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July 26, 2022

The Honorable Amy Klobuchar  
United States Senate  
425 Dirksen Senate Building  
Washington, D.C. 20510

The Honorable Chuck Grassley  
United States Senate  
135 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senators Klobuchar and Grassley:

On behalf of NFIB, the nation's leading small business advocacy organization, I write in support of S. 2992, the *American Innovation and Choice Online Act*.

Over the past three decades, the internet has vastly changed the small business economy, providing new opportunities to access and communicate with consumers and opening new markets. However, over time, a small group of technology companies have come to dominate the digital economy, often acquiring up-and-coming competitors and consolidating small business access to consumers.

Today, one company controls approximately 90% of the online search market<sup>1</sup> and, by some estimations, the owner of the largest online marketplace controls over 50% of all online sales.<sup>2</sup> Most small businesses have no choice but to rely in some capacity on these large technology companies for a variety of business needs, ranging from driving business traffic through search to online advertising to accessing key digital marketplaces. This reliance will only continue to grow as 30% of the world's gross economic output may lie with large technology companies by the next decade.<sup>3</sup>

History has shown that control of markets often leads to monopolistic practices and anticompetitive behaviors, and it is often small businesses who suffer in such situations due to a lack of bargaining power and alternative choices. Unfortunately, these problems are already presenting themselves in the digital economy today. Small business owners are increasingly frustrated by technology company practices such as the blurred line between paid

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<sup>1</sup> Jeff Desjardins, How Google retains more than 90% of market share, Business Insider (Apr. 23, 2018), <https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4>.

<sup>2</sup> Slade Bond, et. al., *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations*, House Judiciary Committee, 2020, pg. 15.

<sup>3</sup> *Id.* at 11.

advertisement, horizontally integrated products, and organic search results, which are critical to driving business traffic. For small business sellers using marketplace platforms, competition between the operator's own products and third-party sellers creates conflicts of interests and has been shown to lead to unfair business practices.<sup>4</sup> Facing these challenges, in a recent member ballot, 84% of NFIB members favor Congress taking legislative action to control unfair and anticompetitive practices of large tech companies.<sup>5</sup>

The *American Innovation and Choice Online Act* is a commonsense proposal that seeks to remedy conflicts of interests, foster increased choice in online services, and ensure a level playing field for small businesses and users of platforms covered by the legislation. Key small business protections include prohibiting large technology companies, who are Covered Platforms, from:

- Unfairly preferencing a platform operator's products, services, or lines of business over a competitor's;
- Unfairly limiting a competitor's products to compete against the platform's operator and discrimination in the enforcement of regulations;
- Discrimination in the application of enforcement of the Covered Platform's terms of service among similarly situated business users in a matter that may harm competition on the platform;
- Restricting the capacity of business owners to operate with different platforms' operating systems, hardware, or software features that are available to the platform operator's products;
- Conditioning access to the Covered Platform or preferred status or placement on the platform on the purchase or use of other products offered by the Covered Platform operator that are not unique to the Covered Platform itself; and
- Using non-public data obtained from or generated on the Covered Platform by the activities of a business user or by the interaction of a Covered Platform user with the products of a business user to offer or support the offering of the Covered Platform's own products.

Many of these provisions have been carefully crafted to respond to specific anticompetitive behaviors and problems already presenting themselves in the digital economy.

During the legislative process, Covered Platforms and groups associated with them have attempted to generate opposition to this legislation on a theory that it will harm existing small business users and eliminate key features that consumers and business owners presently enjoy. It is, however, rarely acknowledged that the sponsors of this legislation have spent considerable time understanding these concerns and tailoring the legislation to help address

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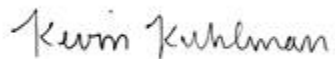
<sup>4</sup> Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, Wall Street Journal (Apr. 29, 2019), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.

<sup>5</sup> NFIB, Federal Member Ballot 580, Question 4 (May 2022).

them. NFIB supports refinement of the bill to minimize any disruptions or unintended consequences to existing users; however, concerns raised by Covered Platforms relating to small businesses cannot be an excuse to not enact legislation principally designed to provide them more online choices and protect these very users from unfair and anticompetitive behavior at the hands of the objecting platforms.

NFIB supports the *American Innovation and Choice Online Act* and appreciates your advocacy for a fair and level playing field for small business owners in the digital economy.

Sincerely,

A handwritten signature in black ink that reads "Kevin Kuhlman". The signature is written in a cursive, slightly slanted style.

Kevin Kuhlman  
Vice President, Federal Government Relations  
NFIB