IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. FACEBOOK, INC., Defendant.	Case No. 1:20-cv-03590-JEB

FACEBOOK, INC.'S MOTION TO DISMISS
THE FTC'S AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying memorandum of law, Defendant Facebook, Inc., by and through its undersigned counsel, hereby moves this Court for an order dismissing with prejudice the FTC's Amended Complaint for Injunctive and Other Equitable Relief, ECF No. 82, for failure to state a claim upon which relief can be granted.

Facebook respectfully requests oral argument on its motion pursuant to Local Civil Rule 7(f).

DATED: October 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2021, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

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MEMORANDUM IN SUPPORT OF
FACEBOOK, INC.'S MOTION TO DISMISS
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INTRODUCTION

The Federal Trade Commission ("FTC") alleged no plausible factual basis for branding Facebook an unlawful monopolist. *See FTC v. Facebook, Inc.*, --- F. Supp. 3d ---, No. 20-3590, ECF No. 73, at 27 (D.D.C. June 28, 2021) ("Op."). This Court gave the agency a second chance to make a valid claim. But the same deficiency that was fatal to the FTC's initial complaint remains: the Amended Complaint, ECF No. 82 ("AC"), still pleads no facts plausibly establishing that Facebook has, and at all relevant times had, monopoly power – the power to raise price or restrict output – in what the Court characterized as the "idiosyncratically drawn" "Personal Social Networking Services" ("PSNS") market. Op. 27. The FTC's initial complaint asserted the unsupported conclusion that Facebook had "in excess of 60%" of that alleged market. Compl. ¶ 64, ECF No. 51. The agency provided no facts to support either the numerator (Facebook's portion of the PSNS market) or the denominator (the total alleged PSNS market), and it offered no plausible means of calculating any market share. The AC repeats previously rejected arguments, but adds no factual allegations supporting the claim of a 60%-plus market share; it merely ratchets up its groundless projection to 70% or even 80%, replacing unsupported assertion with "arguendo" assumption. The agency has to take this tack because no reliable data exists for its contorted PSNS market, which is a litigation-driven fiction at odds with the commercial reality of intense competition with surging rivals like TikTok and scores of other attractive options for consumers. The AC rests on guesswork rather than facts and fails the *Twombly* test for multiple reasons.

The FTC Still Has No Valid Factual Basis for Alleging Monopoly Power. The FTC has again failed to allege a plausible factual basis for the necessary claim that Facebook has and had a dominant share of the alleged PSNS market. The Court dismissed for this reason, but granted leave to amend so that the agency could try to supply the necessary factual allegations.

It has not come close to doing so. To support its new, supercharged market-share numbers, the FTC relies on commercial data regarding total usage of only three cherry-picked apps: Facebook, Instagram, and Snapchat. The vendor of this data disclaims any responsibility for its accuracy or completeness. But the FTC uses it nonetheless to calculate PSNS market share – *even though the data does not even purport to measure PSNS usage*. Rather, it measures overall usage – including non-PSNS usage. Admitting this mismatch, the agency asks the Court to *assume* "arguendo" that data from a different market can establish share in the alleged market, without any facts to support that assumption. This is legally insufficient; as the Court has already warned, aggregate (*i.e.*, non-PSNS) metrics cannot show PSNS market share. *See* Op. 29-30. Courts routinely dismiss antitrust claims that rely on data that does not correspond to the market actually alleged. Our research has disclosed no decision in which a court has permitted a case to proceed based on such admittedly inapposite data paired with conceded guesswork. The absence of any data, from any source, for a "PSNS" market makes clear that the proposed market reflects the FTC's litigation imperatives – not commercial realities.

The FTC's effort to allege market power through dominant share fails for an additional reason: the agency still has not alleged any facts plausibly establishing that Facebook's market position was protected by "barriers to entry" that prevented competition. *See* Op. 18 ("market power is meaningful only if it is durable") (brackets omitted). Instead, the FTC's factual allegations taken as true establish the opposite: entry not only was possible, but in fact occurred, including by startups like Instagram and Snapchat. And the FTC alleges nothing that would prevent services with established networks – the agency names several, including YouTube (Google), iMessage (Apple), Twitter, and TikTok (ByteDance) – from becoming PSNS rivals. That is exactly what the FTC claims WhatsApp would have done – indeed, that is the sole basis for its challenge to Facebook's acquisition of that company.

The FTC hedges its bets by returning to claims the Court already rejected, without invitation to replead. It recycles the claim that direct evidence proves Facebook's monopoly power. But the FTC again fails to allege facts sufficient to support a "rare" case of such direct evidence – that is, facts plausibly establishing that Facebook actually limited output to "'profitably raise prices above the competitive level.'" *Id.* (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam)). The agency effectively acknowledged before that it could not make that case. *See* FTC Opp'n 8, ECF No. 59 (acknowledging that such proof is "only rarely available"). And for good reason: Facebook has never charged users any price and has never restricted output – not before it allegedly became a monopolist and never since. The FTC also reasserts that Facebook's quality is somehow lower and that Facebook's total revenues from advertising somehow indicate monopoly power in a market for free PSNS products. These assertions differ little from those the Court already found inadequate and do not come close to establishing a plausible, fact-based claim of monopoly power.

The FTC Still Has No Valid Factual Basis for Claiming That Facebook Maintained Monopoly Power Through Unlawful Exclusionary Conduct. To satisfy *Twombly*, the agency must also plead *facts* establishing a plausible claim that Facebook maintained a PSNS monopoly through unlawful "exclusionary conduct." But, as before, the AC fails to allege facts showing that either Facebook's *cleared* acquisitions or its *lawful* Platform policies violated antitrust law.

As to the acquisitions, the agency offers only *its* speculation that consumers might have better products if Instagram and WhatsApp had remained independent, based on the theory that each might have someday grown into a unique Facebook rival, and *Facebook's* speculation that these firms might become rivals. Such speculation has *never* been a valid basis for condemning acquisitions as "exclusionary" under Section 2 of the Sherman Act. Tellingly, the agency itself reviewed and cleared the Instagram and WhatsApp transactions under Section 7 of the Clayton

Act, which Congress passed to block acquisitions that could not amount to violations of Section 2. No such cleared acquisition has *ever* been found years later to violate Section 2.

What the agency is doing here is patent: it seeks to upend settled law. Indeed, it seeks to do so twice over, asking the Court both to condemn under Section 2 acquisitions that the FTC cleared under Section 7, and to do so based on a novel "nascent competitor" theory that conflicts with decades of settled antitrust precedent. The FTC falls back on arguing that acquisitions can be unlawful merely because they "neutralize" independent firms. But that cannot be the law because it would condemn every acquisition of an actual or potential competitor.

Taking the allegations in the AC as true, the FTC actually establishes the legality of Facebook's acquisitions when it alleges that Facebook used Instagram and WhatsApp to broaden its competitive "moat" by operating both acquisitions "at scale" and introducing superior services and features – making them more popular with consumers. Those allegations demonstrate that the transactions were procompetitive success stories. Every firm, including an alleged monopolist, is legally privileged to improve its product and service offerings for the benefit of consumers. *See Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998-1000 (9th Cir. 2010). That is the essence of competition that the antitrust laws protect, not exclusionary conduct that the antitrust laws forbid.

Regarding the Platform allegations, the FTC simply ignores the Court's prior, controlling, and correct decision. The AC reiterates rejected allegations and adds rhetoric but no material facts. As this Court explained after review of the Platform policies themselves, those policies were lawful, and the agency lacks authority to litigate long-past applications of the policies. *See* Op. 39. And, once again, the agency has no facts whatsoever to establish a plausible claim that policies ended in 2018 and last enforced even earlier are "imminently" to be restored, much less

that such policies will imminently be enforced in a manner that will somehow squeeze through any "narrow-eyed needle" that may still be open for such claims. Op. 36.

The AC Was Not Approved by Valid FTC Vote; the Chair Should Have Been Recused. The FTC's vote to authorize the AC was invalid, and the AC should be dismissed for that reason. The new Chair cast the decisive vote in a split 3-2 decision. As Facebook demonstrated in its Petition to recuse the Chair from participation in this proceeding, the Chair's authorship of a House Judiciary Subcommittee report asserting that Facebook has violated Section 2 – among other ad hominem public charges – at the very least creates the appearance that the Chair has prejudged the facts and cannot be unbiased or impartial. *See* Hansen Decl. Exs. A, B. The Chair's participation in the proceeding violates both basic due process safeguards and federal ethics rules. The FTC refused even to consider the Petition on the merits. It instead took the remarkable position that due process and federal ethics rules *do not apply* except when the Commissioners are engaged in rulemaking or sitting as judges in an administrative proceeding. That is not the law.

* * *

It is now clear that the agency had no basis for its naked allegation that Facebook has or had a monopoly PSNS market share and no facts to support a claim that barriers to entry prevented the vigorous competition and output expansion that have, in fact, occurred. The FTC challenges acquisitions that the agency cleared after its own contemporaneous review and that resulted not in harm but product improvements, price cuts, and dramatic output expansion to the benefit of many millions of U.S. consumers (all for free, in unlimited quantities). And the agency relitigates claims concerning Platform policies and long-past applications of those policies that this Court already properly dismissed. The case is entirely without legal or factual support. This is as true now as it was before. The case was refiled, on a 3-2 vote, by an agency that seeks

unapologetically to expand antitrust law beyond its settled and appropriate bounds. The Court should now dismiss the FTC's case with prejudice.

LEGAL STANDARD

"[A] complaint must contain sufficient factual matter, [if] accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted), and that rises "above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court should not accept as true "'a legal conclusion couched as a factual allegation,' [or] an inference unsupported by the facts set forth in the Complaint." *CREW v. Pompeo*, 2020 WL 5748105, at *4 (D.D.C. Sept. 25, 2020) (quoting *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006)).

ARGUMENT

I. THE FTC AGAIN FAILS TO ALLEGE FACTS PLAUSIBLY ESTABLISHING MONOPOLY POWER

A. The FTC Fails To Cure the Fatal Deficiency the Court Identified Because the Agency Alleges No Facts Plausibly Supporting Any PSNS Market Share

The Court correctly held that an essential element of any Section 2 claim is the power to raise price substantially above and restrict output substantially below competitive levels. *See* Op. 18. The Court also correctly held that the FTC had not provided *any facts* supporting a plausible case of monopoly power in the "idiosyncratically drawn" PSNS market it defined. Op. 27. Rejecting the agency's half-hearted assertion that it could offer direct proof of Facebook's power, *see* Op. 19, the Court directed the FTC to plead facts, if it could, to support its opening assertion that Facebook had, at all relevant times, a PSNS market share "in excess of 60%," Compl. ¶ 64. This was the specific task set for the agency. *See* Op. 32 (directing FTC to "cure *these* deficiencies") (emphasis added) (cleaned up).

But given nearly two months to supplement its deficient allegations, which followed a year and a half of exhaustive investigation, the agency has returned with no facts plausibly supporting its claim that Facebook had and has a greater than 60% share – now upped to 70% or 80% – of the alleged PSNS market. It is now evident that the FTC's monopoly-power allegation was "naked" all along. Op. 2.

1. ***The FTC's avowedly inapt Comscore data measuring non-PSNS usage provides no plausible basis for an allegation of PSNS market share.*** The Court's initial ruling was expressly tied to its recognition that "some of the features offered by a Facebook or Instagram or Path are not, seemingly, part of those firms' PSN-services offerings as defined by the FTC." Op. 29-30. To strategically exclude many of the obvious rivals that compete with Facebook for user time and attention online, the FTC claims that a service is in the alleged market only if it offers a peculiarly defined, three-element feature; and then only if consumers "primarily" use that feature instead of all other features the service offers; and then only if consumers use that primary feature for the specific purpose of sharing content with friends and family. AC ¶¶ 166-168; 172-176. Because of "the uncertainty left open by the Complaint as to exactly which features of Facebook, Instagram, *et al.* do and do not constitute part of their PSN services," the FTC assumed the burden of alleging Facebook's share of this "idiosyncratically drawn" market for PSNS use – not the market for all time spent on apps that have PSNS features. Op. 27, 30.

But that is exactly what the FTC has failed to do, ignoring the Court's warning that "time spent 'on Facebook' or 'on Instagram' bears an uncertain relationship to the actual metric that would be relevant: time spent using their PSN services in particular." Op. 30. The agency relies on a commercial data source (Comscore) that does not track PSNS usage; it instead tracks users of online services and total time spent on those services (PSNS and non-PSNS alike). Comscore itself warns against reliance on this data, disclaiming responsibility for its "accuracy or

completeness." AC ¶ 182 n.1. But, apart from that fatal flaw, the Comscore data does not even purport to measure PSNS usage. The FTC does not claim otherwise, alleging in the AC only that Facebook's "share of the time spent by users of apps *providing* [PSNS]" has exceeded certain thresholds. *Id.* ¶ 199 (underlining removed; emphasis added). That measures the wrong thing: *not* PSNS usage, but overall time spent using all of an app's features, including, *e.g.*, interest-based broadcast or discovery (*id.* ¶ 174), "video or audio consumption" (*id.* ¶ 175), "content broadcasting and consumption" (*id.* ¶ 176), and the many other things Facebook and Instagram offer other than "friends and family" PSNS sharing.

The Court's skepticism of data measuring all time spent on Facebook and Instagram was well-founded: estimates of overall usage are legally insufficient to support a plausible allegation of market share in the specific PSNS market the FTC defined. *See Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 972-73 (9th Cir. 2008) (affirming order granting motion to dismiss antitrust claim where plaintiff sought to "infer" power in the alleged market from "statistics indicating" that defendant was "an important player" in a different market); *see also Med Vets, Inc. v. VIP Petcare Holdings, Inc.*, 811 F. App'x 422, 423-24 (9th Cir. 2020) (affirming dismissal where market-share statistics did not match the alleged market). "It would be as if [the FTC] had adequately alleged a product market consisting of orange juice, but relied on the defendant's position in the overall beverage industry as evidence of market power." *In re Set-Top Cable Television Box Antitrust Litig.*, 2011 WL 1432036, at *12 (S.D.N.Y. Apr. 8, 2011) (granting motion to dismiss), *aff'd sub nom. Kaufman v. Time Warner*, 836 F.3d 137 (2d Cir. 2016). Accordingly, data showing "a defendant's market share in a market other than the alleged relevant market is irrelevant." *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1212 (11th Cir. 2002) (affirming order directing verdict in favor of antitrust defendant

because, "as a matter of law," the asserted "market share could not be imputed to the alleged relevant market" based on data from a "separate market").

Courts, therefore, routinely dismiss antitrust claims where there is a mismatch between statistics used to claim monopoly power and the market actually alleged. *See Kaufman*, 836 F.3d at 147-48 (affirming order granting motion to dismiss because plaintiffs "cannot plausibly derive Time Warner's market power over Premium Cable Services from broad allegations about the nationwide market for basic cable"); *Shak v. JPMorgan Chase & Co.*, 156 F. Supp. 3d 462, 483-84 (S.D.N.Y. 2016) (rejecting "vague generalities about the [alleged] market . . . combined with evidence about trading in specific spread contracts"); *Top Rank, Inc. v. Haymon*, 2015 WL 9948936, at *8 (C.D. Cal. Oct. 16, 2015) (granting motion to dismiss Section 2 claim where market-power allegations were "disconnected from the relevant market definition"); *Marchese v. Cablevision Sys. Corp.*, 2011 WL 3022529, at *4 (D.N.J. July 21, 2011) (dismissing antitrust claims where market-share allegations "conflate[d]" different product markets). Indeed, the FTC's present effort to allege power in a market by reference to share in another is "[e]ven more problematic" than the agency's initial attempt to allege power by "randomly" asserting a market share (*see* Compl. ¶ 64) because it confirms the absence of any facts as to "market share in th[e] particular product market" actually alleged. *Synthes, Inc. v. Emerge Med., Inc.*, 2012 WL 4473228, at *11 (E.D. Pa. Sept. 28, 2012) (granting motion to dismiss antitrust counterclaims with prejudice).

The FTC asks the Court to accept a square peg pounded, futilely, into a round hole. The agency includes in the numerator of its market-share calculation time spent using features of Facebook and Instagram that are outside its alleged market and for which Facebook faces competitors like YouTube, TikTok, LinkedIn, Twitter, and others (*i.e.*, non-PSNS time spent on Facebook and Instagram). At the same time, the FTC omits from the denominator all time spent

on PSNS using apps that the FTC asserts are not "primarily" PSN services (*e.g.*, YouTube, TikTok, LinkedIn, Twitter, and others), regardless of whether users spend PSNS time on those services. *See Rick-Mik*, 532 F.3d at 973 (rejecting share statistics that "do not distinguish between [in-market] sales and other potential types of sales"). This mix-and-match predictably inflates the FTC's market-share figure while providing no coherent basis to infer anything about how competition works in the real world. This "self-undermining" attempt to infer PSNS market share from an amalgamation of total time spent in concededly "distinct" markets cannot support a "reasonabl[e] infer[ence]" of power in the market actually alleged. *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 621 (S.D.N.Y. 2013) (granting motion to dismiss). Like the FTC's initial complaint, the AC says "nothing concrete on the key question of how much power Facebook actually had, and still has," in the alleged market. Op. 31.

2. ***The FTC cannot overcome this pleading defect by speculating as to PSNS time spent.*** The FTC alleges no facts regarding how much time spent on Facebook "was not in fact spent using personal social networking services." AC ¶ 202. That should foreclose its claim. Indeed, the fulcrum of its allegation is hypothesis: the FTC expressly asks the Court to "assume" various possibilities, including the chance "that half of the[ ] time" spent on Facebook is PSNS time. *Id.* The FTC alleges no more basis for a 50% assumption than a 20% assumption or an 80% assumption (or its earlier 60% market-share assertion). Alleging what is "conceivable" does not make an assertion "plausible" – this is precisely the conclusory approach the Supreme Court has prohibited. *See Twombly*, 550 U.S. at 570. *Twombly* simply does not countenance assuming "arguendo" that just enough time spent on Facebook qualifies as time in the alleged market sufficient to establish power; this is rank "speculati[on]" that invites the Court to reach the agency's desired "legal conclusion." *Id.* at 555. The Supreme Court has instructed that "[i]t is not . . . proper to assume that the [antitrust plaintiff] can prove facts that it has not alleged."

Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983); *see id.* at 545 (holding allegations "insufficient as a matter of law" to state a claim).

Worse, the FTC's proffered assumptions have no factual support. The FTC alleges (at ¶ 202) that it "indicate[d]" how Facebook is "predominantly used" and that this "indicat[ion]" somehow supports its pleading-by-assumption approach. But the AC is devoid of actual relevant facts alleging market power or share. *See Twombly*, 550 U.S. at 556 (requiring "factual matter"). Indeed, what few facts the FTC pleads (at ¶ 178) do nothing to ground its numerical claims:

- Facebook's recognition that friends and family sharing is one important part of its multi-feature service cannot overcome the lack of any facts supporting allegations of PSNS share or time spent.

- Stray comments from Mark Zuckerberg and Sheryl Sandberg that Facebook is "about real connections to actual friends" and documents stating that Facebook is "focused" on connecting "friends and family" say nothing about what percentage of time spent on Facebook is PSNS.

- A snapshot 2018 poll finding that consumers use Facebook to follow "people [they] care about" – which could, of course, include celebrities, influencers, athletes, friends, or family – likewise says nothing about how much time this activity takes relative to others, let alone what PSNS usage was like in 2012 or what it is like today.

Circuit precedent forecloses the FTC's reliance on these vague, unquantified, and conclusory observations, which – on their face – provide no support for the math the FTC asks the Court to assume. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986) ("[G]eneral comments were not evidence of anything, and, in particular, they were certainly not evidence that the industry recognized some specific submarket as a 'separate economic entity.'"). Such "non-economic, qualitative descriptions of market success are insufficient to establish that an antitrust defendant exercises market power," particularly where – as here – the descriptions make no mention of the "relevant product market" actually alleged. *Indep. Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1172 (C.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds, and remanded sub nom. Indep. Ink, Inc. v. Ill. Tool Works, Inc.*,

396 F.3d 1342 (Fed. Cir. 2005), *vacated and remanded*, 547 U.S. 28 (2006). If there were actually a recognized market for PSNS, there would be data that could be used to calculate shares; there is no such data, and thus, all the agency can do is ask the Court to accept unsupported assumptions in lieu of plausible facts.

3. ***The FTC's total MAU and DAU figures cannot plausibly support any PSNS market share.*** The FTC gets no further using its Comscore data to assert that Facebook has more than 70% of "daily active users" ("DAUs") and 65% of "monthly active users" ("MAUs") of the under-inclusive set of apps the agency asserts "predominantly" offer PSN services. AC ¶¶ 200-202. MAUs and DAUs cannot plausibly be used to calculate relative market share, both because the same individuals may (and often do) use more than one service and, more fundamentally, because the mere fact that an individual uses a service says nothing about how much time (if any) that person spends consuming PSNS on that service. *Cf. Iqbal*, 556 U.S. at 679 (claims must be plausible in light of "judicial experience and common sense"). The FTC even acknowledges some of these shortcomings. *See* AC ¶ 204 ("DAUs and MAUs do not reflect a person's intensity of use"). The Court rightly foreclosed reliance on such inapt metrics, finding that they "might significantly overstate or understate any one firm's market share depending on the various proportions of users who have accounts on multiple services, not to mention how often users visit each service and for how long." Op. 29. The FTC alleges nothing new here, and nothing showing that the Court's analysis was wrong before.

* * *

These defects strike at the heart of the claim's plausibility. The FTC cannot cite any relevant data because the PSNS construct is a litigation-driven fiction. After a year-and-a-half investigation, tens of millions of pages of documents, dozens of investigative hearings, and review by a staff of economists, the agency fails to cite any data on and does not even have

a single reference – not one – to "personal social networking service" usage. The FTC's allegations are at most "conceivable," albeit only if one makes the right "assum[ptions]" (AC ¶ 202), but not supported by facts and thus not plausible. *See Twombly*, 550 U.S. at 570. The FTC defined a market for which there is no data (none; zero) measuring any firm's share, and the only basis for alleging market shares is admitted guesswork using disclaimed data inconsistent with the market the FTC actually alleges. No court has ever allowed such a Section 2 claim to proceed.

B. The FTC's Alleged Facts Undermine Its Claim of Barriers to Entry

The Court did not need to "address the issue of whether the FTC ha[d] sufficiently alleged entry barriers" in its prior decision. Op. 27. But the agency did not allege and still has not alleged such facts. On the contrary, taking the FTC's allegations as true, the agency has pleaded itself out of court: its conclusory labels (*e.g.*, "network effects" and "switching costs") are undone by its allegations that other service providers with substantial networks could add PSNS offerings along with other services. Simply put, the FTC's entire basis for challenging Facebook's alleged conduct is squarely inconsistent with the assertion that entry barriers protect the alleged PSNS market. *See* AC ¶¶ 108-109 (alleging that a firm can build a network outside the PSNS market, where Facebook has no power, and then add "additional features and functionalities" to build a PSNS offering).

As the Court explained, "a plaintiff proceeding by the indirect method of providing a relevant market and share thereof must also show that there are 'barriers to entry' into that market." Op. 18. The FTC asserts the pure conclusion (at ¶¶ 212-213) that network effects and switching costs impede building a PSNS from scratch. But its theory of the case is that "differentiated" firms can "gain[] scale" outside of the PSNS market and then – once the non-PSNS network is established – begin "adding additional features and functionalities" to "enter

the personal social networking market at competitive scale." AC ¶¶ 9, 66, 108. Without those allegations, the FTC has no theory of exclusionary conduct. It alleges Facebook bought Instagram and WhatsApp to prevent them from developing a non-PSNS "mechanic" to gain scale and then adding PSNS features. *See id.* ¶¶ 212-217. Its allegation concerning acquisitions is that the targets might grow into significant threats. *See id.* ¶¶ 66, 68-69, 71, 74. And its (already dismissed) Platform allegations are similarly directed at Facebook's supposed efforts to discourage competitors from offering competitive PSNS features. *See id.* ¶¶ 130, 157-158.

As to network effects, the agency alleges that non-PSNS firms are able to grow to massive scale outside the PSNS market; WhatsApp, for example, "had more than 450 million monthly active users worldwide and was gaining users at a rate of one million per day." *Id.* ¶ 113. Yet the FTC itself identifies at least a half dozen other networks that achieved huge scale. *See id.* ¶ 114 (Apple's iMessage), ¶ 175 (Google's YouTube), ¶ 176 (ByteDance's TikTok), ¶ 185 (Snapchat), ¶ 174 (Twitter and Pinterest), ¶ 173 (LinkedIn and Strava). Such service providers are not prevented from entering the (supposed) PSNS market by any "direct network effects" (AC ¶ 212) because they already have huge networks (including many of the same people who use Facebook). *See* Op. 29. And such networks are not deterred by switching costs, because a user can multihome, building and enriching connections on one network as they migrate their usage to the PSNS they prefer. *See id.* (noting that "users . . . have accounts on multiple services"). "Network effects" are not the issue for competitors; the stiff competition provided by Facebook is. And the FTC cannot support a claim of "entry barriers" merely by alleging that users prefer Facebook's products to those offered by competitors. *See United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990) (holding that, as a matter of law, product efficiency and quality are not and cannot be "a structural barrier to entry"); *cf. Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 F. App'x 910, 911-12 (9th Cir. 2003) (holding that a firm's

"good reputation" for high-quality service is not "itself an entry barrier" where customers can "switch to different or additional vendors at will").

This is no mere tension, but a glaring contradiction at the heart of the FTC's case, which depends on the theory that Facebook was genuinely threatened in its (supposed) PSNS monopoly by *any* service provider that attained a network of significant scale. The AC offers no plausible way to square two of its core allegations: that (1) Instagram and WhatsApp had the ability to leverage a growing network by "adding additional features and functionalities" to become a PSNS, AC ¶ 108; but (2) at the same time massive firms like Google, Apple, Twitter, Snapchat, Microsoft, and ByteDance could not do the same, *see id.* ¶ 90 (alleging Instagram was a "small team" with "10-25 employees"). That forecloses the FTC's claim. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990) (Thomas, J.) (noting that it is sufficient to preclude a merger challenge if "the *threat* of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs," and that defendants "need not show that any firm *will* enter the relevant market").

The FTC has asserted, and will surely say again, that Instagram and WhatsApp were different – and that Facebook clairvoyantly acquired the only two companies worth worrying about. But where, as here, the agency *alleges facts* showing that entry barriers were no obstacle for some firms, more must be pleaded than the naked assertion that those firms were special. *See Twombly*, 550 U.S. at 555 (requiring facts, "more than labels and conclusions," "to raise a right to relief above the speculative level"). The conclusory allegations (at ¶¶ 66-67, 184) that Instagram (photos), WhatsApp (messaging), and Snapchat (ephemeral content) developed unique "social mechanics" that "differentiated" them from Facebook – allowing each to build massive networks and then pivot into the PSNS market – do not plausibly explain why other firms, with other social mechanics, were and are not similarly free to differentiate, enter, and compete.

The FTC does not allege, nor could it plausibly assert, that there are only three (or four or forty) "mechanics" for engaging with content online; this universe, which the FTC does not allege Facebook hinders, is limited only by human ingenuity and imagination. The FTC even alleges (AC ¶ 151) that the next "technological transition" – "use of artificial intelligence" or the "metaverse" – is looming and will impose "acute competitive pressures" on Facebook. *Cf. United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 197 (D.D.C. 2018) (explaining that emerging technological "revolution" with a "transforming" effect on how consumers use products dramatically undermines the likelihood of anticompetitive effects), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

C. The FTC Still Has No Facts To Support Its "Rare" Direct-Evidence Theory

Hedging its bets, the agency returns with a theory that it need not cure its market-share fiction, because it can directly allege monopoly power. The Court correctly determined before that the FTC failed to state a claim of monopoly power based on supposed "direct proof." Op. 19. Indeed, in opposition to Facebook's first motion to dismiss, the agency admitted that "'direct proof' that a defendant has monopoly power is 'only rarely available.'" FTC Opp'n 8 (quoting *Microsoft*, 253 F.3d at 51). The Court did not invite the agency to try again on this theory. But the FTC has tried again anyway, still – as before – without alleging any facts establishing that this is one of those "rare" cases.

The "ability to profitably restrict output and set supracompetitive prices is the *sine qua non* of monopoly power." *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008). The FTC alleges neither. Price is still zero and output has exploded, and not only for Facebook. For instance, Snapchat, an alleged PSNS provider that did not exist before 2011 (when Facebook supposedly achieved dominance), has grown to "about 75 million" monthly users who spend hundreds of millions of minutes on the app each day. AC ¶ 185. *See Rebel Oil Co. v. Atl.*

Richfield Co., 51 F.3d 1421, 1441 (9th Cir. 1995) (stating that "undisputed evidence indicat[ed] that competitors have expanded output" and that this can warrant "summary disposition" because "expansion by competitors would suggest that the defendant . . . lacked the market power to control marketwide output in the first place"). And Facebook is a price cutter, having made WhatsApp free after the acquisition. *Cf.* AC ¶¶ 60, 127, 226. These allegations foreclose a finding of direct evidence of power. *See Epic Games, Inc. v. Apple Inc.*, --- F. Supp. 3d ---, 2021 WL 4128925, at *95 (N.D. Cal. Sept. 10, 2021) (expanding output forecloses finding of "direct evidence of monopoly power," even if – unlike here – prices are "higher"), *appeal pending*, No. 21-16506 (9th Cir.).

1. ***Past privacy concerns cannot establish monopoly power.*** The FTC alleges (at ¶ 207) that the Court can infer market power from the fact that the *agency* itself complained about Facebook's "user privacy" practices and that Facebook settled those allegations. No court has ever endorsed the theory the FTC espouses here: that the amount of "privacy" on a service can demonstrate monopoly power. To even articulate a theory based on service quality, the agency would need facts plausibly establishing that Facebook's *overall* PSNS quality was *substantially* below a competitive level. But the FTC has not alleged that Facebook's overall PSNS quality – of which "privacy" could be one aspect – has diminished at all, let alone substantially below a competitive level. And just as price increases cannot be alleged as direct evidence of power in the absence of facts showing that the increase is above a competitive baseline, so too a quality decrease would need to be shown to be substantially below the competitive level. *See*, *e.g.*, *Microsoft*, 253 F.3d at 51 (actionable exercise of power must drive quality "substantially" below the "competitive level"); *cf. BanxCorp v. Bankrate, Inc.*, 847 F. App'x 116, 120 (3d Cir. 2021) ("[P]rice increases, without more, do not constitute

supracompetitive pricing."). The FTC makes no attempt to allege a competitive baseline of "privacy" or even of PSNS quality generally.

There is no logical or legal connection between the FTC's privacy-related suits and monopoly power: the FTC charges *many* firms – including those that the FTC alleges in this case have no market power – with similar defects. *See* Compl., *In re Snapchat, Inc.*, File No. 132 3078 (FTC May 8, 2014); *see also* Op. 9 ("[T]he Court may take judicial notice of . . . public agency action."). Furthermore, beyond the mere conclusion, the agency has alleged no facts showing that any privacy-related aspect of quality has declined at all: it alleges *nothing* about Facebook's privacy features today, let alone net PSNS quality of which "privacy" could be one dimension. For example, the FTC itself alleges (at ¶¶ 46, 49-50) that Facebook collects data to improve "rich ad targeting," which is a benefit both to Facebook's advertisers – which get a better advertising product – *and* to its users, who get a free service supported by relevant and "interactive ads" of such high quality that they "can be similar in appearance to" and "resemble 'native' content" the user chooses to view. In any event, there is not even a conclusory allegation that "privacy" or total quality on Facebook can be measured objectively, much less measured as below a competitive level at any point in time.

The agency's theory is also illogical on its face. As the FTC acknowledges (at ¶ 202), PSNS accounts for only *part* of the time users spend on Facebook. *See also* Op. 29-30. Using its "arguendo" assumption that 50% of time spent on Facebook is outside the supposedly monopolized market, any claimed reduction in quality across the entire Facebook service would logically – were the agency's allegations plausible – nudge time spent away from Facebook, at least as to features that other services admittedly offer. But while the agency claims that Facebook degraded user privacy with respect to *all* features that Facebook offers – not just PSNS, *see* AC ¶¶ 205-207 – it also alleges Facebook has maintained overall growth despite

competition from, among many others, YouTube and TikTok for "video . . . consumption" (*id.* ¶¶ 175-176), Twitter for "topics that interest" users (*id.* ¶ 174), and iMessage for messaging (*id.* ¶¶ 114, 172). The FTC does not (and could not) plausibly allege that the fallout from Cambridge Analytica (*id.* ¶ 206) or the reaction to Facebook's settlement with the FTC (*id.* ¶ 207) somehow affected only Facebook's PSN services, *i.e.*, the only market in which the FTC alleges that Facebook has power. Facebook has succeeded overall – not only in the supposedly monopolized market, but also in markets where it faces vigorous competition. If the FTC's theory were plausible, and Facebook had deliberately reduced the quality of its entire product, that could not have occurred.

2. ***Total Facebook revenues cannot establish PSNS power.*** The FTC's allegation (at ¶¶ 208-209) that the Court can infer Facebook's market power from the revenues its *advertising* business earns ignores the Court's conclusion that "[t]he overall revenues earned by PSN services cannot be the right metric for measuring market share here, as those revenues are all earned in a separate market." Op. 29. This is consistent with established antitrust principles the Supreme Court decided long ago. *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953) (antitrust plaintiff must prove the alleged monopolist's "dominant position" in the market alleged, even if defendant "is a dual trader in separate though interdependent markets").

The FTC compounds this fatal flaw by relying (at ¶ 208) on *all* of Facebook's advertising revenue – not revenue attributed to ads that Facebook shows to users engaging in PSNS specifically. And, on its own mistaken terms, the allegation misses the mark: the AC is devoid of any facts that could establish that Facebook's advertising prices are above a competitive level; the AC therefore cannot support a claim of power in some unalleged advertising market, much less in the PSNS market actually alleged. In any event, "there is not even a good economic

theory that associates monopoly power with a high rate of return" because "competitive firms may be highly profitable merely by virtue of having low costs as a result of superior efficiency" or "because it is offering better service." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995).

II. THE FTC HAS NOT PLAUSIBLY ALLEGED LEGALLY COGNIZABLE EXCLUSIONARY CONDUCT

The FTC's two counts of monopoly maintenance under Section 2 of the Sherman Act fail for the additional reason that, as before, the FTC fails to allege that Facebook engaged in any unlawful exclusionary conduct. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (antitrust violation requires facts establishing plausible claim of "anticompetitive *conduct*").[1]

A. The FTC Fails To Allege a Plausible Section 2 Acquisition Challenge

The agency seeks to enjoin, almost a decade after the fact, two acquisitions based on a novel legal theory without precedent: that cleared acquisitions of "nascent" competitors, or even non-competitors, can be condemned under Section 2 based on speculation that these firms might have become powerful rivals, delivering unknowable benefits to consumers at some future date. The agency has neither law nor factual allegations supporting such a claim here.

1. ***The FTC's prior clearance renders its belated Instagram and WhatsApp challenges implausible.*** The FTC's claim that the Instagram and WhatsApp acquisitions were "anticompetitive" collides with the judicially noticeable fact that the FTC itself cleared both transactions in 2012 and 2014. *See* Op. 9. The AC – like the initial complaint – "conveniently

[1] Count 1 is based entirely on Facebook's allegedly "anticompetitive acquisitions" – the 2012 acquisition of Instagram and the 2014 acquisition of WhatsApp, with other smaller acquisitions alluded to but briefly; Count 2 adds to that mix Facebook's Platform policies, which the Court previously dismissed from the case.

omits any mention of this review." *Id.* The FTC thus fails to explain why the agency's prior clearances should not be taken as a strong indication – if not a decisive one – that neither transaction can support a plausible claim of unlawful or anticompetitive conduct. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006) ("presum[ing]" that a joint venture was "lawful," including because it was "approved by federal and state regulators"); *Eastman v. Quest Diagnostics Inc.*, 2016 WL 1640465, at *9 (N.D. Cal. Apr. 26, 2016) (prior FTC clearance "weigh[ed] against the conclusion" that acquisition could "be plausibly characterized as an unreasonable restriction on competition"), *aff'd*, 724 F. App'x 556 (9th Cir. 2018).

The FTC unconditionally cleared both acquisitions under Section 7 of the Clayton Act, which Congress enacted to address incipient threats to competition that Section 2 *would not* condemn. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962). This supports the inference that the agency did not believe (or did not believe it could prove) that a substantial lessening of competition and resultant consumer harm was likely when Facebook took the risk of investing in Instagram and WhatsApp. And while the agency can bring post-clearance challenges, *see* 15 U.S.C. § 18a(i)(1), the FTC's about-face begs for an explanation that is consistent with the requirement that it plead facts plausibly establishing that anticompetitive effects were likely at the time of the transactions. *See Baker Hughes*, 908 F.2d at 989. Relieving the FTC of that burden – particularly where the FTC alleges that Instagram and WhatsApp have grown and thrived as part of Facebook – risks undermining certainty in the procompetitive investments that antitrust laws encourage.

Facebook is unaware of any case condemning an FTC-cleared acquisition under Section 2 years after the fact, and the FTC's unprecedented effort to plow new ground here is contrary to the purposes of antitrust law. FTC Commissioner Wilson emphasized this in her dissent from the Commission's 3-2 decision to file the AC: the decision to bring this case

"undermine[s] the integrity of the premerger notification process established by Congress and the repose that it provides to merging parties that have faithfully complied with its requirements." Hansen Decl. Ex. C at 1 (Dissenting Statement of Commissioner Christine S. Wilson (Aug. 19, 2021) ("Wilson Dissent")); *see also Trinko*, 540 U.S. at 412 (explaining that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" – which the Hart-Scott-Rodino Act's clearance provisions supplied here – makes it "less plausible that the antitrust laws contemplate such additional scrutiny"). At the very least, the plausibility of the FTC's allegations must be evaluated against the judicially noticed backdrop of the FTC's prior contemporaneous judgments, which were untainted by hindsight. After *Twombly*, claims must be plausible in light of "judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The FTC's belated challenges to acquisitions it cleared nearly a decade ago are not.

2. *The FTC fails to allege facts to support any claim that the Instagram and WhatsApp acquisitions were unlawful exclusionary conduct.*

a. Acquisitions, even by large or dominant firms, are not presumptively unlawful; most are "benign or beneficial." Hansen Decl. Ex. D at 4 (Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021)) ("roughly 95 percent of deals are viewed as benign or beneficial"); *see also Dresses for Less, Inc. v. CIT Grp./Com. Servs., Inc.*, 2002 WL 31164482, at *12 (S.D.N.Y. Sept. 30, 2002) ("horizontal mergers are much more likely to be procompetitive than anticompetitive"). Accordingly, enforcement agencies and courts have developed (and refined) objective standards, grounded in knowable market facts, to identify those transactions that pose an unacceptable risk of harm. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 5.2 (2010). Successful modern challenges to horizontal mergers have almost invariably rested on factual allegations, and proof supporting those allegations, that the mergers would result in aggregations

of market shares exceeding prescribed numerical thresholds. *See*, *e.g.*, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 703-04 (4th Cir. 2021).

But the FTC alleges no increase in market concentration: if Instagram had a PSNS market share in 2012, it has not been calculated or alleged; and WhatsApp concededly had no such share in 2014 because the FTC alleges it was outside the PSNS market. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763-64 (9th Cir. 2018) (affirming order granting motion to dismiss Section 7 claim where plaintiff failed to allege acquisition increased the acquirer's market share). An agency applying the *Horizontal Merger Guidelines* in 2012 or 2014 – as the FTC presumably did – could have relied on the absence of any such increase in market concentration to give those proposed mergers clean bills of health. Courts have relied on these guidelines and have made them part of modern antitrust law. *See*, *e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 209 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 71-72 (D.D.C. 2011). They reflect a practical, objective way to discern what is otherwise difficult to predict: which acquisitions may be likely to result in consumer harm.

The law governing acquisitions has developed largely under Section 7, which Congress enacted to address anticompetitive transactions. Yet there is no successful Section 7 challenge remotely similar to the agency's claim here. Indeed, the FTC cannot even satisfy the legal standard that the agency itself previously proposed for potential-competitor acquisitions under Section 7 (a legal standard itself that no court has ever adopted). *See* Hansen Decl. Ex. E at 6 (Mem. of FTC, *FTC v. Steris Corp.*, No. 15-cv-01080-DAP, ECF No. 21 (N.D. Ohio June 4, 2015)) ("The acquisition of an actual potential competitor violates Section 7 if . . . the competitor 'probably' would have entered the market . . . [and] there are few other firms that can enter effectively.").

The FTC has alleged no facts concerning the "objective" likelihood that WhatsApp would be a significant PSNS rival. *See id.* at 10-11 (stating that assessing the probability of entry requires both "subjective evidence" of intent and "objective evidence" including "financial capabilities" and "management and marketing expertise" relevant to the alleged market); *see also FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (reciting without accepting the FTC's legal theory, and denying the FTC's motion for a preliminary injunction to halt an acquisition because the FTC could not show the acquiree "probably" would enter the alleged market). There are no allegations that, before the acquisition, WhatsApp planned or took any concrete preparatory steps to enter the alleged PSNS market, much less facts making a plausible case that such entry was *probable*.

And, although the FTC *asserts* that Instagram was a competitor, the AC alleges that there was little actual overlap between Instagram – then a mobile-only photo-sharing app – and Facebook, which "had grown dominant in the desktop age" and was attempting (allegedly without success) to develop such an app. AC ¶¶ 6, 83. The FTC's own allegations suggest that the perceived "major threat" posed by Instagram would come, from Facebook's perspective, "over the next few years," *if* Instagram were able to "copy what we're doing now." *Id.* ¶ 84. The allegations regarding Instagram, no less than those regarding WhatsApp, depend on speculation that Instagram would develop into an unusually significant PSNS rival to Facebook down the road.

Instead of alleging that "there [we]re few other firms that c[ould] enter effectively" the PSNS market, *Steris*, 133 F. Supp. 3d at 966, the AC alleges the opposite: Facebook feared entry from multiple "apps that [we]re gaining prominence in the mobile eco-system," each "a potential rival" that could "gain scale" in the alleged market. AC ¶¶ 71-72. The FTC even alleges that there was a "global *trend*" of "messaging apps" – plural – threatening "to build more general

mobile social networks." *Id.* ¶ 108 (emphasis added). Multiple such apps directly "threatened to develop into competitive threats to Facebook." *Id.* ¶ 158.

The AC's passing dismissal of other obvious entrants is implausible on its face. If WhatsApp was a potential PSNS entrant, then there is no straight-face argument that Apple's iMessage is not. The allegation that the latter is "confined to the iOS operating system" says nothing about the significance of that universe of consumers. *Id.* ¶ 114. Indeed, the FTC's central theory is that effective entry into PSNS can come from many and varied sources: "the most significant competitive threats to Facebook . . . may arise from a differentiated product that is able to gain scale quickly by offering users a superior 'mechanic' " – that is, an undefined and unlimited set of potential entrants. *Id.* ¶ 66 (TikTok, for example). These examples unmask the FTC's speculative and inconsistent theorizing and show that it cannot even satisfy its own test. *See Steris*, 133 F. Supp. 3d at 966.

The only acquisitions that courts have held exclusionary under Section 2 bear no similarity whatsoever to the acquisitions at issue here. Successful acquisition challenges under that provision involve, *e.g.*, the shuttering of significant and established rivals or of providers of key inputs needed for competition – all to restrict output (and thereby increase prices). *See United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966) (acquirer used acquisitions to maintain market-allocation agreement between former competitors to limit output); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 603-05 (1957) (acquirer used non-controlling stock interest to steer supply contracts to itself, foreclosing a substantial share of the market); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 183 (1911) (acquirer bought up multiple competing plants in order to shut them down); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 621-22 (W.D. La. 2016) (similar). The agency again alleges the opposite here: Facebook did not shut down Instagram or WhatsApp, but instead kept (and keeps) both

apps "operating at scale" to the indisputable benefit of the increasing numbers of consumers who enjoy these products. AC ¶ 129; *see also id.* ¶ 21.

b. The FTC's challenges to the acquisitions rest on three legally invalid and factually implausible constructs: (1) that Instagram and WhatsApp would have given rise to even better products if left on their own; (2) that acquisitions are inherently suspect because they necessarily eliminate independent entities; and (3) that the acquisitions were so successful in providing additional consumer benefits that they made it hard for Facebook's rivals to compete. Each novel theory fails under established antitrust law. *Cf. Eastman*, 2016 WL 1640465, at *9 (granting motion to dismiss Section 2 acquisition claim because "plaintiffs cannot rely on the fact of the acquisitions alone," but instead "must plead facts showing the particular ways in which the acquisitions have unreasonably restricted competition").

i. *First*, speculation is not a valid basis for condemnation. The agency asserts that, in the "but for" world without the two challenged acquisitions, consumers would have better PSNS products today. But the agency alleges no facts substantiating that claim; the theory is instead admitted speculation. *See*, *e.g.*, AC ¶ 221 (asserting that additional competition could result in "some or all" of undefined "new features" or "improved features," among other undefined "quality improvements"); *id.* ¶ 226 (alleging "social networks *may* also have explored . . . models that consumers . . . *could* have preferred") (emphases added). There are no facts establishing what those new products would be, how they would come about, or why they would be offered when they are not being offered now. The law is clear: the agency *cannot* rely on speculation that Instagram and WhatsApp might have grown and developed into substantial PSNS competitors with even better and even more widely adopted services than those they offer today. *See Twombly*, 550 U.S. at 555.

Courts have regularly warned against just such speculation. As the First Circuit has noted, "there is no possible way to predict just what would happen" had a challenged transaction not occurred. *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 71 (1st Cir. 2002). Accordingly, courts have not embraced such untethered "potential competition" theorizing, even under Section 7. *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 639 (1974) (expressly declining to recognize this legal theory); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 75 (D.D.C. 2017) ("Whether actual potential competition is a viable theory of *section 7 liability* has not been answered by the Supreme Court.") (emphasis added). Rather, courts have rejected as implausible such claims where allegations about "competitive effects would be entirely speculative." *DeHoog*, 899 F.3d at 764-65. "The bottom line is that the complaint offers only speculation as to how" Instagram and WhatsApp might have sought to "do business" but for the acquisitions, which is "a classic speculative conclusion" that "'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* at 765 (quoting *Twombly*, 550 U.S. at 557).

Speculation about the possible competitive trajectory of Instagram and WhatsApp is the only thing the AC alleges to support the claim that the acquisitions were *likely* to harm consumers at the time the transactions closed. *See* V Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1205a (4th ed. 2020) ("Areeda") (legality must be assessed "on the basis of evidence of the situation existing at the time of the acquisition"). The FTC seeks to bolster its own speculation with speculation it cherry-picked from internal Facebook and Instagram documents, *e.g.*, that Facebook executives mused about the possibility that Instagram might develop more features and become more like Facebook and that, in the course of trying to raise money, Instagram suggested that it might one day become a "complete social networking service" or an advertising competitor. AC ¶¶ 87, 89, 100-101. But speculation is only that – speculation – no

matter its source. According to the very documents cited by the FTC, Facebook speculated similarly about a host of possible rivals, some of which thrived while others failed despite early success. *See*, *e.g.*, *id.* ¶ 90. And there is no factual allegation that Instagram was actually competing beyond its limited photo-sharing app or that WhatsApp had plans to add PSNS elements – such as allowing users to find strangers' contact information – to its "privacy-focused" service. *Id.* ¶ 127; *see Twombly*, 550 U.S. at 555-56 (requiring facts, not speculation).

The FTC cannot allege that consumer harm was *likely* at the time of the acquisitions because it cannot even allege (years later) that consumers *were* harmed – the defining characteristic of an unlawful transaction. It speculates instead that things could have been even better. This pie in the sky bears no resemblance to fact-based reality. No alleged facts support the agency's intimation that Instagram and WhatsApp would have achieved the same growth in a better (undefined) way for consumers, if those services were not part of Facebook. *Cf. Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1029 (N.D. Cal. 2015) ("Plaintiffs' allegations of hypothetical loss of consumer choice and innovation are entirely too conclusory and speculative."). Similarly, no alleged facts support the speculation that, but for the acquisitions, Facebook or any other PSNS provider might have a different "ad load and level of privacy." AC ¶ 105. The FTC tellingly alleges nothing about "ad load and level of privacy" on Snapchat today, for instance. There is only agency speculation about unspecified, unsupported "additional innovation," "quality improvements," and "consumer choice." *Id.* ¶ 221. There is not a single fact as to what any of these vague buzzwords actually would entail, much less facts establishing that it was likely these things would have occurred but for the acquisitions. *See Twombly*, 550 U.S. at 555 ("formulaic recitation" without facts is not enough).

The same fanciful claims could be made in *any* challenge to *any* transaction; it can always be hypothesized that Jack's magic beans were destined to grow to the sky. But the

law demands more than fairy tales to unwind highly successful business transactions that have produced indisputable and substantial value for consumers and shareholders alike.

ii. *Second*, the FTC asserts that "neutralization" of an "independent" firm via acquisition is itself anticompetitive. AC ¶ 105. This theory proves far too much: every acquisition entails the elimination of an independent firm and an actual or potential competitor. Unsurprisingly, there is no such dramatic theory of strict liability for acquisitions. *See Dresses for Less*, 2002 WL 31164482, at *12 ("'the mere fact that a merger eliminates competition between the firms concerned has never been a sufficient basis for illegality'" because "horizontal mergers are much more likely to be procompetitive than anticompetitive") (quoting IV Areeda ¶ 901a (2d ed. 1998), and citing Irving Scher, *Antitrust Adviser* § 3.61, at 3-167 (4th ed. 2001)); *United States v. Mfrs. Hanover Tr. Co.*, 240 F. Supp. 867, 930 (S.D.N.Y. 1965) ("Necessarily, such a merger combines the shares of the constituent parties and eliminates one firm from the market. It thereby automatically creates a firm with an increased share and increases concentration of the number of firms in the market. Yet, Congress, in enacting Clayton Act § 7, did not forbid all horizontal mergers but only those which may lessen competition substantially or tend to create a monopoly."). Instead, and before embarking on "a potentially massive factual controversy," *Twombly*, 550 U.S. at 558, the FTC must allege facts to plausibly support the conclusory and speculative assertion that consumers would be better off had Facebook not turned Instagram and WhatsApp into the services that consumers enjoy for free today. But the FTC has alleged nothing close.

iii. *Third*, the FTC claims that Facebook's *successful* development and operation of Instagram and WhatsApp unlawfully "maintains a protective 'moat' that deters and hinders competition." AC ¶¶ 105, 127. This gives the game away entirely. In essence, the FTC seeks to punish Facebook for delivering ever-greater value to consumers. *See id.* ¶ 21 (alleging that

output expansion – *i.e.*, enlarging PSNS activity – "increases" "the value of the service to individual consumers"). Instead of shuttering Instagram or WhatsApp, Facebook has made them thrive. The FTC expressly alleged that Facebook has been able to "win" in photo-sharing and messaging "mechanics," which makes it "difficult" for a competitor "to supplant [Facebook] without *doing something different*." *Id.* ¶ 66 (emphasis added). According to the FTC, once Facebook (or any firm) "wins" a mechanic, a competitor cannot "get much traction" with the *same* mechanic so long as Facebook keeps its winning "mechanics deployed *at scale*." *Id.* ¶¶ 66-67 (emphases omitted in part).

In other words, when Facebook competes successfully by expanding output and providing consumers experiences they value, it makes life harder for copycat rivals that do not innovate by developing new "mechanics" to attract consumers. It is remarkable that the FTC seeks to condemn this as a Section 2 violation, when it is the very competition that the antitrust laws encourage. *See Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.15 (D.C. Cir. 1984) (per curiam) ("[O]nly use of monopoly power to restrict output or exclude competitors, as opposed to promoting the efficiency of production, is unlawful."); *see also Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991) (antitrust laws encourage and "do not stand as an obstacle" to even a dominant firm that "sustains a level of efficiency or innovation such that its rivals cannot effectively compete").

No court has ever adopted the FTC's theory that acquiring a firm and winning by operating the acquired company successfully and "at scale" is unlawful. On the contrary, that theory has been summarily rejected: "[W]hen a producer deters competitors by . . . operat[ing] his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time," for, "[w]hile the successful competitor should not be raised above the law, neither should

he be held down by law." *Syufy*, 903 F.2d at 668 (rejecting as a matter of law a Section 2 acquisition challenge claiming that, after the acquisitions, the monopolist's "effectiveness as a competitor creates a structural barrier to entry, rendering illicit [the defendants'] acquisition of its competitors' [assets]").

3. ***The FTC's other acquisition allegations are without substance.*** The AC borrows vague snippets from the dismissed States' complaint, to wit that Facebook's acquisitions of non-PSNS firms Onavo (AC ¶ 70), tbh (AC ¶ 72), Octazen (AC ¶ 74), Glancee (AC ¶ 75), and EyeGroove (AC ¶ 76) were exclusionary. But little is alleged about these transactions, and there are no facts supporting any claim that, singly or jointly, these non-PSNS acquisitions are even relevant to the Section 2 claims.

a. The FTC alleges (at ¶ 74) that Facebook acquired Onavo to monitor "potential threats," but it is procompetitive to improve one's own products by monitoring how competitors are successfully meeting consumers' needs. *See Sunbeam Television Corp. v. Nielsen Media Rsch., Inc.*, 763 F. Supp. 2d 1341, 1351-52 (S.D. Fla. 2011) (improved market-intelligence product is procompetitive innovation, not exclusionary conduct), *aff'd*, 711 F.3d 1264 (11th Cir. 2013). The FTC does not even suggest that Onavo was an essential input necessary for competition or the only firm providing market research. *See Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1244 (3d Cir. 1987) ("Clearly, de minimis foreclosure of a market is not an antitrust dereliction in itself."). Nor could it: the FTC bases its entire theory of monopoly power on data from Comscore, a "commercially-available data source" and Onavo competitor that "track[s] users' activity online." *Compare* AC ¶ 69 *with id.* ¶ 182.

As to Octazen (AC ¶ 74), a "contact importing" service, the acquisition took place in 2008 – years before Facebook is alleged to have had power in any market – and the FTC does not allege (because it cannot) that contact importing was necessary for competition or that

Octazen was the only commercially available contact-importing service. *Cf. Standard Oil Co. v. United States*, 221 U.S. 1, 32-33 (1911) (Section 2 violation where monopolist bought every competing refinery and thereafter "limit[ed] production" to drive up oil prices). The FTC just cites (at ¶ 74) internal speculation that the acquisition "could" at most "slow some competitors down for a quarter or so" – far from the "monopolistic proportions" of foreclosure required to state a Section 2 claim. *See* IVA Areeda ¶ 1001.

Even less is said about the other apps – tbh (AC ¶ 72), Glancee (AC ¶ 75), and EyeGroove (AC ¶ 76). The FTC does not allege that they were significant PSNS competitors or potential competitors, that they were essential inputs to competition, or that they had any competitive significance at all. Nor does the FTC allege why Facebook shut down these supposedly promising apps rather than use them, as it did with Instagram and WhatsApp, to broaden Facebook's supposed "moat." The agency makes no serious effort to allege plausible claims about any of them.

b. The agency cannot challenge any of these transactions before the Court in any event. The agency proceeds under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), *see* AC ¶ 17, meaning it can challenge only conduct that "is violating" or "is about to violate" federal law, 15 U.S.C. § 53(b). But Facebook allegedly shut down all five apps years before the agency filed its suit. That deprives the FTC of "statutory authority to seek an injunction 'based on [such] long-past conduct.'" Op. 3 (quoting *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 156 (3d Cir. 2019)) (brackets in Op.). Accordingly, the allegation that Facebook shut down these apps years ago renders "an injunction under Section 13(b) unavailable as a matter of law." Op. 17.

B. The FTC's Attempt To Revive Dismissed and Defective Platform Allegations Fails as a Matter of Law

The Court found, after review of the actual Platform policies incorporated by reference in the FTC's initial complaint, that these policies were lawful. And the Court reached the "conclusion[ ] of law" that the FTC's "challenge to Facebook's policy of refusing interoperability permissions with competing apps fails to state a claim for injunctive relief" because "there is nothing unlawful about having such a policy in general." Op. 2-3. The Court likewise held that particular applications of those policies were "long-past conduct" for which "the FTC lacks statutory authority to seek an injunction" (the only remedy available to the agency in federal court, as it lacks statutory authority to pursue damages) and that the only "actionable violation" would need to be "ongoing or about to occur." Op. 3, 42.

The Court did not suggest that the FTC could replead these legally invalid Platform claims, which the Court dismissed as a matter of law. Op. 3. The FTC nonetheless returns with the same allegations as before, with only cosmetic changes. But the agency's claim is barred by the law-of-the-case doctrine: "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). In any event, now as before, the allegations have no merit: Facebook's policies were indeed lawful, as the Court correctly held; and the long-past instances of application cannot, as a matter of law, support a future injunction, as the Court also correctly ruled.

1. *The FTC's attempt to revive its Platform claims is barred by the law of the case.*

The attempt to reinject discredited Platform claims into this case is barred by the law of the case because the Court already decided that indistinguishable allegations failed to state a claim. *See LaShawn*, 87 F.3d at 1393; *see also Berryman-Turner v. Dist. of Columbia*, 233 F. Supp. 3d 26, 35-36 (D.D.C. 2017) (applying law-of-the-case doctrine to dismiss claims in amended complaint

already rejected in initial complaint), *aff'd*, 720 F. App'x 1 (D.C. Cir. 2018) (per curiam); *Blackbook Cap., Inc. v. Fin. Indus. Reg. Auth., Inc.*, 2021 WL 1827268, at *2-3 (D.N.J. May 5, 2021) (same); *Cummings v. City of New York*, 2021 WL 1163654, at *7 (S.D.N.Y. Mar. 26, 2021) (same), *appeal pending*, No. 21-1380 (2d Cir.); *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 2015 WL 4036319, at *8 (D. Colo. July 1, 2015) (similar); *Bigio v. Coca-Cola Co.*, 2010 WL 3377503, at *2 (S.D.N.Y. Aug. 23, 2010) (same), *aff'd*, 675 F.3d 163 (2d Cir. 2012). The AC's allegations regarding Facebook's Platform policies and their application raise the exact same issues that this Court addressed before. Judicial economy requires parties to accept court rulings and not treat them as occasion for repetitive reargument; the "previous judicial determination" controls. *Berryman-Turner*, 233 F. Supp. 3d at 35.

a. ***No new facts or law justify revisiting the Court's holding that the Platform policies were lawful.*** Because the Platform policies were incorporated by reference in the initial complaint, the Court appropriately reviewed those policies – and not just the FTC's gloss on them. *See* Op. 49-50. The Court correctly held that the policies were neither an unlawful "refusal to deal" nor "conditional dealing." Op. 39-40, 50. As the Court already held, "[r]egardless of whether the FTC can amend its Complaint to plausibly allege market power . . . , the conduct it has alleged regarding Facebook's interoperability policies cannot form the basis for Section 2 liability." Op. 3.

The agency continues pressing both points. It claims (at ¶¶ 79, 132, 238) that the same policies were "conditional dealing." But the Court has already explained why that is unfounded: Facebook's announcement and enforcement of its terms for developers to access proprietary Facebook APIs did not "in fact interfere[ ] . . . with the ability of competing social-networking services to deal with app developers." Op. 48-49. The Court went on to explain that, in the absence of any alleged interference between rivals and third parties, the FTC had failed to state

a Section 2 claim for unlawful "conditional dealing." *Id.* The AC still alleges no interference with rivals, and in fact continues to challenge only API "restrictions [that] limited the types of activities developers could engage in *using the platform*." AC ¶ 133 (emphasis added).

The FTC also reasserts that the policies were unlawful refusals to deal, ignoring the preclusive effect of *Trinko*, its progeny, and this Court's holding. As the Court explained, the "central teaching" of refusal-to-deal law, as relevant here, "is that Facebook had no antitrust duty to avoid creating [the] deterrent" to competitor entry that the FTC said Facebook created. Op. 39. Moreover, "Facebook's general policy of withholding API access from competitors . . . was plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing." Op. 40. And any violation would require facts establishing that Facebook was acting irrationally, sacrificing short-term profits solely to harm the firms with which it had previously and voluntarily dealt. *See* Op. 38-39.

The AC continues to rely on the discredited "core argument" (Op. 39) that Facebook's alleged Platform policies unlawfully "changed the incentives of app developers and deterred them from developing competing functionalities or supporting competing personal social networks." AC ¶ 148; *see* Op. 39 (rejecting same theory). The FTC points to the same policies the Court already considered, and it cannot cite any intervening change in law that could justify a departure from this Court's prior decision. The only new ruling of relevance supports Facebook: the Sixth Circuit recently *adopted* this Court's legal standard for a refusal-to-deal claim in *St. Luke's Hospital v. ProMedica Health System, Inc.*, 8 F.4th 479, 486 (6th Cir. 2021) (citing *New York v. Facebook, Inc.*, --- F. Supp. 3d ---, 2021 WL 2643724, at *11 (D.D.C. June 28, 2021), *appeal pending*, No. 21-7078 (D.C. Cir.)).

b. ***There is no valid basis for reconsideration of the Court's decision that the past instances of enforcement of a terminated policy cannot support injunctive relief.*** The Court

also ruled that the FTC's allegations concerning Facebook's pre-2018 *implementation* of its policies fail to state a claim. This Court correctly reasoned that Section 13(b) of the FTC Act "'is prospective, not retrospective,'" and authorizes suit only when a defendant "'is violating' or 'is about to violate'" the antitrust laws. Op. 42 (quoting *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1348 (2021)); *see also* 15 U.S.C. § 53(b). Accordingly, the FTC could not bring suit in federal court challenging alleged refusals to deal that were long past. *See* Op. 41-42.

The FTC had not shown any likelihood of recurrence because it did not plead facts showing that Facebook would "not only . . . imminently reinstate its policies" but also "imminently take the kind of further action that might come within *Aspen Skiing* [*Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)]: target its competitors with which it had a previous, voluntary course of dealing for API revocation in a manner that suggests predatory, short-term-profit-sacrificing behavior." Op. 44; *see also Shire*, 917 F.3d at 160 ("vague allegations" of restarting terminated conduct do not plausibly support imminence "when the alleged misconduct ceased almost five years before filing of the complaint").

The AC recycles the same, stale "they might do it again" rhetoric that the Court correctly rejected last time. The FTC now mentions one additional developer that was allegedly subject to API restrictions – five years ago. *See* AC ¶ 158. But whether five or eight years ago, such past enforcement of discarded policies cannot support the necessary element of a claim: an imminent likelihood of Facebook imposing an unlawful restriction and then enforcing it in a manner that threads the "narrow-eyed needle" of *Aspen Skiing*'s strict and demanding standard. Op. 36; *see also Facebook*, 2021 WL 2643724, at *12, *14 (holding that no injunction could redress alleged refusals to deal from 2015; also noting *Aspen Skiing* requirements that the agency had not even attempted to satisfy).

The AC adds a few sentences of new speculation about conditions that the agency thinks *could* one day drive Facebook to revive the Platform policies. But none of these allegations (at ¶ 151) about unknown "competitive pressures" from some future "period of technological transition" – much less the FTC's unsupported and vague claim that Facebook in some respect "continues to screen developers" – comes close to facts plausibly showing that Facebook will "imminently reinstate its policies," much less that it will "imminently" grant and then restrict the API access of unspecified competitors in a way that suggests otherwise irrational predatory profit sacrifice in violation of Section 2. *See* Op. 44. And the FTC's allegations (at ¶¶ 152-153) regarding Facebook's interactions with regulators have nothing to do with whether Facebook "is about to violate" Section 2 through an unlawful and otherwise-irrational course of dealing with developers. 15 U.S.C. § 53(b). As the Court correctly held, the FTC's speculation about a future problem cannot make the requisite showing, and the agency has given the Court no valid reason to reconsider its decision. *See* Op. 43 (explaining that "conditional and conclusory allegation[s]" would be "insufficient" to establish imminence); *see also Shire*, 917 F.3d at 156.

2. ***The past Platform policies cannot support any valid claim of antitrust violation as a matter of law.*** Even if the Court were writing on a blank slate and considering these issues for the first time, the FTC's allegations regarding policies that have not been in effect since 2018 simply cannot be litigated by the agency under its Section 13(b) authority. The parties briefed these issues extensively in the last round. *See* FB FTC Br. 36-39, ECF No. 56-1; FTC Opp'n 31-38; FB FTC Reply 17-22, ECF No. 62; *see also* FB States Br. 28, No. 1:20-cv-3589-JEB, ECF No. 114-1; States Opp'n 34-42, No. 1:20-cv-3589-JEB, ECF No. 121; FB States Reply 24-25, No. 1:20-cv-3589-JEB, ECF No. 123. The agency has not materially changed its factual allegations – adding only an additional 2016 Platform policy application that still falls outside the reach of Section 13(b) and more speculation about why Facebook might want to reinstate the

policies. *See* AC ¶¶ 151, 158. The Court's prior decision was correct, and there is no valid basis for a different result this time.

Every court to address similar refusal-to-deal claims based on Facebook's Platform policies has upheld Facebook's conduct on the merits. *See Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 1002-03 (N.D. Cal. 2020) (granting motion to dismiss interoperability claims); *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075 (S.D. Cal. 2012) ("Facebook has a right to control its own product, and to establish the terms with which . . . application developers . . . must comply in order to utilize this product."); *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *13 (N.D. Cal. July 20, 2010) (dismissing claims based on prior Platform policies). Facebook's Platform policies lie in the heartland of the general rule that a firm may choose its terms of dealing – including terms to prevent rivals from free-riding on the firm's assets. *See* AC ¶ 146.

III. THE FTC'S VOTE PURPORTING TO AUTHORIZE THE AC WAS INVALID; THE COURT SHOULD ACCORDINGLY DISMISS THE AC

Chair Khan's participation in the decision to file the AC violates due process and federal ethics rules. Facebook submitted a Petition to the agency explaining that due process and the federal ethics rules require Chair Khan to be recused from this case because any disinterested observer would conclude that Chair Khan came to the FTC having already made up her mind that Facebook has violated the antitrust laws and with an "axe to grind" against the company. *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.); *see* Hansen Decl. Exs. A, B (Facebook's Petition for Recusal ("Recusal Petition") and supporting expert declaration of Professor Daniel B. Rodriguez ("Rodriguez Decl.")).

Yet the new Chair, who controls the FTC's agenda, refused to address Facebook's Recusal Petition on the merits or allow the full Commission to do so before pressing forward with a vote

on the AC. That failure violates due process and federal ethics rules and invalidates the Commission's 3-2 vote on the AC. *See* Hansen Decl. Ex. F at 2 (Order, *FTC v. Libbey, Inc.*, No. 1:02-cv-00060-RBW, ECF No. 76 (D.D.C. Apr. 3, 2002)) (Commission vote required under § 13(b) to authorize filing of amended complaint).

As Commissioner Wilson wrote in her dissent, Facebook's Recusal Petition raised serious issues worthy of careful consideration. Wilson Dissent at 1. The only excuse the agency gave for not taking up the Petition was that the agency simply has no mechanism to consider the serious issues raised by Facebook's Petition as they apply to Commissioners except for when Commissioners are engaged in rulemaking or sitting as judges in administrative proceedings. *See* Hansen Decl. Ex. G (Email from April J. Tabor, Office of the Sec'y, FTC, to Geoffrey M. Klineberg (Aug. 19, 2021) ("Tabor Email")). That makes no sense. A federal agency is obligated "to comport its actions to the standards required by the Constitution," and, "[i]f promulgating new regulations is the only manner in which the [agency] can properly conform its conduct, then the [agency] must do so." *Lowry v. Soc. Sec. Admin.*, 2000 WL 730412, at *14 (D. Or. June 7, 2000) (denying Social Security Administration's motion to dismiss claims challenging adequacy of the agency's disqualification procedures); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 223 (D.C. Cir. 2011) (explaining that agencies may need "to adapt established internal procedures" to ensure that their decisions are "untainted").[2]

[2] The Court may take judicial notice of Facebook's Recusal Petition and supporting Rodriguez declaration, the public statements quoted in the Petition (as well as the underlying news articles, publications, and tweets), and the agency's response to the Petition. *See* Fed. R. Evid. 201; *see also*, *e.g.*, *Farah v. Esquire Mag.*, 736 F.3d 528, 534 (D.C. Cir. 2013) (courts may take judicial notice of public "articles" and "publications"); *Wilcox v. Georgetown Univ.*, 2019 WL 132281, at *4 n.5 (D.D.C. Jan. 8, 2019) (courts may take judicial notice of facts "generally known because of newspaper articles"); *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 306 n.23 (D.D.C. 2018) (courts may take judicial notice of "correspondence" from

The Court should dismiss the AC because it was not properly authorized by the Commission. In the alternative, it should direct the FTC to address on the merits the serious issues presented in the Recusal Petition: whether Chair Khan's participation comported with federal law.

A. Chair Khan's Prejudgment of Facebook's Liability Required Her Recusal

1. Chair Khan's prior statements make clear to a disinterested observer that, before she became an FTC Commissioner, she had prejudged Facebook's Section 2 liability and was biased against the company. *See* Recusal Petition at 11-13 (collecting statements). Binding D.C. Circuit precedent requires an FTC Commissioner's recusal where "a disinterested observer" would "conclude that [she] has in some measure adjudged the facts as well as the law of a particular case in advance." *Cinderella Career Coll. & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *see* Recusal Petition at 17-20 (collecting authorities); Rodriguez Decl. at 3-6 (same).

Less than a year ago, Chair Khan, by her own admission, "*led* the congressional investigation into digital markets [by the House Antitrust Subcommittee] and the publication of" a report that purported to conclude that Facebook engaged in conduct that meets all the elements of a Section 2 violation. *See* Lina Khan, Bio, http://www.linamkhan.com/bio-1 (no longer active) [https://perma.cc/9GB5-F78G (visited Oct. 4, 2021)] (emphasis added). The report purported to make factual and legal findings that Facebook has "monopoly power" in a relevant antitrust market, maintained that monopoly power through anticompetitive means, and harmed consumers. *See* Majority Staff of Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm.

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agency); *Vasser v. McDonald*, 228 F. Supp. 3d 1, 10-11 (D.D.C. 2016) (courts may take judicial notice of materials filed with an agency); *Cosgrove v. Oregon Chai, Inc.*, 520 F. Supp. 3d 562, 581 n.5 (S.D.N.Y. 2021) (courts may take judicial notice of websites).

on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 132-73 (Oct. 2020). Having completed this report just months before her nomination and confirmation to the FTC, Chair Khan cannot plausibly be expected to set those conclusions aside and conduct a fresh, impartial review of the evidence.

The Sixth Circuit addressed a similar situation in *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), holding that then-Chair Paul Rand Dixon's participation in a case "amounted . . . to a denial of due process" where he had "played an 'active role' in an [antitrust] investigation by [a congressional] Subcommittee of many of the same facts and issues and of the same parties as are involved in this [FTC] proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties." *Id.* at 763, 767 (ellipsis in original). The court explained that it was sufficient that then-Chair Dixon's conduct created an *appearance* of prejudgment and the "reasonable suspicion of unfairness" because "[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided." *Id.* at 767.

Chair Khan's participation is even more concerning because her public statements regarding Facebook go well beyond the congressional report and reveal that Chair Khan has an "axe to grind" against the company. *Wright*, 732 F.2d at 1056. She has accused Facebook of being responsible for "a host of social ills," including "genocide," Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497, 526-27 (2019), and of having "appropriated [competitors'] business information and functionality," Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1001 (2019). Such hyperbolic animus is incompatible with the requirement of both the fact and the appearance of unbiased exercise of the FTC's prosecutorial power.

2. Chair Khan, purportedly upon advice from the FTC's General Counsel, bypassed the serious issues raised by Facebook's Recusal Petition. *See* Hansen Decl. Ex. H at 2 (Press Release, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021) ("Press Release")) (stating that the Recusal Petition had been "dismissed" by the Office of the Secretary). In particular, the full Commission was not given the chance to address the merits of the Petition. In dissenting from the decision to authorize the AC, Commissioner Wilson explained that, "[i]f the Commission were to review Facebook's recusal petition, [she] would evaluate the petition carefully, applying the relevant law, including Constitutional due process considerations, to the applicable facts." Wilson Dissent at 1 (footnote omitted).

The FTC's explanation for not even considering these issues was both sweeping and unsupported: the agency asserted that it simply had no mechanism to evaluate the application of due process rules to Commissioners in the exercise of their authority under the FTC Act except in specific and limited circumstances. *See* Tabor Email (stating that the "recusal petition and the supporting declaration ha[ve] been procedurally reviewed" but that, "[a]s there are currently no adjudicative or rulemaking proceedings before the Commission in which Facebook . . . is a subject, target, or defendant/respondent, this petition is premature"). The agency likewise maintains that federal-court jurisdiction is all the process to which a defendant is entitled and that a defendant has no right to an unbiased agency decision when it will ultimately have its case decided by an Article III judge. *See* Press Release at 2 (stating that, because "the case will be prosecuted before a federal judge, the appropriate constitutional due process protections will be provided to the company").

That position cannot be squared with federal law. The fact that Chair Khan was not acting as a formal adjudicator did not remove her obligation to avoid the appearance of

prejudgment or bias. The Chair of the FTC exercises extraordinary power within the agency: the entire FTC staff is an extension of the Chair. *See* Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 25, 1950). As the head of a powerful agency entrusted with making enforcement decisions, Chair Khan has an obligation to approach decisions to bring the power of the agency to bear with an open mind through a process that gives fair consideration to all parties. *See* Rodriguez Decl. at 3-8; *see also* 5 C.F.R. § 2635.501(a).

Indeed, all prosecutors – not just those subject to the heightened expectations of neutrality that apply to commissioners of independent administrative agencies – are subject to disqualification when they have an "axe to grind" against the defendant or are not otherwise impartial. *Wright*, 732 F.2d at 1056; *see also* Rodriguez Decl. at 8-16 (collecting authorities). Prosecutors are expected to engage in "fair play," Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 4 (1940), and to exercise their discretion to bring cases in a "disinterested, nonpartisan fashion," N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 683, at 4 (June 7, 1996).[3] While prosecutors do not make the ultimate decision of guilt or innocence, they still have "quasi-judicial" responsibilities because they are charged with important decisions about whether and how to bring claims. *See* Rodriguez Decl. at 11 (collecting authorities). The cavalier assertion that the Constitution and federal ethics rules place *no* limits on the Chair's ability to exercise her considerable power against a defendant, no matter how apparent her bias and prejudice are to any disinterested observer, is both breathtaking and incorrect.

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[3] *See also*, *e.g.*, *State v. King*, 956 So. 2d 562, 563 (La. 2007) (disqualifying prosecutor who had "strong personal feelings of animosity" toward defendant); *State v. Gonzales*, 119 P.3d 151, 162 (N.M. 2005) (disqualifying prosecutor who had previously made "expressions of animosity" toward defendant); *State v. Hohman*, 420 A.2d 852, 854-55 (Vt. 1980) (finding error in trial court's denial of motion to disqualify state's attorney because he formerly pledged to prosecute the defendant in a campaign advertisement), *overruled on other grounds by Jones v. Shea*, 532 A.2d 571 (Vt. 1987).

B. In the Absence of a Valid Commission Vote, the AC Must Be Dismissed

For the reasons explained above, the AC has not been properly authorized, and the agency has failed to satisfy the requirements of Section 13(b), which provides that "the Commission" must make the decision to "bring suit in a district court of the United States." 15 U.S.C. § 53(b). That plain language requires a valid vote of the Commission itself. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 42 n.19 (D.D.C. 2002); 16 C.F.R. § 1.61. In the absence of a valid vote, the agency's staff lacks authority to file a complaint, and any complaint they do file is not "properly before" the Court. *Libbey*, 211 F. Supp. 2d at 42 n.19; *see also*, *e.g.*, *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 554-55 & n.2 (9th Cir. 2016) (dismissing National Labor Relations Board petition for injunctive relief that lacked "valid authorization"); *ICC v. S. Ry. Co.*, 543 F.2d 534, 535 (5th Cir. 1976) (dismissing case where Interstate Commerce Commission lacked the necessary authorization to "bring suit to enforce its orders in the federal district courts"); *FTC v. Guignon*, 390 F.2d 323, 329-30 (8th Cir. 1968) (dismissing FTC subpoena enforcement action where FTC lacked statutory authorization to bring the action).

Even if Chair Khan's vote had not been decisive – which it was – her participation would invalidate the FTC's vote. For example, in *Cinderella*, the D.C. Circuit held that then-Chair Dixon's failure to recuse himself from a vote after giving a speech that gave "the appearance that the case ha[d] been prejudged" invalidated the entirety of the Commission's unanimous vote because there was "no way" to measure "the influence of [then-Chair Dixon] upon the others." 425 F.2d at 590, 592. The taint on the FTC's action is even more apparent here, because the Chair cast the deciding vote for the FTC's action.[4] Dismissal of the AC is therefore required.

[4] Given the Chair's authority to direct the actions of the FTC's staff, Chair Khan's failure to recuse herself is also an ongoing due process violation that will taint all of the agency's litigation choices.

C. In the Alternative, the Court Should Stay the Case and Remand to the FTC To Resolve the Recusal Issue Now

Whether Chair Khan's participation comported with due process and federal ethics rules is an issue that this Court should resolve before this case proceeds. As an alternative to this Court deciding the recusal issue, the Court could also stay this case and order the agency to act on Facebook's Recusal Petition. *See Aera Energy*, 642 F.3d at 220 (the preferred remedy in cases involving allegations that "political considerations have tainted agency action" has been to give "the agency an opportunity to issue a new, untainted decision"); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267-68 (D.C. Cir. 1962) (requiring Securities and Exchange Commission to "determin[e] upon a complete record whether or not any Commissioner should have been disqualified" or end the case). That action may bring the case to an end; at a minimum, it would provide a basis for this Court to evaluate the legal and factual grounds for any ruling by the Commission that Chair Khan's recusal is not required.

CONCLUSION

For the foregoing reasons, the Court should grant the motion and dismiss the FTC's case.

Respectfully submitted,

October 4, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 1:20-cv-03590-JEB

DECLARATION OF MARK C. HANSEN IN SUPPORT OF FACEBOOK, INC.'S MOTION TO DISMISS THE FTC'S AMENDED COMPLAINT

Pursuant to 28 U.S.C. § 1746, I, Mark C. Hansen, declare as follows:

1. I am a partner with the law firm of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. and counsel for Defendant Facebook, Inc. ("Facebook"). I am an attorney admitted to practice law in the District of Columbia and am a member of the Bar of the United States District Court for the District of Columbia. I submit this Declaration in Support of Facebook's Motion To Dismiss the FTC's Amended Complaint. I have personal knowledge of the facts set forth herein and am competent to testify thereto if called as a witness.

2. Attached hereto as Exhibit A is a true and correct copy of Facebook's July 14, 2021 Petition for Recusal of Chair Lina M. Khan from Involvement in the Pending Antitrust Case Against Facebook, Inc., and the exhibits attached thereto, that Facebook filed before the Federal Trade Commission ("FTC").

3. Attached hereto as Exhibit B is a true and correct copy of the August 17, 2021 Expert Declaration of Professor Daniel B. Rodriguez, and the exhibits attached thereto, that Facebook filed before the FTC in support of its July 14, 2021 Petition for Recusal.

4. Attached hereto as Exhibit C is a true and correct copy of the August 19, 2021 Dissenting Statement of Commissioner Christine S. Wilson in *FTC v. Facebook, Inc.* (FTC Matter No. 191 0134), available on the FTC's public website, https://www.ftc.gov/system/files/documents/public_statements/1594737/facebook_-_dissenting_statement_-_first_amended_complaint_-_final.pdf.

5. Attached hereto as Exhibit D is a true and correct copy of the August 9, 2021 Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters, available on the FTC's public website, https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

6. Attached hereto as Exhibit E is a true and correct copy of the June 4, 2015 Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction in *FTC v. Steris Corp.*, No. 1:15-cv-01080-DAP, ECF No. 21 (N.D. Ohio).

7. Attached hereto as Exhibit F is a true and correct copy of the April 3, 2002 Order in *FTC v. Libbey, Inc.*, No. 1:02-cv-00060-RBW, ECF No. 76 (D.D.C.).

8. Attached hereto as Exhibit G is a true and correct copy of the August 19, 2021 email from April J. Tabor, Office of the Sec'y, FTC, to Geoffrey M. Klineberg of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C, counsel for Facebook.

9. Attached hereto as Exhibit H is a true and correct copy of the August 19, 2021 FTC press release titled "FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate," available on the FTC's public website, https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: October 4, 2021

By: /s/ *Mark C. Hansen*

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Exhibit A

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

FEDERAL TRADE COMMISSION

IN RE PETITION FOR RECUSAL OF CHAIR LINA M. KHAN FROM INVOLVEMENT IN THE PENDING ANTITRUST CASE AGAINST FACEBOOK, INC.

PETITION FOR RECUSAL

Facebook, Inc. respectfully petitions Chair Lina M. Khan and the Federal Trade Commission ("FTC" or "Commission") to recuse Chair Khan from participating in any decisions concerning whether and how to continue the FTC's antitrust case against the company.[1]

INTRODUCTION AND SUMMARY

Due process entitles any targeted individual or company to fair consideration of its factual and legal defenses by unbiased Commissioners who, before joining the Commission, have not already made up their minds about the target's legal culpability. When a new Commissioner has already drawn factual and legal conclusions and deemed the target a lawbreaker, due process requires that individual to recuse herself from related matters when acting in the capacity of an FTC Commissioner. For example – and of particular relevance here – the D.C. Circuit deemed it an "appalling" violation of due process when a prior FTC Chair

[1] *See FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, Dkt. No. 72 (D.D.C. June 28, 2021) (order dismissing the FTC's complaint). This petition addresses the agency's pending antitrust case against Facebook, including any decision to file a revised complaint in federal court or in a Part 3 administrative proceeding based on the same or similar allegations. The recusal question presented is particularly urgent, given the Commission's 30-day deadline for filing any amended complaint in federal court. Facebook reserves the right to seek Chair Khan's recusal from any additional matters presenting similar prejudgment concerns.

participated in a matter against a specific defendant because he "had investigated and developed many of the[] same facts" regarding that defendant as a congressional staffer.[2] That precedent, as well as the federal ethics rules, compel Chair Khan's recusal from any decisions regarding the pending antitrust case against Facebook.[3] Chair Khan has consistently made public statements not only accusing Facebook of conduct that merits disapproval but specifically expressing her belief that the conduct *meets the elements of an antitrust offense* under Section 2 of the Sherman Act, thereby constituting an unfair method of competition in violation of Section 5(a) of the FTC Act. Indeed, she has led an organization lobbying the Commission to impose particular remedies against Facebook and, more recently, commented publicly as to her personal beliefs on the merits of the very complaint filed by the Commission last December, the dismissal of which must be addressed in some fashion by the Commission in the coming weeks.

These statements – which Facebook vigorously disputes as unsupported and contrary to law – convey to any disinterested observer that Chair Khan, well before becoming a Commissioner, had already decided the material facts relevant to Facebook's liability in the Commission's pending antitrust lawsuit and already reached legal conclusions that Facebook

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[2] *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966)).

[3] Amazon.com, Inc. has filed a petition with the Commission asking that Chair Khan be recused from certain matters based on her prior statements regarding Amazon. Recusal Pet. by Amazon.com, Inc. at 1, *Motion To Recuse Chair Lina M. Khan from Involvement in Certain Antitrust Matters Involving Amazon.com, Inc.* (June 30, 2021). Facebook agrees with Amazon's arguments concerning the circumstances where a Commissioner's prior statements require recusal and incorporates those legal arguments, as well as the ethics analysis offered by Amazon's expert Professor Thomas D. Morgan. *See* Expert Decl. of Prof. Thomas D. Morgan in Supp. of Recusal Pet. by Amazon.com, Inc. (June 29, 2021) (Ex. A).

was liable under the antitrust laws. She made these public and repeated statements in multiple roles over the course of the last decade:

- ***In Her Work for the Open Markets Institute.*** At various times between 2011 and 2018, Chair Khan worked for the Open Markets Institute, a political advocacy group, and she authored numerous articles opining on Facebook's allegedly unlawful antitrust conduct.[4] While Chair Khan was the Legal Director at Open Markets, the organization advocated for the Commission to "[r]everse the approvals for Facebook [*sic*] purchases of WhatsApp and Instagram, and reestablish these as competing social networks."[5]

- ***In Her Academic Writing.*** Chair Khan published academic articles discussing her belief that Facebook violated the antitrust laws. She has already concluded that Facebook "has both foreclosed competitors from its platform and appropriated their business information and functionality" and that, "[d]espite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market."[6]

- ***As Leader of the House Antitrust Investigation and Report.*** From March 2019 to October 2020, Chair Khan was Majority Counsel for the U.S. House Committee on the Judiciary – Subcommittee on Antitrust, Commercial, and Administrative Law.[7] In her own words, she "led the congressional investigation into digital markets and the publication of [the] final report"[8] by the Subcommittee that purported to make *specific factual findings* and reach *legal conclusions* about the challenged acquisitions at issue in the FTC's district court complaint against Facebook. The Report concluded that Facebook "acquired Instagram to neutralize a nascent competitive threat" that "was growing significantly at the time of the transaction" and that "Facebook's support of

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[4] Lina M. Khan, Resume, https://www.commerce.senate.gov/services/files/AB3EF7E3-1D58-4EB4-9646-3FBB5ADD144F, at 20-21 (Ex. B).

[5] Press Release, Open Markets Inst., *Fines for Facebook Aren't Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy* (Mar. 22, 2018), https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy (accessed July 14, 2021) [https://perma.cc/P4AU-C4CZ].

[6] *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1001, 1004 (2019).

[7] *See* Lina M. Khan, Resume, *supra* note 4 (Ex. B).

[8] Lina M. Khan, Bio, http://www.linamkhan.com/bio-1 (no longer active) [https://perma.cc/9GB5-F78G] (Ex. C). Recently, most of Chair Khan's personal website was deleted, including the reference to her leadership role in the House Subcommittee. Accordingly, Facebook has attached as Exhibit C a copy of the "Bio" page of that website as it existed on July 1, 2021.

Instagram's growth after acquiring it is overstated."[9] The Report also concluded that "Facebook acquired WhatsApp to expand its dominance" and to take over "a maverick competitor."[10]

- ***In Her Public Appearances.*** In interviews and media appearances, Chair Khan has discussed her beliefs on Facebook's culpability under the antitrust laws, including in the context of discussing the Subcommittee's Report. Last year, she told the *New York Times* that Facebook had engaged in "killer acquisition[s] . . . in several cases" and that "Facebook's acquisition strategy was basically a land grab to . . . lock up the market."[11] In particular, she concluded that Facebook's "purchase of Instagram was an effort to really neutralize . . . competitive threats," and the FTC's decision to "allow[] [the Instagram acquisition] to go through" in 2012 was an "institutional failure" that demands "a moment of reckoning."[12]

- ***In Her Posts on Twitter.*** Hours after the Commission filed its complaint against Facebook in federal district court, Chair Khan commented on the substance of the Commission's pending litigation on Twitter, expressing her opinions on the facts and merits. She applauded the FTC and the States for "suing Facebook for violating antitrust laws—and requesting divestitures/breakups, among other forms of relief."[13] She also presumed that Facebook has a monopoly in "social networking" and has a "copy-acquire-kill" strategy, calling on "enforcers" to stop Facebook.[14]

Although Facebook strongly disagrees with Chair Khan's factual and legal conclusions about Facebook, it does not criticize her for having participated in the Open Markets Institute, in academic scholarship, in the Subcommittee's investigation and subsequent Report, or, more generally, for speaking on issues of public concern and seeking to vigorously enforce the

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[9] Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, at 151, 154-55 (Oct. 2020) (hereinafter "Report").

[10] *Id.* at 158, 160.

[11] *See* Sway, *She's Bursting Big Tech's Bubble*, N.Y. Times (Oct. 29, 2020) (transcript), https://www.nytimes.com/2020/10/29/opinion/sway-kara-swisher-lina-khan.html?showTranscript=1 (accessed July 14, 2021).

[12] *Id.*

[13] Lina M. Khan (@linamkhan), Twitter (Dec. 9, 2020), https://web.archive.org/web/20210614143417/https://twitter.com/linamkhan/status/1336828056695136259 (Ex. D). These tweets were recently deleted but are available through the use of archive.org (*i.e.*, the "Wayback Machine").

[14] *Id.*

antitrust laws. But her acknowledged leadership of the investigation and authorship of the Report, as well as her repeated and consistent public claims that Facebook is culpable for antitrust violations, would lead any disinterested observer to conclude that she has prejudged Facebook's alleged antitrust liability. Under controlling D.C. Circuit precedent, that appearance of prejudgment requires her immediate recusal from any involvement in the antitrust litigation against Facebook.

That conclusion would follow even if Chair Khan were a non-Chair Commissioner, but her elevation to Chair makes her recusal obligation particularly obvious and urgent. If she does not recuse herself, she will inevitably play a pivotal role as Chair in any upcoming decision by the Commission about how to respond to the district court's dismissal of the Commission's antitrust complaint, including whether to attempt to abandon the court case in favor of a Part 3 administrative proceeding, in which Chair Khan would ultimately rule on Facebook's liability. Because, "[a]s counsel for the [House] Subcommittee," Chair Khan "investigated and developed many of the[ ] same facts" the Commission has alleged and would allege here, her participation in any decision to revive this case would reflect a fundamental "insensitivity to the requirements of due process."[15] Any decisions made with her participation would thus be subject to dismissal on that threshold ground.[16] Facebook respectfully requests that Chair Khan recuse herself from any decisions regarding the Commission's pending litigation against Facebook.

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[15] *Cinderella*, 425 F.2d at 591.

[16] *Id.* at 591-92. With this filing, Facebook also puts Chair Khan and all other Commission personnel on notice to preserve all emails, memoranda, and other documents reflecting or relevant to her participation in this or any other Facebook matter, both before and after she joined the Commission.

BACKGROUND

For the entirety of her professional career, Chair Khan has consistently and very publicly concluded that Facebook is guilty of violating the antitrust laws. She has built her career, in large part, by singling out Facebook as a professed antitrust violator in her work at the Open Markets Institute, in academic writings, as leader of a congressional investigation and drafting of a final report, in public appearances and speeches, and on Twitter.

I. Chair Khan Has Prejudged Facebook's Antitrust Culpability

A. Chair Khan's Work On Behalf Of The Open Markets Institute

In 2011, Chair Khan started working at what would become the Open Markets Institute.[17] This political advocacy organization claims to have "pioneered analysis of how Google, Amazon, and Facebook wield [monopoly] power in ways that threaten democracy and individual liberty."[18] Chair Khan was a Policy Analyst and Reporter at Open Markets until 2014 and later became the Legal Director of the Institute in 2017.[19] She held that role throughout 2018,[20]

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[17] *See* Lina M. Khan, Resume, *supra* note 4 (Ex. B). The Open Markets Institute "[l]aunched as an independent organization in September 2017." Open Markets Inst., *About*, *Our Mission*, https://www.openmarketsinstitute.org/our-mission (accessed July 14, 2021) [https://perma.cc/TTU4-RS96]. Before 2017, "the Open Markets Team spent eight years studying, speaking, and writing about the problem of market concentration as the Open Markets Program at New America." *Id.*

[18] Open Markets Inst., *Programs*, *Technology & Power*, https://www.openmarketsinstitute.org/technology-power (accessed July 14, 2021) [https://perma.cc/9ABQ-5Y3N].

[19] *See* Lina M. Khan, Resume, *supra* note 4 (Ex. B). As of December 12, 2017, Open Markets' website listed Chair Khan as the "Director of Legal Policy." Open Markets Inst., *About Open Markets* (Dec. 12, 2017), https://web.archive.org/web/20171212181705/http:/openmarketsinstitute.org/meet-our-team.

[20] Chair Khan's resume does not specify when in 2018 she stopped working at the Open Markets Institute, although she spoke on behalf of the organization at a conference on October 17, 2018. *See* Open Markets Inst., *Testimony by Open Markets Senior Fellow Lina Khan at the FTC's Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 17, 2018), https://www.openmarketsinstitute.org/publications/testimony-open-markets-senior-fellow-lina-

during which time "Open Markets' grassroots arm, Citizens Against Monopoly," started a campaign called "Freedom from Facebook"[21] that Open Markets "spearheaded."[22] The Freedom from Facebook movement described itself as "a diverse coalition of organizations asking the FTC to break up Facebook's monopoly on American social media," in part by "[s]pinning off WhatsApp, Instagram, and [Facebook] Messenger to establish greater competition and support market-based accountability[.]"[23] Freedom from Facebook announced on its website that "five members of the Federal Trade Commission . . . can make Facebook safe for our democracy by breaking it up," and stated, "[t]ogether, we will make sure that they do."[24]

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khan-ftcs-hearing-3-competition-consumer-protection-21st-century (accessed July 14, 2021). [https://perma.cc/CDW9-VJUW]. In July 2018, Commissioner Rohit Chopra hired Chair Khan as a Legal Fellow in his office. *See* Lina M. Khan, Resume, *supra* note 4 (Ex. B); Nancy Scola, *FTC Democrat hires tech industry critic who's taken aim at Amazon*, POLITICO (July 9, 2018), https://www.politico.com/story/2018/07/09/prominent-tech-critic-joins-dem-ftc-office-674511 (accessed July 14, 2021).

[21] Open Markets Inst., *The Corner Newsletter, May 31, 2018: Warren Buffet's Monopoly Win – Corporate Buyers Contribute to Wage Stagnation – Growing Support for Single-Price Health Care* (May 31, 2018), https://www.openmarketsinstitute.org/publications/corner-newsletter-may-31-2018-warren-buffetts-monopoly-win-corporate-buyers-contribute-wage-stagnation-growing-support-single-price-health-care (accessed July 14, 2021) [https://perma.cc/G2YG-99V5].

[22] Open Markets Inst., *Freedom From Facebook's Comment to the FTC's "Competition and Consumer Protection in the 21st Century" Hearing* (Aug. 20, 2018), https://www.openmarketsinstitute.org/publications/freedom-facebooks-comment-ftcs-competition-consumer-protection-21st-century-hearing (accessed July 14, 2021) [https://perma.cc/2CLY-E4VP].

[23] Comment from Freedom from Facebook to FTC on "Competition and Consumer Protection in the 21st Century Hearing, Project Number P181201" (Aug. 20, 2018), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebf5afb915c861317ea5d1b/1589598972273/FFF-FTC-Comment.pdf (accessed July 14, 2021) [https://perma.cc/EKE9-9F6H].

[24] Freedom from Facebook, Home Page (Apr. 16, 2019), https://web.archive.org/web/20190416162812/https:/freedomfromfb.com/.

Not only did Open Markets "spearhead" this anti-Facebook group while Chair Khan was the Director of Legal Policy, Open Markets also submitted a letter to the Commission in November 2017 on "Facebook's dominance in social networking and online advertising."[25] Chair Khan personally signed the letter, asking the agency to "assess the hazards that this dominance poses to commerce and competition, basic democratic institutions, and national security."[26] The letter alleged "facts" positioning Facebook as a so-called "top-tier platform monopolist[ ]," claiming, among other things, that "Facebook has 77% of mobile social networking traffic in the United States" and that Facebook had "captured" 38% of "the growth in online advertising last year."[27] Chair Khan and her organization claimed that "[t]he most obvious immediate step to address Facebook's current power is to prohibit mergers between Facebook [*sic*] other potentially competitive social networks or other new and promising products and services."[28]

While Chair Khan was Director of Legal Policy at the Open Markets Institute, the organization also advocated for the Commission to:

- "Spin off Facebook's ad network[.]"[29]
- "Reverse the approvals for Facebook [*sic*] purchases of WhatsApp and Instagram, and reestablish these as competing social networks."[30]

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[25] Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017), https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions (accessed July 14, 2021) [https://perma.cc/DT2Y-D9XM].

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Press Release, *supra* note 5.

[30] *Id.*

- "Prohibit all future acquisitions by Facebook for at least five years."[31]
- "Threaten to bring further legal action against Facebook unless top executives immediately agree to work with the FTC to restructure their corporation to ensure the safety and stability of our government and economy."[32]

B. Chair Khan's Academic Writings

In the fall of 2018, Chair Khan became an Academic Fellow at Columbia Law School, where she authored law review articles that reiterated her belief that Facebook has violated the antitrust laws.[33] Before the Commission informed Facebook that it had opened an antitrust investigation and before the House Subcommittee ever began its antitrust investigation, Chair Khan criticized Facebook at length in an article published in 2019, beginning a five-page section of the article with the claim that "Facebook is a dominant social network."[34] The article further claimed:

- Facebook "has both foreclosed competitors from its platform and appropriated their business information and functionality."[35]
- "In addition to blocking apps that it deemed competitive threats, Facebook has also systematically copied them."[36]
- "Facebook has established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors."[37]

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[31] *Id.*

[32] *Id.*

[33] News Release, Columbia Law School, *Antitrust Scholar Lina Khan Joins Faculty* (Dec. 2, 2020), https://www.law.columbia.edu/news/archive/antitrust-scholar-lina-khan-joins-faculty (accessed July 14, 2021) [https://perma.cc/LQ5K-VT5F].

[34] *See* Khan, *supra* note 6, at 1001-05.

[35] *Id.* at 1001.

[36] *Id.* at 1002.

[37] *Id.* at 1003.

- "Despite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market."[38]

In another article published in 2019, Chair Khan (and a co-author) again criticized Facebook, presenting various legal conclusions about Facebook's allegedly anticompetitive conduct.[39] The article also accused Facebook of using data in ways "that threaten the users' best interests, from allowing predatory advertising and enabling discrimination to inducing addiction and sharing sensitive details with third parties."[40]

C. Chair Khan's Leadership Of The House Majority's Investigation And Report

After a few months as an Academic Fellow, Chair Khan went on leave from Columbia Law School in March 2019 to join the U.S. House Committee on the Judiciary – Subcommittee on Antitrust, Commercial, and Administrative Law as Majority Counsel.[41] According to her website, Chair Khan "*led* the congressional investigation into digital markets and the publication of [the] final report" of the Subcommittee's Majority Staff.[42] That document is explicitly styled as a report, not of the Subcommittee itself, but of the Subcommittee's "Majority Staff," on which Chair Khan served as "Counsel."

A 42-page section of that Report, entitled "Facebook," includes numerous purported factual findings that ostensibly support the Report's core legal conclusions – that Facebook has

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[38] *Id.* at 1004.

[39] *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497 (2019).

[40] *Id.* at 498.

[41] Lina M. Khan, Resume, *supra* note 4 (Ex. B); News Release, *supra* note 33.

[42] Lina M. Khan, Bio, *supra* note 8 (Ex. C) (emphasis added).

"monopoly power" in a relevant antitrust market, that it both obtained and maintained that monopoly power through anticompetitive means, and that its conduct harmed consumers.

Especially relevant here, the Report's "Facebook" section specifically purports to find that Facebook "acquired Instagram to neutralize a nascent competitive threat" that "was growing significantly at the time of the transaction" and that "Facebook's support of Instagram's growth after acquiring it is overstated."[43] As for Facebook's acquisition of WhatsApp, the Report purports to find that "Facebook acquired WhatsApp to expand its dominance" and to takeover "a maverick competitor."[44]

The remainder of the Report's "Facebook" section appears calculated to support, with purported legal and factual findings, the essential elements of a Section 2 offense.

First, the Report concludes that "social networking" is a relevant antitrust market.[45] The Report defines this market as separate from the market for "social media," based on the Subcommittee's "review[ ] [of] relevant market data and documents provided during the investigation."[46] The Report further describes the "social networking" market as having "high entry barriers . . . that discourage direct competition by other firms."[47]

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[43] Report, *supra* note 9, at 151, 154-55.

[44] *Id.* at 158, 160.

[45] *Id.* at 11 (identifying the market for "social networking" as one of "[s]everal markets investigated by the Subcommittee"); *id.* at 90 (distinguishing "between social networking and social media markets"); *id.* at 12 (claiming that Facebook operates "in the market for social networking"); *id.* at 13 (same); *id.* at 133 (same); *id.* at 134 (same); *id.* at 136 (same); *id.* at 138 (same); *id.* at 144 (same); *id.* at 147 (same); *id.* at 149 (same); *id.* at 160 (same); *id.* at 170 (same); *id.* at 172 (same).

[46] *Id.* at 139.

[47] *Id.* at 133.

Second, the Report concludes that Facebook has "monopoly power" in that supposed market.[48] It purports to find that "Facebook and its family of products—Facebook, Instagram, Messenger, and WhatsApp—control a significant share of users and high reach in the social networking market,"[49] and this "demonstrates its monopoly power."[50]

Third, the Report concludes that Facebook illegally acquired and maintained its supposed monopoly power through anticompetitive means.[51] It purports to find that "the company acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market,"[52] including Instagram and WhatsApp. For example, the Report asserts that "the purpose of acquiring nascent competitors like Instagram was to neutralize competitive threats"[53] and that Facebook acquired WhatsApp because it "viewed WhatsApp as a potential threat to Facebook Messenger."[54] The Report concludes that these "serial acquisitions reflect the

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[48] *Id.* at 12 ("Facebook has monopoly power in the market for social networking."); *id.* at 133 (same); *id.* at 136 (same); *id.* at 13 ("Facebook's monopoly power is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms."); *id.* at 137 ("Facebook's maintenance of these high market shares over a long time period demonstrates its monopoly power."); *id.* at 147 ("Facebook has a significant data advantage [that] . . . reinforc[es] Facebook's monopoly power."); *id.* at 170 ("Facebook has monopoly power in online advertising in the social networking market.").

[49] *Id.* at 136.

[50] *Id.* at 137.

[51] *Id.* at 12 ("Facebook acquired its competitive threats to maintain and expand its dominance."); *id.* at 149 (same); *id.* at 14 ("The company used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms."); *id.* at 160 (same); *id.* at 166 ("Facebook [w]eaponized [a]ccess to its [p]latform.").

[52] *Id.* 149.

[53] *Id.* at 149-50.

[54] *Id.* at 150.

company's interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats."[55]

Finally, the Report concludes that Facebook's conduct has caused cognizable consumer harm. It claims, "[i]n the absence of competition, Facebook's quality has deteriorated over time, resulting in worse privacy protections for its users and a dramatic rise in misinformation on its platform."[56]

Chair Khan's personal involvement in both the investigation and the Report was extensive, including personally participating in calls, emails, and an in-person meeting with Facebook's outside counsel. In these communications, Chair Khan regularly spoke on behalf of the Committee, describing the scope of the investigation and her beliefs on the sufficiency of Facebook's responses.

D. Chair Khan's Public Appearances

Before and after she led the congressional investigation into Facebook, Chair Khan publicly shared her beliefs about Facebook's allegedly anticompetitive conduct. For example, in 2018, Chair Khan said, "to make sure Facebook isn't acquiring further power . . . , if Facebook tomorrow announces it is acquiring another company, I would hope that the FTC would look at that very closely *and block it*," both presuming that Facebook has too much "power" and proposing that the government block *any* future acquisition.[57]

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[55] *Id.*

[56] *Id.* at 14.

[57] *The Bernie Sanders Show* (May 15, 2018) (starting at 20:29), https://www.youtube.com/watch?v=wuCAy10hlHI&t=1229s (emphasis added).

Two years later, shortly after the Report was issued in October 2020, Chair Khan reaffirmed her belief in its purported conclusions about Facebook in a transcribed interview for the *New York Times*.[58] She expressed satisfaction that "more of [Facebook's] predatory practices are coming to account," such as "near-perfect market intelligence it can use . . . to cut off any competitor, to buy up that competitor, to introduce replica services."[59] She claimed that Facebook had engaged in "killer acquisition[s] . . . in several cases," in that it "acquire[d] a company for the purpose of shutting it down, for the purpose of killing it because [Facebook] recognize[d] that a product could be a threat to them."[60] She reaffirmed her personal belief in the Report's conclusions that "Facebook's acquisition strategy was basically a land grab to . . . lock up the market" and, in particular, that its "purchase of Instagram was an effort to really neutralize . . . competitive threats."[61] And she claimed that the FTC's decision to "allow[] [the Instagram acquisition] to go through" in 2012 was an "institutional failure" that demands "a moment of reckoning."[62]

In addition, Chair Khan publicly stated that Facebook and others "control the infrastructure on which digital commerce and communications take place," noting that "[t]hey've used their gatekeeper power both to *extort* and to *exploit* the individuals and entities that rely on

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[58] *See* Sway, *supra* note 11.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

their technologies. They've maintained and extended their power through serial acquisitions and through *coercive* and *predatory* tactics."[63]

E. Chair Khan's Statements On Twitter

On December 9, 2020, the same day that the Commission and States filed their complaints against Facebook in federal district court, Chair Khan reaffirmed her prior conclusions about Facebook's antitrust culpability in a series of tweets that are no longer visible on her Twitter profile but are available through the use of archive.org (*i.e.*, the "Wayback Machine").[64] In those tweets, she applauded the FTC and state attorneys general for "suing Facebook for violating antitrust laws—and requesting divestitures/breakups, among other forms of relief."[65] She described the "States' complaint [as] especially impressive" in that it "fully showcas[ed] how Instagram & WhatsApp acquisitions were part of [a] broader monopoly maintenance strategy."[66] She further presumed that Facebook has a monopoly in "social networking" and has long used a "copy-acquire-kill" strategy to preserve its dominance, calling on "enforcers" to stop Facebook from continuing this strategy.[67] She also criticized Facebook for making "another acquisition" just "two days before being sued by the federal government & 48 AGs for a series of illegal acquisitions."[68]

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[63] Andy Fitch, *Concentrated Control: Talking to Lina Khan*, L.A. Rev. of Books (Dec. 19, 2020), https://blog.lareviewofbooks.org/interviews/concentrated-control-talking-lina-khan/ (accessed July 14, 2021) [https://perma.cc/B3XZ-J25G] (emphases added).

[64] Lina M. Khan, Twitter, *supra* note 13 (Ex. D).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

II. Chair Khan's Prejudgment Of Facebook's Broader Conduct

Chair Khan has also made numerous statements that would demonstrate to a disinterested observer that she has a broadly negative view of the company. For instance, in one of her academic articles, Chair Khan and a co-author analogized Facebook to a doctor, named "Marta Zuckerberg," who "has planted surveillance devices all around your neighborhood as well as her office" and whose "main source of income is enabling third parties to market you goods and services."[69] The emphasis of the comparison was that, "unlike doctors, Facebook does not come close to putting its customers first in any serious sense—notwithstanding Zuckerberg's protestations to the contrary."[70] The article also described how Facebook "serves (or disserves)" its users, characterizing the relationship as "an elaborate system of social control whose terms are more imposed than chosen."[71]

Going further, Chair Khan alleged that Facebook is "associated with a host of social ills," including "serving as a tool for the incitement of genocide in Myanmar" and "amplifying the influence of 'fake news,' conspiracy theories, bot-generated propaganda, and inflammatory and divisive content more broadly."[72] Again, consistent with the Open Markets Institute's Freedom from Facebook mission, Chair Khan supported "antitrust lawsuits reversing key acquisitions and penalizing forms of monopoly leveraging" and suggested that "Facebook and Google have achieved their dominance through anticompetitive means."[73]

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[69] Khan & Pozen, *supra* note 39, at 514.

[70] *Id.* at 514 n.81.

[71] *Id.* at 520.

[72] *Id.* at 526-27 (footnote omitted).

[73] *Id.* at 538-39.

Facebook reiterates that it is not seeking Chair Khan's recusal because she has generally criticized "Big Tech" or expressed an eagerness to vigorously enforce the antitrust laws. Rather, recusal is appropriate because she has consistently and repeatedly concluded that Facebook in particular has engaged in conduct that satisfies the elements of an antitrust offense under existing law. For the reasons discussed below, Chair Khan's public prior statements would lead any disinterested observer to conclude that her participation in this matter would deny Facebook due process.

ARGUMENT

I. Commissioners Must Be Recused When Their Prior Congressional Work Or Public Statements Convey An Appearance That They Have Prejudged The Liability Of A Particular Defendant

Cases from the D.C. Circuit and other courts are directly on point and unequivocal in their holdings. The relevant court cases clearly invalidated FTC decisions tainted by the participation of a Commissioner whose prior investigatory work or public statements would lead "a disinterested observer [to] conclude" that she "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[74] The Sixth Circuit's holding in *American Cyanamid* – which the D.C. Circuit reaffirmed in *Cinderella* – is particularly relevant because the due process violation in that case is nearly identical to the due process violation the Commission would commit here in the absence of Chair Khan's recusal.

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[74] *Cinderella*, 425 F.2d at 591 (internal citation omitted); *see also Am. Cyanamid*, 363 F.2d at 757; *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965); *see also Inova Health Sys. Found.*, 2008 WL 2307161, at *3 (F.T.C. May 29, 2008) (citing *Cinderella*, 425 F.2d at 591, and explaining that disqualification is appropriate "if there [is] a demonstration of bias, prejudgment or apparent unfairness on the part of the decision-maker be he an ALJ or a Commissioner").

In *American Cyanamid*, FTC Chair Paul Rand Dixon refused to recuse himself from an antitrust case, even though, as counsel to a Senate Subcommittee, he had "played an 'active role' in an [antitrust] investigation by that Subcommittee of many of the same facts and issues and of the same parties as are involved in this [FTC] proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties."[75] The Sixth Circuit was "not impressed with the Commission's argument that the proceedings before the Senate Subcommittee had no relationship to the proceedings before the Commission because the former were 'legislative' and 'investigative' in nature."[76] And it concluded that Chair Dixon's participation in the FTC's case against the same defendants for the same conduct "amounted to a denial of due process which invalidated the order under review."[77] The court added: "It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify."[78]

The D.C. Circuit reaffirmed that holding in *Cinderella* several years later. There, the court vacated a different FTC order on the ground that Chair Dixon had given a speech that, in one passage, appeared to prejudge the defendants' legal culpability. The court held that FTC Commissioners may not "make speeches which give the appearance that [a] case has been prejudged" because doing so "may have the effect of entrenching a Commissioner in a position

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[75] *Am. Cyanamid*, 363 F.2d at 763, 767.

[76] *Id.* at 767.

[77] *Id.* (quoting *Texaco*, 336 F.2d at 760) (ellipsis omitted).

[78] *Id.*

which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record."[79]

The D.C. Circuit then pointedly criticized Chair Dixon for his participation in the earlier FTC matter at issue in *American Cyanamid*. The court agreed with the Sixth Circuit that Chair Dixon had displayed an "appalling . . . insensitivity to the requirements of due process" when – "[i]ncredible though it may seem" – he participated in an FTC case against particular defendants even though he "had investigated and developed many of the[] same facts" asserted against those defendants as a congressional staffer.[80]

For recusal purposes, Chair Khan stands in an even worse position than Chair Dixon. Like Chair Dixon, she "played an 'active role' in an investigation by [a congressional] Subcommittee of many of the same facts and issues" that would be asserted in any new FTC complaint or appeal involving Facebook, and she "participated in the preparation of the report of the Subcommittee on the same facts [and] issues."[81] And, like Chair Dixon in *Cinderella*, she has made additional public statements against Facebook that "may have the effect of entrenching [her] in a position" regarding Facebook, "making it difficult, if not impossible, for h[er] to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record."[82] Her participation in the congressional investigation and Report, as well as her repeated public condemnations of Facebook, independently require her recusal from

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[79] *Cinderella*, 425 F.2d at 590; *see also Texaco*, 336 F.2d at 760 (finding a due process violation because of a different speech by Chair Dixon).

[80] *Cinderella*, 425 F.2d at 591.

[81] *Am. Cyanamid*, 363 F.2d at 763, 767.

[82] *Cinderella*, 425 F.2d at 590.

participating in any decisions by the Commission regarding the future of its antitrust case against Facebook.

Specifically, as set forth above, *see supra* pages 10-13, the Report contains purported factual findings and legal conclusions to the effect that Facebook has violated Section 2 of the Sherman Act. For instance, the Report finds that Facebook obtained monopoly power in a "social networking" market, acquired Instagram in 2012 "to maintain Facebook's position," and that Facebook acquired WhatsApp in 2014 "to further entrench Facebook's dominance," all to consumers' supposed detriment.[83] All of these "findings" and "conclusions" are attributable to Chair Khan, who avowedly "led the congressional investigation into digital markets and the publication of [the] final report" before joining the Commission.[84] Again, settled precedent requires recusal of any FTC Commissioner from an antitrust case if, in a prior job, she "played an 'active role' in [a congressional antitrust] investigation . . . of many of the same facts and issues and of the same parties as are involved in" the FTC case and "participated in the preparation of the report of the Subcommittee on the same facts, issues and parties."[85] That is plainly the case here.

Chair Khan has also made a variety of public statements before joining the Commission that would leave any disinterested observer with the impression that she has already concluded that Facebook is liable for violating the antitrust laws. As explained in greater detail above, Chair Khan has reached definitive conclusions about essential elements of Facebook's alleged Section 2 liability, including market definition, monopoly power, and the nature and

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[83] Report, *supra* note 9, at 150.

[84] Lina M. Khan, Bio, *supra* note 8 (Ex. C).

[85] *Am. Cyanamid*, 363 F.2d at 763, 767; *see also Cinderella*, 425 F.2d at 591-92.

consequences of Facebook's acquisitions and Platform policies. She has reaffirmed these conclusions in multiple academic articles, in public appearances, and on Twitter, and has done so in the context of the very antitrust case that she might now direct or rule on in her role as Chair.

In sum, these public statements confirm Chair Khan's deeply-held commitment to the conclusions that she drew about Facebook in the Report, independently warranting her recusal. Like the Report, her statements in law review articles, public interviews, and tweets promote her conclusions that Facebook has monopoly power in a defined antitrust market, that it acquired and maintained that monopoly power through unlawful and anticompetitive means, including specifically by acquiring Instagram and WhatsApp, and that it should now face "divestitures/breakups, among other forms of relief."[86] Indeed, her statements about Facebook are far more numerous and explicit than Chair Dixon's statements at issue in *Cinderella* that the D.C. Circuit found sufficient to vacate the FTC orders tainted by his participation.[87]

II. Chair Khan's Recusal Is Required Now, Before The Commission Decides How To Proceed

Chair Khan should not be permitted to participate in deciding whether and, if so, how the FTC's case against Facebook should proceed. Due process requires a Commissioner who appears to have prejudged a case on the basis of her prior work or public statements to recuse herself from participating in that case, and a Commissioner recused on this basis cannot lawfully participate in developing the Commission's strategy for how to proceed going forward.[88] Chair Khan does not come to this juncture in the agency's decisionmaking regarding Facebook with views formed by the FTC's investigation but rather with beliefs formed and expressed on social

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[86] Lina M. Khan, Twitter, *supra* note 13 (Ex. D).

[87] *See Cinderella*, 425 F.2d at 591; *Texaco*, 336 F.2d at 760.

[88] *See Cinderella*, 425 F.2d at 591.

media, in academic writings, and in the Report before she joined the Commission. What she brings to any decision regarding Facebook is thus not objective weighing of the evidence gathered in the course of the agency's investigation, but prejudgment of those very same issues from her activities outside the agency, many of which predated even the beginning of the FTC's investigation.

Moreover, with respect to the FTC's Part 3 procedures, there is little distinction between Chair Khan's role as a "prosecutor" and her role as an "adjudicator." For one thing, as a matter of historical practice, the "FTC has not lost a single case [in its administrative proceedings] in the past quarter-century"[89] because it reaches its own conclusions regardless of those of its Administrative Law Judges. Accordingly, if Chair Khan participates in authorizing a Part 3 complaint against Facebook, such authorization effectively guarantees that the Commission would ultimately find liability, and thus her participation in authorizing the Part 3 complaint is functionally an adjudication on the merits. Furthermore, Chair Khan's participation in the decision as to *whether* the Commission should proceed would violate Facebook's due process rights because of her "prejudice concerning specific controverted factual issues" and her conclusions on "the ultimate issue of liability."[90] But, more than that, Chair Khan's powers go beyond merely voting, as her role as Chair of the FTC vests her with tremendous powers to use her discretion to direct the Commission.

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[89] *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021).

[90] *Kellogg Co.*, 92 F.T.C. 877, 1978 WL 206540, at *1 (F.T.C. Nov. 30, 1978).

No matter her role or the decision that the Commission reaches, every "government lawyer in a civil action or administrative proceeding" owes a minimal "duty of neutrality."[91] When, as here, she "has a personal interest in the litigation," or even the mere appearance of a personal interest, "the neutrality so essential to the system is violated."[92] Indeed, an interested prosecutor violates the "fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion."[93] As Professor Thomas D. Morgan of The George Washington University opined, "it is reasonable to conclude that an FTC Chair whose impartiality could reasonably be questioned by an objective observer must step aside rather than personally participate in those decisions."[94]

Here, Chair Khan cannot meet any standard for neutrality that would permit her to participate in any decisionmaking regarding the FTC's pending antitrust litigation. Her numerous statements throughout her career that reflect her belief in Facebook's culpability under

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[91] *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350-51 (Cal. 1985); *see, e.g.*, Charlie Savage, *Biden Administration Punts on Due Process Rights for Guantánamo Detainees*, N.Y. Times (July 9, 2021), https://www.nytimes.com/2021/07/09/us/politics/guantanamo-detainees-due-process.html (accessed July 14, 2021) (noting that U.S. Attorney General Merrick B. Garland "recused himself from playing any role in the litigation" before the D.C. Circuit on "whether Guantánamo detainees have any due process rights").

[92] *Clancy*, 705 P.2d at 351; *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (due process imposes enforceable "limits on the partisanship of administrative prosecutors").

[93] *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987); *see also United States ex rel. SEC v. Carter*, 907 F.2d 484, 488 (5th Cir. 1990) (disqualifying SEC attorneys from leading criminal contempt prosecutions arising out of underlying SEC enforcement case); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.) (prosecutor must be disqualified if she is not "disinterested" or has "an axe to grind against the defendant"); Am. Bar Ass'n, Model Rules of Prof'l Conduct R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[94] *See* Expert Decl. of Prof. Thomas D. Morgan, *supra* note 3, at 17-18 (Ex. A).

the antitrust laws, as well as her "active role" in the investigation of "many of the same facts and issues and of the same part[y]" as counsel to the House Antitrust Subcommittee's Majority Staff, create the appearance that she has prejudged the merits of the FTC's case against Facebook and thus require her recusal.[95] Moreover, her comments that "Facebook does not come close to putting its customers first in any serious sense"[96] and that Facebook is "associated with a host of social ills"[97] suggest that Chair Khan has "an axe to grind against" Facebook.[98] Her negative statements about Facebook even predate her attending law school.[99]

A disinterested observer would conclude that she could not revisit her conclusions about Facebook with an open mind now that she is the FTC Chair, even in the face of contrary evidence. It has only been about 9 months since she led preparation of the House Antitrust Report, with its conclusions that Facebook has violated the antitrust laws. Not long before this, she was personally involved in lobbying the FTC "to address Facebook's current power" by "prohibit[ing] mergers between Facebook [*sic*] other potentially competitive social networks or other new and promising products and services."[100] And during this same time, her organization "spearheaded" the "Freedom From Facebook coalition"[101] and advocated for, among other things, the FTC to "[r]everse the approvals for Facebook [*sic*] purchases of WhatsApp and

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[95] *Am. Cyanamid*, 363 F.2d at 763.

[96] Khan & Pozen, *supra* note 39, at 514 n.81.

[97] *Id.* at 526.

[98] *Wright*, 732 F.2d at 1056.

[99] *See*, *e.g.*, Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. Const. L. & Pub. Pol'y 37, 55 (2014) (written on Aug. 15, 2014).

[100] Press Release, *supra* note 25.

[101] Public Comment, *supra* note 22.

Instagram, and reestablish these as competing social networks."[102] Even more than the speech at issue in *Cinderella*, Chair Khan's public authorship of the Report and advocacy as part of the Open Markets Institute "ha[d] the effect of entrenching [her] in a position which [s]he has publicly stated, making it difficult, if not impossible, for h[er] to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record."[103]

Finally, for many of the same reasons, Chair Khan's participation in the Facebook antitrust litigation would violate not only due process but also her obligations of impartiality under the federal ethics rules. Those rules require any federal official to "avoid an appearance of loss of impartiality in the performance of [her] official duties."[104] The Office of Government Ethics has specifically noted that an official's "political . . . association[s] . . . may raise an appearance question" requiring recusal even if they do not give rise to a "covered relationship."[105] Chair Khan's leadership of the Subcommittee's investigation and Majority Staff Report illustrates exactly the type of "political association" that warrants recusal.

CONCLUSION

Facebook respectfully requests that Chair Khan be recused from participating in any decisions regarding whether and how to continue the Commission's antitrust case against

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[102] Press Release, *supra* note 5.

[103] *Cinderella*, 425 F.2d at 590.

[104] 5 C.F.R. § 2635.501(a); *see also* Ethics Orientation for New FTC Employees, at 10-11 (rev. June 2019), https://www.ftc.gov/system/files/attachments/office-general-counsel/ieo_for_new_ftc_employees.pdf (accessed July 14, 2021) (noting that the FTC itself requires "every employee" to "act impartially and not give preferential treatment to any private organization or individual").

[105] Mem. to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2 (Apr. 26, 1999).

Facebook. Chair Khan's statements – which are unsupported and contrary to law – convey to any disinterested observer that she has already decided the material facts relevant to the Commission's pending antitrust lawsuit against Facebook, well before becoming a Commissioner. Chair Khan has also already concluded that Facebook was liable under the antitrust laws. Thus, Chair Khan's recusal is necessary in order to protect the fairness and impartiality of the proceedings.

Respectfully submitted,

Dated: July 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2021, I sent via electronic mail Facebook, Inc.'s foregoing Petition for Recusal to the following:

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Exhibits to Facebook, Inc.'s Petition for Recusal (July 14, 2021)

Exhibit A

BEFORE THE FEDERAL TRADE COMMISSION

In re Motion to Recuse	)
Chair Lina M. Khan	)
from Involvement in Certain Antitrust Matters	)
Involving Amazon.com, Inc.	)
	)

EXPERT DECLARATION OF PROFESSOR THOMAS D. MORGAN

1. Professional Experience and Background

I am a 1965 graduate of the University of Chicago Law School and a member of the Bar of Illinois. I am S. Chesterfield Oppenheim Professor Emeritus of Antitrust and Trade Regulation Law at The George Washington University Law School where I was on the faculty from 1989 to 1998 and from 2000 to 2013. From 1998 to 2000, I was the first Rex E. Lee Professor of Law at the J. Reuben Clark Law School, Brigham Young University. From 1980 to 1985, I was Dean of the Emory University School of Law, and from 1985 to 1989, I was a professor at Emory. From 1966 to 1980, less time for military service, I was a professor at the College of Law, University of Illinois.

I have taught both antitrust law and administrative law during my career, and my law school casebook, *Modern Antitrust Law and Its Origins* (5th ed. 2014), was published by West Academic. However, most of my teaching and scholarly research has been in the field of legal and judicial ethics. I taught courses in both subjects one or more times each year for the forty years from 1974

through my retirement in 2013. I continue to co-author a law school casebook covering both legal and judicial ethics, *Professional Responsibility: Problems and Materials* (13th ed. 2018), published by Foundation Press.

I served as one of two Associate Reporters for the American Law Institute (ALI) project that produced the comprehensive *Restatement of the Law (Third): The Law Governing Lawyers* (2000). I then served as one of the two Associate Reporters for the American Bar Association's (ABA) Commission on Revision of the Model Rules of Professional Conduct—the Ethics 2000 Commission—whose work led to extensive revision of the ABA Model Rules in 2002. I currently serve as an Advisor to the ALI project on Principles of Government Ethics. I have received two awards for lifetime contributions to legal ethics scholarship—the American Bar Foundation's Keck Award in 2000 and the New York State Bar Association's Sanford D. Levy Award in 2008.[1] My curriculum vitae listing my publications, presentations and professional activities is attached to this report.

2. My Engagement

Outside counsel for Amazon.com, Inc. (Amazon) has retained me as an expert to consider whether it would be appropriate to conclude that judgments about Amazon expressed by FTC Chair Lina M. Khan prior to her confirmation as a Commissioner at the Federal Trade Commission (FTC) compel Chair Khan to recuse herself from all antitrust cases involving Amazon that consider factual issues she purports to have determined in her academic articles, her public advocacy publications, and her leadership role in preparation of a recent Majority Staff Report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. I have previously rendered expert opinions on questions concerning obligations of lawyers and judges in

[1] Organizations named above are for identification only. None is responsible for the content of this Declaration.

affidavits, depositions, and testimony in approximately one hundred cases, and my declarations, affidavits, and testimony as an expert have been admitted in state and federal courts all over the country. I am being compensated by counsel at my current regular rate for time spent preparing this report and any time later required. No part of the compensation I receive is dependent on the conclusions I reach or the result in any matter in which this Declaration might be introduced.

3. The Factual Record Relevant to My Opinions

Lina M. Khan graduated from college in 2010. In 2011, she went to work in the Open Markets Program at the New America Foundation, a think-tank advocating about what it sees as issues relating to the exercise of corporate power. She maintained an affiliation with that organization and its successor, the Open Markets Institute, in various roles through 2018. She was a Policy Analyst (2011-14), a Fellow (2014-17), and Legal Director (2017-18). Ms. Khan then served as Counsel to the Majority Staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, and as an Associate Professor of Law at Columbia Law School.

Professor Khan was confirmed by the Senate and sworn in as a Commissioner of the Federal Trade Commission (FTC) on June 15, 2021. That same day, President Biden named Commissioner Khan the FTC Chair. In her new role, Chair Khan has all "the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds."[2] In short, Chair Khan is in a position today to direct

[2] 15 U.S.C. § 41, implementing the Reorganization Act of 1949 pursuant to Reorganization Plan No. 8 of 1950 and Reorganization Plan No. 4 of 1961.

Federal Trade Commission staff to take action that affects particular companies. Whether the law permits her to so act in antitrust matters involving Amazon is the subject of this Declaration.

Beginning in 2014, the year she became a student at Yale Law School, Chair Khan began to write prolifically. She did some of her work at Yale, and later, some at Columbia. Some of Chair Khan's articles are written at a high level of generality and are not the subject of this Declaration. My focus will be on a series of other articles, begun at Open Markets/New America, in which Chair Khan has been aggressive in her condemnation of Amazon by name and in which she makes numerous specific assertions that Amazon has engaged in illegal practices that are within the jurisdiction of the FTC. I summarize each article briefly here to provide the context for my later opinions.

A Remedy for the Amazon-Hachette Fight? (2014) was an article for CNN about a dispute in which Amazon allegedly raised prices of books sold on the Amazon website that were published by Hachette, a major French publisher. Chair Khan said Amazon then offered to lower the prices to consumers (and thereby increase Hachette's sales) only if Hachette would lower prices at which it sold the books to Amazon. Chair Khan proposed invoking the Robinson-Patman Act against Amazon, saying that the Act "prohibits a retailer from wielding its mere size to bully suppliers for discounts." Amazon might be willing to sell books to consumers at lower prices than traditional publishers, she asserted, but the purpose of the Robinson-Patman Act is to "give smaller entities a fair chance at competing." "It's worth remembering," she concluded, "that [Amazon's] tactic—holding the publisher hostage unless it concedes to better terms—flouts the principles of anti-price-discrimination laws."

What Everyone's Getting Wrong About Amazon, QZ [Quartz] (Oct. 17, 2014), continued Chair Khan's attack on Amazon by name for charging low prices. Responding to articles

defending Amazon's growth, she contended that a "major way Amazon has secured its dominance is through steeply discounting products and using books as 'loss-leaders' to sell its other wares." She dismissed suggestions that Amazon faced serious competition in retail sales. "First off, approximating Amazon's command as a percent of *everything sold* (minus gas, food & drinks, building supplies) in America is insane. It dissolves the dominance Amazon enjoys in specific sectors—like books, but also in electronics like televisions and in industrial goods like valves." Amazon, she declared, "has a monopoly in books. It has also attained a dominant position in our economy unlike anything we've seen in the last 50 years. That alone should alarm us."

How to Reboot the FTC, POLITICO (Apr. 13, 2016), was Chair Khan's call for antitrust enforcement action against Amazon as a platform company. She argued that a reinvigorated Federal Trade Commission should "take seriously the threats to competition posed by online platform monopolies," and included Amazon in her list of supposed threats. While acknowledging that platforms often provide "great ease and convenience for consumers," Chair Khan complained that the companies "can also use their market power to squeeze or disadvantage the sellers and suppliers that depend on them."

Amazon's Antitrust Paradox, 126 YALE L.J. 710 (2017), a student note, assembled many of the charges Chair Khan previously made against Amazon into an integrated series of findings indicting Amazon for its alleged "structural dominance" and alleged "anticompetitive" activity.

> "In addition to using below-cost pricing to establish a dominant position in e-books, Amazon has also used this practice to put pressure on and ultimately acquire a chief rival. * * * In 2008, Quidsi was one of the world's fastest growing e-commerce companies. It oversaw several subsidiaries: Diapers.com (focused on baby care), Soap.com (focused on household essentials), and BeautyBar.com (focused on beauty products). Amazon expressed interest in acquiring Quidsi in 2009, but the company's founders declined Amazon's offer. Shortly after Quidsi rejected Amazon's overture, Amazon cut its prices for diapers and other baby products by up to 30%. * * * Struggling to keep up with Amazon's pricing war, Quidsi's owners began talks with Walmart about potentially selling

> the business. Amazon intervened and made an aggressive counteroffer. * * * After completing its buy-up of a key rival—and seemingly losing hundreds of millions of dollars in the process—Amazon went on to raise prices."

Id. at 768-70.

Chair Khan asserted as established fact that:

> "As its history with Quidsi shows, Amazon's willingness to sustain losses has allowed it to engage in below-cost pricing in order to establish dominance as an online retailer. Amazon has translated its dominance as an online retailer into significant bargaining power in the delivery sector, using it to secure favorable conditions from third-party delivery companies. This in turn has enabled Amazon to extend its dominance over other retailers by creating the Fulfillment-by-Amazon service and establishing its own physical delivery capacity. This illustrates how a company can leverage its dominant platform to successfully integrate into other sectors, creating anticompetitive dynamics."

Id. at 774.

Chair Khan outlined the future antitrust significance of her findings:

> "Amazon is positioned to use its dominance across online retail and delivery in ways that involve tying, are exclusionary, and create entry barriers. That is, Amazon's distortion of the delivery sector in turn creates anticompetitive challenges in the retail sector. For example, sellers who use [Fulfillment-by-Amazon] have a better chance of being listed higher in Amazon search results than those who do not, which means Amazon is tying the outcomes it generates for sellers using its retail platform to whether they also use its delivery business."

Id. at 778.

Chair Khan summed up her conclusions about Amazon's likely antitrust liability:

> "Amazon has responded to popular third-party products by producing them itself. * * * The anticompetitive implications here seem clear: Amazon is exploiting the fact that some of its customers are also its rivals. The source of [Amazon's market] power is: (1) its dominance as a platform, which effectively necessitates that independent merchants use its site; (2) its vertical integration—namely, the fact that it both sells goods as a retailer and hosts sales by others as a marketplace; and (3) its ability to amass swaths of data, by virtue of being an internet company. Notably, it is this last factor—its control over data—that heightens the anticompetitive potential of the first two."

Id. at 782-83.

In *Amazon Bites Off Even More Monopoly Power*, NEW YORK TIMES (June 21, 2017), Chair Khan protested Amazon's plan to acquire Whole Foods.

> "Amazon on Friday announced plans to acquire Whole Foods, the high-end grocer. * * * Amazon will argue to federal authorities, most likely the Federal Trade Commission, that the deal should be blessed because the combined entity's share of the American grocery market will be less than 5 percent. But antitrust officials would be naïve to view this deal as simply about groceries. Buying Whole Foods will enable Amazon to leverage and amplify the extraordinary power it enjoys in online markets and delivery, making an even greater share of commerce part of its fief."

Chair Khan called Amazon a "vast empire" that "self-deal[s] with great finesse" and "dictates terms and prices to those dependent on" its services.

Stop Amazon From Selling Books—or Anything Else—Below Cost is a portion of *6 Ideas to Rein in Silicon Valley, Open Up the Internet, and Make Tech Work for Everyone*, NEW YORK MAGAZINE (Dec. 11, 2017), and another article in which Chair Khan asserts the factual truth of her premises for deeming Amazon's practices unlawful:

> "In 2009, Amazon executives realized that another company was winning the diapers market, Diapers.com—a subsidiary of Quidsi—offered young parents a range of baby products, and soon became one of the fastest-growing online retailers in the country. When the founders declined an offer by Amazon to buy up the company, Amazon settled on another tactic to tame its rival: drive it into the ground. Amazon began slashing prices on baby products, pricing goods below the cost of production. Over the course of months, Amazon lost millions. While Quidsi initially tried to keep up, the relative newcomer lacked Amazon's almost endless ability to absorb losses. Soon, Quidsi's investors began to panic, and when Amazon then made another bid, the start-up's founders conceded. Once it had Quidsi in its grip, Amazon first jacked prices back up and scaled back loyalty programs. Then it shut down the operation completely."

Predatory pricing "is a standard trick from the monopolist's playbook," Chair Khan asserted, as she called for prosecution of Amazon for allegedly engaging in it.

Sources of Tech Platform Power, 2 GEO. L. TECH. REV. 325 (2018), continued Chair Khan's attack on "dominant platforms," a group in which she includes Amazon.

> "Platforms can use their gatekeeper power to extort and extract better terms from the business users that depend on their infrastructure. For example, Amazon has disabled the 'buy-buttons' for book publishers in order to extract better terms; executives have also described how the company tweaks algorithms during negotiations to remind firms of its power to sink their sales, through demoting their rank below where users usually look when making purchases. Recently, the company has started offloading costs onto suppliers by subsidizing shipping costs through increased fees for the companies that sell through its platform. Merchants attempting to negotiate with Amazon risk seeing their accounts suspended, and getting kicked off its platform often means not just seeing lower revenue, but having to lay off employees."

Id. at 327.

Platforms also can allegedly engage in "information exploitation" to enhance their own profits and penalize others. Chair Khan accuses Amazon, for example, of collecting

> "swaths of information on the merchants selling through its Marketplace. It routinely uses this data to inform its own sales and products, exploiting insights generated by third-party retailers and producers to go head-to-head with them, rolling out replica products that it can rank higher in search results or price below-cost. In this way Amazon's platform functions as a petri dish, where independent firms undertake the initial risks of bringing products to market and Amazon gets to reap from their insights, often at their expense. Notably, it is the other forms of power—the fact that Amazon is a gatekeeper and integrated across lines of business—that enable it to exploit information in this way; those two forms of power enhance its ability to leverage the third."

Id. at 327.

The Separation of Platforms and Commerce, 119 COLUM. L. REV. 973 (2019), again makes Amazon a target on the basis of Chair Khan's purported specific factual findings.

> "Amazon * * * is the dominant online marketplace, the world's largest cloud computing service, a massive shipping and logistics network, a media producer and distributor, a grocer, a small-business lender, a live video-gaming streaming platform, a digital home assistant, a designer of apparel, and an online pharmacy," she reports. "Two areas where it both serves as a bottleneck facility and competes with those reliant on its bottleneck include online retail and digital home-assistant systems."

Id. at 985. The core allegation of the article is that firms such as Amazon are "gatekeepers" for access to customers in Internet commerce. Platform companies like Amazon, Chair Khan asserts, should not also be able to sell their own products over their platforms in competition with third-party sellers.

Recently, Chair Khan served as Counsel to the Majority Staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, a role in which she says that she "led the congressional investigation into digital markets and the publication of its final report." http://www.linamkhan.com/bio-1. The final report contains an 83-page section detailing Amazon conduct that allegedly violated the antitrust laws. Staff of H. Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (2020) [hereafter Majority Staff Report]. The report, also critical of Alphabet/Google, Apple and Facebook, extends Chair Khan's earlier articles into a call for use of the antitrust laws against Amazon and others. The Majority Staff Report begins:

> "Amazon has significant and durable market power in the U.S. online retail market. * * * Although Amazon is frequently described as controlling about 40% of U.S. online retail sales, this market share is likely understated, and estimates of about 50% or higher are more credible."

Majority Staff Report at 15.

The Report continues:

> "Amazon achieved its current dominant position, in part, through acquiring its competitors * * *. It has also acquired companies that operate in adjacent markets, adding customer data to its stockpile and further shoring up its competitive moats. This strategy has entrenched and expanded Amazon's market power in e-commerce, as well as in other markets. The company's control over and reach across its many business lines enable it to self-preference and disadvantage competitors in ways that undermine free and fair competition. As a result of Amazon's dominance, other businesses are frequently beholden to Amazon for their success.

> "Amazon has engaged in extensive anticompetitive conduct in its treatment of third-party sellers. Publicly, Amazon describes third-party sellers as 'partners.' But internal documents show that, behind closed doors, the company refers to them as 'internal competitors." Amazon's dual role as an operator of its marketplace that hosts third-party sellers, and a seller in that same marketplace, creates an inherent conflict of interest. This conflict incentivizes Amazon to exploit its access to competing sellers' data and information, among other anticompetitive conduct. * * * The company's early leadership in this market is leading to the collection of highly sensitive consumer data, which Amazon can use to promote its other business, including e-commerce and Prime Video."

Majority Staff Report at 16.

In a later discussion of barriers to entry in e-commerce, the Majority Staff Report asserts:

> "If current trends continue, no company is likely to pose a threat to Amazon's dominance in the near or distant future. * * * While some of [the] barriers to entry are inherent to e-commerce—such as economies of scale and network effects—others result from Amazon's anticompetitive conduct. As discussed elsewhere in the Report, Amazon's acquisition strategy and many of its business practices were successfully designed to protect and expand its market power."

Majority Staff Report at 87.

Chair Khan is now clearly in a position to order Federal Trade Commission staff to investigate whether to pursue Amazon based on some or all of the issues on which the Majority Staff Report makes findings.

4. My Opinions

a. Parties in Matters Before the FTC Have a Right to Neutral Decisionmakers

When the work of the Federal Trade Commission becomes focused on individual citizens and companies, targets have the right to be investigated, prosecuted, and judged by impartial Commissioners and an impartial Chair. For example, the law prohibits an FTC Commissioner from voting in a case when the Commissioner has a direct financial interest in the outcome. 18 U.S.C. § 208 and 5 C.F.R. §§ 2635.501-.502, "Impartiality in Performing Official Duties." Such

a vote would violate a defendant's right to due process of law, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), and any Commissioner in a position to cast such a vote would clearly be obliged to recuse herself.

In my opinion, the same principles that underlie disqualification in financial conflict cases would extend to a Commissioner's non-financial interests as well. FTC Commissioners are as subject as any other government officers to the principle that those who are judged or prosecuted are entitled to have those decisions made by "impartial" persons who can hear all sides fairly. How that principle applies to someone in the position of Chair Khan is the key issue presented in deciding whether she must recuse herself from participation in future matters that involve Amazon.

b. The Appropriate Standards By Which to Judge Impartiality

Three cases involving former FTC Chairman Paul Rand Dixon are particularly helpful in understanding the legal standards that are relevant here. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), was a case of alleged deceptive advertising. While the case was pending before the Commission, Chairman Dixon gave a speech before the National Newspaper Association that suggested he believed the advertisement in question was deceptive. The court found that the Chairman's speech required reversal of the Commission's later cease and desist order.

> "[The law] does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record."

425 F.2d at 590.

The court concluded:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 489 (2d Cir.), cert. denied, 361 U.S. 896 * * * (1959).'"

425 F.2d at 591.

American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), involved alleged fraud in obtaining pharmaceutical patents. During several years when the matter was under FTC investigation, Paul Rand Dixon was Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee. The Report of the Senate Committee expressed conclusions about many of the same issues and evidence that were before the FTC when Mr. Dixon became Chairman of the Commission. The 6th Circuit vacated the FTC cease and desist order and remanded for de novo consideration of the record without involvement of Chairman Dixon, saying:

> "It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify. See Prejudice and the Administrative Process, 59 Nw. U. L. Rev. 216, 231 (1964); Disqualification of Administrative Officials for Bias, 13 Vand. L. Rev. 713, 727 (1960).
>
> "It is to be emphasized that the Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.
>
> "The result of the participation of Chairman Dixon in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority. 'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.' *Berkshire Employees Association of Berkshire Knitting Mills v. N.L.R.B.*, 121 F.2d 235, 239 (C.A.3 [1941])."

363 F.2d at 767-768.

Earlier still, *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965), was a case against Texaco and several tire companies. While the case was pending before an FTC hearing examiner, then newly-appointed Chairman Dixon gave a speech before the National Congress of Petroleum Retailers. In it, he said:

> "We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases. You know the practices—price fixing, price discrimination, and overriding commissions on TBA. You know the companies—Atlantic, Texas * * * Goodyear, Goodrich, and Firestone.
>
> * * *
>
> "You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry."

336 F.2d at 759.

The D.C. Circuit's reaction was concise and definitive:

> "In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act. * * * We conclude that Chairman Dixon's participation in the hearing amounted in the circumstances to a denial of due process which invalidated the order under review."

Id. at 760.

In my opinion, it is fair to conclude that Chair Khan's published views about Amazon were even more definitive and critical than those of Chair Dixon that required reversal in the Commission cases just noted. Interestingly, the principle running through all the cases is closely analogous to the statutory standard for recusal of a federal judge. Judicial recusal is required when the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a), while 5 C.F.R. §§ 2635.501(a) & .502(a), "Impartiality in Performing Official Duties," use the same "question regarding * * * impartiality" test to describe when federal ethics regulations presumptively require

disqualification of any federal official, including an FTC Commissioner, in any "particular matter involving specific parties." In short, a person's fundamental right to an impartial adjudicator is essentially the same whether a judge or a Commissioner is involved and whether a lack of impartiality is asserted under the Due Process clause or under federal ethics standards.[3]

The 28 U.S.C. § 455(a) judicial standard is given further specificity in three circumstances that are also relevant to situations in which FTC Commissioners might find themselves. The section requires that a judge disqualify himself or herself:

> "(1) Where he [or she] has a personal bias or prejudice concerning a party, or [2] personal knowledge of disputed evidentiary facts concerning the proceeding; * * * [or]
>
> "(3) Where he [or she] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

28 U.S.C. § 455(b).

In my opinion, one key point of both the judicial and the general federal ethics requirements is that disqualification turns on the prior formation of opinions about questions of fact rather than policy judgments. The principles outlined in § 455(a) do not make it a violation of due process "for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law." *FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948). A judge also ordinarily may hear a matter in which he or she learned particular facts in earlier proceedings in the matter. *Liteky v. United States*, 510 U.S. 540 (1994).

[3] 5 C.F.R. § 2635.502(d) provides that an "agency designee" may authorize a federal official to continue acting in a matter in spite of a lack of impartiality if the designee determines "that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." It seems unlikely that an agency designee could make that determination in this situation, but even if the designee did, in my opinion, the action might negate the official's liability under the ethics regulations, but it could not negate the government's due process obligation to persons affected by agency action.

A second key point of both requirements is that the standards are objective, not subjective. As applied to the FTC, they ask whether a reasonable person who knew all the facts and circumstances would decide that the Commissioner's impartiality is reasonably in doubt, not that future improper conduct is a certainty.[4] Fellow Commissioners can apply such an objective standard in reviewing each other's recusal decisions without casting aspersions on their colleague's personal integrity. Congress and reviewing courts can apply the standard in the same spirit. The standard neither requires nor permits proof about whether one Commissioner will act fairly while another will not, primarily because such judgments are personally awkward and often impossible to make in advance.

The specific examples of required recusal found in 28 U.S.C. § 455(b) are also informative here. It is beyond question that Chair Khan has published a great deal of independent research that she purports gives her what § 455(b) calls "personal knowledge of disputed evidentiary facts." Amazon, like any other defendant, will have the right to try to convince her and the other Commissioners that she has gotten the facts and inferences wrong, but the effect of taking such definitive public positions cannot help but "entrench[]" Chair Khan in her positions and make "it difficult, if not impossible * * * to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record." *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d at 590.

In addition, like Chair Dixon, Chair Khan comes to the FTC after service as a leading staff member of a Congressional Committee studying issues that may later come before the Federal Trade Commission. There is good reason that 28 U.S.C. § 455(b) makes prior government service

[4] The relevant provision of the current Code of Conduct for United States Judges, Commentary on Canon 2A, uses the term "appearance of impropriety" to describe the inquiry that underlies this objective test: "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's *** impartiality *** is impaired."

as counsel in a matter that comes before the same person as judge a specific circumstance mandating recusal. The Majority Staff Report in which Chair Khan played a large part in effect asserts that Amazon is guilty of violating the law. In my opinion, in any future matter tried before the FTC, Amazon is entitled to decision makers who have a more open mind about those issues than Chair Khan would appear to a reasonable observer to have.

c. Standards Affecting the Propriety of a Commissioner Voting to Investigate or to Bring an Action in Federal Court

Of course, each of the cases just discussed involved matters being tried before the FTC. That situation makes the judicial ethics analogy easy to see. It is at least possible that the matter facing Amazon might be a prolonged FTC investigation or the filing of an action in federal court. Such choices would not make the issue of Chair Khan's recusal go away. In my opinion, the fact or appearance of a Chair's lack of impartiality in the decision to investigate a firm or to file a judicial proceeding would most likely violate both the agency's due process obligations and the Chair's ethical duties to named respondents and to the public.

To be sure, a prosecutor who initiates proceedings plays a different role in our justice system than a judge does. A prosecutor presents the case that a defendant has violated the law. Prosecutors

> "need not be entirely 'neutral and detached.' * * * [T]hey are necessarily permitted to be zealous in their enforcement of the law. * * * [T]he strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50 (1980).

But acknowledging the differences between judges and prosecutors is only the start of the relevant analysis. The Supreme Court made equally clear in *Jerrico* that the decision to prosecute a private party is also subject to due process standards.

> "We do not suggest * * * that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger v. United States*, 295 U.S. 78, 88 (1935). * * * Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215-256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."

Id.

In my opinion, the Court in *Jerrico* was making the point that, while the impartiality of judges and prosecutors may take different forms, an FTC Chair who votes to have her agency initiate a matter may not simply act as if she were only a partisan. American Bar Association Model Rules of Professional Conduct, Rule 3.8, Comment 1, offers this often-heard insight about the role of a prosecutor:

> "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

A decision to prosecute involves choices of which firms to charge, what charges are appropriate, and how many of an agency's limited resources should be committed to one matter rather than another. That is as true at the FTC as in any prosecutor's office around the country. In my opinion, it is reasonable to conclude that an FTC Chair whose impartiality could reasonably

be questioned by an objective observer must step aside rather than personally participate in those decisions.

Cases prohibiting government agencies from delegating prosecution of enforcement cases to affected private parties help make the point. In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), a California city passed an ordinance defining stores that principally sell "obscene publications" as a public nuisance. The city declared a local book store such a nuisance and retained a local attorney to go to court to abate it. The attorney's fee would be $60 per hour, but if the city were to lose the case, the fee would drop to $30 per hour.

The court found that having a personal interest in a government victory was "antithetical to the standard of neutrality that an attorney representing the government must meet * * *." *Id.* at 353. It justified the neutrality requirement particularly well, saying:

> "[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him' he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors: 'A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.'" (quoting ABA Code of Professional Responsibility, EC 7-14).

Id. at 350. For that reason, the court said, "prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." *Id.* at 351.[5]

[5] The most prominent federal case establishing the same principle is *Young v. United States ex rel. Vuitton et fils, S.A.*, 481 U.S. 787 (1987), in which the Supreme Court held that counsel for private parties who had settled a trademark case could not later be appointed as the special prosecutors in an action charging criminal contempt to enforce the injunction they had obtained. Instead, the lawyer must ask the U.S. Attorney to file the contempt action, and if that office appoints someone else the contempt, it must be someone not connected with the underlying matter.

The focus on financial incentives in many cases has led to a series of cases testing whether private counsel compensated by contingent fee are *per se* barred from representing public entities in civil cases. Several of the cases involve qui tam actions under the False Claims Act, 31 U.S.C. § 3730(b), under which a private party may file suit in

Explaining what it means to have "an interest in the case extraneous to [the prosecutor's] official function," the court in *Clancy* cited *People v. Superior Court (Greer)*, 561 P.3d 1164 (Cal. 1977), where the mother of a victim of violent crime was a non-lawyer employee in the office of the prosecutor. The employee was to be a material witness for the prosecution and, if the defendant were convicted, she might gain custody of her grandchild. The prosecutor had no personal financial interest in the case, but the court recognized that a reasonable judge could conclude that the interest of the prosecutor's employee might unduly influence the prosecutor. Constitutional guarantees of a fair trial, the court said

> "would seem better served when judges have discretion to prevent even the possibility of their violation. Individual instances of unfairness, although they may not separately achieve constitutional dimensions, might well cumulate and render the entire proceeding constitutionally invalid. The trial judge need not delay until the last straw of prejudice is added, by which time it might be too late to avert a mistrial or a reversal."

Id. at 1170.

That principle seems to describe Amazon's situation as well. Chair Khan has built a large portion of her professional reputation by articulating her own factual conclusions and legal opinions about Amazon's alleged guilt under the antitrust laws. Amazon will have the legal right to put on a defense, but in the words used by the D.C. Circuit about Chair Dixon: "[A] disinterested observer may conclude that [Chair Khan] has in some measure adjudged the facts as well as the

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the name of the Government and then be awarded a percentage of any sums recovered. That statutory scheme has been upheld in cases such as *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), in part because the statute lets disinterested Government lawyers take a case over from private counsel. Indeed, government counsel may even dismiss the case if the court approves, *e.g.*, *United States ex rel. Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020). *American Bankers Management Company, Inc. v. Heryford*, 885 F.3d 629 (9th Cir. 2018), extended the qui tam precedents to uphold a contingent fee in a suit to collect civil penalties under the California unfair competition law. In my opinion, such cases have been decided under the particular statutory schemes involved and, in spite of sometimes broad dicta, they do not undercut the principle that disinterested FTC officials must make key investigatory and prosecutorial decisions, not simply the final decisions, in agency matters.

law of a particular case in advance of hearing it," *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970). And in the words of 5 C.F.R. § 2635.502(a), "the circumstances would cause a reasonable person with knowledge of the facts to question [her] impartiality in the matter." *Cf.* 28 U.S.C. § 455(a).

Relying on the published statements cited earlier in this Declaration, in my opinion it would be reasonable to conclude that Chair Khan may not ethically participate in FTC antitrust matters involving Amazon and may not supervise FTC investigations into Amazon relating to practices about which Chair Khan has previously opined.

5. Conclusion

I have never met Chair Khan. I have no personal animus toward her; indeed, I have genuine respect for her energy and scholarly output. I presume that she can be expected to use her position as Chair to assess the conduct of most potential FTC respondents in a fair and impartial manner.

Chair Khan is clearly a person with strong opinions about how the U.S. economy should be structured and about industry practices that she believes too readily lead to industry concentration. Nothing in this Declaration is meant to say that an FTC Commissioner is biased merely because she brings her own sense of desirable public policy to the Commission's work. Nor do I believe that having written scholarly articles about subjects a Commissioner or Chair will face should disqualify an academic from service on a regulatory agency. The nation would be denied many fine public servants if that were the applicable standard.

The point of this Declaration is that when a Commissioner is in a position to sit in judgment on, or assume the function of an investigator or prosecutor against, a particular defendant after having built a great deal of her professional reputation asserting conclusions about the guilt of that defendant, in my opinion, it is reasonable to conclude that the Commissioner is required by federal

law and regulations to step aside and permit others who have not yet formed their opinion make those decisions.

In my opinion, it would be appropriate for Chair Khan to announce that she will recuse herself in all cases against Amazon that consider factual issues she purports to have determined in her academic articles, her public advocacy publications, or the Majority Staff Report. If she does not recuse herself voluntarily, in my opinion it would be appropriate for her fellow Commissioners to direct her to do so.

June 29, 2021
Date

Thomas D. Morgan
Thomas D. Morgan

Attachment

Curriculum Vitae
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J.D. degree with honors; Member, Order of the Coif
Comment Editor, Volume 32, University of Chicago Law Review

Professional Experience:

Oppenheim Professor of Antitrust and Trade Regulation Law, George Washington University, 1989-1998; 2000-2013; Emeritus, since 2014

Rex E. Lee Professor of Law, Brigham Young University, 1998-2000

Dean, Emory University School of Law, 1980-85
Distinguished Professor of Law 1985-89

Professor of Law, University of Illinois, 1974-80
Associate Professor, Illinois, 1970-74; Assistant Professor, Illinois, 1966-67

Visiting Professor, Brigham Young University, Fall 1994
Monash University (Australia), Spring 1988
Cornell University, Winter 1974

Special Assistant to Assistant Secretary of Defense, 1969-70
Attorney, Office of Air Force General Counsel, 1967-69

Bigelow Teaching Fellow, University of Chicago Law School, 1965-66

Publications:

A. In the Field of Professional Responsibility

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PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (Foundation Press 1976); 2nd Edition 1981; 3rd Edition 1984; 4th Edition 1987; 5th Edition 1991; 6th Edition 1995, 7th Edition 2000, 8th Edition 2003, 9th Edition 2006, 10th Edition 2008 (co-authored with R. Rotunda); 11th Edition 2011; 12th Edition 2014, 13th Edition 2018 (co-authored with R. Rotunda and J. Dzienkowski); all with Teachers' Manuals.

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"Sanctions and Remedies for Attorney Misconduct," 19 S. Illinois U. L. Rev. 343 (1995)

"Legal Representation in a Pluralist Society," 63 George Washington L. Rev. 984 (1995) (co-authored with Robert W. Tuttle)

"American Perspectives on the Duty of Loyalty: Conflicts of Interest and Other Issues of Particular Concern to the International Practitioner," in Mary C. Daly & Roger J. Goebel, Eds., Rights, Liability, and Ethics in International Law Practice (1995)

"Law Faculty as Role Models," in ABA Section of Legal Education, Teaching and Learning Professionalism: Symposium Proceedings (1996)

"Suing a Present Client," 9 Georgetown J. Legal Ethics 1157 (1996), reprinted in 1 Journal of Institute for Study of Legal Ethics 87 (1996)

"Conflicts of Interest in the *Restatement*: Comments on Professor Moore's paper," 10 Georgetown J. Legal Ethics 575 (1997)

"Whose Lawyer Are You Anyway?," 23 William Mitchell L. Rev. 11 (1997)

"Use of the Problem Method for Teaching Legal Ethics," 39 William & Mary L. Rev. 409 (1998)

"Conflicts of Interest and the New Forms of Professional Associations," 39 S. Texas L. Rev. 215 (1998)

"What Insurance Scholars Should Know About Professional Responsibility," 4 Conn. Insurance L. J. 1 (1997-98)

"Interview with Professor Thomas Morgan on Professional Responsibility," 13 Antitrust 4 (Fall 1998).

"The Impact of Antitrust Law on the Legal Profession," 67 Fordham L. Rev. 415 (1998)

"Toward a New Perspective on Legal Ethics," Am Bar Foun, Researching the Law (2000)

"Real World Pressures on Professionalism," 23 U. Ark. (Little Rock) L. J. 409 (2001)

"Practicing Law in the Interests of Justice in the Twenty-First Century," 70 Fordham L. Rev. 1793 (2002)

"Toward Abandoning Organized Professionalism," 30 Hofstra L. Rev. 947 (2002)

"Creating a Life as a Lawyer," 38 Valparaiso L. Rev. 37 (2003)

"Sarbanes-Oxley: A Complication, Not a Contribution in the Effort to Improve Corporate Lawyers' Professional Conduct," 17 Georgetown J. Legal Ethics 1 (2003)

"The Client(s) of a Corporate Lawyer," 33 Capital U. L. Rev. 17 (2004)

"Educating Lawyers for the Future Legal Profession," 30 Okla City U. L. Rev. 537 (2005)

"The Corporate Lawyer and the Perjury Trilemma," 34 Hofstra L. Rev. 965 (2006)

"It's Not Perfect, But the ABA Does a Key Job in State-Based Regulation of Lawyers," 11 Tex. Rev. of L. & Politics 381 (2007)

"Comment on Lawyers as Gatekeepers," 57 Case Western Res. L. Rev. 375 (2007)

"Professional Malpractice in a World of Amateurs," 40 St. Mary's L. J. 892 (2009).

"It's Not Your Parents' Profession Anymore: The Changing Course of Legal Careers," GW Law School Alumni Magazine, Summer 2010, p. 18.

"Should the Public Be Able to Buy Stock in Law Firms?" 11 Engage 111 (Sept. 2010).

"Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements," 79 George Washington L. Rev. 734 (2011).

"Realistic Questions About Modern Lawyer Regulation," part of an on-line symposium at http://truthonthemarket.com/2011/09/19/thomas-morgan-on-realistic-questions-about-modern-lawyer-regulation.

"Calling Law a 'Profession' Only Confuses Thinking about the Challenges Lawyers Face," 9 U. St. Thomas L.J. 542 (2011).

"On the Declining Importance of Legal Institutions," 2012 Mich. St. L. Rev. 255.

"The Rise of Institutional Law Practice," 40 Hofstra L. Rev. 1005 (2012).

"*The Lost Lawyer*: An Important Outline of Symptoms, But a Flawed Diagnosis," 2014 J. Professional Lawyer 83.

"The Shift to Institutional Law Practice," in Paul A. Haskins, ed., THE RELEVANT LAWYER: IMAGINING THE FUTURE OF THE LEGAL PROFESSION (2015).

"The Challenge of Writing Rules to Regulate Lawyer Conduct," 49 Creighton L. Rev. 807 (2016).

"Inverted Thinking about Law as a Profession or Business," 2016 J. Prof. Lawyer 115.

"Roger C. Cramton & the Delivery of Legal Services," 103 Cornell L. Rev. 1337 (2018).

B. In the Fields of Economic Regulation and Administrative Law

MODERN ANTITRUST LAW AND ITS ORIGINS: CASES AND MATERIALS (West Publishing Co. 1994; 2nd Ed. 2001; 3rd Ed. 2005; 4th Ed. 2009; 5th Ed. 2014)

ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS (West Publishing Co. 1976)

ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS (2nd Edition 1985) (co-authored with J. Harrison & P. Verkuil)

REGULATION AND DEREGULATION: CASES AND MATERIALS (West Publishing Co. 1997; 2nd Edition 2004) (co-authored with Harrison and Verkuil)

"The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President," 51 N. Carolina L. Rev. 1279 (1973)

Review of "Inner City Housing and Private Enterprise," 1972 U Ill. L Forum 833 (1973)

"Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process," 1974 Wisconsin L. Rev. 301

"Toward a Revised Strategy for Ratemaking," 1978 U. Illinois L. Forum 21

"Procedural Impediments to Optimal Rate Making," in W. Sichel, Ed., Public Utility Rate Making in an Energy-Conscious Environment (Westview Press 1979)

"Federal Chartering of Corporations" and "Shareholder Remedies in Corporations" in M.B. Johnson, Ed., The Attack on Corporate America: The Corporate Issues Sourcebook (McGraw-Hill 1978)

Review of "Economic Analysis and Antitrust Law," 33 Vanderbilt L. Rev. 1523 (1980)

"The Deregulation Bandwagon: Too Far, Too Fast?," 2 J. Law & Commerce 1 (1982)

Review of "Antitrust Stories," Antitrust Source, www.antitrustsource.com (Aug 2008)

"Antitrust Implications of Accreditation Standards That Limit Law School Enrollment," 101 Antitrust & Trade Regulation Report 2508 (BNA, July 15, 2011).

C. In the Field of Legal Education

"Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience," 27 J. Legal Education 138 (1975) (with P. Maggs)

"Teaching Students for the 21st Century," 36 J. Legal Education 285 (1986)

"Thinking About Bar Examining: The Challenge of Protecting the Public," 55 Bar Examiner 27 (Nov.1986)

"President's Address", 90-1 AALS Newsletter 1 (Feb. 1990)

"Should We Oppose Ranking of Law Schools?, 90-2 AALS Newsletter 1 (Apr. 1990)

"Legal Education Organizations in Business," 90-3 AALS Newsletter 1 (Aug. 1990)

"The Challenge to Maintain Diversity in Legal Education," 90-4 AALS Newsletter 1 (Nov. 1990)

"A Defense of Legal Education in the 1990s," 48 Wash. & Lee L. Rev. 1 (1991)

"Admission of George Mason to Membership in the Association of American Law Schools," 50 Case Western Reserve L. Rev. 445 (1999)

"Training Law Students For the Future: On Train Wrecks, Leadership and Choices," 6 St. Thomas L. Rev. 297 (2009).

"The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer," 45 Akron L. Rev. 811 (2012).

Participation in Public Programs:

A. Endowed Lectures Given

Mellon Lecture, University of Pittsburgh - 1981
Altheimer Lecture, University of Arkansas (Little Rock) - 1987
Dunwody Lecture, University of Florida - 1990
Lane Foundation Lecture, Creighton University - 1990 & 2010
Tucker Lecture, Washington & Lee University - 1990
Pirsig Lecture, Wm. Mitchell Law School - 1996
Van Arsdell Lecture, University of Illinois - 1997
Keck Award Lecture, American Bar Foundation - 2000
Tabor Lecture, Valparaiso University - 2003
Sullivan Lecture, Capital University - 2004
Miller-Becker Lecture, University of Akron - 2011
Lichtenstein Lecture, Hofstra Law School - 2012
Payne Lecture, Mississippi College – 2012
TePoel Lecture, Creighton University -- 2016

B. Representative Programs on Which Served as Speaker or Panelist

Let's Make a Deal (the Ethics of Negotiation) - ABA Conference on Professional Responsibility (Palm Beach) - June 1992

Reporting a Client's Continuing Crime or Fraud - ABA Conference on Professional Responsibility (Chicago) - May 1993

Ethical Issues in Representing Older Clients - Fordham University School of Law (New York) - December 1993

Problem of Representing a Regulated Client, Eleventh Circuit Judicial Conference (Orlando) - May 1994

Ethical Issues in Products Liability Cases - Products Liability Committee of the ABA Litigation Section (Tucson) - February 1995

Ethical Issues Arising in the O.J. Simpson Case - University of Washington School of Law (Seattle) - May 1995

Competition Policy for the New South Africa (Pretoria) - November 1995

Ethical Issues in Representing Children - Fordham University School of Law (New York) - December 1995

Are We a Cartel? The ABA/DOJ Consent Decree - AALS Annual Meeting (San Antonio) - January 1996

Professional Responsibilities of the Law Teacher - AALS (Washington) - July 1996

Ethical Issues for Mediators and Advocates - ABA Annual Meeting (Orlando) - August 1996

Legal Issues in Cyberspace - ABA Annual Meeting (Orlando) - August 1996

Teaching Legal Ethics by the Problem Method - College of William & Mary--Keck Foundation Conference (Williamsburg) - March 1997

Litigators Under Fire: Handling Professional Dilemmas In and Out of Litigation - televised ALI/ABA CLE program (Washington) - April 1997

Conflicts of Interest in the New Forms of Law Practice - South Texas Law School Symposium (Houston) - September 1997

Fiduciary Obligations in Dismissal of a Law Firm Partner - Washington & Lee Law School Symposium (Lexington, VA) - April 1998

Impact of Disciplinary Action on Lawyer's Status as Certified Specialist - ABA Committee on Specialization National Roundtable (Washington) - May 1998

Conflicts of Interest in the Restatement of the Law Governing Lawyers - National Organization of Bar Counsel (Toronto) - July 1998

The Ethics of Teaching Legal Ethics - Association of American Law Schools (Washington) - October 1998

The New Restatement of the Law Governing Lawyers: What Is It & How Does It Affect Your Practice? - Assn of Bar of City of New York (New York) - November 1998

Imputation, Screens & Personal Conflicts - ABA Conference on Professional Responsibility (La Jolla) - June 1999

The Future of Legal Education - Dedication of Sullivan Hall, the new Seattle University Law Building (Seattle) - October 1999

Legal Ethics in the New Millennium - J. Reuben Clark Soc. (Dallas) - November 1999

Unauthorized Practice of Law and Ethical Risks to Lawyers from Multistate Practice - ALAS Telephone Seminar (Chicago) - December 1999

Ethics 2000: Rewriting the Standards for Lawyer Conduct - American Intellectual Property Law Association (La Quinta, CA) - January 2000

Real World Pressures on Professionalism - University of Arkansas at Little Rock Law School (Little Rock, AR) - February 2000

Professional Responsibility Issues Arising Out of Electronic Commerce - ABA Section of Public Contract Law (Annapolis, MD) - March 2000

Multidisciplinary Practice: Curse, Cure or Tempest in a Teapot - American Intellectual Property Law Association (Pittsburgh, PA) - May 2000

Ethics 2000: Proposed Changes in the Law Governing Lawyers - Conference of Chief Justices (Rapid City, SD) - July 2000

Attorney Standards in Federal Courts and Developments in the Multidisciplinary Practice Controversy - Conference of Chief Justices (Baltimore) - January 2001

Multijurisdictional Practice - Turner Seminar (Memphis) - February 2001

Ethical Issues in Large Firms – Ass'n of Legal Administrators (Baltimore) - May 2001

Law Firm Ancillary Services - ALAS Annual Meeting (Bermuda) - June 2001

New Rule 1.6 on Disclosure of Confidential Client Information - ABA Civil Justice Roundtable (Washington) - March 2002

Ethics for Corporate In-House Counsel - American College of Investment Counsel (Chicago) - April 2002

Treading Water: A Young Lawyer's Guide to Ethics in Varying Practice Environments - ABA Tax Section Young Lawyers Committee (Washington) - May 2002

Shifting Ethical Sands: Ethics 2000 and Beyond - Federal Communications Bar Ass=n (Washington) - June 2002

Multijurisdictional Practice - ABA Forum on Franchising (Phoenix) - October 2002

The Sarbanes-Oxley Act of 2002 and the ABA Task Force on Corporate Responsibility Report (ALAS Telephone Seminar) - October 2002

At the Bar and in the Boardroom: The Ethics of Corporate Lawyering - Federalist Society (Washington) - Nov. 2002

Law Firm Risk Management: Post-Enron Challenges - Hildebrandt Conference (New York) - Nov. 2002

Future Regulation of Securities Lawyers - ABA Section of Business Law, Committee on Federal Securities Regulation (Washington) - Nov. 2002

What Lawyers Need to Know to Comply with the New SEC Professional Conduct Rules - ABA Section of Business Law Televised Forum (Washington) - Feb 2003

Ethics in Representing Organizational Clients After Sarbanes-Oxley - ABA Section of Business Law Spring Meeting (Los Angeles) - April 2003

Corruption in the Executive Suite: The Nation Responds - National Teleconference from ABA Public Utility Section Spring Meeting (Washington) - April 2003

Sarbanes-Oxley Revolution in Disclosure and Corporate Governance: Complying with the New Requirements - ABA National Institute (Washington) - May 2003

Client Confidentiality, Corporate Representation and Sarbanes-Oxley - ABA National Conference on Professional Responsibility (Chicago) - May 2003

Friend or Foe: The Restatement of Law Governing Lawyers - ABA National Legal Malpractice Conference (La Jolla) - September 2003

Where Were the Lawyers in Enron? - Cato Institute (Washington) - October 2003

Testified before the House Subcommittee on Capital Markets' Hearing on the Role of Attorneys in Corporate Governance (Washington) - February 2004

The Lawyer-Lobbyist "on the Frontier": What Legal and Ethical Rules Apply? - ABA Mid-Year Meeting (San Antonio) - February 2004

The Client(s) of a Corporate Lawyer - Capital U. Law School (Columbus) - March 2004

Ethical Issues Facing Public Interest Law Firms - Heritage Foundation (Washington) - October 2004

Drafting an Ethical Code for a Diverse Legal Profession - Univ. of Memphis Law School (Memphis) - October 2004

Ethical Issues in International Trade Cases - International Trade Trial Lawyers Association (Washington) - November 2004

Professional Regulation of Business Lawyers Isn't Going to Get Any Easier - ABA Section of Business Law (Washington) - November 2004

Problems for Corporate Lawyers in Complying with the Sarbanes-Oxley Act - New Jersey Corporate Counsel Association (Livingston, NJ) - January 2005

Avoiding Conflicts in Business Law Practice: Seven Deadly Sins - ABA Section of Business Law (Nashville) - April 2005

Fireside Chat on Legal and Accounting Ethics - SEC Historical Society (Washington) - November 2005

When Good Clients Go Bad - ALAS Annual Meeting (Toronto) - June 2006

Lawyers Face the Future - St. Thomas Univ. Law School (Minneapolis) - August 2006

Regulating Corporate Morality - George Washington Corporate & Business Law Society (Washington) - September 2006

Comments on Noisy Withdrawal - Case Law School Leet Symposium (Cleveland) - October 2006

The ABA Role in Law School Accreditation - Federalist Society Lawyers' Convention (Washington) - November 2006

Investigative Techniques: Legal, Ethical and Other Limits - ABA Section of Antitrust Law (National) - December 2006

Ethics Issues in Corporate Internal Investigations - Georgia Bar (Atlanta) - March 2007

Are Regulatory Lawyers' Ethical Obligations Changing? - ABA Section of Public Utility Law (Washington) - April 2007

Antitrust Litigation Ethics From Soup to Nuts - ABA Section of Antitrust Law (Washington) - April 2007

How to Survive in Today's Competitive Environment and Comply With the Rules of Professional Conduct - Wisconsin State Bar (Milwaukee) - May 2007

Audit Response Letters: Will There Be Peace Under the Treaty? - ABA National Conference on Professional Responsibility (Chicago) - May 2007

The Buried Bodies Case: Alive and Well After Thirty Years - ABA National Conference on Professional Responsibility (Chicago) - May 2007

Organization and Discipline for an Independent Legal Profession - Visit of Leaders of the Iraqi and Kurdistan Bar Associations (Washington) - November 2007

Feeling Conflicted? The Experts Opine and Prescribe - Tennessee Bar Foundation (Nashville) - January 2008

Ethics Issues in Qui Tam Litigation - ABA National Institute on Civil False Claims (Washington) - June 2008.

Ethics and the Lawyer-Lobbyist - ABA Administrative Law Conference (Washington) - October 2008

Ethics in the Early Going - ABA Tort & Insurance Practice Section, Aviation & Space Law Committee Litigation National Program (Washington) - October 2008

Professional Malpractice in a World of Amateurs - St. Mary's Law School Symposium on Legal Malpractice (San Antonio) - February 2009

The World Economic Crisis and the Legal Profession - Order of Advocates of Brazil (Brazilian counterpart of the ABA) - (Rio de Janeiro) - May 2009

Principles of United States Antitrust Law - Commissioners and Staff of the CADE (Brazilian counterpart of the FTC) - (Brazilia) - May 2009

The World Economic Crisis, Antitrust Law and the Lawyer - Institute of Advocates of Brazil (Brazilian counterpart of the ALI) - (Rio de Janeiro) - May 2009

The World Economic Crisis and Antitrust Law - American Chamber of Commerce - (Bela Horizonte, Brazil) - May 2009

Antitrust Law: The Real U.S. Policies - Seminar celebrating the retirement of Prof. Joao Bosco Leopoldino da Fonseca of the Federal University of Minas Gerais (Bela Horizonte) - May 2009

Where Does It End? Duties to Former Clients - American Bar Association Center for Professional Responsibility (Chicago) - May 2009

The Last Days of the American Lawyer - Creighton Law School (Omaha) - Oct. 2009

Ethics Challenges for National Security Lawyers In and Out of Government - ABA Standing Committee on Law and National Security (Washington) - Nov. 2009

The Transformative Effect of International Initiatives on Lawyer Practice and Regulation: The Financial Action Task Force Guidelines - Association of American Law Schools Annual Meeting (New Orleans) - Jan. 2010

Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements - Humphreys Complex Litigation Center Conference on Aggregate Litigation: Critical Perspectives (Washington) - March 2010

Abandoning Homogeneity in Legal Education - Georgetown Center for Study of the Legal Profession Program on Law Firm Evolution: Brave New World or Business as Usual? (Washington) - March 2010

Ethics Issues in Housing - ABA Forum on Affordable Housing (Washington) - May 2010

The Vanishing American Lawyer - Conference on Regulating and Deregulating Lawyers - Institute for Advanced Legal Studies (London) - June 2010

The Vanishing American Lawyer - Federalist Society Podcast - Sept. 2010.

Developments in Ethics 2010 - ABA Teleconference - Jan. 2011

A Transforming Legal Profession: The Challenges for Bar Associations - National Conference of Bar Presidents (Atlanta) - Feb. 2011

A Transforming Profession: The Challenges for Lawyers Starting Out - ABA Law Student Division (Washington) - Feb. 2011

A Transforming Profession: A Look Back Forty Years and the Challenges Ahead - Alabama Bar Annual Meeting (Point Clear) - July 2011
Florida Bar Board of Governors (Palm Beach) - July 2011

On the Declining Importance of Legal Institutions - Conference at Michigan State Law School (East Lansing) - Sept. 2011

Calling Law a Profession Only Confuses Thinking About Challenges Lawyers Face - Conference at University of St. Thomas Law School (Minneapolis) - Sept. 2011

The Changing Face of Legal Education: Its Impact on What It Means to be a Lawyer - Miller-Becker Lecture at University of Akron Law School (Akron) - Oct. 2011

Law School Accreditation - Federalist Society (Washington) - Nov. 2011

Aggregate Litigation: Don't Let Your End Game Blow-Up - ALM Litigation Summit (Washington) - Nov. 2011

So Someone Objects to Your New Client - ABA Administrative Law & Regulatory Practice Section Fall Conference (Washington) - Nov. 2011

Ethical Dilemmas Facing Lawyers Practicing National Security Law - ABA Standing Committee on Law and National Security (Washington) - Dec. 2011

Needed Law Schools' Response to Changes in the Legal Profession - AALS Annual Meeting (Washington) - Jan. 2012

The Rise of Institutional Law Practice - Lichtenstein Lecture at Hofstra Law School (Hempstead, NY) - Feb. 2012

Blazing New Pathways Through the Legal World - Washington Area Legal Recruitment Administrators Association (Washington) - Mar. 2012

Ethics in Privacy and Social Media - ABA Antitrust Section (Washington) - Mar. 2012

Ethical Issues in Alternative Litigation Funding – Humphries Center at GW Law (Washington) – May 2012

The Vanishing American Lawyer: The Road Ahead - Utah Bar (Sun Valley, ID) - July 2012

The Vanishing American Lawyer: The Changing Legal Profession -- Federal Bar Ass'n (Memphis, TN) -- Oct. 2012

The Professional World Facing New American Lawyers – 2012 Georgia Convocation on Professionalism (Atlanta) -- Nov. 2012

Testimony -- ABA Task Force on the Future of Legal Education (Dallas) - Feb. 2013

Public Ownership of Stock in Law Firms -- Federalist Society Teleforum - Apr. 2013

The ABA's 2012 Changes in Ethics Rules -- ABA Antitrust Section Spring Meeting (Washington) -- Apr. 2013

Proposals for Training Required for Bar Admission – AALS Annual Meeting (New York) – Jan. 2014

Law Professors of the Future: A New Balance of Teaching, Scholarship and Service? – AALS Annual Meeting (New York) – Jan. 2014

Are Lawyers Vanishing? – Transport. Lawyers' Ass'n (St. Petersburg, FL) – May 2014

Higher Education: Run for the Benefit of Students, Faculty or Administrators? -- Federalist Society (Washington) – Nov. 2014

The Challenge of Writing Rules to Regulate Lawyer Conduct – Creighton Law School Symposium on the Kutak Commission – March 2016

Inverted Thinking About Law as a Profession or Business – International Legal Ethics Conference VII – Fordham Law School – July 2016

Who Wants To Be An Ethics Millionaire? – ABA Antitrust Law Section Spring Meeting (Washington) – March 2017

Ethical Issues for Antitrust Lawyers – ABA Antitrust Law Section Spring Meeting (Washington) – April 2018

Ronald D. Rotunda Memorial Lecture – Federalist Society Podcast – March 2019

Duty to Whom? Ethics Dilemmas Confronted by Government Lawyers – American Law Institute Annual Meeting (Washington) – May 2019

Covid-19 and Coming Changes in Lawyer Regulation – Georgetown Roundtable for Law Firm Counsel (virtual) – June 2020

Lawyer Discipline and Executive Branch Lawyers – Cardozo Law School (virtual) – Oct. 2020

Major Civic and Professional Activities:

A. In the Field of Professional Responsibility

Associate Reporter, American Law Institute Restatement of the Law (Third), The Law Governing Lawyers, 1986-2000

Associate Reporter, American Bar Association Ethics 2000 Commission, 1998-99

Reporter, American Bar Association Commission on Professionalism, 1985-86
Adviser, American Law Institute Principles of the Law, Government Ethics, since 2009.

Member, Advisory Board, ABA/BNA Lawyers' Manual on Professional Conduct, since 1984; Chair 1986-87 & 1992-93

Member, Advisory Council, Project on a Digital Archive of the Birth of the Dot Com Era: The Brobeck Papers, Library of Congress and Univ. of Maryland, 2005-2009

Chair, Federalist Society Practice Group on Professional Responsibility and Legal Education 2005-2007; Member since 2001

Member, Drafting Committee, Multistate Professional Responsibility Examination, National Conference of Bar Examiners, 1986-89

Member, Committee on Professional Ethics, Illinois State Bar Association, 1974-1980; Vice Chair 1979-80

B. In the Fields of Economic Regulation and Administrative Law

Vice Chair, ABA Section of Administrative Law & Regulatory Practice, 2001-2002; Council Member, 1983-86

Consultant, Administrative Conference of the U.S., 1975-1979 & 1985-1989

Chair, Section on Law and Economics, Ass'n of American Law Schools, 1979-1980

C. In the Field of Legal Education

President, Association of American Law Schools, 1990

Member, AALS Executive Committee, 1986-1991

Chair, AALS Special Committee on ABA Accreditation Standards, 2010

Chair, AALS Nominating Committee for President-Elect and Members of the Executive Committee, 2010 (Member 2008 & 2011)

AALS Delegate to the ABA House of Delegates, 2011-2013

Chair, AALS Long Range Planning Committee, 1988-1989

Member, Planning Committee for Workshop on Tomorrow's Law Schools: Economics, Governance and Justice, 2013

Member, AALS Special Committee on Faculty Recruitment Practices, 2005-2007

Member, AALS Committee on the Ethical and Professional Responsibilities of Law Professors, 1988-1989

Special Honors Received:

Illinois State Bar Foundation, Honorary Fellow (1988) (for contributions to study of lawyer professionalism)

American Bar Foundation, Keck Foundation Award (2000) (for distinguished scholarship in legal ethics and professional responsibility)

New York State Bar Association, Sanford D. Levy Professional Ethics Award (2008) (for lifetime contributions to legal ethics scholarship)

Legal Consulting:

Testified in twenty-seven contested trials or hearings involving issues such as lawyer discipline, disqualification, right to fees and malpractice.

Gave depositions in thirty cases resolved prior to trial.

Submitted declarations or affidavits in forty-three other cases, typically in connection with motions for summary judgment, disciplinary investigations or motions to disqualify.

Organization Memberships:

American Bar Association
American Law Institute (Life Member)
American Bar Foundation (Life Fellow)
Illinois State Bar Association
Illinois Bar Foundation (Honorary Fellow)
ABA Center for Professional Responsibility
Association of Professional Responsibility Lawyers
The Federalist Society

Current as of June 2021

Exhibit B

LINA M. KHAN
435 West 116th Street, New York, NY 10027
lkhan@law.columbia.edu

EMPLOYMENT

Columbia Law School Fall 2020-present
Associate Professor of Law

U.S. House Committee on the Judiciary—Subcommittee on Antitrust, Commercial, and Administrative Law Mar. 2019-Oct. 2020
Majority Counsel

Columbia Law School 2018-2019
Academic Fellow

Federal Trade Commission 2018
Legal Fellow in the Office of Commissioner Rohit Chopra

Open Markets Institute, Washington, DC 2017-2018
Legal Director

Consumer Financial Protection Bureau Summer 2016
Legal Intern—Enforcement Division

Cohen Milstein Sellers & Toll PLLC, Summer 2016
Summer Associate

Gupta Wessler PLLC Summer 2015
Summer Associate

New America, Open Markets Program 2011- 2014
Policy Analyst & Reporter

EDUCATION

Yale Law School, J.D., 2017
Honors: Israel H. Peres Prize for best student Note or Comment appearing in the *Yale Law Journal*
Michael Egger Prize for best student *Yale Law Journal* Note on current social problems
Reinhardt Fellow 2016-2017, scholarship for demonstrated commitment to public interest law
Activities: Mortgage Foreclosure Litigation Clinic, Student Co-Director
Information Society Project, Student Fellow
Yale Law Journal, Editor, Vol. 126

Williams College, B.A. *magna cum laude* with highest honors in political theory, 2010
Honors: Phi Beta Kappa
Arthur B. Graves Essay Prize for best essay in Political Science
Thesis: "Rethinking (In)action: World Alienation in the Thought of Hannah Arendt"
Activities: Editor-in-Chief of *The Williams Record*, the independent student newspaper

Lina M. Khan

Academic Publications

Digital Platforms, Democracy, and the Antimonopoly Tradition, in Democracy & the American Antimonopoly Tradition (eds. Daniel A. Crane & William J. Novak) (forthcoming 2022)

The End of Antitrust History Revisited, 133 Harvard Law Review 1655 (2020)

The Case for "Unfair Methods of Competition" Rulemaking, 87 University of Chicago Law Review 357 (2020) (with Rohit Chopra)

- Received 2020 Antitrust Writing Award for "Best General Antitrust Academic Article"

A Skeptical View of Information Fiduciaries, 133 Harvard Law Review 497 (2019) (with David E. Pozen)

The Separation of Platforms and Commerce, 119 Columbia Law Review 973 (2019)

- Received Jerry S. Cohen Memorial Fund Writing Award for "Best Antitrust Article of 2019 on Remedies"

The Ideological Roots of America's Market Power Problem, 127 Yale Law Journal Forum 960 (2018)

Sources of Tech Platform Power, 2 Georgetown Law & Technology Review 325 (2018)

The New Brandeis Movement: America's Antimonopoly Debate, 9 Journal of European Competition Law & Policy 3 (Mar. 2018)

Amazon's Antitrust Paradox, 126 Yale Law Journal 710 (2017)

- Received 2018 Antitrust Writing Award for "Best Academic Unilateral Conduct Article"
- Cited in *Erie Insurance Co. v. Amazon.com*, 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring)
- Published as chapter in Digital Dominance (Oxford University Press, 2018)
- Featured in: Steven Pearlstein, *Is Amazon Getting Too Big?*, Wash. Post (July 30, 2017); Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, Atlantic Mag. (July 2018); David Streitfeld, *Amazon's Antitrust Antagonist Has a Breakthrough Idea*, N.Y. Times (Sept. 9, 2018); Rana Foroohar, *'This isn't just about antitrust. It's about values,'* Financial Times (Mar. 19, 2019).

Market Power and Inequality, 11 Harvard Law & Policy Review 234 (2017) (with Sandeep Vaheesan)

Arbitration as Wealth Transfer, 35 Yale Law & Policy Review 101 (2017) (with Deepak Gupta)

Market Structure and Political Law: A Taxonomy of Power, 9 Duke Journal of Constitutional Law & Public Policy 37 (2014) (with Zephyr Teachout)

Honors

Politico 50 (2018); Foreign Policy "Global Thinkers" (2018); The Prospect "Top 50 Thinkers" (2019); Wired25 (2019); TIME Magazine "Next Generation Leader" (2019); National Journal 50 (2019); Washingtonian 40 Under 40 (2020); TIME Magazine 100 Next (2021)

Bar Admission

New York

Exhibit C

LINA KHAN

LEXEY SWALL / NYT

Lina Khan is an associate professor of law at Columbia Law School, where she teaches and writes on antitrust law, infrastructure industries law, and the antimonopoly tradition. Her recent scholarship has focused on how the current antitrust regime is unequipped to capture the power of dominant digital platforms. Prior to joining Columbia, Khan served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law, where she led the congressional investigation into digital markets and the publication of its final report.

Khan's scholarship has been published by the *Harvard Law Review*, *University of Chicago Law Review*, *Columbia Law Review*, and *Yale Law Journal*. The *New York Times* has described her work as having

"reframed decades of monopoly law," and *Politico* has called her "a leader of a new school of antitrust thought." Her article "Amazon's Antitrust Paradox" was awarded the 2018 Antitrust Writing Award for "Best Academic Unilateral Conduct Article," the Yale Law School's Israel H. Peres Prize, and the Yale Law Journal's Michael Egger Prize; her article "The Separation of Platforms and Commerce" won the 2019 Jerry S. Cohen Memorial Fund's Best Antitrust Article on Remedies; and her co-authored article "The Case for 'Unfair Methods of Competition' Rulemaking" received the 2020 Antitrust Writing Award for "Best General Antitrust Academic Article." She has presented her work before the Department of Justice's Antitrust Division, the Federal Trade Commission, the House Judiciary Committee, and the European Commission.

Khan's work has been profiled in the *Atlantic*, *Boston Globe*, *Financial Times*, *New York Times*, *Washington Monthly*, *Washington Post*, *Yahoo Finance*, *Le Figaro*, *El Pais*, *and Manager Magazin*, as well as widely discussed in both U.S. and international press, including by *Bloomberg*, the *Economist*, and the *Wall Street Journal*. She has appeared on CNBC, C-SPAN, Fox Business News, and BBC and been featured on Planet Money, 1A, Current Affairs, Vergecast, and The Bernie Sanders Show. Khan was recently named to the Politico 50, Foreign Policy Magazine's "Global Thinkers," The Prospect's "Top 50 Thinkers," the WIRED25, the National Journal 50, and TIME Magazine's "Next Generation Leaders."

Khan previously served as a legal advisor in the office of Commissioner Rohit Chopra at the Federal Trade Commission and as legal director at the Open Markets Institute. During law school she litigated on behalf of homeowners through Yale's Mortgage Foreclosure Litigation Clinic and spent summers at Gupta Wessler, Cohen Milstein, and the Consumer Financial Protection Bureau. Khan is a graduate of Williams College and Yale Law School, where was awarded the Reinhardt Fellowship for public interest law.

Exhibit D

Lina Khan ✓
@linamkhan

Follow

1. Solid complaints from FTC & 48 AGs suing Facebook for violating antitrust laws -- and requesting divestitures/breakups, among other forms of relief. Hopeful that it marks yet another step forward in the growing efforts to rehabilitate antitrust laws & recover antimonopoly.

4:20 PM - 9 Dec 2020

298 Retweets **1,111** Likes

26 298 1.1K

Lina Khan ✓ @linamkhan · 9 Dec 2020

2. States' complaint is especially impressive. Tight narrative, compelling facts, told in a way where the full force of the story really lands. It's a persuasive document, fully showcasing how Instagram & WhatsApp acquisitions were part of broader monopoly maintenance strategy.

1 23 169

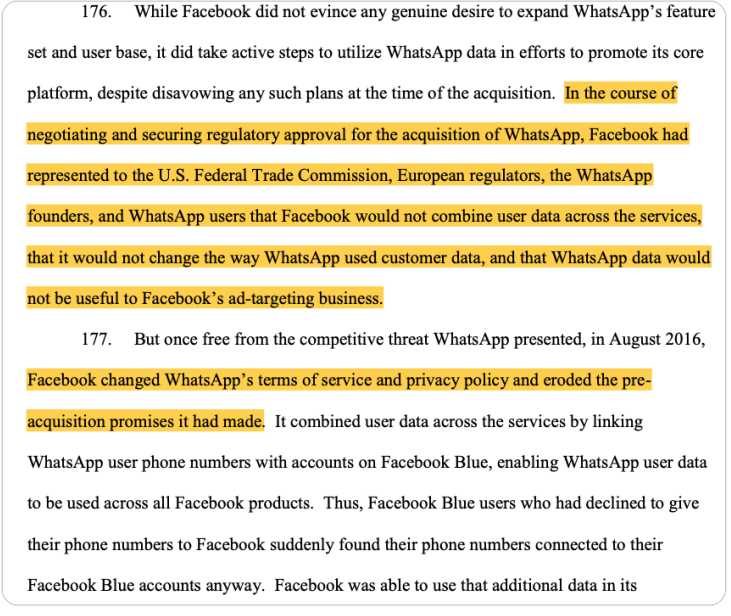
Lina Khan ✓ @linamkhan · 9 Dec 2020

3. States' complaint also reveals a sophisticated understanding of harms. It notes FB entered market by competing on privacy, but degraded privacy once it had eliminated rivals & secured a safe monopoly position -- an echo of @DinaSrinivasan's excellent work.

1 46 226

Lina Khan ✓ @linamkhan · 9 Dec 2020

4. States also note that when seeking approval for WhatsApp acquisition, FB told enforcers (including FTC) that it wouldn't combine data sets or use WhatsApp data for ads. A few years later it did so anyway. European Commission fined FB $122M for the deception. FTC did nothing.



176. While Facebook did not evince any genuine desire to expand WhatsApp's feature set and user base, it did take active steps to utilize WhatsApp data in efforts to promote its core platform, despite disavowing any such plans at the time of the acquisition. In the course of negotiating and securing regulatory approval for the acquisition of WhatsApp, Facebook had represented to the U.S. Federal Trade Commission, European regulators, the WhatsApp founders, and WhatsApp users that Facebook would not combine user data across the services, that it would not change the way WhatsApp used customer data, and that WhatsApp data would not be useful to Facebook's ad-targeting business.

177. But once free from the competitive threat WhatsApp presented, in August 2016, Facebook changed WhatsApp's terms of service and privacy policy and eroded the pre-acquisition promises it had made. It combined user data across the services by linking WhatsApp user phone numbers with accounts on Facebook Blue, enabling WhatsApp user data to be used across all Facebook products. Thus, Facebook Blue users who had declined to give their phone numbers to Facebook suddenly found their phone numbers connected to their Facebook Blue accounts anyway. Facebook was able to use that additional data in its

1 59 273

Lina Khan @linamkhan · 9 Dec 2020

(5. At the time of the deal @EPICprivacy & @DigitalDemoc raised alarms with FTC, prompting FTC to tell FB that reneging on WhatsApp's privacy commitments could violate law and/or a preexisting FTC order. This whole episode is absent from FTC complaint epic.org/2016/08/facebo…)

> WhatsApp's privacy policy clearly states, among other things, that users' information will not be used for advertising purposes or sold to a third party for commercial or marketing use without the users' consent. Facebook's purchase of WhatsApp would not nullify these promises and WhatsApp and Facebook would continue to be bound by them. Further, Facebook has recently promised consumers that it would not change the way WhatsApp uses customer information. Therefore, any use of WhatsApp's subscriber information that violates these privacy promises, by either WhatsApp or Facebook, could constitute a deceptive or unfair practice under the FTC Act. Moreover, such an action could violate the FTC's order against Facebook. Among other things, the Order enjoins Facebook and its subsidiaries from misrepresenting the extent to which they maintain the privacy or security of consumers' personal information and requires Facebook and its subsidiaries to obtain consumers' affirmative express consent before sharing their nonpublic information in a manner that materially exceeds any privacy setting.

2 18 127

Lina Khan @linamkhan · 9 Dec 2020

6. Also very glad to see states connect FB's monopolization to all around quality degradation, including increase in ad load, proliferation of fake accounts, and inaccurate performance & other metrics for advertisers (see, e.g., wsj.com/articles/faceb…).

3 30 180

Lina Khan @linamkhan · 9 Dec 2020

7. States also describe how acquiring Onavo (& the surveillance of rivals it enabled) was key to FB's strategy for identifying competitive threats at the earliest stages. They note FB foreclosed other firms from having access to Onavo data.

> 142. By July 2013, it became apparent to Zuckerberg and his team that Onavo could make an even greater contribution to their overriding goal of maintaining Facebook's monopoly if Onavo were owned and controlled—not merely licensed—by Facebook. Such an acquisition would enable Facebook to gain exclusive control over what could be a key component to an early warning system for detecting competitive threats, allowing it to identify and eliminate or debilitate those threats in their nascency. Acquiring Onavo also allowed Facebook to terminate the access of rivals and potential rivals to Onavo's valuable tools.

1 17 118

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8. States discuss several other competitive threats FB acquired or cut off from APIs. Complaint marshals full set of facts in a very effective way. Net effect is clear picture of how FB's conduct was systemic, exactly what you want for Sec 2 (though states also sued under Sec 7).

2 10 106

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9. Interestingly FTC sued only under Sec 2, not Sec 7. Also notable that many of the docs cited to show Instagram & WhatsApp purchases were illegal were available at the time FTC reviewed the deals (though FTC investigated only Instagram ($1bn) in depth, not WhatsApp ($19bn)).

1 8 107

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10. Many of the Instagram docs cited build on the material the House Antitrust Subcommittee made public through its investigation. In July @JerryNadler confronted Zuckerberg with some of this evidence c-span.org/video/?c492945…

1 8 91

Lina Khan @linamkhan · 9 Dec 2020

11. Finally, both FTC's and states' request for relief includes requirements that would implicate future acquisitions. FTC requests "a prior notice and prior approval obligation for future mergers and acquisitions."

2 7 92

Lina Khan @linamkhan · 9 Dec 2020

12. States request FB be prohibited from deals valued at or > $10million without first informing the states, & that FB submit deal-related disclosures it'd make to FTC/DOJ. This is potentially very significant. 48 AGs would have chance to review these deals, not just FTC/DOJ.

1 9 108

Lina Khan @linamkhan · 9 Dec 2020

13. Notably, during the course of the investigation FB acquired Giphy, which FB could use to deprive rivals of access and/or to collect significant data. FB didn't report the deal to enforcers, presumably bc it was structured to avoid reporting thresholds.

2 15 111

Lina Khan @linamkhan · 9 Dec 2020

14. And just this week Facebook purchased Kustomer, a business software company, reportedly for ~$1 billion. So two days before being sued by the federal government & 48 AGs for a series of illegal acquisitions, Facebook made another acquisition.

3 17 111

Lina Khan @linamkhan · 9 Dec 2020

15. FB is now following this playbook in the virtual reality space. Quoting @PramilaJayapal & House report, Bloomberg notes FB is using same "copy-acquire-kill" strategy it used to monopolize social networking. Key task for enforcers is to prevent a repeat

5 19 82

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Exhibit B

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

BEFORE THE FEDERAL TRADE COMMISSION

IN RE PETITION FOR RECUSAL OF CHAIR LINA M. KHAN FROM INVOLVEMENT IN THE PENDING ANTITRUST CASE AGAINST FACEBOOK, INC.

EXPERT DECLARATION OF PROFESSOR DANIEL B. RODRIGUEZ

I. Professional Background

I am the Harold Washington Professor at Northwestern University Pritzker School of Law. I have been on that faculty since 2012, and, from 2012 to 2018, I served as the dean of the Law School. I previously served as the Minerva Drysdale Regents Chair in Law at the University of Texas Law School, the dean and Warren Distinguished Professor at the University of San Diego Law School, and a professor of law at the University of California, Berkeley School of Law. In addition to these full-time positions, I have been a visiting professor at the law schools at Harvard, Stanford, Columbia, Virginia, and the University of Southern California. I am an honors graduate of Harvard Law School, where I served as Supreme Court editor of the Harvard Law Review and as a research assistant to various faculty members.

For three decades, I have taught administrative law and have written widely in this area. In addition to my scholarly work, I have consulted on various matters concerning governmental decisionmaking. I previously served on the executive council of the American Bar Association ("ABA") Section on Administrative Law and Regulatory Practice. On matters of governmental ethics in particular, I currently serve as an advisor to the American Law Institute ("ALI")'s restatement project on Principles of Government Ethics.

I have held many leadership roles in the profession and the academy, including the president of the Association of American Law Schools, Council Member of the ALI, member of the Board of Directors of the American Bar Foundation, chair of the ABA Center for Innovation, member of the ABA Commission on the Future of Legal Services, and member of other professional organizations.

I have authored scholarship relevant to the subject of this declaration, most recently a monograph-length article entitled *Whither the Neutral Agency? Rethinking Bias in Regulatory Administration*, 69 Buff. L. Rev. 375 (2021). I have included a copy of my current curriculum vitae as Exhibit A to this declaration.

II. Terms of Engagement on This Matter

The law firm of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. has retained me to give this declaration in support of Facebook's July 14, 2021 petition for recusal as an expert in administrative law and process and governmental ethics and consider whether the Chair of the Federal Trade Commission ("FTC"), Professor Lina Khan (hereinafter referred to as Chair Khan), should recuse herself – or be recused – from the pending antitrust matter against Facebook. My role is to address the ethical standards that apply to someone in Chair Khan's role and the statements Chair Khan has made about Facebook.

I am being compensated by counsel at my hourly rate for the time spent preparing this report and any time later required. No part of the compensation I receive is dependent on the conclusions I reach or the result in any matter in which this declaration might be introduced.

III. My Opinions Relevant to Chair Khan's Recusal

My central opinion, the basis of which I will explain in this declaration, is that Chair Khan should be disqualified from any participation in the agency's decision about how to proceed with the pending antitrust matter against Facebook. I first support this opinion by explaining why the

law requires her recusal: The federal ethics rules require an FTC Commissioner to avoid the mere "appearance of loss of impartiality in the performance of [her] official duties," 5 C.F.R. § 2635.501(a), and due process requires an FTC Commissioner to recuse herself when she has already drawn factual and legal conclusions and deemed the target of an antitrust investigation a violator of the federal antitrust laws. Next, I explain why the requirement of an impartial decisionmaker is important to the FTC's functioning as an independent agency. Finally, I highlight the overwhelming evidence in support of Chair Khan's recusal, showing that she has expressed clear and unequivocal views about the exact matters at issue in this dispute and cannot avoid appearing biased against Facebook.

A. Agency Proceedings Require a Neutral Decisionmaker

The ethical rules for federal agency officials, including the Chair of the FTC, are clear in requiring that agency decisionmakers be and appear impartial. *See* 5 C.F.R. § 2635.501(a) (requiring any federal official to "avoid an appearance of loss of impartiality in the performance of [her] official duties"). This consistent requirement of impartiality is necessary to guarantee fundamental fairness to all parties who are involved in matters involving alleged unfair trade practices, including both internal FTC adjudications and proceedings in federal court.

The requirement of a neutral, impartial decisionmaker has been a central component of due process and fair administrative procedure from the earliest days of the regulatory administration. *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *see generally* KRISTIN HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.7 *et seq.* (6th ed. 2018). "The law on bias in regulatory administration starts with the core principle that a fair, rational procedure requires agency officials who approach their tasks with an open-mind." Rodriguez, *Neutral Agency*, 69 Buff. L. Rev. at 381.

This requirement of impartiality, and the facts that bear on whether or not the requirement has or has not been satisfied, has been considered in numerous cases. Some of the most prominent cases in contemporary administrative law have involved the FTC and, in particular, the conduct of then-Chair Paul Dixon. In *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965), the D.C. Circuit held that prior statements by Chair Dixon tainted the proceeding, for "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the [FTC] Act." *Id.* at 760. In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court noted, critically, the "active role" that Chair Dixon had taken in the investigation of a company when he was Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Judiciary Committee. Despite the fact that Chair Dixon did not cast the deciding vote in the proceeding against the same company, the court held that his conduct violated both the Administrative Procedure Act and the Constitution's Due Process Clause, for "[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify." *Id*. at 767.

Chair Dixon's comments in advance of proceedings involving the beauty industry were found by the D.C. Circuit to be improper two separate times, in *FTC v. Cinderella Career & Finishing Schools, Inc*., 404 F.2d 1308 (D.C. Cir. 1968), and in *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970). The fundamental right of the defendants to an open-minded decisionmaker was undermined by FTC Chair statements that suggested to any reasonable observer that "the ultimate determination of the merits will move in predestined grooves." *Cinderella Finishing*, 425 F.2d at 590. In these cases, the court acknowledged that agency officials are, as the U.S. Supreme Court had put it in *Withrow*, entitled to a "presumption

of honesty and integrity," 421 U.S. at 47, yet reached the conclusion that "the statements of [Chair Dixon] that spoke . . . to the merits of the dispute and to the bad conduct of the defendant crossed the line," Rodriguez, *Neutral Agency*, 69 Buff. L. Rev. at 393.

"The test for disqualification," the court said in the second *Cinderella Finishing* case, is "whether 'a disinterested observer may conclude that [the agency official] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" 425 F.2d at 591 (citation omitted). Despite the absence of any evidence suggesting either that Chair Dixon would personally benefit from a decision rendered against these companies or any suggestion of some special personal animus at work, the courts were concerned in each instance with the simple fact that this administrative official – the Chair of the FTC – was approaching these matters with bias. After all, "[the law] does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." *Id*. at 590 (footnote omitted).

Because courts cannot read the minds of official decisionmakers, so as to determine whether in fact the official approached the matter with an open or closed mind, courts commonly rely on the appearance of partiality in determining whether the official's involvement in the matter is appropriate. In *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the Supreme Court considered a case involving a state supreme court justice who had been previously involved in that case as a district attorney. In ruling that the failure to recuse was a constitutional defect, the Court wrote:

> An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice

> are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

Id. at 1909. The appearance of impropriety is part of the standard in cases involving administrative decisionmaking, as well. *See Cinderella Finishing*, 425 F.2d at 590 (FTC Commissioners should avoid statements "which give the appearance that the case has been prejudged."); *American Cyanamid*, 363 F.2d at 767 ("[B]oth unfairness and the appearance of unfairness should be avoided."). The standard is an objective one and was summarized well by the Eighth Circuit in *Antoniu v. SEC*, 877 F.2d 721 (8th Cir. 1989): The test is "whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Id.* at 725 (alterations in original) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959)). The risk that the parties and the public would view the process as fundamentally unfair does counsel a close watch on the behavior and statements of the decisionmaker. "[O]ur system of law," the Court said in *In re Murchison*, 349 U.S. 133, 136 (1955), "has always endeavored to prevent even the probability of unfairness." *See also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

B. <u>Impartiality is Required Regardless of the Source of, and Reasons for, the Prejudice</u>

Bias comes in various forms. The inquiry here is whether there is a risk of partiality that emerges from the facts of this specific matter, considering in particular the statements made before deciding whether to pursue this antitrust case.

Some of the leading cases involve official bias in situations where the official, be it a judge or an administrator, had a financial self-interest in the outcome of the proceeding. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Other cases have involved instances of external influence by those with a preferred outcome in a dispute. *See, e.g.*, *D.C. Fed'n of Civic Ass'ns v.*

Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (considering whether "extraneous pressure intruded into the *calculus of considerations* on which the Secretary's decision was based") (emphasis added). It is clear to me from these and other cases that the courts look with special disfavor at agency decisions where the decisionmaker has a personal interest in the outcome of the case or has become compromised in some serious way because of external political influence. *See* Rodriguez, *Neutral Agency*, 69 Buff. L. Rev. at 383-401 (sorting bias cases into the categories of interest, prejudice, and influence and discussing how courts have criticized the bias arising from each cluster of cases). These cases illuminate the general principle that an agency official should not be seen to be serving two masters – the rule of law and her own or anyone else's individual interest.

While there is no allegation that Chair Khan has any pecuniary interest in the outcome of the agency's actions against Facebook, this principle is nonetheless relevant here because the circumstances of self-interest and external influence do not exhaust the area in which the requirement of neutral decisionmaking is imposed by courts. Administrator neutrality covers not only where the official has been or might be compromised by financial pressures but also circumstances in which, as here, a government official comes to the matter with her mind made up and so cannot be viewed by a reasonable observer as in any way objective. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38 (2004) (holding that defendant was denied due process because he was given no meaningful opportunity to contest the factual basis for his detention before a neutral decisionmaker); *NLRB v. Pittsburgh S.S. Co*., 337 U.S. 656, 659-60 (1949) (finding undue bias where hearing examiner found all of one side's witnesses trustworthy and all from the other side untrustworthy).

Requiring impartiality in decisionmaking regardless of the reasons for bias makes good sense from the perspective of fair procedure and administrative justice, for the risks of unfairness

exist whenever the official has made up his or her mind in advance. Parties to a dispute – here, a company that is being charged with violations of federal statutes – have a right to have their cause considered throughout the process by officials who can be trusted to evaluate the evidence fairly, without preconceived biases, and without any "axe to grind." *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.). Why is biased decisionmaking so objectionable? As I have written recently in an article that looks comprehensively at administrative agency bias, "objective judgment by a neutral decisionmaker . . . emerges from the deeper commitment to blind justice, that is, to decisionmaking based upon the quality of the arguments made and the proof established, and without attention to the characteristics of the disputants." Rodriguez, *Neutral Agency*, 69 Buff. L. Rev. at 420.

While it is tempting to see the concept of neutrality as inextricably tied to the principle of governmental ethics – and therefore, to see anti-bias requirements as merely intended to root out and eradicate public corruption – my opinion as a teacher and scholar of administrative law is that the essential purpose of requiring impartiality in administrative agency decisionmaking is to ensure a fair and rational administrative process. Importantly, that process must also appear to be so. As I will discuss in more detail below, the awesome power of regulatory agencies, such as the FTC, requires scrupulous commitment to a fair, transparent process, and such a process means, at the very least, neutral decisionmakers who can be trusted to consider the parties, arguments, and the evidence presented in an objective, open-minded way.

C. <u>This Requirement Applies as Well to the Functions of an Agency Administrator that are Analogous to a Prosecutor</u>

To be sure, an agency official acting as an adjudicator carries special responsibilities for impartiality. Because that role is analogous to a federal or state judge, the law governing adjudicatory decisionmakers has incorporated the high standards we expect from judges. *See*

Gibson, 411 U.S. at 578 (affirming district court's determination that State Board of Optometry was too biased to constitutionally conduct hearings on appellees' licensing); *Ward*, 409 U.S. at 60 (requiring disqualification of mayor who adjudicated disputes in a town where much of his income came from fines and fees imposed by him in the so-called mayor's court).

By contrast, there is limited judicial precedent addressing the amount of impartiality expected of agency leaders who have multiple roles or assume a role similar to that of a prosecutor. While I have addressed agency decisionmaking in various places in this declaration, this decisionmaking can take different forms, especially at the FTC. Commissioners act in multiple roles because they investigate cases and decide whether and how to bring charges. Depending on which forum the Commissioners choose, they act in roles analogous to judges, when adjudicating a dispute, and to prosecutors, when bringing a case in federal court. It follows from the logic, rationale, and explication of the fundamental requirement of impartiality in administrative decisionmaking that this principle applies regardless of the specific role an administrator plays.

I start with an important observation about the state of the law: The principle of public official impartiality in the case law has never been limited only to those functioning in an adjudicatory role. Nor should it be. Prosecutors must be impartial because they are exercising the great power of the government, the power that enables them to bring both criminal and civil matters to appropriate courts and to urge that defendants be punished or penalized in some way for their conduct. This is not to say that prosecutors do not have a large amount of discretion to investigate and charge and, in exercising that discretion, to bring their opinions and judgment to bear on decisions about how best to allocate their limited resources. Adjudicators and prosecutors occupy different roles in the justice system, and nothing I say should be read as suggesting that the same strict anti-bias rules apply to prosecutors and judges. However, "[p]rosecutors . . . have a duty to

'do justice,'" and such justice requires impartiality and neutrality. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. Rev. 463, 471 (2017).

This impartiality means that prosecutors should come to all matters with an open mind and free from both political influence and ideological bias. *Cf.* Standards for Criminal Justice: Prosecution Function, 3-1.3 cmt. (Am. Bar Ass'n 3d ed. 1993) ("a prosecutor should not allow . . . ideological or political beliefs to interfere with the professional performance of official duties"); D.C. Bar Legal Ethics Op. 371 (2016) (the Rules of Professional Conduct "prohibit[] statements by prosecutors that heighten condemnation of the accused and do not serve a legitimate law enforcement purpose"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 683 (1996) (maintaining that a prosecutor must "exercise [his or her] discretion in a disinterested, nonpartisan fashion" and, therefore, may not exercise prosecutorial discretion "to advance his or her own political interests or those of another").

The great Justice Robert Jackson spoke of this as a prosecutor's obligation of "fair play." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 4 (1940). This special duty emerges from a prosecutor's tremendous discretion, from the fact that he "has more control over life, liberty, and reputation than any other person in America." *Id*. at 3. Shrewdly, Justice Jackson notes that it is precisely because these positions are of "such independence and importance" that these prosecutors can "afford to be just." *Id*. at 4. Because prosecutors must necessarily determine which cases among the many possibilities ought to be investigated and eventually brought to court, it is essential that the prosecutor have "a detached and impartial view of all groups in his community." *Id*. at 5. This requirement of impartiality, as a prominent criminal procedure scholar said nearly four decades later, ensures not only "insulation from narrow interest groups and corrupt influences" but also an understanding, "as an affirmative matter, that

independent-minded prosecutors are well-placed to divine the public interest." Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 Va. L. Rev. 939, 959 (1997).

While the ultimate resolution of the dispute may not rest with prosecutors, the charging decision does reflect judgments reached by prosecutors based upon their investigation and conclusions about the conduct of those investigated. And so prosecutors are properly viewed as decisionmakers with critical functions to play in the resolution of disputes. Judge Gerard Lynch put the matter well when he wrote: "Justice is much better served when prosecutors . . . see themselves as quasi-judicial decision-makers, obligated to reach the fairest possible results, rather than as partisan negotiators." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2136 (1998); *see also* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 215-27 (1988) (observing that "in her *quasi-judicial role* the prosecutor acts 'impartially' and judge-like; her orientation to the factual contest is neutral"); *cf. State v. Tate*, 171 So. 108, 112 (La. 1936) ("The district attorney is a quasi judicial officer. He represents the State, and the State demands no victims. It seeks justice only, equal and impartial justice . . .").

This view of prosecutors need not be in tension with the traditional idea that prosecutors maintain a great amount of discretion in their decisions to investigate and pursue justice. The prosecutor's essential role is as the "arbiter of the accusation." H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1701 (2000). And, therefore, as Professor Uviller puts it:

> Discharge of this major obligation, the wise exercise of virtually unilateral discretion in the matter, demands neutrality, the suspension of the partisan outlook, and at least until the case passes to the adversarial stage, dedication to interests that may prove antithetical to her ultimate position. . . . [T]horough investigation by a

> detached and dedicated investigator is the best assurance of a conclusion that comports with historical truth. . . . So long as the prosecutor is primarily an advocate, sees himself, armor-clad, prepared to do battle for what is right, detachment falters.

Id. at 1701-02.

Although the U.S. Supreme Court has never ruled specifically in a case involving a challenge that a prosecutor must be recused, it has made clear that prosecutorial neutrality is a requirement of procedural due process under the Constitution. In *Berger v. United States*, 295 U.S. 78 (1935), the Court declared that "[t]he [state's attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Id.* at 88. And in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), even though the Court recognized that "the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges," *id.* at 250, it indicated that due process applies to decisions involving so-called administrative prosecutors: "We do not suggest . . . that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. . . . Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication." *Id.* at 249.

A number of state courts have ruled that defendants' fair trial rights were violated by prosecutors taking public positions on matters that would be subject to litigation at trial. In *State v. Hohman*, 420 A.2d 852 (Vt. 1980), *overruled on other grounds by Jones v. Shea*, 532 A.2d 571 (Vt. 1987), the Vermont Supreme Court considered whether the defendant's fair trial rights were violated where the state's attorney had put out an advertisement before trial promising to convict an infamous defendant. The court held in favor of the defendant, ruling that the prosecutor had evidenced improper bias. The court quoted from the U.S. Supreme Court's 1935 decision in

Berger, which emphasized how prosecutors "may prosecute with earnestness and vigor . . . [,] [b]ut, while he may strike hard blows, he is not at liberty to strike foul ones." 295 U.S. at 88.

In *State v. Snyder*, 237 So. 2d 392 (La. 1970), the Louisiana Supreme Court considered the defendant's objection that the district attorney had demonstrated "personal animosity" toward the defendant, arising from a bitterly fought mayoral election. *Id.* at 395. The court reversed the conviction on the grounds of impermissible bias because the district attorney's behavior "might, even though unconsciously, have impaired his power to conduct [the defendant's] trial fairly and impartially." *Id*.

In 1981, again in Vermont, the court struck down a conviction where the district attorney had announced an opinion before a legislative committee about the facts specifically relevant to the case. *See In re J.S.*, 436 A.2d 772 (Vt. 1981). The court reiterated that the law requires the prosecutor "to act with impartiality and with the objective of doing justice without regard to his personal feelings. If he cannot so act, his responsibility to his position and profession requires him to disqualify himself." *Id*. at 773.

In *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), the court returned to an old issue that had once been prominent in cases involving bias, and that is the self-interest attendant to a prosecutor being compensated specially for bringing cases. In invalidating this arrangement for bias, the court noted that "a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly." *Id*. at 350; *see also State v. Gonzales*, 119 P.3d 151 (N.M. 2005) (finding bias

where defendant worked in office of the prosecutor and there was a history of the prosecutor's animus toward defendant).

These state cases involve local and state prosecutors in criminal cases, not a chair of a federal administrative agency. The functions and responsibilities of the latter are obviously distinct from a district attorney or a state attorney general. For example, local prosecutors are often elected officials, and the fact that they express views about certain matters that are likely to come into their orbit as prosecutors is understandable. Agency officials, while by no means empty vessels with respect to either policy issues or private parties, are still expected to conduct themselves comparatively above the ideological fray and approach individual matters with an open mind. So far as the matter of impartiality in governmental decisionmaking is concerned, the basic obligations to behave neutrally and with a scrupulously open mind are essentially the same. As the California Supreme Court put it in *Clancy*, "[t]hese duties [of neutrality] are not limited to criminal prosecutors: A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice." 705 P.2d at 350 (internal quotation marks omitted). At bottom, the courts are deeply protective of the integrity of the process and the rights of the defendant to a fair trial, and there are good reasons to protect these fundamental principles in the context of a civil lawsuit where the awesome power of a major federal agency is being brought against a private company and seeking substantial relief.

The fair process basis of this principle of prosecutorial impartiality is reflected in rules of professional ethics for federal officials. The old ABA Code of Professional Responsibility provided that "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or

results." EC 7-14. The Model Rules of Professional Conduct make this requirement most explicit in criminal cases:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

Rule 3.8, cmt. 1. The National District Attorneys Association National Prosecution Standards (3d ed. 2009) provide that "[t]he prosecutor is an independent administrator of justice," § 1-1.1, and "[a] prosecutor should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases," *id.* § 1-1.2.

These longstanding ethical principles are designed to ensure that the general public trusts prosecutors, in administrative proceedings as elsewhere, to bring objectivity to the task of investigating conduct and charging defendants. In contrasting the prosecutor's role in this pre-trial phase with advocacy at trial, Professor Uviller notes that "[i]nvestigation and adjudication call for neutrality, while the trial mode of the advocate demands full partisan commitment. Passion and dispassion are not cut from the same mentality. Dedicated detachment is a precious quality in a public prosecutor, difficult to cultivate and best developed at some remove from the adversary zeal that characterizes the trial phase." Uviller, *The Neutral Prosecutor*, 68 Fordham L. Rev. at 1718. The failure to ensure such detachment is a fundamental error demanding correction. As Justice Brennan put it: "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding. The appointment of an interested prosecutor raises such doubts." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality) (citations omitted); *see also Gonzales*, 119 P.3d at 161 ("Bias is a ground upon which a prosecutor may be disqualified.").

It is important to acknowledge that these cases and ethical rules offered by the ABA and other organizations are in some tension with the enduring principle of prosecutorial discretion. Chair Khan as prosecutor has discretion not dissimilar in content or rationale to the discretion vested in all prosecutors; and this discretion includes a wide berth to decide whether to bring complaints. I have described in some detail cases that remind us that this prosecutorial discretion is not unlimited and that we want our officials who exercise this extraordinary public power to adhere to the rule of law and standards of fairness, a desire that fuels attention by courts to guarding against biased prosecutorial decisionmaking. And of course the responsibility to ensure a fair process is held in the first instance by the prosecutor him or herself, which is why the recusal petition is directed toward the prosecutor, here Chair Khan.

The tension persists nonetheless and the challenge of reconciling a strong mandate of impartiality with broad prosecutorial discretion is a difficult one. The law remains an inexact, and somewhat inchoate, guidepost. However, I believe we can derive standards of fair process and administrative justice, standards that support an impartiality requirement for administrative prosecutors by looking to the nature and structure of regulatory agencies and the contours of administrative law. This is the focus of the next section of my declaration.

D. A Scrupulous Requirement of Impartial Decisionmaking is a Principle Important to the FTC's Function as an Independent Agency in Our Constitutional Scheme of Regulatory Administration

In my view, the ethical and due process concerns detailed up to this point are sufficient to support Chair Khan's recusal. But, I want to highlight an additional argument for recusal that turns on Chair Khan's function in this particular administrative agency context. I offer this opinion as an expert in administrative law and someone who has taught and written widely about the origins, history, and constitutional functions of regulatory agencies in American government.

The function and role of the FTC should be considered in light of the important expectations established by Congress in creating this agency and in the persistent choices of Congress and the President in maintaining these familiar and important schemes of administrative justice. *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 111 (1938) (explaining that independent regulatory commissions "evolved from the very concept of administrative power"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987) (describing the modern emergence of administrative constitutionalism and the consistent acceptance by courts of broad administrative power under critical checks and balances).

In creating these so-called independent regulatory agencies, beginning with the Interstate Commerce Commission ("ICC") in 1887, continuing with the FTC in 1914, and reaching its zenith in the New Deal, Congress understood that these statutory creations represented new models of regulatory governance. *See generally* Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. Pa. L. Rev. 1699, 1729-44 (2019) (describing origins of regulatory commissions, including the FTC, from the Progressive Era through the New Deal). The agencies were authorized to exercise important administrative powers and, while they acted on behalf of Congress as the creator of these schemes, they were decidedly not Congress. Therefore, as the Supreme Court made clear in key cases from the 1930s and 1940s, Congress must create in the agency's organic statute "intelligible principles" to guide adequately agency conduct, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429-30 (1935); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); they must provide a mechanism for judicial control over agency decisionmaking, especially with respect to the finding of so-called jurisdictional facts, *see Crowell v. Benson*, 285 U.S. 22 (1932); and, significantly for the purposes of this matter, they must function in accordance with transparent procedures, which

would ensure all who came before the agency that matters would be handled fairly,[1] *see, e.g.*, *Morgan v. United States*, 304 U.S. 1, 18 (1938) (parties must have "a reasonable opportunity to know the claims of the opposing party and to meet them").

It is a mistake to suppose that the only obligations imposed on agencies exercising their powers are found in the Constitution's procedural Due Process Clause. It is likewise a mistake to see the Administrative Procedure Act of 1946 ("APA") as the sole source of restrictions on agency actions. Rather, the requirements of fair process – including a neutral and impartial decisionmaker – emerge from what I have called in my scholarship a political accommodation among Congress, courts, and agencies and, more to the point, a constitutional understanding that agencies could exercise awesome power only if they turned very square corners in their decisionmaking – all decisionmaking, including matters of enforcement and implementation, in addition to adjudication. *See* Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. Rev. 147, 202-05 (2020). "The principal concern," as Professor Cass Sunstein has written, "of administrative law since the New Deal, in short, has been to develop surrogate safeguards for the original protection afforded by separation of powers and electoral accountability." Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. Chi. L. Rev. 976, 987 (1982).

[1] FTC Commissioner Wilson recently recognized in testimony that the lack of transparency in the agency risks leading to "agency overreach," expressing concern about "more power without appropriate guardrails." *Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection" Before the Subcomm. on Consumer Protection & Commerce of the* H. Comm. on Energy & Commerce, 117th Cong. (July 28, 2021) (1:00:40 to 1:00:52), https://www.youtube.com/watch?v=AwnW2IwgITY&t=3700s (testimony of Commissioner Christine S. Wilson); *see also* Oral Statement of Commissioner Christine S. Wilson, FTC, at 3 (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf.

Not only is the FTC obliged to respect this constitutional *quid pro quo* – *i.e.*, it may exercise power but only in a manner consistent with scrupulously fair procedures – but there are reasons why it must be especially vigilant. This stems from the statutory fact that the Commission has the power to bring disputes to the federal courts where an Article III judge will make a determination based, in part, upon evidence presented by the FTC as a party to the dispute or, alternatively, to bring matters before the agency to decide in a so-called Part 3 administrative proceeding. It is unlikely that Congress would have created this arrangement without an expectation that the agency members who would wear these two hats would carry out their dual function with careful attention to the need to be impartial. After all, the prosecutor in the first instance could well become the adjudicator, and the FTC lacks any mechanism to substitute a new set of officials to make adjudicatory determinations after it has proceeded – or, perhaps more realistically, considered whether to proceed – with a suit in federal court. Judge Richard Posner summarized well the expectations and obligations of the FTC when he wrote:

> On the procedural or institutional side, it was believed that the establishment of a continuing body with specialized responsibility and broad powers to deal with trade restraints would promote the sound, certain, and expeditious implementation of antitrust policy. Also, Commission enforcement would be outside of politics, and this would promote both effectiveness and impartiality.

Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 49 (1969).

Also worth mentioning is the fact that the FTC was created in the twin images of bureaucratic decisionmaking – this growing out of the foundations of both the Interstate Commerce Commission and the Federal Reserve Board (created just one year before the FTC in 1913) – and also of the courts in their adjudicatory role. And so, when the commissioners were tasked with investigation and building a case for charging businesses with unfair trade practices, if the facts warranted such a case, they had in mind these commissioners functioning as prosecutors and

judges, rather than as lawmakers. It stands to reason that these functions would be performed in ways that would be oriented toward fairness and that impartiality would, therefore, be scrupulously observed. *See generally* GEORGE C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1924) (describing the judge-like powers of federal trade commissioners).

Maintaining fair procedures consistent with this court-like structure was important for Congress from the very beginning. Indeed, one journalist in 1937, as New Deal battles waged about whether these independent regulatory agencies should be subject to more top-down political control, proclaimed that "the country has come to look up to agencies [like the ICC and FTC] largely because of their independence and their fairness" in policymaking. HIROSHI OKAYAMA, JUDICIALIZING THE ADMINISTRATIVE STATE: THE RISE OF THE INDEPENDENT REGULATORY COMMISSIONS IN THE UNITED STATES, 1883-1937, at 138 (2019) (quoting Wash. Evening Star, Jan. 15, 1937)). The most prominent administrative scholars across the century-long time frame from the creation of the FTC to the present have emphasized the critical role of fair process in maintaining the democratic legitimacy of administrative agencies and their functions. *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 16, 104 (2020) (connecting rule of law "virtue" of administrative justice with notions of morality central to administrative law and to the legitimacy of agencies in constitutional government); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 29 (1983) (noting the "moral judgment" model of administrative justice as one central theme of regulatory administration); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (stressing the necessity of administrative procedures and standards in order to limit the scope of agency discretion).

The picture of administrative agency functioning and its tether to fair process articulated above has a long history and is connected to the idea that fair process often requires a clear separation of functions. The idea that there should be a clear separation of functions in administrative agencies is, as Justice White put it in *Withrow*, "substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons." 421 U.S. at 51. The APA provides for a separation of functions in certain contexts in which agencies undertake prosecutorial and, later, adjudicatory proceedings. *See* 5 U.S.C. § 554(d). These rules are designed, as the Court put it in *Butz v. Economou*, 438 U.S. 478 (1978), "to guarantee the independence of hearing examiners," *id*. at 514.[2]

The reference to the separation of functions under the APA illustrates the importance the framers of the modern administrative state put on ensuring independence and transparency.[3] Indeed, administrative law has evolved since the 1930s and 1940s in a direction that reinforces the imperative of fairness in agency procedures, from the beginning of the process to the end.[4] This

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[2] As Professor Barkow has observed:

> The drafters of the APA expected this provision to cover those instances where an agency sought to impose a penalty or withdraw benefits because an individual violated a statute or regulation. The concern was that those individuals at the agency conducting the investigation and bringing the prosecution would have a tendency to "develop the zeal of advocates" and lack "the proper state of mind for providing neutral and dispassionate advice to decisionmakers." The concern was heightened in accusatory proceedings where "there is a greater feeling of right and wrong, of a desire to punish a particular person and of doing justice."

Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 890 (2009) (citations and footnotes omitted).

[3] This is illustrated also by the APA's prohibition against *ex parte* contacts, in Section 557(d).

[4] In one interesting case from the Ninth Circuit, the court interpreted Section 554(d) to disqualify an administrative law judge who previously participated, as an attorney-advisor, in the

is true not only with respect to "conflicting private claims to a valuable privilege," *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959), but in myriad administrative proceedings, where the courts insist on "some kind of hearing," *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974), or at least a process that enables a reviewing court to "examine[e] the decisionmakers" in order to ensure that the decision does not reflect "bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

The development of hearing requirements in so-called informal adjudications, where the APA is silent and where the agency process is not especially trial-like and therefore does not lend itself to traditional due process analysis, illustrates the lengths to which federal courts have gone in creating modern administrative law to ensure that agencies are turning square corners and that they are acting as neutral and impartial decisionmakers. *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279-80 (1975) (discussing the relationship between the prominence of the agency in issuing decisions and the requirement of an unbiased decisionmaker). It is for the protection of the values of administrative process and of maintaining the careful equilibrium that Congress established when creating these remarkably powerful agencies that prohibitions against prejudiced decisionmakers are required. "The importance of a neutral decision maker, so central to the courts and notions of due process, was therefore thought to be equally important in the context of agencies." Barkow, 61 Stan. L. Rev. at 890 (citation omitted). Ultimately, "[b]ias law rests on a skeptical view of agency performance in the shadow of broad administrative discretion." Rodriguez, *Neutral Agency*, 69 Buff. L. Rev. at 419.

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discussions concerning whether to bring a complaint. *See Grolier Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980). Obviously, this is not the posture of this matter, but this case illustrates the lines that the APA's separation of functions provision draws between decisionmaking and advocacy.

All of this bears on the matter of the Chair Khan recusal in the following sense: In a circumstance, as here, where reasonable observers could question whether the member of the agency – and not just any member, but the Commission's chair – would be impartial in making the decision to undertake a thorough investigation under the relevant antitrust laws, then casting a vote upon whether a lawsuit is warranted, and then holding in her pocket the option of undertaking a Part 3 proceeding in which that very same Commission would make a decision on liability, there is a compelling case for humility and caution. This takes the practical form of a recusal, not as a badge of dishonor for previous views articulated or an acknowledgment of some sort of corruption, but simply as a reflection of the fundamental idea that government officials should be beyond reproach. Moreover, they should be wary of actions that could upset this balance established by congressional action a century ago in creating these agencies and approved by courts looking at the questions of how to accommodate these independent agencies into our constitutional architecture.

In a context not unrelated to the larger questions posed by administrative constitutionalism, James Madison wrote in Federalist No. 51 of the need for "auxiliary precautions" to protect We the People against risks to our Republic by official action. THE FEDERALIST NO. 51 (James Madison). The guarantee of impartiality in regulatory decisionmaking, including in the role of prosecutor, is one such auxiliary precaution.

E. Chair Lina Khan Comes to This Matter with an Appearance of Bias and Therefore Fails in Her Responsibility for Impartiality Under the Law

There is no question that Chair Khan is entitled to develop and communicate her own informed views about the legal matters involved in this dispute, including views on the application of antitrust and other statutes to the conduct of Facebook. Consistent with her expertise, she has written a number of influential articles, has given speeches and interviews, and has also deployed

her expertise in her role for the House Judiciary Subcommittee. These efforts are well within the boundaries of academic and professional work.

The problem is that Chair Khan now comes to her position as chair of the federal administrative agency responsible for implementing and enforcing antitrust and other laws with her mind already made up about Facebook's conduct. A plethora of information publicly available, including scholarly writings, governmental and non-governmental reports, media interviews, and even tweets, evince Chair Khan's pattern of arguing that Facebook's conduct has violated the antitrust laws and warrants moral reproach. I have included the most relevant excerpts from her prior writings as Exhibit B to this declaration.

It is not necessary to read Chair Khan's mind to evaluate whether she should recuse herself in light of these statements from the vantage point of governmental ethics and administrative law. As explained above, due process requires both impartiality and the appearance of impartiality to a disinterested observer.

I have read a substantial amount of Chair Khan's scholarship, reports, and other statements. For instance, in a 2017 article in the Yale Law Journal, Chair Khan laid out an extensive case for scrutinizing and ultimately breaking up large information-centered technology companies. Despite the article's highlighting of Amazon, Inc. in the title, part of the article was devoted to the conduct of Facebook. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710, 793 (2017). She suggests that Facebook was violating antitrust laws in its consolidation and acquisition strategies. "[T]he current antitrust regime," she writes, "has yet to reckon with the fact that firms with concentrated control over data can systematically tilt a market in their favor, dramatically reshaping the sector." *Id.* at 783. In a footnote, she continues: "European antitrust authorities do investigate how concentrated control over data may have anticompetitive effects, and—unlike U.S.

antitrust authorities—investigated the Facebook/WhatsApp merger for this reason. Complaints from companies that their rivals are acquiring an unfair competitive advantage through acquiring a firm with huge troves of data may also prompt U.S. authorities to take the exclusionary potential of data more seriously." *Id.* at 783 n.376. She continues in a similar vein: "Data that gave a player deep and direct insight into a competitor's business operations, for example, might trigger review. Under this regime, Facebook's purchases of WhatsApp and Instagram, for instance, would have received greater scrutiny from the antitrust agencies, in recognition of how acquiring data can deeply implicate competition." *Id.* at 793 (footnote omitted).

Chair Khan has expressed prejudgment about Facebook and its business strategies in fora beyond her scholarly work, including her work on behalf of the U.S. House Committee on the Judiciary—Subcommittee on Antitrust, Commercial, and Administrative Law, where she served as majority counsel from March 2019 to October 2020.

During her tenure, Chair Khan was the principal author of a major report, the Digital Markets Report (hereinafter, "Report").[5] In it, she lays out the case for significant legal intervention to combat what she views as the negative effects of Facebook's business practices. In the Report, she comes squarely to the conclusion that Facebook is a monopoly in the social networking market. "[T]he strong network effects associated with Facebook has tipped the market toward monopoly such that Facebook competes more vigorously among its own products—Facebook, Instagram, WhatsApp, and Messenger—than with actual competitors." Report at 11-

[5] *See* Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 116th Cong. (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

12, 133. The Report also concludes that Facebook's monopoly power "is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms." *Id.* at 13.

Chair Khan goes into extensive detail in the Report about how Facebook has allegedly created and maintained this monopoly, laying out a litany of harms that she associates with this purported absence of competition resulting from Facebook's actions. I will not belabor the arguments here.

The Report also specifically seeks to rebut Facebook's claims that the presence of other digital platform companies, including Twitter, Snapchat, Pinterest, and TikTok, demonstrates that it lacks monopoly power, writing that "Facebook's position that it lacks monopoly power and competes in a dynamic market is not supported by the documents it produced to the Committee during the investigation." *Id.* at 136. According to the Report, Facebook's "most significant competitive pressure" comes "from within its own family of products—Facebook, Instagram, Messenger, and WhatsApp." *Id.* at 384.

A reasonable observer could see from this Report that, before coming to the Commission, Chair Khan prejudged Facebook's liability under Section 2 of the Sherman Act as well as the actions the FTC should take to address Facebook's conduct. (The Report refers to the FTC throughout its pages.) While I offer no opinion on the merits of this analysis, there is no doubt that it reaches strong conclusions about Facebook's actions, the reasons for these actions, liability under federal antitrust law, and the remedies appropriate for these purported legal violations.

But Chair Khan's prior statements evince more than mere prejudgment. In another academic article, *see* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019), she brings her critique of Facebook even more to the fore, for example, citing with approval a BuzzFeed essay by a leading "Big Tech" critic, characterizing Facebook as one of

the "'*sinister new centers of unaccountable power*.'" *Id.* at 976 n.4 (emphasis added). She goes on to write: "Facebook, equipped with technology that lets it detect which rival apps are succeeding, would often give companies a choice: Be acquired by Facebook, or watch it roll out a direct replica. Competing with one of these giants on the giant's own turf is rife with hazards." *Id.* at 977-78 (footnote omitted). Venture capitalists, she argues in this "Platform" article, will make investment decisions in light of these hazards. They "now factor this risk [of firms coming too close to Facebook, Google, or Amazon] into their investment decisions" and "now discuss a 'kill-zone' around digital giants—'areas not worth operating or investing in, since defeat is guaranteed.'" *Id*. at 978-79; *see also id*. at 1009 ("[A] survey of more than two dozen Silicon Valley investors revealed that Facebook's willingness to appropriate information from and mimic the functionality of apps has created 'a strong disincentive for investors' to fund services that Facebook might copy.").

The "Platforms" article is an extensive exegesis on the perceived deficiencies of modern antitrust law when applied to large digital platform companies. And Chair Khan applies her analysis to Facebook in particular and at length. Here is a good summary of her essential position as applied to Facebook (with some of the detail omitted):

> Facebook is a dominant social network. . . . Facebook has used its dominant position to appropriate from rivals. . . . [Facebook] has both foreclosed competitors from its platform and appropriated their business information and functionality. . . . Facebook has established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors.

Id. at 1001, 1003.

Khan makes clear that she does not regard Facebook's market dominance as some sort of unintended consequence of complex strategic decisions. She says this about Facebook's motives and actions:

> Despite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market. . . . It is reasonable to consider this policy change a bait and switch. Facebook induced websites to install Facebook plug-ins by representing that the company would not use this installed code to channel user data to its advertising business.

Id. at 1004-05.

She reaches her ultimate conclusion late in the article, declaring that "Google and Facebook's role as dominant portals of news and media, meanwhile, may undermine the health and diversity of the media ecosystem." *Id.* at 1071-72.

The threat posed by Facebook continues as a theme in her other scholarly work, including a 2019 co-authored article in the Harvard Law Review. *See* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497, 526-27 (2019). First, Chair Khan and her co-author describe the threat posed by these companies: "Digital businesses such as Facebook, Google, and Twitter collect an enormous amount of data about their users. Sometimes they do things with this data that threaten the users' best interests, from allowing predatory advertising and enabling discrimination to inducing addiction and sharing sensitive details with third parties." *Id.* at 498. Next, they call upon government to address these ills through appropriate legal strategies: "Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, accountants, and estate managers vis-à-vis their patients and clients, so too should it impose such duties on Facebook, Google, Microsoft, Twitter, and Uber vis-à-vis their end users." *Id.* at 500. Focusing on Facebook in particular, they say, it "offer[s] a particularly stark case study in the inadequacies of the information-fiduciary framework." *Id.* at 502 n.14.

To illustrate their central point, Khan and Pozen go through an extended hypothetical to illustrate what they see as the core of Facebook's bad behavior:

> To appreciate just how odd it is to think that a behavioral-advertising company could be a fiduciary for its users, imagine visiting a doctor—let's call her Marta Zuckerberg—whose main source of income is enabling third parties to market you goods and services. Instead of requesting monetary payment for services rendered, Dr. Zuckerberg floods you (and her two billion other patients) with ads for all manner of pills and procedures from the second you set foot in her office, and she gets paid every time you try to learn more about one of these ads or even look in their direction. In fact, this is just about the only way she gets paid—as her financial backers are apt to remind her. The ads themselves, moreover, are tightly tailored to your economic, demographic, and psychological profile and to any consumer frailties you exhibit. They are also continually updated in light of information Dr. Zuckerberg collects on you; to be sure she does not miss anything, she has planted surveillance devices all around your neighborhood as well as her office.

Id. at 514 (footnote omitted). In a footnote, the authors continue: "Your data, accordingly, *is* the payment you make to Dr. Zuckerberg," approvingly using the following parenthetical after including a source: "Users [of Facebook] are not customers. . . . They are merely free sources of raw material." *Id.* at 514 n.80 (alterations in original). And they insist that no one should be misled into thinking that this is a bug, rather than a feature: "Facebook does not come close to putting its customers first in any serious sense—notwithstanding Zuckerberg's protestations to the contrary." *Id.* at 514 n.81.

Khan and Pozen criticize at length other efforts by a diverse range of scholars to ameliorate the negative effects of Facebook's practices. In criticizing an approach they call the information fiduciary theory, they say:

> To be clear, we do not believe that addressing the market clout of companies like Facebook will remedy the full panoply of harms associated with them. . . . [T]hese other theories at least focus attention on the most constitutionally salient feature of companies like Google and Facebook: not that their end users must be able to trust and depend on them, but that they are extraordinarily powerful actors with the potential to do great harm to (as well as good for) the freedoms of speech, assembly, and the press. . . . The reason a company like Facebook can and should be regulated in a special way, it tells us, is that Facebook has (or should have) a special relationship of trust and dependency with each of its users. Not only does this argument ignore how Facebook generates dependency, but it also recasts what ought to be questions of the public interest . . . . By the same token, the information-fiduciary proposal implicitly acquiesces in the legal decisions that enabled certain

> online platforms to become so dominant. It takes current market structures as a given.

Id. at 528, 534-36.

While the focus of these articles is principally on the alleged anti-competitive practices of Facebook, along with some other tech companies, and how the law ought to remedy these ills through the antitrust laws and other regulatory tools, Chair Khan takes flight toward a view of these companies as terrifyingly destructive to democracy and human rights. Khan and Pozen write:

> [B]eyond the issues of privacy and data security . . . , *the dominant online platforms have been credibly associated with a host of social ills*, from facilitating interference in U.S. elections; to serving as a tool for the incitement of genocide in Myanmar; to decreasing users' mental and physical health; to enabling discrimination and harassment against women and racial minorities; to amplifying the influence of "fake news," conspiracy theories, bot-generated propaganda, and inflammatory and divisive content more broadly.

Id. at 526-27 (emphasis added; footnotes omitted).

Chair Khan's belief of the great peril Facebook presents to our American way of life is also a common theme in her writings and speeches. In an interview published on December 19, 2020, with Andy Fitch of the Los Angeles Review of Books, Chair Khan said this:

> Google, Amazon, Facebook, and Apple control the infrastructure on which digital commerce and communications take place. They function as gatekeepers. They've used their gatekeeper power both to extort and to exploit the individuals and entities that rely on their technologies. They've maintained and extended their power through serial acquisitions and through coercive and predatory tactics. Meanwhile, the targeted ad-based business models of Facebook and Google incentivize maximal surveillance and invasive data collection. *Each of these dynamics imperils the health of our economy and democracy*.[6]

In 2017, while working with the Open Markets Institute, Chair Khan wrote a letter to the agency she now leads, requesting the FTC to take decisive action against Facebook in particular. She wrote: "Our request comes amid growing evidence that Facebook is using its increasing

[6] The interview is available here: https://blog.lareviewofbooks.org/interviews/concentrated-control-talking-lina-khan/ (emphasis added).

market power in ways that stifle innovation, undermine privacy, and divert readers and advertising revenue away from trustworthy sources of news and information." Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017), https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions. She reiterated this suggestion a year later in an interview on Senator Bernie Sanders's show: "I think one of the first steps is to make sure Facebook isn't acquiring further power. So if Facebook tomorrow announces it is acquiring another company I would hope that the FTC would look at that very closely and block it." *The Bernie Sanders Show: The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), https://www.youtube.com/watch?v=wuCAy10hlHI&t=1229s.

According to Chair Khan, remedying this terrible state of affairs requires a major effort to regulate and maybe even break up Facebook. *See, e.g.*, Khan & Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. at 536 n.195 (quoting approvingly from TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 133 (2018) ("The simplest way to break the power of Facebook is breaking up Facebook.")). In a review essay on Professor Wu's book, *see* Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655 (2020), Chair Khan summarizes her recommended course of action under the relevant antitrust laws: "Given current challenges—including the dominance of a small number of technology platforms, certain aspects of which seem to exhibit natural monopoly features . . . —recognizing competition as one among several mechanisms for checking concentrated private power is especially critical." *Id.* at 1664. To support this assertion, she cites one of her own articles (*i.e.*, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019)) and includes the following parenthetical:

"identifying how Amazon, Google, Facebook, and Apple serve as dominant intermediaries in digital markets." 133 Harv. L. Rev. at 1664 n.35.

Chair Khan's writings, taken as a whole, show that she has strong policy views on actions that the FTC, the Department of Justice, and other authorities at the national and state level should take to combat what she views as threats to individual privacy, democracy, and other goals in modern society. I have no opinion as to the merits of Chair Khan's policy views, and nothing in this declaration should be read as expressing an opinion on the merits of those policy prescriptions. However, Chair Khan's public statements indicate that she concluded, before joining the Commission, that Facebook's conduct has violated the antitrust laws and is worthy of moral reproach. Chair Khan has been clear about what she thinks of Facebook's conduct and what she believes should be done to address it. Such prejudgment creates, at the very least, the appearance of partiality.

I will add as one last piece of relevant information that bears on my opinion: the matter of Chair Khan's tweets. Chair Khan had been, until the time of her nomination, a prolific user of Twitter, and on that platform she commonly expressed her critique of Facebook and other platforms, spelling out in the more cursory form that befits that platform, that Facebook was a monopoly and that the government needed to step in and address these serious problems with legal interventions. On December 9, 2020, the day the FTC and States filed their complaints against Facebook in federal court, she pointed to the "[s]olid complaints" of the FTC and the state attorneys general. "Hopeful," Chair Khan said in a tweet since deleted from that platform but available as a screenshot, "that it marks yet another step forward in the growing efforts to rehabilitate antitrust laws & recover antimonopoly." Lina M. Khan (@linamkhan), Twitter (Dec. 9, 2020), https://web.archive.org/web/20210614143417/https://twitter.com/linamkhan/status/

1336828056695136259.[7] She referenced in a longer tweet thread the complaints brought by the FTC and the states. The "[n]et effect" of the complaints' depiction of Facebook and its practices, she tweeted on December 9, 2020, "is [a] clear picture of how FB's conduct was systemic, exactly what you want for Sec 2." *Id.* She went on in the very next tweet to raise the question of why the FTC had not alleged a Section 7 violation. In this thread of 15 separate tweets, she expresses enthusiasm for the FTC's and States' complaints, and raises further questions beyond the four corners of the complaints about Facebook practices.

While I have no opinion on the merits of Chair Khan's academic writings or public policy views, her previous public commentary evidences a commitment to a specific position on the central matters of this dispute – Facebook's antitrust liability. Chair Khan – like Chair Dixon before her – may believe that, notwithstanding all of her prior public statements, she can fairly undertake her duties as Chair of the Commission and bring an open mind to Facebook's case. But, as explained above, what is important from the perspective of governmental ethics, due process, and administrative law is whether a reasonable, third-party observer would expect that she would come to this matter dispassionately, with an open mind as to Facebook's liability. Decisions involving one's individual rights should not be made by a government official who is perceived as having made up her mind in advance.

In my opinion, a reasonable observer could not conclude that Chair Khan is likely to bring an open mind and impartial attitude to Facebook's case in light of her previous public statements, scholarship, and congressional work. Such an observer is much more likely to conclude that Chair Khan has an axe to grind against Facebook. For this reason, fundamental fairness and "fair play,"

[7] Although Chair Khan has deleted these tweets, there is an archive record in the Wayback Machine, and this has been recognized as sufficient for judicial notice. *See Cosgrove v. Oregon Chai, Inc.*, 2021 WL 706227, at *12 n.5 (S.D.N.Y. Feb. 21, 2021).

as Justice Jackson put it, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology at 4, would become sacrificed if Chair Khan does not recuse herself from the decision whether to proceed with a complaint in federal court. Therefore, it is my opinion that Chair Khan has a sufficient appearance of partiality and bias to warrant a recusal from any further consideration of this matter involving Facebook, including a vote as the Chair of the FTC on whether to bring a complaint in federal court on behalf of the agency.

August 17, 2021

Date

Daniel B. Rodriguez

Exhibit A

Daniel B. Rodriguez

Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611-3069

Professional Positions

Harold Washington Professor
Northwestern University School of Law
September 2018--present

Dean and Harold Washington Professor
Northwestern University School of Law
January 2012-August 2018

Research Associate
Institute for Policy Research
Northwestern University
2013-present

Chair, ABA Center for Innovation
2018-2020

Minerva House Drysdale Regents Chair in Law
University of Texas-Austin School of Law
July 2007- December 2011
Professor of Government (by courtesy), 2009-11

Research Fellow
Baker Institute for Public Policy
Rice University
July 2008-2011

July 2005-June 2007
Warren Distinguished Professor of Law
University of San Diego School of Law

July, 1998–June 2005
Dean and Professor of Law, University of San Diego School of Law

July 1988-June, 1998
Professor of Law, Boalt Hall School of Law, University of California, Berkeley, 1988-98 (tenured in 1994)

Judicial law clerk, The Hon. Alex Kozinski, United States Court of Appeals, Ninth Circuit, 1987-88

Visiting Positions:

University of Arizona Law School (February 2020) (visiting professor of Techlaw)
Harvard Law School (Spring 2019) (Louis Brandeis Visiting Professor)
Stanford Law School (Fall 2018)
Columbia Law School (Spring 2011)
University of Southern California Law School (Fall 2005)
University of Illinois Law School (November 2005)
Hoover Institution (summers, 2002-06)
UCSD-Scripps Institute on Oceanography (Fall and Winter, 2002-03)
University of Virginia Law School (Spring 1993) (John M. Olin Fellow)
Free University of Amsterdam (Summer 1991 & 1992)

Areas of teaching and academic specialty: administrative law, local government law, property, state constitutional law, statutory interpretation, law & positive political theory

Endowed/Keynote Lectures

Johnson Lecture, Vanderbilt Law School, March 2021: *"A General Theory of the State Police Power"*

Keynote Lecture, University of Hong Kong, October 2019: *"Global Legal Education: Trends and Strategies"*

Keynote Lecture, University of Arizona School of Law Law-Tech Conference, September 2018: *"Law-Tech and Law School Curricula"*

Commencement Address, BYU Law School Graduation, April 2018

Hartman Hotz Lecture, University of Arkansas Fayetteville Law School, February 2018: *"Federalism During and After Trump"*

APEA Lecture, ITAM Law School, Mexico City, November 2016: *"Challenges in the Legal Profession"*

Distinguished Lecture, Renmin Law School, Beijing, China, June 2016: *"The New Global Lawyer"*

Thomas Jefferson Memorial Lecture, University of California, Berkeley, April 2015: *"Federalism, Localism, and the Shape of Constitutional Conflict"*

Inaugural Dean's Lecture on Legal Education, Florida International University School of Law, February 2014: *"Perspectives on Legal Education and its Trajectory"*

20th State Constitutional Law Lecture, Rutgers-Camden Law School, February 2012: *"The Political Question Doctrine in State Constitutional Law"*

William J. Brennan Lecture, Oklahoma City University School of Law, October 2010: *"Are State Constitutions Fundamentally Progressive Documents (and Why Should we Care"?*

23rd Nathaniel Nathanson Lecture, University of San Diego School of Law, April 2007: *"State Constitutionalism and Modern Governance: What's the Big Idea?"*

Kobe University (Japan) Lecture: *"The Concept of Expertise in American Administrative Law,"* October 1990

Research & Publications

Good Governing and Constitutional Construction: The Police Power in the American States (Cambridge University Press, forthcoming 2022)

Losing Ground: A Nation on Edge," (co-edited with John Nolon, Pace University School of Law) (Environmental Law Institute Press, 2007)

works in progress:

Law Schools in the World: Comparative Perspectives on Legal Innovation (book ms.)

What Statutes Mean: Legislation and Interpretation in a Positive Political Theory Framework (book ms.) (with Mathew McCubbins, Duke Political Science & Law)

"Our Bar Federalism"

"Is Administrative Law Inevitable?" (with Barry Weingast, Stanford Political Science)

"Constitutional Monarchy" (with Weingast & Tom Ginsburg, U Chicago)

Publications:

"Motivation and Purpose in the Elysian Framework," 36 Constitutional Commentary – (forthcoming 2021)

"Road Wary: Law and the Problem of Escape," 106 Iowa L. Rev. 2397 (2021)

"Whither the Neutral Agency? Rethinking Bias in Regulatory Administration," 69 Buffalo L. Rev. 375 (2021)

"Engineering the Administrative State: Political Accommodation and Legal Strategy in the New Deal Era," 46 BYU Law Review 147 (2020) (with Barry Weingast, Stanford Political Science)

"Public Health Emergencies and State Constitutional Quality,"72 Rutgers L.J. 1223 (2020)

"A Public Health Perspective on COVID-19 Business Liability," J. L. & Bio. Sciences (2020) (with Daniel Hemel, U Chicago Law School)

"The Puzzle of Entrenchment in State Constitutional Law," 33 Notre Dame Journal of Law, Ethics, & Public Policy 399 (2019) (symposium issue)

"Financing Local Governments in Times of Recession: Financial and Legal Innovation in the Face of the 2008 Crisis," in Global Perspectives in Urban Law: The Legal Power of Cities (N. Davidson & G. Tewari eds. 2019) (with Nadav Shoked, Northwestern Law).

"The Reformation of American Administrative Law Revisited" (with Weingast), 31 Journal of Law, Economics, & Organization 782 (2016)

"Executive Opportunism, Presidential Signing Statements, and the Separation of Powers," (with Weingast, Jed Stiglitz, Cornell Political Science), 8 Journal of Legal Analysis 95 (2016)

"The Inscrutable (yet Irrepressible) State Police Power," 9 NYU Journal of Law & Liberty 662 (2015) (symposium)

"Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities' Bike Share Plans," XLII Fordham Urban Law Journal 123 (2014) (with Shoked)

"The Political Question Doctrine in State Constitutional Law," 43 Rutgers Law Journal 573 (2013)

"The Location Market," 19 Geo. Mason L. Rev. 637 (2012) (symposium issue) (with David Schleicher, Yale Law School)

"Change that Matters: An Essay on State Constitutional Development," 115 Penn St. Law Review 1073 (2011) (symposium issue)

"State Constitutional Failure," 2011 U. Illinois Law Review 1243

"Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Legislation," Brooklyn Law Review (symposium issue) (2011) (with McCubbins)

"Super Statutory Entrenchment: A Positive and Normative Interrogatory," Yale On-Line Law Journal (symposium issue) (with McCubbins)

"State Constitutionalism and the Scope of Judicial Review," in New Frontiers of State Constitutional Law (Jim Gardner & Jim Rossi eds., Oxford Press (2011)

"The Rule of Law Unplugged," 59 Emory Law Journal 1455 (2010) (with McCubbins & Weingast)

"Opting In or Opting Out: The Conditions for Developing Consensus," 7 J. Empirical Legal Studies 868 (2010) (with McCubbins, Cheryl Boudreau, UC Davis Dep't of Political Science, Nick Weller, USC Dep't of Political Science)

"Constitutional Home Rule and Judicial Scrutiny," 86 Denver Law Review 1337 (2009) (symposium issue) (with Lynn Baker, U. Texas Law)

"Administrative Law," in Oxford Handbook on Law & Politics 340 (Keith Whittington ed., Oxford Press, 2008)

"The Market for Deans," 17 Journal of Contemporary Legal Issues 121 (2008)

"Administrative Law Agonistes," 108 Columbia Law Review Sidebar (2008) (with McCubbins, Roger Noll, Stanford Economics, & Weingast)

"What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation," 44 San Diego Law Review 957 (2007) (with McCubbins, Cheryl Boudreau, UC-Davis Poli Sci Dep't & Arthur Lupia, U. Michigan Poli Sci)

"Institutions Matter: Some Remarks on Disaster Mitigation and the Comparative Competence Debate," in Losing Ground 245 (Nolon & Rodriguez eds. 2007)

"The Paradox of Expansionist Statutory Constructions" (with Weingast), 101 Northwestern Law Review 1207 (2007)

"Positive Political Theory and the Role of Law," Oxford Handbook on Political Economy (with McCubbins) (Barry Weingast & Donald Wittman eds., Oxford Press, 2006)

"When Does Deliberation Improve Democratic Decisionmaking" (with McCubbins), 15 Journal of Contemporary Legal Issues 9 (2006)

"Delegation, Risk Diversification, and the Properly Political Project of Administrative Law," Harvard Law Review On-Line Forum (2006)

"The Intentional(ist) Stance," (with Boudreau & McCubbins), 38 Loyola L.A. Law Review 2131 (2005) (symposium issue on "theories of statutory interpretation")

"Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon of Statutory Interpretation," (with McCubbins), 14 Journal of Contemporary Legal Issues 669 (2005)

"What's New in the New Statutory Interpretation? Introduction to Journal of Contemporary Legal Issues Symposium," (with McCubbins), 14 Journal of Contemporary Legal Issues 535 (2005)

"Of Gift Horses and Great Expectations: Remands without Vacatur in Administrative Law," 36 Arizona State Law Journal 599 (2004)

"The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act," 151 University of Pennsylvania Law Review 1417 (2003) (with Weingast)

"Foreword: Public Interest Lawyering and Law School Pedagogy," 40 San Diego Law Review 1 (2003)

"Straw Polls," 12 Journal of Contemporary Legal Issues 791 (2002)

"Localism and Lawmaking," 32 Rutgers Law Journal 627 (2001)

"Regulatory Incrementalism and Moral Choices: A Comment on Adlerian Welfarism," 28 Florida State University Law Review 375 (2001)

"Administrative Law and the Case Method," 38 Brandeis Law Journal at the University of Louisville 303 (2000)

"State Constitutionalism and the Domain of Normative Theory," 37 San Diego Law Review 523 (2000)

"Legal Process," In The Encyclopedia of the American Constitution II (L. Levy, et al. 2 ed. (2000)

"Legislative Intent," The New Palgrave Dictionary on Economics and the Law (Peter Newman ed.) (Macmillan Press, 1998)

"State Constitutional Theory and its Prospects," 28 New Mexico Law Review 271 (1998) (symposium issue)

"The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law," 24 Ecology Law Quarterly 745 (1997)

"Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory," 72 Chicago-Kent Law Review (1997)

"Turning Federalism Inside Out: The Intrastate Aspects of Interstate Regulatory Competition," 14 Yale Journal of Law & Public Policy/Yale Journal on Regulation 149 (symposium issue) (1996)

"State Supremacy, Local Sovereignty: Reconstructing State/Local Relations Under the California Constitution," in Constitutional Reform in California (Roger Noll & Bruce Cain eds. 1995)

Review of "The Federal Courts, Politics, and the Rule of Law," Political Science Quarterly (Winter, 1995)

"Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State," 43 Duke Law Journal 1180 (1994)

"The Positive Political Dimensions of Regulatory Reform," 72 Washington University Law Quarterly 1 (1994)

"Earl Warren: An Interpretive Essay," in Biographical Dictionary of U.S. Supreme Court Justices (Melvin Urofsky ed. 1994)

"The Constitutionality of Legislative Term Limits," California Lawyer (February, 1993)

"Statutory Interpretation and Political Advantage," 11 International J. Law & Economics 217 (1992)

"Administrative Government and the Original Understanding: Comments on Eskridge & Ferejohn," 8 J. Law, Economics & Organization 197 (1992)

"The Presumption of Reviewability: A Study in Canonical Construction and its Consequences," 45 Vanderbilt Law Review 743 (1992)

"Preface to Symposium on Civil Rights Legislation in the 1990's," 79 California Law Review 591 (May, 1991) (symposium organized by author)

"Civil Rights Politics as Interest Group Politics," 14 Harvard J. Law & Public Policy 1 (Winter, 1991)

"Official Notice and the Administrative Process," 10 J. National Association of Administrative Law Judges 47 (Spring, 1990)

"The Substance of the New Legal Process," 77 California Law Review 919 (May, 1989)

"Free Speech: In Search of a Pattern," American Bar Association Journal (October, 1989)
"Note: Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality," 99 Harvard Law Review 847 (1986)

Selected Academic Presentations

"Our Bar Federalism," University of Oregon Law School, March 2021, Florida State U. Law School, December 2020, American Bar Foundation Workshop, December 2020

"Is Administrative Law Inevitable?," BYU Law School, March 2021, UC Hastings Law School, February 2021

"Legal Technology, Regulation and Access: Equality and Process Norms," Conference on Law Law & Computation, Northwestern Journal of Intellectual Property, February 2021

"Constitutional Monarchy," (with Weingast & Ginsburg, U Chicago Law School, June 2021; Constitutional Law & Economics Workshop, January 2021

"State of Emergencies, Executive Orders, and Separation of Powers," Association of American Law Schools Annual Meeting, January 2021

"Police Powers and the Pandemic," Federalist Society Annual Meeting, January 2021

"Law, Economics, and the Pandemic," Section on Law & Economics, AALS Annual Meeting, January 2021

"Developments in Law, Public Health, and COVID-19," Northwestern University Pritzker School of Law Faculty Workshop, December 2020

Symposium on Legacy of John Hart Ely, U. Illinois Law School, October 2020

"Instrumental Statutory Interpretation," Duke Law School, April 2020

"Road Wary: Law and the Problem of Escape," Iowa Law Review Symposium on Law and Transportation, Iowa Law School, October 2020

"A Public Health Framework for COVID-19 Business Liability," U. Chicago Law School Faculty Workshop, July 2020

"Innovation in Legal Education," United Arab Emirates Law School, Dubai, UAE, December 2019

"Engineering the Administrative State," Cornell Law School, September 2019; Stanford Law School, October 2018; Northwestern Law School, September 2018

"Bias in Regulatory Administration," U. Pennsylvania Law School & Harvard Law School Faculty Workshops, April 2019

"Innovations in Law-Tech," Northeastern School of Law, April 2019

"The Puzzle of Entrenchment in State Constitutional Law," State Constitutional Law Symposium," Notre Dame Journal of Law, Ethics, & Public Policy, Notre Dame Law

School, March 2019

"Courts in Times of Crisis," William & Mary Law Review Symposium, William & Mary Law School, February 2019

"New Perspectives on Legal Education and Legal Technology", Michigan State Law-Tech Conference, April 2018

"The Ethics of Legal Education," Ass'n of American Law Schools Annual Meeting, San Diego, CA, January 2018

"The Role of the AALS in Legal Scholarship," AALS Annual Meeting, San Diego, CA, January 2018

"Prospects, Programs, and the Innovation Premium in Modern Legal Education," Suffolk Law School, October 2017

"The Future of Legal Scholarship," Northwestern Law School, June 2017

"Bias in American Law," Duke Law School, May 2017

"Debt, Austerity, and the Fiscal Predicament of Modern Urbanism," 3rd Annual International & Comparative Urban Law Conference, Hong Kong, June 2016

"The Law of Major Cities," 2nd Annual International and Comparative Urban Law Conference, Sorbonne, Paris, France, June 2015

"The Inscrutable (and Irrepressible) State Police Power," Symposium on Economic Rights in State Constitutional Law, New York University School of Law, April 2015

"Executive Opportunism and Presidential Signing Statements," University of California, Berkeley School of Law, March 2015

"The Law-Business-Technology Interface and its Impact on Professional Education," Chapman Law School Dialogue Series, January 2015

"Trends in Legal Education and its Regulation," Touro Law School, December 2014

"Law and Positive Political Theory," Universidad Panamericana Law School, Mexico City, Mexico, October 2014

"Law Schools and Legal Innovation," 3rd Annual Meeting of the Law School Global

League, Koc University, Istanbul, Turkey, July 2014

"State Action and Freedom of Expression in State Constitutional Law," Northwestern-Brown Roundtable, Brown University, June 2014

"Law-Business-Technology and the New Legal Education," Tel Aviv University School of Law, March 2014

"Comparative Local Government Law," Association of American Law Schools (AALS) Annual Meeting, New York City, NY, January 2014

"Constitutional Borrowing and Democracy," Brown University Lecture, Political Theory Project, February 2013

"The Location Market," State and Local Government Panel, AALS Annual Meeting, San Francisco, January 2012

"A Positive Political Theory of the Reformation of American Administrative Law," University of Texas School of Law Workshop, October 2011

Symposium Panel on "*A Republic of Statutes*," Yale Law School, December 2010

"The Positive Political Foundations of Administrative Law," 25th Anniversary Conference on Positive Political Theory" Northwestern University School of Law & University of Texas School of Law, October 2010 (co-convenor and presenter)

"Revision, Amendment, and the Dynamics of Constitutional Change," Penn St. Law School Conference on "State Constitutionalism in the 21st Century, September 2010

"State Constitutional Failure," Faculty workshops at Columbia Law School (March 2011), St. John's Law School (March 2011), UC Davis School of Law (September 2010), and University of Texas School of Law (September 2010)

"Measuring the Rule of Law," Conference at University of Texas School of Law, March 2010 (co-convenor and presenter)

"State Constitutional Failure: Perspectives from California," Conference on California Constitutional Reform, USC, February 2010

"Constitutional Home Rule," AALS Annual Meeting, New Orleans, January 2010

4th Annual Conference on Empirical Legal Studies," USC School of Law (presented two peer reviewed papers), November 2009

"Defining the Rule of Law," Conference at USC-Caltech Center for the Study of Law & Politics, March 2009 (co-convenor and presenter)

"Home Rule and the New American Constitutionalism," Conference at University of Colorado, Byron White Center for Constitutional Law, January 2009

"Same Sex-Marriage and State Constitutional Law," AALS Annual Meeting, San Diego, January 2009

"Is Administrative Law Inevitable?" Faculty workshops at Northwestern University School of Law, February 2009; University of Virginia Administrative Law Conference, November 2008, Emory University Department of Political Science, October 2008; Vanderbilt Law School, March 2007

"Criminal Justice Meets Democracy and Bureaucracy: Revisiting the Puzzle of Prosecutorial Discretion," University of Texas drawing board workshop, September 2008

"Textual Analysis and the Law," Emory University Conference, February 2008

"State Constitutionalism and the Scope of Judicial Review," Faculty Workshops at University of Pennsylvania Law School, October 2009, Ohio State Law School, February 2007; Florida State College of Law, October 2007, American U. School of Law, October 2007

"When Does Deliberating Improve Decisionmaking?," Faculty Workshops at Duke, Florida State, Georgetown, Ohio State, and University of San Diego Law Schools, UCLA and USC Departments of Political Science, September 2005—May 2006, and at the First Annual Conference on Empirical Legal Studies, University of Texas-Austin School of Law, October 2006

"The Paradox of Expansionist Statutory Interpretations," Faculty Workshops at USC Law School, December 2005, Duke Law School, October 2005, and Vanderbilt Law School, September 2005

Participant, Conference on Constitutional Law and Economics, Boalt Hall School of Law, UC Berkeley, August 2005

"A Fly on the Wall: Lessons for Statutory Interpretation from the Positive Political Theory of Legislation," Faculty Workshop at the University of Chicago Law School and at Northwestern University Law School Conference on "Positive Political Theory," April 2005

Panelist, *Localism and the Federal System: Comparative Institutional Competence,"*

Yale University Conference on Disaster Mitigation and Public Policy, April 2005

"Rethinking the Appropriations Canon of Statutory Interpretation," Faculty Workshops at University of Texas-Austin School of Law, March 2005 and at University of California, Berkeley (Boalt Hall School of Law), April 2004

Discussant, Conference on Direct Democracy, UC Irvine/USC/Caltech, January 2005

Convenor and Panelist, Section on Legislation, Association of American Law Schools Annual Meeting, San Francisco, January 2005

Panelist, AALS Panel on Future of the Solomon Amendment, AALS Annual Meeting, San Francisco, January 2005

Co-organizer and Panelist, Conference on *Administrative Procedure in the U.S. and Abroad,* USD School of Law, UCSD Department of Political Science, and UCSD School of International Relations and Pacific Studies, San Diego, January 2005

Invited Participant and Host, Third Annual Administrative Law Discussion Forum, USD School of Law, May 2004

Paper presenter, University of San Diego Institute for Law & Philosophy Conference on *"What is Legal Interpretation?,"* San Diego, April 2004

Commentator, Conference on the Legacy of the Earl Warren Court, UC Berkeley School of Law, February 2004

"Remands without Vacatur in Administrative Law," Arizona State Law Journal Symposium on Remands in American Law, Phoenix, February 2004

Panelist, American Association of Law Schools Joint Workshop on Administrative Law and Legislation Sections, *"New Perspectives on Congressional Oversight,"* Atlanta, January 2004

Panelist, AALS Panel on Plagiarism, Section on Student Services, Atlanta, January, 2004
Paper presenter, Conference on Dual Enforcement of Constitutional Norms, William & Mary School of Law, Williamsburg, November 2003

Panelist, *"Procedural Due Process and Fair Hearings,"* Conference on "Demystifying Due Process," UC Hastings School of Law, October 2003

"New Perspectives on the Civil Rights Act of 1964," Paper presented (with Barry Weingast) at American Political Science Association Annual Meeting, Philadelphia, August 2003

"State Constitutions as Documents of Limit/National Constitution as a Document of Grant: Reconsidering the Police Power," USC/Caltech Conference on Modeling the Constitution, May 2003

Moderator, Panel on Agencies and Economic Justice, Institute for Law and Economic Policy/Duke Law School Conference, April 2003

"The Positive Political Theory of Legislative History," Faculty workshops at Washington University at St. Louis School of Law and University of California-Berkeley, Department of Political Science, October 2002

Panel organizer and paper presenter, Public Choice Society Annual Meeting, San Diego, March 2002

Panel organizer and moderator, *"The Administrative States,"* ABA Mid-year meeting, Section on Administrative Law, Philadelphia, February 2002

Keynote Address: *"Political Theory and Public Law through the Lens of Socio-Economics,"* AALS Annual Meeting, New Orleans, January 2002

Participant in Second Annual Workshop on Administrative Law, University of Louisville School of Law, November 2001

"Rethinking Statutory Interpretation and the Appropriations Process," International Association of New Institutional Economics Annual Meeting, University of California, Berkeley, September 2001

Colloquium on Statutory Interpretation and Appropriations, USD School of Law, July 2001

Workshop on the New Federalism Jurisprudence, Arizona State College of Law, April 2001

Panel on *"Finding the Source of State Sovereign Immunity,"* Stanford Law Review Symposium, February 2001

"Straw Polls: Thoughts on Community and Coercion," Journal on Contemporary Legal Issues Conference on "Illiberal Communities," University of San Diego School of Law, February 2001

Presentation on *"Finding Moral Resources in the Law,"* Conference on Conscience, Law, and Personal Integrity, University of San Diego School of Law, January 2001

Panel Presentation on *"Theories of Lawmaking,"* Section on Law and Interpretation, AALS

Annual Meeting, Washington DC, January 2001

Panel Presentation on *"Transforming Boundaries: Federalism,"* Joint Program of Sections on Constitutional Law, Family Law, and Federal Courts, AALS Annual Meeting, Washington DC, January 2001

"Home Rule, Municipal Finance, and State Prerogatives," National Tax Association Annual Meeting, Santa Fe, New Mexico, November 2000

Participant in Conference on Welfarism, Institute on Law and Philosophy, University of San San Diego School of Law, October 2000

"Localism and Lawmaking," Faculty Workshop Presentation, Seton Hall University School of Law, September 2000

Discussant, National Association of Scholars of Color Annual Conference, Honolulu, Hawaii, May 2000

Participant/paper presenter in a Ford Foundation conference on *"The State of State Constitutions,"* Center for State Constitutional Studies, Rutgers-Camden Law School, New Jersey, May 2000

Panel participant and panel co-convenor in AALS Workshop on *"Emerging Themes in Administrative Law,"* Washington, DC, March 2000

Participant in Roundtable on Teaching Administrative Law, University of Louisville School of Law, November 1999

Panel on *"Deans of Color Speak Out,"* National People of Color in the Law Conference, John Marshall School of Law, Chicago, Illinois, March 1999

Berkeley Business School Conference on *"Positive Political Theory and Business Strategy,"* Marconi Conference Center, Marin, California, October 1998

Presentation at Conference on *"Constitutional Aspects of Impeachment,"* UC Berkeley Institute for Governmental Studies, October 1998

"Positive Political Theory and Law," Law & Economics Workshop, University of Pennsylvania School of Law, March 1998

"The Constitutional Construction of State and Local Fiscal Policy," Conference on State Constitutional Law, University of New Mexico School of Law, Albuquerque, New Mexico, November 1997

Commentator, Conference: *"Cities on the Cutting Edge,"* Hastings Law School, San Francisco, California, September 1997

"Jaffe's Law: Perspectives on the Intellectual Underpinnings of Modern Administrative Law Theory," Symposium on Administrative Law, Chicago-Kent College of Law, April 1997

Discussant, Conference on *"Judicial Strategy and Judicial Politics*," Washington University, St Louis, November 1996
"Reconsidering Section 5 of the Fourteenth Amendment," Cardozo School of Law, Yeshiva University, September 1996

Paper, *"New Theoretical Paradigms of Federalism,"* Conference on Constructing a New Federalism: Jurisdictional Competition and Competence, Yale Law School, March 1996

Commentator, Conference on *"Major Issues in Federalism*," University of Arizona College of Law, March 1996

Convenor and Participant, Conference on Federalism, UC Berkeley, December 1995

Panel Presentation on *"The Anti-federalist Revival in American Constitutional Law,"* American Association of Law Schools Annual Meeting, San Antonio, Texas, January 1996

"Legislative Rhetoric, Statutory Interpretation, and the Civil Rights Act," American Political Science Association Annual Meeting, Chicago, Illinois, September 1995

Co-convenor and presenter, short-course on *"Public Law, Public Choice, and Positive Political Theory,"* APSA Annual Meeting in Chicago, September 1995

"State Supremacy and Local Sovereignty," Conference on Constitutional Reform in California, UC Berkeley-Stanford University, June 1995

"The Constitutional Status of Federalism," Conference on Revitalizing Federalism, Hoover Institution, Stanford University, May 1995

"Legislative Rhetoric, Statutory Interpretation, and the Civil Rights Act," Conference on Law and Positive Political Theory, University of Southern California Law Center and California Institute of Technology, May, 1995 and Faculty Workshop, Stanford University School of Law, December 1993

"Presidential Leadership in the Modern Administrative State," Duke Law Journal Annual Conference on Administrative Law, January 1994

"The Positive Political Dimensions of Regulatory Reform," Conference on Positive Political Theory and the Rule of Law, University of Rochester, October, 1993; Faculty Workshops, Emory University School of Law, March 1993 & University of Virginia School of Law, April 1993

Discussant, Law & Contemporary Problems Symposium on The Political Economy of Administrative Procedures and Regulatory Instruments, Duke University, November 1992

"The History of the Civil Rights Act," Public Choice Society Annual Meeting, New Orleans, Louisiana, March 1992

Presenter, Panel on *"Administrative Law and the New Public Law,"* American Association of Law Schools Annual Meeting, San Antonio, January 1992

Discussant, Conference on Administrative Adjudication, UCLA Law School, November 1991

"The Presumption of Reviewability: A Study in Canonical Construction," Symposium on The Canons of Statutory Construction, Vanderbilt University Law School, November 1991 and Faculty Workshop, USC Law Center, March 1992

Discussant, Conference on *"The Economics of Administrative Law,"* University of Illinois, Champaign-Urbana, May 1991

"Statutory Interpretation and Political Advantage," Conference on Constitutional Law and Economics, Stanford University, October 1990 and Faculty Workshop, University of Washington School of Law, March 1991.

Panelist, Conference on *"The New Public Law,"* University of Michigan School of Law, March 1991

Panelist, Federalist Society National Student Conference on Civil Rights, Stanford Law School, March 1990

"Presidential Signing Statements," Western Political Science Association Annual Meeting, Salt Lake City, Utah, April 1989 (won Pi Sigma Alpha award for Best Paper presented at the meeting)

Other presentations:

"Frontiers of Legal Technology," Bucerius Law School, August 2020; Hungary Law-Tech Entrepreneurs, May 2020

"Executive Power and the Pandemic," Federalist Society Annual Meeting, June 2020

"The Pandemic and the Law," American Constitution Society National Meeting, June 2020

"The Present and Future of Legal Technology," Knowledge Institute Conference, Lisbon, Portugal, October 2019

"Frontiers of Law-Tech," Northwestern Law Alumni Ass'n presentations, Boston April 2019; San Francisco, October 2018

"Preparing a Diverse Profession for a Diverse World," AALS Annual Meeting, San Francisco, January 2017

Panel on Legal Education, Nat'l Ass'n of Law Placement, New York City, December 2014

"Same Sex Marriage: Anatomy of a Legal Controversy," Rice Alumni Association Presentations, New York City, March 2011; Palo Alto, California, November 2010

Presentation on *Christian Legal Society v. Martinez*, University of Texas Legal Counsel Annual Meeting, Austin, Texas, November 2010

"Governing Arizona," Conference presentation to political leaders and journalists, Phoenix, Arizona, November 2009

Presentation on *"Canons of Statutory Interpretation"* to Texas Bill of Rights Annual Symposium, May 2008

Luncheon speaker, ABA Section on State & Local Government Law Spring Meeting, San Diego, March 2006

Moderator, Panel on Doing Business in China, sponsored by Procopio, Cory law firm and USD School of Law, San Diego July, 2004

Discussant, Keynote Address by Anthony Lewis on *Brown v. Board of Education*, San Diego, May 2004

Panelist, California League of Cities Spring Meeting, *"Procedural Due Process Developments*

in California," San Diego, May 2004

Panelist, ABA Deans' Workshop, Seattle, February 2003

Presentation on *"Foreign Narcotics Kingpin Act,"* ABA Fall Administrative Law Conference, Washington, DC, October 2000

Testimony before U.S. Congress Judicial Review Commission on "Foreign Narcotics Kingpin Act," Washington, DC, September 2000

Participant/Consultant, GTZ Conference on Reform of Budget Law in the People's Republic of China, Beijing, China, June 2000

Federal Judicial Center Program on *"Reviewing Administrative Decisions in a Post-Chevron Environment,"* Stanford Law School, April 1999

"Zealot's Advocacy," Foothill County Bar Ass'n, El Cajon, California, January 1999

"Dimensions of Local Governance," St. Thomas More Society, San Diego, California, August 1998

Panel presentation on *"Opportunities for Minorities in the Legal Profession,"* American Bar Ass'n Annual Meeting, Toronto, Canada, August 1998

Lecture on *"Official Notice and the Administrative Process,"* Annual Meeting of the National Ass'n of Administrative Law Judges, New Orleans, Louisiana, October 1989

Education

J.D. Harvard Law School, with honors, 1987

Supreme Court Editor, *Harvard Law Review*
Research assistant, Visiting Prof. Cass Sunstein
Legal Methods Instructor

B.A. California State University, Long Beach, 1984

Outstanding graduate in the Department of Political Science and in the School of Social & Behavioral Sciences

Distinguished Alumnus of the Year, College of Liberal Arts, 2000

Honors

Fellow, American Bar Foundation

Council, American Law Institute

Distinguished Alumnus of the Year -- 2000, College of Liberal Arts, California State University at Long Beach

Honorary member, San Diego County Bar Association

Honorary member, Phi Alpha Delta Law Fraternity, McCormick Chapter

Honorary member, American Inns of Court, Louis Welsh Chapter

Selected as John M. Olin Fellow in Law & Economics for 1993, University of Virginia School of Law

Pi Sigma Alpha Award (for best paper at annual meeting), Western Political Science Ass'n, 1990

Research grant (co-recipient), Smith-Richardson Foundation, awarded for research on civil rights law and policy, 1992-93

Research grants, 1989, 1990-91, and 1994-95, UC Berkeley Committee on Research

University Service

Northwestern University

Member, Deans Council

Member, Task Force on Global Strategy

Member, Advisory Committee for the Office of Change Management

Member, Search Committee for Associate Vice President of Marketing

University of Texas

Chair, Laterals Subcommittee, Faculty Appointments Committee, 2009-10

Chair, Hamilton Book Prize Committee (campus-wide), 2009

Chair, Dual Degree Committee, 2008-09

Member, Laterals Subcommittee, Faculty Appointments Committee, 2008-09

Chair, Entry-Level Subcommittee, Faculty Appointments Committee, 2007-08

Coordinator, UT Law/LBJ School of Public Affairs Joint Degree Program

University of San Diego

Member, President's Advisory Committee, USD Cabinet, and University Senate

Member, Provost Search Committee

Member, Planning Committee, Joan B. Kroc School of Peace Studies

Member, Council of Deans

Chair, Chief Information Officer Search Committee

Member, Nursing School Dean Search Committee

Member, Committee on University Professorships

Member, Task Force on Implementing Faculty/Administrator Diversity (Irvine II Grant)

UC Berkeley

Campus:

Committee on the Protection of Human Subjects, 1995-97

Advisory Board, Berkeley-Washington, D.C. Center, 1995-98

Committee on Positive Financial Disclosure, 1994-95

Selection Committee, John Gardner Public Service Fellowship, 1993-present

Ad Hoc Review Committee, Berkeley Center for Law & Society, 1992-93

Committee on Academic Freedom, 1990-92

Law School:

Chair, Faculty Appointments Committee, 1996-98

Chair, Committee on Academic Placement, Judicial Clerkships, and Fellowships, 1995-96

Committee on Faculty Appointments, 1991-92, 1994-98

Chair, Subcommittee on Diversity, Committee on Faculty Appointments, 1991-92, 1994-95

Chair, Committee on the Academic Support Program, 1993-94

Committee on Law School Admissions, 1993-95

Task Force on Student-Faculty Relations, 1989-91

Advisory Board, Ecology Law Quarterly

Advisory Board, Environmental Law Program at Boalt Hall

Dissertation Advisor/Graduate Committee:

Lydia Tiede, UCSD (assistant professor-designate, University of Houston, Department of Political Science)
Nathan Monroe, UCSD (currently an assistant professor, Michigan State University, Department of Political Science)
Emerson Tiller, UC Berkeley Graduate School of Business (currently on the faculty at Northwestern University School of Law)

Selection Committee, Harmon Environmental Law Writing Competition, 1995, 1996

Citation awarded by the Boalt Hall Moot Court Board for help in advising students in intramural and extramural moot court competitions, 1995

Academic/Public Service

Board member, American Bar Foundation, 2021—

Board member, Responsive Law, 2020—

Board member, Institute for the Future of Legal Practice, 2019-20

Chair, ABA Center on Innovation, 2018-20

Chair, AALS Deans Steering Committee, 2015-17

President, Association of American Law Schools, 2014; President-elect, AALS, 2013

Member, American Bar Association Commission on the Future of Legal Services, 2014--16

Member, American Law Institute Council, 2012--

Executive Committee, AALS, 2009-2011

Member, AALS Committee on Curriculum, 2007-09

Chair, AALS Section on Legislation, 2004-05

Chair, Consultant's Committee, ABA Project on Administrative Law in the European Union, Transparency Section, 2004-06

Affiliated Scholar, Center for the Study of Law & Politics, USC School of Law, 2004-2007

Academic Board of Advisors, Initiative and Referendum Institute, 2004--2007

Executive Council, American Bar Association Section on Administrative Law and Regulatory Practice, 1999-2002

Executive Committee, American Law Deans Association, 1999–2005

Committee, AALS Section on Libraries and Information Technology, 2003-06

Executive Committee, Section on Local Government Law, American Association of Law Schools, 1997–2002

ABA Mid-Year Administrative Law Meeting Program Chair, 2001

ABA/AALS Site Inspection Teams:
University of Puerto Rico, April, 2002 (Team Chair)
Seton Hall University School of Law, March, 2001
University of Richmond School of Law, April, 2000
Detroit College of Law–Michigan State University, October, 1998

Teacher, Legal Opportunity Program (CLEO), Boalt Hall, Summer, 1992

Television and radio commentator on various topics, including appearances on the O'Reilly Factor, February, 2004, McNeil- Lehrer News Hour, September, 1991 and San Diego and San Francisco TV and radio programs, 1991-present

Subcommittee, Uniform Rules of Agency Procedure and Practice, American Bar Association, 1988-90

Reviewer,
Cambridge University Press
Foundation Press
Oxford University Press
Little, Brown & Co. Press
Journal of Law, Economics & Organization
American Journal on Political Science
Western Political Science Quarterly (now Political Research Quarterly)
Law school appointment/tenure evaluations: Harvard, Chicago, Stanford, UC Berkeley, Cornell, Florida State, Illinois, Minnesota, North Carolina, Northwestern, Toledo, Vanderbilt, USC, & Georgetown

Professional Service

Amicus brief, Petition for Certiorari, *Council Tree Investors, Inc. et al v. FCC et al* (Supreme Court of the United States)

Amicus brief in *Christian Legal Society v. Hastings College of Law* (Supreme Court of the United States)

Expert witness: *Root v. Thomas Jefferson School of Law*

Consultant:
Educational Testing Service (2020-present); University of Pennsylvania (June 2021--) ROSS Intelligence, Inc. (2018-19); Travis County Grand Jury (separation of powers), City of San Diego

(pension fund litigation); City of Los Angeles (charter dispute); City of Los Angeles, Office of Controller (development of new Fraud, Waste, & Abuse Unit); Simon Properties & the City of Austin (land use and scope of local authority); assorted pro bono work

Exhibit B

BEFORE THE FEDERAL TRADE COMMISSION

IN RE PETITION FOR RECUSAL OF CHAIR LINA M. KHAN FROM INVOLVEMENT IN THE PENDING ANTITRUST CASE AGAINST FACEBOOK, INC.

APPENDIX OF STATEMENTS BY CHAIR LINA M. KHAN

I. Chair Khan's Academic Articles

1. **Lina M. Khan, *Amazon's Trust Paradox*, 126 Yale L. Rev. 710 (2017)**
   - **a.** Khan at 783 and n.376: "[T]he current antitrust regime has yet to reckon with the fact that firms with concentrated control over data can systematically tilt a market in their favor, dramatically reshaping the sector." In a footnote, she continues: "European antitrust authorities do investigate how concentrated control over data may have anticompetitive effects, and-unlike U.S. antitrust authorities – investigated the Facebook/WhatsApp merger for this reason. Complaints from companies that their rivals are acquiring an unfair competitive advantage through acquiring a firm with huge troves of data may also prompt U.S. authorities to take the exclusionary potential of data more seriously."
   - **b.** Khan at 793: "Data that gave a player deep and direct insight into a competitor's business operations, for example, might trigger review. Under this regime, Facebook's purchases of WhatsApp and Instagram, for instance, would have received greater scrutiny from the antitrust agencies, in recognition of how acquiring data can deeply implicate competition."

2. **Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019)**
   - **a.** Khan (at 976 n.4) approvingly cites Jonathan Taplin's book "Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy 21 (2017), including by quoting this line: "Facebook has a 77 percent market share in mobile social media."
   - **b.** Khan (at 976 n.4) approvingly cites Ben Smith's opinion article in BuzzFeed News, characterizing it as "describing an increasingly prevalent critique of the major American tech firms-Facebook, Amazon, Google, and Apple-as 'sinister new centers of unaccountable power.'"
   - **c.** Khan at 977-78: "Facebook, equipped with technology that lets it detect which rival apps are succeeding, would often give companies a choice: Be acquired by

Facebook, or watch it roll out a direct replica. Competing with one of these giants on the giant's own turf is rife with hazards." She cites (at 978 n.10) Elizabeth Dwoskin, *Facebook's Willingness to Copy Rivals' Apps Seen as Hurting Innovation*, Wash. Post (Aug. 10, 2017), with the following parenthetical: "describing Facebook's 'aggressive strategy' for attempting to break into fields beyond social networking by 'mimic[king] the most successful features of rival companies' apps.'" Khan also writes in the footnote: "Faced with criticism that it was using Onavo in potentially anticompetitive ways, Facebook announced in 2019 that it was no longer using the technology to collect data on rivals."

d. Khan at 978: "Venture capitalists now factor this risk [of firms coming too close to Facebook, Google, or Amazon] into their investment decisions." She includes the following citation and parenthetical (at 978 n.11): Asher Schechter, Google and Facebook's "Kill Zone": "We've Taken the Focus Off of Rewarding Genius and Innovation to Rewarding Capital and Scale," ProMarket (May 25, 2018) ("The scale of these companies and their impact on what can be funded, and what can succeed, is massive." (internal quotation marks omitted) (quoting Albert Wenger, Managing Partner, Union Square Ventures)).

e. Khan at 978-79: "Venture capitalists now discuss a 'kill-zone' around digital giants—'areas not worth operating or investing in, since defeat is guaranteed.'"

f. Khan (at 984 n.31) approvingly cites Australian Competition & Consumer Comm'n, Digital Platform Inquiry: Preliminary Report 4-5 (2018), including the following parenthetical: "providing an overview of the 'substantial market power' that Facebook and Google have in the Australian social media and online search markets, respectively"; and approvingly citing Digital, Culture, Media & Sport Comm., House of Commons, Disinformation and 'Fake News': Final Report 36 (2019), including the following parenthetical: "discussing how Facebook acquired immense amount of app-usage data from its customers and utilized this information to acquire companies that appeared profitable 'or shut down those they judged to be a threat.'"

g. Khan (at 1001-05) writes an entire subsection about Facebook, reproduced only in part here. "Facebook is a dominant social network. . . . Facebook has used its dominant position to appropriate from rivals. . . . [Facebook] has both foreclosed competitors from its platform and appropriated their business information and functionality. . . . The firms that saw their API access revoked by Facebook all ended up either exiting the market or shutting down entirely. In addition to blocking apps that it deemed competitive threats, Facebook has also systematically copied them. . . . Reports capture how the tool [Onavo] has helped Facebook either imitate rivals or seek to buy them out. . . . Facebook has established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors. Strikingly, one of Facebook's more recent acquisition—the burgeoning social network tbh—had achieved limited market penetration by the time Facebook purchased it. . . . If Facebook were able to surveil a publisher's readers, it could sell access to those readers at a fraction of the publisher's price-undercutting the publisher's pricing

power in the ad market. For Facebook, meanwhile, access to this data would enable it to more precisely target Facebook users when selling ads, increasing ad revenue. . . . Despite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course-perhaps because it no longer faced serious competition in the social network market. . . . It is reasonable to consider this policy change a bait and switch. Facebook induced websites to install Facebook plug-ins by representing that the company would not use this installed code to channel user data to its advertising business. Thirty percent of the top million most-visited websites-including major news publishers-added Facebook's plug-ins, becoming dependent on Facebook's network for greater distribution. . . . Facebook's appropriation of publishers' business information is not a feature of Facebook being vertically integrated. Instead, it derives from the fact that Facebook is both a major communications network and a major advertiser, and the price it charges publishers for using its platform as a distribution network is the right to surveil publishers' users-information that it uses to enrich its advertising business. In other words, collecting publishers' business information is not a functional necessity of allowing publishers to use Facebook; it is instead the condition Facebook has set. . . . Through Facebook Instant Articles, for example, Facebook has vertically integrated into publishing media content on its own platform. Reports suggest that Facebook has used its integrated structure to preference its own offerings."

h. Khan at 1009: "[A] survey of more than two dozen Silicon Valley investors revealed that Facebook's willingness to appropriate information from and mimic the functionality of apps has created "a strong disincentive for investor" to "fund services that Facebook might copy."

i. Khan at 1012: "Investors acknowledge unequivocally that the dominance of digital platforms deters investment in certain markets, and data suggest that firms looking to compete with a core functionality of Google, Facebook, or Amazon have seen funding dry up."
Khan (at 1027 n.291) approvingly cites Sally Hubbard, *The Case for Why Big Tech Is Violating Antitrust Laws*, CNN (Jan. 2, 2019) with the following parenthetical: "The nearly 20-year-old case of *US v. Microsoft* illustrates how today's tech giants are breaking the law . . . Google, Amazon and Facebook are following the same playbook."

j. Khan at 1071-72: "Google and Facebook's role as dominant portals of news and media, meanwhile, may undermine the health and diversity of the media ecosystem. . . . Facebook's emphasis on video content, for example, spurred publishers to fire hundreds of journalists in favor of video producers-only to learn that Facebook had inflated its video numbers. . . . In recent years, questions about news bias by Facebook and the black-box nature of Google search rankings have prompted a larger discussion about whether permitting two firms to capture control over digital information mediation undermines the integrity of our news ecosystems."

k. Khan at 1072: "This algorithm-chasing dynamic is primarily a feature of Google and Facebook's horizontal dominance. But Facebook and Google also vertically

compete with the news publishers that depend on their platforms for greater exposure to readers. This dual role they play-as a competitor in the sale of digital ads and as an intermediary in the distribution of information-diverts advertising revenue from publishers to the dominant platforms, helping them maintain their duopoly in the digital advertising market. The news industry, meanwhile, is on life support: Hundreds of local and regional newspapers have been rolled up or shuttered, such that two thirds of counties in America now have no daily newspaper and 1,300 communities have lost all local coverage. . . . Insofar as this dual role played by Facebook and Google deprives publishers of digital advertising revenue, structurally separating the communications networks these firms operate from their ad businesses could potentially be justified on the basis of protecting the news media. Rather than separating platforms from commerce, such a separation would target a particular business model in order to promote media diversity and protect journalism."

l. Khan (at 1072 n.582) includes a parenthetical that describes Foer's argument that "Google, Facebook, and Amazon are 'indifferent to democracy' and yet 'have acquired an outside role in it.'" She also cites Frank Pasquale, The Black Box Society 71 (2015) and includes the following parenthetical: "describing how the vast array of content provided by Facebook's 'News Feed' may favor the interests of advertisers and Facebook itself over the news-consuming public."

m. Khan (at 1090 n.683) includes the following parenthetical: "providing findings from the French Competition Authority on the dominance that Facebook and Google possess in the market for online advertising."

3. **Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497 (2019)**

a. Khan and Pozen at 498: "Digital businesses such as Facebook, Google, and Twitter collect an enormous amount of data about their users. Sometimes they do things with this data that threaten the users' best interests, from allowing predatory advertising and enabling discrimination to inducing addiction and sharing sensitive details with third parties."

b. Khan and Pozen at 500: "Just as the law imposes special duties of care, confidentiality, and loyalty on doctors, lawyers, accountants, and estate managers vis-a-vis their patients and clients, so too should it impose such duties on Facebook, Google, Microsoft, Twitter, and Uber vis-a-vis their end users — although Balkin concedes that the duties would be 'more limited' in the digital context."

c. Khan and Pozen at 502 n.14: "[W]e focus above all on Facebook, both because Facebook is Balkin's main example of a digital information fiduciary and because it is the company whose practices have most galvanized privacy reformers in recent years. Facebook also happens to offer a particularly stark case study in the inadequacies of the information-fiduciary framework."

d. Khan and Pozen at 505: "Facebook therefore has a strong economic incentive to maximize the amount of time users spend on the site and to collect and commodify as much user data as possible. By and large, addictive user behavior

is good for business. Divisive and inflammatory content is good for business. Deterioration of privacy and confidentiality norms is good for business. Reforms to make the site less addictive, to deemphasize sensationalistic material, and to enhance personal privacy would arguably be in the best interests of users. Yet each of these reforms would also pose a threat to Facebook's bottom line and therefore to the interests of shareholders."

e. Khan and Pozen at 508: "Delaware law broadly permits, and on some accounts even requires, directors to take a long-run perspective. The fact that corporations like Facebook have persistently declined to self-regulate along such lines, however, suggests that their boards do not see these reforms as likely to enhance firm value or shareholder wealth either in the short term or in the long term." For this, the authors cite Dig., Culture, Media & Sport Comm., U.K. House of Commons, Disinformation and "Fake News": Final Report 20-42 (2019), including the following parenthetical (at 508 n.52): "detailing how Facebook has repeatedly taken actions that increased revenue at the expense of users' privacy and data security."

f. Khan and Pozen at 511 n.66: "Facebook denies that it sells user data to third parties. But as Professor Michal Kosinski has pointed out, any time a user clicks on an advertisement, Facebook automatically reveals facets of the user's identity to the advertiser by virtue of the fact that the advertiser has paid Facebook to target specific types of individuals. . . . And as Professor Chris Hoofnagle has observed, Facebook also grants developers access to user data, a form of exchange that he argues should also be considered a 'sale.'"

g. Khan and Pozen at 514: "To appreciate just how odd it is to think that a behavioral-advertising company could be a fiduciary for its users, imagine visiting a doctor let's call her Marta Zuckerberg — whose main source of income is enabling third parties to market you goods and services. Instead of requesting monetary payment for services rendered, Dr. Zuckerberg floods you (and her two billion other patients) with ads for all manner of pills and procedures from the second you set foot in her office, and she gets paid every time you try to learn more about one of these ads or even look in their direction. In fact, this is just about the only way she gets paid as her financial backers are apt to remind her. The ads themselves, moreover, are tightly tailored to your economic, demographic, and psychological profile and to any consumer frailties you exhibit. They are also continually updated in light of information Dr. Zuckerberg collects on you; to be sure she does not miss anything, she has planted surveillance devices all around your neighborhood as well as her office." In a footnote, the authors continue: "Your data, accordingly, is the payment you make to Dr. Zuckerberg," approvingly using the following parenthetical (at 514 n.80) after including a source: "Users [of Facebook] are not customers. . . . They are merely free sources of raw material."

h. Khan and Pozen at 514 n.81: "Our point is simply that unlike doctors, Facebook does not come close to putting its customers first in any serious sense notwithstanding Zuckerberg's protestations to the contrary . . ."

i. Khan and Pozen at 515-16: "Balkin never discusses the advertisers or content producers who rely on social media companies such as Facebook. Nor does he discuss the millions of nonusers whose data is systematically swept up by Facebook through user uploads of phone and email contacts and through 'sites that use Facebook's advertising pixel or other social APIs linking back to Facebook.' Like Facebook's end users, these parties surrender to Facebook certain forms of information that they have an interest in keeping private. Facebook, however, has an economic incentive to monetize this information as well. . . . Many advertisers and content producers are just as captive to Facebook as its end users are, or even more so. Insofar as the purpose of the information-fiduciary proposal is to rebalance the relationship between dominant online intermediaries and those who depend on them, it is unclear why its protections should cover only one set of dependents."

j. Khan and Pozen at 517-18: "The loss of privacy and control experienced by Facebook users therefore does not stem, organically, 'from the structure and nature of the fiduciary relation' . . . It stems from Facebook's deliberate efforts to create such vulnerabilities. Facebook's dominant market position supports this strategy. To the extent that users feel beholden to Facebook, it is not because the company offers them especially skillful services or judgments so much as because of a lack of viable alternatives. By virtue of owning four of the top five social media applications, Facebook makes it difficult to escape the company's ecosystem. As legal scholars and German antitrust authorities have concluded, this market position enables Facebook to extract more data from its users — who often feel they have nowhere else to go — and thereby compounds their vulnerability."

k. Khan and Pozen (at 518 n.96) approvingly cite Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 Berkeley Bus. L.J. 39, 40 (2019), including the following parenthetical: "arguing that Facebook's ability to extract so much data from users 'is merely this titan's form of monopoly rents.'"

l. Khan and Pozen at 520: "As a rule, it appears that Facebook users tend to be deeply ignorant of the ways the company serves (or disserves) them, and deeply unnerved when they find out. This is not just an unusually stark asymmetry of information. It is an elaborate system of social control whose terms are more imposed than chosen."

m. Khan and Pozen at 526-27: "If it is unclear which problems Balkin's proposal would solve, it seems quite clear that the information-fiduciary model would leave many profound problems untouched. This is not the place to offer a detailed inventory, but beyond the issues of privacy and data security that Balkin foregrounds, the dominant online platforms have been credibly associated with a host of social ills, from facilitating interference in U.S. elections; to serving as a tool for the incitement of genocide in Myanmar; to decreasing users' mental and physical health; to enabling discrimination and harassment against women and racial minorities; to amplifying the influence of 'fake news,' conspiracy theories, bot-generated propaganda, and inflammatory and divisive content more broadly."

n. Khan and Pozen at 527: "[I]n recent years Google and Facebook together have captured roughly three-quarters of all digital advertising sales in the United States and an even higher percentage of growth. Their control over digital advertising networks appears to be an important factor behind the past decade's consolidation within the publishing industry and tens of thousands of layoffs at newspapers and magazines."

o. Khan and Pozen at 528: "To be clear, we do not believe that addressing the market clout of companies like Facebook will remedy the full panoply of harms associated with them."

p. Khan and Pozen at 534: "[T]hese other theories at least focus attention on the most constitutionally salient feature of companies like Google and Facebook: not that their end users must be able to trust and depend on them, but that they are extraordinarily powerful actors with the potential to do great harm to (as well as good for) the freedoms of speech, assembly, and the press."

q. Khan and Pozen at 534: "[A] fiduciary framework paints a false portrait of the digital world. It characterizes Facebook, Google, Twitter, and other online platforms as fundamentally trustworthy actors who put their users' interests first. As we tried to show in Part II, this is not a plausible depiction of what most of these companies . . ."

r. Khan and Pozen at 535-36: "The reason a company like Facebook can and should be regulated in a special way, it tells us, is that Facebook has (or should have) a special relationship of trust and dependency with each of its users. Not only does this argument ignore how Facebook generates dependency, but it also recasts what ought to be questions of the public interest . . . By the same token, the information-fiduciary proposal implicitly acquiesces in the legal decisions that enabled certain online platforms to become so dominant. It takes current market structures as a given."

s. Khan and Pozen (at 536 n.195) approvingly cite (among other similar articles) Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 133 (2018) and include the following quoted parenthetical: "The simplest way to break the power of Facebook is breaking up Facebook."

t. Khan and Pozen at 537: "Elsewhere, he suggested that a fiduciary approach might 'nudge' companies like Facebook to 'do the right thing,' 'without outright requiring it.' The details were fuzzy but the message was clear. A fiduciary approach would promote users' interests without necessarily causing too much trouble for the online platforms or their business models, thereby allowing Balkin and Zittrain to win wide support while sidestepping contentious questions like whether to restructure or break up Facebook, a step for which a number of commentators have called. The basic selling point of the fiduciary approach was that it would be flexible, light-touch, un-'heavyhanded' — in contrast to and in lieu of structural reforms."

u. Khan and Pozen at 538: "First, in the case of Facebook, Google, and other large online platforms, we might draw an analogy to 'offline' providers of social and economic infrastructure. To the degree that these platforms serve as key channels

of communication, commerce, and information flow, they can be recognized as controlling the terms of access to essential services."

4. **Zephyr Teachout & Lina M. Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. Const. L. & Pub. Pol'y 37 (2014)**
   a. Teachout and Khan at 55: "[P]olicies set by Facebook regulate the online privacy of over 1.2 billion users worldwide."

5. **Lina M. Khan, *The End of Antitrust History Revisited*, 133 Harv. L. Rev. 1655 (2020) (book review)**
   a. Khan at 1664 and 1664 n.35: "Given current challenges — including the dominance of a small number of technology platforms, certain aspects of which seem to exhibit natural monopoly features, and the revival of antitrust as an antiworker tool — recognizing competition as one among several mechanisms for checking concentrated private power is especially critical." To support this sentence, she cites one of her own articles (*i.e.*, The Separation of Platforms and Commerce) and includes the following parenthetical: "identifying how Amazon, Google, Facebook, and Apple serve as dominant intermediaries in digital markets."

II. Chair Khan's Nomination Hearing Highlights

1. In her opening statement, Chair Khan highlighted her work with House Judiciary Subcommittee, where she co-led the 16-month investigation into the competitive practices of large technology companies that resulted in the Digital Markets Report, and signaled a desire for more aggressive enforcement referring to "missed opportunities" for enforcement actions under the prior Administration. *See* Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, (Oct. 2020) (hereinafter, "the Report").

2. Sen. Mike Lee (R-UT) noted in *American Cyanmid Co. v. FTC*, 363 F.2d 757 (1996) that the Sixth Circuit had previously held that former FTC Commissioner Paul Rand Dixon had to recuse himself in a matter because he had conducted an investigation as a staff member on the Senate Antitrust Subcommittee before taking the role as Commissioner. He asked if Ms. Khan would be "bound" by that precedent and recuse herself from investigating Facebook, Apple, or Google due to her work on the Digital Markets Report. She replied that she has "none of the financial conflicts or personal ties that are the basis of recusal under federal ethics laws" and would follow the evidence on any relevant cases. Sen. Lee asked if this would create the appearance of impropriety. Ms. Khan responded that recusals are resolved on a case-by-case basis, and indicated that she need not categorically recuse herself and would consult with federal ethics lawyers to determine her ethics obligations. Sen. Lee noted that the Sixth Circuit case he had referenced did not involve any personal financial connections, but rather the individual's work on the Senate Antitrust Subcommittee.

3. Sen. Amy Klobuchar (D-MN) stated that Facebook and Google "tried to hold a whole country hostage" by prohibiting news dissemination in Australia. She asked if Ms. Khan was aware of her proposed legislation, which has garnered bipartisan support, allowing news organizations to collectively negotiate for content rates. Ms. Khan responded affirmatively, and noted that this type of legislation has historically been used to ameliorate "deep asymmetries" in bargaining power, citing antitrust exemptions for worker collective bargaining and ad co-ops. She stated that this type of legislation should be applicable here and would be "one step forward" in addressing this issue.

III. The House Judiciary Subcommittee's Findings about Facebook[1]

The Report prepared by the House Judiciary Subcommittee describes how Facebook, along with Amazon, Apple, and Google, has been subject to little regulatory enforcement. For example, although Facebook had nearly 100 acquisitions, the FTC only extensively investigated Facebook's purchase of Instagram in 2012. *Id.* at 11; *see also id.* at 151-156 (describing Facebook's acquisition of Instagram); *id.* at 156-161 (describing Facebook's acquisition of WhatsApp); *id.* at 423-29 (listing Facebook's acquisitions from 2007 to 2020). Nonetheless, the Report points out that state and federal antitrust authorities are currently investigating Facebook for potential violations of antitrust laws. *Id.* at 133.

The Report considers Facebook, the largest social networking platform, to be a monopoly: "The strong network effects associated with Facebook has tipped the market toward monopoly such that Facebook competes more vigorously among its own products–Facebook, Instagram, WhatsApp, and Messenger–than with actual competitors." *Id.* at 11-12, 133. Specifically, the Report identifies Facebook's monopoly power as being in "the market for social *networking*." *Id.* at 12 (emphasis added). So although consumers might spend time on both YouTube and Facebook, the Report considers the two to be in separate markets, with YouTube considered a social *media* platform and Facebook a social *network*. *Id.* at 92; *see also id.* at 140 (discussing the differences between Facebook and YouTube).

Facebook's monopoly power is "firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms." *Id.* at 13. The Report identifies this monopoly power to be "in online advertising in the social networking market." *Id.* at 170. It cites the following as evidence of the monopoly:

- A comment from a Facebook senior executive that Facebook's acquisition strategy is a "land grab" to "shore up" Facebook's position. *Id.* at 12; *see also id.* at 378 ("Facebook used its platform tools to identify and then acquire fast-growing third-party apps, thwarting competitive threats at key moments.").

[1] Chair Khan's personal webpage states that, as counsel to the House Antitrust Subcommittee, she "led the congressional investigation into digital markets and the publication of its final report," presumably including the portions condemning Facebook. Lina M. Khan, Bio, http://www.linamkhan.com/bio-1 (no longer active) [https://perma.cc/9GB5-F78G].

- Mark Zuckerberg's statements that Facebook "can likely always just buy any competitive startups" and that Instagram was a threat to Facebook. *Id.* at 12-13; *see also id.* at 143 (Zuckerberg "stressed the competitive significance of having a first-mover advantage in terms of network effects prior to acquiring WhatsApp.").
- Facebook's description of its network effects as a "flywheel." *Id.* at 13.
- An October 2018 memo by Thomas Cunningham, a senior data scientist and economist at Facebook, which, *inter alia*, called Facebook's network effects and family of products "very strong." *Id.* at 13; *see also id.* at 142 (describing the Cunningham memo in more detail).
- A "series of anticompetitive business practices" where Facebook "used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms." *Id.* at 14; *see, e.g.*, *id.* at 163 (In March 2012, Mark Zuckerberg wrote an email to Facebook executives, stating that "cloning other aps could help Facebook move faster by building out more of the social use cases ourselves and prevent our competitors from getting footholds") (internal citations omitted).
- Facebook's maintenance of "high market shares over a long period of time." *Id.* at 137.

The Report also classifies Facebook, along with Amazon, Apple, and Google, as a "gatekeeper[]." *Id.* at 39; *see id.* at 71 (calling Facebook a "gateway[] to online news media for many consumers"). As such, Facebook can control the fates of other businesses by excluding other firms' access to Facebook users' data and can get concessions from third parties that would not be seen in a competitive market. *Id.* at 39, 149.

In addition, the Report details Facebook's strong network effects, which have made it prone to monopolization, and it cites Mark Zuckerberg's explanation to David Ebersman, then-CFO, about the benefits that would come from Facebook's acquisition of Instagram. *Id.* at 41. The Report also identifies Facebook's high switching costs, which is another barrier of entry for potential market participants, *id.* at 41-42, as well as Facebook's benefits from increasing returns to scale. As for the latter, the Report notes that Facebook was able to build its platform with a large upfront investment and has since grown "exponentially with relatively little increase in costs." *Id.* at 45. And it is this increasing returns to scale that has allowed Facebook "to get more out of consumers than consumers get out of platforms," since the social data gathered through Facebook may be greater than the economic value to consumers. *Id.* at 45-46.

The Report identifies other costs that have resulted from this absence of competition:

- Worse privacy protections for Facebook users. *Id.* at 14; *see also id.* at 48 ("To the extent that a firm successfully offers a service to give people tools to control their privacy, Google or Facebook are going to want to pull that back as fast as they possibly can.") (internal citations omitted).
- A "dramatic rise" in misinformation on Facebook's platform. *Id.* at 14; *see also id.* at 67 (providing an example of when misinformation on Facebook about COVID received almost 20 million views and over 100,000 comments before Facebook could take it down).

- Reduced venture capital investment of startups. *Id.* at 49.
- Decline of trustworthy news sources. *Id.* at 57; *see also id.* at 63-64 (describing how new organizations were negatively impacted when Facebook adjusted its News Feed algorithm in January 2018).
- Increased barriers to entry generated by Facebook's control over its platform's application programming interfaces ("API's"), which new entrants might choose to rely on. *Id.* at 90.
- Less options for advertisers and publishers to buy and sell online ad space due, in part, to the increased barriers to entry. *Id.* at 130-32.
- High switching costs, meaning high costs for users to switch from Facebook to other social networks. *Id.* at 145.

With respect to privacy, the Report explains how a platform's maintenance of a strong network and little user privacy can be considered the same as a monopoly's decision to raise prices or reduce product quality. *Id.* at 52. The Report cites as support for this proposition a law review article written by Dina Srinivasan, which calls Facebook a monopolist. *Id.* at 52 n.208.

Regarding the rise in misinformation, the Report raises a concern that Facebook faces little financial consequence when misinformation is circulated online. *Id.* at 67. The Report notes that Mark Zuckerberg told Facebook employees at an internal meeting that Facebook was "'not gonna change our policies or approach on anything because of a threat to a small percent of our revenue, or to any percent of our revenue.'" *Id.* at 68.

Finally, regarding the increased barriers to entry, the Report explains that, because of Facebook's dominance in the social media market, the main way for new companies to enter the market is by attracting a subgroup or a niche. *Id.* at 90.

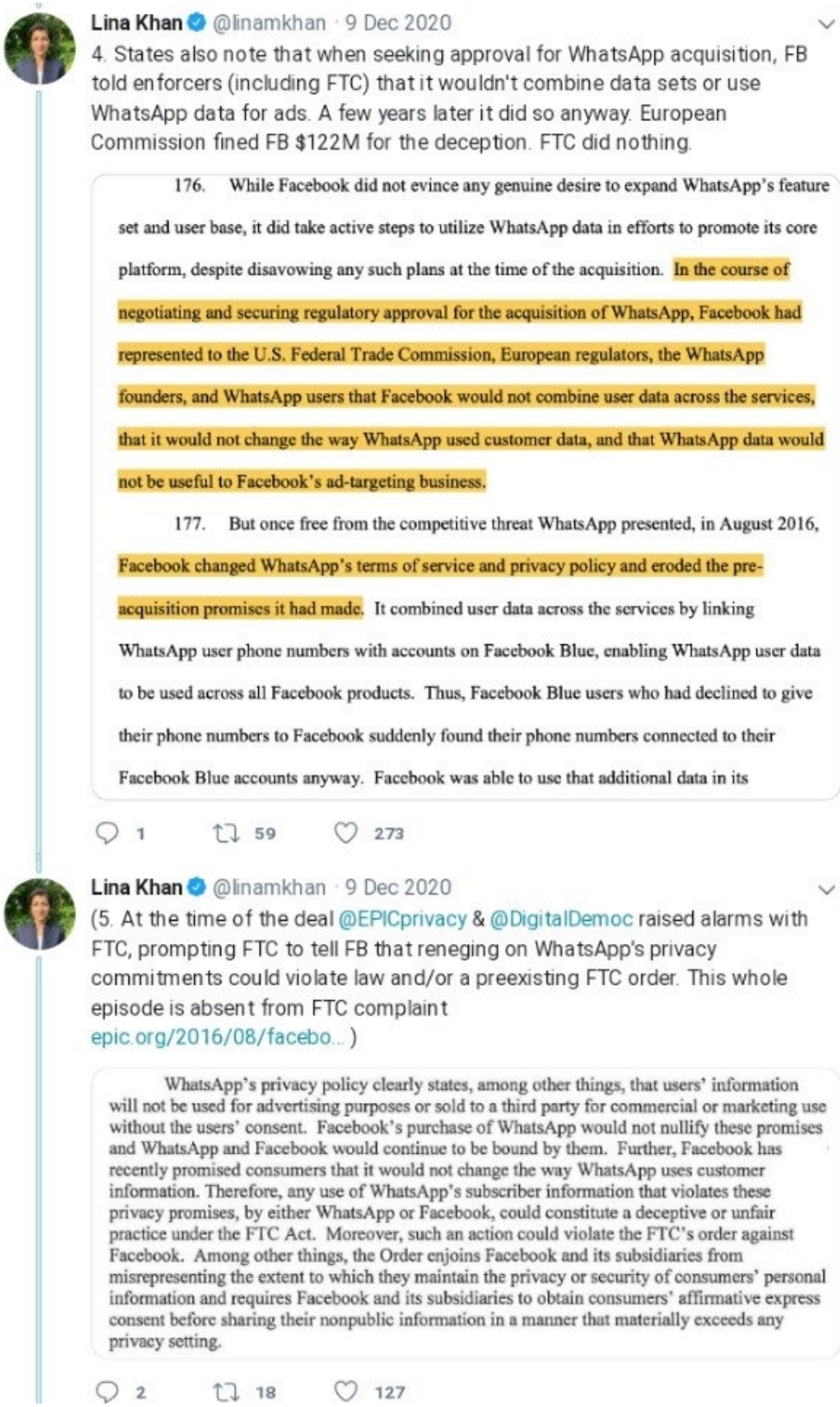
The Report notes that the United States is not alone in its effort to examine Facebook's business practices. For example, the United Kingdom's Competition and Markets Authority found that Facebook is dominant in the social networking and digital display ad markets. *Id.* at 135.

Despite these concerns, Facebook itself has concluded that it lacks monopoly power, citing Twitter, Snapchat, Pintrest, and TikTok as examples of its competition. *Id.* at 134-35. But the HJC states in its Report that it is not convinced: "Facebook's position that it lacks monopoly power and competes in a dynamic market is not supported by the documents it produced to the Committee during the investigation." *Id.* at 136. According to the Report, Facebook's "most significant competitive pressure" comes "from within its own family of products—Facebook, Instagram, Messenger, and WhatsApp." *Id.* at 384.

IV. Excerpts of Chair Khan's Social Media Posts

Lina Khan (@linamkhan), Twitter (Jan. 7, 2021, 12:39 PM) (citing Epic.org, *Facebook to Collect WhatsApp User Data, Violating FTC Order and Privacy Premises*, Electronic Privacy Info. Ctr. (Aug. 25, 2016)).

Lina Khan (@linamkhan), Twitter (Dec. 9, 2020, beginning at 7:20 PM).



Lina Khan @linamkhan · 9 Dec 2020

4. States also note that when seeking approval for WhatsApp acquisition, FB told enforcers (including FTC) that it wouldn't combine data sets or use WhatsApp data for ads. A few years later it did so anyway. European Commission fined FB $122M for the deception. FTC did nothing.

176. While Facebook did not evince any genuine desire to expand WhatsApp's feature set and user base, it did take active steps to utilize WhatsApp data in efforts to promote its core platform, despite disavowing any such plans at the time of the acquisition. In the course of negotiating and securing regulatory approval for the acquisition of WhatsApp, Facebook had represented to the U.S. Federal Trade Commission, European regulators, the WhatsApp founders, and WhatsApp users that Facebook would not combine user data across the services, that it would not change the way WhatsApp used customer data, and that WhatsApp data would not be useful to Facebook's ad-targeting business.

177. But once free from the competitive threat WhatsApp presented, in August 2016, Facebook changed WhatsApp's terms of service and privacy policy and eroded the pre-acquisition promises it had made. It combined user data across the services by linking WhatsApp user phone numbers with accounts on Facebook Blue, enabling WhatsApp user data to be used across all Facebook products. Thus, Facebook Blue users who had declined to give their phone numbers to Facebook suddenly found their phone numbers connected to their Facebook Blue accounts anyway. Facebook was able to use that additional data in its

1 59 273

Lina Khan @linamkhan · 9 Dec 2020

(5. At the time of the deal @EPICprivacy & @DigitalDemoc raised alarms with FTC, prompting FTC to tell FB that reneging on WhatsApp's privacy commitments could violate law and/or a preexisting FTC order. This whole episode is absent from FTC complaint epic.org/2016/08/facebo...)

WhatsApp's privacy policy clearly states, among other things, that users' information will not be used for advertising purposes or sold to a third party for commercial or marketing use without the users' consent. Facebook's purchase of WhatsApp would not nullify these promises and WhatsApp and Facebook would continue to be bound by them. Further, Facebook has recently promised consumers that it would not change the way WhatsApp uses customer information. Therefore, any use of WhatsApp's subscriber information that violates these privacy promises, by either WhatsApp or Facebook, could constitute a deceptive or unfair practice under the FTC Act. Moreover, such an action could violate the FTC's order against Facebook. Among other things, the Order enjoins Facebook and its subsidiaries from misrepresenting the extent to which they maintain the privacy or security of consumers' personal information and requires Facebook and its subsidiaries to obtain consumers' affirmative express consent before sharing their nonpublic information in a manner that materially exceeds any privacy setting.

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Lina Khan @linamkhan · 9 Dec 2020
6. Also very glad to see states connect FB's monopolization to all around quality degradation, including increase in ad load, proliferation of fake accounts, and inaccurate performance & other metrics for advertisers (see, e.g., wsj.com/articles/faceb...).
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Lina Khan @linamkhan · 9 Dec 2020
7. States also describe how acquiring Onavo (& the surveillance of rivals it enabled) was key to FB's strategy for identifying competitive threats at the earliest stages. They note FB foreclosed other firms from having access to Onavo data.
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Lina Khan @linamkhan · 9 Dec 2020

8. States discuss several other competitive threats FB acquired or cut off from APIs. Complaint marshals full set of facts in a very effective way. Net effect is clear picture of how FB's conduct was systemic, exactly what you want for Sec 2 (though states also sued under Sec 7).

2 10 106

Lina Khan @linamkhan · 9 Dec 2020

9. Interestingly FTC sued only under Sec 2, not Sec 7. Also notable that many of the docs cited to show Instagram & WhatsApp purchases were illegal were available at the time FTC reviewed the deals (though FTC investigated only Instagram ($1bn) in depth, not WhatsApp ($19bn)).

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Lina Khan @linamkhan · 9 Dec 2020

10. Many of the Instagram docs cited build on the material the House Antitrust Subcommittee made public through its investigation. In July @JerryNadler confronted Zuckerberg with some of this evidence c-span.org/video/?c492945 ...

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Lina Khan @linamkhan · 9 Dec 2020

11. Finally, both FTC's and states' request for relief includes requirements that would implicate future acquisitions. FTC requests "a prior notice and prior approval obligation for future mergers and acquisitions."

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Lina Khan @linamkhan · 9 Dec 2020

12. States request FB be prohibited from deals valued at or > $10million without first informing the states, & that FB submit deal-related disclosures it'd make to FTC/DOJ. This is potentially very significant. 48 AGs would have chance to review these deals, not just FTC/DOJ.

1 9 108

Lina Khan @linamkhan · 9 Dec 2020

13. Notably, during the course of the investigation FB acquired Giphy, which FB could use to deprive rivals of access and/or to collect significant data. FB didn't report the deal to enforcers, presumably bc it was structured to avoid reporting thresholds.

Lina Khan @linamkhan · 9 Dec 2020

14. And just this week Facebook purchased Kustomer, a business software company, reportedly for ~$1 billion. So two days before being sued by the federal government & 48 AGs for a series of illegal acquisitions, Facebook made another acquisition.

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Lina Khan @linamkhan · 9 Dec 2020

15. FB is now following this playbook in the virtual reality space. Quoting @PramilaJayapal & House report, Bloomberg notes FB is using same "copy-acquire-kill" strategy it used to monopolize social networking. Key task for enforcers is to prevent a repeat

V. Excerpts of Chair Khan's Appearances and Writings

- Chair Khan: "I think one of the first steps is to make sure Facebook is not acquiring further power, right? So if Facebook tomorrow announces that it's acquiring another company I would hope that the FTC would look at that very closely and block it." (*The Bernie Sanders Show: The Greatest Threat to Our Democracy?* (YouTube streamed live May 15, 2018)).

- Chair Khan was interviewed by Andy Fitch from the Los Angeles Review of Books, and this interview was published on December 19, 2020. The interview was on "Concentrated Control" and is available online here. Below is an excerpt of some of the interview questions and Chair Khan's answers.

ANDY FITCH: First, why should we see the core business models (and longstanding business practices) of Google, Amazon, Facebook, and Apple not just as sometimes operating to the detriment of individual consumers, but as systemically harming a much broader range of workers, entrepreneurs, independent businesses, open markets, and public spheres? In what ways do the stakes here extend to the foundational health of our economy and of our democracy?

LINA KHAN: Google, Amazon, Facebook, and Apple control the infrastructure on which digital commerce and communications take place. They function as gatekeepers. They've used their gatekeeper power both to extort and to exploit the individuals and entities that rely on their technologies. They've maintained and extended their power through serial acquisitions and through coercive and predatory tactics. Meanwhile, the targeted ad-based business models of Facebook and Google incentivize maximal surveillance and invasive data collection. Each of these dynamics imperils the health of our economy and democracy. A few facets in particular stand out.

* * * *

ANDY FITCH: Along those lines, with dominant platforms offering so much "for free" (and sometimes experiencing extraordinary growth before generating profits), why does a late-20th-century antitrust focus on consumer-pricing metrics seem inadequate? How might we need to redefine the personal and the collective "price" paid for such services and products? And/or which economic measurements might better help us to assess monopoly dominance?

LINA KHAN: Relying exclusively on price-centric models blinds us to the many coercive and predatory ways that dominant firms use their economic power – ways that, in some instances, existing antitrust laws already prohibit. Recent lawsuits filed against Facebook and Google note that these firms have abused their monopoly power in ways that harm user privacy. These lawsuits offer a small but important step forward for antitrust enforcers. More broadly, antitrust law should rely more on presumptions and bright-line rules that outright ban certain business practices by dominant firms. The current approach (which, in many cases, requires proving the "anticompetitive effects" of a business practice, and sometimes even requires weighing these effects against potential "benefits") has created a much more permissive regime. Lastly, we need to broaden the range of disciplines and methodologies that carry weight in antitrust analysis. We need to incorporate learning from financial analysts, accountants, technologists, and business historians.

* * * *

ANDY FITCH: Now for individual firms, could we start with Facebook's acute dominance within social-networking spheres – with this platform today mostly just "competing" against its own adjacent corporate holdings? How might Facebook's history of purchasing potential rivals, its tacit establishment of innovation kill zones, its impeding of American entrepreneurship, epitomize the need for presumptive prohibition on digital mergers and acquisitions? And why should Facebook's near-perfect market knowledge (far beyond that of regulators) in various domains call forth a proactive incipiency standard protecting nascent competitors, and preventing vertical consolidation?

LINA KHAN: Facebook offers a case study in permissive merger enforcement. As noted in both the House report and the recent complaints filed by 48 state attorneys general and the Federal Trade Commission, Facebook maintained its monopoly through serially acquiring rivals. One business that it purchased, Onavo, even enabled Facebook to identify and closely monitor rival apps diverting attention from Facebook – positioning it to swoop in and buy up a competitor before others (including antitrust enforcers) fully understood what was going on. Collectively, Amazon, Apple, Facebook, and Google have purchased over 500 companies, and not a single one of these acquisitions was blocked by antitrust enforcers.

Antitrust enforcers can begin to remedy this multi-decade institutional failure by revising merger guidelines, and by taking a much more assertive and forward-looking approach. Lawmakers should consider a presumptive ban on acquisitions by these dominant firms. Antitrust law

reflects a preference for growth through internal expansion and investment, rather than through acquisition. Legislating a presumptive ban would reassert this preference. It could be especially impactful amid the COVID-19 recovery, given that the dominant platforms have only grown richer during the crisis, and are sitting on huge sums of cash that they could use to go on a buying spree.

- Lina Khan, *How to reboot the FTC*, Politico (Apr. 13, 2016) ("[T]he FTC should take seriously the threats to competition posed by online platform monopolies. Firms like Amazon, Facebook, Google and Uber have emerged as the railroads of the Internet economy, connecting buyers and sellers in a central marketplace. While often providing great ease and convenience for consumers, these companies can also use their market power to squeeze or disadvantage the sellers and suppliers that depend on them—much as the railroads of yore used their power over manufacturers and farmers to pick winners and losers.").

VI. Chair Khan's Letter to the FTC

- Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017) (accessed Aug. 16, 2021) (also available here) ("Our request comes amid growing evidence that Facebook is using its increasing market power in ways that stifle innovation, undermine privacy, and divert readers and advertising revenue away from trustworthy sources of news and information.").

Exhibit C

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

Facebook, Inc.

Matter No. 1910134

August 19, 2021

Today, the Commission voted to file an amended complaint against Facebook, Inc. As I did with the Commission's original complaint against Facebook, I dissent. Although my dissent is premised on legal, factual, and policy concerns, I write here to provide a brief description of one policy concern, given its relevance to other concerning developments at the Federal Trade Commission.[1] Specifically, the primary allegations in the amended complaint relate to Facebook's acquisitions of Instagram and WhatsApp, transactions that the FTC previously evaluated pursuant to the Hart-Scott-Rodino premerger notification process and permitted to proceed. I believe it is bad policy to undermine the integrity of the premerger notification process established by Congress and the repose that it provides to merging parties that have faithfully complied with its requirements.[2]

Also, I write to make clear that no one should mistake my participation in today's vote to file an amended complaint for a vote, one way or the other, on the recusal petition that Facebook filed on July 14, 2021. In that submission, Facebook petitioned FTC Chair Lina Khan and the Commission to recuse Chair Khan from participating in any decisions concerning whether and how to continue the Commission's antitrust case against the company.[3] If the Commission were to review Facebook's recusal petition,[4] I would evaluate the petition carefully, applying the relevant law, including Constitutional due process considerations, to the applicable facts.

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[1] Holly Vedova, *Adjusting merger review to deal with the surge in merger filings*, FED. TRADE COMM'N COMPETITION MATTERS BLOG (Aug. 3, 2021, 12:28 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

[2] *See* Christine S. Wilson, Comm'r, Fed Trade Comm'n, Statement Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

[3] *See* Cat Zakrzewski, *Facebook seeks recusal of FTC Chair Lina Khan amid high-profile antitrust case*, WASH. POST. (July 14, 2021), https://www.washingtonpost.com/technology/2021/07/14/facebook-seeks-recusal-ftc-chair-lina-khan/; In Re Petition for Recusal of Chair Lina M. Khan from Involvement in the Pending Antitrust Case Against Facebook, Inc. (July 14, 2021), https://about.fb.com/wp-content/uploads/2021/07/Facebook-Inc.s-Petition-to-Recuse-Chair-Khan.pdf.

[4] Commission Rule 4.17 provides a mechanism for disqualification of a Commissioner for rulemaking and adjudicative matters; it does not address a Commissioner's role in prosecutorial decisions. *See* 16 C.F.R. § 4.17.

Exhibit D

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Statement of Commissioner Christine S. Wilson

Regarding the Announcement of Pre-Consummation Warning Letters

August 9, 2021

The Federal Trade Commission (FTC) announced on August 3, 2021[1] that it will send pre-consummation warning letters in connection with deals it cannot fully investigate within the timelines established by the Hart-Scott-Rodino (HSR) Antitrust Improvements Act.[2] These letters alert parties to notified deals that their transactions remain under investigation, and warn that consummation occurs at the parties' own risk.[3]

I am gravely concerned that the carefully crafted HSR framework is suffering death by a thousand cuts. The Commission's pre-consummation warning letters must be considered in conjunction with other recent FTC actions. In February, the Agencies announced a "temporary" and "brief" suspension of grants of early termination.[4] More than six months later, the public has received no clarity regarding when this unwarranted and unprecedented suspension will be lifted.[5] In May, the Commission flouted a negotiated timing agreement after the parties voluntarily extended the timing several times,[6] failed to order a divestiture in a transaction that all Commissioners had reason to believe violated the antitrust laws, and consequently left consumers unprotected.[7] In July, the Commission rescinded a 1995 policy statement on prior

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[1] Press Release, Fed. Trade Comm'n, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021), https://www.ftc.gov/news-events/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger.

[2] 15 U.S.C. § 18a.

[3] FED. TRADE COMM'N, SAMPLE PRE-CONSUMMATION WARNING LETTER (Aug. 3, 2021), https://www.ftc.gov/system/files/attachments/blog_posts/Adjusting%20merger%20review%20to%20deal%20with%20the%20surge%20in%20merger%20filings/sample_pre-consummation_warning_letter.pdf.

[4] Press Release, Fed. Trade Comm'n, FTC, DOJ Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

[5] Noah J. Phillips & Christine S. Wilson, Comm'rs, Fed Trade Comm'n, Statement Regarding the Commission's Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[6] Press Release, 7-Eleven, Inc., 7-Eleven, Inc. Response to FTC Commissioner Statement (May 14, 2021), https://corp.7-eleven.com/corp-press-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement.

[7] Statement of Comm'rs Noah Joshua Phillips and Christine S. Wilson, *In re Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation*, File No. 201-0108 (May 14, 2021),

notice and prior approval, facilitating a massive end-run around HSR filing requirements and opening the door for vindictive and wasteful enforcement.[8] Collectively, these actions raise the costs of doing mergers and threaten to chill harmful and beneficial deals alike. [9]

Before the HSR Act was passed in 1976, parties to a transaction could merge at will, but bore the burden of uncertainty: would the government subsequently conclude the deal was anticompetitive and seek to unwind it? From the merging parties' perspective, the time and resources required to negotiate and implement the merger, and to integrate the two entities, would have been for naught. The pre-HSR landscape was sub-optimal for enforcers, too. With no advance notice of transactions, enforcers had to undertake lengthy and resource-intensive litigation to unwind anticompetitive deals after they were consummated. And even if those challenges were successful, consumers suffered — not just from the loss of competition from anticompetitive deals, but also from the prospect of insufficient remedies arising from typically inadequate attempts to "unscramble the eggs" after the parties have integrated their operations to restore pre-merger levels of competition.[10]

Passage of the HSR Act addressed these issues in a sensible compromise. Under the HSR Act, the FTC and the Antitrust Division of the Department of Justice receive premerger notifications for deals that meet certain criteria. The agencies are afforded time and empowered with investigative tools to determine whether notified transactions may harm competition. The advance notice afforded by the HSR Act enables the government to halt problematic deals before they occur, preserving pre-merger levels of competition and avoiding the challenges of "unscrambling the eggs." But these benefits come with a cost — the agencies must invest the

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https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf.

[8] Christine S. Wilson, Comm'r, Fed Trade Comm'n, Oral Remarks at the Open Commission Meeting (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf; Noah J. Phillips, Comm'r, Fed Trade Comm'n, Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf.

[9] And let us not forget about attempts in 2020 to suspend the HSR process entirely through enactment of a merger moratorium. *See, e.g.*, Erik Wasson, *Warren, Ocasio-Cortez Float Long-Shot Bid to Pause M&A in Crisis*, BLOOMBERG, (Apr. 28, 2020), https://www.bloomberg.com/news/articles/2020-04-28/warren-ocasio-cortez-propose-temporary-corporate-merger-ban.

[10] Kelly Signs, *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FED. TRADE COMM'N (Mar. 16, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective ("In the words of Congressman Rodino, the wisdom of premerger notification was a lesson learned the hard way: … 'Under present law, companies need not give advance notification of a planned merger to the Federal Trade Commission and the Department of Justice. But if the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.'") (citing 122 Cong. Rec. 25051 (1976)).

requisite time and effort to analyze notified deals, and must do so within specified statutory timeframes (or negotiated extensions).

On the flip side, businesses no longer enjoy an unqualified right to merge. Instead, if certain criteria are satisfied, parties to a proposed transaction must file premerger notifications with the FTC and DOJ, observe specified waiting periods, and provide sometimes significant volumes of documents and data to the agencies to facilitate competitive effects analysis. Compliance with the merger review process can be costly — if a transaction draws agency scrutiny, the merger review process can consume many months (if not years), require the submission of several terabytes of documents and data, and cost millions of dollars. But these costs, at least traditionally, have brought the benefit of repose. In fact, many parties voluntarily choose to informally notify non-reportable transactions to the agencies so as to achieve this repose. While the agencies have the authority to challenge deals that have undergone HSR review, those challenges have been understandably rare.[11]

Last Monday's announcement reneges on the Congressionally-mandated compromise and defies the will of Congress by undermining the premerger notification program and diminishing the purpose of the HSR Act. For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings. With rare exceptions, businesses that faithfully comply with the HSR process should not be trapped perpetually beneath a Sword of Damocles. Such a policy would not serve consumers or competition.

Merger filings have increased,[12] and dedicated FTC staff are working hard to assess the deals notified in those filings. But one plausibly could wonder if the FTC is struggling to review

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[11] *See* Complaint, FTC v. Facebook, Inc., Case No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf (requesting divestiture of assets related to at least two consummated transactions).

[12] Mergers filings have been higher over the last twelve months than in recent history, but the antitrust agencies have faced high merger filings in the past. Merger filings today have not reached the number of filings consistently seen in the late 1990s and early 2000s. Reportable transactions per month have averaged 273 per month during the last twelve months. The five-year period from 1996-2000 averaged 359 reportable transactions per month – nearly 90 more transactions per month than reviewed by the antitrust agencies during the last twelve months. *See Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program (HSR transactions by month for October 2019 to July 2021); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019 at app. B, tbl. 1 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf (HSR transactions by month for October 2010 to September 2019); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2010 at app. B, tbl. 1 (2011), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-competition-and-department-justice-antitrust-division-hart-scott.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976-t/1101hsrreport.pdf (HSR transactions by month for October 2001 to September 2010); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2001 at app. B, tbl. 1 (2002), https://www.ftc.gov/sites/default/files/documents/reports/annual-report-congress-regarding-operation-hart-scott-rodino-premerger-notification-program/hsrarfy2001.pdf (HSR transactions by month for October 1992 to September 2001).

transactions in a timely manner not only because of filing volume, but also because something else is afoot.[13] We know the Biden Administration has called for a review of the existing merger guidelines,[14] and we know that some have advocated returning to the 1968 Merger Guidelines that suggest challenging an acquisition in a "less highly concentrated" market if a firm with 5% market share seeks to acquire another firm with 5% market share.[15] Under merger review standards applied by both Democrat and Republican administrations over time, roughly 95 percent of deals are viewed as benign or beneficial.[16] Applying outdated (or no) analytical standards to new HSR filings – rendering suspect even 10 to 15 percent of deals – would certainly create a logjam.[17]

The FTC has now taken several steps that threaten the integrity of the HSR process. The Commission's announcement of pre-consummation warning letters – together with the decisions to disregard a negotiated timing agreement, rescind the prior approval and prior notice policy statement, and suspend early terminations – disrupt the carefully crafted balance that Congress established through the HSR Act. If the majority wishes to overhaul the premerger notification framework, it should ask Congress to pass the appropriate legislation. And if additional resources are necessary to review notified transactions, the FTC should work with Congress to boost appropriations. But the Commission should not rely on self-help to increase the cost and decrease the certainty of completing transactions.

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[13] The DOJ does not appear to be experiencing any issues in completing timely review of notified deals.

[14] *See* Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021), https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf ("To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines."); Press Release, Fed. Trade Comm'n, Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant ("We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive. We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.")

[15] U.S. DEP'T. OF JUST., 1968 MERGER GUIDELINES, https://www.justice.gov/archives/atr/1968-merger-guidelines.

[16] Over the ten-year period from 2010-2019, Second Requests were issued in 2.2%-3.9% of reportable transactions per year. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019 at 6 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

[17] Imagine the standstill in merger review that will arise if – as some commentators and legislators have suggested – the burden of proof is flipped for mergers. *See, e.g.*, Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021) (proposing to flip the burden of proof for acquisitions involving certain online platforms). If we must evaluate arguments from the 95 percent of benign deals explaining why their transactions are not harmful, we would need 20 times the personnel we have today.

Exhibit E

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
v.	)	No. ____-cv-_____
	)	
STERIS CORPORATION	)	**FILED UNDER SEAL**
	)	
and	)	
	)	
SYNERGY HEALTH PLC	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF
FEDERAL TRADE COMMISSION'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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*Authorities principally relied upon are denoted with an asterisk.

INTRODUCTION

The Federal Trade Commission ("FTC") asks this Court to grant a temporary restraining order ("TRO") and preliminary injunction ("injunction") to prevent STERIS Corporation ("Steris"), a major U.S. sterilization company, from acquiring its competitor, Synergy Health plc ("Synergy"). Without court-imposed relief, Steris will eliminate a major threat and maintain its position as one of two dominant radiation sterilization providers in the United States. Consummation of the acquisition would deny customers the benefits of increased competition before the FTC has had the opportunity to exercise its statutory duty to hold an administrative proceeding on the merits and determine whether the proposed merger is illegal.

At the time the acquisition was announced, Synergy, a U.K. company, was poised to enter the United States with [redacted], x-ray sterilization, that could be used to sterilize medical devices and other healthcare products that currently rely on gamma sterilization. Sterilization is a critical part of the manufacturing process, particularly for medical devices and other similar products, and provides the last line of defense against contamination before products are distributed to end-users. Currently, there are only two U.S. suppliers of gamma sterilization services: Steris and Sterigenics International, Inc. ("Sterigenics"). These two firms, through their respective gamma businesses, are dominant—they account for at least [redacted] of all U.S. contract radiation sterilization services. Synergy's goal was to [redacted] and [redacted] As a direct substitute for gamma, Synergy viewed x-ray as a [redacted]

[1] PX 112-037.
[2] PX 544-004.
[3] PX 275-003.

[redacted] and predicted that its entry would provoke a [redacted] [redacted] [redacted] But Synergy's plans [redacted] [redacted] were cut short when Steris offered to acquire Synergy.[7] Absent a TRO and injunction, gamma sterilization customers will be denied the lower prices, improved quality, and increased choice that would have resulted from Synergy's entry with x-ray.

Having found reason to believe that the proposed acquisition violates Section 7 of the Clayton Act and Section 5 of the FTC Act, the Commission seeks a preliminary injunction in this Court under Section 13(b) of the FTC Act.[8] Administrative proceedings are already under way to determine whether this merger violates Section 7, which prohibits mergers "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly."[9] Preliminary relief will preserve the status quo and stave off consumer harm, pending the full administrative proceeding on the merits, which is scheduled to begin on October 28, 2015. Section 13(b) authorizes this Court to grant preliminary relief if, after considering the Commission's likelihood of success on the merits and weighing the equities, the Court determines that such relief would serve the public interest.[10] These criteria are amply satisfied here: Synergy's documents, as well as testimony from customers and other market participants show that, if the acquisition proceeds, customers will lose the substantial benefits that x-ray sterilization would have brought to the United States.

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[4] PX 95-002.
[5] PX 194-011.
[6] PX 275-014; PX 819-054.
[7] *See* PX 1. Steris proposes to acquire Synergy for $1.9 billion.
[8] 15 U.S.C. § 18; 15 U.S.C. § 45; 15 U.S.C. § 53(b).
[9] 15 U.S.C. § 18; 15 U.S.C. § 45.
[10] 15 U.S.C. § 53(b).

STATEMENT OF FACTS

Many manufacturers, including those that make medical devices and other healthcare products, require sterilization to kill microorganisms living on or within their products.[11] Only a small number sterilize any portion of their products themselves; the bulk of sterilization is contracted to suppliers like Steris and Synergy.[12] Three primary methods of sterilization are used in the United States today: gamma radiation, electron-beam ("e-beam") radiation, and ethylene oxide ("EO") gas.[13] Customers choose sterilization methods based on their products' physical characteristics and packaging, the volume requiring sterilization, and the capabilities of each method.[14] Gamma sterilization is the most effective and economical option for many products because of its penetration capabilities. It is the only viable option for many dense products, such as implantable medical devices, and products with heterogeneous density, such as those packaged in large quantities.[15] Other methods are not viable alternatives for these products. Although e-beam sterilization has been available for over thirty years, it still represents only [redacted] of all contract radiation sterilization sales because gamma is the best option for the vast majority of products.[16] EO sterilization, which relies on toxic gas, is not a meaningful alternative for many types of products and packaging.[17]

Steris, with twelve gamma facilities across the country, is one of only two U.S. providers of contract gamma sterilization services.[18] Sterigenics, the other gamma provider, operates

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[11] *See, e.g.*, PX 601 ¶3; PX 605 ¶3; PX 609 ¶¶4-5; PX 610 ¶3; PX 611 ¶3; PX 617 ¶3.
[12] PX 607 ¶19; PX 601 ¶¶14-15; PX 614 ¶14; PX 617 ¶10; PX 710 at 175-180; PX 860-001; PX 366-013.
[13] *See* PX 607 ¶3; PX 614 ¶6; PX 617 ¶4; PX 601 ¶¶4-5; PX 819-004.
[14] *See, e.g.*, PX 890-024; PX 601 ¶4; PX 607 ¶3; PX 615 ¶8.
[15] *See, e.g.*, PX 601 ¶6; PX 610 ¶5; PX 614 ¶7; PX 617 ¶7; PX 91-003; PX 713 at 49.
[16] PX 902-002; PX 854-007; PX 716 at 50; PX 709 at 129-130.
[17] PX 902-002; PX 115; PX 614 ¶13; PX 605 ¶12; PX 607 ¶¶4-6; PX 601 ¶12; PX 617 ¶6; PX 713 at 47-48; PX 711 at 65-67.
[18] PX 854-003. Steris does not currently offer any e-beam services, [redacted]. *Id.*

fourteen U.S. gamma facilities and two U.S. e-beam facilities.[19] Synergy is [redacted] provider of e-beam services in the United States, and the [redacted] sterilization provider in the world with almost three dozen gamma plants outside the United States.[20]

X-ray is a close competitive alternative to gamma because it has comparable, and possibly superior, depth of penetration and turnaround times.[21] These are the very attributes that led Synergy's founder and CEO, Richard Steeves, to [redacted].[22] Synergy operates an x-ray facility in Däniken, Switzerland[23] and [redacted] The expansion [redacted] By early October 2014, Synergy's Senior Executive Board ("SEB") had [redacted] Synergy had also [redacted][27] and negotiated a [redacted] agreement with [redacted] From October 7-9, Synergy held a [redacted]

[19] PX 607 ¶1. Sterigenics is the second-largest U.S. e-beam supplier.
[20] PX 895-004, 009; *see also* PX 819-004.
[21] *See* PX 391-028-029; PX 131-009; PX 155-016; PX 275-007, 055; PX 819-017-018; PX 603 ¶9; PX 601 ¶16; PX 709 at 76-78; PX 716 at 90-96.
[22] PX 102-001-002; PX 95-002.
[23] PX 708 at 22-23; *see also* PX 423-003.
[24] PX 819-006; *see also* PX 194-003.
[25] PX 94-038.
[26] PX 221-001; PX 574-002, 010; PX 194-002, 005; PX-0819-020-021; PX 715 at 129-130; PX 859. [redacted]. PX 704 at 32-36.
[27] *See, e.g.*, PX 880; PX 923; PX 328-002; PX 134-004; PX 128; PX 153-002; PX 571-005; PX 110-001.
[28] [redacted] *See* PX 859; PX 580-004; PX 603 ¶16.

[redacted].[29] Just one week later, Steris announced its agreement to purchase Synergy.[30]

ARGUMENT

Absent judicial intervention, the acquisition will eliminate the procompetitive benefits that would have resulted from Synergy's independent U.S. x-ray entry, leaving sterilization customers without an effective alternative to the current gamma duopoly. Section 13(b) of the FTC Act authorizes this Court to enjoin a potentially anticompetitive merger "[u]pon a proper showing that, weighing the equities and considering the [FTC's] likelihood of ultimate success, such action would be in the public interest."[31]

I. The FTC is Likely to Succeed on the Merits of Its Section 7 Challenge

The proposed merger likely violates Section 7 of the Clayton Act and Section 5 of the FTC Act. In this proceeding, the FTC "is not required to *establish* that the proposed merger would in fact violate Section 7"[32] nor is it the district court's task "to determine whether the antitrust laws have been or are about to be violated."[33] Rather, this Court is required only to "measure the probability that, after an administrative hearing . . . the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of section 7."[34] As the language suggests, Congress chose "the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with

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[29] *See* PX 400-001; PX 195; PX 544.
[30] PX 1.
[31] 15 U.S.C. § 53(b).
[32] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (citing *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)) (emphasis in original).
[33] *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (quoting *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring)); *accord, FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997); *FTC v. Bass Bros.*, No. C84-1304, 1984 WL 355, at *22 (N.D. Ohio June 6, 1984).
[34] *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18); *see also FTC v. ProMedica Health Sys., Inc.*, No. 311 CV 47, 2011 WL 1219281, at *53 (N.D. Ohio March 29, 2011) (quoting *Food Town Stores.*, 539 F.2d at 1342); *Bass Bros.*, 1984 WL 355, at *23.

probabilities, not certainties."[35] The Court's inquiry involves an assessment of both the immediate impact of the acquisition as well as a "prediction of its impact upon competitive conditions in the future," as Section 7 is "intended to arrest anticompetitive tendencies in their 'incipiency.'"[36] Thus, "certainty, even a high probability, need not be shown," and any "doubts are to be resolved against the transaction."[37] Courts typically assess whether a merger violates Section 7 by determining the relevant product market, the relevant geographic market, and the merger's probable effect on competition in those relevant markets.[38]

Absent the acquisition, Synergy's imminent entry with x-ray would have resulted in substantial procompetitive benefits. The "actual potential entrant" doctrine specifically addresses this type of situation: where a potential entrant merges with a firm already competing in the market and the effect lessens future competition.[39] Here, Synergy is a current e-beam provider in the United States and, absent the acquisition, it would have entered the U.S. with x-ray to compete directly with gamma. The acquisition of an actual potential competitor violates Section 7 if: (1) the relevant market is highly concentrated; (2) the competitor "probably" would have entered the market; (3) its entry would have had pro-competitive effects; and (4) there are few other firms that can enter effectively.[40]

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[35] *ProMedica Health Sys.*, 2011 WL 1219281, at *52 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (emphasis in original)).
[36] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (citing *Brown Shoe*, 370 U.S. at 317, 322).
[37] *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989); *see also Brown Shoe*, 370 U.S. at 323.
[38] *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *see also U.S. Steel Corp. v. FTC*, 426 F.2d 592, 595-96 (6th Cir. 1970). Courts often rely on the Merger Guidelines framework to assess how acquisitions impact competition. PX 901 (*U.S. Dep't of Justice & FTC Horizontal Merger Guidelines* (2010) (*Merger Guidelines*)); *see, e.g.*, *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014); *Bass Bros.*, 1984 WL 355, at *24.
[39] *See Marine Bancorp.*, 418 U.S. at 624-26; *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 56-61 (1973); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1232-34 (C.D. Cal. 1973). Synergy's current small presence in the U.S. radiation sterilization market understates its future competitive significance because it is one of the largest sterilization providers in the world and an actual potential entrant into the United States with x-ray.
[40] *See* Areeda & Hovenkamp, Antitrust Law IV ¶1121b (3d ed. 2006); *Yamaha*, 657 F.2d at 977; *Phillips Petroleum*, 367 F. Supp. at 1239.

A. The Contract Radiation Sterilization Market is Highly Concentrated

The Supreme Court has explained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[41] That is, courts look at "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other."[42] The Supreme Court has set forth a series of factors, or "practical indicia," to determine the contours of the relevant product market.[43] Courts also rely on the "hypothetical monopolist test" to define a relevant product market.[44] Based on these criteria, the relevant product market is no broader than contract radiation sterilization services; this includes contract gamma, x-ray, and e-beam sterilization services because other forms of sterilization, including EO, are not functional substitutes for radiation sterilization.[45] In-house radiation sterilization is also not a viable substitute for contract sterilization because most customers do not have the production volumes required to justify investing in sterilization facilities.[46]

Gamma is the predominant method of radiation sterilization because it is more effective than e-beam for most products.[47] Consequently, the [redacted]

[41] *Brown Shoe*, 370 U.S. at 325.
[42] *ProMedica*, 749 F.3d at 565 (quoting *FTC. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004)); *United States v. H&R Block*, 833 F. Supp. 2d 36, 50-51 (2011) (citation omitted); *see also Staples*, 970 F. Supp. at 1074.
[43] *Brown Shoe*, 370 U.S. at 325 (such factors include "industry or public recognition of a submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").
[44] *H&R Block*, 833 F. Supp. 2d at 51-52; *see also* PX 901-011-015 (*Merger Guidelines*) §§ 4.1.1-4.1.3.
[45] PX 902-002; PX 91-003; PX 390-006; PX 854-003; PX 607 ¶¶4-6; PX 601 ¶12; PX 603 ¶¶3-4; PX 709 at 49-51; PX 705 at 88-95; PX 703 at 60-61; PX 710 at 101, 104-105; PX 711 at 82-83; PX 702 at 78-79.
[46] PX 895-004; PX 860-001; PX 366-013; PX 607 ¶19; PX 601 ¶¶14-15; PX 614 ¶¶14-15; PX 605 ¶11; PX 702 at 96-99.
[47] The "outer boundaries" of the product market include all three forms of radiation sterilization because questions surrounding the long-term pricing and availability of gamma may make e-beam a more viable future alternative for some products currently sterilized with gamma. Steris, for example, believes it is uniquely positioned to [redacted] *See* PX 854-007.

[redacted] Contract x-ray sterilization services—which Synergy [redacted]—are likely the only competitive alternative for most customers who currently use contract gamma services. This is consistent with Synergy's "ordinary course" documents,[49] which [redacted].[51] Overall, Synergy's strategy was to present x-ray [redacted] Many U.S. customers could not switch from gamma to e-beam under any reasonable economic conditions, but Synergy expected they [redacted][53] Thus, this Court could analyze the effects of the merger in a narrower market—the sale of contract gamma and x-ray sterilization services to targeted customers.[54] However, whether the merger is evaluated in the radiation market or just that consisting of targeted customers, the result is the same: the merger will cause substantial competitive harm.

The relevant geographic markets—the areas affected by the acquisition—are each of the

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[48] PX 683-001-003; PX 682-001-009; PX 722-038-040; PX 72-001; PX 358; PX 607 ¶20; PX 712 at 123-128; PX 707 at 61-64; PX 710 at 158-165; PX 708 at 218.

[49] When defining the relevant market, "courts often pay close attention to the defendants' ordinary course of business documents." *H&R Block*, 833 F. Supp. 2d at 52; *see also Whole Foods*, 548 F.3d at 1045 (Tatel, J., concurring).

[50] PX 194-003; PX 102-001; PX 96-005; PX 114-003; PX 101-012-013; PX 893-001; PX 110-001; PX 109-001; PX 919-003-004, 041; PX 275-007, 061-064; PX 819-006-007; PX 112-037; PX 95-002; PX 891-005. Synergy already has an existing network of e-beam facilities in the United States, but it determined that it [redacted] PX 819-004.

[51] PX 159; PX 164; PX 541-002; PX 163-001; PX 197-001; PX 73-001; PX 709 at 129-130; PX 708 at 218.

[52] PX 220-002; *see also* PX 163-001; PX 275-032. *See H&R Block*, 833 F. Supp. 2d at 53 (developing "pricing and business strateg[ies] with [a particular] market and those competitors in mind" is "strong evidence" of a market).

[53] PX 614 ¶¶ 10, 17; PX 610 ¶¶ 6, 8; PX 601 ¶¶9, 17-19; PX 614 ¶17; PX 605 ¶10, 14-15; PX 606 ¶11; *see also* PX 902-002.

[54] *See* PX 901-009-010 (*Merger Guidelines*) §3 ("A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away."); *accord Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953) (relevant product markets "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn"); *Brown Shoe*, 370 U.S. at 325 ("submarkets may exist which, in themselves, constitute product markets for antitrust purposes"); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 935 (6th Cir. 2005); *H&R Block*, 833 F. Supp. 2d at 51-54; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 47 (D.D.C. 1998).

[redacted] regions where Synergy planned to build an x-ray sterilization facility between [redacted] and [redacted]. The test for assessing the bounds of the geographic market is the region in which "consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition."[55] The Supreme Court has stated that the relevant geographic market must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach."[56] Because transportation costs are a significant portion of the overall price of sterilization, contract radiation sterilization providers compete for customers located within approximately [redacted] miles of their plants.[57] Synergy planned to locate its [redacted] facility in the [redacted] in [redacted] and its [redacted] plant in [redacted] It then planned to open [redacted] additional facilities in [redacted]

Each of the [redacted] Synergy plants would have competed with Steris [redacted] facilities, and each market is highly concentrated under both the Merger Guidelines and the case law.[59] A market is considered to be "highly concentrated" under the Merger Guidelines when the HHI is

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[55] *Staples*, 970 F. Supp. at 1073. *See* PX 901-016-018 (*Merger Guidelines*) § 4.2. The relevant geographic markets "need not . . . be defined with scientific precision," *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974), or by precise "metes and bounds." *U.S. Steel Corp.*, 426 F.2d at 596 (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 331 (1961)).

[56] *Brown Shoe*, 370 U.S. at 336.

[57] *See* PX 604 ¶6; PX 702 at 195-196; PX 709 at 57-58; PX 705 at 148-150; PX 275-022, 033.

[58] PX 275-004-005. Synergy's [redacted] facility in the [redacted] would compete with Steris's [redacted] and [redacted] facilities. PX 819-047; PX 253; PX 124-008; PX 275-022; PX 703 at 87-88. The [redacted] facility would compete directly with Sterigenics's [redacted] facility, and it would also compete significantly with Steris's [redacted] facility. PX 819-049; PX 124-008. In [redacted], Synergy's other [redacted] facilities in [redacted] would compete with Steris's [redacted]

[59] These markets are far more concentrated than what is required for the actual potential competition doctrine to apply. *See Marine Bancorp*, 418 U.S. at 631 (a high degree of concentration establishes "a *prima* facie case that the . . . market [is] a candidate for the potential competition doctrine"); *Yamaha*, 657 F.2d at 974 (top four firms accounted for 99% and top two for 85%); *Phillips Petroleum*, 367 F. Supp. at 1253 (top four accounted for 58%).

above 2500.[60] The [redacted] market for contract radiation sterilization services currently has an HHI of over [redacted], while the other [redacted] markets—[redacted]—are also highly concentrated with HHIs ranging from at least [redacted] to more than [redacted] points.[61] Similarly, each relevant market for contract gamma and x-ray sterilization services sold to targeted customers is also highly concentrated: in the [redacted] contract gamma sterilization market in the [redacted] the current HHI level is approximately [redacted], and concentration levels in each of the other [redacted] geographic markets are even higher.

B. Synergy is an Actual Potential Entrant and its Entry Would Have Resulted in Substantial Deconcentration and Procompetitive Benefits

The Supreme Court has held that a firm is an actual potential entrant if: (1) it has an "available feasible means" for entering the relevant market; and (2) those means created "a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[62] Courts evaluate the likelihood of entry based on whether the competitor "probably" would have entered, since the question under Section 7 is whether competition "'may be' lessened substantially."[63] To determine a firm's feasible means of entry, courts analyze the intent, capability, and incentive of that firm with respect to the relevant market. Intent is assessed on the basis of subjective evidence (such as whether the firm seriously

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[60] Market concentration is measured by the HHI, or Herfindahl-Hirschman Index. PX 901-021-022 (*Merger Guidelines*) § 5.3; *ProMedica*, 749 F.3d at 568.
[61] *See* PX 275-004, 022, 028.
[62] *Marine Bancorp.*, 418 U.S. at 633; *accord Yamaha*, 657 F.2d at 977-78 (quoting *Marine Bancorp.*, 418 U.S. at 633); *Phillips Petroleum*, 367 F. Supp. at 1232.
[63] *Yamaha*, 657 F.2d at 977. This standard varies between circuits. Most adhere to the statutory standard under Section 7 and evaluate whether the effect of the merger "may be" to eliminate a potential competitor. *See Yamaha*, 657 F.2d at 977-79 ("probably"); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) ("would likely"); *Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 638 F.2d 1255, 1268-69 (5th Cir. 1981) ("reasonable probability"). The Fourth Circuit, in a case that preceded *Tenneco*, *Yamaha*, and *Mercantile Tex.* applied a higher standard. *See FTC v. Atl. Richfield Co.*, 549 F.2d 289, 294-95 (4th Cir. 1977) ("clear proof"). The Sixth Circuit has not addressed the issue. Here, evidence of Synergy's plans satisfies all of these standards.

studied or considered entry, its awareness of the need to diversify, and presentations made to the Board of Directors), while capability and incentive are assessed on the basis of objective evidence (size, financial capabilities, and management and marketing expertise).[64]

It is clear throughout Synergy's "ordinary course" documents that, prior to the acquisition, it [redacted]. Since [redacted], Synergy's founder and CEO, Dr. Richard Steeves, has been working on [redacted] Dr. Steeves was [redacted] because [redacted] By September of 2014, the SEB had [redacted], Synergy [redacted].[70] Synergy had also [redacted]; after only a few months, Synergy had [redacted],[71] and [redacted].[72] After the merger

[64] *See Falstaff*, 410 U.S. at 532-34; *Yamaha*, 657 F.2d at 978; *Phillips Petroleum*, 367 F. Supp. at 1242.
[65] PX 94-038.
[66] PX 92-035-036; *see also* PX 96-005.
[67] PX 95-002.
[68] PX 93-001; *see also* PX 92-010, 016; PX 891-005; PX 704 at 167-168; PX 922-001 [redacted]
[69] PX 400-001; PX 191-001, 004; PX 221-001; PX 101-013; PX 574-010; PX 95-002.
[70] PX 602 ¶¶10, 13; PX 194-008, 012; PX 95-002; PX 544.
[71] *See* PX 407-018; PX 826-002; PX 134-004; PX 328-002; PX 128-001; PX 923; PX 615 ¶¶19-20; PX 602 ¶12; PX 601 ¶21; PX 614 ¶¶18-19; PX 706 at 75-76.

announcement, Synergy pivoted [redacted] But Synergy also believed that [redacted]: as Synergy's CEO told his Steris counterpart, [redacted] Only after the FTC began investigating did Synergy [redacted]

For Synergy, x-ray was its [redacted] As the largest sterilization provider outside of the United States, and as the only company in the world with more than [redacted] years' experience operating a commercial x-ray facility and the ability to offer potential customers x-ray testing, Synergy was particularly well-positioned to introduce x-ray.[77] Synergy's agreement with [redacted] also gave it the technical prerequisite to make a substantial impact in the United States.[78]

Synergy's x-ray entry—derailed by the acquisition—would have provided U.S. radiation sterilization customers with the gamma alternative that they need, and Synergy's rollout would have resulted in significant deconcentration and procompetitive effects throughout the United

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[72] PX 610 ¶16; PX 614 ¶19; PX 163-001; PX 172-001. Johnson & Johnson's subsidiary, Ethicon, received the first FDA approval for x-ray sterilization with a Class III medical device. *See* PX 835-001; PX 836-002; PX 852-002. Other manufacturers would also like to validate their Class III products at Däniken. *See* PX 714 at 87.

[73] PX 248-001; PX 410-001; PX 407-019-21, 025; PX 112-037; PX 403-002.

[74] PX 109-001.

[75] By January 2015, Synergy was [redacted]. At a February 19 meeting with FTC staff, Andrew McLean [redacted] PX 202 ¶20. [redacted]. PX 863. Courts are rightly skeptical of such post-acquisition evidence precisely because it is subject to manipulation, as appears to have occurred here. *See Falstaff*, 410 U.S. at 563-70 (Marshall, J. concurring) (noting that such claims should be discounted as "inherently self-serving" and "viewed with skepticism"); *United States v. Siemens*, 621 F.2d 499, 508 (2d Cir. 1980); *Whole Foods*, 548 F.3d at 1047 (Tatel, J., concurring) (finding such post-acquisition evidence to be "all-but-meaningless"); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986).

[76] *Yamaha*, 657 F.2d at 978. *See* PX 704 at 109 [redacted]

[77] *See* PX 895-014; PX 819-036; PX 714 at 71-73; PX 603 ¶¶16-17.

[78] *See* PX 607 ¶15; PX 711 at 141-142; *see also* PX 819-005. Additionally, Synergy's [redacted]." PX 92-034; PX 819-034-036.

States.[79] "The crux of the entry effect is that if the company which enters the market by acquisition had entered unilaterally (de novo or by toehold acquisition), it would have supplied an additional competitive force."[80] Synergy expected to win [redacted] of the contract gamma sterilization business of [redacted] in the United States.[81] Thus, its entry would have dramatically decreased concentration in the overall contract radiation sterilization market, resulting in a drop in HHI of at least [redacted] points, which far exceeds the 200-point threshold required to create a presumption of competitive harm under the Merger Guidelines.[82] For contract gamma sterilization, Synergy's x-ray entry would have reduced concentration [redacted].[83] Moreover, Synergy planned to [redacted] Expecting [redacted] Customers, including [redacted], share [redacted] the importance of x-ray and have expressed concern that they will lose the benefits of lower prices, better quality

[79] Like the defendant in *Yamaha*, Synergy is a "well-established international firm with considerable financial strength," as well as "considerable marketing experience in the United States," thus Synergy's entry "would have had an *obvious* procompetitive effect" in the U.S. market. *Yamaha*, 657 F.2d at 979 (emphasis added).
[80] *Phillips Petroleum*, 367 F. Supp. at 1232.
[81] *See* PX 275-003; PX 544-004; *see also* PX 215-001 (the x-ray business case was [redacted]
[82] The significant deconcentration across the country is illustrative of, and consistent with, the effect in each of the relevant geographic markets. In the overall contract radiation sterilization market in the [redacted], Synergy's entry would have reduced HHI by more than [redacted] points.
[83] In the narrower contract gamma and x-ray sterilization services market in the [redacted], the HHI would have decreased by at least [redacted] points. PX 901-021-022 (*Merger Guidelines*) § 5.3. *See Bass Bros.*, 1984 WL 355 at *24 ("where 'concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.'") (quoting *Phila. Nat'l Bank*, 374 U.S. at 321, 365 n.42).
[84] PX 709 at 129-130; PX 714 at 90-91.
[85] PX 275-014; *see also* PX 607 ¶22.
[86] PX 221-001; PX 707 at 126.
[87] PX 194-011; *see also* PX 721-003; PX 919-040; PX 708 at 214-216, 220; PX 703 at 55-56.

services, and a better technology if the merger proceeds.[88]

C. Expansion by Other Firms is Unlikely to be Timely, Likely, or Sufficient

Entry by other firms will not be timely, likely, or sufficient to prevent the anticompetitive effects of the acquisition.[89] Entry into contract gamma sterilization is highly unlikely due to the high capital costs required, the uncertain future availability and pricing of Cobalt 60,[90] and the existence of high regulatory barriers.[91] There are few firms likely to enter, and no potential entrant can replicate the competition that Synergy would have provided.[92] Synergy has enormous entry advantages over other possible x-ray entrants as it [redacted].[93] Similarly, e-beam entry is unlikely—facilities are costly and difficult to build, and most gamma customers would not switch to e-beam.[94]

D. Defendants' Efficiencies Claims are Unverified and Not Merger-Specific

Courts apply strict requirements to claims that merger efficiencies outweigh anticompetitive effects, including that efficiencies are verifiable, credible, reliable, and not attainable without the anticompetitive effects of the transaction.[95] When a merger raises significant competitive concerns, as it does here, courts have expressly required "proof of extraordinary efficiencies."[96] Defendants' claimed efficiencies fall well short of what is required.

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[88] *See* PX 601 ¶22; PX 617 ¶18; PX 610 ¶¶17-18; PX 614 ¶¶17, 22; PX 605 ¶¶14-15, 17; PX 609 ¶¶21, 23, 25; PX 615 ¶17; PX 606 ¶15; PX 611 ¶17; PX 618 ¶11; PX 544-005; PX 99-012-013.

[89] PX 901-030-032 (*Merger Guidelines*) § 9. *See also H&R Block*, 833 F. Supp. 2d at 73; *CCC Holdings*, 605 F. Supp. 2d at 47; *Cardinal Health*, 12 F. Supp. 2d at 55; *Bass Bros.*, 1984 WL 355, at *25.

[90] Cobalt 60 is a significant gamma input.

[91] *See* PX 360-013; PX 725-023; PX 895-007; PX 703 at 122-123.

[92] [redacted] *See* PX 613 ¶2, 12, 16; PX 612 ¶¶2, 10; PX 608 ¶12, 12; PX 604 ¶8; PX 619 ¶6.

[93] *See supra* Section B; *see also* PX 275; PX 819-006, 025-027; PX 571-003; PX 897-002; PX 893-001; PX 580-004; PX 202 ¶2; PX 895-007.

[94] *See* PX 360-013; PX 903-001; PX 619 ¶6; PX 612 ¶12. The most likely e-beam entrant is [redacted] which only exacerbates the anticompetitive effects of this transaction. *See* PX 854-007.

[95] *Heinz*, 246 F.3d at 720; *see also CCC Holdings*, 605 F. Supp. 2d at 73; PX00901-032-034 (*Merger Guidelines*) § 10; *H&R Block*, 833 F. Supp. 2d at 89.

[96] *Heinz*, 246 F.3d at 720.

In a $1.9 billion transaction, Defendants have claimed only [redacted] in efficiencies, of which the vast majority are non-merger-specific overhead and other non-cognizable savings.[97] Much of the remaining savings accrues in markets other than those at issue here, and Defendants have not provided evidence that even those efficiencies would be passed on to consumers.[98]

II. The Equities Weigh Heavily in Favor of Preliminary Relief

Courts value the "public interest in effective enforcement of the antitrust laws."[99] Benefits to firms deserve "little weight, lest [the Court] undermine section 13(b)'s purpose of protecting the public-at-large, rather than the individual private competitors."[100] Allowing this merger to close before the completion of the administrative proceeding would cause irreparable harm by allowing the combined firm to begin altering Synergy's operations and business plans, accessing Synergy's sensitive business information, eliminating key Synergy personnel, and stalling Synergy's U.S. x-ray rollout efforts.[101] As a result, consumers would be denied the benefits of free and open competition, and later remedies would be inadequate to undo the harm if the transaction is subsequently found to be illegal in the FTC proceeding. Defendants' likely concern that "the transaction will not occur at all" is "a private consideration that cannot alone defeat [a] preliminary injunction."[102]

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[97] PX 17-012, 024-043; *see also* PX 701 at 48-56.
[98] PX 17-012, 047-048; PX 701 at 49.
[99] *ProMedica*, 2011 WL 1219281, at *60 (citing *Heinz*, 246 F.3d at 726).
[100] *Heinz*, 246 F.3d at 727 n.25 (citing *FTC v. University Health*, 938 F.2d 1206, 1225 (11th Cir. 1991) (quotation omitted)); *Bass Bros.*, 1984 WL 355, at *22 (private equities are not to be considered in determining whether to enjoin a merger) (citing *FTC v. Weyerhaeuser*, 655 F.2d 1072, 1083 (D.C. Cir. 1981).
[101] *See FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n. 5 (1966); *Bass Bros.*, 1984 WL 355, at *23; *Weyerhaeuser*, 665 F.2d at 1085-86 n.31 [redacted] *See* PX 863; PX 811-001; PX 899; PX 248-001.
[102] *Whole Foods*, 548 F.3d at 1041; *see also Heinz*, 246 F.3d at 726-27.

CONCLUSION

For these reasons, the FTC respectfully requests that this Court grant a temporary restraining order and preliminary injunction to prevent Steris from consummating its acquisition of Synergy pending the outcome of the FTC's administrative proceeding.

Dated: May 29, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby **CERTIFY** that, on the 29th day of May, 2015, I filed the foregoing Memorandum in Support of a Motion for Preliminary Injunction with the Clerk of the Court.

Peter Colwell
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Attorney for Plaintiff Federal Trade Commission

I hereby **CERTIFY** that, on the 29th day of May, 2015, I served the foregoing Motion for a Preliminary Injunction on the following counsel for Defendants via electronic mail:

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Exhibit F

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

LIBBEY INC., *et al.*,

Defendants.

Civil Action No. 02-0060 (RBW)

ORDER

This matter is before the Court on the Federal Trade Commission's ("Commission") motion for a preliminary injunction. Staff attorneys for the Commission filed the complaint in this matter on December 12, 2001, after being authorized to do so by the Commission. The complaint alleged that the merger agreement violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1995) ("FTCA"), and Section 7 of the Clayton Act, 15 U.S.C. § 21 (1995) ("Clayton Act"). On January 21, 2002, defendants amended the terms of the proposed merger, effectively abandoning the original proposed merger.[1] Consequently, the staff attorneys for the Commission filed an amended complaint alleging that the amended merger proposed on January 21, 2002, violated the same sections of the FTCA and the Clayton Act.

However, it is unclear from the amended complaint and the entire record whether it was filed with the authorization of the Commission. 15 U.S.C § 53(b) (1995) provides that:

[1] This is a conclusion already reached by the Court and the Court will not entertain further argument on this point. Thus, counsel are advised not to submit or propose to submit additional pleadings on this issue.

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice.

(emphasis added). The Court construes 15 U.S.C § 53(b) to require the Commission's authorization before its staff attorneys file an action challenging a proposed merger.[2] In other words, it is the Commission's affirmative decision to challenge a proposed merger that triggers the Court's jurisdiction to consider the legality of a proposed merger. Gordon v. National Youth Work Alliance, 675 F.2d 356, 363 n. 11 (D.C.Cir.1982) (The Court held that a court may, sua sponte, inquire into the basis for its jurisdiction); Save the Bay, Inc. v. U. S. Army, 639 F.2d 1100, 1102 (5th Cir. 1981) (holding that it is incumbent upon federal trial courts to constantly examine the basis of jurisdiction, doing so on its own motion if necessary).

Accordingly, it is this ___ day of March, 2002, hereby ORDERED that counsel for the Commission advise the Court in writing by 5:00 p.m., April 2, 2002, whether the Commission authorized a challenge of the proposed amended merger agreement.

SO ORDERED.

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[2] It is the Court's view that the Commission must similarly have authorized a challenge of the revised merger agreement for the Court to have jurisdiction over a challenge of it.

REGGIE B. WALTON
United States District Judge

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Exhibit G

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

From: Tabor, April
To: Klineberg, Geoffrey M.
Cc: Dolan, Reilly; Liu, Josephine; Tucci, Elizabeth
Subject: [EXTERNAL] RE: Declaration in Support of Recusal
Date: Thursday, August 19, 2021 3:13:09 PM

Mr. Klineberg,
Thank you for the submission of recusal petition of Facebook, Inc. and the supporting expert declaration of Professor Daniel B. Rodriguez. Your recusal petition and the supporting declaration has been procedurally reviewed for filing purposes. Rule 4.17 provides that disqualification or recusal of a Commissioner may be sought in any adjudicative (under Part 3 of the Rules of Practice) or rulemaking proceedings. 16 C.F.R. § 4.17(a). As there are currently no adjudicative or rulemaking proceedings before the Commission in which Facebook, Inc. is a subject, target, or defendant/respondent, this petition is premature under the Rules. Accordingly, this document has been rejected from filing for failure to comply with the Commission's rules. 16 C.F.R. 4.2(g).
Regards,
April Tabor

_____

April J. Tabor, Esq.
Federal Trade Commission
Office of the Secretary
202.326.3310 | atabor@ftc.gov

From: Tabor, April
Sent: Tuesday, August 17, 2021 2:03 PM
To: Klineberg, Geoffrey M. ; Khan, Lina ; Phillips, Noah ; Chopra, Rohit ; Slaughter, Rebecca ; Wilson, Christine
Subject: RE: Declaration in Support of Recusal
Mr. Klineberg:
By way of this email, I am acknowledging receipt.
Regards,
April Tabor

From: Klineberg, Geoffrey M.
Sent: Tuesday, August 17, 2021 2:01 PM
To: Khan, Lina ; Phillips, Noah ; Chopra, Rohit ; Slaughter, Rebecca ; Wilson, Christine ; Tabor, April
Subject: Declaration in Support of Recusal
Dear Chair Khan, Commissioners, and Secretary Tabor:
On behalf of Facebook, Inc., I am submitting to you the attached Expert Declaration of Professor Daniel B. Rodriguez in support of Facebook's Petition for Recusal (dated July 14, 2021). Thank you.

_____

Geoffrey M. Klineberg
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036
(202) 326-7928 (direct)

Exhibit H

to the Declaration of Mark C. Hansen in Support of Facebook, Inc.'s Motion to Dismiss the FTC's Amended Complaint in *Federal Trade Commission v. Facebook, Inc.*
Case No. 1:20-cv-03590-JEB (D.D.C.)

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate

August 19, 2021

Agency's amended complaint details how the monopolist survived existential threats by illegally acquiring innovative competitors and burying successful app developers

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FOR RELEASE

TAGS: Big Data | Technology | Bureau of Competition | Competition | Merger | Nonmerger | Single Firm Conduct | Unfair Methods of Competition

Today, the Federal Trade Commission filed an amended complaint against Facebook in the agency's ongoing federal antitrust case. The complaint alleges that after repeated failed attempts to develop innovative mobile features for its network, Facebook instead resorted to an illegal buy-or-bury scheme to maintain its dominance. It unlawfully acquired innovative competitors with popular mobile features that succeeded where Facebook's own offerings fell flat or fell apart. And to further moat its monopoly, Facebook lured app developers to the platform, surveilled them for signs of success, and then buried them when they became competitive threats. Lacking serious competition, Facebook has been able to hone a surveillance-based advertising model and impose ever-increasing burdens on its users.

"Facebook lacked the business acumen and technical talent to survive the transition to mobile. After failing to compete with new innovators, Facebook illegally bought or buried them when their popularity became an existential threat," said Holly Vedova, FTC Bureau of Competition Acting Director. "This conduct is no less anticompetitive than if Facebook had bribed emerging app competitors not to compete. The antitrust laws were enacted to prevent precisely this type of illegal activity by monopolists. Facebook's actions have suppressed innovation and product quality improvements. And they have degraded the social network experience, subjecting users to lower levels of privacy and data protections and more intrusive ads. The FTC's action today seeks to put an end to this illegal activity and restore competition for the benefit of Americans and honest businesses alike."

The FTC filed the amended complaint today in the U.S. District Court for the District of Columbia, following the court's June 28 ruling on the FTC's initial complaint. The amended complaint includes additional data and evidence to support

the FTC's contention that Facebook is a monopolist that abused its excessive market power to eliminate threats to its dominance.

According to the amended complaint, a critical transition period in the history of the internet, and in Facebook's history, was the emergence of smartphones and the mobile Internet in the 2010s. Facebook's CEO, Mark Zuckerberg, recognized at the time that "we're vulnerable in mobile" and a major shareholder worried that Facebook's mobile weakness "ran the risk of the unthinkable happening - being eclipsed by another network[.]"

After suffering significant failures during this critical transition period, Facebook found that it lacked the business talent and engineering acumen to quickly and successfully integrate its outdated desktop-based technology to the new era of mobile-first communication. Unable to maintain its monopoly or its advertising profits by fairly competing, Facebook's executives addressed this existential threat by buying up the new mobile innovators, including its rival Instagram in 2012 and mobile messaging app WhatsApp in 2014, who had succeeded where Facebook had failed. The company supplemented its anticompetitive shopping spree with an open-first-close-later scheme that helped cement its monopoly by severely hampering the ability of rivals and would-be rivals to compete on the merits. By anticompetitively cementing its personal social networking monopoly, Facebook has harmed the competitive process and limited consumer choice.

As described in the amended complaint, after starting Facebook Platform as an open space for third party software developers, Facebook abruptly reversed course and required developers to agree to conditions that prevented successful apps from emerging as competitive threats to Facebook. By pulling this bait and switch on developers, Facebook insulated itself from competition during a critical period of technological change. Developers that had relied on Facebook's open-access policies were crushed by new limits on their ability to interoperate. Facebook's conduct not only harmed developers such as Circle and Path, but also deprived consumers of promising and disruptive mavericks that could have forced Facebook to improve its own products and services.

The amended complaint bolsters the FTC's monopoly power allegations by providing detailed statistics showing that Facebook had dominant market shares in the U.S. personal social networking market. The suit also provides new direct evidence that Facebook has the power to control prices or exclude competition; significantly reduce the quality of its offering to users without losing a significant number of users or a meaningful amount of user engagement; and exclude competition by driving actual or potential competitors out of business.

Facebook's dominant position is also protected by significant barriers to entry, including high switching costs. Over time, users of a personal social network build more connections and develop a history of posts and shared experiences, which they cannot easily transfer to another personal social networking provider.

Other significant barriers to entry include user-to-user effects, known as network effects, which make a personal social network more valuable as more users join the service. As the amended complaint notes, it is very difficult for a new entrant to displace an established personal social network in which users' friends and family already participate.

According to the amended complaint, Facebook continues to monitor the industry for competitive threats to its personal social networking monopoly. Facebook is likely to impose anticompetitive conditions on access to its platform and seek to acquire companies it perceives as potential threats, especially when it next faces "acute competitive pressures from a period of technological transition," the amended complaint alleges.

The FTC's Office of General Counsel carefully reviewed Facebook's petition to recuse Chair Lina M. Khan. As the case will be prosecuted before a federal judge, the appropriate constitutional due process protections will be provided to the company. The Office of the Secretary has dismissed the petition.

The Commission vote to authorize staff to file the amended complaint in the U.S. District Court for the District of Columbia was 3-2. Commissioner Christine Wilson also issued a dissenting statement.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

PRESS RELEASE REFERENCE:

FTC Sues Facebook for Illegal Monopolization

Contact Information

MEDIA CONTACT:

Betsy Lordan
Office of Public Affairs
202-326-3707

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 1:20-cv-03590-JEB

[PROPOSED] ORDER GRANTING FACEBOOK, INC.'S MOTION TO DISMISS THE FTC'S AMENDED COMPLAINT

Upon consideration of Defendant Facebook, Inc.'s Motion To Dismiss the FTC's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, it is hereby:

ORDERED that the Motion To Dismiss the FTC's Amended Complaint be, and hereby is, **GRANTED**; and it is further

ORDERED that the FTC's Amended Complaint for Injunctive and Other Equitable Relief, ECF No. 82, be, and hereby is, **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED:_____

_____
Honorable James E. Boasberg
United States District Judge