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DEMOCRATIZING MARKETS

HOW THE BIDEN ADMINISTRATION AND CONGRESS CAN ADVANCE AN ANTITRUST AND COMPETITION POLICY AGENDA FOR WORKING PEOPLE, INDEPENDENT BUSINESSES, AND RESILIENT COMMUNITIES

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"FREEDOM IS NO HALF-AND-HALF AFFAIR. IF THE AVERAGE CITIZEN IS GUARANTEED EQUAL OPPORTUNITY IN THE POLLING PLACE, HE MUST HAVE EQUAL OPPORTUNITY IN THE MARKET PLACE."

- FRANKLIN D. ROOSEVELT

Concentrated economic power has reached extreme proportions in virtually every sector of the economy, from Big Tech to telecommunications, banking, hospitals, defense contracting, pharmaceuticals, and retail. Monopoly power is a causal factor in our most serious economic challenges, such as inequality, health care costs, farm bankruptcies, reduced entrepreneurship and productivity, the decline of the free press, and systems of racial discrimination. It has also been amplified by the COVID-19 pandemic and the government's response to it.[1] Large corporations, private equity firms, and banks are expanding their economic and political power at the same time that small businesses are failing at record rates, businesses are engaging in mass layoffs, and broad swaths of the American population face grinding economic insecurity.[2]

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There is increased recognition on both sides of the aisle that corporate consolidation is a political and economic threat to democracy itself, as well as a growing constellation of efforts at the local, state, and federal level to address it. Most notably, the House Antitrust Subcommittee recently completed a 16-month investigation into competition in digital markets, the most significant investigation into monopoly power in 50 years, signifying a potential reassertion of congressional authority over questions of corporate power.[3] A bipartisan consortium of federal and state antitrust enforcers is bringing cases against Google and Facebook and raising structural solutions as remedies.[4] States, led by

1 Austan Goolsbee, "Big Companies are Starting to Swallow the World," *The New York Times*, September 30, 2020, https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html; Miles Kruppa and James Fontanella-Khan, "Big Tech Goes on Pandemic M&A Spree Despite Political Backlash," *Financial Times,* May 27, 2020, https://www.ft.com/content/04a62a26-42aa-4ad9-839e-05d762466fbe.

2 Diane Schanzenbach and Abigail Pitts, "How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey," *Institute for Policy Research*, June 10, 2020, https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf; Ben Casselman, "*Small-Business Failures Loom as Federal Aid Dries Up*," *The New York Times*, September 1, 2020, https://www.nytimes.com/2020/09/01/business/economy/small-businesses-coronavirus.html; Christine Idzelis, *"The Pandemic Prompted a Record Decline in GDP. A Large Part of Private Equity Portfolios Had No Symptoms,"* Institutional Investor, October 7, 2020, https://www.institutionalinvestor.com/article/b1nq2q0q7x619d/The-Pandemic-Prompted-a-Record-Decline-in-GDP-A-Large-Part-of-Private-Equity-Portfolios-Had-No-Symptoms; Hiatt Woods, "How Billionaires Saw Their Net Worth Increase by Half a Trillion Dollars During the Pandemic," Business Insider, October 30, 2020, https://www.businessinsider.com/billionaires-net-worth-increases-coronavirus-pandemic-2020-7.

3 "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations," US House of Representatives Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

4 Complaint, 57, United States v. Google LLC, No. 20-cv-03010, (D.D.C. Oct. 20, 2020); Leah Nylen, "FTC Likely to Sue Facebook on Antitrust Violations by End of November," *Politico*, November 6, 2020, https://www.politico.com/news/2020/11/06/ftc-sue-facebook-antitrust-violations-434810.

New York, are considering whether to strengthen their own antitrust laws.[5] Cities across the country are banding together to fight back against food delivery platforms that are extorting independent- restaurants.[6] And a growing number of businesses and workers are seeking justice through private antitrust enforcement where public officials have failed to step in.[7]

Now, President Biden and a new Congress have an opportunity to lead the way. During his campaign, President Biden acknowledged the need for stronger antitrust enforcement and the harm corporate concentration has caused to workers, families, consumers, and communities. He pledged to modify antitrust law as part of a broader effort to extend organizing rights to independent contractors[8] and eliminate the coercive contracts corporations use to control workers.[9] He was critical of Big Tech, particularly Facebook, critiquing the corporation's "concentration of power," its privacy violations, and the risk the platform poses to our democracy.[10] And he has made strong antitrust enforcement a core plank of his plan for rural America, blaming increasing market concentration for hurting farmers and producers.[11]

Addressing concentration is a government-wide responsibility, one that extends both to the Department of Justice and Federal Trade Commission and to other institutions like Congress, the Federal Communications Commission, and the U.S. Departments of Agriculture, Transportation, and Defense.

5 "New York State Antitrust: Senate, Assembly Bills Seen Having Good Chance to Pass in 2021; Policymakers and Big Businesses Across the Country are Watching," *The Capitol Forum,* September 2, 2020, https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/capitol-forum-new-york-state-antitrust-senate-assembly-bills.

6 Alicia Kelso, "New York, Los Angeles Extend Delivery Commission Fee Caps," *Restaurant Dive,* August 31, 2020, https://www.restaurantdive.com/news/new-york-los-angeles-extend-delivery-commission-fee-caps/584385/; "Protect Our Restaurants," American Economic Liberties Project, Institute for Local Self-Reliance, and American Sustainable Business Council, https://www.protectourrestaurants.com/learn.

7 See, e.g., Kim Lyons, "Epic Says Apple 'Has No Right to the Fruits of Epic's Labor' in Latest Filing," *The Verge,* October 24, 2020, https://www.theverge.com/2020/10/24/21531873/epic-apple-fortnite-app-store-lawsuit; Coalition for App Fairness, https://appfairness.org/; Josh Eidelson, "UFC Wants You To Watch Brawls, Not Its $5 Billion Lawsuit," *Bloomberg,* May 8, 2020, https://www.bloomberg.com/news/features/2020-05-08/as-ufc-pushes-may-mma-event-fighters-say-deals-are-getting-worse.

8 "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions," Biden for President, https://joebiden.com/empowerworkers/#.

9 "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions."

10 Editorial Board, "Joe Biden," *The New York Times,* January 17, 2020 ("I've been in the view that not only should we be worrying about [Facebook's] concentration of power, we should be worried about the lack of privacy and them being exempt, which you're not exempt. *[The Times]* can't write something you know to be false and be exempt from being sued. But [Facebook CEO Mark Zuckerberg] can. The idea that [Facebook is] a tech company is that Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms."), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html; Cecilia Kang, David McCabe, and Jack Nicas, "Biden is Expected to Keep Scrutiny of Tech Front and Center," *The New York Times,* November 10, 2020, https://www.nytimes.com/2020/11/10/technology/biden-tech-antitrust-privacy.html.

11 "The Biden-Harris Plan to Build Back Better in Rural America," Biden for President, https://joebiden.com/rural-plan/.

This policy brief details a host of recommendations for reversing America's corporate concentration crisis. Addressing concentration is a government-wide responsibility, one that extends both to the Department of Justice and Federal Trade Commission and to other institutions like Congress, the Federal Communications Commission, and the U.S. Departments of Agriculture, Transportation, and Defense. Accordingly, this report recommends numerous polices that can be used across executive agencies to structure fairer, more competitive, and vibrant markets—from expanding existing antitrust actions against Google and Facebook to reviving dormant regulatory and enforcement tools across government. It also lays out a path for Congress to provide strong leadership in strengthening antitrust law, reinvigorating enforcement, and arresting and reversing the concentration of corporate power.

RECOMMENDATIONS

Enforce Fair Competition Goals at the FTC and DOJ

The Department of Justice's Antitrust Division and the Federal Trade Commission should immediately reinvigorate antitrust enforcement by rejecting the consumer welfare standard and embracing an approach that seeks to promote fair competition through a more structuralist analytical approach. Both agencies are essential to forming strong economic policy that empowers workers and supports small business. While the enforcement agencies should use every available tool to make markets serve democratic ends, two measures are of paramount importance:

- **Continuing and Expanding the Google Case:** The Biden administration should immediately make clear that it will continue DOJ's antitrust litigation against Google.[12] Vigorously prosecuting Google will send a clear signal to corporate America that the Biden administration will not tolerate abuses of dominance. DOJ should expand the litigation beyond search to areas such as maps, travel, the app store, and video and online display advertising markets.
- **Appointing Enforcers Who Reject the Consumer Welfare Standard:** The Biden administration must take care to appoint aggressive enforcers to lead the DOJ Antitrust Division and FTC. The administration should only appoint individuals who endorse the

12 "Justice Department Sues Monopolist Google For Violating Antitrust Laws," press release, Department of Justice, October 20, 2020, https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

What is the consumer welfare standard?

The consumer welfare standard is an ideological interpretation of antitrust championed by conservative scholar Robert Bork and adopted by the Supreme Court in *Reiter v. Sonotone*. It holds that corporate antitrust liability should be based purely on whether an action increases economic efficiency and not based on broader concerns over the competitive process and concentrations of power. In general, the consumer welfare standard holds that if a corporation's actions result in lower prices for consumers in the short term, then courts should not find it guilty of breaking the antitrust laws.

There is growing evidence that the "consumer welfare" standard has hardly delivered for consumers, who face high prices charged by monopolistic firms across markets, from cable to airlines to pharmaceuticals.[13] This failure is policy driven; since the 1980s, the FTC and DOJ—even under the "consumer welfare" standard—have systematically allowed mergers that increase consumer prices.[14] That the consumer welfare standard fails to deliver even by the stated goals of its proponents underscores the broader costs of the approach; not only did its purported benefits fail to materialize, but it also led to high concentration across the economy, resulting in a host of harms that consumer welfare ideologues ignore as outside the scope of antitrust.

House Antitrust Subcommittee's Digital Markets report and reject the idea that consumer welfare is the goal of antitrust policy. Potential appointees should be screened according to these criteria.

Additional, immediate priorities for the DOJ and FTC under the Biden administration should include:

Enforcing the Antitrust Laws to Break Corporate Power

The DOJ and FTC should enforce the law vigorously and build on ongoing cases to break monopoly power. They should resurrect structural presumptions, review consummated mergers for possible breakups, and demonstrate throughout their enforcement efforts that they will punish corporate wrongdoing with aggressive remedies. Initial enforcement efforts should include:

13 For a good overview of the problem of high consumer prices as a result of failed antitrust policy in the United States, see Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (Belknap Press, 2019).

14 John Kwoka, Mergers, *Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (MIT Press, 2014).

- **Seeking Structural Remedies in Ongoing Antitrust Litigation:** When challenging unfair practices, the FTC and DOJ should look for structural remedies. This can be done through both direct cases and through encouraging private antitrust action with amicus briefs. The FTC should continue litigating its ongoing monopolization case against Surescripts and seek to limit the applicability of *American Express'* "two-sided market" concept, and the DOJ should begin exploring structural separation for Google through roundtables and external signaling. Attorney General Merrick Garland should publicly commit to seeking a Google breakup. In addition, through amicus briefs, statements of interest, filing cases, or other guidance, the agencies should encourage courts to push back on problematic precedent, such as recent case law asserting that harms in one antitrust market can be offset by purported gains in another.[15]

- **Bringing Additional Cases Against Dominant Corporations:** Building upon DOJ's antitrust litigation against Google and the FTC's antitrust litigation against Facebook, the DOJ and FTC should investigate and charge unfair conduct by the dominant tech platforms, as well as corporations in other sectors of the economy, such as meatpacking, seeds, and pharmaceuticals.[16] To start, the FTC should bring a case against Amazon for antitrust violations or consumer protection violations. The platform appears, at the very least, to be tying certain services to other dominant services.[17] Similarly, the government needs to bring cases aimed at helping farmers who face exorbitant seed prices or coercive meatpacking arrangements, as well as consumers who can't afford high-price generic medicine.

  The FTC should also consider adjudicating more cases through its administrative procedures. In other words, the FTC could try cases, including those seeking breakups, before its administrative law judges and then before the commission itself.[18] This process

15 Ohio v. American Express Co., 138 S. Ct. 2274 (2018); In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp.3d 1058, 1102 (N.D. Calif. 2019).

16 Open Markets Institute, American Economic Liberties Project, et al., "Petition for Rulemaking to Prohibit Exclusionary Contracts," July 21, 2020, 14-47, https://www.openmarketsinstitute.org/publications/petition-federal-communications-commission-ban-exclusionary-contracting.

17 Open Markets Institute, "Open Markets Files Amicus Brief Laying Out Harms From Tying and Urging Court to Affirm Good Law on Practice," August 3, 2020 (articulating potential tying by Google (using its dominance in Google Search to require hardware phone makers to also pre-install other Google services), Facebook (using its dominance in social network games to require users to use its virtual currency), Amazon (among other charges, using its dominance in Amazon search results to force third-party sellers to also purchase Amazon's logistics service), and Microsoft (using its dominant Office software to favor its Microsoft Teams product at the expense of other collaboration software makers such as Slack)), https://www.openmarketsinstitute.org/publications/open-markets-files-amicus-brief-laying-out-harms-from-tying-and-urging-court-to-affirm-good-law-on-practice.

18 As it did in the matter of *McWane,* Inc. See McWane, *Inc.*, and Star Pipe Products, Ltd., In the Matter of, FTC (last updated Apr. 17, 2015), https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter.; ALJ's Decision and Order, RAG Emerald Res., Docket No. 2002-MSA-3 (Dep't of Labor May 16, 2003).

19 José Azar, Ioana E. Marinescu, and Marshall Steinbaum, "Labor Market Concentration," *Journal of Human Resources* (2020): 1218-9914R1; Claire Kelloway and Sarah Miller, "Food and Power: Addressing Monopolization in America's Food System," Open Markets Institute, March 2019, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea9fa6c2c1e9c460038ec5b/1588198002769/190322_MonopolyFoodReport-v7.pdf.

would not completely cut federal courts out, but would allow the agency to shape the record and case directly before it reaches a federal appellate court.

- **Targeting Concentrated Power Among Employers:** The antitrust agencies should develop and bring cases challenging mergers or conduct involving a monopsonist, or powerful buyer. Powerful buyers are ubiquitous in labor markets and agricultural markets.[19] Yet the antitrust agencies appear to have rarely if ever stopped a merger for illegally concentrating power over a labor market.[20] They should bring such a case, perhaps leveraging the private suit against the owners of the Ultimate Fighting Championship for suppressing the compensation of fighters.[21] They should also seek to bring cases against wage-fixers and other buy-side colluders, which should be straightforward per se cases. Through amicus briefs, statements to the public and Congress, speeches, official guidance, and case filings, the antitrust agencies should also limit Supreme Court precedents that allow antitrust harms to workers to be offset or justified by lower prices or other pecuniary gains to consumers.[22] They could limit monopoly-friendly case law by limiting the law's applicability to the case's specific industry, type of conduct, or law. Both agencies should also refrain from prosecuting, investigating, or weighing in on licensing or organizing efforts by workers and professionals and instead defer to the Department of Labor and local governments. Finally, the DOJ should revisit aspects of its 1996 guidance on health care antitrust safe harbors, which may facilitate collusion among employers over wages in the health care industry.[23]

The antitrust agencies appear to have rarely if ever stopped a merger for illegally concentrating power over a labor market.

20 Suresh Naidu, Eric A. Posner, and Glen Weyl, "Antitrust Remedies for Labor Market Power," *Harvard Law Review* 132 (2018): 542 ("Relying, we suspect, on the traditional assumption of economists that labor markets are competitive, the agencies have never blocked a merger because of its effect on labor market – or, even, as far as we know, given the labor market effects of a potential merger more than cursory attention."); but see Federal Trade Commission, "Federal Trade Commission Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System," September 11, 2020 (arguing that the merger between two hospitals would likely hurt compensation for health care workers), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/201009020 10119texashhsccopacomment.pdf.utiny of Tech Front and Center," *The New York Times,* November 10, 2020, https://www.nytimes.com/2020/11/10/technology/biden-tech-antitrust-privacy.html.

21 Michael McCann, "UFC Fighters' Pay Lawsuit Nears Class Action Stage With Long Road Ahead," *Sportico,* October 27, 2020, https://www.sportico.com/law/analysis/2020/ufc-fighters-lawsuit-1234615470/.

22 Sandeep Vaheesan and Matthew Buck, "Antitrust's Monopsony Problem," *ProMarket*, February 3, 2020 (discussing monopsony in antitrust law and explaining how a federal court has sanctioned harms to collegiate athlete-workers by justifying collusive pay caps as serving sports viewer-consumers' ostensible preference for amateur, unpaid sports), https://promarket.org/2020/02/03/antitrusts-monopsony-problem/.

23 See Department of Justice, Antitrust Division and Federal Trade Commission, "Statement 6 – Provider Participation in Exchanges Of Price And Cost Information," in Statements of Antitrust Enforcement Policy in Health Care, 49-50, 1996, https://www.justice.gov/atr/page/file/1197731/download.

24 Rohit Chopra, Commissioner, Dissenting Statement, Your Therapy Source, LLC, Neeraj Jindal, and Shery Yarbray, FTC File No. 1710134, Oct. 31, 2019, https://www.ftc.gov/public-statements/2019/10/dissenting-statement-commissioner-rohit-chopra-matter-your-therapy-source; Rohit Chopra, Dissenting Statement Joined by Commissioner Rebecca Kelly Slaughter, In the Matter of Pfizer Inc./Mylan N.V., October 30, 2020, 2 (criticizing the FTC's status quo acceptance of pharmaceutical mergers and expressing concern that Mylan, Pfizer, and their executives "have been accused of a wide-ranging price fixing and market allocation conspiracy in the generic drug industry. With an expanded empire of generic drug products, these alleged antitrust crimes may be even easier to perpetrate by the new entity."), https://www.ftc.gov/public-statements/2020/10/dissenting-statement-commissioner-rohit-chopra-joined-commissioner-rebecca.

The FTC and DOJ should review and police all existing consent decrees for noncompliance.

- **Reviewing and Enforcing Consent Decrees:** The FTC and DOJ frequently enter into consent decrees or settlements with corporations for potential legal violations without requiring any admission of wrongdoing. They should end this practice. In addition, when the FTC enters into consent decrees, it should make sure that it holds wrongdoers and recidivists accountable, and that consequences for companies and executives deter future wrongdoing.[24] The FTC, for example, has a consent decree with Uber, preventing the ride-hailing corporation from misrepresenting how it uses and protects people's personal information.[25] If corporations such as Uber violate consent decrees, then the FTC should seek serious punishments, including by issuing meaningful fines, holding executives and other management responsible, and even banning operating adjacent business practices or engaging in certain lines of business.[26] The FTC and DOJ should review and police all existing consent decrees for noncompliance. In addition, for consent decrees related to mergers, when merging parties seem to violate consent decrees, such as in the case of Northrop Grumman-Orbital ATK, the FTC should reverse those mergers.[27]

- **Cracking Down on Interlocking Directorates:** Though lessenforced today, Section 8 of the Clayton Act forbids an officer or director of one large company from also being an officer or director at a competing large company.[28] Prosecuting and monitoring so-called "interlocking directorates" would be a straightforward way to make sure that executives and financiers do not collude and engage in stealth quasi-mergers. The antitrust agencies should also monitor the board and directorate memberships of any person with ties to the largest private equity firms. The FTC should set up a system to monitor major corporations' boards on an ongoing basis.

- **Resurrecting Robinson-Patman Enforcement:** The Robinson-Patman Act prohibits price discrimination, or the charging of different prices to different classes of buyers or sellers, for the purpose of fostering monopoly. Such discriminatory pricing often takes the form of

25 "Uber Agrees to Expanded Settlement with FTC Related to Privacy, Security Claims," press release, Federal Trade Commission, April 12, 2018, https://www.ftc.gov/news-events/press-releases/2018/04/uber-agrees-expanded-settlement-ftc-related-privacy-security.

26 Memorandum from Commissioner Rohit Chopra on Repeat Offenders to Commission Staff and Commissioners, May 14, 2018, 1, 3 ("FTC orders are not suggestions."), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

27 Sandra Erwin, "Northrop's Strong Grip on Solid Rocket Motor Market Crippled Boeing in ICBM Competition," *Space News,* July 25, 2019, https://spacenews.com/northrops-strong-grip-on-solid-rocket-motor-market-crippled-boeing-in-icbm-competition/.

28 15 U.S.C. § 19.

29 Leo S. Carameli Jr., "The Anti-Competitive Effects and Antitrust Implications of Category Management and Category Captains of Consumer Products," *Chicago-Kent Law Review* 79, no. 3 (2004), https://scholarship.kentlaw.iit.edu/cklawreview/vol79/iss3/35.

30 Deborah A. Garza et al.✱, "Antitrust Modernization Commission: Report and Recommendations," Antitrust Modernization Commission, April 2007, 316, https://digital.library.unt.edu/ark:/67531/metadc1228317/.

secret or illegal kickbacks or rebates, sometimes in the form of "category manager services" by large food producers to manage retail shelves for large chains.[29] Enforcers experienced four decades of success, starting in 1936, with using Robinson-Patman to protect independent manufacturers, farmers, and retailers, but they stopped enforcing the law in the 1970s.[30] The DOJ and FTC should resurrect this legal tool and begin litigation to block the use of price discrimination to create monopoly power.

Exerting Regulatory Authority at the FTC

The FTC, as a regulatory agency, has the power not just to enforce antitrust and consumer protection laws but to make and shape them by passing rules that have the force of law. It should use this power by:

- **Prohibiting Coercive Contracts:** The FTC should issue rules defining "unfair methods of competition" that would be outlawed under its power under Section 5 of the FTC Act of 1914, consistent with the Administrative Procedure Act. The FTC should, for example, issue rules outlawing non-compete clauses in work arrangements.[31] The FTC should also immediately ban exclusive dealing clauses, tying arrangements, and unilateral modification clauses, as well as prohibit equipment and device makers from restricting users' "right to repair" their own products.[32] Some of these are already illegal under different legal standards. FTC rulemaking could make these practices illegal per se, meaning if they occur, regardless of their effects.[33]
- **Resurrecting the FTC's Penalty Offense Authority:** Section 5(m)(1)(B) of the FTC Act allows the agency to fine companies for unfair or deceptive practices if the FTC has already formally issued a cease-and-desist order against that unfair or deceptive practice and the company knows that that practice is unfair or deceptive. According to FTC Commissioner Rohit Chopra and FTC Attorney Advisor Samuel A.A. Levine, the FTC could begin using its Penalty offense Authority immediately to crack down on a variety of unfair or deceptive practices, such as for-profit college fraud, false earnings claims targeting workers, online disinformation, deceptive data harvesting, and illegal targeted marketing.[34]

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31 "Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses," press release, Open Markets Institute, March 20, 2019, https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses#.

32 Daniel A. Hanley, "The First Thing a Biden FTC Should Tackle," *Slate*, November 18, 2020, https://slate.com/technology/2020/11/biden-ftc-right-repair-exclusive-contracts.html.

33 Open Markets, "Restoring Antimonopoly Through Bright-Line Rules," *ProMarket*, April 26, 2019, https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/; Sandeep Vaheesan, "Resurrecting 'A Comprehensive Charter of Economic Liberty': The Latent Power of the Federal Trade Commission," *University of Pennsylvania Journal of Business Law* 19, no. 3 (2017).

34 15 U.S.C. § 45(m)(1)(B); Rohit Chopra and Samuel A.A. Levine, "The Case for Resurrecting the FTC Act's Penalty Offense Authority," October 29, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256.

35 This rule would counteract the Supreme Court's ruling in Ohio v. American Express, 138 S. Ct. 2274, which legitimated the concept of "two-sided markets" or markets that inextricably connect two different groups of trading partners. Open Markets Institute, "Open Markets Files Amicus Brief in State of Ohio v. American Express," December 15, 2017, https://www.openmarketsinstitute.org/publications/state-of-ohio-v-american-express-omi-amicus-briefing.

- **Ending Conflicts of Interest Through Structural Separations:** The FTC's regulatory authority can be used to mitigate conflicts of interest and unfair advantages companies acquire by rolling up multiple markets. Specifically, the agency could issue rules under Section 5 of the FTC Act to mandate structural separations by prohibiting corporations from:
    - Operating a platform and competing on it. For market operators, the FTC could make it illegal to both operate and also participate in either side of the market.[35]
    - Operating an essential facility, core internet function, or service that collects personal or proprietary information while also benefiting from monetizing that information directly or through resale. This could include licensing a standard essential patent and participating in the market for which it is standard.
    - Leveraging monopoly power in one market to enter into a nascent or dependent market.
    - Vertically integrating in markets that tend toward monopoly, including markets with network effects or patent monopolies.
    - Operating both a pharmacy benefit manager and any business that it negotiates with, such as an insurance company, pharmacy, or drug manufacturer.
    - Making any acquisition if the corporation is under investigation, consent order, deferred prosecution agreement, or in ongoing litigation for violating federal law for 10 years after resolution of the claim.

Shape Antitrust Law Through Antimonopoly Guidance and Policy Statements

The DOJ and FTC have significant authority to shape antitrust law by issuing guidance and policy statements. They should use this authority to arrest and reverse monopoly power, including by:

- **Instituting New Merger Guidelines:** The antitrust agencies should begin drafting new merger guidelines covering all types of

The DOJ and FTC have significant authority to shape antitrust law by issuing guidance and policy statements.

36 Open Markets, "Restoring Antimonopoly Through Bright-Line Rules"; Robert H. Lande and Sandeep Vaheesan, "Preventing the Curse of Bigness Through Conglomerate Merger Legislation," *Arizona State Law Journal* 52 (2020): 75; Robert H. Lande and Sandeep Vaheesan, "Can COVID-19 Get Congress to Finally Strengthen U.S. Antitrust Law?," *Washington Monthly,* May 21, 2020, https://washingtonmonthly.com/2020/05/21/can-covid-19-get-congress-to-finally-strengthen-u-s-antitrust-law/.

mergers and acquisitions, using the 1968 Merger Guidelines as a template.[36] Specifically, agencies should announce strict market share, size, or actual competitor thresholds beyond which companies may not consolidate. The agencies should also consider guidelines and enforcement policies toward mergers with a heightened scrutiny toward corporate size, and challenge additional mergers that may entrench corporate power despite not fitting neatly into horizontal, vertical, or conglomerate merger categories. Purported efficiencies should not factor into merger review decisions. Agencies should also think creatively about new ways to address the bargaining power elements of mergers. For example, DOJ and the FTC may clear a merger that may reduce labor bargaining power on the condition that the merged company allow workers to unionize through a "card-check" process rather than a private vote.[37] The 2020 Trump Vertical Merger Guidelines, which improperly laud corporate concentration, should be rescinded.[38]

- **Increasing Transparency and Scrutiny of the Merger Review Process:** When an agency brings a challenge, it offers a complaint and public trial, creating a useful public record. A refusal to bring a challenge brings no such public accounting, though such a decision can be equally meaningful, if not more so. The antitrust agencies should begin issuing closing statements on all mergers that they review, or at the very least those that trigger the Hart-Scott-Rodino filing requirement. They should also solicit and respond to public comments for all forthcoming merger reviews.

- **Reversing or Repealing Agency Initiatives That Hamper Enforcement:** Under the Trump administration, the DOJ changed its policy to credit companies at both the charging and sentencing stage for having preexisting antitrust compliance programs in place.[39] This policy change makes it easier for lawbreaking companies to avoid prosecution and should be rescinded through enforcement practices as well as speeches, briefs, filings, or other official statements. Similarly, the Trump DOJ hamstrung itself by seeking to expedite merger review timelines by "aim[ing] to resolve most [merger] investigations within six months of filing."[40] DOJ should clarify in speeches, press releases, or other official statements that it will not attempt to make investigations fit arbitrary, predetermined timetables. The FTC should disband initiatives like its Economic Liberty Task Force, which is used to peddle

37 See Sanjukta Paul, Twitter post, November 22, 2020, 2:40 pm, https://twitter.com/sanjuktampaul/status/1330597094235676672.

38 Open Markets Institute and American Economic Liberties Project, "The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines," February 2020, https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf; Rebecca Kelly Slaughter, "Dissenting Statement of Commissioner Rebecca Kelly Slaughter: In re FTC-DOJ Vertical Merger Guidelines," June 30, 2020, https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf; Rohit Chopra, "Dissenting Statement of Commissioner Rohit Chopra: Regarding the Publication of Vertical Merger Guidelines," June 30, 2020, https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

39 Department of Justice, "Antitrust Division Announces New Policy to Incentivize Corporate Compliance," July 11, 2019, https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

40 Makan Delrahim, "It Takes Two: Modernizing the Merger Review Process," remarks prepared for the 2018 Global Antitrust Enforcement Symposium, September 25, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-2018-global-antitrust.

41 "Antitrust Division Seeks Public Comments on Updating Bank Mergers Review Analysis," press release, Department of Justice, September 1, 2020 ("The purpose of [reviewing bank mergers] is to identify proposed merger that do not have significantly adverse effects on competition and to allow them to proceed quickly."), https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.

anti-worker policies such as occupational licensing reform, as well as its Working Groups on Agency Reform and Efficiency that weaken or fail to promote assertive enforcement against corporate monopoly power.

- **Issuing Stronger Bank Merger Guidelines:** The DOJ is currently reviewing its bank merger guidelines with a goal of facilitating bank mergers.[41] The department should reverse course. Instead of exacerbating the damage caused by deregulation and lax merger enforcement, the division should enact stricter limits on banking activities and ownership.[42]

- **Endorsing the House Antitrust Subcommittee Report:** The antitrust agencies should formally adopt and endorse the findings in the House Antitrust Subcommittee's October 2020 digital markets report. Agency leadership should commit to using all of their authorities to implement the report's recommendations.

- **Adopting Antimonopoly Legal Interpretations:** The DOJ and FTC have adopted numerous pro-corporate and pro-employer legal interpretations in recent decades. The agencies should halt ongoing amicus briefs and reorient their efforts to replacing these interpretations and challenging unfavorable court decisions that limit their enforcement power. This includes:

    - *No-poach agreements:* DOJ leadership should argue that worker no-poach agreements, even when initiated by a franchisor in contracts with franchisees, should be judged as a per se offense, not under the rule of reason as DOJ argued in 2019.[43] DOJ should formally declare its new position in legal briefs that repudiate past filings and expand on this position in speeches, testimony, or other public declarations.

    - S*tandard essential patents:* DOJ should clarify through speeches, briefs, testimony, or official guidance that antitrust law can and should be used to police standard essential patentholders' abuse of dominance, rescinding the Trump administration's "New Madison" interpretation.[44]

    - *Unfair methods of competition:* The FTC should withdraw its 2015 Statement of Principles, which unnecessarily limits its ability to address "unfair methods of competition" under Section 5 of the FTC Act.[45]

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42 Letter from American Economic Liberties Project, Washington Center for Equitable Growth, and Open Markets Institute on Antitrust Division Banking Guidelines Review to Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 11-12, October 16, 2020 (calling for "more stringent enforcement of chartering and restrictions on banking activities," "revisiting bank ownership limitations," and "more stringent limitations on concentration, tying, and management interlocks"), https://www.justice.gov/atr/page/file/1330256/download.

43 The Justice Department has argued that if a franchising company includes clauses forbidding poaching rival franchise employees ("no-poaching" agreements) in its contracts with franchisees, then these no-poaching agreements should be judged under the rule of reason and not the per se standard. The DOJ should reverse its position and argue that all no-poaching arrangements for workers be judged per se illegal. This would dispose of the need for market definition and disallow efficiency defenses. See Corrected Statement of Interest of the United States, Harris v. CJ Star, LLC, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Richmond v. Bergey Pullman Inc., 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); Corrected Statement of Interest of the United States, Stigar v. Dough Dough, Inc., 2:18-cv00244 (E.D. Wash. Mar. 8, 2019).

44 Makan Delrahim, "The Future of Standard Essential Patents: The 'New Madison' Approach to Antitrust and Intellectual Property Law," remarks prepared for the University of Pennsylvania Law School Conference, March 16, 2018, https://www.justice.gov/opa/speech/file/1044316/download.

45 Federal Trade Commission, "FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute," August 13, 2015, https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

- *Cancel pending amicus briefs:* The FTC and DOJ should immediately review all amicus briefs planned, pending, or drafted during the Trump administration. The agencies should cancel all briefs that do not advance antimonopoly or pro-worker legal interpretations and, where necessary, file motions to withdraw as amicus curiae from ongoing cases.

Studying Market Power

A major obstacle to challenging corporate power is that relatively little public information is widely available to understand either industry-specific sectors or the systemic nature of the problem. Fortunately, the antitrust agencies can collect such data and provide it to the public and other policymakers, including by:[46]

- **Reviewing Recently Completed Significant Mergers:** The antitrust agencies should begin systematically conducting post-merger reviews of completed mergers. They should require companies to submit post-merger data, which the agencies could use to study markets and their enforcement record. The antitrust agencies should begin by conducting a review of all substantial mergers and acquisitions since President Trump took office, including the flagrantly illegal merger of Uber and Postmates.[47] Researchers should especially investigate essential industries and how corporate consolidation contributes to productive resiliency or fragility. They should also closely scrutinize data from mergers and acquisitions made by Alphabet, Amazon, Apple, Facebook, and Microsoft.[48] For each merger, agencies should at a minimum assess:
    - The claims merging companies made before completing their merger;
    - The predictions that experts and agencies made before approving the merger;
    - The effectiveness of remedies used, including divestitures and carve-outs;
    - The economic consequences for consumers, workers, and productive resiliency;
    - Any common characteristics and patterns to harmful mergers; and
    - The theoretical, methodological, empirical, or ideological bases for mistaken predictions.

46 See Open Markets Institute, America's Concentration Crisis, 2019 ("Locating data on how few companies control individual markets, though, has been difficult, and not by accident."), https://concentrationcrisis.openmarketsinstitute.org/.

47 Maureen Tkacik, "Restaurants are Barely Surviving, Delivery Apps Will Kill Them," *The Washington Post*, May 29, 2020, https://www.washingtonpost.com/outlook/2020/05/29/delivery-apps-restaurants-coronavirus/?arc404=true; "Uber-Postmates Merger Will Only Serve Monopolists," press release, American Economic Liberties Project, September 29, 2020, https://www.economicliberties.us/press-release/uber-postmates-merger-will-only-serve-monopolists/.

48 "FTC to Examine Past Acquisitions by Large Technology Companies," press release, Federal Trade Commission, February 11, 2020, https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

- **Seeking to Understand Businesses and Markets:** Research offices at the FTC and DOJ should restart the FTC's "line-of-business" study. They should also initiate a program of routine data collection of pricing, wage, and other relevant data from merged corporations.
- **Empowering Litigators and Researchers Other Than Economists:** The agencies should reorganize internally so that economists and economics offices are subordinate to enforcement. The lead economists at the antitrust agencies should not be on the same institutional level as, for example, the FTC's director of the Bureau of Competition. Alternatively, the agencies could reorganize their economics offices into research offices and introduce methodological diversity. This could mean incorporating research and tools from labor economists, accountants, sociologists, historians, statisticians, anthropologists, and technologists, and placing less emphasis on research from industrial organization economists focused on theoretical and speculative notions.
- **Identifying Legislative Recommendations for Congress:** If antitrust agencies bring cases and fail to stop a merger or challenge dominant abuses of power, then they should tell Congress and publicly discuss how and why better law or guidance to strengthen antitrust law is necessary.

The antitrust agencies should begin systematically conducting post-merger reviews of completed mergers.

Strengthen Antitrust Enforcement Through Statutory Changes to Antimonopoly Law

Congress can and should take an active role in shaping and defining antitrust and antimonopoly law. The recent report from the House Subcommittee on Antitrust, Commercial, and Administrative Law recommended Congress "revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its commitment to ongoing market investigations and legislative activity."[49] Antitrust law itself has many doctrinal areas that legislation could fix.

Strengthening Antitrust Law

Congress should amend substantive antitrust law to make it conducive to checking corporate power. This includes overruling recent judicial precedents that have eroded substantive antitrust

49 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets," 7.

laws and made public and private enforcement more difficult. For example:

Congress should pass bright-line and per se standards for courts to use in judging a merger challenge.

- Congress could clarify that the purpose and goal of the antitrust laws are not to maximize consumer welfare but to disperse private power and foster small business and worker power.
- Congress should enact a no-fault monopolization and no-fault oligopolization law, which would allow enforcers to break up or obtain other remedies against persistent monopolies and oligopolies without showing exclusionary conduct.[50]
- Congress should enact structural separations, preventing large and powerful corporations from using their power in one market to gain an unfair advantage in another. (See sector-by-sector reforms below.)
- Congress should pass bright-line and per se standards for courts to use in judging a merger challenge. This means that if a merger violates certain objective standards, it should be illegal, regardless of (often speculative) benefits promised by the corporations. Congress should distinguish between large, medium, and small companies and put them under different levels of antitrust scrutiny. Senator Amy Klobuchar's Consolidation Prevention and Competition Promotion Act of 2019, though it does not accomplish this full objective, does distinguish legal standards for large "mega-mergers," and it does make mergers by large corporations past a certain threshold illegal.[51]
- Congress should pass bright-line standards to establish rules defining fair and unfair competition. One such example is the petition before the Federal Trade Commission, co-signed by Economic Liberties, calling on the agency to use its authority to pass rules on "unfair methods of competition" to outlaw exclusive dealing by dominant corporations.[52]
- Congress should enact a national Right to Repair law that guarantees farmers and consumers generally the ability to repair their own equipment. Monopolies today in agribusiness,

50 This idea surfaced in the 1960s and 1970s with widespread agreement on its usefulness, culminating in Senator Philip Hart's 1973 Industrial Reorganization Act to "implement the Neal Commission's recommendations of breaking up most large corporations" in the United States, Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster, 2019), 318. Others have argued that no-fault monopolization rules would more faithfully enact the original understanding and meaning of the Sherman Act's prohibition on monopolization and could boost various measures of efficiency, Robert H. Lande and Richard O. Zerbe, "The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration" *American University Law Review* 70 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3580841&download=yes.

51 Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. § 1 (2019).

52 Open Markets Institute, American Economic Liberties Project, et al., "Petition for Rulemaking."

53 Daniel A. Hanley, Claire Kelloway, and Sandeep Vaheesan, "Fixing America: Breaking Manufacturers' Aftermarket Monopoly and Restoring Consumers' Right to Repair," Open Markets Institute, April 2020, https://www.openmarketsinstitute.org/publications/fixing-america-breaking-manufacturers-aftermarket-monopoly-restoring-consumers-right-repair#:~:text=Open%20Markets%20Institute%20released%20Fixing,Repair%20on%20April%2013%2C%202020.&text=Fortunately%2C%20lawmakers%2C%20antitrust%20enforcers%2C,that%20can%20reopen%20repair%20markets.

54 Protecting Consumer Access to Generic Drugs Act of 2019, H.R. 1499, 116th Cong., § 1 (2019).

electronics, and other industries have forbidden farmers and consumers from repairing or adjusting their devices without going through the manufacturer, wasting users' time and money.[53]

- Congress should make pay-for-delay agreements—schemes in which a company pays a future competitor to "delay" their entry into a market—and product-hops by pharmaceutical monopolies per se illegal.[54]
- Congress should overturn the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis Trinko, LLP*, which allowed and even encouraged telecommunications giants like Verizon and AT&T to monopolize the telecom market.[55] At the same time, the decision's praise of monopoly power gives circuit courts persuasive authority to undermine monopolization cases in other markets. The FCC should push Congress to reverse *Trinko* to check communications monopolists' power and send a broader signal to monopolists that the legal system will not tolerate concentrated power.

Removing Barriers to Private Enforcement

Congress should overrule Supreme Court precedents that make it harder for government agencies and private parties to check corporate power. As an immediate first step, Congress should prohibit practices depriving workers, consumers, small businesses, and people generally of their right to have their day in court. These include:

- Non-compete clauses in work arrangements;
- Mandatory pre-dispute arbitration clauses in all contracts;
- Class action waivers;
- Forum selection clauses;
- Confessions of judgment;
- Unilateral modification clauses; and

Congress should prohibit practices depriving workers, consumers, small businesses, and people generally of their right to have their day in court.

55 In Verizon Communications, Inc. v. Law Offices of Curtis V. 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.

- Other coercive contractual terms. Congress should also exercise its power to shape and amend judicial procedural rules, many of which serve as barriers to justice. In addition to making it easier for antitrust plaintiffs to have their day in court, procedural changes will contribute significantly to broader judicial reform efforts. They include the following:

- Congress should overrule judge-made law that makes it more difficult for antitrust and other plaintiffs to seek redress for their injuries. Specifically, Congress should overrule 2007's *Twombly* and 2009's *Iqbal* Supreme Court decisions, which made it easier for corporate defendants to get their cases dismissed, and 1986's *Matsushita* decision, which made it easier for corporate defendants to get their cases thrown out at the summary judgment stage of litigation.[56]

- Congress should repeal Rule 23(f) of the Federal Rules of Civil Procedure, which lets parties appeal class certification decisions in the middle of litigation. These "interlocutory" appeals make it far more difficult for plaintiffs to bring class actions; they hinder lawsuits in unnecessarily protracted litigation, allow appellate courts to apply unusual scrutiny to class actions, and force plaintiffs to incur the time and expense of winning on class certification twice.[57]

- Congress should restore its role in writing the rules of federal civil procedure by amending the Rules Enabling Act of 1934 to curb the Supreme Court's usurpation of legislative power.[58] At minimum, Congress should exert its authority to reject or modify proposed rules to ensure access to justice for noncorporate litigants.

- Congress should overrule precedents requiring plaintiffs to show antitrust injury and antitrust standing to bring a case and instead permit all injured by an antitrust violation to sue in court, as laid out in the Clayton Act.[59]

- Congress should give the FTC the ability to seek civil penalties when enforcing its standalone authority to police unfair methods of competition.

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56 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

57 Joshua P. Davis and Brian J. Devine, "Procedural Self-Inflicted Wounds," *Lewis & Clark Law Review* 24 (2020): 501-502, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3613836.

58 Diane P. Wood, "Back to the Basics of Erie," *Lewis & Clark Law Review* 18, no. 3 (2014): 680, citing Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (Yale University Press, 2000), 135-136.

59 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States … ").

60 "Local Journalism: America's Most Trusted News Sources Threatened," U.S. Senate Committee on Commerce, Science, and Transportation, October 2020, https://www.cantwell.senate.gov/imo/media/doc/Local%20Journalism%20Report%2010.26.20_430pm.pdf; "Everyone But Us: The Trump Administration and Medical Supply Exports," Report by the Office of Congresswoman Katie Porter (CA-45), April 6, 2020, https://porter.house.gov/uploadedfiles/everyone_but_us.pdf; see Staff Reports, Committee on Oversight and Reform, U.S. House of Representatives September-October 2020, Drug Pricing Investigation: Celgene and Bristol Myers Squibb—Revlimid; Drug Pricing Investigation: Teva—Copaxone; Drug Pricing Investigation: Amgen—Enbrel and Sensipar; Drug Pricing Investigation Novartis—Gleevec; Drug Pricing Investigation Mallinckrodt—H.P. Acthar Gel.

Congress should use the House digital markets investigation as a model for effective oversight, conducting similar investigations across the entire U.S. economy.

Finally, Congress should build on the momentum created by the House Investigation of Competition in Digital Markets, as well as similar efforts, including by using congressional oversight to supplement federal enforcement.[60] While Congress can and should collaborate with the White House and executive branch agencies on sector-specific reforms, it should also work independently to reverse and arrest corporate concentration across American industries:

- As part of the confirmation process, the Senate should ask all appointees to economic policy positions—including DOJ nominees—for their views on corporate concentration. This includes questions on the House digital markets report, including whether they agree with the report's conclusions, how they will use the report to inform their responsibilities should they be confirmed, and their understanding of concentration and corporate power in their area of responsibility.
- Congress should use the House digital markets investigation as a model for effective oversight, conducting similar investigations across the entire U.S. economy. Sector-by-sector investigations, each led by a relevant subcommittee with jurisdiction, are important for demonstrating how corporations exert and exploit market power in different markets. Understanding how corporate power weaves itself into the particular landscape of each economic sector is essential to creating effective policies to combat it, and recognizing common threads and tactics used by bad actors. During these investigations, Congress should not hesitate to exercise and strengthen its subpoena power when necessary to gather information from uncooperative corporations.

Addressing Corporate Power in Future Recovery Legislation

Antimonopoly measures must be incorporated into strategies to rebuild the American economy. Without speaking to the particular details, another round of COVID-19 relief and recovery funding is likely necessary. The next legislative package should provide direct assistance to people, small businesses, schools, and state and local governments; speed the recovery by

61 "What You Need to Know About the CARES Act Bailouts," American Economic Liberties Project, Corporate Power Quick Take, April 2020, https://www.economicliberties.us/our-work/what-you-need-to-know-about-the-cares-act-bailouts/; Sarah Miller, "End Monopoly Power," *Democracy*, July 14, 2020 ("Trying to address wealth inequality without addressing monopoly power is like trying to stop a boat with a hole in the bottom from sinking by bailing out the water, but not plugging up the hole."), https://democracyjournal.org/magazine/end-monopoly-power/.

rebuilding infrastructure and supply chains; and ensure equitable distribution of effective treatments, testing, and vaccines. But without complementary measures to constrain corporate power, additional COVID-related aid to workers, consumers, and small businesses will ultimately end up in the hands of banks, private equity firms, and corporate landlords.[61] To speed economic recovery, Congress and the Biden administration must prevent and address these kinds of corporate abuses. Future recovery packages should include:

- A temporary merger moratorium to prevent big corporations from further consolidating their economic and political power.[62]
- A requirement that the Federal Reserve place conditions on corporations accessing its credit facilities related to stock buybacks, executive compensation, and worker retention.[63]
- Protections included in the Stop Wall Street Looting Act, which will ensure that private equity firms share responsibility for the companies under their control, preventing them from capturing all the rewards of their investments while insulating themselves from risk.[64]
- Measures that strengthen and elevate antitrust scrutiny to roll back concentration already fueled by the pandemic.

Without complementary measures to constrain corporate power, additional COVID-related aid to workers, consumers, and small businesses will ultimately end up in the hands of banks, private equity firms, and corporate landlords.

EXERCISE SHARED SECTOR-BY-SECTOR ENFORCEMENT AUTHORITY TO ATTACK MONOPOLY POWER

Nearly every federal agency has authority that can be used to arrest and reverse the consolidation of corporate power, either independently or in concert with DOJ and the FTC.[65] Antimonopoly regulation can encourage beneficial corporate conduct and set proactive baseline rules of fair competition to

62 Leah Nylen and Betsy Woodruff Swan, "House Antitrust Chairman Proposes Merger Ban During Pandemic," *Politico,* April 23, 2020, https://www.politico.com/news/2020/04/23/house-antitrust-chairman-proposes-merger-ban-during-pandemic-203467.

63 "Warren to Fed, Treasury: Your New $1.45 Trillion Dollar Bailout Loan Program for Businesses Fails to Protect Workers, Taxpayers and the Economy," press release, Senator Elizabeth Warren, April 16, 2020, https://www.warren.senate.gov/newsroom/press-releases/warren-to-fed-treasury-your-new-145-trillion-dollar-bailout-loan-program-for-businesses-fails-to-protect-workers-taxpayers-and-the-economy.

64 Stop Wall Street Looting Act, S. 2155, 116th Cong. § 1 (2019).

65 Sandeep Vaheesan, "Unleash the Existing Anti-Monopoly Arsenal," *The American Prospect,* September 24, 2019, https://prospect.org/day-one-agenda/unleash-anti-monopoly-arsenal/; Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, Exec. Order No. 13,725, *Federal Register* 81, no. 76 (April 15, 2016): 23417, https://www.federalregister.gov/documents/2016/04/20/2016-09346/steps-to-increase-competition-and-better-inform-consumers-and-workers-to-support-continued-growth-of.

Congress or officials at DOJ and the FTC should impose an immediate moratorium on further consolidation among big agribusinesses.

complement antitrust enforcement of unfair actions. The Biden administration should exercise the full extent of these authorities and work with Congress to attack monopoly power sector by sector.

Agriculture

The American food supply is increasingly controlled by monopolists. Farmers are being squeezed on both sides. Giant agribusiness monopolies like Bayer keep charging higher prices for seeds, fertilizer, and other inputs, while meat and grain processing monopolies pay them less for their products and labor. Meanwhile, power buyers in the form of large supermarket chains and food service giants put pricing pressure on the entire production system.[66] Fair competition policies, such as banning exclusive dealing and predatory pricing, will help address grocery retail consolidation and improve choices and access for consumers and emerging and alternative food businesses. The Biden administration and Congress can arrest and reverse this consolidation, including by:[67]

- **Breaking Up Agribusiness Monopolies: C**ongress or officials at DOJ and the FTC should impose an immediate moratorium on further consolidation among big agribusinesses.[68] They should also open investigations into recent mergers and acquisitions, like Bayer's purchase of Monsanto, that allowed the prices of seeds and fertilizer to rise. And Congress and enforcers should also use all of their authorities to unwind the consolidated agricultural supply chain by, for example, breaking corporations like Tyson and Smithfield up into separate livestock breeding, feedlot, and meat processing companies. Recent guilty verdicts in chicken price-fixing cases should help offer mechanisms for the Department of Agriculture to make structural fixes through administrative means.[69]
- **Holding the Meatpacking Industry Accountable:** Congress should restructure the industry to reduce the power any one packer has over farmers and workers. The USDA should strengthen inspections, slow line speeds, and pay inspectors more, and the Department of Labor should

66 Claire Kelloway, "Big Food Paybacks to Cafeteria Operators Spark Controversy," *Food & Power*, September 13, 2018, https://www.foodandpower.net/latest/2018/09/13/big-food-paybacks-to-cafeteria-operators-spark-controversy?rq=kickbacks.

67 Kelloway and Miller, "Food and Power," 12-15. The proposals in this section are adapted from Claire Kelloway and Sarah Miller's 2019 "Food and Power" report.

68 Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2019, S. 1596, 116th Cong, § 1 (2019).

69 One possible mechanism would be to have the Department of Agriculture use its authority under the Packers and Stockyards Act to issue cease and desist orders against unlawful acts and include fencing-in relief to bar corporations from certain lines of business. See 7 U.S.C. § 192. Courts have traditionally offered a wide berth for regulators in allowing such fencing-in discretion to address similar legal authority to bar unfair practices. See Lesley Fair, "Federal Trade Commission Advertising Enforcement," Federal Trade Commission, March 1, 2008, https://www.ftc.gov/sites/default/files/attachments/training-materials/enforcement.pdf.

promulgate strong occupational health and safety standards, especially for meat and poultry processors.[70]

- **Restoring the Grain Inspection, Packers and Stockyards Administration:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) was, until recently, an independent agency charged with enforcing competition policy in the meatpacking industry. The USDA should reinstate the agency and propose new rules to ban price discrimination, prohibit packers from using short-term contracts they can terminate at will, outlaw retaliation against growers for airing grievances or cooperating with other producers, grant producers an effective right to decline arbitration of legal disputes, and create clear criteria for unfair and discriminatory practices in each livestock sector.[71] Congress or the USDA should also strengthen the Packers & Stockyards Act to give GIPSA additional strength. Specifically, it should be updated to ban meatpackers from owning livestock, abolish abusive payment systems, and grant farmers greater legal standing to sue meatpackers, among other reforms.
- **Addressing Consolidation Through the Farm Bill:** Congress primarily sets agricultural policy through the Farm Bill, which is updated every four to five years. Unfortunately, members have long used the bill to help big agribusinesses. They should reverse this trend in the next Farm Bill, using programs like grain reserves and price floors to stabilize prices and discourage overproduction, capping subsidy payouts to the largest corporate farms, and expanding loan programs that support underserved farmers and ranchers, among other key reforms.[72]
- **Reforming the Checkoff Program:** Farmers of milk, wheat, beef, potatoes, pecans, and many other commodities are legally required to pay fees intended to be used by the U.S. government to research and promote their products. Industry trade groups routinely use this funding, however, to lobby for policies that benefit the largest agribusinesses and further disadvantage smaller farmers.[73] Congress should prohibit these "checkoff funds" from being used for lobbying, rein in conflicts of interest, and otherwise reform federal checkoff programs by passing the Opportunities for Fairness in Farming Act and Voluntary Checkoff Act.[74]
- **Protecting Farmworkers:** In many cases, federal labor protections, including overtime, minimum wage, and rights to collective action, do not apply to farmworkers. Congress should amend the National Labor Relations Act and Fair Labor Standards Act to eliminate exemptions that hurt farmworkers. It should also reform the H-2A agricultural guest worker

70 Open Markets Institute, Family Farm Action Alliance, Food & Water Action, American Economic Liberties Project, et al., "Restructuring America's Meat Industry for Worker and Consumer Safety and Farmer Prosperity," May 1, 2020, https://www.openmarketsinstitute.org/publications/open-markets-allies-demand-antitrust-enforcement-meat-industry-protect-workers-farmers; Claire Kelloway, "USDA Continues to Lift Meat Processing Line Speed Limits During Pandemic, Threatening Frontline Workers and Consumers," *Food & Power,* April 9, 2020, https://www.foodandpower.net/latest/2020/04/09/usda-continues-to-lift-meat-processing-line-speed-limits-during-pandemic-threatening-frontline-workers-and-consumers; Claire Kelloway, "Workers Fear Injury as Administration Clears Way for Faster Chicken Slaughter," *Civil Eats*, November 7, 2018, https://civileats.com/2018/11/07/workers-fear-injury-as-administration-clears-way-for-faster-chicken-slaughter/.

71 "Packers and Stockyards Act Reform," Organization for Competitive Markets, https://competitivemarkets.com/gipsa/.

72 Claire Kelloway and Sarah Miller, "Food and Power," 13.

73 Siddhartha Mahanta, "Big Beef," *Washington Monthly,* January/February 2014, https://washingtonmonthly.com/magazine/janfeb-2014/big-beef/.

74 Opportunities for Fairness in Farming Act of 2019, S. 935, 116th Cong. § 1 (2019); Voluntary Checkoff Program Participation Act, S. 740, 115th Cong. § 1 (2017).

Amazon uses predatory pricing to lower prices below cost to drive rivals from the market.

visa program and provide greater protections for undocumented farmworkers by, for example, passing the bipartisan Farm Workforce Modernization Act.[75]

Big Tech

Facebook and Google are more than technology companies: They are 21st-century communication networks that are just as vital to our communities and commerce as roads or phone lines. Amazon, too, is far more than an online retailer: It is a movie and television studio, a supermarket chain, a logistics company, an electronics manufacturer, a cloud-computing provider, and a middleman for much of the U.S. economy. Yet Google, Facebook, and Amazon are almost completely unregulated, and their consolidation of power undermines democracy and makes the economy less competitive, less innovative, and less equal. The only way to reduce these corporations' dominance is to change their business models. Policymakers should do so by:

- **Breaking Up Dominant Platforms:** Congress should break up Facebook, Google, and Amazon, reducing their scale and scope so they are no longer too big to regulate.[76] One way to do this is through structural separations: for instance, by separating out Google's general search from mapping, Android, and YouTube. Federal regulators should also pursue structural separations through antitrust litigation, including by continuing and expanding on DOJ's Google case and the FTC's Facebook case. Policymakers should also prohibit platforms from selling competitive products on any marketplace whose rules they control.
- **Implementing Nondiscrimination Rules:** The House Antitrust Subcommittee recommended a variety of nondiscrimination rules for digital platforms, such as prohibitions on self-preferencing and equal treatment for terms and pricing, as well as interoperability and open-access requirements. A robust set of rules would dramatically reduce the power of these platforms to undermine competitors. They would, for instance, prevent Amazon from self-preferencing its own products. Such rules can be achieved through legislation, regulation, or litigation.[77]
- **Banning Targeted Ads:** Banning dominant platforms from engaging in targeted advertising, or marketing to users based on their individual traits and data, would dramatically reduce their incentives to collect and store user information.[78] They should instead be allowed to engage only in

75 Farm Workforce Modernization Act of 2019, H.R. 5038, 116th Cong., § 1 (2019).

76 John Kwoka and Tommaso Valletti, S*crambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* (forthcoming) (on file with author).

77 Majority Staff Report and Recommendations, "Investigation of Competition in Digital Markets"; Lina M. Khan, "The Separation of Platforms and Commerce," *Columbia Law Review* 119, no. 4 (2019), https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/.

Congress and regulators should prevent the anticompetitive threat and potential systemic risk that platforms' reach into payment systems introduces into both finance and commerce.

"contextual advertising," e.g., placing ads on websites that are relevant to the content of the site.

- **Making Facebook and Google Liable for Commercial Activity:** Section 230 of the Telecommunications Act of 1996 allows "interactive computer services"—platforms including Facebook and Google—to avoid being held liable for what users do or say on the platform and often for the consequences of commercial activities they facilitate. This distinguishes digital publishers from newspapers, which are legally responsible for the content they publish, as well as ordinary retailers, who are liable for the commerce they enable. Stripping Section 230 protections from companies that make money selling targeted advertising and from online retail middlemen would encourage Facebook, Google, and Amazon to change their harmful business models and create a level playing field with other publishers or retailers.[79]

- **Restricting or Banning Acquisitions by Dominant Platforms:** Ending Amazon's, Facebook's, and Google's acquisition sprees would limit their ability to increase their power and hurt other industry participants. It would also encourage venture capitalists to finance their competitors; currently, financiers have an incentive not to do so for fear of being unable to sell unrelated portfolio companies to the platforms.

- **Strengthening Predatory Pricing Law:** Amazon uses predatory pricing to lower prices below cost to drive rivals from the market. Supreme Court decisions in the 1980s and 1990s, however, have made it very difficult for the government or private parties to bring the predatory-pricing lawsuits that would stop this cycle.[80] Congress should overturn them.

- **Banning Tying by Dominant Platforms:** Amazon uses connections between different parts of its business to extract more money from small businesses. Local businesses that sell on Amazon Marketplace are given preferential treatment in search results if they use Fulfillment by Amazon, even when doing so is more expensive than using alternative

78 David Dayen, "Ban Targeted Advertising," The New Republic, April 10, 2018, https://newrepublic.com/article/147887/ban-targeted-advertising-facebook-google; Gilad Edelman, "Why Don't We Just Ban Targeted Advertising?," Wired, March 22, 2020, https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising/; Matt Stoller, Sarah Miller, and Zephyr Teachout, "Addressing Facebook and Google's Harms Through a Regulated Competition Approach," American Economic Liberties Project, Working Paper Series on Corporate Power #2, April 2020, https://www.economicliberties.us/our-work/addressing-facebook-and-googles-harms-through-a-regulated-competition-approach/.

79 American Economic Liberties Project, "Statement of the American Economic Liberties Project: Replying to the Comments of Carrie A. Goldberg," In the Matter of Petition for Rulemaking of the National Telecommunications and Information Administration to Clarify the Provisions of Section 230 of the Communications Act of 1934, RM-11862, September 17, 2020, https://ecfsapi.fcc.gov/file/109170620228328/American%20Economic%20Liberties%20Project%20Reply%20Comment.pdf.

80 Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126, no. 3 (2017): 722-730.

shipping options. Though the case law is still reasonable, Congress should explicitly codify that tying is per se illegal for dominant platforms.

- **Banning Platforms From Entering Financial Services:** Despite public and political opposition, Facebook and its roughly two dozen partners are continuing to develop their Libra, now Diem, payment system.[81] Google has also begun attempting to offer financial services through Citibank.[82] Congress and regulators should prevent the anticompetitive threat and potential systemic risk that platforms' reach into payment systems introduces into both finance and commerce. One such vehicle is to pass the Keep Big Tech Out of Finance Act by House Financial Services Chairwoman Maxine Waters.[83]
- **Stopping State and Local Subsidies to Platform Facilities:** Congress has the power to institute a national ban on company-specific state and local tax incentives. Short of that, states can band together to prevent tax abuse: Legislation introduced in 14 states in 2020 would form a compact against using incentives to poach businesses from other states; a bolstered version could be crafted to disallow the incentivizing of new business facilities.[84]

This destruction of America's industrial capacity has become the single biggest unacknowledged threat to national security.

Defense

The United States increasingly cannot produce or maintain vital systems upon which our economy, military, and allies rely. This destruction of America's industrial capacity has become the single biggest unacknowledged threat to national security. The United States is now reliant on an adversarial country, China, for materials and components for nearly every military end item. For many others, only a sole supplier remains. And competition for defense contracts is at its lowest point in history. The Biden administration and Congress must take immediate steps to rebuild America's defense industrial capacity, including by:

81 Saule Omarova and Graham Steele, "There's a Lot We Still Don't Know About Libra," *The New York Times,* November 4, 2019; Matt Stoller, "Launching a Global Currency Is a Bold, Bad Move for Facebook," *The New York Times,* June 19, 2019, https://www.nytimes.com/2019/06/19/opinion/facebook-currency-libra.html; Americans for Financial Reform Education Fund and Demand Progress Education Fund, "Banking on Surveillance: The Libra Black Paper," June 2020, https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Libra-Black-Paper-FINAL-2.pdf; "Libra Basics: What is Facebook's Currency Project?," Open Markets Institute, July 15, 2019, https://www.openmarketsinstitute.org/publications/open-markets-submits-brief-congress-facebook-libra-currency-risks-calls-congress-block-libra.

82 Cherlynn Low, "Google Teams Up with Citibank on Mobile-First Accounts," *Engadget,* November 18, 2020, https://www.engadget.com/google-citi-plex-bank-accounts-180802372.html.

83 Americans for Financial Reform Education Fund and Demand Progress Education Fund, "Banking on Surveillance," 65-68; Keep Big Tech Out of Finance Act, H.R. 4813, 116th Cong., § 1 (2019); Shaoul Sussman, "How Amazon Uses Lending to Control Small Businesses," *The American Prospect,* February 26, 2020, https://prospect.org/economy/how-amazon-uses-lending-to-control-small-businesses/.

84 Pat Garofalo, Matt Stoller, and Olivia Webb, "Understanding Amazon: Making the 21st-Century Gatekeeper Safe for Democracy," American Economic Liberties Project, Working Paper Series on Corporate Power #5, July 2020, 42, https://www.economicliberties.us/wp-content/uploads/2020/07/Working-Paper-Series-on-Corporate-Power_5-FINAL.pdf; Coalition to Phase Out Corporate Tax Giveaways, https://endtaxgiveaways.org/.

- **Breaking Up Defense Contractors:** Congress and federal enforcers should address concentration that inhibits defense sector competition by unwinding mergers, spinning off companies, funding competitors, cloning companies, and opening IP/patent vaults. DOD should have more accountability and authority to prevent consolidation by blocking defense sector mergers and acquisitions, promoting competition, breaking up defense conglomerates, restricting excess defense contractor profits, and blocking private-equity takeovers of suppliers. One acquisition Congress or enforcers should reverse is Northrop Grumman's 2018 purchase of dominant rocket motor producer Orbital ATK. Specifically, Congress or enforcers should confirm that Northrop violated its 2018 consent decree with the FTC, requiring it to sell Orbital ATK products on a nondiscriminatory basis, during the DOD's call for proposals to produce its new intercontinental ballistic missile system called the Ground Based Strategic Deterrent.[85]
- **Ensuring Access to Markets:** Congress and DOD should assess the effect of antitrust and competition policy on America's national security innovation base with a particular focus on new entrants, vertical foreclosure, supply chain analysis, and vendor lock-in. They should study whether security clearance and cyber security requirements act as barriers to entry for smaller firms and, if so, how to ensure they do not inhibit competition.
- **Expand the Defense Innovation Base:** DOD should strictly limit the use of other transaction authority contracting to nontraditional contractors.
- **Establishing a Right to Repair:** Due to misguided military procurement reform and military-industrial base consolidation beginning in the 1990s, the military is often restricted from repairing its own equipment under warranties and design restrictions. Repair restrictions have significant implications for DOD's ability to achieve its mission. The DOD investigator general should initiate investigations into maintenance lock-in, right-to-repair, and other contractual practices that undermine military operations and national security.[86]
- **Appointing Bold Enforcers at DOD:** The Biden administration should be especially careful to appoint individuals who are dedicated to public service and independent from corporate power as undersecretary of sustainment and acquisition, deputy assistant secretary of defense for industrial policy, and administrator for the office of federal procurement policy.

85 Modified Decision and Final Order, In the Matter of Northrop Grumman Corporation and Orbital ATK, 7-8, December 4, 2018, https://www.ftc.gov/enforcement/cases-proceedings/181-0005-c-4652/northrop-grumman-orbital-atk; Erwin, "Northrop's Strong Grip on Solid Rocket Motor Market Crippled Boeing in ICBM Competition."

86 Comment Submitted by Major Lucas Kunce and Captain Elle Ekman, FTC-2019-0013, September 16, 2019, https://beta.regulations.gov/document/FTC-2019-0013-0074.

Health Care

In America's monopolized health care system, corporations charge patients more for medicine, drugs, supplies, and hospital visits than anywhere else in the world.[87] Health care monopolies have also slashed capacity to boost their own profits, closing hospitals, weakening our supply chains, and moving drug and medical equipment factories overseas. By reversing consolidation and fostering competition within the industry, the Biden administration and Congress can increase resiliency, lower costs, and expand access to quality, local care. They should begin by:

- **Breaking Up Health Care Monopolies:** The best way to address the costs corporate consolidation imposes on our health care system is to reverse it. Congress and federal regulators at the FTC and FDA should launch investigations into concentrated drug, medical device, and hospital industries to determine how to restructure them. Enforcers or regulators should also prevent insurers and providers from integrating, which unfairly excludes unintegrated rivals from covering or treating patients. They should aggressively review future mergers, unwind recent mergers like that between CVS and Aetna, and carefully police anticompetitive practices throughout the industry.
- **Protecting Community and Independent Medical Practices From Consolidation:** Corporate consolidation was already devastating community hospitals and medical practices before COVID-19; the pandemic worsened the situation by leaving these institutions unable to generate revenue from elective procedures and patient visits.[88] Smaller, independent facilities are the lifeblood of community health care, and they are often the cheapest option available.[89] Congress must act to save community and rural hospitals and medical practices, including by ensuring that any future COVID-19 relief measures provide assistance directly to them. The Centers for Medicare & Medicaid Services should also increase funding for individual providers and community hospitals to encourage them not to join larger systems or private-equity partnerships.
- **Capping Hospital Rates:** Congress should pass the Hospital Competition Act of 2019 to freeze the practice of large companies buying smaller hospitals and then raising their prices to increase their profits.[90] Requiring that monopolistic hospitals charge the same prices paid by Medicare

87 Roosa Tikkanen and Melinda K. Abrams, "U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?," *The Commonwealth Fund*, January 30, 2020, https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019.

88 Olivia Webb, "The Avoidable Tragedy of Low Hospital Capacity in New York City," American Economic Liberties Project, Working Paper Series on Corporate Power #3, April 2020, https://www.economicliberties.us/our-work/the-avoidable-tragedy-of-low-hospital-capacity-in-new-york-city/.

89 Katie Bo Williams, "Rural Health Care: Efficient, Safe, and a Lot Cheaper," *Healthcare Dive,* May 8, 2014, https://www.healthcaredive.com/news/rural-health-care-efficient-safe-and-a-lot-cheaper/260313/.

90 Jim Banks, "Rep. Jim Banks Introduces Bill to Lower Hospital Costs," press release, January 11, 2019, https://banks.house.gov/news/documentsingle.aspx?DocumentID=444; Hospital Competition Act of 2019, H.R. 506, 116th Cong., § 1 (2019).

would reduce the cost of health care for the median family by one-third in the first year.[91]

- **Allowing Medicare to Negotiate for Lower Drug Prices:** Congress should make passage of the Lower Drug Prices Now Act an immediate priority.[92]
- **Implementing Patent Reform:** Pharmaceutical manufacturers exploit the existing patent system to foreclose competition and keep prices high. While patent protections are necessary to encourage research and development, the patent system should be reformed to allow only "one-and-done" pharmaceutical patents. This would grant manufacturers a single patent period, barring them from filing a flood of patents on a single drug. Pay-for-delay arrangements should be per se illegal.[93]

By reversing consolidation and fostering competition within the industry, the Biden administration and Congress can increase resiliency, lower costs, and expand access to quality, local care.

- **Fostering Competition in Generics Markets:** Pharmaceutical companies manipulate the markets for generic drugs, suppressing competition in ways that lead to shortages or skyrocketing prices. Federal and state governments should play a stronger role in ensuring affordable access to generic medications, both through the procurement process—by contracting directly with manufacturers to address shortages—and by setting price caps for drugs like insulin, for which there is limited competition but great need.[94]
- **Reforming Anti-Kickback Legislation:** Congress should repeal the federal anti-kickback safe harbor rule that applies to group purchasing organizations (GPOs) as well as pharmacy benefit managers (PBMs) and that has led to drug shortages and concentration.[95] As it currently stands, GPOs receive rebates from medical equipment manufacturers, and PBMs receive rebates from drug manufacturers; both insulate incumbent suppliers from competition. PBMs continue to drive prices higher and receive kickbacks for doing so, while patients suffer increasing

91 Paul S. Hewitt and Phillip Longman, "The Case for Single-Price Health Care," *Washington Monthly,* April/May/June 2018, https://washingtonmonthly.com/magazine/april-may-june-2018/the-case-for-single-price-health-care/.

92 Elijah E. Cummings Lower Drug Costs Now Act, H.R. 3, 116th Cong., § 1 (2019).

93 Michael Bluhm, "The Role of Monopoly in America's Prescription Drug Crisis," Open Markets Institute, December 2019, 41-42, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea4d29f9bc8f31a1117feec/1587860128096/WhitePaper_DrugPrices_Bluhm.pdf, citing Robin Feldman, "May Your Drug Price Be Evergreen," *Journal of Law and the Biosciences 5*, no. 3 (December 2018): 640-643.

94 Affordable Drug Manufacturing Act of 2018, S. 3775, 115th Cong., § 2 (2018); Elizabeth Warren, "Elizabeth Warren: It's Time to Let the Government Manufacture Generic Drugs," *The Washington Post,* December 17, 2018, https://www.washingtonpost.com/opinions/elizabeth-warren-its-time-to-let-the-government-manufacture-generic-drugs/2018/12/17/66bc0fb0-023f-11e9-b5df-5d3874f1ac36_story.html?noredirect=on; Amy Martyn and FairWarning, "States are Trying to Cap the Price of Insulin. Pharmaceutical Companies are Pushing Back," NBC News, August 15, 2020 (reporting that lawmakers "in at least 36 states" are considering price caps on insulin copays), https://www.nbcnews.com/news/us-news/states-are-trying-cap-price-insulin-pharmaceutical-companies-are-pushing-n1236766.

95 Matt Stoller, "On Antitrust Enforcement," *American Compass*, June 11, 2020, https://americancompass.org/essays/on-antitrust-enforcement/.

pharmaceutical costs. Repealing the anti-kickback safe harbor rule would force GPOs and PBMs to negotiate on behalf of hospitals and patients, respectively, not their own profits.

- **Prohibiting Private-Equity Ownership of Hospitals and Medical Practices:** Private equity companies own an increasing number of hospitals, nursing homes, and medical practices, including practices that staff emergency rooms across the country.[96] These private equity companies are run by some of the richest investors in America, and they are reshaping our health care system by closing hospitals, slashing services, increasing prices, and firing doctors or cutting their pay.[97] They have continued to do so during the coronavirus pandemic—even as they received huge bailouts from Congress.[98] Private-equity acquisitions of health care facilities should be restricted or barred.[99]

Labor

Corporate concentration enables big corporations to exert enormous power over working people. One pernicious manifestation is the explosion of non-compete arrangements that limit worker mobility, preventing them from seeking a safer or better-paying job, starting their own businesses, or otherwise competing in the labor market. Another is the rampant misclassification of workers in the gig economy, a trend prior administrations have ignored or abetted. The Biden administration should work with Congress to restore worker power and make it easier for workers to hold abusive and extractive corporations accountable, including by:

The Biden administration should work with Congress to restore worker power and make it easier for workers to hold abusive and extractive corporations accountable.

- **Barring Non-Compete Clauses:** Non-compete clauses restrict wages and dampen entrepreneurship, reducing wages, wage growth, and new-firm entry, and entrenching workers in potentially sexist, racist, or otherwise discriminatory workplaces.[100] Yet anywhere

96 Eileen Appelbaum and Rosemary Batt, "Private Equity Buyouts in Healthcare: Who Wins, Who Loses?" Institute for New Economic Thinking, Working Paper Series No. 118, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593887; Isaac Arnsdorf, "Medical Staffing Companies Owned by Rich Investors Cut Doctor Pay and Now Want Bailout Money," *ProPublica*, April 10, 2020, https://www.propublica.org/article/medical-staffing-companies-owned-by-rich-investors-cut-doctor-pay-and-now-want-bailout-money.

97 Gretchen Morgenson and Emmanuelle Saliba, "Private Equity Firms Now Control Many Hospitals, ERs and Nursing Homes. Is It Good for Health Care?" *NBC News*, May 13, 2020, https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161.

98 Jessica Silver-Greenberg, Jesse Drucker, and David Enrich, "Hospitals Got Bailouts and Furloughed Thousands While Paying C.E.O.s Millions," *The New York Times,* June 8, 2020, https://www.nytimes.com/2020/06/08/business/hospitals-bailouts-ceo-pay.html.

99 One way to restrict such acquisitions is to pass a law similar to the one proposed in California to make such acquisitions more difficult. Chris Cummins, "California Bill to Rein In Private-Equity Health-Care Buyouts Die," *The Wall Street Journal,* September 4, 2020, https://www.wsj.com/articles/california-bill-to-rein-in-private-equity-health-care-buyouts-dies-11599250052.

100 Open Markets Institute et al., "Open Markets Institute, Open Markets, AFL-CIO, SEIU, and Over 60 Signatories Demand the FTC Ban Worker Non-Compete Clauses." See also Sandeep Vaheesan and Matthew Buck, "Non-Competes and Other Contracts of Dispossession," working paper, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727043.

from 30 percent to 50 percent of U.S. workers are bound by a non-compete restriction.[101] As noted above, the FTC should immediately issue rules outlawing non-compete clauses in work arrangements. In addition, Congress should pass the bipartisan Workplace Mobility Act, which would greatly narrow the use of non-competes.[102]

- **Targeting Concentrated Power Among Employers:** Antitrust agencies should challenge monopsonists, opening investigations and challenging mergers. And they should radically limit or entirely stop prosecuting, investigating, or weighing in on licensing or organizing efforts by workers and instead defer to the Department of Labor and local governments.
- **Removing Barriers to Class Action Litigation:** Private class action litigation plays a crucial role in enforcing antitrust laws. Both Congress and the courts, however, have made it more difficult for plaintiffs to bring and win class action cases. And monopolists use class action waivers to make it more difficult for consumers and competitors to challenge their unlawful behavior. Congress should repeal the laws, legal precedents, and federal rules that target and limit class litigation. Specifically, Congress should bar enforcement of pre-dispute class action waivers; remove court-imposed barriers to class action certification; repeal the Class Action Fairness Act; and repeal Rule 23(f) of the Federal Rules of Civil Procedure.
- **Preventing Misclassification of Gig Workers:** Uber, Lyft, DoorDash, and Postmates have built their business model on exploiting the workers who make their services possible. Congress, state legislatures, and state and federal regulators should investigate these and other dominant corporations who profit off of misclassification and the impact their growth has on workers, small businesses, and local communities. States should continue cracking down on worker misclassification and extending employee classification status to gig workers. The Biden administration should stop wielding antitrust laws against independent contractors and encourage—not undermine—state and local efforts to promote collective bargaining. Congress should also pass legislation making misclassification a violation of federal labor law and reject attempts to pass off weakening worker rights and protections as a "third way" approach.[103]

101 Alexander J.S. Colvin and Heidi Shierholz, "Non-compete Agreements," Economic Policy Institute, December 10, 2019, https://www.epi.org/publication/noncompete-agreements/.

102 Senator Chris Murphy, "Murphy, Young Introduce Bill to Limit Non-Compete Agreements, Protect Workers," press release, October 17, 2019, https://www.murphy.senate.gov/newsroom/press-releases/-murphy-young-introduce-bill-to-limit-non-compete-agreements-protect-workers; Workforce Mobility Act of 2019, S. 2614, 116th Cong., § 1 (2019).

103 Carolyn Said, "Lyft Plans Next Gig-Work Move: Making Peace With Unions that Opposed Proposition 22," *LMTOnline,* November 6, 2020, https://www.lmtonline.com/local-politics/article/Uber-Lyft-shares-soar-following-passage-of-15701236.php; Seth D. Harris and Alan B. Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker,'" Brookings Institution, Hamilton Project Discussion Paper 2015-10, December 2015, https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

Media, News, and Entertainment

America's media landscape is now dominated by vertically integrated conglomerates that wield substantial market power across multiple sectors. At the same time, at the hands of Big Tech and private equity, our news publishing industry has fallen apart, presenting an existential threat to an independent press. Congress and federal regulators should restore competition to the media, news, and entertainment industries. It should do so by:

Congress and federal regulators should investigate Hollywood's new market structure, with the goal of preventing the centralization of power in streaming.

- **Investigating and Reviewing Media Mergers:** Congress and federal regulators should launch immediate investigations into the Disney-Fox and Comcast-NBC mergers, and seek to unwind them. And they should prevent future consolidation by aggressively reviewing future acquisitions, blocking further vertical integration, and policing anticompetitive practices throughout the industry, including defensive mergers.
- **Unwinding Entertainment Mergers:** One of the clearest examples of failed merger enforcement was the Antitrust Division's clearance of the Live Nation-Ticketmaster merger in 2010. Though the merger settlement required Ticketmaster to divest its ticketing subsidiary and license its ticketing software to a Live Nation rival, neither arrangement created any substantial competition.[104] By 2018, Ticketmaster was still the dominant ticketing service, ticket prices were at record highs, and Live Nation was reportedly using its control over concert tours to pressure venues into contracting with Ticketmaster. [105] DOJ should continue to police the Live Nation-Ticketmaster consent decree while also seeking to unwind the merger.
- **Investigating Monopsony in Hollywood:** Media conglomerates like Disney and Netflix have used their power to transform the way writers, actors, and other talent are compensated in Hollywood. Both companies have suppressed pay and pursued loss-leading strategies on the backs of their creative workforce. Congress and federal regulators should investigate Hollywood's new market structure, with the goal of preventing the centralization of power in streaming. They should also consider providing credit solutions for small business at very low rates as well as permanent default solutions for new businesses.

104 Sean Burns, "Sens Blumenthal, Klobuchar Urge DOJ Inquiry into Live Nation," *TicketNews,* August 28, 2019, https://www.ticketnews.com/2019/08/sens-blumenthol-klobuchar-doj-live-nation/.

105 Ben Sisario and Graham Bowley, "Live Nation Rules Music Ticketing, Some Say With Threats," *The New York Times,* April 1, 2018, https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

- **Preventing Consolidation in Podcasting:** Compared to other technology industries, podcasting is a relatively open, functional, and egalitarian market. Spotify, however, is attempting to dominate the industry by rolling up power the way Google and Facebook did over the internet.[106] The FTC should use its Section 6(b) authority to study the podcasting industry to understand Spotify's and other firms' acquisition activity, and whether companies are making potentially anticompetitive acquisitions of nascent or potential competitors. Such research is essential to creating effective policies to combat corporate power in the digital audio market.

- **Blocking Further Monopolization of News Publishing:** The most important thing Congress can do to save American journalism is to eliminate Google and Facebook's monopolization of advertising revenue. The business models of both platforms rely on advertising revenue that previously flowed to newspapers; they control 77 percent of such revenue today.[107] The results of this monopolization and subsequent industry consolidation are stark and frightening: 2,000 out of 3,143 U.S. counties now have no daily newspaper.[108] Congress and federal regulators should also prohibit private-equity predation in the news publishing industry by passing the Stop Wall Street Looting Act and using antitrust authorities to block private equity from acquiring newspapers simply in order to drive down wages and initiate layoffs.[109]

- **Pass the Journalism Competition and Preservation Act:** Facebook and Google's control over online advertising is so complete that even innovative new media businesses like BuzzFeed and HuffPost can't generate revenue.[110] Congress should break Big Tech's chokehold over advertising markets and ensure that news organizations receive a fair share of the data and ad revenue generated by their content.[111] Rep. David Cicilline's bipartisan bill would provide news publishers a narrow and temporary authority to collectively negotiate with dominant online platforms.[112]

106 Matt Stoller, "Will Spotify Ruin Podcasting," *BIG,* February 8, 2020, https://mattstoller.substack.com/p/will-spotify-ruin-podcasting.

107 "Local Journalism," U.S. Senate Committee on Commerce, Science, and Transportation, 3; Matt Stoller, "Ad Tech and the News: Background on the Rise of Surveillance Advertising and Its Effects on Journalism," Open Markets Institute, Center for Journalism & Liberty, 2020, https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f75107ef21702786068d8a3/1601507762535/adtech-cjl-sept2020.pdf.

108 Tom Stites, "About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds," *Poynter,* October 15, 2018, https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds/.

109 "Warren, Baldwin, Brown, Pocan, Jayapal, Colleagues Unveil Bold Legislation to Fundamentally Reform the Private Equity Industry," press release, Senator Elizabeth Warren, July 18, 2019, https://www.warren.senate.gov/newsroom/press-releases/warren-baldwin-brown-pocan-jayapal-colleagues-unveil-bold-legislation-to-fundamentally-reform-the-private-equity-industry; Stop Wall Street Looting Act, S. 2155, 116th Cong. § 1 (2019).

110 "Buzzfeed-Huffington Post Merger Reveals Advertising Market Is in Crisis," press release, American Economic Liberties Project, November 19, 2020, https://www.economicliberties.us/press-release/buzzfeed-huffington-post-merger-reveals-advertising-market-is-in-crisis/.

111 Sanjukta Paul and Hal Singer, "Countervailing Coordination Rights in the News Sector are Good for the Public (A Response to Professor Yun)," *Competition Policy International,* June 12, 2019, https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun/#:~:text=1%20Sanjukta%20Paul%20is%20Assistant,Georgetown's%20McDonough%20School%20of%20Business.

112 Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. § 1 (2019), https://www.congress.gov/bill/116th-congress/house-bill/2054?s=1&r=4.

Telecommunications

Today, a handful of corporations provide essential services like broadband, radio, and wireless, thereby controlling access to information, communications, and entertainment for millions of Americans. The FCC has significant authority to foster competition and facilitate the free exchange of information and ideas fundamental to a democratic society. The FCC should use its power to make communications markets work for the whole country—not just corporate giants—including by:

- **Reimplementing the Open Internet Rules:** The Trump administration repealed the FCC's Open Internet Order, which protected net neutrality by regulating broadband internet access as a "telecommunications service" under Title II of the Communications Act.[113] The Open Internet Order should be immediately restored, and the FCC should explore rate regulation as a solution to concentrated market power. Congress should also enshrine the Open Internet Order into law.
- **Enforcing Structural Separations Among Communications Companies:** The FCC should prevent powerful communications companies from owning and exploiting their power over essential infrastructure to dominate other lines of business. For guidance, the FCC should look to its Financial Interest and Syndication Rules, or "Fin-Syn R≠≠≠≠ules," which prevented networks from owning prime-time programming as well as owning stakes in syndicated programs.[114] The FCC could also consider strengthening various media ownership rules, which set limits on how many companies and markets any one company can operate in.[115]
- **Preventing Further Consolidation:** The FCC has a lower legal standard for blocking communications mergers than the DOJ.[116] Yet the FCC has largely deferred to the DOJ in merger cases. The FCC should use its authority to police corporate consolidation more aggressively than antitrust law allows. The agency should unwind megamergers, like Nexstar's $4.1 billion acquisition of Tribune Media, that created broadband duopolies or monopolies, vertically integrated communications infrastructure and content, or consolidated control over the public airwaves.[117] And it should assertively police existing consent decrees, like the one it entered with T-Mobile and Sprint, penalizing noncompliance with harsh fines or by seeking an unwinding. If, as various binding commitments require,

113 "FCC Acts to Restore Internet Freedom," press release, Federal Communications Commission, December 14, 2017, https://www.fcc.gov/fcc-releases-restoring-internet-freedom-order#:~:text=On%20January%205%2C%202017%2C%20the,mobile%20broadband%20Internet%20access%20service; see Daniel A. Hanley, "Another Trump Legacy: Spreading Price Discrimination on the Internet," *Washington Monthly,* July 30, 2020 (noting that, to reinstate net neutrality, "all a Biden administration would need to do is appoint favorable FCC commissioners)", https://washingtonmonthly.com/2020/07/30/another-trump-legacy-spreading-price-discrimination-on-the-internet/.

114 Lina M. Khan, "The Separation of Platforms and Commerce."

115 Daniel A. Hanley, "The FCC Has Untapped Powers. The Next Administration Needs to Use Them," *Washington Monthly,* October 9, 2020, https://washingtonmonthly.com/2020/10/09/the-fcc-has-untapped-powers-the-next-administration-needs-to-use-them/.

116 Daniel A. Hanley, "The FCC Has Untapped Powers."

117 Dade Hayes, "Nexstar Gets FCC Approval for $4.1B Acquisition of Tribune Media," *Deadline,* September 16, 2019, https://deadline.com/2019/09/nexstar-gets-fcc-approval-for-4-1b-acquisition-of-tribune-media-1202736000/.

T-Mobile does not maintain the jobs it promised or if Dish does not become a facilities-based carrier, state and federal enforcers should unwind T-Mobile's acquisition of Sprint.[118] As the Supreme Court has written, assuring the public "has access to a multiplicity of information sources is a governmental purpose of the highest order," because "it promotes values central to the First Amendment."[119]

The possibility of major infrastructure investment as part of a recovery package makes it all the more important that the Biden administration and Congress work to restore competition in the U.S. transportation sector.

- **Making Full Use of Limits on Media Ownership:** As part of its past legacy in limiting concentrations of power over U.S. media, the FCC put in place limits on how many broadcast stations any one entity could own.[120] The FCC should continue to enforce these rules and even consider strengthening them.
- **Revisiting FCC Consequences for Sinclair Broadcasting:** In 2020, the FCC fined Sinclair Broadcast Group $48 million after it tried to acquire Tribune Media and misled the FCC. Chairman Ajit Pai called Sinclair's conduct "completely unacceptable."[121] However, the FCC could also have revoked Sinclair's broadcasting licenses.[122] The FCC should consider whether further proceedings are necessary to hold Sinclair accountable and check its abuse of power over U.S. media markets.
- **Supporting Community and Low-Income Broadband and Wi-Fi Access:** Under the Trump administration, the FCC discouraged the development of community broadband networks, including locally and cooperatively owned networks, which provide better service at lower cost.[123] The Biden administration should reverse this position and work with

118 "Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger," press release, California Attorney General, March 11, 2020, https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state%E2%80%99s-challenge-t-mobile; "DISH to Becomes National Facilities-based Wireless Carrier," press release, DISH, July 26, 2019 ("DISH has committed to the Federal Communications Commission that DISH will deploy a facilities-based 5G broadband network capable of serving 70 percent of the U.S. population by June 2023, and has requested that its spectrum licenses be modified to reflect those commitments."), https://ir.dish.com/news-releases/news-release-details/dish-become-national-facilities-based-wireless-carrier; Michael Hiltzik, "Column: With Its Sprint Merger in the Bag, T-Mobile is Already Backing Away From Its Promises," *Los Angeles Times,* June 26, 2020, https://www.latimes.com/business/story/2020-06-26/tmobile-merger-promises.

119 Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994).

120 Daniel A. Hanley et al., "Financing Free Speech: A Typology of Government Competition Policies in Information, Communication, and Media Markets," Center for Liberty & Journalism, 5-7, September 2020, https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f6a6224a4d0b87437a0a7f0/1600807462241/financing-free-speech_cjl-sept2020.pdf.

121 "Sinclair Agrees to Pay $48 Million Civil Penalty," press release, Federal Communications Commission, May 6, 2020, https://docs.fcc.gov/public/attachments/DOC-364198A1.pdf.

122 Jon Brodkin, "FCC Fines Sinclair $48M, Refuses to Revoke Its Broadcast Licenses," *Ars Technica,* May 7, 2020, https://arstechnica.com/tech-policy/2020/05/fcc-fines-sinclair-48m-refuses-to-revoke-its-broadcast-licenses/?comments=1.

123 David Shepardson, "U.S. FCC Votes to Tighten Rules on Cable Franchise Fees," *Reuters,* August 1, 2019, https://www.reuters.com/article/usa-fcc-television/us-fcc-votes-to-tighten-rules-on-cable-franchise-fees-idUSL2N24X180; Jon Brodkin, "FCC Republican Claims Municipal Broadband is Threat to First Amendment," *Ars Technica,* October 30, 2018, https://arstechnica.com/tech-policy/2018/10/fcc-republican-claims-municipal-broadband-is-threat-to-first-amendment/.

Congress to invest in community broadband infrastructure—and if necessary, preempt state and municipal prohibitions on community broadband and Wi-Fi networks.[124] Congress could subsidize privately owned competitors to take on cable incumbents via reverse auctions of the kind used to promote entry in unserved markets. The FCC could also expand or initiate programs to help low-income households obtain broadband access. Its current Lifeline Program provides low-income people with much-needed help to access telephony; broadband too should be universally available.[125]

- **Reforming the Federal Communications Commission:** The Office of Economics and Analytics was created under the Trump administration to make it more difficult for the FCC to exercise its regulatory authority and should be eliminated.[126]

Transportation

America's transportation industries are increasingly concentrated. Deregulation in the airline and railroad industries paved the way for decades of consolidation, while mergers and acquisitions in industries like trucking have increased dramatically in recent years.[127] The possibility of major infrastructure investment as part of a recovery package makes it all the more important that the Biden administration and Congress work to restore competition in the U.S. transportation sector, including by:

- **Protecting Airline Consumers:** The Department of Transportation has significant regulatory authority to regulate air travel, protect consumers from airline abuses, and improve safety. DOT should use this authority to save and re-envision the airline industry post-pandemic. The department should start by retracting its rulemaking on Defining Unfair or Deceptive Practices, and by issuing congressionally mandated rules on refunds, late baggage, and aviation worker protections.[128] DOT should then issue a bold regulatory agenda to protect airline consumers post-pandemic, increase transparency, bar abusive fees, regulate seat pitch and size, prevent

124 Daniel A. Hanley, "Universal Broadband, Now More Than Ever," *The American Prospect,* October 2, 2020, https://prospect.org/economy/universal-broadband-now-more-than-ever/.

125 Hanley, "Universal Broadband"; Emily Birnbaum, "Jessica Rosenworcel Could Be the FCC Chair Under Biden. She Certainly Sounds the Part," *Protocol,* September 10, 2020 (quoting then-FCC Commissioner Jessica Rosenworcel saying, "I think we need 100 percent of our households online. It needs to be a national policy – 100 percent, nothing less, because everyone needs to have access to affordable and reliable broadband."), https://www.protocol.com/jessica-rosenworcel-fcc-interview.

126 "Ajit Pai's Pro-Monopoly Overhaul at the FCC," *The Corner, O*pen Markets Institute, January 25, 2018, https://www.openmarketsinstitute.org/publications/corner-newsletter-jan-25-2018overhaul-at-the-fcc-big-medicine-vs-big-pharma-antitrust-tech.

127 Phillip Longman and Lina Khan, "Terminal Sickness," *Washington Monthly,* March/April 2012, https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness/; Matthew Buck, "As Wall Street Loots America's Railroads, Manufacturers and Farmers Suffer," *The Corner,* Open Markets Institute, October 4, 2018, https://www.openmarketsinstitute.org/publications/corner-newsletter-october-4-2018-railroads-squeeze-farmers-manufacturers-wall-street-sec-commissioner-jackson-concentration-problem-hurting-small-businesses; Eric M. Johnson and Nick Carey, "U.S. Truck Firms Accelerate into the Merging Lane," *Reuters,* November 6, 2017, https://www.reuters.com/article/us-usa-trucking-m-a/u-s-truck-firms-accelerate-into-the-merging-lane-idUSKBN1D61EC; Aaron Huff and James Jaillet, "Carriers Seize on Conditions for Cheap Capacity as Trucking Acquisitions Ramp Up," *Commercial Carrier Journal,* February 7, 2020, https://www.ccjdigital.com/carriers-cheap-trucking-acquisitions/.

128 "Defining Unfair or Deceptive Practices," *Federal Register* 85, no. 235 (February 28, 2020): 78707; Letter from Senators Edward Markey, Maria Cantwell, Tammy Baldwin, and Richard Blumenthal to Secretary of Transportation Elaine L. Chao, June 10, 2020, https://www.markey.senate.gov/imo/media/doc/DOT%20Unfair%20and%20Deceptive%20Practices%20Rule%20letter.pdf; Association of Flight Attendants, "10 Hours Rest is Law – Implement Now," November 13, 2019, https://www.afacwa.org/10_hours_rest_is_law_implement_now.

maintenance outsourcing, strengthen competition through expanded access to flight data, and reinvigorate enforcement of existing rules like those on tarmac delays.[129]

- **Investigating and Reviewing Airline Mergers:** Congress and federal regulators should launch immediate investigations into all airline mergers concluded since 2007. They should study the impacts of industry consolidation on consumers, workers, and communities, and research how to re-regulate the airline industry, including by requiring airlines to meet baseline standards for regional access.[130] To guard against post-pandemic consolidation, they should challenge future airline mergers and aggressively police anticompetitive practices across the industry.
- **Investigating and Reviewing Railroad Mergers:** Congress and federal regulators should also launch investigations into rail industry consolidation, including accusations of price-fixing in freight rail.[131] Aggressive antitrust enforcement is necessary not only to guard against future anticompetitive mergers but also to prevent monopolistic incumbents from hampering efforts to build out high-speed rail.
- **Investigating Concentration in Other Transportation Industries:** Congress should investigate concentration, corporate power, and practices in the trucking, pipeline, bus, transit, highway construction, and maritime industries. Like the House Antitrust Subcommittee's digital markets investigation, transportation investigations should examine whether monopolistic corporations in each industry have built or abused monopoly power and recommend a series of policies to restore competition, improve service and safety, and protect and empower workers, including through granting them collective bargaining rights.[132] Thorough investigations are a prerequisite to stronger enforcement and statutory reform.

For decades, federal and state policies have helped the biggest corporations at local businesses' expense, making it more difficult for smaller firms to access markets and sapping dynamism from the American economy.

129 Hal Singer, "How Airlines Exploit Laws to Literally Squeeze Customers," *The American Conservative,* December 23, 2019, https://www.theamericanconservative.com/articles/how-airlines-exploit-laws-to-literally-squeeze-customers/.

130 Phil Longman and Lina Khan, "Terminal Sickness."

131 David C. Lester, "More Shipper Accusations of Railroad Price Fixing," *Railway Track and Structures*, January 6, 2020, https://www.rtands.com/freight/class-1/more-shipper-accusations-of-railroad-price-fixing/.

132 Sanjukta M. Paul, "The Enduring Ambiguities of Antitrust Liability for Worker Collective Action," *Loyola University Chicago Law Journal* 47, no. 3 (2016): 979-984.

- **Reforming the Federal Aviation Administration:** The Boeing 737 Max fiasco was aided and abetted by an FAA that has long been captured by industry.[133] The FAA must make sweeping reforms to restore its independence, strengthen accountability and oversight, and ensure aviation safety. At a bare minimum, the FAA should overhaul its process for approving new plane designs—and adding new derivatives to old plane designs—and insulate it from any corporate influence. Congress and the FAA should strengthen whistleblower protections for U.S. aviation manufacturing employees and impose strict standards on maintenance performed in foreign repair stations. Congress could also weigh further reforms, like establishing a systemic risk council to determine whether an aviation company's business model undermines its safety and reliability, and stiffen fees and penalties on repeat corporate offenders.[134]
- **Appointing Independent Regulators:** The Biden administration should be especially careful to appoint to the Surface Transportation Board, Federal Aviation Administration, and Federal Maritime Commission regulators who are dedicated to public service and independent from corporate power.

Small Business

Small and independent businesses make our communities more prosperous, entrepreneurial, and connected, creating jobs and strengthening our middle class. Yet for decades, federal and state policies have helped the biggest corporations at local businesses' expense, making it more difficult for smaller firms to access markets and sapping dynamism from the American economy. The Biden administration and Congress can begin rebuilding America's small business economy by:

- **Reforming the Small Business Administration:** The SBA has long been understaffed, underfunded, and underutilized. As a result, it lacks the tools necessary to provide robust assistance in underserved areas of the economy, as we saw during COVID-19. Instead of providing direct, equitable support to small businesses, SBA was forced to work through private financial intermediaries through the Payroll Protection Program. Congress should strengthen and reform the SBA, including by funding and authorizing the agency to make direct loans to small and medium-sized businesses to rebuild supply chains and manufacturing capacity post-pandemic.

133 Maureen Tkacik, "Crash Course," *The New Republic,* September 18, 2019, https://newrepublic.com/article/154944/boeing-737-max-investigation-indonesia-lion-air-ethiopian-airlines-managerial-revolution.

134 Maureen Tkacik, "Rescue Mission: Bailing Out Boeing and Rebuilding it to Thrive," American Economic Liberties Project, Working Paper Series on Corporate Power #1, March 23, 2020, https://www.economicliberties.us/our-work/boeing-bailout-report-2020/.

- **Reforming Franchising Law:** Big franchisors exercise enormous power over their franchisees, and they use it to extract profit at franchisees' and workers' expense.[135] The FTC should exercise its regulatory authority over franchises to stop unfair, deceptive, and discriminatory franchising practices.[136] The FTC should continue the process of updating its Franchise Rule, and the Department of Labor and National Labor Relations Board should restore the joint employer standard for franchisor liability.[137] The FTC and Congress should investigate consolidation in the restaurant industry, including the impacts of highly consolidated food-delivery services and potentially unfair or deceptive practices by franchisors.[138] Either body could restrict franchisors' ability to insert no-poaching clauses in franchise agreements, which prevent franchisees from hiring workers away from other franchisees. And Congress should strengthen and reform franchising law, including by giving the FTC more power to go after bad actors and by prohibiting other abusive contractual terms in franchising agreements. This is a critical strategy for supporting minority small-business owners, as nearly a third of franchises in 2012 were owned by people of color, compared to 18 percent of nonfranchised businesses.[139]

- **Strengthening Predatory-Pricing Law:** Industry incumbents should not be allowed to leverage their vast resources to bleed smaller competitors of all their resources until they can no longer afford to stay in business. Congress should eliminate the "recoupment" test to make it easier for the government or private parties to bring predatory-pricing lawsuits.[140]

- **Targeting Aid to Microbusinesses:** COVID-19 relief efforts left many of the smallest businesses behind. Congress should direct assistance to small "micro" businesses in any future recovery packages, as Rep. Ayanna Pressley and then-Sen. Kamala Harris proposed in the Saving Our Streets Act.[141]

- **Supporting Community Banks:** Community-based financial institutions like credit unions and small and mid-sized banks are vital to the small-business economy. Though they control only 16 percent of banking assets, they provide more than 50 percent of all small-business

135 Brian Callaci, "Control Without Responsibility: The Legal Creation of Franchising, 1960-1980," *Enterprise & Society* (2020): 1-27.

136 "FTC Commissioner Rohit Chopra on Protecting Franchisees," *CNBC,* September 25, 2020, https://www.cnbc.com/video/2020/09/25/ftc-commissioner-rohit-chopra-small-business-franchises-squawk-box.html.

137 "With 'Joint Employer' Rule, Trump NLRB Sides With Corporations Again," press release, National Employment Law Project, February 25, 2020, https://www.nelp.org/news-releases/joint-employer-rule-trump-nlrb-sides-corporations/; Jonathan Maze, "Calls Grow for Tighter Franchise Regulations," *Restaurant Business,* September 27, 2020, https://www.restaurantbusinessonline.com/financing/calls-grow-tighter-franchise-regulations.

138 "Schakowsky, Scanlon, Jayapal Lead Inquiry Into Unfair, Deceptive Digital Food Delivery Practices Hurting Small Restaurants and Consumers," press release, Rep. Jan Schakowsky, September 22, 2020, https://schakowsky.house.gov/media/press-releases/schakowsky-scanlon-jayapal-lead-inquiry-unfair-deceptive-digital-food-delivery.

139 International Franchise Association Foundation, "Franchised Business Ownership by Minority and Gender Groups," April 5, 2019, 1, 5, https://www.franchise.org/sites/default/files/2019-04/Franchise%20Business%20Ownership%202018_0.pdf.

140 Lina Khan, "Amazon's Antitrust Paradox," 722-730.

141 "Rep. Pressley, Senator Harris Introduce Groundbreaking Bill to Support Small Neighborhood Businesses During COVID-19 Pandemic," press release, Rep. Ayanna Pressley, May 6, 2020, https://pressley.house.gov/media/press-releases/rep-pressley-senator-harris-introduce-groundbreaking-bill-support-small.

loans, and they understand the makeup and needs of the communities they serve.[142] Yet the banking sector has consolidated dramatically since the 2008 financial crisis, and a growing share of counties no longer have any local banks at all—a reality that now impairs their ability to shore up local businesses during COVID-19.[143] Congress and federal regulators need to break up the consolidated financial industry and restore lending power to smaller, local lenders. Such efforts to diversify business lending are especially vital to supporting women entrepreneurs and entrepreneurs of color, as well as those in rural areas.

Provide Committed Leadership From the White House

Enacting aggressive competition policies across government requires dedicated, high-level leadership from the White House. That can be accomplished by:

- **Ensuring That Nonenforcement Officials Believe in Fighting Corporate Monopolies:** President Biden must appoint to leadership positions individuals who are committed to combating corporate power and empower them to direct and coordinate antimonopoly efforts at every agency. His administration should reject policymakers who have held senior roles in the industries they will regulate or who have worked as corporate lobbyists or consultants.
- **Endorsing and Implementing the House Antitrust Digital Markets Recommendations:** The House Antitrust Subcommittee's Competition in Digital Markets Report provides comprehensive recommendations for reforming antitrust laws for the 21st century. The Biden administration should endorse the report, direct federal agencies to implement its recommendations, and work with Congress to advance the statutory changes it outlines.
- **Implementing E.O. 13,725:** The Biden administration should immediately and aggressively implement the 2016 competition executive order. The Biden White House should put a senior advisor in charge of implementation to ensure that all federal agencies use all regulatory tools at their disposal to ensure that injured workers, businesses, and consumers can seek vindication under antimonopoly laws, and that markets under their jurisdiction are open and competitive. This includes asking all nominees to Senate-confirmed positions—and all leadership appointed through Vacancies Act authorities—to commit to prioritizing implementation. This also includes complying with the order's reporting requirements by publicly publishing agencies' competition agendas on a semi-annual basis.

142 "Small Business Lending by Size of Institution, 2018," Institute for Local Self-Reliance, May 14, 2019, https://ilsr.org/small-business-lending-by-size-of-institution-2014/.

143 Stacy Mitchell, "Report: Fewer Small Businesses are Receiving Federal Relief Loans in States Dominated by Big Banks," Institute for Local Self-Reliance, April 29, 2020, https://ilsr.org/banking-consolidation-ppp-report/#_ednref5.

- **Removing Barriers to Antimonopoly Enforcement:** The Biden White House should make sure that its efforts to coordinate competition policy advance, not hamper, antimonopoly goals. Policy councils and the Office of Cabinet Affairs should be used to speed and support, not slow, federal agency antitrust enforcement, rulemaking, and investigations. The White House regulatory review process should also be streamlined and reformed to eliminate barriers to checking corporate power and reversing concentration. For example, the Biden White House should rescind executive orders requiring agencies to minimize regulatory activity and functionally eliminate the Office of Information and Regulatory Affairs.[144]

144 Kalen Pruss, "It's Time for OIRA to Go," *The American Prospect,* April 24, 2020, https://prospect.org/day-one-agenda/its-time-for-oira-to-go/.

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