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Repeal of #NeverNeeded Regulations Can Help People Stay Home and Safe During the COVID-19 Crisis

Reforms to Improve Access to Work, Shopping, and Entertainment at Home Are Key During Quarantine

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As individuals and businesses continue to address the COVID-19 health crisis, access to technologies and services that have enabled large swaths of the economy to move online remains critical. Broadband Internet allows people to work from home with relatively little disruption. Electronic payments enable faster online ordering and contactless delivery of needed items, from groceries to prescriptions to takeout meals. Navigation apps allow delivery drivers to navigate their routes much more quickly and efficiently, while flexible hours make it possible to adjust schedules as needed.

Lawmakers should look to remove barriers to innovation that could yield even greater benefits. Federal and state policy makers have suspended regulations that could hinder response to the crisis. They should go further and make many of those suspensions permanent. Following are some key areas where they should focus.

Suspend Internet Sales Taxes. Online small businesses are struggling to survive during the economic shutdown. These retailers provide a safe way to get customers what they need, but they are faced with burdensome state sales tax compliance.¹ Federal and state governments should remove these tax collection obligations for the sake of small online sellers and the consumers who benefit from them staying in business.

Suspension of state-level taxes for the duration of the coronavirus health crisis would lift the compliance burden on already strained companies. A remote sales tax holiday would encourage Americans to opt for the safer option of buying online, rather than visiting a retailer in person. Now is the time to focus on lightening the load for small businesses and ensuring the physical safety of citizens, not filling the coffers of revenue-hungry states.

The 2018 *South Dakota v. Wayfair* Supreme Court decision reversed decades of precedent by allowing states to collect sales taxes on online purchases from businesses located outside their borders. This was a blow to the federalist principle of tax competition.² It also has proven to be a practical nightmare for many small and medium-sized businesses that sell online.³ Compliance costs are burdensome. Figuring out tax obligations in 10,000 distinct taxing jurisdictions—each with its own rates, definitions, and exemptions—is expensive and

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time-consuming. This problem will only get worse as more small businesses increase their presence online to compensate for shuttered physical locations.⁴

Federal lawmakers should consider preemption if states do not take action. Congress should pass legislation that prevents states from exporting their sales tax regime to businesses located wholly in other states.⁵ An origin-based system preserves the principle of “no taxation without representation,” encourages healthy tax competition among the states, and is based on sound constitutional principles.⁶ This approach goes from preferable to critical in the current economic environment.

Allow Online Sales and Delivery of Legal but Prohibited Items. Some states have regulations forbidding delivery of alcohol, others of tobacco products, and there are many other prohibitions of online sales. As it is necessary to encourage people to stay at home, all such restrictions should be lifted.

Across the country, state and local governments are setting aside rules that ordinarily bar direct delivery of certain products. States like Maryland have temporarily lifted rules that would ordinarily prohibit businesses that make and sell alcoholic beverages from delivering directly to homes.⁷ Such allowances are pragmatic attempts to sustain non-essential businesses forced to close, as well as to encourage compliance with social distancing. In Pennsylvania, for example, where all 600 state-controlled liquor stores have been shut down and online sales remain prohibited, residents have been driving to neighboring states to purchase alcohol.⁸

States have shown less pragmatism with regards to tobacco. While combustible cigarettes remain available for purchase, as they are often sold at establishments deemed essential like supermarkets and gas stations, many consumers are finding themselves suddenly cut off from the lower-risk tobacco alternatives they previously relied on to stay smoke-free. For the most part, vapor shops, which sell non-combustible e-cigarettes, have not been deemed essential. At least six states currently prohibit e-cigarette sellers from delivering devices or liquids directly to residences.⁹ Furthermore, federal lawmakers are urging the Food and Drug Administration (FDA) to ban all e-cigarette sales nationally during the coronavirus outbreak.¹⁰

Such policies do not benefit public health under normal circumstances and could prove disastrous during the current pandemic. At worst, e-cigarettes may pose about 5 percent of the risk associated with smoking traditional cigarettes and, according to clinical trials, are at least twice as effective for smoking cessation than other methods.¹¹

Bans on online sales and direct-to-consumer delivery of products that can help reduce the likelihood of smoking-related illness and death for smokers who switch also perpetuate existing health disparities. Smokers at lower socioeconomic levels and disadvantaged populations remain less likely to switch to these reduced-risk products.¹²

This is likely due to the higher initial cost of purchasing e-cigarettes, as well as the increasingly limited number of outlets selling vapor products. Such hurdles can be

insurmountable for those with fewer resources like money, time, or transportation, as well as those who have lower mobility or live in rural areas or on reservations. As a result, many individuals in these populations continue to smoke at disproportionately high rates. The lockdowns, which have shuttered the few retail outlets allowed to sell e-cigarettes, will only exacerbate these problems, leading some existing smokers to continue with their deadly habit and some who had successfully switched to vaping to return to smoking. Worse, unable to obtain vapor products through legal means, some may turn to illicit and foreign sources of dubious quality and safety.

States that have not already done so ought to immediately lift restrictions on Internet sales and direct-to-consumer delivery of age-restricted products during the coronavirus crisis. Furthermore, they should work to ensure these policies remain in effect after social distancing policies end.

Repeal Price Controls for Debit Cards and Do Not Extend Them to Credit Cards. Credit and debit cards have played essential roles for countless families during the COVID-19 pandemic and lockdown by enabling payments for delivery and pickup of groceries and medical products, while minimizing contact between merchants and customers. But, unfortunately, thanks in large part to a destructive provision of Dodd-Frank financial overhaul of 2010, many Americans lack access to the banks and credit unions that issue these payment cards.

Dodd-Frank's Durbin Amendment, sponsored by then-Senate Majority Whip Dick Durbin (D-Ill.), slapped price controls on the interchange fees that banks and credit unions charge retailers to process debit card purchases. Under the measure, debit card issuers must charge prices the Federal Reserve defines as "reasonable and proportional to the cost." In addition, fees may only cover "incremental costs," a definition that leaves out most fixed costs like computer hardware and software used to process card transactions.

The Durbin Amendment has resulted in a major windfall for the big retail firms that lobbied for it, such as Walmart, Walgreens, and Home Depot. A Home Depot executive bragged on a 2012 stock analysts' conference call that price controls could add up to \$35 million per year to the chain's bottom line.¹³

The Durbin Amendment restricts banks and credit unions to recouping only "incremental costs" in the debit card fees they charge to retailers. That means they cannot recoup from retailers the full cost of many retail debit card transactions. So who pays these costs? Consumers, who have seen costs shifted to them in the form of reduced benefits, fewer free checking account options, and higher fees at banks and credit unions. And data show that the poorest consumers have paid the biggest price.

In 2009, the year before Dodd-Frank was enacted, 76 percent of checking accounts were free of charge. By 2011, that share had fallen to 45 percent, and by 2012 to 39 percent.¹⁴ Service charges on non-interest-bearing checking accounts have also increased dramatically. A 2014 George Mason University study calculates that the Durbin Amendment contributed

to 1 million Americans losing access to the banking system—becoming “unbanked”—by 2011.¹⁵

Retailers that lobbied for the Durbin Amendment said it would result in savings that would be passed on to consumers, but those savings turned out to be miniscule or nonexistent. Even accounting for some lower prices in highly competitive markets, the public still suffered a net welfare loss of \$22 to \$25 billion. The amount lost in free checking and imposition of new bank fees exceeded any gains from lower retail prices, according to a 2015 study published in the *Oxford Review of Law and Economics*.¹⁶

Even in normal times, the lack of access to a payment card imposes severe hardship and inconvenience, such as always having to carry cash to make purchases. During crises such as the current one, when stores are closed or have sharply reduced hours, it can literally be an issue of survival, as those without payment cards are locked out of digital purchases. Congress should repeal or at least substantially relax the Durbin Amendment price controls for debit cards, and resist calls from retailer trade associations to extend these price controls to credit cards.¹⁷

Allow Permissionless Innovation in Development of Cryptocurrency and Blockchain. When Bitcoin launched as the first cryptocurrency more than a decade ago, it looked like its most valued feature would be its ability to serve as an alternative to central bank currency, especially for people worried about inflation in the wake of massive quantitative easing by the Federal Reserve. Today, given the Fed’s actions—which dwarf those of the 2008 financial crisis, but may be more justifiable because of the many businesses and individuals hit by something that was not their fault—there still is some desire to hedge potentially debased national currencies.

Today, when the public and policy makers are looking to move money faster, cryptocurrencies’ potential to enable faster payments may be their biggest draw. The development of “stablecoins,” such as Tether and the Facebook-developed Libra, that can be denominated in a single national currency can lower the costs of payment processing for businesses and consumers. It can also increase financial inclusion for the unbanked and underbanked who are currently locked out of digital transactions (though, as noted, government interventions like the Durbin Amendment substantially contributed to the lack of banking access).

And blockchain technology, initially created as a distributed ledger to record cryptocurrency transactions, may have multiple beneficial uses in the pandemic and recovery. Even before the COVID-19 crisis, blockchain technology was already being utilized in countless new ways, from medical recordkeeping to land titling.¹⁸ Now people are finding many ways that blockchain can be part of the solution to defeat COVID-19. For instance, scholars at Aston University in Birmingham, U.K., are researching a blockchain application to verify that medical equipment came from legitimate factories and is not defective.¹⁹

As it did with the development of the Internet, the government should adopt a hands-off approach that can foster an atmosphere of permissionless innovation for electronic

payments. Cryptocurrency and blockchain creators should not be burdened by red tape in developing technologies that could greatly contribute to public health and economic recovery. The Securities and Exchange Commission should quit asserting jurisdiction where it has none by claiming that cryptocurrencies should be registered as securities.²⁰ Congress should pursue bipartisan legislation to create a less intrusive tax and regulatory regime for these technologies.²¹

Allow Flexible Contracting Work Arrangements. Supporters of California’s AB-5 law contend that it is meant to protect struggling workers by ensuring that they are all classified as “employees,” not contractors. But many Californians have found that the law limits their ability to find work—and the situation has gotten worse during the COVID-19 crisis.

Since COVID-19 put the country under lockdown, people have turned to app-based companies such as DoorDash, Postmates, and UberEats to get daily essentials like food and prescription drugs. To beleaguered businesses, contractor delivery workers offer a lifeline to stay open and even a way to find new customers. For people left without work, they offer a short-term way to make ends meet. Other people have been able to earn extra cash.

Californians have not been as lucky, since AB-5 restricts this type of work in numerous ways.²² The law’s supporters have claimed that the “gig economy” model had nothing to do with flexibility and was just a convenient excuse to exploit workers and shirk responsibilities, like paying Social Security and payroll taxes, unemployment insurance, and other state and federal requirements.²³

In theory, this helped people if they were working jobs full-time for one company. However, those workers represent only a fraction of the ones doing the gig economy jobs. It is little help for the majority of people who only want to work when they need to and do not plan to do it long-term. And limiting freelance work is particularly perverse if workers themselves want to be on their own, or are forced to because of the virus.

In an open letter to Governor Gavin Newsom, economists and political scientists from across the state’s colleges and universities called for AB-5 to be suspended. “Hiring laws, especially for firms with more than 50 employees, mean that companies are unwilling to make long-term commitments to traditional jobs. We aren’t sure what our economic needs and capacities are going to be even two months from now. But hiring someone in a traditional job, with hours and benefit requirements, is too expensive to contemplate given that employers do not know whether they will be able to fill any permanent jobs at all and, if so, when,” they noted.²⁴ Social media sites like Twitter were filled with pleas from Californians seeking relief.²⁵

The Golden State’s unemployment rate was an estimated 24.4 percent in March.²⁶ That is nearly 10 percentage points above the national rate of 14.7 percent, in April.²⁷ How much of that was AB-5’s fault is hard to gauge, but the law certainly has not resulted in more hiring—and the national unemployment rate has only continued to increase. To enable more effective responses to the crisis, policy makers should work to allow flexible work

arrangements that both enable people to make ends meet while providing access to individual goods and services. State lawmakers should avoid laws like AB5—and California should at least suspend it during the crisis. At the federal level, Congress should not include AB5-style labor provisions in any future COVID-19 relief legislation.

End Antitrust Investigation of Successful Tech Companies. Big tech has been invaluable in easing the burden of quarantine for millions of consumers²⁸ and businesses.²⁹ Unfortunately, the Department of Justice, the Federal Trade Commission, Congress,³⁰ and many state attorneys general are continuing their antitrust investigations³¹ into major tech firms like Google,³² Facebook,³³ Apple³⁴ and Amazon.³⁵ Such open-ended investigations cast a destructive shadow of uncertainty over a sector that has proven critical in this crisis.

Facebook helping keep people stay in touch, Apple providing apps for curbside pickup from small businesses, Amazon's deliveries, and Google's tools for keeping informed are all enormously beneficial to consumers. These companies should be left to innovate and serve consumers as creatively, quickly, and as innovatively as needed.³⁶ Yet, as large tech companies try to adapt to this new environment, they may hesitate about certain innovations for fear of running afoul of antitrust rules. This is no benefit to consumers and no time to hobble tech companies with esoteric regulatory concerns.³⁷

The real cost of antitrust regulation is the innovation it prevents. The risk of precluding advances, synergies, and solutions that could prove critical to a struggling economy and a stressed people is too high to justify these investigations.

It is not just a chilling effect on innovative ideas and arrangements that can impair these companies, but also the time and energy required to comply with information requests. For instance, in response to a 48-state investigation led by Texas Attorney General Ken Paxton, Google had provided more than 100,000 pages of information by mid-April 2020.³⁸ Forcing tech companies to use their large, but still limited, resources to comply with paperwork requests of myriad antitrust investigations is counterproductive at a time when the company's customers need them most.

The U.S. standard for antitrust law is consumer harm. With prices for many of big tech's services and products at zero, continuing strong innovation in the industry, and companies competing for consumers' attention, it is hard to imagine any of these investigations finding evidence of customers being harmed.³⁹ Antitrust regulators often point to barriers to entry as proof of monopoly power. But the meteoric success of Zoom clearly shows that barriers to entry are low in the tech sector. The startup's newfound dominance of video conferencing renders accusations of big tech holding widespread monopoly power unpersuasive.

So, with little chance of proving illegal monopoly power or consumer harm, regulators have argued for expanding antitrust enforcement to include data practices, privacy concerns, and the interests of competitors over consumers.⁴⁰ That would represent a return to the chaos that antitrust law wreaked on the U.S. economy for much of the 20th century, yielding the opposite of progress for consumers and businesses. Legislators and agency regulators should reject this expansion of antitrust laws beyond the consumer welfare standard.

Antitrust investigations at the federal and state level should be suspended during the crisis and, ideally, abandoned permanently. The unintended consequences of market distortion and chilled innovation are the last thing consumers and businesses need right now. This is no time for politicians and government lawyers to promote their own careers through antitrust enforcement. Consumer benefit and business resiliency must be paramount.

Ensure Commercial Access to Spectrum. The Federal Communications Commission's (FCC) grant of Special Temporary Authority to AT&T and Verizon to use spectrum to help meet Americans' wireless broadband needs during the COVID-19 crisis suggests that there is a need to move more spectrum into private hands.⁴¹ That would mean fewer spectrum bands sitting idle, designated for government agency use. Regulatory underbrush at the FCC has put American on a spectrum diet and that is suboptimal even in the best of times, but is even more harmful in a crisis. The FCC should push more spectrum into commercial use with property rights-based arrangements as quickly as possible.

A major part of the future of the economy, even prior to the COVID-19 pandemic, has been the increasing integration of the Internet into more and more devices and machines forming the "Internet of Things." From new powerful handheld smart devices to large machines like driverless cars, an Internet of Things requires strong, safe, and reliable wireless connections. Wireless connections require well-allocated spectrum channels to ensure sufficient signal strength and prevent signals from interfering with one another.

This is not some far-off reality we can prepare for tomorrow. Today, millions of Americans working remotely or taking on new gig economy jobs rely more than ever on laptop computers connected through Wi-Fi spectrum and smartphones connected through cellular spectrum. Spectrum capacity is also needed to beam wireless broadband to rural and underserved communities that desperately need to stay connected in a world of social distancing.

The problem is twofold. First, unlike many resources, we simply cannot create more spectrum. This means spectrum policy must be singularly focused on improving the efficiency of its use. Second, virtually all spectrum has been allocated to either a commercial or government use.⁴² This means creating new spectrum capacity for growth areas requires shifting or otherwise accommodating incumbents.

The most efficient way to allocate scarce resources with alternative uses is through markets, price signals, and property rights. The ability to do this with spectrum is limited because the federal government effectively nationalized spectrum in the 1920s and has since allocated it in ways that make potential market-based reallocation more difficult.⁴³ Government-issued licenses are now the closest thing to property rights in spectrum. In addition, the government has allowed various unlicensed uses of spectrum by certain technologies, constrained by various regulations in order to prevent interference.

Assuming there will not be a radical shift in this paradigm, there are a few things the government can do to ensure more spectrum is put to use into private hands and used in more economically efficient ways.

Congress must help clear regulatory uncertainty that exists with regards to spectrum allocation. Under current law, the FCC administers non-federal spectrum while the National Telecommunications and Information Administration (NTIA) administers federal spectrum.⁴⁴ However, the FCC has final say on all spectrum allocation, private or public.⁴⁵ Federal agencies are supposed to coordinate their spectrum issues through NTIA, which subsequently coordinates with the FCC. Yet, there have been several recent cases of agencies flouting this system, openly feuding with the FCC in the media and before Congress, and ultimately delaying the reallocation of underutilized federally allocated spectrum to private uses.⁴⁶ First and foremost, Congress should work to end this increasingly untenable situation.

This confusion occurs because of the dearth of market mechanisms in spectrum allocation. Federal agencies that are incumbent spectrum holders face little to no incentive to help facilitate reallocation. Congress can change this.

First, agencies should be required, in consultation with the Office of Management and Budget, NTIA, and the FCC to include a value on the spectrum licenses they hold in their annual budgets. Subsequently, the fees charged to each federal agency should be made commensurate with the assessed value of the spectrum. Currently, federal agencies pay just \$122 dollars for each assigned frequency they hold.⁴⁷ Finally, federal agencies, working with the FCC should be allowed to sell or sublease the licenses they hold to private sector actors.

Greater commercial access to spectrum will spur major investment in new products and services that harness wireless technology and the network infrastructure that powers them. This investment is not only critical for jumpstarting the post-COVID-19 economy, but also for hardening it against future crises.

Allow the Development of Private Tech Infrastructure. A major area of growth and investment after the crisis will likely involve products and services that allow more economic activity to move permanently online. As a result, the consequences of the digital divide—the gap between those Americans with reliable high-speed Internet access and those without—will only grow wider. The knee-jerk response to this will be to spend on subsidized or government-owned broadband networks.⁴⁸ Such a response will be a drain on needed private-sector investment.

The federal government already spends billions of dollars annually and automatically on broadband deployment. According to the Congressional Research Service, these programs spent a combined \$9.1 billion in 2018.⁴⁹ The Federal Communications Commission, which administers roughly 90 percent of this spending through the Universal Service Fund (USF), is already in the process of restructuring broadband spending to ensure it does not lead to what is known as “overbuilding” and that such funds only go to truly unserved areas.⁵⁰

Dr. Mark A. Jamison, a visiting scholar at the American Enterprise Institute, explained the overbuilding problem in testimony before the Senate last year:

It is normal in competitive markets for rivals to duplicate each other's infrastructure. This duplication is important for rivals to be able to compete for customers and for companies to test alternative services for the future. This duplication of infrastructure can be wasteful at best, and perhaps even destructive, when the government is subsidizing one of the providers.⁵¹

Overbuilding harms investment because private networks struggle with, and often choose not to compete against, subsidized or government-owned networks, which always can afford to undercut competition—ultimately leaving consumers without options if and when service suffers.

If current programs, such as the USF, already need restructuring to prevent overbuilding, haphazard stimulus funds present a substantial risk of this problem.

The correct solution is to either clear away or harmonize state and local regulations that impede the ability of private providers to deploy infrastructure to underserved areas. Whether a company is deploying fixed broadband networks, such as cable or fiber, erecting towers for wireless cellular and broadband service, or installing a dense network of small cells for Fifth Generation (5G) cellular service, there are common things they must do. This includes complying with local right-of-way access regulations, utility pole attachment rates, and historical and environmental reviews. Yet these things can vary not just from state to state but from technology to technology.⁵²

These disparities in regulatory treatment—from state to state and even locality to locality across differing, but competing technologies—poses a major impediment to investment and efforts just to close the digital divide and to provide consumers with competitive options in the event that existing providers' service suffers.

To the extent that access regulations and reviews are necessary, they should be subject to strict cost caps and fixed time periods for review. These measures help potential market entrants approach new infrastructure investments with greater certainty. They further prevent local laws from having impacts on Internet service beyond their borders. A company forced to expend excessive resources in one market will likely divert those resources from serving another.

The Internet, also known as the World Wide Web, is fundamentally an interstate service, thus warranting federal regulatory oversight. The FCC has already made substantial efforts toward reducing and standardizing local regulatory burdens to 5G deployment.⁵³ In addition, the FCC recently intervened to prevent state and local governments from exploiting cable franchise rules in ways that harm broadband deployment.⁵⁴ The federal government should continue to explore areas where differing but competitive technologies are subject to unnecessary and disparate treatment and work to preempt such rules.

Finally, a major deterrent to broadband investment has been the specter of “net neutrality” regulation. Previously, the federal government sought to implement the amorphous concept

of net neutrality through public utility-style regulation of Internet service providers (ISPs). The implementation of this regulatory change had a devastating effect on broadband infrastructure investment. Investment has since rebounded following the reversal of these rules in 2017.⁵⁵

Despite the federal reversal, several states have begun promulgating their own net neutrality rules.⁵⁶ However, a recent ruling at the D.C. Circuit Court largely upheld the FCC's power to preempt state net neutrality laws, albeit on a case-by-case basis rather than via a blanket preemption.⁵⁷ Regardless, even if such state laws are likely to be successfully preempted by the federal government, they can still cause unneeded delays and uncertainty when it comes to broadband investment. States should cease pursuing these laws. Further, Congress should enact legislation with blanket preemption of state net neutrality laws while enshrining the existing regulatory status of ISPs as reestablished in 2017.

Conclusion. An effective response to the COVID-19 crisis requires finding ways to make it easier for people to stay at home. That means facilitating ways to work, shop, and access information and entertainment while sheltering in place. The private sector, especially technology firms, have made great strides in that regard. Government should allow them to continue to do so by removing as many regulatory barriers to innovation as possible.

Notes

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