

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Sixteenth Congress

October 6, 2020

The Honorable Jerrold L. Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Nadler:

Big Tech is out to get conservatives. We can see this bias in, for example, how Twitter and Facebook censor and silence prominent conservative voices. We can see it in how Google blacklists and threatens to demonetize conservative websites. And we can see it in how Amazon has refused to publish or advertise certain conservative works. Congress cannot allow this sort of bias and censorship to stand.

Despite this compelling evidence of anti-conservative bias in Big Tech, the draft report authored by Committee Democrats does not examine these facts. This stubborn refusal to acknowledge anti-conservative bias in Big Tech artificially narrows the Committee's investigation and ultimately discredits the draft report's findings. It also suggests that the Democrat motivation behind this investigation has not been to objectively understand deficiencies in digital markets, but instead to reformulate antitrust law in ways that advance radical left-wing priorities. In this way, the Democrat report and your unwillingness to address anti-conservative bias in Big Tech show that this investigation has been a flawed exercise toward a predetermined outcome.

1. Committee Democrats ignore the Trump Administration's investigation of Big Tech under existing authorities.

The Democrat report fails to sufficiently address why Google, Amazon, Apple, and Facebook will not—or could not—be found liable for anti-competitive behavior under existing antitrust laws. Such an analysis is a necessary predicate for the report's recommendations to change existing law. As Rachel Bovard, Senior Advisor to the Internet Accountability Project, noted in her testimony to the Subcommittee, “our antitrust laws do not need to be updated; . . . the laws on the books are sufficient for tackling per se violations of antitrust as they exist in the tech sector.”¹ This omission is especially egregious because the Trump Administration and the

¹ *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Rachel Bovard).

states are currently investigating Big Tech under existing authorities.² Because these investigations are ongoing and the Democrats cannot articulate how these investigations are deficient, any Democrat recommendation to refashion antitrust laws is premature, ill-advised, and potentially counterproductive.

2. The Democrat recommendations would expand antitrust law in ways that will advance radical liberal priorities.

The Democrats' report makes suggestions—including that Congress should depart from the consumer welfare standard—that go far beyond changing antitrust laws for digital markets. These recommendations will advance a liberal project to radically refashion antitrust in the vision of the far left. Testimony and other evidence relied upon by the Democrats in this investigation, as well as statements from Democrats who have participated in this investigation, reflect the broader Democrat objective of repurposing antitrust law for goals like propping up private-sector unions and redistributing wealth, or achieving racial equity. It is inappropriate to use antitrust law to advance these priorities.

Using Antitrust Law to Aid Unions and Redistribute Wealth

Experts relied upon by the Democrats during the Committee's investigation have argued that antitrust law should be used to strengthen private-sector unions or redistribute wealth. Sally Hubbard, Director of Enforcement Strategy at the Open Markets Institute, testified before the Committee twice during this investigation, and also submitted written views.³ She recently argued that “[d]ecreasing the market power of dominant firms is critical to strengthening unions . . .”⁴ Fiona Scott Morton, a Yale economist, also testified before the Committee and has argued

² Leah Nylen, *Trump administration to launch antitrust suit against Google as soon as next week*, POLITICO (Oct. 2, 2020), <https://www.politico.com/news/2020/10/02/trump-doj-google-antitrust-lawsuit-425617>; Brent Kendall, *et al.*, *FTC Preparing Possible Antitrust Suit Against Facebook*, WALL ST. J. (Sept. 15, 2020), https://www.wsj.com/articles/ftc-preparing-possible-antitrust-suit-against-facebook-11600211840?mod=hp_lead_pos2; David McCabe, *Mark Zuckerberg Questioned Under Oath in F.T.C. Antitrust Inquiry*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/technology/facebook-zuckerberg-ftc-questioned.html>; Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials Over Marketplace*, BLOOMBERG (Sept. 11, 2019), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants>; Charlotte Henry, *DOJ and States Attorneys General Turning Antitrust Attention on Apple*, THE MAC OBSERVER (June 24, 2020), <https://www.macobserver.com/news/doj-states-attorneys-general-antitrust-apple>.

³ *Online Platforms and Market Power, Part 1: The Free and Diverse Press: Hearing before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019); *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2020); Letter from Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute, to Rep. David Cicilline, Chairman, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, and Rep. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary (Apr. 17, 2020).

⁴ See Daniel A. Hanley & Sally Hubbard, OPEN MARKETS INST., EYES EVERYWHERE: AMAZON'S SURVEILLANCE INFRASTRUCTURE AND REVITALIZING WORKER POWER 19 (2020).

that “[m]arket power . . . contributes to growing inequality,” and that antitrust enforcement “redistributes income and wealth to the bottom 90 percent of the population” and “*should be the first choice of policymakers concerned with equity.*”⁵

Using Antitrust Law to Achieve Racial Equity

Some experts relied on by Democrats seek to refocus antitrust law to combat racial inequalities. An affiliate of the Institute for Local Self-Reliance, an organization relied upon by the Democrats in this investigation, recently argued that “[m]onopoly power fuels racial injustice” and leads to “racial disparities that have long oppressed people of color”⁶ Likewise, Sandeep Vaheesan, Legal Director at the Open Markets Institute, has argued that antitrust law as it currently exists is “a tool of racial injustice” and that “[c]orporations, which are overwhelmingly owned and run by whites, exploit and control Black and brown workers and business proprietors”⁷ Vaheesan argued in favor of an antitrust enforcement system that “would redistribute power downward from a class of mostly white economic royalists to the multiracial majority in American society.”⁸ Democrat FTC Commissioner Rebecca Slaughter also supports infusing considerations of social justice warriors into discussions about antitrust law.⁹ She has advocated for “strategically deploy[ing] [the FTC’s] existing tools to address mergers and conduct that contribute to the systematic disadvantages facing Black consumers and Black-owned businesses.”¹⁰ As Hubbard testified at the hearing, “who is in the majority matters . . . [i]f we had three . . . Slaughters running the FTC right now, we would be having vastly different enforcement.”¹¹

Democrats also raised these types of goals in the most recent Committee hearing.¹² For example, Representative Jayapal stated:

I don’t believe that many people make the necessary connections that they should between antitrust law, and racial equity, and economic equity. How would making

⁵ *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019); Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, in *VISION 2020: EVIDENCE FOR A STRONGER ECONOMY* 10-11 (Wash. Ctr. For Equitable Growth 2020) (emphasis added).

⁶ *The Twenty-First Century Antitrust Act (S.8700): Hearing before the New York S. Standing Comm. on Consumer Protection* (2020) (statement of Shaoul Sussman).

⁷ Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, *THE APPEAL* (Sept. 16, 2020), <https://theappeal.org/how-antitrust-perpetuates-structural-racism/>.

⁸ *Id.*

⁹ Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, *CNBC* (Sept. 26, 2020) (interview), <https://www.cnn.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html>.

¹⁰ Rebecca Kelly Slaughter (@RKSLaughterFTC), *TWITTER* (Sept. 9, 2020), <https://twitter.com/RKSLaughterFTC/status/1303762117393346560>.

¹¹ *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2020).

¹² *Id.*

changes to the antitrust laws help us to empower black and brown communities in particular that have been burdened throughout our history with structural inequities?¹³

In response, Sabeel Rahman, President of Dēmos, agreed “[i]t is such an important link to be made.”¹⁴ Rahman stated that “breaking up monopoly power actually is critical to empowering black and brown workers . . .” and that “if we’re trying to build a racially-inclusive public sphere, we have to tackle the monopoly power that Facebook has.”¹⁵ More broadly, Hubbard testified that “[w]e’ve been under monopoly rule for so long that we’re suffering from a crisis of imagination. So let’s take a moment and envision the possibilities of what America could be.”¹⁶

Flipping Burdens of Proof in Antitrust Law to Make Liberal Objectives More Achievable

Some authorities relied upon by Democrats have argued for drastically changing how antitrust claims are settled in the courts. Scott Morton led a committee affiliated with the Stigler Center that argued that antitrust law could be revised to “presume anticompetitive harm on the basis of preliminary showings by antitrust plaintiffs and shift a burden of exculpation to the defendant”¹⁷ If enacted, this type of recommendation—and others like it—would upend centuries of western legal tradition by requiring a defendant to prove his or her innocence rather than requiring the government or other plaintiff to prove a defendant’s culpability.

Stepping back, Congress must not overlook how antitrust law is currently insulated from arbitrary enforcement for projects and policy objectives distinct from the competitive process itself. Put differently, modern antitrust upholds the rule of law. It does so in large part because it generally requires fact-driven, defendant-specific analysis and related showings in court. Such requirements do not make the modern antitrust framework rigid or inflexible when it comes to digital markets—far from it, as experts in this investigation have explained.¹⁸ But these requirements do keep antitrust from being repurposed to other ends. Flipping burdens of proof—or other recommendations that loosen requirements for winning antitrust claims or broaden antitrust’s ambit—may seem innocuous in isolation. But in reality, they threaten to undermine the rule of law and empower arbitrary enforcement decisions, including to advance radical left-wing ideas.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2020).

¹⁷ *See Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Fiona Scott Morton); STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS 98 (2019).

¹⁸ *See Digital Markets Investigation: Expert Submissions*, H. COMM. ON THE JUDICIARY, <https://judiciary.house.gov/issues/issue/?IssueID=14921> (last visited Oct. 5, 2020) (providing expert statements).

3. The Democrat report fails to adequately consider or rebut arguments that contradict the Democrats' analysis and recommendations.

The Democrat report insufficiently addresses expert warnings against radically changing antitrust law in ways that Democrats recommend. For instance, the Democrat report suggests that Congress should expand antitrust laws to remedy broad harm—not harms limited to price, output, or other measures of consumer welfare. However, several experts submitted views to the Committee explaining both the perils of departing from the consumer welfare standard, and why the existing legal framework and common-law process work well for digital markets when enforced. The Democrat report does not adequately address these views, undermining the credibility of the report.¹⁹

4. The Democrat report is the product of a predetermined investigation.

Democrats began this investigation having already decided that the current antitrust framework had failed. In 2018, Chairman Cicilline said that Democrats were “*committed to restoring* competition” in digital markets, suggesting before the investigation even began that digital markets were anticompetitive.²⁰ Chairman Cicilline also proffered before the investigation a “Glass-Steagall for the international [technology companies]” under which companies would be forced to run certain business lines independent of one another.²¹ Then, at the *start* of the investigation, Chairman Cicilline told reporters that the Subcommittee would conduct “a broad investigation . . . with an eye toward developing kind of a deeper understanding of . . . *what we need to do in terms of legislative action.*”²² Chairman Cicilline also coauthored a bill with Senator Elizabeth Warren that would have overturned existing law and targeted companies with as low as a 25% share of any market—again, months before this investigation ended.²³ Republicans have alerted you to the problems of a predetermined outcome before;²⁴ however, you failed to take steps to ensure the investigation was objective, inclusive, and not merely a conclusion in search of facts.

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¹⁹ *Id.*

²⁰ Tony Romm, *Pressure is building among some Democrats for another antitrust probe of Google*, WASH. POST (Jun. 4, 2018) (emphasis added), <https://www.washingtonpost.com/news/the-switch/wp/2018/06/04/pressure-is-building-among-some-democrats-for-another-antitrust-probe-of-google/>.

²¹ Kiran Stacey, *Senior Democrat suggests ‘Glass-Steagall’ law for tech companies*, FIN. TIMES (Mar. 4, 2019), <https://www.ft.com/content/561b8546-355c-11e9-bd3a-8b2a211d90d5>.

²² Cristiano Lima, *House lawmakers open antitrust probe into tech industry's biggest players*, POLITICO (June 3, 2019) (emphasis added), <https://www.politico.com/story/2019/06/03/antitrust-tech-industry-google-facebook-1352388>.

²³ Lauren Hirsch, *Elizabeth Warren’s antitrust bill would dramatically enhance government control over the biggest US companies*, CNBC (Dec. 7, 2019), <https://www.cnn.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html>.

²⁴ *See, e.g.*, Letter from Doug Collins, Ranking Member, H. Comm. on the Judiciary, and F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, to Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Feb. 10, 2020).

Democrats have repeatedly dismissed concerns about Big Tech’s bias and censorship. In early July, Chairman Cicilline announced that the CEOs of Big Tech companies would testify before the subcommittee.²⁵ Shortly after Democrats noticed the hearing, Republicans requested that you convene the hearing before the full committee in order to allow all Members to participate.²⁶ We urged this again on July 15.²⁷ You refused, and also declined to invite our witness choice, Twitter CEO Jack Dorsey.²⁸ At the outset of the hearing, Chairman Cicilline refused to permit the Ranking Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties to express concern relating to Big Tech’s control of speech.²⁹ In the hearing, Democrats dismissed and scoffed at Republicans’ concerns about Big Tech’s bias and censorship.³⁰

The draft Democrat report that you allowed Members and staff to review late last week behind closed doors ignores Big Tech’s anti-conservative bias and legislative efforts to address it. These are vital issues—especially urgent as we approach the 2020 election. Big Tech’s bias against conservatives must stop and Congress must act to remedy this problem. One option is to amend section 230 of the Communications Decency Act. We hope you will support legislative efforts to address this fundamental problem, including legislation which twelve Republicans on the Committee introduced last week.³¹

Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Ranking Member
Committee on the Judiciary

²⁵ Kara Swisher (@karaswisher), TWITTER (Jul. 1, 2020), <https://twitter.com/karaswisher/status/1278432076476428292>; Kara Swisher (@karaswisher), TWITTER (Jul. 1, 2020), <https://twitter.com/karaswisher/status/1278432457944072195>.

²⁶ Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, to Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Jul. 7, 2020).

²⁷ Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, to Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Jul. 15, 2020).

²⁸ Letter from Rep. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, to Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Jul. 22, 2020).

²⁹ See generally *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google, Hearing before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2020).

³⁰ *Id.*

³¹ See H.R. 8517 (“Protect Speech Act”), 116th Cong. (2020).

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cc: The Honorable F. James Sensenbrenner, Ranking Member
Subcommittee on Antitrust, Commercial and Administrative Law

The Honorable David Cicilline, Chairman
Subcommittee on Antitrust, Commercial and Administrative Law