

Chairman Cicilline, Ranking Member Buck, and Members of the Subcommittee and the full Committee, thank you for the opportunity to give this testimony.

I appear before you today as someone who has devoted her career to figuring out how to broaden economy opportunity in this country. That pursuit has led me many places: the Federal Trade Commission as a recent college graduate, a corporate law firm, and the Consumer Financial Protection Bureau. What those experiences have shown is that until we address corporate power at its core, the rest of us are just playing for economic scraps. And currently, there is no greater power that threatens our livelihoods and civil liberties than the Big Tech platforms.

The basic issue is best put by none other than Facebook CEO Mark Zuckerberg. “In a lot of ways Facebook is more like a government than a traditional company,” Mr. Zuckerberg said. “We have this large community of people, and more than other technology companies we’re really setting policies.”<sup>1</sup>

The technology that we have today is extraordinary. Each of us carries a camera-enabled super-computer in our pocket, which connects to a grid of billions of people with whom we can talk, do business, tell stories, or organize in civic or political groups. My generation has grown up watching these technologies flourish. The most important technologies underpinning the digital era, like semiconductors, networking equipment, personal computing, are the result of decades of research and engineering across public and private institutions, as well as coherent competition policy which ensured that this technology would never be captured by a monopolist.

And yet, today, that is exactly what has happened. We have allowed the digital technology that should be a tool of liberty to become instead a vehicle for profit-driven control and deception. By refusing to use our traditional anti-monopoly policies, we have allowed a few tech barons to choose who gets to participate in politics, pick winners and losers in the economy, and sell services enabling scams, counterfeiting and racial discrimination.

There are many reasons to be concerned with the overwhelming power of large technology platforms, and monopolies in general. In this testimony, I’m going to try to cover many of them. But the core problem is simple and gets to what Mr. Zuckerberg noted. Facebook and the other tech platforms are not just corporations. They run critical 21st century infrastructure and make their own rules. We cannot allow tech monopolists to wield this power, with the ability to censor or destroy. Under your leadership, Congress can restore the government’s long legacy of standing up to corporate power that threatens our American way of life. It is time to break them up.

## **I. Defining dominance and harm**

As the subcommittee’s extraordinary 16-month investigation and report revealed last year, Big Tech corporations—Facebook, Google, Amazon, and Apple—have and abuse their extreme market power. Facebook and Google, which together control key communications networks and the

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<sup>1</sup> Franklin Foer, *Facebook’s War on Free Will*, GUARDIAN, Sept. 19, 2017, <https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will>.

digital advertising industry, conduct unwanted surveillance of their users to maximize advertising revenue and depreciate the value of newsgathering.<sup>2</sup> Amazon runs the infrastructure for modern commerce, and engages in a host of anti-competitive practices, such as predatory pricing, leveraging its dominance from one market into another, self-preferencing its own products, tying its services to extract more money from those who must use services, and weaponizing counterfeit products.<sup>3</sup> Apple dominates the mobile operating system market, and uses it to demand exorbitant fees and commissions from developers for software distribution.<sup>4</sup>

It is impossible to include an exhaustive list of the harms this dominance causes because they are so large and so intertwined with much of our economic activity. Fortunately, this subcommittee is well-aware of the remarkable scale and scope of these institutions, so I will just mention a few.

Let's start with entrepreneurship, the backbone of Silicon Valley. There has been a sharp decline in business formation since the early 1980s, but venture capitalists have started using a specific term in the technology industry. They call industry segments dominated by a Big Tech monopolist a "kill zone," and research shows there is less investment and innovation in areas adjacent to large firms such as Google and Amazon.<sup>5</sup> But it's not just in the technology sector. Big Tech undermines ordinary small businesses that are the glue of our communities. From 2000 to 2015, the economy lost more than 108,000 local, independent retail businesses, a drop of 40 percent when measured relative to population.<sup>6</sup> In a 2016 survey of more than 3,000 independent business owners, 70 percent noted that competition from Amazon was their biggest challenge.<sup>7</sup> These firms also have significant tax advantages from cities and states, which they then use to compete with smaller local firms.<sup>8</sup>

These monopolists also tend to reduce product quality over time as competition declines. For instance, surveys routinely show that Americans do not like corporations collecting their private data, and when it was competing with MySpace and other social networks, Facebook promised that it would not engage in excessive collection and misuse of user data. At one point, the firm even allowed users to vote on its terms of service. As soon as Facebook gained market power,

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<sup>2</sup> Matt Stoller, Sarah Miller & Zephyr Teachout, *Addressing Facebook and Google's Harms Through a Regulated Competition Approach* (Am. Econ. Liberties Project, Working Paper Series on Corporate Power No. 2, Apr. 2020), [https://www.economicliberties.us/wp-content/uploads/2020/04/Working-Paper-Series-on-Corporate-Power\\_2.pdf](https://www.economicliberties.us/wp-content/uploads/2020/04/Working-Paper-Series-on-Corporate-Power_2.pdf)

<sup>3</sup> Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017), [https://www.yalelawjournal.org/pdf/e.710.Khan.805\\_zuvfyeh.pdf](https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf)

<sup>4</sup> MAJORITY STAFF OF HOUSE SUBCOMM. ON ANTITRUST, COM. & ADMIN. LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020) [hereinafter *House Digital Markets Report*], [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf).

<sup>5</sup> Noah Smith, *Big Tech Sets up a 'Kill Zone' for Industry Upstarts*, BLOOMBERG, Nov. 7, 2018, <https://www.bloomberg.com/opinion/articles/2018-11-07/big-tech-sets-up-a-kill-zone-for-industry-upstarts?sref=q0qR8k34>; Noah Smith, *America's Startup Scene is Looking Anemic*, BLOOMBERG, June 7, 2018, <https://www.bloomberg.com/opinion/articles/2018-06-07/america-s-startup-scene-is-looking-anemic?sref=q0qR8k34>; Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 Strategic Mgmt. J. 2618 (2018), <https://onlinelibrary.wiley.com/doi/abs/10.1002/smj.2932>.

<sup>6</sup> Pat Garofalo, *Close to Home: How the Power of Facebook and Google Affects Local Communities* (Am. Econ. Liberties Project, Working Paper Series of Corporate Power No. 6, Aug. 2020), [https://www.economicliberties.us/wp-content/uploads/2020/08/Working-Paper-Series-on-Corporate-Power\\_6.pdf](https://www.economicliberties.us/wp-content/uploads/2020/08/Working-Paper-Series-on-Corporate-Power_6.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

however, it backtracked on its promises to both users and media partners that had installed Like and Share buttons under the premise that Facebook would not collect user data. When users could no longer switch, Facebook downgraded the quality of the product. It has subsequently begun collecting more data and inserting more ads into its social networks. Google, similarly, is directing more and more traffic to its own properties and paid search results, as well as disguising which search results are paid and which are organic.<sup>9</sup> This can cause massive harm, such as directing addicts to poor quality recovering facilities.<sup>10</sup> Google, Amazon and Facebook regularly enable scams and the sale and trafficking in counterfeit items.<sup>11</sup>

Collectively, these firms control the livelihoods of many American small business owners and workers. They enable the rampant spread of misinformation, which has compromised our elections and the safety of our schools, communities, and even members of Congress. And they have almost entirely destroyed a core American institution- a free and vibrant press in the form of local newspapers.<sup>12</sup>

## II. Dominance not the result of skill, but exploitation of public policy gaps

The dominant tech firms did not achieve this market power only through ingenuity or business acumen. Rather, they exploited gaps in public policy, including the weakening of merger law and decades of lax monopolization enforcement, to build dominance by aggressively acquiring other businesses and employing anticompetitive tactics to squash competitors. Google has spent over \$20 billion to buy more than 145 companies.<sup>13</sup> One of these companies was DoubleClick, which enabled Google to control the infrastructure between advertisers and publishers in the display ad market.<sup>14</sup> Facebook acquired Instagram and WhatsApp, eliminating their most serious competitors. In total, Facebook has acquired over 80 companies that triggered public reporting since its inception. Amazon has acquired at least 100 companies.<sup>15</sup> And Apple's own CEO has told the media they acquire a new company every two to three weeks.<sup>16</sup> Not a single acquisition was

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<sup>9</sup> Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 Stan. Tech. L. Rev. 55, 61-63 (2020) (observing that the percentage of Google advertising revenue that went to Google properties increased from 64% in 2007 to 85% in 2020).

<sup>10</sup> Cat Ferguson, *Searching for Help*, VERGE, Sept. 7, 2017, <https://www.theverge.com/2017/9/7/16257412/rehabs-near-me-google-search-scam-florida-treatment-centers>

<sup>11</sup> Matt Stoller, *Absentee Ownership: How Amazon, Facebook, and Google Ruin Commerce Without Noticing*, BIG (July 28, 2020), <https://mattstoller.substack.com/p/absentee-ownership-how-amazon-facebook>.

<sup>12</sup> *House Digital Markets Report*, *supra* note 4, at 57-73.

<sup>13</sup> AUSTL. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: PRELIMINARY REPORT 27 (DEC. 2018), <https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>.

<sup>14</sup> Stoller, Miller & Teachout, *supra* note 2, at 16.

<sup>15</sup> Pat Garofalo, Matt Stoller & Olivia Webb, *Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy* 45-46 (Am. Econ. Liberties Project, Working Paper Series on Corporate Power No. 5, July 2020), [https://www.economicliberties.us/wp-content/uploads/2020/07/Working-Paper-Series-on-Corporate-Power\\_5-FINAL.pdf](https://www.economicliberties.us/wp-content/uploads/2020/07/Working-Paper-Series-on-Corporate-Power_5-FINAL.pdf).

<sup>16</sup> Lauren Feiner, *Apple Buys a Company Every Few Weeks, says CEO Tim Cook*, CNBC, May 6, 2019, <https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html>.

challenged by enforcers, and the Department of Justice did not bring a major Section 2 monopolization claim from 1998 until 2020.<sup>17</sup>

This unquestionable dominance led this subcommittee to take on the important work of launching the most thorough investigation into monopoly power in 50 years. The subcommittee's report and recommendations made clear that a traditional, regulated competition approach, including structural separations, is necessary to rein in these corporations and restore freedom in the digital markets.

### III. Our history of regulated competition

The United States has a tradition of using a regulated competition approach to limit corporate power and protect democracy.<sup>18</sup> Congress has been especially attentive to corporations that play an infrastructure role and have integrated into adjacent markets that rely on their networks. By 1900, for example, the dominant railroad corporations had acquired coal mining businesses.<sup>19</sup> After beginning to limit rail for coal operators whom they did not own, Congress passed the Hepburn Act, which prevented corporations from managing transportation and ownership of the companies using such transport.<sup>20</sup>

Over the course of the 20<sup>th</sup> century, policymakers have used laws, regulations, or antitrust suits to break up aviation, banks, television networks, bank holding companies, electric utilities, data processing/telecommunications and telephone systems, often to eliminate conflicts of interest, encouraging resiliency, block concentrations of power and control, and promote diversity. The result was the most robust economy in global history, with high wages, high technology, and high business formation.<sup>21</sup>

This approach has been especially important in communications industries, from the founding of the Post Office to telegraph regulation to the antitrust suits against AT&T in the 20<sup>th</sup> century that opened our telecommunications apparatus to both local control and competition.<sup>22</sup> In the 1970s, the government sued AT&T, at the time a telecommunications giant operating local exchange

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<sup>17</sup> Krista Brown et al., *The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New, Structuralist Approach*, AM. ECON. LIBERTIES PROJECT 30 (Jan. 2021), [https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn\\_12.12.pdf](https://www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf).

<sup>18</sup> GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 (2009).

<sup>19</sup> Comment, *The Judicial History of the Anthracite Monopoly*, 41 YALE L.J. 439, 439 (1932).

<sup>20</sup> Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1037-38 (2019), <https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>.

<sup>21</sup> See also 12 U.S.C. §§ 24, 378 (2012) (Glass-Steagall Act of 1933 for investment and commercial banks); *id.* at 1044-46 (describing the Federal Communications Commission's Financial Interest and Syndication Rules for television networks); *id.* at 1047 (describing FCC's Computer II inquiry for telecommunications systems and data processing); *United States v. AT&T Co.*, 552 F. Supp. 131, 187 (D.D.C. 1982) (telephone systems); Chris Sagers, *#LOLNothingMatters*, 63 ANTITRUST BULL. 7, 28 n. 116 (2018) ("The McKellar-Black Air Mail Act of 1934, 48 Stat. 933 (1934), required that firms receiving federal air mail contracts could not be vertically integrated into either manufacturing or other lines of business."); MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019).

<sup>22</sup> RICHARD R. JOHN, *NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS* (2010).

calls, long distance calls, and telephone equipment. They eventually reached a settlement that required AT&T to divest Bell Operating Companies that ran local exchanges.<sup>23</sup> Though many speculated about the feasibility of breaking up such a large company, the divestiture arguably led to, “competition in the telecom sector and a burst of technological progress” as John Kwoka and Tommaso Valetti write.<sup>24</sup> The most common result of break-ups of monopolies, in other words, is likely innovation.

#### IV. Why break-ups are necessary

As noted in the above examples, at the core of a regulated competition approach are structural separations or break ups. There are several reasons to break up dominant Big Tech platforms:

- *Structural problems demand structural solutions.* Conflicts of interest are baked into the platforms’ business models. Facebook both features content from news publishers and competes with them for ad revenue. Google operates the world’s dominant internet search platform, but also makes products that appear as search results. Amazon features products from independent business owners on its Marketplace, but also sells its own private label products on the same platform. Apple runs a software distribution for third-party developers on their mobile operating system but also develops their own applications. The subcommittee’s report fully details how these platforms leverage their power on their primary platform to operate in adjacent business lines and compete with their users.<sup>25</sup> The only way to address these conflicts is to limit the platforms’ operation in certain markets.
- *Regulatory tools fail to address or can worsen the problem of entrenched market power.* Facebook, Google, Amazon, and Apple are all simply too big to regulate currently. Lax antitrust enforcement has allowed them to grow without interference, and they know they offer critical infrastructure and can effectively ignore regulation. For example, when the European Union ordered Google to “cease and desist” certain abusive conduct with its Google Shopping and Google Android products and provide the regulator with a remedy to stop the behavior, Google continued the conduct and submitted a remedy that did not alter market dynamics in any meaningful way.<sup>26</sup> Similarly, European privacy regulations launched to great fanfare ended up entrenching market dominance of Google and Facebook.<sup>27</sup>

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<sup>23</sup> Khan, *supra* note 18, at 1050.

<sup>24</sup> John Kwoka & Tommaso Valetti, *Scrambled Eggs and Paralyzed Policy: Breaking up Consummated Mergers and Dominant Firms* 27 (working paper, Dec. 14, 2020) (“[T]here is widespread agreement that the break up resulted in greater competition in the telecom sector and a burst of technological progress.”), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3736613](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613).

<sup>25</sup> See generally *House Digital Markets Report*; Nicholas Thompson, *Tim Wu Explains Why He Thinks Facebook Should Be Broken Up*, WIRED, July 5, 2019, <https://www.wired.com/story/tim-wu-explains-why-facebook-broken-up/>.

<sup>26</sup> Kwoka & Valetti, *supra* note 22, at 12-14; Natasha Lomas, *Google’s ‘No Choice’ Screen on Android isn’t Working, Says Ecosia – Querying EU’s Approach to Antitrust Enforcement*, TECHCRUNCH, July 30, 2020, <https://techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecosia-querying-the-eus-approach-to-antitrust-enforcement/>.

<sup>27</sup> Nick Kostov & Sam Schechner, *GDPR Has Been a Boon for Google and Facebook*, WALL ST. J., June 17, 2019, <https://www.wsj.com/articles/gdpr-has-been-a-boon-for-google-and-facebook-11560789219>.

- *Ease of administration.* While information asymmetries exist between every large corporation and regulators, the dominant digital platforms present unique challenges. The platforms and their business practices change rapidly, unlike fixed commodities.<sup>28</sup> They can alter the terms of service and easily create rationales to justify any change.<sup>29</sup> Indeed, federal agencies have a poor track record of effectively monitoring digital companies for anti-competitive practices. For example, when the Department of Justice imposed a firewall on Google after their acquisition of a travel search platform, no public information was released on whether Google breached the firewall and proceeded to use data against rivals.<sup>30</sup> A year after the consent decree expired, Google shut down the platform, rendering the firewall completely obsolete. Structural remedies offer an ex-ante way to address the root cause of a platform's dominance without costly, and ultimately ineffective, supervisory efforts.

Some claim that break ups are infeasible and unduly burdensome, but available evidence does not support that claim.<sup>31</sup> In fact, there is reason to believe that break ups, particularly in the case of undoing previously consummated mergers, might be easier to accomplish with a tech platform than some other commodity-based industries.<sup>32</sup> Furthermore, companies commonly initiate self-imposed break ups. One study examining corporate activity in the 1990s found that over 1600 divestitures occurred, amounting to roughly two per year.<sup>33</sup> They are widely recognized as a tool to streamline operations at many of the largest global corporations. Digital platforms similarly will adjust with changed business models after structural separations.

## V. The Need for Regulation and Antitrust Law Updates

Structural separation will not entirely tame the problem of dominance. First, Facebook, Google, Amazon, and Apple will still be very large corporations with substantial power to recreate their dominance, or to continue choosing who gets to participate in our commerce or politics. Dominant firms should be banned from discriminating against other firms. The same principle making railroads common carriers in the 1880s, should apply to the dominant platforms after structural separation. They should give market players equal access to their platforms and not pick winners or losers. Part of preserving this equal access will involve allowing users to communicate between different platforms and have access to their data in case they want to switch platforms.

Second, competition is not an unvarnished virtue. While it is possible to compete with better products and services, it is also possible to compete with lower standards for product quality or wages, or for more unwanted surveillance and monetization of fraudulent or defamatory content. Privacy rules such as purpose limitation of data, rules against deceptive search engines, do not

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<sup>28</sup> Kwoka & Valletti, *supra* note 22, at 15.

<sup>29</sup> *Id.*

<sup>30</sup> Khan, *supra* note 18, at 1075-76.

<sup>31</sup> Kwoka & Valletti, *supra* note 22.

<sup>32</sup> *Id.* at 40.

<sup>33</sup> Belén Villalonga & Anita McGahan, *The Choice Among Acquisitions, Alliances, and Divestitures*, 26 STRATEGIC MGMT. J. 1183 (2005).

track rules, labor and safety standards for workers, anti-counterfeiting measures, and/or bans on targeted advertising can recreate a high-trust, high-wage economy with strong business formation.

Finally, structural separation must be completed with changes to antitrust law to restore mid-20<sup>th</sup> century monopolization and anti-merger statutes. Breaking up firms is relatively useless if they can simply recombine. Bright lines rules against mergers based on size or market power, as well as specific bans on market conduct for dominant firms, would enable competition to work as a discipline against dominant firms. Similarly, banning arbitration agreements and easier methods to enable class action lawsuits would once again grant competitors, workers and customers access to the courts to seek redress.

It is important to reemphasize that this problem is fundamentally political, not technical. Regulation alone cannot stop the harms the digital platforms are causing, because it will not erode the political power that has allowed these firms to challenge the rule of law itself. Facebook is taking out full-page ads in *The New York Times* inviting regulation because its executives know that the true threat to their business model is a break-up. In fact, when the Australian government moved forward with a regulation forcing them to compensate news outlets for their content, far from welcoming the measure with open arms, Facebook announced it would ban all news. They are retaliating to scare other governmental bodies like this Congress from imposing even more aggressive remedies. Only structural separation can limit their power to enable effective regulation.

## **VI. Conclusion**

The concentrated power of Facebook, Google, Amazon, and Apple present systemic risks to our economy and democracy. When questioned about these impacts, executives from these platforms mislead. They lie to the media. They lie to their own customers. They try to divert attention away from detrimental impacts they are causing by making grand philanthropic gestures. They will give millions of dollars in the name of fighting for racial justice,<sup>34</sup> but refuse to acknowledge how their platforms are the biggest threat to civil rights of our time. If we do not act quickly, the harms identified in your report will further erode the economic liberty of workers and small business owners. I encourage the subcommittee to continue to reassert your Congressional authority over monopolists who seek to govern commerce and key parts of society in your place.

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<sup>34</sup> *We Stand Against Racial Injustice That Denies Safety and Opportunity to Black Communities*, GOOGLE.ORG, <https://www.google.org/inclusion/racial-justice/>.