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What You Need to Know About Section 2 of the Sherman Act

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The Department of Justice is likely to file antitrust claims against Google in the coming weeks. The suit would be the first major case the Department of Justice has filed under Section 2 of the Sherman Act in twenty years.

The case reflects a growing, bipartisan consensus that the federal government's 1970s-era, pro-corporate antitrust ideology has helped bestow tech giants like Google with extraordinary power. It will send an important signal to corporate America that antitrust laws will be enforced and monopoly power will not be tolerated.

While it was once unthinkable to imagine that policymakers would move to break the power of Big Tech, it is now not a question of "if" but "when" and "how." This memo answers questions pertaining to federal Section 2 enforcement and how it should be used to restructure Google and hold other tech giants accountable.

WHAT IS SECTION 2 OF THE SHERMAN ACT?

Section 2 makes it illegal for a single company to "monopolize, attempt to monopolize, or combine or conspire" to monopolize.[1] The law seeks to break concentrated power, guarding against the use of monopoly to unfairly block competition, fix prices, gain a competitive advantage, or destroy a competitor.[2]

Section 2 focuses on **single-firm conduct**—the actions a company takes to attain or keep monopoly power. Section 2 bars companies both from acts to maintain unfair monopoly

1 15 U.S.C. § 2.

2 *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958).

power and from attempting or conspiring to exploit it. This means that enforcers and private parties do not need to show that a company entered illegal agreements to fix prices or rig bids, as they do under Section 1, which is used mostly against cartels. Rather, the fact that a company possesses and abuses a high degree of market power warrants antitrust scrutiny under Section 2. Google's advertising and search practices, Amazon's predation of third-party sellers, or Facebook's use of application program interfaces to thwart competitors could all, for example, be investigated as potential Section 2 violations.

There is strong historical precedent for aggressive Section 2 enforcement. Though courts and enforcers have limited Section 2's application, the law has historically applied to a broad range of unilateral anticompetitive conduct, including:

- Bundled Rebates.[3]
- Enforcing fraudulently-procured patents.[4]
- Exclusionary product design.[5]
- Exclusive dealing.[6]
- Expanding of manufacturing capacity beyond that which a company intends to use. [7]
- Patent abuse.[8]
- Predatory pricing.[9]
- Price discrimination.[10]
- Price squeezes.[11]
- Refusals to deal with competitors.[12]
- Refusing to share essential facilities with competitors.[13]
- Tying arrangements.[14]

3 LePage's, Inc. v. 3M, 324 F.3d 141, 154-57 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004).

4 Walker Process Equipment, Inc. v. Food Machinery Corp., 382 U.S. 172, 175-78 (1965).

5 United States v. Microsoft Corp., 253 F.3d 34, 66 (D.C. Cir. 2001).

6 McWane, Inc. v. FTC, 783 F.3d 814, 836-41 (11th Cir. 2015); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 289 (3d Cir. 2012); LePage's, 324 F.3d at 157-59.

7 United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 428 (2d Cir. 1945).

8 New York ex rel. Schneiderman v. Actavis, PLC, 787 F.3d 638, 659 (2d Cir. 2015); Image Technical Services v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998).

9 Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, 845 F.2d 404, 407-09 (2d Cir. 1988), judgment aff'd, 492 U.S. 257 (1989).

10 United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 329, 336 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

11 Alcoa, 148 F.2d at 438.

12 Otter Tail, 410 U.S. 366; Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

13 Otter Tail, 410 U.S. at 377-79; United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 397 (1912); Fishman v. Estate of Wirtz, 807 F.2d 520, 539-541 (7th Cir. 1986).

14 Int'l Salt Co. v. United States, 332 U.S. 392, 395-96 (1947); Microsoft, 253 F.3d at 66.

- Using a dominant position in one market to gain an uncompetitive advantage in another.[15]
- Vertical foreclosure.[16]

HOW IS A SECTION 2 CASE BROUGHT? WHAT KIND OF DAMAGES OR REMEDIES DO SECTION 2 CASES SEEK?

Section 2 cases can be brought by three kinds of plaintiffs:

1. **Federal antitrust agencies.** The U.S. Department of Justice's Antitrust Division (DOJ) can bring Section 2 claims on behalf of the United States. DOJ can seek injunctions to stop monopolistic conduct and treble damages for the harm the United States has suffered as a purchaser.[17] It can also seek criminal fines up to $100 million—though DOJ has declined to criminally prosecute Section 2 cases for decades.[18] DOJ has not brought a major Section 2 civil or criminal case in twenty years.

   The Federal Trade Commission (FTC) also enforces federal antitrust laws. It operates under a different statute, known as the Federal Trade Commission Act, which allows the agency to bring bring administrative proceedings challenging unfair or deceptive acts or practices.[19] All Sherman Act violations also violate the Federal Trade Commission Act, meaning that, functionally speaking, the FTC also enforces the civil provisions of the Sherman Act. The FTC may order companies to stop antitrust violations and enforce these orders by seeking injunctions in federal court. While the FTC has more often exercised its authority to address monopolization and unilateral conduct in recent years,[20] its track record is quite modest.[21]

2. **State enforcers.** State attorneys general have the authority to enforce federal antitrust laws, including by bringing claims under Section 2 to stop powerful corporations from monopolizing local markets.[22] State AGs can either bring cases on behalf of their states, as direct purchasers of goods and services, or on behalf of their citizens. They may

15 United States v. Griffith, 334 U.S. 100, 107-08 (1948); Great Western Directories, Inc. v. Southwestern Bell Telephone Co., 63 F.3d 1378, 1386 (5th Cir. 1995); Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 136-37 (6th Cir. 1988).

16 Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359 (1927); Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292, 303-04 (D.R.I. 1980), order rev'd, 659 F.2d 273 (1st Cir. 1981).

17 15 U.S.C. §§ 4, 15(a).

18 15 U.S.C. § 2. DOJ can also seek even greater criminal fines under the alternative fines statute, 18 U.S.C. § 3571(d).

19 15 U.S.C. §§ 45(b), (l).

20 *See, e.g.*, McWane, 783 F.3d at 842.

21 The FTC brought 15 monopoly suits under Section 5 of the FTC Act during the Obama administration. However, all but four were in the health care area. One case, against Qualcomm, is still in progress. In the three other cases the FTC settled and the defendant did not admit wrongdoing, and in no case was there a significant change in market structure as a result of the settlement. The Trump administration brought a Section 5 case against Surescripts, which is ongoing. *See* FTC v. Surescripts, LLC, 424 F. Supp. 3d 92, 104 (D.D.C. 2020).

22 15 U.S.C. § 15c.

seek treble damages or injunctive relief.[23] The federal government's failure to enforce antitrust protections makes state leadership even more important.

3. **Private parties.** Private parties injured by companies' violations of Section 2 may sue in federal court for injunctions and treble damages.[24] Consumers, competitors, distributors, wholesalers, retailers, sellers, suppliers, end users, and others may all sue to enforce Section 2, so long as they can show they have suffered an antitrust injury and have proper standing.[25] They may also bring class actions to represent similarly-injured persons.

Federal, state, and private enforcement often proceed simultaneously. For example, DOJ may file a Section 2 claim that is joined by numerous states, or numerous state AGs may launch investigations in parallel to federal or private enforcement actions.

HOW MANY SECTION 2 CASES HAVE BEEN BROUGHT IN RECENT YEARS?

Almost none. The last major Section 2 brought by DOJ was *United States v. Microsoft Corporation* in 1998.[26] Occasionally, DOJ will bring a Section 2 charge to challenge a monopolist's acquisition of another firm. But DOJ has brought only one Section 2 case challenging unfair conduct since 2000, challenging exclusive dealing by a dominant hospital in a small market in Texas.[27] The FTC has been more willing to exercise its Section 2 authority, but much more aggressive enforcement is still needed.

WHY ISN'T SECTION 2 USED MORE OFTEN?

For much of the Progressive and post-World War II eras through the late 1970s, the federal government and federal courts took an expansive view of Section 2 liability. In both eras, DOJ used Section 2 to bring successful monopolization cases against some of the largest corporations in America, like Standard Oil and Alcoa, filing hundreds of complaints to deconcentrate dozens of industries.[28] As part of a larger philosophy of countering concentrated private power, Section 2 was an essential tool to making sure that markets functioned for widespread prosperity.

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23 15 U.S.C. §§ 15, 15c; *see also* Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 452 (1945). Injunctive relief can be pursued for harm to a state's general economy. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261-262 (1972).

24 15 U.S.C. §§ 15(a), 26.

25 Sandeep Vaheesan, *Killing Antitrust Softly (Through Procedure)*, L. & Pol. Econ. Blog, June 11, 2019, https://lpeproject.org/blog/killing-antitrust-softly-through-procedure/.

26 253 F.3d 34 (D.C. Cir. 2001). DOJ also filed two significant Section 2 cases at about the same time: United States v. Dentsply Intern., Inc., 399 F.3d 181 (3d Cir. 2005) and United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003). *See* American Antitrust Institute, The State of Antitrust Enforcement and Competition Policy in the U.S. (Apr. 14, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf.

27 United States v. United Regional Healthcare Sys., No. 7:11-cv-00030 (N.D. Tex. 2011).

28 *See, e.g.*, Alcoa, 148 F.2d 416; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

Beginning in the 1970s, however, a group of conservative scholars successfully reoriented antitrust law around the idea of efficiency in the form of low consumer prices. They abandoned the law's emphasis on dispersing private power, protecting smaller firms, and the social and political harms of monopolized corporate power.[29] They also rejected themid-century legal consensus that the mere holding of monopoly power is illegal.[30] While the text of Section 2 did not change, courts and enforcers changed their interpretation of it, accepting the premise that government intervention is bad and firm dominance is good because it creates efficiencies and is the reward for superior productivity.

Courts and federal enforcers have since made it very difficult for plaintiffs to bring and win Section 2 cases. To bring a monopoly lawsuit, plaintiffs, private parties, or the government has to show an "anticompetitive effect."[31] This is part of a legal framework called the "rule of reason." But to show an anticompetitive effect, a plaintiff has to show that a monopoly has "market power."

Because a monopoly has power over price or other market terms, showing market power should not be hard. Plaintiffs should be able to show that a monopolists' unfair actions hurt them. But courts today generally require plaintiffs not only to show that the monopolist acted unfairly, but to measure the monopolists' market share to ensure that the monopolist is indeed a monopolist. It sounds sensible, but plaintiffs end up having to use expensive economic experts to do this, raising a high barrier to even bringing a case.[32]

And, even if the plaintiff successfully shows that the monopolist unfairly hurt competitors, that's only the first step. Because of the rule of reason legal framework, plaintiffs could still lose, even if they show that the monopolist acted unfairly, because the judge may end up weighing the pros and cons of the unfair action in favor of the monopolist.[33]

This is a high bar to justice. It is analogous to courts saying that we can't prosecute a mob boss simply for being a mob boss and stealing from the neighborhood—even though the law bars these activities. Instead, we would also have to show that he is the only mob boss in town and that he is burning down the offices of his competitors. But showing burned

29 William F. Adkinson et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, FTC Staff Working Paper (Nov. 3, 2008), https://www.ftc.gov/system/files/documents/public_events/section-2-sherman-act-hearings-single-firm-conduct-related-competition/section2overview.pdf.

30 *See, e.g.*, Alcoa, 148 F.2d 416; American Tobacco Co. v. United States, 328 U.S. 781 (1946); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

31 Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50 (2019).

32 Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers,* ProPublica, Nov. 16, 2016, https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

33 In brief, plaintiffs have to show an action had an "anticompetitive effect." That's the so-called first "step" of the rule of reason. Then defendants can claim that the action had a "procompetitive justification" (step two). Plaintiffs can then argue that the procompetitive justification could've been reached with a "less restrictive alternative" (step three). If plaintiffs don't show that third step, then the judge has to do a kind of cost-benefit analysis of the action.

down buildings and video evidence of the arson still wouldn't be enough for the court: we'd have to pay an economist large amounts of money to validate that the mob boss profited from his scheme more than the victims lost. And the economist would insist on using expensive cameras and other instruments to measure the heat of the fire. Together, this discourages prosecutors from taking cases against mob bosses in the first place.

Even then, courts find many ways to ignore market power, to limit what the "relevant" market is, or to find that a company accidentally became a monopoly and thus isn't liable under Section 2. Additionally, courts and Congress have made it more difficult for private parties to bring antitrust cases, limiting especially litigants' ability to bring class actions challenging monopolization.[34] This is a significant barrier to antitrust enforcement: class actions are extraordinarily important because they help capture corporate abuses that might have hurt individuals by a small amount but hurt society by a large one.

Section 2 does not need be interpreted so narrowly. Congress should step in to rescind the bad caselaw that has accumulated since federal enforcers stopped using Section 2 and to clarify and strengthen antitrust laws. DOJ can also begin to restore the law by bringing Section 2 cases again and returning to an aggressive enforcement approach—one that addresses the dramatic increase in concentration that has occurred under the government's lax enforcement policy and seeks structural remedies to the extraordinary monopoly power concentrated in tech giants like Google. There is a growing, bipartisan desire for enforcers to do so.

IS IT TRUE THAT FEDERAL ENFORCERS AREN'T TAKING SECTION 2 CASES BECAUSE THEY CAN'T FIND ANY?

No. More than 75 percent of U.S. industries have become more concentrated over the past twenty years.[35] From the 1980s onward, corporations consolidated in nearly every area of commerce, first in manufacturing, media, banks, and chain stores, and then in technology, telecommunications, defense, and agriculture. The idea that no monopolies existed in America during this period is hard to imagine.[36] Indeed, both the Obama and Trump administrations publicly recognized the need for strong enforcement. "Vigorous antitrust enforcement action under Section 2 of the Sherman Act will be part of the Division's critical contribution" to economic recovery from the 2008 financial crisis, promised Christine Varney, then-Assistant

34 *See generally* Verizon Communiciations v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Comcast Corp. v. Behrend, 569 U.S. 27 (2013); Ohio v. American Express, 138 S. Ct. 2274 (2018).

35 Grullon et al., *Are U.S. Industries Becoming More Concentrated?*, 23 Rev. Fin. 697 (July 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047.

36 *See, e.g.*, Open Markets Institute et al., Petition to the FTC for Rulemaking to Prohibit Exclusionary Contracts (July 21, 2020), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.

Attorney General for the Antitrust Division, in 2009.[37] Makan Delrahim, who now leads the division, has repeatedly stated that antitrust laws should be "timely and vigorously enforced."[38]

Neither administration, however, lived up to its assertive rhetoric.

If federal enforcers are not finding Section 2 cases to take, it is because they are not looking. In 2017 and 2018, for example, DOJ opened no Section 2 investigations at all.[39]

WHAT IS HAPPENING WITH THE POTENTIAL SECTION 2 CASE AGAINST GOOGLE?

The Department of Justice began exploring a potential antitrust case against Google in early 2019.[40] The investigation was referred to DOJ by the FTC's Technology Task Force. The FTC also conducted an antitrust investigation of Google in 2013 but declined to bring charges, against the recommendation of FTC staff, who stated that Google's conduct "helped it to maintain, preserve, and enhance Google's monopoly position in the markets for search and search advertising" in violation of the law.[41]

DOJ's case comes as a bipartisan group of state attorneys general conducts its own investigation of Google, and as the House Antitrust Subcommittee prepares a series of legislative recommendations to address Big Tech's monopoly power. DOJ made a demand for documents last year, as did the state attorneys general investigating a potential case. European antitrust authorities also recently took three cases aginast Google, which in aggregate revealed significant abuses and resulted in orders that Google pay more than $8 billion in fines.

A U.S. monopolization case against Google is long overdue. The sheer number of markets Google dominates—mobile operating systems, general search, online video, mapping, email, display advertising, and browsers—gives Google unprecedented power over online commerce. Google abuses this power in numerous ways:

37 Christine Varney, Assistant Attorney General, Department of Justice, Remarks at the United States Chamber of Commerce: Vigorous Antitrust Enforcement In This Challenging Era (May 12, 2009), https://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era. 9

38 Eric J. Savitz, *Big Tech Antitrust Is Where Republicans and Democrats Can Agree, DOJ Official Says*, Barron's, Oct. 22, 2019, https://www.barrons.com/articles/big-tech-antitrust-is-bipartisan-says-antitrust-chief-makan-delrahim-51571766335; Makan Delrahim, Assistant Attorney General, Department of Justice, Remarks at American Bar Association's 2019 Antitrust Fall Forum: "As Time Goes By" Protecting the Future of Innovation Through Effective Antitrust Enforcement (Nov. 18, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-abas-2019-antitrust-fall-forum.

39 *See* American Antitrust Institute, supra note 26, at 2.

40 Cecilia Kang et al, *Justice Dept. Explores Google Antitrust Case*, N.Y. Times, May 31, 2019, https://www.nytimes.com/2019/05/31/business/google-antitrust-justice-department.html.

41 *The FTC Report on Google's Business Practices*, Wall St. J. 94, Mar. 24, 2015, http://graphics.wsj.com/google-ftc-report/.

- Google's advertising platform engages in exclusive dealing, illegally prohibiting or restricting websites that use AdSense from doing business with competing ad-brokering platforms.

- Google Search discriminates against the company's rivals, using the company's monopoly in online search to favor its own properties like Google Maps, Google Local, and Google Trips over competitors like MapQuest, Yelp, and Expedia.

- Google makes illegal payments to manufacturers to exclusively pre-install Google Search on all of their Android devices.

- Google operates a series of essential communications networks that make money by amplifying untrustworthy, sensational, and addictive content, while destroying legitimate sources of news and introducing a range of other social harms.

HOW WOULD A SECTION 2 CASE AGAINST GOOGLE PROCEED?

After DOJ files a complaint, the 50 states and territories investigating Google will have roughly a week to decide whether to join the litigation. The case will be assigned to a federal judge who will oversee the lawsuit. Depending on where the case is filed, Google may argue for it to be moved to a different district court. If parallel claims are filed elsewhere, they may be consolidated.

Google will likely then file motions arguing that the case should be dismissed for failure to state a claim. Until recently, judges were not supposed to grant motions to dismiss unless there are "no set of facts" that would allow a plaintiff to bring a successful case.[42] But the Supreme Court has made it much more difficult for cases to survive motions to dismiss, requiring plaintiffs to include enough factual allegations in their complaints to make out at least a plausible claim.[43] This can be difficult to do before discovery, when parties exchange information to establish the facts of the case. Higher pleading standards mean that more plaintiffs get their cases dismissed before they can even engage in that process.

If DOJ survives Google's motions to dismiss, the case will proceed to discovery. Federal rules allow parties to request any nonprivileged materials relevant to their claims or defenses—including documents, data, electronically-stored information, responses to questions, and depositions of witnesses. Generally, antitrust discovery is especially time-consuming and subject to challenge from both parties. But because the government has already used its legal authority to compel Google to produce documentary material, the

42 *See* Conley v. Gibson, 355 U.S. 41 (1957).

43 Twombly, 550 U.S. 544; Iqbal 556 U.S. 662.

discovery process may be less protracted.[44] Google will also have another opportunity to argue for the case to be thrown out after discovery occurs, by filing a motion for summary judgment. Such a motion would argue that there is no need to proceed to trial because there are no genuine disputes of material fact remaining in the case. Since the 1980s, courts have applied a summary judgment standard that is more favorable to corporate defendants, giving judges more discretion to determine whether the alleged wrongful conduct makes "economic sense."[45] Only if DOJ defeats Google's summary judgment motion will the case proceed to trial.

Google and DOJ can agree to settle the case at any point during the litigation. Most antitrust cases settle or dismiss before trial. Cases that survive dismissal may go on for years before trial as parties complete and challenge discovery, retain economic experts, conduct economic analysis, and mount other procedural and legal challenges. For example, the company will argue that DOJ hasn't shown that Google has an actual monopoly over online search, online advertising, or mobile phone operating systems. The company will argue for construing their operating market broadly, so that they can allege that they face many rivals. How to define the "relevant market" is usually the most vigorously-litigated issue in antitrust cases. But their protracted nature is largely court-driven; an assertive judge could require the parties to move more quickly and keep a tight schedule for the litigation.

IS THERE ANY MODERN PRECEDENT FOR PROSECUTING GOOGLE UNDER SECTION 2?

Yes—DOJ's successful Section 2 case against Microsoft.[46] DOJ and twenty state attorneys general sued Microsoft from illegally protecting its dominance in the operating systems market. The government won its case, demonstrating that, among other violations, Microsoft illegally tied its operating system to its internet browser by including Internet Explorer with every copy of its Windows operating system software and making it difficult for consumers not to use non-Microsoft browsers. Microsoft also used free licenses and rebates to discourage software developers from developing or promoting other browsers or add-on software.

44 Google received a civil investigative demand (CID) from the DOJ on August 30, 2019. See Alphabet, Current Report (Form 8-K) (Aug. 30, 2019), https://www.sec.gov/ix?doc=/Archives/edgar/data/1652044/000165204419000025/form8-kdojcid.htm. Under federal antitrust law, the government may file CIDs to to determine whether there has been a civil violation of the antitrust laws before filing a complaint. 18 U.S.C. § 1968. Google has also received CIDs from state attorneys general. See David McLaughlin et al., Google Hit With Sweeping Demand From States Over Ad Business, Bloomberg (Sept. 10, 2019), https://www.bloomberg.com/news/articles/2019-09-10/google-hit-with-sweeping-demand-from-states-over-its-ad-business. 5 Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

45 Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

46 Microsoft Corp., 253 F.3d at 66.

The judge who presided over the Microsoft case rightly proposed a structural remedy to split Microsoft up into two companies. But this remedy was overturned on appeal, and the Bush administration quickly agreed to settle the case. The settlement was inadequate, requiring only that Microsoft share certain programming information with third-party companies. Microsoft not only kept its Windows monopoly, it did not have to stop tying software to their Windows operating system in the future. The litigation did change Microsoft's behavior, benefiting start-ups like Google, Facebook, and Amazon—now giants themselves. But Microsoft's loss, cominbed with the appellate court's decision not to break up the company and the Supreme Court's subsequent decision in Trinko, ultimately sent mixed signals to industry about whether or not the legal system will tolerate concentrated power.[47]

Many lawyers and competitors have analogized Google's conduct in the search market to Microsoft's in the 1990s. "Having prosecuted the Microsoft case," said Samuel Miller, the prosecutor who led the federal antitrust case against Microsoft, when FTC announced its Google investigation in 2011, it "seems to me that Google, as a monopoly, is engaging in the same tactics to keep its dominant position as Microsoft was engaging in... Those are the same tactics that got Microsoft in trouble."[48]

WILL A SECTION 2 CASE FIX THE PROBLEMS WITH GOOGLE?

No. Antitrust litigation is only one of the many actions enforcers and policymakers need to take to restructure Google's monopoly power. We believe in a framework called "regulated competition," which means both eliminating monopoly power and regulating business practices so that the resulting markets enable competition among high-quality, safe, and privacy enhancing products.[49] A non-exhaustive list of reforms can be found *here*.

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47 In *Trinko*, 540 U.S. 398 (2004), the Supreme Court limited firms' duty to deal with competitors and suggested that antitrust law should not be applied where sector-specific regulations could instead be enforced.

48 David Goldman, ***DOJ's Microsoft prosecutor: Google is a monopoly***, CNN Money, Mar. 31, 2011, https://money.cnn.com/2011/03/31/technology/microsoft_google_antitrust_case/index.htm.

49 See Gerald Berk, Louis D. Brandeis and the Making of Regulated Competition, 1900-1932 (2009).

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