

**Testimony of Sally Hubbard**

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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”**

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## 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> Google alone has acquired nearly 250 companies since 2006.<sup>4</sup> At last count, Apple has bought more than 100 companies and Amazon nearly 90.<sup>5</sup>

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 21<sup>st</sup> century have long followed the monopolist's classic playbook, in which

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<sup>1</sup> 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>.

<sup>2</sup> 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>.

<sup>3</sup> 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>.

<sup>4</sup> CB Insights, *Infographic: Google's Biggest Acquisitions*, November 1, 2019, <https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/>.

<sup>5</sup> 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](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."<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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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<sup>6</sup> 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>.

<sup>7</sup> 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>.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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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<sup>9</sup> European Commission, "Statement by Commissioner Vestager on Commission Decision to Fine 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/STATEMENT\\_18\\_4584](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4584).

<sup>10</sup> 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>.

<sup>11</sup> 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.<sup>12</sup>

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.”<sup>13</sup> 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 21<sup>st</sup> century. In the same letter, Google answered a different follow-up question with a straightforward “no,” making its failure to answer the earlier question with a “no” telling. With more than 90% of the worldwide search market, such extensive self-preferencing amounts to Google colonizing the internet – and the flow of information around the globe – to serve its interests.

Google's platform privilege means that Google could crush almost any entrepreneur who depends on Google's services, if Google decides to enter the entrepreneur's market. In recent years, Google has also been accused of prioritizing its own reviews, maps, images, and travel booking services in its search results, in ways that effectively destroy competition in these “vertical search” markets.

In 2017, the European Commission fined Google \$2.7 billion for this abuse of platform dominance, finding that, on average, Google buried its comparison shopping competitors on the fourth page of Google search results. In effect, Google used its search monopoly to take over the comparison shopping market without competing on merit. The commission ordered Google to

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<sup>12</sup> 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](https://cicilline.house.gov/sites/cicilline.house.gov/files/7.23.2019_ACAL%20Company%20Clarification%20Requests.pdf).

<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> The European Commission has fined Google nearly \$1.5 billion for abusing its dominance in the market for the brokering of online search advertising.<sup>18</sup> 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 21<sup>st</sup> 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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<sup>14</sup> 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/](http://www.foundem.co.uk/fmedia/Foundem_Apr_2018_Final_Debunking_of_Google_Auction_Remedy/).

<sup>15</sup> 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](http://europa.eu/rapid/press-release_IP-15-4780_en.htm).

<sup>16</sup> 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>.

<sup>17</sup> CB Insights, “Infographic: Google’s Biggest Acquisitions,” May 2019, <https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/>.

<sup>18</sup> 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](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.”<sup>19</sup>

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.”<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> This dynamic arises because many brands don’t want their products

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<sup>19</sup> 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](https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf).

<sup>20</sup> 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/>

<sup>21</sup> 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>.

<sup>22</sup>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,<sup>23</sup> 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,<sup>24</sup> which, according to most commonsense definitions, is clearly a form of extortion.<sup>25</sup>

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>.

<sup>23</sup> 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/>.

<sup>24</sup> 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.)"

<sup>25</sup> 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.<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup>

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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<sup>26</sup> 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>.

<sup>27</sup> 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/tj-60990BCFC736F15D>.

<sup>28</sup> 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/](https://openmarketsinstitute.org/testimony_letter/open-markets-authors-united-letter-doj-regarding-amazon/).

<sup>29</sup> 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-92ec-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.<sup>30</sup> 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.<sup>31</sup>

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

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<sup>30</sup> 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>.

<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

#### 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

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<sup>32</sup> 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>.

<sup>33</sup> 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.<sup>34</sup> Spotify recently sued Apple in Europe, arguing that Apple has leveraged its platform dominance to distort competition with unfair app store terms.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> Apple has been doing this for so long that developers have named the phenomenon getting "Sherlocked."<sup>39</sup> 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.<sup>40</sup>

Apple's App Store accounts for 65% of global app revenue.<sup>41</sup> 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.<sup>42</sup> 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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<sup>34</sup> 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/>.

<sup>35</sup> *Id.*

<sup>36</sup> Testimony of Kirsten Daru, Chief Privacy Officer and General Counsel 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>.

<sup>37</sup> *Id.*

<sup>38</sup> Buster Hein, "8 Apps Apple Killed Today at WWDC," *Cult of Mac*, June 10, 2013, <https://www.cultofmac.com/231121/seven-apps-apple-killed/>.

<sup>39</sup> 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>.

<sup>40</sup> 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>.

<sup>41</sup> 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>.

<sup>42</sup> *Apple, Inc. v. Pepper*, 587 U.S. \_\_\_ (2019), [https://www.supremecourt.gov/opinions/18pdf/17-204\\_bq7d.pdf](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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.*"<sup>47</sup>

The Court noted the possibility that "app developers will also sue Apple on a monopsony theory."<sup>48</sup> 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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<sup>43</sup> 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](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581).

<sup>44</sup> 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>

<sup>45</sup> 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>.

<sup>46</sup> 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/](https://openmarketsinstitute.org/amicus_briefs/open-markets-institute-files-amicus-brief-supreme-court-support-iphone-owners-challenging-apples-retail-monopoly-iphone-apps-2/).

<sup>47</sup> *Apple, Inc. v. Pepper*, 587 U.S. \_\_\_ (2019), [https://www.supremecourt.gov/opinions/18pdf/17-204\\_bq7d.pdf](https://www.supremecourt.gov/opinions/18pdf/17-204_bq7d.pdf).

<sup>48</sup> *Id.*

anger – the most incendiary content – “engages” humans the most.<sup>49</sup> 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.<sup>50</sup> 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.”<sup>51</sup>

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.<sup>52</sup>

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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<sup>49</sup> 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](https://ssir.org/articles/entry/the_algorithms_of_fear).

<sup>50</sup> 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](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).

<sup>51</sup> 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](http://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf).

<sup>52</sup> 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.<sup>53</sup> 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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<sup>53</sup> 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.<sup>54</sup> 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

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<sup>54</sup> 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.<sup>55</sup> 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

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<sup>55</sup> 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.