Nos. 22-277 and 22-555

IN THE
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, ET AL., *Petitioners*,

V.

NETCHOICE, LLC, DBA NETCHOICE, ET AL., *Respondents*.

(For Continuation of Caption, See Inside Cover)

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND ELEVENTH CIRCUITS

BRIEF OF ECONOMISTS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

JENNIFER B. TATEL
Counsel of Record
JONATHAN V. COHEN
MORGAN O. SCHICK
TYLER D. DILLON
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141
jtatel@wbklaw.com

Counsel for Amici Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

(Continuation of Caption)

NETCHOICE, LLC, DBA NETCHOICE, ET AL.,
Petitioners,
V.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent.

Questions Presented

1. Whether the content-moderation restrictions enacted in Florida and Texas comply with the First Amendment.

2. Whether the individualized-explanation requirements enacted in Florida and Texas comply with the First Amendment.

Table of Contents

Table of Authorities

CASES

STATUTES

OTHER AUTHORITIES

BRIEFS AND MOTIONS

Interest of *Amici Curiae*[1]

Amici curiae are Ph.D. economists with expertise in the economics of the digital economy. They are fellows of the Technology Policy Institute, a non-profit 501(c)(3) exempt private foundation organized under the laws of Washington, D.C., with no parent company, and no publicly held corporation owns 10% or more of its stock. *Amici* submit this brief to assist the Court in understanding the importance of applying substantive economic analysis to decisions based on determinations of market power. A list of *amici* is attached as an appendix to this brief.

---

[1] Pursuant to Supreme Court Rule No. 37.6, no counsel for a party authored the brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici* or their counsel made such a monetary contribution. Members of NetChoice LLC, including Amazon, Google, and Meta, are three of over 20 general corporate donors of the Technology Policy Institute, of which *amici* are fellows. Counsel provided notice to the parties of *amici's* intention to file this brief more than 10 days before the deadline. *See* S. Ct. R. 37.2.

Summary of Argument

The Florida and Texas legislatures that enacted the laws being challenged, as well as the Fifth Circuit that upheld the Texas law, each based their actions at least in part on assertions that large social media platforms exert market power in the economic marketplace. In each case, however, these assertions were not grounded in any apparent significant economic analysis or reasoning. Indeed, they presumed the existence of market conditions without engaging in any serious analysis at all. Given the extensive economic consequences that laws and legal decisions in this general area will have on the online information ecosystem, it is critical that the Supreme Court employ well established economic principles as it determines whether and how marketplace considerations bear on the legal questions presented in these cases.

This brief examines the complex factors to consider when analyzing the central economic principles at issue in these cases: market dominance; market power; concentration; market definition; competition; and network effects. More careful and precise study of these multifaceted subjects is necessary if the Court wishes to base any conclusions on economic reasons.

This Court has made clear in the past that, when defining a universe of competitors and determining market dominance, courts should employ established economic techniques and conduct fact-specific analyses based on record evidence. The outcome in these cases could have wide-ranging impact on the

digital economy and on society in general, so the Court's decision should not simply accept unsupported assertions made in the decisions below. Any determination of market power justifying regulation must be founded on an economic analysis that will stand up to scrutiny, understanding that multiple reasonable analytical approaches exist and that different approaches may yield very different conclusions.

Argument

I. Courts Should Base Rulings Concerning Market Power and Market Structure on Economic Analysis, Not on Presumptions

A prominent question in both cases under review is whether certain social media platforms have market power and should be treated like common carriers that may be given less First Amendment protection from government action than other forms of media. When determining whether a social media platform has market dominance or when defining market competitiveness, courts should use established economic techniques and explain the reasoning behind their findings. Unfortunately, the Fifth Circuit's decision in *NetChoice, L.L.C., et al. v. Paxton*, 49 F.4th 439, 476 (5th Cir. 2022) ("*NetChoice v. Paxton*") relies on a conclusory finding of market dominance that lacks the benefit of a process for finding facts from objective analysis.[2]

[2] In Florida's appeal to the Eleventh Circuit of the district court's injunction against its social media law, 2021 Fla. Laws Ch. 32

The Texas state legislature found that "social media platforms with the largest number of users are common carriers by virtue of their market dominance." 2021 Tex. Gen. Laws 3904 § 1.4 (H.B. 20). The Fifth Circuit reversed a district court injunction against the Texas law at least in part because of its view that each of the platforms at issue has an "effective monopoly over its particular niche of online discourse." *NetChoice v. Paxton*, 49 F.4th at 476. Neither the legislature nor the court, however, has explained the economic analysis that led to these conclusions.

Supreme Court precedent suggests that courts should conduct a substantial economic analysis when evaluating the market power of a business. For example, antitrust law has long required courts to "conduct a fact-specific assessment of 'market power and market structure'" when assessing the effect of a business's conduct on competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)). Analyses of market power and market structure may include examining prices or output data. *Id*. at 2288.

The Fifth Circuit refers to Justice Thomas's concurrence in *Biden v. Knight First Amend. Inst.*,

---

(S.B. 7072), the Florida Attorney General argued that large social-media platforms "are clothed with a 'public trust' and have 'substantial market power,'" and that therefore they are (or should be treated like) common carriers. *AG, Fla.* App. Br. 35-37. The appellate court, however, ruled that "even if [these premises were] true, they wouldn't change our conclusion." *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1221 (11th Cir. 2022).

141 S. Ct. 1220, 1224, 1227 (2021) (Thomas, J., concurring) ("*Biden v. Knight*"), to justify its conclusions, but that opinion similarly asserts a conclusion rather than employing economic rigor to reach it. The *Biden v. Knight* concurrence places numerous labels on aspects of the social media market. For example, it highlights the "concentrated control" of speech, the "highly concentrated . . . information infrastructure," the "concentrated control over online content," and the absence of alternatives to counteract the "substantial market power" held by today's digital platforms. *Id.* 1221-22, 1225. These are economic terms, but the opinion provides no substantive economic analysis, does not cite to an evidentiary record, and does not explain the factors considered in defining the relevant market and identifying competitors.

The *Biden v. Knight* concurrence similarly is conclusory in finding that Facebook, Google, and Twitter are "dominant digital platforms" and have "no comparable competitors [which] highlights that the industries may have substantial barriers to entry." *Id.* at 1224. But by not defining "comparable," this opinion raises more questions than it answers about market definition. On one hand, "comparable competitor" could imply an extremely narrow market. If the only possible competitor to Facebook is a Facebook clone, then Facebook would be the dominant and possibly only entity in that market, resulting in little to no competition. On the other hand, if "comparable competitors" include platforms that could displace Facebook with expanded or different features or cause users to leave the platform, then the possibilities for defining competitors in a

market for attention expands significantly. The concurrence implicitly raises that possibility by classifying Facebook and Google both as "digital platforms." If both companies are in a single market for digital platforms, then that market would include far more competitors than those two entities.

It is unclear if the *Biden v. Knight* concurrence defines the market that it deems concentrated as a market of "digital platforms" broadly, the search market, the social media market, or the book market.[3] Notably, Twitter was the social media platform at issue in *Biden v. Knight*, but the concurrence incorporates facts from the search market to support its claim of concentration, rather than facts on the social media market.

The Fifth Circuit decision suffers from similar infirmities. The Fifth Circuit relies on a theory of "effective monopoly" to uphold the Texas law at issue here.[4] *NetChoice v. Paxton*, 49 F.4th at 476. We are unaware of economic literature that supports an "effective monopoly" theory, let alone one that would justify this finding, and the court did not provide this analysis.

---

[3] *Biden v. Knight*, 141 S. Ct. at 1225 n.4 (citing Day & Gu, *The Enormous Numbers Behind Amazon's Market Reach*, BLOOMBERG (Mar. 27, 2019) (Amazon has 42% of the physical book market and 89% of the e-book market as of 2018)).

[4] The Fifth Circuit admits competition between several monopolies and applies an untested theory that each platform has its own monopoly.

Additionally, the Fifth Circuit's decision did not significantly evaluate the possibility that new businesses could enter the market and compete against incumbents. Without analysis, the court largely dismisses the possibility of entry, citing to the concurrence in *Biden v. Knight*, which states that "network effects entrench these companies." *Biden v. Knight*, 141 S. Ct. at 1224. But that concurrence provides little economic analysis to support this claim.

Defining markets is critical to reaching any conclusion regarding market power because market definition drives the analysis of competition or concentration among firms. The broader the definition of a market, the less concentrated the market is, and *vice versa*. If the market is defined as "Facebook," then it is of course highly concentrated. If the market is defined as "social media," it might include firms like Facebook, X (Twitter), TikTok, and others, in which case an analysis would find it to be less concentrated. If the market is defined as "digital platforms" (including search, social media, and retail firms), then the measured concentration would be smaller still. To make a creditable determination of market power justifying common carrier-like regulation, a court must engage in a serious effort to define the relevant market. Such an exercise is lacking in these proceedings.

When he served on the D.C. Circuit, Justice Kavanaugh recognized the importance of economic analysis in his dissent from that court's denial of rehearing *en banc* in the challenge to the FCC's *2015*

Open Internet Order.[5] According to then-Judge Kavanaugh, "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). In the present context, no less of a showing of a platform's market power should be required before ruling on the constitutionality of laws that prescribe social media platforms' content moderation practices. As demonstrated below, the process of defining relevant markets and particular firms' market power is not simple.

II. Defining Markets Is Complex, Especially in The Context of Social Media Platforms

Defining a market is a complex and often controversial undertaking. Those claiming a more competitive market generally argue for a broader definition while those claiming a less competitive market argue for a narrower definition. To decide between competing views, courts and economists must carefully define the relevant product or service, which means determining the firms to include in the market analysis.

In the antitrust context, markets are typically defined along geographic and product dimensions. *See United States v. General Dynamics Corp.*, 415

[5] *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015).

U.S. 486, 510 (1974) (explaining that consideration of geographic and product markets is usually necessary to assess probabilities of effects on competition); *United States v. Connecticut*, 418 U.S. 656, 660 (1974) (explaining that the legality of some mergers must be determined "against the backdrop of properly defined product and geographic markets"). With some exceptions, geographic distinctions are not relevant in the case of social media and most other digital platforms because the markets for these platforms generally cross borders. The product market dimension is defined as goods and services that consumers treat as substitutes. Products tend to be partial rather than perfect substitutes, so bright lines are difficult to draw.

One can determine which firms belong in the same product market by estimating cross elasticities of demand (*i.e.*, how demand for one firm's products changes when the other changes its price). *See United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956).

Market definition and competition analysis is particularly challenging in the case of digital platforms like search and social media because consumers can typically use these products or services without paying money. The lack of monetary payments, however, does not mean that courts can simply punt on the definitions and use economic terms in imprecise ways to justify various types of economic regulation. Instead, courts and economists need to consider metrics other than (or at least in addition to) prices that help measure competitiveness through consumer behavior.

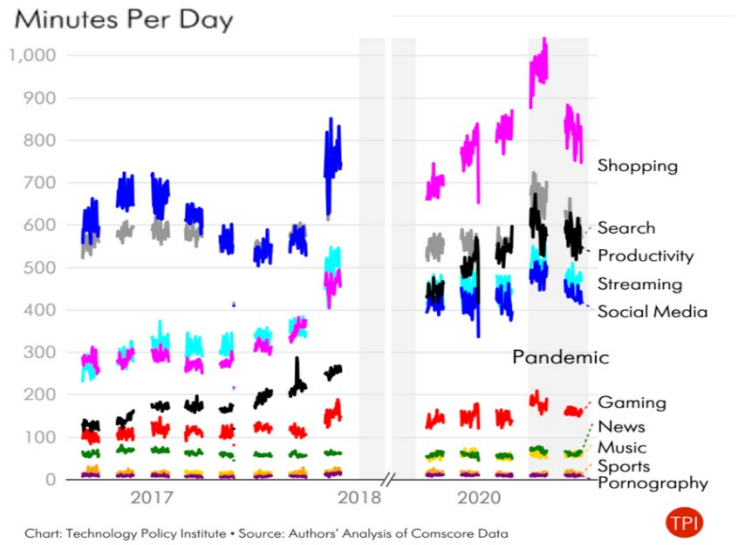
For example, people may not pay money to use digital platforms, but they do spend their time. Time, like money, is limited, so it is possible, in principle, to measure how the time spent using one platform changes in relation to the time spent using another platform. That is, additional time spent on one activity necessarily means less time spent on another. This approach provides a measure we can use for standard antitrust tools, like estimating cross-elasticities and measuring concentration.

As with any market analysis, in the case of social media it is necessary first to outline a potential universe of activities that might be included. In principle, this could include both online and offline activities. For example, going to a movie and streaming a movie at home may be substitutes.[6] For the purposes of discussion, however, we will focus on online activities only. Figure 1 shows that time spent on online activities varies over time.

---

[6] *See*, *generally,* Scott Wallsten, *What Are We Doing When We Are Not Online?*, ECON. ANALYSIS OF THE DIGITAL ECON.: UNIVERSITY OF CHICAGO PRESS (Apr. 2015), https://www.nber.org/chapters/c13001.pdf.

Figure 1. Household Online Activity Over Time (Source: Technology Policy Institute and Comscore's Total Home Panel, 2022)[7]



Even these categorizations may be incomplete now. Generative AI platforms like ChatGPT and Bard are gaining share in the race for user attention, for example.[8]

---

[7] *See* Scott Wallsten, Sarah Oh Lam, & Nathaniel Lovin, *Where Does the Time Go? Competing for Attention in the Online Economy*, TECH. POLICY INS. (May 20, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4505854 ("Tech. Policy Inst. Paper"). Totals can sum to more than 24 hours per day because these measure total time across all household members.

[8] Sabrina Ortiz, *The Best AI Chatbots: ChatGPT and Other Noteworthy Alternatives*, ZDNET (July 27, 2023), https://www.zdnet.com/article/best-ai-chatbot/.

We can begin to determine which types of activities are substitutes – and therefore in the same market – by measuring how changes in time spent in one activity affect time spent in another activity. We find, for example, that time spent on social media and time spent on streaming videos tend to be substitutes.[9] This measure, at least, would suggest that social media and streaming video are in the same market.

To our knowledge, the type of analysis described above has not yet been done across firms rather than across types of activities.[10] Instead, most analysts draw their own conclusions about the firms to include in which categories, which highlights both the lack of broad agreement about which firms constitute these markets and the importance of courts explaining their rationale when deciding these matters.

III. Measuring Market Power and Competition Is Complex, Especially in The Context of Social Media Platforms

"Market power" generally means the ability of a firm to increase profits by charging prices above

---

[9] *See* Tech. Policy Inst. Paper.

[10] And even analyses across types of activities, like ours, make implicit assumptions about which firms to include in which groups. We adopted the classifications used by Comscore, the provider of the underlying data.

competitive levels.[11] Measuring market power and competition is more challenging than defining them.

While legislatures and courts focus heavily on market concentration in their discussions, concentration in and of itself does not measure competition. Economics research has long since rejected the "structure conduct performance paradigm" – so-called because it assumed market structure was the primary determinant of whether a market was competitive.[12]

Measuring concentration can be a starting point for evaluating competition, but it does not yield a conclusion about competitiveness. Instead, factors like ease of entry and the ability of consumers to switch firms must be considered as they are likely to be more indicative of competition.

The following subsections discuss different ways one might measure concentration and competition among platforms and entry.

---

[11] "The core concept underlying the notion of market power or monopoly power is a firm's ability to increase profits and to harm consumers by charging prices above competitive levels." Thomas G. Krattenmaker, et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 242 n.5 (1987), https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law (posted by U.S. Department of Justice).

[12] Timothy Bresnahan, *Empirical Studies of Industries with Market Power*, 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011–57 (1989).

A. Market Concentration

Assuming one has identified the firms in the market, the next question is how to measure concentration. Various measures of market concentration exist. One of the most common, which is used by the antitrust enforcement agencies, is the Herfindahl-Hirschman Index (HHI), as discussed in the 2010 Horizontal Merger Guidelines.[13] The HHI of a market is the sum of squared market shares:

$$HHI = \sum_{i=1}^{n} s_i^2$$

where s is the percent market share of each firm i. The 2010 Horizontal Merger Guidelines generally classify markets into three types:

- Unconcentrated: HHI below 1500
- Moderately Concentrated: HHI between 1500 and 2500
- Highly Concentrated: HHI above 2500[14]

---

[13] U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, § 5.3 (Aug. 19, 2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#5c.

[14] On July 19, 2023, the Department of Justice and the Federal Trade Commission jointly released new Draft Merger Guidelines for public comment. *See* U.S. Department of Justice & Federal Trade Commission, *Draft Merger Guidelines* (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf. If these new draft guidelines are adopted, the HHI concentration classifications would change.

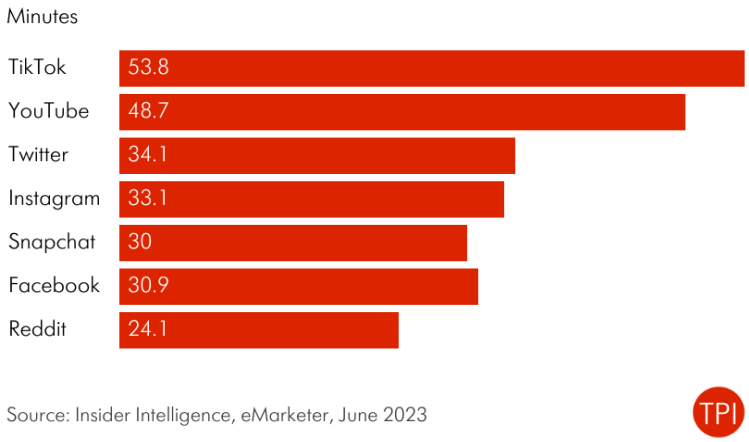
The HHI equation highlights two questions. The first, as discussed above, is how to define the set of firms to include (represented by i). The second is how to measure market shares (represented by s_i). The sections below highlight how different approaches can lead to different conclusions.

We consider three measures that could serve as inputs into a calculation of market concentration: (1) time spent on different platforms; (2) number of users on each platform; and (3) revenues. We then analyze relevant trends. Though we do not opine on which measure would yield the most valid result, we note that the data shows that, depending on the measure used, the number and identity of firms included in the "social media" market would differ. These differences highlight the difficulty of defining the social media market and the need for rigor when making important legislative or judicial decisions.

1. Measuring Time

If time spent on a platform is a valid measure of that platform's value to users, then as a corollary, we can define market shares based on the amount of time people spend on each of the various sites. Figure 2 is an example of data that can be used to calculate the HHI using time across social media as defined by one market research firm.

Figure 2. Average Time Spent Per Day by US Adult Users on Select Social Media Platforms, 2023 (Source: Insider Intelligence, eMarketer, June 2023)

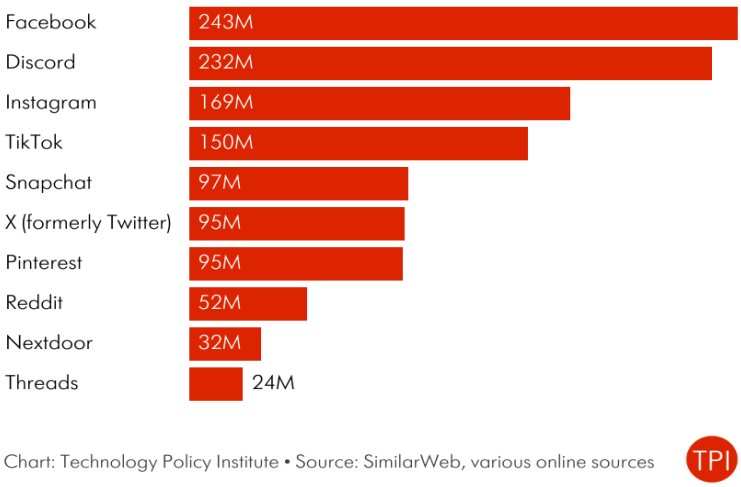


If the relevant market consisted only of the seven competitors from Figure 2 – TikTok, YouTube, X (formerly Twitter), Instagram, Snapchat, Facebook, and Reddit – the HHI would be approximately 1536 for 2023. Under the 2010 Horizontal Merger Guidelines, this market would be considered "moderately concentrated."

2. Measuring Users

Monthly active users ("MAU") might also be a valid metric for considering concentration. Figure 3 shows leading social media sites by U.S. MAU, including Facebook, Discord, Instagram, TikTok, Snapchat, X (formerly Twitter), Pinterest, Reddit, NextDoor, and Threads as defined by SimilarWeb and various online sources.

Figure 3. U.S. Monthly Average Users of Top Social Media Sites, 2023 (Source: SimilarWeb and various online sources)



If we use the same seven competitors as we did above in the time-based HHI calculation, we calculate the MAU-based HHI to be 1733, signifying a moderately concentrated market. However, a broader definition of social media using the ten competitors identified in Figure 3 yields an MAU-based HHI of 1384, showing the market as unconcentrated. This difference highlights the importance of determining which firms to include.

3. Measuring Revenues

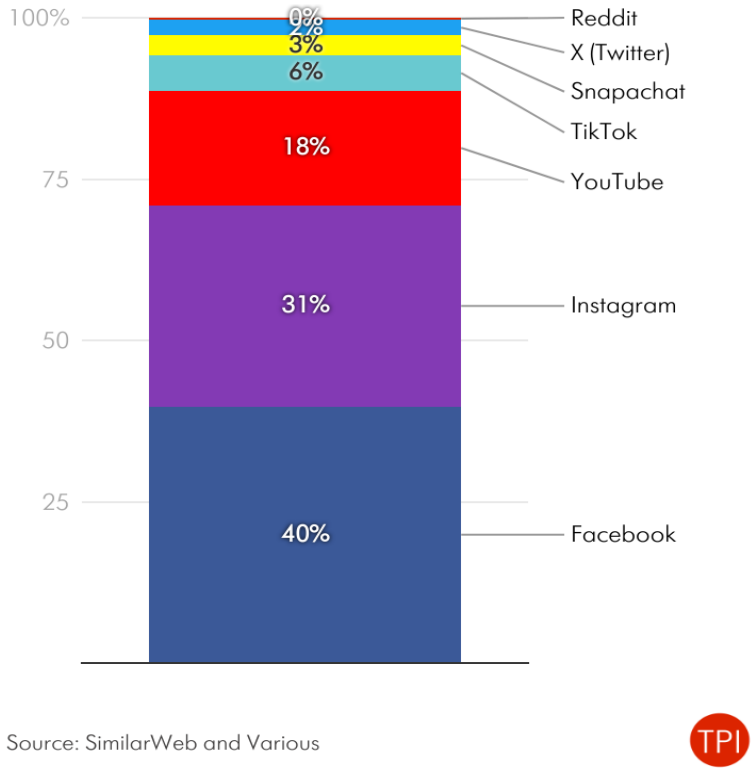
Though it is a commonly used metric to measure concentration, revenues arguably are not a particularly relevant measure when considering user speech because revenues do not come directly from users; after all, they do not spend money to use the sites. However, the revenues metric is worth

discussing because it further highlights the importance of carefully considering market definition.

The social media platforms involved in these cases derive their revenues almost entirely from advertising, which is a market between advertisers and the platforms, not between users and the platforms. In this case, defining a market of social media sites will yield a different result than a market of advertisers.

Figure 4 shows revenue shares of the seven social media sites identified in Figure 2. The resulting HHI for 2022 would be about 2900, above the 2500 threshold for antitrust authorities' definition of "highly concentrated."

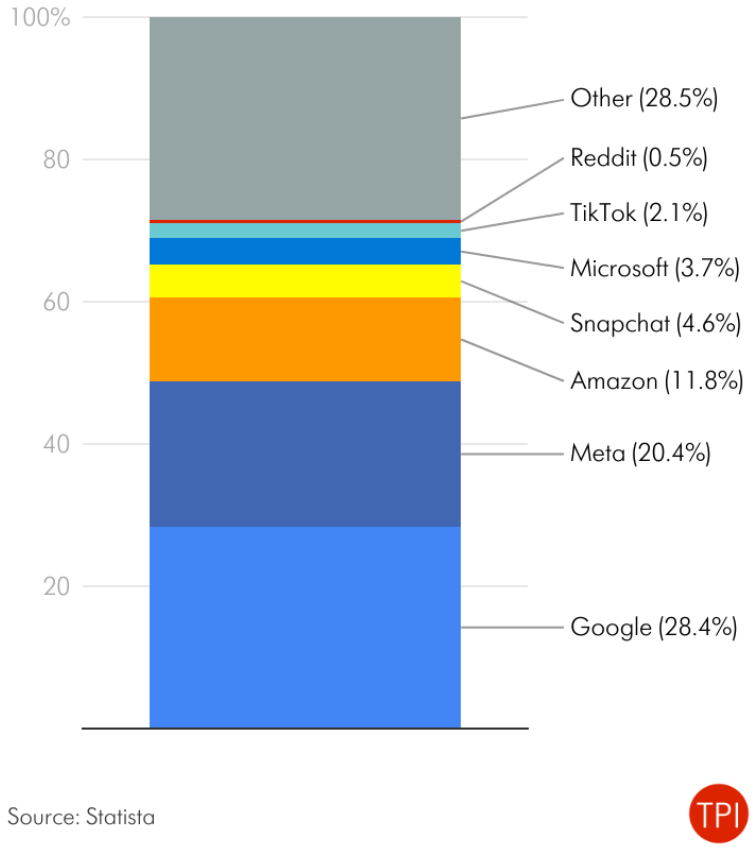
Figure 4. Revenue Shares of Selected Social Media Sites, 2022



However, including just these seven sites presents an incomplete view of an advertising market. One must also consider whether the market includes advertising on other digital platforms as well as on traditional outlets (*e.g.*, broadcasting, print).

Figure 5 shows the approximate shares of digital advertising sold by Google, Meta, Amazon, Snapchat, Microsoft, TikTok, Reddit, and other sites in 2022.

Figure 5. U.S. Digital Advertising Share, 2022 (Source: Statista)



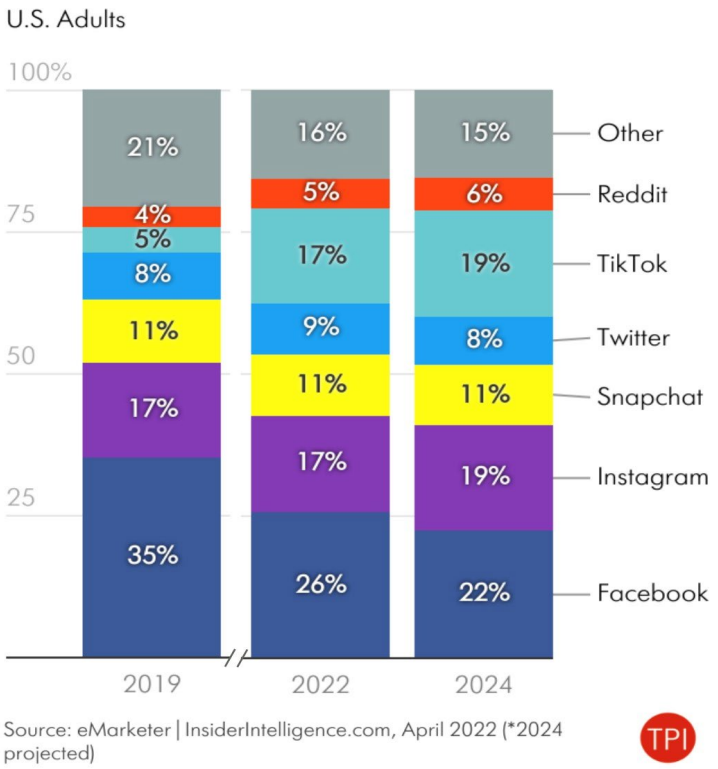
By this definition, a revenue-based HHI falls to 2213 – still within the "moderately concentrated" classification, but lower than with the less inclusive market definition. This number would fall further were we to break out the firms included in the 29% "other" category, and further still if we considered traditional advertising (*e.g.*, radio, television, and print) in addition to digital-only advertising.

B. Entry

If one concludes that a market is, in fact, concentrated, the next step is a case-by-case analysis of competitive indicators, like opportunities for entry. A key determinant of competitiveness is the extent to which the market is contestable over time. That is, evaluating competition requires looking not only at the market at a single point in time but also at entry over time.

The dynamics of social media sites suggest that entry is not as difficult as the legislatures and courts seem to believe when they contend that the companies are "entrench[ed]." *Biden v. Knight*, 141 S. Ct. at 1224. One illustration of this is the rise in popularity of TikTok over the last several years. Figure 6 shows the dramatic recent increase in the share of time spent on TikTok along with decrease in the share of time spent on Facebook.

Figure 6. Share of Time Spent on Select Social Platforms by US Adults, 2019, 2022, & 2024 (Source: Insider Intelligence, eMarketer, April 2022)



These statistics tell us that the social media platform market is dynamic and rapidly changing. Any analysis of market power should take trends and rates of change into account.

C. Network Effects

The Fifth Circuit's opinion states that "network effects" prove that digital platforms have market

power, *NetChoice v. Paxton*, 49 F.4th at 476, agreeing with the concurrence in *Biden v. Knight*, which claims without significant analysis that "network effects entrench these companies." *Biden v. Knight*, 141 S. Ct. at 1224.

The economic literature does not support this statement. "Network effects" refers to a market externality, in this case one in which the value of a product is affected by how many other people also have that product. In general, network effects means that the benefits of an additional user to the network accrue to *all* users, not just to the new user. *See Ohio v. Am. Express Co.*, 138 S. Ct. at 2280-81.

The network effects literature is extensive, with studies of systems competition,[15] hardware and software distinctions,[16] and recent developments in digital platforms that identify and measure the power of network effects in different industries and technologies.[17] Many business services have a network effects feature in which the larger the network in a two-sided or multi-sided marketplace, the more transactions can be possible in an exponentially growing number of combinations.

---

[15] Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. OF ECON. PERSPECTIVES 93 (1994), https://faculty.haas.berkeley.edu/shapiro/systems.pdf.

[16] *Id.*

[17] Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?*, ANTITRUST MAGAZINE (2018), https://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf.

While network effects can have negative effects on competition, they also can be pro-competitive. Network effects mean that larger platforms can be more efficient than smaller ones, all else being equal.[18]

Regardless, network externalities do not necessarily amount to market power or to an "entrenching" of a firm's market position. This point is evidenced by changes in the largest social media platforms and emergence of new ones over time.[19] Even in *Ohio v. Am. Express Co.*, antitrust violations were not found in the "indirect network effects" of two-sided platforms in merchant credit card networks

---

[18] In fact, these externalities can mean that some platforms may be smaller than some socially optimal size. A user joins a platform if the benefits to that user exceed the costs to that user. If the user's benefits are less than the costs, then the user will not join. Because everyone in the network benefits when a new user joins, the total net benefits might be positive even if they are not for the new user. That outcome reflects a market failure and is the reason that many countries subsidize some networks to encourage people "on the margin" to join even if they otherwise would not. Subsidies for telephone service are a classic example. *See*, *generally*, S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. OF ECON. PERSPECTIVES 133-150 (1994), https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.8.2.133.

[19] In earlier generations of Internet platforms, analysts frequently argued that network effects make future competition difficult or impossible: first with Friendster, then with MySpace, and then with Facebook. Pascal-Emmanuel Gobry, *How Strong Are Network Effects Online, REALLY?*, BUSINESS INSIDER (May 19, 2011), https://www.businessinsider.com/network-effects-2011-5 ("But Friendster had network effects. So did MySpace. Founding Facebook President Sean Parker says MySpace lost to Facebook because of its gross incompetence. Fair enough.").

or in anti-steering provisions. *Ohio v. Am. Express Co.*, 138 S. Ct. at 2281.

Thus, it does not automatically follow that a firm with "network effects" has market dominance. An in-depth analysis is still necessary to determine the structure and features of a market, including for social media platforms.

Conclusion

Determinations of market concentration, market dominance, and market power in the social media market, just as in other areas, should be based on evidence and data. To the extent that First Amendment questions related to common carrier regulation are based on findings of market power, it is critical that the Court fully examine economic facts.

Respectfully submitted,

JENNIFER B. TATEL
Counsel of Record
JONATHAN V. COHEN
MORGAN O. SCHICK
TYLER D. DILLON
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141
jtatel@wbklaw.com

Counsel for Amici Curiae

December 7, 2023

Table of Appendices

Appendix A: List of *Amici Curiae*[1]

Sarah Oh Lam, J.D., Ph.D.
Senior Fellow
Technology Policy Institute

Thomas Lenard, Ph.D.
Senior Fellow and President Emeritus
Technology Policy Institute

Scott Wallsten, Ph.D.
President and Senior Fellow
Technology Policy Institute

[1] *Amici curiae* appear in their individual capacities; institutional affiliations are listed for identification purposes only.