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Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the opportunity to submit my recommendations in the wake of your critically important investigation into competition in the digital marketplace.

My expertise and background is in the study of the structures of American democracy.¹ I have spent much of my career exploring corruption and representative systems, with a focus on American history. Accordingly, I ground my submission and proposals in two democratic concerns. First, it is apparent that for the last several decades, Congress has irresponsibly ceded control over antimonopoly policy, and it is therefore a democratic necessity that Congress address the pathological level of market concentration and take responsibility for its impacts. Second, the highly concentrated big data market, and the existing abuses of big tech enabled by their dominant positions, pose a major democratic threat. Both of these concerns point to the critical importance of significant *new* legislation, along with immediate action to amend existing laws to override 40 years of dangerous, pro-monopoly judicial interpretations.

In response to your question on the adequacy of existing laws: they are inadequate. The distinct challenges posed by the current tech giants require Congress to do more than engage in aggressive oversight, pushing enforcement agencies to act. Moreover, forty years of weak antimonopoly policy has led to such extreme concentration that case-by-case efforts to use existing laws will not lead to decentralization quickly enough. We need new tools to enable break-ups.

I propose three specific areas for legislative action: imposing line of business restrictions for big tech companies; banning targeted advertising for essential communications infrastructure;

¹ I prepared this testimony with the help of Shaoul Sussman, a Legal Fellow in the Institute for Local Self-Reliance, whose writing on this subject can be found here: https://promarket.org/author/shaoul_sussman/, and my research assistant Tara O'Malley.

and an economic liberties package overturning bad Supreme Court precedent. These particular recommendations stem from a more general recommendation: Congress must reassert public supremacy over our economic life.

A. General Recommendation: The Need to Reassert Congressional Power over Antimonopoly Policy

Our current economy is beset by insecurity, inequality, the devastation of our small businesses, and the destruction of the journalism necessary for democracy to survive. All of these pathologies existed in some form ten years ago, but have been exacerbated by the radical concentration of power in digital markets.

It is hard to deny that Amazon, Facebook, and Google have become 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; few individuals can. But they are problematic infrastructure because they are riven with conflicts of interest, and their business models undermine healthy democratic debate and a healthily decentralized market.

Because these tech goliaths play chokepoint roles, huge parts of our economy are becoming corrosively dependent economic subspheres, where smaller players (and even several large players) focus their efforts on appealing to and appeasing these great powers, instead of innovation, job growth, creativity, and productive capacity. Such a relationship poisons the freedom that is essential to democracy, making producers, whether of goods or news, subservient to these oligarchs, and making it harder for those dependent upon them to speak up, out of fear of reprisal. Meanwhile, big tech uses their power over essential structures of communications and commerce to siphon off the value in news organizations, retailers, and producers, taking an unfair percentage of the profits created in these areas. This power asymmetry drives inequality.

This infrastructural vice grip over so many parts of public life and private enterprise is a major driver in the democratic decline that we are currently experiencing. And the more powerful these digital giants become, the more we see the development of a softly corrupt relationship between big tech and elected officials. Big tech is, for instance, the biggest lobbyist in D.C., and the lobbying relationship is now going both ways, with electeds also working to be in the good graces of big tech.

Amazon, Google, and Facebook play a grossly outsized role in the basic public functions of our society and have become unelected, unaccountable, and self-serving heads of a planned economy--planned by them. Facebook and Google have taken over as the regulators of the public square, regulating it in a discriminatory way that undermines open, decent communication. As I discuss more fully in the targeted ads section, their regulation is designed to maximize data

gathering and advertising revenue. At the same time, Facebook has set up a dangerous partnership with journalists, privileging publications based on an uber-editorial system that it controls, dictating our news consumption.

In a similar fashion, Amazon developed its own regulatory and judicial system. Entities that deal with Amazon's decision making bodies have come to describe them as the 'District of Amazon Federal Court.'² Currently, Amazon is the sole arbitrator in numerous fields, usurping and circumventing our government's power to validate and invalidate patents, trademarks and copyrights.³ In the field of patents, Amazon has even launched in 2019 an official quasi-governmental body, the Utility Patent Neutral Evaluation Procedure.⁴ This form of patent adjudication is not only lacking in terms of judicial procedure and fair process, but also dangerously biased since Amazon has a vested interest in promoting certain sellers, brands and products that are offered in its marketplace.⁵ Furthermore, from a purely financial perspective, Amazon directly benefits from this form of adjudication and is therefore incentivized to expand this program while making it harder for parties that transact on its platform to seek relief in our courts or with the United States Patent and Trademark Office.⁶

Even more concerning is Amazon's attempt to replace the Food and Drug Administration and the Federal Trade Commission in overseeing the regulation of the safety of goods sold on its platform.⁷ Amazon's ability to self-regulate this field as if it was a governmental agency is extremely dangerous.⁸

² Kaity Y. Emerson, *From Amazon's Domination of E-Commerce to Its Foray Into Patent Litigation: Will Amazon Succeed as "The District of Amazon Federal Court"?*, N.C. J. L. & Tech. (2019), <http://ncjolt.org/from-amazons-domination-of-e-commerce-to-its-foray-into-patent-litigation-will-amazon-succeed-as-the-district-of-amazon-federal-court/>.

³ *Report Infringement*, Amazon.com, <https://www.amazon.com/report/infringement> (last visited Apr. 21, 2020).

⁴ Under this new program, a company that believes certain products for sale on the Amazon Marketplace infringe its patents can request an evaluation by depositing \$4,000. If the seller does not dispute the accusation, Amazon removes the infringing products from the marketplace, and refunds the deposit to the patent owner. If the seller decides to fight the claim, it also deposits \$4,000. Amazon then assigns a lawyer with patent expertise to resolve the dispute. The patent owner submits an opening brief, the merchant files a response, and then the patent owner may submit a reply. The lawyer reviews the submissions, and decides whether the listing should be removed or maintained. The winning party gets its money back, and the loser's \$4,000 gets paid to the lawyer. *There is no discovery, and no appeal or request for reconsideration. The whole process takes just a few months from start to finish.*

⁵ Rory Van Loo, *Federal Rules of Platform Procedures*, 87 U. Chi. L. Rev. (forthcoming 2020).

⁶ Blake Brittain, *Amazon's Judging of IP Claims Questioned in Seller Lawsuits*, Bloomberg Law (Feb. 12, 2020), <https://news.bloomberglaw.com/ip-law/amazons-judging-of-ip-disputes-questioned-in-sellers-lawsuits>.

⁷ *Prohibited Product Claims*, Amazon.com, https://sellercentral.amazon.com/gp/help/external/G202024200?language=en_US (last visited Apr. 21, 2020).

⁸ *How Amazon Promotes, Profits from Deceptively Marketed Brain Supplements*, Truth in Advertising (Jan. 16, 2020), <https://www.truthinadvertising.org/how-amazon-promotes-profits-from-deceptively-marketed-brain-supplements/>.

The danger of private companies playing traditional governmental functions has been further exacerbated during the current pandemic.⁹ We have witnessed rationing, but by private parties, not the government. Amazon's choices as to who receives what goods, and what is essential, are quintessential political decisions, but they are being made by a private, unaccountable, company that has an incentive to use these decision points to enhance its post-pandemic power.¹⁰ A shift in Amazon's labor policy has a bigger impact on warehouse worker safety than any state changing its laws, as well as a significant impact on public health.¹¹ Unsurprisingly, we have proof, from leaked recordings of Amazon's top leadership discussing the punishment of workers speaking out about conditions, that their bottom line, not the public welfare or health, is driving their decisions.¹² Facebook and Google are selecting what information is worthy and unworthy--in a way that serves their bottom line--in a time when the flow of information can mean life or death.

Bad antimonopoly policy, weak enforcement, and Congressional abdication of its role has resulted in this unprecedented level of political and economic power held in private hands. Congress must reassert itself as the representative body of the people in the laws that govern excessive private power. The need is urgent and bipartisan.

For most of American history, people understood that antitrust policy was just as essential as tax policy or a politician's economic vision, and as essential as campaign finance and voting policy to a vision of democracy. Antimonopoly policy, we knew, was not just one of Congress' many jobs, it is among Congress' chief jobs. It is no accident that the legendary Michigan Senator Phil Hart focused on civil rights and antitrust.

For 40 years, Congress has not done this job, but has largely deferred to executive branch agencies making enforcement decisions and unelected judges, who in turn defer to unelected economists, in making basic decisions about the structure of our economy.

Congress must shake off this bad habit, and act immediately. Years of inaction have ossified our collective legislative imagination. This becomes evident when we consider the type

⁹ Fareeha Ali, *The Coronavirus Impact on Amazon Sellers: Part 2*, Digital Commerce 360 (Apr. 6, 2020), <https://www.digitalcommerce360.com/article/amazon-seller-news/>.

¹⁰ Jason Del Rey, *Amazon Says It Unintentionally Hid Some Competitors' Faster Delivery Options*, Vox Recode (Mar. 26, 2020), <https://www.vox.com/recode/2020/3/26/21193928/amazon-delivery-delays-april-21-23-faster-speed-sellers-marketplace-buy-button>.

¹¹ Hayley Peterson, *Amazon-owned Whole Foods is Quietly Tracking its Employees with a Heat Map Tool that Ranks Which Stores are Most at Risk of Unionizing*, Business Insider (Apr. 20, 2020), <https://www.businessinsider.com/whole-foods-tracks-unionization-risk-with-heat-map-2020-1>.

¹² Jason Del Rey & Shirin Ghaffary, *Amazon White Collar Employees are Fuming over Management Targeting a Fired Warehouse Worker*, Vox Recode (Apr. 5, 2020), <https://www.vox.com/recode/2020/4/5/21206385/amazon-fired-warehouse-worker-christian-smalls-employee-backlash-david-zapolsky-coronavirus>.

of legislation that was proposed a few generations ago. For example, in 1979, Massachusetts Senator Ted Kennedy proposed a bill that would have prohibited mergers between companies with assets or sales exceeding \$2 billion, or \$6 billion in today's dollars.¹³ In matters of antitrust law, Kennedy did not think it was necessary to defer to courts' opinions, which in turn were shaped by the views of a handful of self-appointed 'expert' economists, without a big public debate.¹⁴ Antitrust laws were made for the people, by the people's representatives. In stark contrast, most of the proposals that are considered by antitrust experts assume the centrality of the Sherman Act, Clayton Act, and Hart-Scott-Rodino Acts, and build their suggestions around this legislative scaffolding by suggesting new interpretations.

The work that this Subcommittee has done over the last two years represents a powerful beginning, and an inspiring, necessary first step in reasserting democratic power in one of the most fundamental areas of democracy itself. I commend the Subcommittee's work--it is, as I write about in my forthcoming book, one of the most exciting developments in recent years. I hope that it plans to fully use all tools at its disposal--including exercising subpoena power--and advocate for significant legislation.

B. Specific Recommendations

I have three specific recommendations.

1. Delineate Clear 'Line-of-Business' Restrictions for Big Tech

Google currently dominates 90 percent of the search market and the company manipulates rankings to favor its own listings. At the same time, Google's Android smartphone operating system commands 85 percent of the market. Prior to the pandemic, Amazon controlled a majority of online sales, and was the first place that most online searches for products began.¹⁵ That number is clearly growing. Facebook dominates approximately 65 percent of the current global social media landscape,¹⁶ not including its ownership of WhatsApp and Instagram,¹⁷ with

¹³ A.o. Sulzberger, Jr., *Kennedy Introduces Bill to Curb Mergers Among Biggest Companies*, New York Times (Mar. 9, 1979), <https://www.nytimes.com/1979/03/09/archives/kennedy-introduces-bill-to-curb-mergers-among-biggest-companies.html>.

¹⁴ Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 Yale L. J. 980, 981 (2018), <https://www.yalelawjournal.org/forum/the-twilight-of-the-technocrats-monopoly-on-antitrust>.

¹⁵ *Amazon Share of all U.S. Online Sales, 2002-2019*, Marketplace Pulse Research, <https://www.marketplacepulse.com/stats/us-ecommerce/amazon-share-of-all-us-online-sales-54> (last visited Apr. 20, 2020).

¹⁶ *Social Media Stats Worldwide, Mar. 2019 – Mar. 2020*, StatCounter Global Stats, <https://gs.statcounter.com/social-media-stats> (last visited Apr. 21, 2020).

¹⁷ Sam Sheard, *Facebook Owns the Four Most Downloaded Apps of the Decade*, BBC News (Dec. 18, 2019), <https://www.bbc.com/news/technology-50838013>.

roughly 2.5 billion monthly active users (or 1.66 billion daily active users).¹⁸ In 2019, the social media company reported a total annual revenue of \$70.7 billion.¹⁹

Congress should pass a law delineating a clear “single line of business” rule for the very biggest tech companies. Congress can use revenue, role in data collection and sale, and consumer footprint as a way to ensure that the law only applies to the companies that have become dangerously powerful private infrastructure. For instance, it could draw on the kind of framework proposed recently in California for defining truly big tech companies: “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.”²⁰

This law is necessary because many of the democratic and economic dangers arising from Amazon, Facebook, and Google have to do with the ways in which they leverage dominance in one market to dominate suppliers and shut down competition in other, related areas.²¹ This is by no means a new phenomenon in American corporate history. But current antitrust laws, as applied and interpreted by our governmental agencies and the courts, cannot deal with this problem.

All of these big tech companies simultaneously operate essential infrastructure and sell their own goods and services on it, putting them in direct competition with the entities dependent upon them, allowing them to extract unfair profits, quash innovation, kill competition, and weaken our democracy. For instance, Amazon has been steadily expanding its presence to new lines of business.²² Now, it is no longer just the owner and operator of the largest online e-commerce marketplace. Among many other ventures, Amazon is also in the business of producing feature-length films and television series, providing music streaming and cloud computing services, as well as running a lending operation and a rapidly growing logistics arm.²³

¹⁸ Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2019 Results (Jan. 29, 2020), <https://investor.fb.com/investor-news/press-release-details/2020/Facebook-Reports-Fourth-Quarter-and-Full-Year-2019-Results/default.aspx>.

¹⁹ *Facebook's Annual Revenue from 2009-2019*, Statista, <https://www.statista.com/statistics/268604/annual-revenue-of-facebook/> (last visited Apr. 21, 2020).

²⁰ Assemb. B. 1790, 2019-20 Reg. Sess. (Cal. 2019) (published Mar. 25, 2019), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB1790&cversion=20190AB179098AMD.

²¹ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 973-1093 (2019), <https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>.

²² Paris Martineau & Louise Matsakis, *Why It's Hard to Escape Amazon's Long Reach*, Wired (Dec. 23, 2018), <https://www.wired.com/story/why-hard-escape-amazons-long-reach/>.

²³ Eugene Kim, *Bank of America Estimates Amazon's Own Delivery Service Could be Worth Up to \$230 Billion by 2025*, Business Insider (Apr. 20, 2020), <https://www.businessinsider.com/amazons-logistics-service-worth-up-to-230-billion-by-2025-2020-4>.

All of these ventures pose some degree of risk to the health of the markets into which Amazon encroaches. And while the magnitude of the risk might vary from one market to the other, it is now clear that at least one of these ventures, Amazon's logistics arm, Fulfillment by Amazon, poses a significant threat to America's shipping and fulfillment market.²⁴ Evidence indicates that Amazon is currently leveraging its market power in e-commerce to harm competition in the shipping and fulfillment market by forcing sellers on its platform to use its own logistics services.²⁵ This form of leveraging is still in its early stages but the trend is clear. Amazon is seeking to use its market power in the e-commerce market to stifle competition in the market for shipping and delivering those orders. Amazon's ability to monopolize the shipping market does not stem from any superior technological efficiency or superior service. Instead, it is rooted in Amazon's ability to reduce the ability of its rivals to compete.²⁶

Under this type of law, Amazon, Google, Facebook, due to their size, would have to select its primary line of business and would be prohibited from operating in any other. Amazon, for instance, would be prohibited from being involved in fulfillment or shipping of goods, a clearly distinct line of business. That would allow for a competitive marketplace in fulfillment of online e-commerce transactions including warehousing, logistics and shipping, instead of what is happening now, where Amazon is spending considerable energy shutting out potential fulfillment competitors and gaining power and leverage over carriers such as FedEx, UPS, the United States Postal Service, and thousands of small logistics companies.²⁷

Amazon's foray into banking, albeit a much smaller venture, similarly demonstrates the negative impact of insatiable appetite to expand. It appears that 'Amazon Lending', the company's proprietary lending arm, uses lending to control the conduct of sellers.²⁸ Under this type of law, Amazon would be prohibited from operating this type of business.

Similarly, Facebook, a company that primarily focuses on social media, could not also be involved in providing messaging services such as Facebook Messenger and WhatsApp. This in

²⁴ Spencer Soper, *Amazon is Accused of Forcing Up Prices in Antitrust Complaint*, Bloomberg (Nov. 8, 2019), <https://www.bloomberg.com/news/articles/2019-11-08/amazon-merchant-lays-out-antitrust-case-in-letter-to-congress>.

²⁵ *Amazon is Accused of Forcing Up Prices for Independent Merchants*, Competition Policy International (Nov. 10, 2019), <https://www.competitionpolicyinternational.com/us-amazon-is-accused-of-forcing-up-prices-for-independent-merchants/>.

²⁶ Paul Ziobro, *Amazon Blocks Sellers From Using FedEx Ground for Prime Shipments*, Wall Street Journal (Dec. 16, 2019), <https://www.wsj.com/articles/amazon-blocks-sellers-from-using-fedex-ground-for-prime-shipments-11576525190>

²⁷ Nick Statt, *Amazon No Longer Banning Marketplace Sellers from Using FedEx Shipping*, The Verge (Jan. 14, 2020), <https://www.theverge.com/2020/1/14/21065900/amazon-ban-fedex-ground-shipping-lifted-holiday-season>.

²⁸ Shaoul Sussman, *How Amazon Uses Lending to Control Small Businesses*, The American Prospect (Feb. 26, 2020), <https://prospect.org/economy/how-amazon-uses-lending-to-control-small-businesses/>.

turn will allow for a fertile competition between different mail and online messaging providers, which would not only likely improve the privacy of the messaging service, but encourage further innovation.

And Google, primarily a search engine company, could not also be involved in Google Shopping, a relationship which currently leads to abuse and the suppression of exciting alternatives.

The single line of business rule is necessary, because any new law governing merger review will have no impact on the already dystopian state of affairs.

‘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.²⁹ In the telecommunications industry, Congress used to prohibit telephone companies from providing video programming in their local telephone territories.³⁰ Such a law also resembles in many ways public utility rules, which prohibit cross ownership so as to avoid conflicts of interest.

There are other proposals for dealing with this problem, but the line of business proposal has the benefit of simplicity. It creates a simple corporate regulatory expectation: you pick your field, excel in it, but cannot use a platform to control, capture, and demean related and unrelated markets.

2. Ban Targeted Advertisements for Big Tech

Since the beginning of our republic, we have protected the neutrality of communications infrastructure--until recently. The post office was born, funded by the public, protected from spying. While it made money off of private enterprise paying for stamps, the revenue model protected the flow of information. The public library was directly funded by the public (and some overdue fines). The public square did not make money based on how outrageous a speaker was, and sidewalks didn’t live or die based on how “sticky” the conversations between passing friends or strangers might become. Our public communications sphere was “managed” by a blend of public institutions and private decentralized institutions. Our current communications infrastructure, however, is regulated by the big tech companies. We have never had such a centralized control over speech--not even in Jay Gould’s day.

²⁹ Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq. (repealed 2005).

³⁰ Cable Communications Policy Act of 1984, 47 U.S.C. § 533 (1984).

There are six pathological features of the current big tech regime. First, inflammatory content is prioritized. In other words, the business model of our communications infrastructure prioritizes scandal and sensationalism and deprioritizes serious or thoughtful conversation. If you post a “fuck the MAYOR” rant on Facebook, the company will likely prioritize your post because of its stickiness; if you post “I have some concerns about the way the bridge downtown is being constructed,” that post will likely be buried, and none of your friends will see it. (We would not want a regulator telling us to be polite either, but this pro-inflammatory bias is indefensible as a public choice.) The same thing appears to be happening on Amazon’s marketplace where extremists and neo-Nazis who have been banned from other platforms are given unprecedented access to a mainstream audience. Amazon’s algorithm even promotes these books in targeted advertising campaigns.³¹ As Sally Hubbard said in testimony to this Committee, “Propagandists and disinformation agents are not hacking these platforms or misusing them. Rather, they are using these platforms exactly as designed, for influence and manipulation.”³²

Second, we are subject to an unprecedented level of surveillance. Third, the infrastructure wants people to maximize the time spent on it, because that increases the number of ads they can sell and the amount of information they can collect. Fourth, the infrastructure is essentially unstable and the rules can change at any time. Fifth, the part of the communications infrastructure that is public treats each person differently, creating the illusion of a shared space but the fact of a fissured one. Sixth, the targeted ad model is destroying most of the Fourth Estate. Using their chokepoint role, Facebook and Google have taken advertising revenue away from both traditional and Internet “native” publishers, at both the national and local levels, into their own coffers. With the ability to control the distribution of information, ad money, and the relationship between the reader and the news outlet, tech platform monopolists now have unprecedented power over reporters and news publishers themselves, and use that power to take the payments that would otherwise flow to the content creators.

These six features — high degree of surveillance, time maximization, inflammatory content, instability, individualized treatment, and stealing from journalists—are antithetical to what a public sphere and communications infrastructure in a democracy should be. The features in fact destroy the thing it appears to create, replacing a vibrant public square where privacy, debate, and community can flourish with a privately run set of institutions defined by paranoia and distrust. All six of these dynamics pose a threat to American democracy and to the most fundamental liberties of the individual.

³¹ Ava Kofman, Francis Tseng & Moira Weigelfor, *The Hate Store: Amazon’s Self-Publishing Arm Is a Haven for White Supremacists*, ProPublica (Apr. 7, 2020), <https://www.propublica.org/article/the-hate-store-amazons-self-publishing-arm-is-a-haven-for-white-supremacists>.

³² *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. of the Judiciary*, 116th Cong. (2019) (statement from Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute).

The digital advertising business model is at the root of all six of these pathologies. These are not trivial matters, because Facebook, Google and Amazon control American information, news, and books. Facebook and Google are sometimes analogized to publishers because of the decisions they make, but the better analogy is the post office or the library, or even the image of a public square or sidewalk: they are the places in which publishers of all kinds can share their news.

We have so naturalized the targeted ad revenue model for communications infrastructure that many proposals work to regulate around it. If it is helpful to denaturalize it, I find it useful to imagine how the framers of our Constitution would have reacted if the post office was designed as a service where the providers read every piece of mail, and prioritized the scandalous parts, and deprioritized the thoughtful letters between Abigail Adams and John Adams, and used all the information in all the letters to decide what mail would come quickest. Or imagine that the public library was based on a targeted ad business model. The most pornographic, propagandistic, and salacious books would be on the display table, with fiction and history relegated to deep in the stacks. Needless to say, it would not fit with their vision of freedom: the privacy of the mails and the neutrality of communications infrastructure was understood to be sacrosanct for political freedoms. They would be horrified that two private companies, Facebook and Google, read an enormous percentage of our communications to each other, and use those messages to build profiles that help them profit off of us.

Current laws are inadequate to address the democratic damage by this system.

Therefore, Congress should ban targeted ads as the business model of essential infrastructure. This kind of regulation flows naturally from a long tradition of communications infrastructure regulation designed to protect free speech, a free press, and democratic discourse. Congress passed the Postal Service Act in 1792 to make sure the post office was open and nondiscriminatory. When Western Union amassed control over telegraph trunk lines, preferring its own clients and not providing universal, nondiscriminatory service, Congress responded by passing the 1866 Telegraph Act. The Federal Communications Commission created in the New Deal era similarly sought to regulate more modern systems of radio, broadcast, and telephone. And public utility regulation has long restricted business models that distort essential infrastructure.

Banning targeted ads falls squarely in the tradition of these regulatory techniques. As with nondiscrimination and common carriage, common tools for communications regulators, the ban would place limits on the kinds of practices legally available to information platforms. Like

fair pricing requirements, the ban would alter the revenue-generating strategy of the firms themselves.³³

3. Overturn Bad Case Law

As some witnesses have testified to this Committee, there are several incoherent and dangerous Supreme Court interpretations of federal antimonopoly law. Congress should correct these bad decisions through legislation, as it routinely does in other areas of law. This moment is not unlike 1989, when the Supreme Court decided a set of cases that interpreted federal law to restrict workers' rights under federal antidiscrimination laws. In that case, Congress responded in 1991 with a broad, new Civil Rights Act specifically tailored to overturn those cases. Massachusetts Democratic Senator Ted Kennedy and New York Republican Congressman Hamilton Fish, Jr. led that effort, and President George Bush signed the law, which stated in its preamble that the goal was to respond to bad civil rights statutory interpretations by the Supreme Court.

A similar bill is required now--times 10, because instead of undoing a year's worth of bad Court precedent, Congress must undo 40 years of bad judicial precedent. Since the early 1980s, caught up in the throes of a misguided theory of efficiency, the Supreme Court has misinterpreted our existing antimonopoly statutes in a way to make them feeble and

³³ For more reading on banning targeted ads, see K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, Knight First Amendment Inst. at Columbia Univ. (Feb. 4, 2020), <https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure> (arguing that the intervention of banning targeted ads would radically alter the behavior of information platforms); Jeff Gary and Ashkan Soltani, *First Things First: Online Advertising Practices and Their Effects on Platform Speech*, Knight First Amendment Inst. at Columbia Univ. (Aug. 21, 2019), <https://knightcolumbia.org/content/first-things-first-online-advertising-practices-and-their-effects-on-platform-speech> (arguing that targeted advertising has the potential to create substantial injury both to individual consumers and to society); Gilad Edelman, *Why Don't We Just Ban Targeted Ads?*, Wired (Mar. 22, 2020), <https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising/> ("Banning targeted ads is the ultimate root-cause solution when it comes to privacy"); David Dayen, *Ban Targeted Advertisements*, The New Republic, April 10, 2018, <https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google> (proposing that the United States disallow all individually targeted ads with large fines or removal from public airwaves for repeated violations; discussing precedent for banning advertisements in the Public Health Cigarette Smoking Act, Family Smoking Prevention and Tobacco Control Act of 2010, The Telephone Disclosure and Dispute Resolution Act, the Children's Online Privacy Protection Act, etc.); Natasha Lomas, *The Case Against Behavioral Advertising is Stacking Up*, Tech Crunch (Jan. 20, 2019), <https://techcrunch.com/2019/01/20/dont-be-creepy/> (proposing increased regulation of platforms to understand how, why, and where data flows in order to control impacts on consumers); Karl Manheim and Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 Yale J.L. & Tech. 106 (2019) (discussing how the Federal Trade Commission and Congress have taken hands-off approaches in regulating online behavioral advertising), https://yjolt.org/sites/default/files/21_yale_j.l._tech._106_0.pdf; Ellen Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting*, Washington Post (Nov. 1, 2019), <https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/> (arguing that the elimination of political ad microtargeting would enhance transparency and accountability, as well as deter disinformation).

unrecognizable.³⁴ These misinterpretations have played a significant role deterring and justifying prosecutorial inaction, as well as making private claims unworkable. These cases represent an incredible arrogation of power to the judicial branch away from Congress, using the court's own economic theories--instead of those of elected officials--to guide their decisions.

Some, but not all, of the cases that should be overturned in a big economic liberties package include the Court's disastrous predatory pricing policy made in *Weyerhaeuser Co. v. Ross Simmons Hardwood Lumber Co.*,³⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,³⁶ and *Matsushita v. Zenith Radio Corp.*,³⁷ all of which combined to make bringing a predatory pricing or related claim very difficult. In each of these cases, the decisions were based on economic theories preferred by the Justices, not by the American public.³⁸ Predatory pricing law is particularly important in reigning in the abuses of Amazon, Google, and Facebook.³⁹

Second, Congress should legislatively overturn the recent spate of cases making refusal to deal claims extremely difficult to pursue, including *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*⁴⁰ and *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*⁴¹. Congress should move to lessen the overwhelming legal burden on parties challenging exclusionary and restrictive trade practices, a burden which does not comport with the history of our antitrust laws. By overturning *Bell Atlantic Corp. v. Twombly*,⁴² Congress can shift the burden in antitrust litigation back from plaintiffs to defendants.⁴³ And Congress clearly needs to overturn the cases that allowed big companies to require arbitration, effectively destroying plaintiffs' incentives to sue; the FAIR Act is essential for private parties to be able to enforce existing law.⁴⁴

³⁴ Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710, 710-805 (2016), <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>.

³⁵ 549 U.S. 312 (2007).

³⁶ 509 U.S. 209 (1993).

³⁷ 475 U.S. 574 (1986).

³⁸ Christopher R. Leslie, *Predatory Pricing & Recoupment*, 113 Colum. L. Rev. 1695, 1695-1771 (2013), <https://columbialawreview.org/wp-content/uploads/2016/04/Leslie.pdf>.

³⁹ Shaoul Sussman, *Prime Predator: Amazon and the Rationale of Below Average Variable Cost Pricing Strategies Among Negative Cash Flow Firms*, 7 J. Antitrust Enf't. 203, 203-219 (July 2019), <https://academic.oup.com/antitrust/article/7/2/203/5321201>.

⁴⁰ 540 U.S. 398 (2004).

⁴¹ 555 U.S. 438 (2009).

⁴² 550 U.S. 544 (2007).

⁴³ 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.*"

⁴⁴ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

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.⁴⁵ The *American Express* decision represented bad logic, bad precedent, and adoption of a manufactured concept nowhere found in our legislative history--the two sided market. This Committee should immediately introduce legislation overturning *American Express*, which, at worst, gave all tech platforms immunity from scrutiny, and at best, created a major deterrence for any anticompetitive lawsuit against Google, Facebook, or Amazon.

Introducing such legislation would be important on its own terms -- the *American Express* decision has weakened the tools of prosecutors and squeezed out competitors alike, and a green light to anticompetitive behavior by the tech giants. But it would also send a clear signal to the public that the Committee is engaged in the urgent questions of the day. Such intervention will demonstrate that Congress does not automatically defer to judge-made models, where nine robed Justices, with no democratic accountability, would like to organize our economy.

Conclusion

Current laws are not adequate to protect our public institutions; to restore democratic and economic freedoms and rebuild a thriving, fair, and more free country. Congress must act: boldly and quickly.

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