Antitrust and Harm to Innovation

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Subcommittee on Competition Policy, Antitrust, and Consumer Rights

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Chairman Klobuchar, Ranking Member Lee, and Members of the Subcommittee, thank you for inviting me to testify today. I look forward to discussing with you the topic of the impact of consolidation and monopoly power on American innovation.

Innovation and the Consumer Welfare Standard

Let me begin with a few comments on the consumer welfare standard. I support the consumer welfare standard because it is the best way to properly focus antitrust laws without importing broader citizen or public interest concerns. But we should recognize that the consumer welfare standard applied in antitrust law includes more than price and output effects; it also includes quality, consumer choice, and innovation. In certain markets, such as zero-price markets, these non-price effects may be of paramount importance. In almost all markets, a combination and price and non-price effects are central to the analysis. But balancing quantitative and qualitative aspects of consumer welfare raises commensurability problems, because it is difficult to weigh and measure harms and benefits associated with intangibles such as innovation and tangibles such as price and output.[1] This creates the unfortunate tendency to discount subjective factors such as harm to innovation, especially by traditional economists. While there are continued policy debates about the merits of the consumer welfare standard, at a minimum we should agree that in applying the consumer welfare standard courts should give greater weight to quality harms, including harm to innovation.[2]

[1] Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 55-60 (2016).
[2] Hal Singer, Letter to Chairman Cicilline and Ranking Member Sensenbrenner (Mar. 30, 2020), https://judiciary.house.gov/uploadedfiles/submission_from_hal_singer.pdf ("... few if any antitrust cases have turned solely on a showing of quality harm. Instead, quality harms have typically been treated as an 'and also' category in antitrust."); Hal Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone is Concerned About*, 17 Aug Antitrust Source 1, 6 (2017) (discussing *United States v. Microsoft* as rare case of harm to innovation); Gregory Day, *Innovative Antitrust and the Patent System*, 96 Neb. L. Rev. 829, 878 (2018) (because private antitrust lawsuits must allege an antitrust injury, although numerous antitrust suits have pled harm to innovation, all private suits surviving the summary judgment stage also have all alleged a conventional harm to competition); Joshua D. Wright, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L. J. 293, 359-61 (2019) (stating that innovation is a well-accepted factor in consumer welfare analysis and citing cases involving government enforcement actions based on harm to innovation)..

Innovation and "Quality Fixing"

Second, innovation concerns raise the issue of powerful market actors engaging in what may be called "quality fixing." If harm to competition concerns both price and quality, why do we focus so much attention on price fixing but almost never discuss quality fixing? Let me offer a few examples. Why is there is so little enforcement action with respect to standard setting organizations blocking new innovations?[3] How can colleges and the NCAA openly collude with one another on quality—a product definition they call amateurism—in order to pay no salary to the labor that creates the value in college sports while paying coaches like LSU's head coach Brian Kelly $100 million salaries?[4] Why are we not more concerned about Big Tech companies working through trade associations to coordinate with one another and collude on quality, such as a diluted common privacy standard?[5] And what of the concern Senator Lee has frequently highlighted, of Google, Apple, and Amazon raising identical quality concerns to jointly block an alternative conservative social media platform.[6] Rare are the cases such as the European Commission's $1 billion fine against five European automakers for colluding with one another to not compete on quality and delay introducing clean energy innovations.[7] As these examples suggest, quality fixing should play a larger role in the analysis of antitrust harms, including collusion to forestall or undermine innovation.

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[3] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *Am. Soc'y of Mech. Eng'rs v. Hydrolevel,* 456 U.S. 556 (1982)*; see also* Makan Delrahim, Assistant Att'y Gen., *"Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law*, (Dec. 7, 2018) ("Calling your meetings a standard-setting organization, or even in fact publishing some standards necessary for interoperability, is not a free pass for coordination designed to reduce common competitive threats or forestalling innovative developments in the industry that put a legacy business model at risk.").

[4] *Nat'l Collegiate Athletic Assoc. v. Alston,* 141 S. Ct. 2141, 2167-68 (2021) (Kavanaugh, J., concurring) ("[T]he NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid… The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing."); Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 Stan. L. Pol'y Rev. 181 (2017); Michael Lewis, *Serfs of the Turf*, N.Y. Times, (Nov. 11, 2007), https://www.nytimes.com/2007/11/11/opinion/11lewis.html, ("Everyone associated with [the college football business] is getting rich except the people whose labor creates the value.").

[5] David McCabe, *Google Said it Had Successfully 'Slowed Down' European Privacy Rules, According to Lawsuit,* N.Y. Times, (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/technology/google-privacy-lawsuit.html. On collaboration between competitors, *see* DOJ/FTC, *Antitrust Guidelines on Collaborations Among Competitors,* 6 (Apr. 2000), https://www.justice.gov/atr/page/file/1098461/download, ("Competitor collaborations may harm competition and consumers by increasing the ability or incentive profitably to … reduce … quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.").

[6] Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces,* Protocol, (June 22, 2021), https://www.protocol.com/mike-lee-netchoice-antitrust; *American Antitrust: Reforms to Create Further Innovations and Opportunities*, YouTube, (June 22, 2021), https://www.youtube.com/watch?v=pToFy8BY5C4.

[7] Eur. Comm'n Press Release, *Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars* (July 8, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581. (Executive Vice-President of the Commission Margrethe Vestager stating that "Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal.").

Innovation and Nascent Competition

Third, antitrust law should be more particular about the special category of innovation involving startups. Senator Klobuchar emphasized this in her recent book, quoting Tim Wu, noting that the United States is unique for its startup economy and that we should be concerned about excessive consolidation in the U.S. economy that leads to the decline of the American startup.[8] Senator Hawley raised similar issues in his book discussing Google's practice of targeting small competitors, cloning their services, scraping their content, and repackaging it all as Google.[9]

In practice this means that we should be clear-eyed about the best way to deal with startup acquisitions. We should recognize and embrace the fact that one of the most common exit strategies for startups is to be acquired. That should be encouraged. That was true for me when I sold my startup arbitration database company to a leading Dutch publisher at the turn of the century.[10] Vertical and horizontal mergers often will result in greater efficiencies, and the consistent practice of both the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") supports that conclusion.[11] But at the same time, we should recognize the potential anticompetitive role of dominant firms in acquiring startups and the growing threat of kill zones and killer acquisitions. That is, venture capital money is often unavailable to startups that try to compete with dominant firms.[12] And if a startup does try to compete, dominant firms may seek to acquire nascent competition in order to eliminate rivals or competing product.[13] As the United States antitrust enforcers put it in June 2020, "mergers among competitors, including nascent or potential competitors, may be anticompetitive, especially 'when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales.'"[14] The DOJ's challenge of Visa's attempt to acquire fintech startup Plaid is one recent example.[15] So too are the FTC's and 48 State Attorneys General's complaints against Facebook regarding their acquisitions of Instagram and WhatsApp.[16]

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[8] Amy Klobuchar, *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age*, 220 (2021), *citing* Tim Wu, *Where New Industries Get Their Start: Rebooting the Startup Economy*, (July 16, 2019), https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-Wstate-WuT-20190716.pdf.

[9] Josh Hawley, *The Tyranny of Big Tech*, 112 (2021).

[10] See Press Release, *Kluwer Law Launches Site with Collection or Arbitration Materials*, (May 30, 2002), https://www.thefreelibrary.com/Kluwer+Law+launches+site+with+collection+of+arbitration+materials.-a090988672; Kluwer Arbitration, https://www.wolterskluwer.com/en/solutions/kluwerarbitration.

[11] Cornerstone Research, *Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies*, (2020), https://www.cornerstone.com/Publications/Reports/Trends-in-Merger-Investigations-and-Enforcement-2010-2019.pdf.

[12] Sai Krishna Kamepalli, Raghuram G. Rajan, & Luigi Zingales, *Kill Zone*, Working Paper No 2020-19, (Mar. 2020), https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202019.pdf.

[13] OECD, *Start-ups, Killer Acquisitions, and Merger Control*, 31-33 (2020), https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.

[14] Note by the United States, *Start-ups, Killer Acquisitions and Merger Control*, DAF/COMP/WD(2020)23, OECD, (June 4, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf.

[15] DOJ Press Release, *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block,* (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[16] *Substitute First Amended Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. Facebook* (Case No. 1:20-cv-03590-JEB), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf; *Complaint, New York v. Facebook* (Case No. 1:20-cv-03589), https://ag.ny.gov/sites/default/files/facebook_complaint_12.9.2020.pdf.

Mergers and Innovation Divestitures: The Agricultural Industry

Fourth, innovation is of particular concern in the context of mergers. Take the agriculture industry as an example. There has been significant consolidation in this industry, with Big Ag consolidating from six to four seed and agricultural chemical firms.[17] These mergers raised concerns that firms will be less likely to invest in research and development once rivals were removed from the market.

In the *Bayer Monsanto* merger, the Department of Justice's settlement required the merging parties to divest to BASF certain intellectual property and research capabilities, including "pipeline" R&D projects.[18] The two merging firms accounted for almost all of the genetically-modified canola, corn, cotton and soybean seeds that exhibit greater herbicide tolerance and insect resistance.[19] A structural remedy was necessary to maintain competition in emerging product lines. These divested assets included Bayer's seed treatment patents, research and development facilities, and various pipeline products. Note that the innovation concerns in this merger did not relate only to specific product lines, but also to industry-wide concerns with respect to the divesture of research and development facilities.[20]

This is analogous to the European Commission's approach of harm to innovation in the *Dow/Dupont* merger, where the Commission looked at harm to future efforts to innovate. As the European Commission put it, harm to innovation includes removing the parties' incentives to both pursue parallel R&D and bring new products to the market.[21] This theory of harm to innovation suggests that as industries become more concentrated, at a certain point increased concentration leads to a decrease in innovation.

Generally speaking, when merging firms have complementary technologies, their research and development efforts will increase following a merger, but if their technologies are substitutes, their research and development will decrease following a merger.[22] This makes sense, given that merging parties tend to reduce redundant efforts but will invest in complementary efforts that are likely to improve research and development outcomes.[23] The key takeaway is that government enforcers should take an evidence-based approach and carefully consider how a merger may alter the incentives and ability to innovate with respect to existing and future products. The result may

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[17] Koen Deconinck, *From Big Six to Big Four: A New OECD Study Sheds Light on Concentration and Competition in Seed Markets*, European Seed, (Feb. 27, 2019).
[18] DOJ Press Release, *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto,* (May 29, 2018).
[19] James M. MacDonald, *Mergers in Seeds and Agricultural Chemicals: What Happened?*, Econ. Rsch. Serv., USDA, (Feb. 15, 2019); *see also* James M. MacDonald, *Mergers and Competition in Seed and Agricultural Chemical Markets*, Econ. Rsch. Serv., USDA, (Apr. 3, 2017).
[20] *See, e.g., Competitive Impact Statement at 20, United States v. Bayer, AG* (Case No. 1:18-cv-01241) ("Because seed and trait innovations can often be applied across multiple crops, a broader seed and trait portfolio will provide the promise of higher returns on investment and increase the incentives to innovate.").
[21] Eur. Comm'n, Case M. 7932, *Dow/Dupont*, Decision C(2017), Paras. 3015-3053 https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf; *see also* Mario Todino, Geoffroy van de Walle, & Lucia Stoican, *EU Merger Control and Harm to Innovation—A Long Walk to Freedom (From the Chains of Causation)*, 64 Antitrust Bull. 11, 21 (2018).
[22] OECD Report, *Concentration in Seed Markets: Potential Effects and Policy Responses*, 100 (2018), https://www.oecd-ilibrary.org/agriculture-and-food/concentration-in-seed-markets_9789264308367-en.
[23] *Id.*

be to either prohibit a merger or require appropriate structural or behavioral remedies to ensure that a merger will not harm innovation.

The final point with respect to mergers is that government enforcers should conduct more retrospective reviews of approved mergers to confirm whether a merger resulted in less innovation.[24] One can use a variety of metrics to test this question, but an innovation retrospective should focus on more than just price or output. It could include, for example, R&D spending, patent filings, or, in the case of agriculture, registration of new seed varieties.[25]

Forestalling Innovation in the Real Estate Market

Fifth, sometimes innovation has a direct role in lowering prices or increasing output. This is because incumbents often will exert their market power to forestall higher quality or lower priced goods and services. The residential real estate market offers a quintessential example of harm to innovation that impacts price and output. The residential real estate market is dominated by a consortium of real estate cooperatives that enforce a series of mandatory rules that keep prices high and reduce innovation. The National Association of Realtors (NAR) requires real estate brokers to be association members and follow association rules in order to access the Multiple Listing Services (MLS). Those rules require home sellers to offer unconditional blanket unilateral offers of compensation buyer brokers that are completely unrelated to the services these buyer brokers provide.[26] In short, consumers do not benefit from fee transparency or price competition with respect to brokerage fees in the residential real estate market.

As a result, consumers pay 5 to 6 percent in broker commissions, despite a dramatic a rise in housing prices and a dramatic decline in the services that brokers provide. How many of us have had the experience of reviewing the closing statement when buying or selling a home and being shocked at the fees we paid to brokers for so little work? We should be shocked because the United States has some of the highest real estate brokerage fees in the developed world. The average real estate commissions in other OECD countries are drastically lower at 3.46 percent.[27] The real estate commissions paid for the sale of an average home price in the United States are between $20,000 and $24,000, compared to $14,000 for the same priced home in other countries.[28] Imagine the impact on the average American if they could purchase homes more efficiently, enhance their job mobility, and build home equity easier and earlier. Unlike the financial markets where a decline

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[24] *See, e.g.*, FTC, *Retrospective Studies by the Bureau of Economics*, https://www.ftc.gov/policy/studies/merger-retrospectives/bureau-of-economics; John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 Antitrust L. J. 619, 636 (2013).
[25] *Id.* at 174-177; Deconinck, *supra*.
[26] Roger P. Alford & Benjamin H. Harris, *Anticompetition in Buying and Selling Homes*, Regulation, (Summer 2021), https://www.cato.org/regulation/summer-2021/anticompetition-buying-selling-homes; Sophia Gilbukh, Paul Goldsmith-Pinkham, Michael Sinkinson, *How to Make the Market for Real Estate Agents More Competitive*, ProMarket, (Nov. 29, 2021), https://promarket.org/2021/11/29/real-estate-agents-seller-fees-competition-doj-unbundling/.
[27] *See* Wall St. J., *Real-Estate Agent Commissions Around the World*, https://graphics.wsj.com/table/commish_1016.
[28] The median price of a home in the United States the third quarter of 2021 is $404,700, so a 5-percent commission would result in fees of $20,235, a 6-percent commission would result in fees of $24,282, and a 3.46-percent commission would result in fees of $14,002. *See* Fed. Rsrv. Econ. Data, *Median Sales Price of Houses Sold in the United States*, (Oct. 26, 2021), https://fred.stlouisfed.org/series/MSPUS.

in commission rates corresponded with a dramatic increase in transaction volume,[29] the real estate market has seen no measurable decline in commissions or increase in volume.[30]

The increased brokerage fees are largely a result of the absence of meaningful innovation in the real estate brokerage market. Online listing services such as Zillow and Trulia have offered some innovation, providing consumers a greater role in searching for homes and lowering the labor inputs provided by real estate brokers. And online discount brokers such as Opendoor, Houwzer, Redfin and REX offer technological solutions to brokerage services, but they represent a tiny fraction of the market. None of these innovations allow consumers to buy and sell homes through online marketplaces that provide the kind of transparency, functionality, efficiency, and innovation that is commonplace in other online markets such as financial brokerage markets or the automobile resale markets. In the real estate market, there is nothing remotely like Robinhood, E-Trade, Carmax, or Carvana. Real estate innovators either are forced to abide by NAR's anticompetitive rules on buyer and seller commissions or forego the MLS system altogether and try to innovate without the critical inputs NAR withholds that are necessary to compete.

Big Tech and Exclusionary Innovation

Sixth and finally, let me briefly discuss exclusionary innovation. Innovation, including disruptive innovation, is often pro-competitive.[31] We all know that. But innovation is not an unalloyed good. Sometimes innovation has the purpose and effect of excluding competition. This is most obvious in the context of various practices of Big Tech companies. With respect to online platforms, search algorithms can be and often are designed to self-preference a platform's private label brands over superior or cheaper competing products.[32] Technologies are often interoperable with competing services to increase switching costs and create lock-in effects.[33] Data portability raises similar concerns.[34] You can freely switch cellphone carriers and keep your mobile number, but you cannot port your friend list—your so-called social graph—from an incumbent platform to a competitor.[35] Even finding who among your Facebook friends are on Twitter is difficult.[36] Technological "innovations" sometimes do not promote competition.

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[29] Nirav Prajapati, *How Technology is Transforming the Brokerage Industry*, Primid Fintech, (July 18, 2020), https://pirimidtech.com/how-technology-is-transforming-the-brokerage-industry/.
[30] Fed. Rsrv. Econ. Data, *Monthly Supply of Houses in the United States*, (Nov. 24, 2021), https://fred.stlouisfed.org/series/MSACSR.
[31] Roger P. Alford, *The Role of Antitrust in Promoting Innovation*, (Feb. 23, 2018), https://www.justice.gov/opa/speech/file/1038596/download.
[32] OECD, *Abuse of Dominance in Digital Markets*, 54-55 (2020), https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.
[33] Maurice Stucke & Allen Grunes, *Big Data and Competition Policy* 159 (2016).
[34] OECD, *Data Portability, Interoperability and Digital Platform Competition*, 14-19 (2021), https://www.oecd.org/daf/competition/data-portability-interoperability-and-digital-platform-competition-2021.pdf.
[35] Luigi Zingales & Guy Rolnik, *A Way to Own Your Social-Media Data*, N.Y. Times, (June 30, 2017), https://www.nytimes.com/2017/06/30/opinion/social-data-google-facebook-europe.html; Joshua S. Gans, Stephen P. King, & Graeme Woodbridge, *Numbers to the People: Regulation, Ownership and Local Number Portability*, (2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=223189.
[36] Anthony Tareh, *How to Find Facebook Friends on Twitter*, Inquirer, (Apr. 28, 2021), https://technology.inquirer.net/109306/how-to-find-facebook-friends-on-twitter.

Big Tech frequently introduces "innovations" to degrade the quality of competing products and services. Let me offer a concrete example based on my work with the state of Texas. As alleged in the multistate antitrust complaint against Google that Texas is leading, Google uses its power in the online digital advertising market to force publishers to use Google's exchange, which charges extremely high transaction fees.[37] A $100,000 stock trade will cost you a few dollars in exchange fees paid to the NYSE. But a $100,000 ad campaign will cost you $20,000 in fees paid to Google's exchange. As a result of these kinds of fees, Google earned revenue of $65 billion last quarter—over $700 million per day—almost all of it from digital advertising.[38] Obviously, Google's supra-competitive fees hurts publisher revenue, so they developed some code, called header bidding, to allow them to route their inventory to multiple exchanges that could do the trades for much less. Google did not welcome this innovation, so they introduced their own technological changes to exclude competition. Google changed the data fields so publishers could no longer determine if they performed better using one exchange or another. They introduced Accelerated Mobile Pages, (or "AMP") which is that carousel of news stories you see when you do a search in Chrome on your phone. Amazingly, AMP was designed without using JavaScript so that it would be incompatible with header bidding coding. Google also throttled the load time of non-AMP ads with artificial one-second delays. Google's own employees struggled with "how to [publicly] justify [Google] making something slower."[39] And Google imposed artificial line-item caps so that publishers could make fewer granular bids and win fewer auctions if they used another exchange, somewhat like the now illegal quoting convention in the stock market of avoiding odd-eighths in bid/ask quotes.[40] In short, the complaint alleges that Google introduced numerous "innovations" for the express purpose and result of excluding competition and making it more difficult for its own consumers to increase their revenue using competing exchanges.

Big Tech's exclusionary innovations raise difficult questions for Congress and antitrust enforcers. Last year Justice Thomas remarked that "the principle legal difficulty that surrounds digital platforms" is "that applying old doctrines to new digital platforms is rarely straightforward."[41] Precisely how we should analyze exclusionary innovation by Big Tech companies remains uncertain. But at a minimum we should recognize its occurrence with increasing frequency and think hard about possible solutions.

One certainly has the impression that there is a growing bipartisan consensus that Big Tech companies have abused their market power and that something must be done about it.[42] That is

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[37] *Third Amended Complaint (Redacted)* at 133-35, 139-141, *Texas v. Google*, (Case No. 1:21-md-03010-PKC) (Nov. 12, 2021), https://www.texasattorneygeneral.gov/sites/default/files/global/images/TAC%20-%20Redacted%20Version%20(public).pdf ("TAC Complaint"); *Second Amended Complaint (Unredacted)* at 88-92, , *Texas v. Google*, (Case No. 1:21-md-03010-PKC) (Oct. 22, 2021), https://www.texasattorneygeneral.gov/sites/default/files/global/images/Second%20Amended%20Complaint%20Filed.pdf ("SAC Complaint").

[38] *Alphabet Announces Third Quarter 2021 Results*, https://abc.xyz/investor/static/pdf/2021Q3_alphabet_earnings_release.pdf (revenues for the quarter ending in September 30, 2021 were $65,118,000,000 with $53,130,000,000 coming from Google advertising).

[39] *SAC Complaint* at 91.

[40] *United States v. Alex. Brown & Sons, Inc.*, 963 F.Supp. 235 (S.D.N.Y. 1997); DOJ Press Release, *Justice Department Charges 24 Major NASDAQ Securities Firms With Fixing Transaction Costs for Investors*, (July 17, 1996), https://www.justice.gov/archive/opa/pr/1996/July96/343-at.html.

[41] *Biden v. Knight First Amendment Institute at Columbia University*, 141 S.Ct. 1220, 1221 (2021).

[42] Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 Emory L. J. ___ (2022) (forthcoming).

reflected in lawsuits filed and prosecuted by the Trump and Biden Administrations and almost every State Attorney General, as well as the bipartisan legislation introduced in the Senate and the House. The pending litigation relies on existing antitrust and consumer protection laws to address Big Tech's abuse of power. The proposed legislation goes further, recognizing that some of the most intractable problems relating to Big Tech's harm to competition cannot readily be resolved through existing antitrust laws.

Critics may deride these developments as enforcers bending the knee to antitrust populism.[43] But the groundswell of bipartisan concern belies such easy accusations. One need not be a progressive or a "hipster antitrust"[44] advocate to be deeply concerned about Big Tech's abuse of power. As Senator Lee recently noted in a speech to the right-leaning tech trade group NetChoice, "Conservative anger at Big Tech is real, and it's entirely justified…. No business would treat its customers with the prejudice and disdain shown towards conservatives by Big Tech unless that business were confident that it was the only game in town…. The only people who still argue that there's no reason to be concerned about competition in Big Tech are the ones paid by Big Tech to say so."[45]

I look forward to taking your questions. Thank you.

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[43] Trace Mitchell, *The Dangers of the Populist Antitrust Movement*, The Dispatch, (Apr. 23, 2021), https://thedispatch.com/p/the-dangers-of-the-populist-antitrust; Anna Edgerton & David McLaughlin, *GOP Faction Wields Antitrust Threats, Echoing Trump's Populism,* Bloomberg, (Apr. 21, 2021), https://www.bnnbloomberg.ca/gop-faction-wields-antitrust-threats-echoing-trump-s-populism-1.1593086;

[44] Joshua D. Wright, Elyse Dorsey, Jonathan Klick, Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L. J. 293 (2019).

[45] *See also* Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces*, (June 22, 2021), https://www.protocol.com/mike-lee-netchoice-antitrust; *American Antitrust: Reforms to Create Further Innovations and Opportunities*, at 5:30, 7:30, 9:50, YOUTUBE (June 22, 2021), https://www.youtube.com/watch?v=pToFy8BY5C4.