy.[16]

In this last part of my remarks, I would like to outline a policy framework for legislative and regulatory action in response to the problems of tech firms, monopoly power, and infrastructural power.

There are three policy strategies in particular that Congress and regulators at the FTC, FCC, and elsewhere should consider.

First, we must limit the dangers of infrastructural power by *breaking up* dominant firms, imposing *firewalls* and *structural limits* on the power of these firms to control essential infrastructure. This means developing policies that include separation by size ("breaking up" market dominant firms); separation by function (splitting platforms from commerce, for example);[17] laws requiring interoperability to mitigate against undue consolidation and merger

[15] See e.g., Elizabeth Anderson, Private Government, Princeton University Press, 2018; K. Sabeel Rahman, Democracy Against Domination, Oxford University Press, 2017.
[16] See e.g., Brett Frischmann and Spencer Weber Waller, Revitalizing Essential Facilities, Antitrust Law Journal 75:1 (2008); K. Sabeel Rahman, The New Utilities, Cardozo Law Review 39:5 (2018).
[17] See Lina Khan, Separations of Platforms and Commerce, Columbia Law Review (2019).

activity; and laws prohibiting tying contracts or predatory pricing. These limits can be legislated, and enforced by federal regulators.

The impact of these policies would be to break up the private control over essential online infrastructure, and reduce the incentives for self-dealing. Imagine, for example, if Amazon could not hold both the online retail portal and the production and selling of its own branded goods on that portal: there would be far less likelihood of Amazon leveraging its platform dominance to give its own products a leg up in competition. Or consider how a structural limit on ad-based revenue would change the incentives for Facebook, removing the profit motive that currently fuels its preference for attention-maximizing algorithms that accelerate the spread of disinformation[18].

Divestiture or breakup could be a required remedy under these policies, which could in turn spur greater innovation and economic creativity in the future. Indeed, structural separations and breakups have in recent decades been disparaged as overly costly and economically harmful, but these critiques are not borne out by the historical evidence. Looking back at key cases of breakup and structural separation from AT&T to the separation of investment and commercial banking to major antitrust cases of the early twentieth century, the record indicates that breakup—and the threat of breakup—have been essential to enabling the very innovation that eventually gave rise to today's dominant tech companies.[19]

Second, we should through legislation and regulatory enforcement impose public obligations and basic standards of nondiscrimination, fair dealing, fair pricing, and accountability over these infrastructural firms. Over a century ago, common carriage requirements were critical to preventing discrimination on railroads, and ensuring that all comers could access new transportation infrastructure to engage in commerce and travel. Historically, public obligations have also encompassed requirements for basic health and safety—for example, assuring that goods are not toxic or harmful to consumers. It was the rise of these kinds of public obligations that helped drive the development of our modern forms of labor, consumer, and business regulations.[20] Similar public obligations were at the heart of the net neutrality debates in previous years: requirements of common carriage and anti-throttling obligations were meant to ensure that internet service providers did not leverage their control over access to the internet to favor paying information providers or business allies over other content providers and businesses.

In context of today's tech giants, these types of measures today will be critical policy tool that complements the structural separations, firewalls, and breakups noted above. For example, we might require by legislation and/or regulation "rules of the road" for platform firms to treat all

[18] See K. Sabeel Rahman and Zephyr Teachout, From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure, Knight First Amendment Institute at Columbia University, 2020 (online at: https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure)

[19] See e.g. Rory Van Loo, In Defense of Breakups, Cornell Law Review (forthcoming, 2020); Tim Wu, The Curse of Bigness, Columbia Global Reports, 2018.

[20] See e.g. William J. Novak, Law and the Social Control of American Capitalism, Emory Law Journal 60 (2010).

businesses fairly (by not skewing search results, for example), or requiring fiduciary obligations for how tech firms treat personal user data.[21] Nondiscrimination requirements could protect businesses from being squeezed out of Amazon or Google search. Price regulations could prevent predatory pricing on online platforms. Portability requirements and interoperability standards could help ensure equal access and ability to exit market dominant platforms and closed tech ecosystems.

Third, we should consider the degree to which some of these essential infrastructures can be provided not by private, profit-seeking firms, but by public providers, either on an exclusive basis or as "public options" that compete alongside private alternatives.[22] In some markets, a public alternative could help remedy the problems of infrastructural power, especially if the public option operates on a non-profit basis, with statutory requirements for nondiscrimination, fair pricing, and the like. These public options could provide a 'plain vanilla', non-exclusionary alternative—which in turn would impose competitive pressures on private firms to match these socially-beneficial terms of service. In the internet service debate for example, the attempts to create municipal broadband networks represents a "public option" response to the infrastructural power of internet service providers like Comcast or Spectrum.

In the tech platform domain, there have been proposals for example for a "public" digital infrastructure to offset the monopoly power of today's private infrastructure firms.[23] Public options are also a common intervention in "offline" policy debates. In the healthcare space, debates over Medicare for All are about public provision of healthcare services. Similarly, proposals for establishing a publicly-run credit registry to displace the discriminatory and extractive oligopoly of private credit bureaus like Experian, Equifax, and Transunion who manage consumer credit information and the private investment ratings agencies like Moody's Standard and Poor, and Fitch—all of which leverage their private control of this essential infrastructure to generate profit in ways that are extractive, racially-discriminatory, and prone to self-dealing and longer-term systemic risk.[24]

Conclusion – Building an inclusive economy and democracy in a moment of crisis

From Amazon's increasing stranglehold on our economy to the dominance of Alphabet over the flow of information on the internet to the closed ecosystem and market dominance of Apple to the proliferation of extremism and disinformation on Facebook, today's technology giants pose immediate challenges for our economy, our democracy, and the ideal of an equitable, inclusive society. These various challenges share a common root, arising from the fact that these online

[21] Jack Balkin, Information Fiduciaries and the First Amendment, UC Davis Law Review (2016)
[22] See Ganesh Sitaraman and Anne Alstott, The Public Option, Harvard University Press, 2019.
[23] See e.g. Ethan Zuckerman, The Case for Digital Public Infrastructure, Knight First Amendment Institute at Columbia University (2020) (online at: https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure)
[24] [24] Amy Traub, Establish a Public Credit Registry, Demos (2019) (online at: https://www.demos.org/policy-briefs/establish-public-credit-registry)

firms increasingly operate as digital infrastructure for our shared economic, social, and political life, and yet these firms leverage this dominant position to advance their private interests in ways that harm the public welfare. While the technology is new, this kind of infrastructural power is a familiar problem that previous generations of American policymakers have successfully tackled, deploying a range of tools like breakups and firewalls, structural separations and breakups; public obligations and regulatory standard-setting; and direct public provision and/or the creation of public options. Adapting these policy strategies today will require new legislation from Congress, and new creativity from federal regulators at the FTC, FCC, and elsewhere.

The hearings that this Committee has hosted over these last few months have helped document the scale of the problems raised by tech giants, and the kinds of policy solutions we need. In this moment where Americans across the country are demanding dramatic action to address the worst economic collapse since the Great Depression, the pervasive forms of racialized violence against Black and brown communities, and the ongoing attacks on our democratic system itself, a robust anti-monopoly and antitrust agenda will be critical to improving competition, advancing economic and racial inclusion, and rebalancing our democracy.

Thank you for your time and I look forward to your questions.

Mr. CICILLINE. Thank you, Professor Rahman, and I now recognize Professor Yoo for 5 minutes.

TESTIMONY OF CHRISTOPHER YOO

Mr. YOO. Thank you, Mr. Chairman, Ranking Subcommittee Member Sensenbrenner, Chairman Nadler, Ranking Member Jordan, and the members of the subcommittee. I applaud the subcommittee for its review of how antitrust laws should apply to digital markets.

In sifting through the various reform proposals before you, I would encourage the subcommittee to keep in mind three key principles. The first is the importance of maintaining antitrust's longstanding commitment to protecting consumers over competitors. The second is the key role played by innovation and the importance of flexibility in promoting innovation. And the third is that many remedies work far worse in practice than they sound in theory. I'll explore these three themes by examining two of the proposed reforms that have already come up today by restricting companies to a single line of business and mandating portability and interoperability.

Beginning first with line-of-business restrictions, there is strong evidence that proposals to prevent companies from entering complementary lines of business would likely harm consumers. The reality is that all companies do more than one thing, and consumers typically benefit. To cite one specific example, my colleague, Herbert Hovenkamp, has noted that allowing Amazon to sell private label products has provided enormous consumer benefits by allowing them to pay lower prices. In addition, we've seen Amazon expand from just an e-commerce platform into cloud computing and other aspects that have been tremendously beneficial.

If you look at the surveys of the literature on vertical integration conducted by antitrust enforcement officials from both parties, those surveys confirm that, although the theoretical studies hypothesize ways that vertical integration could harm consumers, the real-world data indicate that it is much more likely to benefit consumers. These results underscore the importance of assessing consumer welfare based on systematic real-world evidence and not abstract theoretical possibilities or anecdotes.

Restricting companies to a single line of business can also harm innovation. For example, in 2005, U.S. mobile operating systems were a sleepy market dominated by Palm, Blackberry, Symbian, and Microsoft. Apple iOS appeared in 2007, and then Android followed in 2008. These new entrants employed innovative new business models based on vertical integration and third-party payments that reduced direct costs by consumers that went beyond the original lines of business of just simply mobile operating systems. In so doing, these new entrants unleashed the smartphone revolution that has provided tremendous benefits for consumers. This history provides useful examples of how consumers benefit when companies have the breathing room to experiment with different approaches. Contrary rulings would risk ruling particular business models out of balance. If so, the case-by-case approach of traditional antitrust is better suited to promoting innovation than would ex ante prohibitions. This is particularly important in dynamic in-

dustries where technological change frequently renders particular vertical formulations of ex ante rules obsolete.

Now, regarding data portability and interoperability, an interesting problem is that large platforms, such as Google and Facebook, already provide for data portability, and yet consumers almost never avail themselves of this feature. Understanding why requires a deeper appreciation of what mandating data portability and interoperability actually requires. For data portability and interoperability to be meaningful, the data must be in a standardized format. To do otherwise would be like be trying to fit the proverbial square peg into the round hole. The reality is that different companies structure their data in radically different ways, and reconfiguring data is prohibitively expensive. Therefore, data portability and interoperability imposes standardization costs and have the unfortunate effect of picking winners and losers. As Ranking Member Sensenbrenner noted, the result would be to force data into a one-size-fits-all approach.

In addition, interoperability can be only imposed under certain circumstances. We've learned over time that it works when interfaces are relatively simple, they're easy to monitor, and require a little information. The type of data interfaces we're talking about in this series of proceedings seem to represent a complex interface that has not historically been amenable to mandated interoperability.

And, importantly, data formats are tied directly to innovation. The structure of data determines what types of uses are and are not possible. Forcing data into a particular format would inevitably preclude certain types of important innovation. Together, these considerations suggest that seemingly simple remedies are likely to prove hard to implement and create hidden consumer harms in terms of cost and loss of innovation and that the traditional case-by-case approach is fact intensive and specific, which would be more beneficial.

In closing, I would like to emphasize that it is tempting to ask antitrust to serve a wide range of goals beyond its traditional role in protecting competition. While there are many important roles, asking any one law to do too much risks causing it to be ineffective and doing nothing. I believe U.S. citizens would be best served if antitrust continues to retain its traditional focus on promoting consumer welfare and competition in markets. Thank you very much.

[The statement of Mr. Yoo follows:]

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TESTIMONY OF CHRISTOPHER S. YOO

John H. Chestnut Professor of Law, Communication, and Computer & Information Science and Founding Director, Center for Technology, Innovation and Competition, University of Pennsylvania

Hearing on "Proposals to Strengthen the Antitrust Laws and Restore Competition Online"

Before the Subcommittee on Antitrust, Commercial, and Administrative Law, Committee on the Judiciary, United States House of Representatives

October 1, 2020

Mr. Chairman and Members of the Subcommittee, I am grateful for the opportunity to testify here today. I laud the Subcommittee in undertaking a serious review of the antitrust laws in general and how they apply to digital markets in particular. Antitrust law has evolved many times since the Sherman Act was enacted in 1890, and periodic review has often played an important role.

In sifting through the various reform proposals that have been suggested, I would encourage the Subcommittee to keep in mind two key precepts. The first is the importance of maintaining antitrust's longstanding commitment to protecting consumers over competitors and to promoting innovation. The second is that many remedies work far worse in practice than they sound in theory. I will do so by examining two proposed reforms: the imposition of line of business restrictions and mandating data portability and interoperability.

Line of Business Restrictions

One commonly advanced proposal is to restrict companies' ability to a single line of business. This would require successful online companies to stick a single line of business and not be permitted to vertically integrate into complementary businesses.

Firms engage in constant decisions about whether to make particular inputs themselves or buy them from third party providers. Although economic theory has hypothesized a wide range of scenarios in which vertical integration could possibly harm consumers, surveys of the peer-reviewed empirical literature conducted by antitrust enforcement officials from both parties have concluded that vertical integration is likely to benefit consumers or be neutral the vast majority of the time.[1] These real-world findings underscore how much promoting consumer welfare depends on insisting on data-driven analyses of economic effects instead of resorting to abstract possibility theorems identifying that may or may not actually occur.

Line of business restrictions also have important implications for innovation. Decisions about vertical integration are likely to change over time, depending on the management costs, underlying technology, and consumer demand. Indeed, many scholars now believe that competition between different business models represents one of the most important sources of innovation in the modern economy.[2] Restricting companies to a single line of business risks ruling certain types of business model innovation out of bounds. Worse yet, the language of

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[1] James C. Cooper et al, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648 (2005); Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007); Francine Lafontaine and Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 392, 408-09 (Paolo Buccirossi ed., 2008).

[2] CLAYTON M. CHRISTENSEN ET AL., SEEING WHAT'S NEXT: USING THE THEORIES OF INNOVATION TO PREDICT INDUSTRY CHANGE 16 (2004); Raphael Amit & Christoph Zott, *Creating Value Through Business Model Innovation*, MIT SLOAN MGMT. REV., Spring 2012, at 41; Mark W. Johnson et al., *Reinventing Your Business Model*, HARV. BUS. REV., Dec. 2008, at 50, 52.

those restrictions will be applied to technological contexts that no one could have possibly anticipated at the time they were drafted. How those words will apply to new contexts that no one envisioned is largely accidental.

Anyone familiar with the proposed imposition of line of business restrictions will recognize it as the approach that dominated telecommunications law during the 1980s and 1990s. That experience raises a number of cautionary notes. As an initial matter, line of business restrictions raised difficult definitional problems.[3] The problem of characterizing the precise limits of a line of business is difficult under the best of circumstances, but it becomes unmanageable in industries undergoing rapid technological change. The inflexibility of the line of business restrictions harmed consumers to the tune of over $1 billion per year.[4]

This history illustrates how line of business restrictions can harm innovation. Consider further the history of mobile operating systems. In 2005, just fifteen years ago, the U.S. market was dominated by Palm, Blackberry, Symbian, and Microsoft.[5] Apple iOS appeared on the scene in 2007, with Android following in 2008. These new entrants employed innovative new business models that expanded beyond their original lines of business: iOS embraced vertical integration and required consumers to pay significant prices, while Android did not charge for its system and relied on third-party payments.[6] In so doing, these new entrants shook up what had become a sleepy category in ways that provided tremendous benefits for consumers. Total

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[3] Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 FED. COMM. L.J. 167 (2003)

[4] Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 BROOKINGS PAPERS IN ECON. ACTIVITY: MICROECONOMICS 1, 14-15 (1997).

[5] *Smartphone Operating System Market Share: 2005-2013*, OPINIONS 101 (June 8, 2014), https://opinions101.com/2014/06/08/smartphone-operating-systems-market-share-2005-2013/.

[6] Randal Picker, *Google Android Antitrust: Dominance Pivots and a Business Model Clash in Brussels*, CPI ANTITRUST CHRON., Dec. 2018, https://www.competitionpolicyinternational.com/google-android-antitrust-dominance-pivots-and-a-business-model-clash-in-brussels/.

smartphone sales exploded, growing 50% annually for the next five years.[7] This history provides a prime example of how consumers benefit when companies have the freedom to experiment with different approaches rather than being locked into a single approach. It also shows how consumers benefit when different providers compete by trying different business models.

Data Portability and Interoperability

Another commonly advanced proposal is to require data portability and interoperability. Interestingly, large platforms such as Google and Facebook already provide for data portability, and yet consumers almost never available themselves of this feature. The difficulties faced by past attempts to impose portability and interoperability mandates help explain why data portability has proven so hard to implement.

For a data portability regime to be meaningful, the data must be configured in a standardized format, otherwise the data generated by one system will not be useful to any other system. The problem is that different companies structure their data in radically different ways. In addition, reconfiguring data is typically prohibitively expensive. The choice of data format thus threatens to impose unleash a difficult fight over how to standardize the data and to create significant disadvantages for whoever loses that fight.

In addition, standardizing data formats create significant risks of depriving consumers of the benefits of innovation. The structure of data largely determines what types of uses are and are not possible. Forcing data into a particular format would inevitably preclude important types of innovation.

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[7] S. O'Dea, *Number of smartphones sold to end users worldwide from 2007-2021*, STATISTA (Sept. 2, 2020), https://www.statista.com/statistics/263437/global-smartphone-sales-to-end-users-since-2007/.

Mandating interoperability requires more than just standardizing data formats. It also requires a mutual understanding of how the other components will respond to different scenarios. Such solutions depend on interfaces that are relatively simple, are easy to monitor, and require little information.[8] Although there are some interoperability success stories, such as the Federal Communications Commission's Part 68 rules, the history of telecommunications law is littered with failed attempts to mandate interoperability, such access to unbundled network elements under the Telecommunications Act of 1996 and the use of CableCARDs to support set-top box interoperability just to name two. Data seems to present the complex interface that is not amenable to mandating interoperability.

The Proper Scope for Antitrust Law

In closing, I would like to emphasize the benefits of limiting antitrust to its proper scope. Even though modern antitrust law is designed to protect competition and the operation of markets, many advocates are tempted to ask it to protect a wide range of other goals, such as redressing poverty, empowering labor, and mitigating climate change, just to name a few.

This Subcommittee should bear in mind that there are limits to how many problems any one law can properly solve. In addition, antitrust remains a relatively blunt instrument that is often not well suited to making fine distinctions. These considerations serve as cautionary notes against asking antitrust law to do too much and suggest that U.S. citizens would be best served if antitrust continues to maintain its traditional focus on promoting consumer welfare.

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[8] Gerald R. Faulhaber, *Policy-Induced Competition: The Telecommunications Experiments*, 15 INFO. ECON & POL'Y 73, 77-86 (2003).

Mr. CICILLINE. Thank you, Mr. Yoo. I now recognize Ms. Bovard for 5 minutes.

TESTIMONY OF RACHEL BOVARD

Ms. BOVARD. Chairman Cicilline, Ranking Member Sensenbrenner, Chairman Nadler, and Ranking Member Jordan, thank you for inviting me to testify today.

A growing bipartisan consensus is emerging against the power of the Big Tech companies. This consensus is based on the recognition that corporate hegemony—that is, concentrated power exercised at scale—can be a threat to individual liberty, the free market, and independent thought in a free society. To that end, I started the Internet Accountability Project in 2019 to give a voice to conservatives concerned about the growing concentrated power of Big Tech as it is exercised and weaponized at unprecedented levels. IAP has focused its efforts on three areas of policy and remedy: antitrust enforcement, data privacy and ownership, and reform of Section 230 which one pro-tech law professor has identified as Big Tech's implicit financial subsidy.

That Big Tech systematically engages in viewpoint and information bias is increasingly obvious. Here are a few recent examples. Dr. Scott Atlas, a neuroradiologist and professor at Stanford Medical School, has been accused of spreading medical misinformation by Google's YouTube, but only after he joined the White House's coronavirus Task Force. A deep investigation into Google by the *Wall Street Journal* found that the company "made algorithmic changes to its search results that favor big businesses over small ones." The investigation also found that Google modified its search results around topics like abortion and immigration. In June, Google colluded with NBC News to flex its muscles against the conservative news site, The Federalist, for minor violations of its ad policies in their comments section. In July, the search engine inexplicably stopped presenting search results for several leading conservative websites.

Conservatives are routinely told that bias is a myth, but that assertion is unprovable because these tech companies are not at all transparent about their algorithmic and content moderation practices, but they should be. These decisions have profound impact on the nature of free thought and expression when done at a scale at which these companies exist. A single algorithmic decision made by individuals in a private corporation, accountable to no one, changes what kind of viewpoints and information are available to billions of people around the world. Antitrust enforcement, the subject of this committee's remit, is equipped to tackle corporate hegemony. It is the view of myself and the Internet Accountability Project that our antitrust laws do not need to be updated, that the laws on the books are sufficient for tackling per se violations of antitrust as they exist in the tech sector.

Antitrust enforcement is not regulation, it is law enforcement. As conservatives, we do not support legal amnesty for those who violate our Nation's laws, and this should be extended to corporations who violate competition laws in the market. Though antitrust application to so-called speech concerns may not be direct, proper enforcement of the law against violations where they exist could cer-

tainly have positive downstream effects. Antitrust enforcement does not occur in a vacuum. Enforcing against the monolithic dominance of these companies in one sector, if warranted, could free up the market in such a way that concerns over viewpoint bias could be competed away in ways Big Tech's market dominance now makes impossible. Conservatives who rightly champion the innovation generated by a free market should be equally vigilant about maintaining the integrity of that marketplace. To borrow the old adage from Ronald Reagan, "Trust, but verify."

Conservatism properly understood follows a tradition of skepticism when it comes to concentrations of power. As Barry Goldwater wrote in *Conscience of a Conservative*, "Let us henceforth make war on all monopolies, whether corporate or union. The enemy of freedom is unrestrained power, and the champions of freedom will fight against the concentration of power wherever they find it." Thank you.

[The statement of Ms. Bovard follows:]

"Proposals to Strengthen the Antitrust Laws and Restore Competition Online"

United States House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial and Administrative Law

October 1, 2020

Statement for the Record

Rachel Bovard
Senior Advisor, The Internet Accountability Project

Chairman Cicilline, Ranking Member Sensenbrenner, Chairman Nadler, Ranking Member Jordan, and members of the committee, thank you for the opportunity to testify today.

A growing bipartisan consensus is emerging against the power of the Big Tech companies. This consensus is based on the recognition that corporate hegemony – that is, concentrated power exercised at scale – can be a threat to individual liberty, the free market, and independent thought in a free society.

To that end, I started the Internet Accountability Project (IAP) with Mike Davis in September of 2019 to give a voice to conservatives concerned about the growing, concentrated power of Big Tech. Since founding the group last year, our concerns have only been amplified by the COVID-19 pandemic, the upcoming election, and the role Big Tech plays in both.

In addition to raising awareness about the dangers of corporate power exercised at this scale, IAP has focused its efforts on three areas of policy remedy: antitrust enforcement, data privacy and ownership, and reform of Section 230 – which one pro-tech law professor has identified as Big Tech's "implicit financial subsidy."[1]

My remarks today will focus on the viewpoint discrimination exercised by these platforms and its downstream effects, and on Sec. 230 reform and antitrust enforcement as potential remedies to the broad and multifaceted issues that exist when corporate power is wielded without accountability against both independent thought and the free market.

I. Big Tech's Viewpoint Discrimination

As these Big Tech companies have grown, so too has their ability to filter information for billions of people around the world – that is, to control what they see, when, and what they can say.

Through its dominance of the search engine market, Google now decides how to filter information for 92 percent of the world[2] – and 87 percent of the United States.[3] One content decision by Google has enormous ramifications on what information is displayed, or what businesses are promoted. Facebook, with its nearly 3 billion active monthly users, has similar power to influence what users see and do not see.

Such decisions, when made at scale, have downstream effects on individual development of opinions and beliefs. They can single-handedly change the shape of markets – as is evidenced in the market disruptions that occur every time Google updates its core algorithm.

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[1] Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 is Your Best Hope*, in NEW CONTROVERSIES IN INTERMEDIARY LIABILITY LAW ESSAY COLLECTION (Tiffany Li ed., 2019), available at https://law.yale.edu/sites/default/files/area/center/isp/documents/new_controversies_in_intermediary_liability_law.pdf.

[2] *Search Engine Market Share Worldwide*, STATCOUNTER, https://gs.statcounter.com/search-engine-market-share. (last visited Sept. 30, 2020).

[3] *Search Engine Market Share United States of America*, STATCOUNTER, https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america. (last visited Sept. 30, 2020).

Conservatives feel the exercise of this power acutely. Content moderation and market power has been used by some of the major tech platforms with impunity against conservative political ads, fundraising opportunities, conservative news outlets, and even against the Twitter accounts belonging to members of this committee.

While such concerns are routinely dismissed as "anecdotal," or "unproven," the lack of transparency provided by these companies into their decision-making, and their promotion and amplification of algorithms, renders those claims as unverifiable as the ones they seek to invalidate. In other words, neither claim can be affirmatively proven or disproven.

As *VICE News* remarked after an image of Twitter's internal content moderation panels leaked, prominently displaying the phrases "search blacklist" and "trends blacklist" (emphasis added):

> We can't say with 100 percent certainty how the "Blacklist" tags work because we don't have full visibility into Twitter's moderation mechanism. We can see its public facing policy, but not debates inside of the company, and more critically, the technical process by which accounts are suspended, banned, or prevented from appearing in search.
>
> This opacity creates a situation where a devastating lapse in Twitter's security leads to a leaked image of an internal panel that contains the word "Blacklist," which Twitter doesn't use when talking about moderation, and which sounds more sinister than it is. **For years, academics, journalists, and yes, conservatives, have been demanding more transparency; these are the kinds of scandals that happen when a company's internal language is different from its carefully crafted blog posts and announcements.**[4]

Mark MacCarthy, a senior fellow at the Institute for Technology Law and Public Policy at Georgetown Law, has also noted that the easiest way to dispel accusations of bias is for the tech companies to allow researchers to look under the hood:

> If social media companies are selectively enforcing their rules more vigorously against conservatives than against other points of view, independent researchers should be able to verify this if they have sufficient access to social media data.[5]

To date, however, none of the Big Tech companies have provided regular and system wide algorithmic and content moderation transparency; though, depending on how President Trump's recent executive order on Sec. 230 is implemented, they may soon be required to do so. In the meantime, conservatives are left with case after case of what appears to be a systemic double standard applied by employees of these tech companies, whose staff are notably liberal.[6]

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[4] Emanuel Maiberg, *Twitter 'Blacklists' Lead the Company Into Another Trump Conspiracy*, VICE (July 16, 2020), https://www.vice.com/en_us/article/n7wdxd/twitter-blacklists-lead-the-company-into-another-trump-supporter-conspiracy.

[5] Mark McCarthy, *Trump's Social Media Executive Order is a Huge Opportunity*, THE HILL (May 30, 2020), https://thehill.com/opinion/technology/500248-trumps-social-media-executive-order-is-a-huge-opportunity.

[6] *See, e.g.*, Steven Onerly, *Twitter Public Policy Director Decamps for Biden Transition Team*, POLITICO (Sept. 17, 2020), https://www.politico.com/news/2020/09/17/twitter-public-policy-director-decamps-for-biden-transition-team-417293; Emily Birnbaum, *Trump Supporters are on the Attack Against Yoel Roth. Twitter is Standing by Him*,

The control that a handful of corporations have over speech has become clear during COVID-19, and the runup to the 2020 election.

Facebook has taken on "fact-checking" with new parameters and absurd outcomes using the notably opaque and subjective category of "missing context." Already, this has been used by PolitiFact to remove digital ads from conservative groups like the American Principles Project.

Facebook recently applied this same cudgel against conservative comedian Tim Young, who wrote an opinion piece speculating on what President Obama would have done if he had been presented with a Supreme Court vacancy. Absurdly, a fact check by *USA Today* claimed that an opinion piece speculating about a hypothetical scenario was too dangerous to appear on Facebook or Instagram (owned by Facebook) without a warning label.[7]

These platforms are also now in the medical profession, insofar as they determine what constitutes "appropriate" medical information for their users. Google, Facebook, YouTube, Twitter, and other platforms have banned board-certified physicians from discussing the efficacy of hydroxychloroquine as a COVID-19 treatment,[8] and positing alternative viewpoints about viral spread and how best to contain it.[9]

In April, Facebook made headlines by removing content promoting anti-lockdown protests for violating social distancing guidelines in certain jurisdictions.[10] However, Facebook embraced no such pseudo-governmental enforcement role against more recent protest activities organized on their platform in violation of local ordinances.[11]

PROTOCOL (May 27, 2020), https://www.protocol.com/yoel-roth-twitter-president-tweets; Sheera Frenkel, *Facebook Employees Stage Virtual Walkout to Protest Trump Posts*, THE NEW YORK TIMES (June 1, 2020), (https://www.nytimes.com/2020/06/01/technology/facebook-employee-protest-trump.html; Jillian D'Onfro, *Leaked Video Shows Upset Alphabet Executives Responding to President Trump's Election in Company-wide Meeting*, CNBC (Sept. 12, 2018), https://www.cnbc.com/2018/09/12/leaked-video-from-alphabet-tgif-meeting-after-president-trump-election.html; Joana Pearlstein, Techies Donate to Clinton in Droves. Trump? Not so much, WIRED (Aug. 31, 2016), https://www.wired.com/2016/08/techies-donate-clinton-droves-trump-not-much/; Fredreka Schouten, *Employees of Four Big Tech Companies show lopsided support for Biden campaign*, CNN (Sept. 28, 2020), https://www.cnn.com/2020/09/28/politics/big-tech-joe-biden/index.html.

[7] Tim Young (@TimRunsHisMouth), TWITTER, (Sept. 24, 2020, 11:27 PM), https://twitter.com/TimRunsHisMouth/status/1309333695032184832?s=20.

[8] Jon Passantino and Oliver Darcy, *Social Media Giants Remove Viral Video with false coronavirus claims that Trump tweeted*, CNN (July 28, 2020), https://www.cnn.com/2020/07/28/tech/facebook-youtube-coronavirus/index.html.

[9] Hal Scherz, *Why Banning Doctors with Different Ideas is Bad for Public Health*, THE FEDERALIST (May 8, 2020), https://thefederalist.com/2020/05/08/why-banning-doctors-with-different-ideas-from-youtube-is-bad-for-public-health/.

[10] Georgia Wells and Andrew Restuccia, *Facebook Puts Limits on Protest Organizers*, THE WALL STREET JOURNAL (Apr. 20, 2020), https://www.wsj.com/articles/facebook-curbs-organizing-of-lockdown-protests-11587419628.

[11] New Black Panther Block Party for Self-Defense, New Black Panther Block Party, FACEBOOK (Aug. 28, 2020), https://www.facebook.com/events/2297086643933094/?acontext=%7B%22event_action_history%22%3A[%7B%22mechanism%22%3A%22search_results%22%2C%22surface%22%3A%22search%22%7D]%7D.

Google's YouTube recently removed an interview with Dr. Scott Atlas, a neuroradiologist and professor at Stanford University Medical Center and an advisor on the White House Coronavirus Task Force. The interview was a data-driven discussion about the social harms of sustained lockdowns. Notably, the interview, which was broadcast in June, was not declared to be "medical misinformation" until after Dr. Atlas joined the White House's Coronavirus Task Force in August.

The platforms routinely cite the World Health Organization (WHO) as the arbiter of what can and cannot be said about medical science on its platform. However, the WHO has shown it can be swayed by China's Communist Party, and as recently as January confidently relayed Chinese assertions that there is "no clear evidence of human-to-human transmission" of the virus.[12]

Facebook has also acted as the arbiter of due process rights for Kyle Rittenhouse, the teen charged with fatally shooting two people amid the riots in Kenosha, Wisconsin. Rittenhouse's attorney says his client acted in self-defense, but Facebook has blocked all posts in praise and support of him, and taken down links to contribute to his legal defense.[13] Facebook, by its own admission one of the most powerful speech companies in the world,[14] has already declared him guilty of mass violence, and restricted the use of its platform to reflect their subjective, extralegal judgement.

Google has unprecedented power to filter information for most of the planet and seems to flex this muscle with impunity. A 2019 investigation by the *Wall Street Journal* found that Google "made algorithmic changes to its search results that favor big businesses over smaller ones," and modified search results around subjects like abortion and immigration.[15] In June, Google demonstrated how much power it has to demonetize entire news sites for minor violations of its ad policies.[16] In July, the search engine inexplicably stopped presenting search results for several leading conservative websites.[17] Breitbart News has presented analysis suggesting conservative sites are routinely downgraded.[18]

The gatekeeping role of these mega-platforms is taking on broad and opaque roles as it relates to the upcoming election. Big Tech's influence on voter behavior has already been well-

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[12] World Health Organization (@who), TWITTER, (Jan. 14, 2020, 6:18 AM), https://twitter.com/WHO/status/1217043229427761152?s=20.
[13] The Editorial Board, *Facebook's Rittenhouse Mistake*, THE WALL STREET JOURNAL (Sept. 4, 2020), https://www.wsj.com/articles/facebooks-rittenhouse-mistake-11599260134.
[14] Tony Romm, *Zuckerberg: Standing for Voice and Free Expression*, THE WALL STREET JOURNAL (Oct. 17, 2019), https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/.
[15] Kirsten Grind, Sam Schechner, Robert McMillan, and John West, *How Google Interferences with its Search Algorithms and Changes Your Results*, THE WALL STREET JOURNAL (Nov. 15, 2019), https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753.
[16] Ben Domench and Sean Davis, *NBC Tries to Cancel a Conservative Website*, THE WALL STREET JOURNAL (June 17, 2020), https://www.wsj.com/articles/nbc-tries-to-cancel-a-conservative-website-11592410893.
[17] Rod Dreher, *Google Blacklists Conservative Websites*, THE FEDERALIST (July 21, 2020), https://www.theamericanconservative.com/dreher/google-blacklists-conservative-websites/.
[18] Allum Bokhari, *Election Interference: Google Purges Breitbart from Search Results*, BREITBART NEWS (July 28, 2020), https://www.breitbart.com/tech/2020/07/28/election-interference-google-purges-breitbart-from-search-results/.

documented. Center-left leaning research psychologist Dr. Robert Epstein testified before the Senate Judiciary Committee that Google "displays content to the American public that is biased in favor of one political party." He estimated Google's search behavior, which he tested against other search engines in the weeks leading up to the 2016 election, swung as many as 2.6 million votes to Clinton. He also estimates that Google's algorithmic filtering has "been determining the outcomes of upwards of 25 percent of the national elections worldwide since at least 2015."[19]

Facebook and other tech platforms are reportedly "war gaming" different election outcomes, as well as meeting with government officials about "potential threats to election integrity." "Digital platforms," according to reports, are now as important as state and local elections agencies in "protecting public confidence" as it relates to "faith in democracy."[20]

The legality of content moderation itself is not at issue—but rather, the profound impact these actions have on the nature of free thought and expression when done at the scale at which these companies exist. A single algorithmic decision made by a private corporation, accountable to no one, changes what kind of viewpoints and information are available to billions of people around the world.

The appropriate remedy is not to suppress speech or politicize the platforms themselves, but to reform the tools these platforms use to control what we see, and to ensure that consumers have the power to engage with that process. It is also incumbent upon our antitrust enforcement agencies to ensure that whatever actions these tech companies are taking, they are not doing so with monopoly power.

II. Remedies

a. *Section 230*

A comprehensive approach to combating Big Tech's power will include reforms to Sec. 230, Big Tech's congressionally created liability shield. Multiple Sec. 230 reform efforts are simultaneously happening at once, but all of them share one common goal: to make the recipients of Sec. 230's benefits more transparent and accountable to their users in exchange for the statutory legal privilege they receive.

The initial intent and purpose of Section 230 was to provide a very narrow immunity designed to give platforms the freedom to filter content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" without fear of liability.

Unfortunately, embedded in that section is a catch-all phrase, "otherwise objectionable," that gives tech platforms discretion to censor anything that *they* deem "otherwise objectionable." Such broad language lends itself in practice to arbitrariness.

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[19] *Google and Censorship through Search Engines: Hearing Before the United States Senate Judiciary Subcomm. on the Const.*, 116 Cong. 1 (2019) (Statement of Dr. Richard Epstein), https://www.judiciary.senate.gov/imo/media/doc/Epstein%20Testimony.pdf.

[20] Kyle Daley, *Chaos Scenarios drive 'Gatekeepers' Election Prep*, AXIOS (Sept. 3, 2020), https://www.axios.com/2020-election-gatekeepers-chaos-scenarios-84181512-1fca-4b84-8c10-e95e02e95f61.html.

The intended protections were designed to protect the "good Samaritan" behavior of these platforms to remove smutty content online at a time when infant tech companies needed protection from massive liability. In today's Big Tech era, it has created extraordinary legal protections for these massive companies from lawsuits that challenge their suppressive, discriminatory power over the lawful viewpoints of everyday Americans.

Conservatives are concerned with both sides of the Sec. 230's judicially bloated immunity: that which empowers tech platforms to engage in viewpoint discrimination without recourse, and the shield it gives to tech companies to ignore the harmful content that facilitates unlawful conduct. The parade of horribles is long and indefensible, and includes child pornography, revenge porn, and terrorist conduct.

As law professor Mary Graw Leary stated in testimony to the Senate Judiciary Committee earlier this year, Sec. 230 "was created with the goal of shielding children from objectionable content, protecting good Samaritans, and protecting a nascent internet. The internet is no longer nascent, and children are at risk of exploitation at unprecedented levels."[21]

This latter part is, disturbingly, true. A *New York Times* report published in February revealed that reports of online sexual abuse grew by more than 50 percent in 2019, "an indication that many of the world's biggest technology platforms remain infested with the illegal content."[22] Between 2017 and 2018, the National Center for Missing and Exploited Children's CyberTipline saw a 541 percent increase in videos reported containing the sexual abuse of children.[23]

Some argue that it is simply the prosecutorial arm of the Department of Justice (DOJ) that needs better resourcing. However, the issue for the tech platforms is less the prosecution of offenders than it is their failure to remove the images from circulation. In one case presented to the Senate Judiciary Committee, images of one child's abuse were on more than 160,000 websites.[24] There is far more these platforms can do to target the preservation and circulation of this content.

As Senator John Kennedy (R-La.) put it in March, "some people respond to light, others respond to heat, and I bet if we took away the 230 protection, these companies would feel both light and heat."[25]

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[21] The EARN It Act: Holding the Tech Industry Accountable in the Fight Against Online Child Exploitation: *Hearing Before the United States Senate Judiciary Comm.*, 116 Cong. 2 (2020) https://www.judiciary.senate.gov/meetings/the-earn-it-act-holding-the-tech-industry-accountable-in-the-fight-against-online-child-sexual-exploitation.

[22] Gabriel J.X. Dance and Michael H. Keller, *Tech Companies Detect a Surge in Vides of Child Sexual Abuse*, THE NEW YORK TIMES (Feb. 20, 2020), https://www.nytimes.com/2020/02/07/us/online-child-sexual-abuse.html.

[23] *Id.*

[24] The EARN It Act: Holding the Tech Industry Accountable in the Fight Against Online Child Exploitation: *Hearing Before the United States Senate Judiciary Comm.*, 116 Cong. 2 (2020) (Statement by Nicole, Mother of a Child Whose Sexually Abusive Images were Circulated Online) https://www.judiciary.senate.gov/imo/media/doc/Nicole%20Testimony.pdf.

[25] The EARN It Act: Holding the Tech Industry Accountable in the Fight Against Online Child Exploitation: *Hearing Before the United States Senate Judiciary Comm.*, 116 Cong. 2 (2020)

The DOJ recently put forward a proposal that aims to address both viewpoint bias and the harmful content which Sec. 230 enables. A summary of their proposal is as follows:

Incentivizing Online Platforms to Address Illicit Content

- The DOJ has proposed denying Sec. 230 protections to truly bad actors that "purposely facilitate or solicit third-party content or activity that would violate federal criminal law."
- The DOJ's reform also carves out from a liability shield any material that includes child exploitation and sexual abuse, terrorism, and cyber-stalking.
- Also left unprotected by Sec. 230 would be any platform that had actual knowledge or notice that the third-party content violated federal criminal law or was otherwise provided with a court judgment holding that the content is unlawful in any respect.

Clarifying Federal Enforcement Capabilities to Address Unlawful Content

- The DOJ reform legislation also increases the protection of Americans by making clear that Sec. 230 does not bar civil enforcement actions brought by the federal government.

Promoting Competition

- The DOJ also would reform Sec. 230 to explicitly clarify that federal anti-trust claims are not barred by Sec. 230, which only protects against the publication of third-party speech and not liability for anti-competitive behavior.

Promoting Open Discourse and Greater Transparency

- The DOJ reform proposal would specifically replace the vague "otherwise objectionable" language in (c)(2) with "unlawful" and "promotes terrorism." This would focus on the core objective of Sec. 230 and remove platforms' ability to remove content arbitrarily based on subjective determinations.
- The draft legislation adds a statutory definition of "good faith" in order to provide more accountability and transparency and to prevent hiding behind the Sec. 230 shield regardless of intent.
- Lastly, the DOJ suggests explicitly overruling *Stratton Oakmont, Inc. v Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995) to clarify that a platform's removal of content does not, on its own, render the platform a publisher or speaker for all the content on its site.

Given how pervasive content curation is on online platforms, I believe Congress should consider whether this blanket immunity continues to be justified when platforms actively amplify or suppress the content of others – either through human moderators or their algorithms.

b. Antitrust

Antitrust enforcement, the subject of this committee's remit, is equipped to tackle Big Tech's anti-competitive dominance in multiple sectors of the marketplace.

This committee has heard testimony about various antitrust concerns: if and how Amazon prioritizes its products and services over those of its partners and competitors; Google's dominance in online advertising; Facebook's acquisition strategy for smaller competitors; and if and how Apple favors its own products through the App Store. You have also heard compelling testimony from small businesses about wanton and aggressive anti-competitive behavior by Big Tech giants.

Small businesses are not the only competitors impacted, however. Entire industries are at the mercy of Big Tech's power. As the National Association of Broadcasters told this committee in a statement earlier this month:

> It is no answer to tell broadcasters that, if they feel disadvantaged by the policies and revenue opportunities offered by the dominant platforms, they can decline to publish their content on Google, YouTube or Facebook and forego availability via various apps or devices. Because hundreds of millions of U.S. consumers use Facebook, Google and YouTube, and own smartphones, tablets and smart speakers produced by companies like Apple and Amazon, local stations have no real choice. Beyond offering over-the-air services, broadcasters must be available on all major platforms and types of devices to remain relevant to audiences and advertisers in the digital age. As a result, TV and radio stations lack bargaining power when dealing with the digital giants that have become gatekeepers for content providers, including local media outlets, seeking to reach audiences and monetize their content online. The digital giants have clear financial incentives to keep consumers engaged with their own platforms, content and apps, and lack effective incentives to adopt policies and practices that promote or financially reward the providers of other content, including local news.
>
> In short, the dominance of the leading digital platforms significantly and increasingly impairs broadcasters' ability to earn the ad revenues needed to support production of local news and information.[26]

News publishers have also long argued that Google uses its dominance to force publishers to give up their content without adequate compensation. As the News Media Alliance put it:

> In today's digital age, the tech giants' dual control over news distribution and monetization threatens the very survival of news organizations. These tech giants use secret, unpredictable algorithms to determine how and even whether content is delivered to readers. They scrape news organizations' content and use it to their own ends, without

[26] Online Platforms and Market Power, Part I: The Free and Diverse Press: *Hearing Before the United States House Judiciary Comm. on Antitrust, Commercial and Admin. Law*, 116 Cong. 2 (2020) (Statement by Gordon H. Smith) http://www.nab.org/documents/newsRoom/pdfs/09220_HJC_Local_Journalism_At_Risk_Submission.pdf.

> permission or remuneration for the companies that generated the content in the first place. They also suppress news organizations' brands, control their data, and refuse to recognize and support quality journalism. In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry. Only these regulators are unconstrained by legislative or democratic oversight. And their primary motivation is not to serve the public interest, but rather to maximize their own advertising revenues. Indeed, two dominant platforms—Google and Facebook—now take the vast majority of U.S. online ad revenue through their online advertising services, leaving news organizations with little to reinvest in high-quality, original journalism. They capture that revenue in two ways. First, they scrape news organizations' content and display it on their own pages, where they can monetize it through ads. Second, they control the advertising technology news organizations use to sell ads on their own sites, and the platforms charge increasingly exorbitant fees for the use of those technologies.[27]

While Congress cannot enforce the antitrust law itself, it has a critical role to play in performing the oversight which ensures the responsible agencies are adequately policing the market. It is critical that these agencies have both the congressional support and resources to assess the growing dominance of billion-dollar companies in the market. Many times, this involves reviewing if previous agency decisions were wisely made.

For example, William Kovacic, appointed by President George W. Bush to the Federal Trade Commission and later its chair, voted to approve Google's acquisition of the ad technology company DoubleClick. Kovacic recently told the *New York Times*, "If I knew in 2007 what I know now, I would have voted to challenge the DoubleClick acquisition."[28]

Many on the Right take issue with the use of antitrust enforcement against Big Tech firms. Their claims are generally summarized as follows:

- Antitrust is being used by conservatives as a political tool to go after Big Tech platforms they do not like.
- Antitrust cannot solve speech concerns
- Discussions of antitrust enforcement are actually proxies for updating antitrust law away from the consumer welfare standard.

I will take these claims one at a time. First, the bipartisan efforts and wide-ranging remedies under discussion make clear that there is growing awareness among legislators that Big Tech's unchecked power in specific circumstances warrants review. Big Tech isn't being singled out for

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[27] Online Platforms and Market Power, Part I: The Free and Diverse Press: *Hearing Before the United States House Judiciary Comm. on Antitrust, Commercial and Admin. Law*, 116 Cong. 2 (2020) (Statement by David Chavern) (https://docs.house.gov/meetings/JU/JU05/20190611/109616/HHRG-116-JU05-Wstate-ChavernD-20190611.pdf.

[28] Steve Lohr, *This Deal Helped Turn Google into an Ad Powerhouse. Is that a Problem?*, THE NEW YORK TIMES (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html.

its own sake; rather, specific actions – antitrust violations, viewpoint discrimination, and the facilitation of various criminal acts – are being targeted.

Second, antitrust's application to "speech concerns" may not be direct, but proper enforcement of the law against violations could certainly have tangential effects. Antitrust enforcement does not occur in a vacuum. Enforcing against the monolithic dominance of these companies in one sector, if warranted, could free up the market in such a way that concerns over viewpoint bias could be competed away in ways which Big Tech's market dominance now makes impossible.

Third, it is the view of myself and the Internet Accountability Project that our antitrust laws do not need to be updated; that the laws on the books are sufficient for tackling per se violations of antitrust as they exist in the tech sector. Antitrust enforcement is law enforcement. As conservatives, we do not support legal amnesty for those who violate our nation's laws – and this should extend to corporations who violate competition laws in the market.

Conservatives who rightly champion the innovation generated by a free market should be equally vigilant about maintaining its integrity. To repurpose the old adage from Ronald Reagan, "trust, but verify."

As Congressman Ken Buck (R-Colo.), a member of this committee, has rightly noted:

> Big isn't inherently bad and we should celebrate American success stories. However, when companies use their success as a bat to bludgeon smaller rivals, Congress must address the root causes of these inequities to ensure the American dream remains attainable for all Americans.[29]

III. Conclusion

When it comes to the expansive power of Big Tech, the question really distills to one of who will rule. In America, it should not be the bureaucrats; it should not be the mob; it should not be the tech oligarchs. Rather, in America, it is the people who rule through our system of self-government. "I will not willingly cede more power to anyone, not to the state, not to General Motors, said William F Buckley in *Up From Liberalism.* "I will hoard my power like a miser, resisting every effort to drain it away from me."[30]

Conservativism follows a tradition of skepticism when it comes to concentrations of power. In 1960, Barry Goldwater wrote *Conscience of a Conservative*. Goldwater – America's first libertarian politician, according to Reason magazine[31] – had a prescient and applicable reminder for American conservatives today. "Let us henceforth make war on all monopolies—whether

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[29] Ken Buck, David Peterson, Michael Sall, and Sam Ashenberner, *Breaking Up or Better Regulating Big Tech?,* THE WALL STREET JOURNAL (Sept. 20, 2020), https://www.wsj.com/articles/breaking-up-or-better-regulating-big-tech-11600622572.

[30] WILLIAM F. BUCKLEY, JR., UP FRONT LIBERALISM 1 (1959)

[31] Robert W. Poole, Jr., *In Memoriam: Barry Goldwater – Obituary*, REASON, Aug. 1998, at https://arquivo.pt/wayback/20090628123204/http%3A//findarticles%2Ecom/p/articles/mi_m1568/is_n4_v30/ai_20954419/.

corporate or union," he noted. "The enemy of freedom is unrestrained power, and the champions of freedom will fight against the concentration of power wherever they find it."[32]

But perhaps it is Russell Kirk, one of the founding fathers of conservative thought, who surmised the challenge most aptly: "Our conservative task is to reconcile personal freedom with the claims of modern technology, and to try to humanize an age in which [Permanent] Things are in the saddle.[33]

[32] BARRY M. GOLDWATER, CONSCIENCE OF A CONSERVATIVE 1 (1971).
[33] RUSSELL KIRK, RUSSELL KIRK'S GUIDE TO CONSERVATISM 1 (1957).

Mr. CICILLINE. Thank you, Ms. Bovard. Professor Lipsky is now recognized for 5 minutes.

TESTIMONY OF TAD LIPSKY

Mr. LIPSKY. Thank you, Chairman Cicilline, and thank you also to Ranking Member Sensenbrenner as well as Chairman Nadler and Ranking Member Jordan. Good to see you. You have my statements for the record, and given the length of the witness list, I'm going to try and summarize very briefly.

A hundred and thirty years ago, a gigantic network industry arose as one of the greatest economic manifestations of the second Industrial Revolution in the United States, and that was the railroads. And Congress addressed many grievances and problems with the performance of the railroads in two fundamentally different ways. In 1887, it passed the first major Federal sectoral regulation creating the Interstate Commerce Commission to enforce the Interstate Commerce Act, which was a method of directly regulating competitive outcomes in the railroad industry. And in 1890, it enacted the Sherman Act, which very simply prohibited restraints of competition, conspiracy, and monopolization. It's 130 years later. The Interstate Commerce Commission and the Interstate Commerce Act are gone, but antitrust thrives, and competition thrives, and the success of the American economy thrives.

In the very early stages of Sherman Act interpretation, the Supreme Court, taking a common law approach as Congress intended, very quickly determined that cartel activity was to be condemned per se. But then in 1898, in the *Addyston Pipe & Steel* case, it confirmed that restraint could be reasonable if it had a sensible relationship to a transaction with a lawful purpose. And except for the 1911 imposition of the per se rule against retail price fixing, a long period of time happened in which the courts were trying to feel their way through the complex issues that naturally arise when the antitrust laws are applied to particular industries, and there are nice judgments that are required to be made to determine what is anti-competitive and what is pro-competitive.

Then in the late New Deal in the second FDR term, under the leadership of Assistant Attorney General Jackson and his successor, Thurman Arnold, something changed in antitrust enforcement. With the encouragement of the antitrust agencies, the courts became far more willing to deprive companies of any right to defend their conduct, either using economic arguments or trying to show on the basis of facts and circumstances that what they were doing was justifiable, pro-competitive, that they lacked market power to present any other defense. This was the start of the so-called per se rule era which occurred around 1945 with the *Associated Press* decision. A number of patent licensing practices were condemned per se, and on and on until when you reach *United States* v. *Topco*, almost any type of conduct challenged by a plaintiff or by the government was condemned per se, or very strong presumption against business conduct. The legality of business conduct was adopted by the courts.

But simultaneously, at the end of that era, America's economic fortunes started to go south. We had severe competition from companies arising in Europe and Asia, and many of our leading indus-

tries began to see negative results, and our economy entered a period of stagflation. Scholars and academics in law and economics pointed this out in the 60s and 70s, and they weren't all from Chicago. As a matter of fact, you could say that in the study of economics and its application of the antitrust law, probably the most notably introduced antitrust enforcement was by Lyndon Johnson's first assistant attorney general for antitrust, Don Turner, who had both a Harvard Ph.D. in economics and a Yale law degree, and who advocated very strongly that economic analysis be used as the touchstone for antitrust.

And fortunately, in the mid-70s, the Supreme Court began to take that up. And ever since, there has been a very powerful consensus in the courts, the Bar, the agencies, antitrust practitioners, and businesses that have to deal with very severe antitrust remedies and comply with the law, that the focus on competition rather than competitors, and the ability to defend oneself based on facts and circumstances, and the willingness of the courts at least listen to economic arguments, those are critical to successful application of the antitrust laws to the economy, not to destroy the economy, but to help it grow.

And the Supreme Court and other courts have shown very great flexibility in understanding and absorbing new economic learning and applying it to even high technology industries, as in the two Microsoft cases that were litigated in the 1990s and the latter one resolved in 2001, and, most recently, for example, in the *Ohio* v. *American Express* case. It's not a right/left, Republican/Democrat, liberal/conservative issue. Successful implementation of the mandate for competition in the antitrust laws encourages innovation, which is the main driver of economic growth and ensures that our economy continues to grow and prosper.

And so I want to associate myself with Representative Sensenbrenner's remarks. I think things are very well positioned, and I would caution aggressively against any extensive intervention in our common law system of interpreting the mandate of our basic antitrust laws.

[The statement of Mr. Lipsky follows:]

BEFORE THE
UNITED STATES CONGRESS

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW

"PROPOSALS TO STRENGTHEN THE ANTITRUST LAWS AND RESTORE COMPETITION ONLINE"

October 1, 2020

STATEMENT OF

ABBOTT B. LIPSKY, JR.

Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for the invitation to testify before the Subcommittee on the important questions raised by the subject of this hearing. The views presented in this Statement are my own personal views and are not intended to represent those of any other entity or individual, including the Global Antitrust Institute of the Antonin Scalia Law School, where I serve as Director of Competition Advocacy, and the Antonin Scalia Law School itself, where I am an Adjunct Professor.

The increasing success and importance of digital platforms throughout the economy have led to the expression of a variety of concerns. Some of these concerns involve the competitive conduct of the leading platforms. At present a variety of ongoing antitrust investigations and cases are attempting to address such concerns. On April 17, 2020, I submitted a letter responding to your March 13 request for my views on several questions involving the adequacy of our federal antitrust statutes and enforcement institutions to address antitrust issues arising in the digital economy. I hereby reaffirm the views expressed in that April 17 letter. This Statement essentially provides a brief summary of certain key points made in that letter.

In general, I believe that our current federal antitrust statutes and enforcement institutions are adequate to address competition issues arising in the digital economy. The principal antitrust statutes -- the Sherman Act, the Clayton Act and Federal Trade Commission Act -- are comprehensive in scope, prohibiting agreements "in restraint of trade", "monopolization" and conspiracies and attempts to monopolize, as well as structural transactions (mergers, acquisitions and joint ventures) whose effect "may be substantially to lessen competition" or "to tend to create

a monopoly" in any line of commerce.[1] The enforcement methods available to challenge antitrust violations include criminal and/or civil prosecution by the Antitrust Division of the Department of Justice, civil and administrative proceedings by the Federal Trade Commission, as well as civil suits by any person injured (or threatened with injury) by an antitrust violation. States also have standing to enforce provisions of federal antitrust law (as well as their own antitrust statutes), and there is frequent coordination between state and federal antitrust enforcers.

The criminal investigation techniques available to the Antitrust Division are comprehensive and very powerful – *e.g.*, use of grand jury proceedings, surreptitious surveillance and leniency programs. Both the government and civil plaintiffs – including the States and the so-called "private attorneys general" – also have formidable civil investigation and discovery tools that can be used to pursue antitrust matters. The antitrust remedies are notoriously severe – up to 10 years incarceration for individuals guilty of an antitrust crime, and criminal fines that often range into the hundreds of millions of dollars for corporations under the Alternative Fines Statute. Treble damages in private civil litigation sometimes reach hundreds of millions or even billions of dollars in class actions. Equitable remedies up to and including divestiture (as applied to Standard Oil in 1911, United Shoe Machinery Corporation in 1968 and the Bell System in 1982) as well as detailed and strict limitations on business conduct are also available as remedies to government and private plaintiffs if an appropriate showing is made.

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[1] Although the Federal Trade Commission is authorized to challenge "unfair methods of competition" as well as Clayton Act violations, the law is now well established that any violation of the Sherman Act is also an unfair method of competition under the FTC Act.

Regarding structural transactions, the Hart-Scott-Rodino Act requires parties to prenotify and await clearance from the federal agencies. Thousands of transactions are routinely reviewed, and a small but important fraction of those are investigated intensely and then either restructured or abandoned prior to consummation in light of agency concerns about possible negative competitive effects. The agencies are highly capable of litigating contested cases before the federal courts in order to stop anticompetitive transactions. Even transactions that fall below notification thresholds, and those that actually receive clearance after full HSR review, can be and are challenged successfully by the federal antitrust agencies.

In summary, federal antitrust law provides a wide variety of powerful and inescapable tools for the detection, prevention, deterrence and remedy of any anticompetitive conduct affecting the U.S. economy. Given these longstanding and highly effective provisions of U.S. law, individuals and business firms that are subject to the jurisdiction of U.S. courts are compelled to pay close attention to their antitrust compliance obligations. These observations are fully applicable to digital platforms and other firms participating in the digital economy.

A key feature of federal antitrust enforcement is its reliance on the process of common-law interpretation and application of the antitrust statutes by the federal judiciary. We are fortunate to have a federal judicial system that employs a wide variety of principles and practices that help to ensure that federal court decisions are made by impartial judges independent of the political branches. Article III protections for judges (Presidential nomination, advice and consent of the Senate, tenure during good behavior, no reduction in compensation) as well as extensive rules involving procedure, evidence, appeal and review, and rules of judicial conduct all

help to ensure that our judicial decisions are based on a thorough and balanced assessment of the facts and the law, free of personal bias or *ex parte*, political or other inappropriate influences.

While our basic antitrust statutes protect competition, they do not prescribe rules of decision that are sufficiently specific to resolve all individual cases. Over the 130 years since passage of the Sherman Act, the Supreme Court has refined its approach to antitrust interpretation through the common-law process. Early cases such as United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), and United States v. Joint Traffic Association, 171 U.S. 505 (1898), established that cartel behavior – naked restrictions of competition – would be condemned automatically (*per se*), without regard to whether the resulting prices, output, quality or other competitive terms were reasonable. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), clarified that contractual restrictions ancillary to the main purpose of a lawful transaction are themselves lawful to the extent they are reasonable in scope. Then in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), and United States v. American Tobacco Co., 221 U.S. 106 (1911), the Court established that the rule of reason – allowing competitive practices to be defended based on facts and circumstances of the particular case – would be the usual method of analysis for conduct falling outside the *per se* category established for cartel activity. In that same term the Court also included vertical price agreements among the list of *per se* illegal practices. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled*, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

Antitrust enforcement became a major issue in the Presidential election of 1912, immediately following the *Standard Oil* and *American Tobacco* decisions. The election of President

Woodrow Wilson led to enactment of the Clayton Act and the Federal Trade Commission Act in 1914, which added new enforcement modalities, clarified the application of antitrust law to structural transactions, and created a new antitrust enforcement agency, the FTC. Eventually, in FDR's second term as President, under the leadership of Assistant Attorney General Robert Jackson (later an Associate Justice of the Supreme Court) and his successor, Thurman Arnold, a more aggressive enforcement attitude began to permeate antitrust. With the strong encouragement of the government agencies, the use of *per se* rules and other presumptions of illegality began to proliferate.

Eventually such rules and presumptions spread to nearly every aspect of federal antitrust interpretation – all non-price vertical restraints, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), both price and non-price restrictions contained in joint venture agreements, United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972), and a wide variety of intellectual property licensing restrictions. *See*, Remarks by Deputy Assistant Attorney General for Antitrust Bruce B. Wilson before the American Patent Law Association, "Department of Justice Luncheon Speech Law on Licensing Practices: Myth or Reality?" (Jan. 21, 1975). Although not denominated as *per se* illegal, the Supreme Court adopted strong presumptions of illegality for structural transactions, even for mergers involving competitively insignificant entities, United States v. Von's Grocery Co., 384 U.S. 270 (1966). Similarly, firms with monopoly power were presumed liable for monopolization, and had the burden to establish that their market positions had been "thrust upon" them, even for conduct considered "honestly industrial." United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd mem.*, 347 U.S. 521 (1954).

The effect of these changes in substantive antitrust interpretation was to deprive antitrust defendants of most opportunities (all opportunities, when the *per se* rule applied) to defend their conduct based on the facts and circumstances of particular cases – for example, by showing lack of market power, absence of any anticompetitive effect, legitimate procompetitive business justifications for conduct – or to use economic analysis to explain why the impugned conduct might enhance competition. Indeed, in *Topco*, *supra*, the Court openly mocked the idea of using economic analysis. The effect of these increasingly strict antitrust rules was to limit the competitive vigor of firms engaged in U.S. commerce. During the late 1960's and 1970's the U.S. economy ran into noticeable headwinds. The economy experienced a period of "stagflation" – slow growth and persistent inflation – leading to the three "Nixon Shocks" of 1971 (a federally mandated wage and price freeze followed by a period of wage and price controls, imposition of a 10% surcharge on all imports, and permanent termination of dollar-gold convertibility). Major U.S. firms in important sectors – automobiles, machine tools and consumer electronic products – suffered significant declines due to emerging competition from firms in Asia and Europe.

Given these alarming U.S. economic trends, a broad variety of federal policies came under scrutiny in the 1960's and 1970's, including antitrust enforcement. The widespread use of *per se* rules and other adverse presumptions came under analysis and criticism by legal and economic scholars and antitrust practitioners. Presented with this new learning, beginning with United States v. General Dynamics Corp., 415 U.S. 486 (1974), the Supreme Court became more receptive to efforts by those accused of antitrust violations to defend their conduct based on economic analysis and the facts and circumstances of the particular case. Eventually, the *per se* rules were again limited to naked cartels, and heavy presumptions against the legality of structural

transactions and procompetitive conduct by firms with monopoly power were mollified. A consensus emerged within the antitrust enforcement community – the federal agencies, antitrust practitioners, American businesses, antitrust scholars and antitrust economists – supporting the fundamental principles adopted by the Supreme Court: that antitrust law is for the protection of vigorous competition, not individual competitors, and that antitrust rules should be formulated so that businesses are allowed to defend particular practices – based on specific facts and circumstances as well as sound economic analysis – that do not tend to restrict competition.

As a result of these refinements of the substantive interpretation of the basic antitrust statutes, the U.S. economy has experienced a lengthy period of extraordinary innovation and economic growth. Many other shifts in federal policy also contributed to this success: strengthened intellectual property protection, reduction or elimination of sectoral economic regulation by administrative agencies such as the Interstate Commerce Commission, Civil Aeronautics Board and Federal Communications Commission, as well as adjustments in federal macroeconomic policies. However, since antitrust enforcement provides the main standards for competitive conduct throughout the private economy, these refinements in substantive antitrust interpretation must be given a significant share of the credit for the long period of unprecedented economic success that the U.S. has enjoyed.

With its emphasis on the protection of competition and the use of sound economic analysis rather than legal formalism, the Supreme Court has proven capable of adapting antitrust standards for effective application to new business practices in light of developments in technology and industry structure. Specifically, with regard to digital platforms and other aspects of the digital

economy, it has been shown repeatedly that the existing tools and principles of antitrust enforcement are sufficiently flexible to incorporate new economic understandings and to govern new forms of competition. The unique economic and competitive characteristics of multi-sided markets were initially recognized by Professor William F. Baxter, President Reagan's first Assistant Attorney General for Antitrust, as a result of his extensive study of four-party payment systems (electronic funds transfer systems and credit card systems). William F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, 26 J.L. & Econ. 541 (1983). As further refined by other legal and economic scholars, these insights led to the correct application of the current antitrust statutes to the activities of Microsoft Corporation in two government Sherman Act lawsuits, United States v. Microsoft Corp., Civil Action No. 94-1564 (SS) (D.D.C.; Competitive Impact Statement available at https://www.justice.gov/atr/competitive-impact-statement-us-v-microsoft-corporation), and United. States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc), and in a major lawsuit against one of the leading credit-card systems. Ohio v. American Express, 585 U.S. __, 138 S. Ct. 2274 (2018).

Thus, as explained more fully in my April 17 letter, U.S. antitrust statutes and enforcement institutions are well-adapted to handle competition problems emerging in the digital economy. I have also recommended two initiatives to further improve our antitrust enforcement system so that anticompetitive practices are correctly identified and eliminated, while assuring that procompetitive conduct is not excessively burdened by inappropriate forms of public intervention. Specifically, I support the recommendation made in the March, 2017 Report and Recommendations by the International Competition Policy Experts Group (of which I was a member) to establish and fund a dedicated office within the Executive Branch to identify and eliminate foreign-jurisdiction

antitrust enforcement practices that limit competition and innovation by U.S. firms. Of greatest concern are those non-U.S. antitrust regimes that incorporate standards and objectives in tension or conflict with dynamic free-market competition (*e.g.*, protection of local competitors or promotion of "national champions"), or that unduly restrict the procedural defense rights of business firms that are subject to antitrust investigations and cases. Second, I support efforts to ensure more effective separation of prosecutorial and adjudicative functions within the Federal Trade Commission, such as designating the Director of the Bureau of Competition as an officer of the Executive Branch, with appointment and supervision of the Director similar to those applicable to the Assistant Attorney General for Antitrust.

Thank you for the opportunity to testify in this important hearing. I look forward to answering any questions you may have.

Mr. CICILLINE. Thank you, Mr. Lipsky. You have gone over time significantly. The gentleman yields back. I now recognize Sally Hubbard for 5 minutes.

TESTIMONY OF SALLY HUBBARD

Ms. HUBBARD. Chairman Cicilline, Ranking Member Sensenbrenner, and members of the subcommittee, thank you for inviting me to speak with you today and for conducting this critically important investigation.

Facebook, Amazon, Apple, and Google started on their paths to dominance with innovation, but you've uncovered major evidence that the platforms have used anti-competitive conduct and acquisitions to grow and maintain their monopoly power. They've violated the antitrust laws as they now stand. You've opened up Americans' eyes to the widespread harms that flow from the illegal monopolization of digital markets. It is one thing that most Americans still can't see, what our lives, economy, and country could look like if these markets were open and competitive.

We've been under monopoly rule for so long, but we're suffering from a crisis of imagination, so let's take a moment and envision the possibilities of what America could be. I see an America where anyone can pursue an innovative business idea, get it funded, and build a company that doesn't get crushed by giants protecting their turf. Diverse ideas and founders flourish. Small and big companies can decline platforms' extractive terms of dealing, stop paying them taxes and tolls, reap the rewards of their ingenuity, and pay their employees more. Strong antitrust enforcement creates new waves of innovation like when the government broke up AT&T, and when *U.S.* v. *Microsoft* paved the way for Google to exist by stopping Microsoft from taking over every market that touched its monopoly.

I see an America where creators of all types, from musicians to journalists, enjoy the fruits of their labor no longer siphoned off by Big Tech. I see an America where no company has concentrated control over speech, public discourse flows freely, not subject to business models that boost divisive and incendiary content, where, when we all see the same speech, we can respond to it with counter speech as the First Amendment requires. This vision of America can be ours if we defeat the robber barons of today, just like we've done before, using the antitrust laws.

Some say antitrust isn't the right solution and some other fix is the answer, but we are in a crisis. This isn't an either/or situation. It's a both/and situation. We must attack monopoly rule from every angle. For example, we also need privacy laws, but regulation doesn't work when monopolists are too powerful to comply or when monopolists shape the laws themselves. Others say antitrust is being weaponized for improper purposes, but Senator Sherman always intended to save America from kings of commerce, and if we open up markets by ending platforms' anti-competitive tactics and deals, a wide range of benefits will follow.

Enforcing the antitrust laws won't magically solve all of our problems, but we won't be able to cure America's ills if we don't first disperse monopolies' concentrated power by unlocking competition. Of course the tech giants each provide useful services, but providing some benefits does not give them a free pass to break the

antitrust laws. Unfortunately, our laws have been attacked by the courts for decades, making enforcement expensive and hard. Even so, enforcers need to bring more cases and be more willing to risk losing in court.

Ultimately, we are depending on you, Congress, to fix this. Congress should use bright-line rules and presumptions to remove complexity and make antitrust cases easier, faster, and cheaper. Congress should overrule legal precedent that imposes obstacles for monopolization and merger cases. Congress should also structurally eliminate the platforms' conflicts of interests and remove their incentive and ability to sell preference. It should separate platforms from commerce and divest business lines. The U.S. has used structural separation as a standard regulatory tool and antitrust remedy in network industries. Congress should require platforms to offer equal access on equal terms to all, protecting citizens as sellers of goods and services, consumers, and as speakers. Lawmakers should open up competition through interoperability, and immediately, in order to preserve our elections, Congress should ban the surveillance-based hyper-targeting of content. Advertising should be done based on context, not identity.

This is a turning point for our Nation. Our democracy is hanging in the balance. The time to act is now, decisively and with courage. Speaking to my fellow Americans, in order for your elected representatives to stand up to monopoly power, they need you behind them. The tech giants have endless lobbying funds, but we, the people, can once again rise up and prevail against monopolists. Thank you very much.

[The statement of Ms. Hubbard follows:]

Testimony of Sally Hubbard

Director of Enforcement Strategy, Open Markets Institute

Before the

House Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

On

"Proposals to Strengthen the Antitrust Laws and Restore Competition Online"

October 1, 2020

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for inviting me to testify and for conducting this critically important investigation.

For my written testimony, I attach my April 17 letter to the Subcommittee on behalf of the Open Markets Institute, which discusses proposed solutions for restoring competition online in detail. I also attach my written testimony to the U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, dated March 10, 2020, which focuses specifically on the problem of self-preferencing by digital platforms and recommended solutions.

Last, I'd like to refer the Subcommittee to my written testimony previously submitted in this investigation, pursuant to the June 11, 2019 hearing "Online Platforms and Market Power, Part 1: The Free and Diverse Press," which, in addition to the solutions proposed in the attached, supports the *Journalism Competition and Preservation Act* to ensure that the antitrust laws are not used against journalists who collectively negotiate against tech platforms.

April 17, 2020

The Honorable David Cicilline
Chairman
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House of Representatives

The Honorable F. James Sensenbrenner, Jr.
Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law
U.S. House of Representatives

Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for the opportunity to share the views of the Open Markets Institute, joined by the undersigned, on promoting fair competition in the digital marketplace. We applaud the Subcommittee for undertaking its critically important investigation. The Subcommittee's hearings have helped immensely to educate the American public and Congress itself on the many existing and emerging threats posed by online platform monopolists. The hearings have helped to remind Americans about the fundamental role that America's anti-monopoly law plays in promoting economic prosperity and in protecting our democracy and our fundamental liberties.

The corporations that rule online markets for goods, services, information, and news are all more than 20 years old and have dominated their respective fields for more than a decade.[1] Amazon, Apple, and Google have each surpassed $1 trillion in valuation, and Facebook made $70.7 billion in revenue in 2019 on surveillance-based, hyper-targeted advertising.[2]

Unfortunately, competition on merit alone does not explain the phenomenal rise of these corporations to such positions of power and control, nor does it explain the durability of their power. Individuals at each of these corporations have introduced smart ideas and products to market. But much of the success of these corporations is also due to having acquired hundreds of other companies, along with the people and services within these companies, in ways that have

[1] *See* Mark A. Lemley & Andrew McCreary, *Exit Strategy* (Stanford Law and Econ. Olin Working Paper No. 542), https://ssrn.com/abstract=3506919.
[2] *Facebook's Annual Revenue from 2009 to 2019 (in million U.S. dollars)*, STATISTA, https://www.statista.com/statistics/268604/annual-revenue-of-facebook/ (last visited Apr. 14, 2020); Daisuke Wakabayashi, *Google Reaches $1 Trillion in Value, Even as It Faces New Tests*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/technology/google-trillion-dollar-market-cap.html; Abha Bhattarai, *Amazon Becomes the Country's Second $1 Trillion Company*, WASH. POST (Sept. 4, 2018 5:46 AM), https://www.washingtonpost.com/business/2018/09/04/amazon-becomes-countrys-second-trillion-company/.

enabled these giants to build intricate and self-reinforcing networks of essential services.[3] Many of these acquisitions were clearly illegal under the Clayton Act's prohibition of mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[4] They went through because law enforcement agencies failed to enforce the law.

This illegal monopolization through countless acquisitions, in turn, has played an integral role in powering the further rise of these giants. The platform monopolists of the 21st century have long followed the monopolist's classic playbook. They exploit their positions as providers of multiple essential services to bankrupt, supplant, or sideline rivals in every market in which they operate. They also exploit their position as gatekeepers to the marketplace to manipulate and extort businesses and individuals who simply want to sell their goods, services, and ideas to their fellow citizens. This problem is getting worse fast. The number of businesses that are not at the mercy of the platform monopolists is declining every day, as the giants continue to expand aggressively into new business lines.[5]

In recent written testimony submitted to the Senate Judiciary Committee regarding digital platform self-dealing, which is when these corporations exploit their gatekeeper power to favor their own products and services over those provided by the sellers who depend on them to get to market, I detailed some of the ways that I believe these digital platforms are violating (current interpretations of) Section 2.[6]

This illegal monopolization harms citizens in their capacities as entrepreneurs, innovators, creators, and employees, by reducing opportunity, driving down revenue, and driving down income. This monopolization also harms citizens in their capacity as consumers, by robbing them of choice, innovation, quality, and prices discovered through true inter-brand competition. Perhaps most importantly, this illegal monopolization harms individuals *as* citizens, because these corporations often use their power in ways that disrupt the free press, fair elections, and the marketplace of ideas.[7]

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[3] Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST. 5 (July 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf (detailing that between 1987 and 2019, Google, Apple, Facebook, Amazon, and Microsoft acquired 723 companies).
[4] 15 U.S.C. § 18.
[5] *See, e.g.*, Rob Copeland, *Google's 'Project Nightingale' Gathers Personal Health Data on Millions of Americans*, WALL ST. J. (Nov. 11, 2019), https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790 (detailing Google's partnership with Ascension, one of U.S.'s largest health-care systems, to obtain data related to "lab results, doctor diagnoses and hospitalization records, among other categories, and amounts to a complete health history, including patient names and dates of birth.").
[6] *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter *Hubbard Testimony 1*] (submitted testimony of Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute), https://www.judiciary.senate.gov/imo/media/doc/Hubbard%20Testimony.pdf.
[7] *Online Platforms and Market Power, Part 1: The Free and Diverse Press: Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter *Hubbard Testimony 2*] (submitted testimony of Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute), https://docs.house.gov/meetings/JU/JU05/20190611/109616/HHRG-116-JU05-Wstate-HubbardS-20190611.pdf.

The problem of monopolization was not inevitable. It is due, in part, to enforcers following the libertarian "Chicago School" philosophy to guide their understanding of both the purpose of anti-monopoly law and how to enforce the law. This philosophy overvalues economic efficiency while simultaneously ignoring many of the political harms caused by the concentration of economic power.[8]

The problem is also made worse by three decades of monopoly-friendly court decisions based on this same flawed ideology.[9] These decisions have erected substantial and dangerous obstacles for Sherman Act Section 2 claims. Partly as a result of the guidance provided by this ideology, antitrust enforcers in recent years have tended to shy away from aggressive enforcement of the law in any case that relies on Sherman Act Section 2, especially in relation to Sherman Act Section 1 horizontal collusion cases, with their stronger standard of *per se* illegality.

Over time, this monopoly problem builds on itself. By not bringing enough Section 2 cases, antitrust enforcers have left pro-monopoly legal precedent unchallenged.[10] Over time, such wrongheaded court decisions can become erroneously perceived as settled law.

These platform monopolists provide some useful, high-quality services to some portions of the public, but that does not justify a single one of these harms.

Below, we outline our views on potential solutions according to the topics identified in your letter of March 13, 2020. With these recommended reforms, we aim to open the gates of fair competition to new innovators, restore dynamism to our economy, decrease market concentration, ensure basic rule of law for all sellers and buyers, and protect the security of our nation and our democracy.

1. **Are existing laws that prohibit monopolization and monopolistic conduct adequate? Are current statutes and case law suitable to address any potentially anti-competitive conduct?**

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[8] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 405 (1978) ("The only goal that should guide interpretation of the antitrust laws is the welfare of consumers . . . In judging consumer welfare, productive efficiency, the single most important factor contributing to that welfare, must be given due weight along with allocative efficiency."); MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 107 (1991) (stating, "[R]ational economic actors working within the confines of the market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market."); *see also* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979) (stating "the proper lens for viewing antitrust problems is price theory.").

[9] *See infra* Appendix A.

[10] *The State of Antitrust Enforcement and Competition Policy in the U.S.*, AM. ANTITRUST INST. 15 (Apr. 14, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL.pdf (stating "[S]ince the [*US v. Microsoft*] case some 20 years ago and the handful of other cases litigated at that same time, the DOJ has actually brought only one comparatively insignificant Section 2 case.").

The Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. We believe the main reason for the radical concentration of power in these corporations is not any shortcoming in law, but the lack of political will by antitrust enforcers. We believe this lack of political will is exacerbated by the adherence of law enforcement agencies to dangerously flawed economic philosophies that largely brought us America's monopoly crisis in the first place.

In short, we believe law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws. Indeed, the Open Markets Institute believes that enforcers could push the law in the right direction simply by bringing more aggressive cases under existing legal standards. A good example of how this could work is *United States v. Microsoft Corp.*,[11] because today's digital platforms are following Microsoft's monopolistic playbook.

Similarly, federal antitrust enforcers also are not fully using the tools available to combat anti-competitive conduct. The FTC has a powerful tool with Section 5 of the FTC Act,[12] which is broader than the Sherman and Clayton Acts.[13] Through Section 5, the FTC can establish rules of fair competition and overcome bad Section 2 caselaw.[14] But the agency rarely uses this authority. The FTC also has investigative and rule-making authority that it could broadly deploy.[15]

One of the simplest ways for Congress to address the dangers posed by the platform monopolists is to demand that enforcers at the DOJ, FTC, FCC, and other agencies charged with keeping markets open and competitive, do their jobs aggressively.[16]

That said, the Open Markets Institute also believes that antitrust jurisprudence has in certain respects become so deeply flawed that contemporary interpretations of the law bear little or no resemblance to the original intent of Congress. In other words, three decades of monopoly-

[11] 253 F.3d 34 (D.C. Cir. 2001).
[12] 15 U.S.C. § 45.
[13] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *see also* FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394–95 (1953) (stating "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act -- to stop in their incipiency acts and practices which, when full blown, would violate those Acts") (internal citations omitted).
[14] Sandeep Vaheesan, *Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645 (2017), https://ssrn.com/abstract=2830702; Sandeep Vaheesan, *Unleash the Existing Anti-Monopoly Arsenal*, AM. PROSPECT (Sept. 24, 2019), https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/.
[15] 15 U.S.C. § 46 (authorizing the Federal Trade Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter[,]" which includes unfair methods of competition). *See also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (Oct. 2019), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.
[16] The FCC's has the authority to review proposed mergers of common carriers under Sections 7 and 11 of the Clayton Antitrust Act. *See* 15 U.S.C. §§ 18, 21(a). The FCC can also prohibit the transferring of spectrum licenses if the agency determines that the transfer is not in "the present or future public convenience and necessity" or if the transfer is not in the "public interest, convenience and necessity." *See* 47 U.S.C. §§ 214(a), 310(d).

friendly court decisions based upon libertarian "Chicago School" ideology have erected substantial and dangerous obstacles for Sherman Act Section 2 claims.[17]

The Open Markets Institute therefore would welcome efforts by Congress to strengthen antitrust standards by correcting wrongly decided court decisions. Further, the Open Markets Institute would also welcome efforts by Congress to remove complexity in antitrust doctrine and make antitrust cases easier, faster, and cheaper.

Specific to the digital marketplace, the Open Markets Institute believes there is a clear hierarchy in the importance and effectiveness of particular existing anti-monopoly laws in addressing the concentration of power by the platform monopolists. As Congress considers how it can act to reduce dangerous concentrations of power and control in the digital marketplace, the Open Markets Institute encourages members to use all the following tools in the following order.

Nondiscrimination and Neutrality

Many students of complex networks say that digital online technologies result in business models and corporate structures that are monopolistic by nature, and they point to a principle called network effects. Network effects arise when the value that a user derives from a product increases based on the number of other people who use it.[18] People want to be where their friends are, for example. A social network without a user's friends isn't much use.

There is nothing new about network effects. The same was true of transportation systems such as railroads and of communications systems such as the telephone, and American citizens have developed a wide array of simple tools during the past 150 years to prevent private actors from using such essential networks to manipulate and exploit individual citizens and businesses.

The single most important federal law aimed at such network monopolies was the Interstate Commerce Act (ICA) of 1887.[19] The basic aim of the ICA was to ensure that the operators of the network treated every customer the same, charging each one the same price for the same service. Such "common carrier" rules long predated the ICA at both the federal and state levels. But the ICA provided the first coherent federal framework and set of principles for regulating such essential services at the national level. In certain respects, it is the most important act in U.S. history for establishing the foundations for true rule of law, other than the Constitution itself.

Although the focus of this question centers on the Sherman and Clayton antitrust laws, it is impossible to understand these two laws without taking full account of the Interstate Commerce Act. The fundamental link between these legal regimes was made clear by Sen. John Sherman himself. In addition to providing a key model for the Interstate Commerce Act with his

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[17] *See infra* Appendix A.
[18] Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 5 (2001).
[19] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

authorship of the National Telegraph Act of 1866,[20] Sherman, in his famous speech promoting the antitrust law that bears his name, made clear the fundamental importance of common carrier rules.

"It is the right of every man to work, labor, and produce in any lawful vocation and *to transport his production on equal terms and conditions and under like circumstances*," Sherman said.[21] "This is industrial liberty, and lies at the foundation of the equality of all rights and privileges."[22] In other words, Sen. Sherman himself understood that his antitrust act both stood upon and built upon the foundation of the Interstate Commerce Act, which outlaws individually tailored discriminations by corporations with a monopoly over the provision of an essential service or good.

Google, Facebook, Amazon, Uber, and other platform monopolists are all, in multiple respects, modern analogs of the communications and transportation networks of the past. Each of them provides multiple essential services. Unfortunately, up until now, such rules have never been applied to these corporations. This is what has left them free to exploit their character as gatekeepers to discriminate in the pricing and delivery of their services, in ways that empower them to manipulate and exploit individual citizens, businesses, and indeed entire realms of our national life.

Fortunately, American citizens have a variety of ways to address this huge and pressing challenge. The simplest and most straightforward way would be for the Federal Trade Commission and/or the Federal Communications Commission to assert their full authority to regulate the terms of service and pricing behaviors of these platform monopolists. This is essentially what the FCC did to Internet Service Providers in 2015 with the Open Internet Order.[23]

Sen. Al Franken made this point simply in a November 2017 article in the *Guardian*: "As tech giants become a new kind of internet gatekeeper, I believe the same basic principles of net neutrality should apply here: No one company should have the power to pick and choose which content reaches consumers and which doesn't. And Facebook, Google, and Amazon – like ISPs – should be 'neutral' in their treatment of the flow of lawful information and commerce on their platforms."[24]

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[20] Post Roads Act of 1866, ch. 230, 14 Stat. 221, *repealed by* Act of July 16, 1947, ch. 256, 61 Stat. 327; *see also* RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 116 (2010) (denoting the Post Roads Act of 1866 as the National Telegraph Act).

[21] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (emphasis added).

[22] *Id.*

[23] FED. COMMC'NS COMM'N, FCC-15-24, In re Protecting and Promoting the Open Internet (Mar. 12, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

[24] Al Franken, *We Must Not Let Big Tech Threaten Our Security, Freedoms and Democracy*, GUARDIAN (Nov. 8, 2017, 2:20 PM), https://www.theguardian.com/commentisfree/2017/nov/08/big-tech-security-freedoms-democracy-al-franken.

If the FTC and FCC both fail in their duty, the Department of Justice, states attorneys general, and other agencies have a variety of other tools – including the Essential Facilities Doctrine – which they can use to achieve the same basic ends.[25] Obviously, Congress always has an absolute right to impose such rules on these corporations at any time, and the Open Markets Institute strongly encourages Congress to do so if these other institutions continue to fail to complete their mission of serving the public.

Structural Separations – Vertical and Horizontal

Applying common carrier rules to the platform monopolists will resolve many of the threats these corporations now pose to American democracy and American capitalism. But to finish the job of ensuring that these corporations provide neutral and fair service to all sellers and buyers, and all writers and speakers and all readers and listeners, it is necessary to completely separate ownership of the platforms from ownership of the goods, services, information, and entertainment sold across the platforms.

Structural separation has been the general rule for most of U.S. history in cases of network monopoly and essential services. We can trace clear prohibitions on such "vertical integration" at the federal level back to the National Bank Act of 1863,[26] in the midst of the Civil War. Such rules were also routinely imposed in the act of chartering corporations to engage in particular lines of business. As Lina Khan has written in *Separations of Platforms and Commerce*, such rules were a standard part of the antitrust toolkit and have been used to carefully restrict the powers of corporations such as AT&T and Microsoft.[27]

In every instance, the basic aim of such laws has been to ensure that corporate managers are not presented with conflicts of interest that might tempt them to not provide fair service to individuals and businesses that depend on these corporations to get to market.

Today, however, we see innumerable instances in which the platform monopolies have entered lines of business that put them into direct competition with the people and companies that depend on the platforms' services. Amazon, for instance, sells Amazon-produced books, movies, television shows, apparel, toys, electronics, foods, and even batteries, in addition to hundreds of other products, putting the giant corporation in direct competition against independent makers of these same products.[28] Google, meanwhile, has long pitted its own in-house versions of everything from travel services to advertising services to local business recommendations against similar services provided by independent companies. Clearly, in many such instances, the platform will have an interest in selling its own product before those of its customer/rivals.

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[25] *See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366, 377–79 (1973).*
[26] National Bank Act of 1863, ch. 58, 12 Stat. 665.
[27] Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019), https://ssrn.com/abstract=3180174.
[28] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 754 (2017) (stating "Amazon is a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading provider of cloud server space and computing power.).

Clearly, in all such instances, the platform has a variety of tools at hand with which to favor the sale of its own products over those of the independent companies that depend on the platforms to get to market.

These corporations have repeatedly demonstrated that they are absolutely willing to exploit their gatekeeper positions to promote their own interests over those of independent companies that depend on the platforms' services and over the interests of the public as a whole. Such self-dealing or self-preferencing has enabled these corporations to become the dominant providers of a vast and fast-growing number of goods and services.

The Open Markets Institute supports a solution that has been advanced by Sen. Elizabeth Warren: to structurally eliminate the platforms' conflicts of interest and remove both their incentives and their abilities to exclude competition.[29] Here again, the Open Markets Institute believes that existing law provides enforcers with tools that empower them to break up the platform monopolists along vertical lines in ways that would entirely eliminate all conflicts of interest. That said, action by Congress once again could yield a quicker, cleaner, and more comprehensive solution to the problem.

The Open Markets Institute also believes that enforcement agencies and Congress should immediately begin to study ways to break up the platform monopolists along horizontal lines, whenever the networked nature of the service does not make doing so difficult or impossible. The Open Markets Institute has long held that enforcers should simply reverse Facebook's acquisitions of WhatsApp and Instagram; these acquisitions of growing rivals violated the Clayton Act's prohibition of acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly," and should simply be undone.[30]

The Open Markets Institute has also encouraged enforcers to consider separating one platform monopoly from another, in instances where multiple such platforms have been tied together through acquisition. Google is particularly ripe for such restructuring, and the Open Markets Institute has publicly advocated that enforcers force Google's holding company to spin off YouTube, Maps, Android, and the corporation's suite of online advertising technologies, among other monopoly platforms. Such actions have ample precedent in U.S. law. One of the most famous such actions took place in 1913, when the Wilson administration forced AT&T to sell off the Western Union telegraph service.[31]

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[29] Elizabeth Warren, *It's Time to Break Up Amazon, Google, and Facebook*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c; *see also* Khan, *supra* note 27.

[30] The European Commission has already fined Facebook for saying during the merger review that it would not merge WhatsApp's data with Facebook's data, and then doing it anyway. Since then, WhatsApp co-founder Brian Acton admitted to being coached to tell European regulators that merging data would be difficult. It's highly likely that bad faith representations were similarly made to the FTC. *See* Parmy Olson, *Exclusive: WhatsApp Cofounder Brian Acton Gives The Inside Story on #DeleteFacebook And Why He Left $850 Million Behind*, FORBES (Sep. 26, 2018), https://www.forbes.com/sites/parmyolson/2018/09/26/exclusive-whatsapp-cofounder-brian-acton-gives-the-inside-story-on-deletefacebook-and-why-he-left-850-million-behind/#53c7e4983f20.

[31] Letter from Nathan C. Kingsbury to Attorney General J. C. McReynolds (Dec. 19, 1913).

Interoperability

The COVID-19 crisis has made it even clearer than before that Google, Amazon, Facebook, and other platform monopolists are, in many respects, utilities. In recent years, however, the platform monopolists have done an excellent job of characterizing any and all forms of utility regulation as being overly statist and destructive of innovation.

In fact, the American people have developed over the years a variety of ways to ensure that even essential utilities must compete in ways that force them to constantly innovate, both in terms of technology and in terms of service. One of the simplest ways to do so is to make it easy for upstart competitors to enter into direct rivalry with the incumbent utilities.

One of the most effective ways to achieve this goal has been to enforce interoperability requirements that make it easier for customers of one platform to shift their businesses to another platform. Over the years, regulators and antitrust enforcers have imposed interoperability requirements against AT&T and Microsoft, among others, opening up competition in long-distance calling, telephones, and internet browsers.[32]

For the platform monopolists, interoperability would allow users to authorize networks to securely communicate with one another, much like how consumers with different email providers can send emails to one another. It would help overcome the network effects barrier to entry. For example, interoperability would allow new social media platforms to integrate with Facebook's platform, using APIs offered on reasonable and nondiscriminatory terms, with consumers empowered to control which data is shared and with whom. Users' control over their data is critical to prevent privacy violations.

Facebook CEO Mark Zuckerberg recently offered his own ideas as to how to restructure these businesses, and one of his proposals was data portability.[33] This means that users could take their Facebook data to another platform. But data portability doesn't overcome the network effects barrier for new companies to compete with Facebook, because moving data to a platform that doesn't allow communication with friends is of little use to consumers.

The key thing to remember is that such interoperability requirements alone are not sufficient to deal with any of the fundamental political threats posed by the platform monopolists. On the

[32] United States v. AT&T Co., 552 F. Supp. 131, 224 (D.D.C. 1982) (imposing an equal access mandate to prohibit AT&T's discriminatory practices against long distance competitors and rival equipment manufacturers that were created by the breakup of the company), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983); New York v. Microsoft Corp., 224 F. Supp. 2d 76, 268 (D.D.C. 2002), *aff'd*, 373 F.3d 1199 (D.C. Cir. 2004) (detailing § III.D of the Microsoft Consent Decree which required the corporations to provide and disclose on non-discriminatory basis the APIs "used by Microsoft Middleware to interoperate with a Windows Operating System Product.").
[33] Mark Zuckerberg, *The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

other hand, once we have subjected these corporations to traditional common carrier rules and restructured them to reinforce their neutrality, interoperability requirements will go a long way toward ensuring that the utilities of tomorrow must work hard to provide the innovations that will keep their customers happy.

Exclusionary Conduct

The Open Markets Institute believes that the existing anti-monopoly laws of the United States are generally adequate to the task of protecting our democracy and liberty and promoting constructive and fair competition within open markets. America's present monopoly crisis is due not to any fundamental shortcomings in existing law, but rather to a combination of extremely weak enforcement made worse by the teachings of the deeply flawed, efficiency-fetishizing ideology used to interpret the law.

In the case of the platform monopolists, the combination of common carrier rules and careful restructuring of the corporations will solve the most dangerous threats posed by these corporations, but the Open Markets Institute believes that further steps are necessary to fully eliminate exclusionary conduct. Should the agencies and courts fail to take these steps or actively oppose them, then the Open Markets Institute would strongly support action by Congress to remove complexity from anti-monopoly law and to streamline monopolization cases so that citizens can attain justice more quickly and less expensively.

The Open Markets Institute has repeatedly made clear that the easiest way to remove complexity from the law and to streamline cases is to adopt Bright Line rules for structuring markets and limiting corporate behaviors. Such Bright Line rules were standard in U.S. anti-monopoly law and enforcement from the founding until the early 1980s. A good example of how such rules work is the 1968 Merger Guidelines published by the Department of Justice.[34] These rules set out a series of strict market-share tests for challenging horizontal, vertical, and conglomerate mergers. They also rejected pro-merger arguments that hinge on theoretical increases in productive efficiency.

The Chicago School ideology imposed on American anti-monopoly law in the early 1980s intentionally overthrew this Bright Line approach and replaced it with a largely subjective system of enforcement based on impossible-to-define standards and vague and easily manipulated guidelines. This gross distortion of the expressed will of Congress has stolen from Americans their single most important weapon against concentrated economic power, in ways that have undermined democracy and that have radically reduced individual liberty.

For instance, any citizen or business seeking to vindicate the right to a fair, competitive marketplace now has to spend huge sums to hire economic experts.[35] This is true also for the

[34] U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines [hereinafter 1968 MERGER GUIDELINES].
[35] Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers (detailing one expert that charges over $1,300 an hour).

government when it seeks to protect the public interest. In 2018, the FTC spent nearly $16 million on fees for testifying expert economists, despite the fact that the agency already employs some 80 economists with Ph.D.s in its own Bureau of Economists.[36] As a result, even in the most egregious of cases, monopolists' victims can rarely afford to sue for justice.

Bright Line rules would make antitrust enforcement more efficient and effective.[37] Specific to the online platform monopolists, Bright Line rules should be used to clarify outright the per se illegality of the following practices:

- Refusing to deal with customers and rivals.
- Prohibiting distributors, suppliers, or customers from doing business with rival firms.
- Penalizing purchasers who do not place a large share of their business with the firm.
- Tying the purchase of one good or service to the purchase of a separate good or service, whether done through contractual or technological means.
- Pricing below average variable cost on a significant volume of commerce.
- Most favored nation clauses.
- Using monopoly power in one market to create competitive advantage in a secondary market.
- Buying default installation or prime placement through slotting-fee agreements (such as Google's payment to Apple to set the default search engine for iOS devices to Google's product). Choice screens that present users with a range of competitive options, without those competitors having to pay to play, should replace such agreements.

Under Bright Line rules, a platform monopolist would be allowed to overcome the presumption of illegality under only very limited circumstances. To rebut this presumption, the firm should have to show that the practice is needed to introduce a new product or service and that a less restrictive alternative is not available.

As the Open Markets Institute made clear in recently filed comments on the FTC's proposed vertical merger guidelines, Bright Line rules should also clearly apply to vertical mergers. Here too, the Department of Justice's 1968 Merger Guidelines are a model for using clear rules to protect decentralized market structures in the digital economy. Congress should use the 1968 Merger Guidelines as a template for legislation that strengthens enforcement against vertical acquisitions by the platform monopolists.

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[36] *Oversight of the Enforcement of the Antitrust Laws: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019) (submitted testimony of the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1544480/senate_september_competition_oversight_testimony.pdf. *See also Bureau of Economics*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics (last visited Apr. 14, 2020). Note, the FTC does also enforce consumer protection law so some of these fees may not have been antitrust-related.

[37] Open Mkts., *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), https://promarket.org/restoring-antimonopoly-through-bright-line-rules/.

Congress should also remove court-imposed obstacles to anti-monopoly enforcement, and *Appendix A* lists court decisions that should be the highest priority for legislative repeal.

2. **Are existing laws that prohibit anti-competitive transactions adequate? Are current statutes and case law sufficient to address potentially anti-competitive vertical and conglomerate mergers, data acquisitions, or acquisitions of potential competitors?**

As we made clear above, the Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. And we believe that law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws

Of course, traditional case-by-case enforcement of the law will prove to be very time-consuming, and it is increasingly clear that the concentration of power and control in the hands of the platform monopolists grows more extreme and dangerous by the day.[38]

The COVID-19 pandemic and the resulting worldwide economic crisis have resulted in a sudden, sharp further consolidation of economic power and control by Google, Facebook, and Amazon. The essential nature of their communications, transportation, distribution services, and physical capacities has become only more obvious. And the corporations have in some respects become only more aggressive in exploiting this power to serve their private interests, which include the concentration of even more economic and political power than they now enjoy.

Recently, the Open Markets Institute called on Congress, the executive branch, and the courts to immediately impose a complete ban on all acquisitions by any corporation with more than $100 million in annual revenue and by any financial institution or equity fund with more than $100 million in capitalization, for the duration of the economic crisis set into motion by the COVID-19 pandemic. The Open Markets Institute believes that such a ban is needed to prevent a wholesale concentration of additional power by corporations that already dominate or largely dominate their industries, especially in ways that may significantly worsen the crisis that now threatens America's health, social, and economic systems.

The COVID-19 pandemic, however, has simply sped up processes that were already well under way, especially in the digital marketplace. That's why, even before the pandemic, the Open Markets Institute had already called for the FTC to impose a temporary ban on all acquisitions by Google, Apple, Facebook, and Amazon.[39] The Open Markets Institute recommends that such a ban be lifted only when the FTC certifies to Congress that it has fully investigated platform monopolists' exclusionary and predatory conduct and has brought the weight of the antitrust laws to bear in suing to stop such conduct in court.

[38] Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, 26 GEO. MASON L. REV. 395, 419–20 (2019) (detailing the length of antitrust cases).
[39] Letter from the Open Markets Institute, to Maureen Ohlhausen, Acting-Chair of the Fed. Trade Comm'n (Nov. 1, 2017), https://openmarketsinstitute.org/releases/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions/.

One particularly strong reason for such a ban on takeovers by Google, Apple, Facebook, and Amazon is the danger posed by platform monopolists' acquisitions of nascent competitors.[40] The platform monopolists have repeatedly – almost systematically – acquired the companies that posed competitive threats to them, while these rivals were still in their infancy. Often the platforms have exploited their control of underlying essential infrastructures both to identify such threatening upstarts and to strong-arm them into selling out. Because of their small size, such deals rarely even attract the notice of antitrust enforcers.

Another reason for such a ban is that the measures for evaluating mergers dictated by the Chicago School ideology – price and output – are of little use in assessing digital platforms' acquisitions of nascent competitors. Consumers often pay for digital services with data, not dollars. Unfortunately, like so many other antitrust principles intended to promote open markets, antitrust law's potential competition doctrine has been rendered toothless by overly burdensome legal standards introduced in recent decades. Here again, absent a coherent effort by enforcers to address this problem, Congress should create a structural presumption against the acquisition of competitive threats, in the spirit of the 1968 Merger Guidelines.[41]

Should Congress choose to make such a ban temporary, it should also require the platform monopolists – once the ban has been lifted – to ensure that the acquired assets never engage in any form of discrimination on price or terms and are completely and perpetually interoperable.

In addition, should Congress choose to make such a ban temporary, it should also require that the platform monopolists notify the FTC and DOJ of all acquisitions regardless of size. The legislation should require the FTC and DOJ to subject all such acquisitions to second requests and to provide the public with an opportunity to comment. The legislation should require enforcers to evaluate every acquisition by Google, Apple, Facebook, and Amazon based on the data that the acquisition would allow the platforms to collect, even if the acquisition target does not collect data. The legislation should ban any mergers that would allow a platform monopolist to acquire data or algorithmic machine learning that would either fortify the monopolist's market power or create entry barriers for competition.

In any such legislation, Congress should also require that, if the FTC or DOJ approve any acquisition by a platform monopolist, each agency must issue an in-depth statement to the public detailing the following: the scope of their investigation, any competitive concerns the agency

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[40] *FTC Hearing 3: Oct. 17 Session 4 Nascent Competition: Are Current Levels of Enforcement Appropriate?*, FED. TRADE COMM'N. (Oct. 17, 2018), https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-3-oct-17-session-4-nascent-competition-are-current-levels.

[41] 1968 MERGER GUIDELINES § 18(a)–(b) (stating "Since potential competition (i.e., the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants in the market" and a leading firm….The Department will also ordinarily challenge a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive 'disturbance' or 'disruption' that such entry might create….").

encountered or that were raised by third parties, why those concerns did not lead to a merger block, how the acquisition will impact privacy, whether the acquisition will enhance the platform monopolists' ability to acquire additional data or will transfer data or algorithmic machine learning to the platform monopolist, and how any such data acquisition will erect barriers to competitive entry or impact competition among existing market participants.

3. **Is the institutional structure of antitrust enforcement—including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—adequate to promote the robust enforcement of the antitrust laws?**

The Open Markets Institute believes there are a number of problems with the structure and behavior of antitrust agencies, with current levels of appropriations, with current levels of oversight, and with how we compartmentalize the discussions and authorities for the regulation of our digital marketplace. We also believe that Congress should move swiftly to make it easier for citizens to organize against the power of the platform monopolists.

The Role of Economics

Until the early 1980s, economics played a relatively minor role in the enforcement of antitrust laws. In large part, this was because comparisons of the relative efficiencies of different market structures were rarely needed in a regime characterized by Bright Line rules that aimed to protect particular political and social outcomes.

Beginning in the early 1980s, however, the Reagan administration, in tandem with introducing the flawed Chicago School ideology to competition policy, radically increased the role that economists played in determining what constitutes a just outcome in the enforcement of antitrust law. This included doubling the number of economists within the division by 1986, to nearly three economists for every 10 lawyers. And it included the decision to elevate the division's chief economist to the role of deputy assistant attorney general.

The Open Markets Institute believes that these changes played a major role in subverting the ability of the agencies to enforce U.S. antitrust law according to the original will of the American people as expressed through Congress. We further believe that Congress should now entirely reassess the role of economics within competition policy and reassess the relative levels of funding for economics within the agencies.

Appropriations

The Open Markets Institute calls on both federal and state legislators to allocate more resources to state attorneys general for the enforcement of antitrust laws.[42] The American people have long

[42] The Federal Government at one time financially supported state antitrust enforcement. *See, e.g.*, Pub. L. No. 94-503, § 309, 90 Stat. 2415 (1976) (authorizing the Attorney General of the United States to allocate funding "provide assistance and make grants to States which have State plans approved under subsection (c) of this section to improve the antitrust enforcement capability of such State.").

promoted competition among agencies in the enforcement of the law, to ensure effective checks and balances in economic regulation. One way the American people achieved this in antitrust was through the Clayton Antitrust Act, which ensures that every state in the United States has antitrust authorities equal to those of the federal government.[43]

In recent years, the wisdom of these actions has been made clear repeatedly. States attorneys general have time and again proven to be more aggressive in antitrust enforcement than the FTC or DOJ. Unfortunately, most states do not have sufficient staff members to pursue nearly as many cases as they would like. Bigger states such as New York have about a dozen antitrust lawyers. But many states only have one or even one-half of an antitrust enforcer. Congress should allocate funding for state enforcers to increase their teams and resources so they can enforce antitrust laws against digital platforms, which have tremendous amounts of funds available for their defenses.

Oversight

The Open Markets Institute believes that Congress, in its oversight capacity, must require greater reporting and transparency from the FTC about its investigative and enforcement efforts regarding platform monopolists. Congress should hold the FTC accountable for weak enforcement, such as the FTC's recent fines against Facebook and YouTube for repeated consent decree violations. Fines alone are not enough, because they don't change platform monopolists' destructive business models and anti-competitive practices. Google has handed over more than $9 billion to the European Commission since 2017 for antitrust violations, but Google has not fundamentally changed the ways that it excludes competition.

Congress should also pressure the FTC to use its 6(b) authority to study targeted advertising, disinformation, election interference, the monopolization of digital ad revenue by digital platforms, and other harms related to platform monopolies.[44]

Privacy

The Open Markets Institute believes that it is vital to promote greater coordination between enforcers of anti-monopoly law and privacy law. As we made clear in a letter last year, the Open Markets Institute believes that privacy law cannot be fully effective until it is buttressed by anti-

[43] 15 U.S.C. § 15c(1) (stating "Any attorney general of a State may bring a civil action in the name of such State as parens patriae on behalf of natural persons residing in such State in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of [the Clayton Act].").
[44] 15 U.S.C. § 46(b) (stating the FTC can require an entity to file "annual or special . . . reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.").

monopoly law.[45] As we also made clear, we believe that certain anti-monopoly policies – especially common carrier rules – can help to reduce many privacy concerns.[46]

In the digital marketplace, privacy and monopoly are intricately related.[47] Meaningful privacy reforms would, for instance, undercut Facebook's and Google's dominance because comprehensive tracking of users is required to support the platforms' targeted digital advertising business models, and privacy reforms would undercut Amazon's dominance because it uses data to disadvantage its competitors.[48] Massive data collection allows tech giants to strengthen their monopoly power and erect barriers to competitive entry.

Facebook, for example, has used its control of data to try to shut out rivals. Leaked internal Facebook documents revealed that CEO Mark Zuckerberg personally kept a list of strategic competitors, who were not permitted to access the Facebook Graph API.[49] Such behavior amounts to a discriminatory refusal to deal, which violates Section 2 of the Sherman Act under current legal standards. If a monopoly refuses to offer a service to a competitor that it offers to others, or if a monopoly has done business with the competitor and then stops for anti-competitive reasons, such behavior amounts to illegal monopolization.

In another leaked document, a Facebook employee suggested cutting off a competitor's access to Facebook's API and using privacy as a pretense to justify the move.[50] Facebook seems to define privacy as keeping consumers' data out of others companies' hands. Individuals, as consumers and as citizens, also need privacy protection from Facebook itself.

The most invasive forms of surveillance should be prohibited outright. As journalist David Dayen wrote in an article for *The New Republic*, "the U.S. can take one simple, legal step to roll back this dystopian nightmare: ban targeted advertising."[51] We support such a ban. At a minimum, microtargeted advertising should be banned for several months before elections.[52]

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[45] Letter from the Open Markets Institute, to Jan Schakowsky, Chair of the House of Representatives Subcomm. on Consumer Protection & Commerce, and Cathy McMorris Rodgers, Ranking Member of the House of Representatives Subcomm. on Consumer Protection & Commerce (Mar. 6, 2019), https://openmarketsinstitute.org/wp-content/uploads/2020/03/Open-Markets-Letter-to-House-Energy-and-Commerce-committee-on-Privacy-2.pdf.
[46] *Id.*
[47] *Id.*
[48] *See generally Hubbard Testimony 1*; *see also Hubbard Testimony 2*.
[49] THE DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, DISINFORMATION AND 'FAKE NEWS': FINAL REPORT, 2017–19, HC 1791 (UK), https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf.
[50] *Id.*
[51] David Dayen, *Ban Targeted Advertising*, NEW REPUBLIC (Apr. 10, 2018), https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google; *see also* Gilad Edelman, *Why Don't We Just Ban Targeted Advertising?*, WIRED (Mar. 22, 2018 7:00 AM), https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising/.
[52] Ellen L. Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST (Nov. 1, 2019, 6:51 PM), https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/.

Another way to protect privacy is through stronger antitrust enforcement against exclusionary conduct and illegal mergers that fortify monopoly power. Monopoly power allows platform monopolists to abuse consumers' privacy without losing their business to competitors because consumers have nowhere else to go.[53] Consumers pay monopoly rents of data and receive a lower-quality product, since privacy is a dimension of quality. Monopoly power also allows platforms to keep consumers in the dark about the ways that the platforms abuse consumers' privacy, and greater competition could help shed light on Big Tech's privacy violations. For example, the privacy-protecting search engine DuckDuckGo, in a bid for consumers' business, provides education through its newsletter on the ways that Google and other companies violate privacy.

Immunity for Illegal Behavior

The Open Markets Institute believes that Congress should reform Section 230 of the Communications Decency Act,[54] which at present gives the platform monopolists far-reaching legal immunity for actions that other corporations must police against. Section 230 was first enacted nearly a quarter of a century ago as part of the Telecommunications Act of 1996.[55] It grants broad immunity to "interactive computer services" from lawsuits seeking to hold the services liable for information published by an "information content providers."[56]

One example of an unintended consequence of Section 230 is that dominant platforms remain legally unaccountable for the libel, fake news, fraudulent content, bots, and hate speech flowing across their platforms. At the same time, however, these firms are uniquely and unfairly able to profit from the spread of such content, because they sell advertising next to it. But these platforms are in competition for advertising revenues with traditional publishers, who do not have Section 230 immunity. In addition to reforming Section 230, another possible solution to these imbalanced terms of competition would be to prohibit entities enjoying Section 230 immunity from selling advertising.

The online world and the offline world are no longer separate. Giving a carte blanche to internet actors to violate offline laws means that we live in a lawless society.

For instance, broadcasters and journalists are held to legal standards for political ads. Facebook, too, should be held to those same standards, or it should be prevented from selling those ads entirely. Similarly, wiretapping or reading someone else's mail is illegal, and, in 12 states, so is recording someone without their consent. Similar surveillance by platform monopolists should be illegal. Similarly, fair housing laws prohibit unlawful discrimination in advertising, yet even

[53] *See generally* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39 (2019).
[54] 47 U.S.C. § 230. Section 230 is actually Section 509 of the Telecommunications Act of 1996, which amended the Communications Act of 1934. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56; *See also* Matt Stoller, Sarah Miller, Zephyr Teachout, *Addressing Facebook and Google's Harms through a Regulated Competition Approach*, American Economic Liberties Project, April 2020.
[55] Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56.
[56] 47 U.S.C. § 230(c)(1)–(2).

after Facebook promised to stop this practice, a ProPublica investigation found that the discrimination persisted. Discrimination by algorithm should be just as illegal as discrimination by any other means.

Removing Obstacles to Private Antitrust Enforcement

The Open Markets Institute also calls on Congress to make it easier for citizens to bring class action lawsuits. The American people developed class action lawsuits, in ways that supplement government enforcement, to help deter corporations from abusing their power. In recent years, however, courts have used the constructs of antitrust injury and antitrust standing to erect many procedural obstacles that limit who can sue under the antitrust laws and under what circumstances they can sue.[57] These obstacles clearly flaunt the intent of Congress. Procedural barriers to private class actions, including the widespread use of clauses that require people harmed by monopolization to seek arbitration instead of suing in court, should also be eliminated.[58]

Protections for Concerted Activity and Cooperation Among Workers, Professionals, Small Firms, and Consumers

Along with controlling and reducing platform dominance, permitting the powerless to build power is a pillar of American democracy. Workers, professionals, small businesses, and consumers must have the right to band together to challenge concentrated economic power that has not been addressed by the law enforcement agencies. As a first step, federal antitrust enforcers must abandon all efforts to interfere with the right of independent actors to freely associate, including efforts to bargain collectively and organize boycotts.

To ensure that this freedom of association is durable and not subject to abrupt changes in prosecutorial discretion, Congress should enact a statutory right for workers, professionals, small businesses, and consumers to act in concert. It has an existing model on which to draw: the 1922 Capper-Volstead Act that protects cooperation among farmers and ranchers.[59] Congress should generalize the Capper-Volstead Act to cover workers, professionals, and small businesses (as defined by assets or revenue). A general Capper-Volstead Act would protect the right to engage in coordinated activity and establish public oversight of this concerted action.

As the history of cooperation among farmers shows, such action can be the basis for democratizing key sections of the economy. In the near term, cooperation among individually powerless actors can reduce inequality in the marketplace and yield fairer terms of trade with large corporations. In the medium and long term, collective action can serve as the foundation of democratically owned and operated enterprises that directly compete against investor-owned corporations.

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[57] *See infra* Appendix A.
[58] *See generally* Deepak Gupta & Lina Khan, *Arbitration As Wealth Transfer*, 35 YALE L. & POL'Y REV. 499 (2017); Sandeep Vaheesan, *We Must End Rule by Contract*, CURRENT AFF. (Aug. 19, 2019), https://www.currentaffairs.org/2019/08/we-must-end-rule-by-contract.
[59] 7 U.S.C. §§ 291–92.

In the interim, medium-sized and even large businesses should also be permitted to engage in limited forms of collective action when confronting dominant platforms. Toward this end, the Open Markets Institute supports the *Journalism Competition and Preservation Act* proposed by Rep. Cicilline. Until platforms' dominance is tamed, this measure is necessary to rebalance gross disparities in bargaining power.[60] The exemption is carefully circumscribed and structured in a way so that newspapers and other media outlets can engage in collective action for only certain ends and for only a limited time.

To conclude, our economy, businesses small and large, and consumers would all benefit from immediate action to rein in anti-competitive conduct and acquisitions by platform monopolists. Consumers benefit from the choice, innovation, and quality that robust competition brings. Consumers are also citizens who benefit from the free flow of speech. They are the employees of companies that will benefit when platform extraction ceases. And they are entrepreneurs who deserve an opportunity to compete in the digital marketplace based on merit.

Thank you once again for the opportunity to provide input on these important issues. I am available to answer any questions that may arise.

Best Regards,

Sally Hubbard
Director of Enforcement Strategy
Open Markets Institute

Joined by:
Athena Coalition (See list of coalition partners at https://athenaforall.org)
American Economic Liberties Project
Fight for the Future
Freedom from Facebook and Google Coalition (See list of coalition partners at https://www.freedomfromfacebookandgoogle.com)
Institute for Local Self-Reliance
Jobs with Justice
United 4 Respect
Frank Pasquale, Professor of Law at University of Maryland Francis King Carey School of Law

[60] Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2054/text?q=%7B%22search%22%3A%5B%22Hr+2054%22%5D%7D.

APPENDIX A

The following decisions and guidance documents should be the highest priority for legislative repeal:

Predatory pricing

- *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (requirement of below-cost pricing and dangerous probability of recoupment in predatory pricing cases)
- *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (skepticism toward predatory pricing claims; too high a bar to sustain a monopoly leveraging claim)
- *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (*Brooke Group* test extended to predatory bidding claims)

Refusal to deal

- *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004) (no refusal to deal claims when regulator can mandate duty to deal; skepticism toward all refusal to deal claims in *dicta* that has been expanded and applied widely by lower courts)
- *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 555 U.S. 438 (2009) (price squeezing claims recognized only when antitrust duty to deal exists)

Exclusionary and restrictive trade practices

- *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) (adoption of two-sided markets construct; requirement that plaintiff prove a net anti-competitive harm across two different markets)
- *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason)
-*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (requires proof of dangerous probability of monopolizing secondary market for monopoly leveraging claims; standard of proof means plaintiffs cannot bring suit until harm has already been done).
- *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477 (1977) (creation of antitrust injury doctrine)

-*Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) (multi-factored test to determine whether a plaintiff has standing to bring an antitrust action).

Arbitration

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (arbitration clauses with class action waivers enforceable against workers, despite National Labor Relations Act's protection of concerted conduct by workers)
- *American Express v. Italian Colors*, 570 U.S. 228 (2013) (arbitration clauses enforceable even when they prevent effective vindication of federal statutory claims)
- *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (preemption of state law limits on mandatory arbitration)
-*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (beginning of al line of cases that held antitrust antitrust disputes can be arbitrated). Previously, American Safety Equip. Corp. v. J.P. Macguire & Co., 391 F.2d 821 (2d Cir. 1968), had held that antitrust disputes are not appropriate subjects of arbitration.

Class certification standards

- *Comcast v. Behrend*, 569 U.S. 27 (2013) (heightened class certification standards)

Pleading standards and summary judgment

- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (heightened quantum of evidence needed to survive motion to dismiss)
- *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (heightened quantum of evidence needed to survive motion for summary judgment)

Standing for consumer plaintiffs in antitrust cases

- *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (no standing for indirect purchasers to obtain antitrust damages under federal law)

Testimony of Sally Hubbard

Director of Enforcement Strategy
Open Markets Institute

Before the
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

"Competition in Digital Technology Markets:
Examining Self-Preferencing by Digital Platforms"

March 10, 2020

Table of Contents

I. Introduction

Digital platform self-preferencing threatens the American Dream. When digital platforms pick the winners and losers of our economy, we lose the American promise of upward mobility based on merit. Increasingly, the platforms exploit their middleman positions to pick *themselves* as the winners of our economy.

Antitrust law aims to stop established companies from shutting out competitors. If entrepreneurs and businesspeople bring their hard work and the best products, services, and ideas forward, an open and freely competitive market rewards them with success and prosperity.

The corporations that rule online markets for goods, services, information, and news are all more than 20 years old and have dominated their respective arenas for more than a decade.[1] Amazon, Apple and Google have each reached $1 trillion in valuation.

In part, these corporations have done so through innovation, hard work, and bringing better products to market. Unfortunately, merit alone does not explain their phenomenal rise to positions of such power and control.[2]

Much of their success is due to having acquired hundreds of other companies, in ways that have enabled them to build intricate networks of essential services. Together, Facebook and Google have bought more than 150 companies since 2013.[3] Google alone has acquired nearly 250 companies since 2006.[4] At last count, Apple has bought more than 100 companies and Amazon nearly 90.[5]

Many of these acquisitions were illegal under the Clayton Act's prohibition of mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Think Google's acquisitions of Android and YouTube, and Facebook's acquisitions of Instagram and WhatsApp. Google also bought up the digital ad market spoke by spoke, including Applied Semantics, AdMob, and DoubleClick, cementing its market power in every aspect of the ecosystem.

Illegal mergers are half the picture, and illegal monopolization is the other half. The platform monopolists of the 21st century have long followed the monopolist's classic playbook, in which

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[1] Mark A. Lemley and Andrew McCreary, "Exit Strategy," *Stanford Law and Economics Working Paper #542*, December 19, 2019, Available at SSRN: https://ssrn.com/abstract=3506919.
[2] Daisuke Wakabayashi, "Google Reaches $1 Trillion in Value, Even as It Faces New Tests," *New York Times*, January 16, 2020; https://www.nytimes.com/2020/01/16/technology/google-trillion-dollar-market-cap.html.
[3] Rani Molla, "Amazon's Ring Buy Gives It the Same Number of Acquisitions This Year as Facebook and Google," *ReCode*, March 4, 2018, https://www.vox.com/2018/3/4/17062538/amazon-ring-acquisitions-2018-apple-google-cbinsights.
[4] CB Insights, *Infographic: Google's Biggest Acquisitions*, November 1, 2019, https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/.
[5] CB Insights, *Infographic: Apple's Biggest Acquisitions*, May 29, 2019, https://www.cbinsights.com/research/apple-biggest-acquisitions-infographic/; Crunchbase, Amazon Acquisitions; retrieved February 1, 2020, https://www.crunchbase.com/organization/amazon/acquisitions/acquisitions_list#section-acquisitions.

they exploit their positions as providers of multiple essential services to bankrupt, supplant, or sideline rivals in every market in which they operate. Specific to the subject of today's hearing, they first extract revenue and data from every seller and buyer on their platforms, few of whom have any real choice but to deal with them. They then combine this information with the power they possess as operators of essential platforms, to take over entire lines of business that depend on their platforms.

Because Google, Amazon, Facebook, and Apple each have monopoly power and engage in exclusionary conduct to acquire or maintain that power, I believe that each platform is illegally monopolizing in violation of Section 2 of the Sherman Act. I believe this is bad for every entrepreneur – bad for those who must rely on these services, and bad for those who create a clearly superior product or service and see that product or service stolen from them or choked off in favor of a product owned by the platforms. The number of businesses that are not at the mercy of the platform monopolists is declining every day, as the giants continue to expand into new business lines. That's why I believe that this distorted playing field strikes directly at the heart of the American Dream.

Obviously, this state of affairs also deprives consumers of the choice, innovation, quality, and pricing structures that come from real competition.

Let me be clear. I believe that each of these corporations provides useful, high-quality services to some portions of the public. But these benefits do not make monopolization OK, nor do they justify the exploitation of monopoly business models in ways that result in harm to entrepreneurs and innovators, and to independent business owners and employees. A factory that expels toxic smoke into the air can make a product that offers benefits to consumers, but that doesn't make pollution legal. Offering some benefits to consumers does not give Google, Amazon, Facebook, and Apple a free pass to break our antitrust laws.

We can begin to revive the American Dream and to help restore dynamism in our economy if we robustly enforce the antitrust laws again to prevent such self-preferencing by these providers of essential services. That's why today's hearing is so important.

II. The Platform Monopolists Are Operating Like Microsoft Did

When the Department of Justice and 20 states sued Microsoft in 1998, Microsoft's Windows operating system had a 95% share of the market for "Intel-compatible PC operating systems." Microsoft's Windows operating system was so dominant that companies that made personal computers didn't have a choice but to install Windows if they wanted to sell their computers. The DOJ and the states brought the case after Microsoft exploited this dominance to illegally squash a competitor to its Internet Explorer browser, the Netscape Navigator browser.

Rather than compete against Netscape to provide the best product, Microsoft used a variety of tactics to drive Netscape out of the market entirely. Microsoft required PC makers to pre-install

Internet Explorer in every PC that ran on Windows – in other words, on 95% of PCs. Microsoft also technically integrated Internet Explorer into Windows so that using a non-Microsoft browser would be difficult and glitchy.

Messages between senior executives showed Microsoft didn't think it could win against Netscape through fair competition. A senior Microsoft executive wrote: "Pitting browser against browser is hard since Netscape has 80% marketshare and we have 20%...I am convinced we have to use Windows — this is the one thing they don't have." He added that competition alone wasn't enough, saying "we need something more — Windows integration." The executive planned to offer an upgrade to Windows that "must be killer" on computer shipments "so that Netscape *never gets a chance* on these systems."[6]

In short, even if Netscape offered a browser that was superior to Internet Explorer, Netscape didn't have a shot. Sadly, the antitrust case against Microsoft came too late to save Netscape. But the government did win the case. And one result of that victory is that Microsoft was not free to use the same tactics against Google and other internet upstarts that it had used against Netscape. After taking over the internet browser market, Microsoft could have required computer makers to use its search engine, too. *U.S. v. Microsoft* made Microsoft curb its monopolistic practices, and – for a time – competition and innovation flourished.

Today, Google, Facebook, Amazon, and Apple are each following Microsoft's playbook from the 1990s, leveraging what I call "platform privilege" – the incentive and ability to favor their own goods and services over those of competitors that depend on their platforms. These platform monopolists get to both umpire the game and play in it, too.

A. Google Self-Preferencing in Android

Google is not a single monopoly, but rather a cluster of monopolies in multiple markets. Google Search accounts for 92% of internet search globally, and Google Android accounts for more than 85% of the world's smartphones.[7] Google has seven products with more than 1 billion users each: Search, Android, Chrome, YouTube, Maps, Gmail, and Google Play. In 2018, Google's ad revenue alone was $116 billion.[8]

Google has grown to the behemoth it is today both through hundreds of acquisitions and by leveraging its monopoly power to kick out rivals and take over markets.

Just as Microsoft used its monopoly in PC operating systems to exclude competition in internet browsers, Google used its monopoly power in mobile operating systems to exclude competition

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[6] U.S. District Court Findings of Fact, *U.S. v. Microsoft*, November 5, 1999, paragraph 166, https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iva.

[7] Statcounter, "Search Engine Market Share Worldwide Feb. 2019-Feb. 2020," *Global Stats*, retrieved March 1, 2020, https://gs.statcounter.com/search-engine-market-share; IDC, "Smartphone Market Share," retrieved March 1, 2020, https://www.idc.com/promo/smartphone-market-share/os.

[8] Statista, "Advertising Revenue of Google from 2001 to 2019," retrieved March 7, 2020, https://www.statista.com/statistics/266249/advertising-revenue-of-google/.

in mobile apps. The European Commission fined Google $5 billion in July 2018 for abusing its dominance by requiring phone makers using Android, with its 80% percent market share in Europe, to pre-install Google's apps and not competitors' apps.[9] This was the same tactic used by Microsoft when it required computer makers to pre-install its Internet Explorer browser and not Netscape's Navigator browser.

The way it worked is simple. Google wouldn't give phone makers Google Play, Android's must-have app store, unless the phone makers pre-installed Google Search and Chrome, among other apps such as Gmail, YouTube, and Maps, and did not pre-install competitors' apps.[10] The same as PC makers dealing with Microsoft, phone makers didn't have the power to disobey Google's anti-competitive requirements because they lacked a viable alternative operating system. As the world embraced the smartphone, Google's anti-competitive exclusion of competition allowed Google to extend its monopoly power in Search and Chrome from the computer desktop into the smartphone. Entrepreneurs who wanted to challenge any of Google's apps didn't have a shot at getting pre-installed on any phone that relied on Google operating systems, which makes up 85 percent of the world market.

Android users could still install competing apps after they got their phones, but users tend not to do that. When people already have a map app on their phones, they tend not to seek out another map app. This is a phenomenon known as default bias. Default bias is so powerful that Google paid Apple more than $9 billion in 2018 to be the default search engine on Apple devices, according to Goldman Sachs estimates.[11]

The European Commission ordered Google to stop its anti-competitive contracts in Europe and to offer consumers the choice of which apps are installed on their phones. Many question whether this fix is too little too late, because Google's apps have benefited from years of usage by billions of customers. Google has appealed the decision.

Meanwhile, Google sees that the world is beginning to move from mobile to wearables and smart devices. It's making moves to colonize the next frontier, not merely paying to be the default search engine on the Apple Watch but also purchasing FitBit, the largest smart watch company. The FitBit acquisition violates the Clayton Act because it will allow Google to acquire troves of data to fortify its monopoly power, while ensuring that Google's apps are the default on the new frontier, too.

Google's monopolizing tactics could continue indefinitely, as each new technology rolls out and the Internet of Things surrounds us, unless lawmakers and enforcers put an end to it. Enforcers

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[9] European Commission, "Statement by Commissioner Vestager on Commission Decision to Fine Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strenghten Dominance of Google's Search Engine," July 18, 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4584.

[10] The Capitol Forum, "Google EC Antitrust Enforcement: Expected Android EC Remedies Likely to Make Google Vulnerable to Competitive Threats in Mobile Advertising," September 30, 2016, http://createsend.com/t/j-189AEA75109E1FA5.

[11] Kif Leswing, "Apple Quietly Makes Billions from Google Search Each Year, and It's a Bigger Business than Apple Music," February 13, 2019, https://www.businessinsider.com/aapl-share-price-google-pays-apple-9-billion-annually-tac-goldman-2018-9.

and lawmakers must get out in front of new technologies to protect entrepreneurs and innovators from being trampled. Indeed, Google's dominance is now so great that even the biggest of automakers and appliance makers sit in Google's sights.

B. Google Self-Preferencing in Search

Google's monopoly on desktop and mobile search allow Google to control vast swaths of the internet. However, the exact proportion is unclear, because thus far Google has refused to release that information – even to Congress.

At a House Judiciary Subcommittee hearing in spring 2019, Google was asked whether it was true that fewer than 50% of total U.S. mobile and desktop searches on Google Search result in clicks to non-Google websites, as research had shown. When Google's representative gave an unclear answer, the Subcommittee followed up with written questions that requested a "yes or no" answer and even provided checkboxes.[12]

Google ignored the yes-or-no instruction and responded by saying, among other things, that Google has "long sent large amounts of traffic to other sites."[13] That should come as a given, because Google's search monopoly makes it the de facto directory of the internet – the Yellow Pages of the 21st century. In the same letter, Google answered a different follow-up question with a straightforward "no," making its failure to answer the earlier question with a "no" telling. With more than 90% of the worldwide search market, such extensive self-preferencing amounts to Google colonizing the internet – and the flow of information around the globe – to serve its interests.

Google's platform privilege means that Google could crush almost any entrepreneur who depends on Google's services, if Google decides to enter the entrepreneur's market. In recent years, Google has also been accused of prioritizing its own reviews, maps, images, and travel booking services in its search results, in ways that effectively destroy competition in these "vertical search" markets.

In 2017, the European Commission fined Google $2.7 billion for this abuse of platform dominance, finding that, on average, Google buried its comparison shopping competitors on the fourth page of Google search results. In effect, Google used its search monopoly to take over the comparison shopping market without competing on merit. The commission ordered Google to

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[12] Letter to Kent Walker, Chief Legal Officer of Google, from Representative David N. Cicilline, Chairman of the Subcommittee on Antitrust, Commercial and Administrative Law, Committee on the Judiciary, July 23, 2019, available at https://cicilline.house.gov/sites/cicilline.house.gov/files/7.23.2019_ACAL%20Company%20Clarification%20Requests.pdf.

[13] Letter to Chairman Cicilline from Kent Walker, Google Chief Legal Officer, July 26, 2019, available at https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/07.26.19%20-%20google%20response.pdf.

treat its competitors equally as it treats itself in search results. Complainants maintain the problem still has not been fixed.[14]

Google's platform privilege doesn't just destroy the dreams of entrepreneurs, it also means consumers get worse service, less innovation, and higher prices. "The Commission is concerned that users do not necessarily see the most relevant results in response to queries – this is to the detriment of consumers, and stifles innovation," reads a European Commission press release about the Google comparison shopping case.[15] One study concluded that Google degraded its search quality results in order to prioritize its own services or content that keeps users on Google search pages.[16] And the requirement that businesses of all sizes pay Google to appear at the top of searches for their business name is effectively a form of extortion, which wouldn't be possible if Google were required to deliver the most relevant results.

Google has rejected claims that it tries to hurt competitors and has appealed the EC decision.

C. Google Self-Preferencing in Digital Advertising

Google has far-reaching monopoly power in digital advertising, because it acquired every spoke of the ecosystem while exerting platform privilege.[17] The European Commission has fined Google nearly $1.5 billion for abusing its dominance in the market for the brokering of online search advertising.[18] Google has appealed.

When Google in 2007 bought DoubleClick, a marketplace for buying and selling digital advertising, the FTC did only a cursory investigation and cleared the deal. But one FTC commissioner at the time, Pamela Jones Harbour, dissented. Her predictions about how the merger could harm competition and threaten privacy were prescient.

"I am convinced that the combination of Google and DoubleClick has the potential to profoundly alter the 21st century Internet-based economy – in ways we can imagine, and in ways we cannot," wrote Jones Harbour in her dissenting statement. She argued that the FTC should take a closer look and answer several questions, including whether any other companies will have the ability to compete meaningfully in the market after the merger. The deal has potential to "harm

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[14] Foundem, "Google's CSS Auction: Different Name, Same Illegal Conduct," November 2, 2019, http://www.searchneutrality.org/google/google-css-auction-different-name-same-illegal-conduct; Foundem, "Google's Blatantly Non-Compliant 'Remedy' Part III," April 18, 2018, http://www.foundem.co.uk/fmedia/Foundem_Apr_2018_Final_Debunking_of_Google_Auction_Remedy/.

[15] European Commission, "Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service; Opens Separate Formal Investigation on Android," April 15, 2015, http://europa.eu/rapid/press-release_IP-15-4780_en.htm.

[16] See Luca, Wu, Couvidat, Frank & Seltzer, "Does Google Content Degrade Google Search? Experimental Evidence," *Harvard Business School* Working Paper, No. 16-035, September 2015, (Revised August 2016); Jack Nicas, "Google Has Picked An Answer For You—Too Bad It's Often Wrong," *Wall Street Journal*, November 16, 2017, https://www.wsj.com/articles/googles-featured-answers-aim-to-distill-truthbut-often-get-it-wrong-1510847867.

[17] CB Insights, "Infographic: Google's Biggest Acquisitions," May 2019, https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/.

[18] European Commission, "Antitrust: Commission fines Google €1.49 Billion for Abusive Practices in Online Advertising," March 20, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

competition, and it also threatens privacy," she wrote. "By closing its investigation without imposing any conditions or other safeguards, the Commission is asking consumers to bear too much of the risk of both types of harm."[19]

In 2019, 12 years after Jones Harbour's dissent, Texas Attorney General Ken Paxton spoke about Google's advertising dominance when he announced the investigation into Google by 51 state attorneys general. Paxton said, "They dominate the buyer side, the seller side, the auction side and the video side with YouTube."[20] If Google had not bought Doubleclick and then Admob, the leading mobile advertising company, plus a slew of other ad tech companies, things could have been different. These acquisitions violated Section 7 of the Clayton Act's prohibition of acquisitions that may substantially lessen competition or tend to create a monopoly.

D. Amazon Self-Preferencing

Amazon, too, is following the monopolist's playbook, picking and choosing which products to present on the screen of the consumer. Amazon is able to do so because it – in exactly the same way as Google – has grown so large that it is now an essential infrastructure through which manufacturers and other sellers reach customers.

Amazon does not merely control its marketplace. Amazon also acts as a retailer, buying products at wholesale and selling them on its platform (those are the products that say "sold by Amazon," also called "first-party" products), pitting itself against small, mid-sized, and large businesses that sell products on Amazon.com (known as "marketplace sellers"). Amazon also acts as a brand, selling its own private label products, both Amazon Basics products and products under more than 400 Amazon house labels.[21]

Everyone who sells on Amazon is effectively competing against Amazon and also dependent on Amazon. Many brands and small and mid-sized retailers have no choice but to sell on Amazon if they want to stay in business. No entrepreneur or businessperson wants to be dependent on their competitor, who can peek into their business, take a cut of their profits, push them out of the market, or put them out of business. That's not how the American Dream is supposed to work.

Amazon has excluded rivals from competing, which is the second element of illegal monopolization under Sherman Act Section 2. When Amazon wants to pressure a brand to let Amazon sell its products, Amazon has a practice of kicking out of the marketplace others who sell the brand's products.[22] This dynamic arises because many brands don't want their products

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[19] Dissenting Statement of Commissioner Pamela Jones Harbour In the Matter of Google/DoubleClick, December 20, 2007, https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

[20] Tony Romm, "50 U.S. states and territories announce broad antitrust investigation of Google," *The Washington Post*, September 9, 2019, https://www.washingtonpost.com/technology/2019/09/09/states-us-territories-announce-broad-antitrust-investigation-google/

[21] eMarketer, "Share of Amazon's Private-Label Products, by Product Category, March 2019," March 18, 2019, https://www.emarketer.com/chart/227300/share-of-amazons-private-label-products-by-product-category-march-2019-of-total-number-of-brands.

[22]The Capitol Forum, "Amazon Ousted Marketplace Sellers in Order to Be Only Seller of Certain Products; A Closer Look at Monopolization Enforcement Risk," June 14, 2018,

sold on Amazon, particularly brands with products that require customer service in physical stores. If marketplace sellers discount a brand's products online, then consumers go to the store to take advantage of the customer service, but they buy the products online. Quite logically, companies don't want to pay their employees to provide customer service on products that the company didn't sell, so stores stop carrying brands that are discounted on Amazon.

When a brand complains to Amazon that unauthorized sellers are discounting its products on Amazon's platform, Amazon typically responds that it can do nothing to help them because the marketplace is open and free. But Amazon will help the brand if it agrees to sell to Amazon directly. Amazon then kicks off the discounting sellers or signs an exclusive deal with a brand and gets rid of all other marketplace sellers, regardless of whether they offer discounts. Amazon literally ousts other sellers – its retail competitors – so that Amazon can be the only seller of a brand's products on its monopoly platform. Given that Amazon's platform now accounts for nearly $1 of every $2 spent online,[23] kicking rivals out of the game in this way amounts to illegal monopolization.

Amazon often justifies excluding competition on its platform as necessary for policing counterfeiters. But one seller told me he was kicked off the platform under the guise of counterfeiting, only for Amazon to turn to him for supply of the same supposedly counterfeit items so that Amazon could sell the goods first party. And other businesspeople have said Amazon tied policing against counterfeit products to high-dollar commitments to buy advertising on the platform,[24] which, according to most commonsense definitions, is clearly a form of extortion.[25]

When Amazon doesn't kick out competition entirely, it pulls a number of levers to distort competition in its favor. Amazon gives its own private label products and first-party products advantages over competitors in a number of ways: Amazon pushes its own products to the top of Amazon search results; Amazon gives itself premium advertising placement not available to others; Amazon pursues targeted marketing to Amazon customers based on data collected about them that only Amazon has; and Amazon possesses exclusive customer reviews that competitors

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http://thecapitolforum.cmail19.com/t/ViewEmail/j/96AD55196B0C02DE2540EF23F30FEDED/690A887987F4ABF13FEC1D8A50AFD3BD.

[23] J. Clement, "Projected Retail E-Commerce GMV Share of Amazon in the United States from 2016 to 2021," Statista, August 9, 2019, https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/.

[24] Statement of David Barnett, CEO and Founder of PopSockets LLC, Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, January 15, 2020, https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-Wstate-BarnettD-20200117.pdf. "It was not until December of 2017, in exchange for our commitment to spend nearly two million dollars on retail marketing programs (which our team expected to be ineffective and would otherwise not have pledged), that Amazon Retail agreed to work with Brand Registry to require sellers of alleged PopGrips to provide evidence, in the form of an invoice, of authenticity. As a result, in early 2018, our problem of counterfeits largely dissolved. (Soon thereafter Brand Registry agreed to enforce our utility patent, resulting in the disappearance of most knockoffs.)"

[25] See Testimony of Barry C. Lynn, President and Founder, The Open Markets Institute, before the Judiciary Committee of the Ohio Senate on The Nature of Threats Posed by Platform Monopolists to Democracy, Liberty, and Individual Enterprise, October 17, 2019, available at https://openmarketsinstitute.org.

can't access.[26] Sellers and brands cannot market to their Amazon.com customers because Amazon controls the relationship with customers.

Amazon also has control over the "buy box," the area to the right of the product description that contains the "Add to Cart" yellow button, which yields an estimated 90% of sales. "If you don't have the buy box, and you're the same price as Amazon, you get zero sales," one marketplace seller explained to me. Even if Amazon is not the exclusive seller, "there's no reason to be in the listing as a marketplace merchant if Amazon is selling it first-party," said the seller. "You basically have to liquidate your inventory."[27] Amazon is picking the winners and losers of commerce – and the winner is Amazon.

Such behavior can be especially problematic in particular markets. As the Open Markets Institute has argued extensively in recent years, one such market is books. Amazon today is the dominant marketplace for books, a provider of essential retailing and other services to just about every publisher in the United States. At the same time, Amazon is fast increasing its in-house publishing operations, meaning that Amazon finds itself with a daily increasing incentive to manipulate the interaction between authors and publishers – and readers – in ways that disfavor the books of other publishers and that favor books published by Amazon. Amazon has shown itself willing even to entirely shut down the sale of books by certain publishers for not acceding to Amazon demands. For more than six months, Amazon shut down sales of books published by Hachette. Clearly, Amazon has the capacity to use its power over publishers not only for its own financial benefit, but for its political benefit.[28]

Robert Pitofsky, former chair of the Federal Trade Commission, has pointed out that this type of monopolization can be especially dangerous. "Antitrust is more than economics," he told *The Washington Post* in 2000. If "somebody monopolizes the cosmetics fields, they're going to take money out of consumers' pockets, but the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond what the wholesale price of the books might be."[29]

The overall social and economic effects are also dangerous, in many ways. Whether Google puts its shopping competitor on page four of its search results or Amazon puts its brand or retailer

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[26] Julie Creswell, "How Amazon Steers Shoppers to Its Own Products," June 23, 2018, https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html; The Capitol Forum, "Amazon: EC Investigation to Focus on Whether Amazon Uses Data to Develop and Favor Private Label Products; Former Employees Say Data Key to Private Label Strategy," November 5, 2018, https://thecapitolforum.com/wp-content/uploads/2018/11/Amazon-2018.11.05.pdf.

[27] The Capitol Forum, "Amazon: Amazon at Risk of Antitrust Investigation for Working With Manufacturers to Control Prices, Foreclose Competing Sellers, and Ultimately Monopolize Direct Sales of their Products on its Platform," March 7, 2017, http://createsend.com/t/j-60990BCFC736F15D.

[28] David Streitfeld, "Accusing Amazon of Antitrust Violations, Authors and Booksellers Demand Inquiry," July 13, 2015, https://www.nytimes.com/2015/07/14/technology/accusing-amazon-of-antitrust-violations-authors-and-booksellers-demand-us-inquiry.html; Open Markets Institute, "Open Markets, Authors United Letter to DOJ Regarding Amazon," May 6, 2018, https://openmarketsinstitute.org/testimony_letter/open-markets-authors-united-letter-doj-regarding-amazon/.

[29] Alec Klein, "A Hard Look at Media Mergers," *The Washington Post*, November 29, 2000, https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055/.

competitors at the bottom of its search rankings, the result is the same. The giants are taking their monopolies in one market and leveraging them to take over new markets that depend on their platforms, making competition impossible. They claim monopolies for themselves in the secondary markets, while maintaining and growing their monopoly power in their primary markets. In the process, these platforms crush entrepreneurs and businesses of all sizes. Employees of those businesses lose jobs or get paid less. And this monopoly dynamic degrades the quality of offerings to consumers, who should get the most relevant product search results, not results that prioritize Amazon's or Google's profits.

The problem is getting worse fast. As Amazon rolls out Alexa in 100 million devices, it's creating an entirely new and extreme version of platform privilege. With its "Alexa everywhere" program, Amazon aims to be the platform that pervades every aspect of our lives, from our appliances, to our cars, to every room in our houses. This provides countless opportunities for Amazon to favor its own products and services. Scott Galloway, a professor in New York University's Stern School of Business, conducted an experiment in which he asked Alexa for batteries, and the one answer Amazon provided was its own Amazon Basics brand of batteries. The problems of Amazon and Google putting themselves first in search results will intensify when voice search brings only one search result or a small number of results. Forget about being on page four of Google search or the bottom of Amazon's search ranking – if your product or business is not answer number one, two, or three in a voice search, your business might as well not exist.

Like Google, Amazon can also take other people's businesses and ideas almost at will. Amazon can see that a product is selling well because Amazon has all the data on product sales and customers, so Amazon can easily cut innovators out of the equation and make the product itself. Amazon can put its product at the top of the search results. Its product can quickly amass positive reviews because Amazon controls the ratings program. Amazon can give its knock-off product premium advertising space not available to the original innovator, and it can precisely target potential buyers of the product based on the innovator's customer data, the data of other companies that sell on its platform, and the data Amazon has collected on Amazon Prime members.[30] For example, an innovative laptop stand company one day discovered that its sales had plummeted, after Amazon began to rank its own imitation stand above the company's product in Amazon search results.[31]

When Amazon launches a house-brand product, the effect is different from the long-standing practice of stores making their own generic versions of other products. In the case of a retailer that is not dominant, such as a store with many competitors, the act of introducing house-brand products does not violate the antitrust laws, because the store does not have the ability to leverage monopoly power to sell that product. The products that are put into competition with the house-brand product are not harmed in the overall marketplace, because there are many other stores available to sell those products. In other words, the types of conduct that are exclusionary

[30] Karen Weise, "Prime Power: How Amazon Squeezes the Businesses Behind Its Store," *The New York Times*, December 19, 2019, https://www.nytimes.com/2019/12/19/technology/amazon-sellers.html.
[31] Spencer Soper, "Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too," *Bloomberg*, April 20, 2016, https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too.

and illegal when a firm has monopoly power are not illegal when a firm does not have monopoly power.

Not only does Amazon have monopoly power over the platform, but Amazon also controls the data about its competitors' businesses and customers. A former Amazon employee told me that, in his view, the most valuable data Amazon collects is who has searched for a particular product in the past. This "consideration data" allows Amazon to "target their private label products with perfect precision," he said.

In addition to Amazon's ability to see how many units of each product sell at a particular price point and to whom, the former employee told me that its "discount provided by Amazon" practice allows it to "conduct a controlled experiment" on third-party sellers' products. In November 2018, *The Wall Street Journal* reported that Amazon was discounting prices for products offered by third-party sellers without their knowledge or consent. Amazon would subsidize the discount and pay a refund to the seller, who had no ability to opt out of the discounting program.[32]

The discounting practice allowed Amazon to get price sensitivity data on products that Amazon does not itself sell, the past employee explained. Amazon could learn, for instance, that "if we raise the price a dollar, we get this demand, and here's the demand at a lower price point," to precisely identify the optimal price point to launch Amazon's own version of the product, the former employee explained. Entrepreneurs and businesses of all sizes don't have access to comparable data and cannot fairly compete against Amazon. And because these entrepreneurs cannot survive without putting their products on Amazon's platform, these entrepreneurs are forced to hand over their proprietary business information to their competitor.

Importantly, the tactics that Amazon employs to harm competition on its e-commerce platform are really only one part of the problem. Amazon pulls similar strings in its cloud computing arm, Amazon Web Services (AWS), to co-opt innovations of others, reports *The New York Times*. "It has given an edge to its own services by making them more convenient to use, burying rival offerings and bundling discounts to make its products less expensive," *The Times* reported. Some in the software community call what Amazon does "strip-mining." Yet, the same as Amazon's e-commerce marketplace, rivals don't feel that they have a choice to walk away from AWS because of its market power.[33]

E. Apple Self-Preferencing

Apple has monopoly power in its App Store because there's no real substitute for the App Store for owners of iPhones, iPads, and Apple Watches. As Apple grows into additional lines of business, it exerts platform privilege. Apple has been accused of discriminating against Spotify

[32] Laura Stevens, "Amazon Snips Prices on Other Sellers' Items Ahead of Holiday Onslaught," November 5, 2017, https://www.wsj.com/articles/amazon-snips-prices-on-other-sellers-items-ahead-of-holiday-onslaught-1509883201.
[33] Daisuke Wakabayashi, "Prime Leverage: How Amazon Wields Power in the Technology World," *The New York Times*, https://www.nytimes.com/2019/12/15/technology/amazon-aws-cloud-competition.html.

and giving favorable treatment to Apple Music.[34] Spotify recently sued Apple in Europe, arguing that Apple has leveraged its platform dominance to distort competition with unfair app store terms.[35]

The general counsel of Tile, a software and hardware company that helps people find misplaced items, made similar claims when testifying before the House Judiciary Committee in January 2019.[36] Apple launched an app called FindMy that competes directly with Tile. Apple pre-installs this app and makes it impossible to delete, giving Apple the benefit of default bias. Apple pulls other anticompetitive levers to disadvantage Tile, according to the testimony. This includes kicking Tile's products out of Apple's physical stores, making Tile harder to find on the iPhone, and making it difficult for consumers to enable their Tile devices. As Apple plans to enter more and more markets, including streaming TV, credit cards, and online gaming, Apple's practice of simultaneously umpiring the game and playing in the game can only increase.[37]

Every time Apple introduces a new version of its iPhone operating system iOS or its Mac operating system OS X, it incorporates the features of the most popular apps that other innovators built.[38] Apple has been doing this for so long that developers have named the phenomenon getting "Sherlocked."[39] That term dates all the way back to the early 2000s, when Karelia Software developed a competitor to Apple's Sherlock search tool and named it Watson. Apple simply added Watson's functionality into the next version of Sherlock, killing its rival Watson.[40]

Apple's App Store accounts for 65% of global app revenue.[41] Much like Amazon does for product innovators, Apple represents an essential platform that controls access to the sales necessary for an entrepreneurs' businesses to survive.

In the recent case *Apple v. Pepper*, the U.S. Supreme Court ruled that consumers have the right to sue Apple for charging them a 30% commission on every app sale.[42] The plaintiffs are consumers who argued that Apple used its monopoly power to charge them more for their iPhone apps than they would have paid in a competitive market. They argued that, when app

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[34] Daniel Ek, "Consumers and Innovators Win on a Level Playing Field," March 13, 2019, https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/.
[35] Id.
[36] Testimony of Kirsten Daru, Chief Privacy Officer and General Counself for Tile, Inc, On Online Platforms and Market Power Part 5: Competitors in the Digital Economy, Before the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, January 17, 2020, https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-Wstate-DaruK-20200117.pdf.
[37] Id.
[38] Buster Hein, "8 Apps Apple Killed Today at WWDC," *Cult of Mac*, June 10, 2013, https://www.cultofmac.com/231121/seven-apps-apple-killed/.
[39] Mikey Campbell, "F.lux Says It is 'Original Innovator' of Nighttime Display Colortech, asks Apple to Open Night Shift API," *Apple Insider*, January 14, 2016, https://appleinsider.com/articles/16/01/14/flux-says-it-is-original-innovator-of-nighttime-display-color-tech-asks-apple-to-open-night-shift-api.
[40] William Gallagher, "Developers Talk About Being 'Sherlocked' as Apple Uses Them 'for Market Research,'" June 6, 2019, https://appleinsider.com/articles/19/06/06/developers-talk-about-being-sherlocked-as-apple-uses-them-for-market-research.
[41] Craig Chapple, "Global App Revenue Grew 23% Year-Over-Year Last Quarter to $21.9 Billion," *Sensor Tower*, October 23, 2019, https://sensortower.com/blog/app-revenue-and-downloads-q3-2019.
[42] *Apple, Inc. v. Pepper*, 587 U.S. __ (2019), https://www.supremecourt.gov/opinions/18pdf/17-204_bq7d.pdf.

prices go up, iPhone users are unlikely to switch to an Android phone, so the Android app store doesn't meaningfully constrain the commission that Apple can charge.[43] Like other tech giants, Apple extracts revenue on its own terms because it lacks competition. In 2018, this 30% tax – the so-called Apple tax – brought in nearly $14 billion of revenue for Apple.[44]

Because users and developers of iPhone apps must go through Apple's bottleneck, Apple dictates the terms under which iPhone owners purchase apps and under which iPhone app developers sell their apps. Apple can remove iPhone apps from the App Store and thereby the market as it wishes.[45] Open Markets argued in its amicus brief that, under long-standing Supreme Court precedent, iPhone users have the right to bring suit against Apple for harms caused by this retail monopoly.[46] The court decision, in agreement with our amicus brief, states that purchasers and sellers injured by a monopolist have the right to seek damages: *"A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs... when the retailer's unlawful conduct affects both the downstream and upstream markets."*[47]

The Court noted the possibility that "app developers will also sue Apple on a monopsony theory."[48] Monopsony is a huge problem in an economy where tech giants serve as gatekeepers that set the terms and conditions for suppliers and creators to do business. App developers can't negotiate the 30% Apple Tax that is charged to buyers of apps, nor do they have the power to stop Sherlocking.

F. Facebook Self-Preferencing

Facebook picks the winners and losers of internet content. It favors content that most serves its $1-billion-per-week targeted advertising business model, to the detriment of a freely competitive marketplace of ideas and democracy.

Facebook's behavior causes many economic and political problems.

One of the most egregious is that Facebook manipulates information and news flows in ways that have been proven to actually *boost* disinformation and hateful content. The source of the problem is simple: In order to keep users on the platform longer, the corporation's algorithms prioritize "engagement" (i.e. clicks, likes, comments, and shares). Content that provokes fear and

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[43] European Commission, "Antitrust: Commission fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine," July 18, 2018, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.
[44] Craig Chapple, "Global App Revenue Grew 23% Year-Over-Year Last Quarter to $21.9 Billion," *Sensor Tower*, October 23, 2019, https://sensortower.com/blog/app-revenue-and-downloads-q3-2019
[45] Andrew Liptak, "Apple Explains Why It's Cracking Down on Third-Party Screen Time and Parental Control Apps – Following the Debut of Its Own Screen Time App," *The Verge*, April 28, 2019, https://www.theverge.com/2019/4/27/18519888/apple-screen-time-app-tracking-parental-controls-report.
[46] Brief of *Amicus Curiae* Open Markets Institute in Support of Respondents, *Apple, Inc. v. Pepper*, U.S. Supreme Court, filed October 1, 2018, available at https://openmarketsinstitute.org/amicus_briefs/open-markets-institute-files-amicus-brief-supreme-court-support-iphone-owners-challenging-apples-retail-monopoly-iphone-apps-2/.
[47] *Apple, Inc. v. Pepper*, 587 U.S. __ (2019), https://www.supremecourt.gov/opinions/18pdf/17-204_bq7d.pdf.
[48] *Id.*

anger – the most incendiary content – "engages" humans the most.[49] Much the same set of problems occur on Google's YouTube video platform.

As people spend more time on Facebook and YouTube's platforms, the platforms collect more data, they show more ads, and they make more money. Giving incendiary content top priority best serves Facebook and YouTube's business models because "engagement" makes them the most money. Their amplification of hateful content is not an inevitability of the internet or human nature. It's just a business decision, to prefer content that generates the most profits under a chosen business model.

One reason Facebook and YouTube can get away with this is because they lack competitive constraint. If competition existed among algorithms and the way content is prioritized and delivered, then users could choose platforms that don't worsen anxiety and polarization. An even more fundamental reason is that these monopolies are not constrained by the sorts of common carriage rules that U.S. citizens have applied to all previous providers of essential commercial and communications services. This leaves platform monopolists with a de facto license to manipulate sellers and buyers by providing individuals with different pricing and terms for the same services, or with different service for the same price.

Facebook also uses its control of infrastructure to spy on competitors. In 2013, Facebook bought an app called Onavo that allowed it to detect early competitive threats, so Facebook could buy them or build its own versions.[50] After reviewing internal Facebook documents it had seized from a plaintiff in a private lawsuit against Facebook, the U.K. Parliament concluded: "Facebook used Onavo to conduct global surveys of the usage of mobile apps by customers, and apparently without their knowledge. They used this data to assess not just how many people had downloaded apps, but how often they used them. This knowledge helped them to decide which companies to acquire, and which to treat as a threat."[51]

In the documents, one executive was explicitly worried about mobile messaging apps as a competitive threat, and the executive used Onavo data to identify WhatsApp as Facebook's biggest competitor. Onavo data revealed that WhatsApp was sending more than twice as many messages per day as Messenger.[52]

As with the other tech giants, entrepreneurs trying to compete against Facebook don't get to compete on merits in open markets. Facebook has a history of taking entrepreneurs' ideas when

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[49] Tobias Rose-Stockwell, "This is How Your Fear and Outrage are Being Sold for Profit," *Quartz*, July 28, 2017, https://qz.com/1039910/how-facebooks-news-feed-algorithm-sells-our-fear-and-outrage-for-profit/; Marcia Stepanek, "The Algorithms of Fear," *Stanford Social Innovation Review*, June 14, 2016, https://ssir.org/articles/entry/the_algorithms_of_fear.

[50] Elizabeth Dwoskin, "Facebook's Willingness to Copy Rivals' Apps Seen As Hurting Innovation," *The Washington Post*, August 10, 2017, https://www.washingtonpost.com/business/economy/facebooks-willingness-to-copy-rivals-apps-seen-as-hurting-innovation/2017/08/10/ea7188ea-7df6-11e7-a669-b400c5c7e1cc_story.html.

[51] Damian Collins MP, Chair of the UK Parliament Digital, Culture, Media and Sport Committee, "Summary of Key Issues from Six4Three Files," December 2018, www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf.

[52] Charlie Warzel and Ryan Mac, "These Confidential Charts Show Why Facebook Bought WhatsApp," *BuzzFeed News*, December 5, 2018, https://www.buzzfeednews.com/article/charliewarzel/why-facebook-bought-whatsapp.

they refuse to sell their companies to Facebook. *The Wall Street Journal* reported that Facebook CEO Mark Zuckerberg met with the founders of Snapchat and Foursquare and gave them two options: "either they accept the price he was offering for their companies, or face Facebook's efforts to copy their products and make operating more difficult." Small businesses and newspapers, too, can find their fortunes changed by the flip of a switch, when Facebook makes algorithmic changes that harm their ability to reach their customers and that keep users within Facebook's digital walls.

III. Solutions

Some say tech markets are "winner take all" or monopolistic by nature, and they point to a principle called "network effects." Network effects arise when a user's value from a product increases based on the number of other people who also use it. People want to be where their friends are, for example. A social network without a user's friends isn't much use.

But the same was true for the AT&T monopoly. A phone network would serve no purpose if people couldn't call their friends. Instead of just writing off the phone market as "winner take all," the government applied common carrier rules to AT&T, as it had to the telegraph companies earlier. The government, early in the last century, also required AT&T to connect to other networks, much in the same way that it required large railways to connect to short lines. These requirements are known as interoperability requirements. Much later in AT&T's life, in 1982, the government also broke up the monopoly.

By allowing illegal acquisitions and illegal monopolization, and by abandoning rules and regulations designed to neutralize and/or decentralize communications networks, the government cleared the way for private corporations such as Google and Amazon to monopolize many markets. This was not inevitable; these were policy choices. Congress can now make the opposite choice and start reviving the American Dream.

The goals of reinvigorated antitrust enforcement should be to open the gates of competition to new innovators, to decrease market concentration, to restore dynamism by halting illegal monopolization that kicks competitors out of the game, and to ensure the basic rule of law for all sellers and buyers. Antitrust enforcement should reduce chokepoints so that maximum innovation can occur. Entrepreneurs with new and better business models are waiting in the wings. Antitrust enforcement should aim to enable these new startups to compete and to bring their innovations to users.

Congress and law enforcers can take a number of actions that will help achieve these goals. These include:

A. Stronger Enforcement and Standards Against Exclusionary Conduct

Enforcers need to bring more monopolization cases, such as *United States v. Microsoft*, against anticompetitive conduct. Congress should strengthen rules against exclusionary conduct, as Sen. Amy Klobuchar proposes in her new bill. Legislation should also overrule the procedural

obstacles that courts have erected to limit who can sue under the antitrust laws and under which circumstances they can sue.

Legislators should aim to remove complexity and make antitrust cases easier, faster and cheaper. Anyone seeking to claim their right to a competitive marketplace has to spend millions of dollars to hire economic experts. Monopolists' victims can rarely afford to sue them, and this enormous expense also affects enforcers' calculus of whether or not to bring cases.

B. Structural Separation

I support a solution that has been advanced by Sen. Elizabeth Warren and antitrust scholar Lina Khan: structurally eliminate the platforms' conflicts of interest and remove their incentive and ability to self-preference.[53] Otherwise, enforcers will lose at a game of whack-a-mole, unable to monitor and enforce against almost limitless opportunities for self-preferencing. Such a structural solution is not a novel concept. As Lina Khan writes in *Separations of Platforms and Commerce*, the U.S. has used structural separation as a standard regulatory tool in industries such as railroads, banking, telecommunications, and TV. Separation could be the remedy in monopolization cases, but a quicker and clearer route would be for Congress to require separation through legislation.

C. Nondiscrimination and Neutrality

Congress should also require the platforms to offer equal access on equal terms to all, just as has been done with railroads, buses, airlines, pipelines, electricity, and hotels, to name a few. Otherwise, the platforms will still control the competitive playing field and extract tolls from companies that must use their infrastructure.

Tech platforms that provide essential communications and information services should be subject to rules that prohibit discrimination in price or terms, which we have repeatedly applied to network monopolies in our history. From the post office to the telegraph to cable TV, American government has required nondiscrimination policies to protect the free press and democracy.

Non-discrimination and neutrality will be increasingly important as platform monopolists continue to roll out algorithms that can discriminate on price and terms by virtue of their personalization. The separation of platforms from commerce will reduce the incentives to discriminate but not eliminate them, so neutrality principles would still be required in the event of such separation or a monopoly breakup of any kind. Nondiscrimination can be executed through legislation, and it can also be a remedy in monopolization cases, with the latter approach being more piecemeal.

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[53] Elizabeth Warren, "It's Time to Break Up Amazon, Google, and Facebook," *Medium*, March 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c; Lina Khan, "The Separation of Platforms and Commerce," 119 *Columbia Law Review* 973, May 28, 2019. Available at SSRN: https://ssrn.com/abstract=3180174.

D. Merger Enforcement

Antitrust enforcers need to be more aggressive about suing to block mergers of all kinds, but particularly acquisitions of competitive threats. Tech platforms, for instance, are acquiring companies that pose competitive threats to them, often while still in their infancy, sometimes using their control of infrastructure to identify such threatening upstarts when they are new and small. The deals barely even register on the radar of antitrust enforcers.

Enforcers also need to evaluate every merger involving the acquisition of data and machine learning, which may tend to lessen competition or fortify monopoly power.

The Open Markets Institute has called for temporary bans on acquisitions by the biggest platform monopolists. In November 2017, for example, OMI wrote to the FTC requesting that the FTC: conduct a thorough review of Facebook's dominance in social networking and online advertising; assess the hazards that this dominance poses to commerce and competition, basic democratic institutions, and national security; and issue recommendations on how to address these threats. OMI asked the FTC to adopt a presumptive ban on all acquisitions by Facebook until it completed the requested review.

Enforcers should also unwind illegal mergers that they didn't catch.

Enforcers, for example, should undo Facebook's acquisitions of WhatsApp and Instagram as violating the Clayton Act's prohibition of acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." The European Commission has already fined Facebook for saying during the merger review that it would not merge WhatsApp's data with Facebook's data, and then doing it anyway. Since then, WhatsApp co-founder Brian Acton admitted to being coached to tell European regulators that merging data would be difficult.[54] It's highly likely that bad faith representations were similarly made to the FTC.

Antitrust enforcers should also sue to block more vertical mergers. The Open Markets Institute recently filed comments on the FTC's proposed vertical merger guidelines. The comments argued the proposed guidelines have fundamental deficiencies, and the comments set forth recommendations for more and stronger bright-line standards.

Congress could also shift the burden of proof to the merging companies: Instead of the government having to prove a merger is anti-competitive, the companies should have to prove that a merger is good for competition. Our economy is so concentrated that mergers are more likely than not to be anti-competitive, and a major course correction is needed.

E. Privacy

[54] Parmy Olson, "Exclusive: WhatsApp Cofounder Brian acton Gives the Inside Story on #DeleteFacebook and Why He Left $850 Million Behind," *Forbes*, September 26, 2018, https://www.forbes.com/sites/parmyolson/2018/09/26/exclusive-whatsapp-cofounder-brian-acton-gives-the-inside-story-on-deletefacebook-and-why-he-left-850-million-behind/#2165dc6d3f20.

Strong privacy rules – not crafted by lobbyists for the platform monopolists – would not only protect Americans from ubiquitous surveillance, but would also level the competitive playing field, because data are a main source of dominance.

America's privacy crisis derives largely from a failure to regulate digital platforms as the networked middlemen monopolists that they are.[55] This has left these corporations free to use their immense power as monopolists, along with the vast caches of private information that they collect from their customers, in ways that no previous networked middleman monopolist was allowed to do. The result has been disastrous not only for the privacy of all Americans, but for our freedom of speech, freedom of the press, freedom of commerce, and system of free elections.

There is nothing new about technologically advanced network middleman monopolies. Americans have been dealing with the power of complex communications, transportation, and financial networks for two centuries. In every instance, a major component of the power of these networks was their access to secret information about the lives and businesses of their customers. Time and again, the masters of these corporations – in their efforts to concentrate wealth, power, and control – attempted to use private information gathered from their customers to exploit, manipulate, and even supplant their customers.

That's why, throughout American history, citizens have repeatedly applied the same simple common carriage rules to network monopolists. By prohibiting networked middlemen monopolists from discriminating among customers, and by requiring that these corporations sell the same service at the same price to every customer, such common carriage rules entirely eliminated any opportunity to exploit their positions as providers of essential services. By doing so, such rules eliminated the incentive to gather extensive private information in the first place.

Such common carriage rules were hugely successful – economically, socially, and politically. They ensured that even the most powerful communications, transportation, and financial intermediaries were incentivized to serve the public, rather than to attempt to use private information to manipulate and fleece citizens and businesses. They prevented the masters of these corporations from using their power to concentrate dangerous amounts of wealth and power.

In the case of Big Tech, however, Americans have never applied these basic rules to their operations. But the simple result is that these networked middlemen monopolies have been left entirely unrestrained by any of the regulations that have bound all other such corporations in America since its founding. Absent the restraints of common carriage rules, these corporations adopted business models based on the capture and purchase of vast caches of data about individuals and corporations, and on the use of this data to manipulate users into making certain decisions about how and where to spend their money.

There is a fundamental relationship between market power and both the ability and incentive of corporations to spy on citizens. In many instances, competition policy tools and regulatory

[55] Open Markets Institute letter to Chair Jan Schakowsky and Ranking Member Cathy McMorris Rodgers, U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, March 6, 2019, available at http://openmarketsinstitute.org.

models developed to address the power of previous networked middleman monopolists may prove to be the best method to achieve the end of protecting the privacy of American citizens and businesses. The privacy of the citizen as a producer and a seller (be it of ideas, news, art, products, services, crops, or whatever) must be protected at least as carefully as the privacy of the citizen as a buyer. The privacy of every business, no matter how small or large, must be protected in its interactions with networked middlemen monopolists.

The tried and true, traditional American method for ensuring the neutrality of networked middleman monopolists is through various forms of common carrier regulation, and the imposition of simple bright-line prohibitions against certain corporate structures and behaviors. Such regulations have proven fundamental to the protection of the privacy of citizens in their capacities both as sellers and buyers.

Antitrust enforcement against exclusionary conduct would help protect privacy, too. Pro-privacy, pro-democracy innovators just need the opportunity to break through the monopolists' gates, without being crushed by anticompetitive tactics.

F. Interoperability

Interoperability is an anti-monopoly tool that has been used successfully many times to promote innovation by reducing barriers to entering markets. Regulators and antitrust enforcers have imposed interoperability requirements against AT&T and Microsoft, opening up competition in long-distance calling, telephones, and Internet browsers.

For the platform monopolists, interoperability would allow users to authorize networks to securely communicate with one another, much like how consumers with different email providers can send emails to one another. It would help overcome the network effects barrier to entry. For example, interoperability would allow new social media platforms to communicate with Facebook's platform.

Mark Zuckerberg offered up his own set of solutions, and one of his proposals was data portability. This means that you could take your Facebook data to another platform. But data portability doesn't overcome the network effects barrier for new companies to compete with Facebook, because it would have little value to move your data to a platform that doesn't allow you to communicate with your friends.

IV. Conclusion

Our economy, businesses small and large, and consumers would all benefit from immediate action to halt platform self-preferencing. Consumers benefit from the choice, innovation, and quality that robust competition brings. Consumers are also citizens who benefit from the free flow of speech. They are the employees of companies that benefit when platform extraction ceases. And they are entrepreneurs who deserve a shot at the American Dream.

Mr. CICILLINE. Thank you, Ms. Hubbard. Thank you all for your opening statements. And now we will begin questioning under the 5-minute rule, and I will begin with the chairman of the full committee. Mr. Nadler, you are recognized for 5 minutes.

Chairman NADLER. Thank you, Mr. Chairman. As I said in my opening statement, I strongly believe that we must modernize our antitrust laws to meet the challenges of the modern economy. We must update the antitrust laws to reiterate, as Justice Thurgood Marshall said, that "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." What do each of you think is the most important thing we can do from a legislative standpoint to address the deficiencies of current antitrust law? We will start with Mr.——

Mr. BAER. Baer.

Chairman NADLER [continuing]. Baer.

Mr. BAER. Thank you, Mr. Chairman. Just briefly, I think we need to modify the standard by which we judge mergers. The current law says mergers that may tend to substantially reduce competition are problematic, but the way the courts have interpreted that, they have read the word "tend" out of the law. I think if we move to a materially reduce competition standard, that will help us attack more anticompetitive mergers. The second thing I think is to deal with Section 2 of the Sherman Act, and basically where a company gets of a certain size and engages in conduct that appears to have a significant effect on limiting opportunities for rivals, that that needs to be a potential cause of action where the courts will evaluate whether the pro-competitive benefits of whatever that behavior is are vastly outweighed by the potential harm to consumers and to competition. That is where I would focus, on those two areas.

Ms. TEACHOUT. I think there are three primary areas of focus. The first, especially since we are talking about Big Tech, is structural separation. I think that is quite urgent. And, again, your investigation has shown the incredible abuses of platforms that are also allowed to own companies that compete on those platforms. That is major legislation that I think this body should push. Second, these series of cases, some of which were just mentioned, the predatory pricing trio of cases, I think, are really important. This is Brooke Group, Warehouse, and other cases that made it incredibly hard to prove that companies are engaged in predation. That is important to overturn, along with Trinko, Twombly, these series of cases which I and others have outlined. And I would approach those as a set, which comes to my third point, which is that I would be very clear that the purpose of antitrust law includes the protection of liberty and the support of a decentralized economy, and move past the consumer welfare standard which has not been successful over the last 40 years.

I said three, but the fourth thing that I think we need to do in this arena is something that Ms. Hubbard and Mr. Rahman mentioned, which is in the communications infrastructure, in particular, ban targeted advertising. It is truly toxic. It is undermining our democracy.

Chairman NADLER. Thank you. Mr. Baer, as you previously testified in 2016, there has been an upswing in extremely large, complex, and blatantly anti-competitive transactions that never should have made it out of the boardroom. Why is it that this trend has continued and possibly even worsened, and what can Congress or the agencies do to deter companies from brazenly proposing transactions that are so clearly anti-competitive?

Mr. BAER. As I said earlier, Mr. Chairman, I think the standard as interpreted by the courts, the current standard of the Clayton Act, our merger statute, the courts have sort of applied a one-way ratchet that makes it tougher and tougher for the government to successfully challenge mergers. It is nearly impossible to challenge today an acquisition by a dominant firm of a nascent competitor, something that isn't a large rival today, but could well be tomorrow. Legislative changes that basically make it clear that once a firm achieves a certain dominance, that the burden shifts to justify its acquisition of small potential rival. We think of Facebook, right, Instagram and WhatsApp. They need to justify why this isn't a problematic merger, why it doesn't eliminate somebody who, either on its own or together with merging with somebody else, might well become an alternative platform to a dominant platform today.

Chairman NADLER. Thank you. I yield back.

Mr. CICILLINE. The gentlemen yields back. I now recognize the gentleman from Wisconsin, Mr. Sensenbrenner, for 5 minutes.

Mr. SENSENBRENNER. Thank you, Mr. Chairman. Professor Lipsky, what shortcomings in the antitrust laws, if any, prevented the Obama-Biden era regulations from examining or blocking some of the transactions that have been scrutinized by this investigation? For instance, when Facebook acquired Instagram, it was greenlit by the FTC. I am not asking you to second guess that decision, but rather to discuss whether the existing antitrust laws were insufficient to allow for a proper review.

Mr. LIPSKY. Thank you, Ranking Member Sensenbrenner. My view is that there are no deficiencies in the antitrust laws. In fact, over the years, the legal apparatus built up for the prevention of anti-competitive mergers has become truly formidable. There was some initial question that the Sherman Act, as passed, applied to corporate transactions, but any doubt about that was eliminated with passage of the Clayton Act in 1914, and then again, the Clayton Act was brought and then the standards were clarified by the Celler-Kefauver amendments to the Clayton Act in 1950. And then in 1976, you had Hart-Scott-Rodino, which essentially made it impossible for any significant transaction to be consummated until the Federal authorities had been notified of the nature of the transaction, the competitive activities of the parties, and given very ample tremendous discovery powers to investigate and to go to court prior to consummation of the transaction.

Mr. SENSENBRENNER. So you are saying that the existing statutes at the time of the Facebook-Instagram buyout were sufficient to do a proper review.

Mr. LIPSKY. I do say that.

Mr. SENSENBRENNER. Okay. Now, Mr. Baer, this was before your time as chief honcho in the Antitrust Division, but I think you were around at the time. Would you care to respond to that?

Mr. BAER. As I indicated, Mr. Sensenbrenner, my law school classmate and friend, Tad Lipsky, and I have a bit of a disagreement on this. I do think if you look at Instagram or WhatsApp, and you look at some of the documents that were revealed in this subcommittee's most recent hearing, these were companies that potentially, either on their own or in combination with other companies, had potential to be rivals. It wasn't clear they were going to be, but Facebook, I think, according to the documents your investigation has uncovered, recognized these firms as potential rivals. Current law does not allow the FTC or my old place, the Antitrust Division, to challenge those transactions. You need to be a significant, actual, potential competitor in the marketplace in order for antitrust laws to apply. I am sorry. Go ahead.

Mr. SENSENBRENNER. You are essentially saying that the law that was in effect at the time, which I don't think has been significantly changed then, prevented the enforcement during the Obama years.

Mr. BAER. That is correct, and I think modest changes to the current statute would allow us to go after those kind of acquisitions by dominant firms.

Mr. SENSENBRENNER. Do you know if DOJ requested an amendment to those laws so that they could be more active in enforcing them?

Mr. BAER. I think while I was there that debate was just beginning, and as I have watched what has happened to the antitrust laws since then, the way the courts have, as I indicated, this one-way ratchet, imposing more and more conditions on the government to meet its burden of proof, that we are at a place where some tweaks to the antitrust laws would help the courts understand better what the congressional intent was at the time and is today. I am sorry to filibuster.

Mr. SENSENBRENNER. Okay, Senator. [Laughter.]

You know, I guess, you know, my observation, you know, on this is that, you know, we hear from DOJ and FTC all the time when they think laws are inadequate, and then they come and crack the whip on us to say let's get it fixed, let's get it fixed right away, not tomorrow, but yesterday. And there wasn't any real move by the Department of Justice or the FTC to get those laws fixed if this merger prevented an enforcement of the laws. You know, the final point I would like to make is, you know, I think that antitrust law has to continue to be focused on consumer welfare rather than deviating into other problem areas. If we go back to the basics and enforce those basics, a lot of the complaints that we heard during the previous hearing when the CEOs were here never would have existed. And I yield back. Thank you.

Mr. CICILLINE. The gentleman yields back. I now recognize the distinguished gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON of Georgia. I thank the gentleman for hosting this hearing. It has been a very important hearing, and it has been a very important topic. And it is time for Congress to act, and I am happy to be a part of this monumental effort. Mr. Rahman, in July, I asked Apple CEO, Tim Cook, about Apple's power and control over the App Store. I am still troubled that in order to sell in the App Store, Apple forces app developers to comply with rules it

makes up as it goes along. It develops and sells apps that compete with the app developers who need to be in the App Store in order to gain access to the 100 million Americans who use iPhones, and it also forces those app developers to pay 30 percent. It holds them over a barrel and makes them pay 30 percent of whatever they get out of the App Store for selling their products. So it is like the fox owning the henhouse, and pimping the chickens and then eating the chickens. [Laughter.]

Mr. Rahman, in your written statement, you addressed the concept of gateway power as a type of infrastructure power that the antitrust laws should address. Can you elucidate a little more on gateway power and how the App Store exploits its gateway power?

Mr. RAHMAN. Yeah, thank you very much, Congressman. It is such an important question because I think all of the platforms that we are talking about in these hearings have this type of gateway power, and I love the metaphor you used, the fox owning the henhouse. The way this works is if you build the kind of infrastructure that everybody needs to access basic goods and services, in this case the App Store, it is the same argument you can make about Facebook or Google, because we all need to get entry into that marketplace. If I am an app developer, that means that the owner of the App Store, the person who controls the gates, has a lot of control, a lot of power, and can make unreasonable demands, right, on anyone who needs to get access to that marketplace, to that ecosystem.

And so they may not always use that power benevolently, they may not always use it in an extractive way, but they have that power nonetheless because they have something that any entrepreneur or business developer needs, which is access to the marketplace. So this is why I think it is so important that any remedy include some basic rules of the road, that if you build that kind of infrastructure and you control the gateway, the access point, it is incumbent upon you, as the firm who controls that gateway, to observe basic standards of fair treatment and non-discrimination and so forth. And that would provide regulators with the tools, if Congress provided them, tools to enforce against those types of practices.

Mr. JOHNSON of Georgia. Thank you. Ms. Teachout, Amazon has much the same relationship with vendors on its platform. Can you tell us your thoughts about how this works and how consumers are harmed, how small businesses are harmed, and what Congress should do in order to alleviate this imbalance in our commerce?

Ms. TEACHOUT. Thank you. There are, I believe, about 2 million small business owners that depend upon Amazon to get their goods to market, and your investigation, along with the research of the Institute for Local Self-Reliance, has shown that Amazon charges as much as 30 percent of every sale. Amazon takes as much as 30 percent of every sale when those sellers sell on Amazon on average. This is essentially a form of private tax, and when you talk to Amazon sellers, as you have, you hear about the incredible fear that Amazon sellers have and a kind of rational paranoia about how the algorithms are treating them, and their own beliefs that they need to purchase ancillary Amazon services, something that your investigation revealed as a legitimate belief, as Bezos admit-

ted, that the use of Fulfillment has an impact on the algorithm for the sellers. And that is really dangerous for democracy, but it also leads to inequality because that is essentially Amazon standing at the narrowest point in the pathway, the choke point moment, and demanding 30 percent of every sale.

Mr. JOHNSON of Georgia. Thank you. Ms. Hubbard, do you believe Section 2 of the Sherman Act is sufficient to address the conduct that we are discussing?

Mr. CICILLINE. The time of the gentleman has expired, but the witness may answer the question.

Ms. HUBBARD. Thank you, Congressman. I do not believe Section 2 is sufficient because the soft preferencing and soft prioritization is so rampant, that it is basically a game of whack-a-mole. There are just a myriad of ways that these owners of the platforms can privilege their own products and services, and it is nearly impossible to police them all, not to mention because often it is being done through algorithms that are not transparent and are completely opaque. So that is why I advocate for the structural separation as a way to remove the incentive and ability of these platforms to prioritize their own products and services.

Mr. JOHNSON of Georgia. Thank you. I yield back.

Mr. CICILLINE. Thank you. The gentleman yields back. I recognize the distinguished gentleman from Colorado, Mr. Buck, for 5 minutes.

Mr. BUCK. Thank you, Mr. Chairman. Thank you for holding this hearing. I appreciate the bipartisan and thorough nature in which you have conducted this investigation. I want to start by reiterating one of the Nation's most important founding principles. As Professor Teachout noted, Congress writes our laws and the courts interpret those laws. In the words of my fellow Coloradan, Justice Gorsuch, "Judges wear robes, not capes." The American people elect their Representatives every 2 years. Our constituents hold us accountable for our votes in a way that judges are not. It is worth remembering this as we examine Big Tech's anti-competitive actions and our Nation's antitrust regime more broadly.

It is clear that our antitrust enforcement agencies have hobbled themselves by observing traditional interpretations instead of adhering to the letter of the law, which hampers enforcement agencies' ability to bring cases against industries that do not have a defined price structure or offer free services, like big tech. Congress did not intend for regulators to only bring antitrust cases based on price differential. In fact, lawmakers intentionally wrote the Sherman and Clayton Acts with an open-ended consumer welfare framework to enable antitrust enforcement agencies to bring cases also related to quality, output, consumer choice, or potential innovation in the marketplace. Following this original standard would allow regulators to review big tech mergers that offer free services, while relying on selling user data or making acquisitions based on potential competition.

Data presented by McKinsey & Company further shows how dangerous relying solely on price change doctrine can harm the economy. McKinsey's data shows that return on capital in many industries, including restaurants, auto parts stores, department stores, and oil and gas companies, has remained nearly steady over the

past 50 years. However, two industries show rapid growth: big pharma and big tech. There is a breakdown occurring in the digital economy. A small number of tech titans are using anti-competitive means to grow their marketplace dominance and control the channels of distribution.

Our nation's law enforcement agencies can't keep pace. For example, Facebook's acquisition of Instagram was allowed to proceed primarily because there was no defined price change to the consumer. This review didn't take into account Facebook CEO, Mark Zuckerberg, stating his desire to purchase Instagram centered on buying an up-and-coming competitor before they could overtake Facebook's market dominant position. This case shows exactly why the current price-focused model of antitrust enforcement misses the mark and fails to account for potential innovation and consumer choice.

Congress should lead the way with a meaningful solution to ensure our enforcement agencies are adhering to the original intent of the law, not judicial interpretations. If we don't provide constructive action to address these issues, the progressive left will undoubtedly push for an oppressive regulatory regime. A new Dodd-Frank, along with a CFPB-like agency overseeing the internet, will only benefit big tech firms and harm future innovation.

This shouldn't be the only action Congress takes, though. This committee should work together to ensure our antitrust regulators have the tools and resources necessary to conduct meaningful oversight and successfully bring enforcement cases against bad actors. Currently, the FTC and DOJ Antitrust Division's combined enforcement budget stands at approximately $510 million. Conducting effective oversight and launching antitrust reviews is difficult when your budget is only a minor fraction of big tech's approximately $2 trillion market share with unfailingly deep pockets to combat litigation, comply with regulatory requirements, and pay expert witnesses.

Our law enforcement agencies can't keep up with this onslaught. Congress should consider allocating more funds to the FTC and DOJ to ensure that they have the proper resources to conduct serious investigations and enforce antitrust laws. We should also work to ensure these agencies can recruit and retain the best possible talent to achieve the mission. We also need to seriously consider increasing scrutiny on big tech companies, including shifting the burden of proof required for a market-dominant company to prove that a merger is not anti-competitive. These changes may stop market-dominant companies from further consolidating the tech center in an anti-competitive manner.

As a conservative, I want to see Congress reassert its Article I duties to write our Nation's law. As a former prosecutor, I understand how important it is for our nation's law enforcement agencies to have the tools necessary to fight and win these cases. It is clear that the ball is in Congress' court. Companies like Google, Amazon, Apple, Facebook, and Twitter have acted anti-competitively. We need to rise to the occasion to offer the American people a solution that promotes free and fair competition. Ms. Bovard, could you please offer your thoughts on these proposals?

Ms. BOVARD. Thank you, Congressman. I think you make a couple of really lucid points that are worth emphasizing. We do expect our enforcement agencies to parry with billion-dollar companies, the biggest the world has ever seen, and we give them miniscule budgets to do it. The $2 trillion that you mentioned is about 10 percent of U.S. GDP, and that is the tech sector. We need to give our enforcement agencies, I think, the resources and commitment from Congress to pursue their full mandate in this space. And I would also add that I think a little bit of humility from our enforcement agencies is necessary, that they may not have always gotten it right. If you look at the last 20 years, there have been about 750 acquisitions that have taken place with relatively little scrutiny. And Bill Kovacic, who is a George W. Bush appointee to the FTC, who voted actually to approve the Google acquisition of DoubleClick in 2008, recently told the *New York Times*, and I want to make sure I quote him correctly, "If I knew in 2007 what I know now, I would've voted to challenge the DoubleClick acquisition."

And this tells me that everything that you said is pretty on point. We need to make sure these agencies have the resources to do it, and also that they are not hamstringing themselves by raising the bar on themselves with the laws that currently exist. Section 7 of the Clayton Act, which I think, you know, you referenced, is actually a fairly generous standard when it comes to mergers and acquisitions. You know, to quote it, "The effect of the acquisition may substantially lessen competition or tend to create a monopoly." It doesn't specify price competition alone, and it doesn't raise the evidentiary bar on potential completion versus actual competition. So I would like to align myself with your statement, and thank you for the question.

Mr. BUCK. Thank you. I yield back.

Mr. CICILLINE. The gentleman yields back. I now recognize the gentlelady from Washington, Ms. Jayapal, for 5 minutes.

Ms. JAYAPAL. Thank you, Mr. Chairman, and thank you all for being here for what is such an important hearing. I think technology offers us the promise of freedom, and yet over and over again in these hearings, we have heard about people and businesses that are trapped, small businesses that can never quite get a fair shake, news sites that lose ad revenue, or other websites that lose viewers because of unregulated practices or conflicts of interest, and the many roles of these platforms that disadvantage innovation and competition. And would-be innovators and developers have to make products that cater to major tech companies or face the real threat of being copied and crushed. No one likes to feel trapped, but right now I think many people do, and our democracy is trapped, too.

Ms. Teachout, let me start with you. In other sectors of the economy, like in healthcare markets, Congress has developed legislation that makes certain conduct presumptively illegal, and there has been quite a bit of discussion about this through these questions. Do you think a law that would make certain types of mergers presumptively illegal, shifting the burden to the merging parties to prove the transaction would not be harmful to competition, could be an effective remedy?

Ms. TEACHOUT. Thank you, Congresswoman, yes. You know, in the field where I come from, democracy law and anti-corruption law, prophylactic rules are absolutely essential. If you had to investigate every time there was a $10,000 direct campaign contribution, whether there was something problematic, you would never actually be able to protect against corruption in the campaign finance sphere. So I think it is really important to think about these kinds of prophylactic rules, including the one you talked about, to really shift the burdens. Thank you.

Ms. JAYAPAL. Mr. Baer, I saw you nodding. Did you want to add anything to that?

Mr. BAER. Just that I think as antitrust lawyers, we tend to think of antitrust law enforcement as often the only solution to a problem, and there may well be prospective rulemaking that makes sense. In my testimony, I talked about the 2004 FCC rule basically saying our phone numbers actually were our phone numbers, and we could port them elsewhere. That was a prospective rule. It was not a law enforcement action. Basically, there are ways to promote portability and interoperability in a fashion that may channel competition in constructive ways.

Ms. JAYAPAL. Thank you. Mr. Rahman, I don't believe that many people make the necessary connections that they should between antitrust law, and racial equity, and economic equity. How would making changes to the antitrust laws help us to empower black and brown communities in particular that have been burdened throughout our history with structural inequities?

Mr. RAHMAN. Thank you, Congresswoman, for that question. It is such an important link to be made. The antitrust laws we are talking about here really are one of those foundational rules of the road that, if we don't change them, we actually leave in place many of the structural inequities along the lines of race that you talked about. So three very quick ways that I would name that are connected around economic opportunity, around labor, the treatment of workers, and around racist forms of algorithmic bias.

So the first piece. This whole point about accessing the marketplace, the new digital infrastructure that we talked about, monopoly power is especially hard on small and medium businesses and, in particular, on black and brown businesses. If you look at the challenges of business formation, of staying alive and afloat, especially in this kind of an economy, it is the same kind of challenges that we are seeing hitting black and brown businesses in response to, say, the COVID economy collapse. Solving this in an antitrust policy approach would actually help jump start small business formation. That is number one.

Number two, in terms of workers, we haven't talked about it much yet today, but monopoly power is actually one of the key drivers of the suppression of wages and also the perpetuation of low labor standards, workplace safety standards in particular. And when we look at the plight of essential workers, black and brown workers, in this moment, whether they are Amazon workers or workers of other dominant firms, breaking up monopoly power actually is critical to empowering black and brown workers. And finally, the kind of toxic spread of white nationalism or extremism online and information platforms on Facebook is fundamentally

tied to the ad-based business model that Facebook has. And if we are trying to build a racially-inclusive public sphere, we have to tackle the monopoly power Facebook has. Thank you, Congresswoman.

Ms. JAYAPAL. Thank you so much. Ms. Hubbard, you argue in your testimony for aggressive antitrust enforcement against platform monopolists. Can you talk a little bit about structural separation and how it would help small businesses, new tech startups, and consumers if we were to implement that?

Mr. CICILLINE. The time of the gentlelady has expired, but the witness may answer the question.

Ms. JAYAPAL. I think you may be on mute.

Mr. CICILLINE. You are on mute maybe, Ms. Hubbard.

Ms. HUBBARD. Thank you, Congresswoman. As we have heard today, small businesses, entrepreneurs, and citizens are all beholden to these tech companies and are forced to play by their rules, often paying them which is the equivalent of taxes. You know, the 30 percent tax that Zephyr Teachout mentioned, the amount that every small business has to pay just to appear in Google search results under their own name, is a huge tax on small business. So what we have are small businesses paying taxes to these huge companies, and those companies don't in turn pay their own fair share of taxes. So structurally separating the platforms from the commerce will give everyone a fair shot at innovating, reaping the rewards of their hard work, and it will be good for consumers because consumers are human beings, and they benefit from the choice, innovation, and quality that robust competition brings. And they are also citizens that benefit from the free flow of speech, and there are workers and employees of companies that benefit when the platform extraction ceases. So we can't think of consumers only in one role because it doesn't make any sense to care about whether I pay low prices, but not care about whether I am getting paid less. Thank you very much.

Mr. CICILLINE. Thank you, Ms. Hubbard.

Ms. JAYAPAL. Thank you. I yield back.

Mr. CICILLINE. The gentlelady yields back. I recognize the gentleman from North Dakota, Mr. Armstrong, for 5 minutes.

Mr. ARMSTRONG. Thank you, Mr. Chairman. I think just through the course of this investigation, that it is obvious that there is bipartisan agreement that there are serious competition concerns in digital marketplaces. We may differ on whether ex ante antitrust remedies are sufficient for some of these, like Mr. Baer talking about tweaks versus large-scale change. But, I mean, at the very least, I would like to know whether our current antitrust enforcement is capable of addressing at least some of these concerns, and I am glad you did the DoubleClick quote, other than you stole it from me and I am going to probably do it again. But I think over the past 2 decades there has been, I mean, a lack of antitrust enforcement in digital markets.

And to illustrate, when we were talking about Google's acquisition of DoubleClick in 2007, it was permitted by the FTC. The acquisition allowed Google to leap forward in third-party digital display advertising where it previously only enjoyed considerable market share in search advertising. There is an argument to be made

that nobody could foresee the future competition concerns at the time, that the third-party ad markets were relatively competitive. However, the FTC majority opinion in that case acknowledged that with DoubleClick, Google could engage in a number of potential anti-competitive strategies to further enhance its positions in various markets, because the Commission dismissed the concern that Google would bundle or tie part of its growth ad tech stack. And that concern was hypothetical in 2007, but now we know that it was a very real consequence of Google's acquisition.

I said during our last hearing that the major part of this investigation is dealing exactly with those things. And when we talk about, like, Instagram, or WhatsApp, or Messenger, it is easy to see those things, but a lot of these acquisitions were very small companies at the time, and it only gets to be a problem when it is in the aggregate. I mean, with Google on the ad tech stack, it was both on the buy and sell side, which means they just simply have too much control over advertising. And in that case, though, the Commission also dismissed an additional concern that consolidation of ad tech stack would create a network effect whereby Google's position would make it more attractive to advertisers, which, in turn, would make it more attractive to publishers and so on and so on and so on.

Google's ad tech is informed by a vast majority of user data, and they got it from their first-party services in Google Maps and Chrome. Meanwhile, Google has consolidated its market share by cutting off third parties and cookies. And I will say this every time I bring up the word "cookie." I do not want to be the Congressman responsible for bringing them back, but there is no doubt that it consolidated their market share. And I am not even saying that FTC was right or wrong in that decision, but I am pointing out the FTC was aware of the concerns, which turned out to be proven correct, did not do any enforcement in the subsequent years, even though the majority FTC opinion concluded by promising to watch the online advertising market closely in the future. And that was, I think, towards William Kovacic's quote: if he had known then what he knew in 2007, he would have voted to challenge that. And since 2007, Google has spent billions of dollars to acquire a lot of other key ad tech firms, some big, some small.

This is one anecdote. However, there are similar stories and concerns throughout the digital marketplace. The DOJ right now, though, and FTC are conducting investigations, and suits are reportedly imminent. That seems to me to be at least the most aggressive antitrust enforcement we have seen in decades. And I concur with my friend, Ken Buck, from Colorado. This is one area where, I mean, I do think we need more money, more resources, more enforcement.

Mr. Baer, your testimony discusses additional resources for after-action studies, which obviously this would be easier on the front end, but sometimes that is not always realistic in studies of what have happened in markets where agencies did not bring enforcement actions. Can you elaborate how an after-action review of an instance like the DoubleClick merger would result in better antitrust enforcement?

Mr. BAER. Absolutely, sir, and the best example is hospital consolidation. We saw the courts hostile to the creation of monopolies or near monopolies in local markets as hospital chains combined over the course of the 80's and 90's. Tim Muris, a prior Republican chairman of the FTC, commissioned after-action studies of what those markets looked like after consolidation occurred and the courts had rejected the FTC's merger challenge. They found dramatic price increases in those markets. It established the FTC was right. In subsequent hospital merger challenges, the FTC was able to go to court, use those economic studies and demonstrate, hey, this risk is real, and the courts responded.

Mr. ARMSTRONG. Thank you. It wasn't just DoubleClick, though. It was AdMob in 2009, AdMeld in 2011, AdMetri in 2014. And so when you were talking about tweaking on mergers and changing the standard, I am interested in having that conversation possibly offline because I am not sure any one of these meet it initially. But when you look back, I mean, I think in some instances, we are going to have to figure out a way to deal with that, and I know that is not ideal. You see it right now with Instagram and Messenger trying to combine their data. Well, I mean, just practically, it makes it harder to intertwine. But do you think after-action reports considering how these companies work are a key part to enforcement moving looking forward?

Mr. BAER. It is a key tool, but, in addition, statutory changes, which would require a dominant firm to offer an affirmative justification for its acquisition of smaller nascent competitors, would actually empower the antitrust agencies to address that potential accumulation over time of significant enhanced market power.

Mr. ARMSTRONG. My only concern with that is that a lot of these companies build themselves solely for the purpose of getting bought out. I mean, eventually we get into capitalized. We saw that with the Sprint-T Mobile merger. It was never a question between 4 and 3. It was going to be a question between 4 and 2. But I have used too much time. Thank you, sir.

Mr. CICILLINE. I thank the gentleman. The gentleman yields back. I now recognize the distinguished gentlelady from Florida, Mrs. Demings, for 5 minutes.

Mrs. DEMINGS. Thank you so much, Mr. Chairman, and thank you so much to our witnesses for being with us today. Mr. Baer, you know, it is always so important. You know, we would have never thought, of course, 20 years ago, really 30, 40 years ago when we really began, that we would have companies that have grown or mergers that would grow so huge until they really affected everybody else in an adverse way around them. You talked about that sometimes the fear of getting it wrong really kind of stifles our ability to do what we need to do in this space. Could you please expound on that a little bit, and also talk a bit about the path forward, the fear of getting it wrong.

Mr. BAER. Well, thank you, and thank you for reminding me I have been at this business over 40 years. [Laughter.]

The fear of getting it wrong is sort of an outgrowth of an overreach by the Chicago School of Economics. It is basically the notion that unless we are 100 percent certain that there is an antitrust problem, we should stay back, and that has been infused into the

thinking of the courts. I don't blame the courts for that thinking. It is just this one-way ratchet which has gotten tougher and tougher for the government or a plaintiff to prove up an antitrust case.

That is why I conclude that one of the key solutions has to be Congress stepping forward and instructing the courts that, no, we meant if there is a tendency to substantially reduce competition, you should act. The courts need to intervene. So it is that hesitation about getting it wrong, avoidance of what they call Type I errors, errors of over enforcement, that I think it shifted the pendulum way to the wrong side.

Mrs. DEMINGS. You also talked about additional resources or the need for additional resources. Why should Congress give additional resources when many of the companies that we are talking about have not appropriately used the resources that they have effectively for enforcement efforts?

Mr. BAER. Look, one could always criticize the Federal Trade Commission where I once worked, the Antitrust Division where I once worked, for not doing it exactly right. But I think they have used the resources Congress has appropriated them, in most cases, quite appropriately. The problem is those resources are so small in comparison to the size of the economy, to the number of acquisitions going on, behaviors this subcommittee is properly investigating and properly concerned about. So you look at the ratio. The ratio suggests we need to strike the balance a little differently.

Mrs. DEMINGS. Thank you. Mr. Kades, you talked about the need for reform and not just enforcement. And thinking about legislation to revitalize our country's antitrust law, what do you think are the most important principles right now that Congress should consider?

Mr. KADES. I should remember that. Thank you, Congresswoman. I think you want to think about this in the big picture as you have a court that continually doesn't want to enforce the law, I think, the way that this bipartisan committee thinks it should be enforced. So the first thing you have to do is you need laws that will strip back decisions that limit antitrust enforcement. Professor Teachout talked about *Trinko.* There is a whole list. The second thing you want to do is something along the lines of what Bill Baer suggested is, you want to tweak the statute because at least that sends the signal you are doing it wrong. And then the third thing I think you want to do where you can, and this may sound small, but is very powerful, is you create presumptions where you are more concerned about the harm from the conduct than the potential cost of over enforcement.

And so, in that sense, you know, the way you deal with what Congressman Armstrong said was, is you want the FTC to be more aggressive when they see something like a DoubleClick that looks new. You give them the tools that they don't have to go in and disprove every potential benefit. The company has to come forward and say, yeah, we understand there is a problem. We have to show you it is a good thing. So I think it is those three things.

Mrs. DEMINGS. Could you also finally talk a little bit about how you believe interoperability could help?

Mr. KADES. Right. So I think that the interesting thing about interoperability is not as a solution itself, you know.

Mrs. DEMINGS. Mm-hmm.

Mr. KADES. And it is one of these things, and I know, Professor, you talked about how hard it is. But, you know, it is amazing the way companies can find interoperability when it suits their purposes. So I can call you on the telephone. I can text you. We don't have to be on the same system, but if you are not on Facebook, you know, I can't put up a post on Facebook that goes to you if I want to friend you. Like, that is apparently technologically impossible. But if I could, it means if you don't like Facebook, or, as Congressman Jordan talks about, not liking the way they engage in censorship, you can walk away from Facebook and you don't lose contact with all your friends, right? And so that allows competition to occur, and that has the benefit of reducing the incentives and the ability to exclude competition.

Mrs. DEMINGS. Great. Thank you so much. I yield back.

Mr. CICILLINE. The gentlelady yields back. I now recognize the gentleman from Florida, Mr. Steube, for 5 minutes.

Mr. STEUBE. Thank you, Mr. Chair. My questions are for Ms. Bovard. In May of this year, President Trump issued an executive order to prevent online censorship. The executive order discusses Section 230 of the Communications Decency Act. Ms. Bovard, have Big Tech companies abused Section 230 to their advantage?

Ms. BOVARD. Well, thank you for the question, Congressman, and the short answer, I believe, is yes. When conservatives think about Section 230, I think it is important to point out that the statute, kind of reflecting the conversation we are having here, has become so judicially distorted from what Congress initially passed, that what we rely on for its application today is very bloated, and a bulletproof immunity exists where a porous, narrow one was originally passed. So it is my view that, yes, the companies have abused this practice to the extent that it is now referred to as an implicit financial subsidy to these companies.

Mr. STEUBE. Well, see, you kind of touched on it there. Can you explain other ways that Section 230 has been misused and wrongly applied?

Ms. BOVARD. Well, I think, as I outlined in my written statement, Section 230, originally passed as the Good Samaritan standard, has actually allowed a lot of bad Samaritans a lot of cover. There has been well-documented evidence of the fact that, you know, sex trafficking, all kinds of human trafficking, terrorism, revenge pornography, all flourish on these platforms, and the companies are immune from any liability for it. In 2018, Congress passed FOSTA SESTA to make them liable for knowingly participating in the facilitation of sex trafficking, but there is a whole lot of other criminal and lewd and harassing content that occurs. And these companies, as opposed to being the Good Samaritan that could, you know, walk by and help the guy out of the ditch, they can walk right by and there is no consequence.

Mr. STEUBE. How does the President's executive order seek to promote free speech and rectify this online censorship issue that has been discussed?

Ms. BOVARD. So the President's executive order does two things that I think are very important. The first is that NTIA petitioned the FCC to bring Section 230's application back to its original in-

tent, which, as we discussed, is a very narrow immunity focused on the original title of the amendment itself, which is the Family Online Empowerment Act, allowing, basically, you to clean up the internet. And the second thing it does that I think is really important is it enforces a measure of transparency on to these companies. A lot of the censorship and bias they get away with happens because they don't have to tell us what they are doing. They have never popped the hood and let us look in, and they could. They could put allegations of bias to bed if they let us look under the hood of what they are doing, but they don't. So I think that transparency is also very important.

Mr. STEUBE. Do you believe that Section 230 reform is an avenue for addressing some of these online censorship issues?

Ms. BOVARD. I do because it enforces accountability and transparency on companies who right now have none of it, and I think companies that can upset half of their user base without consequence because they know they have nowhere else to go deserve a little bit of accountability and transparency requirements for a substantial benefit, a government-mandated privilege that they receive.

Mr. STEUBE. What specific reforms should Congress consider when examining ways to address the pitfalls with Section 230?

Ms. BOVARD. So I think the proposal that Ranking Member Jordan mentioned in his opening statement, I think, sounds like a very good place to start. It deals with the otherwise objectionable part of Section 230, which, again, has become this sort of massive catch-all for the companies to enforce against viewpoints they don't like without any consequence. I think addressing that particular part of the law, I think, will be very useful. And, again, I think the transparency, when you have to show what you are doing, when you have to show your work, it is a lot harder just to say "trust me" to no consequence. You actually have to show conservatives that you are listening to them.

Mr. STEUBE. Thank you for your time. Thank you for being here today. I would yield any of my remaining time to Ranking Member Jordan.

Mr. CICILLINE. You yield back. I now recognize the gentleman from Colorado, Mr. Neguse. I am sorry. I am sorry. I recognize the gentleman from Maryland, Mr. Raskin, for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you very much. I want to come to Ms. Teachout. Welcome, Professor Teachout. In your testimony, you advocate what you call structural separation, a Glass-Steagall approach to antitrust in this field. Why did Congress approach concentrated markets, like financial services or telecom, this way in the past, and what is its resonance with American constitutional principles of structural separation of powers?

Ms. TEACHOUT. Thank you for your question. What we have seen in the past, you mentioned Glass-Steagall, which I also mention in my written testimony. You also see laws like the Public Utility Holding Act, which prohibits companies who are subject to the Act, who play the sort of central public utility role, from engaging in acquisitions unless there is SEC approval. And the key theory here is that you don't want conflicts of interest at the heart of your economy with essential infrastructures. You don't want your pipelines

to have a conflict with what is going through those pipelines. And decentralizing that power instead of having platforms that enable competition on those platforms instead of using those to kill, acquire, or copy, as you have shown in your investigation, is really important both for allowing the thriving of small businesses, but also stopping these platforms from becoming a form of private government. And this is something that Justice Douglas spoke about, the inevitable tendency of all private power to form a government in and of itself. Structural separation is one of the key tools to prohibit these private powers from becoming private governments that coexist with our democratic government.

Mr. RASKIN. Well, would that undermine innovation? Would it undermine competition? Would it harm consumers?

Ms. TEACHOUT. Well, in general, I would say that the more feudalist a system is, the less innovation you are going to see. And what we are talking about, you know, when you talk about the democratic threat, it is essentially, a feudal threat, you see Amazon playing a feudal role, Facebook playing a really dangerous feudal role of deciding which newspapers get prioritization in your news feed, YouTube playing this role. And the more you see a feudal system, actually the more you see a closed and fearful system and a less innovative system, so yes.

Mr. RASKIN. Tell us about what you think the role of Congress is today and historically in the development of antitrust principles. If Congress doesn't do it, what happens if we are not updating and modernizing the antitrust laws?

Ms. TEACHOUT. Yeah, I mean, Congress from the 1880s onward has played this really central role, recognizing that protecting fairness in a thriving economy is the quintessential congressional role, and also protecting our democracy and protecting the corruption of the takeover of these forms of private government is a quintessential congressional role. And then starting in the 80s, you saw Congress really step back from this role. You saw this deep depoliticization. Instead, when these cases came down, cases we have been talking about today, whether the cases were involving predatory pricing or changes to merger law, you didn't see a congressional hearing. There was a kind of tacit acceptance that the Supreme Court was the right institution to be making decisions about the shape of our economy. It is a terrible institution to be making decisions about the shape of our economy.

That said, I do want to address something that has not been addressed enough I think. I think Congress' other role is to light a fire under enforcement agencies. I would not allow enforcement agencies to get away with saying that, you know, although the court has made these laws harder to enforce, the FTC can engage in much more aggressive rulemaking, much more aggressive enforcement. In fact, I would say that your investigation has shown some really deep failures in the aggressiveness of the FTC, so I think there is a double role. One is ongoing investigations and ongoing responsibility taking for the structures of power and the structures of the economy here in Congress, and second is ongoing oversight and lighting a fire under the agencies in an ongoing way.

Mr. RASKIN. Well, are there benefits to a regime where you have multiple levers of enforcement in the federal bureaucratic context,

state attorneys general, private plaintiffs? Do you want to try to multiply the different sources of enforcement?

Mr. CICILLINE. The time of the gentleman has expired, but the witness may answer the question.

Ms. TEACHOUT. It is absolutely essential to multiply levers of enforcement. In fact, in the first Congress of this country, about half the laws had qui tam provisions because there was concern about capture or corruption of possible enforcement agencies. So you need to have a dynamic interaction with broad private rights of action, State attorneys general, agencies, and Congress all constantly engaging instead of passively accepting the Supreme Court and big companies taking over this area.

Mr. RASKIN. I yield back. Thank you, Mr. Chairman.

Mr. CICILLINE. The gentleman yields back. I now recognize the gentleman from Ohio for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman. Ms. Bovard, is cancel culture real?

Ms. BOVARD. It certainly is, sir.

Mr. JORDAN. A recent survey, 62 percent of the American people said they are afraid to freely express their thoughts and opinions. I think most Americans agree that it is darn real. It is scary. I think Professor Teachout, I think the quote she just said, "a closed and fearful system" that we find ourselves in. If 62 percent of the American people are afraid to express themselves, do we have a functioning First Amendment?

Ms. BOVARD. You don't. It would seem that would violate the very intent of the First Amendment, which is to provide robust protection for speech of all kinds.

Mr. JORDAN. Yeah, silence is not the First Amendment, and that is exactly what the cancel culture mob is wanting. They are wanting us to be silent. In fact, I think it is even worse. They want us to agree with them. Do you have free speech if only one side is allowed to talk?

Ms. BOVARD. You do not. You have one source of information only. That is not free speech or free thought, I would add.

Mr. JORDAN. Yeah. So if you don't have free thought, you don't have free speech, you have a closed and fearful system. You have a system where 62 percent of the American people are afraid and reluctant to express their thoughts, their opinions, then that is a dangerous place to be. Is Big Tech a part of this phenomena we now find ourselves in?

Ms. BOVARD. I would say absolutely. I think that the bias that we have discussed is a symptom actually of its market power. Google filters information for 92 percent of the world, 87 percent of America. So whatever they choose to amplify or suppress is what billions of people around the world see. That is a problem.

Mr. JORDAN. It strikes me as twofold. One, they can censor themselves. We know about that. We know what Google tried to do to The Federalist. We know what Twitter will do to the President of the United States, but yet then turn around and let the Ayatollah of Iran spew the things that he wants to spew. So they can engage in it themselves, but then they also provide a platform for other people to attack and try to cancel opinions they disagree with. Now, I don't know how we deal with that. We just got to fight back

and be able to use the platform and fight back with that. But that second part, Bari Weiss, the individual, had to resign or did resign. I don't know if she had to. She resigned from *The New York Times.* She called that second phenomena the digital thunderdome, a term that just struck me as exactly what happens when the mob starts attacking positions they don't like. So it seems to me we come to the critical question, what is the answer? How do we address it?

Ms. BOVARD. Well, I think I would actually go back to something that Ms. Hubbard actually referenced in her opening statement, which is that the answer, the antidote to bad speech and suppression of speech is more speech. And I think——

Mr. JORDAN. Always has been in this country. Always has been.

Ms. BOVARD [continuing]. They already are involved with these tech companies with Section 230, with sort of this antitrust immunity that they have given these tech companies. Whatever incentives that Congress can give these companies to abide by what we, in Section 230, designed for, right, which is robust political debate, a diversity of views, I think it is incumbent upon Congress to do that.

Mr. JORDAN. I agree with that, and I want you to take a good look at the legislation I briefly referenced in my opening comments, legislation that we have introduced today. It seems to me that would be something we could all agree on because there is definitely some disagreement. We heard what Ranking Member Sensenbrenner said. We have heard what folks on the Democrat side said about is existing antitrust law good enough. The truth is I don't know. It may be. It may not be. Do we have to change it? Well, we will look at that. Is it more robust action, as some of the Democrat witnesses have said, from the agencies? Probably all that is important, but it seems to me we should be able to agree on Section 230 and what needs to be changed there to foster more speech and not allow these Big Tech companies to particularly, I think, censor conservatives. Would you agree with that?

Ms. BOVARD. I would. I think there are a lot of proposals to reform Section 230, which I think reflects the sentiment that you just suggested, which is that they all have one goal, which is to force more accountability on these platforms for speech, for the criminal acts that flourish there, and I think it is a very important area to address. To your point, I do think this is a multi-pronged problem that is going to probably require multi-pronged approaches——

Mr. JORDAN. Right.

Ms. BOVARD [continuing]. Across different sectors of policymaking. Section 230 is one of them.

Mr. JORDAN. And you know what else I think is important? I think you have to call it out every single time you see it. Every time Big Tech censors somebody, it should be called out, particularly now. I mean, particularly now, 4-and-a-half weeks before a major election, I mean, maybe the biggest election. And we know what happened in 2016. We know what Google tried to do to help the Clinton Campaign, so you have to call it out every single time. And then hopefully we can get some bipartisan support for the Section 230 changes that I think everyone, if we all just sit down and work, we all agree need to happen. I will give you the last word for the last 15 seconds.

Ms. BOVARD. I would agree with that because I would like to get to a point where these Big Tech giants don't have nearly the power they have over speech, over election, over independent behavior. I do not think we can function as a free society when we are ruled by tyrannical corporations.

Mr. JORDAN. Thank you. I yield back, Mr. Chair.

Mr. CICILLINE. The gentleman yields back. I now recognize the gentlelady from Pennsylvania, Ms. Scanlon, for 5 minutes.

Ms. SCANLON. Thank you, Chairman. I want to start by commending the members and the staff of this committee for the incredible work they have done over the course of this hearing series. It is an historic investigation. The report coming forward is shedding light on the crushing power of big tech, and it has really brought before the American people a desperately-needed conversation on what we need to do to reform our antitrust laws. So I am proud to have been a part of this process, very grateful to the chairman for having initiated it and walked us all through this.

You know, over the course of the last year, we have laid out how Amazon, Apple, Facebook, Google, and others have used monopolistic tactics to exert undue market power. In doing this, these companies stifle innovation, kill competition, and harm the American public. We certainly hear about it every day from our constituents. I have little reason to believe that, without regulatory intervention, these companies will continue to act in their self-interests rather than in the interest of free and fair competition or privacy.

Over the course of the investigation, it became clear conversation on rethinking traditional antitrust law is needed. Companies competing in the digital marketplace on the scale we see today could not have been conceived of when the Sherman Antitrust Act and our other anti-monopoly laws were created. And decades of court rulings have obviously made it harder and harder to use traditional antitrust laws to bring enforcement measures against these companies. So, in addition to looking at how we can use traditional antitrust law to bring companies to heel, we also have to identify the areas where we can make reforms to better regulate and police digital marketplaces. So I am looking forward to how we develop a modern antitrust code that can respond to the major competition issues of this time, and I am hopeful that our report and the expert testimony of our witnesses today will serve as a launching point for enforcement and reform legislation.

Now, using the predatory pricing models to drive out competition is a classic monopolistic tactic, and in our hearing in July, I raised concerns with Amazon's scheme to artificially lower the prices of diapers in order to drive down competitors' profits until they could acquire that competitor. And this had a real impact on parents who saw, after the acquisition, saw the cost of Amazon diaper products rise as a result. So, Ms. Teachout, do you see this predatory pricing scheme as a symptom of a company that has grown so large, they no longer care about what is best for consumers?

Ms. TEACHOUT. As a mother of an almost 2-year-old, I feel the diapers problem on a regular basis, so thank you for raising it. Look, the diapers acquisition, and thank you for your line of questioning, which was very powerful. It was an example of one of the moments where great research and great preparation really re-

vealed something powerful. I believe you uncovered just how much Amazon was willing to lose in order to govern that market.

And I think one of the things it showed is the really deeply problematic nature of court-driven antitrust policy, because what we saw in *Brooke Group*, and *Warehouse*, and the series of Supreme Court antitrust cases is a statement that predatory pricing of exactly this kind was really unlikely to happen. It was a statement based in economic theory, but not in the economic realities. And it is just an example of how incredibly important it is for this body to act to make clear that that kind of predatory pricing cannot happen going forward. Right now, we do not know the full scope and range of—I will be quick—of predatory behaviors going on, but we have reason to suspect it is far broader than anything we know. And the opacity of these companies makes it very easy to cross-subsidize in ways that really crush competition.

Ms. SCANLON. And do you have suggestions about how we can use reform to combat this?

Ms. TEACHOUT. Well, sure. Overturn the trio of cases that changed the predatory pricing laws. I mean, this is something Congress does in other areas. When President Obama became President, his first bill, the Lilly Ledbetter Act, was overturning bad Supreme Court interpretation of congressional statutes. So here again, it is your responsibility to take this moment and overturn bad Supreme Court interpretation of congressional statutes.

Ms. SCANLON. Okay. Thank you. I appreciate that. And I do have to say, I am struck by the fact that when they passed the Sherman antitrust law, they probably were not thinking about diaper pricing and did not have witnesses like yourself or representatives like myself. Thank you to all of our witnesses. We really appreciate your insights today, and I yield back.

Mr. CICILLINE. The gentlelady yields back. I now recognize the gentleman from Colorado, Mr. Neguse, for 5 minutes, and the vice chair of——

Mr. NEGUSE. Thank you, Mr. Chairman, and I want to thank each of the witnesses for their testimony today and very thoughtful presentations with respect to the legislative recommendations that this committee is poised to potentially make to the full Congress. I would be remiss if I didn't say first and foremost just how much I have appreciated serving as the vice chair of this subcommittee, particularly given the investigation that we have undertaken, and I want to give my gratitude to the chairman, to Chairman Cicilline, for his thoughtful leadership. I think the way that he has approached this investigation and leading, of course, our counsel and the staff of the committee, and, on a bipartisan basis, working to try to get to the bottom of these very serious, vexing issues that impact every consumer in our country, in my view, has just been a tremendous example of how Congress can work well when we are working at our best. And so I want to say thank you again, Chairman Cicilline, and the ranking member of the subcommittee as well. We appreciate his leadership and, of course, wish him well in his retirement.

I want to, I guess, perhaps end the hearing in a similar way in which we started it. The ranking member asked a series of questions around Facebook, in particular. And I think that Facebook

provides perhaps one of the best examples for this committee and for the country really to consider in terms of acquisitions of competitive and nascent threats, you know, undeniably helping a company amass and maintain market dominance. And I think that was exposed during the course of the hearing, of course, that we held in July with the CEO, and the documentary evidence that this committee was able to compile during the course of our investigation.

Ms. Hubbard, in your prepared testimony, I believe you argue, and I think I am putting this accurately, that enforcers should unwind illegal mergers that they didn't catch. And you cite Facebook's acquisition of WhatsApp and Instagram as examples of what you believe could be illegal mergers. I wonder if you could expound a bit on why, in your view, antitrust enforcers didn't catch these anti-competitive acquisitions in real time, because I think it is fairly clear from the documentary evidence that we have compiled that it was, in fact, an anti-competitive acquisition, and it was consistent with Facebook's, you know, modus operandi, if you will, which Professor Teachout articulates really well in terms of, you know, copying competitors, acquiring competitors, or eliminating them.

Ms. HUBBARD. Thank you for the question. I think in this hearing, we have let the enforcers off the hook a little too lightly. To hear the conversations we have had about the Google-DoubleClick merger, for example, we said how could we have foreseen that. All you need to do is read the dissenting statement of Pamela Jones Harbour. She foresaw everything. So who is in the majority matters, okay? If we had three Chopras or Slaughters running the FTC right now, we would be having vastly different enforcement. So people matter. If Pamela Burns Harbour had been in charge, that deal may have not gone through. She was urging for greater scrutiny.

So, you know, why did they miss these mergers? I think they were trained in the Chicago School ideology, which has been a failure at enforcing the antitrust laws in a way that protects anybody. It is the consumer welfare standard, but it hasn't protected consumers at all, and that ideology is incredibly narrow. And they look at, oh, Facebook is this kind of a product and Instagram is a photo-sharing app, and they don't do any kind of a real thoughtful analysis that, hey, is this a competitor that they are acquiring. I didn't see any of the, you know, discussion of, wow, this is a really hard case to win, and so, you know, even though we think it is a problem, we are not going to do it. What I saw is they didn't do a thorough enough investigation. They didn't get the documents, the documents that your investigation has shown.

If any antitrust enforcer was presented with those documents, you need to try to bring that case. Even if you think you might lose, you need to bring that case, so it is a failure. But the good thing is that it is not too late because there is no rule that you can't unwind an illegal acquisition later in the future, so that should still happen. It is very critically important for our democracy, for elections, for all kinds of problems that we are seeing that result from Facebook not having any competitive threat because it acquired its top competitors.

Mr. NEGUSE. Well, thank you. You know, I couldn't agree with you more, and obviously there has been public reporting. As you know, the FTC is certainly investigating whether Facebook illegally maintained its dominance in the social media market through those acquisitions of, you know, 80-some-odd companies in the course of 15 years. So, in any event, I certainly share your sentiments. And as somebody who previously served in a gubernatorial administration in Colorado prior to coming to Congress, running the State's regulatory department back there, I certainly can attest that personnel is policy in every sense of that phrase, and so your point is salient one.

And I guess I am running out of time here, but the last question I would have for you, Ms. Hubbard, and to the extent Professor Teachout wishes to opine on this as well. I certainly read her report with Mr. Stoller in depth, and think their recommendations are very thoughtful of just what statutory changes, in addition to potentially overturning, of course, the precedents that were referenced by Professor Teachout, to federal antitrust law should Congress pursue to ease challenging dominant firms, rather ease the dominant firms' acquisitions of nascent competitors.

Mr. CICILLINE. The time of the gentleman has expired, but the witness may answer the question.

Ms. HUBBARD. Thank you, yes. So I think when it comes to acquisitions of nascent competitors, we definitely need to reform the standards that are completely broken, but the easiest way would be to go through a bright-line rules process for mergers. We can look at the 1968 merger guidelines as a model for how to do that where it just says, if you have a certain amount of market power, you are not allowed to acquire any further companies. And if you want to grow your market power, you need to do it by investing in products and your workers, and you need to grow organically. You are not allowed to do any kind of a merger once you are a certain size.

And these clear thresholds would get rid of the burdens on enforcers that make it too hard and too expensive to win mergers. It would also create very clear rules for the marketplace so that everyone knows what is acceptable. You know, we need to go further than just little tweaks here and there. We need actually bright-line rules.

Mr. CICILLINE. Thank you. The gentleman yields back. I now recognize the gentlelady from Georgia, Mrs. McBath, for 5 minutes.

Mrs. MCBATH. Thank you, Mr. Chairman. Thank you so much for continuing to bring these important measures before the body today, and thank you so much to each of you. We are really glad to be hearing from you today as we continue to examine the antitrust and also the anti-competitive nature of big tech.

When I had the opportunity to ask questions of the CEOs of big tech companies, I focused on the harms that were faced by small businesses. I asked Mr. Bezos about Amazon's treatment of third-party sellers, small businesses who want to sell on Amazon. I asked Mr. Cook about developers who want to make their apps available in the App Store and the users who were disappointed when their favorite apps just suddenly disappeared. In both cases, Amazon and Apple exercised immense control over whose products,

whether physical or digital, are available in their marketplaces. And this leaves small businesses beholden to their whims as they try to maintain a business, create jobs, and provide for their own families. After our last hearing, even more Amazon sellers reached out to this committee and to my office with the same or similar concerns. Sellers have told us over and over again that they feel that they are dispensable.

So, Ms. Teachout, you made recommendations in your testimony about reforms that we could make. Do you have anything to add on those reforms that can help third-party sellers or app developers?

Ms. TEACHOUT. Thank you, and thank you for your very powerful questioning. As you saw in response to your questions, the CEOs will always have some reason for kicking off their competitors because it is better for consumers, but it looks from the outside like they are using their platform power to really squeeze and really hurt small businesses. And I just want to add one thing. We are in the middle of a global pandemic where small businesses are facing a true catastrophe, and it is more important than ever that we support those small businesses in this moment during a time when margins are tight, if they are there at all. So the most important thing to protect small businesses is structural separation. The most important thing for those Amazon sellers is that they are able to go to Amazon as a place where they sell their wares, but not feel like they are then obliged to go to the feudal lord of Amazon and say, to get prioritization, I will use your advertising, to get prioritization, I will use your Fulfillment services. And those sellers are legitimately fearful that their brilliant, creative ideas will be ripped off and then used by Amazon to compete against them. So structural separation to me is the simplest and most powerful tool for supporting small businesses at this moment.

Mrs. MCBATH. Thank you so much for that answer. Mr. Kades, do the reforms that you are supporting, actually do they have a risk of unintended consequences, and if they do, why or why not?

Mr. KADES. Okay. So I think I actually forgot to turn it off last time, so I am 0 for 3 today. Thank you for that question. I think it is foolish for anyone to say I have an idea for reform, and it is totally costless, and there never will be unintended consequences, so that is true. But what I think is also true is when we look at the situation of where the law is, the cost of doing nothing is tremendous. In some sense, when we address the question of whether the antitrust laws are in the right position, this Committee, in a bipartisan way, already answered yes. Earlier in this Congress, you passed bills directly trying to address the failure of the courts to condemn clearly anti-competitive activity in the healthcare field, both the Pay for Delay and the CREATES Act. Those were much simpler issues than the types of issues that are flowing around with tech. Those were cases involving price, and still the courts are getting them wrong.

So I think if we do nothing, what we are saying is that government is no longer concerned about regulating dominant companies and it is just free rein. Can the reforms have negative consequences? As I said, yes, but I think that is the decision Congress always makes.

Mrs. MCBATH. Thank you very much. And one last question for Ms. Hubbard. Of the reforms that you are recommending, which ones do you think will do the most to address the harms that have been faced by these small businesses? As you know, as one who has been working in gun safety, I know that there is not one solution to the expansive culture of gun violence. But what do you believe is a reform that will do the most effective, efficient, expedient change?

Ms. HUBBARD. Yeah, I have to agree with Professor Teachout, her comment earlier about structural separation. It is just the most administrable. It is, you know, a preventive solution that just eliminates the conflicts of interest and creates a playing field that is level. It just doesn't work to have dominant corporations, you know, playing the game and controlling it, too, right? They have to do one or the other. And you just can't police every little incident because there are so many opportunities for them to favor their own products and services, and so many opportunities for them to put the thumb on the scale that we just can't even see. It is just not possible to get at all of those through individual enforcement actions, and that is why I think the structural separation, which has been done in American history many times in many industries, is the best solution.

Mrs. MCBATH. Thank you, and I yield back.

Mr. CICILLINE. I thank the gentlelady for yielding back. I now recognize myself for 5 minutes.

Professor Teachout, I would like you to respond to an argument that we have heard during the course of this investigation, that Congress suddenly becoming active in this antitrust space risks rendering antitrust laws dangerously political, and that somehow our efforts to sort of get the policy around antitrust modernized and updated creates some perception that we are politicizing antitrust. I wonder if you would respond to that argument.

Ms. TEACHOUT. Economic policy and anti-corruption policy are arguably the core jobs of Congress protecting the people of this country from tyrants and allowing for a thriving economy. There is recent research that Mr. Rahman alluded to showing that corporate concentration is leading to a transfer of as much as $14,000 per year from workers to investors. This is a major driver of inequality. Nobody doubts that labor law is your job, that tax law is your job, that campaign finance law is your job. And when it comes to antitrust, antitrust and anti-monopoly law is about the country sharing its vision of what a moral, fair, and thriving economy looks like. There is nothing more congressional than antitrust law.

Mr. CICILLINE. I couldn't agree with you more. Thank you. You said it much more articulately than I could have. Ms. Hubbard, I would like to now ask you, there obviously is significant reporting that, and we are all aware that the State attorneys general, the FTC, and the DOJ are all pursuing antitrust investigations into the major dominant technology platforms, and some are reporting that lawsuits may be brought very soon. Some have also suggested that, you know, Congress should just wait to see how these cases turn out before pursuing legislative reform. I, of course, have suggested that there are two very different proceedings. One is an enforcement proceeding, which we are not prosecuting, and enforce-

ment action. As Professor Teachout just mentioned, ours is public policy development, and the urgency of doing our work cannot be overstated, and so, of course, we shouldn't await those. I just want to be sure that I am not off course with that thinking.

Ms. HUBBARD. Right, and as you know, I was at the New York AG's office, and they are part of these investigations, so I still don't think you should wait for them. And the reason is, there is so much anti-competitive conduct to go after, that the agencies are just trying to bite off little tiny pieces that they can work on, that are just a tiny fraction of the anti-competitive conduct that is going on. So they are not, you know, getting the whole landscape of all the different ways that these companies are abusing their monopoly power to exclude competition.

The other thing is that antitrust cases take years. So we have very pressing issues here about small business, about citizens, about democracy, about speech. We need urgent action right now in the middle of this global pandemic. We can't wait 5, 10 years for an antitrust case to finish up.

Mr. CICILLINE. Thank you.

Ms. HUBBARD. And the last thing is we have seen some strong antitrust cases lately that the judges just completely screw up. I mean, the New York State AG is soon to block the Sprint-T Mobile merger. That was a classic antitrust case of three to two major competitors. It should have been blocked. The evidence was overwhelming that it would lead to a price increase under the Chicago School theory of consumer welfare, and they still didn't win. So we just can't put this in the hands of the courts. It is too important and too urgent. I do urge those enforcers to carry on and do their job, but we need you as well.

Mr. CICILLINE. Thank you. And, Professor Rahman, in your written statement, you note that tech platforms like Facebook, Google, Amazon, and Apple represent essential infrastructure, just like the railroads, bridges, and telegraph lines of a century ago, and you write about the dangers of unchecked private control over social, economic, and political infrastructure. And I wonder if you could just speak a little more about what that kind of infrastructure and the power that accompanies it means, and why our responsibility in terms of developing good public policy in this context is so important.

Mr. RAHMAN. Thank you very much, Chairman. I think like a lot of the other speakers today have alluded, you know, we are in such a crisis moment right now in our country. And a central piece of this is that if Congress doesn't act, what that means is that we are actually living under the private government, as Professor Teachout said, the private government of these private firms and the misapplication of law that we are seeing from the courts, right? And so essential infrastructure is exactly that, it is essential. If we don't update the rules of the road to make sure everybody can actually access that infrastructure, build the businesses, and engage in the social activities that it enables, then we are not creating the kind of economy that we need to be equitable and inclusive and to create new types of innovation in the future.

Mr. CICILLINE. And so if I could just ask for all the witnesses. As I kind of review both the testimony at this hearing today, which

has been incredibly useful, and your written testimony, it seems as if the reforms that you have all recommended, or some part of these, are kind of in five different areas, and I want to be sure I haven't missed one. The first is a change of some presumptions in statutes to shift burdens to parties that both may be engaging in misconduct, but also have easier access to the information; two, this whole notion of separation of lines of business, that sort of structural change so we eliminate what Professor Teachout has described as this extraordinary conflict of interest, which is bad for our economy, bad for innovation, bad for a whole range of other things; three, more rigorous enforcement, which, of course, we recognize means more resources, staff, and leadership that enthusiastically and creatively promote competition policy, and believe in this stuff, and will work aggressively. The fourth area is a reversal of a number of court decisions that have either kind of misinterpreted or, frankly, just changed the intention of Congress as it relates to important competition policy; and then, fifth, a set of provisions that may just explicitly prohibit discriminatory behavior. And, you know, those obviously have some permutations, but are there other general areas that we ought to be looking at in this final part of our investigation in terms of recommendations? Yes, Mr. Baer.

Mr. BAER. I agree. I think that appropriately summarizes the points. I do think in looking at prohibitions, we also ought to be thinking of forward-looking rules, you know, of interoperability, portability. And it may well be we need to vest, whether it is the Federal Trade Commission or a new agency, with the authority to do targeted rules that actually will promote competition. So that is kind of an addendum to point 5.

Mr. CICILLINE. Great. Thank you. We will make that point 6. It deserves its own.

Anyone else? Yes, sir. Mr. Kades.

Mr. KADES. Yeah, I just want to echo what Bill Baer just said. I mean, I do think it is really important to think about part of——

Mr. BAER. That is why I promoted you back then. [Laughter.]

Mr. KADES. I know, right. Too often, we see when people say the word "regulation," right, they have this theory of burdening commerce, where, in fact, regulation is just a kind of jargon way to say these are the rules of the marketplace.

Mr. CICILLINE. Right.

Mr. KADES. And so, the FCC, right, the reason, right, they decided at some point that long-distance monopoly didn't mean you got to have a monopoly on phones, they said, no, now you got to have interconnection. And I think a lot of the problems we are dealing with, whether it be with any of these companies, is, better regulatory rules really will unleash competition and unleash it along the lines we want to see.

Mr. CICILLINE. And just with the indulgence of my colleagues, I am just going to ask Professor Rahman. I think he had his hand up also.

Mr. RAHMAN. Yeah, thank you, Chairman. Very quickly, I just had one piece, which is it is important to clarify the rulemaking authority that the FTC will also need in order to be an effective enforcer going forward of the kinds of issues that we have talked

about today. That is a dispute right now, and Congress could help improve that.

Mr. CICILLINE. Well, thank you. I have gone way over my time, so I appreciate the indulgence. Before closing today's hearing, though, I would like to first just thank the chairman of the full committee, Chairman Nadler, who has been an extraordinary supporter of this investigation and an active participant, and it would not have been permitted to proceed in the kind of robust nature that it did without his support. So I want to thank Mr. Nadler for that.

Chairman NADLER. Let me thank Mr. Cicilline for his role in this. Without your efforts, this would not have occurred.

Mr. CICILLINE. Thank you, Mr. Chairman. I also want to take a moment as a point of personal privilege to thank the members of the subcommittee on both sides of the aisle who have taken this work seriously, invested extraordinary amounts of time to conduct a really thorough investigation. I am really grateful for that. And I also want to take a particular moment of privilege to extend my thanks to our extraordinary staff of the subcommittee for the work that they have done and will continue to do. I have said this many times before. This is a mighty staff of 5 or 6 that has done the work of 30 or more, and that is Slade Bond, Lina Khan, Amanda Lewis, Phil Berenbroick, Anna Lenhart, and Joe Van Wye. And they have just been extraordinary, and I know all my colleagues will join me in thanking them.

[Applause.]

Mr. CICILLINE. And I think, you know, they have obviously been a really important and indispensable part of this process, and every member on this dais is grateful on both sides of the aisle for all the work that has been put into it. I also want to just take a moment to thank my chief of staff, Peter Karafotas, and my communications director, Richard Luchette, for their diligence and commitment during this investigation.

And finally, to our witnesses, thank you again. You have all informed this work throughout and given us a lot to think about today, and we are grateful for that. And I will end by just reminding everyone the reason that this investigation is so important to the future of our country is because our country has a history of this battle between concentrated economic power, monopolies, and democracy. We are seeing that play out in the most extraordinary way and, frankly, in a dangerous way, and it is incumbent on the Congress of the United States to fulfill our responsibility to make sure our economy works and we safeguard our democracy. And this investigation is a critical part of that, so thank you all.

And with that, the hearing is adjourned.

I am sorry. Members have 5 legislative days to enter into the record materials and extended remarks.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]

APPENDIX

October 1, 2020

The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Consumer Reports has appreciated the opportunity to share our perspective during the course of the Subcommittee's investigation into the state of competition in the digital marketplace. As our letter to you in April[1] reflects, we share your interest in ensuring that the antitrust laws are up to the challenges of protecting competition and consumer choice in this marketplace, what improvements to those laws might be needed, and what might be needed to supplement them.

Throughout our 80+ year history, Consumer Reports has emphasized the fundamental importance of competition for ensuring a marketplace that works for consumers, by empowering them with the leverage of choice, the ability to go elsewhere for a better deal, which means businesses have to be responsive to consumers' interests. Antitrust law is critical to protecting that competition, and we have steadfastly supported strong antitrust laws, and advocated for sound and determined antitrust enforcement, consistent with the core values of an open marketplace and the benefits it brings to consumers, to the economy, and to society.

On September 24, the Digital Lab at Consumer Reports released "Platform Perceptions: Consumer Attitudes on Competition and Fairness in Online Platforms,"[2] the results of a nationally representative survey we conducted this summer. The survey demonstrates that clear majorities of consumers are concerned about the growing power of online platforms, and support government action to rein it in effectively to protect the online marketplace. Among our survey's major findings:

- 85% of Americans are concerned about the amount of data online platforms are collecting and storing about them.
- 81% are concerned that platforms are collecting and holding this data in order to build out more comprehensive consumer profiles.
- 75% say the practice of an online platform giving higher placement in search results for their own products either is unfair (23%), or is fair only if it is openly disclosed (52%).

[1] https://advocacy.consumerreports.org/research/cr-letter-to-house-judiciary-antitrust-subcommittee-online-platforms-investigation/.
[2] https://advocacy.consumerreports.org/press_release/consumer-reports-survey-finds-that-most-americans-support-government-regulation-of-online-platforms/.

- And 83% say this about the practice of an online platform giving higher placement to companies that pay extra for that – that it's unfair (25%), or is fair only if it is labeled as a paid ad.

- But 46% have difficulty distinguishing between what is a paid ad versus an objective search result, and 58% are not confident that they are getting objective and unbiased search results when using an online platform to shop or search for information.

- 79% say that it's unfair for tech platforms to be strategically buying up other companies, because it's undermining competition and consumer choice.

- A clear majority of consumers – about 6 out of 10 – support more government regulation of online platforms (60%), and mandating interoperability features (61%) so consumers can switch without losing valuable connections and information they have built up.

- Three quarters of consumers (75%) said online platforms should not be allowed to manipulate their search algorithm to exclude competing sites or otherwise interfere with a seller's or consumer's own website,

- Three quarters (74%) aid online platforms should be required to use objective and impartial evaluations when showing results, and be clear about how those evaluations are made.

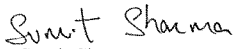
We are pleased that, as you prepare to release your report on the investigation, you are beginning the next step of considering options for addressing the problems you have identified. We look forward to working with you to ensure that the online marketplace works for consumers, and for all who seek to reach them.

Sincerely,

George Slover
Senior Policy Counsel
Consumer Reports

Justin Brookman
Director, Privacy and
Technology Policy
Consumer Reports

Jonathan Schwantes
Senior Policy Counsel
Consumer Reports



Sumit Sharma
Senior Researcher
Consumer Reports

cc: Members, Subcommittee on Antitrust, Commercial and Administrative Law

April 17, 2020

The Honorable Jerrold Nadler
Chairman
U.S. House Committee on the Judiciary
Washington, DC 20515

The Honorable Doug Collins
Ranking Member
U.S. House Committee on the Judiciary
Washington, DC 20515

RE: Competition in the Digital Marketplace

Dear Members of the Committee:

The Americans for Financial Reform Education Fund (AFR Education Fund) and Demand Progress Education Fund (DPEF) appreciate the opportunity to comment on antitrust policy and the digital marketplace. AFR Education Fund is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR Education Fund include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups. DPEF is a fiscally-sponsored project of New Venture Fund, a 501(c)3 organization. DPEF and our more than two million affiliated activists seek to protect the democratic character of the internet — and wield it to render government accountable and contest concentrated corporate power.

We applaud the Committee on its investigation into the relationship between dominant platforms and online competition. Both DPEF and AFR Education Fund support the partition of banking and commerce as a key regulatory principle, as it reduces systemic risks, strengthens consumer protections, and prevents undue concentrations of corporate power.[1] Along with our allies, DPEF specifically supports the break-up of "Big Tech" monopolies, such as Amazon,

[1] Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 275 (2013)

Google, and Facebook, as well as reforms that would prevent other companies from amassing similar power.[2] Historically, commercial firms that also engage in financial services tend to use such enterprises to fund risky business activities, heightening the moral hazard of bailout, while simultaneously failing to deal fairly with customers or competitors.[3]

Recently, sophisticated commercial firms have once again attempted to breach this separation, whether through mergers and acquisitions, applications for special banking charters, or general arbitrage. We are especially concerned about the activities of dominant technology platforms, which already use their "platform privilege" not only to analyze users, but to acquire and appropriate from competitors that rely on the infrastructure they supply.[4] For example, European regulators have fined Google for using its monopoly over desktop and mobile search to prioritize its own products.[5] Amazon uses its own digital marketplace to bury competitors in terms of search, product review, advertising, and marketing.[6]

Given this history, we call for regulators to more thoroughly review all tech acquisitions of financial services companies.[7] Beyond this, we also encourage the Committee to pay special attention to payments provision and surveillance as a potential anti-competitive business activity and special banking charters as anti-competitive regulatory carve-outs. Perhaps most importantly, we urge the Committee to treat financial surveillance as an anti-competitive technology, generally. The systematic monitoring of financial activity allows dominant platforms to become even more extractive and more powerful. With a more comprehensive perspective on consumer behavior, dominant platforms can more easily take over adjacent markets, engage in predatory pricing, self-deal, increase the monetary value of their advertising, and accumulate more economic power.

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[2] Press Release, Demand Progress, *Grassroots Coalition Launches Campaign Calling on 2020 Presidential Candidates to Break Up Amazon, Facebook, Google and Other Big Technology Monopolies* (Dec. 18, 2019), https://demandprogress.org/grassroots-coalition-launches-campaign-calling-2020-presidential-candidates-break-amazon-facebook-google-big-technology-monopolies/

[3] *See., e.g,* Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN L. REV. 1539, 1569 (2007); Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1411 (2018); Graham Steele, *Facebook's Libra cryptocurrency is part of a disturbing financial trend,* WASH. POST (Aug. 12, 2019), https://www.washingtonpost.com/outlook/2019/08/12/facebooks-libra-cryptocurrency-is-part-disturbing-financial-trend/

[4] *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (Testimony of Sally Hubbard), available at https://www.judiciary.senate.gov/imo/media/doc/Hubbard%20Testimony.pdf

[5] Leo Kelion, *Google hit with record EU fine over Shopping service*, BBC News (June 27, 2017), https://www.bbc.com/news/technology-40406542

[6] Hubbard, *supra* note 4, at 9.

[7] *See, e.g.*, Hugh Son, *LendingClub buys Radius Bank for $185 million in first fintech takeover of a regulated US bank,* CNBC (Feb. 18, 2020), https://www.cnbc.com/2020/02/18/lendingclub-buys-radius-bank-in-first-fintech-takeover-of-a-bank.html

Congress Should Structurally Separate Payments and Platforms

We are especially concerned by the encroachment of dominant platforms into the payments space. As payment transactions illuminate the social links between fund senders and recipients, companies that already collect similar social data find payments data extremely valuable. They can use the integrated information to both enhance existing products and offer new services (like credit scoring) to new groups of consumers.[8]

At the moment, some Big Techs intend to create not only payment systems, but corporate currencies. Most notably, Facebook and twenty-seven corporate partners have formed a non-profit in Geneva, Switzerland, the Libra Association, which they intend to use to create new blockchain-based retail payment tools (Libra coins), establishing a parallel financial services economy.[9] Notably, Facebook is already building its own mobile wallet for this economy: meaning it intends to compete within infrastructure it controls.

As TenCent has demonstrated in China, combining a payments network with a massive social media platform allows powerful companies to generate extreme pricing power within captive ecosystems.[10] As European antitrust regulators have argued, data collection also increases the likelihood of product "tying": conditioning the purchase of a product over which a company exercises monopoly power on the purchase of a related product as a means of selling this related product.[11] Because corporate currencies are literally means of paying for other products, they could render the ability to tie and bundle products together limitless.[12]

Moreover, as unregulated payment platforms threaten the safety and soundness of our existing financial systems, Congress should act to more comprehensively regulate all "shadow

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[8] BANK FOR INTERNATIONAL SETTLEMENTS, BIG TECH IN FINANCE: OPPORTUNITIES AND RISKS, BANK FOR INTERNATIONAL SETTLEMENTS ANNUAL ECONOMIC REPORT, https://www.bis.org/publ/arpdf/ar2019e3.htm

[9] *See* LIBRA ASS'N MEMBERS, WHITE PAPER V 2.0, 3-4 (2020), https://libra.org/en-US/white-paper/; Nick Statt, *Facebook's Calibra is a secret weapon for monetizing its new cryptocurrency*, THE VERGE (June 18, 2019), https://www.theverge.com/2019/6/18/18682838/facebook-digital-wallet-calibra-libra-cryptocurrency-kevin-weil-david-marcus-interview

[10] Jacky Wong, *The Next Level for China's Tencent: Global Domination*, WALL ST. J (Nov. 13, 2019) https://www.wsj.com/articles/the-next-level-for-chinas-tencent-global-domination-11573655785; In 2012, Mark Zuckerberg explicitly stated he wanted to create a payment product to exercise pricing power over third-party developers. MATT STOLLER, LIBRA BASICS: WHAT IS FACEBOOK'S CURRENCY PROJECT?, OPEN MKTS INST. (updated July 19, 2019), https://openmarketsinstitute.org/reports/libra-basics-facebooks-currency-project/

[11] WILSON C. FREEMAN AND JAY B. SYKES, "ANTITRUST AND 'BIG TECH'", CONG. RESEARCH SERV., R49510, 15-17 (2019), https://fas.org/sgp/crs/misc/R45910.pdf

[12] Indeed, competitors have already alleged that Facebook used an older payment system, Facebook Credits, to instigate *per se* unlawful tying arrangements. *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013)

payment platforms" — projects that store consumer funds, potentially in long-term custody, outside of FDIC-insured banks.[13] Otherwise, unprotected mobile wallet balances could become so expansive and interconnected to the rest of the financial system that regulators would face severe pressure to bailout tech companies in jeopardy: yet another unfair business advantage. Legislation that would designate the 'deposit-like' obligations of dominant platforms as "deposits", prohibiting them from issuing such obligations absent approval by banking regulators [14] would be a positive response to this danger.

Congress and Regulators Should Withhold Special Banking Charters from Tech Companies

We are also concerned that tech companies are attempting to take advantage of a loophole in the Competitive Equality Banking Act of 1987 to create subsidiary Industrial Loan Companies (ILCs). Although these state-chartered banks benefit from federal deposit insurance and other public protections, ILCs and their parent companies circumvent critical federal supervision and regulation, posing unique risks to consumers, small businesses, and the financial system as a whole.[15] In 2006, in response to opposition from community banks, consumer advocates, and labor unions, the Federal Deposit Insurance Corporation (FDIC) placed a moratorium on Industrial Loan Charters, freezing applications from Walmart, Home Depot, and a subsidiary of Warren Buffett's Berkshire Hathaway.[16]

After a nearly fourteen year moratorium, the FDIC recently approved ILC charters for two fintech companies: Varo Money and Square Financial Services. One might anticipate that larger companies, like Amazon, will follow suit in seeking such charters.[17] We not only oppose the approval of these applications, but join the Federal Reserve Board of Governors in recommending that Congress repeal the ILC loophole, so that non banks are not increasingly able to engage in banking services while evading the comprehensive regulation imposed on

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[13] *See* Dan Awrey and Kristin van Zwieten, *Mapping The Shadow Payment System* (October 7, 2019). SWIFT INSTITUTE WORKING PAPER NO. 2019-001, available at: https://ssrn.com/abstract=3462351

[14] For discussion of this general principle, *see, e.g,* John Crawford, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 3 (2017)

[15] Letter from Ams. for Fin. Reform to FDIC (Oct. 10, 2017), available at https://ourfinancialsecurity.org/2017/10/letter-regulator-afr-opposes-fdic-insurance-square-inc/; Letter from Ams. for Fin. Reform to FDIC (Jul. 19, 2017), available at https://ourfinancialsecurity.org/2017/07/letter-regulators-afr-opposes-sofis-deposit-insurance-application/

[16] Crawford, *supra* note 14, at 8.

[17] *See, e.g.*, Ron Shevlin, *Amazon's Impending Invasion Of Banking*, FORBES (July 8, 2019), https://www.forbes.com/sites/ronshevlin/2019/07/08/amazon-invasion/#1bcfa8477921

traditional banks and bank holding companies. Similarly, we also oppose all plans by the Office of the Comptroller of the Currency to issue special charters to fintech companies.[18]

Congress Should Constrain Corporate Data Collection

In the context of current technology, dividing banking and commerce demands special attention to financial surveillance. Dominant platforms grow by expanding their platforms' user base and information access, securing revenue by selling products directly to their users or by selling access to their users to third parties.[19] Their business model depends upon enabling direct, *monitored* interactions between more and more users. Firms learn from these interactions in order to deploy yet another range of services that generate further activity. This increased activity then generates more data. In a nutshell: the scale of surveillance determines growth.

As U.S. legal scholars and European antitrust authorities have concluded, data begets market power, but market power also allows dominant platforms to continually extract data in unfair ways.[20] For instance, companies like Facebook notoriously use "social plug-ins" (such as Facebook "Like" buttons) to track users on third-party websites and monitor their off-site transactions.[21] By centralizing this sensitive information, Facebook can further mine data and determine the maximum prices consumers and competitors are willing to pay for various services. (One could easily imagine Facebook using Libra payment buttons to accomplish similar functions). Similarly, Amazon already provides the cloud-computing systems that serve as the "technological backbone" of many fintech firms, which grants Amazon access to data other companies are structurally unable to obtain.[22] The company could easily take advantage of this data to unfairly compete with its existing fintech business partners.

Unfortunately, U.S. antitrust regulators have often failed to take such surveillance into proper account.[23] But the Federal Trade Commission (FTC) has important tools at its disposal. Specifically, the Sherman Antitrust Act of 1890 (Sherman Act) authorizes the FTC to break up a conglomerate when it is monopolizing or attempting to monopolize a market. This section was

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[18] Comment from Ams. for Fin. Reform to OCC (Jan. 15, 2017), available at https://ourfinancialsecurity.org/wp-content/uploads/2017/01/FINAL-AFR-Comment-to-OCC-re-FinTech-White-Paper-1-15-2017.pdf

[19] *See, e.g.*, BANK FOR INTERNATIONAL SETTLEMENTS, *supra* note 8.

[20] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 518 (2019)

[21] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1004 (2019)

[22] John Detrixhe, *Amazon is invading finance without really trying*, QUARTZ (Nov. 1, 2017), https://qz.com/1116277/amazons-aws-cloud-business-is-reshaping-how-the-financial-services-industry-works/

[23] *See, e.g.*, Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1010 (2013); In two scholars' review case law uncovered zero instances of antitrust liability premised on remedying privacy injuries. Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 89 (2019)

memorably used to sue Microsoft in the late 1990s.[24] The FTC also retains expansive power to interpret the antitrust provision of Section 5 of the FTC Act, which prohibits "unfair competition", generally.[25] Using this authority, the FTC should establish presumptions of illegality for competitively suspect practices,[26] including certain surveillance practices, either through enforcement activity or through rulemaking.

While the FTC does have some tools at its disposal, no overarching federal privacy law currently curbs the collection, use, and sale of personal data among corporations.[27] Ultimately, however, Congress should take action to minimize data collection to that which is narrowly tailored to permitted usages, so that many of the aforementioned anti-competitive practices become commercially unfruitful.[28]

In sum, we urge the Committee to promote the tradition of separating deposit taking and payment systems from other commercial activities, by extending that set of principles to dominant platforms, especially online marketplaces and social networks.

Thank you for the opportunity to comment on this issue. If you have any questions, please contact Raúl Carrillo (Fellow, AFR Education Fund; Policy Counsel, DPEF) at raul@ourfinancialsecurity.org.

Sincerely,
Americans for Financial Reform Education Fund
Demand Progress Education Fund

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[24] Kelly Ranttila, *Social Media and Monopoly*, 46 OHIO N.U. L. REV. 161, 167 (2020)
[25] Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. 645, 661–63 (2017)
[26] *Id.* at 676–77
[27] BERKELEY MEDIA STUDIES GROUP ET AL., THE TIME IS NOW: A FRAMEWORK FOR COMPREHENSIVE PRIVACY PROTECTION AND DIGITAL RIGHTS IN THE UNITED STATES, Citizen.org, (last visited Mar. 31, 2020), https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf
[28] *See, e.g.*, Woodrow Hartzog and Neil M. Richards, *Privacy's Constitutional Moment and the Limits of Data Protection,* 61 BOSTON COLLEGE LAW REVIEW (forthcoming 2020), available at: https://ssrn.com/abstract=3441502; Press Release, SenateDemocrats.gov, *Privacy and Data Protection Framework* (Nov. 18, 2019), available at https://www.democrats.senate.gov/imo/media/doc/Final_CMTE%20Privacy%20Principles_11.14.19.pdf

Public Knowledge

September 29, 2020

Congressman David Cicilline
Chairman
Subcommittee on Antitrust, Commercial and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

Congressman Jim Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
2449 Rayburn House Office Building
Washington, DC 20515

RE: Proposals to Strengthen the Antitrust Laws and Restore Competition Online Hearing Submission

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Public Knowledge appreciates the Subcommittee holding this hearing on possible reforms to the antitrust laws to protect and reinvigorate online competition. The four companies at the center of the investigation—Google, Facebook, Amazon, and Apple—all wield enormous power in incredibly complex markets. Although reforms to the antitrust laws are needed, antitrust reform alone will be insufficient to fully tackle the market power of dominant digital platforms.

As the Subcommittee looks to make changes to the antitrust laws, we urge you to focus on eliminating recent judicially created impediments to effective law enforcement.[1] For example, flawed legal decisions have created inappropriate barriers to both predatory pricing and refusal-to-deal claims. Congress should pass a law overturning these precedents and restore these claims as valid ways to seek redress against a dominant firm.

Similarly, much of the competitive harm in digital platform markets involves nascent and potential competitors and limits innovation, which the courts have failed to recognize. Antitrust law should be clarified to properly weigh these harms against any consumer benefits.

Antitrust presumptions that go against economic evidence, such as the presumption that vertical mergers do not harm competition, should be re-examined. We need legislation to address the "more likely than not" standard in exclusionary conduct and merger cases, and to instead prohibit conduct that creates a substantial risk of competitive harm. Burdens of proof should be rebalanced to make it easier for plaintiffs to bring successful antitrust cases, including removing output reduction requirements and overly onerous

[1] For more detail on potential antitrust reforms Public Knowledge supports, *see Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets* (Apr. 30, 2020), https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

market definition requirements. Finally, additional funding for the two major enforcement agencies, the Federal Trade Commission and the Department of Justice, would ensure the dedicated professionals at these agencies have the ability to take on cases to protect consumers.

Public Knowledge urges the Subcommittee to also look beyond antitrust reforms. Even strengthened laws with aggressive enforcement cannot bring the swift market-opening tools that are essential to prevent dominant platforms from thwarting the short-term entry and innovation the market needs and consumers deserve. The many years it takes to litigate individual antitrust cases will simply delay necessary reforms.

Whether or not cases launched against dominant technology platforms can ultimately yield structural reforms, legislation empowering regulators to expand competitive options for suppliers and consumers of the dominant platforms could immediately start addressing the imbalance of power that reinforces platform dominance.[2] For example, Congress should call for:

Interoperability

Major digital platform markets are currently dominated by one company with enormous opportunities to take advantage of network effects and scale economies. To combat these inherent advantages, Congress should empower regulators to mandate interoperability. If new services can easily plug in to the incumbent players, then they have a much better chance of getting off the ground and finding success. A novel email client unable to email existing services would be unlikely to gain traction with consumers. Telephone consumers greatly value being able to call others no matter what network they're on—a feature possible only through the networks' interoperability with one another. Digital platform markets should be viewed as similar to email or phone networks and thus interoperability, especially with the dominant company in a market, should be a priority for regulators. By enabling competitors to benefit from the network effects currently exploited exclusively by incumbent platforms, competition should flourish. This would

[2] *See e.g., Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms Before the S. Subcomm. on Antitrust, Comp. Policy & Cons. Rights*, 116th Cong. (2020) (statement of Gene Kimmelman, Senior Advisor, Public Knowledge); Gene Kimmelman, *Key Elements and Functions of a New Digital Regulatory Agency*, HARVARD SHORENSTEIN CENTER (Feb. 12, 2020), https://shorensteincenter.org/key-elements-and-functions-of-a-new-digital-regulatory-agency/; George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report (Jul. 1, 2019) https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.

result in lower prices in some markets and higher quality (more features, great privacy protections, variety in community and moderation standards) in others.[3]

Data Portability (with Privacy Protections)

The lifeblood and currency of online platforms is user data. Large platforms benefit from massive data collection and aggregation they then monetize through targeted advertising. Most users are unaware of the amount and depth of data their favorite platforms collect. Each service a platform offers can become a potential vector for data collection and the services have become so ingrained in our day-to-day lives it can be hard to avoid any one major platform. Google can collect data not just from searches, but also its Chrome browser and YouTube. Furthermore, Google's ability to track user location, perhaps the most important datapoint for ads, is unparalleled due to its Android operating system and Maps application. As platforms like Google expand, they make it difficult for users to leave the ecosystems they create. Data portability coupled with privacy protections would allow users to have more control over their data and easily port that data into competitor platforms. This would break the "walled gardens" many platforms constructed, preventing the use of personal data to thwart consumers from moving to alternative service providers.

Prohibit Unfair Self-preferencing

Numerous platforms have become essential to businesses seeking to reach their customers, while also directly competing with these businesses for those customers. Google can represent both the publishers and advertisers in an online advertising transaction while also running the exchange on which said transaction occurs. Amazon offers a platform to third-party sellers to reach customers while selling its own products on the same platform. There is an obvious incentive to favor one's own products or services in these marketplaces, especially when a platform has market power in one aspect of the market while other aspects remain somewhat competitive. In these circumstances, dominant platforms must be prevented from any form of anti-competitive discrimination against those who depend upon them to reach their customers. This will lessen the outsized advantage that dominant platforms currently enjoy.

A Customer Proprietary Network Information (CPNI) Regime

[3] For more on interoperability as an antitrust remedy, *see* Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, WASH. CENTER FOR EQUITABLE GROWTH (Sept, 23, 2020), https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/.

Platforms wearing multiple hats in a competitive transaction can behave in many more competitively problematic ways over just simply favoring their own products. As a condition of competing on the platform, third parties must give up all sorts of proprietary business data to the platform operators. This could include things like locations of customers or the identity of customers with a particular interest in a product. Platforms can then engineer this data to launch their own competing products. By adapting the CPNI approach from telecommunications law, platforms would be allowed to collect data on competitors, but only use it for competitively neutral purposes (*i.e.*, running the recommendation function on a platform).[4] This will mitigate the competitive advantage a platform enjoys from being both the *marketplace* on which commerce occurs and a *competitor* within that marketplace.

Reforms to App Stores

While app stores present unique benefits to consumers, they can also create unique competitive challenges in the market.[5] To expand competition, dominant app stores should be required to allow app "side-loading." This would allow users a separate avenue to download applications onto their devices if they so choose and would give developers an alternative to the app store bottleneck. A mandatory code-signing requirement could ensure security concerns are met. Competition would also expand if app stores limit in-app purchases to features directly related to app functionality. This would strike a balance between allowing apps to have tiered services or free trials while prohibiting the store from taking a hefty cut from all digital services offered by an app, such as e-books or cloud services. Third, only core device functions should be deemed appropriate for preloading to promote increased competition for apps on devices across the marketplace. Consumers very rarely change defaults, and platforms can take advantage of this to bundle their devices with additional services. Consumers should also be able to easily change default programs on their devices.

We believe that these reforms, taken together, would rein in the power of dominant digital platforms. The best way to enforce and implement these reforms will require both careful remedial oversight through antitrust litigation and the creation of a new digital regulatory body. Such oversight should be dedicated to promoting digital market competition focused on online platforms and would be able to bring the expertise

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[4] For more on how to implement a CPNI regime, *see* Harold Feld, *Mind Your Own Business: Protecting Third-Party Information From Digital Platforms*, PUBLIC KNOWLEDGE (June 2020), https://www.publicknowledge.org/wp-content/uploads/2020/07/Mind-Your-Own-Business.pdf.
[5] For more proposed reforms to app stores, *see* John Bergmayer, *Tending the Garden: How to Ensure That App Stores Put Users First*, PUBLIC KNOWLEDGE (June 2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

necessary to fully monitor digital market dynamics and implement technical remedies. Just as Congress has created public interest requirements alongside antitrust law for every other sector of the economy, it should do the same for the digital marketplace.

We applaud the Subcommittee's thorough and fruitful investigation. We welcome the opportunity to discuss these issues further with you

Sincerely,

/s/ Gene Kimmleman
Senior Advisor
Public Knowledge

/s/ Alex Petros
Policy Counsel
Public Knowledge

Cc:
Congressman Jerrold Nadler
Chairman
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Congressman Jim Jordan
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September 25, 2020
House Judiciary Committee
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Dear Members of the House Judiciary Antitrust Subcommittee,

Your July hearing provided a necessary and welcome opportunity to discuss the urgent questions around market dominance that companies like Amazon have staked out. However, many Amazon sellers have voiced concerns that the hearing did not address the competition issues that have created such an uneven playing field.

As the Subcommittee prepares to release its report on bringing accountability to Big Tech, I urge you to consider the experience of sellers and directly address the power that Amazon has amassed at the expense of these small businesses.

Discussion about Amazon and antitrust often narrowly focuses on the shoppers purchasing goods its platform, while too often ignoring the third-party sellers who are core customers of Amazon's services. These third-party sellers — who use the Amazon marketplace to sell products directly to consumers — give a percentage of every sale to the Amazon marketplace, purchase sponsored ads including Amazon via the demand side platform and rely on Fulfillment By Amazon (FBA) for their shipping and logistics needs, all in the name of building a successful brand on the Amazon marketplace.

Third-party sellers now make up more than half of all Amazon gross merchandise sales, a dramatic transformation that demonstrates the important role these sellers have played in powering the company's explosive growth. And Amazon has significant incentives to continue growing its third-party marketplace: According to e-commerce experts, for every dollar that shoppers spend on products from third-party merchants as much as 50 cents goes back to Amazon.

However, as third-party sales have grown on the Amazon platform, so too have the company's private label products. Amazon now has hundreds of private label products across nearly all product categories, which gives the company tremendous opportunity to experiment and gain a competitive advantage. In fact, in the past two years alone, the number of best-selling AmazonBasics has more than doubled.

Amazon and its executives have long maintained, even under sworn testimony, that the company maintains a barrier between third-party sellers and its own products and does not use data from these sellers to inform its product strategy. Yet reports have continued to emerge that draw these claims into question. A Wall Street Journal investigation exposed that "employees often consulted sales information on third-party vendors when developing private-label merchandise."

Meanwhile, many antitrust advocates have also warned that the concept of Buy Box Suppression, by which Amazon removes the option for sellers to allow consumers to more easily purchase their goods if it sees a sellers' product being sold for less on a competitor e-commerce

site, amounts to modern price fixing. Amazon prohibiting sellers from offering lower prices on other online retail platforms clearly hurts consumers if the only way for sellers to regain their listing on Amazon is to raise their prices on other platforms or remove their listings all together, therefore limiting competition.

Other punishment by Amazon could include not being able to drive traffic to an Amazon listing which reduces a product's visibility or removing important sale information from the listing as well as removing one-click shopping. Sellers have even reported having their listings deleted when they refuse to match pricing. It is apparent that Amazon wields an unfair competitive advantage over its competitors when sellers feel forced to match pricing in order to continue selling on the platform.

Yet in the face of these issues, third-party sellers have few avenues to seek relief from Amazon if they feel that they have been unfairly delisted, have had their account suspended, or otherwise negatively targeted by the company.

Unfortunately, given Amazon's massive market power and the control it wields over its marketplace, sellers are understandably reluctant to come forward and directly address these issues. In their place, the Subcommittee must provide recommendations that speak to these issues on sellers' behalf and how to handle Amazon's clear competitive advantage. A digital marketplace making massive gains at the expense of third-party sellers and ultimately consumers.

The Subcommittee has a tremendous opportunity to lay the groundwork for the future of our competitive environment and to better address the challenges of the modern digital marketplace, and Amazon must be a central focus of that discussion. At a time when many Amazon sellers — many of whom are small businesses with their own employees — are struggling to stay afloat, there is an urgent need for policymakers to ensure there's a level playing field for competition.

Mr. Bezos and Amazon had an opportunity in July to set the record straight on how it uses third-party seller data. He failed to adequately do so. Now, amid these complicated and fraught times for third-party sellers, there is more urgency than ever to demand truthful answers.

Sincerely,

Jason Boyce
Author, The Amazon Jungle
Founder & CEO, Avenue7Media
Former Top 200 Amazon Seller