Mr. Makan Delrahim
Assistant Attorney General, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

August 28, 2019

Dear Mr. Delrahim:

The American Booksellers Association, a not-for-profit trade association of independent booksellers throughout the country, supports the Department's Antitrust Division decision to review whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers. This letter is in response to your call seeking information from the public, including industry participants that have direct insight into competition in online platforms.

As a trade association of independent booksellers, we do indeed have insight into competition in online platforms due to our members' experience competing with Amazon -- a corporate giant that is now far more than a retailer, and that is unquestioningly a leading platform in the U.S.

Industry trends and data clearly indicate that Amazon is well on its way to becoming a tech industry monopoly, and it is already a monopoly in the book industry. When examining the company's history and present business model, it is clear that Amazon is able to use its dominance to manipulate market structures, suppress competition, and harm consumers and other stakeholders. In turn, Amazon is able to further expand its market share.

We urge the Department to investigate Amazon's anticompetitive conduct and rapidly growing dominance in the technology sector under Sections I and II of the Sherman Antitrust Act.

By all standards, Amazon is a book industry monopoly, and trends -- coupled with knowledge of Amazon's previous patterns of behavior and abusive tactics in the book and publishing industry -- clearly show that it is well on its way to monopolizing the retail, distribution, and web services channels.

Today, Amazon controls 75 percent of online sales of physical books, 65 percent of e-book sales, more than 40 percent of new book sales, and about 85 percent of sales by self-published e-book authors.[1] Amazon's dominance and continued growth in the book industry, in and of itself, is a huge issue, especially in terms of consumer access to new authors and marginalized voices. But it is also indicative of Amazon's larger business model, which is to enter a given market with the goal of simply dominating it at every turn.

In 2014, economist Paul Krugman reported in the *New York Times* that Amazon had as large a share in the entire book business as Standard Oil did in its industry in 1911, right before it was broken up into 34 companies.[2]

We see this happening in the overall retail sector, where Amazon is quickly becoming just as dominant as it is in the book industry, but at a much faster

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[1] Authors United to William J. Baer, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, May 2018, Https://openmarketsinstitute.org/wp-content/uploads/2018/05/NA-Authors-United-Letter.pdf.

[2] Paul Krugman, "Amazon's Monopsony Is Not O.K.," The New York Times, October 19, 2014, accessed April 30, 2019, https://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html.

pace. As of late 2018, Amazon commanded 49.1 percent of all online retail sales[3]. In 2012, its online retail sales market share was 20 percent.[4] Clearly, based on Amazon's growth over the past several years, it is not unreasonable to think that Amazon could own 65 - 70 percent of the online retail sales market by 2030 barring any kind of regulatory intervention.

Amazon's growth as a third-party marketplace facilitator is just as alarming. Amazon's burgeoning Marketplace allows third-party sellers to reach the company's vast customer base and has evolved into the core retail growth strategy for the company. It is a source of high-margin revenue as sellers are charged fees for storage and movement of their goods[5].

Amazon's third-party service revenue grew from $11.7 billion in 2014 to $16.1 billion in 2015 and increased even more in 2016, to reach $23.0 billion. As a result, the revenue Amazon was receiving from third-party sellers increased 96 percent from 2014-16, as Amazon's direct sales increased 35 percent in the same time frame,"[6] according to a report by the economics research firm Civic Economics. Over the last five years, the report noted, total retail sales with Amazon as the seller increased by a remarkable 94 percent. But that near-doubling of sales pales beside the growth of third-party sales, which increased more than 300 percent over the same period.[7]

Amazon: Gaming the System to Grow

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[3] Ingrid Lunden, "Amazon's Share of the US E-commerce Market Is Now 49percent, or 5percent of All Retail Spend – TechCrunch," TechCrunch, July 13, 2018, accessed April 30, 2019, https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend/.

[4] "Amazon Sales as a Percentage of Online Retail Sales in the United States from 2012 to 2017," Statista, https://www.statista.com/statistics/917414/amazon-first-party-third-party-ecommerce-total-online-retail-sales-share/.

[5] Civic Economics, "Prime Numbers: Amazon and American Communities," http://www.civiceconomics.com/primenumbers.html

[6] *Ibid.*

[7] Civic Economics, "Prime Numbers: Amazon and American Communities," http://www.civiceconomics.com/primenumbers.html

It is important to review the methods that Amazon used to become the country's largest retailer and book industry monopoly. It is crucial to understand that the tech giant uses these tactics today to grow in other markets, as well, which is why we believe an Amazon monopoly in the tech industry is a foregone conclusion unless regulators take action.

Predatory pricing is known for being notoriously hard to prove, but some legal experts believe Amazon has engaged in this practice. A recent paper by Shaoul Sussman, a Fordham University law student, notes that Amazon is the largest negative cash flow firm in the world, and that these types of companies "can achieve greater market share through predatory pricing strategies that involve long-term, below-average variable cost prices." Sussman continues that not only is it "entirely rational for Amazon to engage in price predation and a long-term strategy of monopolization but that under current corporate disclosure rules such conduct would be virtually undetectable. The negative impact of this behavior is the elimination present and future competition."[8]

Some five years before Sussman's paper was published, technology attorney Bob Kohn made news when he declared that Amazon was engaged in predatory pricing in the publishing industry.[9] Amazon was, not surprisingly, very successful, and that success opened the door for the online giant to enter -- and dominate -- other retail markets.[10]

In 2014, Kohn told CNBC that, with customers hungry for a discount, Amazon will continue to sell books at a discount until it had captured nearly all of the book market.

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[8] Shaoul Sussman, "Prime Predator: Amazon and the Rationale of Below Average Variable Cost Pricing Strategies Among Negative-Cash Flow Firms," https://academic.oup.com/antitrust/advance-article/doi/10.1093/jaenfo/jnz002/5321201#132683654

[9] Drew Sandholm, "Amazon's 'Predatory Pricing' Questioned," CNBC, June 30, 2014, accessed May 02, 2019, https://www.cnbc.com/2014/06/30/amazons-predatory-pricing-questioned.html.https://www.cnbc.com/2014/06/30/amazons-predatory-pricing-questioned.html

[10] *Los Angeles Times*, "Remember When Amazon Only Sold Books?", June 18, 2017, https://www.latimes.com/business/la-fi-amazon-history-20170618-htmlstory.html

It is also worth noting that anecdotal reports from independent bookstores seem to back up these assertions -- that Amazon regularly sold books below cost, especially in the early 2000s, presumably as a way to draw consumers into its website to upsell them on bigger ticket items.

Of course, as a company nears its goal of monopolistic market share, the presumption would be that, without competition, prices would thus begin to increase. This appears to be the case with Amazon. For instance, a 2018 Institute for Local Self-Reliance (ILSR) study indicates that government agencies and public schools that purchase from Amazon appear to be paying more than they should.[11]

Kohn predicted this would be the case back in 2014 when, in that same CNBC interview, he forecast that eventually Amazon will begin to charge more for books. Worse still, its dominance in the book industry could force authors to publish with Amazon, even though they are being paid less and less for their works. "When [Amazon has] 90 percent of the market and you go to authors, even self-published ones, and say we don't want to pay anymore, where are you going to get your book published? If Amazon has 90 percent share, there's no place else to go." Kohn added that Amazon's strategy could dampen the creation of new books, negatively impacting free speech.[12]

In addition, there's evidence that Amazon is using its huge trove of data about customers' buying habits to raise prices. It's also started blocking access to certain products, charging higher prices, and delaying shipping times for customers who decline to join its *Amazon Prime* program. Research has shown that Amazon shows itself to consumers as the default seller even when third-party sellers' products are offered at a lower cost. About 75 percent of the time,

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[11] Olivia LaVecchia and Stacy Mitchell, Amazon's Next Frontier: Your City's Purchasing, July 2018, accessed May 6, 2019, https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf.

[12] Drew Sandholm, "Amazon's 'predatory Pricing' Questioned," CNBC, June 30, 2014, accessed May 02, 2019, https://www.cnbc.com/2014/06/30/amazons-predatory-pricing-

Amazon placed its own products and those of companies that pay for its Fulfillment by Amazon [FBA] services in [the buybox] position even when there were substantially cheaper offers available from others.[13]

Clearly, Amazon's dominance is bad for consumers, the book industry, and for the publishing industry.

Using Market Power to Game the System to Grow Even Larger

Along with the alleged tactic of predatory pricing, Amazon grew in large part because it gamed the system politically. This has become a staple of its business model.

In the late 1990s, Amazon took advantage of a loophole, or better put, misunderstanding about sales tax laws in the 45 states that collect sales tax. By employing online sales agents (known as affiliates) who sign an agreement and work on commission, Amazon was establishing nexus in each of these states, thereby requiring the company to collect and remit sales tax on book sales (and later, all other retail sales). But Amazon refused to do this, which, in turn, led consumers to believe that buying at Amazon was tax free when it was not. Amazon was legally responsible for collecting and remitting the tax, but even if they were not, consumers still owed use tax.

Legislators were very slow to act, resulting in lost tax revenue that hamstrung states, resulting in lost revenue and curtailed state services. Lacking these expected funds, some states threatened consumers with onerous audits if they did not at least estimate the use tax owed based on their yearly income. Income and property taxes were raised on consumers in an attempt to recoup the shortfall. But as Amazon grew, in large part because people took advantage of "tax-free" shopping, so too did state budget shortfalls. This was compounded when the Great Recession hit, which ultimately prompted states to act, beginning in 2008 with New York State, when it passed an affiliate nexus law

[13] *Ibid*.

requiring companies like Amazon to collect and remit sales tax on sales in the state. By 2017, all 45 states that collect sales tax required Amazon to collect and remit sales tax on orders generated by consumers within their state.[14]

While Amazon is now collecting on direct sales in the 45 states with sales tax laws, Amazon still does not collect and remit sales tax on its third-party marketplace sales in most states. These sales now account for well over half of Amazon retail sales. As of February 2019, only eight states collect state and local taxes on those sales through so-called "marketplace facilitator" policies. Uncollected sales tax is also highly variable among the states depending on state and local tax rates and agreements in place in any given year. As a result, Amazon continues to avoid a substantial and widely underestimated share of state and local sales taxes, resulting in direct fiscal harm to communities and states.[15]

Amazon for a long time evaded its obligation to collect and remit sales tax in part because of its lobbying prowess in state capitals and Washington, D.C. Offering tax-free shopping helped the company grow, which has spurred a vicious circle. The bigger it becomes, the more power and influence it gains, helping it grow bigger, and so on. As its size has grown, Amazon has not surprisingly invested its capital into growing its lobbying influence. It is not a stretch to postulate that, the bigger Amazon grows, the more influence it will gain over legislation and regulations that can help it succeed at the expense of competitors (e.g., not collecting sales tax on third-party marketplace sales).

Federal records show that Amazon.com Inc. lobbied more government entities than any other tech company in 2018 and sought to exert its influence over more issues than any of its tech peers except Alphabet Inc.'s Google, Bloomberg

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[14] Bookselling This Week, "Victory! Amazon Will Collect and Remit Sales Tax in All States With Sales Tax Laws," https://www.bookweb.org/news/victory-amazon-will-collect-and-remit-sales-tax-all-states-sales-tax-laws-35874

[15] Civic Economics, "Prime Numbers: Amazon and American Communities," http://www.civiceconomics.com/primenumbers.html

reports. In 2018, Amazon spent $14.2 million on lobbying, a record for the company, up from its previous high mark of $12.8 million in 2017. Since 2012, Amazon has ramped up spending by more than 460 percent -- much faster than its rivals.[16]

This aforementioned "vicious circle" has given Amazon an unfair advantage by giving it an edge in securing government contracts.

For instance, in 2017, Section 846 in the National Defense Authorization Act (NDAA) looked to send federal procurement of commercial off-the-shelf items, a $53 billion market, to e-commerce portals. So few business entities matched the qualifications necessary to secure the contract, because of the Section's many demands of the e-commerce portal, that many began to refer to Section 846 pejoratively as the "Amazon amendment."[17] Even after the amendment was modified, "critics still [saw] the program as tailor-made for Amazon to dominate."[18]

For one, Amazon is responsible for almost half of all e-commerce sales and government officials are as "likely to lean on Amazon as any other consumer, especially because of the array of third-party sellers supplying at least a semblance of competition in one site." And ironically, even if government officials use smaller sellers, many of them use Amazon's platform, so the online giant will benefit from those sales as well since it gets a fee from smaller sellers using its platform.[19]

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[16] Bloomberg BusinessWeek, "Amazon Is Flooding D.C. With Money and Muscle: The Influence Game," https://www.bloomberg.com/graphics/2019-amazon-lobbying/

[17] Brian Feldman, "Emails Shed Light on Amazon's Cozy Relationship With the U.S. Government," New York Magazine, December 26, 2018, http://nymag.com/intelligencer/2018/12/emails-show-amazons-cozy-relationship-with-u-s-government.html.

[18] The Intercept, "Congress Prepares to Send Major Gift to Amazon….," https://theintercept.com/2017/11/10/amazon-amendment-ndaa-congress/

[19] David Dayen, "Congress Prepares to Send Major Gift to Amazon, While Trump Battles "Amazon Washington Post", The Intercept, November 10, 2017, accessed May 06, 2019, https://theintercept.com/2017/11/10/amazon-amendment-ndaa-congress/.

In 2017, Amazon was awarded a contract by U.S. Communities, an organization that negotiates purchasing agreements for local governments, to provide cities, counties, and schools with such commodities as office and classroom supplies, library books, and electronics. The ILSR report, *Amazon's Next Frontier: Your City's Purchasing*, examines the risks associated with the contract, which has an estimated value of $5.5 billion over a potential 11-year term and has been adopted by more than 1,500 jurisdictions, including government agencies and public schools. These risks include "four ways that the contract fails local governments," as identified by ILSR: process, cost, service, and terms and transparency.

Perhaps most striking is the difference in pricing between Amazon's contract and the established norms in public procurement. Whereas the norm is to guarantee fixed pricing, Amazon uses dynamic pricing, meaning that local governments are locked into a contract in which prices can fluctuate and, quite possibly, become inflated. The report analyzes data from a school district in California, finding that the district would have paid 10-12 percent more if they had bought from Amazon rather than through its local supplier. It further examines the additional cost of shipping and signing up for an Amazon Business Prime account, which could be avoided by purchasing from a local vendor.[20]

Not only does this relationship with governments further spur Amazon's growth and dominance, some lawmakers could be reluctant to investigate Amazon so as not to jeopardize the contractual obligations the government has with Amazon, contracts that they see as beneficial (e.g. the aforementioned U.S. Communities or Amazon Web Services contractual obligations with the CIA[21]). Ironically, this

[20] Olivia LaVecchia and Stacy Mitchell, Amazon's Next Frontier: Your City's Purchasing, July 2018, accessed May 6, 2019, https://ilsr.org/wp-content/uploads/2018/07/ILSR_AmazonsNextFrontier_Final.pdf.

[21] The Atlantic, "The Details About the CIA's Deal With Amazon," published July 17, 2014, accessed July 3, 2019, https://www.theatlantic.com/technology/archive/2014/07/the-details-about-the-cias-deal-with-amazon/374632/

only further points to the detrimental impact of Amazon’s size and influence that they are, in many ways, above scrutiny.

Amazon: Abuse of Market Power

Amazon is using its market power to eliminate competition and take control of one industry after another, leaving consumers with an economy that is less diverse and innovative, and one that affords fewer opportunities for businesses to start and grow.

Amazon was not subtle about throwing its weight around in the publishing industry, and one can see that Amazon follows this pattern of behavior in other market channels.

Amazon’s dominance in the book industry forces publishers to deal with the retailer and its bullying tactics. In one well-publicized fight over e-book terms, Amazon.com delayed fulfillment of customer orders for many popular books from Hachette’s imprints in order to get the terms it wanted from the company.[22] The publisher continued to ship titles to Amazon, but it delayed shipments of Hachette titles to consumers and restocked Hachette titles slowly. Most popular books ship from Amazon within two days, but shipping times for Hachette books were listed as upwards of two to three weeks.

In another instance, in 2010, Amazon pulled Macmillan titles during an e-book pricing dispute between Amazon and the publisher.[23] This incident provides another example of Amazon’s ability and willingness to exploit its power to force publishers to adopt terms and policies amenable to Amazon. While these tactics are detrimental to free trade, cases like that of the Hachette and Macmillan

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[22] David Streitfeld, "Writers Feel an Amazon Hachette Spat," The New York Times, May 9, 2014, accessed April 30, 2019, https://www.nytimes.com/2014/05/10/technology/writers-feel-an-amazon-hachette-spat.html.

[23] Paul Krugman, "Amazon's Monopsony Is Not O.K.," The New York Times, October 19, 2014, accessed April 30, 2019, https://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html.

feuds additionally raise concerns for readers' ability to access books as Amazon moves towards establishing a monopoly.

Today, Amazon is using its role as a platform and a retailer anti-competitively to secure greater dominance in the many markets in which it operates.[24] Its growth as a company was aided in part by avoiding its obligation to collect and remit sales tax until 2014, and its ongoing and well-publicized demands from states and local governments for tax subsidies and incentives to open offices, warehouses, and, more recently, its second headquarters. As the company has grown, and has used its increasing dominance to acquire companies in various markets -- including distribution, wholesale, and publishing -- it secured the aforementioned government contracts. It is no surprise then that its platform has come to dominate the industry. But it is crucial that the commission understand that this is merely part of a larger issue.

According to the Institute for Local Self-Reliance study, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, Amazon uses its market power to eliminate competition.[25]

"Amazon uses its vast financial resources to sell many products below its own cost as a tactic for both eliminating less well-funded competitors and acquiring customers into its *Prime* ecosystem, which sharply reduces the chances they will shop around in the future."[26]

Amazon has also abused its market share by displacing an open market with a privately controlled market. By using *Amazon Prime* to corral an ever-larger

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[24] Zach Freed and Stacy Mitchell, "ILSR Submits Comments as Federal Trade Commission Embarks on a Rare Review of Its Antitrust Policy," Institute for Local Self-Reliance, August 30, 2018, accessed May 6, 2019, https://ilsr.org/ilsr-ftc-comments/.

[25] Olivia LaVecchia and Stacy Mitchell, "Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities," Institute for Local Self-Reliance, November 2016, accessed May 6, 2019, https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

[26] *Ibid*.

share of online shoppers, Amazon has left rival retailers and manufacturers with little choice but to become third-party sellers on its platform; in addition, half of all online searches begin with Amazon[27]. In effect, Amazon is supplanting an open market with a privately controlled one, giving it the power to dictate the terms by which its competitors can operate, and to effectively levy a kind of tax on their revenue.

Amazon leverages the interplay between the direct retail and platform sides of its business to maximize its dominance over suppliers. As Amazon extracts more fees from suppliers, it reduces their ability to invent and develop new products. Meanwhile, Amazon is rapidly expanding its own product lines, using the trove of data it gathers from its platform to understand its suppliers' industries and compete directly against them. Many of these Amazon products appear at the top of its search listings.[28]

Once a consumer is hooked on using Amazon's platform as their go-to source, Amazon then sets about increasing its prices. Already there's evidence that Amazon is using its huge trove of data about customers' buying habits to raise prices. It's also started blocking access to certain products, charging higher prices, and delaying shipping times for customers who decline to join its *Prime* program. ProPublica tested the purchasing options at Amazon and found that, in their tests, Amazon's sophisticated shopping algorithm favored Amazon and the sellers it charges for its services, even if the price is much higher.[29]

Furthermore, similar to how Amazon undercut its bookstore competitors, it appears to be lowballing rivals in a classic squeeze to take over yet another industry: freight. As Axios points out, with its track record of upending nearly

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[27] Jumpshot's Competitive State of eCommerce Marketplaces Data, http://go.jumpshot.com/rs/677-KZC-213/images/Jumpshot-Q2-Data-Report.pdf

[28] Olivia LaVecchia and Stacy Mitchell, "Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities," Institute for Local Self-Reliance, November 2016, accessed May 6, 2019, https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

[29] *Ibid*.

every business it enters, Amazon has the potential to decimate UPS and FedEx as it moves into shipping.[30] Its tactic is a modern example of putting competition through a Rockefeller-style "good sweating," that is, cutting prices in the local market and forcing the competitor to operate at a loss.[31]

"Amazon is turning areas of the business that were historically costs into new revenue streams," says Gartner L2 analyst Griffin Carlborg. Shipping could be a massive source of profit for the tech giant — U.S. companies spent $1.5 trillion on moving goods in 2017, reports *WSJ*.[32]

Yes, Amazon *is* Like A&P of the 1940s, and, No, It's *Not* Good for Consumer Welfare

While many antitrust experts cite Standard Oil when discussing Amazon as a monopoly, perhaps the best comparison would be to review the antitrust case against A&P in the 1940s, in which, ultimately, the A&P monopoly was broken up.

Like Amazon, in the 1920s and 1930s, The Great Atlantic and Pacific Tea Company (A&P) changed the way people shopped. And like Amazon, A&P ultimately used its size in an abusive manner. The business model of A&P was based on two things: Spreading innovative formats (such as the economy store and then the supermarket), and using threats, bribery, and extortion to destroy competition and control suppliers.[33] A&P also used its clout with key government officials to fight back at regulators calling for the monopoly to be investigated, including

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30 Erica Pandey, "Amazon Looks to Decimate UPS and FedEx as It Moves into Shipping Industry," Axios, April 29, 2019, accessed April 30, 2019. https://www.axios.com/amazons-shipping-industry-ups-fedex-79b25285-8864-4069-9ae8-6097835c96eb.html.

31 Penn State, "John D. Rockefeller, Standard Oil and "The Great Game," https://www.e-education.psu.edu/egee120/node/204

32 Erica E. Phillips, "Companies Spent a Record $1.5 Trillion on Shipping Costs in 2017," The Wall Street Journal, June 19, 2018, accessed May 1, 2019, https://www.wsj.com/articles/companies-are-spending-more-on-shipping-and-thats-not-changing-soon-1529413500.

33 Matt Stoller, "Goliath: The 100-Year War Between Monopoly Power and Populism," Simon & Schuster, 2019

offering James Farley, a key Roosevelt advisor, a job[34]. Similarly, and as noted earlier, Amazon has used its market power to cultivate advantageous relationships within government.

Also, like A&P, Amazon not only controls the retailing channel, but it is now beginning to dominate the distribution channel, third-party marketplace, as well as the web services channel. All told, just as A&P made it extremely hard for its competitors to avoid doing business with them, so too does Amazon force its competitors to do business with it.

The one difference between A&P and Amazon is the latter's ability to pit communities against one another for tax incentives and subsidies. And this aspect of its business model makes the case against Amazon even more compelling than the case made against A&P. Because Amazon not only hurts its competitors and consumers, it hurts their communities as well.

To date, Amazon has thus far procured at least $2.4 billion in subsidies from governments.[35] In essence, while businesses are forced to use Amazon's wide-ranging services if they are to stay in business, the funneling of tax dollars to the online tech giant means that these same businesses, and consumers, are funding the company as well via tax dollars meant for infrastructure, first responders, and schools. The HQ2 bidding war was widely publicized and it is telling that New York State, which has a budget shortfall of more than $2 billion, was nonetheless offering Amazon more than $3 billion in tax incentives -- incentives based on thresholds Amazon knew it would meet without question. So, who would ultimately have to pay that bill in 10 years' time? The taxpayers, who include Amazon's very own competitors -- the very same competitors that Amazon is trying to wipe out.

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[34] *Ibid*.

[35] "Amazon Tracker," Good Jobs First, February 2019, accessed May 6, 2019, https://www.goodjobsfirst.org/amazon-tracker.

The similarity between Amazon and A&P is not lost on Amazon proponents, who insist that because Amazon has low prices, anything it does is fine (but, as previously noted by Kohn, these prices are going up as Amazon grows its market share beyond the 70 percent threshold).

These Amazon apologists vehemently argue that the antitrust action against A&P was a mistake that should not be repeated. However, it's important to recognize that the overall grocery market experienced very strong growth following the decision against A&P. In 1950, grocery supermarkets accounted for 35 percent of food sales, but over the next two decades, supermarkets flourished -- by 1960, supermarkets sold 70 percent of food for home consumption. During the 1950s, the number of stores more than doubled -- from 14,000 in 1950 to 33,000 in 1960.[36] It is very hard to believe that such growth would have occurred had A&P continued to abuse its monopoly power. In addition, A&P continued to compete and do well after being broke up, only shuttering its doors for good in 2015, more than 60 years after the government's antitrust.

Moreover, it is not debatable that the action to break up A&P clearly benefited consumers, offering them a plethora of choices as to where to buy food and at excellent prices. Competition and price did not suffer due to the actions taken by government regulators; indeed, competition increased and prices went down.

Amazon is Anti-Competitive

Amazon increasingly controls the underlying infrastructure of the economy. Its Marketplace for third-party sellers has become the dominant platform for digital commerce. Its Amazon Web Services division provides the cloud computing backbone for much of the country, powering everyone from Netflix to the CIA. Its distribution network includes warehouses and delivery stations in nearly every major U.S. city, and it's rapidly moving into shipping and package delivery for both itself and others. By controlling this critical infrastructure, Amazon both

[36] "New Frontiers of the 1950s," by Jenny McTaggart, Progressive Grocer, April 2012, accessed August 2, 2019; https://progressivegrocer.com/new-frontiers-1950s

competes with other companies and sets the terms by which these same rivals can reach the market.[37]

The business model is clear: Amazon forces competitors to work with it, thereby exercising control over their competition. Amazon's dominance cannot be gauged if we measure competition primarily through price and output. The economics of platform markets create incentives for a company to pursue growth over profits, a strategy that investors have rewarded. Under these conditions, predatory pricing becomes highly rational, even as existing doctrine treats it as irrational and therefore implausible. Second, because online platforms serve as critical intermediaries, integrating across business lines positions these platforms to control the essential infrastructure on which their rivals depend. This dual role also enables Amazon to exploit information it has collected on companies that use its services to undermine them as competitors.[38]

Amazon's recent decision to drop its most-favored nation clause – where it forced third-party sellers to sign anti-competitive provisions -- is simply an indication that the corporate giant fears an antitrust investigation. Despite this attempt to appease the critics, the company chose to sustain its fair-price policy, which functions in much the same way as the eliminated most-favored nation clause.[39] And, in terms of anti-competitive practices, this clause was only the tip of the iceberg.

Foremost among our concerns is Amazon's creation of a private market through vertical acquisitions and expansion, which has effected the restraint of retail

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[37] Olivia LaVecchia and Stacy Mitchell, "Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities," Institute for Local Self-Reliance, November 2016, accessed May 6, 2019, https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

[38] Lina M. Khan, "Amazon's Antitrust Paradox," Yale Law Journal 126, no. 3 (January 2017), January 2017, accessed April 30, 2019, https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

[39] Guadalupe Gonzalez, "You're No Longer Required to Sell Products for Less on Amazon. The Problem? If You Don't, You've Got Another Penalty Coming," Inc.com, March 13, 2019, accessed April 30, 2019, https://www.inc.com/guadalupe-gonzalez/amazon-removes-price-parity-not-fair-price-rule-third-party-sellers-antitrust-violations.html.

markets. Amazon now serves as a retailer, marketplace platform, web service provider, warehouse network, and fulfillment provider.

Perhaps the most glaring problem at play here is Amazon's practice of leveraging its multi-sided role as direct retailer and as a platform for retailers. First, Amazon charges third-party sellers a fee to use its warehousing and fulfillment services, as well as for paid advertisements. These costs constitute a kind of private tax, as competitors must pay Amazon in order to compete against them, while Amazon profits off of sellers that are often their direct competitors. Additionally, Amazon's role as an online platform also enables it to exploit information it has collected on companies that use its services to undermine them as competitors.[40] In this case, the risk associated with entering a market by developing and introducing a new product is entirely shifted to the third-party seller, while Amazon enjoys the benefits of the seller's risk in the form of data and can then introduce a competing product with minimal costs and risk.

In addition to exploiting its competitor-customers for information and unearned market research, it is then able to prioritize its own products over that of its third-party sellers in search listings, even if the price is much higher, deepening its anti-competitive advantage.[41]

Amazon's acquisition of Quidsi shows the company's ability to employ below-cost pricing and psychological intimidation to suppress competition, at the cost of an open market and at a cost to consumers. In 2009, Quidsi -- an e-commerce company that oversaw subsidiaries including Diapers.com, Soap.com, and BeautyBar.com -- declined an offer from Amazon to acquire the company. Soon after, Amazon cut its prices for diapers and other baby products by up to 30 percent. By experimentally changing their prices, Quidsi executives were able to

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[40] Feng Zhu and Qihong Liu, "Competing with Complementors: An Empirical Look at Amazon.com," Strategic Management Journal 39, no. 10 (October 2018), accessed April 30, 2019, doi:10.1002/smj.2932.

[41] Julia Angwin and Surya Mattu, "Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't," ProPublica, September 20, 2016, accessed April 30, 2019, https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt.

determine that Amazon was using pricing software to monitor Diapers.com's prices and undersell them accordingly.[42] Additionally, in September 2010, Amazon introduced Amazon Mom, a new service that offered a year of free two-day shipping. Another offer allowed customers who signed up for a subscription service with Amazon to receive 30 percent off of diapers.

Over time, as Amazon continued pricing baby products below cost, Diapers.com's growth slowed and investors became wary of further funding the startup, in light of the competition from Amazon. Quidsi executives calculated that they were on track to lose $100 million over three months in the diaper category alone. Quidsi ultimately accepted Amazon's offer to acquire the company --despite a better counter-offer from Walmart – "largely out of fear." Quidsi founders were told that Amazon would drive diaper prices to zero if they sold to Walmart.[43]

After successfully buying its competitor, Amazon proceeded to raise prices by significantly scaling back the discounts offered on baby products. Amazon now holds a dominant position in the online market for baby supplies. In addition to the significant entry barrier to entering this market--the necessity of building a new, successful online platform -- Lina Khan points to predators' use of psychological intimidation, which courts tend to discount. In this case, "Amazon's history with Quidsi has sent a clear message to potential competitors -- namely that, unless upstarts have deep pockets that allow them to bleed money in a head-to-head fight with Amazon, it may not be worth entering the market. Even as Amazon has raised the price of the Amazon Mom program, no newcomers have recently sought to challenge it in this sector, supporting the idea that intimidation may also serve as a practical barrier."[44] The result is a lack of competition, virtually no incentive for Amazon to keep prices on baby

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[42] Brad Stone, "The Secrets of Bezos: How Amazon Became the Everything Store," Bloomberg.com, October 10, 2013, accessed April 30, 2019, https://www.bloomberg.com/news/articles/2013-10-10/jeff-bezos-and-the-age-of-amazon-excerpt-from-the-everything-store-by-brad-stone.

[43] *Ibid.*

[44] Lina M. Khan, "Amazon's Antitrust Paradox," Yale Law Journal 126, no. 3 (January 2017), January 2017, accessed April 30, 2019, https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

products competitive and to halt raising prices, and heightened entry barriers for potentially innovative or more efficient newcomers.[45]

The myriad problems with creating barriers to entry through methods like below-cost pricing and vertical monopolization are clear. Potential competitors may choose not to enter the position of taking on such a powerful, and often predatory, incumbent. In this way, entry barriers stifle innovation and could prevent a potentially more efficient company from attempting to enter the market, at a cost to consumers. Newcomers will opt out of competing, and Amazon will not have an incentive to keep costs low or to innovate.

That said, even if we were to agree with Murris's and Nuechterlein's premise that consumer welfare is all, Amazon still must come under scrutiny. Their argument inadvertently explains precisely why Amazon must be investigated: for the good of consumer welfare, both short-term and long-term. Amazon's dominance and continued growth is negatively impacting consumer welfare. Whether it is decimating communities by depleting sales tax revenue or inhibiting new voices from publishing or making it nearly impossible for entrepreneurs to compete, the end result is less choice of products and fewer jobs in communities across the country.[46]

Free Expression Implications

We are additionally concerned that consolidation in the book industry could have implications for free expression by limiting the diversity of titles available, likely at the cost of books by new authors and authors with marginalized identities or viewpoints. Amazon's recent decision to pull anti-vaccine book titles and video content after being questioned by Rep. Adam Schiff (D-CA) sheds light on the

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[45] *Ibid*.

[46] Civic Economics, "Prime Numbers: Amazon and American Communities," http://www.civiceconomics.com/primenumbers.html

threat that monopoly power poses to consumers' ability to access books.[47] Regardless of one's opinion on these specific titles, it is concerning that a company with a dominant share of the book retail industry is able to decide on its whim, or while facing political pressure, to remove books promoting a certain viewpoint. While booksellers, including Amazon, have the right to decide which titles to carry, an open market is necessary to ensure consumers' access to information and a platform for marginalized voices and ideas.

In a 2015 letter to Assistant Attorney General William J. Baer, Authors United highlights how Amazon's dominance and abusive practices have led to consolidation in the publishing industry, and how that consolidation has in turn limited the diversity of published books.[48] Authors United explained that Amazon leverages its power in order to extract "arbitrary and unexpected fees" from publishers, taking punitive actions such as slowing or stopping the sale of their books if publishers resist the unexpected fees. Its conflict of interest as both a publisher and monopolistic retailer also allows it to promote its own books over those of other publishers. In addition to restraining the market, Amazon's exploitation of monopsony and monopoly power mean that other publishers, competing against Amazon on an uneven playing field, are unable to take financial risks on books that "espouse unusual, quirky, offbeat, or politically risky ideas, as well as books from new and unproven authors," instead focusing more on books by already-established or celebrity authors.[49]

Amazon: Undoubtedly Trending Toward Tech Industry Monopoly

Clearly, Amazon's tentacles reach into many different markets, and in each market, there is a ripple effect throughout the economy as competitors are

[47] "ABFE Criticizes Congressman for Challenging Amazon on Anti-Vaccine Titles." Bookselling This Week, March 27, 2019. Accessed April 30, 2019. https://www.bookweb.org/news/abfe-criticizes-congressman-challenging-amazon-anti-vaccine-titles-571846.

[48] Authors United to William J. Baer, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice, May 2018, Https://openmarketsinstitute.org/wp-content/uploads/2018/05/NA-Authors-United-Letter.pdf.

[49] *Ibid*.

forced, more and more, to use Amazon's service, whether it is its third-party marketplace, its web services, its shipping and distribution services, or its retail engine. While European regulators have recognized the deleterious effect that Amazon has on its economy[50], U.S. proponents of Amazon's efficiency and offerings ignore the clear signs as to how company is hurting communities throughout the country.

By any legal antitrust standard, whether its Standard Oil or A&P, Amazon is a book industry monopoly and is rapidly becoming a retail sector monopoly. Trends point to this. Similar trends also show that Amazon is merely years away from similarly dominating both the distribution sector and web services sector, and growth in each market sector facilitates further growth in tech sectors where their dominance has not yet reached monopoly status. But it is clear from Amazon's past behavior that the goal is to monopolize and trends indicate they are well on their way to doing this.

Technology has allowed Amazon to merge business sectors fluidly in ways not possible in the 1940s, perhaps making its monopolistic growth less obvious -- and much easier -- than it would have been before the advent of computers, database marketing, software advances, and the Internet. What took A&P decades may take Amazon just a few years. This is why it is crucial this issue be addressed now, and not later.

What's the World Like Without Amazon?

Based on the evidence presented here, It is not an overstatement to claim that a world in which Amazon does not exist would have a more diverse and productive retail economy, a greater number of job offerings and better work environment, a more wide-ranging offering of book titles and new authors, and more dynamic and aesthetically pleasing neighborhoods with bustling Main Streets.

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[50] Aoife White and Maria Tadeo, "EU's Antitrust Probes of Big Tech Aren't Over, Vestager Says," Bloomberg.com, May 3, 2019, accessed May 06, 2019, https://www.bloomberg.com/news/articles/2019-05-03/eu-s-big-tech-antitrust-probes-aren-t-done-yet-vestager-says.

So how bad is Amazon's impact on the country? According to the study, *Prime Numbers: Amazon and American Communities*, conducted by Civic Economics, "The growth of online sales in general and Amazon in particular has had a visible impact in American communities, exhibited by the much-discussed 'retail apocalypse' as retail activity increasingly moves from commercial districts to industrial parks."[51]

Prime Numbers estimates that, in 2016 alone, Amazon's retail sales displaced 44,000 storefronts employing 637,000 retail workers. Even considering Amazon's massive distribution network, the net result is a loss of more than 500,000 jobs nationwide."[52] The 44,000 displaced storefronts is an increase of almost 50 percent from 2014.

For those familiar with the classic holiday film, it's *a Wonderful Life*, a world with Amazon versus one without Amazon is like the difference between Pottersville (with Amazon) and Bedford Falls (without).

The Solution to the Amazon Problem

To address the concentration of power resulting from Amazon's anticompetitive business model, we support a ban on vertical integration by Amazon, as outlined in Khan's "Amazon's Antitrust Paradox."[53] As Khan explains, limits on vertical integration would recognize conflicts of interest created when a platform has an incentive to privilege its own business over other companies. In the cases of online platforms, like that of Amazon, the risk of abuse resulting from conflicts of interest is exacerbated by the platform's ability to generate data as a platform and then use that privileged data to disadvantage competitors as a

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[51] Civic Economics, "Prime Numbers: Amazon and American Communities," April 04, 2018, accessed May 01, 2019, https://civiceconomics.wordpress.com/2018/04/04/prime-numbers-amazon-and-american-communities/

[52] Civic Economics, "Prime Numbers: Amazon and American Communities," April 04, 2018, accessed May 01, 2019, https://civiceconomics.wordpress.com/2018/04/04/prime-numbers-amazon-and-american-communities/.

[53] Lina M. Khan, "Amazon's Antitrust Paradox," Yale Law Journal 126, no. 3 (January 2017), January 2017, accessed April 30, 2019, https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

retailer. We believe that separating Amazon's Third-Party Marketplace platform and retail operation would eliminate conflicts of interest, allowing competitors a chance to compete on a level playing field and ensuring that consumers reap the benefits of a competitive, free market.

Another solution would be to require Amazon to sell its book business, since by all standards, it is a monopolistic presence in this industry. As previously noted, its dominance in the book industry has made it far more difficult for new authors to gain a foothold in the industry, thus threatening the diversity of books and with it, a greater availability of titles and new authors.

Given its dominance in retailing and in the book industry, we believe it is critical that the DOJ Antitrust Division examine the impact of Amazon's business practices on these industries -- and how it is using this model in its distribution and web services. All trends point to Amazon setting up a tech industry monopoly.

We ask the DOJ Antitrust Division to consider how Amazon's practices impact consumer welfare as well as competition, innovation, free expression, and job creation. Please feel free to reach out if we can provide further information about Amazon's anticompetitive business strategy.

ABA would be happy to provide any assistance the Department needs as it conducts its review. If you have any questions or need further information as it pertains to this letter, please contact David Grogan, director, advocacy and public policy, david@bookweb.org.

Sincerely,

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