

FEDERAL TRADE COMMISSION

IN RE MOTION TO RECUSE)
CHAIR LINA M. KHAN)
FROM INVOLVEMENT IN CERTAIN ANTITRUST)
MATTERS INVOLVING AMAZON.COM, INC.)
_____)

RECUSAL PETITION BY AMAZON.COM, INC.

INTRODUCTION AND SUMMARY

Amazon.com, Inc. respectfully petitions the Commission for recusal of Chair Lina Khan from any antitrust investigation, adjudication, litigation, or other proceeding in which Amazon is a subject, target or defendant for which Chair Khan’s prior public statements create the appearance of her having prejudged facts and/or legal issues relevant to the proceeding (the “Recusal Matters”).¹

Amazon respects the important role of the FTC in enforcing our nation’s antitrust laws and understands that large institutions will be, and should be, scrutinized. But due process entitles all individuals and companies to fair consideration of the merits of any investigation or adjudication by impartial Commissioners who have not—and, equally importantly, who do not appear to have—prejudged the issues against them. Courts have thus consistently held that due process requires a Commissioner’s recusal if, in a prior role, he or she appeared to have prejudged the facts and/or pronounced legal conclusions about the company’s liability.² Federal

¹ In her confirmation testimony, Chair Khan anticipated that “defendants before the Commission [would] petition to have [her] recused” and stated that the Commission should resolve any “prejudgment” claims. *See Nomination Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 117th Cong. (Apr. 21, 2021), <https://www.commerce.senate.gov/2021/4/nomination-hearing> (at 2:44:52 to 2:46:25).

² *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (deeming it a due process violation when an FTC Chair participated in a matter against a defendant because he “had investigated and developed many of the[] same facts” regarding that defendant as a congressional staffer); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966) (same).

ethics rules similarly require public officials, including any Commissioner, “to avoid an appearance of loss of impartiality.”³ These principles require recusal when a new Commissioner previously has expressed views that go beyond general policy commentary and has made statements about specific factual and legal issues relating to a particular company. A Commissioner who has made such statements about a particular company may not act as an investigator, prosecutor, or judge against that company where a reasonable observer would conclude that the Commissioner has already prejudged—or appears to have prejudged—material facts relating to that company’s potential liability or the issue of liability itself.

These principles require Chair Khan’s recusal from the Amazon Recusal Matters, as set forth below and in the attached declaration of George Washington University Professor Emeritus Thomas D. Morgan, a leading expert on legal and judicial ethics (*see* Exh. A). Chair Khan has made numerous and highly detailed public pronouncements regarding Amazon, including on market definition, specific conduct and theories of harm, and the purpose, effects, and legality of such conduct. Indeed, she has on numerous occasions argued that Amazon is guilty of antitrust violations and should be broken up. These statements convey to any reasonable observer the clear impression that she has already made up her mind about many material facts relevant to Amazon’s antitrust culpability as well as about the ultimate issue of culpability itself. She has publicly affirmed those conclusions not only as a legal scholar, but also as an advocate for an antitrust advocacy group and then as lead author of a major congressional report:

- *Work for an Advocacy Group Arguing for Legal Action Against Amazon.* Between 2011 and 2018, Chair Khan worked for, or was otherwise affiliated with, the antitrust advocacy group Open Markets. Citing that affiliation, she wrote several articles in prominent

³ *See* 5 C.F.R. § 2635.501(a).

publications stating that, in her view, Amazon has engaged in antitrust violations, including predatory pricing and unlawful M&A activity.

- *Academic advocacy.* In 2017, Chair Khan published *Amazon's Antitrust Paradox*,⁴ a 96-page law review note that embodies, in great detail, her belief that Amazon has violated the antitrust laws. Chair Khan has since argued that her legal conclusions about Amazon's antitrust liability warrant breaking up the company.
- *Counsel for House Antitrust Investigation and Report.* Chair Khan has stated that she “led the congressional investigation into digital markets and the publication of [the] final report”⁵ issued in October 2020 by the Majority Staff of the House Antitrust Subcommittee. That Majority Staff Report contains 83 pages of detailed allegations that Amazon has engaged in unlawful anticompetitive conduct.

As this record demonstrates—and as the press reports surrounding her nomination underscore⁶—Chair Khan has built her academic and professional career in large measure by pronouncing Amazon liable for violating the antitrust laws.

Although Amazon profoundly disagrees with Chair Khan's conclusions about the company, it does not dispute her right to have spoken provocatively and at great length about it in her prior roles. But given her long track record of detailed pronouncements about Amazon, and her repeated proclamations that Amazon has violated the antitrust laws, a reasonable observer would conclude that she no longer can consider the company's antitrust defenses with an open mind. Indeed, doing so would require her to repudiate the years of writings and

⁴ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017). As noted, Chair Khan was still affiliated with the advocacy group Open Markets when this note was published.

⁵ Lina Khan, Bio, <http://www.linamkhan.com/bio-1> (last visited June 20, 2021); see 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* 9 (Comm. Print 2020) (“Majority Staff Report”).

⁶ See, e.g., Kate Cox, *White House Reportedly Plans to Name Amazon Foe Lina Khan to FTC*, Ars Technica (Mar. 9, 2021), <https://arstechnica.com/tech-policy/2021/03/white-house-reportedly-plans-to-name-amazon-foe-lina-khan-to-ftc/>; Bryan Koenig, *Biden Officially Picks Amazon Critic Lina Khan for FTC Post*, Law360 (Mar. 22, 2021), <https://www.law360.com/articles/1367515/biden-officially-picks-amazon-critic-lina-khan-for-ftc-post>; Monica Nickelsburg, *Amazon's Antitrust Adversary: What Lina Khan's Senate Hearing Reveals About Big Tech's Future*, GeekWire (Apr. 21, 2021) <https://www.geekwire.com/2021/amazons-antitrust-adversary-lina-khans-senate-hearing-reveals-big-techs-future/>.

statements that are at the foundation of her professional career. These concerns are all the greater now that she has been designated Chair, a role in which she will direct agency staff and run the agency on a day-to-day basis.⁷ In the absence of recusal, she will be directly involved in, and will exercise direct supervisory authority over, virtually all aspects of any investigation of Amazon as well as any prosecutorial or adjudicatory decisions relating to the company. She should therefore be recused from the Amazon Recusal Matters, as discussed herein.

BACKGROUND

1. Chair Khan's Prejudgment of Amazon Issues in Her Work on Behalf of a Group Advocating for Legal Action Against Amazon.

Open Markets is a political advocacy group devoted to “influencing enforcement” of the antitrust laws and “[s]hining a light on monopoly power and its dangers to democracy through ... op-eds and articles ... that reach large, diverse audiences.”⁸ Chair Khan worked full-time at Open Markets as a Policy Analyst from 2011 to 2014; remained affiliated with the group as a Fellow during law school from 2014 to 2017; and rejoined it full-time as Legal Director from 2017 to 2018.⁹ Throughout this period, Chair Khan published multiple opinion pieces arguing

⁷ See Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 25, 1950); *see also* Reorganization Plan No. 4 of 1961, § 2, 26 Fed. Reg. 6191 (July 9, 1961).

⁸ Open Markets Institute, *Our Mission*, <https://www.openmarketsinstitute.org/our-mission> (last visited June 16, 2021); *see* Danny Vinik, *Inside the New Battle Against Google*, Politico (Sept. 17, 2017), <https://www.politico.com/agenda/story/2017/09/17/open-markets-google-antitrust-barry-lynn-000523/> (identifying Chair Khan as “[Barry] Lynn’s first hire” at Open Markets).

⁹ Lina Khan Responses to Senate Commerce Committee Nominee Questionnaire, 117th Congress, at 2-3 (Mar. 28, 2021) (“Khan Confirm. Q”; attached as Exh. B).

that Amazon has committed antitrust violations and urging the government to sue the company. All of those opinion pieces noted Chair Khan’s affiliation with Open Markets.¹⁰

First, in a May 2014 opinion piece for CNN.com, Chair Khan urged antitrust enforcers to sue Amazon under the Robinson-Patman Act for allegedly “bullying” book publishers.¹¹ At the time, Amazon was embroiled in a contractual impasse with Hachette—part of a multi-billion-euro French conglomerate and one of the Big Five publishing companies. In her opinion piece, Chair Khan endorsed Hachette’s position and severely criticized Amazon: “Understandably, authors, publishers, and others from the literary world reacted to Amazon’s latest play with alarm, cautioning that its brute exercise of power threatens not only the economic underpinnings of their industry, but also the very quality of books and diversity of ideas.”¹²

She argued that the solution could be found in “the Robinson-Patman Act of 1936,” which she characterized as “prohibit[ing] a retailer from wielding its mere size to bully suppliers for discounts.”¹³ Although she noted that the antitrust agencies do not generally enforce the Act today, she urged them to apply it against Amazon.¹⁴ Chair Khan also quoted with approval the head of the American Booksellers Association, who stated: “If the government still enforced Robinson-Patman, it would go a fair way towards limiting the power of Amazon.”¹⁵ And she left

¹⁰ The Open Markets Program was housed within the New America Foundation until 2017, when it split off and became the Open Markets Institute. All of the opinion pieces discussed below identify Chair Khan’s institutional affiliation as the Open Markets Institute or the New America Foundation.

¹¹ Lina Khan, *A Remedy for Amazon-Hachette Fight?*, CNN.com (May 30, 2014), <https://www.cnn.com/2014/05/30/opinion/khan-amazon-hachette-antitrust/index.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

no doubt that, in her view, Amazon’s conduct “flouts the principles of anti-price discrimination laws.”¹⁶

Second, in October 2014, Chair Khan published a broad-ranging attack on Amazon in *Quartz*.¹⁷ She defended Franklin Foer’s argument in the *New Republic* that “Amazon has grown so large it must be stopped through government action.”¹⁸ Chair Khan further declared that “Amazon has a monopoly in books” and “a dominant position in our economy” that “should alarm us” because it is “unlike anything we’ve seen in the last 50 years.”¹⁹ She rejected claims that Amazon has succeeded “purely through greater smarts and superior service to consumers.”²⁰ Instead, she wrote, Amazon CEO Jeff Bezos “has built his empire in part through practices that 50 years ago would have been illegal,” when “the Justice Department and Federal Trade Commission took predatory pricing as a serious threat to fair markets.”²¹ She thus left no doubt that, if she ever assumed a position of authority at the FTC, she would deem Amazon’s business activities illegal,²² whether as a Sherman Act Section 2 violation or more generally as an “unfair method of competition.”²³

Third, in January 2015, Chair Khan argued in *Salon* that the Antitrust Division “pursued the wrong company” when it charged the Big Five publishing houses with a price-fixing

¹⁶ *Id.*

¹⁷ Lina Khan, *What Everyone’s Getting Wrong About Amazon*, *Quartz* (Oct. 17, 2014), <https://qz.com/282971/what-everyones-getting-wrong-about-amazon/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 15 U.S.C. § 45(b).

conspiracy directed against Amazon.²⁴ She pronounced that Amazon “famously loss-leads on books generally and was discounting heavily on e-books specifically so that it could solidify a monopoly in the e-reader market, with its Kindle.”²⁵ She stated that this practice was the real antitrust violation that the Division should have pursued: “Pricing goods significantly below what you paid for them—for the sake of establishing dominance or driving out your competitors—is known as ‘predatory pricing,’ conduct that antitrust authorities once policed.”²⁶ Here, too, Chair Khan unmistakably signaled that, in her view, Amazon violated antitrust law and that she would prosecute the company if placed in a position of authority, despite the Department of Justice, a district court, and an appellate court all finding that Amazon was the target, not the perpetrator, of an illegal price fixing conspiracy.

Several months after Chair Khan published this *Salon* article and while she still identified herself as a “Fellow,”²⁷ Open Markets (along with Authors United) wrote a letter petitioning the Antitrust Division to investigate Amazon for supposed antitrust violations that included the violations asserted in her article.²⁸

Fourth, Chair Khan rejoined Open Markets full-time in 2017 as “Legal Director,”²⁹ in which capacity she again called for the government to sue Amazon under the antitrust laws. In a

²⁴ Lina Khan, *The Age of Amazon Is Upon Us: How One Court Battle Reveals the Growing Threat of Monopoly*, *Salon* (Jan. 16, 2015), https://www.salon.com/2015/01/16/the_age_of_amazon_is_upon_us_how_one_court_battle_reveals_the_growing_threat_of_monopoly/.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Khan, *The Age of Amazon Is Upon Us*, *supra* (identifying Khan in 2015 as “a student at Yale Law School and a fellow with the Open Markets Program at New America”); Khan Confirm. Q. at 3.

²⁸ Letter from Open Markets and Authors United to the Hon. William J. Baer, Ass’t Att’y Gen. for the Antitrust Div. (July 2015), <https://www.openmarketsinstitute.org/publications/open-markets-authors-united-letter-doj-regarding-amazon>.

²⁹ Khan Confirm. Q. at 2.

June 2017 *New York Times* op-ed entitled “Amazon Bites Off Even More Monopoly Power,” she urged the FTC to “block the company’s bid for Whole Foods.”³⁰ That acquisition, she claimed, would “enable Amazon to leverage and amplify the extraordinary power it enjoys in online markets and delivery, making an even greater share of commerce part of its fief.”³¹ Chair Khan also reiterated her prior claims that, in “building [its] vast empire,” Amazon “pric[ed] key goods and services below cost to chase out competitors.”³² She further contended that Amazon had unlawfully acquired key rivals—that it “b[ought] out innovators like Diapers.com [owned by Quidsi] after waging price wars” and then “followed its acquisition by raising prices.”³³ She concluded: “Wall Street recognizes the reality of Amazon’s market dominance. Antitrust enforcers should as well.”³⁴

2. Chair Khan’s Prejudgment of Amazon Issues in Her Academic Statements and Conclusions.

In a 2017 issue of the *Yale Law Journal*, Chair Khan (then a law student) published a 96-page article dedicated to Amazon and antitrust.³⁵ Entitled *Amazon’s Antitrust Paradox*, her article claimed, in considerable detail, that Amazon has committed numerous antitrust violations. This publication has solidified Chair Khan’s public stature as Amazon’s adversary-in-chief, highlighted in such profile articles as “How to Fight Amazon (Before You Turn 29)” (*The Atlantic*), “Amazon’s Antitrust Antagonist Has a Breakthrough Idea” (the *New York Times*), and

³⁰ Lina M. Khan, *Amazon Bites Off Even More Monopoly Power*, N.Y. Times (June 21, 2017), <https://www.nytimes.com/2017/06/21/opinion/amazon-whole-foods-jeff-bezos.html>. The article appeared in the print edition under the title “Amazon’s Growing Monopoly Bite.” *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Khan, *Amazon’s Antitrust Paradox*, *supra*. This article has been downloaded on SSRN many more times than any other article Khan has posted on that site. See Lina Khan SSRN Profile, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2291888 (last visited June 16, 2021).

“Is Amazon Getting Too Big?” (the *Washington Post*).³⁶ Even viewed in isolation from her numerous other Amazon-specific writings, this article’s content—together with the national publicity it generated—would lead a reasonable observer to conclude that Chair Khan has already made factual and legal judgments regarding Amazon and antitrust on a wide range of issues. At a minimum, this record creates the appearance that the FTC, under Chair Khan’s leadership, would not be a neutral and impartial evaluator of the evidence developed in any antitrust investigation against Amazon or in deciding whether to bring enforcement actions against the company.

First, building on her Open Markets advocacy about the book-publishing industry, Chair Khan credited claims that “DOJ was going after the wrong actor” when it sued the Big Five publishing houses for conspiracy because “it was Amazon’s predatory tactics that drove the publishers” to take the steps they did.³⁷ She faulted both DOJ and the district court for “miss[ing] the anticompetitive implications of Amazon’s below-cost pricing,” which she stated “positioned Amazon to dominate the market in a way that sets it up to raise future prices.”³⁸ Referring once more to the Hachette contractual impasse, she determined that Amazon’s “power to demand” fees from publishers for the services it provides enabled it to “recoup some of the losses it sustained in below-cost pricing” and “stems from dominance partly built through that same

³⁶ Khan Confirm. Q., Attach. (resume) at 2 (citing articles).

³⁷ Khan, *Amazon’s Antitrust Paradox*, *supra*, at 758. In accusing Amazon of antitrust violations for its bookselling practices, Chair Khan has embraced, as true, exceptionally detailed allegations about disputed factual issues—not only in the 2017 article discussed here, but also in her other writings. *See, e.g.*, Lina M. Khan, *Sources of Tech Platform Power*, 2 *Geo. L. & Tech. Rev.* 325, 327 (2018) (“Amazon has disabled the ‘buy-buttons’ for book publishers in order to extract better terms; executives have also described how the company tweaks algorithms during negotiations to remind firms of its power to sink their sales, through demoting their ranks below where users usually look when making purchases.”); Khan, *A Remedy for Amazon-Hachette Fight?*, *supra* (discussed above).

³⁸ Khan, *Amazon’s Antitrust Paradox*, *supra*, at 761.

below-cost pricing.”³⁹ And she insisted that Amazon’s pricing practices should give rise to liability “[e]ven within the narrower ‘consumer welfare’ framework” favored by the Chicago School; in her view, any suggestion to the contrary “stems from a misunderstanding of online markets generally and of Amazon’s strategy specifically.”⁴⁰ In short, she left no doubt that she had decided that she would deem Amazon’s pricing practices a violation of current predatory pricing bans under Section 2 of the Sherman Act as well as an “unfair method of competition” under Section 5 of the FTC Act.

Second, Chair Khan returned to another theme in her Open Markets advocacy by claiming that Amazon violated the antitrust laws when it acquired Quidsi and its Diapers.com subsidiary in 2011. She reiterated her conclusion that Amazon subjected Diapers.com to unlawful “predatory pricing” by charging below-cost prices for diapers and then recouping its losses after Quidsi agreed to be acquired: “After completing its buy-up of a key rival—and seemingly losing hundreds of millions of dollars in the process—Amazon went on to raise prices.”⁴¹ She also credited claims that the FTC erred in approving the deal, given “a host of red flags” that the deal supposedly presented.⁴² As with her commentary on the Whole Foods merger

³⁹ *Id.* at 765-66.

⁴⁰ *Id.* at 756, 767.

⁴¹ *Id.* at 768, 770; see also 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> (“Amazon ha[s] become so dominant through relying on a variety of business practices that frankly 50 years ago would have been found to be illegal. It engaged in predatory pricing. . . . And in certain cases, like with diapers, they did that strategy with an explicit goal of driving out a rival.”).

⁴² Khan, *Amazon’s Antitrust Paradox*, *supra*, at 770 n.305.

that she condemned two years later, this article creates the impression to any reasonable observer that she had made up her mind on key issues like market definition and supposed market power.

Third, Chair Khan claimed that Amazon had harmed competition through various forms of vertical integration, such as by making multi-billion dollar investments in delivery infrastructure and by opening its website to third-party sellers (in Amazon Marketplace) in competition with Amazon’s first-party retail operations. Rejecting the widespread view among economists that such vertical integration is normally *procompetitive*,⁴³ she wrote: “To capture fully the anticompetitive features of Amazon’s business strategy, it is vital to analyze how vertical integration across internet businesses introduces more sophisticated—and potentially more troubling—opportunities to abuse cross-market advantages and foreclose rivals.”⁴⁴ To take one example, she claimed that, as Amazon “now rolls out more AmazonBasics products, it is clear that the company has used insights gleaned from its vast Web store to build a private-label juggernaut that now includes more than 3,000 products. . . . The anticompetitive implications here seem clear: Amazon is exploiting the fact that some of its customers are also its rivals.”⁴⁵ To take another example, she claimed that Amazon “use[d] its dominance across online retail and delivery in ways that involve tying, are exclusionary, and create entry barriers,” thereby

⁴³ See, e.g., James C. Cooper, Luke M. Froeb, Dan O’Brien, & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 Int’l J. of Indus. Org. 639 (2005), <https://www.ftc.gov/public-statements/2005/02/vertical-antitrust-policy-problem-inference>.

⁴⁴ Khan, *Amazon’s Antitrust Paradox*, *supra*, at 780.

⁴⁵ *Id.* at 782-83 (internal quotation marks omitted).

“creat[ing] anticompetitive challenges in the retail sector.”⁴⁶ Here, too, she condemned Amazon for engaging in “predatory growth” to “expand wildly and dominate online commerce.”⁴⁷

Chair Khan then advocated structural remedies for the antitrust violations she claimed to have identified in the vertical relationships among these various Amazon operations. In particular, she proposed “[l]imiting Amazon’s reach through prophylactic bans on vertical integration”; “forcing it to split up its retail and Marketplace operation”; subjecting the company to “common carrier obligations”; imposing “public utility regulations to all of Amazon’s businesses that serve other businesses”; “breaking up parts of Amazon and applying nondiscrimination principles separately”; and forcing Amazon to give its rivals access to its assets under antitrust’s “essential facilities” doctrine.⁴⁸ Any reasonable onlooker would have the impression that she has already made up her mind about Amazon’s antitrust liability and about

⁴⁶ *Id.* at 779; *see also id.* at 774 (“Amazon has translated its dominance as an online retailer into significant bargaining power in the delivery sector, using it to secure favorable conditions from third-party delivery companies. This in turn has enabled Amazon to extend its dominance over other retailers by creating the Fulfillment-by-Amazon service and establishing its own physical delivery capacity. This illustrates how a company can leverage its dominant platform to successfully integrate into other sectors, creating anticompetitive dynamics.”).

⁴⁷ *Id.* at 786; *see also* Lina Khan (@linamkhan), Twitter (Dec. 23, 2020, 5:21 PM) (“Studying Amazon’s business practices reveals a panoply of ways Amazon exploits its role as a dominant marketplace to advantage itself in adjacent lines of business.”), <https://twitter.com/linamkhan/status/1341871613256581121>.

⁴⁸ *Amazon’s Antitrust Paradox, supra*, at 797, 799-800 (internal emphasis omitted).

the remedies that would be appropriate for those supposed violations. Indeed, Chair Khan has repeatedly called for breaking up Amazon throughout her career.⁴⁹

In an article published in 2019, Chair Khan continued advocating the use of such measures as “remedies” for Amazon’s supposedly anticompetitive acts.⁵⁰ This article devotes thirteen pages to Amazon’s vertically integrated operations, recites allegations of anticompetitive conduct made by Amazon’s critics, and accepts all of those allegations at face value.⁵¹ These include disputed and fact-specific claims concerning the details of Amazon’s business practices, such as the criteria used in its “ranking algorithm,”⁵² its policies regarding counterfeit goods,⁵³ its uses of third-party data,⁵⁴ the criteria it uses for launching Amazon-branded products,⁵⁵ and

⁴⁹ See, e.g., Lina Khan (@linamkhan), Twitter (Jan. 19, 2018, 12:37 PM) (“There are no easy options, but *it is time to look for a way to split Amazon into two independent companies*, each with the strength to grow and invest.”) (emphasis added) (quoting Tim Harford, Opinion, *The Case for Ending Amazon’s Dominance*, Fin. Times (Jan. 19, 2018)), <https://twitter.com/linamkhan/status/954407413628665856>; Lina Khan (@linamkhan), Twitter (June 23, 2018, 5:31 PM) (“Amazon will say ... that it provides consumers with what consumers want, and consumers happen to prefer Amazon’s batteries. *Better to require that Amazon either run a platform or sell its own batteries, but not both.*”) (emphasis added) <https://twitter.com/linamkhan/status/1010636520418611201>; *Amazon’s Book Monopoly: A Threat to Freedom of Expression?* New Am. Found. (panel held Jan. 27, 2016; recording uploaded Feb. 4, 2016) (starting at 49:52), https://www.youtube.com/watch?v=15_DWJqGMr8 (Questioner: “[W]hat are some *specific breakups of Amazon* that you think would be realistically askable ... in some sort of aggressive scenario where, you know, you’re made Attorney General tomorrow and decided to do everything you could?” Chair Khan: “... The most obvious [problem is] a vertical integration problem. So *if you’re publishing, you shouldn’t also be retailing; if you’re hosting third-party merchants, you shouldn’t also be competing with them. I think that [principle] can get you quite far and could actually expose where the fissures should be where you would break up.*”) (emphases added); Lina Khan, *The Next President Should Break Up Some Big Companies*, Wash. Post (Oct. 28, 2015) <https://www.washingtonpost.com/posteverything/wp/2015/10/28/the-next-president-should-break-up-some-big-companies/> (proposing “company breakups” and citing “online platforms, such as Amazon”).

⁵⁰ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973 (2019).

⁵¹ See *id.* at 984-96.

⁵² *Id.* at 987-88.

⁵³ *Id.* at 990-91.

⁵⁴ *Id.* at 991-92.

⁵⁵ *Id.* at 992-93.

the uses to which it puts data from Alexa applications developers.⁵⁶ For example, this article purported to find that “Amazon appropriates Marketplace merchants’ data to shape its own retail strategy” and “has responded to popular items introduced by third-party merchants by sourcing those same products directly from the manufacturer and demoting the third-party merchants in search results.”⁵⁷

3. Chair Khan’s Prejudgment of Amazon Issues in Her Work as Leader of the House Majority’s Investigation and Report.

From March 2019 to October 2020, Chair Khan served as Counsel on the Majority Staff for the U.S. House Committee on the Judiciary—Subcommittee on Antitrust, Commercial, and Administrative Law.⁵⁸ On her personal website, Chair Khan states that she “led the congressional investigation into digital markets and the publication of [the] final report” of the Subcommittee’s Majority Staff.⁵⁹ Chair Khan served in that role not as a career official working for the federal government, but rather as a member of the political staff assigned to prepare a report on behalf of the Majority.⁶⁰

⁵⁶ *Id.* at 994-96.

⁵⁷ *Id.* at 991-92, 993; *see also* Weekend Edition Sunday, *Examining Amazon’s Business Model*, NPR (Apr. 1, 2018) (interview with Lina Khan), <https://www.npr.org/2018/04/01/598630221/examining-amazons-business-model> (“And I think that is a really—a parasitic dynamic that we’re now seeing where you have these independent producers that are undertaking the initial risk of bringing a good to market, but it’s ultimately Amazon that’s able to reap off of that risk.”).

⁵⁸ Khan Confirm. Q. at 2 & Attach. (resume) at 1 (Exh. B).

⁵⁹ Khan Bio, *supra* (“Khan served as counsel to the U.S. House Judiciary Committee’s Subcommittee on Antitrust, Commercial, and Administrative Law, where she led the congressional investigation into digital markets and the publication of its final report.”); *see also* Testimony of Lina M. Khan, Nominee for Commissioner of the Federal Trade Commission, Before the S. Comm. on Commerce, Sci., & Transp. 1 (Apr. 21, 2021), <https://www.commerce.senate.gov/services/files/C6833010-7232-45CF-B1E0-3E8C471B3035> (“While in the House I helped lead a 16-month bipartisan investigation into digital markets, a top-to-bottom empirical review of how these markets are functioning[.]”).

⁶⁰ The Report was not formally issued by the Subcommittee itself or even its Democratic Members; instead, it is styled as the “Majority Staff Report and Recommendations.” Because Chair Khan acknowledges that, as “counsel,” she “led . . . publication of [the] final report,” Khan Bio, *supra*, she is properly viewed as a principal author of this advocacy document.

The Majority Staff Report made a wide range of specific accusations and legal conclusions against Amazon that built on Chair Khan’s original advocacy at Open Markets and her academic publications. These include the following:

- “Amazon has significant and durable market power in the U.S. online retail market.”⁶¹
- “Amazon has monopoly power over most third-party sellers and many of its suppliers.”⁶²
- “Amazon achieved its current dominant position, in part, through acquiring its competitors, including Diapers.com and Zappos. ... This strategy has entrenched and expanded Amazon’s market power in e-commerce, as well as in other markets.”⁶³
- “A decade ago, Amazon acquired two of its direct competitors: Zappos and Quidsi. ... Amazon viewed both online retailers as competitive threats prior to acquiring them.”⁶⁴
- “Amazon’s acquisition of Whole Foods has added to the platform’s market power in retail by increasing its buyer power over suppliers[.]”⁶⁵
- “Amazon acquiring Ring and Blink was in part to expand and reinforce its market power for its other business lines.”⁶⁶
- “Amazon’s acquisitions—including acquisitions of its direct competitors—have been key to Amazon’s attainment, maintenance, and expansion of market power.”⁶⁷
- “The company’s control over and reach across its many business lines enable it to self-preference and disadvantage competitors in ways that undermine free and fair competition.”⁶⁸
- “Due to a lack of alternatives, third-party sellers have no choice but to purchase fulfillment services from Amazon.”⁶⁹

⁶¹ Majority Staff Report, *supra*, at 15.

⁶² *Id.* at 257.

⁶³ *Id.* at 16.

⁶⁴ *Id.* at 262.

⁶⁵ *Id.* at 265.

⁶⁶ *Id.* at 309.

⁶⁷ *Id.* at 267.

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 288.

- “The anticompetitive effects of Amazon’s use of MFN clauses are particularly pronounced in the book market.”⁷⁰
- “Essentially, Amazon disrupted [the book] market, dominated it, and now wields its immense power to effectively guarantee that no competitor could possibly do the same.”⁷¹
- “Amazon’s dominance in e-books and its anticompetitive application of price parity clauses to its business relationships in this market eliminate the ability of rivals or new entrants to gain any meaningful competitive advantage relative to Amazon.”⁷²
- “Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company’s history.”⁷³
- “Amazon had been willing to lose \$200 million in a single quarter in order to pressure Diapers.com, a firm it had recognized as its most significant rival in the category. Amazon cut prices and introduced steep promotions, prompting a pricing war that eventually weakened Diapers.com. Amazon then purchased the company, eliminating its competitor and subsequently cutting back the discounts and promotions it had introduced.”⁷⁴
- “Amazon uses a predatory pricing strategy to increase its sales of smart home devices by pricing its products below cost.”⁷⁵

Soon after Chair Khan completed her work on the Majority Staff Report, she conducted a *New York Times* podcast interview in which she was introduced as the author of “an eviscerating paper about Amazon and antitrust” and “a key player in the recent congressional hearings.”⁷⁶ In that interview, Chair Khan reaffirmed the core conclusions she and her coauthors had drawn in the Report. For example, she stated that Amazon had illegally “engaged in predatory pricing” in a variety of circumstances.⁷⁷ And she asserted that Amazon had “extract[ed] leverage from

⁷⁰ *Id.* at 295.

⁷¹ *Id.* at 296.

⁷² *Id.* (cleaned up).

⁷³ *Id.* at 297.

⁷⁴ *Id.* at 397.

⁷⁵ *Id.* at 312.

⁷⁶ *She’s Bursting Big Tech’s Bubble, supra.*

⁷⁷ *Id.*

business partners” through tying arrangements that “hav[e] a range of harms,” “undermin[e] innovation and entrepreneurship,” “undermin[e] user privacy,” cause “degradation of the free and independent press,” and more generally “harm[]core economic and political liberties.”⁷⁸

Like Chair Khan’s prior assertions regarding Amazon, the Report uncritically accepts the (unfounded) allegations of Amazon’s antagonists on disputed factual issues. The House Report’s extensive bill of particulars, along with the many similar factual and legal conclusions Chair Khan has propounded against Amazon in other capacities, cover nearly every conceivable theory of liability that the FTC, under her leadership, could now investigate, prosecute, or adjudicate in any antitrust proceeding against Amazon.⁷⁹

ARGUMENT

Chair Khan’s public statements over the past decade—summarized above—show that she has reached and publicly declared firm factual and legal conclusions that Amazon’s business practices are anticompetitive, that the company should be held liable for antitrust violations, and that it should be subject to extraordinary antitrust remedies. Amazon vigorously disputes both these factual and legal conclusions. Due process entitles it, like any other person or company, to fair consideration of its defense by a Commission that is neutral and impartial in both fact and appearance. Any reasonable observer would likely conclude, however, that Chair Khan’s anti-Amazon convictions are both deeply held and integral to her professional credibility. As a result, she could not maintain an appearance of impartiality in any antitrust investigation, litigation, or

⁷⁸ *Id.*

⁷⁹ To be clear, Amazon disputes that there is any factual or legal basis for Chair Khan’s conclusions that the company has violated the antitrust laws, but this petition is not the place for resolving those disputes. Rather, the petition seeks to ensure that the Commission maintains both the fact and the appearance of impartiality in conducting and resolving those issues in any antitrust investigations of Amazon.

adjudication involving the Amazon Recusal Matters. Her participation in those matters would thus violate due process and federal ethics rules, as detailed below and in Professor Morgan’s attached declaration.

1. Chair Khan’s Prejudgment of Amazon Recusal Matters Bars Her Participation in Those Matters Under Due Process Principles.

Citing due process concerns, courts have repeatedly invalidated FTC actions tainted by the participation of a Commissioner whose prior activities present an appearance of prejudgment. In *American Cyanamid*,⁸⁰ the Sixth Circuit invalidated an FTC antitrust order in which Chairman Paul Rand Dixon participated, because he had previously investigated the same basic issues as “Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly.”⁸¹ As the court noted, Chair Dixon 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,”⁸² which criticized the companies that faced FTC scrutiny.

The court held that, given this prior role, Chair Dixon’s participation in the FTC action “amounted to a denial of due process which invalidated the order under review.”⁸³ As the court explained, “[i]t 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.”⁸⁴ The court further held that due process required the FTC order’s invalidation even though Chair

⁸⁰ *Am. Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

⁸¹ *Id.* at 763.

⁸² *Id.*

⁸³ *Id.* at 767 (cleaned up) (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated & remanded on other grounds*, 381 U.S. 739 (1965)).

⁸⁴ *Id.*; *see also id.* (FTC proceedings “must be attended, not only with every element of fairness but with the very appearance of complete fairness”) (quoting *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)).

Dixon’s “vote was not necessary for a majority” because “there [wa]s no way” to determine “the influence of one [Commissioner] upon the others.”⁸⁵ The same basis for recusal applies even more obviously here: by her own acknowledgment, Chair Khan “led the congressional investigation into digital markets and the publication of [the] final report” of the Subcommittee’s Majority Staff,⁸⁶ which includes an 83-page section that is devoted to discussion of Amazon and condemns numerous aspects of Amazon’s business as antitrust violations; and her position as Chair enables her to exercise control over the investigation well beyond that of a non-Chair Commissioner as well as to influence any enforcement decision or adjudication.⁸⁷

Several years later, in *Cinderella Career & Finishing Schools*, the D.C. Circuit invalidated a separate FTC order on the ground that one of the participating Commissioners—again, Chair Dixon—had given a speech condemning the specific companies the Commission subsequently found liable.⁸⁸ As the court found, FTC Commissioners may not “prejudge cases or ... make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position 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.”⁸⁹ The court noted that it had

⁸⁵ *Id.* at 767-68 (cleaned up) (quoting *Berkshire Emps. Ass’n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941)).

⁸⁶ Khan Bio, *supra*.

⁸⁷ Majority Staff Report, *supra*, at 247-329.

⁸⁸ *Cinderella Career and Finishing Schs. v. FTC.*, 425 F.2d 583 (D.C. Cir. 1970).

⁸⁹ *Id.* at 590 (footnote omitted); *see also* Statement of Commissioner Julie Brill, *LabMD, Inc.*, No. 9357 (Dec. 24, 2013), https://www.ftc.gov/system/files/documents/public_statements/568831/d09357_statement_of_commissioner_brill.pdf (Commissioner recused herself in response to criticism for citing a specific company in a footnote in a speech about the Commission’s data security enforcement priorities). Like the *American Cyanamid* court, the *Cinderella* court invalidated the Commission’s order even though Dixon’s vote “was not necessary for a majority.” *Cinderella*, 425 F.2d at 592.

similarly ordered Chair Dixon’s disqualification in a previous case where he had “made a speech before the National Congress of Petroleum Retailers” that expressed views on “a case against Texaco [that] was pending.”⁹⁰ There, too, a “disinterested reader of [that] speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the [FTC] Act.”⁹¹

In addition to invalidating the FTC order at issue in *Cinderella* on the basis of Chair Dixon’s speech, the D.C. Circuit took the unusual step of condemning him as well for his earlier misconduct in *American Cyanamid*, where, as discussed, the prejudgment concern arose from his congressional work. “Incredible though it may seem,” the D.C. Circuit noted, Chair Dixon “had investigated and developed many of the[] same facts” as a congressional staffer that he later embraced as an FTC Chairman.⁹² The D.C. Circuit found it “appalling to witness such insensitivity to the requirements of due process.”⁹³

Here, Chair Khan comes to the Commission with both of the independent bases for compulsory recusal recognized by these courts: (1) she “investigated and developed many of the same facts” as a congressional staffer that will be presented in the Amazon antitrust Recusal Matters *and* (2) she has made voluminous public statements—in the form of op-eds, law review articles, and recorded interviews—asserting those same conclusions. As discussed, she also repeatedly urged the government to sue Amazon for asserted antitrust violations. She has made direct statements about her view of Amazon’s culpability in connection with its sales of books, its dealings with third-party sellers, and the operation of other of its services—all issues that she

⁹⁰ 425 F.2d at 591 (discussing *Texaco*, 366 F.2d 754).

⁹¹ *Id.* (quoting *Texaco*, 366 F.2d at 760).

⁹² *Id.*

⁹³ *Id.*

will now be purportedly investigating, prosecuting, and perhaps adjudicating. A reasonable observer would therefore conclude that she appears to have prejudged these issues and likely would not analyze Amazon’s conduct with the impartial eyes required by due process.

Finally, as Professor Morgan concludes in his attached declaration, due process would require invalidation of any FTC antitrust action against Amazon tainted by Chair Khan’s participation whether she served as an adjudicator in an administrative proceeding or as a prosecutor if the Commission were to sue Amazon in federal court. The Supreme Court has emphasized that due process requires both the fact and appearance of impartiality in any adjudicatory process.⁹⁴ The Supreme Court also has confirmed that due process imposes “limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. ... [T]raditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.”⁹⁵ In the Second Circuit’s words, any defendant has a due process right to a “disinterested” prosecutor, and a prosecutor is not disinterested if she has “an axe to grind against the defendant.”⁹⁶

Any objective reviewer of Chair Khan’s long track record of public, highly detailed conclusions about Amazon would conclude that she cannot avoid the appearance of partiality

⁹⁴ See, e.g., *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016) (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncement and thus to the rule of law itself.”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (requiring judicial recusal where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”).

⁹⁵ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980); accord *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350-51 (Cal. 1985) (per curiam) (any prosecutor, including any “government lawyer in a civil action or administrative proceeding,” owes a strict “duty of neutrality”).

⁹⁶ *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) (Friendly, J.); see, e.g., *United States ex rel. SEC v. Carter*, 907 F.2d 484, 488 (5th Cir. 1990) (disqualifying FTC attorneys from leading criminal contempt prosecutions arising out of underlying FTC enforcement case); see also *FTC v. Am. Nat’l Cellular*, 868 F.2d 315, 319-20 (9th Cir. 1989).

and should recuse herself. “When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.”⁹⁷ Here, Chair Khan’s numerous past statements have been unequivocal and have played a prominent role in building her national reputation as “Amazon’s Antitrust Antagonist,” in the words of a *New York Times* headline.⁹⁸ A reasonable observer would conclude that, even in the face of contrary evidence, Chair Khan would feel a strong personal interest, extraneous to her official role as Chair, to take actions consistent with her oft-repeated positions on Amazon’s antitrust culpability.⁹⁹

2. Chair Khan’s Participation in the Amazon Recusal Matters Would Create an Appearance of Loss of Impartiality and Thus Would Violate Federal Ethics Rules.

Chair Khan’s participation in the Recusal Matters would violate not only due process, but also the rules of ethical conduct applicable to all federal officers and employees.¹⁰⁰ Although those rules focus on financial relationships, they contain a broader requirement that any federal official “avoid an appearance of loss of impartiality in the performance of [her] official

⁹⁷ *Clancy*, 705 P.2d at 351.

⁹⁸ David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. Times (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>; see also Robinson Meyer, *How to Fight Amazon (Before You Turn 29)*, Atl. Mag. (July/Aug. 2018), <https://www.theatlantic.com/magazine/archive/2018/07/lina-khan-antitrust/561743/>; Khan Confirm. Q., Attach. (resume) at 2 (citing these articles and other articles featuring Chair Khan’s statements regarding Amazon).

⁹⁹ See, e.g., *Clancy*, 705 P.2d at 350-51 (“[A] prosecutor’s duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors [P]rosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.”); cf. Exh. A, Expert Declaration of Professor Thomas D. Morgan 18 n.5.

¹⁰⁰ These ethics rules apply to “any officer or employee of an agency.” 5 C.F.R. § 2635.102(h). An agency is defined, *inter alia*, as “an executive agency as defined in 5 U.S.C. 105.” *Id.* § 2635.102(a). In turn, the definition of an agency under 5 U.S.C. § 105 includes “an Executive department, a Government corporation, and an independent establishment,” which includes the FTC.

duties.”¹⁰¹ Thus, as a general matter, an employee should avoid “participat[ing] in a particular matter involving specific parties,” even in “circumstances not specifically described” in the regulations, if “a reasonable person would question the employee’s impartiality.”¹⁰² For example, a “professional, social, political or other association not specifically treated as a covered relationship, may raise an appearance question” warranting recusal.¹⁰³ And in the analogous context of judicial disqualification, the statute requires disqualification where a judge’s “impartiality might reasonably be questioned,” and specifically where the judge “has a personal bias or prejudice concerning a party,” “has personal knowledge of disputed evidentiary facts concerning the proceeding,” or “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.”¹⁰⁴

Those familiar with Chair Khan’s anti-Amazon advocacy since at least 2014 would not view her as “impartial,” nor conclude that she could reasonably maintain an “appearance of ... impartiality,” with respect to the Amazon business practices she has repeatedly described as legal violations. Chair Khan has also maintained very recent professional associations that

¹⁰¹ 5 C.F.R. § 2635.501(a); *see id.* § 2635.502(a)(2) (creating process for review of “circumstances other than those specifically described in this section [that] would raise a question regarding [an employee’s] impartiality”).

¹⁰² U.S. Off. of Gov’t Ethics, OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *1-2 (Apr. 26, 1999). An agency may theoretically authorize participation despite a serious appearance problem, but only after concluding “that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.” 5 CFR § 2635.502(d). The factors relevant to that inquiry in a non-financial context weigh against Chair Khan’s participation here: her “role in the matter” would be unavoidably substantive rather than peripheral; she would be “called upon to exercise discretion” in (for example) directing the staff as Chair during the investigation and in voting on whether to authorize a suit; the matter is highly “sensitiv[e]” in that an FTC suit could have major repercussions for the U.S. retail industry; and “reassigning the matter to another employee” is unnecessary because the Commission is designed to function without a recused Commissioner and routinely does so. *Id.*

¹⁰³ OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2.

¹⁰⁴ 28 U.S.C. § 455.

independently “raise an appearance question” requiring recusal.¹⁰⁵ For example, it has been only about eight months since she completed preparation of the House Antitrust Report on behalf of the Majority Members of the House Antitrust Subcommittee. As noted, the standard for recusal does not require a conclusion that Chair Khan will act unfairly toward Amazon. Rather, under the objective standard for recusal, because Chair Khan’s participation in the Recusal Matters would create at least the appearance, if not the reality, of bias and prejudice, her recusal is required.

CONCLUSION

For the reasons discussed above, Amazon respectfully requests that Chair Khan be recused from participating in the Amazon Recusal Matters. Chair Khan has made extensive and detailed public statements regarding her conclusions relating to, among other issues: (i) the definition of many relevant markets in which she believes Amazon competes; (ii) Amazon’s share and power in such relevant markets; (iii) specific conduct in which she believes Amazon engaged relating to pricing, access to products and services, tying, bundling, leveraging, use of information, acquisitions, and other supposed actions; (iv) the purpose and effects on competition of such supposed conduct; and (v) the legality of such conduct under a range of antitrust laws. Accordingly, the Recusal Matters should include at least all of the current antitrust investigations of Amazon of which the Commission has notified Amazon.¹⁰⁶

¹⁰⁵ OGE Informal Advisory Mem. 99 X 8, 1999 WL 33308429, at *2.

¹⁰⁶ If Amazon learns of any other antitrust investigations or other antitrust proceedings in which Amazon is a subject, target, or defendant, Amazon reserves the right to extend this motion, or to file a new motion, for recusal of Chair Khan from such matters to the extent that they present the same or similar concerns with the appearance of prejudice.

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Respectfully submitted,



Thomas O. Barnett
Kate Mitchell-Tombras
COVINGTON & BURLING LLP
850 Tenth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 662-6000
Telefax: (202) 662-6291
E-mail: tbarnett@cov.com
E-mail: kmitchelltombras@cov.com



Heidi K. Hubbard
Kevin M. Hodges
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Telefax: (202) 434-5029
E-mail: hhubbard@wc.com
E-mail: khodges@wc.com