



REP. KEN BUCK

THE THIRD WAY

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW



INTRODUCTION

The House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (ACAL) recently completed a year-long investigation into potential anticompetitive conduct occurring in the Big Tech marketplace. On October 2, 2020, after conducting a seventh and final hearing on the topic, majority staff released a comprehensive report detailing the investigation's findings and offering legislative recommendations to address the competitive deficiencies existing in the technology marketplace and strengthen our nation's antitrust enforcement regime.

We wish to thank Chairman Cicilline for his collegiality, cooperation, and commitment to conducting a bipartisan and holistic review of Big Tech's anticompetitive market distortions. Since June 2019, the Chairman has delivered on his promise to conduct a bipartisan, top-to-bottom review of the anticompetitive behavior in the technology marketplace, including examining the monopolistic business practices of tech's titans – Apple, Amazon, Google, and Facebook.

We write this response to join Chairman Cicilline and the majority staff on certain recommendations, offer modifications to some recommendations, and argue against the wisdom of proceeding on a few recommendations. We also want to point out that the committee's ongoing efforts should emphasize issues that have been ignored but must be addressed in the future for a truly bipartisan approach to reforming Big Tech's dominant position in the marketplace. Finally, we want to thank the Chairman for not using this report as an opportunity to push a progressive labor, environmental, or other unrelated policy agenda under the guise of antitrust enforcement. We sincerely appreciate the Chairman's friendship and dedication to making this process open and accessible to all members.

We also offer our appreciation to the 30 witnesses who offered their testimony to ensure the subcommittee's hearings were substantive and the 240 market participants and technology employees who offered themselves for interviews with committee staff. These witnesses and experts, including law professors, antitrust practitioners, small business owners, and the CEOs of Apple, Amazon, Google, and Facebook helped shine a light on decades of anticompetitive market practices and identify areas where Congress can work together to ensure the technology market is operating in a free and fair manner. Similarly, we offer our thanks to the more than 40 antitrust experts who have offered their time and

INTRODUCTION

talent to help subcommittee members understand the intersection of technology, market principles, and antitrust laws.

Finally, we offer our thanks to the members of the subcommittee and committee staff who worked diligently to review approximately 1.3 million documents and communications, offered invaluable expertise, and ultimately uncovered and documented significant competitive failures occurring in the technology marketplace.

Discussion of the Majority's Findings

The majority staff report offers a comprehensive review of the technology marketplace and accurately depicts the harmful effects of Big Tech's anticompetitive reign over the digital economy. Many of the factual findings detailed in the report are undeniable. The majority staff accurately portrays how Apple, Amazon, Google, and Facebook have used their monopoly power to act as gatekeepers to the marketplace, undermine potential competition, and pick winners and losers, all while simultaneously cozying up to unfriendly nations like China in order to further expand their global footprint.

The report also offers a chilling look into how Apple, Amazon, Google, and Facebook have used their power to control how we see and understand the world. These market-dominant companies have all engaged in myriad forms of anticompetitive behavior, including using "killer acquisitions" to remove up-and-coming competitors from the marketplace. The report also documents Big Tech's self-preferencing tactics that allow these companies to obtain and sell years worth of consumer data, boost their own private label products, and weaponize venture capital investment meetings to bury startups.

The majority staff report details how Big Tech's titans, with a combined market cap nearing \$5 trillion, have tipped the technology marketplace toward monopolization. These tech titans have used their dominant positions to hike fees, misappropriate third-party data, steal Intellectual Property, and erect barriers to entry with the intent of keeping themselves in a position of power for decades to come.

The report also deftly describes how these companies conduct "land grabs" or "killer acquisitions" to further snuff out potential competitors. These types of anticompetitive transactions have allowed Facebook to tip the marketplace toward monopolization, such that internal competitors like Instagram and WhatsApp provide more competition to Facebook's platform than from any outside companies. Google has also acquired more than 260 competing companies, creating a massively sprawling ecosystem that includes nine services or applications with more than one billion users.

Notably, the report highlights how Amazon uses its market-dominant position to crush

INTRODUCTION

third-party competition. Majority staff documented that of the 2.3 million third-party sellers operating on the Amazon marketplace, approximately 850,000, or 37 percent, rely on Amazon's platform for their sole source of income. However, while Amazon outwardly describes third-party sellers as partners, internal documents refer to these companies as "internal competitors." Amazon then uses the sales and demographic data shared by its internal competitors to determine where the company should insert a new white label product into the marketplace.

It is fundamentally anticompetitive to simultaneously serve as the only substantial marketplace operator, including setting terms, policies, and fees; host third-party sellers; and use marketplace data to launch and sell competitive products. In some remarkable cases, such as Amazon's relationship with VocaLife, Amazon engaged VocaLife and other promising startups in venture capital meetings. The third-party companies, eager to have Amazon's backing, handed over internal data and schematics to Amazon before Amazon terminated communications with the company. Ultimately, the startups lost big as Amazon used the information acquired through these meetings to launch Amazon Basics products.

Similarly, Google uses its massive online footprint to shield itself from competition. The majority report details how Google currently enjoys an estimated 94 percent share of the search market. The company uses this dominance to expand into other marketplaces and also utilizes killer acquisitions to bring up-and-coming competitors into its vast orbit of subsidiaries. While many of the 260 acquisitions Google has made over the past decades were legitimate, it is notable that Google's purchase of YouTube and Waze has given the company a dominant seat controlling both the video sharing marketplace and consumer GPS mapping application market. These transactions are not unique, as Google maintains nine applications or services with at least one billion users.

Furthermore, the report described how Apple transformed itself from a revolutionary hardware company that specialized in producing iPods, iPhones, iPads, and Macintosh computers into a company focused on developing software to compete with third-party application developers on the App Store. Apple claims to offer the same set of terms and services to all potential app developers, but the subcommittee's investigation found that Apple has engaged in harmful practices that preclude competition, including requiring certain competitors to pay a 30 percent surcharge for "web development services," while self-preferencing internal products on the App Store and offering internal products as pre-downloaded apps that cannot be deleted.

As an example, all new Apple products come pre-loaded with the Apple Music app. Apple Music only requires a \$9.99 per month subscription before a user can enjoy unlimited streaming music. However, Apple charges major competitors, including Spotify, a 30 percent fee for similar treatment on the App Store. Users are forced to pay \$12.99 per

INTRODUCTION

month for a Spotify membership if they sign up for an account using an Apple device. Similarly, Apple offers the “Find My” application as a free, pre-downloaded app on all new Apple devices, while disadvantaging competitors like Tile, Inc.’s device-locating widget and app. Apple also reportedly working to build a competing physical hardware token, which will further dominate this emerging marketplace.

Finally, the report details how antitrust enforcement agencies and regulators have hobbled their own abilities to conduct effective oversight of the marketplace by adhering to a narrow web of jurisprudence instead of following the letter of the law, as Congress intended. The Clayton, Sherman, and Federal Trade Commission Acts were all written with broad interpretations to ensure antitrust regulators would not be hamstrung by future market developments. However, antitrust enforcers have boxed themselves in by relying on judicial interpretations instead of statutory language and Congressional intent. The report accurately describes how these changes have hamstrung true oversight efforts, granting Big Tech a de facto immunity from antitrust scrutiny.

Discussion of the Majority’s Recommendations

The subcommittee majority is right to take a hard look at how our nation’s antitrust enforcement agencies are currently enforcing the law. The report also importantly details how Congress must ensure the American people that our regulating agencies have the tools and resources necessary to effectively promote competition in the marketplace. The majority report also contemplates a menu of potential changes to current law that will empower antitrust enforcers.

We agree that antitrust enforcement agencies need additional resources and tools to provide proper oversight. However, these potential changes need not be dramatic to be effective. By reinforcing presumptions that certain behaviors are likely to reduce competition, lowering evidentiary burdens in litigated cases, and emphasizing that anticompetitive effects are not limited to price effects and include innovation competition, quality, output, and consumer choice, Congress can make a meaningful difference.

We also agree with a number of the majority’s other legislative recommendations, including proposals to shift the burden of proof for companies pursuing mergers and acquisitions and empowering consumers to take control of their user data through data portability and interoperability standards. Additionally, the report offers recommendations where we believe there is common ground, but the subcommittee should receive expert feedback before pushing forward. Some of these proposals include the majority’s monopoly reforms related to predatory pricing, monopoly leveraging, the Essential Facilities Doctrine, and policies related to the Supreme Court’s recent decision related to two-sided markets in *Ohio v. American Express Co.*

INTRODUCTION

However, the majority also offers policy prescriptions that are non-starters for conservatives. These proposals include eliminating arbitration clauses and further opening companies up to class action lawsuits. Similarly, the majority's desire to institute Glass-Steagall for America's tech sector and modeling the majority's equal terms for equal services recommendation on President Obama's net neutrality rule will not garner support from Republicans.

While we agree in principle with the findings identified in the report, we cannot endorse all of the legislative recommendations offered by the majority. We will work with the Chairman in a bipartisan fashion to help enact the legislative solutions where we can agree. However, we are concerned that sweeping changes could lead to overregulation and carry unintended consequences for the entire economy. We prefer a targeted approach, the scalpel of antitrust, rather than the chainsaw of regulation.

Additionally, the majority report fails to address a number of concerns shared by progressives and conservatives alike. Most notably, the report does not address how Big Tech has used its monopolistic position in the marketplace to censor speech. This censorship is experienced by groups and ideologies on all wings of the political spectrum but is most notably realized through tech platforms exerting overt bias against conservative outlets and personalities.

Notably, Google used its dominant advertising technology product to demonetize conservative media outlets, including The Federalist. YouTube, a Google subsidiary, blocked videos from Republican politicians and media groups. Amazon censored conservative organizations, including the Family Research Council and the Alliance Defending Freedom by blocking Americans' ability to donate to these groups through the AmazonSmile tool. Facebook's algorithms, advertising policies, and content moderation rules have all combined to discriminate against conservative viewpoints, shadow ban conservative organizations and individuals, and suppress political speech. The majority also left Twitter and its suppression of speech out of the investigation completely.

These concerning behaviors are the fruit of Big Tech's poisonous and monopolistic tree. These issues would not exist if the digital economy was functioning in a truly competitive marketplace. Unfortunately, the majority missed an opportunity to fully scrutinize Big Tech's use of monopoly power to silence Americans' First Amendment right to free speech. It is difficult to consider the subcommittee's investigation into platform behaviors and anticompetitive behavior complete without a robust discussion about platforms using their monopoly power to engage in editorial decisions that silence free speech.

While we sincerely appreciate Chairman Cicilline's bipartisan efforts to investigate Big Tech's anticompetitive behavior, we can only endorse portions of the majority staff report.

INTRODUCTION

As conservatives, we agree that we can and must address the challenges posed by Big Tech's monopolistic control of the digital economy. The Chairman has proposed a number of legislative recommendations that will help address these problematic market dynamics. However, any legislative proposals stemming from the subcommittee's efforts should reasonably balance interests and not result in heavy-handed regulation that will only further harm competition and hamper our antitrust enforcement agencies. We believe there is a bipartisan path forward.

In the following pages, we offer our support for many of the legislative recommendations included in the majority staff report and offer our suggestions to find bipartisan agreement on many other suggestions. This report also offers a third way forward that will ensure our antitrust regulators have the tools and resources they require to conduct proper oversight and bring effective antitrust enforcement cases. We firmly believe that we have an opportunity to offer bipartisan solutions that will promote competition and build a better technology marketplace for the future if we follow this new path forward.



Ken Buck
Member of Congress



Doug Collins
Member of Congress



Matt Gaetz
Member of Congress



Andy Biggs
Member of Congress

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

The following section of this report contains an analysis of the legislative recommendations offered in the majority report and offers a path toward bipartisan legislative solutions. As stated, we agree with several recommendations and explain our disagreement with others below.

Common Ground: Areas of Agreement With the Majority

More Resources for Antitrust Agencies

The report makes a good case for the need to strengthen our nation's antitrust agencies with regard to resources. We agree wholeheartedly with this recommendation. We need to give our nation's antitrust enforcers the resources needed to succeed in litigation against Big Tech. To illustrate, the FTC has an annual budget of approximately \$330 million spread across the entire economy and two missions, namely antitrust and consumer protection. Additionally, the DOJ's Antitrust Division maintains a \$180 million budget for a similar mission.

In contrast to the U.S. government's \$510 million investment in antitrust law enforcement, the Big Tech sector accounts for approximately 10 percent of our GDP, or \$2 trillion. These companies also have unfailingly deep pockets to fight litigation and regulatory compliance. The words David and Goliath come to mind. Fortunately, there is broad agreement among subcommittee members that this resource imbalance needs to be addressed. However, the subcommittee must be vigilant to ensure that this solution is not joined at the hip by a new regulatory agency or other harmful rulemaking that will only serve to further benefit Big Tech.

Data Portability and Interoperability

The majority report recommends establishing rules of the road to ensure personal user data is portable and interoperable between platforms. Several witnesses testified before the subcommittee that data portability and interoperability will benefit consumers by allowing individuals to move freely between tech platforms while simultaneously reducing Big Tech's market dominance. For example, while Facebook utilizes a number of tactics to maintain its market dominance, the company's aggregated user data is by far its most valuable commodity. Users truly are the commodity as Facebook sells this information to

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

third-party advertisers. The more data present, the more specifically Facebook's partner can target the advertisements.

In a perfect world, consumer-oriented data portability and interoperability policies will further facilitate competition in the marketplace as similar changes served to further competition in the cellular telephone marketplace. As with the individual's ability to switch their cell phone number between carriers, these data portability policies present an opportunity for the American people to take control of their data decision-making. However, questions remain regarding how to operationalize data portability while avoiding unintended consequences.

Conservatives should consider supporting very limited legislative changes to provide consumers with a data portability standard that is similar to transferring cell phone numbers, as mentioned above. However, the language must be exact to prevent regulators from stretching Congressional intent to regulate Internet data companies as public utilities under Title II of the Communications Act of 1934, similar to net neutrality. The current proposal lacks this clarity and should be further refined to prevent the potentially disastrous unintended consequences of unleashing a massive regulatory regime on Internet-based companies.

Reforming the Burden of Proof in Merger Cases

Congress intended to grant our nation's antitrust enforcement agencies flexible enforcement standards through the Clayton and Sherman Acts. Over time, the enforcement agencies have hampered their ability to respond to threats to competition in mergers by following a web of jurisprudence instead of following congressional intent. The evidentiary burden of proof that antitrust agencies must meet in many merger cases has become insurmountable. As a result, our nation's antitrust enforcement agencies have built a wall, making it nearly impossible to bring an enforcement case on potential competition grounds in digital markets, granting near-total immunity for Big Tech.

First, emboldened by narrow antitrust standards, Big Tech platforms have engaged in a mergers and acquisitions buying spree in recent decades that antitrust regulators and Congress have yet to fully examine. Estimates vary but the number of deals involving digital platforms over the past two decades stands at approximately 750. This M&A activity appears to have strengthened the platforms' market power and yet the vast majority of the deals were cleared by our antitrust agencies without scrutiny. Of course, many of these deals were either pro-competitive or competitively benign, but the important point here is that we have no real way of knowing what their competitive effect was because they were not reviewed by the antitrust cops. This enforcement gap strengthens the perception that tech platforms benefit from antitrust immunity. The FTC is currently studying Big Tech's platform mergers over the past decade and we look forward to reviewing its findings.

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

Second, the antitrust enforcement standards that have emerged in recent decades appear to have put important dimensions of competition in digital markets beyond the antitrust enforcement agency's reach. The shorthand for these antitrust standards is consumer welfare, meaning that antitrust should generally only concern itself with price increases and output reductions. The challenge in Big Tech markets is that competition is mostly driven not by price or output but rather by potential innovation and forward-looking competition reviews. In many cases, this comes not from the Big Tech platforms but from startups, many of whom have been driven out of business or acquired by Big Tech. With its laser-like focus on price and output, modern antitrust appears to have missed the marketplace realities in Big Tech markets.

Third, many startups are not only innovative, but their innovations provide important potential competition against Big Tech in these winner takes all' markets. This potential competition should be a powerful constraint on Big Tech. The potential for startups to challenge market leaders reinvigorates the competitive process within the Big Tech platform's core market.

It is clear that under current potential competition doctrine, plaintiffs must meet an insurmountably high standard of proof for demonstrating that the startup would likely enter the market. Even when entry is likely, courts require that the target be uniquely situated to enter and not be one of many potential entrants. Courts also require proof that the startup's entry will significantly reduce the dominant firm's market power. The judiciary's onerous evidentiary requirements on innovation and potential competition reviews have made it nearly impossible to bring a case under Section 7 of the Clayton Act in digital markets.

The report touches on these issues and suggests ways through which antitrust presumptions and burdens of proof in merger cases can be recalibrated so that antitrust enforcers can once again be the proverbial cop on the beat in digital markets. Congress should reaffirm to the antitrust enforcement agencies that the standard given to the agencies by Congress under the Clayton Act Section 7 allows them to challenge a merger when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The standard does not specify price change as our enforcers' only way to review cases where harms to innovation and potential competition exist, and neither does it raise the evidentiary bar on potential completion versus actual competition. In other words, the antitrust agencies raised the bar on themselves, with help from the courts, in the years since Congress adopted the Clayton Act.

It is appropriate for Congress to remind the agencies and the courts of the original Congressional intent behind the antitrust laws, including that our enforcement agencies should be able to bring cases, like a review of Facebook's acquisition of Instagram, based on potential competition doctrine without facing impossible evidentiary burdens.

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

Clarifying that Market Definition is Not Required if There is Direct Proof of Market Power

The majority's recommendation that market definition is not required if there is direct proof of market power and anticompetitive effects reflects current agency enforcement guidance. For example, the 2010 Horizontal Merger Guidelines demoted market definition from an indispensable starting point to merely one available tool in merger cases.

Common Ground: Need for Clarification and Expert Feedback on Majority Proposals

The section below discusses proposals in the report that we believe require further study by Congress and feedback from experts, including our antitrust agencies. The proposals relate to reforming both Section 2 Sherman Act and Section 7 Clayton Act with regard to Big Tech. While we agree with the premise of the majority's findings that there is problematic conduct warranting Congressional scrutiny in Big Tech markets, we have not heard enough expert evidence indicating that the solutions to the problematic conduct in the report are the optimal solutions and would not invite unintended consequences. Some recommendations, for example a ban on vertical mergers, stand in opposition to recent guidance issued by the antitrust agencies that has yet to take effect in the marketplace. Congress should therefore forebear from creating hard mandates while these policy changes have yet to work their way through the M&A marketplace.

Monopolization Reform: Monopoly Leveraging and Predatory Pricing

The report points to several examples of dominant platforms exercising their market power by acting as gatekeepers and suggests reforms to existing antitrust case law aimed at tackling this issue. Specifically, the report points to monopoly leveraging and predatory pricing doctrine as examples of antitrust law's inability to reach Big Tech platforms.

Monopoly leveraging occurs when a firm with monopoly power in one market uses its established power in that market to monopolize or threaten to monopolize a second marketplace. The majority correctly identifies that Apple, Amazon, Google, and Facebook have used their market-dominant positions to expand into new business lines, sometimes using their successes in other markets to offer non-competitively low-priced options in a new market. Amazon notably engaged in these practices in the PopSockets case. Additionally, Google has leveraged its position as a dominant search engine to sell user data and become an AdTech behemoth, controlling all facets of the digital sales market. There is no question that Big Tech's four titans have engaged in these types of practices.

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

Furthermore, the report discusses predatory pricing, also known as below-cost selling, and the requirement that a plaintiff demonstrates that a monopolist be able to recoup lost profits from below cost selling. Apple's self-preferencing tactics on the App Store come to mind. Apple uses its control of the App Store to institute a 30 percent surcharge on certain competitors, allowing Apple to offer its home-grown suite of apps for a lower price than competing apps. Similarly, Amazon collects and uses third-party seller data to find new markets to offer white label products and offer those products at a significantly lower price than the original seller.

We concur with the Chairman's assessment that there is clear evidence that Big Tech is using these anticompetitive behaviors to further their market-dominant positions and enter new markets. However, instead of issuing new bright line rules and creating a large regulatory framework to govern these behaviors, we believe the solution is to offer a thoughtful plan that ensures our nation's antitrust enforcers are following Congress' original intent regarding the burden of proof needed to bring and win cases involving these theories of harm. For example, we are particularly interested in the reasoning behind our current antitrust law regarding predatory pricing. The Supreme Court in a series of cases developed predatory pricing doctrine to a point where the evidentiary burden of proof on plaintiffs, including government agencies, has become virtually insurmountable. The impact of these cases in digital markets should be the subject of further committee hearings before the committee drafts legislation.

Monopolization Reform: Revitalizing the Essential Facilities Doctrine

The majority also raises monopolization reform through the revitalization of the "Essential Facilities Doctrine," which states that if a monopoly power is found to own a facility that is essential to other competitors succeeding in the marketplace, the monopoly must provide reasonable use of that facility. While there are five potential elements of the Essential Facilities test, control of the essential facility by the monopolist or the competitors' inability to practically or reasonably duplicate the essential facility is all that is necessary for a court to require monopolies provide access to competitors.

The majority rightfully identifies that Big Tech firms maintain vitally important platforms for digital commerce. Apple and Google maintain market-dominant application and e-commerce stores, while 2.3 million third-party sellers rely on Amazon's e-commerce marketplace to sell their goods, and Facebook operates a social networking platform that cannot be duplicated. While all four Big Tech titans control these important methods of delivery, Congress should focus on providing antitrust enforcement agencies with the necessary resources to conduct continual oversight of the existing market participation rules that hold these companies accountable. Additionally, this subcommittee should evaluate additional proposals to further assist startups in accessing capital and other resources to become the next major competitor to Big Tech's giant firms. Conservatives

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

should be wary of handing additional regulatory authority to agencies in an attempt to micromanage platforms' access rules.

Monopolization Reform: Product Improvement

The majority report also contemplates whether a platform monopolist may make design changes to its platform. The report offers a view that platform monopolists engaged in exclusionary conduct should no longer be able to defend making design changes by arguing that the conduct improved the user's experience of an existing product or service.

We share the Chairman's concerns that certain changes to web designs or terms of service may exclude competitors from the marketplace. However, it is a slippery slope to cut a platform's ability to make design changes completely, especially if these changes are made to benefit the consumer's experience. Harming consumers through a well-intentioned rewrite of the law is the last thing Congress should do with this opportunity for bipartisan agreement. Instead, this subcommittee should continue focusing its time and resources on ensuring our antitrust enforcement agencies have the resources and tools necessary to bring enforcement actions in cases where the platform is clearly acting in an anticompetitive manner or these design changes have no apparent consumer benefit.

Monopolization Reform: Overriding *Ohio v. American Express Co.*

The report considers the Supreme Court's 2018 decision in the *Ohio v. American Express Co.* case that established a new antitrust standard regarding two-sided platform markets. In this case, the State of Ohio sued American Express Co. on the theory that American Express' anti-steering provision stifled price competition on the merchant side of the credit card platform. American Express countered that the pro-consumer benefits of its credit cards and associated benefits outweighed any merchant complaints of anticompetitive conduct.

The Supreme Court sided with American Express, deciding that a plaintiff must show that economic harm occurred on both sides of the two-sided market in order to prevail. While there may be concerning trends occurring in the credit card market, there is no question that the marketplace offers a multitude of competing options. Should a consumer or merchant decide to stop using or accepting American Express' products, both sides of the marketplace have a plethora of competing options to choose from when selecting a new credit card or when deciding which vendors to partner within a business.

It is true that there are many forms of anticompetitive behavior occurring in the technology marketplace today. However, Congress must ensure that any action taken to increase competition must also ensure that consumer welfare is not further harmed. We are not certain that a legislative solution that merely overrides *Ohio v. American Express Co.* is the answer.

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

This subcommittee should spend time conducting hearings and talking to experts about how to delicately balance competition in the marketplace while ensuring consumer welfare is not further harmed. Additionally, this case offers yet another example of how our antitrust enforcement agencies desperately need additional resources and tools to enforce our nation's existing antitrust laws.

Merger Reform: 40% Dominance by Seller and 25% Dominance by Buyer Rebuttable Presumption

The majority staff similarly offers a recommendation to set rebuttable presumptions to deny mergers at a 40 percent market stake for the seller and that a buyer may not control more than 25 percent of the market. Setting a bright line rule for mergers and acquisitions similar to the Philadelphia National Bank ruling may appear to serve as a straightforward and simple path to protecting the marketplace. However, we are concerned that these presumptions present a rigid line that is far too low and will only serve to dissuade companies from taking growth-oriented mindsets. We are also concerned that these rules will reach far beyond the technology marketplaces and will cut off access to venture capital.

Congress must always consider the unintended consequences of its actions before passing new laws. Establishing these new presumptions without further investigation and analysis presents a concerning future where big box stores, like Walmart and Target, or telecommunications companies, like AT&T or Verizon, are precluded from engaging in pro-competitive acquisitions despite the clear evidence that competition is alive and well in these marketplaces. While we agree that the subcommittee should evaluate ways to reform the burden of proof for mergers and acquisitions, we should not rush into rebuttable presumptions based on low market shares without further investigation and study. The subcommittee should also call in experts from all corners of the economy to ensure that the bright line rules will not unintentionally harm competition in other competitive marketplaces. We should also include enforcement officers from the antitrust agencies as experts to explain how they currently analyze mergers under their existing enforcement guidelines. These guidelines have evolved over time and in some respects have voluntarily raised the bar on agency enforcement standards to the point where agencies are reluctant to challenge all but the most egregious mergers to monopoly or duopoly in Big Tech markets.

Merger Reform: Presumptive Ban on Future Acquisitions and Prohibiting Acquisitions of Potential Rivals and Startups

The majority offers a legislative recommendation to create a presumptive ban on future acquisitions of potential rivals and start-ups. The majority offers the suggestion following documented cases of Big Tech abusing their market-dominant positions to make killer acquisitions that further entrench the company's monopolistic standing in the marketplace. Facebook's purchases of Instagram and WhatsApp, and Google's purchase of

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

Waze, come to mind as examples of Big Tech gobbling up potential competitors to further their position in the marketplace.

However, Congress must be cautious not to establish a new bright line presumption that Big Tech should be banned from making any and all future acquisitions. First, many startups rely on developing an impactful app or product and then selling that product. Congress should not be so eager to shut down a tried and true business path for the application marketplace. Second, while the majority correctly observes the competitive imbalance in the marketplace, we do not believe the answer is to create a regime where investors have fewer incentives to back an up-and-coming product and venture capital funding subsequently dries up. This move will only further Big Tech's grasp on the marketplace.

Instead, Congress should look to reinvigorate the antitrust enforcement agencies' ability to conduct proper oversight and bring enforcement cases based on potential competition doctrine. This may require legislation restoring the potential competition doctrine to its original Congressional intent while freeing it from its current overly restrictive standards.

Freeing our antitrust regulators to follow the original congressional intent of the Sherman and Clayton Acts provides prosecutors with plenty of latitude to bring a case against a potential merger or acquisition that presents undue harm to the marketplace while allowing competitive mergers to proceed.

Merger Reform: Presumption that Vertical Mergers are Anticompetitive

The majority report also includes a recommended presumption that any vertical merger by a dominant platform is unlawful. We are concerned that the presumption against vertical mergers, in particular, will chill venture capital investment in a way that will further harm innovative startups and reduce their ability to get their product to market.

Notably, the DOJ Antitrust Division and FTC recently released new draft guidelines governing vertical merger reviews. Assistant Attorney General Delrahim who oversees the DOJ's Antitrust Division recently stated, "While many vertical mergers are competitively beneficial or neutral, both the DOJ and FTC have recognized for over 25 years that some vertical transactions can raise serious concerns. The revised guidelines are based on new economic understandings..." We agree with the Assistant Attorney General's comments and believe Congress should evaluate the effectiveness of these new rules before taking such a drastic step as to presume all vertical mergers are presumptively anticompetitive. The new agency guidance on vertical mergers may change enforcement activity against vertical mergers and shift the current thinking that vertical mergers are presumptively pro-competitive in all but the rarest instances.

Non-Starters: Majority Proposals that Minority Members Do Not Support In Current Form

This final set of proposals include recommendations made in the majority report that do not enjoy bipartisan support. The subcommittee should spend its time considering the less intrusive proposals that have been offered by the majority. These proposals include measures relating to private antitrust enforcement and other measures that are regulatory in nature. In our assessment, these proposals invite unforeseen consequences and divert attention away from public interest antitrust enforcement by our antitrust agencies, the revitalization of which we fully support.

Glass-Steagall for the Internet – Structural and Line of Business Separations

The majority's primary remedy to create competition in the tech marketplace is to enact legislation creating structural separation and delineating a clear "single line of business" rule for any large data company. Before wading into new rulemaking, Congress should first evaluate whether antitrust enforcement agencies currently have the tools necessary to enforce structural and line of business separations in existing law.

In fact, Congress has weighed in on structural and line of business separations a number of times in the past. Notably, as the majority report highlights, Congress passed the Hepburn Act in 1906. Prior to the Hepburn Act's enactment, railroad companies that hauled millions of tons of coal every year began purchasing coal mines and coal loading facilities in an attempt to control the full production line from start to finish. However, the railroad's anticompetitive behavior disadvantaged independent coal mining companies to the point of failure. Congress stepped in to delineate railroads as shipping companies and removed them from the mining business. Similar proposals could be considered to ensure up-and-coming companies are not bulldozed by aggressive Big Tech companies in the way Amazon took PopSockets' design and used its "internal competitor's" seller data to create its own similar product line.

However, the majority also cited the Glass-Steagall Act of 1933 as legislative underpinning for this recommendation. Glass-Steagall's efforts to separate retail from investment banking to protect individuals who put their money in retail banks only to lose everything when investment banks lost their money is wholly unrelated to the Big Tech marketplace. Furthermore, this proposal is a thinly veiled call to break up Big Tech firms. We do not agree with the majority's approach to pass a Big Tech Glass-Steagall Act. Instead, this subcommittee should evaluate tailored and targeted proposals to ensure Big Tech firms are not using their market-dominant positions to crush competition in other lines of business.

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

Eliminating Arbitration Clauses and Limits on Class Action Lawsuits

The majority staff report offers a multitude of serious legislative recommendations. However, the majority's proposal to eliminate arbitration clauses and remove all limits on class action lawsuits is not a productive starting point for bipartisan policy conversations. The majority offers this favor to the trial lawyers bar under the guise of ensuring all aggrieved small businesses and startups have their day in court against the Big Tech's titans. While this idea may play well on the silver screen, it is rife with unintended consequences in the real world.

Arbitration clauses provide a number of vital protections to small businesses and startups. While there is room for Congress to reevaluate some portions of arbitration clause policy, the ultimate goal of this legislative recommendation is to increase the number, frequency, and payout of class action lawsuits. While it may sound like a great idea to get Big Tech into the courtroom, this policy suggestion ignores the fact that members of a class receive markedly lower payouts that take much longer to achieve when compared to an arbitration process. A better idea is to ensure the Federal Trade Commission (FTC) and Department of Justice (DOJ) the resources and funding they need to effectively enforce the law against Big Tech's anticompetitive actions.

Nondiscrimination Rules – Equal Terms for Equal Service

Nondiscrimination rules for the Internet are intended to prevent platforms from self-preferencing in a way that gives a company's own product an anticompetitive advantage over a competing application, product, or service. However, the majority's plan to realize this laudable goal is to offer a government-imposed regulatory regime similar to net neutrality that will write the rules of the road governing what equality really means. Creating a net neutrality-like regulatory regime where the government determines who receives equal terms and defines what services are equal will only serve to crush innovation and stymie the creative market.

The technology marketplace is successful primarily because firms are nimble and light enough to rapidly respond to consumer demands. In fact, as Facebook CEO Mark Zuckerberg previously stated, Facebook was able to grow so rapidly because the marketplace allowed the company to "move fast and break things." Unfortunately, calling for the government to write the rules governing equal terms for equal service will only increase harmful regulations on small and medium-sized tech firms while reducing capital and innovation in the marketplace.

Private Antitrust Enforcement

The report recommends several changes to pleading standards and what it calls 'barriers' to private antitrust enforcement. It also recommends that antitrust arbitration clauses not be included in contracts. We do not support these recommendations and would rather see

CONSIDERATION OF THE MAJORITY'S LEGISLATIVE RECOMMENDATIONS

the subcommittee focus on legislation that removes barriers to agency antitrust enforcement rather than private enforcement. The antitrust agencies have materially different incentives when bringing antitrust enforcement cases. Their client is the United States of America and American consumers. Private antitrust litigation and its associated treble damages are driven by different incentives and should not be prioritized over public interest agency enforcement.

CONCLUSION

Capitalism is the greatest instrument for freedom the world has ever seen. This economic system has allowed businesses to flourish, pulled countless individuals out of poverty, and allowed millions, if not billions, of individuals across the globe to engage in the digital economy. In fact, Big Tech's founders were able to utilize America's capitalist system to build ideas born in dorm rooms, garages, and warehouses into four of the biggest power players in the global economy.

However, the evidence is mounting that these four tech giants have acted anticompetitively to further their market dominance. These companies have also used their monopolistic powers to silence conservatives and push their worldview on the American people. Congress should not sit by idly as Big Tech further consolidates the marketplace and gains control of additional channels of information and product distribution. Congress must retake its Article I authority to ensure our nation's antitrust enforcement agencies are not hampered by judicial interpretations and an ever-narrowing maze of regulatory actions. We should ensure the regulating bodies have the tools and resources necessary to conduct holistic oversight of our nation's competitive markets. Congress should also ensure our antitrust enforcement agencies are able to freely bring cases based upon quality, output, consumer choice, and potential innovation, not just price change doctrine.

Finally, Congress should consider revising the burdens of proof to ensure our nation's antitrust regulators have the ability to successfully challenge truly anticompetitive mergers and acquisitions in court. This subcommittee must also reject efforts to enact legislative solutions that will further grow the regulatory state, hamper competition, or enact a Glass-Steagall or CFPB-like agency to oversee the Internet.

It's clear that the ball is in Congress' court. Companies like Apple, Amazon, Google, and Facebook have acted anticompetitively. We need to rise to the occasion to offer the American people a solution that promotes free and fair competition and ensures the free market operates in a free and fair manner long into the future.