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**U.S. Public Interest Research Group Education Fund \$**  
**600 Penn Ave. SE, Suite 400, Washington, DC 20003 \$**

21 August 2018

Secretary  
The Federal Trade Commission  
Washington, DC

**RE: Preliminary Comments of the U.S. Public Interest Research Group and the U.S. PIRG Education Fund on the Commission’s Hearings on Competition & Consumer Protection.**

Dear Secretary and Commissioners,

We write to commend the commission on its pending hearings on Competition & Consumer Protection. The inquiry comes at a critical time, as consolidation in the digital economy threatens consumers, potential competitors and innovation in the marketplace. In particular, the rapidly growing market power and concomitant political influence of the digital platform firms – Amazon, Google, Facebook, Apple, and Microsoft -- deserves intense scrutiny, which your hearings must provide. Although these comments could apply generally to any of your topics, we file them in response to **Topic #4/757: The intersection between privacy, big data, and competition.**

As you may know, U.S. PIRG serves as the federation of non-profit, non-partisan state Public Interest Research Groups. U.S. PIRG Education Fund serves as its research affiliate. PIRGs advocate against powerful special interests on behalf of their members and all consumers generally.

In addition to this brief preliminary comment, U.S. PIRG has also joined a group comment of leading consumer and privacy groups in this docket, to be filed by EPIC.

Some examples illustrative of U.S. PIRG’s work on and longstanding interest in FTC-related and other competition matters include the following:

- Supporting, through amicus briefs, Congressional testimony and other advocacy, greater competition in prescription drug pricing, by opposing brand name pharmaceutical efforts to prevent low cost generic entry, including pay-for-delay, product-hopping and similar schemes.<sup>1</sup>

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<sup>1</sup> See, for example, Brief of Public Citizen, U.S. PIRG *et al* in support of Plaintiff-Appellee State of New York v. Actavis, PLC, and Forest Laboratories, LLC, 19 February 2015, available at [https://uspirg.org/sites/pirg/files/resources/Namenda\\_Consumer\\_Amicus\\_Brief\\_Feb15.pdf](https://uspirg.org/sites/pirg/files/resources/Namenda_Consumer_Amicus_Brief_Feb15.pdf) (product-hopping case concerning Namenda, a treatment for Alzheimer’s Disease. See also News Release, [“U.S. PIRG Testifies On “Pay For](#)

- Supporting through amicus briefs, court objections and other advocacy, the need for greater competition in banking payment networks that are dominated by the duopoly Visa and Mastercard, but also abused by American Express.<sup>2</sup>
- **Filing, in partnerships with the Center for Digital Democracy, EPIC and sometimes others, a series of petitions to the FTC and other reports explaining the threats to consumers and competition posed by the growing threat of the digital ecosystem, fueled by non-transparent collection and sharing of consumer data.** We began these filings in 2006 and they continue today.<sup>3</sup>

For example, in 2007, U.S. PIRG, EPIC and Center for Digital Democracy filed a petition with the FTC challenging the acquisition of the online advertising giant Double-Click by the search engine leader Google.<sup>4</sup> At the time, we argued the following:

49. Google’s proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google’s plan to combine the search histories and web site visit records of Internet users.

In a second supplemental filing,<sup>5</sup> we argued the following:

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[Delay” Before Senate Subcommittee](https://uspig.org/news/usp/us-pirg-testifies-pay-delay-senate-subcommittee)”, 23 July 2013, available at <https://uspig.org/news/usp/us-pirg-testifies-pay-delay-senate-subcommittee>

<sup>2</sup> See Testimony of Edmund Mierzwinski, U.S. PIRG, before the House Judiciary Committee, at a Hearing on the Credit Card Fair Fee Act, 28 April 2010, available at <https://judiciary.house.gov/files/hearings/pdf/Mierzwinski100428.pdf>. Also see amicus brief of U.S. PIRG Education Fund in support of respondents in *Visa, et al. v. Osborn, et al.*, 20 October 2016, available at [http://www.scotusblog.com/wp-content/uploads/2016/10/15-961-15-962\\_amicus\\_resp\\_us\\_PIRG\\_education\\_fund\\_inc.pdf](http://www.scotusblog.com/wp-content/uploads/2016/10/15-961-15-962_amicus_resp_us_PIRG_education_fund_inc.pdf), and amicus brief of U.S. PIRG Education Fund, et al., in support of petitioners in *Ohio, et al. v. American Express, et al.*, 14 December 2017, available at [https://www.supremecourt.gov/DocketPDF/16/16-1454/23778/20171214124020307\\_Ohio%20v.%20Amex%20-%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/23778/20171214124020307_Ohio%20v.%20Amex%20-%20Amicus%20Brief.pdf).

<sup>3</sup> See U.S. PIRG and Center for Digital Democracy, “Complaint and Request for Inquiry and Injunctive Relief Concerning Unfair and Deceptive Online Marketing Practices,” 1 November 2006, available at [http://www.centerfordigitaldemocracy.org/sites/default/files/FTCadprivacy\\_0\\_0.pdf](http://www.centerfordigitaldemocracy.org/sites/default/files/FTCadprivacy_0_0.pdf) and see “U.S. PIRG Education Fund & CDD File Add'l Comments on Big Data at FTC: Urge Action to Rein in “Wild West” of Unfair & Discriminatory Practices,” 29 October 2014, available at <https://www.democraticmedia.org/content/us-pirg-education-fund-cdd-file-addl-comments-big-data-ftc-urge-action-rein-wild-west-unfair>. Also see archive of reports and articles at <https://uspigedfund.org/issues/uf/digital-data-and-consumer-protection-ensuring-fair-and-equitable-financial-marketplace>

<sup>4</sup> See “Complaint and Request for Injunction, Request for Investigation and for Other Relief,” EPIC, U.S. PIRG and Center for Digital Democracy 20 April 2007, available at [https://www.epic.org/privacy/ftc/google/epic\\_complaint.pdf](https://www.epic.org/privacy/ftc/google/epic_complaint.pdf)

<sup>5</sup> See “Second Filing of Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief,” EPIC, U.S. PIRG and Center for Digital Democracy, 17 September 2007, available at [https://epic.org/privacy/ftc/google/supp2\\_091707.pdf](https://epic.org/privacy/ftc/google/supp2_091707.pdf)

38. The detailed profiling of Internet users raises profound issues that concern the right of privacy, the accountability of large corporations, and the operation of democratic governments.

38. [...] In addition to the far-reaching privacy issues discussed in this Second Supplement and the previous filings, the merger could be blocked simply on anti-trust grounds.

Today, of course, in 2018, the growth in market power of Google -- as well as Facebook and Amazon, in particular -- as dominant digital platforms, demands even greater antitrust scrutiny and even more attention to the impact of consumer data on that power.

The FTC's competition hearings could not be more timely as the power of fewer and larger digital platforms over buyers, sellers, consumers and citizens only continues to grow. There is a need to explore new solutions that take a broader view of measuring market power and enforcing antitrust and competition laws than the failed "Consumer Welfare" theories of the Chicago school.

A recent Supreme Court decision in *Ohio v. American Express*, if broadly interpreted, may make it harder to enforce the antitrust laws against the digital platforms such as Google and Facebook, Amazon, Apple and Microsoft.<sup>6</sup> Briefs of U.S. PIRG Education Fund et al and Open Markets Institute make this clear.<sup>7</sup>

There is a school of independent economists and advocates (including, for example, the Open Markets Institute<sup>8</sup> and the Institute for Local Self-Reliance<sup>9</sup>) and professors (including Frank Pasquale<sup>10</sup>) evaluating the growing power of the digital platforms; your hearings could provide a crucial microphone to amplify their work.

Further, as noted in the proceedings of a recent conference:

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<sup>6</sup> *Ohio, et al. v. American Express, et al.*, 585 U.S. \_\_\_ (2018), available at [https://www.supremecourt.gov/opinions/17pdf/16-1454\\_new\\_1a72.pdf](https://www.supremecourt.gov/opinions/17pdf/16-1454_new_1a72.pdf).

<sup>7</sup> See in this case, brief of U.S. PIRG Education Fund et al, 14 December 2017, available at [http://www.supremecourt.gov/DocketPDF/16/16-1454/23778/20171214124020307\\_Ohio%20v.%20Amex%20-%20Amicus%20Brief.pdf](http://www.supremecourt.gov/DocketPDF/16/16-1454/23778/20171214124020307_Ohio%20v.%20Amex%20-%20Amicus%20Brief.pdf) and brief of Open Markets Institute, 14 December 2017, available at [https://www.supremecourt.gov/DocketPDF/16/16-1454/23961/20171214162630698\\_16-1454%20Open%20Markets%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/16/16-1454/23961/20171214162630698_16-1454%20Open%20Markets%20Amicus%20Brief.pdf)

<sup>8</sup> See e.g., Lina Kahn, "Amazon's Antitrust Paradox," 2 January 2017, available at <https://openmarketsinstitute.org/articles/amazons-antitrust-paradox/>.

<sup>9</sup> News Release, "Release: Amazon's National Contract to Supply Local Governments Puts Cities and Schools at Risk, ILSR Report Finds," 10 July 2018, available at <https://ilsr.org/release-amazons-purchasing/>.

<sup>10</sup> Frank Pasquale, "From Territorial to Functional Sovereignty: The Case of Amazon," 6 December 2017, available at <https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon/>.

“Governments have the most power in regulating and standing up to digital monopolies. Within their arsenal lie the abilities to regulate, fine, breakup, and change the course of monopolies in ways that benefit the public and increase overall prosperity.<sup>11</sup>”

Again, the problem of the power of the digital platforms also extends to our political economy, ! as the recent Facebook and Cambridge Analytica linkages have exposed. Therefore, the ! hearings are coming at a critical time for both our economy and our democracy. !

Sincerely, !

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Michael Landis, !  
Litigation Director, U.S. PIRG Education Fund mlandis<at>pirg.org !

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<sup>11</sup> Sandra Matz, Guy Rolnik, and Moran Cerf, “Solutions to the Problems of Digital Monopolies,” Chapter 5 in Digital Platforms and Concentration,” Proceedings of a 2018 Antitrust And Competition Conference - Digital Platforms And Concentration, 19-20 April 2018, available at <https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>