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

Since the early days of this country, corporations and corporate powers were always carefully checked by the government, and people well aware of the democratic dangers associated with unfettered corporate activity and expansion. In fact, almost two hundred years ago the Supreme Court explained that:

> The continued existence of a government, would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations.[1]

We have long understood that antitrust is an essential democracy-protection tool. As Former Supreme Court Justice Douglas wrote in an opinion over 70 years ago, one of the key goals of antitrust law is to protect against tyranny: "The philosophy of the Sherman Act" is that a few men should not be allowed to gather sufficient private power to control others. "For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy."[2]

Big tech, as currently structured, epitomizes this threat of private power. Facebook and Google, private companies with toxic business models, have enormous control over our communications infrastructure. Amazon has a chokehold on e-commerce. Apple leverages its power over an entire generation of innovative startups and budding entrepreneurs. Tech companies increasingly control key parts of cities' public transportation networks. These tech behemoths are directly governing more and more parts of our society, and simultaneously lobbying the formal government to gain even more control. They constitute a direct threat to our democracy by wielding centralized and unaccountable power. The outsized power of big tech has

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[1] *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 9 L. Ed. 773 (1837)
[2] *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) (Douglas, J., dissenting).

only been exacerbated by the pandemic; big tech companies make billions by extracting tolls from small businesses that are left to collapse by the wayside.

As Senator Alpheus Felch explained all the way back in 1844 lawmakers are vested with the duty of protecting democracy by passing laws designed "to prevent monopolies, and to confine these powerful bodies strictly within their proper sphere."[3] That's what people elect representatives to do: write rules of the road that make a thriving and fair economy possible, and protect against monopolists and tyrants. Congress's inaction in this area for forty years bears some of the blame, because antimonopoly policy is a quintessentially Congressional job.

You will hear testimony today about the importance of agencies using their existing enforcement power. I fervently agree with and second this testimony. But while agencies bear some responsibility for their own passivity, and must do more to engage in greater enforcement and rule-making, Congress is ultimately responsible for the structure of the economy and democracy.

This testimony will focus on three actions Congress should take immediately:

(1) Overturn via legislation bad Supreme Court precedent and reassert Congressional supremacy over the Supreme Court in antitrust policy.
(2) Legislate break ups and mandate structural separations or line of business laws in the digital economy.
(3) Use its investigative powers to their fullest extent.

1. Reassert Congressional supremacy in the relationship between Courts and Congress in Antitrust Policy

Congress must overturn via legislation bad Supreme Court decisions, and reassert Congressional supremacy over economic policy. The Sherman Act, the Clayton Act, and our antitrust laws are not Constitutional provisions over which Congress must defer interpretation to the Supreme Court. They are federal laws, passed by this body, and when they are misinterpreted by courts, Congress must act. For 40 years it has failed to do so, and stood by while the Supreme Court rewrote federal antitrust policy.

For example, in a trio of cases the Supreme Court reinterpreted the law in a way that essentially ripped apart our existing predatory pricing laws.[4] Congress did not act. There were no hearings on these cases and no legislative action. Anti-predatory behavior laws are a key tool for reigning in the abuses of Amazon, Google, and Facebook.[5]

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[3] *Bank of Michigan v Niles*, 1 Doug 401, 408-10 (Mich 1844).

[4] *Brooke Group*, *Matsushita*, and *Weyerhauser Co*.

Another example is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 in (2004) and *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*, 555 U.S. 438 (2009), in which the Supreme Court invented new massive barriers to bringing refusal-to-deal claims, barriers that could not be found in legislative history. Again, Congress stood by and allowed the judicial re-write, and big tech companies rushed into the void, abusing the new, Supreme Court-created standard.

In 2007 the Supreme Court shifted the burden in antitrust litigation back from plaintiffs to defendants in cases where parties are challenging exclusionary and restrictive trade practices.[6] Congress did nothing, although as the dissenting Justice Stevens decried, the decision was not rooted in Congressional history.[7]

Most recently, in 2018, the Supreme Court held that gag orders on merchants who contract with credit card providers---where American Express prevented merchants from steering consumers to cheaper credit options--was not anticompetitive.[8] The case represented bad logic, bad precedent, and the creation of a manufactured concept nowhere found in our legislative history--the "two sided market." The case created a major deterrence for any anticompetitive lawsuit against Google, Facebook, or Amazon.

Twenty four years ago, then-Judge Scalia, in his answered questions in his nominating hearing, joked that: "I never understood [antitrust law]. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then."

His later jurisprudence revealed that this joke represented a real belief. Over the next several decades, Justice Scalia one of the voices, and often the leading voice, in a Court who actively sought to replace congressional judgment with judicial visions. In 1968, in a 7-1 decision the Court clearly held "that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices

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[5] Questioning by Congresswoman Scanlon at your hearing showed that Amazon was prepared to lose $200 million in a predatory strategy to sink Diapers.com, then its main competitor in the baby care area. While that acquisition requires investigation under the current, Court-created standard, if *Brooke Group et al* had come out differently, Amazon might have been deterred from this acquisition in the first place. See also: https://academic.oup.com/antitrust/article/7/2/203/5321201

[6] As Justice Stevens explained in his dissent in that case "This case is a poor vehicle for the Court's new pleading rule, for we have observed that in antitrust cases, where the proof is largely in the hands of the alleged conspirators, … ***dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly***. Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that ***Congress intended to encourage, rather than discourage, private enforcement*** of the law. ***It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.***"

[7] *In Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[8] *Ohio v. American Express Co.*, 138 S.Ct. 2274 (2018).

by the monopolist."[9] But by 2009 the Court, led by Scalia, essentially overturned its own precedent in holding that "Simply possessing monopoly power and charging monopoly prices does not violate § 2."[10]

Such decisions demonstrate that the Court has arrogated to itself the power to decide the shape of our economy, in a power grab that only this body can remedy. Congress must act to overturn these decisions, and to take responsibility for the structure of our economy and democracy.

2. Pass Laws Requiring Structural Separation/Line of Business Laws

Amazon, Google, Facebook and Apple control market access to central parts of our economy, and directly compete with businesses that use their markets. These platforms abuse their chokepoint power to demand high private taxes from suppliers, copy, kill or acquire competitors, and then use their ill-gotten profits to subsidize adventures into new markets where they repeat their abuse of power strategies.

Your investigation revealed what Amazon sellers have long suspected: that sellers have to use the "Fulfillment by Amazon" service in order to get preferred treatment on the marketplace. This use of its dual role as platform and warehouse/shipping company has allowed Amazon to charge enormous fees--an average of 30% per sale--to its sellers.

Congresswoman McBath's questioning to Tim Cook about why Apple removed parental control competitors from the App Store when it introduced Screen Time (an affiliated clone) was just one example of the dangers of this conflict of interest. While Cook said that Apple was "concerned, congresswoman, about the privacy and security of kids." Congresswoman McBath pointed out that Apple let the independents return without privacy changes, suggesting that the privacy justification was a pretext for removing a rival. Without structural separation, this kind of behavior-- preferring your own affiliate to others--will always be a problem. Google has no business owning Youtube, or Google Flights, or Google Shopping; Amazon has no business running its own private label on its platform; Apple should not be competing with Apps that depend upon it.

Congress should pass a structural separation law delineating a clear "single line of business" rule for any large data company, using revenue, role in data collection and sale, and consumer footprint. For instance, it could draw of the kind of framework used in California's recent AB-1790, which used the following definition: "An online e-commerce marketplace with more than 200,000,000 active customer accounts that, in whole or in part, offers to customers for sale goods or services sold by companies that are not owned by the online e-commerce marketplace."

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[9] *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 392 U.S. 481, 497-499 (1968).
[10] *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 447-48 (2009).

'Line of business' restrictions have a long history in American corporate and antitrust laws. Glass Steagall is perhaps the best known of these federal restrictions, but by no means the only one. The Public Utility Holding Company Act prohibits companies subject to the Act from making corporate acquisitions unless the SEC proactively approves, taking the public interest into account; instead of a pro-merger default, the PUHC has a default of merger skepticism.[11] In the telecommunications industry, Congress used to prohibit telephone companies from providing video programming in their local telephone territories.[12]

To be clear, structural separation alone is not sufficient to deal with the particular algorithmic pathologies of big tech and the ways in which targeted advertising distorts the public sphere. As I argued in my prior submission, Congress should also ban targeted advertising for essential public infrastructure, with a full recognition of the unique obligation it has to protect the communications sphere, and the long history of laws designed to support a robust public sphere. However, structural separation is a necessary part of any solution.

3. More Congressional Investigations

The CEO hearing of this subcommittee was a paradigm for what Congressional hearings should be. You were prepared, serious, and detailed, and brought forward important testimony because of the deep investigative work of the last year. Your investigation showed what a serious, demanding, unafraid assertion of public power over abusive companies looks like. And it shouldn't just be the antitrust subcommittee. The labor committee should bring in Uber and Lyft in for tough questioning about how they use psychological techniques and big data on drivers, and how pay and prices are calculated. The small business committee (perhaps in conjunction with this committee) should interrogate Postmates, GrubHub, DoorDash, and UberEats about the evidence that they have been charging restaurants exorbitant commission fees, stealing tips, creating impostor restaurant websites, and draining revenue from restaurants facing a global pandemic.

While Congressional leaders may have worried in the past about whether the Supreme Court would permit this kind of investigation, in *Trump v. Mazars* this summer, the Court gave Congress a green light for investigations into big corporations. Justice John Roberts made clear that Congress is at the peak of its power when investigating economic behavior in service of prospective legislation. The Court says Congress' power to investigate corporate actors in the process of understanding how it should respond legislatively is "broad" and "indispensable." Investigations are necessary for wise and effective legislation. It is the job of Congress to stand between private tyrants and the people, and in service of that job, it must investigate rigorously.

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[11] https://www.loc.gov/law/help/statutes-at-large/74th-congress/session-1/c74s1ch687.pdf

[12] Cable Communications Policy Act of 1984, 613, Pub. L. No. 98-549, 98 Stat. 2779, 2785 (1984), codified before repeal at 47 U.S.C. 533(b) (1994).

I teach at Fordham Law School, and have written two books and dozens of articles on the intersection of private law and the law of democracy. My anti-corruption research has been cited in state and federal courts as well as in the Supreme Court. I am affiliated with the American Economic Liberties Project (AELP). This testimony was prepared in consultation with AELP and Shaoul Sussman of the Institute for Local Self-Reliance.