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Congressional Antitrust Bills Seek to Regulate a New Internet Era

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CONGRESS PASSED OUR FOUNDATIONAL antitrust statutes in the late 1800s and early 1900s to address concerns over the negative economic effects of monopolies and business trusts existing or developing in that era. In the 21st century, commentators and legislators have expressed similar concerns, but about evolving technology and business arrangements in the digital era. Among other developments, large technology companies have created new business arrangements, notably including internet platforms, that present different competitive challenges than those posed by early 20th-century industries.

As society has progressed and new technologies have emerged, threatening historical conceptions of competition, antitrust practitioners and political wonks alike have started to question the efficacy of our current antitrust laws, against Big Tech* and more broadly. Several bills recently introduced in Congress seek to strengthen our established antitrust statutes, to affect mergers, to control internet platforms, and to increase antitrust enforcement budgets. These bills address concerns about economic concentration and are designed to enhance competition in the United States economy. In doing so, the bills could benefit consumers, modern businesses on the internet, and society as a whole.

The Current Antitrust Laws Need Updating to Promote Fair Competition in the Internet Age

Current Antitrust Landscape. Our current antitrust laws were primarily created to dissolve monopolies already existing, and combinations formed as business trusts, in the sugar, railroad, steel, and oil industries during the 1800s. Lawmakers began to realize that the monopolistic power enjoyed by combinations such as U.S. Steel and Standard Oil enabled these massive trusts to control both the supply and prices of their products. Control over an industry by a single company stymied competition, creating insurmountable barriers to entry and diminished consumer choice.

It was in this context that our current antitrust laws were conceptualized and enacted. The first bill passed by Congress was the Sherman Act of 1890,[1] which prohibits any unreasonable "contract, combination . . . , or conspiracy, in restraint of trade," and any "monopoliz[ation], or attempt to monopolize, or combine or conspire . . . to monopolize."[2]

In the beginning of the 20th century, other large corporations emerged as dominant market forces and began engaging in predatory pricing, exclusive dealing, and mergers designed to stifle potential competition. In response to this threat, Congress passed the Clayton Act in 1914 as an amendment to the Sherman Act. The Clayton Act, enforced by the Federal Trade Commission, principally seeks to prevent anticompetitive mergers or acquisitions and prohibit predatory or discriminatory pricing practices.[3]

Capitalizing on this new set of antitrust laws, the Department of Justice and FTC began investigating and prosecuting unreasonable restraints of trade. Antitrust enforcement peaked from the 1940s through the late 1970s as antitrust laws became the default mechanism to ensure effective competition. The extent of this enforcement declined after the 1970s, although a few important cases were brought by the government after that time.[4] While cartel enforcement remained robust, investigation into potential violations and other forms of enforcement declined considerably. Mergers and acquisitions among competitors were rarely challenged. Markedly, the DOJ passed on the opportunity to challenge Facebook's acquisition of Instagram—a missed opportunity now heavily criticized—to prevent Facebook's monopolistic control of the social media industry. The FTC's current suit against Facebook seeks Facebook's divestiture of Instagram.[5]

The Internet Has Dramatically Changed the Economy, Allowing the Emergence of New Monopolies in Big Tech. The industries previously policed through early 20th-century antitrust laws differ materially from today's ever-evolving Big Tech sector. Each of the Big Tech

*For the purpose of this article, "Big Tech" encompasses major information technology companies, such as Alphabet (Google), Amazon, Apple, and Meta (formerly Facebook).

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companies currently under scrutiny has drastically morphed from its original business model. Amazon entered the marketplace as a platform primarily for purchasing books and has grown to become the world's largest online retailer. Facebook was introduced as a way to stay connected with friends and family around the globe but has reportedly acquired more than 90 other businesses since its inception.[6] Google started out as a simple internet search engine and is now the world's top advertising platform, drawing approximately 90 percent of global internet searches[7] and 29 percent of all digital ad spending.[8] As these companies transform, so too must the laws used to regulate their marketplaces. Antitrust laws have always sought to maintain competitive marketplaces with the goal of encouraging high output and low prices.

Updated Antitrust Laws May Better Promote Fair Competition in the Internet Age. The existing federal antitrust laws were passed prior to the creation of the world's first computer; their sheer age has raised questions about their efficacy against potential antitrust violations in the 21st century. Online platforms' emerging dominance has aptly been compared to the railroads' transformation of the U.S. economy 130 years ago. While the railroads substantially expanded access to national markets, they also created key chokeholds that an increasingly concentrated railroad industry unfairly exploited. While Congress recognized then "that these powerful new technologies [have] reshaped the balance of power in our economy," it also recognized that rebalancing was required to prevent the new monopolists from abusing their power.[9] So too today—similar challenges now arise from newer technologies. But once again, these new platform companies "have the ability to control access to critical markets," which is a substantial economic shift that again calls for legislative rebalancing.[10]

The enforcement framework under the existing antitrust laws may not give enforcers, either private or public, the remedial options they need to address the competitive challenges of our modern economy. Common law antitrust principles have had difficulty keeping up with competitive conditions in rapidly changing technological periods, such as we have today. These conditions have led to increasing calls for regulatory and legislative reform to better protect competition in the modern economy.

One approach would be to increase the standards for merger review to avoid excessive concentration in the first place. Another specific change appropriate for dominant platforms would be to add a nondiscrimination policy that prohibits infrastructure-like platforms from promoting their own goods or services over those of their rivals. Requiring large online platforms to "ensure open and fair access to other businesses" through nondiscrimination and related requirements would limit the platforms' power to use "dominance in anticompetitive ways."[11] These approaches, among others, are encompassed within the bills now being considered by Congress, as discussed below.

Bills Now Before Congress Would Transform the Economy for the Better

Advocates of change have suggested that Congress must update antitrust law now because the process by which antitrust standards evolve over time to catch up to market and economic conditions is unacceptably slow. Accordingly, sponsors have introduced a number of legislative reform bills in Congress. Some of these bills, discussed first, focus on digital markets. Others propose reforms to strengthen antitrust law more generally and to improve private and government antitrust enforcement.[12]

Bills Focused on Big Tech and Digital Markets. Various advocates for antitrust improvement argue for sector-specific regulations, "especially to deal with the tech titans."[13] Accordingly, some pending antitrust bills seek to enhance competition in technology platform industries.[14] For example, reforms suggested by the House Majority Staff Report focused on tech included structural separations and prohibitions on dominant platforms limiting their expansion into adjacent markets or through acquisitions, nondiscrimination requirements to prevent self-preferencing, and mandatory data portability.[15]

American Choice and Innovation Online Act (H.R. 3816). The American Choice and Innovation Online Act (H.R. 3816)[16] was introduced in June 2021 to deal with online platforms' self-preferencing opportunities. Dominant technology platforms have integrated into adjacent lines of business and in some cases "operate both as key intermediaries for third-party companies as well as direct competitors to them."[17] A recent House Subcommittee Report noted significant complaints related to "how the dominant platforms can exploit this dual role, through data exploitation, self-preferencing, appropriation of key technologies, and abrupt changes to a platform's policies."[18] A platform's vertical integration plus market power in one of its upstream markets can increase its power to impair competition. For example, "[a] flourmill that also owned a bakery could hike prices or degrade quality when selling to rival bakers—or refuse to do business with them entirely."[19]

The House Report states a congressional investigation "identified numerous instances in which dominant platforms engaged in preferential or discriminatory treatment. In some cases, the dominant platform privileged its own products or services. In others, a dominant platform gave preferential treatment to one business partner over others."[20] Since the platforms were, in most instances, "the only viable path to market, [their] discriminatory treatment had the effect of picking winners and losers in the marketplace."[21]

The American Choice and Innovation Online Act attempts to prevent large tech companies from favoring their own products over the products of their competitors on their proprietary platforms. House Judiciary Chair Jerrold Nadler (D-NY) described the bill as restoring market fairness and online competition "by preventing dominant online platforms from using their market power to pick

winners and losers, [or] favor their own products."[22] Among other provisions, the bill would forbid certain platforms from advantaging their own products or services over those of another or from putting at a disadvantage the products or services of a user of the platform.[23]

Platform Competition and Opportunity Act of 2021 (H.R. 3826). The Platform Competition and Opportunity Act of 2021 (H.R. 3826),[24] sponsored by Representative Hakeem S. Jeffries (D-NY), seeks to regulate market consolidation and "merger enforcement in the digital economy by shifting the burden of proof for transactions involving a dominant platform that are most likely to harm competition, eliminate consumer choice, and prevent new competition from entering the market."[25] The bill would prohibit online platforms from merging with competitors and would place the burden on the merging entities to demonstrate the merger's propriety and lack of anticompetitive effects.[26]

The Clayton Act prohibits mergers that "substantially . . . lessen competition, or tend to create a monopoly."[27] Courts analyze contested mergers through a burden-shifting process. First, a plaintiff challenging a merger must show that the transaction would likely have anticompetitive effects in a relevant product and geographical market, typically by comparing the market's concentration before and after the merger. That showing shifts the burden of proof to the transaction's proponents to discredit the market concentration evidence, show that the model otherwise "inaccurately predicts the merger's probable effect on competition,"[28] or show that the procompetitive effects of the merger likely "outweigh any potential anticompetitive effects."[29] If the merger proponents meet their burden of proof, that showing shifts the burden of showing additional evidence back to the government, and that burden merges with the government's ultimate burden of persuasion.[30]

Critics of the current merger review process argue that it fails to protect consumers and the economy from uncompetitive price increases and other ill effects. "Detailed studies of merger policy have revealed that a significant share of mergers have resulted in price increases: out of fifty-three transactions that took place over the last few decades, over seventy-five percent resulted in price increases without any offsetting benefits in quality, cost, or nonprice measures."[31] For example, the district and appeals courts both rejected the DOJ's assertion that the AT&T/Time Warner merger could substantially lessen competition, accepting arguments that the merger would not increase the resulting entity's leverage or increase consumer costs. Nevertheless, AT&T reportedly raised prices after the merger, "raising some bills by fifty percent."[32]

This bill operates by forbidding a covered platform operator from acquiring another firm or its assets. The bill excludes transactions for which the platform operator demonstrates by clear and convincing evidence that the acquisition target does not compete with the covered platform operator, does not "constitute nascent or potential competition," and does not enhance or increase the platform's market position or ability to maintain its position.[33] The bill provides for FTC enforcement, state attorney general enforcement, and private suits by persons injured by a violation.[34]

Ending Platform Monopolies Act (H.R. 3825). The Ending Platform Monopolies Act (H.R. 3825),[35] sponsored by Representative Pramila Jayapal (D-WA), is intended to "promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses."[36] The bill targets large tech companies' exploitation of their dominant position in the market to harm their smaller competitors. Under the bill, large digital platforms would need to divest from businesses in which they leveraged their position as a dominant platform to harm their competitors who use the platform.[37]

One problem this bill addresses, and should limit or prevent, is monopoly leveraging. "Leverage occurs when a monopolist uses power in one market to induce or foreclose sales in another market and thereby monopolize both."[38] Although leverage theory is best known in the context of tying cases, antitrust authorities also have applied leverage theory "in cases involving vertical mergers, exclusive dealing, reciprocal dealing, and monopolization under § 2 of the Sherman Act."[39] In addition, although courts traditionally discuss leveraging in terms of gaining new markets, defensive leveraging allows the monopolist to shore up the splintered segment of its prime market against a cheaper or next-generation product.[40]

The contour of a monopoly leveraging violation "has divided courts, legal scholars, and economists."[41] In a formative 1979 case, the Second Circuit adopted a broad view of monopoly leveraging claims in *Berkey Photo Inc. v. Eastman Kodak Co*.[42] *Berkey* held that a firm violates Section 2 "by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market."[43] Nine years later, the Sixth Circuit followed *Berkey* in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc*.[44] However, the Ninth Circuit later disagreed with these cases in *Alaska Airlines, Inc. v. United Airlines, Inc.*, holding that allowing a claim against a company for gaining a competitive advantage in a second market with less than a monopolization attempt failed to distinguish between improper monopolies and efficient or natural monopolies.[45] A year after *Alaska Airlines,* the Third Circuit, in *Fineman v. Armstrong World Industries,* also limited Section 2 leveraging claims by requiring a "threatened or actual monopoly in the leveraged market."[46]

Vertically integrated gatekeeper platforms have particular potential to inhibit competition when they have market power at one level of the distribution chain. As mentioned above, the flourmill that owned a bakery could affect the prices or quality of the products it sells to its competing bakeries.[47] Proponents of change suggest that online platforms,

as vertically integrated gatekeepers, should be viewed as integrated entities, since "isolating a particular line of business and its prices in that segment fails to capture both (1) the true shape of the company's dominance and (2) the ways it is able to leverage advantages gained in one sector to boost its business in another."[48]

The Ending Platform Monopolies Act strengthens the law around monopoly leveraging in situations involving certain platform operators. This bill forbids a "covered platform operator" from owning or controlling a line of business, other than the covered platform, that (1) uses the covered platform to sell or provide services or products, (2) offers a product or service that requires or gains advantages from purchasing or using the covered platform, or (3) "gives rise to a conflict of interest."[49] The bill defines a conflict of interest to include a platform operating a line of business where the platform has the incentive and ability to advantage its own products or services over competitors or nascent competitors or to exclude or disadvantage competitors or nascent competitors.[50] Since the bill applies to covered platforms—defined in terms of size, function, and relationship with certain trading partners—the bill limits covered platform conduct that would constitute monopoly leveraging without requiring proof of market power.[51]

ACCESS Act of 2021 (H.R. 3849). Representative Mary Gay Scanlon (D-PA) sponsored the Augmenting Compatibility and Competition by Enabling Switching Act of 2021, or ACCESS Act of 2021 (H.R. 3849).[52] This bill addresses the tremendous barriers to entry in digital markets in which large digital platforms control facilities their competitors need to compete. The House Report noted that "[Google, Amazon, Facebook, and Apple] are akin to essential facilities for many smaller businesses."[53] The essential facilities doctrine "imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first."[54] As discussed below, for situations involving a "covered platform,"[55] the bill would change the elements of an essential facilities claim.

Viamedia, Inc. v. Comcast Corp. recently applied the essential facilities doctrine of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp* to allow a refusal-to-deal claim to go to the jury.[56] There, Comcast allegedly obtained monopoly power over collective "interconnect" platforms that cable providers used to share access to advertising business within regional broadcasting areas. Viamedia argued that Comcast used its control of the interconnect platforms "to force its smaller retail cable television competitors to stop doing business with Viamedia, thereby gaining monopoly power over the market for advertising representation services."[57] The court in *Viamedia* held that *Aspen Skiing* supported a refusal-to-deal claim in *Viamedia* and reversed the district court's dismissal of the case.[58]

However, in *Epic Games, Inc. v. Apple, Inc.,* the court rejected the application of the essential facilities doctrine in the context of Apple's iOS App Store.[59] It defined "essential facilities" as those "not capable of being replicated" that "serve as a conduit for the distribution of another product," including finite physical infrastructures such as bridges or power networks.[60] It held that such a claim requires a showing that (1) the defendant is a monopolist controlling an essential facility, (2) the plaintiff cannot practically or reasonably duplicate that facility, (3) the defendant refused to allow access to the facility, and (4) providing such access is feasible for the defendant.[61]

After broadly defining the relevant market as mobile gaming transactions (rather than mobile gaming limited to Apple's iOS system), the court found that Apple was not "an illegal monopolist in control of the iOS platform."[62] The court also stated that Epic Games failed to prove "that the iOS platform is an essential facility" because pricing content could be distributed through methods other than Apple's App Store, such as web apps, websites, and other app stores.[63]

The ACCESS Act would require covered platforms to maintain "transparent, third-party-accessible interfaces (including application programming interfaces) to facilitate and maintain interoperability with a competing business or a potential competing business" that comply with the Act's standards.[64] A covered platform is defined by the bill as an online platform that either has been designated by the FTC as covered or meets substantial revenue and subscriber criteria and is a critical trading partner for a product or service offered on or directly related to the platform.[65] A critical trading partner is one with the ability to restrict or impede a business user's access to its customers or to services the business needs to serve its users or customers.[66] The bill allows a covered platform to change its interoperability interface only after approval by the FTC.[67] The bill also calls for the creation of an FTC "Technical Committee" to create new standards regarding data access and provides the FTC with heightened authority to enforce those standards.[68] For a covered platform like Apple, the bill would change the *Epic* plaintiff's burden of proof by substituting "covered platform" status for the monopoly power element and substituting critical trading partner status for the duplication and feasibility elements the court articulated.

General Antitrust Reform Provisions. In addition to technology platform concerns, some advocates for antitrust reform argue that courts have not kept up with developments in the economy at large, leaving merger and monopolization case law "ossified" by unduly *laissez faire* doctrinal assumptions.[69] Accordingly, proponents of change have also suggested antitrust legislation focused on the general economy, including legislation to strengthen presumptions, impose bright-line rules limiting mergers, and expand liability for abuse of dominance. Advocates for change have also suggested reforms to improve enforcement, including increased agency funding, increased penalties, removing private plaintiffs' enforcement barriers, and increasing merger retrospectives.[70] From those various reform ideas, three bills have emerged in Congress.

The Competition and Antitrust Law Enforcement Reform Act of 2021 (S. 225). Senator Amy Klobuchar (D-MN) introduced the Competition and Antitrust Law Enforcement Reform Act of 2021 (S. 225) on February 4, 2021 (CALERA).[71] Senators Richard Blumenthal (D-CT), Cory Booker (D-NJ), Ed Markey (D-MA), and Brian Schatz (D-HI) co-sponsored the bill, which is pending before the Senate Committee on the Judiciary. CALERA would modify the Clayton Act's merger standard, deter more exclusionary conduct, and enhance the federal antitrust enforcement agencies' enforcement abilities.[72] The following are among the bill's important proposed reforms.

Changes to Merger Review. The Clayton Act[73] was enacted to enhance the Sherman Act[74] by including provisions that, among others, prohibit anticompetitive mergers.[75] However, because of prevailing agency budgets and existing case law, the government is only able to challenge the most egregious mergers and must make an unduly strong showing of anticompetitive effects to prevail.[76] To restore the Clayton Act and provide the government with greater latitude in effectuating the Clayton Act's original purpose, CALERA would shift the burden of proof in some mergers to the merging entities, requiring them to demonstrate that the proposed merger is not anticompetitive. This burden shifting would apply, *inter alia*, to mergers that significantly increase market concentration, acquisitions of competitors by a dominant firm, and mergers valued at over $5 billion.[77]

CALERA would also revise the legal standard for evaluating mergers under the antitrust laws. It would change the standard for denying a merger from substantially lessening competition or tending to create a monopoly to "creat[ing] an appreciable risk of materially lessening competition,"[78] thereby granting the enforcement authorities greater leeway in blocking potentially anticompetitive mergers.[79]

Addressing Monopsony Conduct. The proposed legislation would also specifically address "buyer market power," or monopsony conduct. In recent years, the DOJ, state attorneys general, and individual employees have shifted their focus to no-poach agreements and covenants not to compete imposed in employment contracts.[80] The increased use of such restraints has led to increased concentration in labor markets and stagnant wages and created what some scholars have dubbed a "labor monopsony."[81] Heightened awareness of monopsony power in the labor market context has trickled into tech markets, where large digital platforms can be the only buyers in a concentrated market, with the result that suppliers must accept less-than-competitive prices for the goods or services they sell.[82]

Private and public enforcement against monopsonies has largely failed, primarily due to courts' reluctance to find that monopsonies lessen competition in the same way that monopolies can. CALERA would eliminate this confusion by "amend[ing] the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the Clayton Act."[83]

Amending the Clayton Act to Preclude Dominant Firm Conduct. CALERA also explicitly addresses exclusionary conduct designed to deter competition.[84] The bill would amend the Clayton Act to define "exclusionary conduct," traditionally an ambiguous term, as conduct that "(i) materially disadvantages [one] or more actual or potential competitors; or (ii) tends to foreclose or limit the ability or incentive of [one] or more actual or potential competitors to compete."[85] The bill would also amend the Clayton Act to prohibit dominant firm conduct that creates an "appreciable risk of harming competition."[86]

Agency Reform and Budgets. CALERA provides for budget increases for the FTC and the DOJ's Antitrust Division to accommodate growing antitrust concerns due to increased industry consolidation and the rise in digital markets.[87] Budgetary increases for enforcement agencies are especially pertinent, as large, affluent companies—including Big Tech companies—increasingly engage in anticompetitive conduct, against which it is expensive and difficult to bring legal challenges.

In addition, CALERA would establish a new, independent FTC division to conduct market studies and merger analyses. The goal of this reform is to identify potential areas of anticompetitive behavior before unlawful conduct occurs and to understand more about the actual effects of past mergers on competition.

Further, CALERA would allow the FTC and DOJ to seek monetary civil penalties for antitrust violations.[88] The bill notes that current remedies, such as "injunctions, equitable monetary relief, and private damages," are not adequate.[89] In addition, the bill would create greater incentives and protections for "whistleblowers" who report anticompetitive conduct and allow civil antitrust litigants the ability to recover prejudgment interest on any damages award.[90]

Merger Filing Fee Modernization Act of 2021 (H.R. 3843). In the House of Representatives, lawmakers have introduced bills aimed at addressing some of the same shortcomings targeted by the Senate bills. One such bill is the Merger Filing Fee Modernization Act of 2021 (H.R. 3843),[91] sponsored by Representative Joe Neguse (D-CO). It increases funding for the FTC and DOJ so that those agencies can efficiently and effectively enforce the antitrust laws and litigate important antitrust matters. House Judiciary Committee Chairman Nadler stated, "We have not updated the merger filing fees in more than two decades and the budgets for the antitrust enforcement agencies have not kept pace with the demands placed on them. Officials from both parties agree that these agencies need additional resources to perform their critical work."[92] The bill sets the filing fees for large merger transactions higher than those for small transactions, acknowledging the significant time and resources needed to evaluate large mergers.

A substantial problem for regulating high-technology firms as well as other industries is that antitrust enforcement budgets have not kept up with the challenge. A recent article

in this magazine noted that appropriations for the antitrust agencies in 2018 "were 18 percent lower than in 2010 and that the agencies had slightly fewer resources in 2018 than they had in 2001."[93] In 2019, the DOJ's Antitrust Division had 594 employees, compared with 795 ten years earlier; the FTC had roughly the same number of employees as it had ten years earlier. "In contrast, Gross Domestic Product has increased 37 percent from 2010 to 2018, and HSR merger filings increased by 81 percent from FY 2010 to FY 2018."[94]

Merger activity, one important enforcement area, is substantial and resource-intensive and needs more attention. Litigating merger challenges consumes substantial resources. When the DOJ challenged two health insurance mergers in 2016, the two cases "required 25–30 percent of the Division's professional staff."[95] From 2005 to 2014, only about 3 percent of 15,000 mergers were "subject to close scrutiny."[96] "In the first eight months of 2021, companies . . . announced mergers and acquisitions worth more than $1.8 trillion in the U.S.," the highest number at that point in the year since 1995.[97] The tech sector "recorded the most deals by dollar amount" in that period, but at least six other sectors recorded more than twice their five-year averages.[98] The FTC, which reviews certain deals over $92 million, announced it could not complete all merger reviews in its standard 30-day window. The agency received over 2,900 "deal filings" through July 2021.[99] Providing additional resources to the agencies is aimed at remediating these enforcement problems.

State Antitrust Enforcement Venue Act of 2021 (S. 1787). The State Antitrust Enforcement Venue Act of 2021 (S. 1787)[100] (Venue Act) amends the federal multidistrict litigation (MDL) provision with regard to actions by state attorneys general. Sponsors have also introduced this bill in the House of Representatives.[101] The MDL provisions authorize the Judicial Panel on Multidistrict Litigation to transfer actions involving common questions of fact to a single district court "for coordinated or consolidated pretrial proceedings."[102] That section currently authorizes multidistrict proceedings for state attorneys generals' *parens patriae* actions but exempts any action in which the United States has filed an antitrust action.[103] The bill, if passed, will amend the section to exempt state *parens patriae* actions from multidistrict litigation proceedings. As a result, both state and federal governments may choose the venues for their antitrust enforcement actions.

The state's brief opposing Google's motion to transfer *In re Digital Advertising Antitrust Litigation* illustrates how this bill might operate if passed. Following an 18-month investigation, including pre-suit discovery, Texas and fourteen other state attorneys general filed a civil case in the Eastern District of Texas alleging anticompetitive and deceptive conduct in web display advertising markets.[104] Google moved to transfer venue to "its own West Coast backyard," first pursuant to the general change of venue statute and then through a motion for transfer and centralization, along with numerous private cases, pursuant to the MDL statute.[105] The Venue Act, if passed, would prevent transfer under these circumstances. Among other arguments, the states maintained that the bill, effective retroactively as of June 1, 2021, would require undoing any MDL transfer and restoring the states' case to the Eastern District of Texas.[106]

Enacting the New Competition Bills Will Enhance the Welfare of Consumers, Small Businesses, and Society Overall.

The pending House and Senate bills take aim at dominant platforms, scrutinize exclusionary and leveraging conduct by monopolists, reform merger review policy, address monopsony conduct, and increase funding so regulators can do their jobs. Enactment of these bills would substantially benefit consumers, small businesses, and society at large by increasing competition, reducing concentration, lowering barriers to entry, and enhancing enforcement.

Increased industry consolidation and dominant-firm conduct impact society in ways that extend far beyond increased prices. The consolidation of media corporations is one prime example. As of 2012, only six companies "owned 90 percent of the media consumed by the Americans."[107] This is in contrast to 50 media companies in 1983.[108] These limited media sources have an outsized influence on the kind and type of information that the public receives. Likewise, dominant social media outlets, such as Facebook, have an inordinate role in the type and amount of information that the public receives. For instance, during the 2016 U.S. presidential election, Facebook and the few other dominant social media platforms were used to spread misinformation designed to divide voters.[109] Without alternative sources of information, these large social media platforms can dominate public thought, spread misinformation, and create political and other divisions in society. Greater checks on industry consolidation could lead to increased competition and greater access to different, and potentially more trustworthy, sources of information. Further, increased competition, particularly in the digital realm, incentivizes competitors to develop new approaches for handling misinformation or privacy issues that can greatly benefit society.

Conclusion

The antitrust laws have an important role to play in defending consumers, small businesses, and society at large against anticompetitive practices and dominant firm conduct. The traditional approach to antitrust regulation continues to value empirically measurable "consumer welfare" and less-regulated markets, and is motivated by the belief that government intervention is not as self-corrective as free markets.[110] This viewpoint concludes that the consumer welfare standard has "served this country well for over a century"[111] and that "[i]n America, you should be rewarded for success."[112]

On the other side of the debate, proponents of antitrust reform believe that such traditional views have resulted in courts falling behind more recent economic research[113] and

have allowed substantial increases in economic concentration.[114] Aside from the larger doctrinal debate, proponents of legislative change argue that the new technology titans' "ability to control access to critical markets" marks a substantial economic shift that calls for legislative intervention.[115]

Accordingly, new laws should be enacted and old laws adapted to address current antitrust concerns arising from increased industry concentration and the growing digital marketplace. As Senator Klobuchar stated in introducing CALERA, "[w]hile the United States once had some of the most effective antitrust laws in the world, our economy today faces a massive competition problem. We can no longer sweep this issue under the rug and hope our existing laws are adequate."[116] The new competition bills are bold and necessary steps toward reforming our antitrust laws for the betterment of our society and economy. ■

1 15 U.S.C. §§ 1–38.

2 15 U.S.C. §§ 1, 2.

3 *See* 15 U.S.C. § 13–14, 18.

4 *Compare* Einer Elhauge, *Horizontal Shareholding,* 129 Harv. L. Rev. 1267, 1292 (2016) (detailing high enforcement 1938–1982) *with* United States v. Microsoft Corp., 253 F.3d 34, 45 (D.C. Cir. 2001); United States v. Am. Tel. & Tel. Co., 552 F.Supp. 131, 141–42 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *Microsoft* and *AT&T* show antitrust law's potential for ambitious cases adapting to changing technology.

5 First Amended Complaint for Injunctive and Other Equitable Relief at 79, ¶ B, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Aug. 19, 2021) (ECF No. 75-1) (requesting Instagram divestiture).

6 *Facebook Acquisitions*, Owler, https://www.owler.com/company/facebook/acquisitions (last visited February 13, 2022).

7 Matt O'Brien, *If Google's a Monopoly, Who is Harmed by Its Market Power?*, Associated Press (Oct. 21, 2020), https://apnews.com/article/google-monopoly-antitrust-lawsuit-f37aa86939c39a95571475495213e73d.

8 *Id.*

9 *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google, Hearing Before the Subcomm. on Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. 6 (July 29, 2020) (statement of Jerrold Nadler).

10 *Id.*

11 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 799 (2017).

12 Gary P. Zanfagna et al., *The Chair's Showcase: The Future of Antitrust*, Antitrust, Summer 2021, at 4, 8 [hereinafter The Chair's Showcase] (Maureen Ohlhausen comments, discussing House Majority Staff Report recommendations).

13 Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, Antitrust, Summer 2021, at 33, 41–42.

14 *See House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives*, Clifford Chance, www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf.

15 House Judiciary Comm. Majority Report, Investigation of Competition in Digital Markets 20 (2020) [hereinafter House Report].

16 H.R. 3816, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3816/text?r=43&s=1.

17 House Report, *supra,* note 15, at 40.

18 *Id.*

19 Khan, *supra* note 11, at 732.

20 House Report, *supra* note 15, at 382.

21 *Id*. The House Report noted the European Commission's finding that Google's self-preferencing in comparison shopping services abused its dominance and the Commission's order to implement "a remedy of 'equal treatment.'" *Id.* at 195, n.1181; *see also id.* at 191, 311, 382 (describing other alleged platform self-preferencing).

22 *See* Press Release, H. Comm. on the Judiciary, Chairman Nadler Statement for the Markup of H.R. 3816, the American Innovation and Choice Online Act (June 24, 2021), judiciary.house.gov/news/documentsingle.aspx?DocumentID=4620.

23 H.R. 3816, § 2.

24 H.R. 3826, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3826/text?r=5&s=1.

25 Press Release, H. Comm. on the Judiciary, Chairman Nadler Statement for the Markup of H.R. 3826, the Platform Competition and Opportunity Act of 2021 (June 23, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4619.

26 *See id.*

27 15 U.S.C. § 18.

28 Steves & Sons, Inc v. Jeld-Wen, Inc. 988 F.3d 690, 704 (4th Cir. 2021).

29 United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 72 (D.D.C. 2011).

30 *Id*. at 49.

31 Lina M. Kahn, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655, 1672 (2020); Elhauge, *supra* note 4, at 1299 ("Empirical analysis of mergers indicates, for example, that merger policy in the past thirty years has mistakenly allowed many mergers that turned out to increase prices.").

32 Kahn, *supra* note 31, at 1674.

33 H.R. 3826, § 2(a) & (b).

34 *Id.* §§ 5 & 7.

35 H.R. 3825, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3825/text.

36 *Id.*

37 Press Release, Pramila Jayapal, Jayapal's Landmark Big Tech Legislation Passes House Judiciary Committee (June 24, 2021), https://jayapal.house.gov/2021/06/24/big-tech-legislation-passes-judiciary-committee/.

38 Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 Geo. L.J. 2079, 2081 (1999).

39 *Id.* at 2082.

40 *Id.* at 2092–93.

41 Eun K. Chang, *Expanding Definition of Monopoly Leveraging*, 17 U. Miami Bus. L. Rev. 325, 326 (2009).

42 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

43 *Id*. at 275.

44 Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc., 854 F.2d 135, 137 (6th Cir. 1988).

45 Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547–48 (9th Cir. 1991).

46 Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 206 (3d Cir. 1992).

47 Kahn, *supra* note 11, at 732.

48 *Id.* at 747 (internal quotation omitted).

49 H.R. 3825, § 2(a).

50 *Id.* § 2(b).

51 *Compare id.* § 2(a) (defining violations), *with Alaska Airlines,* 948 F.2d at 544–45, n.12 (requiring monopoly control of upstream market).

52 H.R. 3849, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3849/text.

53 House Report, *supra* note 15, at 382 n.2424 (quoting Submission from Harry First, Charles L. Denison Prof. of Law, N.Y.U. Sch. of Law, & Eleanor Fox, Walter J. Derenberg Prof. of Trade Reg., N.Y.U. Sch. of Law, to H. Comm. on the Judiciary (Aug. 6, 2020)).

54 *Alaska Airlines, Inc*., 948 F.2d at 542.

[55] *See infra* note 65 (discussing the definition of "covered platform").

[56] Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 434, 438 (7th Cir. 2020) (applying Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), to refusal to deal in cable television advertising).

[57] *Viamedia,* 951 F.3d at 434.

[58] *Id.* at 463 (pleading "adequately alleges an anticompetitive refusal to deal").

[59] Epic Games, Inc. v. Apple Inc., No. 4:20-cv-5640, 2021 WL 4128925, at *112 (N.D. Cal. Sept. 10, 2021) (notice of appeal filed (9th Cir. Sept. 13, 2021)).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at *112–13.

[64] H.R. 3849, § 4(a).

[65] *Id.* § 5(6) (defining covered platform). Under the definition, a covered platform would have either 50 million active users or 100,000 active business users, have net annual sales or market capitalization over $600 million, and be a critical trading partner for a product or service offered on or directly related to the platform. *Id.*

[66] *Id.* § 5(8).

[67] *Id.* § 4(e)(1); *but see* § 4(b)(3) (special rule for data security emergencies).

[68] *Id.* §§ 7, 10.

[69] *The Chair's Showcase*, *supra* note 12, at 8 (Carl Shapiro comments); *id.* at 12 (Fiona Scott Morton comments); but cf. id. at 5 (Maureen Ohlhausen comments, describing more conservative "liberty" advocates' views).

[70] *Id.* at 5 (Maureen Ohlhausen comments, summarizing House Majority Staff Report's non-tech reform recommendations).

[71] S. 225, 117th Cong. (2021), www.congress.gov/bill/117th-congress/senate-bill/225/text.

[72] *Id.*

[73] 15 U.S.C. § 12–27.

[74] 15 U.S.C. §§1–38.

[75] *The Clayton Antitrust Act*, U.S. House of Representatives, history.house.gov/HistoricalHighlight/Detail/15032424979.

[76] Press Release, Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement (only egregious cases); S. 225, § 2(a)(15)(D) (bill's proposed finding).

[77] *See* S. 225 §§ 2(b)(4) & 4(b).

[78] *Id.* § 4(b)(1).

[79] *Id.*

[80] David Streitfeld, *Engineers Allege Hiring Collusion in Silicon Valley*, N.Y. Times (Feb. 28, 2014), https://www.nytimes.com/2014/03/0l/technology/engineers-allege-hiring-collusion-in-silicon-valley.html; Will Racke, *Jimmy John's Settles Non-Compete Lawsuit*, Chi. Bus. J. (Dec. 8, 2016, 12:04 PM), https://www.bizjoumals.com/chicago/news/2016/12/08/Jimmy-johns settles-non-compete-lawsuit.html.

[81] *See* S. 225 § 2(a)(8) (defining monopsony power).

[82] *See* Council of Economic Advisors, Labor Market Monopsony: Trends, Consequences, and Policy Responses 10 (Oct. 2016), obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf (noting rising concentration in technology sector in which employees alleged collusion among employers).

[83] S. 225 § 2(b)(3).

[84] *Id.* § 2(b)(6).

[85] *Id.* § 9(a).

[86] *Id.* (amending 15 U.S.C. § 26A(b)(1)).

[87] *Id.* §§ 2(a)(25), 2(b)(7).

[88] *Id.* § 2(b)(6).

[89] *Id.* §§ 2(a)(23)–(24).

[90] *Id.* §§ 2(b)(8)–(9).

[91] H.R. 3843, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3843/text; Press Release, H. Comm. on the Judiciary, Chairman Nadler Statement for Markup of H.R. 3843, the Merger Filing Fee Modernization Act of 2021 (June 23, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4614.

[92] Press Release, Chairman Nadler Statement for Markup of H.R. 3843, the Merger Filing Fee Modernization Act of 2021 (June 23, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4614.

[93] Kevin Hahm et al., *Recent Private Merger Challenges: Anomaly or Harbinger?*, Antitrust, Summer 2021, at 90, 91.

[94] *Id.*

[95] *Id.* at 91.

[96] *Business in America: Too Much of a Good Thing*, Economist (Mar. 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing (3% of mergers carefully reviewed).

[97] Peter Rudegeair & David Benoit, *Deals Spree Puts Banks on Track for Busiest-Ever Year*, Wall St. J. (Sept. 7, 2021, 5:30 AM), https://www.wsj.com/articles/deals-deals-deals-banks-feast-on-merger-bonanza-11631007002.

[98] *Id.*

[99] *Id.*; Hahm et al., *supra* note 93, at 91; *see Business in America*, *supra* note 96 (reporting 3% of mergers carefully reviewed).

[100] S. 1787, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/1787/text.

[101] H.R. 3460, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3460/text.

[102] 28 U.S.C. § 1407(a).

[103] *Id.* §§ 1407(g) & (h); *see generally* 15 U.S.C. § 15c (*parens patriae* actions).

[104] Plaintiff States' Opposition to Google's Motion for Transfer and Centralization Pursuant to 28 U.S.C. § 1407 at 1, 5, *In re*: Digital Advertising Antitrust Litig., MDL No. 3010 (J.P.M.L. May 26, 2021).

[105] *Id.* at 1.

[106] *Id.* at 7–8.

[107] James B. Stewart, *When Media Mergers Limit More Than Competition*, N.Y. Times (July 25, 2014), www.nytimes.com/2014/07/26/business/a-21st-century-fox-time-warner-merger-would-narrow-already-dwindling-competition.html.

[108] *Id.*

[109] Davey Alba, *On Facebook, Misinformation is More Popular Now Than in 2016*, N.Y. Times (Oct. 12, 2020), www.nytimes.com/2020/10/12/technology/on-facebook-misinformation-is-more-popular-now-than-in-2016.html.

[110] *The Chair's Showcase*, *supra* note 12, at 8 (Maureen Ohlhausen comments).

[111] *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google, Hearing Before the Subcomm. On Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. 5 (July 29, 2020) (James Sensenbrenner statement).

[112] *Id.* at 4 (James Sensenbrenner statement).

[113] Shapiro, *supra* note 13, at 36; *The Chair's Showcase*, *supra* note 12, at 12 (Fiona Scott Morton comments) ("The courts have been busy codifying into jurisprudence assumptions that are not up-to-date and not supported by the evidence and do not reflect reality on the ground, and that does not help us to capture anticompetitive conduct when we see it.").

[114] Kahn, *supra* note 31, at 1671 & n.66.

[115] *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google*, *Hearing Before the Subcomm. On Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. 6 (July 29, 2020) (Jerrold Nadler statement); Kahn, *supra* note 11, at 747 (consumer welfare standard fails to appreciate certain platform strategies and dominance).

[116] Klobuchar, *supra* note 76.