IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREEDOM WATCH, INC., *individually and on behalf of those similarly situated*
2020 Pennsylvania Ave NW #345
Washington, DC, 20006

LAURA LOOMER, *individually and on behalf of those similarly situated*
Palm Beach, Florida

Plaintiffs,

v.

GOOGLE, INC.
160 Amiptheatre Parkway
Mountain View, CA, 94043

And

FACEBOOK, INC.,
1 Hacker Way
Menlo Park, CA, 94025

And

TWITTER, INC.,
1355 Market Street #900
San Francisco, CA, 94103

And

APPLE, INC.
1 Infinite Loop
Cupertino, CA, 95014

Defendants.

AMENDED CLASS ACTION COMPLAINT

1:18-cv-02030

I. INTRODUCTION AND CLASS ACTION ALLEGATIONS

Plaintiffs Freedom Watch, Inc. ("Freedom Watch") and Laura Loomer ("Ms. Loomer") (collectively "Plaintiffs"), individually and on behalf of all others similarly situated, bring this

suit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is defined as all politically conservative organizations, entities and/or individuals who create and/or distribute media content and advocacy who have experienced illegal suppression and/or censorship of their media content by Defendants. This class meets all the criteria required by Federal Civil Rule 23(a).

The members of the class are so numerous that joinder of all its members is impossible. There are likely to be hundreds or more class members in the United States and worldwide. Furthermore, common questions of fact and law exist as to all class members, including, but not limited to, whether Defendants are engaging in illegal suppression and censorship of politically conservative content. Plaintiffs' claims are typical of all of the claims of the respective class that it seeks to represent and Plaintiffs have no interests averse to the interest of the other members of the class, insofar as its injuries are substantially similar to those suffered by the other members of the class. Lastly, prosecution of separate actions of the hundreds, if not more, of potential members of this class would almost certainly result in inconsistent or varying adjudication, which would result in different standards of conduct being imposed upon Defendants by different courts.

II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332 (Diversity of Citizenship Jurisdiction) and 28 U.S.C. § 1331 (Federal Question Jurisdiction). This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d), as the amount in controversy exceeds the value of $1,500,000,000, this is a class action, and one or more Plaintiffs is a citizen of a state different from the state of citizenship of one or more of the Defendants.

2. This Court has supplemental jurisdiction over this case pursuant to 28 U.S.C. § 1367.

3. Venue is proper pursuant to 18 U.S.C. § 1965 and 28 U.S.C. § 1391(b)(2), (3) in that a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

4. Freedom Watch is incorporated in and does substantial business in the District of Columbia. Ms. Loomer is an individual and citizen of Florida and resides in this state.

III. PARTIES

Plaintiffs

5. Freedom Watch is a 501(c)(3) non-profit corporation that is incorporated in the District of Columbia.

6. Ms. Loomer is an individual and a citizen of the state of Florida

Defendants

7. Defendant Google, Inc. ("Google") is a corporation incorporated in the state of Delaware. Google does business in all 50 states, including the District of Columbia. Google owns the video streaming service, YouTube, and is therefore liable for the violative conduct of YouTube alleged herein.

8. Defendant Facebook, Inc. ("Facebook") is a corporation incorporated in the state of Delaware. Facebook does business in all 50 states, including the District of Columbia. Facebook owns the photo and video-sharing social networking service, Instagram, and is therefore liable for the violative conduct of Instagram alleged herein.

9. Defendant Twitter, Inc. ("Twitter") is a corporation incorporated in the state of Delaware. Twitter does business in all 50 states, including the District of Columbia.

10. Defendant Apple, Inc. ("Apple") is a corporation incorporated in the state of Delaware. Apple does business in all 50 states, including the District of Columbia.

IV. STANDING

11. Freedom Watch and Ms. Loomer, individually and those similarly situated, have standing to bring this action because they have been directly affected and victimized by the unlawful conduct complained herein. Their injuries are proximately related to the conduct of Defendants, acting in concert in restraint of trade and other unlawful acts, each and every one of them.

V. FACTS

Defendants' Suppression and Censorship of Conservative Content

12. It has been revealed that Defendants, each and every one them, have engaged in a conspiracy to intentionally and willfully suppress politically conservative content.

13. This conspiracy has resulted in severe financial loss, as well as unconstitutional suppression of speech and other content, for Freedom Watch and those similarly situated.

14. Acting in concert with traditional media outlets, including but not limited to Cable News Network ("CNN"), MSNBC, the New York Times and the Washington Post – all of whom are owned and/or managed by persons with a leftist political ideology, Defendants have intentionally and willfully suppressed politically conservative content in order to take down President Donald Trump and his administration with the intent and purpose to have installed leftist government in the nation's capital and the 50 states.

15. Defendants' goal is to use their position of influence and great market power – as set forth below – to re-craft the nation into their leftist design.

16. Indeed, many executives of Defendants and at CNN, MSNBC, the New York Times and the Washington Post, which outlets are not being suppressed and censored, are intricately connected with former President Barack Obama, former Secretary of State and presidential candidate Hillary Clinton, and former President Bill Clinton and still serve their interests, as well as those of other leftist politicians, through the media.

17. It has been widely reported and documented that Defendants have each, as part of the conspiracy described herein, actively, willfully, and intentionally and/or or through parallel concerted violative conduct suppressed conservative content in furtherance of their political agendas and those of their co-conspirators.

18. According to Senator Ted Cruz, as reported in the New York Times, "if internet companies are not a 'neutral platform,' they should not be protected by a law known as Section 230 of the Communications Decency Act, which (some claim) gives companies broad legal immunity for what people put on their services."[1]

19. In the same article, Rep. Kevin McCarthy stated, "Social media platforms are increasingly serving as today's town squares….But sadly, conservatives are too often finding their voices silenced."[2]

20. In an article from the National Review, it was revealed that each and every one of the Defendants have actively suppressed and censored conservative content.[3] (the "National Review Article").

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[1] Adam Santariano, *Trump Accuses Google of Burying Conservative News in Search Results*, N.Y. Times, Aug. 28, 2018, available at: https://www.nytimes.com/2018/08/28/business/media/google-trump-news-results.html

[2] *Id.*

[3] Ben Shapiro, *Viewpoint Discrimination with Algorithms*, National Review, Mar. 7, 2018, available at: https://www.nationalreview.com/2018/03/social-media-companies-discriminate-against-conservatives/

21. YouTube is one of the top three most visited websites globally (along with co-Defendant Facebook and its parent company, Google) and, as of 2017, it was used by over one billion users each month—almost one out of every two people on the Internet.

22. YouTube holds itself out to be a public forum for video-based speech in this district and all around the world, allowing users to upload videos viewable by anyone in the world, in order to share ideas, viewpoints, and ideologies.

23. Eighty-five percent of Americans watch videos online and more than 500 million hours of videos are watched on YouTube each day.

24. More video content has been uploaded to Google/YouTube by public users than has been created by the major U.S. television networks in 30 years

25. It was revealed that "YouTube has demonetized videos from conservatives while leaving similar videos up for members of the Left. For example, Prager University has watched innocuous videos titled 'Why America Must Lead,' 'The Ten Commandments: Do Not Murder,' and 'Why Did America Fight the Korean War' demonetized (i.e. barred from accepting advertisements) at YouTube's hands."[4]

26. YouTube has also demonetized the account of the conservative Western Journal, "accusing the account owners of 'duplicating content,' although the Google subsidiary declined to specify what material in particular violated the video platform's terms of service."[5]

27. As evidence of the political motivation behind YouTube's action, Shaun Hair of the Western Journal stated, "[w]e had zero copyright strikes and zero community guideline

[4] *Id.*
[5] Allum Bokhari, *YouTube Cuts Off Conservative News Org's Ad Revenue Without Explanation*, Breitbart, Aug. 24, 2018, available at: https://www.breitbart.com/tech/2018/08/24/youtube-cuts-off-conservative-news-orgs-ad-revenue-without-explanation/

strikes. Not even a recent warning. Youtube has on three occasions declined to explain or even give a single example of why duplication is other than generic language about copyright rules."[6]

28. YouTube has also targeted conservative pundit, Alex Jones of InfoWars, deleting his channel, which had "more than 2 million subscribers and many years' worth of video content."[7]

29. YouTube's parent company, Google, has even been accused by President Trump himself of bias against conservatives, and that search results on Google only reported "fake news" against him.[8]

30. In a study conducted by Paula Bolyard of PJ Media, it was revealed that an incredible 96% of Google search results for "Trump" news came from liberal media outlets, using the widely accepted Sharyl Attkisson media bias chart.[9]

31. In the same study, it was revealed that not a single conservative leaning site appeared on the first page of search results.[10]

32. The same article also examined another study conducted by "Can I Rank," which found that:

> … top search results were almost 40% more likely to contain pages with a 'Left' or 'Far Left' slant than they were pages from the right," Can I Rank found. "Moreover, 16% of political keywords contained no right-leaning pages at all within the first page of results.

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[6] *Id.*
[7] *Id.*
[8] Susan Heavey, *White House investigating Google after Trump accuses it of bias*, Reuters, Aug, 28, 2018, available at: https://www.reuters.com/article/us-usa-trump-tech/white-house-investigating-google-after-trump-accuses-it-of-bias-idUSKCN1LD1I1
[9] Paula Bolyard, *96 Percent of Google Search Results for 'Trump' News Are from Liberal Media Outlets*, PJ Media, Aug. 25, 2018, available at: https://pjmedia.com/trending/google-search-results-show-pervasive-anti-trump-anti-conservative-bias/
[10] *Id.*

33. As reported by the New York Times, "Larry Kudlow, the director of the National Economic Council and a longtime advocate of deregulation, appeared to back Mr. Trump when asked by reporters later on Tuesday whether the administration would be pursuing more regulation of Google. 'We'll let you know,' Mr. Kudlow said. "We're taking a look at it.'"[11]

34. The National Review Article also examined Facebook's political censorship:

> Facebook was slammed two years ago for ignoring conservative stories and outlets in its trending news; now Facebook has shifted its algorithm to downgrade supposedly "partisan" news, which has the effect of undercutting newer sites that are perceived as more partisan, while leaving brand names with greater public knowledge relatively unscathed. Facebook's tactics haven't just hit conservative Web brands — they've destroyed the profit margins for smaller start-ups like LittleThings, a four-year-old site that fired 100 employees this week after the algorithm shift reportedly destroyed 75 percent of the site's organic reach (the number of people who see a site's content without paid distribution)

35. Furthermore, as documented in an article published on www.gizmodo.com in 2016 titled "Former Facebook Workers: We Routinely Suppressed Conservative News," [12] "Facebook workers routinely suppressed news stories of interest to conservative readers from [its] influential "trending" news section…." (the "Gizmodo Article").

36. The Gizmodo Article was published after interviews with former Facebook "news curators," who were "instructed to artificially 'inject' selected stories into the trending news module, even if they weren't popular enough to warrant inclusion—or in some cases weren't trending at all."

37. The Gizmodo Article further explains that Facebook's "news curators" routinely suppressed topics that were of interest to conservative and thus Republican-oriented readers. One curator that was interviewed was "so troubled by the omissions that they kept a running log of

[11] Santariano, *supra* note 1.
[12] Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, Gizmodo, May 9, 2016, available at: https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006.

them at the time…. Among the deep-sixed or suppressed topics on the list: former IRS official Lois Lerner, who was accused by Republicans of inappropriately scrutinizing conservative groups; Wisconsin Gov. Scott Walker; popular conservative news aggregator the Drudge Report; Chris Kyle, the former Navy SEAL who was murdered in 2013; and former Fox News contributor Steven Crowder."

38. This "news curator" stated, "I believe it had a chilling effect on conservative [and thus Republican] news."

39. The Gizmodo article revealed that "[s]tories covered by conservative outlets (like Breitbart, Washington Examiner, and Newsmax) that were trending enough to be picked up by Facebook's algorithm were excluded unless mainstream sites like the *New York Times*, the BBC, and CNN covered the same stories."

40. Another "news curator" stated, "It was absolutely bias. We were doing it subjectively. It just depends on who the curator is and what time of day it is…. Every once in awhile a Red State or conservative news source would have a story. But we would have to go and find the same story from a more neutral outlet that wasn't as biased."

41. This clearly demonstrated bias against conservative and Republican oriented news stories and outlets has been manifest in Facebook's new algorithm change, which was effected in 2018, and has in effect censored conservative-leaning publishers on Facebook.

42. A study conducted by Western Journal found that since the algorithm change, "Liberal publishers have gained about 2 percent more web traffic from Facebook than they were getting prior to the algorithm changes implemented in early February. On the other hand,

conservative [and thus Republican] publishers have lost an average of nearly 14 percent of their traffic from Facebook."[13] (the "Study").

43. According to the Study, after removing the 15 publishers with the least traffic from Facebook (from the original 50 outlets analyzed), the 12 most conservative sites lost an average of 27.06 percent of their traffic from Facebook.

44. On the other hand, "Of the 12 most liberal sites, six saw double-digit decreases in traffic, while four saw double-digit increases and two — The Washington Post and HuffPo — saw single-digit increases. CNN's traffic increased 43.78 percent."

45. These results are not coincidental. "Campbell Brown, a former anchor on NBC and CNN who now leads Facebook's news partnerships team, told attendees at a recent technology and publishing conference that Facebook would be censoring news publishers based on its own internal biases."[14]

46. Ms. Brown incredibly admitted:

> "This is not us stepping back from news. This is us changing our relationship with publishers and emphasizing something that Facebook has never done before: **It's having a point of view**, and it's leaning into quality news. … We are, for the first time in the history of Facebook, taking a step to try to to define what 'quality news' looks like and give that a boost." (Emphasis added.)[15]

47. It is clear from the results shown in the Study, as well as the biases and prejudices detailed in the Gizmodo Article, that the "point of view" referred to by Ms. Brown is one that censors conservative content while propping up liberal content.

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[13] George Upper, *Confirmed: Facebook's Recent Algorithm Change Is Crushing Conservative Sites, Boosting Liberals*, The Western Journal, Mar. 13, 2018, available at: https://www.westernjournal.com/confirmed-facebooks-recent-algorithm-change-is-crushing-conservative-voices-boosting-liberals/.

[14] *Id.*

[15] *Id.*

48. Thus, Facebook is not the neutral social media platform that it holds itself out to be, and its end users are precluded from seeing news and stories of interest to them if the happen to lean conservatively.

49. The National Review Article also revealed that Twitter, "has banned nasty accounts perceived as right-wing while ignoring similar activity from the left."

50. As the National Review Article reported, "James O'Keefe recently exposed the practice of 'shadowbanning,' in which Twitter hides particular content or mutes particular hashtags for political purposes. That's no coincidence: Twitter head Jack Dorsey is an ardent leftist who has campaigned with radicals like Black Lives Matter founder DeRay Mckesson, and whose company relies on the input of an Orwellian Trust and Safety Council staffed thoroughly with left-wing interest groups.

Facts Pertaining to Directly to Freedom Watch

51. Freedom Watch is a leading conservative non-profit public interest organization that operates its own website, a YouTube channel as Freedom Watch TV, a Twitter account, and Podcasts on Apple's network. The chairman and general counsel of Freedom Watch, Larry Klayman, is also the founder of Judicial Watch and previously was a trial attorney and prosecutor in the Antitrust Division of the U.S. Department of Justice ("DOJ"). He was an integral member of the Antitrust Division's trial team that broke up the AT&T monopoly during the Reagan administration.

52. Freedom Watch has and still does pay Google and YouTube, Facebook and the other Defendants for services to promote and advertise its media content in order to inform the public about its conservative advocacy and to raise the funds through donations to further its public advocacy and mission.

53. Freedom Watch had experienced steady growth in both audience and revenue generated through these platforms for many years, until the recently reported suppression of conservative content set forth above, which grew more pronounced and severe approximately eight months ago, notably after the election of President Donald J. Trump and as the so-called Russian collusion and obstruction of justice investigation of Special Counsel Robert Mueller was publically attacked by the president and other conservatives as a continuing leftist inspired "witch hunt." Freedom Watch also has a "Leftist Media Strike Force" which was created to combat discrimination against conservative media content and advocacy, and has several pending lawsuits which seek to further justice and the rule of law, which it maintains is being compromised by the Defendants herein, as well as other left-leaning interests. See www.freedomwatchusa.org, which is incorporated herein by reference.

54. Since Defendants, each and every one of them, have begun their conspiracy to intentionally and willfully, and/or acting in concerted parallel fashion, to suppress conservative content and refuse to deal with Freedom Watch, Freedom Watch's growth on these platforms has come to a complete halt, and its audience base and revenue generated has either plateaued or diminished.

55. For instance, the number of subscribers to Freedom Watch's YouTube channel has remained static and is now declining especially over the last several months, after years of steady grown, which simply cannot be a coincidence given the facts set forth in the previous section.

56. The amount of revenue generated by Freedom Watch is a direct and proximate result of the number of people who engage with its content on YouTube, Twitter, Facebook, and Apple.

57. Since Defendants have begun suppressing and censoring Freedom Watch's content on these platforms, Freedom Watch has suffered a dramatic loss in viewership and user engagement, and this has led directly and proximately to a dramatic loss in revenue.

58. Since Defendants have begun suppressing and censoring Freedom Watch's content on these platforms, Freedom Watch has suffered a dramatic loss in viewership and user engagement, and this has led directly and proximately to a dramatic loss in revenue.

59. Indeed, whereas Freedom Watch's YouTube videos often reach over 100,000, with a substantially positive "like" to "dislike" ratio, it is losing subscribers each and every day from over 70,000 to under 69,000, which has directly and proximately led to led to a substantial drop in revenue. This is the result of the illegal and anti-competition actions as pled herein.

60. This is evidence that YouTube is suppressing and censoring Freedom Watch's content to prevent it from obtaining new subscribers, or even removing Freedom Watch's subscribers unilaterally.

61. Defendants' conspiracy to suppress conservative content has directly and proximately caused Freedom Watch significant financial injury, as well as injury in the form of suppression of speech and ideas in furtherance of its conservative public interest advocacy.

62. Not only is Freedom Watch a user and consumer of Defendants' platforms, it is also a competitor, insofar as it creates its own original media content in the form of videos, articles, and podcasts and other audio media, such as radio, which are distributed via the internet in this district, and both nationwide and worldwide.

Facts Pertaining Directly to Laura Loomer

63. Ms. Loomer is a well-known conservative investigative journalist and political activist.

64. Ms. Loomer is a conservative activist and Jewish woman.

65. In the past, Ms. Loomer has worked for Canadian news publisher, The Rebel Media, as well as Project Veritas.

66. Renowned political consultant and strategist Roger Stone said of Ms. Loomer:

> Laura Loomer is the most fearless investigative journalist working today. Loomer is unafraid to confront and expose the connected and powerful. Frankly, Laura Loomer has bigger journalistic cojones than many of her male counterparts-combine that with her energy and passion for truth and you have a force that must be reckoned with by the MSM

67. As of November 21, 2018, Ms. Loomer had over 260,000 followers on Twitter.

68. On November 21, 2018, Twitter permanently and without cause banned Ms. Loomer from its platform for the following tweet:

> Ilhan is pro Sharia Ilhan is pro- FGM Under Sharia homosexuals are oppressed & killed. Women are abused & forced to wear the hijab. Ilhan is anti Jewish

69. Facebook subsequently banned Ms. Loomer for 30 days.

70. Ms. Loomer's tweet refers to Rep. Ilhan Omar ("Rep. Omar"), who was elected to Congress from Minnesota and will take office in January of 2019.

71. Indeed, Ms. Loomer's tweet simply contained facts about Sharia law, which Rep. Omar is known to support. The tweet pointed out the fact that which pointed out that Rep. Omar's support of Sharia law does not make her an ally for gay people, women, or Jews.

72. For instance, "[i]n Iran, Sudan, Saudi Arabia and Yemen, homosexuality is still punishable by death, under sharia law. The same applies in parts of Somalia and northern

Nigeria. In two other countries – Syria and Iraq – the death penalty is carried out by non-state actors, including Islamic State."[16]

73. Rep. Omar herself has tweeted anti-Semitic sentiments, yet has faced no discipline from any of Defendants' platforms:

> Israel has hypnotized the world, may Allah awaken the people and help them see the evil doings of Israel. #Gaza #Palestine #Israel[17]

74. In stark contrast, Twitter refused to take any action against the vile anti-Semite and anti- white Louis Farrakhan for referring to Jewish persons as "termites."[18]

75. Twitter also refused to remove tweets and ban known terrorist organizations, including Hamas,[19] whose leaders have openly called for the mass-scale extermination of Jewish people[20] and who even brutally executed one of its own prominent commanders on accusations of homosexuality.[21] It also entertains tweets from the Muslim Brotherhood and the terrorist connected Council for American Islamic Relations ("CAIR").

76. This glaring contrast in behavior is conclusive evidence of discriminatory intent and restraint of trade against those who share conservative beliefs and those of Jewish origin.

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[16] *Gay relationships are still criminalised in 72 countries, report finds*, The Guardian, Jul. 27, 2017, available at: https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report.
[17] https://twitter.com/ilhanmn/status/269488770066313216?lang=en
[18] Megan Keller, *Twitter says it won't suspend Louis Farrakhan over tweet comparing Jews to termites*, The Hill, Oct. 17, 2018, available at: https://thehill.com/policy/technology/411950-twitter-says-it-wont-suspend-louis-farrakhan-over-tweet-comparing-jews-to.
[19] https://twitter.com/HamasInfoEn?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor
[20] Adam Ragson, *Hamas official urges killing all Zionist Jews, praises 'peaceful' Gaza protests*, The Times of Israel, Jul. 26, 2018, available at: https://www.timesofisrael.com/hamas-official-urges-killing-of-zionist-jews-praises-peaceful-gaza-protests/
[21] Jack Moore, *Hamas Executes Prominent Commander After Accusations of Gay Sex*, Mar. 2 2016, available at: https://www.newsweek.com/prominent-hamas-commander-was-executed-after-accusations-gay-sex-432343

77. Whereas Ms. Loomer was banned for tweeting facts about Sharia law, Mr. Farrakhan was allowed to refer to Jewish persons as termites without any repercussion.

78. Even those who strongly oppose Ms. Loomer's viewpoints have taken issue with Ms. Loomer's "relatively illogical ban."[22] Indeed, Twitter's discriminatory motive and behavior is so evident that even a columnist who calls Ms. Loomer a "hack" has defended Ms. Loomer against Twitter.

79. Ms. Lowe correctly writes:

> That said, the line for banning someone from an open platform should be clear and consistent. News organizations are liable for the content they publish because they are specifically publishers. Open platforms are not. But if the likes of Facebook and Twitter are moving into the business of publishing, choosing which content creators they will ban and which they will lend platforms, then they should lawyer up and get ready to be taken to court.[23]

80. Ms. Lowe even defends the veracity of the facts asserted in Ms. Loomer's tweet, writing, "[b]ut Loomer is not wrong that Omar has openly spread the anti-Semitic conspiracy theory that Jewish Zionists posses hypnotic powers. Nor is she wrong that Sharia law is inherently homophobic and sexist."[24]

81. As a direct and proximate result of Defendants' illegal discriminatory conduct as actionable herein, Ms. Loomer has and will continue to suffer severe financial injury, as the loss of her over 260,000 Twitter followers and Facebook account will prevent her from reaching her audience with her investigative work.

Defendants' Market Power and Antitrust Allegations

[22] Tiana Lowe, *Twitter has banned the idiotic Laura Loomer for an innocuous tweet*, Washington Examiner, Nov. 22 2018, available at: https://www.washingtonexaminer.com/opinion/twitter-has-banned-the-idiotic-laura-loomer-for-an-innocuous-tweet
[23] *Id.*
[24] *Id.*

82. Defendants have entered into an illegal agreement to refuse to deal with conservative news and media outlets, such as Freedom Watch and those similarly situated, as well as to suppress media content and advocacy, which has no legitimate business justification and is plainly anticompetitive.

83. This illegal agreement is evidenced by the fact that Freedom Watch began losing users on each of Defendants platforms at or around the same time, around eight months ago, notably after the election of President Donald J. Trump and as the so-called Russian collusion and obstruction of justice investigation of Special Counsel Robert Mueller was publically attacked by the president and other conservatives as a continuing leftist inspired "witch hunt."

84. Defendants' agreement has a plainly anti-competitive effect and has no rational economic justification, as they are willing to lose revenue from conservative organizations and individuals like Freedom Watch and those similarly situated to further their leftist agenda and designs to effectively overthrow President Trump and his administration and have installed leftist government in this district and the 50 states.

85. Alternatively, Defendants, who are and should be competitors to each other, have engaged in "conscious parallelism" insofar as they have each mimicked each others' refusal to deal with Freedom Watch and those similarly situated in order to set, control, and establish the relevant market, as defined below.

86. There is no legitimate independent business reason for Defendants "conscious parallelism," as they are losing revenue from conservative organizations and individuals like Freedom Watch and those similarly situated.

87. Facebook is the leading and the largest social media network in the world, with a social network global market share of 69.97 percent as of March, 2018.[25]

88. Facebook has the largest market share in the United States for social networking advertising revenue, at 79.2% in 2018 thus far.[26] Facebook has held at least a 73.9% market share in advertising revenue since at 2015.

89. In 2017, Facebook held a market share of 20.9% of the net United States digital ad revenues, as well as 26.8% of the net United States mobile ad market.[27]

90. In conjunction with Google, Facebook makes up 63.1% of total United States digital advertising revenues.

91. Facebook's CEO, Mr. Zuckerberg, testified before a joint session between the Senate Judiciary and Commerce committees on April 10, 2018.

92. During his testimony, Zuckerberg struggled to name a single competitor to Facebook.[28]

93. The Verge published a transcript of the line of questioning on this topic:

> **Sen. Lindsey Graham:** Who's your biggest competitor?
> **Mark Zuckerberg:** Uh, senator, we have a lot of competitors.
> **LG:** Who's your biggest?
> **MZ:** The categories… do you want just one? I am not sure I can give one but can I give a bunch? There are three categories that I would focus on. One are the other tech platforms: Google, Apple, Amazon, Microsoft, we overlap with them in different ways.
> **LG:** Do they provide the same service you provide?

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[25] http://gs.statcounter.com/social-media-stats
[26] https://www.statista.com/statistics/241805/market-share-of-facebooks-us-social-network-ad-revenue/
[27] https://www.emarketer.com/Article/Google-Facebook-Tighten-Grip-on-US-Digital-Ad-Market/1016494
[28] Sarah Jeong, *Zuckerberg struggles to name a single Facebook competitor*, The Verge, Apr. 10, 2018, available at: https://www.theverge.com/2018/4/10/17220934/facebook-monopoly-competitor-mark-zuckerberg-senate-hearing-lindsey-graham

> **MZ:** In different ways.
> **LG:** Let me put it this way. If I buy a Ford, and it doesn't work well, and I don't like it, I can buy a Chevy. If I'm upset with Facebook, what's the equivalent product I can go sign up for?
> **MZ:** Well, the second category I was going to talk about…
> **LG:** I'm not talking about categories. I'm talking about real competition you face. 'Cause car companies face a lot of competition. They make a defective car, it gets out in the world, people stop buying that car, they buy another one. Is there an alternative to Facebook in the private sector?
> **MZ:** The average American uses eight different apps to communicate with their friends and stay in touch with people ranging from text to email—
> **LG:** Which is the same service you provide?
> **MZ:** Well, we provide a number of different services.
> **LG:** Is Twitter the same as what you do?
> **MZ:** It overlaps with a portion of what we do.
> **LG:** You don't think you have a monopoly?
> **MZ:** It certainly doesn't feel like that to me.[29]

94. Sarah Miller ("Miller"), the Deputy Director of the Open Markets Institute, has plainly stated that Facebook is a "corporate monopoly."[30]

95. Miller reasons, "[t]here is no other social media company today that has the enormous global reach combined with the personal intimacy and immediate engagement of Facebook. There are more than 200 million users in the United States, with more than half of all American adults accessing it every day, and almost 2 billion worldwide. It accounts for 77 percent of mobile social networking traffic in the U.S. Through its ownership of WhatsApp and Instagram, that reach is even greater."[31]

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[29] *Id.*
[30] Sarah Miller, Matt Stoller, *Facebook Can't Be Fixed, It Needs To Be Broken Up*, The Daily Beast, Apr. 10, 2018, available at: https://www.thedailybeast.com/facebook-cant-be-fixed-it-needs-to-be-broken-up
[31] *Id.*

96. "Facebook is also the leading way that most Americans get their news. According to the Pew Research Center, just shy of half of all Americans get their news on Facebook – far more reach than any other social media site."[32]

97. In another study, it was revealed back in 2016 that 59% of Twitter users get their news through the Twitter platform.[33] The same study found that 48% of all American adults got their news from Facebook, 10 % from YouTube, and 16% from Twitter, meaning a total of 74% of American adults get their news from Defendants' platforms.

98. The relevant market is the market for media and news publications (and the submarket for political media and news publications).

99. The geographic markets are in this district and nationwide and worldwide.

100. Defendants collectively have obtained monopoly power in the relevant markets through exclusionary conduct that has severely harmed competition.

101. As set forth in the both the foregoing and the following sections, Defendants have engaged in a refusal to deal with Freedom Watch and Ms. Loomer and those similarly situated that has no viable economic justification and is plainly anticompetitive.

102. Similarly, the violative conduct of Defendants has resulted in a worse quality of services for its consumers who tend to lean conservatively and, as set forth in this Amended Complaint, lack any normal business justification.

FIRST CAUSE OF ACTION

Violation of Section 1 of the Sherman Act – Illegal Agreement in Restraint of Trade

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[32] *Id.*

[33] Jeffrey Gottfried, Elisa Shearer, *News Use Across Social Media Platforms 2016*, Journalism, May 26, 2016, available at: http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/

103. Plaintiffs reallege and incorporate herein by reference each and every foregoing paragraph of this Amended Complaint as if set forth in full.

104. Section 1 of the Sherman Antitrust Act states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

105. Defendants, each and every one of them, have conspired and illicitly agreed to refuse to deal and suppress media content and advocacy from Freedom Watch, Ms. Loomer and those similarly situated members of the class.

106. Alternatively, Defendants, each and every one of them, have engaged in "conscious parallelism" and in concert mimicked each others' refusal to deal with Freedom Watch and Ms. Loomer and those similarly situated in order to set, control, and establish the relevant market, as defined above.

107. Defendants' agreement unreasonably restrains competition insofar as it has no legitimate business justification. Defendants are losing significant revenue from conservative groups and individuals like Freedom Watch and Ms. Loomer and those similarly situated members of the class.

108. Defendants are accepting this temporary loss of revenue in order to set, control, and dominate the relevant market, as defined above.

109. Defendants' illegal agreement affects interstate commerce because Freedom Watch and Ms. Loomer and those similarly situated have a nationwide and worldwide reach for their conservative media content and advocacy.

110. There is a significant negative impact on the relevant market because consumers' access to conservative media and news content is severely limited and suppressed as a result of Defendants' agreement and/or "conscious parallelism."

WHEREFORE, Freedom Watch and Ms. Loomer respectfully request that this Court enter judgment against Defendants in a sum to be determined by a jury, grant preliminary and permanent injunctive relief, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

SECOND CAUSE OF ACTION
Violation of Section 2 of the Sherman Act

111. Plaintiffs reallege and incorporate herein by reference each and every foregoing paragraph of this Amended Complaint as if set forth in full.

112. Defendants have targeted media and news publications such as lead plaintiff Freedom Watch and Ms. Loomer and those members of the class that have the potential to compete with it and thereby to erode its monopoly.

113. Defendants have willfully engaged, and is engaging, in an exclusionary course of conduct, and there is a dangerous probability that, unless restrained, it will succeed, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

114. Defendants have acted with a specific intent to monopolize, and to destroy effective competition in the relevant market for media and news publications.

WHEREFORE, Freedom Watch and Ms. Loomer respectfully request that this Court enter judgment against Defendants in a sum to be determined by a jury, grant preliminary and permanent injunctive relief, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

THIRD CAUSE OF ACTION

Discrimination in Violation of D.C. Code § 2-1403.16 ("DCHRA")

115. Plaintiffs incorporate herein by reference each and every foregoing paragraph of this Amended Complaint as if set forth in full.

116. The DCHRA makes discrimination illegal based on 20 different traits for people that live, visit, or work in the District of Columbia.

117. Among the traits protected under the DCHRA are "Political Affiliation" and "Religion."

118. Defendants, each and every one of them, acting in concert, are discriminating against Plaintiffs because of its perceived conservative advocacy which is perceived by them to further the interests of what is perceived to be an affiliated Republican Party.

119. Defendants, each and every one of them, acting in concert, are discriminating against Freedom Watch and Ms. Loomer because of her Jewish faith. Not coincidentally the founder and chairman and general counsel of Freedom Watch is also of Jewish origin.

120. Defendants have denied Plaintiffs the full and equal enjoyment of the services, privileges, and advantages that they provide to persons which they perceive to not be affiliated with the Republican Party or of Jewish faith.

121. Defendants have indicated that full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations will be unlawfully refused, withheld from or denied to Plaintiffs and that its patronage of Defendants' platforms is objectional, unwelcome, unacceptable, or undesirable.

122. Defendants qualify as "public accommodation[s]," as defined by the DCHRA, as an "establishment…dealing with services of any kind…."

WHEREFORE, Freedom Watch and Ms. Loomer respectfully request that this Court enter judgment against Defendants in a sum to be determined by a jury, grant preliminary and permanent injunctive relief, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

FOURTH CAUSE OF ACTION

Violation of the First Amendment to the Constitution and/or 42 U.S.C. § 1983

123. Plaintiffs reallege and incorporate herein by reference each and every foregoing paragraph of this Amended Complaint as if set forth in full.

124. The First Amendment of the United States Constitution protects the freedom of speech and association, and against viewpoint discrimination in the access and use of public spaces, quasi-public spaces, and limited public spaces.

125. Defendants created, operate, and control public platforms that are for public use and public benefit and invite the public to utilize their platforms as a forum for free speech.

126. Defendants act as quasi-state actors because they regulate their public platforms, thereby regulating free speech within their public forums, Google/YouTube, Facebook, and Twitter, Apple, Instagram as well as the other social media companies or entities.

127. Defendants, each and every one of them acting in concert, have deprived Plaintiffs and those similarly situated of its constitutional rights by censoring its content for purely political reasons. Defendants' censorship is arbitrary and capricious, and is purely viewpoint based.

128. There exists no compelling, significant, or legitimate reason for the suppressing and censoring of Freedom Watch's and Ms. Loomer's content as well as the other members of the class.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of itself and the other members of the class pray for relief and judgment against Defendant as follows:

(a) For general (non-economic), special (economic), actual and compensatory and punitive damages in excess of $ 1,500,000,000.00;

(b) For injunctive relief preventing Defendants, each and every one of them, acting in concert and individually as joint tortfeasors from discriminating against, refusing to deal, suppressing media content and advocacy, censoring Freedom Watch and Ms. Loomer and those similarly situated members of the class.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all counts as to all issues so triable.

Dated: December 5, 2018

Respectfully submitted,

/s/ Larry Klayman

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREEDOM WATCH, INC. *et al.*, Plaintiffs, v. **GOOGLE, INC. *et al.***, Defendants.	Case No. 1:18-cv-02030 (TNM)

MEMORANDUM OPINION

This case is brought by conservative activists who allege that America's major technology firms have conspired to suppress their political views. The Plaintiffs raise non-trivial concerns. But because they have failed to tie these concerns to colorable legal claims, the Court must dismiss their Amended Complaint.

I.

Freedom Watch and Laura Loomer accuse Google, Facebook, Twitter, and Apple (collectively, the "Platforms") of working together to "intentionally and willfully suppress politically conservative content." Am. Compl. 4. Freedom Watch describes itself as a "conservative non-profit public interest organization." Am. Compl. 11. It operates YouTube,[1] Facebook, Twitter, and Apple accounts through which it publishes and promotes media content. *Id*. This content seeks to "inform the public about [Freedom Watch's] conservative advocacy" and to raise funds to further its mission. *Id*.

[1] YouTube is a video-sharing website owned by Google.

Freedom Watch "experienced steady growth in both audience and revenue generated through these platforms for many years." *Id*. at 12. This changed, the organization suggests, following the "suppression of conservative content," which "grew more pronounced and severe . . . after the election of President Donald J. Trump." *Id*. Freedom Watch alleges that its "growth on these platforms has [since] come to a complete halt, and its audience base and revenue generated has either plateaued or diminished." *Id*.

Like Freedom Watch, Ms. Loomer has a Facebook account. *Id*. at 16. Until recently, she also maintained a Twitter account with over 260,000 followers. *Id*. at 14. She describes herself as a "conservative investigative journalist and political activist," *id*. at 13, and she uses her social media accounts to "reach[] her audience with her investigative work." *Id*. at 16. Ms. Loomer claims that Twitter banned her "permanently and without cause" after she posted a tweet about Congresswoman Ilhan Omar, a Democrat. *Id*. at 14. After this tweet, "Facebook subsequently banned [her] for 30 days." *Id*. Because of these alleged actions, Ms. Loomer "has and will continue to suffer severe financial injury." *Id*. at 16.

The Plaintiffs believe that the Platforms' conduct violates several laws. First, they argue that the Platforms "have entered into an illegal agreement to refuse to deal with conservative news and media outlets . . . as well as to suppress media content and advocacy." *Id*. at 17. This purported agreement is "evidenced by the fact that Freedom Watch began losing users on each of Defendants[']' platforms at or around the same time." *Id*. And because it has "no legitimate business justification and is plainly anticompetitive," *id*., the agreement violates § 1 of the Sherman Act. *Id*. at 20-21.

Second, the Plaintiffs contend that the Platforms have also violated § 2 of the Sherman Act. *Id*. at 22. They have done so by "willfully" engaging in "an exclusionary course of

conduct" with a "specific intent to monopolize, and to destroy effective competition in the relevant market for media and news publications." *Id*.

Third, the Platforms have allegedly violated the District of Columbia's Human Rights Act. *Id*. at 23. The Plaintiffs suggest that the Platforms have denied them "the full and equal enjoyment of the services, privileges, and advantages that they provide to persons which they perceive to not be affiliated with the Republican Party or of Jewish faith." *Id*. Political affiliation and religious beliefs are both traits protected by the Act, which prohibits discrimination on these bases at places of public accommodation. *See* D.C. Code § 2-1402.31. Arguing that the Platforms are "public accommodations," the Plaintiffs contend that the Act covers the alleged discrimination they faced. Am. Compl. 23.

Finally, the Plaintiffs assert that the Platforms have deprived them of their "constitutional rights by censoring [their] content for purely political reasons." *Id*. at 24. This censorship, they assert, violates the First Amendment because the Platforms are "quasi-state actors" that "create[], operate, and control public platforms that are for public use and public benefit." *Id*.

The Platforms have moved to dismiss these claims. They argue that the Plaintiffs lack standing to sue them. Defs.' Mot. to Dismiss Am. Compl. ("Defs.' Mot.") at 4, ECF No. 29. They also argue that the Plaintiffs have failed to state legally cognizable claims. *Id*. at 8. They believe that they are not subject to the First Amendment or the District's Human Rights Act, as they are neither state actors nor public accommodations. *Id*. at 8, 17. And they contend that the Plaintiffs have failed to allege sufficiently the existence of any agreement or unilateral actions that violate the Sherman Act. *Id*. at 12-16.[2]

[2] The Court has diversity and federal question jurisdiction over this case. *See* 28 U.S.C. §§ 1331-32.

II.

Whether the Plaintiffs have standing to sue is a "threshold jurisdictional question." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Article III of the U.S. Constitution limits this Court's jurisdiction to "actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies," and the "concept of standing is part of this limitation." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (citation omitted).

To show standing, the Plaintiffs bear the burden of alleging an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409. Facing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), they "must clearly allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (cleaned up). The Court will "draw all reasonable inferences from [the Plaintiffs'] allegations in [their] favor," but it may not "accept inferences that are unsupported by the facts," "assume the truth of legal conclusions," or credit "threadbare recitals of the elements of standing." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015).

The Platforms also seek dismissal for a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A valid complaint must contain factual allegations that, if true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Mere "labels and conclusions" or "naked assertion[s] devoid of further factual enhancement" are insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

In evaluating a motion to dismiss, the Court must construe the complaint in the light most favorable to the Plaintiffs and accept as true all reasonable factual inferences drawn from well-pleaded allegations. *In re United Mine Workers of Am. Emp. Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994). The Court need not, however, accept legal conclusions or mere conclusory statements as true. *Iqbal*, 556 U.S. at 678. Evaluating a motion to dismiss is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679.

III.

A.

The Plaintiffs have sufficiently alleged facts supporting their standing. To begin with, the Platforms do not contest Ms. Loomer's standing to sue Facebook and Twitter. *See* Defs.' Mot. at 8; Defs.' Reply in Supp. of Mot. to Dismiss ("Defs.' Rep.") at 4, ECF No. 41 (arguing only that Ms. Loomer lacks standing against Google and Apple). Because Ms. Loomer has standing against Facebook and Twitter, the Court assumes for these purposes that Judicial Watch does too. *See Horne v. Flores*, 557 U.S. 433, 446 (2009) (noting that because one plaintiff "clearly has standing" to sue, the Court "need not consider whether the [other plaintiffs] also have standing to do so").

As to Apple and Google, the Plaintiffs have met their burden of establishing standing at this initial stage. This burden "grows heavier at each stage of the litigation," and, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015). In the Amended Complaint,

Freedom Watch alleges that the growth of its audience and revenues generated from the Platforms' platforms have "come to a complete halt." Am. Compl. 12. It states that the cause of this decline is the conspiracy to suppress their content, and that "each and every one of" the Platforms has participated in this conspiracy. *Id*. And it asserts, for example, that the "number of subscribers to Freedom Watch's YouTube channel has remained static and is now declining." *Id*.

Similarly, Ms. Loomer alleges that the Platforms banned her after suggesting that Representative Omar is in favor of Sharia law and is "anti Jewish." *Id*. at 14. She contends that, though Representative Omar "herself has tweeted anti-Semitic sentiments," she has faced "no discipline from" the Platforms. *Id*. at 15. She also notes that "Twitter refused to take any action against" Louis Farrakhan after he posted a video clip on the platform that seemingly compared Jewish people to "termites." *Id*. (citing an October 2018 article from The Hill). Because of this discriminatory behavior by Twitter and the Platforms, Ms. Loomer argues, she has "suffer[ed] severe financial injury" and has lost the ability to communicate with her followers. *Id*. at 16.

In other words, the Plaintiffs have alleged a plausible harm—a decrease in revenues—that is fairly traceable to the alleged conspiracy by the Platforms. The injunctive relief the Plaintiffs seek would prevent the Platforms from continuing the alleged suppression of the Plaintiffs' media content. Am. Compl. 25. These allegations sufficiently establish the Plaintiffs' standing to bring their claims.

B.

While they have established standing, the Plaintiffs have failed to state viable legal claims. Consider first their Sherman Act arguments. Section 1 of the Sherman Act states that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the

several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. "Independent action is not prescribed" by § 1. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760 (1984). So a valid claim must allege that the Platforms "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id*. at 764.

The Plaintiffs' claim fails to do this. True, the Amended Complaint repeatedly states that the Platforms have engaged in a conspiracy or illegal agreement. *See, e.g.*, Am. Compl. 4, 5, 12, 17. But it offers only these conclusory statements to suggest the existence of such an agreement. It includes no allegations, for example, that any of the Platforms met or otherwise communicated an intent to collectively suppress conservative content.

Adequately stating a Sherman Act § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Merely invoking terms like "conspiracy" and "agreement" is not enough. *See id*. at 557. A "district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id*. at 558 (quoting *Assoc. Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)). That specificity is lacking here.

The Plaintiffs also suggest that the Platforms "have engaged in 'conscious parallelism' and in concert mimicked each others' refusal to deal with Freedom Watch and Ms. Loomer." Am. Compl. 21. But Freedom Watch admits that it "has and still does pay Google and YouTube, Facebook and the other Defendants for services." *Id*. at 11. This admission contradicts assertions of a coordinated "refusal to deal" with the Plaintiffs.

More broadly, "conscious parallelism [is] a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions." *Twombly*, 550 U.S. at 553. It is "not in itself unlawful." *Id*. at 554.

"Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id*. at 556-57.

While the Plaintiffs sufficiently alleges that each of the Platforms acted to suppress or censor conservative content, they fail to show how the Platforms' purportedly parallel actions stem from a conspiracy. The Amended Complaint asserts that the Platforms are "willing to lose revenue from conservative organizations and individuals like Freedom Watch." Am. Compl. 17. This willingness comes from a desire to "further their leftist agenda." *Id*. The Plaintiffs suggest this allegation—that the Platforms were motivated to take these actions despite losing revenue—provides enough circumstantial evidence of an antitrust conspiracy. *See* Pls.' Opp. to Mot. to Dismiss ("Pls.' Opp.") at 13, ECF No. 34.

Not so. Losing revenue from certain organizations or individuals is not necessarily against the economic interests of any of the Platforms. The Amended Complaint does not allege that the Platforms' overall profitability decreased because of their actions. A loss of income from one source can be offset by larger gains in income from other sources. And the effect of politically motivated business decisions on the net revenues of corporations is far from clear.[3] In

[3] Compare, for example, two news stories about Nike's decision to feature former NFL quarterback Colin Kaepernick in a new advertising campaign. In a September 5, 2018, article, CNN noted that Nike's share price declined by three percent after the launch of the campaign and suggested that "Wall Street seems to think Nike just blew it." Paul R. La Monica, *Nike Investors Aren't Happy About the Colin Kaepernick Ad*, CNN (September 5, 2018), https://money.cnn.com/2018/09/04/news/companies/ nike-stock-down-colin-kaepernick/index.html. But just a few days later, a reporter noted that Nike's shares were up about four percent since the launch and reasoned that the Kaepernick campaign "is resonating with the company's core customer base." Jonathan Berr, *Nike Stock Price Reaches All-Time High After Colin Kaepernick Ad*, CBS News (September 14, 2018), https://www.cbsnews.com/news/nike-stock-price-reaches-all-time-high-despite-colin-kaepernick-ad-boycott/.

short, the Plaintiffs' Amended Complaint presents no facts excluding the possibility that the alleged conspirators were acting alone. It therefore fails to state a § 1 claim.

The Plaintiffs' Sherman Act § 2 claim fares no better. Section 2 makes it illegal for an entity to "monopolize, or attempt to monopolize, or combine or conspire with any other [entity], to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. The Amended Complaint suggests that the "Defendants collectively have obtained monopoly power in the relevant markets through exclusionary conduct that has severely harmed competition." Am. Compl. 20.

Even taking their statements as true, the Plaintiffs fail to make out a § 2 claim. As the Platforms correctly note, collective or "shared monopoly" arguments are generally "insufficient to state a claim that defendants have monopolized or attempted to monopolize the [relevant] market in violation of Section 2 of the Sherman Act." *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 42 (D.D.C. 2007). *See also* Defs.' Mot. at 15 n. 7 (collecting cases holding that allegations of a shared monopoly do not state a viable § 2 claim). Indeed, the Plaintiffs apparently concede the futility of their shared monopoly claim. *See* Pls.' Opp. at 14.

The Amended Complaint also suggests that Facebook is "the leading way that most Americans get their news," and that the company "has held at least a 73.9% market share in advertising revenue since at [sic] 2015." Am. Compl. 18, 20. The Plaintiffs argue that these assertions sufficiently "support a finding of single-firm monopolization." Pls.' Opp. at 14. They do not.

First, the Amended Complaint does not allege that any of the Platforms, acting individually, has monopolized or sought to monopolize any market. Rather, its legal claims focus on the conduct of the Platforms acting together. *See* Am. Compl. 20, 22.

Second, even if it can be read as alleging that Facebook or one of the other Platforms has tried to monopolize a market, the Amended Complaint offers only conclusory statements in support of this argument. It defines the relevant market as the "market for media and news publications (and the submarket for political media and news publications)." Am. Compl. 20. And it states that the "geographic markets are in this district and nationwide and worldwide." *Id*.

But the Plaintiffs offer no market share data for any of the Platforms in either the local or worldwide markets for media and news publications. Instead, they make claims about the "social network global market," the "social networking advertising revenue" market, the "digital ad revenues" market, and the "mobile ad market." Am. Compl. 18. And though the Amended Complaint states that "59% of Twitter users get their news through the Twitter platform" and that "48% of all American adults [get] their news from Facebook," it offers no support for the notion that either firm has achieved or tried to achieve monopolization of the nationwide media and news publications market. Am. Compl. 20.

The Plaintiffs also argue that the Platforms conspired to monopolize the market for media and news publications. Am. Compl. 22; Pls.' Opp. at 14-15. But, as discussed above, the Amended Complaint does not adequately allege the existence of a conspiracy. Thus, this argument fails too, and the Court will dismiss the Plaintiffs' Sherman Act claims.

C.

Turning to the Plaintiffs' discrimination claim, the Court finds that the Platforms' online services are not "places of public accommodation" under the D.C. Human Rights Act. The Act makes it unlawful to "deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations" because of the person's political affiliation or religion. D.C. Code § 2-

1402.31(a). It defines a "place of public accommodation" as "all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels . . . restaurants, . . . wholesale and retail stores," and many other physical locations. *Id.* § 2-1401.02(24). The definition includes over 50 specific examples of "places of public accommodation." Not one of these examples is an online or virtual platform.

As the D.C. Court of Appeals has made clear, the alleged place of public accommodation must be a physical location. In *U.S. Jaycees v. Bloomfield*, it held that a "voluntary membership organization" that "render[ed] community service" was not a place of public accommodation. 434 A.2d 1379, 1381 (D.C. 1981). The court noted that the organization "does not operate from any particular place within the District of Columbia," and instead conducts its activities through other entities. *Id.*; *accord Samuels v. Rayford*, 1995 WL 376939 at *8 (D.D.C. Apr. 10, 1995) ("Reading the definition in its entirety, therefore, a 'place of public accommodation' must: (1) be a place; and (2) be public, not private, in nature.").

The Plaintiffs' arguments to the contrary are unpersuasive. They suggest that "many Courts across the nation have expressly held internet sites to be places of 'public accommodation.'" Pls.' Opp. at 16. Maybe so. But these courts were not interpreting the D.C. Human Rights Act. *See* Pls.' Opp. at 17 (discussing cases that interpreted Title III of the Americans With Disabilities Act (the "ADA")). And courts have also held that "public accommodations" under the ADA are limited to physical spaces. *See, e.g.*, *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995). The applicability of an unsettled interpretation about an unrelated statute is unclear.

The Plaintiffs also invite the Court to find that the cases interpreting the District's Human Rights Act do not apply, as they were decided before courts "had any occasion to determine the ubiquitous nature of internet-based service providers today." Pls.' Opp. at 16. The Court declines to do so. The D.C. Court of Appeals authoritatively interprets the D.C. Code, and it is not up to this Court to retire *U.S. Jaycees*. Indisputably, platforms like Facebook and Twitter have changed the ways people interact with each other, and these social media networks now permeate most aspects of our lives. But any decision to extend the coverage of existing laws to these networks must be made elsewhere. Because the Plaintiffs erroneously allege that the Platforms "qualify as public accommodations as defined by the [Act]," their claim fails.

D.

Lastly, the Court must also dismiss the Plaintiffs' First Amendment claim. It is axiomatic that "the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). In other words, to "trigger First Amendment protection, the infringement upon speech must have arisen from state action of some kind." *Bronner v. Duggan*, 249 F. Supp. 3d 27, 41 (D.D.C. 2017) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1002-03, (1982)).

Here, the Plaintiffs have failed to allege state action. They suggest that the Platforms are "quasi-state actors because they regulate their public platforms, thereby regulating free speech within their public forums." Am. Compl. 24. But an entity can only be a "state actor" if "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). The Plaintiffs do not show how the Platforms' alleged conduct may fairly be treated as actions taken by the government itself. Facebook and Twitter,

for example, are private businesses that do not become "state actors" based solely on the provision of their social media networks to the public. *See Llyod Corp. v. Tanner*, 407 U.S. 551, 569 (1972) ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes.").

The Plaintiffs cite two recent cases, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), and *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300 (2d Cir.), *cert. granted*, 139 S. Ct. 360 (2018), in support of the proposition that "access to these social media sites could form the basis for a constitutional First Amendment issue." Pls.' Opp. at 10. Neither case applies here.

True, in *Packingham*, the Supreme Court recognized that Facebook and Twitter are among the "most important places (in a spatial sense) for the exchange of views" in society today. 137 S. Ct. at 1735. But the case involved a challenge to a *state* law that limited the speech rights of certain criminals on these platforms. *Id*. at 1738. It did not create a new cause of action against a private entity for an alleged First Amendment violation.

In *Halleck*, the Second Circuit noted that "facilities or locations deemed to be public forums are usually operated by governments," and that "determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action." 882 F.3d at 306. The court found that public access television channels are public forums. *Id*. As a result, it held that private companies operating public access television channels can qualify as state actors. *Id*. at 307.

But this conclusion was based on a finding that the private companies had "a sufficient connection to governmental authority to be deemed state actors." *Id*. Specifically, the court determined that municipal authorities, who traditionally operate public access television

channels, had expressly "designated [the private companies] to run the public access channels." *Id*. It added that, by running the channels, the private companies were "exercising precisely the authority to administer" a public forum "conferred on them by a senior municipal official." *Id*.

Indeed, the regulatory framework of public access television channels underscores the nexus between the private providers and traditionally governmental functions. The Cable Communications Policy Act of 1984 authorizes local regulators to require that "channel capacity be designated for public, educational, or governmental use." 47 U.S.C. § 531(b). As the *Halleck* court explains, New York's Public Service Commission has long used this authority to require cable operators to "designate . . . at least one full-time activated channel for public access use." 882 F.3d at 302 (citing N.Y. Comp. Codes R. & Regs. tit. 16, § 895.4(b)(1)). The regulation requires that such channels be "designated for *noncommercial use by the public* on a first-come, first-served, nondiscriminatory basis." *Id*. (emphasis added). In other words, private cable companies are required by law to provide public access channels for the public benefit. In their absence, it would be the government that provided this service to its citizens.

By contrast, the Plaintiffs here allege no nexus between the Platforms' actions and a function traditionally reserved exclusively to the state. Nor do they contend that the Platforms were designated by the state to perform a governmental operation. Instead, the Amended Complaint focuses on the Platforms' alleged suppression of conservative political content. It details, for instance, the seemingly disparate treatment of conservative news publishers on Facebook and of conservative commentators on Twitter. Am. Compl. 4-5. But while selective censorship of the kind alleged by the Plaintiffs may be antithetical to the American tradition of

freedom of speech, it is not actionable under the First Amendment unless perpetrated by a state actor. Thus, their claim must be dismissed.[4]

IV.

For these reasons, the Platforms' Motion to Dismiss will be granted. A separate order accompanies this opinion.

Dated: March 14, 2019

TREVOR N. McFADDEN, U.S.D.J.

[4] Because the Court finds that the Plaintiffs have failed to state valid claims, it need not address the Platforms' argument that the claims are barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1).

Nos. 19-7030

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREEDOM WATCH, *et al.*,

Plaintiffs-Appellees

v.

GOOGLE, INC. *et al.*,

Defendants-Appellants

On Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-02030-TNM

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, counsel for *amici curiae* certify that the Lawyers' Committee for Civil Rights Under Law and the Washington Lawyers' Committee for Civil Rights and Urban Affairs are not publicly held corporations, do not have parent corporations, and no publicly held corporation owns 10 percent or more of their stock. *Amici curiae* are nonprofit, nonpartisan organizations whose purpose is to protect civil rights and advance equal opportunity.

/s/ David Brody
David Brody

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STATEMENT OF INTEREST

Amici curiae are a national and a regional civil rights organization who advocate for racial justice and regularly litigate discrimination and equal opportunity cases, including discrimination in public accommodations under the DCHRA. *See, e.g.*, *Dumpson v. Ade*, 2019 WL 3767171 (D.D.C. Aug. 9, 2019).[1]

The Lawyers' Committee for Civil Rights Under Law ("National Lawyers' Committee") is a nonprofit, nonpartisan organization founded at the request of President John F. Kennedy in 1963 to enlist the private bar's leadership and resources in combating racial discrimination and vindicating the civil rights of African Americans and other racial and ethnic minorities. The principal mission of the National Lawyers' Committee is to secure equal justice for all through the rule of law; the organization frequently participates as *amicus curiae* to protect the interests of these communities. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Bethune-Hill v. Va. State*

[1] *Amici curiae* file this brief pursuant to the Court's September 3, 2019 Order granting leave to participate. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no one other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Bd. of Elections., 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Stewart v. Azar*, No. 19-5095 (D.C. Cir. 2019). The National Lawyers' Committee's Stop Hate Project works to combat online hateful activities, which can have chilling effects on the free expression of targeted communities. *See, e.g.*, *Shen v. Albany Unified Sch. Dist.*, No. 3:17-cv-02478-JD (N.D. Cal. 2017); Kristen Clarke and David Brody, *It's time for an online Civil Rights Act*, The Hill (Aug. 3, 2018).[2]

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers' Committee") is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in Washington, D.C. and the surrounding areas. In furtherance of this mission, the Washington Lawyers' Committee represents some of the most vulnerable persons and populations, including individuals who are discriminated against on the basis of their race, national origin, gender, and disability. The Washington Lawyers' Committee frequently enforces the DCHRA on behalf of our clients, and has an active practice aimed at reducing barriers to public services and public accommodations so that

[2] https://thehill.com/opinion/civil-rights/400310-its-time-for-an-online-civil-rights-act.

everyone, regardless of race, gender, disability or language can be free from discrimination in civic participation, economic activity and social engagement. *See, e.g.*, *Farmer v. Sweetgreen, Inc.*, No. 1:16-cv-02103 (S.D.N.Y. 2016); *Stanley v. Barbri, Inc.*, No. 3:16-cv-01113 (N.D. Tex. 2016); *Am. Council of the Blind v. U.S. Gen. Serv. Admin.*, No. 1:14-cv-00671 (D.D.C. 2014).

SUMMARY OF ARGUMENT

Amici curiae file this brief to address one significant error of the District Court: its legal determination that online businesses are exempted from the provisions of the District of Columbia Human Rights Act (DCHRA) that ban discrimination in public accommodations. Ignoring the plain text, which contains no such exception, and the statutory history, which makes clear that the statute was designed to eradicate all discrimination in public accommodations, the District Court instead improperly relies upon a case deciding that a private club was not subject to the DCHRA's anti-discrimination provisions when it held events in public spaces over which it had no control. Because the impact of the Court's decision in this case will go beyond the instant parties and facts, *amici curiae* urge the Court to carefully consider the scope, intent, text, history, and function of the DCHRA and to reverse the trial court's decision on this issue.

When a business posts a sign that says, "Whites Only," it does not matter if it is written in ink or pixels. The discrimination is the same. The harm is the same. And under District of Columbia law, the transgression is the same. Places of public accommodation include "all places included in the meaning of such terms as . . . establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). There is no text, history, or case law suggesting that the DCHRA does not apply to modern online commerce simply because it is online. To the contrary, the statute and the D.C. Council are as explicit as they can possibly be that the DCHRA is meant "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit," D.C. Code § 2-1401.01, and that "the elimination of discrimination within the District of Columbia should have the highest priority." D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report of Bill 2-179, at 3 (July 5, 1977). To hold that the Act does not apply to the entire universe of online businesses—including, *inter alia*, online retailers, banks, insurers, travel agencies, airlines, hotel booking services, entertainment venues, accounting services, food delivery services, and social media services—means that Appellees and other businesses could discriminate against consumers without repercussion under D.C. civil rights law. For example, they could explicitly refuse service based on race, charge higher

prices based on religion, provide subpar products based on gender, or ignore the accessibility needs of persons with disabilities. This outcome is antithetical to the text, history, and caselaw underlying a statute that was explicitly written to be "powerful, flexible, and far-reaching." *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000).

The District Court's decision is fully at odds with the text and purpose of the DCHRA, and the Court consequently conducted an incorrect and cursory extrapolation of *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). *U.S. Jaycees* narrowly held that a specific membership-based club was not a public accommodation when it hosted public events at locations that it did not own or substantially control. *Id*. 434 A.2d at 1382. The instant case presents a fundamentally different issue that *U.S. Jaycees* does not even begin to address: whether an online business should be exempted from the same civil rights obligations that apply to a brick-and-mortar business.[3] Comparing one private civic service organization's social events in 1981 to the multi-billion dollar online services offered by the largest technology companies in the world in 2019 is unfounded and erroneous.

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[3] The other case briefly cited by the District Court is similarly inapplicable; it dealt with a doctor denied the ability to work at a hospital and held the hospital was a private venue. *Samuels v. Rayford*, 1995 WL 376939, at *7-8 (D.D.C. 1995).

Racial discrimination and bigotry are just as common online as in brick-and-mortar storefront operations. When the D.C. Council gives D.C. residents the right to "equal opportunity to participate in all aspects of life," D.C. Code § 2-1402.01, equal opportunity in online commerce is a subset of such right.

ARGUMENT

I. THE DCHRA'S PUBLIC ACCOMMODATIONS PROVISIONS ARE PIVOTAL TO PROTECTING THE CIVIL RIGHTS OF THE RESIDENTS OF THE DISTRICT OF COLUMBIA.

Public accommodations laws like the D.C. Human Rights Act (DCHRA) were an essential component of ending *de facto* race segregation and currently protect broad classes of individuals from discrimination in evolving marketplaces and town squares. As this Court interprets the DCHRA, it is important to recognize what these laws do, why they were necessary, and the role they continue to play.

A. The D.C. Council intentionally created a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds."

The DCHRA is intentionally one of the most comprehensive and powerful civil rights laws in the nation, designed to prohibit all kinds of discrimination. "It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than individual merit[.]" D.C. Code § 2-1401.01. The Council "reinforce[d] … [its] view that the Human Rights Act is among our most important laws and is to be

vigorously enforced." D.C. Council, Comm. on Pub. Servs. and Consumer Affairs, Report of Bill 2-179, at 1 (July 5, 1977); *see also id.* at 3 ("the Council's intent [is] that the elimination of discrimination within the District of Columbia should have the highest priority").

Moreover, the Council wrote the Act to be broad, flexible, and inclusive. The Act covers more protected characteristics, more types of activities, and more entities than most states in order to be as inclusive as possible. *See id.* at 2 (DCHRA "widely hailed as the most comprehensive of its kind in the nation"); D.C. Code § 2-1402.01 ("Every individual shall have an equal opportunity to participate fully in the economic, cultural, and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.").

B. Public accommodations laws were enacted to stop and prevent racial segregation, discrimination, and hateful persecution.

A public accommodation is a business that offers goods or services to the general public, such as restaurants, hotels, banks, retail stores, insurance companies, public houses, taxis, and travel agencies. Before modern public accommodations laws, these venues often openly refused to serve African

Americans, *see, e.g., Dist. of Columbia v. John R. Thompson Co*., 346 U.S. 100 (1953) (restaurant refused to serve African Americans solely on account of race); insurance companies and banks charged people of color more based on their race, *see, e.g.,* Mary L. Heen, *Ending Jim Crow Life Insurance Rates,* 4 Nw. J. L. & Soc. Pol'y. 360 (2009); and white supremacists routinely harassed, assaulted, and lynched minorities who challenged Jim Crow segregation. *See, e.g.*, Gillian Brockell, *The deadly race riot 'aided and abetted' by The Washington Post a century ago*, Wash. Post (July 15, 2019).[4]

Congress, States, and the District enacted public accommodations laws and other statutes to end Jim Crow. Importantly, these laws prohibit not only segregation and discrimination by businesses that serve the general public, but also interference by third parties in the equal enjoyment of such businesses. *See* D.C. Code § 2-1402.61. For example, these laws both forbid a lunch counter from denying service on the basis of race as well as bar a racist interloper from threatening those seeking equal access to the lunch counter.

Local public accommodations laws, like the DCHRA, serve an important function over and above federal law. They can be tailored to community needs,

[4] https://www.washingtonpost.com/history/2019/07/15/deadly-race-riot-aided-abetted-by-washington-post-century-ago/.

more easily updated, and more protective than federal baselines. The DCHRA, for example, covers more protected classes and more industries than Title II of the Civil Rights Act of 1964. *Compare* 42 U.S.C. § 2000a *with* D.C. Code §§ 2-1401.02(24), 2-1402.31. The DCHRA protects individuals from discrimination based on twenty protected traits, including *inter alia* sex, age, sexual orientation, and gender identity or expression, whereas Title II only addresses race, color, religion, and national origin. 42 U.S.C. § 2000a; D.C. Code § 2-1402.31. The DCHRA also allows disparate impact claims. D.C. Code § 2-1402.68; *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987) (en banc).

C. Online Discrimination and Intimidation Disproportionately Harm African Americans, People of Color, and Other Marginalized Communities.

Today, as the District Court acknowledged, it is indisputable that platforms like Facebook and Twitter have changed the ways people interact with each other, and these social media networks now permeate most aspects of our lives. *Freedom Watch, Inc. v. Google, Inc*., 368 F. Supp. 3d 30, 40 (D.D.C. 2019). Online discrimination impacts the economic, cultural, and intellectual life of District residents and is the type of discrimination that the Council sought to eliminate when it enacted the DCHRA. District residents are often subject to discrimination

in online businesses where they are entitled to public accommodation, both when they are explicitly denied services because of their protected characteristics and when they experience such severe harassment that their equal enjoyment of the business is inhibited.

Businesses operating online may use personal data in discriminatory ways. "Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new worries that big data technologies could be used to 'digitally redline' unwanted groups, either as customers, employees, tenants, or recipients of credit." *Big Data: Seizing Opportunities, Preserving Values*, The White House, at 53 (May 2014).[5] *See also, generally, Big Data: A Tool for Inclusion or Exclusion?*, FTC (Jan. 2016).[6] Online retailers can unfairly discriminate on price. *See* Julia Angwin et al, *When Algorithms Decide What You Pay*, ProPublica (Oct. 5, 2016) (online test prep company charged higher prices in ZIP codes with large Asian

[5] *Available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

[6] *Available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

populations);[7] *Big Data and Differential Pricing*, The White House (Feb. 2015);[8] Jennifer Valentino-DeVries et al, *Websites Vary Prices, Deals Based on Users' Information*, Wall Street J. (Dec. 24, 2012).[9] Online advertising systems can enable discriminatory targeting that directly blocks equal opportunity, *see* Julia Angwin and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016),[10] as well as entrench disparate impacts into their ad delivery algorithms. *See* Louise Matsakis, *Facebook's Ad System Might Be Hard-Coded for Discrimination*, WIRED (April 6, 2019);[11] Tracy Jan and Elizabeth Dwoskin, *HUD is reviewing Twitter's and Google's ad practices as part of housing discrimination probe*, Wash. Post (March 28, 2019).[12] Online travel companies, like their offline counterparts, can engage in racial discrimination. *See* Kristen

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[7] https://www.propublica.org/article/breaking-the-black-box-when-algorithms-decide-what-you-pay.

[8] *Available at* https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf.

[9] https://www.wsj.com/articles/SB10001424127887323777204578189391813881534.

[10] https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race.

[11] https://www.wired.com/story/facebooks-ad-system-discrimination/.

[12] https://www.washingtonpost.com/business/2019/03/28/hud-charges-facebook-with-housing-discrimination/.

Clarke, *Does Airbnb Enable Racism?*, N.Y. Times (Aug. 23, 2016);[13] Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. Times (June 21, 2016).[14] "[B]oth online and face-to-face lenders charge higher interest rates to African American and Latino borrowers." Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Berkeley Haas Sch. of Bus. (Nov. 13, 2018).[15] The "cutting edge of the insurance industry" is using A.I. to profile consumers, but "artificial intelligence is known to reproduce biases that aren't explicitly coded into it." Sarah Jeong, *Insurers Want to Know How Many Steps You Took Today*, N.Y. Times (April 10, 2019);[16] *see also* Justin Volz, *Health Insurers Are Vacuuming Up Details About You – And It Could Raise Your Rates*, ProPublica (July 17, 2018) (insurers use race and marital status data).[17] Online home security services often amplify racial profiling. *See* Caroline Haskins, *Amazon's Home Security Company Is Turning Everyone Into Cops*, Motherboard

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[13] https://www.nytimes.com/2016/08/23/opinion/how-airbnb-can-fight-racial-discrimination.html.

[14] https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html.

[15] https://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/.

[16] https://www.nytimes.com/2019/04/10/opinion/insurance-ai.html.

[17] https://www.propublica.org/article/health-insurers-are-vacuuming-up-details-about-you-and-it-could-raise-your-rates.

(Feb. 7, 2019) (posts on the app "disproportionately depict people of color, and descriptions often use racist language or make racist assumptions about the people shown").[18] And businesses often fail to make their websites and apps accessible to people with disabilities. *See, e.g.*, *Farmer v. Sweetgreen, Inc.,* No. 1:16-cv-02103 (S.D.N.Y. 2016) (Defendant agreed in settlement to rework website and app that were not accessible to people with visual impairments); *Stanley v. Barbri, Inc.*, No. 3:16-cv-01113 (N.D. Tex. 2016) (Barbri failed to offer accessible online test prep materials); *Am. Council of the Blind v. U.S. Gen. Servs. Admin.*, No. 1:14-cv-00671 (D.D.C. 2014) (GSA award management website inaccessible).

In addition to direct discrimination, African Americans, other people of color, women, LGBTQ individuals, religious minorities, immigrants, people with disabilities, and other marginalized communities are also frequent targets of third-party threats, intimidation, and harassment online. These hateful acts interfere with their equal enjoyment of online services, chill their speech and civic engagement, and cause serious harm. The use of communications technology to subjugate, exclude, or silence protected classes is not new. *See, e.g.*, Fannie Lou Hamer, Testimony before the Credentials Committee, Democratic National Convention

[18] https://www.vice.com/en_us/article/qvyvzd/amazons-home-security-company-is-turning-everyone-into-cops.

(Aug. 22, 1964) ("Is this America . . . where we have to sleep with our telephones off the hooks because our lives be threatened daily, because we want to live as decent human beings, in America?").[19] A study by the Pew Research Center of online harassment found that 41% of Americans have been personally subjected to harassing behavior online, including nearly one-in-five Americans who were targeted for physical threats, sustained harassment, sexual harassment, or stalking, and 66% have witnessed these behaviors directed at others. Maeve Duggan, *Online Harassment 2017*, Pew Research Center, at 1 (July 11, 2017).[20] Marginalized groups are more likely to be targeted based on their protected characteristics. 25% of African Americans and 10% of Latinos report being targeted for online harassment on the basis of their race or ethnicity, compared with 3% of whites. Maeve Duggan, *1 in 4 black Americans have faced online harassment because of their race or ethnicity*, Pew Research Center (July 25, 2017).[21] One third of U.S. women have experienced online abuse or harassment and the majority of the perpetrators were complete strangers. *Toxic Twitter*, Amnesty Int'l, Chp. 3 (March

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[19] http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html.

[20] https://www.pewinternet.org/2017/07/11/online-harassment-2017/.

[21] https://www.pewresearch.org/fact-tank/2017/07/25/1-in-4-black-americans-have-faced-online-harassment-because-of-their-race-or-ethnicity/.

2018).[22] Online intimidation often causes serious injuries including emotional trauma, reputational harm, interpersonal and professional harms, and financial loss. *Online Harassment 2017* at 2. It also causes silencing and withdrawal: 27% of Americans have self-censored after witnessing online harassment and 13% have quit a platform altogether. *Id*. at 1. 81% of American women who experience online harassment change the way they use social media; 35% said they stopped posting content expressing their opinions on certain issues. *Toxic Twitter*, Chp. 5.[23]

The DCHRA is designed to protect individuals experiencing direct and indirect discrimination in public accommodations – including denials of service, discriminatory pricing, and online harassment that interferes with the equal enjoyment of public accommodations. Online threats, intimidation, and harassment can violate the DCHRA. D.C. Code §§ 2-1402.31, 2-1402.61. In *Dumpson v. Ade*, white supremacists targeted the plaintiff—the first African American woman elected student body president of American University—for a real-world hate crime and subsequent online harassment and threats. 2019 WL 3767171 (D.D.C. Aug. 9, 2019). The District Court held neo-Nazi Andrew Anglin violated the

[22] https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-3.

[23] https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5.

DCHRA when he used his white supremacist website, *The Daily Stormer*, to incite his followers to harass and threaten the plaintiff on social media. The court held the online harassment violated the DCHRA because it interfered with plaintiff's equal enjoyment of American University, a place of public accommodation. *Id*.

II. THE DCHRA'S PUBLIC ACCOMMODATIONS DEFINITION DOES NOT DISTINGUISH BETWEEN ONLINE AND OFFLINE ENTITIES; TO HOLD OTHERWISE WOULD YIELD DISCRIMINATORY OUTCOMES AND GUT THE DISTRICT'S PRIMARY CIVIL RIGHTS LAW.

The DCHRA is a broad remedial statute that protects the civil rights of District residents. The meaning of the DCHRA's public accommodations provisions must be interpreted with the context of the statute as a whole and the D.C. Council's intent in passing the DCHRA. When interpreting a District of Columbia statute, "[c]ourts must not 'make a fortress out of the dictionary,' which is to say that 'even where the words of a statute have 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve." *Expedia, Inc. v. Dist. of Columbia*, 120 A.3d 623, 631 (D.C. 2015) (citations omitted) (holding that D.C. sales tax applied to online travel companies).

The D.C. Court of Appeals has consistently held that the DCHRA is "a remedial civil rights statute that must be generously construed." *Lively v. Flexible*

Packaging Ass'n, 830 A.2d 874, 887 (D.C. 2003) (en banc) (citation omitted); *accord Blodgett v. Univ. Club*, 930 A.2d 210, 218 (D.C. 2007). The Act is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Exec. Sandwich Shoppe*, 749 A.2d at 732. "The right to equal opportunity without discrimination based on race or other such invidious ground is … a warrant for the here and now, and not merely a hope of future enjoyment of some formalistic constitutional or statutory promise." *Harris v. Dist. of Columbia Comm'n on Human Rights*, 562 A.2d 625, 626 (D.C. 1989) (citations omitted).

A. The Act does not exempt online entities.

Affirming the District Court's decision would be contrary to the clear intent of the Council and the plain text of the statute. Nowhere in the statutory definition of "place of public accommodation" is there any language that the statute provides an exception to online businesses or is limited to physical facilities. D.C. Code § 2-1401.02(24).[24] To the contrary, the definition is incredibly broad and inclusive. It

[24] "'Place of public accommodation' means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments

begins by including "all places included in the meaning of such terms as . . ." *Id.* "The term 'all' is unambiguous in its scope and covers the entirety of rights with no limitation whatsoever." *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 116 (D.D.C. 2017). The Act then provides an extensive list of categories, including a number that often interface with the public via the Internet: banks and "all other financial institutions;" credit bureaus; insurance companies; a wide variety of entertainment venues, including movie theaters; travel agencies and tour advisory

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dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 2-1402.67. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

(A) Has 350 or more members;
(B) Serves meals on a regular basis; and
(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." D.C. Code § 2-1401.02(24).

services; wholesale and retail stores, and "establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). "Moreover, the word 'any' … 'read naturally … has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Mazza v. Hollis*, 947 A.2d 1177, 1180 (D.C. 2008) (quoting *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 219-20 (2008)). The "of any kind" verbiage means the existence of an "actual physical location" is of little significance in determining the DCHRA's scope. *James v. Team Washington, Inc.*, 1997 WL 633323, at *2 (D.D.C. Oct. 7, 1997).

Businesses that offer goods or services to the general public over the Internet are a subset of "*all* places included in the meaning of such terms as . . . establishments dealing with goods or services *of any kind*." *Id*. (emphasis added). This clause must be "generously construed." *Lively*, 830 A.2d at 887; *Blodgett*, 930 A.2d at 218; *accord Exec. Sandwich Shoppe*, 749 A.2d at 732. Whether goods or services are offered on a website, Internet-enabled app, or brick-and-mortar storefront makes no difference under the DCHRA; the plain text is all-inclusive.

The D.C. Court of Appeals has clarified that businesses that do not principally operate from physical locations within the District may still be subject to the DCHRA so long as they are serving D.C. residents and otherwise satisfy the statutory definition. *See Shoppers Food Warehouse v. Moreno*, 746 A.2d 320 (D.C.

2000) (en banc) (D.C. personal jurisdiction extends to the constitutional limit; Maryland corporation with no D.C. stores was still subject to D.C. law when it purposefully solicited D.C. customers through local advertising); *Nat'l Org. for Women v. Mutual of Omaha Ins. Co., Inc.*, 531 A.2d 274, 276-77 (D.C. 1987) (Nebraska-based insurer serving District residents is subject to DCHRA); *James*, 1997 WL 633323 at *2. In *James*, a Delaware-incorporated company operating out of Virginia was an "establishment dealing with goods or services of any kind" when it offered pizza delivery to D.C. residents despite not having any physical presence in the District. *Id*. The DCHRA prohibits "the improper denial of the full and equal enjoyment of the goods and services *of* a place of public accommodation" and it does not matter whether "the challenged conduct take[s] place *in* a particular physical structure." *Id.* (emphasis in original).

The District Court's legal analysis of the DCHRA was inadequate, which led to its flawed finding. First, the trial court's cursory analysis failed to account for the voluminous binding precedent instructing that the DCHRA be "generously construed" to effect its remedial purpose. *Lively*, 830 A.2d at 887; *Blodgett*, 930 A.2d at 218; *accord Exec. Sandwich Shoppe*, 749 A.2d at 732. Second, the court disregarded the plain text of the statute by skipping over the "establishments offering goods or services of any kind" clause. Third, the court flouted the

fundamental purpose of the DCHRA, which is to prevent discrimination by retailers, service providers, and other public-facing businesses such as Appellees. Fourth, the court misinterpreted and stretched *U.S. Jaycees* beyond that decision's own bounds.

The District Court's extension of *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981) to the instant case was erroneous because it does not stand for the broad principle that the DCHRA excludes online places of public accommodation. The *U.S. Jaycees* decision was narrow and particularized to a specific entity; it held that conducting community service activities and public events (such as a cherry blossom festival, soap box derby, and public service awards ceremony) were insufficient to transform this private membership-based club into a public accommodation. 434 A.2d at 1381-82. In distinguishing the Jaycees organization from a little league baseball club (a public accommodation), the Court focused on the entities' control over their places of operation and whether they operate from "any particular place." *Id*., at 1381. "[A]lthough Jaycees sponsors civic activities at various public places . . . it does not control these areas to the same extent as does the Little League." *Id*., at 1382. Unlike a private club temporarily renting a hotel or restaurant for one event, most online businesses, including Appellees, (1) are

distinctly public, not private, and (2) continuously operate from and control fixed "places:" their websites and apps.[25]

The District Court in this case failed to do the exact thing the *U.S. Jaycees* and *Samuels* courts did—examine each entity to determine if it falls within the broad definition of a public accommodation in the DCHRA. A case about a private membership-based club from 1981—before the Internet existed—is simply inapposite to deciding a case about online commerce in 2019. There are scores of online companies serving D.C. residents with myriad business models and practices; this one case cannot fairly account for them all. To hang the Act's applicability to the modern "economic, cultural, and intellectual life of the District," D.C. Code § 2-1402.01, on an anachronistic analogy to *U.S. Jaycees* fails to follow the instruction that the Act be "powerful, flexible, and far-reaching," *Exec. Sandwich Shoppe*, 749 A.2d at 732, and a "warrant for the here and now." *Harris*, 562 A.2d at 626.

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[25] *Samuels v. Rayford*, cited in passing by the District Court, is also inapt. 1995 WL 376939 (D.D.C. Apr. 10, 1995). The *Samuels* court held that while a hospital is a place of public accommodation when dealing with patients and visitors, it is not a place of public accommodation with regard to a doctor seeking privileges to work at the hospital, because the doctor-hospital relationship is distinctly private. *Id*. at *7-8. This unremarkable conclusion has no relevance for the instant case; Appellees all provide consumer goods and services to the general public.

Moreover, *if* a physical location is a requirement of the DCHRA, online businesses do operate from physical facilities.[26] The Internet exists in the physical world and is not an ethereal construct. All online activity—including the commercial offering of goods and services through a website or app—occurs on computers in physical locations. *See, e.g.*, *United States v. Microsoft*, 138 S. Ct. 1186, 1187 (2018) (addressing territoriality concerns for a search warrant for emails stored by a U.S. company in an overseas data center). Online activity therefore does occur at a physical "place" if one is required. Delivering goods or services through the Internet is no different from delivering goods or services by mail, phone, or courier—at the other end of the communication there is an establishment rendering the service to D.C. residents.

An online service provider discriminating in its offer of services is no different from an insurer making discriminatory coverage decisions in its out-of-state headquarters. *See Mutual of Omaha*, 531 A.2d at 276-77. An e-commerce vendor discriminating in its sale of goods is no different from an out-of-state pizzeria discriminating in its delivery of pizza. *See James*, 1997 WL 633323. An

[26] Amici maintain that the text, history, and purpose of the DCHRA make clear that there is no physicality requirement; all that matters is whether a business is offering a covered good or service to the public. Amici make this argument in the alternative, however, to show that a physicality requirement makes no difference to the ultimate outcome in this case.

online business that purposefully solicits D.C. customers for its goods or services—such as through targeted advertising—or otherwise engages in commerce in the District must abide by D.C. law, including the DCHRA. *See Shoppers Food Warehouse*, 746 A.2d 320.[27]

B. Appellees are places of public accommodation with regard to the online goods or services they offer to District residents.

When Appellees Google, Facebook, Twitter, and Apple offer consumer goods or services to District residents, they are places of public accommodation under the DCHRA. Google offers numerous goods and services, including consumer electronics and computers; software; YouTube; and an online marketplace for media, video games, and third-party software. Facebook offers social media and entertainment services through websites and apps for its namesake platform, Instagram, Messenger, and WhatsApp, as well as various online marketplace services.[28] Twitter offers social media services. Google,

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[27] Appellees are headquartered out-of-state, but if an online business was located within the District of Columbia, the analysis becomes even simpler. This is another reason why the location of a facility should not confound the question of whether an online business could be a public accommodation.

[28] *See, e.g.*, *Marketplace*, Facebook, www.facebook.com/marketplace (last visited Oct. 11, 2019) ("Buy and sell local goods, or shop new items shipped from stores. Use your Facebook account to find what you want and sell what you don't.").

Facebook, and Twitter allow any user to buy online advertisements. Apple sells consumer electronics and computers, as well as myriad software and online services to use with such hardware; it also operates an online marketplace where anyone can buy or sell apps and other media. Notably, Apple also has two physical stores in the District at 1229 Wisconsin Avenue NW and 801 K Street NW.

Beyond the catchall of "dealing with goods or services of any kind," many of Appellees' services either match or closely mirror other categories of public accommodations as well, including banking and credit,[29] travel and tour advisory

[29] Google and Apple offer online payment services so their users can send and receive money and make purchases at stores. Google Pay, pay.google.com/about (last visited Sept. 20, 2019); Apple Pay, www.apple.com/apple-pay (last visited Sept. 20, 2019). Google and Apple also offer financing options for devices they sell in their stores, either directly or in partnership with banks. *See* Terms, Google Fi, https://fi.google.com/about/tos/#device-plan-terms (last visited Oct. 11, 2019) ("Pay Monthly Device Plan Terms and Conditions"); *Two great ways to buy. Choose the one that's right for you.*, Apple, https://www.apple.com/us-hed/shop/browse/financing (last visited Oct. 11, 2019). Apple also offers its own credit card. *Id*.

services,[30] insurance,[31] food delivery,[32] and entertainment.[33] In other words, the goods and services offered by Appellees are the exact types of public

[30] Google Travel is an online portal for buying plane tickets, booking hotel rooms, and planning trips. *Want the best prices for your trip? Google can help.*, Google (Aug. 8, 2019) https://www.blog.google/products/flights-hotels/best-prices-for-your-trips/. Both Google Maps and Facebook enable users to hail a ride from Uber or Lyft. *Ride with Lyft and Google Maps*, Lyft Blog (Sep. 8, 2016) https://blog.lyft.com/posts/lyft-and-google-maps; *Say Hello to Uber On Messenger*, Uber Newsroom (Dec. 17, 2015) https://www.uber.com/newsroom/messengerlaunch. Google Maps, Apple Maps, and Facebook provide recommendations for nearby restaurants, local events, and/or other activities happening near your location. *Explore and Eat Your Way Around Town with Google Maps*, The Keyword (May 8, 2019), https://www.blog.google/products/maps/explore-around-town-google-maps; Apple Maps Connect, https://mapsconnect.apple.com/ui/help (last visited October 10, 2019); *Updating Pages to Make it Easier to Interact with Customers*, Facebook Business (Oct. 19, 2016), https://www.facebook.com/business/news/page-call-to-action-updates.

[31] Google and Apple offer insurance policies for the devices they sell in their stores. AppleCare+, https://www.apple.com/legal/sales-support/applecare/applecareplus/ (last visited October 10, 2019); Google Store Preferred Care, https://store.google.com/us/magazine/preferred_care (last visited October 10, 2019).

[32] Google and Facebook offer the ability for users to purchase meals for delivery from local restaurants. *What's for Dinner? Order it with Google*, The Keyword (May 23, 2019) https://www.blog.google/products/assistant/order-your-favorite-food-with-google/; *Facebook Now Lets You Order Food Without Leaving Facebook*, The Verge (Oct. 13, 2017) https://www.theverge.com/2017/10/13/16468610/facebook-food-ordering-new-feature/.

[33] Google and Apple sell music, video, and video games through their online stores. Google Play, https://play.google.com/store (last visited Oct. 11, 2019); Apple Music, https://www.apple.com/apple-music/ (last visited Oct. 10, 2019); *App Store*, Apple https://www.apple.com/ios/app-store/ (last visited Oct. 11, 2019).

accommodations to which the D.C. Council intended the DCHRA to apply. Exempting these exceedingly popular businesses from a broad, remedial civil rights statute would create absurd results and hinder equal opportunity, especially as online commerce continues to grow. *See* D.C. Code § 2-1402.01.

C. Exempting online businesses would create absurd results and disadvantage District-based brick-and-mortar businesses against online competitors.

If online businesses are not places of public accommodations under the DCHRA, it would create an incompatible dichotomy between brick-and-mortar covered businesses and their online competitors or counterparts—especially for D.C.-based online businesses. An online retailer with an Etsy shop operating out of the District, such as Sneekis, which sells D.C. themed t-shirts, could discriminate against a buyer while a brick-and-mortar company offering the exact same goods would be prohibited from discrimination.[34] Online restaurants such as Galley, which offers locally-prepared chef-made meals to District residents, would be permitted to refuse to deliver to African Americans or be inaccessible to blind

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Google's YouTube is equivalent to a movie theater, in that it is a communal place to consume video entertainment and interact with others. Facebook and Twitter's social media platforms are similarly centers for communal entertainment, akin to digital public squares, as well as services for consuming music and video.

[34] *Sneekis*, Etsy, https://www.etsy.com/shop/Sneekis?ref=simple-shop-header-name&listing _id=572225854 (Last visited Sept. 30, 2019).

users, while a brick-and-mortar restaurant must, rightfully, serve patrons of all races and be accessible.[35] Peapod, an online grocery delivery service operating in the District, could refuse to serve the elderly while its parent company, Giant, could not discriminate in its store.[36] The D.C. Credit Union, which offers online banking and a mobile platform, could charge different fees for customers using online banking based on the customer's sexual orientation while of course the DCHRA would prohibit such discrimination at a storefront bank.[37] An online travel agency or insurer could refuse service or price gouge religious minorities or immigrants, while storefront travel agencies or insurers could not. And misogynists could sexually harass and threaten a woman patronizing an online business, whereas such conduct in a bar or physical store would violate the Act. These dichotomies are illogical. Holding that the DCHRA does not apply online would allow discrimination to flourish and cause a chilling effect on the District's economic, cultural, and intellectual life.

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[35] Galley, https://www.galleyfoods.com/welcome (Last visited Sept. 30, 2019).

[36] Peapod, https://www.peapod.com/ (Last visited October 14, 2019).

[37] DC Credit Union, https://www.dccreditunion.coop/personal/online-banking/ (Last visited Sept. 30, 2019).

III. IF THE COURT IS UNCERTAIN AS TO THE MEANING OF THE DCHRA, IT MUST CERTIFY THE LEGAL QUESTION TO THE D.C. COURT OF APPEALS.

If this federal Court is uncertain about whether the DCHRA's public accommodations provisions create a special exception for online commerce, it should certify the issue to the D.C. Court of Appeals so that the local high court can interpret the District's own law. D.C. Code § 11–723. "A federal court sitting in diversity should normally decline to speculate on such a question of local doctrine." *Delahanty v. Hinckley*, 845 F.2d 1069, 1070 (D.C. Cir. 1988). The Court should certify legal questions to the D.C. Court of Appeals if the Court concludes that District of Columbia law is "genuinely uncertain," with respect to a dispositive question, *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988), and the case concerns "a matter of public importance, in which the District of Columbia has a substantial interest." *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014) (citation omitted). For the reasons discussed at length above, this case is one of extreme public importance; the D.C. Council stated that the elimination of discrimination is the District's "highest priority" and the Act was one of "our most important laws." Report of Bill 2-179, at 1-3. The District of Columbia has a substantial interest in the interpretation of the DCHRA to preserve the intent of the Act and safeguard the civil rights of the District's residents.

Moreover, to the extent the Court has concerns about the applicability of *U.S. Jaycees*, the D.C. Court of Appeals is better situated to clarify the meaning of that case.

IV. CONCLUSION

For the reasons discussed above, the Court should either hold that the DCHRA does not exempt online businesses offering goods or services to D.C. residents, such as Appellees, from providing public accommodations free from discrimination, or certify the legal question to the D.C. Court of Appeals.

Respectfully Submitted,

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October 16, 2019

RULE 32(g) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure. It contains 6469 words.

/s/ David Brody
David Brody
Oct. 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and that service to the participants in this appeal, all of whom are registered CM/ECF users, will be accomplished by the appellate CM/ECF System.

/s/ David Brody
David Brody
Oct. 16, 2019

SCHEDULED FOR ORAL ARGUMENT ON APRIL 15, 2020

No. 19-7030

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREEDOM WATCH, INC., *et al.*,
APPELLANTS,

V.

GOOGLE INC., *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the District of Columbia files this brief under Federal Rule of Appellate Procedure 29(a)(2) to address a single aspect of this case: the interpretation of the term "place of public accommodation" under the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 2-1401.01 *et seq*. The District has a clear interest in the proper interpretation of this key provision of its foremost antidiscrimination law. Although the final say in interpreting the DCHRA lies with the D.C. Court of Appeals, absent further guidance from that tribunal this Court's interpretation will control in any case adjudicated in federal court in this Circuit. The District therefore urges the Court to reject the district court's flawed reading of the statute.

BACKGROUND

Appellants Freedom Watch, Inc. and Laura Loomer ("Freedom Watch") are "conservative activists who allege that America's major technology firms have conspired to suppress their political views." Op. 1 (JA 196). Freedom Watch filed this suit against several of those firms, contending, among other things, that the firms' activities violate the DCHRA. It argued that the firms' websites and digital platforms are places of public accommodation under the DCHRA, and that the firms have denied Freedom Watch "the full and equal enjoyment" of those websites' and platforms' services because of its political affiliation or religion. Op. 10 (JA 205)

(quoting D.C. Code § 2-1402.31(a)). The district court dismissed Freedom Watch's DCHRA claim on the theory that the firms' websites and platforms were not places of public accommodation under the statute. Op. 10-12 (JA 205-07). That was so, according to the district court, because an "alleged place of public accommodation must be a physical location." Op. 11 (JA 206). In the district court's view, this "physical location" interpretation was "authoritatively" established by *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981), and Freedom Watch's arguments were therefore unavailing. Op. 11-12 (JA 206-07).

SUMMARY OF ARGUMENT

The district court's holding that a place of public accommodation must be a physical location within the District was incorrect and should be reversed. The DCHRA provides an expansive, nonexhaustive definition of "place of public accommodation," which must be generously construed in favor of greater protection against discrimination. That definition includes several categories of entities—such as "establishments dealing with goods or services of any kind," "insurance companies," "financial institutions, and credit information bureaus"—that can operate in the District without having any physical location here. D.C. Code § 2-1401.02(24). At the time of the DCHRA's enactment in 1977, for instance, mail-order businesses that sold to District residents would have clearly been covered by

the definition. And today, that definition easily encompasses many internet-based businesses, such as Amazon.com and online banks that cater to District residents.

Any doubt about the definition of "place of public accommodation" is resolved by looking to the statute's purpose. That purpose includes giving every District resident "an equal opportunity to participate fully in the economic, cultural and intellectual life of the District." *Id.* § 2-1402.01. Allowing the many businesses that operate in the District without physical locations to discriminate at will would substantially undermine this goal.

Principles of administrative deference also foreclose the district court's interpretation. The D.C. Court of Appeals applies the equivalent of *Chevron* deference to District agencies' reasonable interpretations of the statutes they administer. In 2001, the D.C. Commission on Human Rights, the adjudicatory arm of the D.C. Office of Human Rights, concluded that the Boy Scouts, despite not being (or operating) a physical location in the District, was a place of public accommodation. Because the Commission's rejection of a physical location requirement was reasonable, that interpretation would bind the D.C. Court of Appeals—and so should govern here too.

The district court's constricted view of the statute rested entirely on its belief that the D.C. Court of Appeals' 1981 decision in *Jaycees* authoritatively established a physical location requirement. But *Jaycees*—a preliminary ruling, reached without

adequately adversarial briefing and superseded by the Commission's 2001 decision—is neither controlling nor persuasive. And if this Court is left with serious doubts on that score, it should certify this question to the D.C. Court of Appeals.[1]

ARGUMENT

I. A Place Of Public Accommodation Need Not Be A Physical Location.

A. The text of the DCHRA is not limited to physical locations.

The goal of the DCHRA is "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit." D.C. Code § 2-1401.01. Given this "sweeping statement of intent," the D.C. Court of Appeals has stressed that courts "must read the words of the DCHRA liberally." *Esteños v. PAHO/WHO Fed. Credit Union*, 952 A.2d 878, 887 (D.C. 2008). "The Human Rights Act is a broad remedial statute, and it is to be generously construed." *George Wash. Univ. v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003). This principle of "generous construction" means that uncertainties about the DCHRA's scope should be resolved in favor of broader rather than narrower coverage. *See, e.g.*, *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 887-90 (D.C. 2003) (en banc) (adopting broader view of hostile work environment claims as "consistent with the 'generous construction' principle"); *Exec. Sandwich Shoppe, Inc. v. Carr Realty*

[1] The District takes no position on the merits of Freedom Watch's other claims, or on whether Freedom Watch's DCHRA claim fails for reasons other than those addressed in this brief.

Corp., 749 A.2d 724, 731-32 (D.C. 2000) (adopting broader interpretation of term "any person"). Generous construction ensures that the DCHRA remains the "powerful, flexible, and far-reaching prohibition against discrimination of many kinds" that the D.C. Council "undoubtedly intended [it] to be." *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 98 (D.C. 2010) (en banc) (quoting *Exec. Sandwich Shoppe*, 749 A.2d at 732).

Consistent with its expansive overall sweep, the DCHRA "defines 'place of public accommodation' broadly." *Blodgett v. Univ. Club*, 930 A.2d 210, 218 n.5 (D.C. 2007). The term "means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels," and dozens of other examples, including "wholesale and retail stores, and establishments dealing with goods or services of any kind"; "banks" and "all other financial institutions"; "insurance companies"; and "travel or tour advisory services, agencies or bureaus." D.C. Code § 2-1401.02(24) (reproduced in full in the addendum). The words "*all* places" and "*such* terms as" show that the definition is capacious and the examples non-exhaustive. *See United States v. Godoy*, 706 F.3d 493, 495 (D.C. Cir. 2013) ("The phrase 'such as' typically indicates that enumerated examples are not comprehensive."). The only express exclusion is for "any institution, club, or place of accommodation that is distinctly private." D.C. Code § 2-1401.02(24).

Nothing in the DCHRA's definition requires a "place of public accommodation" to be a physical location in the District. To be sure, some of the listed examples are necessarily physical locations—for instance, "swimming pools" and "public halls and public elevators of buildings." *Id.* But others are not. Indeed, several of the listed terms naturally encompass commonplace businesses and entities that operate in the District but are not tied to physical locations here. And contrary to the firms' suggestion, this was as true in 1977, when the DCHRA was enacted, as it is today. *See* Appellees' Reply to D.C.'s Opposition to Motion for Summary Affirmance 4 (June 20, 2019) ("MSA Reply").

1. The statutory text encompassed more than physical locations in 1977.

Consider first "establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). An "establishment" need not be a physical location. As the California Supreme Court held—15 years before the DCHRA's enactment—in construing California's analogous civil rights statute, the word "establishment" "includes not only a fixed location . . . but also a permanent 'commercial force or organization' or 'a permanent settled position (as in life or business).'" *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962) (quoting dictionary definitions). A company that sells its products to District residents through a mail-order catalog is thus an "establishment[] dealing with goods . . . of any kind." Mail-order retailing was commonplace at the time of the DCHRA's enactment, and many such retailers

would have no physical storefront in the District. *See, e.g.*, *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 753-55 (1967) (describing "mail order house" with no Illinois facilities).

It is likewise easy to conjure examples of "establishments dealing with . . . services" that would have existed in 1977 and operated without physical locations, such as locksmith, lawncare, housecleaning, and handyman businesses. Pointing to precisely these types of businesses, the New York Court of Appeals unanimously declined to read a physical location element into New York's nearly identical definition of "place of public accommodation." *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1202-04 & n.1 (N.Y. 1983); *see id.* at 1204 ("Analytically, such establishments may discriminate by denying goods and services without denying individuals access to any particular place, e.g., home delivery service or services performed in the customer's home and mail order services.").

The DCHRA's definition of "place of public accommodation" also expressly refers to "insurance companies," "financial institutions, and credit information bureaus." In 1977, many such entities could—and predictably would—operate in the District without having physical locations here. A Connecticut insurance company could sell policies to District residents through door-to-door salesmen. And a New York stock brokerage—or an Illinois credit reporting agency—could

solicit District customers and manage their accounts by mail and phone. The DCHRA's express coverage of these types of entities thus refutes the notion that only physical locations qualify.

Nor does the mere use of the word "place" imply such a restriction. *Cf. Samuels v. Rayford*, No. 91-CV-365, 1995 WL 376939, at *8 (D.D.C. Apr. 10, 1995) ("[T]o be a 'place of public accommodation,' a challenged entity must first be a 'place.'"). As the list of statutory examples itself demonstrates, it is common to use "place" to refer to businesses and service-providers as entities, rather than as physical locations. Other real-world examples prove the point as well:

- "Compared to most places, you'd have to say [A.T.&T. is] a good place to work." N.R. Kleinfield, *A.T.&T. Trying to Lift Morale*, N.Y. Times, Apr. 14, 1979, at 29.
- "His favorite place to shop, his wife reported, is the Sears Roebuck catalogue." Scott Harris, *The Pendulum Swings in Favor of Braude*, L.A. Times, Mar. 6, 1988, at B1.
- "[A] 911-type emergency service . . . will give residents a central place to call for help for the first time." Anthony DePalma, *Mexico City Journal: A Glittering Vision of Suburbia Supplants a Dump*, N.Y. Times, June 23, 1993, at A4.
- "Wachovia Corp. . . . wants to be known as a place to buy insurance." Jay Loomis, *Wachovia Banking on Selling Insurance*, Winston-Salem Journal, July 10, 1997, at D1.

There was thus no basis at the time of the DCHRA's enactment to interpret "place of public accommodation" as encompassing only physical locations in the District.

2. The statutory text encompasses internet-based entities and digital platforms today.

Because the term "place of public accommodation" in the DCHRA has never been limited to physical locations, it embraces websites, internet-based entities, and digital platforms that otherwise meet the statutory definition. Granted, the list of statutory examples does not specifically mention websites, the internet, or digital platforms. *See* Op. 11 (JA 206) ("Not one of these examples is an online or virtual platform."). But that is both unsurprising and immaterial. Unsurprising, because no one had ever heard of these technologies when the DCHRA was enacted in 1977. Immaterial, because a statute's reach is not limited to the applications its drafters anticipated. "While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Thus, an electronic funds transfer qualifies as "money remuneration" even under a statute enacted in 1937. *Id.* at 2074-75. Or as Justice Scalia put it, "[a] 19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens . . . ." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 323 (1988) (concurring in part and dissenting in part); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 85-87 (2012).

The principle that general statutory language reaches new and unexpected technologies applies with special force to the DCHRA. The DCHRA was

specifically "intended to 'provide a regulation of sufficient scope and flexibility to be responsive to future needs for the protection of civil and human rights,' since 'there may be contexts and reasons for discrimination tomorrow that we do not anticipate today.'" *Jackson*, 999 A.2d at 120 (quoting legislative history). Thus, the mere fact that websites and digital platforms were an unanticipated context for discrimination in 1977 is of no moment, provided that they fall within the statutory text. Many plainly do.

For example, consider once again the category "wholesale and retail stores, and establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24). Although websites like Amazon.com and Wayfair.com are not physical locations, they are no doubt "retail stores" and "establishments dealing with goods or services of any kind." Indeed, Amazon.com describes itself as "one of the world's largest and best known online retailers and cloud service providers." Br. for Technology Companies as Amici Curiae 2, *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (No. 17-2). And the Supreme Court has described Wayfair as "a leading online retailer of home goods and furniture." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018). Online stores with no physical location thus fit comfortably within the statutory definition of "place of public accommodation."

Consider also "banks," "financial institutions," and "insurance companies." In the internet age, many such institutions provide services to District residents

without having any physical location that customers can visit, either inside the District or elsewhere. Ally Bank, for example, is an online bank that offers services to District residents but has no physical branches anywhere.[2] The same is true for the financial services and insurance firm SoFi.[3] These and other online businesses that operate in the District are just as much places of public accommodation as their brick-and-mortar competitors.

Once again, the word "place" is no impediment. Using "place" to refer to a website or a digital platform is perfectly ordinary English usage. In fact, the district court, quoting the Supreme Court, did just that, noting that "Facebook and Twitter are among the 'most important places (in a spatial sense) for the exchange of views' in society today." Op. 13 (JA 208) (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)). And the United States recently described "retail websites" as "hold[ing] themselves out to the public as places (or virtual places) of general accommodation." Br. for the United States as Amicus Curiae 27, *Wayfair*, 138 S. Ct. 2080 (No. 17-494). Contrary to the district court's conclusion, then, the term

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[2] *See Headquarters & Offices*, Ally.com, https://www.ally.com/about/locations (last visited October 15, 2019) ("As an online bank we don't have physical branches . . . .").

[3] *See How It Works*, SoFi.com, https://www.sofi.com/how-it-works (last visited October 15, 2019) ("Since we don't have brick-and-mortar branches, we save on operating costs.").

"place of public accommodation" can readily encompass websites and digital platforms.

B. Limiting the DCHRA's reach to physical locations contradicts its purpose.

The preceding analysis of the DCHRA's text is reason enough to reject the district court's "physical location" gloss. But the statute's purpose further reinforces that conclusion. *See* Scalia & Garner, *Reading Law*, at 63 ("A textually permissible interpretation that furthers rather than obstructs [a statute's] purpose should be favored.").

The purposes of the DCHRA are laid out in the statute itself. As noted, the act's first provision states that the Council's "intent" was "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit," including discrimination based on race, religion, age, sex, sexual orientation, and various other characteristics. D.C. Code § 2-1401.01. A separate provision then further pledges: "Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life," including in places of public accommodation and other settings. *Id.* § 2-1402.01.

If businesses without physical locations were, as a categorical matter, not places of public accommodation, the promise of "equal opportunity to participate fully" in the District's economic life would be hollow. A mail-order retailer could

refuse to accept orders from District residents with "ethnic-sounding" names. A lawncare company could refuse to work at the homes of black District residents. An out-of-state stock brokerage firm could refuse to open accounts for District women. An online insurance company could refuse to sell its policies to gay District residents. These results clash irreconcilably with the DCHRA's express aims, and they are not compelled by its text.

A physical-location requirement is fundamentally misguided because the goal of prohibiting public-accommodation discrimination is not limited to gaining equal access to physical spaces. The goal is also to ensure "full and equal enjoyment" of "goods, services, . . . privileges, advantages, and accommodations." D.C. Code § 2-1402.31(a)(1). In other words, it is not enough for a brick-and-mortar bank, say, to allow people of color to come inside the building; it must allow them to open checking accounts, obtain credit cards, take out loans, and all the rest. The firms cannot dispute this. And yet their position is that if that same bank decides to close its physical branches and operate solely through a website, it is suddenly free to discriminate against District residents with respect to any or all of its services. The Court should not accept such an irrational, ineffective interpretation of the DCHRA. *Cf. Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) ("We should not lightly conclude that [the legislature] enacted a self-defeating statute.").

C. The Office of Human Rights has rejected a physical location requirement.

Even if the combination of the DCHRA's plain text and its express purposes left any doubt about a physical location requirement, principles of agency deference would remove it. Much as with federal courts and federal agencies, the D.C. Court of Appeals defers to District agencies' reasonable interpretations of the statutes they administer. *See, e.g.*, *Brown v. D.C. Dep't of Emp't Servs.*, 83 A.3d 739, 746 & n.21 (D.C. 2014). Accordingly, interpretations of the DCHRA by the D.C. Office of Human Rights ("OHR") and its adjudicatory arm, the D.C. Commission on Human Rights, are entitled to deference. *See, e.g.*, *Timus v. D.C. Dep't of Human Rights*, 633 A.2d 751, 758-59 (D.C. 1993) (en banc). And nearly two decades ago, OHR rejected the view that a place of public accommodation must be a physical location.

It did so through formal adjudication in *Pool & Geller v. Boy Scouts of America*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001).[4] There, two gay men who sought to be Boy Scout leaders argued that their exclusion from the organization was public-accommodation discrimination under the DCHRA. OHR initially dismissed their complainants, citing *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993), for the proposition that the Boy Scouts was not a place of public accommodation. *Pool & Geller* at 2. *Welsh* had

[4] *Available at* http://www.glaa.org/archive/2001/poolandgellerruling0621.pdf.

held that the Boy Scouts was not a place of public accommodation under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, because it was not closely tied to a "structural facility"—*i.e.*, a physical location. 993 F.2d at 1269. Later, however, OHR reversed course, dropped its reliance on *Welsh*, and concluded that there was "probable cause to believe that the respondents violated the [DCHRA] in a place of public accommodation." *Pool & Geller* at 2.

After a formal hearing, the Commission sustained the charge. Despite acknowledging that "[n]either the [Boy Scouts] National Council nor the Local Council maintains any facilities in the District of Columbia," the Commission held that the Boy Scouts was a place of public accommodation under the DCHRA. *Id.* at 7, 48-54. In addition to discussing the breadth of the statutory definition of "place of public accommodation," the Commission favorably cited a pair of decisions from New York and Connecticut—"jurisdictions with similar statutes"—which found "that membership organizations like the Boy Scouts are a place of public accommodation." *Id.* at 54 (citing *U.S. Power Squadrons*, 452 N.E.2d 1199, and *Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987)). Both decisions prominently rejected the notion that only physical locations can be places of public accommodation. *See U.S. Power Squadrons*, 452 N.E.2d at 411 ("The place of the public accommodation need not be a fixed location . . . ."); *Quinnipiac Council*, 528 A.2d at 358

("[P]hysical situs is not today an essential element of our public accommodation law.").

On appeal, the D.C. Court of Appeals reversed the *Pool & Geller* decision. *Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192 (2002). But it did so solely on First Amendment grounds, stating expressly that it was not addressing the statutory question. *Id.* at 1196 & n.4; *id.* at 1204 (Reid, J., concurring). The *Pool & Geller* decision's interpretation of "place of public accommodation" therefore remains intact and constitutes OHR and the Commission's considered reading of the statute. That interpretation's rejection of a physical location requirement is, at minimum, a reasonable reading of the statute, and it is therefore "binding" on the D.C. Court of Appeals. *Brown*, 83 A.3d at 746 n.21. And because this Court is in turn "bound to follow interpretations of D.C. law by the D.C. Court of Appeals," *Blair-Bey v. Quick*, 151 F.3d 1036, 1050 (D.C. Cir. 1998), it governs here as well.

D. *United States Jaycees v. Bloomfield* is neither controlling nor persuasive.

The district court undertook no meaningful analysis of the DCHRA's text or purpose because it believed that the D.C. Court of Appeals had "authoritatively" held that a place of public accommodation "must be a physical location" in *United States Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981). Op. 11-12 (JA 206-07). That conclusion was mistaken.

In *Jaycees*, a trial court found that excluding women from full membership in the Jaycees (a community service organization) was likely sex discrimination in a place of public accommodation under the DCHRA, and it therefore granted a preliminary injunction. 434 A.2d at 1380. A panel of the D.C. Court of Appeals reversed. *Id.* at 1381-83. Although "the rationale of the [*Jaycees*] opinion is somewhat unclear," *Samuels*, 1995 WL 376939, at *10 n.12, the panel apparently believed that the Jaycees did not qualify as a place of public accommodation because it "[wa]s a voluntary membership organization whose primary function is to render community service" and "d[id] not operate from any particular place within the District of Columbia," *Jaycees*, 434 A.2d at 1381; *see also id.* at 1382 (noting that "Jaycees does not utilize any one particular facility provided by municipal government for its entire operation"). At first blush, then, *Jaycees* might seem to support the district court's decision here. But for at least three reasons *Jaycees* is neither controlling nor persuasive.

First, *Jaycees* is not controlling because it was a tentative ruling on a question of preliminary relief. As *Jaycees* itself noted repeatedly, the court was "review[ing] the trial court's grant of a preliminary injunction only to gauge the likelihood of success, not determine the suit on its merits." 434 A.2d at 1381 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (warning against "improperly equat[ing] 'likelihood of success' with 'success'")); *id.* at 1384 (same). And the court explicitly

framed its holding on the public-accommodation issue in terms of *likelihood* of success. *Id.* at 1381-82 ("[A]ppellees have failed to demonstrate that there is a likelihood of success for their argument that under the [DCHRA] Jaycees is a 'place of public accommodation.'"). The court's construction of the DCHRA was thus tentative, not definitive or binding.

This principle was well explained by then-Judge Alito in *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64 (3d Cir. 1999). In an appeal after obtaining summary judgment, the plaintiffs in that case argued that a prior panel's decision regarding a preliminary injunction bound the Third Circuit as the law of the case. *Id.* at 69. Not so, Judge Alito explained. In deciding to grant preliminary relief, "the prior panel did not hold that the plaintiffs were *entitled* to succeed; instead, it concluded that they were *likely* to succeed." *Id.* at 70. Because the preliminary injunction standard concerns only *likelihood* of success, he noted, both "the findings of fact" *and* "conclusions of law" reached at that stage—including those reached by an appellate court on interlocutory appeal—are tentative. *Id.* at 69-70 (citing, *inter alia*, *Camenisch*, 451 U.S. at 395). They bind neither the trial court at later stages of the case nor an appellate court in an appeal from final judgment. *Id.*; *see Taylor v. FDIC*, 132 F.3d 753, 766 (D.C. Cir. 1997) (conclusion of prior panel that denied preliminary injunction "lacks authoritative weight for this appeal"); *Johnson v. Capital City Mortg. Corp.*, 723 A.2d 852, 856 (D.C. 1999) ("It

follows from the nature of a preliminary injunction proceeding that any findings on the merits of claims raised are, unless otherwise clearly indicated, merely tentative.").

The same logic applies with even more force to the *Jaycees* decision. In reversing the preliminary injunction, the panel did not hold that the Jaycees were *entitled* to succeed on the public-accommodation claim, only that they were *likely* to succeed. 434 A.2d at 1381-82. Thus, the panel's interpretation of the DCHRA in *Jaycees* would not have bound the Court of Appeals even in a later appeal in *Jaycees* itself. *A fortiori*, that interpretation is not binding here, for "a decision that doesn't bind the court that issued it or the litigants cannot bind nonparties." Bryan A. Garner et al., *The Law of Judicial Precedent* 232 (2016); *see id.* at 230-32 (discussing the limited force of nonfinal decisions).

That *Jaycees* did not conclusively hold that only physical locations can be places of public accommodation is confirmed by the D.C. Court of Appeals' later decision in *Boy Scouts*, 809 A.2d 1192. That appeal from the Commission's *Pool & Geller* decision raised two questions: (1) whether the Boy Scouts' exclusion of gay Scout leaders was public-accommodation discrimination under the DCHRA, and (2) if so, whether that exclusion was nonetheless protected by the First Amendment. The court sidestepped the first question, "assum[ing] without deciding that the Human Rights Act was intended to reach a membership organization such as the Boy

Scouts as a 'place of public accommodation,'" but noting—with a citation to *Jaycees*—that "[t]he issue is a complex one." *Id.* at 1196 & n.4. Despite the canon of constitutional avoidance, the court jumped ahead to the First Amendment question and ruled for the Boy Scouts on that ground. *Id.* at 1196-1203. If *Jaycees* had resolved the physical-location issue, the Court of Appeals would not have considered the question of the Boy Scouts' status "a complex one." It would have been a trivially easy one, for the Boy Scouts is no more a physical location than is the Jaycees. *See Pool & Geller* at 7 ("Neither the [Boy Scouts] National Council nor the Local Council maintains any facilities in the District of Columbia.").[5]

Second, both the precedential and persuasive force of *Jaycees* is undermined by the failure of the appellees in that case to seriously contest the meaning of "place of public accommodation." On the one hand, they claimed to "embrace the reasoning employed by the trial court," which had rejected a physical location requirement. 434 A.2d at 1381. But on the other, they expressly surrendered on the

[5] At the summary affirmance stage, the firms tried to dispute this implication of *Boy Scouts*. "The 'complex' issue," they said, "was not whether there was a physical location requirement, but instead whether the statutory definition's reference to 'institutions' and 'clubs' encompassed membership organizations such as the Boy Scouts." MSA Reply 3. But even if that were so, the Court of Appeals *never would have reached* that uncertainty if *Jaycees* established a per se rule that only physical locations can be places of public accommodation.

key question: "Appellees candidly concede (Brief at 6) that Jaycees 'is not a place of public accommodation to which women will be denied equal access.'" *Id.*

This explicit concession would be enough on its own to rob *Jaycees* of binding force on this issue. The D.C. Court of Appeals does not consider points conceded in one case to be binding in others. In *Daly v. D.C. Department of Employment Services*, 121 A.3d 1257 (D.C. 2015), for example, the court addressed whether formal service of an agency order was necessary to trigger a workers-compensation deadline. An earlier decision had treated service as the triggering event. *Id.* at 1262. But the *Daly* court said that because the point had been "essentially conceded during oral argument" in the prior case, that decision's discussion of the issue was "not binding precedent." *Id.* The same logic applies to *Jaycees*.

The appellees' concession in *Jaycees* also radically diminishes any *persuasive* force it might otherwise appear to have. "Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)). Accordingly, opinions "written without the benefit of full briefing or argument on [an] issue" carry little weight. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 202 (2014); *see* Garner et al., *Law of Judicial Precedent*, at 226 (noting the "diminished" authority

of cases "submitted without argument, or on scanty or insufficient argument"). It is hard to imagine anything further from a "vigorous defense" of the DCHRA's breadth than the appellees' express concession in *Jaycees* that the organization was "*not* a place of public accommodation." 434 A.2d at 1381 (emphasis added) (quoting appellees' brief).

Third, on top of everything else, *Jaycees* has been superseded by the decision of OHR and the Commission in *Pool & Geller*. When *Jaycees* was decided, no administrative decision or rulemaking had addressed whether a place of public accommodation under the DCHRA must be a physical location. *Jaycees* itself noted that it was not applying the "deferential" standard that would govern if "an administrative agency order" were at issue. 434 A.2d at 1382 n.6. But in 2001, the Commission issued the *Pool & Geller* decision, which rejected a physical location requirement. *See supra* Part I.C. Because, at the very least, the DCHRA does not foreclose that reading, *see Boy Scouts*, 809 A.2d at 1196 & n.4, it trumps any contrary interpretation in *Jaycees*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (holding that agency interpretations entitled to deference supersede contrary judicial interpretations).

E. If in doubt, this Court should certify the question to the D.C. Court of Appeals.

For the reasons explained, the Court should hold that a place of public accommodation under the DCHRA need not be a physical location and that a website

or digital platform can qualify. If, however, the Court has serious doubts about that conclusion, it should certify the question to the D.C. Court of Appeals. *See* D.C. Code § 11-723 (authorizing certification).

In recent years, this Court has repeatedly certified questions of District law, and the Court of Appeals has answered. *See, e.g.*, *Owens v. Republic of Sudan*, 864 F.3d 751, 811-12 (D.C. Cir. 2017), *certified question answered*, 194 A.3d 38 (D.C. 2018); Order, *Rivera v. Lew*, No. 13-5222 (D.C. Cir. Jan. 30, 2014), *certified question answered*, 99 A.3d 269 (D.C. 2014). This Court has said that certification is proper when (1) "District of Columbia law is genuinely uncertain," and (2) "the question is of extreme public importance." *Companhia Brasileira Carbureto de Calicio v. Applied Indus. Materials Corp.*, 640 F.3d 369, 373 (D.C. Cir. 2011) (internal quotation marks omitted), *certified question answered*, 35 A.3d 1127 (D.C. 2012). Here, assuming the Court is unwilling to overrule the district court's holding outright, both certification criteria are satisfied.

First, as this brief has shown, the notion that only a physical location can qualify as a place of public accommodation is *at least* "genuinely uncertain" (and in fact certainly wrong). No doubt the firms will say *Jaycees* proves otherwise. But as discussed, *Jaycees* never established a binding per se rule, and it was in any event superseded by the *Pool & Geller* decision. *Cf. Companhia*, 640 F.3d at 372-73 (finding uncertainty where "a subsequent decision of the D.C. Court of Appeals"

"arguably" limited the reach of an earlier decision). The fact that, after *Jaycees*, the high courts of New York and Connecticut rejected a physical location requirement under their similar antidiscrimination laws also creates uncertainty. *See Owens*, 864 F.3d at 812 (finding uncertainty where "[o]ther states have reached different conclusions on th[e] question"). And even if *Jaycees* stood for everything the district court thought it did, it was decided nearly 40 years ago, did not apply the principle of "generously construing" the DCHRA that has since become firmly settled, and did not examine the remarkable consequences of excluding all but physical locations from the DCHRA's public-accommodation protections. Certification would therefore still be appropriate because, in circumstances like these, a state high court might decide that "it no longer feels bound by an earlier decision." Garner et al., *Law of Judicial Precedent*, at 627 (discussing certification).

Second, the question here is surely of extreme public importance. Among the questions that this Court has found satisfy this standard are:

- whether fraudulent petitions sent to federal agencies in the District provide a basis for establishing personal jurisdiction over the petitioners (*Companhia*, 640 F.3d at 373);
- whether a claim for intrusion upon seclusion arises when "a restaurant discloses to a third party the dining habits of a patron without the patron's consent" (*Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 38 (D.C. Cir. 2004)); and
- whether a plaintiff is barred from recovering on a contract to perform architectural services in the District if she is licensed to practice architecture

only in another jurisdiction (*Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1303 (D.C. Cir. 2002)).

Those questions were indeed important, but the issue here—which touches the lives of many more District residents—is even more so. If in fact only physical locations are places of public accommodation under the DCHRA, then the countless businesses and institutions that operate in the District without brick-and-mortar facilities here have a blank check to discriminate on the basis of race, sex, age, and other protected characteristics in the provision of goods and services. This Court should not endorse such an extraordinary proposition without letting the D.C. Court of Appeals address it—on the merits, and with adequate briefing—in the first instance.

CONCLUSION

The district court's holding that a place of public accommodation "must be a physical location" should be reversed.

Respectfully submitted,

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ADDENDUM

D.C. Code § 2-1401.02

§ 2-1401.02. Definitions.

The following words and terms when used in this chapter have the following meanings:

* * *

(24) "Place of public accommodation" means all places included in the meaning of such terms as inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest; restaurants or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectioneries, soda fountains and all stores where ice cream, ice and fruit preparation or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores, and establishments dealing with goods or services of any kind, including, but not limited to, the credit facilities thereof; banks, savings and loan associations, establishments of mortgage bankers and brokers, all other financial institutions, and credit information bureaus; insurance companies and establishments of insurance policy brokers; dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments; barber shops, beauty parlors, theaters, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiards and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures, occupied by 2 or more tenants, or by the owner and 1 or more tenants. Such term shall not include any institution, club, or place of accommodation which is in its nature distinctly private except, that any such institution, club or place of accommodation shall be subject to the provisions of § 2-1402.67. A place of accommodation, institution, or club shall not be considered in its nature distinctly private if the place of accommodation, institution, or club:

(A) Has 350 or more members;

(B) Serves meals on a regular basis; and

(C) Regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.

* * *

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29(a)(5) because it contains 5750 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Graham E. Phillips
GRAHAM E. PHILLIPS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7030 **September Term, 2019**

FILED ON: MAY 27, 2020

FREEDOM WATCH, INC., INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED AND LAURA LOOMER, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED PALM BEACH, FLORIDA,

APPELLANTS

v.

GOOGLE INC., ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02030)

Before: ROGERS and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the decision of the district court be **AFFIRMED**.

Freedom Watch and Laura Loomer (collectively, "Freedom Watch") brought this suit against Google, Facebook, Twitter, and Apple (the "Platforms") alleging that they conspired to suppress conservative political views and violated the First Amendment, the Sherman Antitrust Act, and the District of Columbia Human Rights Act. The district court dismissed the complaint, holding that Freedom Watch had standing to sue but failed to allege colorable legal claims. *Freedom Watch, Inc. v. Google*, 368 F.Supp.3d 30, 36–37 (D.D.C. 2019). On appeal, we reach the same conclusion.

Freedom Watch has standing to bring this suit. Freedom Watch alleges that the Platforms conspired to suppress its audience and revenues, and succeeded in reducing each. As the district court concluded, this injury suffices for standing purposes. *Id.* at 36.

The Platforms protest this conclusion, arguing that Freedom Watch is unable to point to any actions by the Platforms that caused its alleged injury. With respect to Twitter and Facebook, Freedom Watch specifically alleges that those Platforms prevented Ms. Loomer from using their services. With respect to Google and Apple, standing rests on the general claim that those companies were engaged in a conspiracy against Freedom Watch. As the district court explained, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* at 36 (quoting *Osborn v. Visa Inc.*, 797 F.3d 1057, 1064 (D.C. Cir. 2015)). The general allegation that the Platforms conspired to suppress Freedom Watch's audience and revenue, combined with Freedom Watch's representations that its audience and revenue declined, suffices to establish standing.

Freedom Watch's First Amendment claim fails because it does not adequately allege that the Platforms can violate the First Amendment. In general, the First Amendment "prohibits only *governmental* abridgment of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Freedom Watch contends that, because the Platforms provide an important forum for speech, they are engaged in state action. But, under *Halleck*, "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor." *Id.* at 1930. Freedom Watch fails to point to additional facts indicating that these Platforms are engaged in state action and thus fails to state a viable First Amendment claim.

Freedom Watch also fails to state a viable claim under the Sherman Antitrust Act. To state a § 1 claim, a complainant must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Freedom Watch argues that we should infer an agreement primarily from the Platforms' parallel behavior, as each company purportedly refused to provide certain services to Freedom Watch. But, as the district court explained, parallel conduct alone cannot support a claim under the Sherman Act. *See Freedom Watch*, 368 F.Supp.3d at 37 (citing *Twombly*, 550 U.S. at 556 ("Without more, parallel conduct does not suggest conspiracy")). Freedom Watch puts forth two additional factors that it claims suggest conspiracy: that the Platforms are pursuing a revenue-losing strategy and that they are motivated by political goals. But Freedom Watch does not explain why either factor tends to show an unlawful conspiracy, rather than lawful independent action by the different Platforms. *See Freedom Watch*, 368 F.Supp.2d at 37–38.

Freedom Watch's § 2 claim is also deficient. To state a § 2 claim – collective monopolization by several parties or individual monopolization by a single party – a complainant must allege that monopoly powers were acquired through "anticompetitive conduct." *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis omitted). The only anticompetitive conduct that Freedom Watch alleges (without supporting factual allegations) is that the Platforms conspired against it to suppress conservative content, but not that the Platforms conspired to acquire or maintain monopoly power. A § 2 claim requires the latter allegation.

That leaves Freedom Watch's discrimination claim under the D.C. Human Rights Act. The Act prohibits discrimination on the basis of political affiliation in "any place of public

accommodations." D.C. CODE § 2-1402.31(a); *see also id.* § 2-1401.02(24). Relying on a D.C. Court of Appeals case interpreting that statute, *U.S. Jaycees v. Bloomfield*, 434 A.2d 1379 (D.C. 1981), the district court concluded that only physical places within the District of Columbia qualify as "places of public accommodation." *Freedom Watch*, 368 F.Supp.3d at 39. Because Freedom Watch had not alleged that the Platforms operated out of a particular place in D.C., but only that they do business in the District, the district court dismissed the claim. *Id*.

On appeal, Freedom Watch contests the district court's interpretation of "place of public accommodations." It is joined by the District of Columbia, which submitted an amicus brief on this issue. The District of Columbia argues that the district court's reliance on *Jaycees* is misplaced. It contends that *Jaycees* is not authoritative because it was a decision on a preliminary injunction rather than a final decision on the merits and that the D.C. Commission on Human Rights has interpreted the Human Rights Act to reject a physical location requirement, *Pool & Geller v. Boy Scouts of America*, Nos. 93-030-(PA) & 93-031-(PA) (D.C. Comm'n on Human Rights June 18, 2001).

When interpreting D.C. law, we strive "to achieve the same outcome we believe would result if the District of Columbia Court of Appeals considered this case." *Novak v. Capital Mgmt. & Dev. Corp.*, 42 F.3d 902, 907 (D.C. Cir. 2006). The D.C. Court of Appeals in *Jaycees* held that "places of public accommodation" under the D.C. Human Rights Act must operate from a "particular place". *Jaycees*, 434 A.2d at 1381–82.

The arguments to the contrary are unsuccessful. The District of Columbia argues that *Jaycees* is not binding, because it was a decision on a preliminary injunction and thus not a final legal conclusion. *See University of Texas v. Camenisch*, 41 U.S. 390, 395 (1981). Maybe so. But the D.C. Court of Appeals has interpreted this statute and at minimum, its interpretation is a reasonable one. We have no basis to believe it would reach a different conclusion on reconsideration. The *Pool & Geller* decision does not alter this analysis because the D.C. Court of Appeals reversed the Commission's decision, although it explicitly declined in that case to consider what qualified as a "place of public accommodation." *See Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1196 n.4 (D.C. 2002).

Freedom Watch argues that we should interpret this local statute more broadly to make it consistent with the Americans with Disabilities Act. That Act also contains a provision concerning places of "public accommodation," and several federal courts have concluded that clause sweeps wider than just physical places. *See, e.g., Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994). But as the district court noted, other federal courts have reached the opposite conclusion and held that only physical places qualify as places of public accommodation under the ADA. *See Freedom Watch*, 368 F.Supp.3d at 39. Moreover, the D.C. Court of Appeals is the arbiter of D.C. law and the definitions of "public accommodation" in the two laws are different from one another. The fact that other courts interpret another (though similar) statute differently is not a sufficient reason to deviate from *Jaycees*.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. CIR. R. 41.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7030 **September Term, 2019**

1:18-cv-02030-TNM

Filed On: August 5, 2020

Freedom Watch, Inc., individually and on behalf of those similarly situated and Laura Loomer, individually and on behalf of those similarly situated Palm Beach, Florida,

Appellants

v.

Google Inc., et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; and Randolph, Senior Circuit Judge.

O R D E R

Upon consideration of appellants' petition for rehearing en banc, which includes a request for oral argument on the petition, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED that the request for oral argument be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION 600 Pennsylvania Avenue, N.W. Washington, DC 20580 **Plaintiff,** **v.** **FACEBOOK, INC.** 1601 Willow Road Menlo Park, CA 94025 **Defendant.**	**Case No.:** **PUBLIC REDACTED VERSION OF DOCUMENT FILED UNDER SEAL**

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), by its designated attorneys, petitions this Court pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), for a permanent injunction and other equitable relief against Defendant Facebook, Inc. ("Facebook"), to undo and prevent its anticompetitive conduct and unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

I. NATURE OF THE CASE

1. Facebook is the world's dominant online social network. More than 3 billion people regularly use Facebook's services to connect with friends and family and enrich their social lives. But not content with attracting and retaining users through competition on the merits, Facebook has maintained its monopoly position by buying up companies that present competitive threats and by imposing restrictive policies that unjustifiably hinder actual or potential rivals that Facebook does not or cannot acquire.

2. Facebook holds monopoly power in the market for personal social networking services ("personal social networking" or "personal social networking services") in the United States, which it enjoys primarily through its control of the largest and most profitable social network in the world, known internally at Facebook as "Facebook Blue," and to much of the world simply as "Facebook."

3. In the United States, Facebook Blue has more than [redacted] daily users and more than [redacted] monthly users. No other social network of comparable scale exists in the United States.

4. Facebook's unmatched position has provided it with staggering profits. Facebook monetizes its personal social networking monopoly principally by selling advertising, which exploits a rich set of data about users' activities, interests, and affiliations to target advertisements to users. Last year alone, Facebook generated revenues of more than $70 billion and profits of more than $18.5 billion.

5. Since toppling early rival Myspace and achieving monopoly power, Facebook has turned to playing defense through anticompetitive means. After identifying two significant competitive threats to its dominant position—Instagram and WhatsApp—Facebook moved to squelch those threats by buying the companies, reflecting CEO Mark Zuckerberg's view, expressed in a 2008 email, that "*it is better to buy than compete.*" To further entrench its position, Facebook has also imposed anticompetitive conditions that restricted access to its valuable platform—conditions that Facebook personnel recognized as "anti user[,]" "hypocritical" in light of Facebook's purported mission of enabling sharing, and a signal that "we're scared that we can't compete on our own merits."

6. As Facebook has long recognized, its personal social networking monopoly is protected by high barriers to entry, including strong network effects. In particular, because a personal social network is generally more valuable to a user when more of that user's friends and family are already members, a new entrant faces significant difficulties in attracting a sufficient user base to compete with Facebook. Facebook's internal documents confirm that it is very difficult to win users with a social networking product built around a particular social "mechanic" (i.e., a particular way to connect and interact with others, such as photo-sharing) that is already being used by an incumbent with dominant scale. Even an entrant with a "better" product often cannot succeed against the overwhelming network effects enjoyed by a dominant personal social network.

7. Despite strong network effects, important competitive threats to a dominant personal social networking provider can emerge, particularly during periods of technological or social transition and particularly if the newcomer is differentiated from the incumbent in a manner that exploits the technological or social transition. During such periods, a competitor may be able to gain scale despite the network effects enjoyed by the incumbent.

8. Accordingly, Facebook's leadership has learned and recognized that the sharpest competitive threats to Facebook Blue come not from "Facebook clones," but from differentiated services and during periods of transition.

9. In an effort to preserve its monopoly in the provision of personal social networking, Facebook has, for many years, continued to engage in a course of anticompetitive conduct with the aim of suppressing, neutralizing, and deterring serious competitive threats to Facebook Blue. This course of conduct has had three main elements: acquiring Instagram, acquiring WhatsApp, and the anticompetitive conditioning of access to its platform to suppress competition.

10. **Instagram Acquisition.** In 2012, Facebook acquired Instagram, the most significant personal social networking competitor to emerge since Facebook Blue launched.

11. Instagram—a mobile-first app that enables users to engage in personal social networking with family and friends through taking, editing, sharing, and commenting on photographs—emerged at a critical time of technological and social transition, when users of personal social networking were migrating from desktop computers to smartphones and toward a greater use of photo-based sharing. Smartphones combined high-quality cameras with mobile access to the internet, which gave consumers new ways to share moments from their lives. By satisfying users' demand for excellence in photo handling, social networking, and user experience via their smartphones, Instagram quickly seized a particularly strong position as a fast-growing provider of personal social networking. As users increasingly demanded and prioritized personal social networking services on their smartphones, and connecting with friends and family through photo-sharing, Instagram became an existential threat to Facebook Blue's personal social networking monopoly.

12. Facebook initially tried to compete with Instagram on the merits by improving its own mobile photo-sharing features. But by September 2011, Mr. Zuckerberg saw that Facebook had fallen far behind, writing internally: "In the time it has taken us to get ou[r] act together on this[,] Instagram has become a large and viable competitor to us on mobile photos, which will increasingly be the future of photos."

13. So Facebook fell back on the philosophy that "it is better to buy than compete." In February 2012, Mr. Zuckerberg acknowledged that if left independent—or in the hands of another acquirer like Google or Apple—Instagram threatened to leave Facebook Blue "very behind in both functionality and brand on how one of the core use cases of Facebook will evolve in the mobile

world." Emphasizing that this was a "really scary" outcome for Facebook, Mr. Zuckerberg suggested "we might want to consider paying a lot of money" for Instagram.

14. Mr. Zuckerberg recognized that by acquiring and controlling Instagram, Facebook would not only squelch the direct threat that Instagram posed, but also significantly hinder another firm from using photo-sharing on mobile phones to gain popularity as a provider of personal social networking. As Mr. Zuckerberg explained to Chief Financial Officer David Ebersman in an email, controlling Instagram would secure Facebook's enduring dominance around one of the few social mechanics that could provide a footing for a competing personal social networking provider:

> *[T]here are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product. [Integrating Instagram's functions into Facebook] is also a factor but in reality we already know these companies' social dynamics and will integrate them over the next 12-24 months anyway.* The integration plan involves building their mechanics into our products rather than directly integrating their products if that makes sense. . . . [O]ne way of looking at this is that what we're really buying is time. *Even if some new competitors spring[] up, buying Instagram, Path, Foursquare, etc now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.* (Emphasis added.)

15. On April 9, 2012—the day Facebook announced it was acquiring Instagram—Mr. Zuckerberg wrote privately to a colleague to celebrate suppressing the threat: "I remember your internal post about how Instagram was our threat and not Google+. You were basically right. One thing about startups though is you can often acquire them."

16. The Instagram acquisition has given Facebook control over its most significant personal social networking competitor, which both neutralizes the direct threat that Instagram posed by itself, and, additionally, makes it more difficult for other firms to use photo-sharing via

smartphones to gain traction in personal social networking. Through its control of Instagram, Facebook has attempted to prevent Instagram from "cannibalizing" Facebook Blue, confirming that an independent Instagram would constitute a significant threat to Facebook's personal social networking monopoly. Despite Facebook's efforts, Facebook Blue has lost users and engagement to Instagram [redacted]

17. **WhatsApp Acquisition.** After neutralizing the threat from Instagram, Facebook turned to what it considered "the next biggest consumer risk" for Facebook Blue: the risk that an app offering mobile messaging services would *enter* the personal social networking market, either by adding personal social networking features or by launching a spinoff personal social networking app. Facebook identified the popular and widely used mobile messaging app, WhatsApp, as the most significant threat in this regard. Once again, though, rather than investing and innovating in an effort to out-compete WhatsApp, Facebook responded to the competitive threat by acquiring it.

18. By early 2012, the risk that a successful mobile messaging app available on multiple mobile operating systems could break into personal social networking had become a strategic focus for the company's leadership. In an April 2012 email, for example, Mr. Zuckerberg identified a troubling global trend of "messaging apps . . . using messages as a springboard to build more general mobile social networks." And by October 2012, the threat was widely recognized within Facebook, with a Facebook business growth director predicting internally that "[t]his might be the biggest threat we've ever faced as a company."

19. Facebook's attention soon focused on WhatsApp, which, by 2012, had become a uniquely threatening competitor in mobile messaging and an obvious candidate to enter the personal social networking market. Not locked into a single mobile operating system like Apple's

iMessage, nor heavily localized in parts of Asia like LINE, Kakao, or WeChat, WhatsApp was the clear "category leader" in mobile messaging. In an August 2013 email, the head of Facebook's internal mergers and acquisitions ("M&A") group warned that WhatsApp's "kind of mobile messaging is a wedge into broader social activity/sharing on mobile we have historically led in web."

20. Once again, Facebook decided it was better to buy than compete. After Facebook announced the acquisition of WhatsApp, employees internally celebrated the acquisition of "probably the only company which could have grown into the next FB purely on mobile[.]" Other industry observers shared that view. For example, investment bank SunTrust Robinson Humphrey observed in an analyst report: "We think WhatsApp and Facebook were likely to more closely resemble each other over time, potentially creating noteworthy competition, which can now be avoided."

21. Just as with Instagram, WhatsApp presented a powerful threat to Facebook's personal social networking monopoly, which Facebook targeted for acquisition rather than competition. Facebook's control of WhatsApp both neutralizes WhatsApp as a direct threat and, separately, makes it harder for future mobile messaging apps to acquire scale and threaten to enter personal social networking.

22. **Anticompetitive Conditioning.** In addition to its strategy of acquiring competitive threats to its personal social networking monopoly, Facebook has, over many years, announced and enforced anticompetitive conditions on access to its valuable platform interconnections, such as the application programming interfaces ("APIs") that it makes available to third-party software applications.

23. In order to communicate with Facebook (i.e., send data to Facebook Blue, or retrieve data from Facebook Blue) third-party apps must use Facebook APIs. For many years—and continuously until a recent suspension under the glare of international antitrust and regulatory scrutiny—Facebook has made key APIs available to third-party apps *only* on the condition that they refrain from providing the same core functions that Facebook offers, including through Facebook Blue and Facebook Messenger, and from connecting with or promoting other social networks.

24. This conduct—which is motivated by a desire to weaken and hinder potential competitive threats—harms competition and helps maintain Facebook's monopoly in personal social networking, in at least two ways.

25. First, announcing these anticompetitive conditions changed the incentives of third-party apps that relied upon the Facebook ecosystem, by deterring them from including features and functionalities that might compete with Facebook or from working in certain ways with other firms that compete with Facebook. This deterrence suppresses the emergence of threats to Facebook's personal social networking monopoly.

26. Second, enforcing the anticompetitive conditions by terminating access to valuable APIs hinders and prevents promising apps from evolving into competitors that could threaten Facebook's personal social networking monopoly.

27. **Harm to Competition.** Through at least the foregoing conduct, Facebook suppresses, deters, hinders, and eliminates personal social networking competition, and maintains its monopoly power in the U.S. personal social networking market, through means other than merits competition. In doing so, Facebook deprives users of personal social networking in the United States of the benefits of competition, including increased choice, quality, and innovation.

Facebook cannot justify this substantial harm to competition with claimed efficiencies, procompetitive benefits, or business justifications that could not be achieved through other means.

28. By suppressing, neutralizing, and deterring the emergence and growth of personal social networking rivals, Facebook also suppresses meaningful competition for the sale of advertising. Personal social networking providers typically monetize through the sale of advertising; thus, more competition in personal social networking is also likely to mean more competition in the provision of advertising. By monopolizing personal social networking, Facebook thereby also deprives advertisers of the benefits of competition, such as lower advertising prices and increased choice, quality, and innovation related to advertising.

29. Today, Facebook's course of conduct to unlawfully maintain its personal social networking monopoly continues, and must be enjoined. Facebook continues to hold and operate Instagram and WhatsApp, and continues to keep them positioned to provide a protective "moat" around its personal social networking monopoly. Facebook continues to look for competitive threats, and will seek to acquire them unless enjoined. Likewise, Facebook's imposition of anticompetitive conditions on APIs continued until suspended—at least for the time being—in the glare of attention from governments and regulators around the globe. Facebook will resume those policies or equivalent measures unless enjoined.

II. JURISDICTION AND VENUE

A. Jurisdiction

30. This Court has subject matter jurisdiction over this action pursuant to Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. § 1331, 1137(a), and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against

restraints and monopolies, and is brought by an agency of the United States authorized by an Act of Congress to bring this action.

31. This Court has personal jurisdiction over Facebook because Facebook has the requisite constitutional contacts with the United States of America pursuant to 15 U.S.C. § 53(b).

32. Facebook's general business practices, and the unfair methods of competition alleged herein, are "in or affecting commerce" within the meaning of Section 5 of the FTC Act, 15 U.S.C. § 45.

33. Facebook is, and at all relevant times has been, a corporation, as the term "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

B. Venue

34. Venue in this district is proper under 15 U.S.C. § 22, 28 U.S.C. § 1391(b)(1), and 15 U.S.C. § 53(b). Facebook resides, transacts business, and is found in this district.

III. THE PARTIES

35. Plaintiff FTC is an administrative agency of the United States government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 *et seq.*, with its principal offices in the District of Columbia. The Commission is vested with authority and responsibility for enforcing, among other things, Section 5 of the FTC Act, 15 U.S.C. § 45, and is authorized under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate court proceedings to enjoin violations of any law the FTC enforces and to seek equitable remedies.

36. The FTC is authorized to bring this case in federal court because it has reason to believe that Defendant Facebook is violating or is about to violate a provision of law enforced by the Federal Trade Commission, and this is a proper case for permanent injunctive relief within the meaning of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

37. Defendant Facebook is a publicly traded, for-profit company, incorporated in Delaware and with its principal place of business at 1601 Willow Road, Menlo Park, CA 94025. Facebook's principal businesses are in technologies that facilitate digital interactions and communications, including Facebook Blue, which provides personal social networking; Instagram, which provides personal social networking; Facebook Messenger, which provides mobile messaging services; and WhatsApp, which provides mobile messaging services.

IV. INDUSTRY BACKGROUND

A. The Rise of Personal Social Networking and Facebook

38. In the early 2000s, the widespread use of personal computers enabled a new way of connecting and communicating with other people online: social networking with friends and family. Friendster, launched in March 2003, was one of the first personal social networks to gain significant popularity, and Myspace followed soon after. Half a year later, in February 2004, Mr. Zuckerberg and his Harvard College classmates launched Facebook (then styled "TheFacebook").

39. In contrast to the limited functionalities of email and messaging, personal social networking gained popularity by providing a distinct and richer way for people to maintain personal connections. Personal social networking enables people to stay up to date and share personal content with friends and family, and is an integral part of the daily lives of millions of Americans.

40. Through an account on a personal social network, people can post content about their own lives and interests, and view what personal connections have posted. In doing so, they can stay up to date about the lives of people they care about. During a single session, a person can read about one friend's recent vacation, another friend's thoughts on a local restaurant, and a relative's wedding announcement. And then the person can post her own content, and interact

with her friends' posts, through comments, replies, and reactions. Thus, personal social networking gives people a personalized social space in which they can share content with their personal connections.

41. Facebook launched first on college campuses, but within a few years it had expanded to the general public. Soon after that, Facebook surpassed both Friendster and Myspace, presenting itself as a more premium, private, and personal social networking experience. By 2009, Facebook had established itself as the most popular personal social networking provider in the United States and the world. Facebook has remained the number one provider of personal social networking in the United States and the world ever since.

42. Historically, personal social networking providers have refrained from charging a monetary price for providing personal social networking to users, relying instead on monetizing user data and engagement through advertising. Personal social networking providers compete for users on a variety of factors, including quality of the user experience, functionality, and privacy protection options, among others.

B. <u>Facebook's Business Model: Selling Advertising Based on Detailed User Data</u>

43. While there are other ways in which personal social networking could be monetized, Facebook has chosen to monetize its businesses by selling advertising that is displayed to users based on the personal data about their lives that Facebook collects.

44. This has been highly profitable for Facebook. Advertisers pay billions—nearly $70 billion in 2019—to display their ads to specific "audiences" of Facebook Blue and Instagram users, created by Facebook using proprietary algorithms that analyze the vast quantity of user data the company collects regarding its users. This allows advertisers to target different campaigns and

messages to different groups of users. Ads displayed by Facebook are interspersed with—and can be similar in appearance to—user-generated content on each personal social network.

45. Facebook has recognized the unique characteristics of the advertising that a personal social network can offer ("social advertising"). For example, in earnings calls, Facebook Chief Operating Officer ("COO") Sheryl Sandberg described Facebook Blue as the "world's first global platform that lets marketers personalize their messages at unprecedented scale," and called Facebook Blue and Instagram the "two most important mobile advertising platforms" in the world.

46. Social advertising is distinct from other forms of advertising, including other forms of display advertising, search advertising, and "offline" advertising (e.g., television, radio, and print).

47. Social advertising is a distinctive form of display advertising. Display advertising refers to the display of advertisements—in the form of images, text, or videos—on websites or apps when a user visits or uses them. Display advertising is distinct from "offline" advertising, such as TV, radio, and print advertising, because it offers the ability to reach consumers during their online activity (including during their use of mobile devices like smartphones and tablets), allows for interactive ads, and permits rich ad targeting to users using personal data generated and collected through their online activity. Display advertising is also distinct from search advertising, which is a form of digital advertising that is shown to a person when he or she enters a specific search term in an online search engine, like Google or Bing. Advertisers buy search advertising to target consumers who are actively inquiring about a particular type of product or service. By contrast, display advertising reaches consumers who are not actively querying a search engine, including consumers who may be further from making a specific purchase decision.

48. Social advertising is a type of display advertising, but it is distinct in several ways from the non-social display advertising on websites and apps that are not personal social networks. For example, in part because users must log in to a personal social network with unique user credentials, social advertising enables advertisers to target users based on personalized data regarding users' personal connections, activities, identity, demographics, interests, and hobbies. Also, in contrast to display advertising on other websites and apps, social advertising leverages high engagement and frequent contact with users, as well as the integration of advertisements directly into a user's feed of content generated by personal connections (including ads that resemble "native" content and boosted content). Social advertising also facilitates forms of engagement with the advertisement that are not available with other forms of display advertising—such as allowing a user to share an advertisement with a personal connection, or to "like" or follow an advertiser's page. Among other things, the foregoing characteristics enable social advertising providers to sell advertisers access to personally targeted "audiences" of highly engaged users, and to reach users that need not be actively searching for—or even aware of—the advertised product or service.

49. As Ms. Sandberg emphasized in a 2012 earnings call: "[O]n the question of where advertisers are, you know as I've said before, we are a third thing. We're not TV, we're not search. We are social advertising." Facebook in particular has a preeminent ability to target users with advertising due to its scale, its high level of user engagement, and its ability to track users both on and off Facebook properties to measure outcomes.

50. Facebook's social advertising business, serving ads to users of its personal social networks reflecting its vast access to data, is extraordinarily profitable. According to its public

earnings reports, Facebook earns "substantially all of [its] revenue from selling advertising placements to marketers."

V. RELEVANT MARKET AND MONOPOLY POWER

A. Personal Social Networking in the United States

51. The provision of personal social networking services ("personal social networking" or "personal social networking services") in the United States is a relevant market.

52. Personal social networking services are a relevant product market. Personal social networking services consist of online services that enable and are used by people to maintain personal relationships and share experiences with friends, family, and other personal connections in a shared social space. Personal social networking services are a unique and distinct type of online service. Three key elements distinguish personal social networking services from other forms of online services provided to users.

53. First, personal social networking services are built on a social graph that maps the connections between users and their friends, family, and other personal connections. The social graph forms the foundation upon which users connect and communicate with their personal connections, and can reflect friendships, online conversations, a desire to see someone's updates, visits to places, and other shared connections to personal interests and activities, including groups, locations, businesses, artists, and hobbies. Personal social networking providers use the social graph as the backbone for the features they offer users, including the two other key elements of personal social networking discussed below.

54. Second, personal social networking services include features that many users regularly employ to interact with personal connections and share their personal experiences in a shared social space, including in a one-to-many "broadcast" format. In this shared social space,

which may include a news feed or other similar feature, users share content—such as personal updates, interests, photos, news, and videos—with their personal connections. Personal social networking providers can use the social graph to inform what content they display to users in the shared social space and when. This generally applies to all forms of content on the personal social networking service, including user-created content like user "news feed" posts, publisher-created content like news articles, and advertisements.

55. Third, personal social networking services include features that allow users to find and connect with other users, to make it easier for each user to build and expand their set of personal connections. The social graph also supports this feature by informing which connections are suggested or available to users.

56. The relevant geographic market is the United States. The United States is a relevant geographic market for personal social networking services due to several factors, including differences in broadband access and social norms that vary at the country level. In addition, network effects between users are generally stronger between users in the same country, because for most users the vast majority of relevant friends, family, and other personal connections reside in the same country as the user. Accordingly, users in the United States predominately share with other users in the United States. For users in the United States, a personal social networking service that is not popular in the United States, even if it is popular in another country, is therefore not reasonably interchangeable with a personal social networking service that is popular in the United States. Facebook and other industry participants recognize these distinctions and track their performance, and that of rivals, separately by country.

57. While users may engage with other websites and apps, other types of internet services are not adequate substitutes for personal social networking.

58. Personal social networking is distinct from, and not reasonably interchangeable with, specialized social networking services like those that focus on professional (e.g., LinkedIn) or interest-based (e.g., Strava) connections. Specialized networks are designed for, and are utilized by users primarily for, sharing a narrow and highly specialized category of content with a narrow and highly specialized set of users for a narrow and distinct set of purposes.

59. Personal social networking is distinct from, and not reasonably interchangeable with, online video or audio consumption-focused services such as YouTube, Spotify, Netflix, and Hulu. Users employ such services primarily for the passive consumption and posting of specific media content (e.g., videos or music) from and to a wide audience of often unknown users. These services are not used primarily to communicate with friends, family, and other personal connections.

60. Personal social networking is distinct from, and not reasonably interchangeable with, mobile messaging services. Mobile messaging services do not feature a shared social space in which users can interact, and do not rely upon a social graph that supports users in making connections and sharing experiences with friends and family. Indeed, users of mobile messaging services generally do not and cannot query a mobile messaging service to find contact information they do not already possess, nor can they query the service to find other users connected to the people, places, things, and interests that matter to them. Instead, users of mobile messaging services employ such services primarily to send communications to a small and discrete set of people generally limited to a set of contacts entered by each user. Mr. Zuckerberg described this distinction in a 2019 post, calling personal social networking providers like Facebook Blue "the digital equivalent of a town square," and contrasting the private communication offered by mobile messaging apps like WhatsApp as "the digital equivalent of the living room."

B. Facebook's Monopoly Power

61. Facebook provides personal social networking to users via its Facebook Blue and Instagram services.

62. Facebook Blue has been the dominant personal social networking provider in the United States since at least 2011. From the beginning, Mr. Zuckerberg has described Facebook Blue as being "about real connections to actual friends, so the stories coming in are of interest to the people receiving them, since they are significant to the person creating them." [redacted] Indeed, in August 2020, Mr. Zuckerberg testified that "the use cases that we've focused on the most over time are helping you connect . . . with your friends and family." Similarly, Ms. Sandberg testified in September 2020 that the value Facebook Blue provides to its users is "helping you stay in touch with friends and family and helping you know what's going on with them in a very efficient way."

63. Instagram provided personal social networking at the time Facebook acquired it. Instagram's founders set out to build a "mobile social network" and succeeded in doing so. Since its founding, Instagram has provided the defining features of personal social networking, including maintaining a social graph with personal connections, enabling users to interact with their personal connections and share their personal experiences via a shared social space, including in a one-to-many "broadcast" format, and offering features that allow each user to find and connect with other users, to build a network of personal connections.

64. Facebook holds monopoly power in the provision of personal social networking in the United States, and has held such power continuously since at least 2011. Facebook has

maintained a dominant share of the U.S. personal social networking market (in excess of 60%) since that time, until the present day. It is likely to continue to hold monopoly power for the foreseeable future.

65. Facebook's dominant position in the U.S. personal social networking market is durable, due to significant entry barriers, including direct network effects and high switching costs. Direct network effects refer to user-to-user effects that make a personal social network more valuable as more users join the service. Direct network effects are a significant barrier to entry into personal social networking. Specifically, because a core purpose of personal social networking is to connect and engage with personal connections, it is very difficult for a new entrant to displace an established personal social network in which users' friends and family already participate.

66. A potential entrant in personal social networking services also would have to overcome users' reluctance to incur 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 would lose by switching to another personal social networking provider. Further, these switching costs can increase over time—a form of a "ratchet effect"—as each user's collection of content and connections, and investment of effort in building each, continually builds with use of the service.

67. Providers of personal social networking typically sell advertising that they display to their users. Any positive indirect network effects (i.e., increases in the value of one service as a function of usage of another) between a personal social networking provider's services to users and its sale of advertising to advertisers operate in only one direction: users either are indifferent

to the amount of advertising that the personal social networking provider displays, or would prefer fewer or no advertisements.

VI. ANTICOMPETITIVE CONDUCT

A. Facebook's Efforts to Deter, Suppress, and Neutralize Personal Social Networking Competition

68. Personal social networking is characterized by strong network effects: a provider's service is generally more valuable to a user when more of the user's friends and family are using that service. Once a personal social network has achieved dominant scale, these effects make competition and entry harder, even for a rival that users perceive as offering a higher quality product.

69. As a result, and as Facebook well understands, the most significant competitive threats to Facebook Blue may come not from near clones of Facebook Blue, but from differentiated products that offer users a distinctive way of interacting with friends and family for which Facebook Blue is not optimized. As Mr. Zuckerberg explained in a February 2012 email: "Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different."

70. Facebook's leadership also understands that Facebook Blue's personal social networking monopoly is most vulnerable at moments of disruption and transition, when a competitor may be better placed than Facebook Blue to exploit changes in technology or consumer behavior. A crucial transition of this kind occurred from about 2010 to 2014 with the proliferation of smartphones, which transformed the way that users consumed digital services. Mr. Zuckerberg and other executives realized that Facebook Blue offered a relatively poor experience for mobile users, and that this made Facebook's monopoly position more vulnerable than it had ever been.

71. Facebook navigated this period of transition, and has maintained its monopoly power in personal social networking thereafter, not by competing on the merits, but rather through a course of anticompetitive conduct spanning years. This course of conduct includes at least:

a. the acquisition and continued control of Instagram, which has neutralized a significant independent personal social networking provider;

b. the acquisition and continued control of WhatsApp, which has neutralized a significant competitive threat to Facebook's personal social networking monopoly; and

c. the imposition and enforcement of anticompetitive conditions on access to APIs in order to suppress and deter competitive threats to its personal social networking monopoly.

72. This conduct reflects a deeply rooted view within Facebook that, as Mr. Zuckerberg put it in a June 2008 internal email, "it is better to buy than compete." This view recurs in Facebook's internal documents. For example, Mr. Zuckerberg noted after the announcement of the Instagram acquisition that "we can likely always just buy any competitive startups."

73. Consistent with this approach, and in addition to the conduct identified above and described in more detail below, Facebook has tried and failed to buy other companies that have drawn its competitive attention, including Twitter and Snapchat. For example, in lamenting that Twitter had "turned down [Facebook's] offer" to be acquired in November 2008, Mr. Zuckerberg wrote: "I was looking forward to the extra time that would have given us to get our product in order without having to worry about a competitor growing." Similarly, Facebook has made multiple overtures to acquire [redacted] over the years, [redacted]

[redacted].

74. Facebook has also made a point of attempting to detect and evaluate competitive threats early, in order to neutralize them before they have a chance to grow fully. Reflecting this policy, in October 2013, Facebook acquired the user surveillance company Onavo. Onavo marketed itself to users as providing secure virtual private networking services, but—unknown to many users—it also tracked users' online activity.

75. By acquiring Onavo, Facebook obtained control of data that it used to track the growth and popularity of other apps, with an eye towards identifying competitive threats for acquisition or for targeting under its anticompetitive platform policies. As a December 2013 internal slide deck noted: "With our acquisition of Onavo, we now have insight into the most popular apps. We should use that to also help us make strategic acquisitions." Facebook also used Onavo data to generate internal "Early Bird" reports for Facebook executives, which focused on "apps that are gaining prominence in the mobile eco-system in a rate or manner which makes them stand out." Facebook shut down Onavo in 2019 following public scrutiny; however, it continues to track and evaluate potential competitive threats using other data.

76. Today, Facebook's monopolization is ongoing. Facebook continues to hold and operate Instagram and WhatsApp, which neutralizes their direct competitive threats to Facebook, and continues to keep them positioned to provide a protective "moat" around its personal social networking monopoly. Specifically, Facebook recognizes that so long as it maintains Instagram and WhatsApp operating at scale, it will be harder for new firms to enter and build scale around their respective mechanics. Thus, Facebook benefits from precisely the dynamic that Mr. Zuckerberg emphasized when explaining the value of the Instagram acquisition: "new products

won't get much traction since we'll already have their mechanics deployed at scale." Facebook continues to look for other competitive threats, and will seek to acquire them unless enjoined from doing so.

77. Likewise, Facebook's imposition of anticompetitive conditions on APIs—punishing and suppressing some promising threats (e.g., Path, Circle, and various messaging apps) and preventing and deterring others from even becoming threats in the first place—continued until recently suspended in the glare of attention from governments and regulators around the globe. Facebook will resume those policies or equivalent measures unless enjoined from doing so.

B. Facebook Acquired Instagram to Neutralize a Competitor

78. Beginning around 2010, the widespread adoption of smartphones marked a significant change in the way that people consumed digital services, with people shifting from desktop computers to mobile devices. With respect to personal social networking services, because smartphones are portable and offer integrated digital cameras, social networking with family and friends through taking, sharing, and commenting on photographs via a mobile app optimized for that activity became increasingly popular.

79. But Facebook Blue was struggling to provide a strong user experience for this kind of personal social networking activity. It was built and optimized for desktop use, not smartphones, and its performance for working with and sharing photos on mobile devices was weak. Facebook feared that its personal social networking monopoly would be toppled by a mobile-first, photo-based competitor emerging and gaining traction.

80. It was soon clear that Instagram was just that competitor. Following its launch in October 2010 for iOS devices, Instagram quickly gained popularity for users seeking a product that facilitated photo-based social interactions with friends and family.

81. Instagram's growth was stellar. It gained 25,000 users on its first day; 100,000 users in a week; 1 million users in less than three months; and 10 million users in less than a year—all while available only on Apple's iOS devices and before launching on Android devices.

82. Facebook watched Instagram's emergence with mounting anxiety. In February 2011, Mr. Zuckerberg wrote to colleagues: "In 4 months they're up to 2m users and 300k daily photo uploads. That's a lot. We need to track this closely."

83. Facebook initially tried to compete on the merits with mobile photo-sharing capabilities, dedicating significant resources to developing its own camera app, code-named "Snap." But despite relentless pressure from senior management, these efforts met with limited success. In July 2011, one executive demanded: "[W]hy is mobile photos app development moving so slowly? We still are getting our ass kicked by Instagram." And by September 2011, Mr. Zuckerberg was railing: "In the time it has taken us to get ou[r] act together on this[,] Instagram has become a large and viable competitor to us on mobile photos, which will increasingly be the future of photos."

84. In that same September 2011 email, Mr. Zuckerberg warned that Instagram was a major threat:

> *One theme in many of the products we're about to launch -- News Feed, Timeline, Open Graph -- is that people love nice big photos.* A lot of the time people don't even understand how the new News Feed or Timeline work, but they love those products because of the bigger and richer photos. While this is nice in the short term, *I view this as a big strategic risk for us if we don't completely own the photos space. If Instagram continues to kick ass on mobile or if Google buys them, then over the next few years they could easily add pieces of their service that copy what we're doing now, and if they have a growing number of people's photos then that's a real issue for us.*
>
> *They're growing extremely quickly right now. It seems like they double every couple of months or so, and their base is already ~5-10m users.* As soon as we launch a compelling product a lot of people will use ours more and future Instagram users will find no reason to use them. But at the current rate, *literally every couple*

> *of months that we waste translates to a double in their growth and a harder position for us to work our way out of.* (Emphasis added.)

85. Facebook employees scrambled to meet Mr. Zuckerberg's demands. In an internal email dated September 13, 2011, Facebook's Director of Engineering reminded her team: "Zuck is anxious for the [Facebook] snap app (mainly motivated by a desire to slow down Instagram's growth)."

86. Facebook's leadership feared not only an independent Instagram, but also an Instagram in the hands of another purchaser, such as Google (mentioned by Mr. Zuckerberg in the September 2011 email above), Apple, or Twitter. In April 2012, a Facebook engineer warned Mr. Zuckerberg of "the potential for someone like Apple to use [Instagram] as a foothold." And an investor in Instagram and former Facebook executive underscored the threat of Twitter: "if twitter and instragram [sic] became one company it would make life more difficult for facebook."

87. As Instagram soared, Facebook's leaders began to focus on the prospect of acquiring Instagram rather than competing with it. For example, in January 2012, the head of Facebook's internal M&A group wrote to Mr. Zuckerberg to suggest "m&a" as a solution to this problem, in order to increase users' switching costs, retain engagement, and lock them into Facebook Blue:

> *[I] think photos in general and certainly in conjunction with mobile is a weak spot for us, yet represents a large part of many users['] engagement on fb. i view this as both a significant threat (google/picasa/android, instagram, etc.) and opportunity*. . . . imo, photos (along with comprehensive/smart contacts and unified messaging) is perhaps one of the most important ways we can make switching costs very high for users - if we are where all users' photos reside because the upoading [sic] (mobile and web), editing, organizing, and sharing features are best in class, will be very tough for a user to switch if they can't take those photos and associated data/comments with them. i think this area should be a priority for us organically *and through m&a especially given competitive dynamics*. (Emphasis added.)

88. By February 2012, Mr. Zuckerberg predicted that an independent Instagram could soon achieve massive scale, and suggested that Facebook should move to acquire it:

> *If [my analytical] framework holds true, then we should expect apps like Instagram to be able to grow quite large.* If it has 15m users now, it might be able to reach 100-200m in the next 1-2 years. (Intuitively this is not crazy because in the next year alone iOS should double and it should spread to Android, so even without further increase in market share it should grow by at least 4x this year.) If those assumptions hold true, then *we should perhaps be more open to buying these companies than we currently seem to be*. (Emphasis added.)

89. Throughout this period, Mr. Zuckerberg repeatedly explained the case for acquisition in terms of Instagram's threat as a personal social networking competitor. In February 2012, he wrote:

> *I wonder if we should consider buying Instagram,* even if it costs ~$500m. . . . For the network piece, *one concerning trend is that a huge number of people are using Instagram every day -- including everyone ranging from non-technical high school friends to even FB employees -- and they're only uploading some of their photos to FB*. This creates a huge hole for us and one that I'm [sic] sure anything we're going to do on platform or with social dynamics will completely solve. *Sometimes you don't want to bug all your FB friends with a lot of photos so you put them in the photo-posting place instead.* With [Facebook] Snap, our basic thesis is that what people need is a good way to post a bunch of photos on FB. We're doing some work on filters but not a ton, and the team is approaching this more as a nice feature and somewhat of a gimmick. Instagram, on the other hand, is approaching this problem from the perspective of how to help people take beautiful photos. *I think it's quite possible that our initial thesis was wrong and that theirs is right -- that what people want is more to take the best photos than to put them on FB. If so, [Facebook] Snap might be a good first step but we'd be very behind in both functionality and brand on how one of the core use cases of Facebook will evolve in the mobile world, which is really scary and why we might want to consider paying a lot of money for this.* (Emphasis added.)

90. Later that month, Mr. Zuckerberg wrote in similar terms to Mr. Ebersman:

> One business questions [sic] I've been thinking about recently is how much we should be willing to pay to acquire *mobile app companies like Instagram and Path that are building networks that are competitive with our own.* These companies have the properties where they have millions of users (up to about 20m at the moment for Instagram), fast growth, a small team (10-25 employees) and no revenue. The businesses are nascent *but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very*

> *disruptive to us.* These entrepreneurs don't want to sell (largely inspired [by] our success), but at a high enough price -- like $500m or $1b -- they'd have to consider it. Given that we think our own valuation is fairly aggressive right now and that *we're vulnerable in mobile,* I'm curious if we should consider going after one or two of them. What do you think about this? (Emphasis added.)

91. Mr. Ebersman cautioned that acquiring a nascent competitor was a poor reason for an acquisition since "someone else will spring up immediately in their place" and "[w]e will always have upstarts nipping at our heels." But, as Mr. Zuckerberg explained, Mr. Ebersman was wrong:

> *It's a combination of (1) [i.e., neutralizing a potential competitor] and (3) [integrating acquired products into Facebook]*. The basic plan would be to buy these companies and leave their products running while over time incorporating the social dynamics they've invented into our core products. *One thing that may make [neutralizing a potential competitor] more reasonable here is that there are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product. [Integrating acquired products into FB] is also a factor but in reality we already know these companies' social dynamics and will integrate them over the next 12-24 months anyway.* The integration plan involves building their mechanics into our products rather than directly integrating their products if that makes sense. By a combination of (1) and (3), one way of looking at this is that what we're really buying is time. *Even if some new competitors spring[] up, buying Instagram, Path, Foursquare, etc now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.* (Emphasis added.)

92. On March 9, 2012, Mr. Zuckerberg emailed Facebook's Vice President of Engineering (and later Chief Technology Officer) Mike Schroepfer to let him know that "Kevin [Systrom] from Instagram called me yesterday to talk about selling his [company] to us. He said he thinks he'll either raise money or sell at $500m." Mr. Schroepfer replied that "not losing strategic position in photos is worth a lot of money."

93. Similarly, on April 4, 2012, Ms. Sandberg and other senior managers received an email report that compared usage of Instagram and Facebook Blue on the iPhone, which flagged that "Facebook is not that far ahead [of Instagram] on iPhone." Ms. Sandberg forwarded the email to Mr. Zuckerberg, noting: "This makes me want instagram more[.]"

94. Meanwhile, Facebook employees continued their efforts to compete with Instagram by developing a standalone photo-sharing app for the Facebook Blue network. For example, in an email dated April 3, 2012, Mr. Schroepfer reminded a Facebook engineer, with respect to Facebook's own photo app: "[W]e need to get into ship mode asap. Not sure if you saw the recent instgram [sic] numbers but we just don't have much time." The engineer responded a couple of hours later: "Yeah, Instagram stats are scary and we need to ship asap. I'll communicate to the team that we need to enter into launch mode."

95. On April 9, 2012, Facebook announced that it had reached an agreement to acquire Instagram for $1 billion, Facebook's most expensive acquisition as of that date. Facebook paid a premium for Instagram, reflecting the significant threat that Instagram posed to Facebook's monopoly.

96. Meanwhile, Facebook employees celebrated the acquisition of an existential threat. For example, on April 10, 2012—two days after the announcement—the head of Facebook's internal M&A group wrote to Mr. Ebersman emphasizing that Instagram had "done a great job in one of the main tenets of social networking as we know it today (photos), but where social networking is clearly headed (mobile)." He noted that "their growth trajectory is pretty incredible, mark asked them yesterday during their visit when they will reach 100m users and they said their projections are for end of this year."

97. Other close observers of Facebook recognized that Facebook had neutralized a significant competitive threat by buying Instagram. For example, in an email dated April 12, 2012, a major Facebook shareholder and former Facebook executive wrote to Instagram co-founder Kevin Systrom:

> *I have been prodding various FB folks, including Zuck, for at least 6 months to do this, do it quickly, and do it at any cost. From my perspective the risk of not buying you guys (and someone like Google snapping you up) was beginning to make me, and a lot of other major shareholders, extremely uncomfortable*. . . . [I]n the last few years [Facebook] allowed [its] core photos product (and its mobile offering) to languish. As a result the photos product never realized its ultimate potential, and worse, *it ran the risk of the unthinkable happening - being eclipsed by another network with a "parallel graph"*. As you know, *photos is the lifeblood of Facebook, propping up the whole network through the usage, interaction, and positive feedback loops it generates, and time on site is directly linked to photo browsing*. Going back to 2005, *shortly after I launched photos it was generating ~50% of all Facebook page views,* a stat which remained fairly steady until the introduction of games on platform. (Emphasis added.)

98. Less than two weeks after the acquisition was announced, Mr. Zuckerberg suggested canceling or scaling back investment in Facebook's own mobile photo app as a direct result of the Instagram deal, writing in an email dated April 22, 2012: "Examples of things we could scale back or cancel: . . . Mobile photos app (since we're acquiring Instagram)." And Facebook did indeed allow it to die, making only two updates to it before discontinuing it entirely in 2014.

99. In the wake of the Instagram acquisition, Facebook employees felt that they no longer needed to fear that a personal social networking competitor would emerge using mobile photo-sharing. For example, in an email dated April 23, 2012, a Facebook business development manager wrote to colleagues that he was unconcerned about the apps Camera+ and Hipstamatic because, among other things, "Instagram is clear winner on iOS and would [be] difficult to compete with at this point[.]" In an October 2012 document, a Facebook product director

recognized that its ownership of Instagram meant it "effectively dominate[d] photo sharing," and would not be "require[d] to do much work to maintain or extend" that dominance.

100. Facebook's acquisition of Instagram neutralized a singularly threatening personal social networking competitor and an increasingly serious threat to Facebook Blue's monopoly. An investor slide deck dated May 31, 2011, underscored Instagram's founders' plan "to develop a complete social networking service." Mr. Systrom emphasized the breadth of this vision to Mr. Zuckerberg in private correspondence shortly before the acquisition:

> [My vision for Instagram] means *not limiting the scope of Instagram to just photos - but to explore other mediums as well which support the original vision* of Burbn [Instagram's original name] *being to improve the way we communicate and share in the real world. . . . Is it a next-generation photos app or is it a next-generation communication app?* I don't mean to get overly philosophical, *but the limits of our ambitions have really yet to be tested, and I want to see that through at least for now. The desire to have an effect at the scale of FB is real and tangible,* and one that is actually quite hard to balance in our minds. (Emphasis added.)

101. Instagram also planned and expected to be an important advertising competitor. An investor slide deck dated May 31, 2011, records Instagram's plan to earn revenues through mobile advertising. Likewise, in a January 2012 email, Mr. Systrom explained to an external partner: "[W]e believe in the long run brands will pay to either be featured, have their content featured, or run targeted 'instagrams' to people as advertisements. Right now we raised enough money that we can work on building a product people love before going to try to sell to advertisers. We want an audience first[.]"

102. By acquiring Instagram, Facebook neutralized Instagram as an independent competitor to Facebook Blue. Since the acquisition, Facebook has taken actions to reduce the impact of Instagram on Facebook Blue, confirming that Instagram is a significant threat to Facebook's personal social networking monopoly. For instance, after the acquisition Facebook limited promotions of Instagram that would have otherwise drawn users away from Facebook

Blue. This disappointed Mr. Systrom, who complained in a November 2012 email: "you keep mentioning how you can't promote Instagram until you understand it's [sic] effect on FB engagement. Who decided this?"

103. Facebook's Vice President of Growth responded: "Chris [Cox, Vice President of Product,] voiced the concern (which btw I agree with) about instagram's feed cannibalizing our own / training users to check multiple feeds—which is why we want to first measure the impact of instagram's usage on our engagement / wire things up to make sure it is all accretive. . . . I am not sure growing Instagram blindly through promotions without understanding the impact on FB's engagement makes sense[.]"

104. Nevertheless, despite Facebook's efforts to minimize Instagram's impact on Facebook Blue, Facebook Blue continues to lose ground to Instagram. For example, a [redacted]

105. In sum, Facebook's acquisition and control of Instagram represents the neutralization of a significant threat to Facebook Blue's personal social networking monopoly, and the unlawful maintenance of that monopoly by means other than merits competition. This conduct deprives users of the benefits of competition from an independent Instagram (either on its own or acquired by a third party), including, among other things: the presence of an additional locus of competitive decision-making and innovation; a check on Facebook Blue's treatment of and level of service offered to users; an alternative provider of personal social networking for users untethered from Facebook's control; and a spur for Facebook to compete on the merits in response.

Facebook's ownership and control of Instagram also maintains a protective "moat" that deters and hinders competition and entry in personal social networking.

106. Facebook cannot substantiate merger-specific efficiencies or other procompetitive benefits sufficient to justify the Instagram acquisition.

C. Facebook Acquired WhatsApp to Neutralize a Competitive Threat to its Personal Social Networking Monopoly

107. Beginning around 2010, as another consequence of the increased popularity of smartphones, consumers began using mobile messaging services to communicate with one another. Mobile messaging includes (1) text messaging via short-message-service or multimedia-message-service protocols ("SMS"), and (2) text messaging via internet-based, over-the-top mobile messaging apps ("OTT mobile messaging services"). Traditionally, OTT mobile messaging services have not charged a per-message fee, and have provided improvements over SMS, like enhanced features for sharing content (e.g., photos, videos, sound clips, and GIFs) and the option to create persistent groups of users. Since 2011, when the messaging volume of SMS peaked, the messaging volume of OTT messaging services has grown astronomically.

108. Facebook's leadership soon realized that the explosion of OTT mobile messaging services presented a significant competitive threat to Facebook Blue's personal social networking monopoly. In particular, they realized that a mobile messaging app that reached sufficient scale could, by adding additional features and functionalities, enter the personal social networking market at competitive scale and undermine or displace Facebook Blue's personal social networking monopoly.

109. Facebook's leadership feared that mobile messaging would serve as a path for a serious competitive threat to enter the personal social networking market. For example, in an April 2012 email, a Facebook data scientist noted: "[W]hile these [mobile messaging] apps began as

alternatives to SMS, they are increasingly expanding into domains that more closely resemble traditional social-networking services." A couple of weeks later, he wrote again to colleagues: "We're continuing to focus on mobile messenger apps. Two takeaways: several of these apps are trying to expand into more full-fledged social networking; and a number are working on international expansion but with varying degrees of success." Likewise, in an August 2013 email, the head of Facebook's internal M&A group warned that "the scary part, of course, is that this kind of mobile messaging is a wedge into broader social activity / sharing on mobile we have historically led in web."

110. Facebook executives and employees saw this as a serious strategic threat. For example, in an email dated October 4, 2012, Facebook's Director of Product Management wrote to colleagues on the subject of competition from mobile messaging services: "[T]his is the biggest threat to our product that I've ever seen in my 5 years here at Facebook; it's bigger than G+, and we're all terrified. These guys actually have a credible strategy: start with the most intimate social graph (I.e. [sic] the ones you message on mobile), and build from there."

111. Similarly, notes included with a February 2013 Facebook board presentation titled "Mobile Messaging" warned that mobile messaging services were "a threat to our core businesses: both [with respect to] graph and content sharing. [T]hey are building gaming platforms, profiles, and news feeds. [T]hese competitors have all the ingredients for building a mobile-first social network. . . . At its current rate, WhatsApp will be near SMS levels of messaging in 1 year[.]"

112. Mr. Zuckerberg also recognized the strategic value of mobile messaging services as popular and important services in their own right. For example, in April 2012, he wrote: "I actually think that messaging is the single most important app on anyone's phone. It may not be the biggest business, but it is almost certainly by far the most used app, and therefore it's a

critical strategic point for us." He continued: "Since we bought Instagram (and extended the close date!), I now feel like we're ahead in photos but falling increasingly behind in messages."

113. Facebook's fears soon focused on WhatsApp, the leading OTT mobile messaging services provider and a significant competitive threat to Facebook Blue's personal social networking monopoly. Launched in November 2009, WhatsApp's distinctively strong user experience and top-grade privacy protection had fueled stellar growth. By February 2014, WhatsApp had approximately 450 million monthly active users worldwide and was gaining users at a rate of one million per day, placing it "on a path to connect 1 billion people."

114. Unlike other mobile messaging apps that had built a large user base in parts of Asia but had not made inroads in the West, WhatsApp had not only achieved vast scale in Asia and Europe, but was also building share in the United States. Unlike Apple's iMessage app, which is confined to the iOS operating system on Apple devices, WhatsApp was available on all the major smartphone operating systems, positioning it as a credible threat to achieve significant cross-platform scale. And unlike traditional SMS, WhatsApp offered a rich content-sharing ability akin to a social network and increased encryption for privacy-conscious users. As a result, WhatsApp threatened a move or spin-off into the personal social networking market.

115. Facebook launched Facebook Messenger, an app that offered OTT mobile messaging services, in the fall of 2011, in a direct effort to prevent WhatsApp from gaining scale. On the date of its global launch, the product director of Facebook Messenger wrote to his team that: "We have a great shot of competing with Whatsapp on being the app for serious mobile messaging users worldwide. . . . Whatsapp has 15 million (registered?) users. Let's see how quickly can we get to 10 million daily actives."

116. But Facebook soon realized that it was far behind WhatsApp. To improve its performance and usage, Facebook would have had to spend considerable resources to catch up. As Mr. Zuckerberg put it in April 2012:

> [R]ight now, aside from Facebook integration, WhatsApp is legitimately a better product for mobile messaging than even our standalone Messenger app. It's more reliable and faster for sending messages. You get better signal and feedback via read receipts and last seen times. You can even reach most people easily via the contacts integration. . . . [W]hatsApp sends more mobile messages per day than we do by more than 2x, and they're growing about 3x faster week-over-week. This is a big deal. . . . [U]nfortunately for us, I don't think there's any way to directly minimize the advantage which is their momentum and growth rate. Their growth comes from the product and network they've built, so the best things that we can do is build out our product and network as well and as quickly as we can.

117. Facebook executives saw clearly that WhatsApp credibly threatened to increase its scale in mobile messaging in the United States as it had already done in Europe and elsewhere. One executive wrote to Mr. Zuckerberg on August 8, 2013: "[I] am really worried . . . these guys [WhatsApp] are the real deal!" He continued: "With the window of opportunity to solve the messaging situation shrinking there are a couple of things we might want to add to messenger 3.0 . . . . I will run it by you offline briefly to get your thoughts / see if we should double down now (it might be now or never given how fast these guys keep growing / the ambitions they are signaling)[.]" Mr. Zuckerberg responded: "[I]f they build substantive features beyond just making SMS free, that could be enough for them to tip markets like the US where SMS is still the primarily [sic] platform."

118. Facebook executives and employees repeatedly identified WhatsApp internally as a unique threat to Facebook Blue that it would not be able to forestall through competition via Facebook Messenger. For example:

a. In May 2013, a Facebook director of product growth commented of WhatsApp's CEO, Jan Koum, that he is "our biggest competitor/threat today[.]"

b. In July 2013, a director of engineering wrote: "'If we don't build the thing that kills Facebook, someone else will,' and that's WhatsApp (see below). I personally think companies like WhatsApp are Facebook's biggest threat . . . [.]"

c. In August 2013, the Vice President of Growth noted: "We are definitely not playing in the same field as whatsapp does . . . . [W]e might be already too late as of today for a 'start from scratch strategy' . . . [.]"

d. In September 2013, the Vice President of Growth wrote further that if WhatsApp became a platform "in a way that makes the user experience better / fuels growth -> we are f.ed / this cements them as leader[.]"

119. Facebook feared not only what WhatsApp would do independently; it also feared what WhatsApp would do in the hands of another purchaser. As Facebook's Vice President of Growth wrote in October 2012, the "[b]iggest problem would be if it lands in the wrong hands…[.]" Facebook particularly feared an acquisition of WhatsApp by Google. As a manager of engineering and co-founder of a messaging app that Facebook acquired in 2011 warned colleagues in October 2012: "[T]he case for Google acquiring WhatsApp has only gotten stronger in the past 6 months. . . . [I]f [WhatsApp] is acquirable at all, the risks of us not being the acquirer have grown." Facebook's Vice President of Growth agreed: "[T]hat is definitely what I would do if I was them…[.]"

120. As with Instagram, Facebook decided to acquire WhatsApp rather than compete with it, in an effort to neutralize a significant competitive threat to its personal social networking monopoly. In April 2012, Mr. Zuckerberg wrote: "[I]'m the most worried about messaging. WhatsApp is already ahead of us in messaging in the same way Instagram was 'ahead' of us in photos." He added: "I'd pay $1b for them if we could get them."

121. Facebook first reached out to WhatsApp about a potential acquisition in November 2012; and it reached out again in February 2014, this time with more success. On February 19, 2014, Facebook announced an agreement to buy WhatsApp for $19 billion. This valuation reflected the seriousness of the threat that WhatsApp posed to Facebook's personal social networking monopoly.

122. For the second time in two years, Facebook employees celebrated the neutralization of an existential competitive threat. In an instant message dated February 19, 2014, a Facebook manager noted approvingly: "[W]orth it. Their numbers are through the roof, everyone uses them, especially abroad it [sic]. *Prevents probably the only company which could have grown into the next FB purely on mobile[.]* . . . [1]0% of our market cap is worth that[.]" (Emphasis added.)

123. A few days later, a Facebook executive wrote to colleagues summarizing the WhatsApp acquisition as a "land grab"—a significant response to a limited period of competitive vulnerability, rather than something that would have to be repeated regularly in the future:

> A big concern expressed is that we are going to spend 5-10% of our market cap every couple years to shore up our position. I like David's answer that we think this is a "point in time" where change is coming to the mobile landscape. I hate the word "land grab" but I think that is the best convincing argument and we should own that.

124. Outside Facebook, industry analysts also understood that the WhatsApp acquisition had neutralized a significant competitive threat to Facebook. The investment bank SunTrust Robinson Humphrey laid out the case for the deal with remarkable clarity:

> [W]e feel it is easy to see why WhatsApp was more than just a "messaging" threat. Much like how the acquisition of Instagram by Facebook was both an offensive and defensive move, we think this acquisition not only expands the company's [total addressable market] and capabilities but also covers it's [sic] flank from the fast growing "messaging companies". At first glance, one may assume that WhatsApp is "merely a texting app". However WhatsApp is much more, sharing 600m photos, 100m videos, 200m voice messages, and 19B messages per day. Moreover, users can also share locations, places, and communicate 1-to-1 or 1-to-many. Given this

> functionality by WhatsApp and the focus of Facebook on communication and linking the world's population, we think WhatsApp and Facebook were likely to more closely resemble each other over time, potentially creating noteworthy competition, which can now be avoided.

125. Another firm, Bernstein Research, noted of the deal:

> The "distance" between the WhatsApp mobile stream and Facebook's mobile Newsfeed is not great and one could see the emergence of another 1 billion user service that could, over time, become a competitor to Facebook for user engagement. As an independent company or as part of another business such as Google, Twitter, or eBay, WhatsApp graph could be extended and used to create a feasible competitor to Facebook.

126. By acquiring WhatsApp, Facebook has suppressed the competitive threat that WhatsApp poses to Facebook's personal social networking monopoly. Facebook has kept WhatsApp cabined to providing mobile messaging services rather than allowing WhatsApp to become a competing personal social networking provider, and has limited promotion of WhatsApp in the United States. For example [redacted]

127. In sum, Facebook's acquisition and control of WhatsApp represents the neutralization of a significant threat to Facebook Blue's personal social networking monopoly, and the unlawful maintenance of that monopoly by means other than merits competition. This conduct deprives users of the benefits of competition from an independent WhatsApp (either on its own or acquired by a third party), which would have the ability and incentive to enter the U.S. personal social networking market. Moreover, WhatsApp's strong focus on the protection of user privacy would offer a distinctively valuable option for many users, and would provide an important form of product differentiation for WhatsApp as an independent competitive threat in personal social

networking. Facebook's ownership and control of WhatsApp also maintains a protective "moat" that deters and hinders other mobile messaging apps that could credibly threaten to enter the personal social networking market.

128. Facebook cannot substantiate merger-specific efficiencies or other procompetitive benefits sufficient to justify the WhatsApp acquisition.

D. Facebook Maintained and Enforced Anticompetitive Conditions for Platform Access to Deter Competitive Threats to its Personal Social Networking Monopoly

129. Facebook launched "Facebook Platform" in 2007 with the goal of becoming the infrastructure for social interactions on the internet. Facebook Platform encouraged software developers to build an entire ecosystem of apps and tools—ranging from games and page design tools to video-sharing tools and e-marketing apps—that interoperate with Facebook Blue, with the aim of turning Facebook Blue into a dominant platform for apps. As Mr. Zuckerberg put it in June 2009, the "platform strategy" was an effort to "enable us to be the de facto open graph/identity database that everyone uses in all their applications."

130. Since its launch, Facebook Platform has undergone a variety of adjustments and added functionalities, such as APIs that allowed third-party apps access to Facebook user data. In 2010, Facebook provided third-party apps with access to critical APIs, including the Find Friends API and other APIs used to access user content from Facebook Blue. The Find Friends API, in particular, was a valuable growth tool for third-party apps because it enabled users of such apps to find their Facebook Blue friends who also used the third-party app and to invite those friends who did not.

131. Also in 2010, Facebook added the Open Graph API to Facebook Platform, which enabled third-party apps and websites to add plug-ins, such as the Facebook "Like" button, to their own services. Using the Like button, Facebook Blue users could like and share their interest in

the third-party app. Third-party apps were motivated to install the Like button and encourage its use, as a "Like" would be shared on the user's news feed and profile on Facebook Blue, which could attract additional users to the third-party app.

132. Usage of Open Graph grew rapidly. One week after the introduction of Open Graph, over 50,000 websites had installed Open Graph plug-ins. Those sites realized the immediate benefits of a massive new distribution channel. By July 2012, Open Graph was being used to share nearly one billion pieces of social data each day to Facebook Blue, giving Facebook substantially greater and richer information about its users and their online activities.

133. This strategy not only integrated users' online lives and activities more fully into Facebook Blue; it also drove profits for Facebook. As a Facebook executive summarized it in a May 2012 email to Facebook COO Sheryl Sandberg: "Because we have this critical mass of people, that attracts new people to sign up, it attracts developers who want to find customers for their apps and websites, and it attracts advertisers [who] want to reach the audience" and Facebook had "[r]eached a size now where you can imagine as a developer that most of your current and future users/customers are on Facebook[,]" noting that "[7] of the top 10 apps in the Apple App store are Facebook enabled[.]"

134. Further, third-party apps helped Facebook grow and provided other forms of value to Facebook by promoting Facebook around the internet, via the Facebook plug-ins and by directing social data, such as "Likes," back to Facebook Blue. Since launching its Facebook Platform and Open Graph initiatives, Facebook has grown significantly, adding at least 150 million monthly users each year and serving over 2.7 billion monthly users worldwide today.

135. With the success of Facebook Platform, Facebook became important infrastructure for third-party apps and obtained immense power over apps' developmental trajectories, competitive decision-making, and investment strategies.

136. Facebook uses this power to deter and suppress competitive threats to its personal social networking monopoly. In particular, to protect its personal social networking monopoly, Facebook adopted conditional dealing policies that limited how third-party apps could use Facebook Platform. Specifically, between 2011 and 2018, Facebook made Facebook Platform, including certain commercially significant APIs, available to developers *only* on the condition that their apps neither competed with Facebook (including, at relevant times, by "replicating core functionality" of Facebook Blue or Facebook Messenger), nor promoted competitors. Facebook punished apps that violated these conditions by cutting off their use of commercially significant APIs, hindering their ability to develop into stronger competitive threats to Facebook Blue.

137. These actions, individually and in the aggregate, have suppressed the ability and incentive of apps in the Facebook ecosystem to become competitive threats to Facebook—and its personal social networking monopoly—in at least two ways. First, the public announcement and enforcement of the policies changed the incentives of software developers, deterring them from developing features and functionalities that would present a competitive threat to Facebook, or from working with other platforms that compete with Facebook. Second, enforcement of the policies—i.e., the actual termination of API access for competitive threats that attracted Facebook's attention—hindered the ability of individual businesses to threaten Facebook's personal social networking monopoly.

1. Facebook's Anticompetitive Conditions on Platform Access Required Developers Not to Work with Competitors

138. From July 2011 until December 2018, Facebook publicly announced and imposed a set of anticompetitive conditions governing access to Facebook Platform.

139. On July 27, 2011, Facebook introduced a new policy that "Apps on Facebook may not integrate, link to, promote, distribute, or redirect to any app on any other competing social platform."

140. This policy was intended to harm the prospects for—and deter the emergence of—competition, including personal social networking competitors. Indeed, the immediate impetus for the policy was Google's launch of the Google+ personal social network. In a July 27, 2011, email, a Facebook manager explained: "[W]e debated this one a lot. In the absence of knowing what and how google was going to launch, it was hard to get very specific, so we tended towards something broad with the option to tighten up as approach and magnitude of the threat became clear." Later that same day, another Facebook employee protested the anticompetitive move to colleagues: "I think its [sic] both anti user and sends a message to the world (and probably more importantly to our employees) that we're scared that we can't compete on our own merits."

141. Following that, Facebook imposed several other policies restricting app developers' use of Facebook Platform, including Facebook APIs. Through these policies, Facebook used its control over APIs to deter and suppress competition.

142. <u>September 2012: no exporting data to competitor social networks.</u> On September 12, 2012, Facebook introduced a new policy: "Competing social networks: You [developers] may not use Facebook Platform to export user data into a competing social network without our permission[.]"

143. January 2013: no promotion / data export to any app that "replicates a core Facebook product or service." On January 25, 2013, Facebook added a new condition to prevent developers from "replicating core functionality" (i.e., competing with Facebook), or assisting others who might do so:

> Reciprocity and Replicating core functionality: (a) Reciprocity: Facebook Platform enables developers to build personalized, social experiences via the Graph API and related APIs. If you use any Facebook APIs to build personalized or social experiences, you must also enable people to easily share their experiences back with people on Facebook. (b) Replicating core functionality: *You may not use Facebook Platform to promote, or to export user data to, a product or service that replicates a core Facebook product or service without our permission.* (Emphasis added.)

144. Facebook continued to evaluate further restrictions that would target competitors. Again, the proposal to further restrict competitors' access to Facebook Platform fueled internal dissent, as well as repeated explicit recognition of the importance of API access to the growth and success of apps and businesses in the Facebook Platform ecosystem. In an email from December 2013, a Facebook software engineer wrote:

> [S]o we are literally going to group apps into buckets based on how scared we are of them and give them different APIs? How do we ever hope to document this? Put a link at the top of the page that says "Going to be building a messenger app? Click here to filter out the APIs we won't let you use!" And what if an app adds a feature that moves them from 2 to 1? Shit just breaks? And a messaging app can't use Facebook login? So the message is, "if you're going to compete with us at all, make sure you don't integrate with us at all."? I am just dumbfounded.

145. Facebook's Head of Developer Products responded, noting that Facebook already targeted competitors for access restrictions: "[Y]eah, not great, but this already happens to some degree - e.g. Path isn't allowed to use certain things. . . . [T]he absolute numbers in terms of who is considered a competitor are pretty small." Another Facebook engineer agreed: "[m]ore than complicated, it's sort of unethical[,]" while an engineering manager noted: "[w]ell, I agree it is bad[.]" The Head of Developer Products replied: "[S]o, I agree this sucks but you are reading this

too absolutely. . . . [R]ealistically only the top 5 messaging apps will ever raise an eyebrow." But the software developer was unsatisfied: "[T]hat feels unethical somehow, but I'm having difficulty explaining how. It just makes me feel like a bad person." The Head of Developer Products replied: "[T]his is kind a [sic] political safety net internally that allows Platform to escape-hatch situations that the rest of the company isn't happy about."

146. May 2014: Platform 3.0 launches. A new approach—dubbed Platform 3.0—launched on May 2, 2014. At that time, Facebook terminated all apps' access to certain APIs, which included restricting third-party apps from accessing information about their users' friends who were not already using that third-party app.

147. An internal Facebook slide deck from August 21, 2014, summed up the fear of competition that motivated Facebook to restrict access to its Facebook Platform ecosystem: "Concern: App may use Facebook for growth, switch functionality to become [a] direct competitor[.]"

148. December 2018: removal of explicit anticompetitive conditioning policy. On December 4, 2018, Facebook removed its "core functionality" restrictions. The following day, a Member of the U.K. Parliament published a cache of documents, obtained from litigation between Facebook and the app Six4Three, highlighting Facebook's anticompetitive conduct towards app developers.

149. Facebook's suspension of the explicit anticompetitive conditioning policy in December 2018 was driven by anticipated public scrutiny from the release of the documents, and did not represent a disavowal by Facebook of the underlying anticompetitive conduct. Having suspended its anticompetitive platform policies in response to anticipated public scrutiny, Facebook is likely to reinstitute such policies if such scrutiny passes.

150. Because access to the relevant APIs is valuable to app developers, Facebook policy conditions changed the incentives of app developers, and deterred them from developing competing functionalities or supporting competing social networks.

151. Moreover, Facebook knew and expected that API access was sufficiently important to affect the incentives of developers and the developmental trajectories of their apps. Developers were incentivized to make decisions that would not jeopardize their access to Facebook's APIs. An internal Facebook slide deck dated January 2014 dealing with Facebook Platform policies directly acknowledged the importance of API access, asking whether Facebook was "[c]omfortable altering / killing prospects of many startups[.]"

2. Facebook's Enforcement of its Anticompetitive Conditions Deterred Emerging Threats

152. Facebook's actions to enforce these policies by cutting off API access were generally directed against apps in three groups.

153. First, Facebook targeted promising apps that provided personal social networking. For example, Facebook took actions against a personal social networking competitor, Path, which was founded by a former Facebook manager. In or around April 2013, Facebook terminated Path's access to Facebook's APIs, and Path's growth subsequently slowed significantly.

154. The second group of targets were promising apps with some social functionality. For example, Circle was an app that was attempting to build a local social network that came to Facebook's attention in December 2013. In proposing to cut off Circle's API access, a Facebook manager emphasized Circle's competitive promise: "Circle positions itself as the 'local social network' and has seen some strong growth over the last four days (+800K downloads yesterday, +600K FB logins yesterday, #1 in the App Store in the UK)." While Facebook claimed externally that the termination was because Circle had "spammed" users, internal correspondence after Circle

had resolved the spam problems revealed the real reason was because Circle posed a threat: "They are duplicating the [social] graph - and doing a rather excellent job if [sic] it. . . . They are also very directly creating a competing social network on top of that graph." Indeed, Facebook continued to withhold access to its APIs after Circle remedied concerns that Facebook had flagged, with a Facebook manager stating: "While I appreciate that Circle has done all of the items below (or agrees to do them), we ultimately still have the replicating core functionality piece, which can't be 'fixed'." Over the following weeks, Circle's daily new users dropped from six hundred thousand per day to nearly zero.

155. Similarly, in January 2013, Facebook's Director of Platform Partnerships and Operations wrote to colleagues: "[T]witter launched Vine today which lets you shoot multiple short video segments to make one single, 6-second video. As part of their NUX [new user experience], you can find friends via FB. Unless anyone raises objections, we will shut down their friends API access today. [W]e've prepared reactive PR, and I will let Jana know our decision." Mr. Zuckerberg replied: "[Y]up, go for it." By cutting off Vine, Facebook prevented it from accessing APIs that would have helped it grow.

156. The third group of targets were promising apps that offered mobile messaging services, that were existing competitors of Facebook Messenger, and that ultimately threatened to develop into competitive threats to Facebook Blue. Throughout 2013, Facebook blocked mobile messaging apps from using commercially significant APIs. For example, in August 2013, Facebook undertook an enforcement strike against a number of messaging apps simultaneously, with the Head of Developer Enforcement directing colleagues to restrict them from "accessing any read APIs beyond basic info[,]" instructing that "we will not be communicating with the [developers] in any way about these restrictions."

157. Thus, Facebook's enforcement of the conditional platform policies hindered the ability of individual businesses to grow and threaten Facebook's personal social networking monopoly.

158. Facebook's enforcement actions also alerted other apps that they would lose access to Facebook's APIs if they, too, posed a threat to Facebook's personal social networking monopoly. For instance, one third-party app contacted Facebook about its platform practices soon after Facebook cut off Vine. A Facebook manager reported internally about the third-party app: "They're super concerned about the viability of relying on our platform moving forward when there's this lingering chance that we can shut them down under grounds like this."

159. Collectively, Facebook's announcement and enforcement of its anticompetitive conditions have served to hinder, suppress, and deter the emergence of promising competitive threats to its U.S. personal social networking monopoly. Accordingly, this conduct has contributed to the maintenance of Facebook's U.S. personal social networking monopoly.

160. Facebook cannot substantiate procompetitive benefits sufficient to justify the anticompetitive conditioning of access to Facebook Platform.

VIII. HARM TO COMPETITION

161. Through the conduct described above, Facebook has hindered, suppressed, and deterred the emergence and growth of rival personal social networking providers, and unlawfully maintained its monopoly in the U.S. personal social networking market, other than through merits competition.

162. The conduct described above harmed, and continues to harm, competition by limiting and suppressing competition that Facebook otherwise would have to face in the provision

of personal social networking. As a result, users of personal social networking in the United States have been deprived of the benefits of additional competition for personal social networking.

163. The benefits to users of additional competition include some or all of the following: additional innovation (such as the development and introduction of new attractive features, functionalities, and business models to attract and retain users); quality improvements (such as improved features, functionalities, integrity measures, and user experiences to attract and retain users); and/or consumer choice (such as enabling users to select a personal social networking provider that more closely suits their preferences, including, but not limited to, preferences regarding the amount and nature of advertising, and the availability, quality, and variety of data protection privacy options for users, including, but not limited to, options regarding data gathering and data usage practices).

164. In addition, by monopolizing the U.S. market for personal social networking, Facebook also harmed, and continues to harm, competition for the sale of advertising in the United States. In particular, because personal social networking providers typically monetize through the sale of advertising, Facebook's suppression of competing personal social networking providers also has enabled Facebook to avoid close competition in the supply of advertising services.

165. Competing personal social networking providers would have been close competitors of Facebook Blue in the supply of advertising. This is because they would have been able to offer the distinctive advertising features described above that distinguish social advertising from other forms of display advertising, search advertising, and "offline" advertising. Instagram and WhatsApp, in particular, were each well-situated to develop into meaningful competitive constraints on Facebook Blue in the sale of advertising. Instagram's founders explicitly planned to develop advertising offerings to monetize the Instagram personal social network. And an

independent WhatsApp that developed a personal social networking offering would have had incentives to monetize it by offering advertising. Competing social networks may also have explored and developed alternative advertising models that consumers and advertisers preferred.

166. Facebook's anticompetitive conduct to maintain its personal social networking monopoly therefore also has neutralized, suppressed, and deterred competition for the sale of advertising, and deprived advertisers of the benefits of additional competition.

167. The benefits to advertisers of additional competition include some or all of the following: additional users to advertise to (as a result of increased innovation and improved quality of personal social networking for users); lower advertising prices (as additional advertising competition would incentivize reductions in advertising prices); additional innovation (as additional advertising competition would incentivize the development and introduction of additional attractive features, functionalities, and business models in order to attract advertisers); quality improvements (as additional advertising competition would incentivize quality improvement, such as with respect to transparency, integrity, authentication of ad views, customer service, accuracy in reporting performance and other metrics, and brand safety measures such as sensitivity to neighboring content); and/or choice (as additional advertising competition would enable advertisers to select a personal social networking provider that more closely suits their preferences, including, but not limited to, preferences regarding different forms of advertising and/or different options for users).

168. Facebook cannot establish business justifications or procompetitive benefits in any relevant market to justify its unlawful and anticompetitive conduct to maintain its personal social networking monopoly.

IX. VIOLATION OF LAW

Monopolization of Personal Social Networking Arising Under Section 2 of the Sherman Act

169. The FTC re-alleges and incorporates by reference the allegations in paragraphs 1-167 above.

170. At least since 2011, Facebook has had monopoly power in the United States with respect to personal social networking.

171. Facebook has willfully maintained its monopoly power through its course of anticompetitive conduct, including though anticompetitive acquisitions and anticompetitive conditioning of access to interconnections. Through its course of conduct, Facebook has excluded competition and willfully maintained its monopoly in personal social networking through means other than competing on the merits.

172. Facebook's course of conduct is ongoing. Facebook continues to hold and integrate the competitive threats it acquired in Instagram and WhatsApp. Facebook recognizes that its continued ownership and operation of Instagram and WhatsApp both neutralizes their direct competitive threats, and creates and maintains a "moat" that protects Facebook from entry into personal social networking by another firm via mobile photo-sharing and mobile messaging. Facebook continues to monitor the industry for competitive threats, and likely would seek to acquire any companies that constitute, or could be repositioned to constitute, threats to its personal social networking monopoly. Further, having suspended its anticompetitive platform policies in response to anticipated public scrutiny, Facebook is likely to reinstitute such policies or equivalent measures when such scrutiny passes.

173. There is no procompetitive justification for Facebook's exclusionary conduct in maintaining its personal social networking monopoly.

174. Facebook's anticompetitive acts violate Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus constitute unfair methods of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

IX. POWER TO GRANT RELIEF

175. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to issue a permanent injunction against violations of the FTC Act and, in the exercise of its equitable jurisdiction, to order equitable relief to remedy the injury caused by Facebook's violations.

X. PRAYER FOR RELIEF

WHEREFORE, the FTC requests that this Court, as authorized by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and pursuant to its own equitable powers, enter final judgment against Facebook, declaring, ordering, and adjudging:

A. that Facebook's course of conduct, as alleged herein, violates Section 2 of the Sherman Act and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a);

B. divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp), and such other relief sufficient to restore the competition that would exist absent the conduct alleged in the Complaint, including, to the extent reasonably necessary, the provision of ongoing support or services from Facebook to one or more viable and independent business(es);

C. any other equitable relief necessary to restore competition and remedy the harm to competition caused by Facebook's anticompetitive conduct described above;

D. a prior notice and prior approval obligation for future mergers and acquisitions;

E. that Facebook is permanently enjoined from imposing anticompetitive conditions on access to APIs and data;

F. that Facebook is permanently enjoined from engaging in the unlawful conduct described herein;

G. that Facebook is permanently enjoined from engaging in similar or related conduct in the future;

H. a requirement to file periodic compliance reports with the FTC, and to submit to such reporting and monitoring obligations as may be reasonable and appropriate; and

I. any other equitable relief, including, but not limited to, divestiture or restructuring, as the Court finds necessary to redress and prevent recurrence of Facebook's violations of law, as alleged herein.

Dated: December 9, 2020

Respectfully submitted,

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Plaintiffs,

v.

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Defendant.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the States of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas, acting through their respective Attorneys General, bring this action under Section 2 of the Sherman Act, 15 U.S.C. § 2, to restrain Google LLC (Google) from unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices, and to remedy the effects of this conduct.

I. NATURE OF THIS ACTION

1. Two decades ago, Google became the darling of Silicon Valley as a scrappy startup with an innovative way to search the emerging internet. That Google is long gone. The Google of today is a monopoly gatekeeper for the internet, and one of the wealthiest companies on the planet, with a market value of $1 trillion and annual revenue exceeding $160 billion. For many years, Google has used anticompetitive tactics to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising—the cornerstones of its empire.

2. As in many other businesses, a general search engine must find an effective path to consumers for it to be successful. Today, general search engines are distributed primarily on mobile devices (smartphones and tablets) and computers (desktops and laptops). These devices contain web browsers (software applications for accessing information on the internet) and other "search access points" that call on a general search engine to respond to a user's query. Over the last ten years, internet searches on mobile devices have grown rapidly, eclipsing searches on computers and making mobile devices the most important avenue for search distribution in the United States.

3. For a general search engine, by far the most effective means of distribution is to be the preset default general search engine for mobile and computer search access points. Even where users can change the default, they rarely do. This leaves the preset default general search engine with *de facto* exclusivity. As Google itself has recognized, this is particularly true on mobile devices, where defaults are especially sticky.

4. For years, Google has entered into exclusionary agreements, including tying arrangements, and engaged in anticompetitive conduct to lock up distribution channels and block rivals. Google pays *billions* of dollars each year to distributors—including popular-device

manufacturers such as Apple, LG, Motorola, and Samsung; major U.S. wireless carriers such as AT&T, T-Mobile, and Verizon; and browser developers such as Mozilla, Opera, and UCWeb—to secure default status for its general search engine and, in many cases, to specifically prohibit Google's counterparties from dealing with Google's competitors. Some of these agreements also require distributors to take a bundle of Google apps, including its search apps, and feature them on devices in prime positions where consumers are most likely to start their internet searches.

5. Google's exclusionary agreements cover just under 60 percent of all general search queries. Nearly half the remaining queries are funneled through Google owned-and-operated properties (e.g., Google's browser, Chrome). Between its exclusionary contracts and owned-and-operated properties, Google effectively owns or controls search distribution channels accounting for roughly 80 percent of the general search queries in the United States. Largely as a result of Google's exclusionary agreements and anticompetitive conduct, Google in recent years has accounted for nearly 90 percent of all general-search-engine queries in the United States, and almost 95 percent of queries on mobile devices.

6. Google has thus foreclosed competition for internet search. General search engine competitors are denied vital distribution, scale, and product recognition—ensuring they have no real chance to challenge Google. Google is so dominant that "Google" is not only a noun to identify the company and the Google search engine but also a verb that means to search the internet.

7. Google monetizes this search monopoly in the markets for search advertising and general search text advertising, both of which Google has also monopolized for many years. Google uses consumer search queries and consumer information to sell advertising. In the United States, advertisers pay about $40 billion annually to place ads on Google's search engine results

page (SERP). It is these search advertising monopoly revenues that Google "shares" with distributors in return for commitments to favor Google's search engine. These enormous payments create a strong disincentive for distributors to switch. The payments also raise barriers to entry for rivals—particularly for small, innovative search companies that cannot afford to pay a multi-billion-dollar entry fee. Through these exclusionary payoffs, and the other anticompetitive conduct described below, Google has created continuous and self-reinforcing monopolies in multiple markets.

8. Google's anticompetitive practices are especially pernicious because they deny rivals scale to compete effectively. General search services, search advertising, and general search text advertising require complex algorithms that are constantly learning which organic results and ads best respond to user queries; the volume, variety, and velocity of data accelerates the automated learning of search and search advertising algorithms. When asked to name Google's biggest strength in search, Google's former CEO explained: "Scale is the key. We just have so much scale in terms of the data we can bring to bear." By using distribution agreements to lock up scale for itself and deny it to others, Google unlawfully maintains its monopolies.

9. Google's grip over distribution also thwarts potential innovation. For example, one company recently started a subscription-based general search engine that does not rely on advertising profits derived from monetizing user information. Another, DuckDuckGo, differentiates itself from Google through its privacy-protective policies. But Google's control of search access points means that these new search models are denied the tools to become true rivals: effective paths to market and access, at scale, to consumers, advertisers, or data.

10. Google's practices are anticompetitive under long-established antitrust law. Almost 20 years ago, the D.C. Circuit in *United States v. Microsoft* recognized that

anticompetitive agreements by a high-tech monopolist shutting off effective distribution channels for rivals, such as by requiring preset default status (as Google does) and making software undeletable (as Google also does), were exclusionary and unlawful under Section 2 of the Sherman Act.

11. Back then, Google claimed Microsoft's practices were anticompetitive, and yet, now, Google deploys the same playbook to sustain its own monopolies. But Google did learn one thing from Microsoft—to choose its words carefully to avoid antitrust scrutiny. Referring to a notorious line from the *Microsoft* case, Google's Chief Economist wrote: "We should be careful about what we say in both public and private. 'Cutting off the air supply' and similar phrases should be avoided." Moreover, as has been publicly reported, Google's employees received specific instructions on what language to use (and not use) in emails because "Words matter. Especially in antitrust law." In particular, Google employees were instructed to avoid using terms such as "bundle," "tie," "crush," "kill," "hurt," or "block" competition, and to avoid observing that Google has "market power" in any market.

12. Google has refused to diverge from its anticompetitive path. Earlier this year, while the United States was investigating Google's anticompetitive conduct, Google entered into agreements with distributors that are *even more* exclusionary than the agreements they replaced. Also, Google has turned its sights to emerging search access points, such as voice assistants, ensuring that they too are covered by the same anticompetitive scheme. And Google is now positioning itself to dominate search access points on the next generation of search platforms: internet-enabled devices such as smart speakers, home appliances, and automobiles (so-called internet-of-things, or IoT, devices).

13. Absent a court order, Google will continue executing its anticompetitive strategy, crippling the competitive process, reducing consumer choice, and stifling innovation. Google is now the unchallenged gateway to the internet for billions of users worldwide. As a consequence, countless advertisers must pay a toll to Google's search advertising and general search text advertising monopolies; American consumers are forced to accept Google's policies, privacy practices, and use of personal data; and new companies with innovative business models cannot emerge from Google's long shadow. For the sake of American consumers, advertisers, and all companies now reliant on the internet economy, the time has come to stop Google's anticompetitive conduct and restore competition.

II. JURISDICTION, VENUE, AND COMMERCE

14. The United States brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain Google's violations of Section 2 of the Sherman Act, 15 U.S.C. § 2.

15. Plaintiffs Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas by and through their respective Attorneys General, bring this action in their respective sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare, and economy of their respective States under their statutory, equitable, or common law powers, and pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Google's violations of Section 2 of the Sherman Act, 15 U.S.C. § 2.

16. This Court has subject matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

17. The Court has personal jurisdiction over Google; venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391 because Google transacts business and is found within this District.

18. Google is a limited liability company organized and existing under the laws of the State of Delaware, and is headquartered in Mountain View, California. Google is owned by Alphabet Inc., a publicly traded company incorporated and existing under the laws of the State of Delaware and headquartered in Mountain View, California. Google engages in, and its activities substantially affect, interstate trade and commerce. Google provides a range of products and services that are marketed, distributed, and offered to consumers throughout the United States, in the plaintiff States, across state lines, and internationally.

III. INDUSTRY BACKGROUND

A. Search Engines, Search Advertising, and General Search Text Advertising

19. In the early 1990s, computer scientists and entrepreneurs explored different ways to search and index the growing number of internet sites. The first computer program or general "search engine" that could perform this task was designed in 1990 by a student at McGill University in Montreal and called "Archie." Other early general search engines emerged, with different methods of gathering, organizing, and presenting information about internet sites. Google's founders launched their research project "Backrub" on Stanford University's network in 1996.

20. Most modern general search engines use software to "crawl" the internet, indexing webpages and the information within them. As Google explains, "The web is like an ever-growing library with billions of books and no central filing system. We use software known as web crawlers to discover publicly available webpages. Crawlers look at webpages and follow

links on those pages, much like you would if you were browsing content on the web. They go from link to link and bring data about those webpages back to Google's servers."

21. When a search user enters a query into a general search engine, the software uses algorithms to evaluate the relevance of information on any given webpage to the user's query. Depending on the query, some general search engines may also search selected proprietary databases for pertinent information to offer additional "specialized" search results. The general search engine then delivers the results on the SERP, with links to, and short descriptions of, webpages the algorithm has curated and ranked. Sometimes, the general search engine will serve ads with the search results.

22. Given the internet's enormous breadth and constant evolution, establishing and maintaining a commercially viable general search engine is an expensive process. Google's search index contains hundreds of billions of webpages and is well over 100,000,000 gigabytes in size. Developing a general search index of this scale, as well as viable search algorithms, would require an upfront investment of billions of dollars. The costs for maintaining a scaled general search business can reach hundreds of millions of dollars a year.

23. General search engines are "one-stop shops" consumers can use to search the internet for answers to a wide range of queries. The United States has only three general search engines that crawl the internet: Google, Bing, and, to a lesser extent, privacy-focused search provider DuckDuckGo. DuckDuckGo combines search results from different sources (including Bing) depending on the search query. A fourth general search engine, Yahoo!, does not currently crawl the internet and instead purchases search results from Bing.

24. Consumers can find certain specialized information online using sources other than general search engines. For example, consumers can search retail marketplaces such as

Amazon or eBay to shop for products, or go to Expedia or Priceline to compare airfares. Search sites that offer users a narrower, focused set of answers to queries are "specialized search engines." Specialized search engines are often able to give users deeper topical results than general search engines by using specialized data or information gathered from users or supplied by third parties.

25. Most general search engines do not charge a cash price to consumers. At least one, Bing, even offers to pay consumers rewards for using its general search engine. That does not mean, however, that these general search engines are free. When a consumer uses Google, the consumer provides personal information and attention in exchange for search results. Google then monetizes the consumer's information and attention by selling ads.

26. Search advertising first appeared on Google in 2000. During that same year Google launched AdWords, its buying platform for search ads. Two years ago, Google rebranded AdWords as Google Ads.

27. To sell ads on its SERP, in 2002, Google adopted auctions for keywords; advertisers would bid on selected keywords, and when those keywords arose in a query, the winning bidder's ad was shown. At that time, Google also started using a compensation scheme where advertisers pay only when the user clicks on the ad, known as cost-per-click pricing. Some SERP displayed multiple ads. Eventually, Google discovered that it could increase the number of clicks—and its own profits—by ranking ads to promote those with greater relevance and therefore higher expected click-through rates. To help determine placement of ads, Google still uses a "quality score" based on various factors.

28. Advertisers use various types of ads to achieve different objectives. Marketers and advertisers typically refer to a "purchase funnel" or "customer acquisition funnel" to describe the

average consumer's various states of mind leading up to a potential purchase, and the type of advertising most effective at each state. The following is an illustration of the purchase funnel:

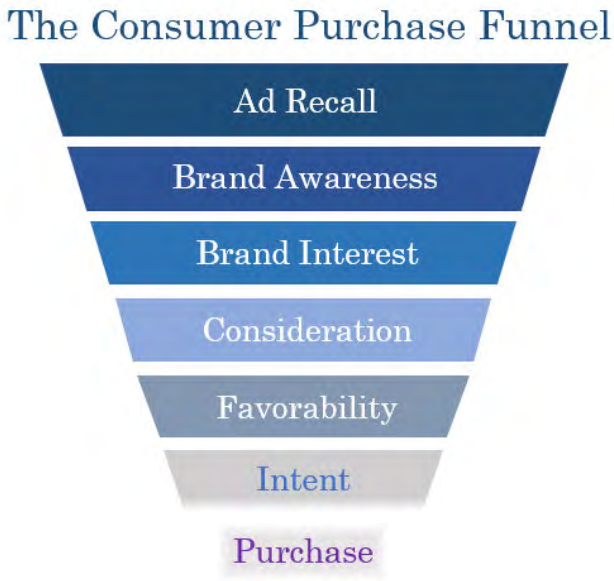

Figure 1

29. Search ads enable advertisers to target potential customers based on keywords entered by these users, at the exact moment users express interest in the topic of the queries. For this reason, search ads are lower in the purchase funnel—closer to the consumer's ultimate intent to make a purchase—than other types of ads that are primarily intended to drive brand awareness. The ability of search ads to provide advertising based on a consumer's self-disclosed interests, when the consumer is actively seeking information, makes search ads uniquely valuable to advertisers.

30. Historically, general search engines such as Google sold only general search *text* ads. General search text ads resemble the organic search results that appear on a SERP—what Google refers to as the "10 blue links"—but with a subtle notation that they are "ads" or "sponsored." Google describes its text ads as follows:

Text ads on the Search Network show above and below Google search results. It has three parts: headline text, a display URL, and description text.

Comprehensive Insurance | Protect Yourself on a Budget | Get Your Free Quote Today
Ad www.example.com/insurance
Get affordable & trustworthy insurance. 10% discount on all online quotes. Easily compare insurance plans side-by-side in just a few seconds.

Figure 2

31. Over time, general search engines also began to sell some specialized search ads, which promoted specific categories of goods and services such as retail products, hotel rooms, or local services such as locksmiths and plumbers. Figure 3 shows a Google SERP that includes, from top to bottom, specialized search ads (in this case, Google "Shopping Ads" designed specifically to sell retail products), a general search text ad, and an organic search result.

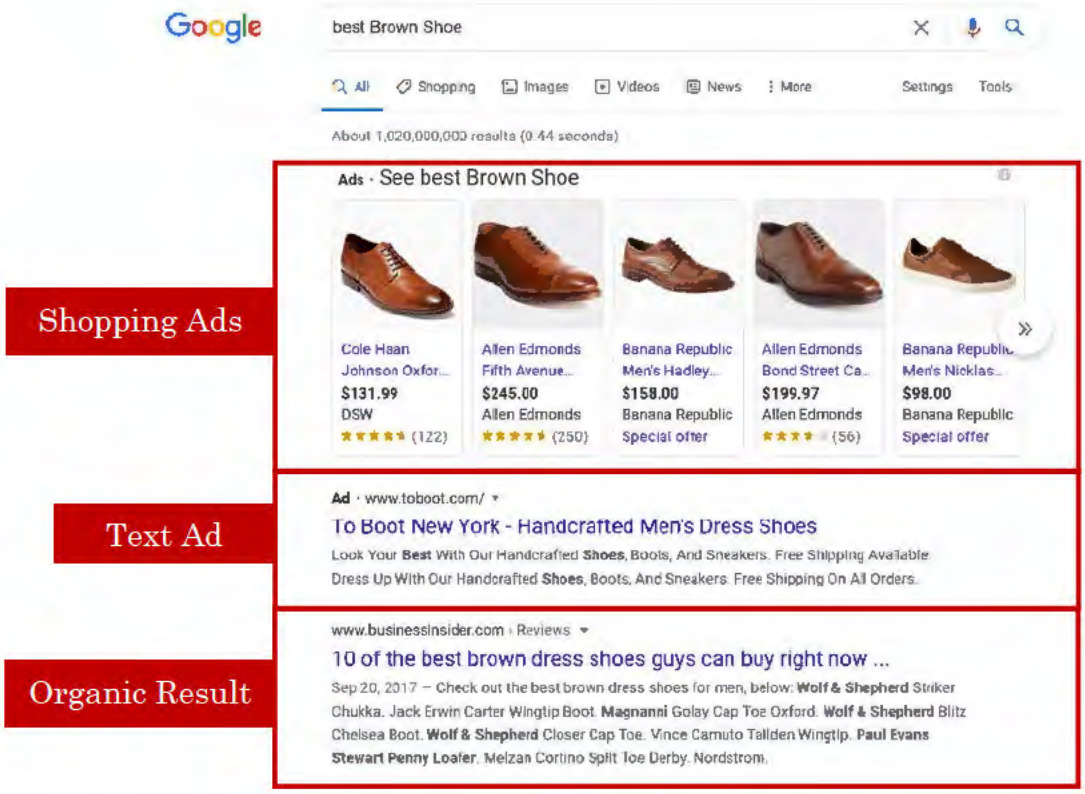

Figure 3

32. Some specialized search providers also sell search ads. For example, advertisers can buy specialized search ads for goods sold on Amazon, hotels presented on Expedia, and local services listed on Yelp.

33. As the number of users of a general search engine grows, advertisers benefit because they want their marketing campaigns to reach large groups of consumers. But users do not benefit from indirect network effects in an equivalent way. As Google's Chief Economist has explained, "users do not decide which search engine to use based on the number of advertisers."

34. Today, the search advertising business in the United States is enormous—over $50 billion per year—and dominated by Google. Because of Google's user base and scale, the company's search ads have become a "must have" for many advertisers. Advertising agencies and larger companies often have entire groups that manage search advertising, mostly focused on Google.

B. Importance of Scale

35. Scale is of critical importance to competition among general search engines for consumers and search advertisers. Google has long recognized that without adequate scale its rivals cannot compete. Greater scale improves the quality of a general search engine's algorithms, expands the audience reach of a search advertising business, and generates greater revenue and profits.

36. The additional data from scale allows improved automated learning for algorithms to deliver more relevant results, particularly on "fresh" queries (queries seeking recent information), location-based queries (queries asking about something in the searcher's vicinity), and "long-tail" queries (queries used infrequently).

37. Scale is also important for search advertising because advertisers pay more to buy ads from a search provider with a large audience of potentially interested customers. Google can

deliver enormous audiences, especially in mobile, which its competitors cannot. Google's scale also enables it to better discern which ads are most relevant for which queries.

38. Further, to recoup the large investment in creating and maintaining a general search engine, scale is critical to generating the necessary revenues and profits. Even a competitor that syndicates its search results from other general search engines must make substantial investments to compete. The most effective way to achieve scale is for the general search engine to be the preset default on mobile devices, computers, and other devices, as described in more detail below.

C. General Search Engine Distribution and Default Status

39. Search is like many other businesses in that the owners of general search engines can benefit greatly from a network of distributors to get their products to consumers. Distribution of general search engines takes place primarily through search access points, such as browsers and search apps, typically located on mobile devices and computers. More recently, searches have become available on IoT devices.

40. General search service providers can enter into agreements with various distributors, including computer and mobile-device manufacturers, cell phone carriers, and browser developers, to secure preset default status on computer and mobile-device search access points.

41. New computers and new mobile devices generally come with a number of preinstalled apps and out-of-the-box settings. Computers and mobile devices generally have apps preinstalled that include search access points, such as browsers, search apps and widgets, and voice assistants. Mobile devices may also have hardware features—such as a home button triggering a voice assistant—that a consumer can use to invoke apps with search functionality. Each of these search access points can and almost always does have a preset default general

search engine. Being the preset default general search engine is particularly valuable because consumers rarely change the preset default.

1. The Mobile Search Distribution Channel

42. With roughly 60 percent of searches, mobile devices represent the largest and, over the last five years, fastest growing search distribution channel.

43. In the United States, Apple iOS devices—those running on Apple's proprietary mobile operating system—account for roughly 60 percent of mobile-device usage. Apple's iOS is a closed ecosystem; Apple does not license iOS to third-party mobile-device manufacturers. Another roughly 40 percent of mobile-device usage comes from devices that use Android, an open-source mobile operating system controlled by Google. Unlike iOS, Android is licensable, which means third-party mobile-device manufacturers can use it as the operating system for their devices. All other mobile operating systems, combined, account for less than one percent of mobile-device usage in the United States.

44. General search services can be delivered to mobile-device users through a variety of search access points, including: (1) a browser, (2) a static search bar (search widget, referred to in Figure 4 as the QSB or quick search box) on the device's home screen, (3) a search app, (4) artificial intelligence software (voice assistants) accessed by a button or voice command and designed to answer voice-initiated queries, and (5) other apps that link to general search engines, such as smart keyboards. Figure 4, from a 2018 Google strategy deck, provides a more specific breakdown of how Google delivers its general search service on Android devices.

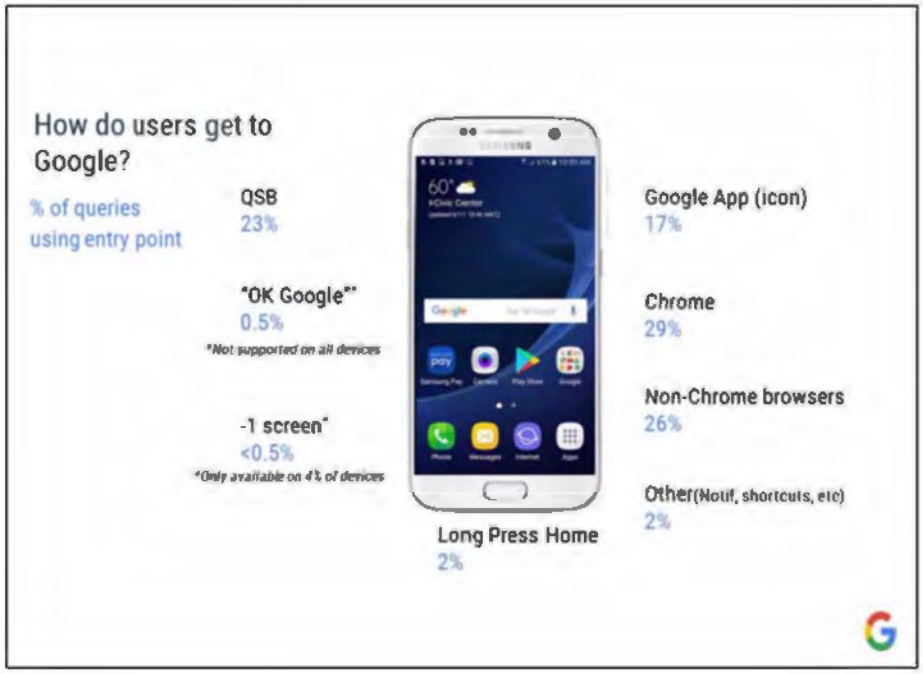

Figure 4

45. In the United States, both cell phone carriers and manufacturers sell mobile devices. As discussed above, these phones or tablets typically have search access points preset with a general search engine as the default. These preset defaults are usually governed by a distribution or licensing agreement. For instance, Google has contracted with Apple for many years to preset Google's search engine as the default for Apple's Safari browser and, more recently, other search access points on Apple's mobile devices. When a consumer takes a new iPhone or iPad out of its box, all the significant access points default to Google as their general search provider. Indeed, Google has preset default status for an overwhelming share of the search access points on mobile devices sold in the United States.

46. For mobile browsers, Google is the default search provider for both Apple Safari (approximately 55 percent share) and Google Chrome (over 35 percent share), which together account for over 90 percent of the browser usage on mobile devices in the United States.

47. Consumers typically do not change their mobile device's default search functions, making securing preset default status for search access points important for effective distribution of general search engines (and delivery of search ads). As one search competitor noted in 2019, "For the most part, despite the simplicity of changing a default setting to enable customer choice, experience shows us that users accept the default search experience that comes with their device or the browser." This fact is especially true on mobile devices; as Google observed in a 2018 strategy document, "People are much less likely to change [the] default search engine on mobile." Alternative methods of obtaining search access points or encouraging general search engine usage—such as direct marketing to consumers—are not nearly as effective as preinstalling search access points on mobile devices and computers.

2. The Computer Search Distribution Channel

48. When using a computer, most consumers access a general search engine through a browser, either by (1) typing a query directly into the address bar at the top of the browser, or (2) visiting a general search engine web page and entering a query. Many browsers default to a general-search-engine web page as the home or start screen each time a user activates the browser; this offers users a convenient way to start their search experience.

49. In the United States, Google Chrome is the leading computer browser, with almost 60 percent market share. Apple's Safari browser has approximately 16 percent share on computers. Mozilla's Firefox has approximately 7 percent share, and Microsoft's Edge and Internet Explorer together have approximately 15 percent share. Other small browsers have a combined share of less than 4 percent. With the exception of Microsoft, most browser developers have agreed with Google to preset its search engine as the default search provider.

50. Preset default settings are important for computers. Consumers may not understand that they can change the browser's preset default general search engine, or consumers may not bother to invest the time to make such a switch.

51. For both mobile and computer search access points, being preset as the default is the most effective way for general search engines to reach users, develop scale, and become or remain competitive.

D. Distribution Agreements in Mobile and Computer Channels

52. General search services providers typically enter into licensing and distribution agreements with manufacturers and carriers that distribute mobile devices with search access points. In the United States, roughly 60 percent of all search queries are covered by Google's exclusionary agreements. On mobile devices, Google's exclusionary agreements cover more than 80 percent of all U.S. search queries.

53. Of the remaining search queries not covered by Google's exclusionary contracts, almost half take place on search access points owned by Google. Google is a vertically integrated search provider and distributes search in part through several of its own properties, including for example its browser (Chrome) and phone (Pixel). Between its exclusionary contracts and owned-and-operated properties, Google effectively owns or controls search distribution channels accounting for roughly 80 percent of the general search queries in the United States.

54. Google's distribution agreements come in three basic types, with the specific terms of each agreement depending upon the counterparty and the search access points at issue. First, Google requires Android device manufacturers that want to preinstall Google's proprietary apps to sign an anti-forking agreement; these agreements set strict limits on the manufacturers' ability to sell Android devices that do not comply with Google's technical and design standards.

55. Next, for Android device manufacturers that sign an anti-forking agreement, Google provides access to its vital proprietary apps and application program interfaces (APIs) for preinstallation, but only if the manufacturers contractually agree to (1) take a bundle of other Google apps, (2) make certain apps undeletable, and (3) give Google the most valuable and important real estate on the default home screen.

56. Finally, Google provides a share of its search advertising revenue to Android device manufacturers, mobile phone carriers, competing browsers, and Apple; in exchange, Google becomes the preset default general search engine for the most important search access points on a computer or mobile device. As a practical matter, users rarely switch the preset default general search engine. In many cases, the agreements relating to mobile devices go even further, expressly prohibiting (1) the preinstallation of any rival general search services, and (2) the setting of other defaults to rival general search engines. This means that Google is the only preset default search provider preinstalled on the device.

57. These agreements work exactly as Google designed them—to foreclose distribution to Google's search rivals, weakening them as competitive alternatives for consumers and advertisers by denying them scale.

1. Background on Mobile Strategy and Development of Android Ecosystem

58. Google's anticompetitive agreements must be understood against the backdrop of Google's overall business strategy. When Google was formed and achieved initial success in the late 1990s and early 2000s, internet searches were almost exclusively performed through browsers on computers. But as Google told investors in its 2007 Form 10-K: "More individuals are using non-desktop devices to access the internet. If users of these devices do not widely adopt versions of our web search technology, products or operating systems developed for these devices, our business could be adversely affected."

59. In a mobile world, Google had to deal with mobile device manufacturers (such as LG, Motorola, and Samsung), and carriers (such as AT&T, T-Mobile/Sprint, and Verizon) that would hold sway over distribution of search and search ads. Google thus asked internally, "How can we conquer the world's major wireless markets simultaneously?"

60. The answer started with Android, a mobile operating system that Google purchased in 2005. In 2007, Google released the Android code for free under an open-source license. Being "open source" means that anyone can access the source code and use it to make their own, modified operating system—a "fork." This was key to Android's adoption.

61. First, Google's apparent lack of control over an open-source operating system attracted skeptical manufacturers and carriers of mobile phones to use Android instead of the other choices then available. As the Android team leader observed to Google's board of directors, "Google was historically seen as a threat" to these distributors. But an open-source model suggested that they—and not Google—would ultimately retain control over their devices and the app ecosystem on those devices.

62. Second, once enough major distributors agreed to use Android, the operating system attracted developers looking for wide distribution of their apps. As more app developers focused their efforts on designing Android apps, Android became more attractive to consumers, which in turn led even more developers to design for Android. The result was a must-have ecosystem of Android apps.

63. Third, to help the Android ecosystem achieve critical mass and to advance the network effects, Google "shared" its search advertising and app store revenues with distributors as further inducement to give up control. As one senior executive explained about Android Market, an earlier name for Google's app store, "Android Market is a bitter pill for carriers, and

a generous revenue share is the sugar that makes it go down smoother." In other words, beginning over ten years ago, Google used revenue sharing to attract partners to Android; as discussed below, Google uses revenue sharing to keep them locked in today.

64. By 2010, the Android team leader noted that "Android is poised for world domination—the success story of the decade." He was right; the strategy worked. The "Google Play" app store has a massive library of apps, making it essential for Android distributors to have on their devices. As for the operating system itself, it quickly became the dominant licensable mobile operating system in the United States. In the four years between 2009 and 2012, Android's share of licensable mobile operating systems on smartphones in the United States more than tripled, reaching about 80 percent. Today, Android represents over 95 percent of licensable mobile operating systems for smartphones and tablets in the United States and accounts for over 70 percent of *all* mobile device usage worldwide. The only other mobile operating system with significant market share in the United States is Apple's iOS, which is not licensable.

65. Control over Android has always been a critical issue. As Google's Android team leader asked at the time: "How do we retain control of something we gave away?" Google's answer is the set of contractual "carrots" and "sticks" discussed below that empower Google to "[o]wn the ecosystem" and help thwart any alternative mobile ecosystem from developing that could support a different search provider.

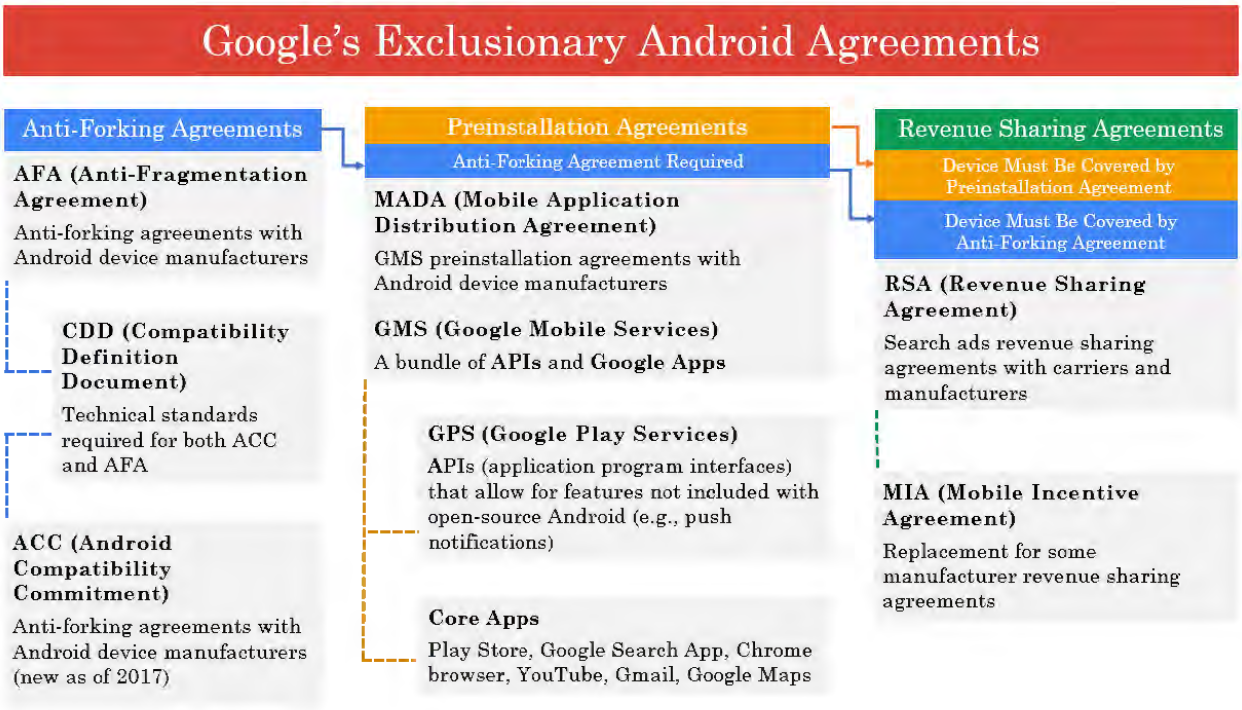

Figure 5

2. Anti-Fragmentation Agreements and Compatibility Commitments (Android Mobile Devices)

66. The Android operating system is open source; Google updates the Android code periodically and makes it publicly available. But Google takes steps to minimize the risk that a developer creates an Android fork to compete with the Android ecosystem controlled by Google. By limiting the existence of devices running Android forks, Google limits possible distribution channels available to its search rivals.

67. One way Google retains control of the Android ecosystem is through anti-forking agreements. These agreements broadly prohibit manufacturers from taking "any actions that may cause or result in the fragmentation of Android." Notably, "fragmentation" is left undefined, giving Google wide latitude in practice.

68. Google's anti-forking agreements specifically forbid manufacturers from developing or distributing versions of Android that do not comply with Google-controlled technical standards, as defined in its Android Compatibility Definition Document (CDD).

69. Two types of anti-forking agreements exist. Before 2017, Google required distributors to sign Anti-Fragmentation Agreements (AFAs). In 2017, while being investigated by the European Commission (and long after Google had locked up its monopoly status), Google began shifting its anti-forking restrictions from AFAs to new Android Compatibility Commitments (ACCs). Today, Google has an AFA or ACC with the leading Android device manufacturers, including LG, Motorola, and Samsung.

70. ACCs are marginally less onerous than AFAs because they allow manufacturers to build devices or components for third parties to sell to consumers, even if those devices or components do not comply with Google's technical standards. But ACCs, like AFAs, prohibit signatories from manufacturing Android forks of their own, distributing devices with Android forks, or using their powerful brands to market forks on behalf of third parties. Most well-known Android manufacturers are bound by AFAs or ACCs.

71. The AFAs and ACCs do not just restrict manufacturers' ability to build and distribute innovative versions of mobile phones. Over time, Google has extended the Android CDD such that its specifications apply to tablets and emerging technologies such as smart TVs, watches, and automotive devices. Manufacturers that hope to release Android-based versions of these products must comply with Google's standards as well.

3. Mobile Application Distribution Agreements (Android Mobile Devices)

72. Manufacturers agree to anti-forking agreements in part because they are a precondition to receiving a license to distribute devices with must-have proprietary Google apps and APIs (the set of technical specifications that enable software applications to communicate

with each other, operating systems, and hardware). This license is provided only through preinstallation agreements—called Mobile Application Distribution Agreements, or MADAs. Leading Android device manufacturers, such as LG, Motorola, and Samsung, are MADA licensees.

73. Over time, Google has chosen to include important features and functionality in Google's own ecosystem of proprietary apps and APIs, rather than the open-source Android code. Google refers to this proprietary layer as "Google Mobile Services" (GMS). GMS includes many popular apps, such as Google's search app, Chrome, YouTube, and Google Maps. GMS also includes Google Play, Google's app store. An app store is one of the most valuable features of a mobile device because it offers access to compatible apps that do not come preinstalled on the device. Google Play offers about three million apps, more than any other app store (including Apple's App Store, which is compatible only with Apple devices). More than 90 percent of apps on Android devices are downloaded through Google Play. For years, Google Play has been the only commercially significant app store option for Android manufacturers.

74. Another key part of GMS is the set of APIs that allow developers to access certain important features. The APIs available within GMS are part of "Google Play Services" (GPS). GPS allows apps, including third-party apps, to perform functions that are not possible using the open-source version of Android. For example, using the open-source Android system, third-party apps cannot provide basic "push notifications," enable in-app purchases through Google Play, or use data from Google Maps; to have these functionalities, third-party apps must use GPS.

75. The integration of key functions with GPS makes it more difficult for third-party Android developers to port their apps to Android forks because the apps are designed to interact

with Google's proprietary APIs. And as the functionality gap between open-source Android apps and Google's proprietary apps grows, developers are more dependent on GPS.

76. Signing a preinstallation agreement is the only way for an Android device manufacturer to preinstall any Google app, including Google Play. It is also the only way an Android device manufacturer can gain access to GPS and the APIs many developers need for their apps to work properly, at least without expensive and time-consuming reprogramming. But any manufacturer installing Google Play or GPS must preinstall a full suite of apps identified by Google, including the search access points most frequently used by consumers: Chrome, Google search app, Google search widget, and Google Assistant. Google's search engine is the default on all these search access points. Indeed, Google uses the MADAs to control the appearance of Android devices, requiring the manufacturer to place the Google search widget on the home screen, and to preinstall Chrome, the Google search app, and other apps in a way that makes them undeletable by the user.

77. Moreover, before 2017, most MADAs also required manufacturers to set Google as the default general search engine for all key search access points on any device with preinstalled Google apps—these requirements are now found in the revenue sharing agreements discussed below.

4. Revenue Sharing Agreements (Android Mobile Devices)

78. Google enters into search revenue sharing agreements (RSAs) with Android manufacturers and carriers. Google generally requires exclusive distribution as the sole preset default general search service on an ever-expanding list of search access points; in exchange, Google remits to these companies a percentage of search advertising revenue. Google offers revenue share to Android device manufacturers only if they are MADA licensees, and Google offers revenue share to carriers only for devices built by manufacturers that are MADA

licensees. The leading U.S. carriers (AT&T, T-Mobile, and Verizon) and the leading Android device manufacturer (Samsung) have RSAs with Google.

79. Some of Google's revenue sharing agreements require blanket coverage for all Android devices sold by Google's counterparty. Under this version of the revenue sharing agreements, the distributor receives a payment from Google only if *all* the distributor's Android devices comply with the exclusivity requirements. Other revenue sharing agreements provide for a model-by-model choice. Under this version of the agreements, for the distributor to receive a cut of the advertising revenue from any units of a model, every unit of that model must comply with the exclusivity requirements.

80. As innovation has increased the number of search access points on mobile devices—including smart keyboards and voice assistants—Google has expanded its RSAs to close off these avenues to search rivals.

5. Mobile Incentive Agreements (Android Mobile Devices)

81. In Google's latest round of negotiations with some Android manufacturers, Google has replaced RSAs with mobile incentive agreements (MIAs), under which Google pays manufacturers to (1) forego preinstalling rival general search services on their Android devices and (2) comply with a significant number of "incentive implementation requirements"—including preloading up to fourteen additional Google apps. LG and Motorola have MIAs with Google.

82. To maximize payments under the MIAs, the manufacturers must also set Google as the default for all search access points on nearly all of their devices. Moreover, Google generally retains "sole discretion" to determine what constitutes a "search access point," and thus controls the coverage of its exclusive contracts. Although the MIAs change the payment

structure for certain manufacturers, the agreements achieve the same end as their predecessors: search exclusivity for Google.

83. Today, Google has revenue sharing agreements (RSAs or MIAs) with all major U.S. carriers and Android device manufacturers, as well as a number of smaller carriers and manufacturers. Google's revenue sharing agreements (and preinstallation agreements) with Android device manufacturers, together, account for more than 30 percent of mobile device usage in the United States.

6. Revenue Sharing Agreements (Apple and Others)

84. Google's revenue sharing agreements are not limited to its Android partners. Google has entered into revenue sharing agreements with rival browsers and other device manufacturers, further blocking off search access points from competition.

85. Most significantly, Google has had a series of search distribution agreements with Apple, effectively locking up one of the most significant distribution channels for general search engines. Apple operates a tightly controlled ecosystem and produces both the hardware and the operating system for its popular products. Apple does not license its operating systems to third-party manufacturers and controls preinstallation of all apps on its products. The Safari browser is the preinstalled default browser on Apple computer and mobile devices. Apple devices account for roughly 60 percent of mobile device usage in the United States. Apple's Mac OS accounts for approximately 25 percent of the computer usage in the United States.

86. In 2005, Apple began using Google as the preset default general search engine for Apple's Safari browser. In return, Google gave Apple a significant percentage of Google's advertising revenue derived from the search queries on Apple devices. Two years later, Google extended this agreement to cover Apple's iPhones. In 2016, the agreement expanded further to cover additional search access points—Siri (Apple's voice-activated assistant) and Spotlight

(Apple's system-wide search feature)—making Google the preset default general search engine for both services. Today, Google's distribution agreement with Apple gives Google the coveted, preset default position on all significant search access points for Apple computers and mobile devices.

87. Today, Google has RSAs with nearly every significant, non-Google browser other than those distributed by Microsoft, including Mozilla's Firefox, Opera, and UCWeb. These agreements generally require the browsers to make Google the preset default general search engine for each search access point on both their web and mobile versions.

IV. RELEVANT MARKETS

A. General Search Services in the United States

1. General Search Services in the United States Is a Relevant Antitrust Market

88. General search services in the United States is a relevant antitrust market. General search services allow consumers to find responsive information on the internet by entering keyword queries in a general search engine such as Google, Bing, or DuckDuckGo.

89. General search services are unique because they offer consumers the convenience of a "one-stop shop" to access an extremely large and diverse volume of information across the internet. Consumers use general search services to perform several types of searches, including navigational queries (seeking a specific website), informational queries (seeking knowledge or answers to questions), and commercial queries (seeking to make a purchase).

90. Other search tools, platforms, and sources of information are not reasonable substitutes for general search services. Offline and online resources, such as books, publisher websites, social media platforms, and specialized search providers such as Amazon, Expedia, or Yelp, do not offer consumers the same breadth of information or convenience. These resources

are not "one-stop shops" and cannot respond to all types of consumer queries, particularly navigational queries. Few consumers would find alternative sources a suitable substitute for general search services. Thus, there are no reasonable substitutes for general search services, and a general search service monopolist would be able to maintain quality below the level that would prevail in a competitive market.

91. The United States is a relevant geographic market for general search services. Google offers users in the United States a local domain website with search results optimized based on the user's location in the United States. General search services available in other countries are not reasonable substitutes for general search services offered in the United States. Google analyzes search market shares by country, including the United States. Therefore, the United States is a relevant geographic market.

2. Google Has Monopoly Power in the General Search Services Market in the United States

92. Google has monopoly power in the United States general search services market. There are currently only four meaningful general search providers in this market: Google, Bing, Yahoo!, and DuckDuckGo. According to public data sources, Google today dominates the market with approximately 88 percent market share, followed far behind by Bing with about seven percent, Yahoo! with less than four percent, and DuckDuckGo with less than two percent.

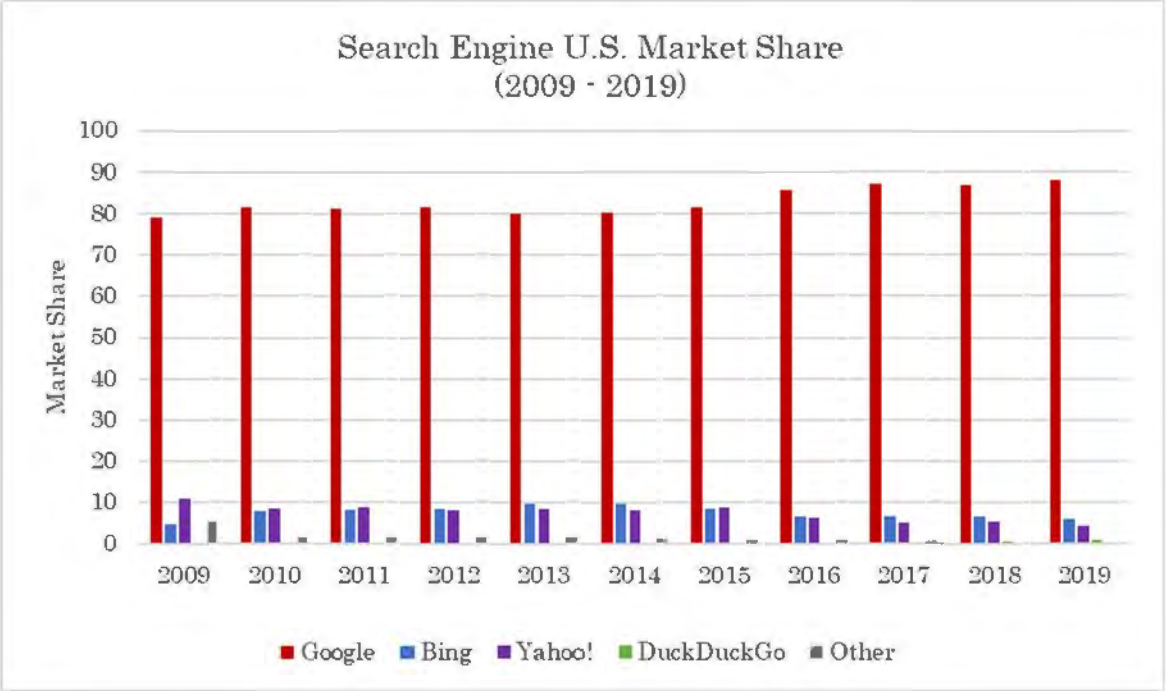

Figure 6

93. Over the years, Google has steadily increased its dominant position in general search services. In July 2007, Google estimated its general search services market share at 68 percent. By June 2013, Google estimated that its share in the United States had already increased to 77 percent on computers. By April 2018, Google estimated that its share was 79 percent on computers and 93.5 percent on mobile. More recently, Google has accounted for almost 90 percent of all general search engine queries in the United States, and almost 95 percent of queries on mobile devices. Recent share estimates are in Figures 7 and 8.

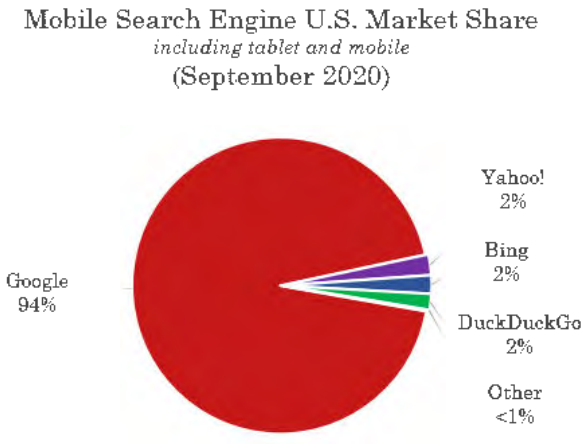

Figure 7

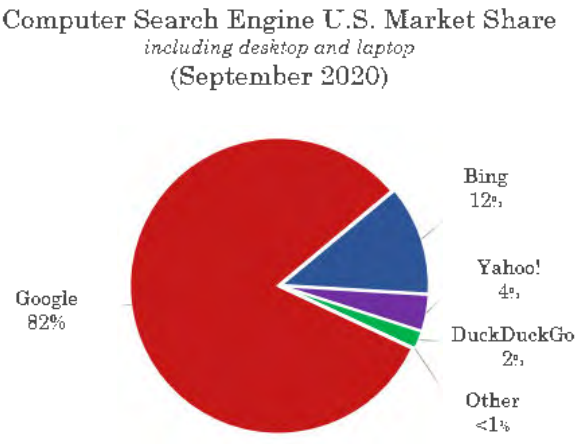

Figure 8

94. There are significant barriers to entry in general search services. The creation, maintenance, and growth of a general search engine requires a significant capital investment, highly complex technology, access to effective distribution, and adequate scale. For that reason, only two U.S. firms—Google and Microsoft—maintain a comprehensive search index, which is just a single, albeit fundamental, component of a general search engine.

95. Scale is also a significant barrier to entry. Scale affects a general search engine's ability to deliver a quality search experience. The scale needed to successfully compete today is greater than ever. Google's anticompetitive conduct effectively eliminates rivals' ability to build the scale necessary to compete.

96. Google's large and durable market share and the significant barriers to entry in general search services demonstrate Google's monopoly power in the United States.

B. Search Advertising in the United States and General Search Text Advertising in the United States Are Relevant Antitrust Markets

1. Search Advertising Is a Relevant Product Market

97. Search advertising in the United States is a relevant antitrust market. The search advertising market consists of all types of ads generated in response to online search queries, including general search text ads (offered by general search engines such as Google and Bing)

and other, specialized search ads (offered by general search engines and specialized search providers such as Amazon, Expedia, or Yelp).

98. Search ads enable advertisers to target marketing messages in real time in response to queries entered by a consumer. Thus, a user's general search query has the important function to an advertiser of revealing the searcher's intent. The ability of search ads to respond to consumer inquiries, at the moment the consumer is investigating a subject relevant to an advertiser's product or service, makes these ads highly valuable to advertisers and distinguishes them from other types of advertising that cannot be similarly targeted, whether online or offline.

99. Other forms of advertising are not reasonably substitutable for search ads. For example, "offline" ads such as newspaper, billboard, TV, and radio ads cannot be targeted at a specific consumer based on the consumer's real-time, self-disclosed interests. Similarly, other forms of online ads, such as display ads or social media ads, do not enable advertisers to target customers based on specific queries and are generally aimed at consumers who are further from the point of purchase. As Google's Chief Economist explained: "One way to think about the difference between search and display/brand advertising is to say that 'search ads help satisfy demand' while 'brand advertising helps to create demand,'" and "[d]isplay and search advertising are complementary tools, not competing ones."

100. Few advertisers would find alternative sources a suitable substitute for search advertising. Thus, there are no reasonable substitutes for search advertising, and a search advertising monopolist would be able to maintain prices above the level that would prevail in a competitive market.

2. General Search Text Advertising Is a Relevant Product Market

101. There also is a relevant product market for general search text advertising that is wholly contained within the broader search advertising market. General search text ads are sold

by general search engines, typically placed just above or below the organic search results on a SERP, and resemble the organic results that appear on a general search engine's SERP, with a subtle notation that they are "ads" or "sponsored." In contrast, other types of search ads—specifically, specialized search ads—typically are visually different from general search text ads and convey different types of information. For example, a Google Shopping Ad normally includes an image of the product, its price, and star-based ratings (see Figure 3). In 2018, general search text ads accounted for close to 85 percent of Google's search ad revenue.

102. General search text ads are distinct from specialized search ads in ways that limit their substitutability for most purposes, including their scope of coverage, purpose, format, and sales process. Indeed, for many advertisers that purchase general search text ads, there are no reasonable alternatives for these ads, which renders these advertisers particularly vulnerable to targeted price increases. General search text ads on Google are vitally important for many different types of advertisers, including companies that prefer to sell directly to consumers from their own websites and companies that want to protect their brand names on Google.

103. General search text ads can be delivered in response to search queries related to any subject that users explore on the internet. General search text ads are offered predominantly by the two companies that operate general search engines: Google and Microsoft (Bing); Bing also syndicates general search text ads for Yahoo! and DuckDuckGo. By contrast, other kinds of search ads are provided by specialized search providers in response to narrower and deeper searches in their areas of specialization, such as retail (e.g., Amazon), travel (e.g., Kayak), or local (e.g., Yelp).

104. General search text ads often target consumers further from an actual sale or "conversion" than specialized search ads. Users often rely on a general search engine such as

Google to start a search of the entire web to explore an interest, consider options, and form a preference, often about a purchase. An advertiser often will buy a general search text ad to drive these searchers down the purchase funnel to the advertiser's website to shop for a product or service. In part for this reason, specialized search providers, such as Amazon, Expedia, and eBay, are among Google's largest *customers* for general search text ads—i.e., they *buy* general search text ads to drive consumers to their specialized search sites, where they then *sell* specialized search ads to advertisers who want to reach those interested consumers at or near the point of purchase. Because general search text ads and specialized ads serve different functions, advertisers often view these ads as complements.

105. General search text ads link to the advertiser's website, so the user can "click out" to that site. By contrast, ads by specialized search providers often link to webpages on that specialized search provider's own website. For example, if a company sells a product on Amazon and buys an ad on Amazon to promote its product, the ad links to the Amazon page on which the advertised product can be purchased—not the seller's own website. This kind of search ad is called a "click in" ad. Thus, general search text ads can be purchased by advertisers that do not sell their products or services on specialized search sites (such as Amazon) as well as advertisers that prefer to sell their products or services directly to consumers.

106. Few general search text advertisers would find alternative sources a suitable substitute for general search text advertising. Thus, there are no reasonable substitutes for general search text advertising, and a general search text advertising monopolist would be able to maintain prices above the level that would prevail in a competitive market.

3. The United States Is a Relevant Geographic Market

107. The United States is a relevant geographic market for both the search advertising and the general search text advertising markets. Market participants recognize this in the

ordinary course of business. For example, Google offers advertisers the ability to target and deliver ads based on the location of consumers in the United States, and Google search is customized for particular countries. Google also separately tracks revenue for the United States.

4. Google Has Monopoly Power in the Search Advertising and General Search Text Advertising Markets in the United States

108. Google has monopoly power in the search advertising market. Based on public estimates of total search advertising spending in the United States, Google's share of the U.S. search advertising market is over 70 percent. This market share understates Google's market power in search advertising because many search-advertising competitors offer only specialized search ads and thus compete with Google only in a limited portion of the market.

109. Google also has monopoly power in the general search text advertising market. Google's market share of the U.S. general search text advertising market also exceeds 70 percent. Google's share of the general search text advertising market well exceeds its share of the search advertising market.

110. There are barriers to entry in these advertising markets that protect Google's advertising monopolies. Most critically, search advertising of any kind requires a search engine with sufficient scale to make advertising an efficient proposition for businesses. Specialized search engines require significant investment, including the cost of populating and indexing relevant data, distribution, developing and maintaining a search algorithm, and attracting users. Search advertising of any kind also requires (1) a user interface through which advertisers can buy ads, (2) software to facilitate the sales process, and (3) a sales and technical support staff. The same barriers to entry that apply to general search services also protect Google's general search text advertising monopoly.

V. ANTICOMPETITIVE CONDUCT

111. Google is a monopolist in the general search services, search advertising, and general search text advertising markets. Google aggressively uses its monopoly positions, and the money that flows from them, to continuously foreclose rivals and protect its monopolies.

112. Google has unlawfully maintained its monopolies by implementing and enforcing a series of exclusionary agreements with distributors over at least the last decade. Particularly when taken together, Google's exclusionary agreements have denied rivals access to the most important distribution channels. In fact, Google's exclusionary contracts cover almost 60 percent of U.S. search queries. Almost half the remaining searches are funneled through properties owned and operated directly by Google. As a result, the large majority of searches are covered by Google's exclusionary contracts and own properties, leaving only a small fraction for competitors.

113. Google's continued use of the exclusionary agreements over many years, long after there was any real competition in general search, has denied its rivals access to the scale that would allow rivals to increase quality. By depriving them of scale, Google also hinders its rivals' ability to secure distribution going forward, insulating Google from competition.

114. Google's exclusionary motives influence its negotiations with distributors. Some of these exclusionary agreements have been described by Google as an "[i]nsurance policy that preserves our search and assistant usage." To preserve its dominance, Google has developed economic models to measure the "defensive value" of foreclosing search rivals from effective distribution, search access points, and ultimately competition. Google recognized it could pay search distributors to "protect [its] market share from erosion." Google continues to focus on the exclusionary defensive value of its distribution contracts as it tries to expand its search dominance into new distribution channels, such as smart home speakers. Here, Google's

defensive value "is attributable to protecting access to Search and other Google services that may otherwise be blocked in a given household" if a user chooses a rival.

115. In sum, Google deprives rivals of the quality, reach, and financial position necessary to mount any meaningful competition to Google's longstanding monopolies. By foreclosing competition from rivals, Google harms consumers and advertisers.

A. Google's Agreements Lock Up Mobile Distribution of Search

116. Launched in the infancy of mobile smartphones, Google's strategy to ward off competition for mobile search distribution had two parts. First, Google expanded its existing search deal with Apple to cover mobile. Second, for other mobile distributors, Google offered its Android operating system for "free" but with a series of interlocking distribution agreements to ensure it search-engine dominance in the Android ecosystem.

117. Google's strategy worked. Google has almost completely shut out its competitors from mobile distribution. As one executive for a competing search product recognized in frustration last year: "Google essentially [has] locked up ALL DISTRIBUTION" with its Apple deal and restrictive Android licensing terms, leaving the competitor's product with "no mobile volume."

1. Distribution on Apple iOS Devices

118. Apple has not developed and does not offer its own general search engine. Under the current agreement between Apple and Google, which has a multi-year term, Apple must make Google's search engine the default for Safari, and use Google for Siri and Spotlight in response to general search queries. In exchange for this privileged access to Apple's massive consumer base, Google pays Apple billions of dollars in advertising revenue each year, with public estimates ranging around $8–12 billion. The revenues Google shares with Apple make up approximately 15–20 percent of Apple's worldwide net income.

119. Although it is possible to change the search default on Safari from Google to a competing general search engine, few people do, making Google the *de facto* exclusive general search engine. That is why Google pays Apple billions on a yearly basis for default status. Indeed, Google's documents recognize that "Safari default is a significant revenue channel" and that losing the deal would fundamentally harm Google's bottom line. Thus, Google views the prospect of losing default status on Apple devices as a "Code Red" scenario. In short, Google pays Apple billions to be the default search provider, in part, because Google knows the agreement increases the company's valuable scale; this simultaneously denies that scale to rivals.

120. Apple's RSA incentivizes Apple to push more and more search traffic to Google and accommodate Google's strategy of denying scale to rivals. For example, in 2018, Apple's and Google's CEOs met to discuss how the companies could work together to drive search revenue growth. After the 2018 meeting, a senior Apple employee wrote to a Google counterpart: "Our vision is that we work as if we are one company."

121. The current version of the Google–Apple agreement substantially forecloses Google's search rivals from an important distribution channel for a significant, multi-year term. This agreement covers roughly 36 percent of all general search queries in the United States, including mobile devices and computers. Google estimates that, in 2019, almost 50 percent of its search traffic originated on Apple devices.

122. Particularly when considered with the other exclusionary distribution agreements discussed below, Google's hold on Apple's distribution channel is self-reinforcing, impairing rival general search engines' ability to offer competitive products and making Google's monopolies impenetrable to competitive discipline. By paying Apple a portion of the monopoly rents extracted from advertisers, Google has aligned Apple's financial incentives with its own

and set the price of bidding for distribution extraordinarily high—in the billions. And, even if a rival was willing to make no money from a distribution relationship or could afford to lose money indefinitely, the rival would likely still fall short because the existing distribution agreements have for more than a decade denied rivals the benefits of scale, thus limiting (1) the quality of their general search and search advertising products, as well as (2) the audience to attract advertisers. In other words, because of the longtime deprivation of scale, no other search engine can offer Apple (or any other partner) the mix of quality, brand recognition, and economics that market-dominant Google can.

2. Distribution on Android Devices

123. Google controls the Android mobile distribution channel with its distributor agreements and owned-and-operated distribution properties.

124. Even though Android is open source, Google has used Android to protect Google's lucrative general search and search advertising monopolies. Google sets the rules through anti-forking agreements, preinstallation agreements, and revenue sharing agreements. Notably, each of these agreements builds on the others to preserve control. Thus, Google will not pay a revenue share or financial incentive payment on a mobile device unless it is covered by (1) an anti-forking agreement, (2) a preinstallation agreement ensuring that Google's search access points are preinstalled and given prominent placement, and (3) a revenue sharing or mobile incentive agreement that entitles Google to preset default status and, in most cases, prohibits preinstallation of search access points with rival general search providers.

125. Through these interlocking, anticompetitive agreements, Google insulates and protects its monopoly profits. One internal Google analysis of these restrictive agreements concluded that only one percent of Google's worldwide Android search revenue was currently at

risk to competitors. This analysis noted that the growth in Google's search advertising revenue from Android distribution was "driven by increased platform protection efforts and agreements."

a) Anti-Forking Agreements

126. An alternative operating system could serve as a pathway for distribution of general search services other than Google. However, Google's anti-forking agreements inhibit the development of an operating system based on an Android fork that could serve as a viable path to market for a search competitor.

127. Developing an operating system from scratch is extremely expensive, but a manufacturer could start with existing Android open-source code for a fraction of the cost. Moreover, the costs to app developers of "porting" GMS-compatible Android apps to an Android fork are substantially less than developing apps for an entirely new operating system.

128. Google's anti-forking agreements, however, have inhibited operating system innovation through forking, ensuring that manufacturers and distributors are beholden to Google's version of Android. Distributors know that any violation of an anti-forking agreement could mean excommunication from Google's Android ecosystem, loss of access to Google's must-have GPS and Google Play, and millions or even billions of dollars in lost revenue sharing. Thus, distributors avoid anything that Google might deem "fragmentation"—a term that Google "purposely leave[s] . . . very vague" and interprets broadly.

129. Pursuant to the preinstallation agreements discussed below, Google also has final say over whether a device is found to be compatible with the technical specifications Google requires manufacturers to meet before they can preinstall GMS. As a Google engineer noted, it must be "obvious to the [manufacturers] that we are using compatibility as a club to make them do things we want." Google views its anti-fragmentation mandate, and its final approval of

devices before they launch, as a "poison pill" to prevent deviation from the Google-controlled Android ecosystem.

130. Google's broad interpretation of the anti-forking agreements, and the reluctance it creates among Android distributors to support alternative versions of Android, presents barriers to entry. These were on display when Amazon developed its Fire OS operating system, a competing fork of Android. Rather than preinstall Google's search engine, GPS, Google Play, or other Google apps on Fire devices, Amazon preinstalled its own proprietary apps and agreed to make Microsoft's Bing the preset default general search engine. Amazon originally sold only Fire OS tablets, but in 2014 it launched a phone that ran on Fire OS. The phone was not a commercial success and Amazon quickly exited the phone business. Amazon continues to sell Fire tablets, which account for less than two percent of mobile device usage in the United States.

131. Google's anti-forking provisions and policies limited the growth of Amazon's mobile phone, and of Fire OS, because major manufacturers declined to support Amazon's phone out of fear doing so would risk their lucrative deals with Google. Manufacturers willing to work with Amazon did not have the same marketing and logistics capabilities as top manufacturers. Despite hundreds of millions of dollars in investment over nearly ten years across tablets and phones, Fire OS still has not reached sufficient critical mass to challenge Google's version of Android and provide a significant alternative path to market for search rivals.

132. No Android fork has made significant inroads to challenge Google for mobile devices, and there is no meaningful operating system alternative for manufacturers and carriers to license. These manufacturers and carriers are beholden to Google's Android ecosystem, which Google uses to preserve its monopolies in general search, search advertising, and general search text advertising. Google's anti-forking agreements further inhibit the development of alternative

Android operating systems for the next generation of search distribution channels, such as smart watches, smart speakers, smart TVs, and connected automobiles.

b) Preinstallation Agreements

133. Google uses preinstallation agreements—MADAs—to ensure that its entire suite of search-related products is given premium placement on Android GMS devices. Consumers naturally and regularly turn to these prominently placed search access points to conduct searches. Preinstallation agreements also reinforce Google's anti-forking requirements, either by including an anti-forking clause of their own or, more commonly, requiring device manufacturers to be signatories to an anti-forking agreement.

134. If a manufacturer wants even one of Google's key apps and APIs, the device must be preloaded with a bundle of other Google apps selected by Google. The six "core" apps are Google Play, Chrome, Google's search app, Gmail, Maps, and YouTube. Manufacturers must preinstall the core apps in a manner that prevents the consumer from deleting them, regardless of whether the consumer wants them. These preinstallation agreements cover almost all Android devices sold in the United States.

135. Google's preinstallation agreements effectuate a tie, that is, they condition the distribution of Google Play and GPS to the distribution of these other apps. This tie reinforces Google's monopolies. The preinstallation agreements provide Android device manufacturers an all-or-nothing choice: if a manufacturer wants Google Play or GPS, then the manufacturer must also preinstall, and in some cases give premium placement to, an entire suite of Google apps, including Google's search products. The forced preinstallation of Google's apps deters manufacturers from preinstalling those of competitors. This forecloses distribution opportunities to rival general search engines, protecting Google's monopolies.

136. Google recognizes it could "make [the] phone experience better for user[s] by ensuring . . . preloaded apps are deletable." In large part, this is because "[u]sers can free up space by deleting apps they don't want." Consumers desiring to use non-Google search access points thus suffer because they cannot save storage space on their devices by deleting unwanted Google apps. In this way, manufacturers must agree to make their phones less attractive to consumers to accommodate Google's efforts to lock up search distribution.

137. Once the manufacturer adopts the necessary suite of Google apps, the search access points of those apps are preset to default to Google's search engine. For example, the preinstalled version of Chrome is preset to default to Google search. A senior executive at Google referred to changing Chrome's preset search default as "totally off the table" and insisted that if a manufacturer "values their MADA, they cannot modify Chrome's settings." The result is that Google locks up the access points to general search on Android phones, as shown in Figure 9:

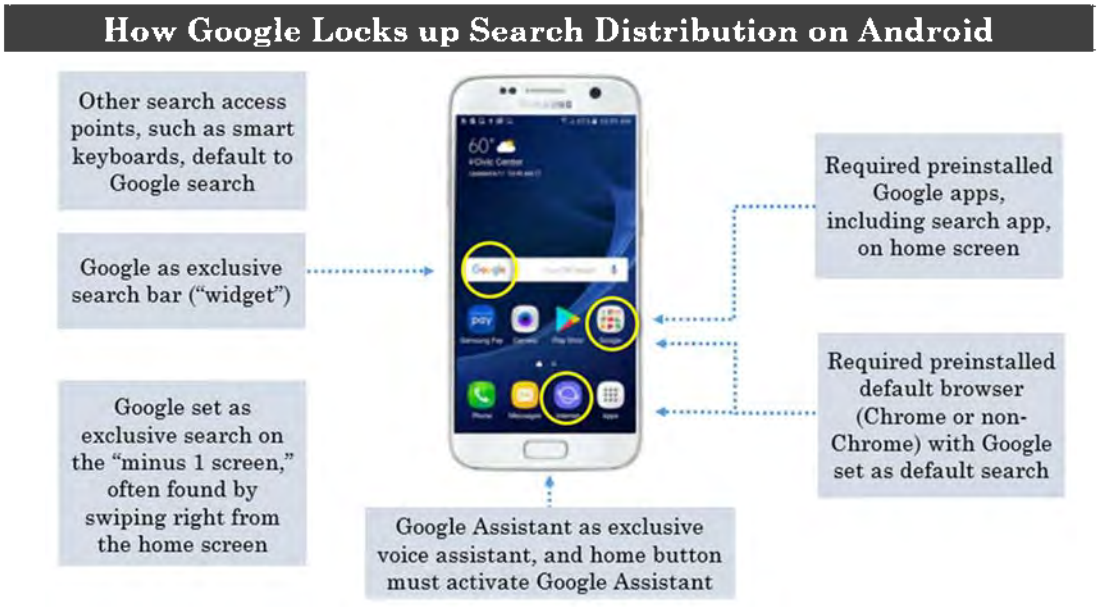

Figure 9

138. The preinstallation agreements are even more pernicious than basic ties because these agreements force distributors to configure the appearance of their phones to Google's specifications. For example, they require manufacturers to put the Google search widget on the device's default home screen. Google considers the search widget "an essential part of the Google brand" and rejects requests by manufacturers to waive the preinstallation agreement's search-widget requirement. This locks up another search access point, as it would be impractical for a manufacturer to preinstall two search widgets on the same home screen.

139. Google's preinstallation agreements also impose voice-search preferencing. In addition to requiring the preinstallation of Google Assistant, preinstallation agreements require manufacturers to (1) implement a Google hotword, which activates Google Assistant, and (2) ensure certain touch actions on the device's home button directly access Google Assistant or Google. Google's agreements with most manufacturers also (3) set Google Assistant as the default assistant app.

140. Rivals to Google Assistant are deprived of the same opportunities. Most of Google's preinstallation agreements prevent rival assistants from being the preset default or using a home button. Google also handicaps rival assistants by limiting the APIs that non-Google apps can use, ensuring that the useful features, such as "always on" microphone access that would enable the use of a hotword or the initiation of phone calls, are available only to Google Assistant. Even Google Assistant's chief rival—Amazon's Alexa—is unable to navigate these disincentives to get significant preinstallation or functional integration on Android devices.

141. Voice search is an important, emerging access point. Internal Google documents have recognized that the "[v]oice platform will become the future of search" and financial projections for the assistant category recognize "search defensive value."

142. Partners that depart from the preinstallation agreements risk discipline from Google. For example, in 2011, one major electronics manufacturer considered giving a group of consumers outside the United States a choice between two home screen experiences for their device: one home screen with the Google search widget and a second home screen with a rival search widget. Discussing this proposal with colleagues, one Google employee noted "[a]llowing a mode that does not have Google as the default search provider and completely changes the home screen" would violate Google's terms and risk breach.

143. In 2015, Google was concerned that a major United States carrier would ask manufacturers to install a search widget powered by the carrier's in-house search engine. Google's Vice President of Partnerships wrote to a colleague that Google needed to make clear to manufacturers that "[these] customization requests will not go far" and replacing the Google search widget with a different search box would violate the preinstallation agreement. Termination of this default agreement would, in turn, prohibit access to the entire GMS suite, including Google Play and GPS, and forfeit any potential cut of Google's search advertising revenue under a revenue sharing agreement. In short, as the above examples illustrate, Google's documents show its efforts to discipline its counterparties, including major electronics companies and carriers.

c) Revenue Sharing Agreements

144. In exchange for a substantial portion of Google's search advertising revenues, Android distributors agree to make Google the preset default general search engine for all significant search access points on the device. In addition, these agreements typically contain an exclusivity provision prohibiting the preinstallation of a competing general search service.

145. Google has recognized for some time that its revenue sharing agreements with Android device manufacturers and carriers provide exclusivity for its general search service on

those devices. As stated explicitly in a draft 2014 Google strategy deck in Figures 10 and 11 below, Google's revenue sharing arrangements with Android manufacturers or OEMs "provide exclusivity of Search" and its deals with carriers similarly "prevent[] the pre-installation of other Search engines or browsers," thus enabling Google "to protect Search exclusivity on the device as it makes its way to the user."

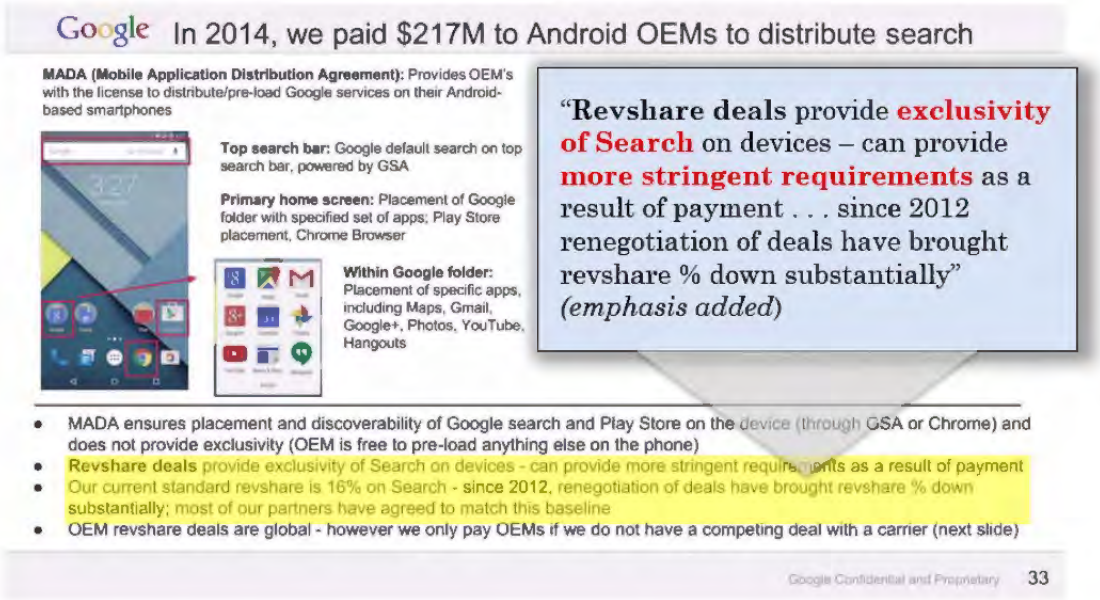

Figure 10 (Android manufacturers)

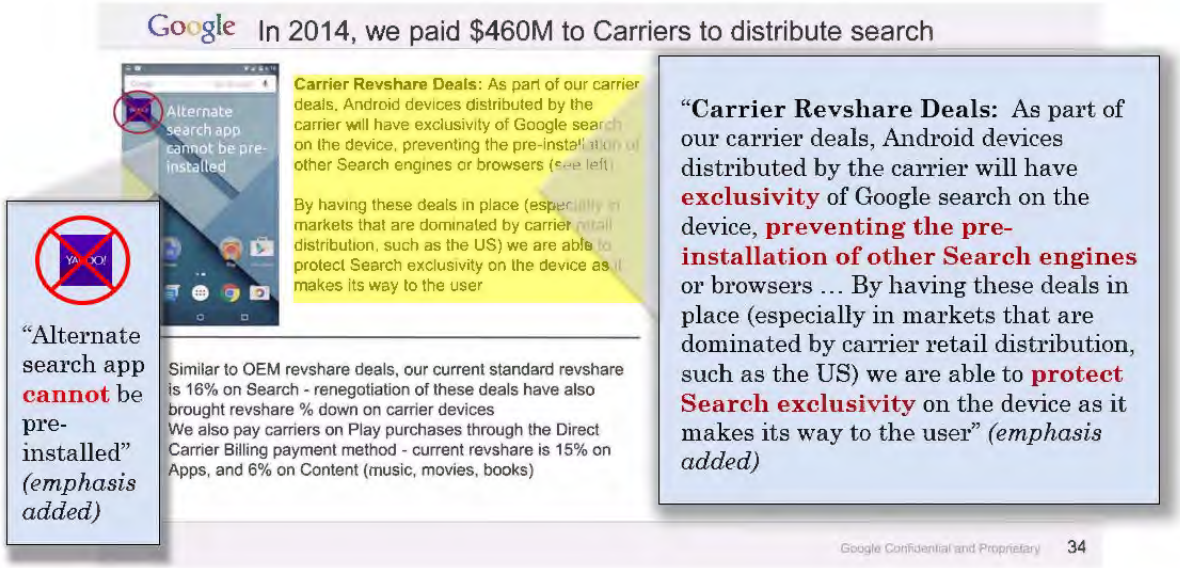

Figure 11 (Android carriers)

146. Similarly, one Google executive acknowledged that exclusivity is "the general philosophy of the RSA or one of the tenets of the value exchanged in the RSA." Another Google executive noted, "our philosophy is that we are paying revenue share *in return for* exclusivity." These agreements are, as that executive further explained, "really important" because "otherwise Bing or Yahoo can come and steal away our Android search distribution at any time."

147. As Google's documents recognize, the preinstallation agreements and revenue sharing agreements work together as a belt-and-suspenders strategy for driving searches to Google (and therefore away from competitors) on Android devices. As one Google executive explained in 2017, Google uses revenue sharing agreements "as a lever for motivating partner behavior that is consistent with our goals for Google and the ecosystem," and to "drive incremental revenue (securing search defaults not covered by MADA)." By using its monopoly profits, Google is able to secure even "more stringent requirements" on manufacturers and carriers to obtain the preset default position on search access points not covered by the preinstallation agreements. The combined result of Google's preinstallation and revenue sharing agreements is to lock up all the main pathways through which consumers access search on Android devices, thus foreclosing rivals and protecting Google's monopoly positions.

148. The size of Google's payments to Android distributors demonstrates the enormous value of default status and exclusivity provided by the agreements. Last year, Google paid major U.S. carriers, collectively, more than a billion dollars.

149. Other channels of distribution left for competitors are far inferior to those paid for by Google and protected by its agreements. For example, a consumer can in theory download a competing search app on his or her own. But as one of Google's executives bluntly put it, "most

users just use what comes on the device" and do not attempt to download or use other general search services.

150. Google's revenue-sharing partners turn down opportunities to preinstall or otherwise enable innovative, search-related apps because those new partnerships could violate Google's demand for exclusivity.

151. Google also uses its agreements to ensure that new search access points are not available to competitors. For example, Google developed a smart keyboard—a mobile app that can be used as an alternative for the standard-issued keyboards on smart phones—with the recognition that such keyboards might be "the next big search access point." Google relies on its preinstallation and default restrictions in its revenue sharing agreements as a "strategic defense" against rival keyboards that might provide a "[b]ridge" to rival general search engines. Thus, search queries cannot leak out to Google's rivals even in niche areas.

152. Google likewise structures its agreements to penalize any distributor that might walk away, tying them to Google. The typical term of the carrier and manufacturer revenue sharing agreement is two to three years. If a carrier or manufacturer does not renew its revenue sharing agreement with Google, the distributor loses out on revenue share not only for new mobile devices but also for the phones and tablets previously sold and in the hands of consumers. This provision is punitive to the carrier or manufacturer and helps to ensure that carriers and manufacturers will not stray from Google.

153. To be attractive to a carrier or manufacturer, a rival search provider's offer for preset default status would need to cover not only the revenue the carrier or manufacturer would have earned from Google for new devices, but also the revenue that the carrier or manufacturer would have earned on all the devices that are currently in the hands of consumers. Google will

continue to benefit from those devices with defaults previously set to Google. A rival search provider is left with no practical way to ensure that it will generate revenues from those devices, regardless of how competitive its general search service might otherwise be.

154. In roughly a decade, no other general search provider has secured preset default search status on any preinstalled search access point on GMS Android devices. As with the Apple distribution agreements, the Android distribution agreements—taken together—are self-reinforcing, depriving rivals of the quality, audience, and financial benefits of scale that would allow them to mount an effective challenge to Google.

155. Particularly for newer entrants, the revenue sharing agreements present a substantial barrier to entry. These entrants cannot pay the billions of dollars that Google does for the most effective forms of distribution—premium placement and default status. Instead, they are relegated to inferior forms of distribution that do not allow them to build scale, gain brand recognition, and generate momentum to challenge Google.

B. Google Agreements Lock Up Browser Distribution

156. Beyond its agreements locking up distribution on Android and Apple devices, Google also has entered into exclusive revenue sharing agreements with browsers. Google has recognized it is "crucial to retain web browser partnerships." Google's agreements with browsers generally require the browsers to make Google the preset default general search engine for search access points in both the browser's computer and mobile versions.

157. In exchange for being the preset default general search engine, Google shares up to 40 percent of the advertising revenue it generates from these search access points with Google's browser rivals. Browser revenue sharing agreements typically last at least two years and are routinely extended.

158. Browsers are one of the most important distribution channels for general search services because they are the gateway to the internet for most consumers. Many search queries on mobile devices and computers are performed through the device's browser. Today, Google has revenue sharing agreements with the most widely used browsers in the United States, such as Apple's Safari browser and Mozilla's Firefox browser; Microsoft's browsers are the only notable exceptions. Over 85 percent of all browser usage in the United States occurs on Google's own Chrome browser or on one of the browsers covered by these revenue sharing agreements.

159. In a competitive market, rivals could compete to be the preset default general search engine on a browser. The general search services market has not, however, been competitive for many years. When considered with Google's other exclusionary agreements and its monopoly power, Google's conduct forecloses a critical avenue for search competitors to enter the market or increase distribution. In the absence of these agreements, rival browsers would have the ability to consider making other general search engines the preset default for some or all search access points, spurring greater competition in the general search services market and offering additional choices to consumers. As a Google employee once noted, Google's browser agreements can be "a good way to keep [a browser] away from Bing."

C. Google Is Positioning Itself to Control the Next Generation of Search Distribution Channels

160. Although mobile phones and computers account for the vast majority of general searches on the internet today, in the future, an increasing number of searches will likely be conducted on next generation devices such as smart watches, smart speakers, smart TVs, and connected automobiles. Google is positioning itself to control these emerging channels for search distribution, excluding new and established rivals.

161. As noted above, Google has interpreted its anti-forking agreements (AFAs and ACCs) with Android mobile partners to cover next generation devices. Additionally, Google uses other points of leverage in the mobile channel to discourage mobile partners from working with rival operating systems on next generation devices. The result is that Google is positioned to retain control over the operating systems that power next generation devices manufactured by mobile partners and to inhibit adoption of alternative search services on those devices.

162. Google also requires connected-device manufacturers that do not sell Android mobile phones to agree to restrictive contract terms that mirror the effects of the mobile distribution agreements. For instance, Google partners with automobile manufacturers on the condition that they not preinstall rival search-related apps. Google has similarly restrictive agreements with smart watch manufacturers: its agreements to license Google's "free" smart watch operating system (Wear OS) prohibit manufacturers from preinstalling *any* third-party software, including any rival search services.

163. Additionally, Google refuses to license its Google Assistant to IoT device manufacturers that would host another voice assistant simultaneously—a feature commonly known as "concurrency." Through concurrency, a rival voice assistant could grow in popularity to challenge Google for control over the way that consumers access the internet generally, even on more established devices such as mobile phones. Google recognizes that concurrency is a feature that consumers would value, but it sees too great a competitive risk from allowing consumers to decide which voice assistant to use on a case-by-case basis.

164. Finally, Google uses its control over hardware products—including smart speakers and Google Nest smart home products—to protect its general search monopoly. Google recognizes that its "[h]ardware products also have HUGE defensive value in virtual assistant

space AND combatting query erosion in core Search business." Looking ahead to the future of search, Google sees that "Alexa and others may increasingly be a substitute for Search and browsers with additional sophistication and push into screen devices."

165. Google therefore aims to control emerging search access points to protect its monopolies in the general search services, search advertising, and general search text advertising markets in the present and the future. Google is poised to ensure that history repeats itself, and that all search access points funnel users in one direction: toward Google.

VI. ANTICOMPETITIVE EFFECTS

166. Google has maintained unlawful monopolies in the general search services, search advertising, and general search text advertising markets through its many exclusionary agreements and other conduct that have separately and collectively harmed competition by:

a. Substantially foreclosing competition in general search services and protecting a large majority of search queries in the United States against any meaningful competition;

b. Excluding general search services rivals from effective distribution channels, thereby denying rivals the necessary scale to compete effectively in the general search services, search advertising, and general search text advertising markets;

c. Impeding other potential distribution paths for general search services rivals;

d. Increasing barriers to entry and excluding competition at emerging search access points from nascent competitors on both computers and mobile devices;

e. Stunting innovation in new products that could serve as alternative search access points or disruptors to the traditional Google search model; and

f. Insulating Google from significant competitive pressure to improve its general search, search advertising, and general search text advertising products and services.

167. By restricting competition in general search services, Google's conduct has harmed consumers by reducing the quality of general search services (including dimensions such as privacy, data protection, and use of consumer data), lessening choice in general search services, and impeding innovation.

168. Google's exclusionary conduct also substantially forecloses competition in the search advertising and general search text advertising markets, harming advertisers. By suppressing competition, Google has more power to manipulate the quantity of ad inventory and auction dynamics in ways that allow it to charge advertisers more than it could in a competitive market. Google can also reduce the quality of the services it provides to advertisers, including by restricting the information it offers to advertisers about their marketing campaigns.

169. Google's conduct also has harmed competition by impeding the distribution of innovative apps that offer search features that would otherwise challenge Google. Google has also harmed competition by raising rivals' costs and foreclosing them from effective distribution channels, such as distribution through voice assistant providers, preventing them from meaningfully challenging Google's monopoly in general search services.

170. Google's monopoly in general search services also has given the company extraordinary power as the gateway to the internet, which it uses to promote its own web content and increase its profits. Google originally prided itself as being the "turnstile" to the internet,

sending users off its results pages through organic links designed to connect the user with a third-party website that would best "answer" a user query. Over time, however, Google has pushed the organic links further and further down the results page and featured more search advertising results and Google's own vertical or specialized search offerings. This, in turn, has demoted organic links of third-party verticals, pushing these links "below-the-fold" (i.e., on the portion of the SERP that is visible only if the user scrolls down) and requiring them to buy more search advertising from Google to remain relevant. This raises their costs, reduces their competitiveness, and limits their incentive and ability to invest in innovations that could be attractive to users. Not surprisingly, investors also report being unwilling to provide funding to vertical startups with business models similar to or potentially competitive with Google's search advertising monopoly.

171. Absent Google's exclusionary agreements and other conduct, dynamic competition for general search services would lead to higher quality search, increased consumer choice, and a more beneficial user experience. In addition, more competitive search advertising and general search text advertising markets would allow advertisers to purchase ads at more attractive terms, with better quality and service. Finally, the incentives and abilities for companies to develop and distribute innovative search products would be restored, resulting in more options, better products, and higher consumer welfare overall.

172. The anticompetitive effects flowing from Google's distribution agreements, particularly when considered collectively, have allowed Google to develop and maintain monopolies in the markets for general search services, search advertising, and general search text advertising; these anticompetitive effects outweigh any benefits from those agreements, or those benefits could be accomplished by less restrictive means.

VII. VIOLATIONS ALLEGED

First Claim for Relief: Maintaining Monopoly of General Search Services in Violation of Sherman Act § 2

173. Plaintiffs incorporate the allegations of paragraphs 1 through 172 above.

174. General search services in the United States is a relevant antitrust market and Google has monopoly power in that market.

175. Google has willfully maintained and abused its monopoly power in general search services through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers, and other devices; require preinstallation and prominent placement of Google's apps; tie Google's search access points to Google Play and Google APIs; and other restrictions that drive queries to Google at the expense of search rivals.

176. Google's exclusionary conduct has foreclosed a substantial share of the general search services market.

177. Google's anticompetitive acts have had harmful effects on competition and consumers.

178. The anticompetitive effects of Google's exclusionary agreements outweigh any procompetitive benefits in this market, or can be achieved through less restrictive means.

179. Google's anticompetitive and exclusionary practices violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

Second Claim for Relief: Maintaining Monopoly of Search Advertising in Violation of Sherman Act § 2

180. Plaintiffs incorporate the allegations of paragraphs 1 through 172 above.

181. Search advertising in the United States is a relevant antitrust market and Google has monopoly power in that market.

182. Google has willfully maintained and abused its monopoly power in search advertising through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers, and other devices; require preinstallation and prominent placement of Google's apps; tie Google's search access points to Google Play and Google APIs; and other restrictions that benefit Google at the expense of search advertising rivals.

183. Google's exclusionary conduct has foreclosed a substantial share of the search advertising market.

184. Google's anticompetitive acts have had harmful effects on competition, advertisers, and consumers.

185. The anticompetitive effects of Google's exclusionary agreements outweigh any procompetitive benefits in this market, or can be achieved through less restrictive means.

186. Google's anticompetitive and exclusionary practices violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

Third Claim for Relief: Maintaining Monopoly of General Search Text Advertising in Violation of Sherman Act § 2

187. Plaintiffs incorporate the allegations of paragraphs 1 through 172 above.

188. General search text advertising in the United States is a relevant antitrust market, and Google has monopoly power in that market.

189. Google has willfully maintained and abused its monopoly power in general search text advertising through anticompetitive and exclusionary distribution agreements that lock up the preset default positions for search access points on browsers, mobile devices, computers, and other devices; require preinstallation and prominent placement of Google's apps; tie Google's

search access points to Google Play and Google APIs; and other restrictions that benefit Google at the expense of general search text advertising rivals.

190. Google's exclusionary conduct has foreclosed a substantial share of the general search text advertising market.

191. Google's anticompetitive acts have had harmful effects on competition, advertisers, and consumers.

192. The anticompetitive effects of Google's exclusionary agreements outweigh any procompetitive benefits in this market, or can be achieved through less restrictive means.

193. Google's anticompetitive and exclusionary practices violate Section 2 of the Sherman Act, 15 U.S.C. § 2.

VIII. REQUEST FOR RELIEF

194. To remedy these illegal acts, Plaintiffs request that the Court:

a. Adjudge and decree that Google acted unlawfully to maintain general search services, search advertising, and general search text advertising monopolies in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;

b. Enter structural relief as needed to cure any anticompetitive harm;

c. Enjoin Google from continuing to engage in the anticompetitive practices described herein and from engaging in any other practices with the same purpose and effect as the challenged practices;

d. Enter any other preliminary or permanent relief necessary and appropriate to restore competitive conditions in the markets affected by Google's unlawful conduct;

e. Enter any additional relief the Court finds just and proper; and

f. Award each Plaintiff an amount equal to its costs incurred in bringing this action on behalf of its citizens.

Respectfully submitted,

October 20, 2020

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