The Honorable Joseph J. Simons, Chairman
The Honorable Noah Joshua Phillips, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Rebecca Kelly Slaughter, Commissioner
The Honorable Christine S. Wilson, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

July 23, 2020

To the Commissioners,

Our organizations, the International Brotherhood of Teamsters, the Communications Workers of America, the United Food and Commercial Workers International Union, and Change to Win, represent millions of working people across all industries and sectors of the economy. In February, we petitioned the Commission to use its power under Section 6(b) of the Federal Trade Commission Act to investigate Amazon.com, Inc.[1] for abusing its extraordinary power in ways that harm workers, consumers, small business merchants, and competitors.

We are writing today because we are highly alarmed by Amazon's conduct during the unprecedented crisis brought about by the COVID-19 pandemic. By this submission, we are conveying new evidence that suggests Amazon is taking advantage of the economic desperation and upheaval caused by COVID to engage in new or intensified conduct that further entrenches its market power and dominance, and that Amazon uses its market position to extract further concessions from and assert additional power over others across the full range of market segments in which the company operates.

As we discuss below, the domestic ecommerce sector grew at an accelerated pace during the pandemic and Amazon stands to benefit disproportionately from that growth. Because the offline retail sector has contracted drastically, and is unlikely to recover fully, we estimate that Amazon could hold 12 percent of domestic retail—offline and on—in only four years, even if it does not gain market share relative to other ecommerce firms. But in fact, it is expanding aggressively: Amazon hastened its pace of acquisitions and investments in the midst of an economic situation that left many new and existing firms vulnerable. As a result, Amazon has expanded or further expanded into vertical areas such as entertainment and delivery technology that threaten undesirable dominance in additional segments of business. Amazon also found pandemic-specific ways to intensify its exploitation of the small businesses that sell on its platform. Amazon abused its power to restrict sales to what it defined as "essential" goods in discriminatory and non-transparent ways, reportedly even effectively requiring some sellers to ship inventory to Amazon rather than distributing it to grocery stores. Finally, Amazon leapt forward in the size of its warehouse and storage workforce, now employing more than one-third of all warehouse and storage workers in the U.S. Its dominance in this labor market has been on full display during the pandemic as Amazon has persistently failed to protect adequately those workers' health and safety.

These additional practices provide further evidence not only of Amazon's extraordinary and unprecedented power in the ecommerce market, but also that the situation is urgent: The crisis has resulted in new weaknesses in our economy, and Amazon has not hesitated to exploit these weaknesses

[1] Petition to the Fed. Trade Comm'n for the Investigation of Amazon.com, Inc., by Int'l Bhd. of Teamsters, Commc'ns Workers of Am., United Food & Commercial Workers Int'l Union, Service Employees Int'l Union, & Change to Win (Feb. 27, 2020), http://www.changetowin.org/wp-content/uploads/2020/02/Petition-for-Investigation-of-Amazon.pdf (hereinafter "Unions' Petition to the FTC").

in ways that further bolster its hold on consumers, small businesses, and workers. As COVID-19 and the economic crisis it has brought about extend into the second half of 2020 and likely beyond, we urge the Commission to take immediate action to examine and halt Amazon's harmful activities.

## Amazon's Power in Ecommerce and the Overall Retail Market Has Grown During the Pandemic

Before COVID-19, Amazon already held a commanding share of the domestic ecommerce market—an estimated 40 percent.[2] The pandemic dramatically accelerated a decades-long shift toward online retail, and Amazon responded in kind by strengthening its own position in the market. During the initial months of the pandemic, the sudden shift of retail toward ecommerce as brick-and-mortar stores shuttered meant that the retail landscape came to resemble what analysts expected would not happen until 2025. The size of the ecommerce market in relation to all of retail increased as much in April 2020[3] as it did over the previous five years combined.[4] Many industry analysts expect that offline retail will never regain pre-pandemic levels. This has presented Amazon with a significant opening. As one large mutual fund manager explained, "Amazon is [already] dominant in gigantic categories." Its current sales account for 6 percent of total domestic retail spending, which the manager predicted "will grow, so Amazon still has a big runway remaining."[5] Even if Amazon does not continue to grow and simply retains its pre-COVID market share in ecommerce of approximately 40 percent, and ecommerce as a whole grows to represent 30 percent of all retail by 2024, as estimated, the company's share of the entire domestic retail market will be 12 percent within four years.[6]

Amazon's overall retail market share, while notable in its own right, does not reflect Amazon's even starker dominance in individual product categories—a traditional metric for judging whether the company satisfies the legal definition of a monopoly. For example, Amazon was already a dominant player in consumer electronics, with 45 percent of the domestic ecommerce electronics market in 2019.[7] Going into the pandemic, Amazon's closest competitor in this product market, Best Buy, generated $6.6 billion in online U.S. sales in 2019, approximately $20 billion less than Amazon.[8] Amazon's control of the online electronics market during the pandemic has undoubtedly strengthened as ecommerce electronics sales have grown at the expense of in-store sales. Electronics sales online

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[2] Recent estimates of Amazon's 2019 market share in ecommerce are as high as 44 percent. *Latest E-Commerce Market Share Numbers Highlight Amazon's Dominance*, BENZINGA (Feb. 4, 2020), https://www.benzinga.com/analyst-ratings/analyst-color/20/02/15247764/latest-e-commerce-market-share-numbers-highlight-amazons-dominance. Estimates for 2018 place its share at 38 percent. *Amazon US Online Market Share Estimate Cut to 38% from 47%*, BLOOMBERG (June 13, 2019), available at https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share (referencing Jeffrey P. Bezos, *Letter to Shareholders*, Amazon.com, Inc. (2019), https://www.sec.gov/Archives/edgar/data/1018724/000119312519103013/d727605dex991.htm).
[3] Unless otherwise specified all dates herein are in 2020.
[4] J.P. Morgan, *Retail vs. Amazon: Life In A Post COVID-19 World* at 22, N. AM. EQUITY RESEARCH (June 11, 2020).
[5] *Manager Of A Top Performing Mutual Fund Explains Big Amazon Bet, Overall Strategy*, INVESTOR'S BUSINESS DAILY (July 6, 2020) (on file).
[6] J.P. Morgan estimates that, following the pandemic, ecommerce will account for 30% of the domestic retail sales market by 2024. *Retail vs. Amazon*, *supra.*
[7] *Id.* at 21.
[8] Best Buy Form 10-K for Fiscal Year 2019-20 at 26, https://www.sec.gov/ix?doc=/Archives/edgar/data/764478/000076447820000017/bby-20200201x10k.htm **;** *Understanding How to Evaluate E-Commerce Market Share*, Stevenson Co. (Nov. 5, 2019), https://stevensoncompany.com/understanding-how-evaluate-e-commerce-market-share/

increased 58 percent in April, according to Adobe Analytics, as all in-store sales dwindled.[9] Notably, *prices* of electronics also increased, and were forecast to continue growing.[10] Amazon's dominance in this one product market is notable, but likely not exceptional: COVID-19 allowed Amazon's role in the economy to metastasize.

There is no crisis exemption to the Sherman Act. As the country continues to reckon with the economic consequences of the pandemic, Amazon's power is poised to reach a tipping point. The company likely holds monopoly power in the domestic ecommerce market, including in electronics retail both on- and offline, and monopsony power in the ecommerce platform market for third-party sellers and as an employer of warehouse and storage workers. It is dominant in cloud computing and quickly claiming market share in advertising at the expense of Google and Facebook. Both its cloud computing and advertising business segments have benefitted as consumers spend more time online, viewing ads and using software that runs on Amazon Web Services.[11] Moreover, as explained below, Amazon is leveraging its pandemic-strengthened position to further exploit its power over sellers, to acquire numerous targets in weakened industries–with serious implications for the future of those industries, and to exercise its considerable and increasing power in the labor market for warehouse and storage workers at the expense of those workers, on whose labor its expansion relies.

## Amazon's Power over Sellers is Evident Because Sellers did not Defect from the Platform Even When Abused Over "Essential" Shipments

The pandemic has further illuminated Amazon's hold over sellers, who have not turned to its competitors despite Amazon effectively cutting them off from online retail entirely during the height of the pandemic. In our previous submission, we called attention to the onerous conditions third-party sellers must accept in exchange for advantageous placement before consumers on Amazon's ecommerce platform.[12] Amazon's potentially discriminatory conduct regarding "essential" products during the pandemic has further exposed the extent of Amazon's power over third-party sellers who, in spite of Amazon's abusive treatment, did not abandon Amazon's platform.

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[9] *April Digital Economy Index: How COVID-19 Continues to Shift E-Commerce Trends*, Adobe Blog (May 12, 2020), https://theblog.adobe.com/april-digital-economy-index-how-covid-19-continues-to-shift-e-commerce-trends/.
[10] *Id.*
[11] *See Manager of a Top Performing Mutual Fund, supra.*
[12] Unions' Petition to the FTC at 3-12. As explained in the petition, sellers use Amazon's own fulfillment services, giving the company insight into their operations, pay Amazon for ads, and refrain from attracting new customers with discounts on non-Amazon sites, all in the hope that their products will obtain the "Buy Box" or high ranking in search results. If a product does not appear high in Amazon's search results, it may as well not appear on the platform at all. As we noted in our petition, one study estimated that more than 80 percent of sales on Amazon are of products ranked first in search results, and another found that two-thirds of consumers do not even look at any products listed after the first page of search results. Loren Baker, *Amazon's Search Engine Ranking Algorithm: What Marketers Need to Know*, SEARCH ENGINE J. (Aug. 14, 2018), https://www.searchenginejournal.com/amazon-search-engine-ranking-algorithm-explained/265173/. Using Amazon's fulfillment services ties sellers to other Amazon services, such as loans; because sellers relinquish access to their wares upon delivering them to Amazon warehouses, they lack collateral to secure traditional bank loans and must use Amazon's own lending services. Amazon's constantly-spinning flywheel traps sellers into using so many of the company's services that even when Amazon becomes an objectively inferior platform for sellers, they continue to patronize Amazon rather than competing platforms.

On March 17, Amazon issued a statement that the company was temporarily prioritizing fulfillment of so-called "essential" items from its warehouses.[13] The rules meant that third-party sellers of items Amazon deemed "non-essential" could not ship new inventory using Amazon's fulfillment service, FBA. Third-party sellers with existing "non-essential" inventory in Amazon's warehouses also reported that, for their Prime-eligible items, delivery times now far exceeded the usual two-day shipping guarantee.[14]

Sellers of items that Amazon deemed "non-essential" who wanted their businesses to survive attempted to continue satisfying orders placed on Amazon's website without relying on FBA. This meant that sellers' items would lose Prime designation, a powerful attraction for customers, even though the sellers could use outside providers to offer much faster shipping speeds than customers would get with Prime shipping. This option faltered, however, when sellers found that Amazon abused the power of its platform and represented—*falsely*—to customers that seller-shipped items would take much longer to arrive than sellers told Amazon.[15] An investigation by *Recode* confirmed these anecdotal seller reports.[16] That investigation found that Amazon actually *concealed* fast shipping times for products that did not have a Prime designation, even though—by virtue of Amazon's own policy decision—Prime was no longer an acceptable stand-in for fast shipping. Amazon told *Recode* that the concealment of shipping times was "unintentional" and that it was working to fix the issue. Whether or not Amazon intentionally harmed the businesses of the small retailers with which it directly competes, this episode highlights the extent of Amazon's power over these competitors.

Before Amazon allowed US sellers to resume delivery of "non-essential" products in mid-April,[17] seller forum postings revealed pervasive confusion about the company's determination of what constituted an "essential" item, and suspicion that such determinations were self-interested. Amazon had communicated to sellers that "essential" items included "household staples, medical supplies, and other high-demand products for customers"[18] and that it considered "many factors" when determining eligibility for the "essential" categorization.[19] One seller, however, asked why the company deemed that "nail files and teddy bears are essential. But a workbook for my 3-year old to keep him active and a textbook needed for a course exam are not."[20] A second seller claimed that many of the products Amazon has continued to prioritize are in fact *not* essential, and were selected in order to "maximize

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[13] *Amazon warehouses will stop accepting non-essential items amid COVID-19 outbreak*, GEEKWIRE (Mar. 17, 2020), https://www.geekwire.com/2020/amazon-warehouses-will-stop-accepting-non-essential-items-company-triages-amid-covid-19-outbreak/.

[14] *The coronavirus impact on Amazon sellers: Part 2*, DIGITAL COMMERCE 360 (Apr. 6, 2020), https://www.digitalcommerce360.com/article/amazon-seller-news/.

[15] Comments to "April 5th 'Nonessential' items for FBA still unavailable?" Amazon Seller Forums, https://sellercentral.amazon.com/forums/t/april-5th-nonessential-items-for-fba-still-unavailable/605253/30.

[16] *Amazon says it unintentionally hid some competitors' faster delivery options*, RECODE (Mar. 26, 2020), https://www.vox.com/recode/2020/3/26/21193928/amazon-delivery-delays-april-21-23-faster-speed-sellers-marketplace-buy-button.

[17] Amazon to Resume Delivery Of Nonessential Products, PYMNTS (Apr. 13, 2020), https://www.pymnts.com/news/delivery/2020/amazon-resume-delivery-nonessential-products/.

[18] Comments to "COVID-19: Removal order delays and long-term storage fee waiver" Amazon Seller Forums, https://sellercentral.amazon.com/forums/t/covid-19-removal-order-delays-and-long-term-storage-fee-waiver/597803.

[19] Temporarily prioritizing products coming into our fulfillment centers, Amazon Seller Central, https://sellercentral.amazon.com/gp/help/external/help.html?itemID=F37V7QBB8WSVF43.

[20] *See* "April 5 'Nonessential' items," *supra.*

profit." The seller went on to ask why Roku-brand consumer electronics were deemed "essential" while home and kitchen products were excluded from this categorization.[21]

Amazon's own employees echoed this skepticism. According to a nationwide online survey of 4,348 Amazon workers conducted by Change to Win between April 29 and May 9, Amazon continued to ship non-essential items such as hammocks, fish tanks, sex toys, and pool floaties.[22] In fact, seventy percent of fulfillment center workers reported that half or more of the items they handled were non-essential.

These accounts from both workers and sellers demonstrate that Amazon's unilateral decision-making process around essential items has been neither predictable nor transparent. Sellers seeking recourse have few options: One law firm that represents third-party sellers in Amazon's internal "Seller Support" process calls the company's procedures "a Kafkaesque bureaucracy with bad writing," with "inscrutable rulings [that] emerge as if from a black box."[23] Even if sellers wanted to take more formal, external action, Amazon has bound most of them to mandatory arbitration agreements where resolution takes place outside of public view.[24]

In contrast to the U.S., in France Amazon was forced to treat shipments more even-handedly. There, both Amazon sellers and its workers, through their union, have the power to call the company to account for its actions publicly in court.[25] In April, French trade unions sued Amazon, seeking to limit Amazon's warehousing operations until Amazon implemented proper health and safety measures. An appellate court granted the unions' motion, and issued a list of "essential" items that Amazon could continue shipping. These essential items were identified, not unilaterally by the company that stood to profit from them—as was the case in the U.S.—but by a regional tribunal.[26]

U.S. sellers did not benefit from the same disinterested judgment that kept workers safe and sellers satisfied in France. Instead, they were subjected to Amazon's own internal, opaque, and potentially self-interested decision-making procedures. Indeed, because Amazon physically controls the

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[21] *Id*. An outside commentator dismissed the idea that Roku products were a problem, and observed instead that Amazon had not designated any of its own Amazon-branded products as non-essential. *As Amazon limits shipping of 'non-essential' items, every single one of its own products remains in stock*, ANDROID POLICE (Mar. 26, 2020), https://www.androidpolice.com/2020/03/26/amazons-essential-shipping-apparently-includes-every-single-one-of-its-products/

[22] Change to Win, *Amazon Worker COVID-19 Survey Data Brief* (May 21, 2020), https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/5ec67b15a155792a0f9ef435/1590065963743/Amazon-Worker-COVID-19-Data-Brief.pdf.

[23] *The Biggest Abuser of Forced Arbitration Is Amazon*, AM. PROSPECT (July 10, 2020), https://prospect.org/labor/biggest-abuser-forced-arbitration-amazon/.

[24] *Id.*

[25] *Amazon amends seller terms worldwide after German antitrust action*, TECHCRUNCH (July 17, 2019), https://techcrunch.com/2019/07/17/amazon-amends-seller-terms-worldwide-after-german-antitrust-action/.

[26] *France: Court Orders Amazon France to Limit Its Activity to Sale of Essential Items*, GLOBAL LEGAL MONITOR (May 5, 2020), https://www.loc.gov/law/foreign-news/article/france-court-orders-amazon-france-to-limit-its-activity-to-sale-of-essential-items/. The list of items that Amazon could ship was limited by the trial court to the following 'essential' product categories: food, hygiene and medical products. The appeal judgement further refined and expanded that list, which now includes both 'essential' products as well as products deemed conducive to upholding the government's 'work from home' guidelines. The court stated that products listed on Amazon on April 21 under the following categories can be shipped from French warehouses: 'High-tech, I.T. and office products', 'Animal products' listed under the 'House, DIY and animal' section of amazon.fr, 'Body care, Men, Nutrition and pharmaceutical products' listed under the 'Beauty, Health and Wellbeing' section of amazon.fr, 'Grocery, beverage and home maintenance' products.

inventory that sellers who use FBA maintain at Amazon warehouses, Amazon's designation of essential items kept sellers from accessing and earning income on their own inventory and left them with thousands of "pending" orders placed by impatient customers. When Amazon did start accepting those products again, in mid-April, it placed strict limits on the quantity it would accept, which meant that some sellers were unable to satisfy pending orders or increased demand, and became concerned about their ability to make payments on their Amazon-funded loans.[27] Delivery times only began returning to pre-pandemic levels in mid-May, which is also when the company began accepting normal levels of inventory from third-party sellers.[28]

However, in spite of the enormous hindrances Amazon placed on the operations of sellers in the United States, sellers did not shift to competing platforms. This was the case even though those platforms did not experience extended shipping times and do not, as a condition of product visibility, require sellers to give up control of their inventory.[29] In mid-April, a month after Amazon reduced the level of its services to third-party sellers, the research firm Marketplace Pulse found that there had been a slight increase in Walmart's seller base and no increase at all in new sellers on eBay, Target, Google Shopping, or other multi-sided ecommerce platforms.[30] This was true even as consumers reportedly began shopping on those platforms more frequently than they had before the pandemic, ostensibly making them more attractive places to sell.[31]

A ProPublica investigation offered one specific explanation for sellers' behavior, in addition to the existing power that Amazon wields over sellers: in response to pandemic-related demand, the company increased its "suggested" product inventory levels for third-party sellers on its platform.[32] Like many of Amazon's "suggestions" for sellers, this one could double as an ultimatum. If third-party sellers do not maintain their "suggested" inventory levels, their products are demoted in search results and lose the "best seller" label that leads to improved sales. Sellers reported to ProPublica that, as a result, they sent all available inventory to Amazon, to the detriment of grocery and other retailers who do not disfavor sellers' products based on their inventory levels.[33] This means that Amazon's hold over sellers effectively took food from the shelves of neighborhood grocery stores—many of which began offering delivery as essential businesses—and moved it to Amazon's own warehouses, where it earned fees for Amazon. Assuming seller reports are accurate, Amazon's actions represent an extraordinary flexing of market muscle and true peril to a free market. A company that will amass all available supplies of certain

[27] *Sellers' Amazon loans at risk as company limits warehouses to essential goods*, REUTERS (Mar. 19, 2020), https://www.reuters.com/article/us-amazon-com-essential-merchants/sellers-amazon-loans-at-risk-as-company-limits-warehouses-to-essential-goods-idUSKBN21645O. Amazon later paused loan payments and interest accrual until May 1. *Amazon's New 'Essential Items' Policy Is Devastating Sellers*, WIRED (Mar. 24, 2020), https://www.wired.com/story/amazon-essential-items-policy-devastating-sellers/.

[28] *Amazon Says Deliveries Returning to Normal After Covid Crush*, BLOOMBERG (May 12, 2020), https://www.bloomberg.com/news/articles/2020-05-13/amazon-says-delivery-speed-returning-to-normal-after-covid-crush.

[29] Other marketplaces rely on sellers stocking their own inventory and fulfilling their own orders. Walmart, for example, was "still displaying relatively fast shipping times" on March 24. *Amazon's New 'Essential Items' Policy, supra*.

[30] *Sellers are Not Diversifying as Amazon Struggles,* MARKETPLACE PULSE (Apr. 17, 2020), https://www.marketplacepulse.com/articles/sellers-are-not-diversifying-as-amazon-struggles.

[31] *Amazon Says Deliveries Returning to Normal After Covid Crush*, *supra.*

[32] *The Amazon Lockdown: How an Unforgiving Algorithm Drives Suppliers to Favor the E-Commerce Giant Over Other Retailers*, PROPUBLICA (Apr. 26, 2020), https://www.propublica.org/article/the-amazon-lockdown-how-an-unforgiving-algorithm-drives-suppliers-to-favor-the-e-commerce-giant-over-other-retailers.

[33] *Id.*

goods begins to look alarmingly like a monopsonist exercising market power. Action such as this during a national pandemic would exploit desperate companies and people for considerable gain.

## The Pandemic Positioned Amazon to Further Exploit Warehousing & Storage Workers

Workers in warehousing and storage have occupied a contradictory place during the pandemic. Although they were classified as "essential," they did not gain significant bargaining power because workers laid off from other, non-essential jobs flooded the labor market, creating a high degree of demand for a relatively small number of essential jobs.[34] In the midst of this contraction of the overall labor market, Amazon announced it was hiring 175,000 new workers to staff its warehouses, and later decided that it would hire 125,000 of those workers in permanent positions. This brought the total number of Amazon warehousing and storage workers to approximately 425,000 by June 2020.[35] This is in a sector that, according to Bureau of Labor Statistics estimates, only counted a total of 1,194,400 employees in that month.[36] Amazon, therefore, now directly employs more than *one-third* of all warehousing and storage workers in the country, in contrast to the 25 percent it employed before the pandemic, only three months earlier.[37] Moreover, this number does not account for numerous workers in Amazon warehouses employed by Amazon contractors.[38]

At least one Amazon insider called attention to the dangerous level of power Amazon can exercise in such a concentrated labor market. In a blog post explaining his recent resignation, former Amazon executive Tim Bray contrasted the "humane" and "ethical" treatment of engineers in Amazon's AWS division with its treatment of the workers in its storage and warehousing facilities. The engineers, he said, are highly-paid and in high demand—"anyone who's unhappy can walk across the street and get

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[34] *See* Courtenay Brown, Amazon Fresh employee, discussing labor market patterns during the pandemic in her hometown of Newark and neighboring cities of Elizabeth and Linden, New Jersey. Small businesses "don't have any jobs left….There really aren't any opportunities over here *other* than Amazon that pay $15/hour. So everybody is really desperate and willing to risk their lives just to try and provide for their families." "Building a Pro-Worker Anti-Monopoly Movement," Open Markets Institute (June 2, 2020), https://youtu.be/YGQEc95wMvQ.

[35] On April 5, the Times reported that Amazon employed 400,000 warehousing and storage workers, taking Amazon's initial wave of 100,000 new hires into account. *Gaps in Amazon's Response as Virus Spreads to More Than 50 Warehouses*, N.Y. TIMES (Apr. 5, 2020), https://www.nytimes.com/2020/04/05/technology/coronavirus-amazon-workers.htmlO. On April 13, Amazon announced that it had completed the first 100,000 hires and would hire an additional 75,000 workers. Amazon's subsequent decision to make 125,000 of those 175,000 hires permanent brought its total number of employees in warehousing and storage to 425,000. *Amazon offering 125,000 full-time jobs to seasonal employees*, Amazon (May 28, 2020), https://blog.aboutamazon.com/operations/amazon-offering-125-000-full-time-jobs-to-seasonal-employees

[36] *Employees on nonfarm payrolls by industry sector and selected industry detail*, Bureau of Labor Statistics, https://www.bls.gov/news.release/empsit.t17.htm; *Warehousing and Storage: NAICS 493,* Bureau of Labor Statistics, https://www.bls.gov/iag/tgs/iag493.htm.

[37] Before Amazon hired an additional 125,000 permanent warehouse workers, it employed approximately 300,000 workers in that sector. In March 2020, the total number of warehousing and storage workers nationwide was 1,216,600. *Employment, Hours, and Earnings from the Current Employment Statistics survey (National)*, Bureau of Labor Statistics, https://data.bls.gov/timeseries/CES4349300001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true

[38] *See The Life and Death of an Amazon Warehouse Temp*, HUFFINGTON POST (Oct. 21, 2015), https://highline.huffingtonpost.com/articles/en/life-and-death-amazon-temp/. By contrast, Walmart—the nation's and the world's largest private employer—employs about 10% of all retail workers in the country. "Company Facts," Walmart, https://corporate.walmart.com/newsroom/company-facts; *Retail Trade: NAICS 44-45*, Bureau of Labor Statistics, https://www.bls.gov/iag/tgs/iag44-45.htm#workforce.

another job paying the same or better."[39] By contrast, "warehouse workers are weak and getting weaker, what with mass unemployment and (in the US) job-linked health insurance." Bray is describing conditions characteristic of a monopsony, where employment in a given job market is so concentrated that workers lack bargaining power and are forced to accept undesirable working conditions, like low wages, discrimination and harassment, and hazards to health and safety. This is what Bray called the "balance of power" between Amazon and blue-collar workers, particularly those in warehousing and storage. The imbalance has only been exacerbated by the pandemic, which has seen overall job losses of 14.7 million concentrated in low- and moderate-wage sectors in the U.S.[40]

As Amazon grew as a warehousing and storage employer, so did the size of the sector in relation to the rest of the labor market. In April 2020, at the height of shutdown orders across the country, 1,121,400 workers were employed in warehousing and storage.[41] The total number had fallen slightly from March, but it was only 5 percent lower than the number of workers employed in the sector a year earlier. The national unemployment rate, during the same period, had jumped by more than 10 percent, to 14.7 percent.[42] Job losses were most significant in leisure and hospitality; food services and drinking places; the arts, entertainment, and recreation industry; and in the accommodation industry.[43] Amazon was cognizant of this, and specifically recruited laid-off workers to fill its new positions. CEO Jeff Bezos wrote in a social media post, "[b]usinesses like restaurants and bars are being forced to shut their doors. We hope people who've been laid off will come work with us until they're able to go back to the jobs they had."[44]

Amazon already held a dominant share of many local warehousing and storage labor markets,[45] and as a result of its rapid expansion at a time of national contraction, the company gained even more power over vulnerable workers. One of the principal dangers of monopsony is the dominant employer's power to impose exploitative conditions, which workers are less inclined to challenge than they would be if there were alternative employment options available to them. In many geographic areas, the pandemic exacerbated such conditions when local and state governments restricted the operations of most employers and allowed only some to operate, with no competitive constraints preventing those employers from paying low wages for high-risk work and exposing workers to hazardous workplaces.[46]

Amazon employees reported that their company took full advantage of this power imbalance. According to Change to Win's nationwide survey of 4,348 Amazon workers between April 29 and May 9, more than a third of all Amazon workers surveyed—including those employed by Whole Foods grocery stores, and those employed by contractors staffing Amazon warehouses—specifically reported receiving no training about hazards associated with COVID-19; among warehouse workers surveyed, this

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[39] "Bye, Amazon," https://www.tbray.org/ongoing/When/202x/2020/04/29/Leaving-Amazon.

[40] *Current Employment Statistics Highlights*, Bureau of Labor Statistics (June 2020), https://www.bls.gov/web/empsit/ceshighlights.pdf; *Reopening America,* Brookings Inst. (June 2020), https://www.brookings.edu/wp-content/uploads/2020/06/Brookings-Reopening-America-FINAL.pdf.

[41] *Warehousing and Storage: NAICS 493, supra.*

[42] *Employment Situation News Release,* Bureau of Labor Statistics (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.htm.

[43] *Id.*

[44] https://www.instagram.com/p/B-A5UI_nNrD/

[45] Unions' Petition to the FTC at 13-16.

[46] Letter from Rohit Chopra, Commissioner of the Federal Trade Commission to Ass't Attorney General Makan Delrahim, Antitrust Div., Dept. of Justice, re: Department of Justice Initiative on Competition in Labor Markets at 2-3 (Sept. 18, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544564/chopra_-_letter_to_doj_on_labor_market_competition.pdf

proportion reached 41 percent.[47] This was the case despite the fact that, according to the survey respondents, six in ten Amazon workers were aware of confirmed COVID-19 cases at their workplaces. Employees who work in Amazon warehouses—in fulfillment, sortation, or delivery stations—were the most likely to report COVID-19 positive cases at their facilities, with three in four reporting cases. Of the workers who reported COVID-19 cases at their facilities, a majority reported that their workplaces were either never or only partially closed or sanitized following the confirmed cases.[48]

Workers quickly organized to raise the alarm about Amazon's abuse of power. In addition to several strikes and job actions, Amazon workers took legal action. In June, a group of workers from Amazon's massive Staten Island warehouse filed a lawsuit alleging that Amazon's failures to comply with state and federal public health guidance during the pandemic had caused injury and death to Amazon workers and their families.[49] The plaintiffs include warehouse worker Barbara Chandler, who had become infected, survived, and then faced the infections of several family members in her household, including her cousin, who died after experiencing COVID-19 symptoms.[50] The plaintiffs drew a clear link between Amazon's power as an "essential" business, operational when many competitor employers were not, and the hazards they faced. "Amazon controls its workers and undermines its workers' efforts to protect themselves and their coworkers from the virus that causes COVID-19 through a culture of workplace fear reinforced by constant technological supervision, retaliation against those who speak out, and the threat of automatic and immediate job loss in a job market where it may be impossible to find work elsewhere."[51]

Workers across the country have voiced identical fears. An Amazon Fresh worker sued the company for "fail[ing] to take even the most basic precautions to protect the employees at their San Francisco Fulfillment Center."[52] The complaint noted that "ultimately, the only option for employees who are uncomfortable with Amazon's practices are to take an unpaid leave of absence or sign-up for fewer (or no) shifts."[53] The option of finding work elsewhere was so remote it did not even factor in the plaintiff's life-and-death calculus. Regulators should be concerned that Amazon's growth as an employer has outpaced that of the warehouse sector as a whole. Amazon's clear awareness of its near-absolute power over warehouse workers' wages and working conditions, exemplified by Amazon's persistent disregard for the health and safety of these same "essential" workers, indicates the consequences that such growth can have.

## Amazon Has Moved Aggressively to Expand and Acquire Both Startups and Established Firms Weakened by the Pandemic.

The impact of the pandemic on the economy has been staggering worldwide. It has particularly weakened small companies, including potential competitors to Amazon in many markets where Amazon has a toehold. Because Amazon's business model turns on expansion into adjacent but not necessarily vertical product markets—for example, its transition to a retail platform at a time when its core business was retail itself, or its shift to provide cloud services for businesses with similar computing needs—it was already prepared to acquire companies that could pose potential competitive threats but would not

[47] Amazon Worker COVID-19 Survey Data Brief at 1, *supra*.
[48] *Id.*
[49] *Palmer et al. v. Amazon et al.,* E.D.N.Y. Case No. 20-cv-2468, Dkt. 1 (Compl. at ¶¶ 2-3).
[50] *Id.* at ¶¶ 17-18.
[51] *Id.* at ¶ 11.
[52] *Brent v. Amazon Fresh et al.*, Cal. Sup. Ct. Case No. CGC20584828 (Mem. in Support of Temp. Restraining Order at 1) (July 1, 2020).
[53] *Brent v. Amazon Fresh et al.*, Cal. Sup. Ct. Case No. CGC20584828 (Compl. at ¶ 100).

necessarily garner the opposition of regulators. The past several months have been a buyers' market, as entire industries faltered and startup valuations plummeted. This economic uncertainty also led some regulators to treat anticompetitive mergers more leniently than they would have otherwise, even though the post-pandemic impact of such transactions on consumers could be devastating. In the midst of all of these COVID-driven conditions, Amazon took advantage of several opportunities to acquire or otherwise expand its business, in ways that should be expected to further increase its power across a range of markets or market segments.

Before the pandemic, Amazon had attempted to revive its flagging presence in the food delivery industry by making a significant investment in the UK-based firm Deliveroo, the second-largest online restaurant platform delivery service in the UK, with 20 to 30 percent market share.[54] The British Competition and Markets Authority ("CMA") had greeted the investment with suspicion: Amazon had exited the British food delivery business in 2018, and controlling Deliveroo meant it would likely not return as an independent competitor, potentially decreasing choice for consumers if Amazon decided to reenter the market. Moreover, the combined power of Amazon and Deliveroo's established local delivery networks would likely increase the costs of entry to new competitors in the industry. Although Amazon claimed that its approximately 16 percent stake in Deliveroo would not give it material influence over the company, the CMA rejected that defense and found that it was "more likely than not to confer on Amazon the ability to exercise material influence over Deliveroo due to the cumulative impact of several avenues of influence."[55] Because of these concerns, the CMA took the position that the transaction would "substantially lessen" competition and announced an initial inquiry followed by an in-depth investigation into the transaction in late 2019.

Then, unexpectedly, the British authority reversed course. In March 2020, Deliveroo informed the CMA that as a result of the pandemic, Deliveroo "face[d] the…prospect of insolvency," and would be forced to initiate bankruptcy proceedings in the absence of Amazon's investment.[56] The following month—after meeting with Amazon and Deliveroo—the CMA announced that it was provisionally approving the merger, based on its conclusion that "as a result of the Coronavirus (COVID-19) crisis, Deliveroo is likely to exit the market unless it receives the additional funding" that Amazon sought to provide.[57]

But the CMA soon decided that its conclusion regarding Deliveroo's potential insolvency was premature: In the two months between the CMA's first and second provisional findings—issued on April 22 and June 16, 2020, respectively—it appeared that Deliveroo was no longer at risk of exiting the market as a result of the pandemic. The CMA reported that even Deliveroo's April earnings were better than forecast, and that by June, its financial position was similar to its position before the pandemic.[58] In spite of this, the CMA nevertheless again provisionally *approved* the merger, disregarding evidence from Amazon's internal documents that showed that Amazon had a strong, continued interest in the food and grocery delivery markets and would likely reenter those markets absent the Deliveroo deal, and that the pandemic had in fact made Amazon's reentry even more likely. As Just Eat Takeaway.com, a delivery

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[54] Provisional Findings: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo at 59, Comp. & Markets Auth. (Apr. 16, 2020), https://assets.publishing.service.gov.uk/media/5ea6e697e90e0704930d8a97/PFs_Report_.pdf.
[55] *Id.* at 28.
[56] *Id.* at 46.
[57] *Id.* at 63.
[58] Revised Provisional Findings: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo at 94, Comp. & Markets Auth. (June 22, 2020), https://assets.publishing.service.gov.uk/media/5efc79d63a6f4023c77a136f/Revised_provisional_findings_Amazon-Deliveroo_---_PDF_A_web_-_.pdf.

competitor, put it: "[w]ith millions of dollars at [Amazon UK's] disposal and its dominance in e-commerce secure, its position as a potential competitor into the UK [food delivery market] must surely have become even more certain."[59] The CMA's final decision on the transaction is expected on August 6; it appears likely that the agency's apparently pandemic-related analytical shift will allow Amazon's control over Deliveroo to proceed.[60]

The pandemic had a less explicit but no less powerful impact on other Amazon investments. The company announced that it was acquiring self-driving vehicle start-up Zoox in late June 2020, after the six-year-old company began seeking out potential buyers earlier this year. Zoox had laid off 120 contractors and 100 employees in April, citing pressures of the pandemic—what the company called "an unfortunate reflection of the difficult situation faced by many organizations in an uncertain economic climate."[61] Three months after shutdowns prevented Zoox from test-driving its cars, Amazon reportedly paid $1.2 billion for the company, far less than its 2018 valuation of $3.2 billion.[62]

The Zoox acquisition quickly expands Amazon's capacity in driverless technology, a key area of growth for the company. Amazon claimed publicly that the acquisition would advance Zoox's work toward passenger travel through ride-hailing.[63] But Amazon began investing in similar technologies several years ago, focusing on last-mile delivery robots, "mini tank-like delivery vehicles about the size of a cooler" designed to traverse sidewalks and carry small packages,[64] and on self-driving freight trucks, intended to alleviate a "driver shortage currently plagu[ing] the trucking industry, owing in part to the low pay and difficult schedules and conditions of the job."[65] Amazon, of course, is at least partially responsible for the driver shortage, as ecommerce increases overall shipping volume and Amazon pushes to minimize delivery costs.[66] Responding to the conditions it created, Amazon has invested in other companies focused on cargo-carrying autonomous vans and semi-trailer trucks, and the same

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[59] Just Eat Takeaway.Com, Submission to the CMA in response to its request for views on its Provisional Findings in relation to the Amazon/Deliveroo merger inquiry at 18, https://assets.publishing.service.gov.uk/media/5ec27cc1e90e071e31153684/Just_Eat_Takeaway.com_N.V_180520.pdf. UK pub-management company All Our Bars voiced the same concerns about Amazon's pandemic-"enhanced…dominance in the retail world." All Our Bars Ltd., Response to the CMA's Provisional Findings, https://assets.publishing.service.gov.uk/media/5ebbf971e90e07082fa57d14/All_Our_Bars_Limited.pdf

[60] Amazon/Deliveroo Inquiry, Comp. & Markets Auth., https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry#administrative-timetable (last updated July 15, 2020).

[61] *Zoox cuts 100 jobs, a week after letting go 120 contract workers,* SILICON VALLEY BUS. J. (Apr. 14, 2020), https://www.bizjournals.com/sanjose/news/2020/04/14/zoox-cuts-100-jobs-a-week-after-letting-go-120.html

[62] *Amazon will have to invest many billions more than it's spending on Zoox to bring self-driving tech to market*, CNBC (June 26, 2020), https://www.cnbc.com/2020/06/26/amazon-spending-1-billion-on-zoox-will-have-to-invest-billions-more.html

[63] We're acquiring Zoox to help bring their vision of autonomous ride-hailing to reality, Amazon (June 26, 2020), https://blog.aboutamazon.com/company-news/were-acquiring-zoox-to-help-bring-their-vision-of-autonomous-ride-hailing-to-reality.

[64] *Amazon's autonomous robots have started delivering packages in Southern California*, SEATTLE TIMES (Aug. 12, 2019), https://www.seattletimes.com/business/technology/amazons-autonomous-robots-have-started-delivering-packages-in-southern-california/

[65] *Amazon is hauling cargo in self-driving trucks developed by Embark*, CNBC (Jan. 20, 2019), https://www.cnbc.com/2019/01/30/amazon-is-hauling-cargo-in-self-driving-trucks-developed-by-embark.html

[66] *Companies are complaining they can't find enough truck drivers to ship their stuff because of Amazon*, CNBC (Apr. 25, 2018), https://www.cnbc.com/2018/04/25/companies-are-complaining-they-cant-find-enough-truck-drivers-to-ship-their-stuff-because-of-amazon.html; *Amazon looks to reduce shipping costs, carbon footprint with 'Amazon Day' program*, Chain Storage (Feb. 28, 2019), https://chainstoreage.com/technology/every-day-can-be-amazon-day-for-prime-members.

technology powers the autonomous forklifts that move goods around Amazon's warehouses.[67] It thus seems more likely that Amazon's control of Zoox will serve its existing goals of minimizing delivery costs, time, and reliance on humans, rather than bringing the company into an entirely new industry in which it would have to compete for customers. In other words, through acquisitions such as Zoox, Amazon is positioning itself to squeeze all aspects of the delivery business: through pre-existing delivery options where it has already exercised significant power to drive down costs and create driver shortages, and now by investing in new technologies and businesses that represent the probable future of delivery.

Amazon has reportedly shown interest in other pandemic-distressed firms in adjacent or complementary markets as well, including in its entertainment segment. In early May, the company was rumored to be in talks to buy AMC Theaters. The value of the large movie theater chain halved between the end of 2019 and May 2020, after shutdown orders cut off its revenue stream, and analysts predicted that Amazon would be able to acquire the firm "at a cut rate price."[68] The vertical expansion of Amazon's existing entertainment production and streaming businesses would allow Amazon to control theatrical releases, making its projects eligible for industry awards, and according to analysts would "provid[e] Amazon both an incremental earnings stream from its own films and an attractive marketing vehicle to drive additional subscribers being exposed to the studio's films."[69]

Amazon's purchase of AMC would be facilitated by the federal Justice Department's pending withdrawal from a 70-year-old consent decree that prohibited movie studios from owning theaters, a decree that addressed the type of exclusive dealing and self-preferencing that vertical integration facilitates. Without the consent decree, all 905 Amazon-controlled AMC theaters across the United States and Europe will be able to preference Amazon-produced projects, at the expense of showing films produced by small, independent, or competing studios.[70] AMC is the largest movie theater chain in North America, with almost twice as many screens as the third largest competitor.[71] The acquisition of AMC by one of the largest providers of online content—and one of the largest media companies, period—should raise urgent consumer-protection alarm bells.

Amazon is similarly making strategic acquisitions of former retail space, and possibly retailers. In late May 2020, *Women's Wear Daily* reported that Amazon was negotiating with J.C. Penney, the retailer that had filed for Chapter 11 bankruptcy protection for restructuring several weeks earlier, after the pandemic depressed its quarterly net income to negative levels and its share value below 50 cents.[72] Reports speculated that Amazon's investment could help expand the company's apparel business, increase its warehousing footprint, and add "sophisticated omnichannel pickup" and automated fitting room technology to Amazon's assets.[73] Although J.C. Penney's real estate holdings have been called an "albatross" for the traditional retailer, Amazon's need for physical space is much different. Amazon

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[67] *How Amazon's billion-dollar buy of robotaxi developer Zoox might help it save money on deliveries in its core retail business*, SILICON VALLEY BUS. J. (July 2, 2020) (on file).

[68] *Why Amazon gobbling up AMC Theatres Doesn't Make Sense,* OBSERVER (May 15, 2020), https://observer.com/2020/05/amazon-acquiring-amc-rumors-stock-analysis-info-details/.

[69] *AMC's stock soars after report Amazon held merger talks*, MARKETWATCH (May 12, 2020), https://www.marketwatch.com/story/amcs-stock-soars-after-report-amazon-held-merger-talks-2020-05-11.

[70] AMC owns 661 theatres in the US, and 244 theatres in Europe. *AMC Theatres Closes Carmike Cinemas Acquisition to Become Largest U.S. Exhibitor*, HOLLYWOOD REP. (Dec. 21, 2016), https://www.hollywoodreporter.com/news/amc-theatres-closes-carmike-cinemas-acquisition-become-largest-us-exhibitor-958228.

[71] Leading cinema circuits in the United States and in Canada as of February 2020, by number of screens, STATISTA (June 18, 2020), https://www.statista.com/statistics/188565/north-american-movie-theater-circuits-by-number-of-screens/.

[72] JCPNQ:US, https://www.bloomberg.com/quote/JCPNQ:US?sref=WqRx4luL.

[73] *Three Tech-Related Reasons Amazon Should Buy J.C. Penney,* RETAILER (May 26, 2020) (on file).

could use the retailer's stores as a hybrid of retail space, showroom, and fulfillment center—a network of satellite distribution centers analogous to that which the Whole Foods grocery chain offered Amazon when it was acquired three years ago.[74] Even in the absence of a larger investment, Amazon has already begun taking over available facilities, like a former J.C. Penney warehouse outside of Milwaukee that will serve as one of its five last-mile hubs in that metropolitan area.[75]

Amazon has also taken advantage of its increased pandemic-related cash flow to lay the groundwork for expanding its core business. At a time when the vast majority of commercial flights were grounded and cargo airlines were expected to grow only cautiously, Amazon expanded its fleet of more than 70 delivery planes by leasing twelve new Boeing 767s.[76] One recent academic study, offering "Insights into Amazon Air, 2020's Transportation Juggernaut," observed that "at a time when many other airlines are downsizing due to the COVID-19 pandemic, Amazon's push for faster and cheaper at-home delivery is moving ahead on an ambitious timetable. Amazon Air's robust expansion makes it one of the biggest stories in the air cargo industry in years."[77]

Over the course of the last six months, the pattern of Amazon's expansion shows how the company has seized profit from a pandemic: It has made purchases and investments at a discount, planning for a post-COVID world in which it will have attained power at the expense of firms that did not have the resources to weather the downturn. When the economy regains post-pandemic levels, Amazon will be there, bigger than ever, and—assuming closure of the deals discussed herein—ready to deliver food, using autonomous, driverless vehicles, screening its own films in its own theatres, selling clothing using automated fitting room technology through a ready-made network of last-mile warehouses, and flying a dozen new cargo planes on more than 100 flights a day.[78]

## The Pandemic that Weakened the American Economy Will Make Amazon Stronger

Even before the COVID-19 pandemic, there were many reasons to raise the alarm regarding the fairness of Amazon's practices, the scope of its power, and the adequacy of existing regulation to cabin Amazon's increasingly aggressive and expansive use of its power. We have now seen how Amazon responds when the chips—for others—are down: It charged into the crisis increasing its retail market share and expanding to new markets and new technologies, while at the same time further squeezing two of the most vulnerable constituencies in its ecosystem, third-party sellers and warehousing and storage workers. Although these acts—and opportunities—were driven by the pandemic, there is no reason to expect that they will be limited to it. The ecommerce share of the retail market, the vertical expansion of Amazon's business, and Amazon's ability to abuse its relationships with sellers and workers will all continue to inform, enable, and enrich the company in the future.

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[74] *A J.C. Penney REIT Is an 'Odd Value Proposition' in Today's Climate. But its Stores Could Attract a Wealthy Buyer*, NAT'L REAL ESTATE INVESTOR (May 26, 2020), https://www.nreionline.com/retail/jc-penney-reit-odd-value-proposition-today-s-climate-its-stores-could-attract-wealthy-buyer.

[75] *Amazon.com confirmed to take over part of J.C. Penney's former Wauwatosa warehouse*, MILWAUKEE BUS. J. (June 9, 2020) (on file).

[76] Press Release: Amazon Air expands aircraft fleet (June 3, 2020), https://www.businesswire.com/news/home/20200603005770/en/Amazon-Air-Expands-Aircraft-Fleet; *Amazon again expands its fleet of widebody cargo jets*, SEATTLE TIMES (June 3, 2020), https://www.seattletimes.com/business/boeing-aerospace/amazon-again-expands-it-fleet-of-widebody-cargo-jets/.

[77] Joseph P. Schwieterman & Jacob Walls, *Insights into Amazon Air, 2020's Transportation Juggernaut* at 11, CHADDICK POLICY BRIEF (May 22, 2020), https://las.depaul.edu/centers-and-institutes/chaddick-institute-for-metropolitan-development/research-and-publications/Documents/Amazon%20Air%20Policy%20Brief%20final.pdf.

[78] *See id.* at 8 ("modestly understat[ing] flight activity" for April 23, 2020, at 113 flights).

Indeed, thus far the pandemic has exposed how Amazon will assert its power when its dominance is largely unrivaled—by either brick and mortar retail or by ecommerce providers with less well-developed fulfillment operations, and unfettered—by regulators who are hesitant to use the tools at their disposal in an uncertain economic environment. When Amazon decides unilaterally who, when, how much, and under what conditions huge numbers of merchants will sell, and huge numbers of workers will labor, the results are not fair and they are not the outcome of a freely competitive market. For several critical months, Amazon has been dictating the terms of retail distribution nationwide, affecting everything from inventory in local grocery stores to the lasting financial viability of the small merchants who compete with Amazon on its own platform.

These practices and abuses are all the more alarming because it does not appear that COVID-19 is winding down; and even when does, the economy will be forever altered. The question is how, and how much. We submit that the evidence is clear: In the absence of immediate and decisive action to curb Amazon's most abusive practices and its market power, a dominant Amazon—that edges out or undercuts competitors across a wide swath of industries, from consumer merchandise to movie content to delivery technology, and squeezes dry all the various players up and down its vertical supply chain—could be here to stay. We therefore urge the Commission to respond now, with vigorous and immediate action against Amazon.

Respectfully submitted,

International Brotherhood of Teamsters

Communications Workers of America

United Food & Commercial Workers International Union

Change to Win