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REPUBLICAN HEARING GUIDANCE

Committee on the Judiciary

Subcommittee on Antitrust, Commercial, and Administrative Law

Online Platforms and Market Power, Part 6: Examining the Dominance of

Amazon, Facebook, Google and Apple

Monday, July 27, 2020, at 12:00 p.m., in 2141 Rayburn House Office Building and via WebEx

On Monday, July 27, 2020, at 12:00 p.m., the Subcommittee on Antitrust, Commercial, and Administrative Law will convene a hearing titled “Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Facebook, Google and Apple.” The CEOs of these four companies will appear remotely and on a single panel. This guidance memorandum provides background in advance of the hearing, including themes and questions to consider given the opportunity to engage with all four CEOs at once.

**HEARING THEMES**

1. Political bias in Big Tech is a problem that must be highlighted and examined so that consumers are aware, the market can respond, and lawmakers can evaluate options.
2. Antitrust law should be used to promote freedom, competition, and the American dream, not to punish success or attack companies solely because they are large.
3. Many Democrats seek to use opportunities to change antitrust law as an opening to undo a century’s worth of legal precedents that gave rise to greatest economy in history and to Europeanize the American business climate.
4. Pursuant to existing law, each of these companies is already subject to numerous investigations – these investigations are ongoing and we should trust the Trump Administration and Attorney General Barr to bring appropriate enforcement actions.

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## **OVERVIEW OF THE BIG TECH HEARING**

This subcommittee hearing is the sixth in a months-long investigation of competition in digital markets. The investigation has centered on four companies that are part of “Big Tech”: Google, Amazon, Apple, and Facebook.

### Background on the Committee’s investigation

Though this investigation began as a bipartisan endeavor, the majority’s approach is raising grave concerns about whether it can continue on that basis,<sup>1</sup> or whether it simply reflects the majority’s efforts to promote predetermined conclusions under an unearned banner of bipartisanship.<sup>2</sup> As a February letter from Ranking Member Collins and Ranking Member Sensenbrenner to Chairman Nadler reflects, Democrats may have reached their conclusions about Big Tech some time ago.<sup>3</sup> Those conclusions go beyond condemning the conduct of any given company. Instead, those conclusions suggest this investigation has ultimately been about larger objectives that are at odds with fundamental principles that undergird the American economy.<sup>4</sup>

The hearing will focus on perspectives from the CEOs of Google, Amazon, Apple, and Facebook. Each company has different businesses with a number of products and services.

During this hearing, particular aspects of each company’s business lines, products, and services may come up. Questions to Google may relate to its role in markets for online search and advertising technology. Amazon may take questions about how it operates both as a retailer with private-label products, and also as a platform for third-party sellers—and whether it misled Congress in this investigation. Apple may receive questions about its App Store, which is Apple’s distribution channel or storefront for software developers that have products for iPhone owners. Last, Facebook may be asked about how it approaches mergers and acquisitions (M&A), as well as other topics, such as privacy and security.

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<sup>1</sup> Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (July 7, 2020); Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (July 15, 2020).

<sup>2</sup> See generally Letter from Doug Collins, Ranking Member, H. Comm. on the Judiciary, and Jim Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Feb. 10, 2020).

<sup>3</sup> Id. (explaining how Chairman Nadler “said, ‘[the investigation goes] way beyond the fact’ that certain companies allegedly misbehave; ‘that [these companies] cannot be allowed to exist in society;’ and that leaders must ‘chang[e] the distribution of power’ and ‘[break] up all the large companies.’”).

<sup>4</sup> See id. (“As we have consistently emphasized during the Subcommittee’s investigation, ‘big’ doesn’t necessarily mean ‘bad.’ America’s leaders should not punish tech companies simply because those companies have succeeded—that will hurt consumers and stifle innovation. Our online ecosystem is thriving and breaking up large tech companies simply because of their size isn’t the answer.” (emphasis added)).

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Justice Department and Federal Trade Commission investigations of Big Tech

However, for Congress to explore company-specific minutiae at this hearing runs the risk of ignoring an elephant in the room. For some time, the executive branch, including the Justice Department’s Antitrust Division and the Federal Trade Commission (FTC), have been taking steps to investigate Google, Amazon, Apple, and Facebook.<sup>5</sup> The Justice Department and FTC have large teams of attorneys and economists, and extensive resources—personnel and resources Congress has authorized or appropriated specifically to conduct investigations and enforce U.S. antitrust laws.

To the extent this hearing’s discussion duplicates the efforts that these agencies are undertaking—by focusing primarily on document productions, or resembling a transcribed interview—it is both unnecessary and may distract from larger themes and topics Congress could explore with these CEOs. Likewise, given how these executive-branch investigations are ongoing, using this hearing to urge that current antitrust law must change is arguably premature. Instead, these ongoing investigations are consistent with arguments that modern antitrust laws are working well and as designed, and need not change for digital markets. Even if one or more of these companies has or is engaged in wrongful conduct, arguably enforcement would be the appropriate solution, not overhauling existing antitrust laws.

Potential topics of discussion for hearing

Members may wish to take the opportunity to ask these four CEOs about topics that matter broadly for American society and to the future of digital markets. Such an approach will align the investigation more closely with what it has arguably become: a debate over whether America should remain a nursery for entrepreneurship, innovation, and technological progress, or whether it should be a place that effectively punishes hard work and success, and condemns large companies out of a vague notion that “big is bad.” In addition, though topics like political bias in Silicon Valley may not directly relate to antitrust law as such—which is properly focused on preserving the competitive process and market efficiencies that benefit consumers<sup>6</sup>—they do reflect the state of competition in digital markets writ large and in relation to social media in particular. Accordingly, such topics are important and ripe for these CEOs to address.

With that background, Members could consider exploring a number of topics with these CEOs, such as: Political bias in Big Tech against Republicans or views they hold.

- What should be done, if anything, to address political bias against certain viewpoints, and updates on steps these companies may have taken to prevent or address such bias.

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<sup>5</sup> Daisuke Wakabayashi et al., Justice Department Opens Antitrust Review of Big Tech Companies, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/technology/justice-department-tech-antitrust.html>.

<sup>6</sup> See, e.g., Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary, and Jim Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, to John Matze, CEO of Parler, 1 (July 8, 2020).

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- What steps these CEOs are taking to ensure such bias does not crop up as the country heads toward a contentious election season.
- Whether these CEOs expect continued innovation and competition in social media to address perceptions of political bias.
- The CEOs' views on the overall competitive landscape that their companies face: e.g., competition in providing search or advertising services; in retail products and working as a platform for third-party sellers; in distribution channels for app developers; and in mergers and acquisitions (M&A), such as for communications and social media firms.
- Whether these companies consider themselves as controlling their markets, and what companies they view as competitors.
- What these companies do to protect privacy and address cyber-threats—vectors of competition that recent events, like the recent Twitter lock-out, show are vital. This topic is also arguably important because of how often public figures communicate through private-sector tools.
- Their views on the importance of strong incentives in driving innovation and technological advancement—for example, how the possibility of success through M&A drives entrepreneurs and investors to make sacrifices necessary for innovation—and how barriers to exit may ultimately be barriers to entry.
- Relatedly, how changing antitrust law in the U.S.—for example, heightening standards for M&A activity—might affect innovation and the flow of venture capital in the U.S. relative to other countries (e.g., China).
- What each company's overall M&A strategy (if any) is, and any examples of how each may use M&A as an avenue for improving products and services for consumers.
- How COVID has affected innovation and technological progress in the U.S., as well as the state of competition; and whether COVID has actually increased the competition some of these companies face.
- What steps these companies take to compete aggressively and stay ahead of the curve, and how they plan to do so in the future (for example, spending on research and development; workforce training and enhancement; etc.).
- Threats each of these companies may face—or that digital markets may face generally—from foreign jurisdictions with more interventionist antitrust laws (or protectionism masquerading under the guise of antitrust).
- Given those threats to U.S. companies from foreign jurisdictions, the CEOs' perspectives on what Congress could do to ensure America retains its status as a remarkable nursery for innovation and technological progress.
- How overhauling antitrust law now might affect the American economy and U.S. consumers—especially given COVID and the need to recover rapidly.

In addition to such substantive topics, questions, and themes, Members could also choose to flag in their remarks how—despite repeated requests—Chairman Nadler did not open the hearing to the Full Committee. This was an odd decision given the unique nature of the hearing, as explained in the final

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section of this memo. Likewise, Members may choose to highlight prior concerns Republicans have voiced, such as the concerns in Ranking Member Collins's and Ranking Member Sensenbrenner's letter from February.<sup>7</sup>

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<sup>7</sup> See generally Letter from Doug Collins, Ranking Member, H. Comm. on the Judiciary, and Jim Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Feb. 10, 2020)

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**POLITICAL BIAS IN BIG TECH SHOULD BE DECRIED, BUT ANTITRUST WON'T SOLVE IT.**

Political bias in Big Tech

As conservatives have consistently pointed out, it is appropriate to be apprehensive about instances of political bias in Big Tech when they occur. When large companies act on such bias, they not only attack or even silence public figures, but they also affront the values of those Americans who voted for the public figures. All Americans—regardless of their political views—should treat suppression of free speech and lopsided censorship as dangerous when it occurs on apparently-neutral forums. This hearing presents an opportunity to further explore the extent of political bias in Big Tech, as well as the steps companies may be taking to address it.

As explained below, antitrust law is ill-equipped for and may not be the best vehicle to address political bias. Speaking broadly, however, consistent political bias against Republicans in Silicon Valley would create a competitive void and opportunity for entrepreneurs to fill. To the extent such bias exists and is properly publicized—and as consumers and entrepreneurs are made aware of the extent of this “flaw” in existing companies’ offerings and services—free markets will provide remedies commensurate with the flaw. Existing companies can opt to take steps to reduce bias or perceptions of bias as they see fit. And new, disruptive competitors can also step up and provide alternative products and social media platforms.

Events over the past several years have left some Republicans with little doubt that some in Silicon Valley harbor political bias against them.<sup>8</sup> In the words of President Trump’s recent executive order: Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms “flagging” content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse ...<sup>9</sup>

The bias of certain companies against conservative political positions and views has come up in a number of settings. Companies like Twitter have shown bias against Republican political views.<sup>10</sup>

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<sup>8</sup> See, e.g., Executive Order 13925, 85 Fed. Reg. 34079 (May 28, 2020) (“Preventing Online Censorship”); Georgia Wells, Inside Twitter’s Decision to Take Action on Trump’s Tweets, WALL ST. J. (May 30, 2020), <https://www.wsj.com/articles/inside-twitters-decision-to-take-action-on-trumps-tweets-11590866833>; Juliegrace Brufke, Republican feels ‘victimized’ by Twitter ‘shadow banning’, THE HILL (July 25, 2018), <https://thehill.com/homenews/house/398932-republican-feels-victimized-by-twitter-shadow-banning>; Jonah Gottschalk, Jeff Bezos’ Streaming Service Twitch Bans Trump, THE FEDERALIST (June 30, 2020), <https://thefederalist.com/2020/06/30/jeff-bezos-streaming-service-twitch-bans-trump/>.

<sup>9</sup> Executive Order 13925, 85 Fed. Reg. 34079, 34079 (May 28, 2020) (“Preventing Online Censorship”).

<sup>10</sup> See generally Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary, and Jim Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, to Jack Dorsey, CEO of Twitter (July 8, 2020).

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Perhaps most prominent in recent news is how Silicon Valley has sought to suppress the President or views associated with the Trump Administration.<sup>11</sup> In addition to Twitter:

- Amazon’s video-streaming service “Twitch” temporarily banned President Trump’s account for “hateful conduct.”<sup>12</sup>
- Google’s Youtube has removed some of President Trump’s campaign advertisements.<sup>13</sup>
- Facebook has also censored some of President Trump’s political advertisements,<sup>14</sup> and Facebook’s policies have raised broader concerns in other contexts as well.<sup>15</sup>

Other instances similarly suggest that Big Tech sometimes censors conservative voices,<sup>16</sup> and President Trump is not the only Republican who has experienced or alleged biased treatment on digital platforms. For example, in 2018, Twitter shadow-banned a number of Republicans, including Representatives Matt Gaetz, Devin Nunes, Jim Jordan, and then-Representative Mark Meadows, as well as Republican Party

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<sup>11</sup> See, e.g., Jonah Gottschalk, Jeff Bezos’ Streaming Service Twitch Bans Trump, THE FEDERALIST (June 30, 2020), <https://thefederalist.com/2020/06/30/jeff-bezos-streaming-service-twitch-bans-trump/>; Georgia Wells, Inside Twitter’s Decision to Take Action on Trump’s Tweets, WALL ST. J. (May 30, 2020), <https://www.wsj.com/articles/inside-twitters-decision-to-take-action-on-trumps-tweets-11590866833>.

<sup>12</sup> Jonah Gottschalk, Jeff Bezos’ Streaming Service Twitch Bans Trump, THE FEDERALIST (June 30, 2020), <https://thefederalist.com/2020/06/30/jeff-bezos-streaming-service-twitch-bans-trump/>; Adam Smith, Trump Has Twitch Account Restored After Two Week Suspension for ‘Hateful Conduct’, THE INDEPENDENT (July 14, 2020), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/trump-twitch-account-ban-return-a9617371.html>. Adam Smith, Trump Has Twitch Account Restored After Two Week Suspension for ‘Hateful Conduct’, THE INDEPENDENT (July 14, 2020), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/trump-twitch-account-ban-return-a9617371.html>.

<sup>13</sup> Brian Fung, YouTube confirms it has removed some Trump campaign ads, CNN BUSINESS (Dec. 2, 2019), <https://www.cnn.com/2019/12/02/tech/youtube-trump-ads/index.html>; Aris Folley, Google, YouTube removed more than 300 Trump campaign ads: report, THE HILL (Dec. 2, 2019), <https://thehill.com/policy/technology/472566-google-and-youtube-took-down-more-than-300-trump-video-ads-report>.

<sup>14</sup> Emily Glazer, Facebook Removes Trump Campaign Ads for Violating Policy on Use of Hate Symbol, WALL ST. J. (June 19, 2020), <https://www.wsj.com/articles/facebook-removes-trump-campaign-posts-ads-for-violating-policy-11592504003>; Emily Glazer & Janet Adamy, Facebook Removes Trump Campaign Ads, Citing Census Interference Policy, WALL ST. J., (Mar. 5, 2020), <https://www.wsj.com/articles/facebook-removes-trump-campaign-ads-over-census-interference-policy-11583440198>.

<sup>15</sup> Jon Kyl, Why Conservatives Don’t Trust Facebook, WALL ST. J. (Aug. 20, 2019) (opinion), <https://www.wsj.com/articles/why-conservatives-dont-trust-facebook-11566309603>.

<sup>16</sup> See Cathy Young, How Facebook, Twitter silence conservative voices online, THE HILL (Oct. 28, 2016) (opinion), <https://thehill.com/blogs/pundits-blog/media/303295-how-facebook-twitter-are-systematically-silencing-conservative>.

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chair Ronna McDaniel.<sup>17</sup> As another example, in 2017,<sup>18</sup> conservative radio host Dennis Prager alleged Google’s Youtube wrongly censored some of his educational videos.<sup>19</sup>

Content moderation policies have also recently led platforms to reject positions associated with some Republicans. During the COVID pandemic, Google’s Youtube banned videos contradicting recommendations from the World Health Organization (WHO)—a move that coincided and conflicted with Republicans’ criticism of the WHO.<sup>20</sup> Just recently, the funding status of independent news source The Federalist came under threat due to actions Google took.<sup>21</sup>

Taken together, these episodes raise serious questions about how tech companies and platforms relate to their users and to Republican political views, writ large. Awareness of such questions is only likely to increase in importance, as companies like Facebook work to execute content-moderation policies.<sup>22</sup> For example, Facebook’s CEO Mark Zuckerberg recently announced:

We believe there is a public interest in allowing a wider range of free expression in people’s posts than in paid ads. We already restrict certain types of content in ads that we allow in regular posts, but we want to do more to prohibit the kind of divisive and inflammatory language that has been used to sow discord. So today we’re prohibiting a wider category of hateful content in ads. Specifically, we’re expanding our ads policy to prohibit claims that people from a specific race, ethnicity, national origin,

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<sup>17</sup> Eliza Collins, Report: Prominent Republicans see their influence limited on Twitter, Democrats don’t, USA TODAY (July 25, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/07/25/report-some-gopers-shadow-banned-twitter/836734002/>.

<sup>18</sup> Press Release, PragerU Takes Legal Action Against Google and YouTube for Discrimination (citing complaint filed in Oct. 2017), <https://www.prageru.com/press-release-prager-university-prageru-takes-legal-action-against-google-and-youtube-discrimination/>.

<sup>19</sup> Jonathan Stempel, Google defeats conservative nonprofit’s YouTube censorship appeal, REUTERS (Feb. 26, 2020) (describing lawsuit against “Google and YouTube by Prager University, a conservative nonprofit run by radio talk show host Dennis Prager,” for “tag[ging] dozens of videos on such topics as abortion, gun rights, Islam and terrorism for [Youtube’s] ‘Restricted Mode’ setting, and block[ing] third parties from advertising on the videos” ), <https://www.reuters.com/article/us-google-lawsuit-censorship/google-defeats-conservative-nonprofits-youtube-censorship-appeal-idUSKCN20K33L>; see also Isobel Hamilton, Facebook apologizes to right-wing group PragerU after being accused of censoring its videos, BUSINESS INSIDER (Aug. 21, 2018) (detailing exchange between PragerU and Facebook, after Facebook mistakenly took down certain content), <https://www.businessinsider.com/facebook-apologises-to-prageru-for-blocking-its-videos-2018-8>.

<sup>20</sup> See generally Dan Sanchez, YouTube to Ban Content That Contradicts WHO on COVID-19, Despite the UN Agency’s Catastrophic Track Record of Misinformation, FOUNDATION FOR ECONOMIC EDUCATION (Apr. 23, 2020), <https://fee.org/articles/youtube-to-ban-content-that-contradicts-who-on-covid-19-despite-the-un-agency-s-catastrophic-track-record-of-misinformation/>.

<sup>21</sup> Tristan Justice, A Recap Of NBC’s Failed Attempt To Deplatform The Federalist On Google, THE FEDERALIST (updated June 30, 2020), <https://thefederalist.com/2020/06/22/a-recap-of-nbcs-failed-attempt-to-deplatform-the-federalist-on-google/>.

<sup>22</sup> See, e.g., Suzanne Vranica, Deepa Seetharaman, Facebook Tightens Controls on Speech as Ad Boycott Grows, WALL ST. J. (June 26, 2020), <https://www.wsj.com/articles/unilever-to-halt-u-s-ads-on-facebook-and-twitter-for-rest-of-2020-11593187230>.

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religious affiliation, caste, sexual orientation, gender identity or immigration status are a threat to the physical safety, health or survival of others. We're also expanding our policies to better protect immigrants, migrants, refugees and asylum seekers from ads suggesting these groups are inferior or expressing contempt, dismissal or disgust directed at them.<sup>23</sup>

While such objectives sound admirable, they also raise important questions as Americans enter election and voting season. For example, some may ask how Facebook will treat certain views on illegal immigration or on the importance of building a wall that are presented in political ads. This hearing presents a venue for the Big Tech CEOs to elaborate on how their companies address political bias and the need for a free and open exchange of ideas.<sup>24</sup>

#### Antitrust won't solve political bias

While exploring political bias in Big Tech, it is important to recognize that antitrust serves as a poor tool for advancing socio-political goals separate from market efficiencies and the competitive process.<sup>25</sup> Modern antitrust law focuses on preserving the competitive process through application of rigorous economic analysis, and is poorly suited to achieving broader regulatory objectives.<sup>26</sup> Accordingly, it seems wise to avoid repurposing antitrust in an attempt to advance and preserve freedom of speech in social media. Using antitrust to break up large technology companies or create sector-specific regulations instead seems likely to backfire. Such regulations may also reduce incentive for entrepreneurs to develop alternate platforms, such as Parler. Instead, new regulations may fortify large social media companies—as has happened in other industries when regulation actually strengthened

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<sup>23</sup> Announcement from Mark Zuckerberg, FACEBOOK (June 26, 2020), <https://www.facebook.com/zuck/posts/10112048980882521>.

<sup>24</sup> See generally Dan Sanchez, YouTube to Ban Content That Contradicts WHO on COVID-19, Despite the UN Agency's Catastrophic Track Record of Misinformation, FOUNDATION FOR ECONOMIC EDUCATION (Apr. 23, 2020) ("The more we centralize decision-making and the management of actionable information, the wider the scope of the damage caused by any single error. But if we let a thousand errors bloom along with a thousand truths, any single error will be circumscribed in its damage and more likely to be corrected through experience and counter-argument."), <https://fee.org/articles/youtube-to-ban-content-that-contradicts-who-on-covid-19-despite-the-un-agency-s-catastrophic-track-record-of-misinformation/>.

<sup>25</sup> See, e.g., Sen. Mike Lee, Facebook, Google, others have big problems, but antitrust law is not the answer, FOX NEWS (Feb. 22, 2019) (opinion) (acknowledging how "Silicon Valley's efforts to stifle conservative speech are troubling, reflect a lack of tolerance for dissenting viewpoints, and contribute to our increasingly balkanized political culture," but that "calls to use antitrust law to address these issues are misplaced, and . . . risk undermining the soundness and impartiality of antitrust enforcement"); cf. Joshua Wright & Aurelien Portuese, Antitrust Populism: Towards A Taxonomy, 25 STAN. J.L. BUS. & FIN. 131, 139-40 (2020) (describing how an economic approach to antitrust has reduced the "discretionary power of political enforcement of antitrust").

<sup>26</sup> See generally Maureen K. Ohlhausen, Submission, 2-3 (Apr. 17, 2020) (on file with the Committee) (explaining antitrust "is not designed for, nor intended to correct a 'problem' in the market wholly divorced from its impact on the competitive process. In other words, concerns over fairness, consumer privacy, or the protection of small business should be addressed by regulatory actions, not antitrust.").

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the entities it was designed to check.<sup>27</sup> Instead of intervention, publicizing how large technology companies operate and the bias they may exhibit will arguably make those companies more self-aware, and also empower markets and entrepreneurs to provide solutions.<sup>28</sup>

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<sup>27</sup> See generally, Adam J. White & Boyden Gray, 'The Biggest Kiss', THE WEEKLY STANDARD (Oct. 29, 2012), <https://www.washingtonexaminer.com/weekly-standard/the-biggest-kiss>.

<sup>28</sup> See, e.g., Cathy Young, How Facebook, Twitter silence conservative voices online, THE HILL (Oct. 28, 2016) (opinion) (arguing that "[i]f established social networks are increasingly perceived as inhospitable to conservatives or libertarians, there will inevitably be stepped-up initiatives to create alternative platforms—which would have no shortage of potential Silicon Valley backers such as Luckey or fellow pro-Trump tycoon Peter Thiel"), <https://thehill.com/blogs/pundits-blog/media/303295-how-facebook-twitter-are-systematically-silencing-conservative>; see also Brian Flood, Parler CEO John Matze provides Twitter Alternative: 'People are sick of cancel culture, constant judgment', FOX NEWS (Jul. 2, 2020), <https://www.foxnews.com/media/parler-ceo-john-matze-provides-twitter-alternative-people-are-sick-of-cancel-culture-constant-judgement>; Jack Brewster, As Twitter Labels Trump Tweets, Some Republicans Flock To New Social Media Site, FORBES (June 26, 2020), <https://www.forbes.com/sites/jackbrewster/2020/06/25/as-twitter-labels-trump-tweets-some-republicans-flock-to-new-social-media-site/#f7c074678c8f>.

## **BACKGROUND ON GOOGLE, AMAZON, APPLE, AND FACEBOOK**

This section outlines concerns and considerations relating to Google, Amazon, Apple, and Facebook. As described in more detail below, these four companies already face ongoing, in-depth, and far-ranging investigations from various enforcement agencies. Accordingly, this memo does not catalogue and address every possible allegation of anti-competitive conduct that agencies are investigating or may act upon. Rather, this memo provides relevant context for the companies and selects some of the most prominent issues that may arise at the hearing.

As an initial matter, when considering these particular companies and antitrust law, it is useful to distinguish between aggressive competition and conduct that undermines the competitive process itself. Tough negotiating tactics or strategic marketplace decisions that make other companies squirm if they cannot keep up are not necessarily illegal under antitrust law. To the contrary: lawful but aggressive competition is exactly what antitrust exists to foster. And steps a company takes that may seem harsh to outsiders may still have procompetitive justifications. In the words of a former FTC Commissioner: “the antitrust laws are designed to protect the competitive process, not to redress simple contract injury to competitors; they neither prohibit hurt feelings nor compensate for poor business decisions.”<sup>29</sup> This distinction—between competing efficiently but in ways competitors may dislike and complain about, versus illegal activity—is important. Without it, society risks punishing companies simply for competing well. That result is wrong, and would be akin to demoting an athlete that has won “too many” medals after competing fairly but aggressively.<sup>30</sup> With such general observations in mind, the following concerns and considerations provide perspective relevant to these companies:

### **GOOGLE**

**Concerns:** Antitrust concerns relating to Google center on several aspects of its business, especially search and advertising technology. These areas may be the subject of pending antitrust enforcement as soon as this summer or fall.<sup>31</sup> Some of these concerns also relate to Europe’s recent treatment of Google.<sup>32</sup>

**Search:** Google is known well for its search engine, Google Search. Among other claims, some have argued that when Google Search provides search results, it exhibits “search bias” that favors Google’s

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<sup>29</sup> Joshua Wright, Court Should Reverse Flawed Antitrust Ruling, REALCLEAR POLITICS (July 4, 2020) (emphasis added), [https://www.realclearpolitics.com/articles/2020/07/04/court\\_should\\_reverse\\_flawed\\_antitrust\\_ruling.html](https://www.realclearpolitics.com/articles/2020/07/04/court_should_reverse_flawed_antitrust_ruling.html).

<sup>30</sup> Cf. Elyse Dorsey et. al., Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement, 47 PEPP. L. REV. 861, 893-95 (2020).

<sup>31</sup> See Leah Nylen, Justice Department expected to file antitrust suit against Google, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/google-anti-trust-suit-341912>.

<sup>32</sup> See generally Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 20, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

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content over content from competitors. The idea is that Google’s Search results promote Google’s own “properties” (e.g., Google Maps) over other similar websites (e.g., Mapquest).<sup>33</sup> From 2011 to 2013, the FTC investigated whether Google exhibited certain types of search bias, but the FTC declined to pursue an enforcement action.<sup>34</sup>

Other issues related to Google Search are under investigation now,<sup>35</sup> and some may claim Google unlawfully expanded the dominance of its search engine through agreements that require manufacturers to make Google Search the default on smartphones.<sup>36</sup> Relatedly, some believe Google acted wrongly by requiring that when manufacturers install Google Play (Google’s app store), they must also preinstall Google Search and Google Chrome (Google’s internet browser, which has Google Search as a default).<sup>37</sup> Such “tying” to preserve dominance can be anticompetitive.<sup>38</sup>

Some concerns related to Search require knowledge of Google’s Android operating system. As background, Google’s “Android” product refers to Google’s mobile operating system for smartphones.<sup>39</sup> A mobile operating system “manages [a phone’s] hardware and makes it possible for smartphones . . . to run apps and other programs in a user-friendly way.”<sup>40</sup> Such an operating system is necessary for hardware (such as a smartphone) to run specific application software (“apps”).<sup>41</sup> A large number of phones, such as certain Samsung Galaxy phones, use Google’s Android operating system.<sup>42</sup> The Android “source code is free for anyone to download, customize, and distribute,” which means manufacturers can “build mobile devices at lower costs.”<sup>43</sup>

With that context in mind, another concern is that Google may have required phone manufacturers that use Google Play and Google Search not to sell products with alternative versions of Android unapproved

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<sup>33</sup> Id. at 21-22.

<sup>34</sup> Id. at 21; see generally Statement of the Fed. Trade Commission Regarding Google’s Search Practices, In the Matter of Google, Inc., No. 111-0163 (Jan. 3, 2013).

<sup>35</sup> Leah Nysten, Justice Department expected to file antitrust suit against Google, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/google-anti-trust-suit-341912>.

<sup>36</sup> Id.

<sup>37</sup> Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 23, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>38</sup> Id. at 25-26.

<sup>39</sup> See id. at 23.

<sup>40</sup> Priya Viswanathan What Is a Mobile Operating System?, LIFEWIRE (Apr. 24, 2020), <https://www.lifewire.com/what-is-a-mobile-operating-system-2373340>.

<sup>41</sup> See id.

<sup>42</sup> See, e.g., How To Check Updates For A Galaxy Device, SAMSUNG, <https://www.samsung.com/uk/support/mobile-devices/how-do-i-check-for-operating-system-updates-on-my-samsung-galaxy-device/> (last visited July 19, 2020). By contrast, “iOS” is Apple’s operating system for Apple iPhones.

<sup>43</sup> Android is for Everyone, ANDROID, <https://www.android.com/everyone/> (last visited July 21, 2020).

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by Google.<sup>44</sup> This practice could be anticompetitive because such alternative versions of Android might enable Google's competitors to distribute their own products (such as alternative search engines) through channels competing with Google's.<sup>45</sup>

**Advertising Technology:** Some believe that Google has wrongly exercised its dominance in the digital advertising industry. As background: the digital advertising industry involves matching content publishers—which have “space” to house advertisements, just like print newspapers have room for ads—with advertisers that wish to place their advertisements and reach consumers.<sup>46</sup> When someone visits a content publisher (such as a newspaper) online, a rapid auction for that publisher's ad space occurs based on data about the visitor.<sup>47</sup> The auction enables the publisher to sell space to advertisers seeking to get their ads in front of that particular type of visitor, resulting in customized ad placement.<sup>48</sup>

As described in a recent article:

*The . . . lucrative and complicated system, largely invisible to consumers, . . . connects the sellers of ad space with advertisers that want to buy it. When a reader clicks on an article on a news website, for example, numerous interconnected products can sell an ad on that page to the highest bidder, . . . [for example, a] clothing brand or a carmaker.<sup>49</sup>*

This process has a number of steps, and “Google controls products that aid in every step of that [advertising auction] process, including the different pieces of software for advertisers and publishers that run auctions for ad space.”<sup>50</sup>

Complicating matters further, Google is itself a content publisher with advertising space to sell. Some of that space is on Youtube. Youtube draws over 2 billion monthly users and has the largest audience for

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<sup>44</sup> Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 24, 26, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>45</sup> Id. at 26.

<sup>46</sup> See generally Keach Hagey & Vivien Ngo, How Google Edged Out Rivals and Built the World's Dominant Ad Machine: A Visual Guide, WALL ST. J. (Nov. 7, 2019), [https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article\\_inline&mod=article\\_inline](https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article_inline&mod=article_inline); Patience Haggin & Kara Dapena, Google's Ad Dominance Explained in Three Charts, WALL ST. J. (June 17, 2019), <https://www.wsj.com/articles/why-googles-advertising-dominance-is-drawing-antitrust-scrutiny-11560763800>.

<sup>47</sup> Id.

<sup>48</sup> See id.

<sup>49</sup> David McCabe, How May Google Fight an Antitrust Case? Look at This Little-Noticed Paper, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/technology/google-ads-antitrust.html>.

<sup>50</sup> Id.; Keach Hagey & Vivien Ngo, How Google Edged Out Rivals and Built the World's Dominant Ad Machine: A Visual Guide, WALL ST. J. (Nov. 7, 2019).

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online video.<sup>51</sup> Google requires advertisers to use Google’s tools to buy ads on Youtube; in the past, advertisers had other means to buy ad space on Youtube.<sup>52</sup>

Some may argue Google has “abus[ed] its power,” “including as the dominant broker of digital ad sales across the web.”<sup>53</sup> Not only does Google own and provide tools that many publishers and advertisers use, but it also owns one of the primary exchanges where those transactions occur.<sup>54</sup> Given such control, there is concern that Google’s approach to pricing takes advantage of participants.<sup>55</sup> Some also argue that Google games the bidding system in competing for revenue from selling advertising space.<sup>56</sup> In addition, some may have complaints about Google’s exclusive control over ads displayed on Youtube.<sup>57</sup>

**Considerations:** Given the complexity of Google’s business, it is helpful to recall that Google may face imminent enforcement by the Justice Department and state attorneys general.<sup>58</sup> This executive-branch investigation may shed more light soon on how Google operates and its various business strategies. In the meantime, some high-level considerations may still be useful in advance of the hearing.

First, despite its string of success, Google has said it continues to face a number of competitors, including in search and advertising technology. As far as general, “horizontal” search engines (i.e., search engines that are not subject-matter specific), Google competes with search engines such as Yahoo!, Microsoft’s Bing, and DuckDuckGo.<sup>59</sup> Google also competes against products and firms that provide “vertical search” for specific products or services—such as searches for products on Amazon.<sup>60</sup>

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<sup>51</sup> Patience Haggin & Kara Dapena, Google’s Ad Dominance Explained in Three Charts, WALL ST. J. (June 17, 2019).

<sup>52</sup> Id.; Keach Hagey & Vivien Ngo, How Google Edged Out Rivals and Built the World’s Dominant Ad Machine: A Visual Guide, WALL ST. J. (Nov. 7, 2019).

<sup>53</sup> Keach Hagey & Vivien Ngo, How Google Edged Out Rivals and Built the World’s Dominant Ad Machine: A Visual Guide, WALL ST. J. (Nov. 7, 2019).

<sup>54</sup> Id.; see also Keach Hagey et al., Google Gets Ready for Legal Fight as U.S. Mulls an Antitrust Probe, WALL ST. J. (June 2, 2019), [https://www.wsj.com/articles/google-gets-ready-for-legal-fight-as-u-s-weighs-an-antitrust-probe-11559521581?mod=article\\_inline](https://www.wsj.com/articles/google-gets-ready-for-legal-fight-as-u-s-weighs-an-antitrust-probe-11559521581?mod=article_inline).

<sup>55</sup> See, e.g., David McCabe, How May Google Fight an Antitrust Case? Look at This Little-Noticed Paper, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/technology/google-ads-antitrust.html>.

<sup>56</sup> Id.

<sup>57</sup> Keach Hagey & Vivien Ngo, How Google Edged Out Rivals and Built the World’s Dominant Ad Machine: A Visual Guide, WALL ST. J. (Nov. 7, 2019), [https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article\\_inline&mod=article\\_inline](https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071?mod=article_inline&mod=article_inline).

<sup>58</sup> Brent Kendall & John McKinnon, Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google, WALL ST. J. (May 15, 2020), <https://www.wsj.com/articles/justice-department-state-attorneys-general-likely-to-bring-antitrust-lawsuits-against-google-11589573622>.

<sup>59</sup> Letter from Alicia C. O’Brien, Partner, King & Spalding, to Jerrold Nadler, Chairman, David Cicilline, Chairman, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, and Doug Collins, Ranking Member, F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, A-11 (Nov. 22, 2019) (on file with the Committee).

<sup>60</sup> Id.

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Likewise, Google’s considers itself to face numerous competitors in the advertising space. In a letter to the Committee, Google noted that it competes with “hundreds of companies,” such as Facebook, Amazon, Oracle, Microsoft, Twitter, and Verizon, among others.<sup>61</sup> Additionally, Google has said it faces competition from “highly-successful specialized advertising technology companies” and other companies; examples of possible competitors include Adform, Zedo, AdGlare, Outbrain, Data Xu, and Zeta, to name a few.<sup>62</sup>

Recognizing this range of competitors—and the breadth of the markets they represent—matters because antitrust law generally requires accurately defining the relevant markets that companies allegedly control.<sup>63</sup> In Google’s case, this would mean accurately accounting for its share of markets related to search, digital advertising, and in relation to Android. The hearing presents an opportunity to learn more from Google about the scope of the various markets it operates within, how they should be defined, and Google’s competitors.

Second and relatedly, it may be helpful to note Google’s position that it “faces constant pressure to improve its products and services due to intense competition . . . .”<sup>64</sup> There is some evidence that those are not empty words and that Google works hard to compete. Take, for example, its spending on research and development (R&D): in 2018, Google spent \$21.4 billion on R&D and related areas.<sup>65</sup> Though executive-branch investigations may be needed to reach accurate conclusions about any given accusation, it seems possible that the company’s success in numerous fields may stem from investing aggressively and strategically to compete, not from illegal exclusionary conduct.<sup>66</sup>

Third, there is not consensus that Google is acting wrongfully under existing U.S. law in relation to search, advertising technology, or conduct related to Android. For example, some of Google’s advocates have argued that “[e]ven though [Google] accounts for almost 30 percent of spending in the global

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<sup>61</sup> Id. at A-3 – A-4.

<sup>62</sup> Id. at A-4 – A-5.

<sup>63</sup> See, e.g., Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 5, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019) (“To demonstrate that a defendant possesses a dominant market share, plaintiffs must define the scope of the market in which the defendant operates.”); see generally id. at 5-8.

<sup>64</sup> Letter from Alicia C. O’Brien, Partner, King & Spalding, to Jerrold Nadler, Chairman, David Cicilline, Chairman, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, and Doug Collins, Ranking Member, F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, A-4 (Oct. 14, 2019) (on file with the Committee).

<sup>65</sup> Letter from Alicia C. O’Brien, Partner, King & Spalding, to Jerrold Nadler, Chairman, David Cicilline, Chairman, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, and Doug Collins, Ranking Member, F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Admin. Law, H. Comm. on the Judiciary, A-1 (Nov. 22, 2019) (on file with the Committee).

<sup>66</sup> Cf. Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 4, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019) (detailing requirement of not just a monopoly, but also unlawful activity to “achieve, maintain, or enhance” the monopoly power).

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digital ad market, it does not control enough of the industry to overcharge its customers and box out its competitors.”<sup>67</sup> Instead, some advocates claim that “Google’s products have made the process of buying ads more efficient” or “offered strong alternatives for buyers and sellers.”<sup>68</sup> Others have claimed more generally that Google’s “success stems from good business judgment, not illegal conduct.”<sup>69</sup> While Google’s conduct presents interesting and complex questions—questions that U.S. enforcement agencies are investigating and equipped to address—it seems far from open-and-closed that Google has engaged in anti-competitive or illegal conduct.

### AMAZON

**Concerns:** Several concerns exist about Amazon’s business practices. These concerns generally stem from how Amazon both sells its own products and also operates an online marketplace for third-party merchants.<sup>70</sup> As examples of recent concerns:

**Third-party seller data and private-label products:** Some believe Amazon has used information from individual third-party merchants to develop Amazon’s own, competing private-label products. The Wall Street Journal recently reported that “[c]ontrary to assertions to Congress, employees often consulted sales information on third-party vendors when developing private-label merchandise.”<sup>71</sup>

Subsequently, Members of the Committee sent a letter to Amazon expressing concern about related statements Amazon made in a hearing last year.<sup>72</sup> Amazon agreed that the alleged practice of consulting individual third-party seller data would violate its own policy.<sup>73</sup> Amazon is conducting an internal investigation of these matters.<sup>74</sup>

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<sup>67</sup> David McCabe, How May Google Fight an Antitrust Case? Look at This Little-Noticed Paper, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/technology/google-ads-antitrust.html>.

<sup>68</sup> Id.

<sup>69</sup> Chris Marchese, Is Google Search an Advertising Goliath? Think Again: Competition in Digital Advertising is Strong & Growing Stronger, NETCHOICE, 4 (June 2020), <https://netchoice.org/wp-content/uploads/2020/06/Is-Google-Search-an-Advertising-Goliath-Think-Again-FINAL.pdf>.

<sup>70</sup> See generally Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 27, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>71</sup> Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, WALL ST. J. (Apr. 23, 2020), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

<sup>72</sup> Letter to Jeff Bezos, Amazon CEO, from Members of House Judiciary Committee (May 1, 2020).

<sup>73</sup> Letter from Amazon to Chairman Nadler, et al., 3 (May 15, 2020), <https://d39w7f4ix9f5s9.cloudfront.net/cc/e6/540046ec457e9c5f9dd7c6fe8736/response-to-hjc-seller-data-5.15.2020.pdf>.

<sup>74</sup> Id.

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**Discrimination against third-party merchants:** Relatedly, some have accused Amazon of discriminating against third-party merchants that sell products on Amazon Marketplace.<sup>75</sup> Some say Amazon preferences its own, private-label products over those of third-party merchants.<sup>76</sup> Another concern is that Amazon may disfavor third-party sellers when they opt not to use Amazon’s ancillary offerings, such as Amazon’s fulfillment services (which provides storage, packaging, and shipping to sellers).<sup>77</sup> Another accusation is that Amazon has pushed certain third-party sellers entirely off the Amazon Marketplace platform.<sup>78</sup>

**Other exclusionary conduct:** In addition, some have claimed Amazon may have engaged in “predatory pricing,” i.e., lowering prices of certain goods below cost to harm competitors.<sup>79</sup>

**Considerations:** In evaluating these concerns, certain aspects of Amazon’s business and competitive ecosystem may be of use.

First, as an initial matter, Amazon appears to face a number of competitors. This is so both when Amazon operates as a retailer and when it competes for the business of third-party merchants that sell through Amazon Marketplace.

As a retailer, Amazon faces competition from numerous sellers, both on and offline. Such competitors include both large chain stores (such as Walmart, Costco, Target, Barnes & Noble, etc.), and also smaller boutiques or other brick-and mortar shops. Due to such competition, in reporting last year, Amazon was said to have only approximately 4% of the overall U.S. retail market.<sup>80</sup> Even when considered solely in terms of online commerce, Amazon was estimated to have under 40% of the market.<sup>81</sup> Notably,

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<sup>75</sup> See, e.g., Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 27-28 CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>76</sup> Id. at 28.

<sup>77</sup> See, e.g., id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> See Spencer Soper & Ben Brody, Amazon Probed by U.S. Antitrust Officials Over Marketplace, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants>.

<sup>81</sup> Id.; see also Thomas Barrabi, Amazon’s online market share may be smaller than previously thought, FOX BUSINESS (June 19, 2019), <https://www.foxbusiness.com/retail/amazon-market-share-ecommerce-sales>.

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Amazon’s market share of e-commerce is below 50%—an amount below which courts typically do not find monopoly power,<sup>82</sup> and they often require a higher market share.<sup>83</sup>

However, this latter approach of treating Amazon solely as an online retailer is arguably a poor way to define the relevant market, in part because of how consumers shop in diverse venues. According to sources submitted in this investigation, between 72% and 83% of consumers in the United States and certain European countries reported using a variety of methods—not just e-commerce—to shop.<sup>84</sup> The same data showed that “90% of respondents regularly or occasionally browse products online and then purchase in a retail store, and 89% do the reverse.”<sup>85</sup> The general point here is that consumer and company behavior is increasingly difficult to neatly categorize as either brick-and-mortar commerce or online commerce. Because of this, arguably there is reason to think of Amazon as a retailer that competes against all types of retailers, not just other online retailers.

Just as it faces competition as a retailer, Amazon also faces competition as a platform and partner for third-party merchants. These third-party sellers may choose to sell through numerous platforms other than Amazon Marketplace, platforms like Google Shopping,<sup>86</sup> Walmart Marketplace,<sup>87</sup> Shopify,<sup>88</sup> Bonanza,<sup>89</sup> eBay,<sup>90</sup> and Etsy,<sup>91</sup> for example. Some merchants also appear eager to sell through a platform other than Amazon’s.<sup>92</sup>

Second and relatedly: given such competition, Amazon may be unlikely to succeed in the long-run if it consistently injures—or is even perceived to injure—“consumers,” whether those consumers are individuals or third-party merchants.

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<sup>82</sup> Single Firm Conduct: Monopolization Defined, FEDERAL TRADE COMMISSION (“Courts look at the firm’s market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area. Some courts have required much higher percentages.”), <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (last visited July 17, 2020).

<sup>83</sup> See, e.g., Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 8-9 CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019) (describing variety of precedent requiring market share for monopoly power to be significantly higher than 50%).

<sup>84</sup> HJC-AMAZON-00206179 – HJC-AMAZON-00206180 (on file with the Committee).

<sup>85</sup> HJC-AMAZON-00206180 (on file with the Committee).

<sup>86</sup> Google Shopping, GOOGLE, <https://shopping.google.com/about> (last visited July 21, 2020).

<sup>87</sup> Walmart Marketplace, WALMART, <https://marketplace.walmart.com/> (last visited July 21, 2020).

<sup>88</sup> About Us: Shopify powers over 1,000,000 businesses worldwide, SHOPIFY, <https://www.shopify.com/> (last visited July 21, 2020).

<sup>89</sup> About Bonanza, BONANZA, [https://www.bonanza.com/about\\_us](https://www.bonanza.com/about_us) (last visited July 21, 2020).

<sup>90</sup> eBay Seller Hub, eBay, <https://www.ebay.com/sh/landing> (last visited July 19, 2020).

<sup>91</sup> Sell, Etsy, <https://www.etsy.com/sell> (July 19, 2020).

<sup>92</sup> See Kiri Masters, As Shoppers Lose Interest In Amazon, Brands Shift To Selling On Walmart, FORBES (Nov. 6, 2019), <https://www.forbes.com/sites/kirimasters/2019/11/06/as-shoppers-lose-interest-in-amazon-brands-shift-to-selling-on-walmart/#2e0d87d52762>.

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Deceiving or otherwise providing a poor experience for individual consumers will likely damage Amazon’s position as a retailer. For example, if Amazon consistently “self-preferences” private-label products that are of poor quality or inferior to offerings from third-party sellers, individual buyers may become unhappy with their experiences and shop elsewhere—and they have plenty of options, as described above.<sup>93</sup> In considering Amazon’s use of private-label brands, it is worth noting that Amazon appears to act like other retailers when it features its own products based on what Amazon considers likely to sell.<sup>94</sup> Amazon is not the first company to develop and promote its own product lines. Examples include Costco’s Kirkland brand,<sup>95</sup> or Walgreens and CVS promoting their own versions of various name-brand products. This practice of in-house labelling and promotion gives consumers more options to choose from at various price points. Though competing retailers may be unhappy when Amazon introduces or promotes a new brand—perhaps in part because they may have to compete harder and innovate more—such steps are consistent with long-standing practices in the retail industry. Likewise, due to competition from other online platforms, it seems likely that Amazon will lose third-party merchants over time if they view Amazon as untrustworthy. If or when Amazon violates contracts with third-party sellers—or violates its own internal policies designed to protect merchants—those merchants have other platforms to choose from, as described above. And the more Amazon develops a reputation for such behavior, the more likely it seems that third-party sellers will in fact take their business elsewhere.<sup>96</sup>

Third, if Amazon is treated as having monopoly power in particular markets, it may be difficult for the legislative branch to establish that Amazon has engaged in illegal exclusionary conduct through practices like predatory pricing.<sup>97</sup> Inquiries into pricing practices are fact-specific.<sup>98</sup> For example, though Amazon may have offered below-cost sale prices on certain products, the practice of offering “loss leaders” can cause customers to buy other types of more profitable products, and can be pro-competitive.<sup>99</sup> Such granular analysis is exactly what antitrust enforcement agencies—and arguably not Congress—are

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<sup>93</sup> See, e.g., Best 13 Sites Like Amazon: Free Shipping, Better Deals, and More, TECHBOOMERS (Mar. 12, 2020), <https://techboomers.com/amazon-alternatives>.

<sup>94</sup> See, e.g., Letter from Amazon to Chairmen Nadler, Cicilline, et al., 2 (May 15, 2020), <https://d39w7f4ix9f5s9.cloudfront.net/cc/e6/540046ec457e9c5f9dd7c6fe8736/response-to-hjc-seller-data-5.15.2020.pdf>.

<sup>95</sup> See, e.g., Kirkland Signature, COSTCO <https://www.costco.com/kirkland-signature.html> (last visited July 17, 2020).

<sup>96</sup> See generally Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, WALL ST. J. (Apr. 23, 2020), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

<sup>97</sup> See generally Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 29-30, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>98</sup> Id. at 30.

<sup>99</sup> Id. at 12; 29-30.

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equipped to undertake. As mentioned elsewhere, the FTC is aggressively investigating Amazon,<sup>100</sup> as are certain states.<sup>101</sup> Calls to change antitrust law based on Amazon’s alleged conduct—especially when antitrust enforcement agencies are taking steps now and may bring enforcement actions soon—may be premature.

**Postscript: Amazon’s testimony to Congress**

As mentioned above, some have expressed concern that Amazon may have misled Congress. The Wall Street Journal reported that “[c]ontrary to assertions to Congress, employees often consulted sales information on third-party vendors when developing private-label merchandise.”<sup>102</sup> Subsequently, Members of the Committee sent a letter to Amazon expressing concern.<sup>103</sup> Amazon responded by acknowledging that the alleged practice of consulting individual third-party seller data would violate its own policy.<sup>104</sup> Amazon is currently conducting an internal investigation.<sup>105</sup>

The letter from Members of this Committee raised the possibility of criminal liability for Amazon based on misleading statements,<sup>106</sup> which is a serious charge. Among other elements, perjury requires a willful or knowing false statement;<sup>107</sup> and related crimes require similar proofs.<sup>108</sup> At present, there seems to be little evidence that Amazon intentionally or knowingly misled Congress. Yet, no one would deny that speaking candidly to Congress is vital for legislative inquiries. Accordingly, this hearing may be a good opportunity to emphasize the importance of accurate testimony, supported by complete and accurate research, when the private sector speaks to Congress. But the hearing may be a poor venue for offering conclusions about Amazon’s particular conduct last year.

APPLE

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<sup>100</sup> Spencer Soper & Ben Brody, Amazon Probed by U.S. Antitrust Officials Over Marketplace, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants>.

<sup>101</sup> Karen Weise & David McCabe, Amazon Said to Be Under Scrutiny in 2 States for Abuse of Power, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/technology/state-inquiry-antitrust-amazon.html>.

<sup>102</sup> Dana Mattioli, Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products, WALL ST. J. (Apr. 23, 2020), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

<sup>103</sup> Letter to Jeff Bezos, Amazon CEO, from Members of House Judiciary Committee (May 1, 2020).

<sup>104</sup> See Letter from Amazon to Chairmen Nadler, Cicilline, et al., 3 (May 15, 2020), <https://d39w7f4ix9f5s9.cloudfront.net/cc/e6/540046ec457e9c5f9dd7c6fe8736/response-to-hjc-seller-data-5.15.2020.pdf>.

<sup>105</sup> See id.

<sup>106</sup> Letter to Jeff Bezos, Amazon CEO, from members of House Judiciary Committee, 3 (May 1, 2020).

<sup>107</sup> Criminal Resource Manual, 1747. Elements of Perjury – Specific Intent, DEP’T OF JUSTICE (updated Jan. 2020), <https://www.justice.gov/archives/jm/criminal-resource-manual-1747-elements-perjury-specific-intent>.

<sup>108</sup> 18 U.S.C. § 1001(a).

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**Concerns:** Several types of concerns exist around Apple and its App Store. There is significant interest in Apple’s design of its iPhone operating system, iOS, as a closed system that gives Apple control over how users download apps.<sup>109</sup> Relatedly, there has been strong interest in the fees Apple charges developers that sell products through its App Store.

**iPhone’s closed operating system:** There is concern that “Apple has illegally monopolized the market for iPhone apps by designing iOS as a closed system and installing security measures to prevent customers from purchasing apps outside of the App Store.”<sup>110</sup> Arguably, “[i]f ‘iPhone apps’ represent a properly defined antitrust market, Apple’s decision to design iOS in a manner that requires users to purchase apps only from the App Store limits competition in that market to one seller/distributor.”<sup>111</sup>

**Fees for selling through the App Store:** Relatedly, Chairman Cicilline has alleged that due to Apple’s market power, it “charg[es] exorbitant rents” in its App Store that amount to “highway robbery.”<sup>112</sup> Mr. Cicilline called the 30% commission that Apple charges some developers “unconscionable.”<sup>113</sup> In keeping with such concerns, at the hearing the App Store may be analogized to a toll road. The idea is that Apple has created a “toll road” that it controls, and “cars” (apps/developers) can only get on the road to reach the destination (iPhone users) if Apple says so and on Apple’s terms. The implication is that Apple’s level of control is unfair to developers, and that some type of limit should be set.

**Considerations:** In evaluating these concerns, certain aspects of Apple’s business model, and related background information, may be of use.

First, in considering how Apple controls its App Store as a distribution channel for apps to reach iPhones, it is worth reviewing Apple’s perspective on the store. “At its core, the App Store is a safe, secure platform where users can have faith in the apps they discover and the transactions they make. And developers, from first-time engineers to larger companies, can rest assured that everyone is playing by the same set of rules.”<sup>114</sup> As one might expect, Apple has claimed it is costly to maintain this store.<sup>115</sup> These costs are presumably a function of how involved Apple is in policing and assisting with the

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<sup>109</sup> Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 32, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>110</sup> Id.

<sup>111</sup> Id.

<sup>112</sup> Nilay Patel, Apple’s App Store Fees are ‘Highway Robbery,’ says House Antitrust Committee Chair, THE VERGE (Jun. 18, 2020), <https://www.theverge.com/2020/6/18/21295778/apple-app-store-hey-email-fees-policies-antitrust-wwdc-2020>.

<sup>113</sup> Id.

<sup>114</sup> Press Release, Addressing Spotify’s claims, APPLE (Mar. 14, 2019), <https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/>.

<sup>115</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (Apple response to Rep. Steube QFR #2).

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products distributed through the store.<sup>116</sup> For example, Apple conducts 100,000 app reviews each week, and most reviews occur within a day of when a developer submits the app.<sup>117</sup> Apple also offers extensive support to developers.<sup>118</sup> In other words, Apple takes an active role in managing and maintaining the store and the “products” in it.

Second, and relatedly, calling Apple’s business practices or pricing “unconscionable” arguably fails to consider relevant details and information regarding the App Store. First, “eighty four percent of the apps,” that is, “over 2 million apps available on the [App Store] pay nothing to Apple. It is only a very small percentage that pay a commission.”<sup>119</sup> Apple receives a commission when consumers pay up front to buy apps in the store.<sup>120</sup> Apple also receives a commission when users buy certain digital “products” or subscribe to certain services directly through apps in the store.<sup>121</sup> In other words, Apple receives a cut when a consumer buys something in Apple’s store. But, arguably, this is not a novel approach to how stores—digital or otherwise—are run.

Apple does not consider these fees arbitrary taxes on products. Instead, Apple believes the commission “reflects the value of the App Store as a channel of distribution for developers and the costs of running the store.”<sup>122</sup> Fees arguably help compensate Apple for what it invests in the App Store, similar to how other types of stores receive a commission or rent to build and maintain distribution channels for other types of products.<sup>123</sup>

Another relevant detail is how much developers paid historically to distribute certain apps. Before Apple’s App Store came along, app developers used to pay a significantly-higher percentage to access distribution channels. As Apple’s representative testified last year:

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<sup>116</sup> See, e.g., Dedicated to the best store experience for everyone, APPLE, <https://www.apple.com/ios/app-store/principles-practices/> (last visited July 20, 2020)

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 59 (2019) (Hr’g transcript).

<sup>120</sup> Dedicated to the best store experience for everyone, APPLE, <https://www.apple.com/ios/app-store/principles-practices/> (last visited July 19, 2020).

<sup>121</sup> Dedicated to the best store experience for everyone, APPLE, <https://www.apple.com/ios/app-store/principles-practices/> (last visited July 19, 2020). When Apple receives a commission for subscriptions purchased through an app from its store, its commission drops from 30% for the first year of an annual subscription to 15% afterward. Id.

<sup>122</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (Apple response to Rep. Steube QFR #2).

<sup>123</sup> See generally Ben Sperry, Does Apple’s “Discrimination” Against Rival Apps in the App Store harm Consumers?, TRUTH ON THE MARKET (Oct. 16, 2019) (opinion), <https://truthonthemarket.com/2019/10/16/does-apples-discrimination-against-rival-apps-in-the-app-store-harm-consumers/>.

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*You asked how we came to the 30 percent. Ten years ago, and it is easy to forget, most software was distributed through physical distribution like CompUSA or Best Buy. Typically a developer would share up to 60, 70 percent of the retail price with the distribution channel. So we set a very aggressive price of 30 percent . . . .*<sup>124</sup>

Arguably, the App Store has significantly lowered the cost of entry for developers overall.

Last, by charging a commission when customers purchase subscriptions through apps—without telling consumers that they might be able to sign up for the subscription elsewhere (and at a lower cost)—Apple’s approach is, (again, from Apple’s standpoint):  
*no different than the policies of virtually any other retailer, both brick-and mortar or online. . . . [A]nti-circumvention rules, to prevent free-riding, are common. No one would expect or demand that a brick-and-mortar retail store be required by a wholesaler to hang a sign on the display of certain goods directing customers to a different store to spare the wholesaler any fees charged by that retailer, and no online store should be held to a different standard.*<sup>125</sup>

Third, and more generally: criticizing how a private company runs a store, or how it structures its contracts with third parties that wish to sell products in that store, raises larger questions about what role government should have in product design and price-setting. In this case, Apple designed the iPhone that hosts developer’s apps. Apple also established and invests in the app store platform, and monitors the quality of apps offered through it.<sup>126</sup> Based on such considerations, some have argued that the app store is Apple’s property, and accordingly that “the company may control it in any way it likes.”<sup>127</sup>

Likewise, suggesting that 30% is too much to charge developers raises additional questions, such as whether Congress is better positioned than business to gauge the best price for app distribution. Such questions are important, and they may help illustrate the wisdom of a legal system with a default that simply lets private parties exercise their business judgment and enter contractual relationships as they see fit. That some app developers dislike fees (or costly quality standards) Apple sets does not mean government intervention is necessary, or would lead to better outcomes. For example, if Apple simply imposed a universal commission of 5% on all app developers to access its store, that might make

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<sup>124</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 60 (2019) (Hr’g transcript).

<sup>125</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (Apple response to Rep. Steube QFR #1 (footnote omitted)).

<sup>126</sup> Dedicated to the best store experience for everyone, APPLE, <https://www.apple.com/ios/app-store/principles-practices/> (last visited July 19, 2020).

<sup>127</sup> Kevin O’Connor, The Political Attack on Big Tech, WALL ST. J. (Sept. 23, 2019), <https://www.wsj.com/articles/the-political-attack-on-big-tech-11569279637>.

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developers that currently pay 15% commissions happy. But it could (at least in theory) have the unintended result of shutting certain developers out of the store.

As a final note, analogizing the app store to a toll road arguably falls short of the reality because—unlike the typical owner of a toll road—Apple has also created and maintains the “destination,” i.e., the iPhone. Rather than try to analogize the app store to something else, it is more accurate to think of the app store as what it is—a storefront. Even though the storefront is digital, Apple built, owns, and maintains it. Apple should arguably be the one to control it.

As with the other companies described in this memo, if Apple has engaged in unlawful behavior by how it has designed its products or runs its store, that does not establish that existing antitrust laws are deficient. Federal<sup>128</sup> and state<sup>129</sup> enforcement agencies are currently investigating how Apple operates, and changing law or policy based on current views of Apple would arguably be premature.

#### FACEBOOK

**Concerns:** Among other issues, Facebook may be accused of a “predatory acquisition strategy,” both in relation to specific acquisitions and as a general mode of operating.<sup>130</sup> Facebook may also face more general questions about privacy, security, and its approach to content moderation.

**Specific acquisitions:** Facebook has made a number of acquisitions over time.<sup>131</sup> Some of its past acquisitions continue to receive significant attention.<sup>132</sup> Most prominently, Facebook bought Instagram, a video and photo sharing service, in 2012; and Whatsapp, a messaging and call service, in 2014.<sup>133</sup> One concern with these acquisitions is that, had Instagram and Whatsapp developed on their own as independent companies, they would have become Facebook’s rivals and competitors. Instead, the general claim is that Facebook bought them because it considered them competitive threats.

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<sup>128</sup> See, e.g., Jack Kelly, Justice Department Is Investigating Google, Apple, Facebook And Amazon For Monopolistic Activities, FORBES (July 24, 2019), <https://www.forbes.com/sites/jackkelly/2019/07/24/justice-department-is-investigating-google-apple-facebook-and-amazon-for-monopolistic-activities/#3d26a1fbba6b>.

<sup>129</sup> Charlotte Henry, DOJ and States Attorneys General Turning Antitrust Attention on Apple, THE MAC OBSERVER (June 24, 2020), <https://www.macobserver.com/news/doj-states-attorneys-general-antitrust-apple/>.

<sup>130</sup> See, e.g., David N. Cicilline, The Case for Investigating Facebook, N.Y. TIMES (Mar. 19, 2019) (opinion), <https://www.nytimes.com/2019/03/19/opinion/facebook-antitrust-investigation.html>.

<sup>131</sup> See, e.g., Chaim Gartenberg, Facebook is buying Giphy and integrating it with Instagram, THE VERGE (May 15, 2020), <https://www.theverge.com/2020/5/15/21259965/facebook-giphy-gif-acquisition-buy-instagram-integration-cost>.

<sup>132</sup> See, e.g., Brent Kenall et al, FTC Antitrust Probe of Facebook Scrutinizes Its Acquisitions, WALL ST. J. (Aug. 1, 2019), <https://www.wsj.com/articles/ftc-antitrust-probe-of-facebook-scrutinizes-its-acquisitions-11564683965>.

<sup>133</sup> Id.

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**M&A strategy overall:** Relatedly, Facebook’s general approach and strategy for M&A is of significant interest.<sup>134</sup> Related to such interest, Facebook may receive questions about its 2013 purchase of the Israeli company Onavo. Onavo offered a security-related app that millions of users downloaded.<sup>135</sup> The app enabled Onavo to gather extensive information about users’ online activity.<sup>136</sup> Reportedly, Facebook used data from Onavo to assess smaller potential competitors before buying them, as well as to “scope out new product categories.”<sup>137</sup> Facebook has since shut down Onavo,<sup>138</sup> but this purchase and supposed use of Onavo’s data may support the larger narrative and concern that Facebook engages in a practice of “killer acquisitions” to stifle competitors (or potential competitors).

**Additional concerns:** other topics, though not strictly related to antitrust law, may come up. For example, Facebook’s privacy and security policies seem timely, given recent attacks on other social media platforms like Twitter.<sup>139</sup> Facebook’s approach to content moderation is also fair game, since how Facebook moderates content such as political ads creates the potential for political bias against positions held by President Trump and the Republican party.<sup>140</sup>

**Considerations:** In weighing the concerns above, some of the following background and information may be of use.

First, and as a general matter, American laws do not seek to make the federal government a Monday-morning quarterback to second-guess business judgments based on vague socio-political goals or speculative concerns divorced from economic analysis. Instead, the general default of American antitrust law is to permit companies to exercise their business judgment as they see fit, including in transactions with other companies. America is not a socialist country, and her citizens—not the government—generally control how private property is used. Accordingly, “antitrust is largely reactive . . .”<sup>141</sup> It recognizes the general power of the markets as efficient and disciplined means for allocating scarce resources and picking winners and losers. Changes to antitrust law that threaten to supplant

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<sup>134</sup> Wilson C. Freeman, Jay B. Sykes, Antitrust and “Big Tech” R45910, 30, CONGRESSIONAL RESEARCH SERVICE (Sept. 11, 2019).

<sup>135</sup> Deepa Seetharaman and Betsy Morris, Facebook’s Onavo Gives Social-Media Firm Inside Peek at Rivals’ Users, WALL ST. J. (Aug. 13, 2017), [https://www.wsj.com/articles/facebooks-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003?mod=article\\_inline](https://www.wsj.com/articles/facebooks-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003?mod=article_inline).

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Jon Porter, Facebook pulls the plug on its data snooping Onavo VPN service, THE VERGE (Feb. 22, 2019), <https://www.theverge.com/2019/2/22/18235908/facebook-onavo-vpn-privacy-service-data-collection>.

<sup>139</sup> See, e.g., Colin Dwyer, 'We're Embarrassed': Twitter Says High-Profile Hack Hit 130 Users, NATIONAL PUBLIC RADIO (July 18, 2020), <https://www.npr.org/2020/07/18/892615413/we-re-embarrassed-twitter-says-high-profile-hack-hit-130-users>

<sup>140</sup> See, e.g., Announcement from Mark Zuckerberg, FACEBOOK (June 26, 2020), <https://www.facebook.com/zuck/posts/10112048980882521>.

<sup>141</sup> Cf. Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 15 (2005).

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individual or corporate decision-making with central planning arguably jeopardize the benefits of America's current competition policy.

Second, though it is possible that Facebook and other companies acquire competitors or potential competitors simply to eliminate them, it also seems possible that companies buy other companies to obtain intellectual property, new talent, and to compete more effectively given the acquirer's existing products, anticipated markets, or other factors. As one author put it, "[t]he vast majority of acquisitions aren't to stop competitors, but to buy innovative ideas and talent . . ." <sup>142</sup> And while Facebook's arguments need not be taken at face value, its position is that acquisitions can fuel innovation and connect firms of "complementary strengths." <sup>143</sup>

Third, with respect to Facebook's acquisitions of Instagram and Whatsapp—purchases that are again under scrutiny <sup>144</sup>—it is important to recognize that both transactions were already subject to antitrust scrutiny when they occurred. The Obama-Biden Administration approved Facebook's acquisition of Instagram <sup>145</sup> and Whatsapp. <sup>146</sup> If these deals were, in fact, anticompetitive and ran counter to antitrust law, that does not necessarily mean the existing antitrust laws or framework need to change given the benefit of hindsight. Instead, it might actually mean that the Obama-Biden Administration was asleep at the switch. A possible failure of the prior administration is a poor reason to overhaul antitrust law or establishing a new, interventionist legal framework.

Fourth, and stepping back from Facebook's acquisition of these two companies, a permissive approach to M&A may actually be one of the best ways to incentivize competition and cause entrepreneurs to

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<sup>142</sup> James Pethokoukis, The cranky elites who hate Big Tech, and the normal people who love them, AEIDEAS (Mar. 4, 2020) (internal quotation marks omitted), <https://www.aei.org/economics/the-cranky-elites-who-hate-big-tech-and-the-normal-people-who-love-them/>; see also Will Rhine, Welcome to the kill zone? A closer look at merger and start-up data suggests it's a cultivation zone, THE BENCHMARK (Feb. 27, 2020), <https://medium.com/cgo-benchmark/welcome-to-the-kill-zone-852339601fbb>.

<sup>143</sup> Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (written testimony of Matt Perault).

<sup>144</sup> Brent Kendall, John D. McKinnon & Deepa Seetharaman, FTC Antitrust Probe of Facebook Scrutinizes Its Acquisitions, WALL ST. J. (Aug. 1, 2019), <https://www.wsj.com/articles/ftc-antitrust-probe-of-facebook-scrutinizes-its-acquisitions-11564683965>; Allison Matyus, The FTC wants to know exactly why Facebook bought Instagram and WhatsApp, DIGITALTRENDS.COM (Aug. 1, 2019), <https://www.digitaltrends.com/news/ftc-investigating-facebook-acquisition-of-instagram-and-whatsapp/>.

<sup>145</sup> Lauren Feiner, How Cambridge Analytica and the Trump campaign changed Big Tech forever, CNBC (Dec. 26, 2019), <https://www.cnn.com/2019/12/24/how-facebook-and-big-tech-gained-dc-scrutiny-in-the-2010s.html>.

<sup>146</sup> Alexei Oreskovic, Facebook says WhatsApp deal cleared by FTC, REUTERS (Apr. 10, 2014), <https://www.reuters.com/article/us-facebook-whatsapp/facebook-says-whatsapp-deal-cleared-by-ftc-idUSBREA391VA20140410>.

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innovate.<sup>147</sup> This is true in part due to the existing high costs of taking a company public.<sup>148</sup> Making M&A harder would curtail one of the most important incentives that leads entrepreneurs, investors, and business experts to found, invest in, and offer expertise to new companies.<sup>149</sup> If a would-be entrepreneur knows it will be hard to monetize a venture, he or she will be less inclined to take risks and make the investments that entrepreneurship requires.<sup>150</sup> In other words, restricting M&A would damage the “entrepreneurial ecosystem. Entrepreneurs would be chilled from creating start-ups if they could not easily create a liquidity event to extract financial rewards from their investment.”<sup>151</sup> This is especially so where it may be hard to take a product to market or otherwise monetize a concept or service.<sup>152</sup> It would arguably be poor policy to use Facebook as the touchstone for M&A policy and raise standards for such transactions, especially given how “barriers to exit are barriers to entry.”<sup>153</sup>

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<sup>147</sup> See generally Will Rhine, *Welcome to the kill zone? A closer look at merger and start-up data suggests it’s a cultivation zone*, THE BENCHMARK (Feb. 27, 2020), <https://medium.com/cgo-benchmark/welcome-to-the-kill-zone-852339601fbb>.

<sup>148</sup> See general Id.

<sup>149</sup> See, e.g., Knowledge@Wharton, *Why Breaking Up Big Tech Could Do More Harm Than Good*, UNIVERSITY OF PENNSYLVANIA (Mar. 26, 2019) (podcast featuring various antitrust experts) (describing how “restricting big tech companies from buying smaller startups can be harmful. For many startups, the initial, say, \$100 million they get from venture capitalists is given with the expectation that they will be bought by a Google or Facebook. For many of these firms, the only way out is to get acquired by these big tech companies . . . [i]f you somehow tell them that is not going to happen, then they may never reach the point of developing that ambitious product” (internal quotation marks omitted)), <https://knowledge.wharton.upenn.edu/article/why-breaking-up-big-tech-could-do-more-harm-than-good/>.

<sup>150</sup> See, e.g., Mauren K. Ohlhausen, *Submission*, 7 (Apr. 17, 2020) (on file with the Committee) (explaining “economic research demonstrates a strong link between the potential for acquisition of small entities, their access to investment, and innovation”).

<sup>151</sup> D. Daniel Sokol, *Submission*, 25 (Apr. 17, 2020) (on file with the Committee) (footnote omitted).

<sup>152</sup> See, e.g., Sam Bowman, *Pragmatic, incremental approach is the best way to reform antitrust law*, THE HILL (June 10, 2020) (opinion) (“Making mergers and acquisitions more difficult, for example, would make it harder for startup founders and investors to ‘exit’ those companies through buyouts, which are currently a key way that those entrepreneurs can recoup their investments. This would make it even riskier to set up or invest in a new business, especially in areas where it may not be simple to turn a good idea into a reliable revenue stream.”), <https://thehill.com/blogs/congress-blog/politics/501993-pragmatic-incremental-approach-is-the-best-way-to-reform>.

<sup>153</sup> Noah Phillips, *FTC Commissioner, Competing for Companies: How M&A Drives Competition and Consumer Welfare*, (May 31, 2019) (internal quotation marks omitted), [https://www.ftc.gov/system/files/documents/public\\_statements/1524321/phillips\\_-\\_competing\\_for\\_companies\\_5-31-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf); see also See Annual Report, COUNCIL OF ECONOMIC ADVISORS 221 (Feb. 2020) (“If dominant platforms were routinely deterred from acquiring start-ups, such a policy could reduce venture capital funding in this segment.”); Geoffrey A. Manne, *Submission*, 9 (April 17, 2020) (on file with the Committee) (“Without sufficient evidence, proposals to ban large technology companies from acquiring nascent or potential competitors could do much more harm than good, resulting in significantly lower levels of innovation and consumer welfare, including deterring start-up activity. In addition to halting welfare-enhancing integrations and potentially leaving many small companies to fail in the long run, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation.”).

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**ENFORCEMENT AGENCIES ARE ALREADY INVESTIGATING THESE COMPANIES; CONGRESS NEED NOT DUPLICATE THOSE EFFORTS.**

Investigations are underway

While the Committee’s Big Tech investigation and this hearing may prove instructive generally—and provide fodder for those with a chip on their shoulders against capitalism—it is important to remember that the Trump Administration is already enforcing the antitrust laws that Congress has given it to administer, and is examining Google, Amazon, Apple, and Facebook. Arguably—far from showing that the existing antitrust framework is dysfunctional—as they play out these investigations may establish just how well the existing framework functions. In more detail:

- Google: The Justice Department is investigating Google for antitrust violations.<sup>154</sup>
  - Action against Google appears imminent, including in relation to Google’s search and advertising practices.<sup>155</sup>
- Amazon: The FTC is investigating Amazon for antitrust violations.<sup>156</sup>
  - That probe includes how Amazon competes as a retailer with third-party merchants that use its platform, as well as the extent of its control over such third parties.<sup>157</sup>
- Apple: The Justice Department is investigating Apple for antitrust violations.<sup>158</sup>
  - This investigation appears to encompass how Apple manages its app store,<sup>159</sup> which is a topic that Chairman Cicilline has focused on recently.<sup>160</sup>
- Facebook: The FTC is investigating Facebook for antitrust violations.<sup>161</sup>

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<sup>154</sup> Brent Kendall & John McKinnon, Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google, WALL ST. J. (May 15, 2020), <https://www.wsj.com/articles/justice-department-state-attorneys-general-likely-to-bring-antitrust-lawsuits-against-google-11589573622>.

<sup>155</sup> Id.; John McKinnon & Brent Kendall, Justice Department, State Attorneys General to Confer on Google Antitrust Challenge, WALL ST. J. (June 23, 2020), <https://www.wsj.com/articles/justice-department-state-attorneys-general-to-confer-on-google-antitrust-challenge-11592937476>.

<sup>156</sup> See, e.g., Spencer Soper & Ben Brody, Amazon Probed by U.S. Antitrust Officials Over Marketplace, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants>.

<sup>157</sup> Id.

<sup>158</sup> Leah Nysten, Apple’s easy ride from U.S. authorities may be over, POLITICO (June 24, 2020), <https://www.politico.com/news/2020/06/24/justice-department-anti-trust-apple-337120>.

<sup>159</sup> Id.

<sup>160</sup> Nilay Patel, Apple’s App Store Fees are ‘Highway Robbery,’ says House Antitrust Committee Chair, THE VERGE (Jun. 18, 2020), <https://www.theverge.com/2020/6/18/21295778/apple-app-store-hey-email-fees-policies-antitrust-wwdc-2020>.

<sup>161</sup> Steven Overly, Facebook discloses FTC antitrust investigation underway, POLITICO (July 24, 2019), <https://www.politico.com/story/2019/07/24/facebook-discloses-ftc-antitrust-investigation-underway-1432927>.

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- The FTC’s investigation entails, in part, examining “whether Facebook acquired potential rivals such as Instagram and WhatsApp to head off competitive threats.”<sup>162</sup>
- Recent reporting suggests the FTC may soon depose high-profile executives.<sup>163</sup>

In addition to these investigations, states across the nation have been investigating large technology companies for some time.<sup>164</sup> And the FTC is currently conducting a study related to acquisitions unreported under the Hart-Scott-Rodino Act between January 1, 2010, and December 31, 2019.<sup>165</sup> The companies reporting to the FTC on their acquisitions include Google, Amazon, Apple, and Facebook, as well as Microsoft.<sup>166</sup>

Congress need not duplicate work of the executive branch

The point of describing each of these executive-branch investigations and, in brief, their overlap with some of the most prominent concerns about Google, Amazon, Apple, and Facebook, is not to predict what the agencies may find or how any enforcement actions will play out. Instead, it suggests that to the extent the Committee’s investigation duplicates the work of the agencies, the legislative branch is unnecessarily taking on work for which it is ill-equipped. Relatedly, even if this hearing suggests that any of these companies have violated antitrust laws, that would arguably not establish systemic problems with current antitrust laws. Changing laws in response to such findings would be premature.

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<sup>162</sup> John D. McKinnon, States to Launch Google, Facebook Antitrust Probes, WALL ST. J. (Sept. 6, 2019), <https://www.wsj.com/articles/states-to-launch-google-facebook-antitrust-probes-11567762204>.

<sup>163</sup> Brent Kendall & Emily Glazer, FTC Considering Deposing Top Facebook Executives in Antitrust Probe, WALL ST. J. (July 17, 2020), [https://www.wsj.com/articles/ftc-considering-deposing-top-facebook-officials-in-antitrust-probe-11595019047?mod=tech\\_lead\\_pos6](https://www.wsj.com/articles/ftc-considering-deposing-top-facebook-officials-in-antitrust-probe-11595019047?mod=tech_lead_pos6).

<sup>164</sup> See, e.g., Brent Kendall & John McKinnon, Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google, WALL ST. J. (May 15, 2020), <https://www.wsj.com/articles/justice-department-state-attorneys-general-likely-to-bring-antitrust-lawsuits-against-google-11589573622>; Leah Nylén, Apple’s easy ride from U.S. authorities may be over, POLITICO (June 24, 2020), <https://www.politico.com/news/2020/06/24/justice-department-anti-trust-apple-337120>; John D. McKinnon, States to Launch Google, Facebook Antitrust Probes, WALL ST. J. (Sept. 6, 2019), <https://www.wsj.com/articles/states-to-launch-google-facebook-antitrust-probes-11567762204>.

<sup>165</sup> Press Release, FTC to Examine Past Acquisitions by Large Technology Companies, (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

<sup>166</sup> *Id.*

**EXISTING ANTITRUST LAWS WORK WELL, AND NEED NOT CHANGE FOR DIGITAL MARKETS.**

U.S. antitrust laws are sound

As Congress considers political bias in Big Tech, or changing existing antitrust laws based on allegations against specific companies (rather than trust to the enforcement process), it is worthwhile to revisit antitrust's recent history and fundamentals. The Committee's investigation is not the first time in recent years that Congress has caused reevaluation of those fundamentals, including modern antitrust law and the consumer welfare standard. Current proposals to overhaul those laws sidestep the extensive work of Congress's bipartisan<sup>167</sup> Antitrust Modernization Commission (AMC).<sup>168</sup> Through legislation introduced by then-Chairman Sensenbrenner, Congress established the AMC to examine the need to modernize U.S. antitrust law.<sup>169</sup> In 2007, after three years spent examining what is generally the same legal framework that governs today, the AMC declared that the state of the U.S. antitrust laws was "sound."<sup>170</sup> A number of expert submissions in this current investigation and on file with the Committee have echoed that conclusion.

They need not change for digital markets

American antitrust laws arguably preserve a well-functioning competitive process with significant benefits, including in digital markets. General principles about antitrust law and policy may help frame the larger debate about whether it is appropriate to change antitrust laws for digital markets at this time:

- Antitrust exists to protect competition and the competitive process itself,<sup>171</sup> not disgruntled individual competitors that run to Congress when they feel aggrieved.
  - In the words of a former FTC Commissioner: "the antitrust laws are designed to protect the competitive process, not to redress simple contract injury to competitors; they neither prohibit hurt feelings nor compensate for poor business decisions."<sup>172</sup>
  - This means that antitrust should not punish successful competitors, or operate out of a simple mentality that "big is bad."

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<sup>167</sup> ANTITRUST MODERNIZATION COMMISSION, Report and Recommendations, i (2007) (hereafter "AMC Report"), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>168</sup> See generally AMC Report 5-6 (legislative history of the Commission).

<sup>169</sup> Id.

<sup>170</sup> Id. at i.

<sup>171</sup> See, e.g., *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2290 (2018) (explaining that the "primary purpose" of antitrust law is to promote interbrand competition (citation omitted)); *N.C. State Bd. Of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1110 (2015) (explaining that antitrust law embodies "fundamental national values of free enterprise and economic competition" (citation omitted)).

<sup>172</sup> Joshua Wright, Court Should Reverse Flawed Antitrust Ruling, REALCLEAR POLITICS (July 4, 2020) (emphasis added), [https://www.realclearpolitics.com/articles/2020/07/04/court\\_should\\_reverse\\_flawed\\_antitrust\\_ruling.html](https://www.realclearpolitics.com/articles/2020/07/04/court_should_reverse_flawed_antitrust_ruling.html).

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- The American dream rests on the possibility of achieving success through competition—on the merits, in the marketplace.
  - The American dream does not rest on government picking winners and losers.
  - Nor has it protected individual competitors from the need to compete efficiently, even when they find themselves losing on the market.
  - Instead, the American legal framework and government generally seek to create an even playing field.
- Within this framework, the size and success of companies may simply reflect hard work and successful competition.
  - Again, competition with an eye toward success is what antitrust exists to foster.
  - This means that growth and large company size are not necessarily bad.
  - That a large company “wins” repeatedly does not establish lack of competition:
    - Claiming that a string of success means the competitive process is broken would be like saying repeated wins of prominent athletes mean they did not or do not have to keep competing to keep winning.<sup>173</sup>
    - Absent some showing of unlawful conduct, punishing Big Tech (or any large company) would be like stripping an athlete of her trophies, simply because she is winning too much.
- Relatedly, antitrust would be a poor tool to redistribute wealth from winners—efficient and productive companies—to less efficient firms.
  - This is fundamentally unfair to successful entrepreneurs, businesses, and investors.
  - It would harm American consumers that benefit from the efficient competition that success represents.
  - This would ultimately be a step toward socialism and away from capitalism and freedom.
- Resting as it generally does on such principles, modern antitrust law—including the consumer welfare standard—is arguably adequate for digital markets.
  - First, nothing about digital markets exempts them from supply and demand, or the long-term pressures of “creative destruction” and the disruption it causes.<sup>174</sup>
    - Relatedly, modern antitrust law already accounts for “network effects,” and other dynamics supposedly unique to digital markets.<sup>175</sup>

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<sup>173</sup> Cf. Elyse Dorsey et. al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 893-95 (2020).

<sup>174</sup> See, e.g., Adam Thierer, *Tech Titans And Creative Destruction*, FORBES (Oct. 19, 2011) (opinion), <https://www.forbes.com/forbes/2011/1107/opinions-capital-flows-tech-titans-destruction-adam-thierer.html#1899ec8f2f8a>.

<sup>175</sup> See, e.g., Ryan Bourne, *Big Is Not Always Bad: Why We Shouldn't Rush to Break up the Tech Giants*, UK TELEGRAPH (June 6, 2019) (opinion) (explaining that “[a]s these [enforcement] investigations get under way, be extraordinarily wary about claims that ‘this time is different’ and necessitates a new antitrust approach. This politically convenient talking point will come from both well-meaning economic sources and vested interests, and the sheer size of these firms will mean it is taken seriously”; and that “[t]he ‘network effects’ said to protect

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- According to the former Chair of the Antitrust Modernization Commission, Deborah Garza:
- “While antitrust analysis of technology-based markets may involve consideration of issues like network effects, high switching costs and entry barriers, these issues are not unique to digital markets. They are well understood and have also made their way into the body of antitrust case law over the past two decades, providing legal roadmaps for future enforcement cases.”<sup>176</sup>
- This means that existing antitrust law is arguably adequate for addressing features of digital markets—as appropriate and through enforcement actions.
- Second, modern antitrust, and factors the consumer-welfare standard accounts for, work in assessing digital markets.
  - The phrase “consumer welfare standard” reflects “the methodology underlying modern antitrust,” which “focus[es] on the well-being of consumers and appl[ies] rigorous economic analysis.”<sup>177</sup>
  - In addition to examining price, “the consumer welfare standard considers . . . quantity, variety, quality, and innovation.”<sup>178</sup>
- Due to how the consumer welfare standard focuses on preserving those benefits of competition, in part through rigorous economic analysis, it means that antitrust is not a function of political whims.
- Instead, economic analysis disciplines antitrust law and protects it from being applied arbitrarily—including in the context of digital markets.

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Facebook or Google from competition were, at different times, thought to be creating monopolies out of MySpace, Microsoft’s Internet Explorer and AOL’s Instant Messenger. \*\*\* As late as 2006, experts claimed that web managers [optimizing] their sites for Internet Explorer due to its wide usage created a feedback loop that would be an insurmountable barrier to competitors. In the case of AOL’s Instant Messenger, 40 businesses even wrote to the US Federal Communications Commission asking for AOL’s network to be opened to other firms’ services. Since then, MySpace has been eaten alive by Facebook, Internet Explorer by Google Chrome, and instant messaging is now available on scores of new apps and services. \*\*\* History, in other words, is replete with examples of dominant firms falling by the wayside despite having the exact same economic advantages that worry us today.”), <https://www.telegraph.co.uk/business/2019/06/06/big-not-always-bad-shouldnt-rush-break-tech-giants/>.

<sup>176</sup> Deborah A. Garza, Submission, 15 (Apr. 17, 2020) (internal quotation marks and citation omitted) (on file with the Committee).

<sup>177</sup> Timothy J. Muris, submission, 4-5 (Apr. 17, 2020) (internal quotation marks omitted) (on file with the Committee).

<sup>178</sup> Elyse Dorsey et. al., Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement, 47 PEPP. L. REV. 861, 883 (2020); see also Deborah A. Garza, Comment, 7 (Apr. 17, 2020) (on file with the Committee) (explaining “consumer welfare was recognized as the unifying goal of antitrust law, with few disputing that the core mission of antitrust law is to protect consumers’ right to the low prices, innovation, and diverse production that competition promises”) (citation and internal quotation marks omitted)).

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- Importantly, in addition to reflecting economic analysis, modern antitrust evolves through court decisions over time.<sup>179</sup>
- This common-law approach has significant benefits.
- Among other things, it is fact-specific and accounts for the features of relevant markets and industries.
- Accordingly—and rather than taking a broad and potentially-erroneous approach to digital markets through new legislation that may stifle innovation—modern antitrust law through enforcement is arguably a sufficient mode of addressing possible competition problems over time.
- It is also important to note that Americans have tried non-economics-based approaches to antitrust before, with disastrous results.<sup>180</sup>
- If changes are made, it may make sense to avoid “Europeanizing” the U.S. approach to competition law.
  - America is remarkable on the world stage, including for technological innovation.<sup>181</sup>
  - The U.S. is an incredible nursery for innovation and technological progress.
    - This is arguably because America’s default is freedom—which both unleashes individual and business ingenuity, and helps ensure entrepreneurs have the resources needed to bring their ideas to fruition.
    - Such an approach creates jobs for countless workers and employees.
  - By contrast, Europe’s markets are relatively underwhelming.<sup>182</sup>
  - Proposals for government intervention that may weaken our economy and benefit global competitors deserve careful scrutiny.
- Congress should arguably act with special deliberation as the economy seeks to recover from the effects of COVID.

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<sup>179</sup> Thomas A. Lambert, Submission, 5 (Apr. 17, 2020) (on file with the Committee).

<sup>180</sup> See generally Joshua D. Wright et al., *Requiem for A Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 293-94 (2019).

<sup>181</sup> See, e.g., Michael Moritz, *Europe should forget Google and investigate its own shortcomings*, THE FINANCIAL TIMES (Apr. 22, 2016) (opinion) (“Over the past five years the eight most valuable technology companies developed in Europe have assembled a combined market value of around \$32bn. That’s not a figure to be sneezed at any more than the admirable young European technology entrepreneurs who, despite all odds, are more inclined to take a risk than members of their parents’ generation. But EU legislators should be wondering why Europe’s eight most valuable companies are only worth about 10 per cent of Facebook or 6 per cent of Google.”), <https://www.ft.com/content/6425979e-07b0-11e6-9b51-0fb5e65703ce>; see also Mark Jamison, *What if House Judiciary Committee members were testifying before Big Tech?*, AEIDEAS (July 15, 2020), <https://www.aei.org/technology-and-innovation/what-if-house-judiciary-committee-members-were-testifying-before-big-tech/>.

<sup>182</sup> *Id.*; see also Editorial Board, *A Loss for Europe’s Antitrust Abusers*, WALL S. J. (July 15, 2020) (opinion) (describing “the first and the largest attempt to stifle tax competition through misapplying antitrust law,” and how “[h]igh-tax European governments would love nothing better than to milk profitable American tech giants for all the revenue they can get. Efforts to do it directly by passing new tax laws have failed so far. And on Wednesday a European Union court slapped down an especially frivolous attempt to impose such taxes through the back door.”), <https://www.wsj.com/articles/a-loss-for-europes-antitrust-abusers-1159485534>.

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- Such caution and deliberation may help prevent false steps that hinder the economy or reduce innovation at a time when the U.S. is already struggling.
- Also, aspects of “digital markets” are arguably still in their infancy or early years, relatively speaking.
  - Imposing a more interventionist framework now may strangle one of the most complex and promising areas in the U.S. while these markets are still in their cradle.
- Last, and as mentioned above, even if this hearing or investigation suggest that Google, Amazon, Apple, or Facebook have acted unlawfully, that would not necessarily mean underlying antitrust law needs an overhaul.
  - These four companies are already subject to ongoing investigations by either the FTC or DOJ.
  - Given those investigations, which could lead to charges soon, calls to change antitrust are arguably premature.

### **PROCESS CONCERNS WITH THE DEMOCRATS' HEARING**

Despite Republican requests, this hearing is still at the subcommittee level. Given the importance of this hearing—and the unique opportunity to interact with these large technology companies' CEOs all at once—Ranking Member Jordan twice requested, on behalf of Republican Members who do not serve on the Subcommittee, that Chairman Nadler convene the hearing at the full Committee.<sup>183</sup> There are a number of reasons for making this request, as elaborated to Chairman Nadler:

*The companies under examination employ hundreds of thousands of individuals, generate hundreds of billions of dollars in annual revenue, and have been central to the establishment of the United States as a leader in technological innovation and investment. In doing so, these companies have competed in the free market and delivered considerable benefits that have materially advanced the welfare of consumers across the country and the world. The nature of the Committee's investigation and the companies under examination suggest that this hearing deserves more thorough treatment than simply being confined to examination by a subset of Antitrust Subcommittee Members. This issue simply demands a hearing before the full Committee.*<sup>184</sup>

Having this hearing before the full Committee would have made the most sense given the scope of the Committee's investigation, wide interest from Members of both parties that do not serve on the Subcommittee, and the importance of the CEOs and the companies they represent.<sup>185</sup> For a hearing that holds itself out as historic, it seems odd to convene it at the subcommittee level and to deny Members the opportunity to fully and aggressively participate—especially when these companies interact with or affect so many of Members' constituents. This decision by Chairmen Nadler again calls into question the bipartisan nature of these proceedings.

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<sup>183</sup> Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (July 7, 2020); Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (July 15, 2020).

<sup>184</sup> Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary, 1-2 (July 7, 2020).

<sup>185</sup> See generally Letter from Jim Jordan, Ranking Member, H. Comm. on the Judiciary to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (July 7, 2020).

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**WITNESSES**

Jeff Bezos, CEO, Amazon

Tim Cook, CEO, Apple

Sundar Pichai, CEO, Google

Mark Zuckerberg, CEO, Facebook

Jack Dorsey, CEO, Twitter (Republican invitee)

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**STAFF CONTACT**

Please contact the Republican Committee staff at 202-225-6906 with questions.