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

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[17] *See infra* Appendix A.
[18] Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 5 (2001).
[19] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

authorship of the National Telegraph Act of 1866,[20] Sherman, in his famous speech promoting the antitrust law that bears his name, made clear the fundamental importance of common carrier rules.

"It is the right of every man to work, labor, and produce in any lawful vocation and *to transport his production on equal terms and conditions and under like circumstances*," Sherman said.[21] "This is industrial liberty, and lies at the foundation of the equality of all rights and privileges."[22] In other words, Sen. Sherman himself understood that his antitrust act both stood upon and built upon the foundation of the Interstate Commerce Act, which outlaws individually tailored discriminations by corporations with a monopoly over the provision of an essential service or good.

Google, Facebook, Amazon, Uber, and other platform monopolists are all, in multiple respects, modern analogs of the communications and transportation networks of the past. Each of them provides multiple essential services. Unfortunately, up until now, such rules have never been applied to these corporations. This is what has left them free to exploit their character as gatekeepers to discriminate in the pricing and delivery of their services, in ways that empower them to manipulate and exploit individual citizens, businesses, and indeed entire realms of our national life.

Fortunately, American citizens have a variety of ways to address this huge and pressing challenge. The simplest and most straightforward way would be for the Federal Trade Commission and/or the Federal Communications Commission to assert their full authority to regulate the terms of service and pricing behaviors of these platform monopolists. This is essentially what the FCC did to Internet Service Providers in 2015 with the Open Internet Order.[23]

Sen. Al Franken made this point simply in a November 2017 article in the *Guardian*: "As tech giants become a new kind of internet gatekeeper, I believe the same basic principles of net neutrality should apply here: No one company should have the power to pick and choose which content reaches consumers and which doesn't. And Facebook, Google, and Amazon – like ISPs – should be 'neutral' in their treatment of the flow of lawful information and commerce on their platforms."[24]

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[20] Post Roads Act of 1866, ch. 230, 14 Stat. 221, *repealed by* Act of July 16, 1947, ch. 256, 61 Stat. 327; *see also* RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 116 (2010) (denoting the Post Roads Act of 1866 as the National Telegraph Act).

[21] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (emphasis added).

[22] *Id.*

[23] FED. COMMC'NS COMM'N, FCC-15-24, In re Protecting and Promoting the Open Internet (Mar. 12, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf.

[24] Al Franken, *We Must Not Let Big Tech Threaten Our Security, Freedoms and Democracy*, GUARDIAN (Nov. 8, 2017, 2:20 PM), https://www.theguardian.com/commentisfree/2017/nov/08/big-tech-security-freedoms-democracy-al-franken.

If the FTC and FCC both fail in their duty, the Department of Justice, states attorneys general, and other agencies have a variety of other tools – including the Essential Facilities Doctrine – which they can use to achieve the same basic ends.[25] Obviously, Congress always has an absolute right to impose such rules on these corporations at any time, and the Open Markets Institute strongly encourages Congress to do so if these other institutions continue to fail to complete their mission of serving the public.

Structural Separations – Vertical and Horizontal

Applying common carrier rules to the platform monopolists will resolve many of the threats these corporations now pose to American democracy and American capitalism. But to finish the job of ensuring that these corporations provide neutral and fair service to all sellers and buyers, and all writers and speakers and all readers and listeners, it is necessary to completely separate ownership of the platforms from ownership of the goods, services, information, and entertainment sold across the platforms.

Structural separation has been the general rule for most of U.S. history in cases of network monopoly and essential services. We can trace clear prohibitions on such "vertical integration" at the federal level back to the National Bank Act of 1863,[26] in the midst of the Civil War. Such rules were also routinely imposed in the act of chartering corporations to engage in particular lines of business. As Lina Khan has written in *Separations of Platforms and Commerce*, such rules were a standard part of the antitrust toolkit and have been used to carefully restrict the powers of corporations such as AT&T and Microsoft.[27]

In every instance, the basic aim of such laws has been to ensure that corporate managers are not presented with conflicts of interest that might tempt them to not provide fair service to individuals and businesses that depend on these corporations to get to market.

Today, however, we see innumerable instances in which the platform monopolies have entered lines of business that put them into direct competition with the people and companies that depend on the platforms' services. Amazon, for instance, sells Amazon-produced books, movies, television shows, apparel, toys, electronics, foods, and even batteries, in addition to hundreds of other products, putting the giant corporation in direct competition against independent makers of these same products.[28] Google, meanwhile, has long pitted its own in-house versions of everything from travel services to advertising services to local business recommendations against similar services provided by independent companies. Clearly, in many such instances, the platform will have an interest in selling its own product before those of its customer/rivals.

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[25] *See, e.g.*, *Otter Tail Power Co. v. United States, 410 U.S. 366, 377–79 (1973).*
[26] National Bank Act of 1863, ch. 58, 12 Stat. 665.
[27] Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019), https://ssrn.com/abstract=3180174.
[28] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 754 (2017) (stating "Amazon is a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading provider of cloud server space and computing power.).

Clearly, in all such instances, the platform has a variety of tools at hand with which to favor the sale of its own products over those of the independent companies that depend on the platforms to get to market.

These corporations have repeatedly demonstrated that they are absolutely willing to exploit their gatekeeper positions to promote their own interests over those of independent companies that depend on the platforms' services and over the interests of the public as a whole. Such self-dealing or self-preferencing has enabled these corporations to become the dominant providers of a vast and fast-growing number of goods and services.

The Open Markets Institute supports a solution that has been advanced by Sen. Elizabeth Warren: to structurally eliminate the platforms' conflicts of interest and remove both their incentives and their abilities to exclude competition.[29] Here again, the Open Markets Institute believes that existing law provides enforcers with tools that empower them to break up the platform monopolists along vertical lines in ways that would entirely eliminate all conflicts of interest. That said, action by Congress once again could yield a quicker, cleaner, and more comprehensive solution to the problem.

The Open Markets Institute also believes that enforcement agencies and Congress should immediately begin to study ways to break up the platform monopolists along horizontal lines, whenever the networked nature of the service does not make doing so difficult or impossible. The Open Markets Institute has long held that enforcers should simply reverse Facebook's acquisitions of WhatsApp and Instagram; these acquisitions of growing rivals violated the Clayton Act's prohibition of acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly," and should simply be undone.[30]

The Open Markets Institute has also encouraged enforcers to consider separating one platform monopoly from another, in instances where multiple such platforms have been tied together through acquisition. Google is particularly ripe for such restructuring, and the Open Markets Institute has publicly advocated that enforcers force Google's holding company to spin off YouTube, Maps, Android, and the corporation's suite of online advertising technologies, among other monopoly platforms. Such actions have ample precedent in U.S. law. One of the most famous such actions took place in 1913, when the Wilson administration forced AT&T to sell off the Western Union telegraph service.[31]

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[29] Elizabeth Warren, *It's Time to Break Up Amazon, Google, and Facebook*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c; *see also* Khan, *supra* note 27.

[30] The European Commission has already fined Facebook for saying during the merger review that it would not merge WhatsApp's data with Facebook's data, and then doing it anyway. Since then, WhatsApp co-founder Brian Acton admitted to being coached to tell European regulators that merging data would be difficult. It's highly likely that bad faith representations were similarly made to the FTC. *See* Parmy Olson, *Exclusive: WhatsApp Cofounder Brian Acton Gives The Inside Story on #DeleteFacebook And Why He Left $850 Million Behind*, FORBES (Sep. 26, 2018), https://www.forbes.com/sites/parmyolson/2018/09/26/exclusive-whatsapp-cofounder-brian-acton-gives-the-inside-story-on-deletefacebook-and-why-he-left-850-million-behind/#53c7e4983f20.

[31] Letter from Nathan C. Kingsbury to Attorney General J. C. McReynolds (Dec. 19, 1913).

Interoperability

The COVID-19 crisis has made it even clearer than before that Google, Amazon, Facebook, and other platform monopolists are, in many respects, utilities. In recent years, however, the platform monopolists have done an excellent job of characterizing any and all forms of utility regulation as being overly statist and destructive of innovation.

In fact, the American people have developed over the years a variety of ways to ensure that even essential utilities must compete in ways that force them to constantly innovate, both in terms of technology and in terms of service. One of the simplest ways to do so is to make it easy for upstart competitors to enter into direct rivalry with the incumbent utilities.

One of the most effective ways to achieve this goal has been to enforce interoperability requirements that make it easier for customers of one platform to shift their businesses to another platform. Over the years, regulators and antitrust enforcers have imposed interoperability requirements against AT&T and Microsoft, among others, opening up competition in long-distance calling, telephones, and internet browsers.[32]

For the platform monopolists, interoperability would allow users to authorize networks to securely communicate with one another, much like how consumers with different email providers can send emails to one another. It would help overcome the network effects barrier to entry. For example, interoperability would allow new social media platforms to integrate with Facebook's platform, using APIs offered on reasonable and nondiscriminatory terms, with consumers empowered to control which data is shared and with whom. Users' control over their data is critical to prevent privacy violations.

Facebook CEO Mark Zuckerberg recently offered his own ideas as to how to restructure these businesses, and one of his proposals was data portability.[33] This means that users could take their Facebook data to another platform. But data portability doesn't overcome the network effects barrier for new companies to compete with Facebook, because moving data to a platform that doesn't allow communication with friends is of little use to consumers.

The key thing to remember is that such interoperability requirements alone are not sufficient to deal with any of the fundamental political threats posed by the platform monopolists. On the

[32] United States v. AT&T Co., 552 F. Supp. 131, 224 (D.D.C. 1982) (imposing an equal access mandate to prohibit AT&T's discriminatory practices against long distance competitors and rival equipment manufacturers that were created by the breakup of the company), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983); New York v. Microsoft Corp., 224 F. Supp. 2d 76, 268 (D.D.C. 2002), *aff'd*, 373 F.3d 1199 (D.C. Cir. 2004) (detailing § III.D of the Microsoft Consent Decree which required the corporations to provide and disclose on non-discriminatory basis the APIs "used by Microsoft Middleware to interoperate with a Windows Operating System Product.").

[33] Mark Zuckerberg, *The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

other hand, once we have subjected these corporations to traditional common carrier rules and restructured them to reinforce their neutrality, interoperability requirements will go a long way toward ensuring that the utilities of tomorrow must work hard to provide the innovations that will keep their customers happy.

Exclusionary Conduct

The Open Markets Institute believes that the existing anti-monopoly laws of the United States are generally adequate to the task of protecting our democracy and liberty and promoting constructive and fair competition within open markets. America's present monopoly crisis is due not to any fundamental shortcomings in existing law, but rather to a combination of extremely weak enforcement made worse by the teachings of the deeply flawed, efficiency-fetishizing ideology used to interpret the law.

In the case of the platform monopolists, the combination of common carrier rules and careful restructuring of the corporations will solve the most dangerous threats posed by these corporations, but the Open Markets Institute believes that further steps are necessary to fully eliminate exclusionary conduct. Should the agencies and courts fail to take these steps or actively oppose them, then the Open Markets Institute would strongly support action by Congress to remove complexity from anti-monopoly law and to streamline monopolization cases so that citizens can attain justice more quickly and less expensively.

The Open Markets Institute has repeatedly made clear that the easiest way to remove complexity from the law and to streamline cases is to adopt Bright Line rules for structuring markets and limiting corporate behaviors. Such Bright Line rules were standard in U.S. anti-monopoly law and enforcement from the founding until the early 1980s. A good example of how such rules work is the 1968 Merger Guidelines published by the Department of Justice.[34] These rules set out a series of strict market-share tests for challenging horizontal, vertical, and conglomerate mergers. They also rejected pro-merger arguments that hinge on theoretical increases in productive efficiency.

The Chicago School ideology imposed on American anti-monopoly law in the early 1980s intentionally overthrew this Bright Line approach and replaced it with a largely subjective system of enforcement based on impossible-to-define standards and vague and easily manipulated guidelines. This gross distortion of the expressed will of Congress has stolen from Americans their single most important weapon against concentrated economic power, in ways that have undermined democracy and that have radically reduced individual liberty.

For instance, any citizen or business seeking to vindicate the right to a fair, competitive marketplace now has to spend huge sums to hire economic experts.[35] This is true also for the

[34] U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines [hereinafter 1968 MERGER GUIDELINES].
[35] Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers (detailing one expert that charges over $1,300 an hour).

government when it seeks to protect the public interest. In 2018, the FTC spent nearly $16 million on fees for testifying expert economists, despite the fact that the agency already employs some 80 economists with Ph.D.s in its own Bureau of Economists.[36] As a result, even in the most egregious of cases, monopolists' victims can rarely afford to sue for justice.

Bright Line rules would make antitrust enforcement more efficient and effective.[37] Specific to the online platform monopolists, Bright Line rules should be used to clarify outright the per se illegality of the following practices:

- Refusing to deal with customers and rivals.
- Prohibiting distributors, suppliers, or customers from doing business with rival firms.
- Penalizing purchasers who do not place a large share of their business with the firm.
- Tying the purchase of one good or service to the purchase of a separate good or service, whether done through contractual or technological means.
- Pricing below average variable cost on a significant volume of commerce.
- Most favored nation clauses.
- Using monopoly power in one market to create competitive advantage in a secondary market.
- Buying default installation or prime placement through slotting-fee agreements (such as Google's payment to Apple to set the default search engine for iOS devices to Google's product). Choice screens that present users with a range of competitive options, without those competitors having to pay to play, should replace such agreements.

Under Bright Line rules, a platform monopolist would be allowed to overcome the presumption of illegality under only very limited circumstances. To rebut this presumption, the firm should have to show that the practice is needed to introduce a new product or service and that a less restrictive alternative is not available.

As the Open Markets Institute made clear in recently filed comments on the FTC's proposed vertical merger guidelines, Bright Line rules should also clearly apply to vertical mergers. Here too, the Department of Justice's 1968 Merger Guidelines are a model for using clear rules to protect decentralized market structures in the digital economy. Congress should use the 1968 Merger Guidelines as a template for legislation that strengthens enforcement against vertical acquisitions by the platform monopolists.

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[36] *Oversight of the Enforcement of the Antitrust Laws: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019) (submitted testimony of the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1544480/senate_september_competition_oversight_testimony.pdf. *See also Bureau of Economics*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics (last visited Apr. 14, 2020). Note, the FTC does also enforce consumer protection law so some of these fees may not have been antitrust-related.

[37] Open Mkts., *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), https://promarket.org/restoring-antimonopoly-through-bright-line-rules/.

Congress should also remove court-imposed obstacles to anti-monopoly enforcement, and *Appendix A* lists court decisions that should be the highest priority for legislative repeal.

2. **Are existing laws that prohibit anti-competitive transactions adequate? Are current statutes and case law sufficient to address potentially anti-competitive vertical and conglomerate mergers, data acquisitions, or acquisitions of potential competitors?**

As we made clear above, the Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. And we believe that law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws

Of course, traditional case-by-case enforcement of the law will prove to be very time-consuming, and it is increasingly clear that the concentration of power and control in the hands of the platform monopolists grows more extreme and dangerous by the day.[38]

The COVID-19 pandemic and the resulting worldwide economic crisis have resulted in a sudden, sharp further consolidation of economic power and control by Google, Facebook, and Amazon. The essential nature of their communications, transportation, distribution services, and physical capacities has become only more obvious. And the corporations have in some respects become only more aggressive in exploiting this power to serve their private interests, which include the concentration of even more economic and political power than they now enjoy.

Recently, the Open Markets Institute called on Congress, the executive branch, and the courts to immediately impose a complete ban on all acquisitions by any corporation with more than $100 million in annual revenue and by any financial institution or equity fund with more than $100 million in capitalization, for the duration of the economic crisis set into motion by the COVID-19 pandemic. The Open Markets Institute believes that such a ban is needed to prevent a wholesale concentration of additional power by corporations that already dominate or largely dominate their industries, especially in ways that may significantly worsen the crisis that now threatens America's health, social, and economic systems.

The COVID-19 pandemic, however, has simply sped up processes that were already well under way, especially in the digital marketplace. That's why, even before the pandemic, the Open Markets Institute had already called for the FTC to impose a temporary ban on all acquisitions by Google, Apple, Facebook, and Amazon.[39] The Open Markets Institute recommends that such a ban be lifted only when the FTC certifies to Congress that it has fully investigated platform monopolists' exclusionary and predatory conduct and has brought the weight of the antitrust laws to bear in suing to stop such conduct in court.

[38] Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer Welfare Standard*, 26 GEO. MASON L. REV. 395, 419–20 (2019) (detailing the length of antitrust cases).
[39] Letter from the Open Markets Institute, to Maureen Ohlhausen, Acting-Chair of the Fed. Trade Comm'n (Nov. 1, 2017), https://openmarketsinstitute.org/releases/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions/.

One particularly strong reason for such a ban on takeovers by Google, Apple, Facebook, and Amazon is the danger posed by platform monopolists' acquisitions of nascent competitors.[40] The platform monopolists have repeatedly – almost systematically – acquired the companies that posed competitive threats to them, while these rivals were still in their infancy. Often the platforms have exploited their control of underlying essential infrastructures both to identify such threatening upstarts and to strong-arm them into selling out. Because of their small size, such deals rarely even attract the notice of antitrust enforcers.

Another reason for such a ban is that the measures for evaluating mergers dictated by the Chicago School ideology – price and output – are of little use in assessing digital platforms' acquisitions of nascent competitors. Consumers often pay for digital services with data, not dollars. Unfortunately, like so many other antitrust principles intended to promote open markets, antitrust law's potential competition doctrine has been rendered toothless by overly burdensome legal standards introduced in recent decades. Here again, absent a coherent effort by enforcers to address this problem, Congress should create a structural presumption against the acquisition of competitive threats, in the spirit of the 1968 Merger Guidelines.[41]

Should Congress choose to make such a ban temporary, it should also require the platform monopolists – once the ban has been lifted – to ensure that the acquired assets never engage in any form of discrimination on price or terms and are completely and perpetually interoperable.

In addition, should Congress choose to make such a ban temporary, it should also require that the platform monopolists notify the FTC and DOJ of all acquisitions regardless of size. The legislation should require the FTC and DOJ to subject all such acquisitions to second requests and to provide the public with an opportunity to comment. The legislation should require enforcers to evaluate every acquisition by Google, Apple, Facebook, and Amazon based on the data that the acquisition would allow the platforms to collect, even if the acquisition target does not collect data. The legislation should ban any mergers that would allow a platform monopolist to acquire data or algorithmic machine learning that would either fortify the monopolist's market power or create entry barriers for competition.

In any such legislation, Congress should also require that, if the FTC or DOJ approve any acquisition by a platform monopolist, each agency must issue an in-depth statement to the public detailing the following: the scope of their investigation, any competitive concerns the agency

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[40] *FTC Hearing 3: Oct. 17 Session 4 Nascent Competition: Are Current Levels of Enforcement Appropriate?*, FED. TRADE COMM'N. (Oct. 17, 2018), https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-3-oct-17-session-4-nascent-competition-are-current-levels.
[41] 1968 MERGER GUIDELINES § 18(a)–(b) (stating "Since potential competition (i.e., the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants in the market" and a leading firm….The Department will also ordinarily challenge a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive 'disturbance' or 'disruption' that such entry might create….").

encountered or that were raised by third parties, why those concerns did not lead to a merger block, how the acquisition will impact privacy, whether the acquisition will enhance the platform monopolists' ability to acquire additional data or will transfer data or algorithmic machine learning to the platform monopolist, and how any such data acquisition will erect barriers to competitive entry or impact competition among existing market participants.

3. **Is the institutional structure of antitrust enforcement—including the current levels of appropriations to the antitrust agencies, existing agency authorities, congressional oversight of enforcement, and current statutes and case law—adequate to promote the robust enforcement of the antitrust laws?**

The Open Markets Institute believes there are a number of problems with the structure and behavior of antitrust agencies, with current levels of appropriations, with current levels of oversight, and with how we compartmentalize the discussions and authorities for the regulation of our digital marketplace. We also believe that Congress should move swiftly to make it easier for citizens to organize against the power of the platform monopolists.

The Role of Economics

Until the early 1980s, economics played a relatively minor role in the enforcement of antitrust laws. In large part, this was because comparisons of the relative efficiencies of different market structures were rarely needed in a regime characterized by Bright Line rules that aimed to protect particular political and social outcomes.

Beginning in the early 1980s, however, the Reagan administration, in tandem with introducing the flawed Chicago School ideology to competition policy, radically increased the role that economists played in determining what constitutes a just outcome in the enforcement of antitrust law. This included doubling the number of economists within the division by 1986, to nearly three economists for every 10 lawyers. And it included the decision to elevate the division's chief economist to the role of deputy assistant attorney general.

The Open Markets Institute believes that these changes played a major role in subverting the ability of the agencies to enforce U.S. antitrust law according to the original will of the American people as expressed through Congress. We further believe that Congress should now entirely reassess the role of economics within competition policy and reassess the relative levels of funding for economics within the agencies.

Appropriations

The Open Markets Institute calls on both federal and state legislators to allocate more resources to state attorneys general for the enforcement of antitrust laws.[42] The American people have long

[42] The Federal Government at one time financially supported state antitrust enforcement. *See, e.g.*, Pub. L. No. 94-503, § 309, 90 Stat. 2415 (1976) (authorizing the Attorney General of the United States to allocate funding "provide assistance and make grants to States which have State plans approved under subsection (c) of this section to improve the antitrust enforcement capability of such State.").

promoted competition among agencies in the enforcement of the law, to ensure effective checks and balances in economic regulation. One way the American people achieved this in antitrust was through the Clayton Antitrust Act, which ensures that every state in the United States has antitrust authorities equal to those of the federal government.[43]

In recent years, the wisdom of these actions has been made clear repeatedly. States attorneys general have time and again proven to be more aggressive in antitrust enforcement than the FTC or DOJ. Unfortunately, most states do not have sufficient staff members to pursue nearly as many cases as they would like. Bigger states such as New York have about a dozen antitrust lawyers. But many states only have one or even one-half of an antitrust enforcer. Congress should allocate funding for state enforcers to increase their teams and resources so they can enforce antitrust laws against digital platforms, which have tremendous amounts of funds available for their defenses.

Oversight

The Open Markets Institute believes that Congress, in its oversight capacity, must require greater reporting and transparency from the FTC about its investigative and enforcement efforts regarding platform monopolists. Congress should hold the FTC accountable for weak enforcement, such as the FTC's recent fines against Facebook and YouTube for repeated consent decree violations. Fines alone are not enough, because they don't change platform monopolists' destructive business models and anti-competitive practices. Google has handed over more than $9 billion to the European Commission since 2017 for antitrust violations, but Google has not fundamentally changed the ways that it excludes competition.

Congress should also pressure the FTC to use its 6(b) authority to study targeted advertising, disinformation, election interference, the monopolization of digital ad revenue by digital platforms, and other harms related to platform monopolies.[44]

Privacy

The Open Markets Institute believes that it is vital to promote greater coordination between enforcers of anti-monopoly law and privacy law. As we made clear in a letter last year, the Open Markets Institute believes that privacy law cannot be fully effective until it is buttressed by anti-

[43] 15 U.S.C. § 15c(1) (stating "Any attorney general of a State may bring a civil action in the name of such State as parens patriae on behalf of natural persons residing in such State in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of [the Clayton Act].").
[44] 15 U.S.C. § 46(b) (stating the FTC can require an entity to file "annual or special . . . reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals.").

monopoly law.[45] As we also made clear, we believe that certain anti-monopoly policies – especially common carrier rules – can help to reduce many privacy concerns.[46]

In the digital marketplace, privacy and monopoly are intricately related.[47] Meaningful privacy reforms would, for instance, undercut Facebook's and Google's dominance because comprehensive tracking of users is required to support the platforms' targeted digital advertising business models, and privacy reforms would undercut Amazon's dominance because it uses data to disadvantage its competitors.[48] Massive data collection allows tech giants to strengthen their monopoly power and erect barriers to competitive entry.

Facebook, for example, has used its control of data to try to shut out rivals. Leaked internal Facebook documents revealed that CEO Mark Zuckerberg personally kept a list of strategic competitors, who were not permitted to access the Facebook Graph API.[49] Such behavior amounts to a discriminatory refusal to deal, which violates Section 2 of the Sherman Act under current legal standards. If a monopoly refuses to offer a service to a competitor that it offers to others, or if a monopoly has done business with the competitor and then stops for anti-competitive reasons, such behavior amounts to illegal monopolization.

In another leaked document, a Facebook employee suggested cutting off a competitor's access to Facebook's API and using privacy as a pretense to justify the move.[50] Facebook seems to define privacy as keeping consumers' data out of others companies' hands. Individuals, as consumers and as citizens, also need privacy protection from Facebook itself.

The most invasive forms of surveillance should be prohibited outright. As journalist David Dayen wrote in an article for *The New Republic*, "the U.S. can take one simple, legal step to roll back this dystopian nightmare: ban targeted advertising."[51] We support such a ban. At a minimum, microtargeted advertising should be banned for several months before elections.[52]

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[45] Letter from the Open Markets Institute, to Jan Schakowsky, Chair of the House of Representatives Subcomm. on Consumer Protection & Commerce, and Cathy McMorris Rodgers, Ranking Member of the House of Representatives Subcomm. on Consumer Protection & Commerce (Mar. 6, 2019), https://openmarketsinstitute.org/wp-content/uploads/2020/03/Open-Markets-Letter-to-House-Energy-and-Commerce-committee-on-Privacy-2.pdf.
[46] *Id.*
[47] *Id.*
[48] *See generally Hubbard Testimony 1*; *see also Hubbard Testimony 2*.
[49] THE DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, DISINFORMATION AND 'FAKE NEWS': FINAL REPORT, 2017–19, HC 1791 (UK), https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf.
[50] *Id.*
[51] David Dayen, *Ban Targeted Advertising*, NEW REPUBLIC (Apr. 10, 2018), https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google; *see also* Gilad Edelman, *Why Don't We Just Ban Targeted Advertising?*, WIRED (Mar. 22, 2018 7:00 AM), https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising/.
[52] Ellen L. Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting.*, WASH. POST (Nov.1, 2019, 6:51 PM), https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/.

Another way to protect privacy is through stronger antitrust enforcement against exclusionary conduct and illegal mergers that fortify monopoly power. Monopoly power allows platform monopolists to abuse consumers' privacy without losing their business to competitors because consumers have nowhere else to go.[53] Consumers pay monopoly rents of data and receive a lower-quality product, since privacy is a dimension of quality. Monopoly power also allows platforms to keep consumers in the dark about the ways that the platforms abuse consumers' privacy, and greater competition could help shed light on Big Tech's privacy violations. For example, the privacy-protecting search engine DuckDuckGo, in a bid for consumers' business, provides education through its newsletter on the ways that Google and other companies violate privacy.

Immunity for Illegal Behavior

The Open Markets Institute believes that Congress should reform Section 230 of the Communications Decency Act,[54] which at present gives the platform monopolists far-reaching legal immunity for actions that other corporations must police against. Section 230 was first enacted nearly a quarter of a century ago as part of the Telecommunications Act of 1996.[55] It grants broad immunity to "interactive computer services" from lawsuits seeking to hold the services liable for information published by an "information content providers."[56]

One example of an unintended consequence of Section 230 is that dominant platforms remain legally unaccountable for the libel, fake news, fraudulent content, bots, and hate speech flowing across their platforms. At the same time, however, these firms are uniquely and unfairly able to profit from the spread of such content, because they sell advertising next to it. But these platforms are in competition for advertising revenues with traditional publishers, who do not have Section 230 immunity. In addition to reforming Section 230, another possible solution to these imbalanced terms of competition would be to prohibit entities enjoying Section 230 immunity from selling advertising.

The online world and the offline world are no longer separate. Giving a carte blanche to internet actors to violate offline laws means that we live in a lawless society.

For instance, broadcasters and journalists are held to legal standards for political ads. Facebook, too, should be held to those same standards, or it should be prevented from selling those ads entirely. Similarly, wiretapping or reading someone else's mail is illegal, and, in 12 states, so is recording someone without their consent. Similar surveillance by platform monopolists should be illegal. Similarly, fair housing laws prohibit unlawful discrimination in advertising, yet even

[53] *See generally* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39 (2019).
[54] 47 U.S.C. § 230. Section 230 is actually Section 509 of the Telecommunications Act of 1996, which amended the Communications Act of 1934. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56; *See also* Matt Stoller, Sarah Miller, Zephyr Teachout, *Addressing Facebook and Google's Harms through a Regulated Competition Approach,* American Economic Liberties Project, April 2020.
[55] Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56.
[56] 47 U.S.C. § 230(c)(1)–(2).

after Facebook promised to stop this practice, a ProPublica investigation found that the discrimination persisted. Discrimination by algorithm should be just as illegal as discrimination by any other means.

Removing Obstacles to Private Antitrust Enforcement

The Open Markets Institute also calls on Congress to make it easier for citizens to bring class action lawsuits. The American people developed class action lawsuits, in ways that supplement government enforcement, to help deter corporations from abusing their power. In recent years, however, courts have used the constructs of antitrust injury and antitrust standing to erect many procedural obstacles that limit who can sue under the antitrust laws and under what circumstances they can sue.[57] These obstacles clearly flaunt the intent of Congress. Procedural barriers to private class actions, including the widespread use of clauses that require people harmed by monopolization to seek arbitration instead of suing in court, should also be eliminated.[58]

Protections for Concerted Activity and Cooperation Among Workers, Professionals, Small Firms, and Consumers

Along with controlling and reducing platform dominance, permitting the powerless to build power is a pillar of American democracy. Workers, professionals, small businesses, and consumers must have the right to band together to challenge concentrated economic power that has not been addressed by the law enforcement agencies. As a first step, federal antitrust enforcers must abandon all efforts to interfere with the right of independent actors to freely associate, including efforts to bargain collectively and organize boycotts.

To ensure that this freedom of association is durable and not subject to abrupt changes in prosecutorial discretion, Congress should enact a statutory right for workers, professionals, small businesses, and consumers to act in concert. It has an existing model on which to draw: the 1922 Capper-Volstead Act that protects cooperation among farmers and ranchers.[59] Congress should generalize the Capper-Volstead Act to cover workers, professionals, and small businesses (as defined by assets or revenue). A general Capper-Volstead Act would protect the right to engage in coordinated activity and establish public oversight of this concerted action.

As the history of cooperation among farmers shows, such action can be the basis for democratizing key sections of the economy. In the near term, cooperation among individually powerless actors can reduce inequality in the marketplace and yield fairer terms of trade with large corporations. In the medium and long term, collective action can serve as the foundation of democratically owned and operated enterprises that directly compete against investor-owned corporations.

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[57] *See infra* Appendix A.
[58] *See generally* Deepak Gupta & Lina Khan, *Arbitration As Wealth Transfer*, 35 YALE L. & POL'Y REV. 499 (2017); Sandeep Vaheesan, *We Must End Rule by Contract*, CURRENT AFF. (Aug. 19, 2019), https://www.currentaffairs.org/2019/08/we-must-end-rule-by-contract.
[59] 7 U.S.C. §§ 291–92.

In the interim, medium-sized and even large businesses should also be permitted to engage in limited forms of collective action when confronting dominant platforms. Toward this end, the Open Markets Institute supports the *Journalism Competition and Preservation Act* proposed by Rep. Cicilline. Until platforms' dominance is tamed, this measure is necessary to rebalance gross disparities in bargaining power.[60] The exemption is carefully circumscribed and structured in a way so that newspapers and other media outlets can engage in collective action for only certain ends and for only a limited time.

To conclude, our economy, businesses small and large, and consumers would all benefit from immediate action to rein in anti-competitive conduct and acquisitions by platform monopolists. Consumers benefit from the choice, innovation, and quality that robust competition brings. Consumers are also citizens who benefit from the free flow of speech. They are the employees of companies that will benefit when platform extraction ceases. And they are entrepreneurs who deserve an opportunity to compete in the digital marketplace based on merit.

Thank you once again for the opportunity to provide input on these important issues. I am available to answer any questions that may arise.

Best Regards,

Sally Hubbard
Director of Enforcement Strategy
Open Markets Institute

Joined by:
Athena Coalition (See list of coalition partners at https://athenaforall.org)
American Economic Liberties Project
Fight for the Future
Freedom from Facebook and Google Coalition (See list of coalition partners at https://www.freedomfromfacebookandgoogle.com)
Institute for Local Self-Reliance
Jobs with Justice
United 4 Respect
Frank Pasquale, Professor of Law at University of Maryland Francis King Carey School of Law

[60] Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2054/text?q=%7B%22search%22%3A%5B%22Hr+2054%22%5D%7D.

APPENDIX A

The following decisions and guidance documents should be the highest priority for legislative repeal:

Predatory pricing

- *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993) (requirement of below-cost pricing and dangerous probability of recoupment in predatory pricing cases)
- *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) (skepticism toward predatory pricing claims; too high a bar to sustain a monopoly leveraging claim)
- *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*., 549 U.S. 312 (2007) (*Brooke Group* test extended to predatory bidding claims)

Refusal to deal

- *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004) (no refusal to deal claims when regulator can mandate duty to deal; skepticism toward all refusal to deal claims in *dicta* that has been expanded and applied widely by lower courts)
- *Pacific Bell Telephone Co. v. LinkLine Communications, Inc*., 555 U.S. 438 (2009) (price squeezing claims recognized only when antitrust duty to deal exists)

Exclusionary and restrictive trade practices

- *Ohio v. American Express Co*., 138 S. Ct. 2274 (2018) (adoption of two-sided markets construct; requirement that plaintiff prove a net anti-competitive harm across two different markets)
- *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints subject to rule of reason)
-*Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (requires proof of dangerous probability of monopolizing secondary market for monopoly leveraging claims; standard of proof means plaintiffs cannot bring suit until harm has already been done).
- *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc*., 429 U.S. 477 (1977) (creation of antitrust injury doctrine)

-*Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) (multi-factored test to determine whether a plaintiff has standing to bring an antitrust action).

Arbitration

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (arbitration clauses with class action waivers enforceable against workers, despite National Labor Relations Act's protection of concerted conduct by workers)
- *American Express v. Italian Colors*, 570 U.S. 228 (2013) (arbitration clauses enforceable even when they prevent effective vindication of federal statutory claims)
- *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (preemption of state law limits on mandatory arbitration)

-*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (beginning of al line of cases that held antitrust antitrust disputes can be arbitrated). Previously, American Safety Equip. Corp. v. J.P. Macguire & Co., 391 F.2d 821 (2d Cir. 1968), had held that antitrust disputes are not appropriate subjects of arbitration.

Class certification standards

- *Comcast v. Behrend*, 569 U.S. 27 (2013) (heightened class certification standards)

Pleading standards and summary judgment

- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (heightened quantum of evidence needed to survive motion to dismiss)
- *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) (heightened quantum of evidence needed to survive motion for summary judgment)

Standing for consumer plaintiffs in antitrust cases

- *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (no standing for indirect purchasers to obtain antitrust damages under federal law)