

## FEDERAL TRADE COMMISSION

**IN RE PETITION FOR RECUSAL OF  
CHAIR LINA M. KHAN FROM  
INVOLVEMENT IN THE PENDING  
ANTITRUST CASE AGAINST  
FACEBOOK, INC.**

### PETITION FOR RECUSAL

Facebook, Inc. respectfully petitions Chair Lina M. Khan and the Federal Trade Commission (“FTC” or “Commission”) to recuse Chair Khan from participating in any decisions concerning whether and how to continue the FTC’s antitrust case against the company.<sup>1</sup>

### INTRODUCTION AND SUMMARY

Due process entitles any targeted individual or company to fair consideration of its factual and legal defenses by unbiased Commissioners who, before joining the Commission, have not already made up their minds about the target’s legal culpability. When a new Commissioner has already drawn factual and legal conclusions and deemed the target a lawbreaker, due process requires that individual to recuse herself from related matters when acting in the capacity of an FTC Commissioner. For example – and of particular relevance here – the D.C. Circuit deemed it an “appalling” violation of due process when a prior FTC Chair

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<sup>1</sup> See *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, Dkt. No. 72 (D.D.C. June 28, 2021) (order dismissing the FTC’s complaint). This petition addresses the agency’s pending antitrust case against Facebook, including any decision to file a revised complaint in federal court or in a Part 3 administrative proceeding based on the same or similar allegations. The recusal question presented is particularly urgent, given the Commission’s 30-day deadline for filing any amended complaint in federal court. Facebook reserves the right to seek Chair Khan’s recusal from any additional matters presenting similar prejudgment concerns.

participated in a matter against a specific defendant because he “had investigated and developed many of the[] same facts” regarding that defendant as a congressional staffer.<sup>2</sup> That precedent, as well as the federal ethics rules, compel Chair Khan’s recusal from any decisions regarding the pending antitrust case against Facebook.<sup>3</sup> Chair Khan has consistently made public statements not only accusing Facebook of conduct that merits disapproval but specifically expressing her belief that the conduct *meets the elements of an antitrust offense* under Section 2 of the Sherman Act, thereby constituting an unfair method of competition in violation of Section 5(a) of the FTC Act. Indeed, she has led an organization lobbying the Commission to impose particular remedies against Facebook and, more recently, commented publicly as to her personal beliefs on the merits of the very complaint filed by the Commission last December, the dismissal of which must be addressed in some fashion by the Commission in the coming weeks.

These statements – which Facebook vigorously disputes as unsupported and contrary to law – convey to any disinterested observer that Chair Khan, well before becoming a Commissioner, had already decided the material facts relevant to Facebook’s liability in the Commission’s pending antitrust lawsuit and already reached legal conclusions that Facebook

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<sup>2</sup> *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966)).

<sup>3</sup> Amazon.com, Inc. has filed a petition with the Commission asking that Chair Khan be recused from certain matters based on her prior statements regarding Amazon. Recusal Pet. by Amazon.com, Inc. at 1, *Motion To Recuse Chair Lina M. Khan from Involvement in Certain Antitrust Matters Involving Amazon.com, Inc.* (June 30, 2021). Facebook agrees with Amazon’s arguments concerning the circumstances where a Commissioner’s prior statements require recusal and incorporates those legal arguments, as well as the ethics analysis offered by Amazon’s expert Professor Thomas D. Morgan. See Expert Decl. of Prof. Thomas D. Morgan in Supp. of Recusal Pet. by Amazon.com, Inc. (June 29, 2021) (Ex. A).

was liable under the antitrust laws. She made these public and repeated statements in multiple roles over the course of the last decade:

- ***In Her Work for the Open Markets Institute.*** At various times between 2011 and 2018, Chair Khan worked for the Open Markets Institute, a political advocacy group, and she authored numerous articles opining on Facebook’s allegedly unlawful antitrust conduct.<sup>4</sup> While Chair Khan was the Legal Director at Open Markets, the organization advocated for the Commission to “[r]everse the approvals for Facebook [*sic*] purchases of WhatsApp and Instagram, and reestablish these as competing social networks.”<sup>5</sup>
- ***In Her Academic Writing.*** Chair Khan published academic articles discussing her belief that Facebook violated the antitrust laws. She has already concluded that Facebook “has both foreclosed competitors from its platform and appropriated their business information and functionality” and that, “[d]espite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market.”<sup>6</sup>
- ***As Leader of the House Antitrust Investigation and Report.*** From March 2019 to October 2020, Chair Khan was Majority Counsel for the U.S. House Committee on the Judiciary – Subcommittee on Antitrust, Commercial, and Administrative Law.<sup>7</sup> In her own words, she “led the congressional investigation into digital markets and the publication of [the] final report”<sup>8</sup> by the Subcommittee that purported to make *specific factual findings* and reach *legal conclusions* about the challenged acquisitions at issue in the FTC’s district court complaint against Facebook. The Report concluded that Facebook “acquired Instagram to neutralize a nascent competitive threat” that “was growing significantly at the time of the transaction” and that “Facebook’s support of

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<sup>4</sup> Lina M. Khan, Resume, <https://www.commerce.senate.gov/services/files/AB3EF7E3-1D58-4EB4-9646-3FBB5ADD144F>, at 20-21 (Ex. B).

<sup>5</sup> Press Release, Open Markets Inst., *Fines for Facebook Aren’t Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy* (Mar. 22, 2018), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy> (accessed July 14, 2021) [<https://perma.cc/P4AU-C4CZ>].

<sup>6</sup> See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 1001, 1004 (2019).

<sup>7</sup> See Lina M. Khan, Resume, *supra* note 4 (Ex. B).

<sup>8</sup> Lina M. Khan, Bio, <http://www.linamkhan.com/bio-1> (no longer active) [<https://perma.cc/9GB5-F78G>] (Ex. C). Recently, most of Chair Khan’s personal website was deleted, including the reference to her leadership role in the House Subcommittee. Accordingly, Facebook has attached as Exhibit C a copy of the “Bio” page of that website as it existed on July 1, 2021.

Instagram’s growth after acquiring it is overstated.”<sup>9</sup> The Report also concluded that “Facebook acquired WhatsApp to expand its dominance” and to take over “a maverick competitor.”<sup>10</sup>

- ***In Her Public Appearances.*** In interviews and media appearances, Chair Khan has discussed her beliefs on Facebook’s culpability under the antitrust laws, including in the context of discussing the Subcommittee’s Report. Last year, she told the *New York Times* that Facebook had engaged in “killer acquisition[s] . . . in several cases” and that “Facebook’s acquisition strategy was basically a land grab to . . . lock up the market.”<sup>11</sup> In particular, she concluded that Facebook’s “purchase of Instagram was an effort to really neutralize . . . competitive threats,” and the FTC’s decision to “allow[] [the Instagram acquisition] to go through” in 2012 was an “institutional failure” that demands “a moment of reckoning.”<sup>12</sup>
- ***In Her Posts on Twitter.*** Hours after the Commission filed its complaint against Facebook in federal district court, Chair Khan commented on the substance of the Commission’s pending litigation on Twitter, expressing her opinions on the facts and merits. She applauded the FTC and the States for “suing Facebook for violating antitrust laws—and requesting divestitures/breakups, among other forms of relief.”<sup>13</sup> She also presumed that Facebook has a monopoly in “social networking” and has a “copy-acquire-kill” strategy, calling on “enforcers” to stop Facebook.<sup>14</sup>

Although Facebook strongly disagrees with Chair Khan’s factual and legal conclusions about Facebook, it does not criticize her for having participated in the Open Markets Institute, in academic scholarship, in the Subcommittee’s investigation and subsequent Report, or, more generally, for speaking on issues of public concern and seeking to vigorously enforce the

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<sup>9</sup> Majority Staff of H. Subcomm. on Antitrust, Com. & Admin. Law of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, at 151, 154-55 (Oct. 2020) (hereinafter “Report”).

<sup>10</sup> *Id.* at 158, 160.

<sup>11</sup> See Sway, *She’s Bursting Big Tech’s Bubble*, N.Y. Times (Oct. 29, 2020) (transcript), <https://www.nytimes.com/2020/10/29/opinion/sway-kara-swisher-lina-khan.html?showTranscript=1> (accessed July 14, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> Lina M. Khan (@linamkhan), Twitter (Dec. 9, 2020), <https://web.archive.org/web/20210614143417/https://twitter.com/linamkhan/status/1336828056695136259> (Ex. D). These tweets were recently deleted but are available through the use of archive.org (*i.e.*, the “Wayback Machine”).

<sup>14</sup> *Id.*

antitrust laws. But her acknowledged leadership of the investigation and authorship of the Report, as well as her repeated and consistent public claims that Facebook is culpable for antitrust violations, would lead any disinterested observer to conclude that she has prejudged Facebook's alleged antitrust liability. Under controlling D.C. Circuit precedent, that appearance of prejudgment requires her immediate recusal from any involvement in the antitrust litigation against Facebook.

That conclusion would follow even if Chair Khan were a non-Chair Commissioner, but her elevation to Chair makes her recusal obligation particularly obvious and urgent. If she does not recuse herself, she will inevitably play a pivotal role as Chair in any upcoming decision by the Commission about how to respond to the district court's dismissal of the Commission's antitrust complaint, including whether to attempt to abandon the court case in favor of a Part 3 administrative proceeding, in which Chair Khan would ultimately rule on Facebook's liability. Because, "[a]s counsel for the [House] Subcommittee," Chair Khan "investigated and developed many of the[] same facts" the Commission has alleged and would allege here, her participation in any decision to revive this case would reflect a fundamental "insensitivity to the requirements of due process."<sup>15</sup> Any decisions made with her participation would thus be subject to dismissal on that threshold ground.<sup>16</sup> Facebook respectfully requests that Chair Khan recuse herself from any decisions regarding the Commission's pending litigation against Facebook.

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<sup>15</sup> *Cinderella*, 425 F.2d at 591.

<sup>16</sup> *Id.* at 591-92. With this filing, Facebook also puts Chair Khan and all other Commission personnel on notice to preserve all emails, memoranda, and other documents reflecting or relevant to her participation in this or any other Facebook matter, both before and after she joined the Commission.

## BACKGROUND

For the entirety of her professional career, Chair Khan has consistently and very publicly concluded that Facebook is guilty of violating the antitrust laws. She has built her career, in large part, by singling out Facebook as a professed antitrust violator in her work at the Open Markets Institute, in academic writings, as leader of a congressional investigation and drafting of a final report, in public appearances and speeches, and on Twitter.

### I. Chair Khan Has Prejudged Facebook’s Antitrust Culpability

#### A. Chair Khan’s Work On Behalf Of The Open Markets Institute

In 2011, Chair Khan started working at what would become the Open Markets Institute.<sup>17</sup> This political advocacy organization claims to have “pioneered analysis of how Google, Amazon, and Facebook wield [monopoly] power in ways that threaten democracy and individual liberty.”<sup>18</sup> Chair Khan was a Policy Analyst and Reporter at Open Markets until 2014 and later became the Legal Director of the Institute in 2017.<sup>19</sup> She held that role throughout 2018,<sup>20</sup>

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<sup>17</sup> See Lina M. Khan, Resume, *supra* note 4 (Ex. B). The Open Markets Institute “[l]aunched as an independent organization in September 2017.” Open Markets Inst., *About, Our Mission*, <https://www.openmarketsinstitute.org/our-mission> (accessed July 14, 2021) [<https://perma.cc/TTU4-RS96>]. Before 2017, “the Open Markets Team spent eight years studying, speaking, and writing about the problem of market concentration as the Open Markets Program at New America.” *Id.*

<sup>18</sup> Open Markets Inst., *Programs, Technology & Power*, <https://www.openmarketsinstitute.org/technology-power> (accessed July 14, 2021) [<https://perma.cc/9ABQ-5Y3N>].

<sup>19</sup> See Lina M. Khan, Resume, *supra* note 4 (Ex. B). As of December 12, 2017, Open Markets’ website listed Chair Khan as the “Director of Legal Policy.” Open Markets Inst., *About Open Markets* (Dec. 12, 2017), <https://web.archive.org/web/20171212181705/http://openmarketsinstitute.org/meet-our-team>.

<sup>20</sup> Chair Khan’s resume does not specify when in 2018 she stopped working at the Open Markets Institute, although she spoke on behalf of the organization at a conference on October 17, 2018. See Open Markets Inst., *Testimony by Open Markets Senior Fellow Lina Khan at the FTC’s Hearing #3: Competition and Consumer Protection in the 21st Century* (Oct. 17, 2018), <https://www.openmarketsinstitute.org/publications/testimony-open-markets-senior-fellow-lina->

during which time “Open Markets’ grassroots arm, Citizens Against Monopoly,” started a campaign called “Freedom from Facebook”<sup>21</sup> that Open Markets “spearheaded.”<sup>22</sup> The Freedom from Facebook movement described itself as “a diverse coalition of organizations asking the FTC to break up Facebook’s monopoly on American social media,” in part by “[s]pinning off WhatsApp, Instagram, and [Facebook] Messenger to establish greater competition and support market-based accountability[.]”<sup>23</sup> Freedom from Facebook announced on its website that “five members of the Federal Trade Commission . . . can make Facebook safe for our democracy by breaking it up,” and stated, “[t]ogether, we will make sure that they do.”<sup>24</sup>

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[khan-ftcs-hearing-3-competition-consumer-protection-21st-century](https://perma.cc/CDW9-VJUW) (accessed July 14, 2021). [<https://perma.cc/CDW9-VJUW>]. In July 2018, Commissioner Rohit Chopra hired Chair Khan as a Legal Fellow in his office. See Lina M. Khan, Resume, *supra* note 4 (Ex. B); Nancy Scola, *FTC Democrat hires tech industry critic who’s taken aim at Amazon*, POLITICO (July 9, 2018), <https://www.politico.com/story/2018/07/09/prominent-tech-critic-joins-dem-ftc-office-674511> (accessed July 14, 2021).

<sup>21</sup> Open Markets Inst., *The Corner Newsletter*, May 31, 2018: *Warren Buffet’s Monopoly Win – Corporate Buyers Contribute to Wage Stagnation – Growing Support for Single-Price Health Care* (May 31, 2018), <https://www.openmarketsinstitute.org/publications/corner-newsletter-may-31-2018-warren-buffetts-monopoly-win-corporate-buyers-contribute-wage-stagnation-growing-support-single-price-health-care> (accessed July 14, 2021) [<https://perma.cc/G2YG-99V5>].

<sup>22</sup> Open Markets Inst., *Freedom From Facebook’s Comment to the FTC’s “Competition and Consumer Protection in the 21st Century” Hearing* (Aug. 20, 2018), <https://www.openmarketsinstitute.org/publications/freedom-facebooks-comment-ftcs-competition-consumer-protection-21st-century-hearing> (accessed July 14, 2021) [<https://perma.cc/2CLY-E4VP>].

<sup>23</sup> Comment from Freedom from Facebook to FTC on “Competition and Consumer Protection in the 21st Century Hearing, Project Number P181201” (Aug. 20, 2018), <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ebf5afb915c861317ea5d1b/1589598972273/FFF-FTC-Comment.pdf> (accessed July 14, 2021) [<https://perma.cc/EKE9-9F6H>].

<sup>24</sup> Freedom from Facebook, Home Page (Apr. 16, 2019), <https://web.archive.org/web/20190416162812/https://freedomfromfb.com/>.

Not only did Open Markets “spearhead” this anti-Facebook group while Chair Khan was the Director of Legal Policy, Open Markets also submitted a letter to the Commission in November 2017 on “Facebook’s dominance in social networking and online advertising.”<sup>25</sup> Chair Khan personally signed the letter, asking the agency to “assess the hazards that this dominance poses to commerce and competition, basic democratic institutions, and national security.”<sup>26</sup> The letter alleged “facts” positioning Facebook as a so-called “top-tier platform monopolist[.]” claiming, among other things, that “Facebook has 77% of mobile social networking traffic in the United States” and that Facebook had “captured” 38% of “the growth in online advertising last year.”<sup>27</sup> Chair Khan and her organization claimed that “[t]he most obvious immediate step to address Facebook’s current power is to prohibit mergers between Facebook [*sic*] other potentially competitive social networks or other new and promising products and services.”<sup>28</sup>

While Chair Khan was Director of Legal Policy at the Open Markets Institute, the organization also advocated for the Commission to:

- “Spin off Facebook’s ad network[.]”<sup>29</sup>
- “Reverse the approvals for Facebook [*sic*] purchases of WhatsApp and Instagram, and reestablish these as competing social networks.”<sup>30</sup>

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<sup>25</sup> Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions> (accessed July 14, 2021) [<https://perma.cc/DT2Y-D9XM>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Press Release, *supra* note 5.

<sup>30</sup> *Id.*



- “Prohibit all future acquisitions by Facebook for at least five years.”<sup>31</sup>
- “Threaten to bring further legal action against Facebook unless top executives immediately agree to work with the FTC to restructure their corporation to ensure the safety and stability of our government and economy.”<sup>32</sup>

## **B. Chair Khan’s Academic Writings**

In the fall of 2018, Chair Khan became an Academic Fellow at Columbia Law School, where she authored law review articles that reiterated her belief that Facebook has violated the antitrust laws.<sup>33</sup> Before the Commission informed Facebook that it had opened an antitrust investigation and before the House Subcommittee ever began its antitrust investigation, Chair Khan criticized Facebook at length in an article published in 2019, beginning a five-page section of the article with the claim that “Facebook is a dominant social network.”<sup>34</sup> The article further claimed:

- Facebook “has both foreclosed competitors from its platform and appropriated their business information and functionality.”<sup>35</sup>
- “In addition to blocking apps that it deemed competitive threats, Facebook has also systematically copied them.”<sup>36</sup>
- “Facebook has established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors.”<sup>37</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> News Release, Columbia Law School, *Antitrust Scholar Lina Khan Joins Faculty* (Dec. 2, 2020), <https://www.law.columbia.edu/news/archive/antitrust-scholar-lina-khan-joins-faculty> (accessed July 14, 2021) [<https://perma.cc/LQ5K-VT5F>].

<sup>34</sup> *See Khan, supra* note 6, at 1001-05.

<sup>35</sup> *Id.* at 1001.

<sup>36</sup> *Id.* at 1002.

<sup>37</sup> *Id.* at 1003.

- “Despite facing public backlash for both its apparent deception and its pervasive surveillance, Facebook did not change course—perhaps because it no longer faced serious competition in the social network market.”<sup>38</sup>

In another article published in 2019, Chair Khan (and a co-author) again criticized Facebook, presenting various legal conclusions about Facebook’s allegedly anticompetitive conduct.<sup>39</sup> The article also accused Facebook of using data in ways “that threaten the users’ best interests, from allowing predatory advertising and enabling discrimination to inducing addiction and sharing sensitive details with third parties.”<sup>40</sup>

### **C. Chair Khan’s Leadership Of The House Majority’s Investigation And Report**

After a few months as an Academic Fellow, Chair Khan went on leave from Columbia Law School in March 2019 to join the U.S. House Committee on the Judiciary – Subcommittee on Antitrust, Commercial, and Administrative Law as Majority Counsel.<sup>41</sup> According to her website, Chair Khan “*led* the congressional investigation into digital markets and the publication of [the] final report” of the Subcommittee’s Majority Staff.<sup>42</sup> That document is explicitly styled as a report, not of the Subcommittee itself, but of the Subcommittee’s “Majority Staff,” on which Chair Khan served as “Counsel.”

A 42-page section of that Report, entitled “Facebook,” includes numerous purported factual findings that ostensibly support the Report’s core legal conclusions – that Facebook has

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<sup>38</sup> *Id.* at 1004.

<sup>39</sup> See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497 (2019).

<sup>40</sup> *Id.* at 498.

<sup>41</sup> Lina M. Khan, Resume, *supra* note 4 (Ex. B); News Release, *supra* note 33.

<sup>42</sup> Lina M. Khan, Bio, *supra* note 8 (Ex. C) (emphasis added).

“monopoly power” in a relevant antitrust market, that it both obtained and maintained that monopoly power through anticompetitive means, and that its conduct harmed consumers.

Especially relevant here, the Report’s “Facebook” section specifically purports to find that Facebook “acquired Instagram to neutralize a nascent competitive threat” that “was growing significantly at the time of the transaction” and that “Facebook’s support of Instagram’s growth after acquiring it is overstated.”<sup>43</sup> As for Facebook’s acquisition of WhatsApp, the Report purports to find that “Facebook acquired WhatsApp to expand its dominance” and to takeover “a maverick competitor.”<sup>44</sup>

The remainder of the Report’s “Facebook” section appears calculated to support, with purported legal and factual findings, the essential elements of a Section 2 offense.

*First*, the Report concludes that “social networking” is a relevant antitrust market.<sup>45</sup> The Report defines this market as separate from the market for “social media,” based on the Subcommittee’s “review[] [of] relevant market data and documents provided during the investigation.”<sup>46</sup> The Report further describes the “social networking” market as having “high entry barriers . . . that discourage direct competition by other firms.”<sup>47</sup>

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<sup>43</sup> Report, *supra* note 9, at 151, 154-55.

<sup>44</sup> *Id.* at 158, 160.

<sup>45</sup> *Id.* at 11 (identifying the market for “social networking” as one of “[s]everal markets investigated by the Subcommittee”); *id.* at 90 (distinguishing “between social networking and social media markets”); *id.* at 12 (claiming that Facebook operates “in the market for social networking”); *id.* at 13 (same); *id.* at 133 (same); *id.* at 134 (same); *id.* at 136 (same); *id.* at 138 (same); *id.* at 144 (same); *id.* at 147 (same); *id.* at 149 (same); *id.* at 160 (same); *id.* at 170 (same); *id.* at 172 (same).

<sup>46</sup> *Id.* at 139.

<sup>47</sup> *Id.* at 133.

*Second*, the Report concludes that Facebook has “monopoly power” in that supposed market.<sup>48</sup> It purports to find that “Facebook and its family of products—Facebook, Instagram, Messenger, and WhatsApp—control a significant share of users and high reach in the social networking market,”<sup>49</sup> and this “demonstrates its monopoly power.”<sup>50</sup>

*Third*, the Report concludes that Facebook illegally acquired and maintained its supposed monopoly power through anticompetitive means.<sup>51</sup> It purports to find that “the company acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market,”<sup>52</sup> including Instagram and WhatsApp. For example, the Report asserts that “the purpose of acquiring nascent competitors like Instagram was to neutralize competitive threats”<sup>53</sup> and that Facebook acquired WhatsApp because it “viewed WhatsApp as a potential threat to Facebook Messenger.”<sup>54</sup> The Report concludes that these “serial acquisitions reflect the

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<sup>48</sup> *Id.* at 12 (“Facebook has monopoly power in the market for social networking.”); *id.* at 133 (same); *id.* at 136 (same); *id.* at 13 (“Facebook’s monopoly power is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms.”); *id.* at 137 (“Facebook’s maintenance of these high market shares over a long time period demonstrates its monopoly power.”); *id.* at 147 (“Facebook has a significant data advantage [that] . . . reinforce[s] Facebook’s monopoly power.”); *id.* at 170 (“Facebook has monopoly power in online advertising in the social networking market.”).

<sup>49</sup> *Id.* at 136.

<sup>50</sup> *Id.* at 137.

<sup>51</sup> *Id.* at 12 (“Facebook acquired its competitive threats to maintain and expand its dominance.”); *id.* at 149 (same); *id.* at 14 (“The company used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms.”); *id.* at 160 (same); *id.* at 166 (“Facebook [w]eaponized [a]ccess to its [p]latform.”).

<sup>52</sup> *Id.* 149.

<sup>53</sup> *Id.* at 149-50.

<sup>54</sup> *Id.* at 150.

company’s interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats.”<sup>55</sup>

*Finally*, the Report concludes that Facebook’s conduct has caused cognizable consumer harm. It claims, “[i]n the absence of competition, Facebook’s quality has deteriorated over time, resulting in worse privacy protections for its users and a dramatic rise in misinformation on its platform.”<sup>56</sup>

Chair Khan’s personal involvement in both the investigation and the Report was extensive, including personally participating in calls, emails, and an in-person meeting with Facebook’s outside counsel. In these communications, Chair Khan regularly spoke on behalf of the Committee, describing the scope of the investigation and her beliefs on the sufficiency of Facebook’s responses.

#### **D. Chair Khan’s Public Appearances**

Before and after she led the congressional investigation into Facebook, Chair Khan publicly shared her beliefs about Facebook’s allegedly anticompetitive conduct. For example, in 2018, Chair Khan said, “to make sure Facebook isn’t acquiring further power . . . , if Facebook tomorrow announces it is acquiring another company, I would hope that the FTC would look at that very closely *and block it*,” both presuming that Facebook has too much “power” and proposing that the government block *any* future acquisition.<sup>57</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 14.

<sup>57</sup> *The Bernie Sanders Show* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10hlHI&t=1229s> (emphasis added).

Two years later, shortly after the Report was issued in October 2020, Chair Khan reaffirmed her belief in its purported conclusions about Facebook in a transcribed interview for the *New York Times*.<sup>58</sup> She expressed satisfaction that “more of [Facebook’s] predatory practices are coming to account,” such as “near-perfect market intelligence it can use . . . to cut off any competitor, to buy up that competitor, to introduce replica services.”<sup>59</sup> She claimed that Facebook had engaged in “killer acquisition[s] . . . in several cases,” in that it “acquire[d] a company for the purpose of shutting it down, for the purpose of killing it because [Facebook] recognize[d] that a product could be a threat to them.”<sup>60</sup> She reaffirmed her personal belief in the Report’s conclusions that “Facebook’s acquisition strategy was basically a land grab to . . . lock up the market” and, in particular, that its “purchase of Instagram was an effort to really neutralize . . . competitive threats.”<sup>61</sup> And she claimed that the FTC’s decision to “allow[] [the Instagram acquisition] to go through” in 2012 was an “institutional failure” that demands “a moment of reckoning.”<sup>62</sup>

In addition, Chair Khan publicly stated that Facebook and others “control the infrastructure on which digital commerce and communications take place,” noting that “[t]hey’ve used their gatekeeper power both to *extort* and to *exploit* the individuals and entities that rely on

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<sup>58</sup> See Sway, *supra* note 11.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

their technologies. They’ve maintained and extended their power through serial acquisitions and through *coercive* and *predatory* tactics.”<sup>63</sup>

#### **E. Chair Khan’s Statements On Twitter**

On December 9, 2020, the same day that the Commission and States filed their complaints against Facebook in federal district court, Chair Khan reaffirmed her prior conclusions about Facebook’s antitrust culpability in a series of tweets that are no longer visible on her Twitter profile but are available through the use of archive.org (*i.e.*, the “Wayback Machine”).<sup>64</sup> In those tweets, she applauded the FTC and state attorneys general for “suing Facebook for violating antitrust laws—and requesting divestitures/breakups, among other forms of relief.”<sup>65</sup> She described the “States’ complaint [as] especially impressive” in that it “fully showcas[ed] how Instagram & WhatsApp acquisitions were part of [a] broader monopoly maintenance strategy.”<sup>66</sup> She further presumed that Facebook has a monopoly in “social networking” and has long used a “copy-acquire-kill” strategy to preserve its dominance, calling on “enforcers” to stop Facebook from continuing this strategy.<sup>67</sup> She also criticized Facebook for making “another acquisition” just “two days before being sued by the federal government & 48 AGs for a series of illegal acquisitions.”<sup>68</sup>

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<sup>63</sup> Andy Fitch, *Concentrated Control: Talking to Lina Khan*, L.A. Rev. of Books (Dec. 19, 2020), <https://blog.lareviewofbooks.org/interviews/concentrated-control-talking-lina-khan/> (accessed July 14, 2021) [<https://perma.cc/B3XZ-J25G>] (emphases added).

<sup>64</sup> Lina M. Khan, Twitter, *supra* note 13 (Ex. D).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

## II. Chair Khan’s Prejudgment Of Facebook’s Broader Conduct

Chair Khan has also made numerous statements that would demonstrate to a disinterested observer that she has a broadly negative view of the company. For instance, in one of her academic articles, Chair Khan and a co-author analogized Facebook to a doctor, named “Marta Zuckerberg,” who “has planted surveillance devices all around your neighborhood as well as her office” and whose “main source of income is enabling third parties to market you goods and services.”<sup>69</sup> The emphasis of the comparison was that, “unlike doctors, Facebook does not come close to putting its customers first in any serious sense—notwithstanding Zuckerberg’s protestations to the contrary.”<sup>70</sup> The article also described how Facebook “serves (or disserves)” its users, characterizing the relationship as “an elaborate system of social control whose terms are more imposed than chosen.”<sup>71</sup>

Going further, Chair Khan alleged that Facebook is “associated with a host of social ills,” including “serving as a tool for the incitement of genocide in Myanmar” and “amplifying the influence of ‘fake news,’ conspiracy theories, bot-generated propaganda, and inflammatory and divisive content more broadly.”<sup>72</sup> Again, consistent with the Open Markets Institute’s Freedom from Facebook mission, Chair Khan supported “antitrust lawsuits reversing key acquisitions and penalizing forms of monopoly leveraging” and suggested that “Facebook and Google have achieved their dominance through anticompetitive means.”<sup>73</sup>

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<sup>69</sup> Khan & Pozen, *supra* note 39, at 514.

<sup>70</sup> *Id.* at 514 n.81.

<sup>71</sup> *Id.* at 520.

<sup>72</sup> *Id.* at 526-27 (footnote omitted).

<sup>73</sup> *Id.* at 538-39.



Facebook reiterates that it is not seeking Chair Khan’s recusal because she has generally criticized “Big Tech” or expressed an eagerness to vigorously enforce the antitrust laws. Rather, recusal is appropriate because she has consistently and repeatedly concluded that Facebook in particular has engaged in conduct that satisfies the elements of an antitrust offense under existing law. For the reasons discussed below, Chair Khan’s public prior statements would lead any disinterested observer to conclude that her participation in this matter would deny Facebook due process.

## ARGUMENT

### **I. Commissioners Must Be Recused When Their Prior Congressional Work Or Public Statements Convey An Appearance That They Have Prejudged The Liability Of A Particular Defendant**

Cases from the D.C. Circuit and other courts are directly on point and unequivocal in their holdings. The relevant court cases clearly invalidated FTC decisions tainted by the participation of a Commissioner whose prior investigatory work or public statements would lead “a disinterested observer [to] conclude” that she “has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”<sup>74</sup> The Sixth Circuit’s holding in *American Cyanamid* – which the D.C. Circuit reaffirmed in *Cinderella* – is particularly relevant because the due process violation in that case is nearly identical to the due process violation the Commission would commit here in the absence of Chair Khan’s recusal.

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<sup>74</sup> *Cinderella*, 425 F.2d at 591 (internal citation omitted); see also *Am. Cyanamid*, 363 F.2d at 757; *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated and remanded on other grounds, 381 U.S. 739 (1965); see also *Inova Health Sys. Found.*, 2008 WL 2307161, at \*3 (F.T.C. May 29, 2008) (citing *Cinderella*, 425 F.2d at 591, and explaining that disqualification is appropriate “if there [is] a demonstration of bias, prejudgment or apparent unfairness on the part of the decision-maker be he an ALJ or a Commissioner”).

In *American Cyanamid*, FTC Chair Paul Rand Dixon refused to recuse himself from an antitrust case, even though, as counsel to a Senate Subcommittee, he had “played an ‘active role’ in an [antitrust] investigation by that Subcommittee of many of the same facts and issues and of the same parties as are involved in this [FTC] proceeding, and participated in the preparation of the report of the Subcommittee on the same facts, issues and parties.”<sup>75</sup> The Sixth Circuit was “not impressed with the Commission’s argument that the proceedings before the Senate Subcommittee had no relationship to the proceedings before the Commission because the former were ‘legislative’ and ‘investigative’ in nature.”<sup>76</sup> And it concluded that Chair Dixon’s participation in the FTC’s case against the same defendants for the same conduct “amounted to a denial of due process which invalidated the order under review.”<sup>77</sup> The court added: “It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.”<sup>78</sup>

The D.C. Circuit reaffirmed that holding in *Cinderella* several years later. There, the court vacated a different FTC order on the ground that Chair Dixon had given a speech that, in one passage, appeared to prejudge the defendants’ legal culpability. The court held that FTC Commissioners may not “make speeches which give the appearance that [a] case has been prejudged” because doing so “may have the effect of entrenching a Commissioner in a position

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<sup>75</sup> *Am. Cyanamid*, 363 F.2d at 763, 767.

<sup>76</sup> *Id.* at 767.

<sup>77</sup> *Id.* (quoting *Texaco*, 336 F.2d at 760) (ellipsis omitted).

<sup>78</sup> *Id.*

which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.”<sup>79</sup>

The D.C. Circuit then pointedly criticized Chair Dixon for his participation in the earlier FTC matter at issue in *American Cyanamid*. The court agreed with the Sixth Circuit that Chair Dixon had displayed an “appalling . . . insensitivity to the requirements of due process” when – “[i]ncredible though it may seem” – he participated in an FTC case against particular defendants even though he “had investigated and developed many of the[] same facts” asserted against those defendants as a congressional staffer.<sup>80</sup>

For recusal purposes, Chair Khan stands in an even worse position than Chair Dixon. Like Chair Dixon, she “played an ‘active role’ in an investigation by [a congressional] Subcommittee of many of the same facts and issues” that would be asserted in any new FTC complaint or appeal involving Facebook, and she “participated in the preparation of the report of the Subcommittee on the same facts [and] issues.”<sup>81</sup> And, like Chair Dixon in *Cinderella*, she has made additional public statements against Facebook that “may have the effect of entrenching [her] in a position” regarding Facebook, “making it difficult, if not impossible, for h[er] to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record.”<sup>82</sup> Her participation in the congressional investigation and Report, as well as her repeated public condemnations of Facebook, independently require her recusal from

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<sup>79</sup> *Cinderella*, 425 F.2d at 590; *see also Texaco*, 336 F.2d at 760 (finding a due process violation because of a different speech by Chair Dixon).

<sup>80</sup> *Cinderella*, 425 F.2d at 591.

<sup>81</sup> *Am. Cyanamid*, 363 F.2d at 763, 767.

<sup>82</sup> *Cinderella*, 425 F.2d at 590.

participating in any decisions by the Commission regarding the future of its antitrust case against Facebook.

Specifically, as set forth above, *see supra* pages 10-13, the Report contains purported factual findings and legal conclusions to the effect that Facebook has violated Section 2 of the Sherman Act. For instance, the Report finds that Facebook obtained monopoly power in a “social networking” market, acquired Instagram in 2012 “to maintain Facebook’s position,” and that Facebook acquired WhatsApp in 2014 “to further entrench Facebook’s dominance,” all to consumers’ supposed detriment.<sup>83</sup> All of these “findings” and “conclusions” are attributable to Chair Khan, who avowedly “led the congressional investigation into digital markets and the publication of [the] final report” before joining the Commission.<sup>84</sup> Again, settled precedent requires recusal of any FTC Commissioner from an antitrust case if, in a prior job, she “played an ‘active role’ in [a congressional antitrust] investigation . . . of many of the same facts and issues and of the same parties as are involved in” the FTC case and “participated in the preparation of the report of the Subcommittee on the same facts, issues and parties.”<sup>85</sup> That is plainly the case here.

Chair Khan has also made a variety of public statements before joining the Commission that would leave any disinterested observer with the impression that she has already concluded that Facebook is liable for violating the antitrust laws. As explained in greater detail above, Chair Khan has reached definitive conclusions about essential elements of Facebook’s alleged Section 2 liability, including market definition, monopoly power, and the nature and

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<sup>83</sup> Report, *supra* note 9, at 150.

<sup>84</sup> Lina M. Khan, Bio, *supra* note 8 (Ex. C).

<sup>85</sup> *Am. Cyanamid*, 363 F.2d at 763, 767; *see also Cinderella*, 425 F.2d at 591-92.

consequences of Facebook’s acquisitions and Platform policies. She has reaffirmed these conclusions in multiple academic articles, in public appearances, and on Twitter, and has done so in the context of the very antitrust case that she might now direct or rule on in her role as Chair.

In sum, these public statements confirm Chair Khan’s deeply-held commitment to the conclusions that she drew about Facebook in the Report, independently warranting her recusal. Like the Report, her statements in law review articles, public interviews, and tweets promote her conclusions that Facebook has monopoly power in a defined antitrust market, that it acquired and maintained that monopoly power through unlawful and anticompetitive means, including specifically by acquiring Instagram and WhatsApp, and that it should now face “divestitures/breakups, among other forms of relief.”<sup>86</sup> Indeed, her statements about Facebook are far more numerous and explicit than Chair Dixon’s statements at issue in *Cinderella* that the D.C. Circuit found sufficient to vacate the FTC orders tainted by his participation.<sup>87</sup>

## **II. Chair Khan’s Recusal Is Required Now, Before The Commission Decides How To Proceed**

Chair Khan should not be permitted to participate in deciding whether and, if so, how the FTC’s case against Facebook should proceed. Due process requires a Commissioner who appears to have prejudged a case on the basis of her prior work or public statements to recuse herself from participating in that case, and a Commissioner recused on this basis cannot lawfully participate in developing the Commission’s strategy for how to proceed going forward.<sup>88</sup> Chair Khan does not come to this juncture in the agency’s decisionmaking regarding Facebook with views formed by the FTC’s investigation but rather with beliefs formed and expressed on social

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<sup>86</sup> Lina M. Khan, Twitter, *supra* note 13 (Ex. D).

<sup>87</sup> *See Cinderella*, 425 F.2d at 591; *Texaco*, 336 F.2d at 760.

<sup>88</sup> *See Cinderella*, 425 F.2d at 591.

media, in academic writings, and in the Report before she joined the Commission. What she brings to any decision regarding Facebook is thus not objective weighing of the evidence gathered in the course of the agency’s investigation, but prejudice of those very same issues from her activities outside the agency, many of which predated even the beginning of the FTC’s investigation.

Moreover, with respect to the FTC’s Part 3 procedures, there is little distinction between Chair Khan’s role as a “prosecutor” and her role as an “adjudicator.” For one thing, as a matter of historical practice, the “FTC has not lost a single case [in its administrative proceedings] in the past quarter-century”<sup>89</sup> because it reaches its own conclusions regardless of those of its Administrative Law Judges. Accordingly, if Chair Khan participates in authorizing a Part 3 complaint against Facebook, such authorization effectively guarantees that the Commission would ultimately find liability, and thus her participation in authorizing the Part 3 complaint is functionally an adjudication on the merits. Furthermore, Chair Khan’s participation in the decision as to *whether* the Commission should proceed would violate Facebook’s due process rights because of her “prejudice concerning specific controverted factual issues” and her conclusions on “the ultimate issue of liability.”<sup>90</sup> But, more than that, Chair Khan’s powers go beyond merely voting, as her role as Chair of the FTC vests her with tremendous powers to use her discretion to direct the Commission.

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<sup>89</sup> *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021).

<sup>90</sup> *Kellogg Co.*, 92 F.T.C. 877, 1978 WL 206540, at \*1 (F.T.C. Nov. 30, 1978).

No matter her role or the decision that the Commission reaches, every “government lawyer in a civil action or administrative proceeding” owes a minimal “duty of neutrality.”<sup>91</sup> When, as here, she “has a personal interest in the litigation,” or even the mere appearance of a personal interest, “the neutrality so essential to the system is violated.”<sup>92</sup> Indeed, an interested prosecutor violates the “fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion.”<sup>93</sup> As Professor Thomas D. Morgan of The George Washington University opined, “it is reasonable to conclude that an FTC Chair whose impartiality could reasonably be questioned by an objective observer must step aside rather than personally participate in those decisions.”<sup>94</sup>

Here, Chair Khan cannot meet any standard for neutrality that would permit her to participate in any decisionmaking regarding the FTC’s pending antitrust litigation. Her numerous statements throughout her career that reflect her belief in Facebook’s culpability under

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<sup>91</sup> *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350-51 (Cal. 1985); *see, e.g.*, Charlie Savage, *Biden Administration Punts on Due Process Rights for Guantánamo Detainees*, N.Y. Times (July 9, 2021), <https://www.nytimes.com/2021/07/09/us/politics/guantanamo-detainees-due-process.html> (accessed July 14, 2021) (noting that U.S. Attorney General Merrick B. Garland “recused himself from playing any role in the litigation” before the D.C. Circuit on “whether Guantánamo detainees have any due process rights”).

<sup>92</sup> *Clancy*, 705 P.2d at 351; *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (due process imposes enforceable “limits on the partisanship of administrative prosecutors”).

<sup>93</sup> *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987); *see also United States ex rel. SEC v. Carter*, 907 F.2d 484, 488 (5th Cir. 1990) (disqualifying SEC attorneys from leading criminal contempt prosecutions arising out of underlying SEC enforcement case); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.) (prosecutor must be disqualified if she is not “disinterested” or has “an axe to grind against the defendant”); Am. Bar Ass’n, Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

<sup>94</sup> *See* Expert Decl. of Prof. Thomas D. Morgan, *supra* note 3, at 17-18 (Ex. A).

the antitrust laws, as well as her “active role” in the investigation of “many of the same facts and issues and of the same part[y]” as counsel to the House Antitrust Subcommittee’s Majority Staff, create the appearance that she has prejudged the merits of the FTC’s case against Facebook and thus require her recusal.<sup>95</sup> Moreover, her comments that “Facebook does not come close to putting its customers first in any serious sense”<sup>96</sup> and that Facebook is “associated with a host of social ills”<sup>97</sup> suggest that Chair Khan has “an axe to grind against” Facebook.<sup>98</sup> Her negative statements about Facebook even predate her attending law school.<sup>99</sup>

A disinterested observer would conclude that she could not revisit her conclusions about Facebook with an open mind now that she is the FTC Chair, even in the face of contrary evidence. It has only been about 9 months since she led preparation of the House Antitrust Report, with its conclusions that Facebook has violated the antitrust laws. Not long before this, she was personally involved in lobbying the FTC “to address Facebook’s current power” by “prohibit[ing] mergers between Facebook [*sic*] other potentially competitive social networks or other new and promising products and services.”<sup>100</sup> And during this same time, her organization “spearheaded” the “Freedom From Facebook coalition”<sup>101</sup> and advocated for, among other things, the FTC to “[r]everse the approvals for Facebook [*sic*] purchases of WhatsApp and

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<sup>95</sup> *Am. Cyanamid*, 363 F.2d at 763.

<sup>96</sup> Khan & Pozen, *supra* note 39, at 514 n.81.

<sup>97</sup> *Id.* at 526.

<sup>98</sup> *Wright*, 732 F.2d at 1056.

<sup>99</sup> See, e.g., Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. Const. L. & Pub. Pol’y 37, 55 (2014) (written on Aug. 15, 2014).

<sup>100</sup> Press Release, *supra* note 25.

<sup>101</sup> Public Comment, *supra* note 22.



Instagram, and reestablish these as competing social networks.”<sup>102</sup> Even more than the speech at issue in *Cinderella*, Chair Khan’s public authorship of the Report and advocacy as part of the Open Markets Institute “ha[d] the effect of entrenching [her] in a position which [s]he has publicly stated, making it difficult, if not impossible, for h[er] to reach a different conclusion in the event [s]he deems it necessary to do so after consideration of the record.”<sup>103</sup>

Finally, for many of the same reasons, Chair Khan’s participation in the Facebook antitrust litigation would violate not only due process but also her obligations of impartiality under the federal ethics rules. Those rules require any federal official to “avoid an appearance of loss of impartiality in the performance of [her] official duties.”<sup>104</sup> The Office of Government Ethics has specifically noted that an official’s “political . . . association[s] . . . may raise an appearance question” requiring recusal even if they do not give rise to a “covered relationship.”<sup>105</sup> Chair Khan’s leadership of the Subcommittee’s investigation and Majority Staff Report illustrates exactly the type of “political association” that warrants recusal.

## CONCLUSION

Facebook respectfully requests that Chair Khan be recused from participating in any decisions regarding whether and how to continue the Commission’s antitrust case against

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<sup>102</sup> Press Release, *supra* note 5.

<sup>103</sup> *Cinderella*, 425 F.2d at 590.

<sup>104</sup> 5 C.F.R. § 2635.501(a); *see also* Ethics Orientation for New FTC Employees, at 10-11 (rev. June 2019), [https://www.ftc.gov/system/files/attachments/office-general-counsel/ieo\\_for\\_new\\_ftc\\_employees.pdf](https://www.ftc.gov/system/files/attachments/office-general-counsel/ieo_for_new_ftc_employees.pdf) (accessed July 14, 2021) (noting that the FTC itself requires “every employee” to “act impartially and not give preferential treatment to any private organization or individual”).

<sup>105</sup> Mem. to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at \*2 (Apr. 26, 1999).

Facebook. Chair Khan's statements – which are unsupported and contrary to law – convey to any disinterested observer that she has already decided the material facts relevant to the Commission's pending antitrust lawsuit against Facebook, well before becoming a Commissioner. Chair Khan has also already concluded that Facebook was liable under the antitrust laws. Thus, Chair Khan's recusal is necessary in order to protect the fairness and impartiality of the proceedings.

Respectfully submitted,

Dated: July 14, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that, on July 14, 2021, I sent via electronic mail Facebook, Inc.'s foregoing Petition for Recusal to the following:

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