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The Honorable Amy Klobuchar
Chair
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
U.S. Senate

The Honorable Mike Lee
Ranking Member
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
U.S. Senate

I want to thank the Subcommittee for inviting me to testify on the important topic of ensuring that news publishers are compensated at competitive rates for the right to access their content.¹

At the request of the News Media Alliance, I wrote a study that assesses the underpayment to news publishers from Facebook and Google (the “dominant platforms”) attributable to the power imbalance between individual news publishers and the dominant platforms, and to describe how a pending bill in Congress, the Journalism Competition and Preservation Act (JCPA), could effectuate competitive payments to all news publishers, regardless of their political bent, effectively simulating a world in which the power imbalance were removed.² My study is attached as an appendix to this testimony. In addition to the *private* harms to news publishers from what is likely billions of dollars per year in underpayments, allowing market forces to determine the access charge results in a host of *social* harms, including underemployment of journalists and other news employees, less accountability for local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints.

Why Antitrust Cannot Get at the Anticompetitive Conduct Addressed by the JCPA

The dominant platforms appropriate the value added of news publishers by reframing articles in rich previews containing headlines, summaries, and photos; and by curating the content alongside advertisements. This reframing and curation decreases the likelihood of a user clicking into the article, thereby depriving news publishers of clicks while enriching the dominant tech platforms. The underpayments that would be addressed via this legislation are for the right to access news publishers’ content in the first instance. The anticompetitive conduct being challenged here concerns value appropriated for news content *before* it has been scraped, indexed, posted, aggregated, or

1. I currently serve as an economic expert in two litigation matters, one adverse to Apple and another adverse to Google.

2. Prior to being retained by the NMA, I published an article, co-authored with law professor Sanjutka Paul, in *Competition Policy International* titled “Countervailing Coordination Rights in the News Sector Are Good for the Public” The article is available for download at <https://www.competitionpolicyinternational.com/countervailing-coordination-rights-in-the-news-sector-are-good-for-the-public-a-response-to-professor-yun/>.

displayed. In economic parlance, the platforms are exercising their “monopsony” or buying power, effectively marking down the value added of news publishers to zero, as news publishers are so beholden to the platforms for referral traffic that they have no where else to turn.³ Because this underpayment for access is achieved via the power imbalance, as opposed to a classic restraint in trade such as a tie-in or exclusive-dealing arrangement, the platforms’ flexing of their monopsony muscles cannot be addressed via antitrust law.

In a competitive input market for online news content, where news publishers enjoyed free agency and could play one platform against another, payments to news publishers for the right to access content would approach the incremental contribution of news publisher content (legitimate news) to the platforms’ advertising revenues. By exploiting their monopsony power over news publishers, however, the dominant platforms effectively pay a price of zero for accessing and “crawling” the news publishers’ content. My study finds that allowing current market forces to dictate the news publishers’ payments ensures that news publishers are compensated at rates significantly below competitive levels. And this underpayment results in underemployment of journalists and other news employees, as well as host of social ills associated with local news deserts, including less competent local governments, greater spread of partisanship and misinformation, removal of economic stimulus to local economies, and a reduction in the diversity of viewpoints, particularly among minority populations.

The best way to correct this market failure is for the government to permit the news publishers and broadcasters to coordinate in their dealings with the digital platforms over payment terms and conditions, as contemplated in the JCPA. Under an expanded bill being considered, the JCPA would allow a joint-negotiation entity to form that could then avail themselves of good-faith protections during a good faith negotiation period. In the event an agreement could not be reached, news publishers would have the additional right to invoke “baseball-style” arbitration, in which both parties would offer their best estimate of the fair market value of the services being exchanged and a panel of arbitrators choose the most compelling offer of the two. The fair market value to be determined at arbitration would represent the news publishers’ collective contribution to the platforms’ revenues. It would not vary in proportion to the number of links the platform offered or links that were clicked through. Hence, the oft-used “link tax” reference is a misnomer. This model is very similar to Australia News Media Bargaining Code that recently resulted in payments from the tech platforms to news publishers. Current proposals being deliberated by this Committee would deviate from the Australia model, however, to

3. Roughly two thirds of all 2018 referrals to newspapers originated from Facebook and Google (including Google Search, Google News, and Google Chrome Suggestions). See John Saroff, *Working Together to Make Sense of Facebook’s News Feed*, CHARTBEAT, Jan. 18, 2018 (“Facebook has been an important referral partner for publishers. Chartbeat tracks just over 50 billion page views a month across thousands of publishers in 65 countries. In aggregate, 13% of those page views (and 30% of all “external” page views) are driven by referrals from Facebook. In both metrics, Facebook is the second largest referrer behind Google search which, by comparison, drives 21% of total page views and 40% of external referrals.”), available at <https://blog.chartbeat.com/2018/01/18/working-together-make-sense-facebooks-news-feed/>.

ensure that large publications cannot avail themselves of the protections should they opt out of the joint-negotiation entity.

To compound the news publishers' financial problems, Facebook and Google also allegedly engage in a host of classic restraints that are recognized under antitrust law and depress payments to publishers from the sale of advertisements from click-throughs to be artificially depressed. According to a complaint filed by ten state attorneys general in December 2020, Google and Facebook conspired to prevent the ascendancy of a process called "header bidding," which was used by news publishers as a workaround to reduce their reliance on Google's ad platforms and thereby capture a larger pay share on ads sold on their sites.⁴ In particular, header bidding permitted news publishers to solicit bids for ad placements from multiple ad exchanges at once. In March 2017, Facebook announced it was testing a header-bidding program with several major publishers; but by September 2018, those plans were abandoned, as Google and Facebook entered into an agreement not to compete for news publishers. As part of the agreement, Facebook allegedly received special information and speed advantages to help it succeed in the auctions, as well as a guarantee that Facebook would win a fixed percentage of auctions that it bid on, in what appears to be a market-allocation scheme.

Google is separately being sued by a class of news publishers for unilateral exclusionary conduct, including but not limited to: (1) extending its power across the "ad stack" via acquisitions in the ad-server segment and via manipulation of its auction to favor its own ad exchange; (2) placing a tax on rival ad exchanges to discourage header bidding by publishers; and (3) requiring that publishers use Google's ad exchange in order to get the best bids from its ad servers (a "tie in"). According to the complaint, this unilateral exclusionary conduct allegedly reduced the publishers' pay shares on the sale of advertising from click-throughs. Like Google and Facebook's alleged coordination to stymie header bidding, these classic restraints fall squarely within the ambit of antitrust. In any event, if news publishers are able to prevail in those antitrust lawsuits, they would recover payments for underpayments for click-throughs *in the past*; the JCPA would allow news publishers, by contrast, to capture competitive payments for the right to access their content *going forward*.

Facebook and Google Wield Monopsony Power in the Acquisition of News Publishers' Content

Facebook and Google possess significant buying or monopsony power in the acquisition of news publisher content generally. Monopsony is the flip side to monopoly, or selling power in the output market. The relevant question here is whether Facebook or Google (or both) possess monopsony power in the acquisition of news content for their

4. With no sense of self-awareness, the platforms assail the JCPA for allowing the formation of a "cartel" of newspapers. To the extent the States' allegations concerning Project Jedi Blue are proven to be true, Google and Facebook would be the only known operating cartel in the digital news landscape. Importantly, the antitrust exemption in the JCPA would allow the news publishers to coordinate only in their dealings with dominant platforms. The news publishers would not be allowed to coordinate in their dealings with customers, workers, or any other economic agents.

respective platforms. As it turns out, for many of the same reasons that end users and advertisers lack substitution opportunities to Facebook and Google, input providers such as merchants (for Amazon), app developers (for Apple and Google) and news publishers (for Google and Facebook) lack substitution possibilities, and thus are beholden to these platforms. The input providers are chasing the set of customers assembled by the platforms; by locking in customers, the platforms simultaneously lock in the suppliers. Accordingly, evidence of Facebook's and Google's selling power in their respective output markets is also evidence of their buying power in their respective input markets. The platforms' massive buying power can be demonstrated indirectly, via evidence of high market shares combined with high barriers to entry. For example, Facebook and Google accounted for over half of U.S. digital display advertising in 2019;⁵ combined shares in excess of 50 percent are consistent with collective market power under U.S. antitrust jurisprudence. Google and Facebook capture approximately 61 percent of all digital advertising dollars because of their ability to collect consumer data across the web.⁶

Buying power also can be proven directly via evidence of payments below competitive levels or the ability to exclude rivals. Direct evidence of the platforms' buying power includes: (1) payments to news publishers significantly below competitive levels, (2) news publishers are compelled to accept these take-it-or-leave-it terms by the platforms, indicating the power imbalance; (3) the platforms have used exclusive agreements with third parties to exclude horizontal rivals, and they have prevented rivals from acquiring news content via acquisition.

Payments to news publishers can be measured in a "but-for" world where the platforms' buying power were removed, thereby making the news content (input) market competitive. Economic theory dictates that in competitively supplied input markets, input providers tend to capture 100 percent of their marginal revenue product (MRP). Fortunately, the three measures of incremental revenue generated by news publishers for the platforms serve as a reasonable approximation for the news publishers' MRP. By compelling the dominant platforms to pay news publishers the fair-market value of their value added, Congress could replicate payments to news publishers in a world absent Google and Facebook's buying power. News content is a "must-have" input for the platforms, as news drives most of the conversation. Must-have inputs, such as broadcasting and sports networks, command something closer to their MRP for cable programming, as their selling power counteracts a portion of cable's buying power. These must-have input providers capture pay shares of between seven and eleven percent of the cable operators' total revenue; pay shares that vastly exceed the pay shares currently captured by news publishers from Google and Facebook.

5. eMarketer, *Leading Digital Display Ad Sellers in the US, June 2020*, available at <https://www.emarketer.com/chart/238193/leading-digital-display-ad-sellers-us-by-net-revenueshare-2019-2022-of-us-digital-display-ad-spending>.

6. Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, EMARKETER, Nov. 4, 2019, available at <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year>.

The Social Harms Flowing from the Underpayments to News Publishers

There are myriad social harms of news publishers not receiving competitive compensation. The news industry has incurred losses in advertising revenue every year since 2006, around the time that the platforms solidified their market power over digital advertising. This is not to say that Facebook's and Google's domination of digital advertising came entirely at the expense of news publishers. Rather, it is to provide context as to how any underpayment to news publishers can exacerbate an environment that is already quite dire. The effect of shrinking advertising revenues⁷—in part caused by underpayment from dominant platforms—is less cash flow to support journalists, a clear employment effect flowing from the exercise of monopsony power by the dominant platforms. According to Pew Research, newsroom advertising declined from \$37.8 billion in 2008 to \$8.8 billion in 2020; over the same time period, newsroom employees declined from 71,070 to 30,820.⁸ As a result of the deteriorating news media landscape described above, hundreds of local news publishers have been acquired or declared bankruptcy. The elimination of local news threatens democracy. Another critical role of traditional news outlets is providing fact-based journalism in the face of disinformation campaigns. The reduction in traditional news publishers has coincided with more Americans using social media platforms to access news. Local newspapers also provide an important role in keeping governments accountable.⁹

Moreover, the negative employment trends among news publishers, exacerbated by underpayments from the dominant platforms, can have ripple effects throughout local economies. When reporters, correspondents, and broadcast news analysts, along with the other supporting employees at a publishing firm, lose their jobs, they lose incomes to spend at grocers, restaurants, and other local businesses. This reduction in spending can have a multiplier effect that ripples throughout a local economy and removes stimulus that was once there. There are also social harms of news publisher closure on a community, including the lack of social cohesion and a reduction in the diversity of viewpoints. These findings support a proportionate intervention to effectuate competitive payments to news publishers and thereby mitigate these social harms. At a high level, and as contemplated by the JCPA, the solution to the power imbalance is to permit news publishers to conduct joint negotiations for payments from platforms, with good faith negotiations, followed by, if necessary, an adequate enforcement mechanism that ensures equitable payment to all news publishers.

7. Newspaper advertising revenue has declined 82 percent by nearly \$40 billion from 2000 to 2020. See Pew Research Center, *Newspapers Fact Sheet*, June 29, 2021, available at <https://www.pewresearch.org/journalism/fact-sheet/newspapers/>. Newsroom staff has declined 57 percent from 2004 to 2020. *Id.* Since 2000, newspaper circulation has dropped by half, with 31 million fewer daily newspapers in circulation in 2020 than were published when the century started. *Id.*

8. Pew Research Center, *Newspapers Fact Sheet*, June 29, 2021, available at <https://www.pewresearch.org/journalism/fact-sheet/newspapers/>.

9. See, e.g., Terry Francke, *Why the Bell Scandal Happened and What Can Be Done*, VOICE OF OC, July 28, 2010 (attributing the self-dealing scandal in the local government of Bell, Canada to the closure of the local newspaper), available at <https://voiceofoc.org/2010/07/why-the-bell-scandal-happened-and-what-can-be-done/?amp>.

Rebutting the Platforms' Attacks on the Bill

It is easy to rebut economic criticisms of this proposal. Detractors from this proposal, including but not limited to the platforms, have argued that: (1) This effort is meant to enrich the largest news publishers; (2) it is better to attack the power imbalance leading to near-zero payments for access with antitrust intervention; (3) news publishers derive significant value via referrals from platforms, which should be deducted from the value added by news publishers to platforms when determining compensation; and (4) the JCPA will lead to higher prices for consumers. I address each of these arguments and explain why they are not persuasive as a matter of economics or competition policy.

With respect to purportedly benefiting only the largest news publishers, while it is true that large news publishers benefit by coordinating with smaller news publishers in their dealings with Google, smaller news publishers benefit by even more, as small news publishers would be subjected to even greater levels of exploitation if they were compelled to deal with Google unilaterally. A handful of the very largest news publishers have a modicum of countervailing bargaining power against the platforms. This is not so for the vast majority of news publishers. Accordingly, the largest beneficiaries of this proposal are the smallest news publishers.

The argument that this proposal is meant to enrich the largest news publishers also ignores the likely allocation mechanism of a joint-negotiation entity, which would prevent large publishers from appropriating a disproportionate share of the award. Even if the allocation were done purely in proportion to a news publisher's pro-rata share of clicks, no single news publisher would achieve all of the payments, as the allocation of clicks across news publishers is well distributed. To the extent news publishers elect to distribute some portion of funds according to full-time journalists, high-quality news sites that deliver informative yet non-click-worthy news could achieve payments in excess of their pro-rata share of clicks.

With respect to using antitrust to attack the problems raised here, greater enforcement of existing antitrust laws against Google or Facebook, even if successful, could recover only a fraction of the underpayment described here, which flows from the platforms appropriation of value added from the news publishers' content, including from impressions, *regardless of whether a news story is clicked on by a user*. A Sherman Act Section 2 complaint against a platform would require publisher plaintiffs (or an agency) to (1) challenge a restraint of trade, preferably in a contract with a third-party publishers or advertisers; and (2) establish a causal connection between said restraint and the underpayment to news publishers. While restraints in contracts with publishers or advertisers might be contributing to artificially suppressed news publishers' pay shares on ads sold against news publishers' stories generated by click-throughs, there are myriad factors, including network effects, customer lock-in, and other natural barriers to entry, also potentially contributing to the underpayment from ads sold against news publishers' stories; at best, a successful antitrust lawsuit challenging a platform's restraints would raise payments from that platform by the increment attributable to the restraints for ads sold against news publishers' stories. Such a lawsuit would not address the platform's

appropriation of news publishers' value-add from impressions that do not result in a click-through, and thus would not restore the payments to competitive levels for the entirety of the value-added by news publishers to platforms. Moreover, a successful antitrust lawsuit against (say) Google would provide zero relief for news publishers in their dealings with Facebook. And a successful antitrust lawsuit against Google or Facebook would require several years to adjudicate, and the appeals might not be resolved for nearly a decade. In the interim, news publishers would be left twisting in the wind. Given news publishers' precarious financial state, it is not clear how long many could survive without an intervention today.

The dominant platforms might argue that they are generating traffic for news publishers, and they are thus owed payments by the news publishers, or at least such incremental benefits should be deducted from the value added by news publishers to platform advertising revenues. This is wrong for at least two reasons. *First*, although the platforms designed a compelling product that retains users and advertisers via network effects, the platforms are not entitled to keep 100 percent of the incremental value that news publishers bring to their platforms. The traffic generated by the platforms should not be considered payment because news content is what brings users (and advertisers) to the platforms in the first instance. And news publishers would garner that traffic in a more competitive search or social media markets, without having to surrender access to their content as they do now.

Second, platforms are already being compensated for this traffic generation via a monopoly tax imposed on the advertising revenue. As noted above, the anticompetitive restraints that support the size of the tax are the subject of fresh antitrust litigation. Google takes a cut of 22 to 42 percent of U.S. ad spending that goes through its ad systems—two to four times as much as the fees charged by rival digital advertising exchanges.¹⁰ An employee at Google said the platform can get away with it because “smaller pubs don’t have alternative revenue sources.”¹¹

The purpose of granting the antitrust exemption and placing some structure on the ensuing joint negotiations is to compensate news publishers for the uncompensated value they bring to the platforms. As noted above, the platforms are reframing news stories in rich previews containing headlines, summaries, and photos. The platforms are not compensating news publishers for any of this lost traffic or lost subscription revenues. The proper focus of the inquiry should be the incremental platform advertising revenues generated by the news publishers. After all, this value added to the platforms would be the payments to news publishers in a competitive input market. Accordingly, such “offsets” should be ignored.

10. Keach Hagey & Tripp Mickle, *Google Charges More Than Twice Its Rivals in Ad Deal, Unredacted Suit Says*, WALL STREET JOURNAL, Oct. 22, 2021, available at <https://www.wsj.com/articles/google-charges-more-than-twice-its-rivals-in-ad-deals-wins-80-of-its-own-auctions-court-documents-say-11634912297>.

11. *Id.*

Finally, the notion that the JCPA will result in higher prices for consumers defies basic pricing principles and economic logic. Under the best-case scenario for news publishers, a joint-negotiation entity will achieve an award in the billions of dollars per year, which will be allocated to its members according to metrics such as pro-rata share of traffic generated and investments in journalism. From the platforms' perspective, that payment will be considered lump-sum, which per standard pricing theory means that it will not enter into their pricing calculus. By the classic Lerner index in microeconomics,¹² only costs that vary with small changes in output affect pricing decisions. Moreover, both Google and Facebook have embraced “zero prices” for users, choosing instead to generate revenue from advertisers. That these platforms would suddenly reject this pricing model—which has succeeded wildly in drawing in users and keeping them there—due to a lump-sum transfer to news publishers is flatly uneconomic and should be rejected by this Committee as scaremongering.

12. See, e.g., *Lerner Index definition*, CONCURRENCES, available at <https://www.concurrences.com/en/dictionary/lerner-index>.

Appendix: Addressing the Power Imbalance Between News Publishers and Digital Platforms: A Legislative Proposal for Effectuating Competitive Payments to Newspapers