American Antitrust Criteria and Their Application to the Major Platforms

美国技术政策研究所, “美国反垄断标准及其在主要平台上的应用”

August 24, 2021

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In 2020-21, lawsuits have been filed raising antitrust complaints in state and federal district court by coalitions of state attorneys general, the U.S. Department of Justice, the Federal Trade Commission, and private firms against four large American technology companies, Amazon, Apple, Facebook, and Google. In this paper, I review the complaints and the criteria that will be used by judges and juries to assess whether Amazon, Apple, Facebook, and Google engaged in anticompetitive conduct. The courts will use the consumer welfare standard, rule of reason analysis, and other legal precedents in antitrust law and competition policy to prove harm. In each case, the courts will ask litigants to present evidence and develop theories of market definition, market concentration, market structure, and exclusionary agreements for different components of the digital economy.

Keywords: antitrust law, competition policy, market definition
JEL Classification: K21, D42, L11, L22, L40, L52, L86

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Current Antitrust Litigation

Company	Brought by	Complaint	Statutes	Forum
Amazon	District of Columbia	Horizontal and vertical restraints of trade in third-party seller marketplace	District of Columbia Antitrust Act, D.C. Code §§ 28-4501, *et seq*.	Superior Court of D.C.
Apple	Epic Games, Inc.	Unlawful monopoly maintenance, denial of essential facility, and unreasonable restraints of trade in Apple's In-App Payment (IAP) System	Sherman Act, 15 U.S.C. §§ 1, 2; California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq*.; California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*.	U.S. District Court for the Northern District of California
Facebook	Federal Trade Commission, *et al*. (and 46 state attorneys general, District of Columbia, and Guam)	Unfair methods of competition in or affecting commerce	Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a)	U.S. District Court for the District of Columbia
Google	Colorado, *et al*. (and 38 other state attorneys general)	Unlawful restraint of trade and maintaining monopolies in general search services, general search text advertising, and general search advertising	Sherman Act, 15 U.S.C. § 2	U.S. District Court for the District of Columbia
Google	Utah, *et al*., (and 36 other	Unlawful monopoly maintenance, unreasonable restraints of trade in Android	Sherman Act, 15 U.S.C. §§ 1, 2; and state-specific claims[2]	U.S. District Court for the Northern

[2] Alaska Restraint of Trade Act, AS 45.50.562-.596; Alaska Unfair Trade Practices and Consumer Protection Act, AS 45.50.471, *et. seq*. ("AUTPCPA"); Arizona Revised Statutes ("A.R.S.") § 44-1401 *et seq*.; Arizona Consumer Fraud Act, including A.R.S. §§ 44-1521 to -1534; Arkansas Unfair Practices Act § 4-75-201, *et seq*., Arkansas law on Monopolies § 4-75-301, *et seq*., Arkansas Deceptive and Unfair Trade Practices Act, Ark. Code Ann. § 4-88-100, *et seq*.; California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq*., California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq*., Colorado Antitrust Act of 1992, Colo. Rev. Stat. § 6-4-101, *et seq*., Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101, *et. seq*., Connecticut Antitrust Act, Conn. Gen. Stat. §§ 35-26 and 35-28, Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b, *et seq*.; Delaware Antitrust Act ("DAA"), Del. Code tit. 6, § 2101 *et. seq*., District of Columbia Antitrust Act, D.C. Code § 28-4501, *et seq*., District of Columbia Consumer Protection Procedures Act, D.C. Code § 29-3801, *et seq*.; Florida Antitrust Act, Fla. Stat. § 542.15, *et seq*., Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204, *et seq*.; Idaho Competition Act, Idaho Code §§ 48-104 and 48-105; Indiana Antitrust Act, Ind. Code §§ 24-1-2-1 and 24-1-2-2; Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1, *et seq*.; Iowa Code § 553.1, *et seq*.; Iowa Consumer Fraud Act, Iowa Code. § 714.16, *et seq*.; Ky. Rev. Stat. § 367.175; Maryland Antitrust Act, Md. Com. Law Code Ann §11-201, *et. seq*.; Massachusetts Consumer Protection Act, M.G.L c. 93A, § 2, *et seq*.; Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325D.49-325D.66; Miss. Code Ann. § 75-21-1, *et seq*., Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq*.; Missouri Antitrust Law, RS Mo. §§416.011, *et seq*., Missouri Merchandising Practices Act, RS Mo. §§407.010, *et seq*.; Montana's Unfair Trade Practices and Consumer Protection Act, Mont. Code Ann. §-30-14-101, -103, -205 *et seq*.; Unlawful Restraint of Trade Act, Neb. Rev. Stat. § 59-801, *et seq*., Consumer Protection Act, Neb. Rev. Stat. § 59-1614; Nevada Unfair Trade Practice Act, NRS 598A.010, *et seq*., Nevada Deceptive Trade Practices Act, NRS 598.0903, *et seq*.; N.H. RSA §356, *et. seq*., New Hampshire Consumer Protection Act, N.H. RSA §358:A:1, *et. seq*., New Jersey Antitrust Act, N.J.S.A. 56:9-1, *et seq*., New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq*., Donnelly Act, New York Gen. Bus. Law §§ 340, *et seq*., New York Executive Law § 63(12); North Carolina, N.C.G.S. § 75-2.1; North Carolina Unfair or Deceptive Trade Practices Act, N.C.G.S. § 75 1.1; Uniform State Antitrust Act, North Dakota Century Code (N.D.C.C.) § 51-08.1-01, *et seq*., Consumer Fraud Law, North Dakota Century Code (N.D.C.C.) § 51-15-01, *et seq*., Unlawful Sales or Advertising Practices; Oklahoma Antitrust Reform Act, 79 O.S. §§ 201, *et seq*., Oklahoma Consumer Protection Act, 15 O.S. §§ 751, *et seq*.; Oregon Revised Statutes ("ORS") 646.705, ORS 646.725, ORS 646.730, *et seq*.; Rhode

	state attorneys general)	App Distribution Market and In-App Payment (IAP) Processing Market		District of California
Google	Epic Games, Inc.	Unlawful monopoly maintenance, denial of essential facility, and unreasonable restraints of trade in Android's In-App Payment (IAP) Processing Market	Sherman Act, 15 U.S.C. §§ 1, 2; California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq*.; California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*.	U.S. District Court for the Northern District of California
Google	Texas, *et al*. (and 10 other state attorneys general)	Monopolization, attempted monopolization, unlawful tying, unlawful agreement in ad servers, display ad exchanges, and ad buying tools	Sherman Act, 15 U.S.C. §§ 1, 2; and supplemental state law antitrust claims[3]	U.S. District Court for the Eastern District of Texas
Google	United States, *et al*. (and 11 state attorneys general)	Unlawful maintenance of monopoly in general search services, general search text advertising, and general search advertising	Sherman Act, 15 U.S.C. § 2	U.S. District Court for the District of Columbia

Island Antitrust Act, R.I. Gen. L. §§ 6-36-1, *et. seq*.; South Dakota Codified Laws (SDCL) § 37-1-3.1, *et seq*., South Dakota Deceptive Trade Practices and Consumer Protection, SDCL ch. 37-24; Utah Antitrust Act, Utah Code §§ 76-10-3101, *et. seq*., Utah Consumer Sales Practices Act, Utah Code §§13-11-1, *et. seq*.; Virginia Antitrust Act, Virginia Code § 59.1-9.1, *et seq*.; Washington Consumer Protection Act, RCW 19.86.020, 19.86.030, and19.86.040; and West Virginia Antitrust Act, W.Va. Code § 47-18-1, *et seq*.

[3] Texas Business and Commerce Code § 15.01 *et seq*.; Idaho Competition Act, Idaho Code § 48-105; Ind. Code §§ 24- 1-2-1 and -2; Ky. Rev. Stat. § 367.175; Missouri Antitrust Law, Mo. Rev. Stat. §§ 416.011 *et seq*.; North Dakota Century Code (N.D.C.C.) § 51-08.1-01 *et seq*., Uniform State Antitrust Act, including §§ 51-08.1- 02 and 51-08.1-03; South Dakota statutes SDCL 37-1-3.1 and 37-1-3.2; Utah Antitrust Act, Utah Code § 76-10-3101, *et. seq*.; DTPA § 17.46; Consumer Protection Act, Ky. Rev. Stat. § 367.110 *et seq*.; Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1, *et seq*.; Missouri's Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq*.; N.D.C.C. §51- 15-01 *et seq*., Unlawful Sales or Advertising Practices, including § 51-15-02; South Dakota statute SDCL 37-24-6(1).

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Colorado, et al., v. Google LLC, Case No. 1:2020cv03715 (D.D.C., Dec. 17, 2020), https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf (including the States and Commonwealths of Colorado, Nebraska, Arizona, Iowa, New York, North Carolina, Tennessee, Utah, Alaska, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, Wyoming).

D.C. v. Amazon.com, Inc., Case No. 2021-CA-001775-B (D.C. Super. Ct., May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf.

Epic Games, Inc. v. Apple, Inc., Case No. 4:20-cv-05640-YGR (N.D. Cal., Aug. 13, 2020), https://cdn2.unrealengine.com/apple-complaint-734589783.pdf.

Epic Games, Inc. v. Google LLC, et al., Case No. 3:20-cv-05671 (N.D. Cal. Aug. 13, 2020, unredacted complaint released Aug. 19, 2021), https://cdn.vox-cdn.com/uploads/chorus_asset/file/21759099/file0.243586135368002.pdf, and https://storage.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.165.1.pdf.

Federal Trade Commission v. Facebook, Inc., Case No. 1:20-cv-03590, (D.D.C., Jan. 21, 2021, amended Aug. 19, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf, and https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

Texas, et al., v. Google LLC, Civil Action No. 4:20cv957 (E.D. Texas, Dec. 16, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf (including the States and Commonwealths of Texas, Arkansas, Idaho, Indiana, Kentucky, Mississippi, Missouri, North Dakota, South Dakota, and Utah).

United States v. Google LLC, Case No. 1:20-cv-03010 (D.D.C., Oct. 20, 2020), https://www.justice.gov/atr/case-document/file/1329131/download (including the States and Commonwealths of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas).

Utah, et al., v. Google LLC, et al., Case No. 3:21-cv-05227 (N.D. Cal., Jul. 7, 2021), https://ag.ny.gov/sites/default/files/utah_v_google.1.complaint_redacted.pdf (including the States and Commonwealths of New York, North Carolina, Tennessee, Arizona, Colorado, Iowa, Nebraska, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Virginia, Vermont, Washington, West Virginia).

I. Introduction

American technology firms have been sued by antitrust enforcers and private plaintiffs in half a dozen lawsuits over the last two years. In this paper, I review the complaints and the criteria that will be used by judges and juries to assess whether Amazon, Apple, Facebook, and Google engaged in anticompetitive conduct.

In 2020-21, lawsuits have been filed in state and federal district court by coalitions of state attorneys general, the U.S. Department of Justice, the Federal Trade Commission, and private firms. Each case focuses on a different product or service made by these companies. The criteria that will be used to prove harm will rely on the consumer welfare standard, rule of reason analysis, and other legal precedents in antitrust law and competition policy. In each case, litigants will be asked by the courts to present evidence and develop theories of market definition, market concentration, market structure, and exclusionary agreements in a digital economy.

Federal officials, legislators, and the press have also been concerned with various aspects of the digital economy and online marketplaces. The Judiciary Committee of the U.S. House of Representatives held a series of public hearings last year, one of which took place on July 29, 2020 that included witness testimony from four chief executive officers: Jeff Bezos of Amazon, Sudhar Pichai of Google, Mark Zuckerberg of Facebook, and Tim Cook of Apple.[4] To accompany the public hearings, the Subcommittee on Antitrust released a large number of business documents that included email communications and strategy plans that the members collected for its investigation. The documents alone are not sufficient to prove anticompetitive conduct but do reveal more context on the decisions made by these technology executives in the course of doing business in competitive markets.[5] In October 2020, the majority staff of the Subcommittee released a report concluding its antitrust investigation of the four companies.[6] In

[4] Hearing on "Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook and Google," *H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law,* 116th Cong. 2 (2020), https://judiciary.house.gov/online-platforms-and-market-power; *see generally* Sarah Oh, *Is There Evidence of Antitrust Harm in the House Judiciary Committee Hot Docs?,* 37 SANTA CLARA HIGH TECH. L.J. 193-229 (2021), available at https://digitalcommons.law.scu.edu/chtlj/vol37/iss2/2/.

[5] *"Online Platforms and Market Power: Part 6: Examining the Dominance of Amazon, Apple, Facebook and Google," Hearing Before the H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm., and Admin. Law,* 116th Cong. 2 (2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113, video recording available at https://www.youtube.com/watch?v=WBFDQvIrWYM [hereinafter *Hearing Video*]; *see also* "Documents from the Hearing," https://judiciary.house.gov/online-platforms-and-market-power [hereinafter *Hearing Documents*].

[6] *Investigation on Competition in Digital Markets, Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Administrative Law of the Comm. of the Judiciary, 116th Cong. 2*, Oct. 4, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (summarizing findings after six hearings and document requests) [hereinafter *Majority Staff Report and Recommendations*].

June 2021, several Subcommittee members introduced legislation in an effort to address these alleged harms discussed in the staff report and public hearings, and in the Senate, other members have introduced legislation to strengthen antitrust laws, enforcers, and remedies.[7]

II. American Antitrust Criteria

Federal courts will decide whether technology firms have caused antitrust harm to consumers after fact-finding and analysis of market definition, market structure, market concentration, and exclusionary agreements. In the proceeding sections, one for each of the four technology companies, I review the complaints and the criteria that will be used by judges and juries to assess whether Amazon, Apple, Facebook, and Google engaged in anticompetitive conduct.

A. Amazon

Antitrust enforcers and legislators have raised concerns about Amazon's governance of the third-party seller marketplace, pricing strategies, and acquisitions of nascent or potential competitors.

1. Third-Party Seller Agreements

The Attorney General of the District of Columbia alleged in May 2021 that Amazon raised prices for third-party sellers in violation of the District of Columbia Antitrust Act.[8] The lawsuit alleges that several of Amazon's terms for its third-party seller platform amount to horizontal and vertical agreements in restraint of trade. First, the lawsuit claims, Amazon dominates the online retail sales market, holding 50 to 70 percent of market share of all online retail sales. The lawsuit then alleges that the terms of the Business Solutions Agreement (BSA) with third-party sellers is anticompetitive because Amazon prohibited sales of the same goods on competing online sales platforms through the "price parity provision" (PPP) and "platform most-favored-nation agreement" (PMFN). The theory is that these contract terms caused third-party

[7] Press Release, House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice," June 11, 2021, https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4591; Press Release, Sens. Lee, Grassley Introduce TEAM Act to Reform Antitrust Law, Jun. 14, 2011, https://www.lee.senate.gov/public/index.cfm/2021/6/sens-lee-grassley-introduce-team-act-to-reform-antitrust-law (introducing the Tougher Enforcement Against Monopolies Act); Leah Nylen, "House Democrats About to Uncork 5-Pronged Assault on Tech," POLITICO, June 9, 2021, https://www.politico.com/news/2021/06/09/house-democrats-announce-tech-bills-492703.

[8] *D.C. v. Amazon.com, Inc.*, Case No. 2021-CA-001775-B (D.C. Super. Ct., May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf (claiming that Amazon is in violation of D.C. Code §§ 28-4501, 28-4502, and 28-4503).

sellers to incorporate Amazon's fees into their product prices, thus raising prices for consumers and causing a loss of horizontal competition from the ban on selling the same products on other online retail sales platforms.[9] The PMFN also amounts to "unreasonable vertical agreements in restraint of trade" and creates artificially high prices to consumers, according to the lawsuit.[10] In addition, Amazon charges a "scheme of fees and extra charges—sometimes equaling up to 40% of the total product price" imposed on third-party sellers.[11]

To prove these claims of horizontal and vertical restraints of trade, the D.C. attorney general will need to establish that Amazon indeed has market dominance in the relevant market, prove causal effects of the Business Solutions Agreement on consumer prices; establish causal effects of fees and extra charges on consumer prices; and determine the extent to which there are barriers to entry and abuse of network effects in the Amazon third-party seller marketplace. The complaint is based on state law claims and will be heard in the Superior Court of D.C., rather than federal claims in a federal court. The prosecutor seeks a jury trial, injunctions, and damages from the alleged anticompetitive conduct.

The particular rules by which Amazon operates the third-party seller marketplace have not yet been the subject of a federal investigation, although some indications suggest the Federal Trade Commission and state attorneys general of New York and California may file a complaint in the coming months.[12]

2. Conflicts of Interest and Self-Preferencing

In the public hearing on July 29, 2020, members of the Subcommittee on Antitrust of the Judiciary Committee of the U.S. House of Representatives also expressed concerns related to conflicts of interest between Amazon and its third-party sellers. Members of Congress appeared to be concerned about small sellers who compete in Amazon's marketplace. In one exhibit displayed during the hearing, a small bookseller, which claimed to be in compliance with the rules of the marketplace, pleaded with Amazon not to squash its business.[13] The members of

[9] *Id*. at ¶¶ 3-4.
[10] *Id*. at ¶ 9.
[11] *Id*. at ¶ 7.
[12] *Majority Staff Report and Recommendations, supra* note 4, at 253 n.1551, 1552 (citing "Tyler Sonnemaker, 'Amazon is Reportedly Facing a New Antitrust Investigation into its Online Marketplace Led by the FTC and Attorneys General in New York and California,' BUSINESS INSIDER (Aug. 3, 2020), https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8; Karen Weise & David McCabe, 'Amazon Said to Be Under Scrutiny in 2 States for Abuse of Power,' N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/technology/state-inquiry-antitrust-amazon.html).
[13] *Hearing Documents, supra* note 3 (Exhibit B – Amazon Documents, https://judiciary.house.gov/uploadedfiles/0006.pdf).

Congress appeared to be responding to a news report that outlined the ways that third-party sellers were being disadvantaged on the Amazon marketplace.[14] Jeff Bezos responded to the questioning by focusing on the opportunity that has been created for the 2.3 million active third-party sellers from around the world[15] who, without Amazon's marketplace, would not have the same opportunity to reach Amazon's pool of retail consumers: "I'm very proud of what we've done for third-party sellers on our platform."[16]

Conflicts of interest[17] and self-preferencing claims[18] will be assessed by the courts based on purported effects on consumer welfare, and not on whether smaller competitors are protected from rigorous competition. In its final staff report, the majority staff repeated the concern that Amazon considered third-party sellers "internal competitors" rather than "partners," which amounts to a conflict of interest that disadvantages smaller firms.[19] The staff report noted that Amazon charges third-party sellers fees that may include "a monthly subscription fee, a high-volume listing fee, a referral fee on each item sold, and a closing fee on each item sold,"[20] as well

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[14] *See* Oh, *supra* note 2, at 207 n.74 ("Several members of Congress focused on alleged harms to small sellers, as reported in Dana Mattioli, "Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products," WALL ST. J., Apr. 23, 2020, https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015. *See Hearing Video*, *supra* note 3 (question by Pramila Jayapal, Representative, Washington at 01:51:00, for Jeff Bezos asking how Amazon uses data to compete with third-party sellers); *id*. (question by Lucy McBath, Representative, Georgia at 02:25:35, to Jeff Bezos); *id*. (question by David Cicilline, Representative, Rhode Island at 02:31:31, to Jeff Bezos); *id*. (question by Kelly Armstrong, Representative, North Dakota, at 03:43:00 for Jeff Bezos on use of aggregate data on third-party sellers in the development of Amazon's private label products); *id*. (question by Joe Neguse, Representative, Colorado at 04:06:11 for Jeff Bezos on Amazon's use of data on users of AWS).").

[15] *Majority Staff Report and Recommendations*, *supra* note 4, at 249.

[16] *Id*. (response by Jeff Bezos to Pramila Jayapal, Representative, Washington, at 01:56:00).

[17] "Ending Platform Monopolies Act," June 11, 2021, sponsored by Rep. Jayapal (D-WA) and Rep. Gooden (D-TX), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Ending%20Platform%20Monopolies%20-%20Bill%20Text.pdf (one of five bills introduced by House Democrats entitled "A Stronger Online Economy: Opportunity, Innovation, and Choice," https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4591); *see supra* note 5 (describing a bill sponsored by Rep. Pramila Jayapal to regulate conflicts of interest in digital marketplaces).

[18] "American Innovation and Choice Online Act," June 11, 2021, sponsored by Rep. Cicilline (D-RI) and Rep. Gooden (D-TX), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/American%20Innovation%20and%20Choice%20Online%20Act%20-%20Bill%20Text.pdf (one of five bills introduced by House Democrats entitled "A Stronger Online Economy: Opportunity, Innovation, and Choice," https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4591); *see supra* note 5 (describing a bill sponsored by Rep. David Cicilline (D-RI) to bar discrimination by platforms against rivals in self-preferencing of private label products and services). Self-preferencing has been the subject of other high profile antitrust litigation, most notably *U.S. v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001).

[19] *Majority Staff Report and Recommendations*, *supra* note 4, at 16.

[20] *Id*. at 251 n.1537, citing Selling on Amazon Fee Schedule, Amazon Seller Central, https://sellercentral.amazon.com/gp/help/external/200336920 (last visited Sept. 25, 2020).

as fees for fulfillment and delivery services and advertising.[21] Net sales from third-party seller fees amounted to $23 billion in the first half of 2019 and $32 billion in the first half of 2020.[22]

Whether these fees disadvantage consumers by raising prices is a question that will need to be answered with economic models and a battle of the experts. In litigation, Amazon will likely defend its management of the third-party seller marketplace by showing how its rules promote innovation and entry by more third-party sellers who find efficiencies in exchange for the fees, in order to reach more customers and increase sales volumes.

3. Predatory Pricing

At the July 29, 2020 hearing, one member of the House Judiciary Committee's Subcommittee on Antitrust asked Jeff Bezos about price competition with Diapers.com in 2009. Representative Mary Scanlon stated that Amazon incurred $200 million in losses in order to win market share in the diapers category, only to raise prices later to recoup their losses.[23] This strategy to compete on lower prices was described in internal business emails.[24]

The question of whether this business strategy amounted to illegal predatory pricing, as some have asserted, would need to be answered in litigation based on an economic model of the market for diapers and Amazon's sequence of actions to incur losses and recoup profits later.[25] In general, price discounts benefit consumers, enabling lower prices and therefore higher welfare. This consumer welfare standard means that antitrust enforcement is more focused on cases of anticompetitive injury that lead to higher prices and less quality or quantity for consumers, with less concern about lower prices or higher quality or quantity which benefit consumers. Amazon's

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[21] *Id*. at 251 n.1538, citing Pricing Overview, Amazon Seller Central, https://sell.amazon.com/pricing.html (last visited Sept. 25, 2020).

[22] *Id*. at 251 n.1536, citing Amazon.com, Inc., Quarterly Report (Form 10-Q) 18 (July 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK0001018724/a77b5839-99b8-4851-8f37-0b012f9292b9.pdf.

[23] *See* Oh, *supra* note 2, at 198 n.16, citing *Hearing Video, supra* note 3 ("question by Mary Gay Scanlon, Representative, Pennsylvania at 02:14:00 for Jeff Bezos asking for his estimate of how much Amazon was willing to lose to compete with lower prices than Diapers.com after describing Amazon emails that outlined a plan to temporarily cut prices, referencing Email from Doug Herrington to Jeff Bezos, *infra* note 20); *id*. (response from Jeff Bezos at 02:16:54 recollecting that Amazon invested $350 million into Diapers.com after the acquisition for further development of the service)").

[24] *See* Oh, *supra* note 2, at 198 n.18, citing *Hearing Documents, supra* note 3 ("Email from Doug Herrington, Senior Vice President of North American Retail, Amazon to Tom Furphy, Vice President of AmazonFresh, Amazon, Michelle Rothman, Vice President of Amazon Fashion, Amazon, David Nenke, Dir. of Marketing and Product for Cloud Drive, Amazon and Chance Wales, Dir. of Worldwide Brand Merchandising and Content (Feb. 9, 2009), https://judiciary.house.gov/uploadedfiles/00151722.pdf).").

[25] *See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT: CHAPTER 4, https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#N_56 (stating Section 2 investigations of predatory pricing by the U.S. Department of Justice include inquiries into six key issues, "(1) the frequency of predatory pricing, (2) treatment of above-cost pricing, (3) cost measures, (4) recoupment, (5) potential defenses, and (6) equitable remedies").

economies of scale and ability to successfully execute in many areas of retail distribution has been questioned by lawmakers who are concerned by Amazon's ability to offer price discounts on popular products.[26]

Finding conduct that amounts to predatory pricing requires inquiry into many key issues such as the frequency of the pricing changes and the occurrence of above-cost pricing, cost measures, and recoupment mechanisms.[27] The federal agencies, state attorneys general, or private plaintiffs have yet to file a lawsuit on the Diapers.com acquisition.[28] However, the U.S. Federal Trade Commission has opened a 6(b) investigation that would include a review of its past decisions to not challenge smaller acquisitions that may represent nascent or potential competition.[29]

4. Acquisition of Nascent or Potential Competitors

Lawmakers have also asked whether Amazon's acquisitions of the home security systems, Blink (for $90 million in 2017) and Ring (for $1.2 billion in 2018),[30] stifled potential or nascent competition. The House Judiciary Committee's Subcommittee on Antitrust released documents that revealed Amazon's internal assessment of Ring technology. In email communications, Amazon executives remarked that it was "willing to pay for market position as it's hard to catch the leader."[31] Jeff Bezos wrote that the Ring acquisition was about "buying market position – not technology. And that market position and momentum is very valuable."[32]

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[26] *See* Oh, *supra* note 2, at 200 n.28, citing *Hearing Video*, *supra* note 3 (citing "statement of Mary Gay Scanlon, Representative, Pennsylvania at 02:14:00; statement of Jamie Raskin, Representative, Maryland at 02:56:18, asking Jeff Bezos if the Amazon Echo was priced below-cost, with response by Jeff Bezos that it is not priced below-cost at its list price, but on promotion, yes, it may be priced below-cost.").

[27] *See supra* note 19.

[28] *Majority Staff Report and Recommendations, supra* note 4, at 267 (describing the FTC's investigation of Amazon's acquisition of Quidsi, the parent company of Diapers.com, but the decision not to challenge the acquisition as a violation of antitrust law), citing Letter from April Tabor, Acting Sec. of the Fed. Trade Comm'n, to Thomas Barnett (Aug. 22, 2012).

[29] The FTC has authority under Section 6(b) of the FTC Act to conduct wide-ranging studies that do not have a specific law enforcement purpose, *see* Oh, *supra* note 2, at 205 n.63 (citing "Press Release, Fed. Trade Comm'n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies (special orders approved by a 5-0 commission vote with authority to conduct a 6(b) study under the Federal Trade Commission Act, 15 U.S.C. § 46(b) (2018), with reference to its implementation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (2018)).").

[30] *Majority Staff Report and Recommendations*, *supra* note 4, at 265.

[31] *See* Oh, *supra* note 2, at 204 n.50, citing *Hearing Documents, supra* note 3 ("Email from Allen Parker, Vice President of Finance, World-wide Operations and Customer, Service, Amazon to Brian Olsavsky, Chief Financial Officer, Amazon (Oct. 11, 2017), https://judiciary.house.gov/uploadedfiles/00214132.pdf).

[32] *See* Oh, *supra* note 2, at 204 n.52, citing *Hearing Documents, supra* note 3 ("Email from Jeff Bezos, Chief Exec. Officer, Amazon to Dave Limp, Vice President, Kindle, Amazon (Dec. 15, 2017), https://judiciary.house.gov/uploadedfiles/00173560.pdf).").

While the statements may sound incriminating, the criteria for whether the acquisitions rise to the level of causing antitrust injury includes more than mere statements of business strategy in "hot docs."[33] Rather, to show that the acquisition harmed consumer welfare by eliminating a nascent or potential competitor, economists and attorneys will need to establish many facts related to market structure and trends in innovation in that particular product or service.[34] A judge or jury would also need to eliminate the possibility that the acquisition of the nascent or potential competitor could have helped innovation by providing the incentive to the founders to build and sell a startup company in the first place.[35]

B. Apple

Federal litigation has been the main avenue for increased scrutiny of Apple's business decisions related to in-app payments in the Apple App Store and App Store commissions. The wide distribution of the iOS mobile operating system forms the basis of the theory of market dominance by Apple in the app economy.[36] Because the operating system has been successfully distributed to phones and computers in the United States and globally, the rules that govern the app ecosystem are viewed with more scrutiny by regulators and competitors. Apple's App Store market dominance has not been conclusively determined, however. In *Apple Inc. v. Pepper*, the Supreme Court did not make a determination about whether Apple's App Store has market power in the marketplace for mobile apps for developers or consumers, but rather deferred that question to fact-finding by the federal district courts.[37]

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[33] *See generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005) (discussing the difference between business rhetoric and economic conduct in antitrust litigation).

[34] *See generally* John Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 18, Nov. 2020, https://ssrn.com/abstract=3733716. *But see supra* note 5 (describing a bill sponsored by Rep. Hakeem Jeffries (D-NY) that would shift the burden to the acquiring firm to show by a "clear and convincing evidence" standard that a potential rival does not pose a competitive threat).

[35] *See* Oh, *supra* note 2, at 203 n.45, citing Prepared Remarks of Chairman Joseph J. Simons for the ABA Section of Antitrust Law Fall Forum 2020, Nov. 12, 2020, https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf ("Large firms often acquire small firms, and the payout associated with the acquisition may incentivize individuals and small firms to engage in costly and risky innovation in the first place. If the law prohibits all acquisitions of this type, then we might expect a lower amount of such innovation.").

[36] *Majority Staff Report and Recommendations, supra* note 4 at 16 (claiming that Apple has market power emanating from its dominance in the mobile operating system market).

[37] *See generally* Sarah Oh & Scott Wallsten, "The Law and Economics of *Apple Inc. v. Pepper*," TECH. POL'Y INST. (Dec. 20, 2018), https://techpolicyinstitute.org/2018/12/20/the-law-and-economics-of-apple-inc-v-pepper; *Apple Inc. v. Pepper*, 139 S. CT. 1514, 1516 (2019); Transcript of Oral Argument of *Apple Inc. v. Pepper*, at 14, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-204_32q3.pdf; Oral Argument of *Apple Inc. v. Pepper*, Nov. 26, 2018, https://www.supremecourt.gov/oral_arguments/audio/2018/17-204.

1. In-App Purchase (IAP) System

In a high-profile federal trial, Epic Games. Inc. alleges that Apple has market power in the app economy and has violated the Sherman Act, California's Cartwright Act, and California's Unfair Competition Law in the governance of its in-app purchase (IAP) system and fee structure.[38] At issue are the agreements between app developers, such as Epic Games, and Apple as the provider of the App Store marketplace. Third-party developers for popular games such as Fortnite agree to use the in-app purchase (IAP) system on the iOS platform and agree not to circumvent payments through other means.[39] Apps such as the Fortnite game are free to be sold on other mobile platforms and app stores, including Android, Windows, Sony Playstation, Microsoft Xbox, Nintendo Switch, and directly from the developer's own web properties such as the Epic Games Store.[40] The restriction on payments made on the iOS app applies only to the apps downloaded from the Apple App Store. Epic Games intentionally breached the Apple developer agreement and activated "hidden code" to allow Fortnite users to make payments directly through the Epic Games payment system to buy "V-bucks," thus bypassing the Apple IAP system.[41] In response, Apple removed Fortnite from the Apple App Store for violation of the terms of the marketplace.[42] In concurrent litigation, Epic Games also sued Google which similarly removed Fortnite from the Google Play Store for violating the terms of the Google Play marketplace that barred the developer from allowing users to make payments directly to the Epic Games payment system.[43]

The public bench trial for the *Epic Games, Inc. v. Apple Inc.* case occurred between May 3, 2021 to May 25, 2021 in the U.S. District Court of the Northern District of California with hundreds of pages of exhibits and expert testimony.[44] Each side presented expert reports and submitted proposed findings of fact and conclusions of law.[45] The criteria that will determine

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[38] Complaint for Injunctive Relief, *Epic Games, Inc. v. Apple, Inc.*, Case No. 4:20-cv-05640-YGR (N.D. Cal. Aug. 13, 2020), https://cdn2.unrealengine.com/apple-complaint-734589783.pdf.
[39] *Id.*
[40] *Id.* at 2 n.1.
[41] *Id.* at 3.
[42] *Id.*
[43] Complaint for Injunctive Relief, *Epic Games, Inc. v. Google LLC, et al.*, Case No. 3:20-cv-05671 (N.D. Cal. Aug. 13, 2020), https://cdn.vox-cdn.com/uploads/chorus_asset/file/21759099/file0.243586135368002.pdf.
[44] U.S. District Court of the Northern District of California, Cases of Interest, Trial Docket, *Epic Games, Inc. v. Apple Inc.*, https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc/ (May 3-25, 2021) (bench trial by Honorable Yvonne Gonzalez Rogers); *see also* Trial Exhibits from May 3-25, 2021, https://app.box.com/s/6b9wmjvr582c95uzma1136exumk6p989 (last accessed June 14, 2021).
[45] Epic Games, Inc.'s Proposed Findings of Fact and Conclusions of Law, https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-Games-20-cv-05640-YGR-Dkt-407-Epic-Games-Proposed-Findings-of-Facts-and-Conclusions-of-Law.pdf; Apple Inc.'s Proposed Findings of Fact and Conclusions

whether Apple's App Store policies are anticompetitive will focus on how to define the relevant market and whether Apple acted in a way to maintain monopoly power in how it structured its payment system agreement.[46] Ultimately, however, even after the federal district court judge decides facts and law, the lower court decision will likely be appealed to the U.S. Ninth Circuit Court of Appeals for further review.

The Subcommittee on Antitrust of the House Judiciary Committee of the U.S. House of Representatives also directed its attention to investigating App Store rules and questions of innovation in the app economy.[47] At the time of the public hearing of the chief executive officers on July 29, 2020, the staffers released email communications it had obtained from 2010 and 2011 from the time when App Store policies were first formulated by Steve Jobs and Eddy Cue.[48] Since then, other app developers have disagreed with the in-app purchase (IAP) system policies and have been in non-compliance with the App Store rules and standards.[49] The findings of fact and conclusions of law in the litigation brought forth by Epic Games against Apple and Google will be important precedents in the coming years for developers who build apps and marketplace owners who operate in-app purchase systems.

2. App Store Fees

Apple's App Store collects fees from app developers depending on the price of the app sold in the store.[50] The 30% commission on paid apps was a point of discussion in the *Apple Inc.*

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of Law, https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-Games-20-cv-05640-YGR-Dkt-410-Apple-Proposed-Findings-of-Facts-and-Conclusions-of-Law.pdf.

[46] Consumer Plaintiffs' Amicus Brief re: Trial Elements, Legal Framework, and Remedies, https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/20-5640_Epic_Games_Dkt_325_Consumer_Plaintiffs_Amicus_Brief_Re_Trial_Elements_Legal_Framework_and_Remedies.pdf; Developer Plaintiffs' Amicus Brief re: Trial Elements, Legal Framework, and Remedies, https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/20-5640_Epic_Games_Dkt_326_Developer_Plaintiffs_Amicus_Brief_Re_Trial_Elements_Legal_Framework_and_Remedies.pdf.

[47] *Majority Staff Report and Recommendations, supra* note 4, at 93-100.

[48] *See* Oh, *supra* note 2, at 211 n.100, citing *Hearing Documents, supra* note 3 ("E-mail from Steve Jobs, Chief Exec. Officer, Apple Inc., to Philip Schiller, Apple Fellow, Apple Inc. (Nov. 23, 2010), https://judiciary.house.gov/uploadedfiles/014701.pdf)); *id*. at 20 n.103, citing *Hearing Documents, supra* note 3 (Email from Steve Jobs, Chief Exec. Officer, Apple Inc., to Eddy Cue, Senior Vice President of Internet Software and Services, Apple Inc. (Feb. 6, 2011), https://judiciary.house.gov/uploadedfiles/014816.pdf).").

[49] *Hearing Documents, supra* note 3 ("E-mail from Jai Chulani, Dir. of Worldwide Prod. Mktg: Apple TV & Dig. Media Prods., Airport Wi-Fi Prods., Apple Inc., to Eddy Cue, Senior Vice President of Internet Software & Servs., Apple Inc. (Mar. 17, 2011), https://judiciary.house.gov/uploadedfiles/015059.pdf; *Hearing Documents, supra* note 3 (Memorandum from Bruce Sewell, Vice President & Gen. Counsel, Apple Inc., to Horacio Gutierrez, Gen. Counsel & Sec'y, Spotify USA Inc. (Oct. 28, 2016), https://judiciary.house.gov/uploadedfiles/013578.pdf).").

[50] *See generally Majority Staff Report and Recommendations, supra* note 4, at 98-99 (describing how 30% has become an industry standard in the Google Play store as well, with 15% charged on subscriptions for the second year and beyond).

v. Pepper case before the United States Supreme Court but was not the focus of the legal dispute.[51] Whether the commission rate is unfair or an abuse of market dominance, and whether that cost is passed along as higher prices for consumers,[52] remain questions to be answered in findings of fact in the current Epic Games litigation.

Epic Games claims that the competitive level is about 3-5%, not 30%, and that Apple's ability to raise prices substantially is evidence of monopoly power.[53] The 30% commission on paid apps, however, has become an industry standard in the Apple App Store, Google Play Store, Steam Store, and Microsoft Store.[54]

Apple claims that the effective commission rate that they charge developers is actually closer to 3% with a downward trend toward 0%, because many of the apps on the App Store are free-to-download and have a 0% commission rate.[55] Furthermore, according to Apple, the 30% commission on paid apps has never been increased, and to the contrary, has been lowered for certain categories of apps such as subscription services.[56] As the App Store has grown, an increasing share of apps in the App Store are free-to-download, rising to 66% of app downloads in 2019.[57]

Epic Games also claims that the 30% commission enables Apple to achieve high profit margins which is evidence of monopoly power.[58] Apple defends its profit margins by comparing its margins with those of other marketplaces in the app economy.[59] Prices above marginal cost are typical in software markets, where accounting profits do not reflect economic profits when companies reinvest in intellectual property, and joint costs need to be incorporated in any estimates of profit and loss which include other hardware products developed at Apple.[60] In other

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[51] *See generally* Oh & Wallsten, *supra* note 34.
[52] *Id*.
[53] Epic Games, Inc.'s Proposed Findings of Fact and Conclusions of Law, *supra* note 42, at 83-84 (citing Findings of Fact ¶ 297(a)).
[54] Sarah Bond, "Empowering PC Game Creators with New Tools, Greater Opportunity," Apr. 29, 2021, https://www.linkedin.com/pulse/empowering-pc-game-creators-new-tools-greater-opportunity-sarah-bond/ ("We're in awe of the incredible innovations that developers like Valve, Epic, Unity and so many others have brought, and continue to bring, to PC gaming… Starting on August 1, the developer share of Microsoft Store PC games sales revenue will increase to 88%, from 70%. Having a clear, no-strings-attached revenue share means developers can bring more games to more players and find greater commercial success from doing so."); Tom Warren, "Microsoft Shakes Up PC Gaming By Reducing Windows Store Cut to Just 12 Percent," THE VERGE, Apr. 29, 2021, https://www.theverge.com/2021/4/29/22409285/microsoft-store-cut-windows-pc-games-12-percent.
[55] Apple Inc.'s Proposed Findings of Fact and Conclusions of Law, *supra* note 42, at 101-02.
[56] *Id*.
[57] *Id*. at 102.
[58] Apple Inc.'s Proposed Findings of Fact and Conclusions of Law, *supra* note 42, at 108.
[59] *Id*. (describing the market structure and market outcomes of app stores).
[60] *Id*. at 108-09.

words, in any industry with high fixed costs, prices must exceed marginal costs in order to be sustainable.

In litigation, the answer to the question of whether the 30% commission is evidence of supracompetitive pricing behavior will be a closely watched finding of fact and dependent on case-specific data on the actual scale and scope of Apple's App Store (and Google's Play Store, in concurrent litigation).

C. Facebook

Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014 have been the focus of much antitrust debate. These two acquisitions fall into the nascent or potential competition category.

1. Acquisition of Nascent or Potential Competitors

The U.S. Federal Trade Commission, with a coalition of attorneys general of 46 states, District of Columbia, and Guam, sued Facebook in December 2020 in federal court alleging anticompetitive conduct and unfair methods of competition in violation of Section 5(a) of the Federal Trade Commission Act.[61]

The complaint alleges that Facebook dominates the market as an online social network and maintains a monopoly position by acquiring potential or nascent competitors and by imposing conditions that restrict third-party access to its platform. [62,63] The plaintiffs' theory is that Facebook takes advantage of its network effects and high barriers to entry, thus blocking innovation and competition. Yet, at the same time, new entrants threaten competition which provide the motivation for aggressive strategies of acquisition.[64]

In federal court, the plaintiffs and defendant will argue the facts and law about whether small acquisitions that fell below the Hart-Scott-Rodino Act size thresholds may have been competitive threats to the incumbent Facebook. The federal district court will assess the nature of

[61] *FTC v. Facebook, Inc.*, Case No. 1:20-cv-03590, (D.D.C., Jan. 21, 2021, dismissed and amended complaint filed Aug. 19, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf and https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf (under its 13(b) authority, 15 U.S.C. § 53(b), the FTC sued Facebook for violation of 15 U.S.C. § 45(a)); dismissed and amended); FTC, "FTC Sues Facebook for Illegal Monopolization," Dec. 9, 2020, https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

[62] *Id.* at 1-2.

[63] *Id.* at 2.

[64] *Id.* at 3, ¶ 7 ("Despite strong network effects, important competitive threats to a dominant personal social networking provider can emerge, particularly during periods of technological or social transition and particularly if the newcomer is differentiated from the incumbent in a manner that exploits the technological or social transition.").

the competitive threat of Instagram and WhatsApp at the time of acquisition based on evidence of market structure and market definition in 2012 and 2014. As a matter of theory, it will be important for the court to establish whether Facebook had strong network effects or whether Facebook faced an existential threat from Instagram or WhatsApp at the time of acquisition.

The Subcommittee on Antitrust of the House Judiciary Committee released documents that it had collected in 2020 that offer the public more context on the competitive position of Facebook at the time of these acquisitions.[65] It had collected a list of Facebook's top ten competitors and internal and external analyses of Facebook's market share compared to competitors.[66] The company produced 41,442 documents, and an additional 83,804 documents from another ongoing litigation matter, including email communications describing its competition strategy.[67] In the public hearing on July 29, 2020, members of Congress referred to email communications between Mark Zuckerberg and Kevin Systrom as evidence of the anticompetitive nature of the Instagram acquisition.[68] In a response to a question from Representative Jerrold Nadler, Mark Zuckerberg defended the company's assessment of Instagram as a competitor or a complement to the Facebook platform:

> "in the growing space around—after smart phones started getting big, they competed with us in the space of mobile cameras and mobile photo sharing, but, at the time, almost no one thought of them as a general social network, and people didn't think of them as competing with us in that space, and I think the acquisition has been wildly successful. We were able to, by acquiring them, to continue investing in it and growing it as a standalone brand that now reaches many more people than I think Kevin, the founder at the time, or I, thought to be possible at the time while also incorporating the technology to making Facebook's photo sharing products better."[69]

In the majority staff report, other internal documents are cited as evidence that Instagram was acquired in order to help Facebook compete with other companies in a rapidly changing and global social networking environment.[70] In an October 2018 memorandum that outlined Facebook's growth strategy, the executives debated how to position Instagram and Facebook as internal competitors after the acquisition was completed. If Instagram was viewed as a nascent

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[65] *Majority Staff Report and Recommendations*, *supra* note 4, at 24-25.
[66] *Id*.
[67] *Id*. at 25.
[68] *See* Oh, *supra* note 2, at 215 n.127, citing *Hearing Documents, supra* note 3 ("E-mail from Mark Zuckerberg, Chief Exec. Officer, Facebook Inc. (Apr. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006334000063341.pdf.").
[69] *See* Oh, *supra* note 2, at 215 n.128, citing *Hearing Video, supra* note 3 (question by Jerrold Nadler, Representative, New York at 01:02:05, and live response from Mark Zuckerberg).
[70] *See Majority Staff Report and Recommendations, supra* note 4, at 13 (citing the Cummingham Memo from October 2018).

competitor to quash, it appears that the threat emerged as late as 2018, four years after the acquisition:

> "The question was how do we position Facebook and Instagram to not compete with each other. The concern was the Instagram would hit a tipping point . . . There was brutal in-fighting between Instagram and Facebook at the time. It was very tense. It was back when Kevin Systrom was still at the company. He wanted Instagram to grow naturally and as widely as possible. But Mark was clearly saying "do not compete with us." . . . It was collusion, but within an internal monopoly. If you own two social media utilities, they should not be allowed to shore each other up. It's unclear to me why this should not be illegal. You can collude by acquiring a company."[71]

In the public hearing and in the majority staff report, these "hot docs" offer context for the competitive landscape in global social networking for Facebook and Instagram at various times of interest, in 2012 at the time of acquisition, and in 2018, in the years after integrating the service and team. While these internal communications may reveal assessments of rapid changes in the global markets for social networking, they do not rise to the level of economic proof that such an acquisition actually prevented growth in the market for social networking services.[72]

In cases of nascent or potential competition, firms and regulators are predicting future outcomes based on uncertain present conditions.[73] A new bill recently introduced in Congress seeks to shift the burden for "covered platforms" to prove by "clear and convincing evidence" that they are not acquiring another firm for the purpose of quashing nascent or potential competition.[74] The *FTC v. Facebook* litigation in the U.S. District Court of the District of Columbia will generate an important record to define the scope of nascent or potential competition as both sides rigorously argue and defend their characterizations of market structure and market dominance. The determination that an acquisition is made to quash "nascent or

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[71] *Id*. (citation omitted) (citing Interview with former Instagram employee, Oct. 2, 2020).
[72] *See* Manne & Williamson, *supra* note 30.
[73] *See* Yun, *supra* note 31.
[74] "The Platform Competition and Opportunity Act," June 11, 2021, sponsored by Rep. Jeffries (D-NY) and Rep. Buck (D-CO), https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/Platform%20Competition%20and%20Opportunity%20Act%20-%20Bill%20Text%20%281%29.pdf (one of five bills introduced by a group of House Democrats entitled "A Stronger Online Economy: Opportunity, Innovation, and Choice," https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4591); Jon Swartz, "House Democrats Just Introduced 5 Antitrust Bills Aimed at Reining in Big Tech," MARKETWATCH, June 11, 2021, https://www.marketwatch.com/story/house-democrats-just-introduced-5-antitrust-bills-aimed-at-reining-in-big-tech-11623436959; Joan Solsman, "Amazon, Apple, Facebook, Google Targeted with 5 Antitrust Bills," CNET, Jun. 11, 2021, https://www.cnet.com/news/amazon-apple-facebook-google-targeted-with-5-antitrust-bills/; Diane Bartz, "Breaking Up Big Tech in Focus as New U.S. Antitrust Bills Introduced," REUTERS, June 11, 2021, https://www.reuters.com/technology/us-house-lawmakers-introduce-bipartisan-bills-target-big-tech-2021-06-11/.

potential competition" requires close analysis of markets and trends, with counterfactual analysis.[75]

D. Google

Antitrust litigation initiated by federal and state enforcers is underway in the federal courts. These lawsuits focus on exclusionary agreements in default search and mechanics of Google's advertising servers, exchanges, and marketing tools. The acquisition of YouTube by Google in 2006 has also been the subject of scrutiny as an example of possible attempts to quash nascent or potential competition.

1. Exclusionary Agreements in Default Search

The U.S. Department of Justice, along with 11 state attorneys general, filed a lawsuit in October 2020 in the U.S. District Court of the District of Columbia alleging violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.[76] The lawsuit alleges that Google unlawfully maintains monopolies in "general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices."[77] The DOJ alleges that exclusionary agreements and tying arrangements are used to lock-in distribution channels.[78] These exclusionary agreements establish default search placement for Google on browsers and devices sold by wireless carriers, and in some cases, require prime placement and installation of bundles of default apps.[79] The complaint alleges that 60 percent of all searches are generated under these exclusionary arrangements, and up to 80 percent of all searches when including owned-and-operated properties,[80] amounting to a foreclosure of competition in general search.[81] The market dominance of Google Search generates an advantage that grows as data grows, and

[75] *See* Yun, *supra* note 31.
[76] *United States v. Google LLC*, Case No. 1:20-cv-03010 (D.D.C., Oct. 20, 2020), https://www.justice.gov/atr/case-document/file/1329131/download (including the States and Commonwealths of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas); *see also* U.S. Department of Justice, Antitrust Division, Oct. 20, 2020, https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc; U.S. Department of Justice, Press Release, "Justice Department Sues Monopolist Google for Violating Antitrust Laws," Oct. 20, 2020, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.
[77] *Id*. at 2.
[78] *Id*. at 3.
[79] *Id*. at 4.
[80] *Id*. at 18, ¶ 53.
[81] *United States v. Google LLC, supra* note 72, at 4.

combined with algorithms, an advantage amounting to unlawful maintenance of monopoly, according to the lawsuit.[82]

The complaint describes alleged exclusionary agreements that Google has developed to manage the quality of the Android ecosystem, which is open source and subject to the risk of forking, an outcome that would diminish the user experience across 70 percent of mobile devices across the globe.[83] These exclusionary agreements include anti-forking agreements,[84] preinstallation agreements,[85] and revenue sharing agreements.[86] In this case, the United States will need to prove that the exclusionary agreements have denied rivals from access to distribution channels in an anticompetitive manner. The DOJ asks the court to consider the mobile environment apart from the personal computer environment. In the mobile environment, Google's deal to be the default search engine on the Apple mobile operating system, combined with Android's licensing terms, forms the basis of the complaint's main argument that Google acted to maintain a monopoly position in general search.[87]

The plaintiffs will bear the burden to prove that these exclusionary distribution agreements were actually illegal and caused harm to consumer welfare. The complaint alleges that the agreements caused Google's revenue-sharing partners to "turn down opportunities to preinstall or otherwise enable innovative, search-related apps because those new partnerships could violate Google's demand for exclusivity."[88] Whether those other opportunities existed at the time or would have, in the counterfactual, enabled greater innovation than actual outcomes, is a matter that will be scrutinized in court.[89]

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[82] *Id*. at 5.
[83] *Id*. at 21, ¶ 64 ("Today, Android represents over 95 percent of licensable mobile operating systems for smartphones and tablets in the United States and accounts for over 70 percent of all mobile device usage worldwide. The only other mobile operating system with significant market share in the United States is Apple's iOS, which is not licensable.").
[84] *Id*. at 22, fig.5 (showing the anti-forking agreements: AFA (Anti-Forking Agreement), CDD (Compatibility Definition Document), ACC (Android Compatibility Commitment)).
[85] *Id*. (showing the preinstallation agreements: MADA (Mobile Application Distribution Agreement), GMS (Google Mobile Service), GPS (Google Play Service), Core Apps).
[86] *Id*. (showing the revenue sharing agreements: RSA (Revenue Sharing Agreement), MIA (Mobile Incentive Agreement)).
[87] *Id*. at 37, ¶ 117.
[88] *Id*. at 48, ¶ 150.
[89] *Id*. at 49, ¶¶ 154-55 (assertions about the harms of these agreements will be subject to cross-examination and likely a battle of the experts who will disagree about whether "the Android distribution agreements—taken together—are self-reinforcing, depriving rivals of the quality, audience, and financial benefits of scale that would allow them to mount an effective challenge to Google" and whether "[p]articularly for newer entrants, the revenue sharing agreements present a substantial barrier to entry." As a matter of fact, it's uncertain whether "they are relegated to inferior forms of distribution that do not allow them to build scale, gain brand recognition, and generate momentum to challenge Google.").

2. Search Engine Marketing Tools and Specialized Vertical Search

The attorney general of the state of Colorado, along with 38 other state attorneys general, filed a lawsuit in December 2020 in the U.S. District Court of the District of Columbia alleging violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.[90] The lawsuit defines the markets that Google allegedly restrains trade and maintains monopolies as the markets for "general search services, general search text advertising, and general search advertising in the United States."[91] The complaint argues that "[c]lose to 90 percent of all internet searches done in the United States use Google," and that the nearest competitor has no more than 7 percent of the share of remaining searches.[92]

The complaint includes many of the same data points as the lawsuit filed by the United States,[93] but goes into more detail around Google's SA360 search engine marketing tool.[94] This SA360 tool automates many tasks that advertisers rely on for sophisticated, high-spend campaigns.[95] The complaint alleges that the SA360 tool is advertised as interoperable and neutral, allowing advertisers to manage ad campaigns on other search engines such as Bing, but in effect, is operated in a way that grants Google more ad transactions due to faster connections with Google's auction bidding service and data.[96] The SA360 tool allows advertisers to connect with Bing's real-time auctions, but only allows seamless integration with Google's real-time auctions, according to the lawsuit.[97] That the SA360 tool "steers ad spend away from Bing and towards Google" is a competitive harm since it causes advertisers to use Bing less, prevents the opportunity for Bing to improve, and creates pricing power for Google's ad network.[98] The lawsuit concedes, however, that other independent search engine marketing tools are available to advertisers that offer "superior support for Bing features," even though SA360 may not.[99]

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[90] *Colorado, et al., v. Google LLC*, Case No. 1:2020cv03715 (D.D.C., Dec. 17, 2020), https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf (including the States and Commonwealths of Colorado, Nebraska, Arizona, Iowa, New York, North Carolina, Tennessee, Utah, Alaska, Connecticut, Delaware, District of Columbia, Guam, Hawaii, Idaho, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, Wyoming); *see also* State of Colorado, Press Release, "Colorado Attorney General Phil Weiser Leads Multistate Lawsuit Seeking to End Google's Illegal Monopoly in Search Market," Dec. 17, 2020, https://coag.gov/press-releases/12-17-20/.
[91] *Id*. at 5.
[92] *Id*.
[93] *United States v. Google LLC, supra* note 73.
[94] *Colorado, et al., v. Google LLC*, *supra* note 87, at 50, ¶ 145.
[95] *Id*.
[96] *Id*. at 53, ¶ 156.
[97] *Id*. at 53, ¶ 157.
[98] *Id*. at 55, ¶ 159.
[99] *Id*. at 56, ¶ 163.

The Colorado lawsuit also sets forth more detailed claims of anticompetitive conduct in Google's treatment of specialized vertical search results.[100] Specialized vertical search results are query results for commercial segments such as travel, shopping, and restaurants.[101] As opposed to general search, these results are more commercial in nature, where users seek to make transactions to purchase goods or services, and advertisers seek to obtain traffic in order to sell products and services.[102] The lawsuit states that specialized vertical ad buyers rely on Google for 30 to 40 percent of their traffic, creating reliance by these advertisers on traffic flow.[103] In its decisions for how it presents general results alongside vertical search ads, Google acts in exclusionary ways that disadvantage vertical providers, according to the complaint.[104]

Members of the House Judiciary Committee's Subcommittee on Antitrust raised concerns about the vertical search results that Google uses to leverage and abuses its monopoly position in general search.[105] The majority staff report summarizes the theory animating the claim that Google abuses its market dominance in the way it displays vertical search results on its search pages.[106] The criteria by which the courts will determine whether Google violated the antitrust laws in its operation of SA360 and vertical search results will depend on an analysis of alternative venues for advertisers to reach users and whether Google's conduct has generated harms to consumers or competition. As a Sherman Act Section 2 case, the Colorado litigation will rely on expert reports that establish the relevant markets for search engine marketing tools and vertical search engines.

3. Ad Servers, Display Ad Exchanges, and Display Ad Networks

The attorney general of the state of Texas, along with 10 other state attorneys general, filed a lawsuit in December 2020 in the U.S. District Court of the Eastern District of Texas alleging violation of federal and state antitrust laws and deceptive trade practice laws.[107] Since its

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[100] *Colorado, et al., v. Google LLC*, *supra* note 87, at 57, ¶ 168.
[101] *Id*. at 58, ¶ 169.
[102] *Id*. at 58, ¶ 170.
[103] *Id*. at 59, ¶ 172.
[104] *Id*. at 61, ¶¶ 176-77.
[105] *See* Oh, *supra* note 2, at 224 n.170, citing *Hearing Video*, *supra* note 3 (citing "(question by David Cicilline, Representative, Rhode Island at 00:51:45, regarding Google's fear of competitors in vertical search and the 'proliferating threat' of certain websites getting 'too much traffic,' with response from Sudhar Pichai that 'when we look at vertical searches, it validates the competition we see...')").
[106] *Majority Staff Report and Recommendations, supra* note 4, at 83-84.
[107] *Texas, et al., v. Google LLC*, Civil Action No. 4:20cv957 (E.D. Texas, Dec. 16, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/20201216_1%20Complaint%20(Redacted).pdf (including the States and Commonwealths of Texas, Arkansas, Idaho, Indiana, Kentucky, Mississippi, Missouri, North Dakota, South Dakota, and Utah); *see also* State of Texas, Press Release, "AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations,"

acquisition of DoubleClick in 2008, Google has exerted leverage in the ad exchange market for display advertising, according to the complaint.[108] Google engaged in unlawful agreements and anticompetitive conduct in routing inventory in the DoubleClick ad servers in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, according to the lawsuit.[109]

Publishers' inventory management systems (ad servers), display ad exchanges, ad networks for mobile in-app inventory, and ad buying tools, are the subject of the Texas lawsuit. At issue are the ways that Google discourages "header bidding," restricts information on ad exchanges, forces advertisers to use Google's ad buying tools, and forces publishers to use Google's ad server and use Google's ad exchange.[110] This litigation includes more technical analysis of the mechanics of the publisher ad server market, exchange market, and market for ad buying tools, as well as theories of how Google's business decisions generate harm to consumers and harm to competition.[111]

The complaint goes into detail to describe the emergence of "header bidding," an innovation introduced by publishers to route ad inventory to "multiple neutral exchanges each time a user visited a web page in order to return the highest bid for the inventory."[112] "Header bidding" threatened to undermine Google's advantages in operating ad exchanges.[113] The Texas lawsuit describes how Facebook and Google collaborated to quash the growth of header bidding, rising to the level of an unlawful agreement to diminish competition in ad bids.[114] The market power that Google maintains in the ad server, ad exchange, and ad tools results in "a very high tax" on online publishers and content producers, which "invariably are passed onto the advertisers themselves and then to American consumers," according to the complaint.[115]

This litigation is brought under Sections 1 and 2 of the Sherman Act, with an unlawful agreement claim under Section 1, and monopolization, attempted monopolization, and unlawful tying claims under Section 2.[116] The ad-tech suite has been investigated by the House Judiciary Committee's Subcommittee on Antitrust,[117] but will undergo more focused scrutiny in the Texas

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Dec. 16, 2020, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive.

[108] *Id*. at 3.
[109] *Id*. at 12.
[110] *Id*.
[111] *Id*.
[112] *Texas, et al., v. Google LLC, supra* note 104, at 4, ¶ 9.
[113] *Id*. at 5-6.
[114] *Id*. at 6, ¶¶ 14-15.
[115] *Id*. at 7, ¶ 16.
[116] *Id*. at 100.
[117] *Majority Staff Report and Recommendations, supra* note 4, at 130.

litigation in federal court. How the sell-side and buy-side markets are affected by Google's decisions to manage the ad marketplace will require economic analysis of the ad server, ad exchange, and ad buying tool marketplaces.

4. Acquisition of Nascent or Potential Competitors

The members of the Subcommittee on Antitrust of the House Judiciary Committee directed attention to Google's YouTube acquisition in 2006. At the July 29, 2020 public hearing, a member of the Subcommittee expressed concerns that Google's acquisition of the video streaming platform may have quashed competition, rather than improving Google's product or services. Representative Mary Gay Scanlon (D-PA) asked Sudhar Pichai about the disparity between other offer prices and the final valuation of YouTube to explore the motivations for the acquisition.[118] Business documents released with the public hearing showed that YouTube had rejected offers of $200 million and $500 million but accepted the $1.65 billion acquisition offer.[119]

At the time of the YouTube acquisition, the Federal Trade Commission and U.S. Department of Justice reviewed the proposed merger, issued an early termination notice, and declined to challenge the acquisition with further action.[120] The value of YouTube appeared to include $1 billion premium that was difficult to explain by the popular press.[121] This disparity between a company's internal valuation of an acquisition target and the external public's valuation is not in itself proof that the small firm was indeed a nascent or potential competitor, however.

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[118] *See* Oh, *supra* note 2, at 221-22 n.161, citing *Hearing Video, supra* note 3 ("question by Mary Gay Scanlon, Representative, Pennsylvania at 03:58:55 for Sudhar Pichai about the disparity between the first bid and final acquisition price of $1.65 billion for YouTube which was nearly 30 times the initial bid of $50 million).").

[119] *Hearing Documents*, *supra* note 3 ("E-mail from Susan Wojcicki, Senior Vice President of Advertising & Commerce, Google, to Jonathan Rosenberg, Senior Vice President, Google (May 1, 2006), https://judiciary.house.gov/uploadedfiles/04189266.pdf); *Hearing Documents*, *supra* note 3 (E-mail from Eric Schmidt, Chief Exec. Officer, Google, to Sean Dempsey, Principal Corp. Dev., Google (Feb. 13, 2006), https://judiciary.house.gov/uploadedfiles/04189250.pdf).").

[120] *See* Fed. Trade Comm'n, *Early Termination Notices, Premerger Notification Program, Transaction Number 20070088, Google Inc.; YouTube, Inc.*, https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20070088; *but see* FTC, Press Release, "FTC to Examine Past Acquisitions by Large Technology Companies: Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp.," Feb. 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[121] *See generally* Greg Sandoval, "Schmidt: We Paid $1 Billion Premium for YouTube," CNET, Oct. 6, 2009, https://www.cnet.com/news/schmidt-we-paid-1-billion-premium-for-youtube ("Since 2006, many observers have scratched their head over what prompted Google to pay $1.65 billion for the video site YouTube. We're now a little closer to the answer.").

The majority staff report includes a discussion of the YouTube acquisition, including its sale price, after an investigation which yielded 1,135,398 documents from Alphabet, and corporate documents in response to the request for information.[122] The report shows that Google has engaged in hundreds of acquisitions between 2001 and 2020, of which YouTube was only one of many.[123] A determination of whether the Federal Trade Commission and U.S. Department of Justice erred in declining to block the YouTube acquisition would require a sophisticated counterfactual analysis. An economic study would need to include data on the full set of acquisitions both completed and rejected, along with an analysis that estimates whether competition would have been better off without the acquisition in a counterfactual environment. This exercise of reviewing merger decisions is ongoing and regularly conducted by the federal agencies through merger retrospective program[124] and 6(b) studies.[125]

5. In-App Payment (IAP) System

The attorney general of the state of Utah, along with 36 other state attorneys general, filed a lawsuit in July 2021 in the U.S. District Court of the Northern District of California alleging violation of Sections 1 and 2 of the Sherman Act for the Android App store and the Android In-App Payment (IAP) policy.[126] This lawsuit includes similar allegations as in the *Epic v. Apple* litigation as described above.

III. Conclusion

The criteria by which American technology firms will be judged for antitrust violations depends on matters of fact and law that are relevant to each digital good or service under investigation. American antitrust enforcers have focused attention on alleged anticompetitive conduct by Amazon, Apple, Facebook, and Google in their production of general search

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[122] *Majority Staff Report and Recommendations*, *supra* note 4, at 22-23.
[123] *Id*. at 431-50.
[124] *See* Oh, *supra* note 2, at 222 n.162 (citing "Fed. Trade Comm'n, Bureau of Economics, *Overview of the Merger Retrospective Program in the Bureau of Economics*, https://www.ftc.gov/policy/studies/merger-retrospectives/overview (describing the agency's effort to evaluate its internal analytical tools and models in premerger notification reviews by comparing predicted results with actual results and measuring the efficacy of analytical thresholds and empirical methods used by antitrust economists to predict merger effects and counterfactual scenarios).").
[125] Press Release, Fed. Trade Comm'n, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies (special orders approved by a 5-0 commission vote with authority to conduct a 6(b) study under the Federal Trade Commission Act).
[126] *Utah, et al., v. Google LLC, et al.*, Case No. 3:21-cv-05227 (N.D. Cal., Jul. 7, 2021), https://ag.ny.gov/sites/default/files/utah_v_google.1.complaint_redacted.pdf.

services, advertising networks, social networking, app stores, third-party marketplaces, and acquisitions of nascent or potential competitors in video streaming and home security systems. Legislators have recently introduced bills that attempt to curb perceived harms, but the main advances in antitrust law and policy will arise from legal precedent that will be generated by several large lawsuits that have been filed in federal court in 2020-21, as discussed in this article. Even after lower courts establish findings of fact and conclusions of law, it is likely that the antitrust enforcers and private firms will appeal to the federal appellate courts.