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"BREAKING THE NEWS: JOURNALISM, COMPETITION, AND THE EFFECTS OF MARKET POWER ON A FREE PRESS"

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I. Introduction

Chair Klobuchar, Ranking Member Lee, Members of the Subcommittee, thank you for the opportunity to appear before you today and testify about antitrust policy in news markets.

My name is Daniel Francis, and I am currently a lecturer and fellow at Harvard Law School. I am a former federal antitrust enforcer: from May 2018 to January 2021 I served in the antitrust arm of the FTC as Senior Counsel, Associate Director for Digital Markets, and finally as Deputy Director. My portfolio focused on digital and platform antitrust, including among other things the Facebook investigation and litigation. Before joining the FTC, I spent a little over a decade in private practice. Since leaving the government, I have not taken on any work for private clients, so I have no brief in testifying today other than my interest in protecting consumers and supporting the antitrust system. My academic work currently focuses on ways to reinforce our antitrust laws, including in digital markets, without sacrificing principle and rigor.[1]

I strongly support close antitrust scrutiny of tech markets, including in areas that relate to news. When digital monopolists, or monopsonists, engage in anticompetitive acquisitions or practices to attain, expand, or entrench monopoly power, agencies and courts should act promptly and effectively. But I recommend against the creation of a national news cartel: even in response to the remarkable success of Google and Facebook in winning advertising business, and even given the genuine struggles that many news publishers face today.

The difficulties facing news publishers today do not appear to be the result of monopsony power, nor of any other problem that could be solved by forming a national news cartel. Rather

[1] *See*, *e.g.*, Daniel Francis, *Making Sense of Monopolization: Antitrust and the Digital Economy*, Antitrust L.J. (forthcoming 2022) (proposing a principled regrounding of monopolization doctrine); Steven C. Salop, Daniel Francis, Lauren Sillman, and Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3959827 (proposing a balanced approach to platform antitrust cases).

than solving publishers' problems, the creation of such a cartel would harm consumers and deter innovation in news. Instead, Congress should reaffirm its commitment to competition, and invest in more antitrust, not less. Among other things, fully funding the antitrust agencies would help to guard against anticompetitive practices and transactions, in news and other digital markets, without adding more monopoly power into the supply chain.

Of course, there are real hardships in the news industry today. The industry in general, and local news in particular, appears to be undergoing a painful transition driven by a shift in advertisers' and consumers' demand away from local print and broadcast media, and toward digital alternatives. That transition has been hard on news publishers, particularly smaller ones. But this alone is no reason to depart from our fundamental commitment to competition by authorizing conduct that would normally be a matter for criminal prosecution. To the contrary: the transition is evidence of competition working as it should, as consumers and advertisers are choosing platforms that they prefer. Moreover, there seems to be considerable evidence that the industry is responding by pivoting to digital business models, albeit slowly and painfully. This process of competition is almost certainly best left to continue, under the watchful eye of federal and state antitrust enforcers, and this Subcommittee, to make sure that it takes place on the merits. A "competitive" market that does not tolerate failure and exit is really nothing of the kind.

I am aware of an argument that Google and Facebook must be monopsonists—that is, buyer-side monopolists—in a market for news distribution because they get more value from linking and previewing news web sites than they pay to news publishers.[2] But that argument seems to me to rest on a fundamental mistake. It presumes there is a market for "news distribution rights,"

[2] *See*, *e.g.*, Hal J. Singer, *Second Round Comments in Response to U.S. Copyright Office's Publishers' Protection Study: Notice and Request for Public Comment*, 86 Fed. Reg. 56721 (Oct. 12, 2021) 15–17.

in which news publishers have the initial IP (or equivalent) right to decide who can link and preview their content, which they can then license to others (like Facebook or Google).

But no such market exists, because the news publishers hold no such right in the first place. The operator of a website—news or otherwise—has no legal right that is invaded when others link to it, or reproduce small "snippet" previews covered by copyright's fair use doctrine.[3] Today, Google and Facebook are not purchasing a right to link-and-preview news publishers' web sites from anyone, because they already have that right under our law. Thus, when Google , Facebook, or anyone else—Bing, DuckDuckGo, Twitter, LinkedIn, a new entrant—links and previews content for free on the internet, they are not exercising monopsony power, just the freedoms that our law grants to us all. These freedoms are foundational to the internet as we know it today: a place in which we do not need permission to link to a website or quote a sentence or two from it. Moreover, in exercising their rights to link and preview, platforms and their users appear to confer a considerable traffic-generation windfall upon news publishers: it does not seem plausible that news publishers receive *less* traffic rather than more overall because Google and Facebook are disseminating links to their articles. Indeed, a 2017 study commissioned by an association of publishers in Spain indicated that linking-and-previewing is good, not bad, for publishers.[4]

So authorizing a national news cartel would not solve either of the publishers' problems. It would not return advertisers or consumers to local news, and it would not create new veto powers over linking and previewing, even if Congress wanted to do either of these things. Instead, it

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[3] *See*, *e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 225 (2d Cir. 2015); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).

[4] NERA Economic Consulting, *Impact on Competition and on Free Market of the Google Tax or AEDE fee: Report for the Spanish Association of Publishers of Periodical Publications (AEEPP)* (2017), https://clabe.org/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf.

would likely harm consumers, chill innovation, and undermine our antitrust system. But antitrust needs reinforcement, not erosion.

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The remainder of my written testimony is in two parts. Part II explains why I recommend that Congress not depart from the fundamental rule against cartels to authorize the proposed national news monopoly. Part III explains why, in my view, there are better ways to move forward, while keeping a close watch on tech monopolies and news competition.

II. <u>Congress Should Not Authorize a National News Cartel</u>

I understand that news publishers have proposed that they be allowed to form a national news cartel: that is, that they be given a statutory power to agree with one another on the prices and terms on which they will supply their news content, free from the criminal liability that would usually attend such conduct.

This proposal should be strongly resisted. As Section A explains, the rule against cartels is the first commandment of antitrust law and policy, and a centerpiece of decades of antitrust enforcement and advocacy at home and abroad. Statutory authorization to cartelize is the antitrust equivalent of a license to kill: it should be granted only under the most compelling circumstances, and then only with extreme care and subject to close supervision.[5]

[5] It is often difficult to ensure effective supervision of an authorized cartel, even when it is expressly commanded by Congress. For example, a GAO report in 1979—prepared at the request of this Subcommittee to monitor the effects of an antitrust exemption for agricultural cooperation under the Capper-Volstead Act—noted that statutory supervision of agricultural cooperation by the Department of Agriculture, intended to protect against "unwarranted price increase[s]," was inadequate in practice. GAO, *Family Farmers Need Cooperatives, But Some Issues Need to Be Resolved*, CED-79-106 (July 26, 1979), ii–iii (noting concerns that "cooperatives have garnered a dominant market position in some commodities and increased prices, thereby fueling inflation" and that "[the Department of] Agriculture has done very little to guard against undue price enhancement and other unfair practices"). Strikingly, 11 years later, when the GAO undertook a second investigation of the same issue, the Office concluded that such supervision remained inadequate. GAO, *Dairy Cooperatives—Role and Effects of the Capper-Volstead Exemption*, GAO/RCED-90-186 (Sept. 1990), 30–32 ("USDA has done little to improve its oversight of cooperatives since our

Those circumstances are not present here. Section B explains that the central complaints articulated by news publishers are not of the kind that would justify an antitrust exemption. Section C explains why considerable consumer harm would likely result from the creation of such an exemption. Section D proposes that this is a time to reinforce antitrust, not a time to undermine it by opening the door to a long line of immunity applicants seeking special treatment.

A. Licenses to Cartelize Are Strongly Disfavored.

For more than 130 years, our antitrust laws have required that businesses in the United States must gain and retain market and monopoly power by competition, not by anticompetitive practices or transactions.[6] That principle has applied with equal force in virtually every part of our economy. Today, the Sherman Act is the "Magna Carta of free enterprise" in the United States, and it stands at the heart of our commitment to protecting American consumers and guaranteeing the competitiveness of our economy.[7]

Over the years, recognizing the critical importance of this commitment to competition, Congress has granted exemptions from the antitrust laws only in a handful of very unusual cases.[8] This strong presumption against immunities and carveouts has served consumers, and our economy, very well. Every bite taken out of our antitrust framework weakens our protection of competition, and encourages others to seek similar special treatment. Today—with bipartisan

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1979 review."), 3 (USDA has "little information on cooperative pricing activities and provides little assurance that cooperatives are not inappropriately increasing prices for their goods").

[6] *See* 15 U.S.C. § 1 *et seq.*

[7] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). *See also*, *e.g.*, *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (noting that, in passing the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country").

[8] *See*, *e.g.*, 46 U.S.C. § 49307 (shipping line exemption). Prominent judicially-created exemptions include, for example, the *Noerr-Pennington* doctrine, which immunizes certain petitioning conduct, and the "state action" doctrine, which provides limited immunity for conduct undertaken by or at the behest of state and local governments. *See*, *e.g.*, *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Parker v. Brown*, 317 U.S. 341 (1943).

agreement that our antitrust system needs to be strengthened rather than weakened, and with consumer prices already climbing fast—this commitment is more important than ever.

Among antitrust violations, cartels—naked agreements on prices and terms—are uniquely harmful to consumers (and workers[9]), and uniquely abhorrent to our antitrust laws. It has long been the most basic point of bipartisan consensus in antitrust, as well as the consistent position of the Supreme Court, that cartels are the "supreme evil" of antitrust: accordingly, cartel enforcement has been a flagship priority of the Department of Justice for decades.[10]

In fact, cartels are so reliably associated with harm to consumers and competition that the Department of Justice prosecutes such nakedly anticompetitive behavior *criminally*, imposing significant jail time and criminal fines.[11] In civil litigation, courts do not permit defendants to adduce justifications for naked cartelization, instead imposing a "*per se*" or automatic rule of

[9] Although cartels most commonly involve suppliers of products and services, the Sherman Act's prohibitions apply equally to cartelization among buyers of labor that harm workers. *See*, *e.g.*, Statement of Doha Mekki before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, "*Antitrust and Economic Opportunity: Competition in Labor Markets*" (Oct. 29, 2019) ("[N]aked no-poach and wage-fixing agreements are indistinguishable from and eliminate competition in the same irredeemable was as agreements to ix product prices or allocate customers."); *United States v. Jindal*, Case 4:20-cr-00358, 2021 WL 5578687, at *6 (E.D. Tex. Nov. 29, 2021) ("[N]aked horizontal agreements to fix the price of labor, like the agreement here, are ordinarily *per se* illegal.").

[10] *See*, *e.g.*, *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (collusion is the "supreme evil" of antitrust); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992) ("No antitrust offense is more pernicious than price fixing."); Christine Varney, Remarks to the U.S. Chamber of Commerce (June 24, 2011), https://www.justice.gov/opa/speech/assistant-attorney-general-christine-varney-speaks-us-chamber-commerce ("The Division has focused on prosecution of large price-fixing, bid-rigging, and market allocation cartels that raise prices to both businesses and individual consumers, restrict supply, reduce innovation, and act as a drag on the entire economy."); R. Hewitt Pate, Asst. Atty. Gen., U.S. Dept. of Justice, *International Anti-Cartel Enforcement* (Nov. 21, 2004), https://www.justice.gov/atr/speech/international-anti-cartel-enforcement ("[W]e at the U.S. Justice Department see antitrust enforcement as a three part hierarchy. At the top of this hierarchy is enforcement against cartels, conduct that is devoid of any efficiency justification and inflicts tremendous harm on our economy.").

[11] *See*, *e.g.*, Renata Hesse, Acting Asst. Atty. Gen, U.S. Dept. of Justice, *The Measure of Success: Criminal Antitrust Enforcement During the Obama Administration* (Nov. 3, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-remarks-26th ("[I]n recent years we've obtained the largest fines in the division's history. The auto parts cases now total nearly $2.9 billion in criminal fines, surpassing the international cartel investigation before it—the air transportation investigation totaled $1.8 billion. And last year we announced over $2.5 billion in criminal fines and penalties from corporate offenders in a single investigation in the financial-services sector. At the same time, we continue to hold individuals accountable for the crimes imputed to their corporate employers, asking for sentences that reflect their seriousness and send a powerful deterrent message. During the past eight years we obtained well over 300 individual convictions while maintaining a 23-month average prison sentence.").

illegality.[12] As long ago as 1940, the Supreme Court stated that: "[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that *no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense*."[13]

This remains a central commandment of the U.S. antitrust system, and the Department of Justice has long emphasized it in both its policy advocacy and its enforcement practice.[14] Indeed, the Department has invested decades of leadership and advocacy in encouraging other jurisdictions around the world to punish cartels, and in supporting the repeal of cartel exemptions at home.[15]

For all these reasons, any departure from the rule against cartels should be entertained only with considerable skepticism, only in light of compelling evidence that cartelization really is the right solution to the policy problem at issue, and only after carefully considering the consequences

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[12] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). *See also* John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1 (2014) ("Virtually all cases apply a rule of per se illegality to hard-core collusion . . . even if the colluders are selling to or buying from a firm with substantial power. Only one case has recognized the benefits of offsetting power. Similarly, most scholars would not let firms collude to exert countervailing power, concluding that a defense for such behavior would do more harm than good."); *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986) ("That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it.").

[13] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (emphasis added).

[14] *See*, *e.g.*, Richard A. Powers, Depty. Asst. Att'y Gen., U.S. Dept. of Justice, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (Feb. 19, 2020) https://www.justice.gov/atr/page/file/ 1250346/download ("[I]ndividuals who violate U.S. antitrust laws and seek to evade justice will find no place to hide."); Gregory J. Werden et al., *Deterrence and Detection of Cartels; Using All The Tools and Sanctions* (Mar. 1, 2012), https://www.justice.gov/atr/file/518936/download ("Cartels have no legitimate purposes and serve only to rob consumers of the tangible blessings of competition. . . . [P]articipation in a cartel is viewed in the United States as a property crime, akin to burglary or larceny, and it is properly treated accordingly. Like other serious crimes, cartels are never socially desirable, and therefore U.S. law properly seeks to deter them completely rather than merely tax them.").

[15] *See*, *e.g.*, Contribution by the United States, OECD Working Party No. 3 on Co-operation and Enforcement (June 9, 2020) (noting that cartels are "uniquely pernicious"). The Antitrust Division has also advocated for the repeal of exemptions in U.S. law. *See*, *e.g.*, Contribution by the United States, *Competition Issues in Liner Shipping*, OECD Working Party No. 2 on Competition and Regulation (May 26, 2015), https://www.justice.gov/atr/file/823411/download, ¶ 10 ("Because the [ocean shipping carrier] exemption denies the full benefits of competition, the Division has twice testified before Congress in favor of eliminating the exemption. In addition, the American Bar Association's monograph on Federal Statutory Antitrust Exemptions describes why the arguments traditionally asserted to justify the exemption (i.e., ruinous competition due to overcapacity) are dubious. The ABA concludes that the conferences typically result in inefficiently high rates and have at least some ability to inflate price.").

for consumers and competition. This is doubly true if the proposed cartel would include not just vulnerable minnows but also vast conglomerates. As the following sections explain, those factors do not appear to support a departure from the general rule here.

B. Publishers' Complaints Do Not Support an Exemption.

The struggles of many news publishers—as genuine and as troubling as they are—do not appear to be of a kind that would support an antitrust exemption. At root, the public case for an antitrust exemption seems to rest on two main complaints. The first is the dramatic migration of advertising dollars from local print and broadcast media to digital advertising. The second is the perceived exploitation of news publishers by digital platforms who include links and previews in search results, or allow them to be shared by users in social media posts.

Neither of these complaints states a problem that an antitrust exception could plausibly be expected to solve. Despite the optics of wealthy platforms prospering while some local news publishers flounder, neither of the news publishers' two main complaints appears to be a result of monopoly or monopsony power (although certainly some digital platforms do enjoy such power in some markets[16]) against which a supply cartel could act as an economic counterweight.

In fact, on closer examination, neither of the complaints appears to state a problem that Congress would be well advised to try to "solve." Advertising dollars probably cannot, and probably should not, be forced back toward local news. And there is no improper "exploitation" of news content here because platforms, like everyone else, invade no legal right of the publisher

[16] *See*, *e.g.*, First Amended Complaint, *FTC v. Facebook, Inc.*, Case No. 1:20-cv-3590 (D.D.C., filed Aug. 19, 2021), ¶¶ 163–216 (alleging monopoly power in personal social networking).

when they link to, and preview, their news content. I will suggest, as other commenters have, that that is an exceedingly good thing, and should not be altered or undermined—even implicitly.

I want to acknowledge two important points before continuing. First, to be sure, the U.S. news industry is an important one. But so too are many other industries—pharmaceuticals, healthcare, energy, defense, and so on—from which antitrust agencies hear pleas for special indulgence on a weekly basis. Those pleas are routinely and correctly denied. The more important the market, the *more* important it is that we insist on the antitrust rules of the road. Our fundamental commitment to competition is not reserved for trivial or unimportant industries.

Second, digital monopoly is a matter of serious public and Congressional concern. News publishers, like many other businesses in our economy, face enormous digital platforms, the operation of which have raised serious policy problems while bringing undeniable benefits. But if we are concerned about monopoly power, in tech markets or elsewhere, the solution is more antitrust enforcement, not less. Our task should be to make sure that market, monopoly, and monopsony power are vulnerable to competitive erosion, and that they are neither created nor maintained by anticompetitive practices or transactions. As I shall suggest in Part III, concerns about digital monopoly counsel in favor of additional support for federal and state antitrust enforcers, as well as carefully calibrated reinforcements to antitrust doctrine.

1. Complaint 1: Advertising dollars and consumers have moved elsewhere.

The first complaint articulated by news publishers is that advertising dollars and consumers are leaving local print and broadcast news in large numbers.

It is clear that the news industry has seen profound and painful change in the last few decades. Before the rise of digital advertising, many local print and broadcast media companies enjoyed significant market power—sometimes with only one or two newspapers in a given metropolitan area—and enjoyed high margins as a result.[17] As a report from the UNC Center for Innovation and Sustainability in Local Media ("UNC Report") explains, this changed radically with the arrival of the tech revolution, when advertisers and readers migrated to digital—and often national—alternatives that they preferred:

> In the latter half of the 20th century, the sole surviving newspaper in many markets was often a de facto monopoly, able to set rates for both print advertisers and readers. As a result, papers in smaller markets often operated at 20 to 40 percent profit margins. But, by 2011, reader habits had shifted, with more people getting their news online than from a newspaper. Advertisers followed readers, causing the collapse of the print business model.[18]

As painful as this has been, this turn is not itself a result of market power, monopoly power, monopsony power, or anticompetitive conduct (although it may well have *led to* such power): instead, it is caused by technological and commercial progress, and changes in market demand. The turn to digital advertising, for example, may be due to its broader geographic reach, its vastly superior ability to target consumers and generate metrics for advertisers, or to other advantages—and, to be sure, it may raise other concerns, including those relating to privacy.[19] But ultimately this shift is evidence of competition working as it should: migration to a superior product by the many purchasers that prefer it.

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[17] *See*, *e.g.*, U.S. Copyright Office, Publishers' Protections Study: Notice and Request for Public Comments 86(194) Fed. Reg. 56,721, 56,722–23 (Oct. 12, 2021) ("Digital distribution exposed city papers that once enjoyed close to local monopolies to national competition from well-heeled newsrooms like *The New York Times.*").

[18] Penelope Muse Abernathy, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? Report of the UNC Center for Innovation and Sustainability in Local Media (2020) 22.

[19] *See generally*, *e.g.*, Farhad Manjoo, *The Online Ad Industry Is Undergoing Self-Reflection. That's Good News*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/technology/online-ad-industry-self-reflection.html? ("Digital advertising fundamentally altered [the previous business model of advertising]. Through profiling, now ad companies know — or, at least, aim to know — exactly who is reading a certain site or watching a certain video. So instead of buying ads tied to a certain piece of content, companies can buy ads targeted exactly to an audience.").

Consumers, too, appear to be switching their news consumption away from local print and broadcast news. In 2019, a Pew Research report found that only 14% of Americans had directly paid a local news source.[20] And, as the U.S. Copyright Office has noted, decline in newspaper circulation predates the internet era.[21] Again, the fact of this secular decline does not imply that market or monopoly power, or anticompetitive conduct, is to blame. Rather, it appears that given increasing access to sources of news, including national news—print, radio, television, web sites (including publishers and aggregators alike), social media, podcasts, and so on—consumers are choosing other things than local news. Such switching by consumers to a preferred product is the essence of competition.

But however legal and necessary this transition may be, it has been extremely hard on many local print and broadcast news publishers. The UNC Report noted "Between 2005 and 2018, newspaper advertising revenue, which had historically funded local news gathering, dropped from almost $50 billion annually to less than $15 billion, resulting in the elimination of thousands of newsroom positions."[22] Indeed, we have long known that technological and commercial change can be a very painful process for market participants whose traditional products or business models no longer thrive: from the photographic camera-and-film industry to video rental stores.

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[20] Pew Research Center, For Local News, Americans Embrace Digital but Still Want Strong Community Connection (Mar. 26, 2019), https://www.pewresearch.org/journalism/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/.

[21] U.S. Copyright Office, *Publishers' Protections Study: Notice and Request for Public Comments* 86(194) Fed. Reg. 56722 (Oct. 12, 2021) ("Total newspaper circulation, already declining before the internet-era, in 2020 fell to its lowest point since 1940.").

[22] Penelope Muse Abernathy, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? Report of the UNC Center for Innovation and Sustainability in Local Media (2020) 41.

These facts suggest that the news industry, and particularly local news, is undergoing a difficult and painful transition away from a business model that is "broken and must be rebuilt."[23] For many publishers, the pandemic has made conditions even harder.[24]

Importantly, however, not all publishing businesses are equally situated. The UNC Report points out that, "[d]espite the shrinking universe of surviving papers, the chains are bigger than ever—and poised to grow even bigger, with the creation of a handful of highly leveraged mega-chains formed by the union of large publicly traded newspaper companies with large hedge funds and private equity firms."[25] The Harvard University Future of Media Project has published a helpful chart of ownership information for the largest U.S. news sources.[26]

Amid the difficulties, there are reasons for optimism. In particular, it appears that news publishers are responding to the changes in the marketplace and that consumer demand for digital news is rising. While overall newsroom employment has fallen considerably in recent years, a Pew Research Center study has identified a steady *growth* in employment at digital-native publishers.[27] The New York Times added almost half a million digital subscriptions in the third quarter of 2021 alone, recording its "best third-quarter performance in both News and total net subscription additions since the launch of the digital pay model more than a decade ago, and, outside of 2020, [the paper's] best quarter ever for digital subscription additions."[28] Last month, Hearst Newspapers announced its "single largest digital expansion ever" following an increase in

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[23] *Id.* at 56.

[24] *Id.* at 29.

[25] *Id.* at 10.

[26] https://projects.iq.harvard.edu/futureofmedia/index-us-mainstream-media-ownership.

[27] Pew Research Center, U.S. newsroom employment has fallen 26% since 2008 (July 13, 2021), https://www.pewresearch.org/fact-tank/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/

[28] Marc Tracy, New York Times Adds 455,000 Subscriptions in Third Quarter, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/business/media/new-york-times-3q-earnings.html.

paid digital-only subscriptions of 50% more than in the previous year, and a Senior Vice President noted that "collectively, our Hearst Newsrooms are the same size as five years ago, although with much different digital skill sets."[29] In general, then, digital news appears to be firmly on the rise,[30] with Pew Research noting that "[o]utlets have several options for reaching their consumers online, including apps, newsletters, podcasts and aggregation platforms like Apple News or Flipboard."[31]

Many of the undoubted difficulties experienced by news publishers, especially local ones, imply *more* competition, not less, in news: markets are expanding, new platforms are emerging, and once-comfortable local incumbents are encountering strong competitive headwinds.[32] The U.S. Copyright Office recently pointed out that "[d]igital distribution [has] exposed city papers that once enjoyed close to local monopolies to national competition from well-heeled newsrooms like *The New York Times*."[33] Indeed, today, American consumers appear to be receiving news through a wider variety of distribution channels than ever, including television, radio, newspapers

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[29] Rick Edmonds, *Coming off big digital subscription growth, Hearst Newspapers plan a new data and product hub for 2022*, POYNTER (Jan. 27, 2022), https://www.poynter.org/business-work/2022/coming-off-big-digital-subscription-growth-hearst-newspapers-plan-a-new-data-and-product-hub-for-2022/.

[30] *See*, *e.g.*, Pew Research Center, *Digital News Fact Sheet* (July 27, 2021) ("The average fourth quarter, monthly unique visitors for the primary domains of [97 news] outlets in 2020 was 32.1 million, an 11% increase over the 29 million visitors those sites received in 2019, according to Comscore data."); Faisal Kalim, *300% growth in subscriptions for digital news and media: Time for publishers to reassess their business models?*, WHAT'S NEW IN PUBLISHING (Apr. 30, 2020), https://whatsnewinpublishing.com/300-growth-in-subscriptions-for-digital-news-and-media-time-for-publishers-to-reassess-their-business-models/.

[31] Pew Research Center, *Digital News Fact Sheet* (July 27, 2021).

[32] Indeed, some public advocacy materials say this out loud. *See*, *e.g.*, BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (2021), https://www.nab.org/documents/newsRoom/pdfs/Economic_Impact_Tech_Platforms_Broadcast_News.pdf, 3 ("[Big tech platforms] have hit local broadcasting where it hurts most, in its ability to produce and serve audiences with quality journalism and generate advertising revenue to maintain viability and competitiveness in the market."). This argument, in a study commissioned by the National Associated of Broadcasters, is an explicit complaint about competitition.

[33] U.S. Copyright Office, *Publishers' Protections Study: Notice and Request for Public Comments* 86(194) Fed. Reg. 56,721, 56,722–23 (Oct. 12, 2021). *See also*, *e.g.*, Matthew S. Weber, *Antitrust Policy and the United States News Media*, USC Annenberg Center on Communication Leadership & Policy (2010), https://fundingthenews.usc.edu/related-research/ ("In the online space . . . margins are significantly smaller and competition notably higher, resulting in decreased profits for newspapers.").

(including web sites operated by print newspapers), digital-native news publishers, podcasts, social media, and so on. There is some indication that even more competitive entry is on the way.[34]

And the marketplace appears fairly competitive today, as a number of studies have suggested. A Statista report in September 2021 concluded that the top ten most-visited news websites in the United States were those of: CNN (378.7 million monthly visits); msn.com (329.3 million); foxnews.com (266.3 million); nytimes.com (252.7 million); finance.yahoo.com (162.3 million); washingtonpost.com (122.1 million); news.yahoo.com (100.7 million); bbc.com / bbc.co.uk (98.5 million); cnbc.com (96.6 million); nypost.com (94.4 million).[35]

A poll conducted in May 2021 by Morning Consult and The Hollywood Reporter found that adults in the United States exhibit considerable diversity in the channels of news distribution to which they turn:

	Daily	**Once or More per Week**	**Once or More Per Month**	**Less than Once Per Month**	**Never**
Newspapers	13%	22%	12%	14%	39%
Radio	20%	30%	13%	10%	27%
Cable News	22%	24%	11%	7%	35%
Network News	27%	29%	11%	8%	24%
Online-Only News Sites	19%	28%	14%	8%	31%
Social Media	32%	24%	9%	5%	30%
Podcasts	6%	18%	10%	11%	55%

Source: Morning Consult & The Hollywood Reporter, National Tracking Poll #210530 (May 6–9, 2021) (question: "How often do you turn to the following sources for news?") (aggregation mine).[36]

[34] BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (2021), https://www.nab.org/documents/newsRoom/pdfs/Economic_Impact_Tech_Platforms_Broadcast_News.pdf, 9 (noting evidence that Amazon and Apple plan to increase their activity in news markets).

[35] Amy Watson, *Leading global English-language news websites in the United States in September 2021, by monthly visits*, STATISTA (Oct. 28, 2021) (reporting survey of visits in the United States during September 2021).

[36] Source: Morning Consult & The Hollywood Reporter, *National Tracking Poll #210530 (May 6–9, 2021), Crosstabulation Results*, https://assets.morningconsult.com/wp-uploads/2021/05/18093706/210530_crosstabs_HOLLYWOOD_Adults_v1_AUTO.pdf, 42–69.

In sum: the news industry appears to be negotiating the slow and painful process of adjustment to technological and commercial change, and to the introduction of more options for consumers and advertisers. The central problem faced by local publishers—migration of advertisers and customers to other options—seems to be a consequence of competition, not monopoly. And the industry appears to be responding appropriately to the resulting pressures, by developing an expanding array of digital options.[37]

2. *Complaint 2: Publishers do not have an IP right to prevent linking and previewing.*

The second complaint articulated by news publishers is that large digital platforms—including Google and Facebook in particular—derive a benefit from activity involving links to, and previews of, news websites. In particular, Google's search results may include links to news websites and short preview "snippets" (just as they do for other search results); likewise, Facebook users may choose to share links to news websites, which may also include preview snippets. And the platform may monetize this activity, like other activity on the platform, through advertising.[38]

As I understand the applicable law,[39] this is not a function of market, monopoly, or monopsony power: rather, it is a (very fortunate) consequence of our property laws. Under our

[37] Similar developments can be seen in other jurisdictions. *See*, *e.g.*, NERA Report, *supra* note 4, § 3.1 (Spanish experience).

[38] Competing studies have been published by the (keenly interested) participants expressing very different views of the value of the marginal contribution made by the news content to platform revenue. *See*, *e.g.*, News Media Alliance, *Google Benefit from News Content* (June 2019), 25 & Ex. C (listing a "suggested estimate" of benefit at $4.7 billion in 2018, although the factual basis for that estimate is not fully explained).

[39] To be very clear: I am not an expert in intellectual property, the law of the internet, or the law of news. The text states only my high-level understanding of applicable law. I note the existence of a question in at least some states about the status and scope of "hot news" misappropriation doctrine, including questions about whether and to what extent that doctrine is preempted by federal copyright law. However, I have set that issue aside, for—as the Copyright Office has noted in a recent Federal Register notice—"most courts faced with hot news misappropriation claims since *Motorola* have found them to be either preempted or insufficiently proven," and "even if a hot news misappropriation claim could be brought against a news aggregator, it would face a significant hurdle in avoiding preemption by the Copyright Act." U.S. Copyright Office, *Publishers' Protections Study: Notice and Request for Public Comments* 86(194) Fed. Reg. 56,721, 56,722–23 (Oct. 12, 2021). I also note protections and safe harbors in the Digital Millennium Copyright Act for certain forms of reproduction. *See* 17 U.S.C. § 512. Of course, publishers may have practical or technical means of impeding linking-and-previewing: if they were to exercise such means, platforms and others would remain free in turn to implement workarounds to the extent permitted by applicable law, because linking-and-previewing invades no exclusive right of the publisher.

law, *everyone* has the vital freedom to link and preview web pages, without asking the page owner's permission, and without paying a penny for the privilege. Indeed, linking-and-previewing is ubiquitous on the internet: on the Bing and DuckDuckGo search engines, on the Twitter microblogging site, on the LinkedIn professional networking site, and countless other platforms and sites. Anyone could set up a new-entrant app or website today, with zero users and a zero market share in both news and advertising, and do exactly the same thing for exactly the same (zero) price. This freedom to link and preview without permission or payment has nothing at all to do with market, monopoly, or monopsony power.

Instead, it is a function of the fact that *news publishers (and web site operators generally) have no intellectual property right covering such activity*. Our property and IP laws simply do not give web site publishers—of news or otherwise—exclusive control of the right to link and preview their websites. A short preview, such as a low-resolution thumbnail image and a line or two of text, falls within the "fair use" exception to copyright.[40] So neither a vast digital platform nor the smallest new entrant has any need to bargain with a news publisher for the right to link and preview. The news publisher has nothing that the platform (or entrant) needs to purchase.

Accordingly, the claim that monopsony power can be inferred from the fact that Google and Facebook do not pay for linking-and-previewing news seems incorrect.[41] That claim presupposes that there is a market for the right to link-and-preview news: a right held initially by the news publisher that can then be sold or licensed to the digital platforms, or anyone else, for a

[40] *See supra* note 3. *See also* Letter from Authors Alliance et al. to Chair Klobuchar, Chair Cicilline, Ranking Member Lee, and Ranking Member Sensenbrenner (June 17, 2021), https://www.authorsalliance.org/wp-content/uploads/2021/06/20210617_JCPA-Letter-to-Congress.pdf ("[B]rief snippets of content--such as headlines, images, or short excerpts--that often accompany links . . . have been consistently found to be fair uses under copyright law, and protection for these uses is mandated by our participation in the Berne Convention. These fair uses cannot be banned or substantially curtailed without running afoul of Supreme Court jurisprudence, the First Amendment, and multilateral international obligations.").

[41] *See*, *e.g.*, Singer, supra note 2.

price. But a market for that right does not exist. The right to link-and-preview websites has already been allocated, by our property law, to anyone in the economy who wants it, including platforms.

This is almost certainly an exceedingly good thing. Hyperlinks are the very lifeblood of the internet: nothing like our modern internet could have flourished if a user or platform needed to obtain a copyright license before linking to another page.[42] Imagine the incalculable harm it would do if no-one on the internet could link to another website (news or otherwise) without obtaining the permission of the linked website and paying a fee.[43] So much of the economic, intellectual, creative, and political value of our internet would be sacrificed in a flash: the freedom to link between websites is right at the core of the enormous value the internet has brought. And it is hard to think of anything more deserving of robust protection in a democratic society than our ability to communicate freely—online and offline—about news and news reporting in particular.

To illustrate the importance of this freedom by analogy, consider how research works in our traditional offline world of books and articles. People engaged in research express their ideas in books and articles all the time. Those ideas, and the books and articles that articulate them, often represent extensive investment of time and energy. And while copyright provides considerable protections against reproductions of creative works like books and articles, neither copyright nor any other law prevents other people engaged in research from using and building on

[42] Letter from Authors Alliance et al. to Chair Klobuchar, Chair Cicilline, Ranking Member Lee, and Ranking Member Sensenbrenner (June 17, 2021), https://www.authorsalliance.org/wp-content/uploads/2021/06/20210617_JCPA-Letter-to-Congress.pdf ("The ability of one website to connect ('link') to other websites, without needing to negotiate to do so, is a foundational component of modern internet infrastructure.").

[43] *See*, *e.g.*, Lisa Mcpherson, *Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says "Probably Not."* PUBLIC KNOWLEDGE (June 17, 2021), https://publicknowledge.org/can-the-journalism-competition-preservation-act-really-preserve-local-journalism-public-knowledge-says-probably-not/ ("Digital platforms like Google and Facebook do not currently negotiate with news sites for the right to link to their stories, just like regular users don't need a license to drop a link in a tweet or a Facebook post. That's because news outlets currently have no legal right to prohibit third parties from linking to their content; linking exists entirely outside the ambit of copyright law. (Any site that doesn't want its content to be linked to just has to put its content behind a paywall or a login screen.) That is the fundamental, wonderful nature of the internet: It's built on links, and the fact that you don't need to ask for permission or negotiate compensation to link to sites has facilitated the free and open flow of information.").

the underlying ideas, from citing previous works, and from quoting extracts—snippets, if you like—from them, so long as the later writer keeps the extracts brief and within the bounds of fair use. (Citing and quoting a written work, of course, is remarkably similar to linking and previewing a web page.)

Importantly, those who later use the earlier ideas, and who cite and quote the earlier-published works, may derive *enormous* benefits from the earlier writers' investments, including significant financial benefits. A later book that popularizes an idea may make vastly more money than an earlier book or article that advanced the idea for the first time. Even Newton famously emphasized that his own extraordinary achievements came by building on the work of others.[44] But the later writer does not owe the earlier writer a penny under our law. As a matter of law, the originating writer simply does not have the legal right to appropriate profits derived from the use of ideas, nor from citing and quoting the original work—however well the later book sells.

Thus, creators of books and articles setting out new ideas and knowledge, confers a benefit on the rest of the world over which the creator does not have a property right. A good thing too: it would be a terrible thing for research if a writer had a right, in intellectual property or otherwise, to prevent citation of, or brief quotation from, their work without a license. Imagine the stifling nature of an IP system that gave everyone the legal right to sue in infringement for every use of their every idea, or for every citation or quotation to their published work. And so it is with linking and previewing on the internet. The freedom to link and preview without permission is at the heart of a vital online sphere and free public discourse. A search engine that could return only a list of

[44] Isaac Newton, *Letter to Robert Hooke* (Feb. 5, 1675), https://digitallibrary.hsp.org/index.php/Detail/objects/9792.

bare links (with no previews), or indeed no links at all without permission, would be vastly less valuable to consumers.

Finally, it is worth emphasizing that even if Congress wanted to expand the armory of property rights to allow news publishers to capture more of the social benefits of their investments—notwithstanding the broader costs of doing so for the internet and for public discourse—that goal could justify the creation of a new intellectual property right, but it would not justify the right to license that property through a cartel.

A note on "free riding"

Some commenters have suggested that digital platforms are "free riding" on the efforts of news publishers in a way that, even if it is not illegal, is unfair and provides a basis for regulatory intervention. The intuition is understandable, but the framing is misleading, and the policy implications are not as they may appear.

Platforms do obtain a benefit from news publishers' investment, in the form of increased activity that helps to drive additional advertising revenue. Users may post more, or engage more intensively, on a platform as a result of news content being discussed and shared.[45] Platforms do not generally pay for this benefit because—as explained above—there is no legal or economic reason why they should do so. It is what an economist would call a positive externality: a benefit that one entity receives by virtue of an activity undertaken by another. (The same kind of thing happens, for example, when a shopping mall opens near a pre-existing coffee shop, and the coffee shop gains significant extra traffic and profit from the arrival of the mall without paying a penny.)

[45] *See generally*, *e.g.*, News Media Alliance, *Google Benefit from News Content* (June 2019) (arguing that this effect is considerable in magnitude).

So the benefits of publishers' investments in news confer an unpriced benefit on the public: if publishers were permitted to recapture this benefit through the creation of an exclusive property right in linking-and-previewing (setting aside the separate question of cartelization), their profits and incentives could in principle be increased—albeit at the cost of making others, including consumers, worse off than they are today.

But the free riding in this case goes both ways, and publishers do not seem to be losing out on balance from linking and previewing. News publishers benefit because linking and previewing drives a tremendous amount of traffic to the news publishers' websites which they would not enjoy if Google and Facebook did not permit linking and previewing, or did not exist at all.[46] (Even if only a modest percentage of users click through to a news article, the claim that news publishers, individually or collectively, are receiving less traffic rather than more traffic *overall* as a result of linking-and-previewing does not seem intuitively plausible, and should probably not be accepted without robust evidence.) And the news publishers, in turn, typically monetize this additional traffic through advertising. They do not pay the platforms for the free service of link dissemination. So they, also, benefit from a positive externality, just as platforms do.

The fact that publishers are enjoying a significant windfall externality of their own is critical for any policy analysis. It means that if Congress were to create a property right over the linking-and-previewing of articles, the digital platforms would face a choice about whether they wanted to buy or license that right. They could simply choose not to take the deal, in turn

[46] *See*, *e.g.*, Parse.ly, *2018 traffic sources by content categories and topics: Referral trend benchmarks for Facebook, Google, and others for 23 categories* (April & May 2018), http://learn.parsely.com/rs/314-EBB-255/images/authority-report-15.pdf?utm_campaign=authority-report-15-pdf, 2; U.S. Copyright Office, *Publishers' Protections Study: Notice and Request for Public Comments* 86(194) Fed. Reg. 56,721, 56,722 (Oct. 12, 2021) ("Aggregators appear to drive a significant amount of traffic to news websites, and therefore their activities may serve to expand the market for press publishers.").

terminating the positive externality that they confer on news publishers. In light of these realities, the parties would engage in bargaining.

The outcome of that bargaining process would depend on how much better or worse each party's alternatives were, compared to a deal. And there is considerable reason to believe—as a 2017 study commissioned by publishers concluded[47]—that uncompensated linking-and-previewing is on balance good, not bad, for publishers, and that in a "free" market publishers would have little ability or willingness to extract a fee on top of the free service of link-and-preview dissemination. For example, in France, when the freedom to preview articles with snippets was revoked, Google simply stopped previewing and switched to bare linking, until the French government intervened on grounds that this harmed publishers (!).[48] Likewise, in Spain, when the freedom to link was revoked and Google terminated the practice, an economic study commissioned by publishers themselves concluded that "publishers saw traffic fall on average more than six percent, while smaller publications saw it drop by 14 percent[.]"[49] In Germany, a study found, when news aggregators chose to exclude publishers rather than pay a government-mandated fee, publishers soon "noticed that they were losing traffic" and "asked to be linked back without demanding any payment in return."[50]

It is important to appreciate that positive externalities are common in our digital economy. A new product or platform often creates opportunities for others to jump into the market and seize a profit opportunity that the first mover created, and suppliers in adjacent markets frequently

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[47] NERA Report, *supra* note 4, at iii–v.

[48] *See*, *e.g.*, Natasha Lomas, *France's competition watchdog orders Google to pay for news reuse*, TECHCRUNCH (Apr. 9, 2020), https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/.

[49] Anna Solana, *The Google News effect: Spain reveals the winners and losers from a "link tax,"* ZDNET (Aug. 14, 2015), https://www.zdnet.com/article/the-google-news-effect-spain-reveals-the-winners-and-losers-from-a-link-tax/.

[50] NERA Report, *supra* note 4, i.

benefit from one another's investments. For example, the introduction of new hardware frequently confers a benefit on software developers by driving demand for new software or new software features—and vice versa. The introduction of an improved operating system frequently benefits app developers and device-makers—and vice versa. And so on. It would be a serious mistake to see this kind of joint value creation as a problem invariably requiring that one side or other be given a legal exclusive property right to control the joint profit. And it would be considerably worse to see it as justification for a cartel that would sell this new exclusionary right not for a competitive price but on monopoly terms.

Moreover, the framing that platforms are appropriating publisher investment is incomplete: the benefits of traffic from social media users seeing news articles that interest them are the benefits of *joint* investment. They reflect the fruits of the investment of publishers and platform alike.

Nor does there seem to be any serious suggestion that the externalization of news value is what is driving the flight of advertising from local print and broadcast to digital: in fact, on the contrary, all the evidence strongly suggests that that is the consequence of changes in underlying demand for news and advertising services.[51] In other words, digital platforms do not appear to be "monopolizing" advertising markets by linking-and-previewing articles.

Ultimately, the claim that Google and Facebook are monopsonists extracting an infracompetitive price turns out to hide a more fundamental and less attractive complaint that is grounded in property, not competition: that news publishers, like other publishers of content on the web, have no stranglehold on the ability of others to link to, or give fair-use previews of, their

[51] *See supra* § II.B.1.

content. True as it is, this not a problem: it is the right outcome. Not all externalities are bad; some are vitally beneficial; and this one is not the source of publishing's ills.

3. Cartelization would neither bring back advertising nor create IP rights.

It should be clear that neither of these putative problems—that is, neither the flight of advertising dollars nor the freedom of others to link-and-preview—would plausibly be solved by blessing a national news cartel. Such an measure would not do a thing to force advertising or consumers back to local print and broadcasting, nor would it create new property rights allowing web site operators to stifle the practice of linking and previewing—even if we wanted to do either of those things. (For the avoidance of doubt: I certainly do not recommend either!)

Instead, as the next section explains, an antitrust exemption would just create a new source of harm, at the expense of consumers and competition. Specifically, it would likely allow news publishers to create a new source of monopoly power in the supply chain; suffocate their incentives to innovate and disrupt in news distribution; and perhaps also create a back door around the merger control laws that could make consolidation more likely.

To be sure, cartelization would generate some additional money for publishers, and that revenue stream might in a crude sense "offset" some of the challenges facing the publishing industry, in just the same way that a right to engage in any other profitable crime would do. But this money would be the fruits of competitive harm, extracted at the expense of consumers and harm to the competitive process. Moreover, the well-known problem of deadweight loss would mean that the loss would exceed the gains, leaving us socially worse off overall.

More fundamentally, in the United States we do not generally respond to technological upheaval, or the rigors of competition, by giving unsuccessful competitors a license to engage in profitable law-breaking simply because it provides them an offsetting subsidy from the pockets of their victims. That is a wise policy, and Congress should not depart from it here.

C. A National News Cartel Would Harm Consumers and Competition.

The creation of a statutory national news cartel would not just be a poor fit with the problems facing news publishing today: it would also be independently harmful. Specifically, long experience and economic theory alike suggest that it would harm consumers (including by driving up consumer prices at a time of sharp inflation), deter innovation, turn hungry commercial adversaries into cozy stakeholders in the status quo, and entrench monopoly in the supply chain.

1. A national news cartel will harm consumers.

As noted above, it has long been the most basic tenet of U.S. antitrust law that cartels—naked agreements among competing suppliers or purchasers on prices and other terms—are the supreme evil of antitrust, the top enforcement priority of the Department of Justice, a principal focus of our policy advocacy, and an appropriate matter for jail time and criminal penalties, not encouragement.[52] This policy is based on the long teachings of economists and experience that cartels consistently raise prices, lower output, reduce quality, and suffocate innovation, even when sponsored by the state.[53] An OECD study of the effects of cartelization concluded that cartel markups "can be very large, as much as 50% or more," and explained:

> Cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises price above the competitive level and reduces output. Consumers choose either not to pay the higher price for some or all of the

[52] *See supra* § II.A.

[53] *See*, *e.g.*, George Symeonidis, *The Effect of Competition on Wages and Productivity: Evidence from the United Kingdom*, 90 Rev. Econ. & Stats. 134, 142 (2008) (finding "clear evidence of a negative effect of collusion on labor productivity growth"); Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50 J. Indus. Econ. 1, 8 (2002) ("[D]uring the New Deal, the government-sponsored cartels behaved consistently with the traditional theory by reducing output."). I will discuss a narrow exception to the principle that cartels are always bad, involving monopsony and countervailing power, in the next section. *See infra* § II.C.2.

> [cartelized] product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects adversely affect efficiency in a market economy.[54]

We should deeply—and perhaps particularly—fear the creation of a national cartel in news, which would inflict all these harms in a market of particular importance. First and most straightforwardly, by setting a news monopoly at the very top of the supply chain, it would impose monopoly overcharge on prices for news content that would cascade down the chain.[55] A monolithic union of all the nation's news publishers—large and small, national and local, diversified and specialized alike—would wield startling power over the price and output of one of our nation's most important goods: information about events of public importance. The cartel overcharge would likely be passed through Google and Facebook to millions of consumers, whether in the form of increased consumer prices (or, equivalently, reduced quality) for products and services, or higher advertising prices that would then raise the costs of the advertised products and services. This would be unwelcome and harmful at any time: at a time of soaring inflation it seems particularly unattractive.

Importantly, even if Google and Facebook hold downstream market or even monopoly power in a market for distributing news—despite what appears to be considerable variety and diversity in news distribution today, as noted above[56]—the cartel overcharge will still likely land on consumers. It is an elementary point of textbook microeconomics that increasing a monopolist's costs for an input, holding downstream demand constant, will tend to increase that

[54] OECD, *Report on The Nature And Impact of Hard Core Cartels and Sanctions Against Cartels under National Competition Laws*, DAFFE/COMP(2002)7, at 2.

[55] *See*, *e.g.*, NERA Report, *supra* note 4, ii (noting negative impact of a compulsory link-and-preview tax on consumers and advertisers).

[56] *See supra* § II.B.1.

monopolist's own profit-maximizing downstream price, and reduce output.[57] This could flow to consumers directly (in the form of increased nominal prices, or reduced quality for zero-price products and services) or through advertisers (in the form of increased advertising prices, which are then transmitted to the businesses buying them).

Separately, we should also fear the loss of vital incentives to innovate and disrupt in news publishing and distribution. Today, news publishers have strong incentives to invest in new and innovative methods of digital news delivery and distribution: indeed, as noted above, this is already taking place.[58] That incentive to disrupt is driven, in large part, by a desire to capture more of the profits from Americans' demand for news. But authorizing a national news cartel with the ability to extract monopoly prices from the status quo would suffocate this vital incentive, turn news publishers into cozy incumbents, and entrench the status quo. After all: why take the risks and incur the costs of investment in competitive innovation, when you can instead shelter under a comfortable cartel authorization and enjoy supracompetitive profits? As Laura Alexander warns, "two monopolists at adjacent levels in a market will quickly realize their interests align in imposing a monopoly price on the downstream market and dividing the resulting monopoly profits amongst themselves."[59] Stifling a vital spur to disruption, by aligning the incentives of major media corporations with major digital platforms, is the very last thing we should do if we want a competitive, innovative news industry.

Finally: limiting the antitrust exemption to negotiations with specific large platforms (say, Facebook and Google) would not improve matters much, if at all. Charging a monopoly price to

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[57] *See*, *e.g.*, Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS (7th ed. 2009) § 10.1.

[58] *See supra* § II.B.1.

[59] Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea*, American Antitrust Institute (Oct. 15, 2020), https://www.antitrustinstitute.org/work-product/new-aai-white-paper-analyzes-the-pitfalls-of-countervailing-power-as-a-response-to-rising-market-concentration/, 5.

Facebook and Google—piggy-backing a new monopoly rent upon whatever market or monopoly power those platforms enjoy downstream—will wash downstream to their customers, users and advertisers alike. That is a significant harm to many millions of Americans consumers and businesses. Second, authorizing a hardcore cartel for sales to one customer is likely to facilitate coordination to other customers.[60] It is, after all, not particularly plausible to think that news publishers will get together and agree on prices and terms for two customers, while competing vigorously on their dealings with all the rest. Third, such a limitation could create a perverse incentive for the news publishers to *preserve*, rather than erode, whatever downstream monopoly Google and Facebook might have, by turning the publishers into profit-sharers in the digital platforms' own market power.[61] This would certainly blunt their incentive to undertake, or sponsor, new entry downstream in competition with the incumbent platforms.[62]

2. The "monopsony exception" does not apply here.

There is a narrow theoretical exception to the economic proposition that cartels invariably harm consumers. When a competitive set of suppliers are confronted by a textbook monopsonist—that is, a sole buyer—and the sole buyer is exerting its power to obtain monopsony prices below the competitive level, then the formation of an upstream supplier cartel can in theory improve total welfare (although not all the way to the efficient level), by creating what economists call a bilateral

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[60] For example, scholars have recognized that export cartels—at least in their true hard-core cartel form—may facilitate coordination on domestic sales. *See*, *e.g.*, D. Daniel Sokol, *What Do We Really Know About Export Cartels and What is the Appropriate Solution?*, 4 J. Comp. L. & Econ. 971, 971 (2008); Christian Schultz, *Export Cartels and Domestic Markets*, 2 J. Ind. Comp. & Trade 223 (2002).

[61] If the cartel participants can enjoy monopoly returns over the volume of downstream transactions that Facebook and Google control, but are relegated to (at least more) competitive returns over the volume that the competitors of Facebook and Google control, it is easy to see which outcome publishers are likely to favor.

[62] As Public Knowledge warns, this would more generally be a way of "deepening existing power relationships between the largest platforms and largest publishers." Lisa Mcpherson, *Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says "Probably Not."* PUBLIC KNOWLEDGE (June 17, 2021), https://publicknowledge.org/can-the-journalism-competition-preservation-act-really-preserve-local-journalism-public-knowledge-says-probably-not/.

monopoly: a monopoly seller facing a monopsony buyer.[63] But while bilateral monopoly may be work out well in theory, in practice—as the nonpartisan pro-enforcement American Antitrust Institute has explained—"it rarely does so."[64]

The theoretical basis for the idea is disputed and fragile. Since the introduction of the idea, "more sophisticated economic analyses . . . have identified only very narrow circumstances in which bilateral monopoly can improve efficiency and even more narrow circumstances where those efficiency gains are passed on to smaller or weaker players."[65] For example, as three leading former antitrust-agency chief economists have pointed out, the theoretical tendency of bilateral monopoly to make things better rather than worse may not survive information asymmetries, incomplete contracting, or markets in which suppliers' marginal costs are declining (in which case "the classic monopsony model is inapplicable and misleading").[66] They point out that "with private information, economic theory indicates that negotiated outcomes often are *more* efficient and lead to *more* trade if [a single dominant] buyer can negotiate with two or more suppliers rather than just one."[67] And they underscore that, in making real decisions about antitrust policy outside blackboard microeconomics, competition is almost always a safer bet than monopoly.[68] In other words, a bilateral monopoly defense looks a lot like the kind of fragile economic-theory excuse for anticompetitive conduct that modern antitrust is often criticized for being too quick to accept.

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[63] *See* Roger D. Blair & Jeffrey L. Harrison, MONOPSONY IN LAW AND ECONOMICS (2010) Chs. 6 & 10; Jonathan B. Baker, Joseph Farrell, & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 Antitrust L.J. 637, 640-41 (2008); John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1 (2014).

[64] Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea*, American Antitrust Institute (Oct. 15, 2020), https://www.antitrustinstitute.org/work-product/new-aai-white-paper-analyzes-the-pitfalls-of-countervailing-power-as-a-response-to-rising-market-concentration/.

[65] *Id.* at 12.

[66] *See* Jonathan B. Baker, Joseph Farrell & Carl Shapiro, *Merger to Monopoly to Serve a Single Buyer: Comment*, 75 Antitrust L.J. 637 (2008).

[67] *Id.* at 643.

[68] *Id.* at 646.

At the barest minimum, before accepting the applicability of the principle here, Congress would probably want to be confident of at least three things. *First*, that there is evidence of genuine and enduring monopsony power held by a buyer in a market for "news distribution" (*i.e.*, not just downstream monopoly power as a seller of some downstream product or service, nor monopoly or monopsony power in some *other* market such as advertising) that is not vulnerable to competitive erosion for some reason. *Second*, that the cartel would not "overcorrect" and make things worse, by creating more downstream market power than previously existed, or by creating innovation harms that outweigh the static benefits. *Third*, that the coordination would not have "spillover" effects into other markets where there is no monopsony purchaser.[69] But, far from establishing all these of these elements, public evidence does not appear to support any of them.

(a) Monopsony Power

First and most importantly, as noted at length above, there does not appear to be any reason to think that news publishers are facing a monopsonist purchaser in a market for "news distribution." Assuming that by "news distribution" we mean linking and previewing news articles, no such market exists, because news publishers, like other web site operators, *do not* have

[69] *See* John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1, 60 (2014) ("Suppliers should not be allowed to collude in response to a customer's power, no matter how large, if their collusion would enable them to exercise downstream market power. For in that case, they would acquire the ability and the incentive to exploit consumers."); *id.* at 61–62 ("Supplier collusion could create downstream market power that did not already exist in three principal ways. First, the colluding suppliers could raise prices beyond what is necessary to counteract the anticompetitive effects of the buyer's power, raising the buyer's input costs and causing it to increase its downstream prices. Second, supplier collusion could reduce competition downstream between the powerful customer and its rivals. . . . Third, supplier collusion could create downstream market power in an unrelated market. Suppose that the suppliers sell their product in two markets: in the first, they face a powerful customer; in the second, they sell to customers that lack any significant power as buyers or sellers. In the first, their collusion may create no downstream market power. In the second, however, the suppliers may exert downstream power and raise prices to consumers. This assumes, of course, that the second market is a relevant antitrust market, a market in which significant downstream power could be exercised."). Some existing antitrust exemptions—such as the exemption for labor unions and the exemption for agricultural cooperatives in the Capper-Volstead Act—might plausibly be seen either as circumstances in which these criteria are met, and/or as situations in which an antitrust exemption has served as a vehicle to provide a direct welfare subsidy to workers or farmers for reasons unrelated to competition or competition policy.

a legal right to prevent or monetize the linking and previewing of their news content. That freedom is just not theirs to sell.[70]

Moreover, as explained above, that fact is likely a very good thing: both for the growth and vibrancy of the internet and for the health of our national discourse. The freedom to hyperlink without permission, and to excerpt without permission under the "fair use" doctrine, ensures that web site operators in general, and news publishers in particular, do not have a legally-backed stranglehold over public debate.

Thus, the relationship between the value that Google and Facebook get from news, and any payments that they make to news publishers, is not a helpful guide to monopoly or monopsony power. (Of course, platforms may enter into an arrangement to obtain *more* than the bare right to link-and-preview, and they may choose to pay for those additional rights. But in that case they are still getting the basic right to link-and-preview for free by operation of law, and paying only for the extra rights: to put it a little crudely, they are getting the cupcake by operation of law, and choosing to pay for a cherry on top as well. In such a case, nothing much can be learned from the relationship between the value to the platform of the cupcake and the payment to the publisher for the cherry.[71])

(b) Harm that would exceed benefits

Second, even if the creation of a national news cartel *would* somehow generate benefits through countervailing power, there are many reasons to fear that it would also cause harm vastly in excess of those benefits. For the creation of a national news monopolist would wield market

[70] *See supra* § II.B.2.

[71] *Compare* Singer, *supra* note 2, at 18–19.

and monopoly power across the entire U.S. news ecosystem, reaching far more broadly than the channels operated by Facebook and Google.

Neither Facebook nor Google really appear to be monopolists or monopsonists in news. First, whatever the market or monopoly power of Facebook and Google in other markets (such as internet search, personal social networking, or advertising), there is not much reason—at least at first blush—to think that either company has monopoly or monopsony power as a supplier or distributor of news. In fact, today, as noted above, there is remarkable variety and fragmentation in news publishing and news distribution: with a growing array of online news channels available in what were formerly one- and two-paper areas, markets for publication and distribution of news may be *more* competitive today than they have ever been.[72]

Consider the 2021 Morning Consult / Hollywood Reporter poll described above, showing the wide variety of channels through which news is consumed. It indicates that less than a third of Americans consume news daily on social media; almost the same amount never consume news this way at all. Each of the seven channels carries a significant volume of news distribution.

	Daily	**Once or More per Week**	**Once or More Per Month**	**Less than Once Per Month**	**Never**
Newspapers	13%	22%	12%	14%	39%
Radio	20%	30%	13%	10%	27%
Cable News	22%	24%	11%	7%	35%
Network News	27%	29%	11%	8%	24%
Online-Only News Sites	19%	28%	14%	8%	31%
Social Media	32%	24%	9%	5%	30%
Podcasts	6%	18%	10%	11%	55%

Source: Morning Consult & The Hollywood Reporter, National Tracking Poll #210530 (May 6–9, 2021) (question: "How often do you turn to the following sources for news?").[73]

[72] *See supra* § II.B.1.

[73] Source: Morning Consult & The Hollywood Reporter, *National Tracking Poll #210530 (May 6–9, 2021), Crosstabulation Results*, https://assets.morningconsult.com/wp-uploads/2021/05/18093706/210530_crosstabs_HOLLYWOOD_Adults_v1_AUTO.pdf, 42–69.

Given this diversity, and the availability of multiple channels and apparent substitutability from one channel to another, it is very far from obvious that either Google or Facebook—even together, let alone separately—would easily be called monopolists of the nation's news.[74]

None of this is to exclude or deny the possibility that there might be narrower markets for news: market definitions are fact-intensive and complicated things. The more limited point is, rather, that such evidence has not been prominently featured in the public debate so far, and that Big Tech platforms are not always monopolists in every market in which they participate. Nor, as noted above, is the concept of "monopsony in news distribution" applicable to interactions like linking-and-previewing where the good to be purchased is already lawfully in the hands of the "buyer."

Accordingly, it is far from clear that Google and Facebook enjoy market or monopoly power in a market for news: whatever market, monopoly, or monopsony power they enjoy in any other markets, including markets for advertising.

A national news cartel certainly would hold monopoly power. On the other side of the ledger, we can be fairly confident that a national news cartel—bringing together all the nation's news publishers, large and small, online and offline—*would* exercise vast monopoly power. It would be an antitrust enforcer's nightmare. One need only imagine the antitrust attention that would quite deservedly accompany a proposed merger between any *two* of the major participants (say, News Corp. and the New York Times): the idea of bringing *all* of them under one roof to set prices and terms should instill horror.

[74] *Compare*, *e.g.*, *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) ("[Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.").

Such a measure would place the manacles of monopoly on the country's access to news content. Its power would extend far beyond whatever portion of the news supply chain Google and Facebook might control today. As noted above and in the following section, we would probably not be well advised to expect that the pernicious effects of the cartel could or would be limited to publishers' dealings with Google and Facebook.

Finally, it is also worth noting that a statutorily authorized cartel is likely to be worse, not better, than an organic one. The participants in a legal cartel need not fear detection: their activities can be as extensive, expansive, and public as they like, including in their mechanisms of monitoring and enforcement of cartel discipline. They can communicate the terms openly throughout their participant entities without having to limit communications to trusted insiders. And they can be confident that the enterprise is not vulnerable to being brought down by an FBI investigation or a leniency applicant.[75]

(c) Spillover harms

The harms of a national news cartel would likely be felt in markets *other* than those in which Facebook and Google are across the bargaining table. In those markets, it would simply be a vast, new monopolist.

As noted above, it does not seem particularly plausible to suppose that a national news cartel could or would be limited to dealings with a couple of customers. The participants would have the opportunity to conduct extensive exchanges of information, including information about prices, costs, and strategy (including information about possible innovations that might affect the

[75] Participants in organic cartels face the problem—ingeniously created by the Justice Department's landmark leniency program—that any other participant might, fearing detection, choose at any time to report the collusion to the Antitrust Division and cooperate against the other participants, in exchange for significant leniency benefits. A state-sanctioned cartel, of course, is free from this gnawing threat of collapse, and to that extent more robust.

terms of supply); negotiate collective bargaining positions; and explicitly harmonize their prices and terms. Once that knowledge is shared and the terms of collusion are established, they will become a de facto baseline for dealings with other customers. At the very least, the information exchange will facilitate "oligopolistic" interaction (*i.e.*, tacit collusion) in dealings with other customers. Imagine, for example, authorizing all the nation's major defense contractors to form a cartel for their dealings with one major customer, and then trusting that they would compete vigorously to supply the very same products to other customers. That is no more plausible than what is suggested here.

Indeed, if—as the current bill text contemplates—the statutory immunity applies to any negotiations that *include* news, the tentacles of the cartel would surely spread into markets for other products and services that have nothing to do with news at all! This includes, of course, markets in which Google and Facebook are not even present. The threat is very clear.

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In sum, a national news cartel would look nothing like—for example—a labor union, or a cooperative of agricultural producers facing genuine monopsony power in markets for milk or wheat, and presenting little risk of spillover harms or lost innovation. (Not least because it would prominently feature a number of enormous, and profitable, media giants.) Rather, it would look much more like the kind of thing that the Antitrust Division has long prosecuted criminally.

3. The proposed exemption could undermine merger enforcement.

Congress may wish to consider one further risk. If news publishers are given a license to collude with one another, such that competition between them is lawfully eliminated, it may be harder to succeed in a merger challenge in the event that publishers subsequently seek to acquire their rivals.

This is because merger enforcement relies on showing that the proposed transaction may have an effect on competition: specifically, that the merger may substantially lessen competition between the parties or tend to create a monopoly.[76] And if the merging parties are already allowed to collude because of an antitrust exemption, such that they are not competing anyway, it becomes more difficult to show that effect. To make it concrete: suppose that the antitrust exemption is enacted and the news cartel is created. Under that exemption, Big Publisher and Small Publisher cease to compete for at least a significant percentage of their business. Later on, Big Publisher seeks to acquire Small Publisher, which operates newspapers or broadcasting in the same area. And the first argument on the table from the merging parties, to an agency and to a court, will be: *this transaction does not harm competition because we are already lawfully colluding, so there's no harm—only an efficiency from integration.* There is a real risk that such an argument would be accepted, either by a court or by an agency weighing the chances of litigation success in deciding whether to allocate scarce resources to a challenge.

This may be a particular problem because, while a cartel authorization could in theory be revoked in a later effort to go back to competitive business as usual, mergers may end up being closed during the life of the cartel period that could not, either legally or practically, be unpicked after that period. Thus, the proposed exemption could have the ultimate effect of fueling and sheltering consolidation among news publishers, rather than guarding against it.

[76] 15 U.S.C. § 18.

4. Compelled arbitration would not likely be better, and could be worse.

I am aware that some public advocacy has proposed that collective bargaining could take place against the background of compelled arbitration.[77] That approach does not seem much better than mere cartelization—and may be worse—for four reasons.

First, compelled arbitration would undesirably force the platforms to make a payment for the exercise of what is, and should almost certainly remain, the important freedom to link and preview. Even a bare national news cartel could not, after all, literally *force* its customers to buy a liberty that, as a matter of law, they already have. But a forced-arbitration system would create exactly this power. And the one thing that can drive a price higher than a cartel's monopoly price is that same cartel *plus* a government obligation to buy the cartelized product.

Second, more fundamentally, there is a risk that such a direction from Congress would send a harmful message to the arbitrator, the public, and to the market. It would surely suggest to the arbitrator (or panel) that Congress believes there is something wrong with the fact that the freedom to link and preview is currently unpriced, and that some kind of meaningful payment is expected.[78] (Recent actions in Australia and France seem to point in this direction.[79]) This implicit instruction—perhaps combined with public opinion, which would no doubt expect to see a significant payment emerge from the arbitration process—could influence the arbitrator, resulting

[77] *Compare*, *e.g.*, *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, No. 21, 2021 (amending the Australian Competition and Consumer Act 2010), §§ 52KZ *et seq.*

[78] *Compare*, *e.g.*, Letter from Authors Alliance et al. to Chair Klobuchar, Chair Cicilline, Ranking Member Lee, and Ranking Member Sensenbrenner (June 17, 2021), https://www.authorsalliance.org/wp-content/uploads/2021/06/20210617_JCPA-Letter-to-Congress.pdf (expressing concern that the proposed exemption "could be interpreted by courts to *implicitly* change the scope of copyright, expanding the exclusive rights that news publications enjoy in their material beyond what any copyright owner has ever enjoyed").

[79] *See generally* Harold Feld, *America Needs a Public Interest Approach to Solving Big Tech Harms to News*, PUBLIC KNOWLEDGE (Feb. 9, 2021), https://publicknowledge.org/america-needs-a-public-interest-approach-to-solving-big-tech-harms-to-news/ ("[Australian and French] proposals establish the principle that linking transfers value from the linked source to the linker — an unjust enrichment where the linker should pay the linked to website. This constitutes a radical change that threatens the fundamental nature of the internet as it exists today. If this principle becomes established in law, we can expect it to expand[.]").

in a hefty tax on an activity that ought to remain free. More generally, it is not at all clear that there are any principled grounds on which an arbitrator could or should draw to set a "fair" price for something that is already (and fortunately) available for free. (Imagine, by way of comparison, an arbitrator trying to set a "fair value" for the right to talk about ideas published by others, or the right to cite, or quote briefly from, books and articles!) Further complexity would be created by the need to calculate the offsetting benefit enjoyed by publishers as a result of platform investment and activity, as any fair rule would require. And, as noted above, the fair value of this benefit could offset the value of the linking-and-previewing, such that the efficient "balancing" payment might flow the other way: *i.e.*, from publishers to platforms.

Third, the arbitration would leave intact the harmful collusion, merely trusting in the power of a government price-setter to manage its effects. The formation and operation of the cartel—with all the attendant exchange of information and agreement on prices, terms, and rates—would still take place under this model. As a result, this approach would promise anticompetitive effects outside the cartel's formal bounds, and thus outside the scope of the arbitrator's control.

Fourth, and finally, compelled statutory arbitration is just another way of doing something that Congress has tried to avoid for a long time: having the government set prices based on what Robert Jackson long ago called "calculation, not . . . competition."[80] Any pre-arbitration negotiations will reflect not "free market" dynamics, or anything of the kind, but rather the looming shadow of the expected legal determination.[81] (Even less happily, the process as applied to this market seems likely to put the government in the position of having to distinguish "legitimate"

[80] Robert H. Jackson, Asst. Att'y Gen. for Antitrust, *Should the Antitrust Laws Be Revised?* 71 U.S.L.Rev. 575, 578 (1937).

[81] *See*, *e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

news providers, who can benefit from this special treatment, from others.) The core purpose of the antitrust system is the protection of a competitive market, not a price-managed one in which winners, losers, and prices are picked by the state or its designee.[82]

D. Congress Should Not Open the Door to Special-Interest Immunities.

Many of the principles at the heart of this discussion are not limited to the news industry. Today, many sets of trading partners confront digital platforms with impressive scale and power. And in some markets, some of these platforms exercise market, monopoly, or monopsony power—although it can be harder than it looks to be certain that such power exists.[83] When such power does exist, vigorous antitrust scrutiny is appropriate, just as in other markets throughout the economy. But consumers will be best served if Congress resists the urgings of market participants to create statutory monopoly cartels across the table in the hope of "leveling the playing field." Consumers, and American competitiveness, will bear the costs of that effort. And countless businesses will be turned from eager disruptors of the status quo into cozy stakeholders in it.

Today, for example, it is news publishers who are pointing to the success and scale of digital platforms, and seeking a statutory profit-share through a cartel overcharge. If their effort succeeds, other industries will surely follow. Merchants will argue for a cartel exemption to negotiate collectively with e-commerce platforms. Content creators will seek one for joint negotiations with video- or music-streaming platforms. Advertisers will seek one to negotiate

[82] Robert H. Jackson, Asst. Att'y Gen. for Antitrust, *Should the Antitrust Laws Be Revised?* 71 U.S.L.Rev. 575, 576 (1937) ("The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its true responsibility to seeing that a true competitive economy functions.").

[83] *See*, *e.g.*, *FTC v. Facebook, Inc.*, No. CV 20-3590, 2021 WL 2643627, at *12 (D.D.C. June 28, 2021) (dismissing complaint against Facebook with leave to amend for insufficient detail in allegations of monopoly power).

jointly with advertising suppliers. Publishers to negotiate with e-book platforms. App and software developers to negotiate with platforms of all kinds.[84] And so on.

At every turn, Congress will be invited to respond to digital power—in some cases amounting to true market, monopoly, or monopsony power—by creating a statutory monopoly. But an economy of cartels is an economy of higher prices, lower quality, and stifled innovation. That is no remedy for digital monopoly, which is best kept on its toes by the threats of unhappy trading partners and rapid innovation. Nor should we compromise the uniform and even-handed application of antitrust across markets and industries—"one of its greatest strengths"—by carving a patchwork of exemptions for favored players.[85] We need *more* antitrust enforcement, not less: even for businesses facing Big Tech.

III. There Are Better Alternatives.

Although Congress should decline the invitation to create a national news cartel, there is plenty that can be done to support our local news during this transitional period. First, and most importantly, Congress should provide significant additional funding—FTEs and dollars—to support the work of the DOJ Antitrust Division and the FTC Bureau of Competition. This work includes supervision of conduct and transactions in digital markets, including platform markets as well as activity within the ad tech stack. Second, to the extent that Congress is focused on harm to local news suppliers that may not make it onto the radar of the federal agencies, Congress may wish to consider supporting the antitrust capacity of State Attorneys General. Third, if Congress

[84] Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea*, American Antitrust Institute (Oct. 15, 2020), https://www.antitrustinstitute.org/work-product/new-aai-white-paper-analyzes-the-pitfalls-of-countervailing-power-as-a-response-to-rising-market-concentration/, 15 ("[W]e are currently seeing a push to allow app developers to collude and collectively bargain against Apple to countervail Apple's market power resulting from its control of its app store.").

[85] *Id.* at 16.

chooses to target local news for transitional support, this may best be done directly, in the form of a subsidy from general revenue. Fourth, publishers themselves have some scope to collaborate under existing law, as genuinely procompetitive activities are already lawful under the antitrust laws.

Of course, these measures will not wholly alleviate the rigors and pains of competition or technological transition. That is probably an impossible and undesirable goal. Those rigors and pains are the very engine of progress in a market economy, and intervention in this area should be framed with that in mind.

A. Congress Should Support Antitrust Enforcement.

The best way to protect news publishers from digital monopoly is to ensure that digital monopolists must compete on the merits, and that unlawful transactions and practices are promptly detected and prohibited. This means, above all else, reinforcing the antitrust agencies. In fact, the *most* urgent need in antitrust enforcement today—more urgent than substantive law reform, and much easier to design—is a serious infusion of resources to the agencies. The FTC Bureau of Competition and DOJ Antitrust Division have been heavily outgunned for a long time, and things are getting worse.

The FTC's website demonstrates the soaring workload of the agencies and the desperate imbalance between work and resources. In fiscal year 1979, there were 814 HSR filings,[86] while in fiscal year 2021 there were 3,644 HSR filings: more than four times as many.[87] But the staffing

[86] FTC, *Third Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976*, https://www.ftc.gov/system/files/documents/reports/3rd-report-fy-1979/3annrpt1979.pdf/, 4.

[87] FTC, Premerger Enforcement Program, https://www.ftc.gov/enforcement/premerger-notification-program (preliminary numbers). Fiscal year 2020 involved a relatively low 1,637 transactions, down from 2,089 the previous year. FTC & U.S. Dept. of Justice, *Hart-Scott-Rodino Annual Report Fiscal Year 2020*, https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf, 2.

of the agency has not just failed to keep pace: shockingly, it has *declined*. In fiscal year 1979, the agency's FTE utilization was 1,746, while by fiscal year 2020, it had fallen to 1,128: a loss of more than 35%.[88]

In addition to the urgent need for staff, the agencies need money for experts, without whom antitrust cases against sophisticated businesses often cannot be won. For example, a recent successful hospital merger litigation—of the kind that may appear, from afar, relatively straightforward when compared to novel cases in tech markets—involved no fewer than *seven* testifying experts, with the defendants retaining five to the FTC's two.[89] (The case is on appeal.) If this is the expert need for a hospital merger—a type of case in which the FTC has decades of world-leading experience and expertise—it is easy to see how enforcement targeted at novel practices in novel markets, including tech markets affecting news, urgently need serious financial backing.

Although resources are top of the list, there is also plenty of scope to sharpen the antitrust laws on some margins that matter tremendously for digital antitrust. Section 2 of the Sherman Act, the law against monopolization, needs clarification and reinforcement.[90] Section 7 of the Clayton Act, the law against anticompetitive mergers and acquisitions, needs a somewhat more flexible application reflecting its letter and spirit.[91] And the Supreme Court's *AmEx* decision has made platform cases vastly more difficult, apparently requiring plaintiffs not only to prove harms but also to disprove benefits claimed by a defendant: that, too, requires correction.[92] And so on.

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[88] https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation.

[89] *FTC v. Hackensack Meridian Health, Inc.*, Case No. 20-18140, 2021 WL 4145062, at *1–2 (D.N.J. filed Aug. 4, 2021).

[90] *See generally* Daniel Francis, *Making Sense of Monopolization*, *supra* note 1.

[91] *See generally id.* at 34; Daniel A. Crane, *Antitrust Antitextualism*, 93 Notre Dame L. Rev. 1205, 1242–45 (2021) ("[A]lthough continuing to pay lip service to the 'incipiency' standard pregnant in the language of the statute, the courts have increasingly held the government to the burden of proving probable harm to competition in the form of higher prices.").

[92] *See* Steven C. Salop et al., *Rebuilding Platform Antitrust*, *supra* note 1.

In this effort, the bills introduced by Chair Klobuchar and Ranking Member Lee represent valuable achievements: each contains much that would concretely help antitrust enforcement.[93]

B. Congress Should Support State-Level Enforcement.

Congress may reasonably be concerned that the federal agencies may not be well placed to identify or prioritize antitrust violations that affect local news publishers: for example, a series of rollup acquisitions or other pernicious practices eliminating news competition in a state far from Washington, DC, might escape the agencies' attention. Thus, Congress may wish to consider reinforcing the antitrust enforcement capacity of State Attorneys-General, with a contribution of funding grants and/or technical assistance. State AGs are often the first line of defense for consumers, but—while many offices are prominent and effective voices in antitrust enforcement—others lack sufficient funding and expertise to operate a robust antitrust enforcement program.

C. Any Support to News Publishers May Best Be Done Directly.

Finally, if Congress prefers to intervene to support local news during its transition, the cleanest and least distortionary way to do so may be to furnish a subsidy out of general revenue, possibly in the form of a kind of National Endowment for Local News modeled on the existing National Endowments for the Arts and the Humanities. Such a measure would support news publishers during the transitional period, would avoid the deadweight losses associated with monopoly, and could be specifically targeted at businesses at the heart of Congress's concerns: perhaps local or small newsrooms far from our metropolitan centers. Among other things, this

[93] Competition and Antitrust Law Enforcement Reform Act, S.R. 225, 117th Cong. (2021); Tougher Enforcement Against Monopolists Act, S.R. 2039, 117th Cong. (2021).

would avoid the wasteful and illogical prospect of subsidizing major media conglomerates from the pockets of taxpayers and consumers.

To be sure, this approach would raise challenges and concerns of its own. These include the risks of political influence and entanglement in news coverage, as well as the dangers of discouraging the necessary shift to self-sustaining digital business models. But it would avoid many of the harms that would attend a national news monopoly, and would preserve the integrity of our antitrust statutes.

D. Procompetitive Collaborations Are Already Lawful.

Finally, there is plenty of room under the antitrust laws for news publishers to help themselves, and each other. Existing antitrust law does not prevent news publishers from entering into joint ventures and other collaborations that are procompetitive overall: indeed, the antitrust agencies have issued extensive guidance on the principles that apply to such joint efforts.[94]

These principles often permit competitors to work together to generate new products and services that would not otherwise be available to the market. For example, in light of the Supreme Court's seminal decision in *BMI v. CBS*, it would likely be lawful for a group of news publishers to jointly contribute to a nonexclusive blanket IP license that would cover all their content, granting licensees much broader rights to use their content than existing law (such as fair use) would allow, and avoiding any need for collusive setting of the terms on which their own individual content would be made available.[95]

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[94] *See* FTC & U.S. Dept. of Justice, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[95] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

It also would likely be lawful for local news publishers to enter into other cost-saving ventures: for example, through joint procurement.[96] And when the effect of a merger or acquisition would be to promote competition (*e.g.*, by joining several small, struggling publishers into one capable of weathering the competitive environment), it too may be an effective and lawful means of building a business model that can compete in the modern news landscape. Any of these methods would be vastly preferable to the creation of a national news cartel. A Business Review Letter from the DOJ Antitrust Division would help the participants be confident that they were on the right side of the line.[97]

IV. Conclusion

The news supply chain, like the rest of our economy, needs competition and disruption, not monopoly and stagnation. Congress should protect our antitrust system and the competitive process that it guards.

In particular, Congress should not create a state-sanctioned national news monopoly, however superficially appealing the prospect of "leveling the playing field" might seem. Cartels are virtually always harmful, and this one seems virtually certain to be so. There is something to be said for countervailing power in theory, but in practice it is much more likely that a news cartel would be a new monopolist—loading more weight on the backs of consumers, and heavily invested in the status quo—and not a counterweight to existing power. Congress may also wish to keep in mind that, while small publishers are front-and-center in public advocacy on this issue,

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[96] See, e.g., COMPETITOR COLLABORATION GUIDELINES, supra note 94, at 14 ("Competitor collaborations may involve agreements jointly to purchase necessary inputs. Many such agreements do not raise antitrust concerns and indeed may be procompetitive. Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies.").

[97] *See* https://www.justice.gov/atr/business-reviews.

large media conglomerates hover in the background and would receive a massive windfall, at the expense of consumers, from the opportunity to lead a national cartel.

Digital monopoly, like all monopoly, deserves close scrutiny. The solution is more antitrust and more competition, not less of either. A great deal of harm could be done under the banner of "what's bad for Big Tech is good for America." Certainly, Big Tech should be made to play by the same rules that apply to the rest of the economy: but so too should their trading partners.

I am grateful for the opportunity to testify before the Subcommittee today.