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## The Bipartisan Consensus on Big Tech

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## THE BIPARTISAN CONSENSUS ON BIG TECH

*Roger P. Alford\**

### ABSTRACT

*This Article contends that there is an emergent bipartisan consensus that Big Tech has grown too powerful and that action must be taken to address its abuse of power. That action takes the form of a variety of legislative proposals to enhance government enforcement powers, reform the merger laws, and address self-preferencing, data portability, and interoperability. Litigation efforts focus on Facebook and Google's abuse of monopoly power, particularly with respect to Facebook's elimination of competition through acquisitions and Google's abuse of monopoly power in search and display advertising. While we are in the midst of one of the most divisive and polarizing periods in our nation's history, there is a strong bipartisan consensus on the perils of Big Tech and a desperate need to do something about it.*

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## INTRODUCTION

We are in the midst of an antitrust moment. After decades of lax antitrust enforcement against monopolies, the Trump administration, in its waning days, filed two of the most important monopoly cases in history against Google and Facebook.<sup>1</sup> Shortly thereafter, almost every state attorney general joined several complaints against Google and Facebook for abuse of their monopoly power in search, online advertising, and social media.<sup>2</sup>

The Biden administration has appointed antitrust leaders that promise to be aggressive enforcers against monopoly abuse in the technology sector.<sup>3</sup> President Biden also signed an Executive Order that recognized “a whole-of-government approach . . . to address overconcentration, monopolization, and unfair competition in the American economy.”<sup>4</sup> Among the principal concerns of that Executive Order is the “small number of dominant internet platforms [that] use their power to exclude market entrants, to extract monopoly profits,

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<sup>1</sup> See *infra* notes 186, 193–97 and accompanying text.

<sup>2</sup> See *infra* notes 187–89, 201–22 and accompanying text.

<sup>3</sup> See Jim Tankersley & Cecilia Kang, *Biden's Antitrust Team Signals a Big Swing at Corporate Titans*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html>.

<sup>4</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

and to gather intimate personal information that they can exploit for their own advantage.”<sup>5</sup>

Democratic and Republican leaders in Congress have introduced a number of far-reaching legislative proposals to address Big Tech’s monopoly practices.<sup>6</sup> Senators Amy Klobuchar and Josh Hawley have both published hefty books on the history of antitrust law and the risks we face today from concentrated power in the technology industry.<sup>7</sup> Progressive liberals, like Senator Elizabeth Warren, run presidential campaigns on a platform of breaking up Big Tech companies.<sup>8</sup> Meanwhile, traditional conservatives, like Senator Mike Lee, remain steadfastly loyal to traditional antitrust principles but apply those principles against digital platforms. Senator Lee, in a keynote speech to NetChoice, a technology lobbying group, said that “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.”<sup>9</sup> He also remarked that “the idea that Big Tech operates in a functioning free market can no longer be taken as a serious position.”<sup>10</sup>

Even Justice Clarence Thomas has weighed in, expressing concern over the “unprecedented . . . concentrated control of . . . speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately-owned information infrastructure such as digital platforms.”<sup>11</sup> Such musings suggest that there is little doubt that cases challenging Big Tech’s concentrated power will eventually find their way to the Supreme Court.

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<sup>5</sup> *Id.*

<sup>6</sup> See *infra* notes 93–178 and accompanying text.

<sup>7</sup> See generally AMY KLOBUCHAR, *ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE* (2021) (discussing remedies to the growing monopolization in the United States with a focus on Big Tech companies); JOSH HAWLEY, *THE TYRANNY OF BIG TECH* (2021) (discussing the history of monopolies, how Big Tech became the “natural successor” of the corporate barons of the Gilded Age, and how to return to the “common man’s republic”).

<sup>8</sup> See Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html>.

<sup>9</sup> NetChoice, *American Antitrust: Reforms to Create Further Innovation and Opportunity*, YOUTUBE (June 22, 2021) <https://www.youtube.com/watch?v=pToFy8BY5C4>.

<sup>10</sup> *Id.*; see also Ben Brody, *Republican Senator Slams Conservative Tech Lobbyists to Their Faces*, PROTOCOL (June 22, 2021), <https://www.protocol.com/mike-lee-netchoice-antitrust> (discussing Senator Mike Lee’s concerns about Big Tech).

<sup>11</sup> *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring); see also *Google LLC v. Oracle Am., Inc.* 141 S. Ct. 1183, 1218 (2021) (Thomas, J., dissenting) (“If the majority is worried about monopolization, it ought to consider whether Google is the greater threat.”).

Concerns about Big Tech are not confined to elites. The concerns among average Americans manifest themselves in different ways to different groups.<sup>12</sup> Traditional conservatives are deeply concerned about Big Tech's ideological bias and ability to silence conservative voices.<sup>13</sup> Liberals are troubled by Big Tech's misinformation and political power to sway elections.<sup>14</sup> Parents are gravely concerned about Big Tech's influence on their children, which heightens their addiction, isolation, and depression.<sup>15</sup> Consumers are troubled by the invasion of their privacy and the leveraging of their personal data to line the pockets of Silicon Valley giants earning hundreds of billions in advertising revenue.<sup>16</sup> Small town newspapers and their readers are concerned about news deserts and the death of traditional journalism.<sup>17</sup> Community leaders lament the demise of traditional retail stores and the jobs they sustained.<sup>18</sup> Almost everyone recognizes that Big Tech coarsens our public discourse and promotes political division.<sup>19</sup> Regardless of one's race, gender, geography, or political persuasion,

<sup>12</sup> See Megan Brennan, *Views of Big Tech Worsen; Public Wants More Regulation*, GALLUP (Feb. 18, 2021), <https://news.gallup.com/poll/329666/views-big-tech-worsen-public-wants-regulation.aspx>.

<sup>13</sup> See REPUBLICAN STAFF OF HOUSE COMM. ON THE JUDICIARY, 116TH CONG., *REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES* 1, 4–5, 27 (Oct. 6, 2020), (arguing that Big Tech companies such as Facebook, Amazon, Google, YouTube, and Twitter are biased against conservatives and that Congress needs to take action to prevent these companies from engaging in censorship, discrimination, and content moderation); Senator Mike Lee, *Sen. Mike Lee: Big Tech Companies Falsely Claim No Bias Against Conservatives—They May Be Violating the Law*, FOX NEWS (Oct. 30, 2020), <https://www.foxnews.com/opinion/big-tech-bias-conservatives-sen-mike-lee> (arguing that censorship and content moderation on social media sites such as Facebook and Twitter have unfairly targeted and biased conservative ideologies); Chris Talgo, *Big Tech's Assault on Free Speech*, THE HILL (Aug. 4, 2020), <https://thehill.com/opinion/technology/510367-big-techs-assault-on-free-speech> (discussing how major Big Tech companies censor conservative ideologies through “shadow bans” or filtered searches favoring “left” views).

<sup>14</sup> See SALLY HUBBARD, *MONOPOLIES SUCK: 7 WAYS BIG CORPORATIONS RULE YOUR LIFE AND HOW TO TAKE BACK CONTROL* 134–52 (2020).

<sup>15</sup> See THE SOCIAL DILEMMA (Exposure Labs, Argent Pictures & The Space Program 2020).

<sup>16</sup> See *Public Opinion on Privacy*, EPIC (Apr. 27, 2021), <https://epic.org/privacy/survey/>.

<sup>17</sup> See generally PENELOPE MUSE ABERNATHY, *NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE?* 1, 9, 11–18 (2020) (discussing the harmful impact due to the rapid decline in local news and suggesting potential solutions).

<sup>18</sup> See generally Stacy Mitchell, *The Impact of Chain Stores on Community*, INST. FOR LOCAL SELF-RELIANCE (Apr. 18, 2000), <https://ilsr.org/impact-chain-stores-community/> (discussing the impact of chain retail stores on communities and how some community leaders have adopted policies that prioritize the development of local independent businesses); Philip Mattered, *Fighting Chain Stores Past and Present: The Roots of the Campaign Against Wal-Mart*, CORP. RSCH. PROJECT (Aug. 2005), <https://www.corp-research.org/e-letter/fighting-chains-stores-past-and-present> (discussing the anti-chain movement); Brandi Calero-Holmes, *What It Really Costs When Walmart Comes to Town*, BUS. NEWS DAILY (Dec. 1, 2021), <https://www.businessnewsdaily.com/2405-real-cost-walmart.html> (explaining that large retail chains like Wal-Mart pay lower wages for their employees and drive out local businesses, which negatively affects local economies).

<sup>19</sup> See Clara Hendrickson & William A. Galston, *Big Tech Threats: Making Sense of the Backlash Against Online Platforms*, BROOKINGS (May 28, 2019), <https://www.brookings.edu/research/big-tech-threats-making-sense-of-the-backlash-against-online-platforms/>; Cory Doctorow, *How Big Tech Monopolies Distort Our Public Discourse*, ELEC. FRONTIER FOUND. (May 28, 2020), <https://www.eff.org/deeplinks/2020/05/how-big-tech>

the vast majority of Americans believe that Big Tech companies are simply too big and too powerful.<sup>20</sup>

Despite these grave misgivings about Big Tech, the irony is that we all use their products and services on a daily basis.<sup>21</sup> We even recognize that Big Tech provides significant value to the average consumer.<sup>22</sup> In other words, our relationship with Big Tech is complicated. One can take a variety of perspectives on Big Tech that may appear to be contradictory. But a nuanced approach recognizes that one can have complex opinions about Big Tech. As Senator Lee put it, “Big Tech isn’t always bad, but neither is it always good.”<sup>23</sup>

One could say that we have cognitive dissonance about Big Tech. Under cognitive dissonance theory, when we engage in behavior that is inconsistent with our beliefs, we experience an unpleasant psychological tension—dissonance—which we are motivated to reduce.<sup>24</sup> Our behavior in using Big Tech’s products and services is inconsistent with our knowledge about Big Tech’s abuse of power, and therefore we have complex feelings of dissonance when we use monopoly products that we know are useful at one level but also harmful to us, our children, and society. The problem is that Big Tech’s monopoly power makes it difficult to meaningfully choose alternatives to avoid the cognitive dissonance.<sup>25</sup>

This Article outlines four views about Big Tech and suggests that one can be in agreement with all four superficially contradictory propositions. One can recognize and affirm the following: (1) Big Tech provides valuable services; (2) Big Tech is too powerful; (3) current antitrust laws are inadequate to address Big Tech’s power; and (4) Big Tech is abusing its monopoly power and violating existing antitrust laws. In fact, I would suggest that, regardless of political

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monopolies-distort-our-public-discourse.

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See, e.g., Kashmir Hill, *I Tried to Live Without the Tech Giants. It Was Impossible.*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html> (finding that it was impossible to operate on a daily basis without relying on and using Big Tech products).

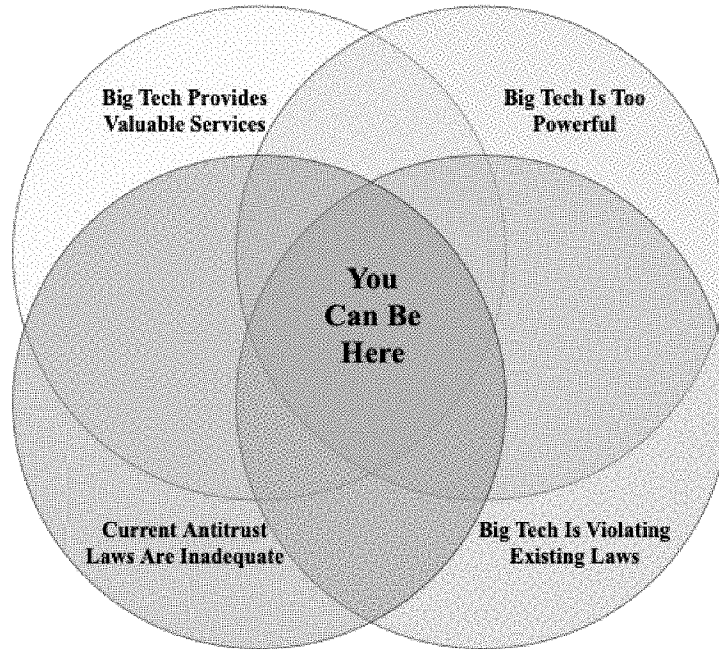
<sup>22</sup> See Christopher Koopman, *CGO Tech Poll*, CTR. FOR GROWTH & OPPORTUNITY (Nov. 5, 2021), <https://www.thecgo.org/research/tech-poll/>.

<sup>23</sup> NetChoice, *supra* note 9.

<sup>24</sup> LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2–3, 9–11 (Stanford Univ. Press 1962).

<sup>25</sup> Doctorow, *supra* note 19.

persuasion, many of us maintain precisely those four propositions simultaneously. We are in the middle of the Venn diagram below.



We are in the midst of one of the most polarizing and divisive periods in our nation’s history—a division that Big Tech exacerbates and exploits to its advantage.<sup>26</sup> Yet, “there is one issue the left and right can agree on”: the perils of Big Tech and the desperate need to do something about it.<sup>27</sup> The perspective that Big Tech is a force that is uniquely deleterious to a healthy body politic is a view shared by conservatives and liberals alike.<sup>28</sup>

Part I of this Article recognizes the valuable services that Big Tech provides. Part II summarizes surveys demonstrating the public perception that Big Tech companies are too powerful. Part III explores, in some detail, the numerous bipartisan congressional proposals that have been introduced in recent months,

<sup>26</sup> *Id.* (discussing how Big Tech companies create bigger divides in public discourse through surveillance and data collection to manipulate users).

<sup>27</sup> Matt Stoller, *The One Issue the Left and Right Can Agree On*, NEW REPUBLIC (Dec. 31, 2018), <https://newrepublic.com/article/152680/one-issue-left-right-can-agree>.

<sup>28</sup> Kara Frederick, *Combating Big Tech’s Totalitarianism: A Road Map*, HERITAGE FOUND. (Feb. 7, 2022), <https://www.heritage.org/technology/report/combating-big-techs-totalitarianism-road-map>; KLOBUCHAR, *supra* note 7, at 315–16; TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 21–22 (2018).

recognizing that antitrust laws are inadequate to deal with the abuse of Big Tech's power. Finally, Part IV outlines the numerous lawsuits that federal and state antitrust enforcers have brought in the past year, reflecting the bipartisan consensus that Google and Facebook are violating existing antitrust laws. Given the variety and complexity of proposed solutions, this Article focuses on the legislative and litigation efforts to combat Big Tech's abuse of power.

### I. BIG TECH PROVIDES VALUABLE SERVICES

There is no doubt that Big Tech companies, including Facebook, Amazon, Google, Apple, and even Twitter, provide valuable services to consumers around the world. Big Tech companies connect people, provide ready access to information, create platforms for small businesses and consumers to buy and sell goods, and offer tools to simplify our lives in innumerable ways.<sup>29</sup> Big Tech has also served an invaluable role in accelerating globalization and economic development.<sup>30</sup> The general public recognizes that these companies provide goods and services that improve their lives on a regular basis.<sup>31</sup>

Big Tech products and services are ubiquitous. As of 2018, eighty-one percent of Americans have a Google account, seventy-six percent have an Amazon account, seventy percent have a Facebook account, and sixty-four percent own an Apple product.<sup>32</sup> Nearly all Americans rely on Big Tech every day to optimize their lives. According to a survey by the conservative nonprofit Center for Growth and Opportunity,<sup>33</sup> the average American recognizes the benefits of technological innovation.<sup>34</sup> Another survey showed that sixty percent of Americans somewhat or completely agree that their professional lives have

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<sup>29</sup> See Om Malik, *Apple, Google, Amazon, and the Advantages of Bigness*, NEW YORKER (Aug. 9, 2016) <https://www.newyorker.com/business/currency/apple-google-amazon-and-the-advantages-of-bigness>.

<sup>30</sup> See, e.g., *In Poor Countries Technology Can Make Big Improvements to Education*, ECONOMIST (Nov. 17, 2018), <https://www.economist.com/international/2018/11/17/in-poor-countries-technology-can-make-big-improvements-to-education> (discussing the benefits of technology on education in developing countries).

<sup>31</sup> See Koopman, *supra* note 22.

<sup>32</sup> Samuel Chamberlain, *New Poll Details Voters' Distrust of Big Tech, Big Government*, N.Y. POST (June 26, 2021), <https://nypost.com/2021/06/26/new-poll-details-voters-distrust-of-big-tech-big-government/>; Steve Liesman, *America Loves Its Apple. Poll Finds that the Average Household Owns More than Two Apple Products*, CNBC (Oct. 10, 2017, 9:49 AM), <https://www.cnbc.com/2017/10/09/the-average-american-household-owns-more-than-two-apple-products.html>.

<sup>33</sup> The Center for Growth and Opportunity is funded by the Charles Koch Foundation. Mark Hand, *New Center Stokes Fears that Utah University is Becoming 'Koch U' of the West*, THINKPROGRESS (May 1, 2018), <https://archive.thinkprogress.org/koch-funded-academics-join-utah-state-university-center-de592401959e/>. For information on the Charles Koch Foundation, see *About Us*, CHARLES KOCH FOUND., <https://charleskochfoundation.org/about-us/> (last visited Apr. 27, 2022).

<sup>34</sup> See Koopman, *supra* note 22 (finding that, on average, most Americans believe that their personal lives and professional lives have been improved by technological innovation).



been improved by technological innovation.<sup>35</sup> That percentage increased to seventy-six percent when asked whether their personal lives have been improved by technological innovation.<sup>36</sup> Regardless of party affiliation, the vast majority of consumers recognize that technological innovations have improved their personal and professional lives.<sup>37</sup>

Even Big Tech's harshest critics recognize that Amazon, Apple, Facebook, and Google "play an important role in our economy and society as the underlying infrastructure for the exchange of communications, information, and goods and services."<sup>38</sup> The ubiquity of Big Tech's presence in our lives underscores its potential to impact the lives of every American, for good and for ill.<sup>39</sup> As Representative David Cicilline argued, "Any single action by one of these companies can affect hundreds of millions of us in profound and lasting ways."<sup>40</sup>

Trade associations funded by Big Tech have seized upon the benefits we enjoy from technological innovation to argue that reforms are unnecessary and counterproductive. For example, NetChoice argues that proposed legislation is "Anti-American" because it would "take away connection, innovation, and opportunity, hurting Americans in all areas of their lives."<sup>41</sup> According to NetChoice, "Amazon, Apple, Facebook, and Google . . . deliver more and more benefits to consumers. And despite rhetoric to the contrary, none engages in unlawful conduct."<sup>42</sup> Of course, it is a non sequitur to say that because these companies provide valuable services, their conduct is beyond reproach. Nor does it follow that the status quo is the most conducive environment to promote further innovation.

One can recognize that Big Tech companies provide valuable services while also recognizing that they are too powerful and in need of reform. No one would

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<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> MAJORITY STAFF OF H. SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 1, 10 (2020) [hereinafter INVESTIGATION OF COMPETITION].

<sup>39</sup> David McCabe & Cecilia Kang, *Lawmakers from Both Sides Take Aim at Big Tech Executives*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/live/2020/07/29/technology/tech-ceos-hearing-testimony>.

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

<sup>41</sup> NETCHOICE, NEW ANTITRUST BILLS ARE ANTI-AMERICAN 1 (2021), [https://netchoice.org/wp-content/uploads/2021/06/FINAL-NetChoice\\_Mocks\\_6.17.21.pdf](https://netchoice.org/wp-content/uploads/2021/06/FINAL-NetChoice_Mocks_6.17.21.pdf).

<sup>42</sup> NETCHOICE, AGGRESSIVE COMPETITION IN DIGITAL MARKETS: PROOF OUR ANTITRUST LAWS WORK 41 (2020), <https://netchoice.org/wp-content/uploads/2020/09/NetChoice-Response-to-House-Antitrust-Hearing.pdf>.

suggest, for example, that by producing, refining, and marketing oil that was in high demand at the turn of the twentieth century, Standard Oil was therefore absolved of its misconduct.<sup>43</sup> As Ida Tarbell noted in her history of Standard Oil, “the whole world was crying” for Standard Oil products. According to Tarbell, “Petroleum came at the moment when the value and necessity of a new, cheap light [oil] was recogni[z]ed everywhere.”<sup>44</sup> But despite the insatiable demand for cheap oil, the Supreme Court ordered the breakup of Standard Oil in 1911.<sup>45</sup> Monopolists can satisfy intense consumer demand and abuse their market power at the same time.

## II. BIG TECH IS TOO POWERFUL

There is a broad consensus in the United States that Big Tech companies are too powerful and abuse their market power.<sup>46</sup> As one commentator noted, “The concern that Big Tech has too much power is a theme that resounds strongly across the political spectrum.”<sup>47</sup> These concerns are shared by lawmakers from both political parties who agree that these companies wield too much power and limit competition.<sup>48</sup> Digital markets are highly concentrated, with many markets—social media, search advertising, display advertising, app stores—being controlled by one or two competitors.<sup>49</sup> The laundry list of anticompetitive practices continues to grow, as these companies consistently use their dominant positions to control multiple segments of various technology markets.<sup>50</sup>

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<sup>43</sup> See IDA M. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* 285 (Peter Smith 1963) (1904).

<sup>44</sup> *Id.*

<sup>45</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 81–82 (1911).

<sup>46</sup> See Chris Raymond, *Americans Say Nation's Big Tech Companies Have Too Much Power*, CONSUMER REP. (Sept. 24, 2020), <https://www.consumerreports.org/consumer-protection/big-tech-companies-have-too-much-power-americans-say/> (finding that three in four Americans “worry about the power wielded by today’s biggest tech platforms”); *Consumers Feel Big Tech Companies Have Too Much Power and Require More Stringent Regulation*, BUS. WIRE (June 29, 2021, 10:23 AM), <https://www.businesswire.com/news/home/20210629005791/en/Consumers-Feel-Big-Tech-Companies-Have-Too-Much-Power-and-Require-More-Stringent-Regulation> (“Nearly two-thirds of consumers in the United States feel big tech companies wield too much power . . .”).

<sup>47</sup> Gavin Bridge, *Republicans, Democrats United in Concern over Big Tech: Survey*, VARIETY (Aug. 4, 2021), <https://variety.com/vip/republicans-democrats-united-in-concern-over-big-tech-survey-1235033853/> (finding that, in response to the question, “Do you think Big Tech has too much power over consumers?”, seventy percent of respondents said yes—seventy-seven percent of Republicans, sixty-nine percent of Independents, and sixty-seven percent of Democrats).

<sup>48</sup> Alex Sherman, *U.S. Lawmakers Agree Big Tech Has Too Much Power, but What to Do About It Remains a Mystery*, CNBC, <https://www.cnbc.com/2020/07/30/us-lawmakers-agree-big-tech-has-too-much-power-remedies-unclear.html> (July 30, 2020, 2:29 PM).

<sup>49</sup> See INVESTIGATION OF COMPETITION, *supra* note 38, at 11.

<sup>50</sup> *Id.*

Likewise, consumers recognize the value of Big Tech products, but they also have grave misgivings about the companies themselves. One poll indicated that seventy percent of Americans believe technology companies are too big.<sup>51</sup> Americans' trust in Big Tech has declined significantly, especially among Republicans and Independents.<sup>52</sup> Just two years ago, Americans' impressions of Big Tech was a net positive of six points from Republicans, ten points from Independents, and twenty from Democrats.<sup>53</sup> Today, the same poll produced results of net negative forty-five for Republicans, negative eleven for Independents, and positive nineteen for Democrats.<sup>54</sup> Other polls have found that the majority of Americans across the political spectrum think that the government should increase regulation of Big Tech companies.<sup>55</sup>

Moreover, on key issues, concerns about Big Tech do not break down on partisan lines. A recent Ipsos poll found that sixty-seven percent of Republicans and sixty-five percent of Democrats support "[b]reaking up large, monopolistic, technology companies."<sup>56</sup> Seventy-six percent of Democrats and seventy-five percent of Republicans support "[m]aking it harder for large companies to establish monopolies through acquiring competitor companies."<sup>57</sup> In other words, the overwhelming majority of Americans across the political spectrum support measures to prevent Big Tech companies from acquiring or maintaining their monopoly status.

The reputations of Big Tech companies have plummeted in recent years. Five years ago, Google was ranked among the top ten U.S. companies.<sup>58</sup> Today, it no longer ranks in the top fifty.<sup>59</sup> In fact, according to Axios/Harris, no

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<sup>51</sup> Ashley Gold, *Conservatives Aim to Cool GOP's Newfound Antitrust Fervor*, AXIOS (July 29, 2020), <https://www.axios.com/conservatives-aim-to-cool-gops-newfound-antitrust-fervor-32aa023a-6601-4201-8002-a7cce6d84444.html>.

<sup>52</sup> See Brennan, *supra* note 12.

<sup>53</sup> *Id.*

<sup>54</sup> See *id.*

<sup>55</sup> *Id.*; Emily A. Vogels, *56% of Americans Support More Regulation of Major Technology Companies*, PEW RSCH. CTR. (July 20, 2021), <https://www.pewresearch.org/fact-tank/2021/07/20/56-of-americans-support-more-regulation-of-major-technology-companies/>.

<sup>56</sup> *What Tech Executives Should Know in Today's Polarized Society*, IPSOS (Feb. 14, 2022), <https://www.ipsos.com/en-us/knowledge/society/what-tech-executives-should-know-in-todays-polarized-society>.

<sup>57</sup> *Id.*

<sup>58</sup> See Alanna Petroff, *The 10 Most Valuable Brands of 2016*, CNN BUS. (June 7, 2016, 8:49 PM), <https://money.cnn.com/gallery/news/companies/2016/06/07/google-most-valuable-brands/index.html>.

<sup>59</sup> Sara Fischer & Danielle Alberti, *A Divided Nation Flocks to Partisan Brands*, AXIOS (May 13, 2021), <https://www.axios.com/brands-politics-patagonia-trump-mypillow-4391077e-f74e-4b97-a509-384730349aae.html>; Sara Fischer & Scott Rosenberg, *Big Tech's Reputation Takes a Pandemic Plunge*, AXIOS (May 13, 2021), <https://www.axios.com/tech-firms-reputation-pandemic-plunge-78685c5f-7238-491c-b955-70e98083852d.html>.

company's reputation has fallen further than Google's in the past year, falling thirty-six places.<sup>60</sup> Google has received particularly low marks regarding its reputation for ethics and citizenship.<sup>61</sup> Even worse are Facebook and Twitter, which rank near the very bottom of the Axios/Harris poll of the reputation of technology companies.<sup>62</sup> Of the Big Tech companies, respondents identified only one company—Amazon—as having an excellent reputation.<sup>63</sup>

Americans are deeply skeptical about Big Tech's role with respect to privacy. According to Pew Research Center, four out of five Americans say they have little or no control over the data collected about them by technology companies and that the potential risks outweigh the benefits when it comes to technology companies collecting personal data.<sup>64</sup>

As for Big Tech's role in politics, almost three out of four Americans state that “they are not too or not at all confident in technology companies to prevent misuses of their platforms to influence the 2020 presidential election.”<sup>65</sup> Seventy-three percent of Americans agree that “it's likely that social media sites intentionally censor political viewpoints they find objectionable,” while sixty-six percent have “not too much or no confidence” in technology companies labeling such posts “as inaccurate or misleading.”<sup>66</sup>

Given that the vast majority of Americans have expressed concern about the Big Tech's abuse of their power, there is an emerging recognition that something drastic must be done. Public concern about Big Tech translates into political momentum to address the problem. The impetus for reform comes in two forms: legislation and litigation. Notably absent in the current political environment is the traditional answer that these monopolies are fragile or that Big Tech markets are competitive.

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<sup>60</sup> AXIOS & THE HARRIS POLL, 2021 AXIOS HARRIS POLL 100, at 14 (2021), <https://theharrispoll.com/axios-harrispoll-100/>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Brooke Auxier & Lee Raine, *Key Takeaways on Americans' Views About Privacy, Surveillance and Data Sharing*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/fact-tank/2019/11/15/key-takeaways-on-americans-views-about-privacy-surveillance-and-data-sharing/>.

<sup>65</sup> Brooke Auxier, *How Americans See U.S. Tech Companies as Government Scrutiny Increases*, PEW RSCH. CTR. (Oct. 27, 2020), <https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/>.

<sup>66</sup> *Id.*

### III. CURRENT LAWS ARE INADEQUATE TO CURB BIG TECH

In recent years, the U.S. Congress has taken a particular interest in addressing the power of Big Tech companies such as Amazon, Apple, Facebook, and Google.<sup>67</sup> Both Democrats and Republicans agree that Big Tech companies are too powerful, that they abuse that power to harm competition, and that stronger oversight of Big Tech companies is essential.<sup>68</sup>

Under the Biden administration, antitrust enforcement is a key priority and leaders from the progressive wing of the Democratic party are now in positions of leadership. The choice of Tim Wu as Special Assistant to the President for Technology and Competition Policy,<sup>69</sup> Lina Khan as the Federal Trade Commission (FTC) chair,<sup>70</sup> and Jonathan Kanter as the Assistant Attorney General for Antitrust at the Department of Justice (DOJ)<sup>71</sup> suggests that antitrust leadership under the Biden administration will be far more aggressive than antitrust leadership under previous recent Democratic administrations. In addition, Congress has aggressive leadership in Senator Amy Klobuchar, Chair of the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust, and Consumer Rights, as well as Representative David Cicilline, Chair of the House Judiciary Committee's Antitrust Subcommittee.<sup>72</sup> These executive and congressional leaders portend an aggressive, neo-Brandeisian antitrust agenda in the coming years that is deeply skeptical of Big Tech.

Likewise, many Republicans have taken an approach of favoring stricter enforcement.<sup>73</sup> This is in contrast to a traditionally cautious Republican approach on antitrust enforcement and longstanding Republican opposition to

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<sup>67</sup> See INVESTIGATION OF COMPETITION, *supra* note 38, at 11.

<sup>68</sup> See Brennan, *supra* note 12.

<sup>69</sup> Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html>.

<sup>70</sup> Cecilia Kang, *Biden Nominates Lina Khan, A Vocal Critic of Big Tech, to the F.T.C.*, N.Y. TIMES (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/business/lina-khan-ftc.html>.

<sup>71</sup> Ankush Khadori, *It Took Forever to Get Confirmed. Now All He Has to Do Is Fix All of Antitrust Law*, POLITICO (Dec. 14, 2021), <https://www.politico.com/news/magazine/2021/12/14/antitrust-enforcement-obstacles-kanter-justice-department-524187>.

<sup>72</sup> See Ben Brody, *The Senate is Ready to Take on Big Tech Competition Now*, PROTOCOL (Oct. 14, 2021), <https://www.protocol.com/policy/senate-antitrust-bill>; Cristiano Lima, *Why 2022 Could be a Watershed Year for Tech Regulation*, WASH. POST (Jan. 3, 2022, 8:55 AM), <https://www.washingtonpost.com/politics/2022/01/03/why-2022-could-be-watershed-year-tech-regulation/>; Leah Nylen, *The New Rules of Monopoly*, POLITICO (Dec. 27, 2021, 4:30 AM), <https://www.politico.com/news/2021/12/27/monopoly-antitrust-new-rules-tech-525161>. See generally KLOBUCHAR, *supra* note 7 (discussing the history of antitrust in the United States and recommending ways to improve competition enforcement).

<sup>73</sup> Nylen, *supra* note 72.

increased government regulation.<sup>74</sup> Republican antitrust leadership in Congress, particularly by Representative Ken Buck, Ranking Member of the House Judiciary Committee's Antitrust Subcommittee, Senator Mike Lee, Ranking Member of the Senate Judiciary Committee's Subcommittee on Competition Policy, Antitrust, and Consumer Rights, and Senator Josh Hawley, a leading conservative critic of Big Tech, has scrambled the traditional antitrust policy positions on Capitol Hill.<sup>75</sup> Although several coalitions with deep pocket donors (particularly Big Tech donors) have attempted to counter this trend,<sup>76</sup> the bipartisan effort to curb Big Tech continues to rise.<sup>77</sup>

Republicans and Democrats have found agreement in supporting certain types of antitrust action, with Republicans scrutinizing potential anti-conservative censorship, Democrats expressing concern over Big Tech's failure to curtail hate speech and misinformation, and both Republicans and Democrats being deeply suspicious of technology companies' size and power.<sup>78</sup> Several congressional committees have taken action to bring the greater oversight of Big Tech to the forefront of their antitrust agenda.

Recently, the House Judiciary Antitrust Subcommittee, led by Representative Jerrold Nadler, Chairman of the Committee on the Judiciary, completed a sixteen-month investigation of the market dominance of Big Tech companies and released a document with recommendations that totaled over 400 pages.<sup>79</sup> Inside the report, Representative Cicilline stated the following:

[C]ompanies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons . . . . These firms have too much power, and that power must be reined in and subject to

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<sup>74</sup> Brenan, *supra* note 12.

<sup>75</sup> See Nysten, *supra* note 72; Brody, *supra* note 72; Maggie Miller, *Hawley Introduces Legislation Targeting Amazon, Google Antitrust Concerns*, THE HILL (Apr. 19, 2021, 6:00 AM), <https://thehill.com/policy/technology/548930-hawley-introduces-legislation-targeting-amazon-google-antitrust-concerns>; Nancy Scola, *The Congressman Who Doesn't Use Google*, POLITICO (Dec. 20, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/12/20/ken-buck-congressman-google-525282>; JOSH HAWLEY, THE TYRANNY OF BIG TECH (2021).

<sup>76</sup> See *Find Out Which Groups Get Big Tech Funding*, TECH TRANSPARENCY PROJECT (Aug. 10, 2021), <https://www.techtransparencyproject.org/articles/find-out-which-groups-get-big-tech-funding>.

<sup>77</sup> Nysten, *supra* note 72.

<sup>78</sup> Brenan, *supra* note 12; Tal Axelrod, *Views of Big Tech Firms Worsen Over Past 18 Months: Poll*, THE HILL (Feb. 18, 2021, 9:22 AM), <https://thehill.com/policy/technology/539367-views-of-big-tech-firms-worsen-over-past-18-months-poll>.

<sup>79</sup> See generally Press Release, House Comm. on Judiciary, Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted by Monopoly Power (Oct. 6, 2020) (available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429>) (investigating state of digital economy with recommendations for reform).

appropriate oversight and enforcement. Our economy and democracy are at stake.<sup>80</sup>

In response, several Republican members on the committee, led by Congressman Ken Buck, released “The Third Way.”<sup>81</sup> Congressman Buck’s approach reflects the views of many Republicans, historically skeptical of changing the antitrust laws but increasingly open to the idea after detailed investigations of Big Tech’s abuse of power.<sup>82</sup> Although the Republican minority report disagrees with some recommendations made in the majority report, it highlights the bipartisan consensus that Congress must address Big Tech’s abuse of power.<sup>83</sup> It stated that these companies’ “behaviors are the fruit of Big Tech’s poisonous and monopolistic tree. . . . [W]e agree that we can and must address the challenges posed by Big Tech’s monopolistic control of the digital economy.”<sup>84</sup>

The House Antitrust Subcommittee has held several hearings to address Big Tech anticompetitive conduct, notably including testimony from the CEOs of Amazon, Apple, Google and Facebook.<sup>85</sup> Likewise in the Senate, Senators Klobuchar and Lee have conducted numerous hearings involving Big Tech’s abuse of power.<sup>86</sup> The tenor of these hearings reflects strong bipartisan hostility

<sup>80</sup> INVESTIGATION OF COMPETITION, *supra* note 38, at 6–7.

<sup>81</sup> KEN BUCK, THE THIRD WAY 7 (2020), [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Buck%20Report.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf).

<sup>82</sup> Gold, *supra* note 51.

<sup>83</sup> BUCK, *supra* note 81, at 2 (“Since June 2019, the Chairman has delivered on his promise to conduct a bipartisan, top-to-bottom review of the anticompetitive behavior in the technology marketplace, including examining the monopolistic business practices of tech’s titans—Apple, Amazon, Google, and Facebook. We write this response to join Chairman Cicilline and the majority staff on certain recommendations, offer modifications to some recommendations, and argue against the wisdom of proceeding on a few recommendations.”).

<sup>84</sup> *Id.* at 6–7.

<sup>85</sup> See *Online Platforms and Market Power, Part 1: The Free and Diverse Press*, H. COMM. ON THE JUDICIARY (June 11, 2019, 6:00 PM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2260>; *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship*, H. COMM. ON THE JUDICIARY (July 16, 2019, 6:00 PM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2258>; *Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition*, H. COMM. ON THE JUDICIARY (Sept. 12, 2019, 1:00 PM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2294>; *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies*, H. COMM. ON THE JUDICIARY (Nov. 13, 2019, 7:00 PM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2287>; *Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy*, H. COMM. ON THE JUDICIARY (Jan. 17, 2020, 10:00 AM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2386>; *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google*, H. COMM. ON THE JUDICIARY (July 29, 2020, 12:00 PM), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113>.

<sup>86</sup> *Subcommittee on Competition Policy, Antitrust, and Consumer Rights*, COMM. ON JUDICIARY, <https://www.judiciary.senate.gov/about/subcommittees/subcommittee-on-antitrust-competition-policy-and->

toward Big Tech's business practices, suggesting widespread political support for more aggressive legislative action.<sup>87</sup>

In the wake of these legislative reports and hearings, the House and Senate antitrust leaders have introduced several bills to strengthen the antitrust laws to address Big Tech's abuse of power.<sup>88</sup> Many of these bills have significant Democratic and Republican support.<sup>89</sup> Based on the reports, hearings, and legislative proposals in Congress, there is now clear bipartisan agreement among many congressional leaders that companies like Apple, Amazon, Google, and Facebook have engaged in anticompetitive conduct that necessitates further legislative action.<sup>90</sup> Both political parties frequently frame Big Tech as having a "monopolization" of the marketplace.<sup>91</sup>

The essence of these concerns is that Big Tech companies have market power that they abuse through anticompetitive conduct that discourages new entrants, diminishes quality, increases prices, reduces output, and stifles innovation. As President Biden stated in an Executive Order to promote competition, "The American information technology sector has long been an engine of innovation and growth, but today a small number of dominant internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage."<sup>92</sup>

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consumer-rights (last visited Apr. 27, 2022).

<sup>87</sup> Anna Edgerton, *Unlikely Senate Alliance of Amy Klobuchar, Mike Lee Paints a Bull's-Eye on Big Tech*, SEATTLE TIMES, <https://www.seattletimes.com/business/technology/unlikely-senate-alliance-of-klobuchar-lee-paints-a-bulls-eye-on-big-tech/> (May 17, 2021, 6:38 PM); see also Cecilia Kang & David McCabe, *Antitrust Overhaul Passes Its Final Tests. Now, the Hard Parts*, N.Y. TIMES, <https://www.nytimes.com/2021/06/24/technology/antitrust-overhaul-congress.html> (June 29, 2021) (discussing difficulties in the House and Senate to secure final passage of antitrust bills).

<sup>88</sup> JAY B. SYKES, CONG. RSCH. SERV., R46875, THE BIG TECH ANTITRUST BILLS 2, 8, 11, 14 (2021).

<sup>89</sup> Ryan Tracy & John McKinnon, *Antitrust Tech Bills Gain Bipartisan Momentum in Senate*, WALL ST. J. (Nov. 25, 2021, 5:30 AM), <https://www.wsj.com/articles/antitrust-tech-bills-gain-bipartisan-momentum-in-senate-11637836202>.

<sup>90</sup> See Press Release, Ken Buck, Rep., House of Rep., Representative Buck Pens Antitrust Report that Presents a "Third Way" to Take on Big Tech (Oct. 6, 2020) (available at <https://buck.house.gov/media-center/press-releases/rep-buck-pens-antitrust-report-presents-third-way-take-big-tech>); Christopher Mims, *Republicans and Democrats Find a Point of Agreement: Big Tech Is Too Powerful*, WALL ST. J., <https://www.wsj.com/articles/republicans-and-democrats-find-a-point-of-agreement-big-tech-is-too-powerful-11596118625> (July 30, 2020, 10:49 AM).

<sup>91</sup> BUCK, *supra* note 81, at 3.

<sup>92</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).



### A. Stronger Antitrust Enforcement

The first legislative proposal enjoying strong bipartisan support aims to provide more resources for stronger antitrust enforcement.<sup>93</sup> In the House, the Merger Filing Fee Modernization Act increases merger fees paid to enforcement agencies for merger filings, with the goal of then distributing more resources to the FTC and DOJ.<sup>94</sup> This bill, pending a full House vote, serves as companion legislation to a portion of the Senate U.S. Innovation and Competition Act, which also includes this proposal and has passed the Senate.<sup>95</sup> Co-sponsored by Chairwoman Klobuchar and Senator Grassley, the bill includes changes to pre-merger notifications, increases filing fees for large mergers, and reduces the fees for smaller mergers.<sup>96</sup>

Reforms to the merger filing fees are long overdue. The merger filing-fee structure has not been modified since 2001.<sup>97</sup> Consequently, “midsize deals provide a disproportionate amount of the funding, but large deals (more than \$5 billion) trigger a disproportionate percentage of antitrust investigation.”<sup>98</sup> Further, the legislation is attractive because it will significantly increase enforcement agency resources without negatively impacting American taxpayers.<sup>99</sup> Such a proposal is among the least controversial proposals in the package of antitrust legislative reforms.

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<sup>93</sup> Cecilia Kang & David McCabe, *House Lawmakers Are Considering Six Bills Aimed at Big Tech*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/technology/big-tech-antitrust-bills.html>.

<sup>94</sup> Adam Kovacevich, *Regulating Big Tech: Should Congress Pass the Most Sweeping Antitrust Bills in Generations? | Pro/Con*, PHILA. INQUIRER (July 1, 2021), <https://www.inquirer.com/news/congress-antitrust-big-tech-mary-gay-scanlon-20210701.html>; Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021, 3:49 PM), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/>; Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms that Could Reshape Amazon, Apple, Facebook and Google*, CNBC, <https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html> (Dec. 13, 2021, 1:35 PM).

<sup>95</sup> Thomas Franck, *Senate Passes \$250 Billion Bipartisan Tech and Manufacturing Bill Aimed at Countering China*, CNBC, <https://www.cnbc.com/2021/06/08/senate-passes-bipartisan-tech-and-manufacturing-bill-aimed-at-china.html> (June 9, 2021, 11:13 AM); Ben Brody, *Bipartisan Merger Fee Bill Heads to Senate Floor*, PROTOCOL (May 13, 2021), [protocol.com/merger-fee-senate](https://protocol.com/merger-fee-senate).

<sup>96</sup> Merger Filing Fee Modernization Act of 2021, S. 228, 117th Cong. (“Ordered to be reported without amendment favorably.”).

<sup>97</sup> See Press Release, S. Comm. on the Judiciary, Grassley, Klobuchar Bill to Ensure Antitrust Authorities Have Resources to Protect Consumers Unanimously Passes Out of Committee (May 13, 2021) (available at <https://www.judiciary.senate.gov/press/rep/releases/grassley-klobuchar-bill-to-ensure-antitrust-authorities-have-resources-to-protect-consumers-unanimously-passes-out-of-committee>).

<sup>98</sup> Michael Kades, *The State of U.S. Federal Antitrust Enforcement*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 17, 2019), <https://equitablegrowth.org/research-paper/the-state-of-u-s-federal-antitrust-enforcement/?longform=true>.

<sup>99</sup> Press Release, S. Comm. on the Judiciary, *supra* note 97.

Closely related to the merger bill is the State Antitrust Enforcement Venue Act, which would strengthen state enforcement of federal antitrust laws.<sup>100</sup> The bill has broad bipartisan support, clearing the House Judiciary Committee by a vote of thirty-four to seven,<sup>101</sup> and the Senate Judiciary Committee by an overwhelming voice vote.<sup>102</sup> The bill would grant state attorneys general the same power as federal enforcers to choose the venue for pursuing antitrust litigation without the risk of transfer and consolidation pursuant to 28 U.S.C. § 1407.<sup>103</sup> The National Association of Attorneys General (NAAG) endorsed the bill with a letter signed by fifty-two state and territory attorneys general expressing “strong support” for passing the legislation “as soon as possible so that our citizens can benefit from efficient, effective, and timely adjudication of antitrust actions.”<sup>104</sup>

The problems with the existing laws are readily apparent, with a multidistrict panel in *Texas v. Google* recently granting Google’s request to transfer and consolidate the complaint of the state attorneys general with private antitrust cases after a federal district court already had rejected Google’s motion to transfer the case pursuant to 28 U.S.C. § 1404.<sup>105</sup> The multidistrict panel completely ignored the severe delays that would result from such consolidation and the sovereign interests at stake in the litigation.<sup>106</sup> The proposed venue

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<sup>100</sup> State Antitrust Enforcement Venue Act of 2021, H.R. 3460, S.1787, 117th Cong. (2021) (aiming to strengthen state enforcement by “prevent[ing] the transfer of [antitrust] actions . . . in which a State is a complainant”).

<sup>101</sup> Five of the seven dissenting votes in the House Judiciary Committee came from the California delegation that is more likely beholden to Big Tech’s political and financial influence. See Roll Call Vote of H.R. 3460 (June 23, 2021) (dissenting votes from Zoe Lofgren (CA-19), Eric Swalwell (CA-15), Lou Correa (CA-46), Darrell Issa (CA-50), Tom McClintock (CA-04), Thomas Massie (KY-04), Michelle Fischbach (MN-07)).

<sup>102</sup> Press Release, S. Comm. on the Judiciary, Senate Judiciary Committee Advances Latest Slate of Nominations and Legislation (Sept. 23, 2021) (available at <https://www.judiciary.senate.gov/press/dem/releases/senate-judiciary-committee-advances-latest-slate-of-nominations-and-legislation>) (“S. 1787, the *State Antitrust Enforcement Venue Act of 2021* . . . advanced out of Committee by voice vote.”).

<sup>103</sup> See 28 U.S.C. § 1407(g).

<sup>104</sup> National Association of Attorneys General, Support for the State Antitrust Enforcement Venue Act of 2021 (June 18, 2021), <https://11i23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/06/Final-State-Antitrust-Enforcement-Venue-Act-Endorsement.pdf>.

<sup>105</sup> *Texas v. Google LLC*, No. 4:20-CV-957, 2021 WL 2043184, at \*10 (May 20, 2021).

<sup>106</sup> *In re Google Digital Advertising Antitrust Litigation*, 555 F. Supp. 3d 1372 (J.P.M.L. Aug. 10, 2021). In the Order, the panel said that “[w]e recognize the states’ concerns regarding potential delay from centralization with putative class actions. But these are essentially case management concerns appropriate to raise with the transferee court for resolution.” *Id.* at 1378. It also stated that “[t]he state plaintiffs’ status as sovereigns does not weigh against inclusion of their action. . . . [T]he states’ arguments to exclude their action rely in large part on proposed legislation that, if enacted, would effectuate that desired outcome. However, we must apply the law currently in effect, without speculating about what future legislation might be passed.” *Id.* at 1378–79. A proper recognition of the states’ sovereign interests would have excluded the states from the consolidation altogether

legislation will prevent the delay and forum shopping tactics of Big Tech companies in the future and have the effect of remanding the *Texas v. Google* case to the federal court chosen by the seventeen state attorneys general.<sup>107</sup>

A third proposal for stronger antitrust enforcement is additional federal and state funding. Senator Klobuchar has introduced legislation proposing dramatic increases in funding for the DOJ and the FTC.<sup>108</sup> Under the proposed legislation, the DOJ Antitrust Division budget would increase from \$184 million in 2021 to \$484 million in 2022, an increase of 164%. Similarly, under the proposed legislation, the FTC's budget would increase from \$351 million in 2021 to \$651 million in 2022, an increase of 85%.<sup>109</sup>

Additional funding for state attorneys general is also under consideration, with an NAAG letter signed by forty-five state attorneys general proposing federal funding to support state litigation against Big Tech companies. The letter stated that "antitrust policy is at a pivotal moment, and . . . [a]t the forefront of this consensus is Big Tech[,] where we are confronted daily with the effects of extreme concentrations of market power amassed by firms in technology industries."<sup>110</sup>

These proposals are in the early stages, but given the widespread bipartisan agreement that more vigorous enforcement against Big Tech is necessary, funding in support of such state and federal enforcement seems warranted.

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or, at a minimum, consolidated the cases in the sovereign states' chosen forum of the Eastern District of Texas. *Id.* at 1375.

<sup>107</sup> State Antitrust Enforcement Venue Act of 2021, H.R. 3460, S.1787, 117th Cong. (2021). The proposed legislation would be effective on June 1, 2021, with the effect that any action in which a state is a complainant would be remanded to the original district court from which it was transferred. *Id.*

<sup>108</sup> Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225 § 15, 117th Cong. (2021). As part of the \$2 trillion Build Back Better proposed legislation, the Biden administration has proposed an additional \$500 million in antitrust funding for the Department of Justice Antitrust Division and an additional \$500 million in antitrust funding for the Federal Trade Commission. The Build Back Better proposed legislation has little Republican support. NANCY PELOSI, FACT SHEET, H.R. 5376, THE BUILD BACK BETTER ACT 13 (2021), [https://www.speaker.gov/sites/speaker.house.gov/files/UpdatedFact%20Sheet\\_TheBuild\\_BackBetterAct.pdf](https://www.speaker.gov/sites/speaker.house.gov/files/UpdatedFact%20Sheet_TheBuild_BackBetterAct.pdf).

<sup>109</sup> See DEP'T OF JUST. ANTITRUST DIV., CONGRESSIONAL SUBMISSION FY 2022 PERFORMANCE BUDGET 18 (2022), <https://www.justice.gov/jmd/page/file/1398291/download> (describing budget allocation for DOJ Antitrust Division of \$184,524,000); *FTC Appropriation and Full-Time Equivalent (FTE) History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation> (last visited Apr. 27, 2022).

<sup>110</sup> Letter from Nat'l Ass'n of Att'ys Gen., to Chairs Klobuchar and Cicilline & Ranking Members Lee & Buck, Re: Enhanced State Antitrust Enforcement (May 10, 2021) (available at <https://11i23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2021/05/Support-for-Antitrust-Federal-Funding-Final-NAAG-Letter-2.pdf>).

### B. Merger Reforms

Congressional leaders from both parties share concerns about Big Tech’s frequent use of mergers and acquisitions to acquire and then kill competition.<sup>111</sup> Companies engaging in this conduct may be stifling innovation by buying up competition before a competitor becomes large enough to be a threat—conduct commonly referred to as “buying sprees.” Estimates indicate the number of digital platform deals in the last two decades may be over 750.<sup>112</sup> As described by Chairman Nadler, “In some instances these acquisitions enabled the dominant firm to neutralize a competitive threat; in other instances, the dominant firm shut down or discontinued the underlying product entirely—transactions aptly described as ‘killer acquisitions.’”<sup>113</sup>

Among the more notable examples of a killer acquisition was Facebook’s acquisition of Instagram. Emails from Facebook CEO Mark Zuckerberg confirm Facebook’s intent to acquire any competitive threats.<sup>114</sup> Mr. Zuckerberg noted after the announcement of the Instagram acquisition that “[Facebook] can likely always just buy any competitive startups.”<sup>115</sup> In another email, Mr. Zuckerberg wrote, “The businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale, they could be very disruptive to us.”<sup>116</sup> Big Tech companies recognize that early acquisitions of potential startups are unlikely to be challenged under existing merger laws.

Such acquisitions of potential competitors may deprive users of the benefits of competition from new and emerging entrants. For example, the FTC alleges that Facebook’s acquisition of Instagram deprives consumers of an “additional locus of decision-making and innovation; a check on [Facebook’s] treatment and level of service offered to users . . . ; an alternative provider of personal social

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<sup>111</sup> BUCK, *supra* note 81, at 3 (“The majority staff report . . . accurately depicts the harmful effects of Big Tech’s anticompetitive reign over the digital economy. . . . These market-dominant companies have all engaged in myriad forms of anticompetitive behavior, including using ‘killer acquisitions’ to remove up-and-coming competitors from the marketplace.”).

<sup>112</sup> *Id.* at 9. See generally David McLaughlin, *Big Tech Goes on Shopping Spree, Brushing off Antitrust Scrutiny*, FIN. POST (July 27, 2020), <https://financialpost.com/technology/big-tech-goes-on-shopping-spreec-brushing-off-antitrust-scrutiny> (discussing the number of Big Tech acquisitions since 2015); Angus Loten, *Large Tech Companies Prepare for Acquisition Spree*, WALL ST. J.: CIO J. (May 21, 2020, 5:30 AM), <https://www.wsj.com/articles/large-tech-companies-prepare-for-acquisition-spreec-11590053401> (discussing Big Tech acquisition in light of market developments).

<sup>113</sup> INVESTIGATION OF COMPETITION, *supra* note 38, at 38.

<sup>114</sup> Complaint at 21, Fed. Trade Comm’n v. Facebook, Inc., No. 20-CV-3590 (D.D.C. Jan. 13, 2021).

<sup>115</sup> *Id.*

<sup>116</sup> Deepa Seetharaman, *Facebook “Destroy Mode”—Myth or Reality?*, WALL ST. J., <https://www.wsj.com/articles/facebooks-destroy-modemyth-or-reality-11596068322> (July 29, 2020, 9:10 PM).

networking for users untethered from Facebook's control; and a spur for Facebook to compete on the merits in response."<sup>117</sup>

Congress has proposed merger reforms that would limit Big Tech's power to merge with actual or nascent competitors. A bipartisan bill introduced in the House would prohibit Big Tech companies from acquiring a nascent competitor unless the merging parties can prove that the merger would not have an adverse effect on competition.<sup>118</sup> Senate versions would shift the burden to the merging parties if, among other things, the merger was valued at more than \$5 billion, the merger significantly increased market concentration, or a dominant firm attempted to acquire a nascent competitor.<sup>119</sup> Such mergers would be unlawful unless the merging parties can prove that the merger does not create an appreciable risk of materially lessening competition or tend to create a monopoly or monopsony.<sup>120</sup>

Some argue that the risk of such proposals is that they may undermine viable exit strategies for startups.<sup>121</sup> Dominant firms can pay startups significant capital, and critics fear restricting such acquisitions could dissuade venture capitalists from investing in companies that have fewer viable exit paths.<sup>122</sup> But restrictions on Big Tech acquisitions are unlikely to dramatically alter the venture capital landscape, because in the past decade their acquisitions account for less than five percent of all tech deals in the United States.<sup>123</sup> As Herbert Hovenkamp noted, the legislation "wisely permits mergers to be treated as exclusionary practices, rather than looking merely at the opportunities they create for collusive behavior or price increases."<sup>124</sup>

The House version of the bill has bipartisan support, clearing the House Judiciary Committee by a vote of twenty-three to eighteen.<sup>125</sup> The proposal has

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<sup>117</sup> Complaint at 105, *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-CV-3590 (D.D.C. Aug. 19, 2021).

<sup>118</sup> Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021).

<sup>119</sup> Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021); Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. (2021).

<sup>120</sup> See Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. (2021).

<sup>121</sup> Lauren Feiner, *Start-Ups Will Suffer from Antitrust Bills Meant to Target Big Tech, VCs Charge*, CNBC (July 24, 2021, 9:44 AM), <https://www.cnbc.com/2021/07/24/vcs-start-ups-will-suffer-from-antitrust-bills-targeting-big-tech.html>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Herbert Hovenkamp, *Congress' Antitrust War on China and American Consumers*, PROMARKET (June 25, 2021), <https://promarket.org/2021/06/25/congress-antitrust-china-consumers-merger/>.

<sup>125</sup> See Mark-Up, Comm. on the Judiciary (June 23, 2021) (available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112818>) (H.R. 3826 agreed on roll call vote of twenty-three "ayes," eighteen "nos," and one "present").

strong bipartisan support.<sup>126</sup> Senator Josh Hawley has proposed similar legislation preventing dominant firms from acquiring companies if doing so lessens competition.<sup>127</sup> And at the end of the Trump administration, the DOJ endorsed proposed legislation shifting the burden of proof for firms with more than fifty percent market share.<sup>128</sup> Former Assistant Attorney General for the Antitrust Division Makan Delrahim explained that, under the DOJ's proposal, there would be a presumption that further acquisitions would be anticompetitive for firms with more than fifty percent market share.<sup>129</sup> Merging parties can rebut that presumption if they cannot exercise market power or the procompetitive benefits outweigh the anticompetitive effects. The government would still have the burden of defining the market and proving market shares, and then rebutting procompetitive efficiencies.<sup>130</sup>

### C. *Self-Preferencing*

Additional proposals aim to curb self-preferencing of Big Tech's own products and services over competitors on their platforms.<sup>131</sup> A classic example is Amazon, which hosts third-party products on its platform while also promoting and preferencing its own competing products on the platform. Amazon's internal documents refer to third-party sellers utilizing their platform as "internal competitors."<sup>132</sup> Empirical studies found "many instances" where "Amazon may present itself as the default seller even when the same product is offered at lower cost . . . with a comparable shipping speed by third-party sellers with high ratings."<sup>133</sup> In other words, Amazon uses its platform power to demote competing products that offer lower prices and higher quality.<sup>134</sup>

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<sup>126</sup> See H.R. 3826: *Platform Competition and Opportunity Act of 2021*, GOVTRACK, <https://www.govtrack.us/congress/bills/117/hr3826> (last visited Apr. 27, 2022).

<sup>127</sup> See Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. (2021).

<sup>128</sup> Makan Delrahim, Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Just., "A Whole New World": An Antitrust Entreaty for a Digital Age 5 n.2 (Jan. 29, 2021), <https://www.justice.gov/opa/speech/file/1356766/download>.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> *Id.*

<sup>131</sup> See generally Cecilia Kang & David McCabe, *Boom Time for Lawyers as Washington Pursues Big Tech*, N.Y. TIMES, <https://www.nytimes.com/2021/06/29/technology/boom-times-for-lawyers-as-washington-pursues-big-tech.html> (Oct. 28, 2021) (discussing market demand for antitrust lawyers).

<sup>132</sup> BUCK, *supra* note 81, at 4.

<sup>133</sup> Feng Zhu & Kihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618, 2637 (2018); see Randy M. Stutz, *Antitrust Law and Dominant-Firm Behavior in the Digital Technology Sector: Toward an Actionable Agenda for Policy Makers*, AM. ANTITRUST INST. (June 28, 2021), <https://www.antitrustinstitute.org/work-product/antitrust-law-and-dominant-firm-behavior-in-the-digital-technology-sector-toward-an-actionable-agenda-for-policy-makers/>.

<sup>134</sup> See Zhu & Liu, *supra* note 133, at 2637.

Proposals in the House and Senate would make it illegal for companies to give preferential treatment to their own products over the products of a competitor hosted on the same platform.<sup>135</sup> The key objective of this legislation is to prohibit discriminatory conduct by dominant platforms, which includes preferencing their own services or disadvantaging the services of rivals.<sup>136</sup> For example, the Senate version prohibits a covered platform from engaging in conduct that would do the following:

- (1) [U]nfairly preference the covered platform's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform;
- (2) unfairly limit the ability of another business user's products, services, or lines of business to compete on the covered platform relative to the covered platform operator's own products, services, or lines of business in a manner that would materially harm competition on the covered platform; or
- (3) discriminate in the application or enforcement of the covered platform's terms of service among similarly situated business users in a manner that may materially harm competition on the covered platform.<sup>137</sup>

With the House Judiciary Committee having already cleared a similar version of the bill in June 2021 by a vote of twenty-four to twenty, the Senate Judiciary Committee passed the bill by a vote of sixteen to six in January 2022, referring the bill to the full Senate.<sup>138</sup> It is anticipated that these bills will be voted on by the House and Senate later in 2022.

Another Senate bill, focusing on app stores, would make it illegal for Google and Apple to continue their practice of self-preferencing their own app stores and preventing the creation of third-party app stores on their platforms.<sup>139</sup> That

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<sup>135</sup> American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2(a)(1)-(3) (2021); Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2019-2020); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021) § 2(a)-(b). In a significant display of momentum, the Department of Justice has endorsed these bills. Ryan Tracy, *Antitrust Bill Targeting Amazon, Google, Apple, Gets Support From DOJ*, WALL ST. J., <https://www.wsj.com/articles/doj-backs-antitrust-bill-targeting-amazon-google-apple-11648519385> (Mar. 28, 2022, 10:34 p.m.).

<sup>136</sup> See American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2019-2020); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

<sup>137</sup> American Innovation and Choice Online Act, S. 2992, 117th Cong. § 2(a) (2021).

<sup>138</sup> Cat Zakrzewski & Gerrit de Vynck, *Senate Advances Antitrust Legislation, Despite Reservations from California Democrats*, WASH. POST (Jan. 20, 2022), <https://www.washingtonpost.com/technology/2022/01/20/senate-advances-antitrust-bill/>.

<sup>139</sup> Open App Markets Act, S. 2710, 117th Cong. § 3(a) (2021).

bill passed the Senate Judiciary Committee in February 2022 by an overwhelming vote of twenty to two.<sup>140</sup>

Critics of these proposals, including those funded by Big Tech companies, argue that discriminatory practices and self-preferencing may be pro-competitive.<sup>141</sup> The legislative proposals anticipate this argument and include affirmative defenses for discriminatory conduct that would not result in harm to the competitive process, would be necessary to protect user privacy, or would increase consumer welfare.<sup>142</sup> By prohibiting Big Tech companies from discriminatory self-preferencing—but allowing affirmative pro-competitive defenses—the proposed legislation is likely to promote greater deterrence of exclusionary conduct. Such a “change would be justified by the recognition that such . . . conduct by dominant networks involve greater harms from false negatives than false positives.”<sup>143</sup> That is, such burden-shifting reflects a rethinking of error cost analysis that views under-deterrence of Big Tech’s exclusionary self-preferencing as a bigger threat to competition than over-deterrence.<sup>144</sup> The legislation provides clear rules, reducing high enforcement costs that result in under-deterrence of Big Tech’s anticompetitive conduct.<sup>145</sup>

Both the Senate and House versions of the two self-preferencing pieces of legislation have bipartisan support, but it is unclear whether such proposals will secure sufficient support to overcome a Senate filibuster.<sup>146</sup> However, the

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<sup>140</sup> Cat Zakrzewski, *Apple Avoided the Washington Techlash for Years. Now it’s at the Center of the Bull’s Eye*, WASH. POST (Feb. 3, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/02/03/apple-competition-senate-app-store/>.

<sup>141</sup> Michael Salinger, *Self-Preferencing*, in GLOB. ANTITRUST INST. REPORT ON THE DIGITAL ECON. 329, 365–68 (2020); AURELIEN PORTUESE, “PLEASE, HELP YOURSELF”: TOWARD A TAXONOMY OF SELF-PREFERENCING 2 (2021), <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing> (“The antitrust literature acknowledges the proconsumer, procompetitive effects on self-preferencing. Yet, despite the overwhelmingly positive effects of self-preferencing on strengthening competition, antitrust populists aim to weaponize self-preferencing to target only a few companies, while allowing self-preferencing for the rest of the economy.”); D. BRUCE HOFFMAN & GARRETT D. SHINN, SELF-PREFERENCING AND ANTITRUST: HARMFUL SOLUTIONS FOR AN IMPROBABLE PROBLEM 3, 11 (2021); Sam Bowman & Geoffrey Manne, *Platform Self-Preferencing Can Be Good for Consumers and Even Competitors*, TRUTH ON THE MARKET (Mar. 4, 2021), <https://truthonthemarket.com/2021/03/04/platform-self-preferencing-can-be-good-for-consumers-and-even-competitors/>.

<sup>142</sup> American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2(c) (2021); American Innovation and Choice Online Act, S. 2992, 117th Cong. § 2(d) (2021).

<sup>143</sup> Steven Salop, *Dominant Digital Platforms: Is Antitrust Up to the Task*, 130 YALE L.J.F. 563, 585 (2021).

<sup>144</sup> JONATHAN BAKER, *THE ANTITRUST PARADIGM* 73–77 (2019).

<sup>145</sup> Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 360–62 (2020).

<sup>146</sup> Press Release, Amy Klobuchar, Sen., Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech (Oct. 14, 2021) (available at <https://www.klobuchar.senate.gov/public/index>).



margin of support in the Senate Judiciary Committee for both bills suggests that the votes may be there.

Yet, another bill introduced in the House would go further and prevent digital platforms from having conflicts of interest by concurrently owning or controlling the online platform and other businesses or product lines that are sold on the platform.<sup>147</sup> Under this House version, for example, Amazon would be prohibited from both owning the Amazon platform and selling its own Amazon Basics product line on the platform.<sup>148</sup> The proposed legislation has no pro-competitive defenses and could have the practical effect of breaking up several Big Tech companies, akin to a Glass-Steagall Act for the Internet.<sup>149</sup> It is consistent with structural separation requirements in other industries.<sup>150</sup> As its principal co-sponsor Representative Pramila Jayapal put it, “My legislation is a structural solution to a structural problem.”<sup>151</sup> The bill narrowly cleared the House Judiciary Committee.<sup>152</sup>

Finally, there is proposed legislation that would prohibit conflicts of interest in the online display advertising market. Senator Mike Lee is scheduled to introduce in 2022 legislation that would reportedly require Google to divest major parts of its dominant advertising technology operations.<sup>153</sup> It also would require “unprecedented transparency to the murky world of digital ad trading, where deception, conflicts of interest and insider dealing have been rampant

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cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech); see Mark-Up, Committee on the Judiciary (June 23, 2021) (available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112818>) (H.R. 3816 agreed on roll call vote of twenty-four “ayes” and twenty “nos”); Anna Edgerton & Siri Bulusu, *Senate Judiciary Panel Clears Tech-Focused Antitrust Bill*, Bloomberg (Jan. 20, 2022), <https://www.bloomberg.com/news/articles/2022-01-20/senate-judiciary-committee-clears-tech-focused-antitrust-bill> (S.2992 clears Senate Judiciary Committee by a vote of sixteen to six).

<sup>147</sup> Ending Platform Monopolies Act, H.R. 3825, 117th Cong. § 2 (2021).

<sup>148</sup> Dana Mattioli & Ryan Tracy, *House Bill Seeks to Break Up Amazon and Other Big Tech Companies*, WALL ST. J. (June 11, 2021, 6:30 PM), <https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248>.

<sup>149</sup> *Id.* (“One of the proposed measures, titled the Ending Platform Monopolies Act, seeks to require structural separation of Amazon and other big technology companies to break up their businesses.”).

<sup>150</sup> Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1037–52 (2019) (discussing separation regimes in railroads, banking, television, and telecommunications).

<sup>151</sup> Press Release, Pramila Jayapal, Congresswoman, House of Reps., Jayapal’s Landmark Big Tech Legislation Passes House Judiciary Committee (June 24, 2021) (available at <https://jayapal.house.gov/2021/06/24/big-tech-legislation-passes-judiciary-committee/>).

<sup>152</sup> See Mark-Up, Comm. on the Judiciary (June 23, 2021) (available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112818>) (H.R. 3825 agreed on roll call vote of twenty-one “ayes” and twenty “nos”).

<sup>153</sup> Josh Sisco, Sarah Krouse & Mark Di Stefano, *Senators Target Google with New Bill to Break Its Grip on Murky Ad Tech Market*, THE INFORMATION (Jan. 28, 2022, 2:09 PM), <https://www.theinformation.com/articles/senators-target-google-with-new-bill-to-break-its-grip-on-murky-ad-tech-market>.

from its inception.”<sup>154</sup> As Senator Lee stated at a Senate Judiciary Committee hearing, “It is hard to imagine a circumstance in which one can own the exchange platform and also be a buyer, seller, broker, dealer . . . without something anticompetitive going on in purpose and effect.”<sup>155</sup> If passed, such legislation would require structural divestitures from the largest companies in the only display advertising markets, and impose obligations on other buy-side and sell-side brokers to maximize transparency and reduce conflicts of interest.<sup>156</sup>

#### *D. Data Portability and Interoperability*

Data portability is “the ability . . . of a natural or legal person to request that a data holder transfer to the person, or to a specific third party, data concerning that person in a structured, commonly used and machine-readable format on an ad-hoc or continuous basis.”<sup>157</sup> Relatedly, “[t]he term interoperability . . . refers to the ability of different digital services to work together and communicate with one another.”<sup>158</sup>

Data portability and interoperability reform should make it easier for consumers to use different technology products together. Interoperability is common in other markets such as email, telephone, and telegraph.<sup>159</sup> For example, the Telecommunications Act of 1996 requires each telecommunication carrier “to interconnect . . . with the facilities and equipment of other telecommunication carriers” and requires “[e]ach local exchange carrier” to provide “number portability in accordance with requirements prescribed by the [Federal Communications] Commission.”<sup>160</sup> The Act also required a telecommunications provider “to honor a consumer request to provide relevant information to rivals to perform competing services.”<sup>161</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Senate Hearing on the Impact of Corporate Monopolies on Innovation*, C-SPAN, at 58:00 (Dec. 15, 2021), <https://www.c-span.org/video/?516757-1/senate-hearing-impact-corporate-monopolies-innovation>.

<sup>156</sup> *Id.*

<sup>157</sup> ORG. FOR ECON. COOP. & DEV., DATA PORTABILITY, INTEROPERABILITY AND DIGITAL PLATFORM COMPETITION 10 (2021) (citation omitted).

<sup>158</sup> *Id.* at 12–13.

<sup>159</sup> *Id.* at 8.

<sup>160</sup> 47 U.S.C. §§ 251(a)(1), 251(b)(2).

<sup>161</sup> HAROLD FELD, THE CASE FOR THE DIGITAL PLATFORM ACT: MARKET STRUCTURE AND REGULATION OF DIGITAL PLATFORMS 24, 78–80 (2019), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RJ-Case-for-the-Digital-Platform-Act-201905.pdf>; *see also* 47 U.S.C. § 222(c)(2) (“A telecommunication carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.”).

Interoperability breaks down the power of network effects, allowing competitors to access existing networks at the market level rather than the company level.<sup>162</sup> Online platforms often make the cost of switching to alternative platforms unnecessarily high, reducing consumer choice and raising barriers to competition.<sup>163</sup> Facebook, for example, makes it almost impossible for users to export their own Facebook data to a competing social network platform.<sup>164</sup>

Proposed legislation in the House requires Big Tech platforms to maintain transparent, third-party accessible interfaces that enable data portability, which should “enable the secure transfer of data to a user, or with the affirmative consent of a user, to a business user at the direction of a user, in a structured, commonly used, and machine-readable format.”<sup>165</sup> These platforms must also enable interoperability—that is, maintain interfaces that “facilitate and maintain interoperability with a competing business or a potential competing business.”<sup>166</sup> A Senate bill likewise makes it unlawful to restrict or impede the capacity of a business to interoperate with a covered platform if the platform operator’s own services compete with services offered by business users on the platform.<sup>167</sup>

These proposals attempt to give consumers greater control over their own information. Data portability is initiated by the user, avoiding the traditional legal challenges in the refusal to deal context.<sup>168</sup> Absent the consumer’s request for its own data, dominant platforms are not required to share user data with competitors.<sup>169</sup> Unlike competition law in other countries, current antitrust law in the United States rarely imposes a duty to deal with rivals.<sup>170</sup> And interoperability promotes competition within digital ecosystems, reducing Big Tech’s ability to use its market power in one part of a digital ecosystem to force consumers to use its services in other segments of the ecosystem.<sup>171</sup> These reforms recognize the inherent problems of network effects and high switching costs that make Big Tech markets prone to tipping in favor of incumbent

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<sup>162</sup> INVESTIGATION OF COMPETITION, *supra* note 38, at 384–85.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 144–47.

<sup>165</sup> Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H.R. 3849, 117th Cong. §§ 1, 3(a).

<sup>166</sup> *Id.* § 4(a).

<sup>167</sup> American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021).

<sup>168</sup> ORG. FOR ECON. COOP. & DEV., *supra* note 157.

<sup>169</sup> SYKES, *supra* note 88, at 15.

<sup>170</sup> *Id.* at 15–16 (“[C]urrent antitrust doctrine does not offer an attractive means of imposing interoperability or data portability on Big Tech firms that do not already offer those options.”).

<sup>171</sup> ORG. FOR ECON. COOP. & DEV., *supra* note 157, at 20–21.

platforms.<sup>172</sup> As Herbert Hovenkamp noted, “Network effects can be a formidable barrier to entry, but interoperability can facilitate the entry and survival of small firms.”<sup>173</sup>

These measures enjoy bipartisan support. Senator Josh Hawley has said that “[y]our data is your property. Period. Consumers should have the flexibility to choose new online platforms without artificial barriers to entry.”<sup>174</sup> In the House minority report on digital markets, Republicans expressed support for “empowering consumers to take control of their user data through data portability and interoperability standards. . . . As with the individual’s ability to switch their cell phone number between carriers, these data portability policies present an opportunity for the American people to take control of their data decision-making.”<sup>175</sup> The proposal has numerous Democratic and Republican co-sponsors and cleared the House Judiciary Committee by a vote of twenty-five to nineteen.<sup>176</sup>

#### *E. Executive Orders and FTC Rulemaking*

The final proposal for addressing Big Tech’s abuse of power is to bypass the legislative approach and pursue more vigorous FTC rulemaking authority. President Biden’s Executive Order reflects this impulse, setting forth policy positions, creating a White House Competition Council, and identifying dozens of anticompetitive concerns that agencies are ordered or encouraged to enact.<sup>177</sup> In the Executive Order, the FTC is “encouraged . . . to exercise the [its] statutory rulemaking authority . . . [in] unfair competition in major Internet marketplaces.”<sup>178</sup> Consistent with this Executive Order, the FTC updated its rulemaking authority to pave the way for more effective rulemaking to protect consumers from unfair and deceptive trade practices.<sup>179</sup> These changes set the

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<sup>172</sup> STIGLER CTR. STUDY OF THE ECON. & THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT 34–36 (2019).

<sup>173</sup> Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2037 (2021).

<sup>174</sup> Press Release, Sen. Mark R. Warner, Senators Introduce Bipartisan Bill to Encourage Competition in Social Media (Oct. 22, 2019) (available at <https://www.warner.senate.gov/public/index.cfm/2019/10/senators-introduce-bipartisan-bill-to-encourage-competition-in-social-media>).

<sup>175</sup> BUCK, *supra* note 81, at 5, 9.

<sup>176</sup> H.R. COMM. ON THE JUDICIARY, 117TH CONG., FINAL PASSAGE ON H.R. 3849 (June 23, 2021), <https://docs.house.gov/meetings/JU/JU00/20210623/112818/CRPT-117-JU00-Vote014-20210623.pdf>.

<sup>177</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36990 (July 9, 2021).

<sup>178</sup> *Id.* at 36991.

<sup>179</sup> Press Release, Fed. Trade Comm’n, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021) (available at <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>).

stage for the FTC to promulgate administrative rules to address Big Tech's abuse of its market power.

Republican reaction to this Executive Order has been noticeably muted, particularly in light of strong statements of support from the likes of the Republican-leaning trade associations such as the American Farm Bureau, the National Grange, and the U.S. Cattlemen's Association.<sup>180</sup> It remains unclear whether Republicans who are deeply skeptical of Big Tech power will support more vigorous regulatory action in the form of Executive Orders and FTC administrative rules. Part of the answer may depend on whether Big Tech successfully thwarts other avenues of reform.

In a similar fashion, the Federal Trade Commission rescinded a 2015 antitrust policy statement that aligned FTC's Section 5 authority to challenge unfair methods of competition with the Sherman Act and Clayton Act.<sup>181</sup> While the Republican FTC Commissioners expressed dismay at this action,<sup>182</sup> a faithful reading of Section 5 of the FTC Act would admit that "[i]t is . . . textually apparent that [S]ection 5 is more open-textured and general than [S]ections 1 and 2 of the Sherman Act, and therefore that [S]ection 5 must prohibit everything that the Sherman Act prohibits, and more."<sup>183</sup>

It is not clear that Republicans will accept progressives at the FTC taking a broader approach to rulemaking and enforcing Section 5 of the FTC Act. But conservative scholars and judges committed to textualism may prefer a consistent application of their mode of statutory interpretation, particularly if it aligns with their commitment to addressing Big Tech's unfair practices.<sup>184</sup>

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<sup>180</sup> Matt Stoller, *Biden Launches Sweeping Action on "Big Tech, Big Pharma, and Big Ag." Can It Be Real?*, BIG BY MATT STOLLER (July 11, 2021), <https://mattstoller.substack.com/p/biden-launches-sweeping-action-on>.

<sup>181</sup> Press Release, Fed. Trade Comm'n, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act* (July 1, 2021) (available at <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>).

<sup>182</sup> Noah Phillips, Comm'r, Fed. Trade Comm'n, *Regarding the Commission's Withdrawal of Section 5 Policy Statement* (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591578/phillips\\_remarks\\_regarding\\_withdrawal\\_of\\_section\\_5\\_policy\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf); Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (2015)* (July 1, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf).

<sup>183</sup> Daniel Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1233 (2021).

<sup>184</sup> *See id.* at 1212, 1227.

#### IV. BIG TECH IS VIOLATING EXISTING ANTITRUST LAWS

There is broad bipartisan consensus that Big Tech companies are violating current antitrust laws.<sup>185</sup> One of the more remarkable features of the current antitrust environment is the sheer number of antitrust cases against Google and Facebook and the depth and breadth of support among federal enforcers and state attorneys general.

##### A. *Litigation Against Facebook*

There are currently two major government cases against Facebook. The first was brought on December 9, 2020, by the Trump administration's FTC and amended under the Biden administration with a more detailed complaint following a dismissal with leave to amend.<sup>186</sup> The other was brought on the same date by a forty-eight-state coalition led by the New York State Attorney General and joined by twenty-five Democratic, twenty-two Republican, and one independent state attorneys general. In announcing the complaint, the FTC's Director of the Bureau of Competition, Ian Conner, stated, "We bring these claims in coordination with attorneys general from across the country, and we greatly appreciate the cooperative efforts of all of the enforcers involved in this investigation."<sup>187</sup> Likewise, New York State Attorney General Letitia James emphasized that "[a]lmost every state in this nation has joined this bipartisan lawsuit because Facebook's efforts to dominate the market were as illegal as they were harmful."<sup>188</sup>

Both complaints allege that Facebook unlawfully abused its market power to eliminate or destroy competition by acquiring potential competitors such as Instagram and WhatsApp and adopting and enforcing policies that blocked rival apps from interconnecting their product with Facebook.<sup>189</sup> The killer acquisition of competitors like Instagram and WhatsApp deprives users of the benefit of independent competitors, which undermines innovation, eliminates incentives to

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<sup>185</sup> Mackenzie Holland, *Antitrust Reform Is Uncertain Despite Bipartisan Support*, TECHTARGET (Nov. 12, 2021), <https://searchcio.techtargget.com/news/252509429/Antitrust-reform-is-uncertain-despite-bipartisan-support>.

<sup>186</sup> See Fed. Trade Comm'n v. Facebook, Inc., Case No. 1:20-CV-03590, (Dec. 9, 2020); Amended Complaint, Fed. Trade Comm'n, Case No: 1:20-cv-3590.

<sup>187</sup> *Statement of FTC Bureau of Competition Director Ian Conner on the Facebook Enforcement Action*, FED. TRADE COMM'N (Dec. 9, 2020) [hereinafter *Statement of Ian Conner*], [https://www.ftc.gov/system/files/attachments/press-releases/ftc-sues-facebook-illegal-monopolization/statement\\_of\\_ftc\\_bc\\_director\\_ian\\_conner\\_on\\_fb\\_enforcement\\_action.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-sues-facebook-illegal-monopolization/statement_of_ftc_bc_director_ian_conner_on_fb_enforcement_action.pdf).

<sup>188</sup> *Attorney General James Leads Multistate Lawsuit Seeking to End Facebook's Illegal Monopoly*, N.Y. ATT'Y GEN. (Dec. 9, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-leads-multistate-lawsuit-seeking-to-end-facebooks-illegal>.

<sup>189</sup> Amended Complaint, *supra* note 186, at 26, 35; *Statement of Ian Conner*, *supra* note 187.

enhance performance, and deters competitive entry.<sup>190</sup> And the imposition of anticompetitive contractual terms with app developers suppressed the ability and incentive for those apps to become competitive threats to Facebook.

Particularly noteworthy is the bipartisan consensus that the acquisition of nascent potential competitors may be viewed as an exclusionary practice, rather than simply viewed through the lens of opportunities to collude or increase prices.<sup>191</sup> That view is shared by the federal district court hearing the case, with the court recently confirming that the acquisition and continued holding of merged assets could constitute an antitrust violation.<sup>192</sup>

### B. *Litigation Against Google*

There are several government cases against Google, reflecting strong bipartisan support for curtailing Google's monopoly practices. The first government case filed against Google was filed in October 2020 by the Trump administration's DOJ and eleven Republican state attorneys general, alleging that Google abused its monopoly power in search and search advertising.<sup>193</sup> Three Democratic state attorneys general joined that complaint in December 2020,<sup>194</sup> and the Biden administration has continued to prosecute the case.

The complaint alleges that Google accounts for “nearly 90 percent of all general-search-engine queries in the United States and almost 95 percent of queries on mobile devices.”<sup>195</sup> “Google monetizes this search monopoly in the markets for search advertising and general search text advertising,” with advertisers paying Google approximately \$40 billion annually to place ads on Google's general search results page.<sup>196</sup> Google abuses its monopoly position by, among other things, entering into exclusivity agreements that forbid preinstallation of competing search services and into revenue sharing

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<sup>190</sup> Amended Complaint, *supra* note 186, at 5.

<sup>191</sup> Hovenkamp, *supra* note 124.

<sup>192</sup> Fed. Trade Comm'n v. Facebook, Inc., Case No. 1:20-CV-3590, 2021 WL 2643627, at \*1, \*50–53 (D.D.C. June 28, 2021) (mem.). The state AG action against Facebook was dismissed on the basis of laches. That decision is on appeal. Leah Nysten, *State AGs Will Appeal Loss in Facebook Case*, POLITICO (July 28, 2021, 10:10 AM), <https://www.politico.com/news/2021/07/28/states-appeal-facebook-case-501247>.

<sup>193</sup> Press Release, Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020) (available at <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>).

<sup>194</sup> Press Release, Dep't of Just., Three Additional States Ask Court to Join Justice Department Antitrust Suit Against Google (Dec. 17, 2020) (available at <https://www.justice.gov/opa/pr/three-additional-states-ask-court-join-justice-department-antitrust-suit-against-google>).

<sup>195</sup> Complaint at 4, United States v. Google, LLC, No. 1:20-CV-03010 (D.D.C. Oct. 20, 2020).

<sup>196</sup> *Id.*

agreements with mobile device manufacturers and carriers on both Android and Apple devices.<sup>197</sup>

Attorney General William Barr remarked that “[c]ompetition in this industry is vitally important, which is why today’s challenge against Google—the gatekeeper of the Internet—for violating antitrust laws is a monumental case both for the Department of Justice and for the American people.”<sup>198</sup> He continued, adding that “[t]his lawsuit strikes at the heart of Google’s grip over the internet for millions of American consumers, advertisers, small businesses, and entrepreneurs beholden to an unlawful monopolist.”<sup>199</sup>

The second government complaint against Google came on December 16, 2020, alleging that Google had abused its monopoly power in online display advertising.<sup>200</sup> Led by the state of Texas, a total of seventeen state attorneys general—fifteen Republican and two Democratic—have alleged that Google abused its market power for display advertising by forcing publishers and advertisers to use Google products and services rather than rivals.<sup>201</sup> According to the complaint, Google has monopoly power on the sell side, the buy side, the exchange, and adjacent markets.<sup>202</sup> Despite the inherent conflicts of interest that this creates, Google uses its monopoly power throughout these different markets to advantage itself at the expenses of its *own* clients.<sup>203</sup> It leverages its market power through its intermediaries strategically located in different segments of the ad tech stack.<sup>204</sup> In almost every case, the function of these intermediaries is to advantage Google rather than to enhance consumer welfare or promote competition.<sup>205</sup>

Texas Attorney General Ken Paxton said that “Google’s monopolization of the display-advertising industry and its misleading business practices stifle innovation, limit consumer choice and reduce competition.”<sup>206</sup> He added,

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<sup>197</sup> *Id.* at 56, 78–79.

<sup>198</sup> Press Release, Dep’t of Just., *supra* note 193.

<sup>199</sup> *Id.* In his memoirs, Barr described the DOJ lawsuit as attacking Google’s behavior of creating “a continuous, self-reinforcing cycle of monopolization across multiple markets.” WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL 440 (2022).

<sup>200</sup> Complaint at 3, Texas v. Google, No. 4:20-CV-957 (N.D. Tex. Dec. 16, 2020).

<sup>201</sup> *Id.* at 43.

<sup>202</sup> *Id.* at 11–12.

<sup>203</sup> *Id.* at 46–47.

<sup>204</sup> *Id.* at 110.

<sup>205</sup> Third Amended Complaint at 84–122, Texas v. Google, LLC, 1:21-MD-03010 (S.D.N.Y. Jan. 14, 2022),

<sup>206</sup> Press Release, Ken Paxton, Att’y Gen. of Tex., AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations (Dec. 16, 2020) (available at



“Texas and its coalition of allied states bring this action to lift the veil on Google’s secret practices and secure relief to prevent it from engaging in future deceptive and misleading practices.”<sup>207</sup>

Third, on the following day, December 17, 2020, the state attorneys general from Colorado and Nebraska led a bipartisan coalition in filing a complaint alleging that “Google has systematically degraded the ability of other companies to access consumers.”<sup>208</sup> In addition to addressing Google’s misuse of its monopoly power in search to control and dominate the search advertising market, the complaint went further than the DOJ complaint and also argued that Google excludes competition in the Internet of Things—that is, in the emerging market for consumer access to general search through home smart speakers, televisions, and cars.<sup>209</sup> The complaint also addresses Google’s monopoly practices to hinder access to information in specialized vertical commercial market segments such as travel, home improvement, and entertainment.<sup>210</sup> Thirty-eight state attorneys general—twenty-three Democratic, thirteen Republican, and one independent—joined the complaint.<sup>211</sup> The case was consolidated in January 2021 with the DOJ search case for all pretrial purposes, including discovery and all related proceedings.<sup>212</sup>

A fourth government action against Google, filed on June 8, 2021, in Ohio state court by the Republican State Attorney General, David Yost, alleges that Google is a common carrier or public utility and, as such, “has a duty not to feature Google products and services in a manner designed to steer search traffic to Google products and services instead of organic search results without providing equal access to such steering mechanisms to Google’s competitors in business lines other than internet search.”<sup>213</sup> The complaint cites a concurring opinion from Justice Thomas contending that “[t]here is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.”<sup>214</sup> But the complaint is short—

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<https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive>).

<sup>207</sup> *Id.*

<sup>208</sup> Complaint at 5, *Colorado v. Google*, No. 1:2020-CV-03715 (D.D.C. Jan. 4, 2021), <https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf>.

<sup>209</sup> *Id.* at 4, 7, 45, 75.

<sup>210</sup> *Id.* at 15.

<sup>211</sup> *Id.* at 4–5.

<sup>212</sup> *In re Google Digital Advertising Antitrust Litigation*, F. Supp. 3d (J.P.M.L. 2021).

<sup>213</sup> Complaint at 11, *Ohio v. Google*, No. 21-CV-H060274 (C.P. June 8, 2021).

<sup>214</sup> *Id.* at 4 (citing *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring)).

only seventeen pages—and does not provide details as to why Google should be treated as a common carrier or public utility.<sup>215</sup>

A fifth government action against Google was filed on July 7, 2021, alleging that Google had abused its monopoly power by requiring app developers that offer their apps through the Google Play Store to use Google Play Billing as a middleman.<sup>216</sup> This has the effect of forcing consumers to pay Google’s commission—up to thirty percent—on in-app purchases of digital content sold through apps on Google Play Store.<sup>217</sup> Thirty-six state attorneys general—eighteen Democratic and eighteen Republican—joined the complaint.<sup>218</sup> Utah Attorney General Sean Reyes said, “Utah and the other states in our coalition are fighting back to protect our citizens and innovative app developers—including many small businesses across America—from Google’s unlawful practices.”<sup>219</sup>

What is remarkable about these cases is the extent to which there is bipartisan consensus to challenge Google’s and Facebook’s anticompetitive conduct.<sup>220</sup> As the following chart reveals, almost every state has joined two or more of these five complaints. Twenty Republican and eighteen Democratic state attorneys general have joined three or more complaints and eleven Republican and one Democratic state attorneys general have joined four complaints.<sup>221</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> Complaint at 9–10, *Utah v. Google*, No. 3:21-CV-052227 (N.D. Cal. July 7, 2021).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Press Release, Sean D. Reyes, Att’y Gen. of Utah, *Utah Leads Bipartisan Lawsuit Against Tech Giant Google* (Aug. 6, 2021) (available at <https://attorneygeneral.utah.gov/utah-ag-leads-bipartisan-lawsuit-against-tech-giant-google/>).

<sup>220</sup> See *Who are America’s Attorneys General?*, NAT’L ASS’N ATT’YS GEN., <https://www.naag.org/news-resources/research-data/who-are-americas-attorneys-general/> (last visited Apr. 27, 2022) (highlighting the political party of each state attorney general).

<sup>221</sup> The following is the legend for the following table:

^ = lead, \* = executive committee

Unitalicized = Republican

*Italicized* = Democratic

Underlined = Independent

Note that Alabama is the only state not joining any of these complaints.

Facebook <sup>222</sup>	Google - Search Exclusion <sup>223</sup>	Google - Vertical Search <sup>224</sup>	Google - Advertising <sup>225</sup>	Google - Play Store <sup>226</sup>
Alaska Arizona Arkansas *California *Colorado Connecticut D.C. Delaware *Florida Guam  Hawaii Idaho Illinois Indiana *Iowa Kansas Kentucky Louisiana Maine Maryland Massachusetts Michigan Minnesota Mississippi Missouri Montana *Nebraska Nevada New Hampshire New Jersey New Mexico ^New York *North Carolina North Dakota *Ohio	Arkansas <i>California</i>  Florida  Georgia  Indiana  Kentucky Louisiana  Michigan  Mississippi Missouri Montana	Alaska *Arizona  ^Colorado Connecticut D.C. Delaware  Guam  Hawaii Idaho Illinois  *Iowa Kansas  Maine Maryland Massachusetts  Minnesota  ^Nebraska Nevada New Hampshire New Jersey New Mexico *New York *North Carolina North Dakota Ohio	Alaska  Arkansas  Florida  Idaho  Indiana  Kentucky Louisiana  Mississippi Missouri Montana  Nevada  North Dakota	Alaska Arizona Arkansas <i>California</i> <i>Colorado</i> Connecticut D.C.  Florida  Idaho  Indiana <i>Iowa</i>  Kentucky  Maryland <i>Massachusetts</i>  Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York North Carolina North Dakota

<sup>222</sup> Complaint at 4–5, *New York v. Facebook*, No. 1:20-CV-03589 (D.D.C. June 28, 2021).

<sup>223</sup> Complaint, *supra* note 195, at 2.

<sup>224</sup> Complaint, *supra* note 208, at 5.

<sup>225</sup> Complaint, *supra* note 200, at 1.

<sup>226</sup> Complaint, *supra* note 216, at 9–10.

Oklahoma Oregon Pennsylvania  Rhode Island  *Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin Wyoming	South Carolina  Texas  Wisconsin	Oklahoma Oregon Pennsylvania Puerto Rico Rhode Island  South Dakota *Tennessee  *Utah Vermont Virginia Washington West Virginia Wyoming	Puerto Rico  South Carolina South Dakota  ^Texas Utah	Oklahoma Oregon  Rhode Island  South Dakota Tennessee  ^Utah Vermont Virginia Washington West Virginia
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Republican state attorneys general are the most active participants in all of these complaints, with a total of eighty-seven Republican state attorneys general signatures to these five complaints and sixty-seven Democratic state attorneys general signatures to these complaints. Typically, Republican state attorneys general are more likely to join complaints brought by Democratic state attorneys general—the New York-led Facebook and the Colorado-led Google vertical search complaints—than Democratic state attorneys general are willing to join complaints led by Republican state attorneys general—the Texas-led Google advertising complaint—or Google search complaint filed by the Trump administration’s DOJ.

### C. Investigations Against Apple and Amazon

State and federal antitrust enforcers have yet to file a complaint against Apple but have opened investigations into Apple’s anticompetitive conduct in the app distribution market.<sup>227</sup> Likewise, with the exception of the District of Columbia’s lawsuit against Amazon regarding its price parity clauses,<sup>228</sup> state

<sup>227</sup> Diane Bartz, *Exclusive: iPhone App Makers Questioned in U.S. Antitrust Probe of Apple*, REUTERS (Feb. 4, 2020, 12:04 PM), <https://www.reuters.com/article/us-tech-antitrust-apple-exclusive/exclusive-iphone-app-makers-questioned-in-u-s-antitrust-probe-of-apple-sources-idUSKBN1ZY29M>.

<sup>228</sup> Press Release, Karl Racine, Off. of the Att’y Gen. for D.C., AG Racine Files Antitrust Lawsuit Against Amazon to End Its Illegal Control of Prices Across Online Retail Market (May 25, 2021) (available at <https://oag.dc.gov/release/ag-racine-files-antitrust-lawsuit-against-amazon>).

and federal enforcers are investigating, but have yet to file a case regarding, Amazon's alleged anticompetitive conduct.<sup>229</sup>

#### *D. Litigation Reflecting Shared Consensus*

Almost all of these cases against Facebook and Google are in the early stages, and it remains to be seen whether governments will prevail in their claims.<sup>230</sup> Nonetheless, the decision to bring such cases is momentous and reflects a shared consensus around the world and across the political spectrum that significant resources should be deployed to address Big Tech's monopoly practices. These cases are conservative in that they assiduously apply existing case law to the present facts to argue that Google and Facebook are engaging in abusive monopoly practices.<sup>231</sup> None of the complaints suggest that courts should eschew traditional antitrust standards regarding, for example, consumer welfare, market definition, market power, anticompetitive conduct, or anticompetitive effects.

Nonetheless, the complaints are aggressive in that they argue for a broad array of remedies—including structural reforms—that are more likely to meaningfully address the anticompetitive landscape than simply monetary damages or behavioral remedies.<sup>232</sup> Even still, the remedies proposed in these complaints are included for traditional reasons—i.e., because they would enhance competition (for example, by increasing output, decreasing prices, improving product quality, or spurring innovation).<sup>233</sup> There is no suggestion in these complaints that antitrust remedies are necessary to address concerns traditionally considered outside of consumer welfare, such as political power, curtailment of free speech, or social inequality.<sup>234</sup>

Federal and state enforcers recognize that applying traditional antitrust principles to complex monopoly practices by digital platforms presents unusual

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<sup>229</sup> Victor Malachard, *5 Things You Need to Know About the Amazon Antitrust Probe*, NOZZLE, <https://insights.nozzle.ai/amazon-antitrust-probe> (last visited Apr. 27, 2022).

<sup>230</sup> The one adverse dispositive ruling came on June 28, 2021, when a federal district court dismissed New York's case against Facebook on the grounds of laches. *New York v. Facebook*, No. 1:20-CV-03589, at \*67 (D.D.C. June 28, 2021). The state AGs are appealing that ruling as of July 2021. See Nylen, *supra* note 192.

<sup>231</sup> Hovenkamp, *supra* note 173, at 1957–58.

<sup>232</sup> See, e.g., Complaint, *supra* note 213, at 5–6 (requesting declaratory relief stating Google cannot self-preference on its results pages).

<sup>233</sup> James Keyte, Frédéric Jenny & Eleanor Fox, *Buckle Up: The Global Future of Antitrust Enforcement and Regulation*, 35 ANTITRUST 32, 37–38 (2021).

<sup>234</sup> Complaint, *supra* note 222; Complaint, *Colorado v. Google*, 1:2020-CV-03715 (D.D.C. Dec. 17, 2020); Complaint, *supra* note 200; Complaint, *supra* note 213; Complaint, *supra* note 195.

problems.<sup>235</sup> They fully appreciate that courts will continue to hew closely to existing antitrust jurisprudence and attempt to apply that jurisprudence to these novel circumstances.<sup>236</sup> As scholars have noted, “[A]bsent legislation, changes [from the courts] will be around the edges and incremental, as courts continue to determine how robustly the U.S. antitrust goals can accommodate such values as innovation, quality, and dynamic competition without crossing the boundaries into unreliable speculation.”<sup>237</sup>

These cases were brought notwithstanding the fact that “an anti-enforcement bias has haunted antitrust since the late twentieth century.”<sup>238</sup> State and federal enforcers—fully recognizing that courts are skeptical of monopolization cases—have nonetheless chosen to expend significant resources to rebut the anti-enforcement presumption inherent in the current jurisprudence by vigorously pursuing Section 2 cases in federal courts against Big Tech companies.<sup>239</sup> In short, there is bipartisan consensus reflected in the state and federal complaints that Google’s and Facebook’s behavior violate existing antitrust laws.<sup>240</sup> Similarly, there are ongoing bipartisan investigations of potential antitrust violations by other Big Tech companies, including Apple and Amazon.<sup>241</sup>

#### CONCLUSION

One should not be Pollyannish about the bipartisan consensus on Big Tech. The obstacles on the road to meaningful reform are significant.<sup>242</sup> Legislative proposals will be fiercely contested and difficult to enact.<sup>243</sup> Litigation will require lengthy prosecution of cases applying existing antitrust jurisprudence and convincing courts to impose effective remedies, including structural relief.<sup>244</sup>

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<sup>235</sup> Keyte et al., *supra* note 233, at 37.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 37–38.

<sup>238</sup> Hovenkamp, *supra* note 173, at 1956.

<sup>239</sup> Mitch Stoltz, Corynne McSherry, Cindy Cohn & Danny O’Brien, *Competition, Civil Liberties, and the Internet Giants*, ELEC. FRONTIER FOUND. (June 27, 2018), <https://www EFF.ORG/deeplinks/2018/06/competition-civil-liberties-and-internet-giants>.

<sup>240</sup> See *Who Are America’s Attorneys General?*, *supra* note 220 (highlighting the political party of each state attorney general); Complaint, *supra* note 216, at 5; Complaint, *supra* note 195, at 2.

<sup>241</sup> Bartz, *supra* note 227; Malachard, *supra* note 229.

<sup>242</sup> Alison Jones & William E. Kovacic, *Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULL. 227, 238–46 (2020).

<sup>243</sup> Kang & McCabe, *supra* note 87.

<sup>244</sup> Jones & Kovacic, *supra* note 242, at 239.

Many of the problems related to Big Tech go beyond traditional antitrust remedies. While it is easy to agree about the threat Big Tech poses to American society, it is more difficult to agree on the solutions. Some of these problems—such as Big Tech’s influence on elections or the coarsening of public discourse—are beyond the reach of traditional antitrust laws. Others fall squarely within the domain of protecting American consumers, such as from the monopoly profits Google earns from controlling online advertising. In between are non-price harms, which fall within an expansive understanding of consumer welfare but nonetheless are difficult to measure, such as concerns relating to consumer privacy.

The impetus to be more aggressive against Big Tech masks the continuum of views on the appropriate level of antitrust reform.<sup>245</sup> We should not assume that because Republicans and Democrats agree on the core problems relating to Big Tech that they are going to agree on everything. Republicans are unlikely to abandon the consumer welfare standard in favor of citizen welfare, as many Democrats have proposed. Democrats are unlikely to abandon the FTC’s role in enforcing antitrust laws, as some Republicans have proposed. Many progressives will push the envelope further than they should, and many conservatives will resist change that is warranted under the current circumstances. Nonetheless, the fact that Republicans and Democrats cannot agree on everything should not obscure the fact that they agree on many things when it comes to the perils of Big Tech.

Lurking in the background are the billions of dollars that the largest technology companies in the world have at their disposal to employ lobbyists, law firms, economists, think tanks, pollsters, and influencers who will do everything in their power to resist change and defend Big Tech’s monopoly power.<sup>246</sup> Amazon, Apple, Facebook, and Google have combined over \$500 billion cash on reserve,<sup>247</sup> and therefore they have almost unlimited resources to influence their preferred political outcomes. Big Tech companies are the biggest corporate lobbying spenders in the country, hiring over 330 lobbyists and spending over “\$124 million on lobbying and campaign contributions” in 2020.<sup>248</sup> They routinely use lobbying firms such as NetChoice, Chamber of

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<sup>245</sup> William Kovacic, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46, 47–51 (2021).

<sup>246</sup> Matt Krantz, *13 Firms Hoard \$1 Trillion in Cash (We’re Looking at You Big Tech)*, INV. BUS. DAILY (Feb. 3, 2022), <https://www.investors.com/etfs-and-funds/sectors/sp500-companies-stockpile-1-trillion-cash-investors-want-it/>.

<sup>247</sup> *Id.*

<sup>248</sup> Jane Chung, *Big Tech, Big Cash: Washington’s New Power Players*, PUB. CITIZEN (Mar. 24, 2021),

Progress, the Competitive Enterprise Institute, and the Information Technology and Innovation Foundation as fronts to push their agenda.<sup>249</sup> Any efforts at legislative reform must be done in the context of these political headwinds.

Likewise on the litigation front, Big Tech has hired dozens of law firms<sup>250</sup> to defend their monopoly practices and pursue a war of attrition that includes delay, forum shopping, noncompliance with discovery requests, unreasonable privilege logs, sanitized documents, and strategic obfuscation.<sup>251</sup> The federal and state complaints filed against Google and Facebook go to the heart of their business models, and there are few limits to what they will spend to defend their behavior and maintain the status quo. If a company like Google earns over \$700 million a day,<sup>252</sup> much of it from monopoly practices in online advertising, every day that delays a finding of liability is a victory for Google. Despite the strong bipartisan consensus on holding Big Tech companies accountable for abuse of their monopoly power, the path of litigation is slow, expensive, and uncertain.

We are in a pivotal moment in antitrust history. Republicans and Democrats are both realigning in a way that fears the concentrated power of digital platforms. On the Republican side, social conservatives recognize Big Tech as aligned against their interests and committed to undermining their voices and values. Republicans also are increasingly a populist party of the working class, and that political trajectory is in tension with another traditional Republican impulse to align with big business interests. Democrats have their own internecine battles, with progressives aligned against Davos Democrats. Recent appointments and pronouncements suggest that the Biden administration has unequivocally departed from the Obama administration's lax antitrust approach

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<https://www.citizen.org/article/big-tech-lobbying-update/>.

<sup>249</sup> See, e.g., Clyde Wayne Crews, Jessica Melugin & Patrick Hedger, *House Hearing with Big Tech Companies Unwarranted on Antitrust Grounds*, COMPETITIVE ENTER. INST. (July 28, 2020), [https://cei.org/news\\_releases/house-hearing-with-big-tech-companies-unwarranted-on-antitrust-grounds/](https://cei.org/news_releases/house-hearing-with-big-tech-companies-unwarranted-on-antitrust-grounds/); Steve Delbianco, *'Big Government' Should Not Replace 'Big Tech,' Says Tech Advocate*, NETCHOICE (Dec. 22, 2021), <https://netchoice.org/media-press/big-government-should-not-replace-big-tech-says-tech-advocate/>.

<sup>250</sup> Kang & McCabe, *supra* note 131.

<sup>251</sup> Adrienne Jeffries, *To Head Off Regulators, Google Makes Certain Words Taboo*, MARKUP (Aug. 7, 2020, 8:00 AM), <https://themarkup.org/google-the-giant/2020/08/07/google-documents-show-taboo-words-antitrust>; Matt Stoller, *The Big Law Cartel: How Antitrust Lawyers Help Their Clients Break the Law*, BIG BY MATT STOLLER (July 18, 2021), <https://mattstoller.substack.com/p/the-big-law-cartel-how-antitrust> (“The legal services industry market is competitive in a toxic way, with big law antitrust defense lawyers competing with one another not on whether they can give the best advice on how to follow the law, but on whether they can help their clients break the law. It’s a dysfunctional market structure, an auction of injustice.”).

<sup>252</sup> Google annual revenue for 2021 was \$257 billion, “a [41 percent] year-over-year jump in revenue.” Kim Lyons, *Google Parent Company Alphabet Broke \$200 Billion in Annual Revenue for the First Time*, VERGE (Feb. 1, 2022, 4:54 PM), <https://www.theverge.com/2022/2/1/22912196/google-alphabet-200-billion-annual-revenue-youtube-pixel-search>.



toward monopolies, which utterly failed to address Big Tech's monopoly power.<sup>253</sup> The confluence of these changes portends a rare moment of public sentiment and political consensus to challenge the abuse of power through state and federal litigation and bipartisan legislation.

There is no magic solution to solve the myriad problems posed by Big Tech companies such as Amazon, Apple, Facebook, and Google. The best strategy is to find common ground between Republicans and Democrats on some of the core problems that Big Tech poses to American society and pursue common-sense legislation, regulation, and litigation to address them.

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<sup>253</sup> AM. ECON. LIBERTIES PROJECT, *THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION POLICY DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW STRUCTURALIST APPROACH* 9–10 (2021), <https://www.economicliberties.us/our-work/courage-to-learn/>; Leah Nysten, *How Washington Fumbled the Future*, POLITICO, <https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573> (Mar. 16, 2021, 5:46 PM).