Testimony of Sally Hubbard

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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.

OPEN MARKETS
LIBERTY ★ DEMOCRACY ★ PROSPERITY

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, ANTIRUST 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

[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

[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.