117TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
117–655

AMERICAN INNOVATION AND CHOICE ONLINE ACT

DECEMBER 21, 2022.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3816]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3816) to provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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The amendments are as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "American Innovation and Choice Online Act".

SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to engage in any conduct in connection with the operation of the covered platform that—

(1) advantages the covered platform operator's own products, services, or lines of business over those of another business user;

(2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator's own products, services, or lines of business; or

(3) discriminates among similarly situated business users, including, but not limited to, those business users employed by businesses owned by women and minorities.

(b) OTHER DISCRIMINATORY CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to—

(1) restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware or software features that are available to the covered platform operator's own products, services, or lines of business;

(2) condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator;

(3) use non-public data to offer, or support the offering of, the covered platform operator's own products, services, or lines of business that are obtained from or generated on the covered platform—

(A) by the activities of a business user; or

(B) through an interaction of a covered platform user with the products or services of a business user;

(4) restrict or impede a business user from accessing data generated on the covered platform by the activities of the business user, or through an interaction of a covered platform user with the business user's products or services, such as by establishing contractual or technical restrictions that prevent the portability of such data by the business user to other systems or applications;

(5) restrict or impede covered platform users from un-installing software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator;

(6) restrict or impede businesses users from communicating information or providing hyperlinks on the covered platform to covered platform users to facilitate business transactions;

(7) in connection with any user interface, including search or ranking functionality offered by the covered platform, treat the covered platform operator's own products, services, or lines of business more favorably than those of another business user;

(8) interfere with or restrict a business user's pricing of its products or services;

(9) restrict or impede a business user, or a business user's customers or users, from interoperating or connecting to any product or service; or

(10) retaliate against any person that raises concerns with any law enforcement authority about actual or potential violations of State or Federal law or that initiates or participates in litigation to enforce this Act.

(c) AFFIRMATIVE DEFENSE.—Subsections (a) and (b) shall not apply if the defendant establishes by clear and convincing evidence that the conduct described in subsections (a) or (b)—

(1) would not result in harm to the competitive process by restricting or impeding legitimate activity by business users; or

(2) was narrowly tailored, could not be achieved through less discriminatory means, was nonpretextual, and was necessary to—

(A) prevent a violation of, or comply with, Federal or State law; or

(B) protect user privacy or other non-public data; or

(3) increases consumer welfare.

(d) COVERED PLATFORM DESIGNATION.—The Federal Trade Commission or Department of Justice shall designate a covered platform for the purpose of implementing and enforcing this Act. Such designation shall—

(1) be based on a finding that the criteria set forth in subsection (g)(4)(i)–(iii) are met;

(2) be issued in writing and published in the Federal Register; and

(3) apply for 10 years from its issuance regardless of whether there is a change in control or ownership over the covered platform unless the Commission or the Department of Justice removes the designation under subsection (e).

(e) REMOVAL OF COVERED PLATFORM DESIGNATION.—The Commission or the Department of Justice shall—

(1) consider whether its designation of a covered platform under subsection (d) should be removed prior to the expiration of the ten-year period if the covered platform operator files a request with the Commission or the Department of Justice, which shows that the online platform no longer meets the criteria set forth in subsection (g)(4)(i)–(iii);

(2) determine whether to grant a request submitted under paragraph 1 not later than 120 days after the date of the filing of such request; and

(3) obtain the concurrence of the Commission or the Department of Justice, as appropriate, before granting a request submitted under paragraph (1).

(f) REMEDIES.—

(1) CIVIL PENALTY.—Any covered platform operator who is found to have violated subsections (a) or (b) shall be liable to the United States or the Commission for a civil penalty, which shall accrue to the United States Treasury, in an amount not more than the greater of—

(A) 15 percent of the total United States revenue of the person for the previous calendar year; or

(B) 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct. This civil penalty may be recovered in a civil action brought by the United States or the Commission.

(2) REMEDIES IN ADDITION.—Remedies provided in this subsection are in addition to, and not in lieu of, any other remedy available under Federal or State law.

(A) RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, with respect to a violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.

(B) DISGORGEMENT.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, disgorgement of any unjust enrichment that a covered platform operator obtained as a result of the violation that gives rise to the suit.

(C) INJUNCTIONS.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(D) CONFLICT OF INTEREST.—

(i) If the fact finder determines that a violation of this Act arises from a conflict of interest related to the covered platform operator's ownership or control of multiple lines of business, the court shall consider requiring, and may order, divestiture of the line or lines of business that give rise to such conflict.

(ii) For purposes of this section, the term "conflict of interest" includes the conflict of interest that arises when—

(I) a covered platform operator owns or controls a line of business, other than the covered platform; and

(II) the covered platform operator's ownership or control of that line of business creates the incentive and ability for the covered platform operator to—

(aa) advantage the covered platform operator's own products, services, or lines of business on the covered platform over those of a competing business or a business that constitutes nascent or potential competition to the covered platform operator; or

(bb) exclude from, or disadvantage, the products, services, or lines of business on the covered platform of a competing business or a business that constitutes nascent or potential competition to the covered platform operator.

(3) REPEAT OFFENDERS.—If the fact finder determines that a covered platform operator has engaged in a pattern or practice of violating this Act, the court shall consider requiring, and may order, that the Chief Executive Officer, and any other corporate officer as appropriate to deter violations of this Act, forfeit to the United States Treasury any compensation received by that person during

the 12 months preceding or following the filing of a complaint for an alleged violation of this Act.

(g) DEFINITIONS.—In this section:

(1) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(2) BUSINESS USER.—The term "Business User" means a person that utilizes or plans to utilize the covered platform for the sale or provision of products or services.

(3) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(4) COVERED PLATFORM.—The term "covered platform" means an online platform—

(A) that has been designated as a "covered platform" under section 2(d); or

(B) that—

(i) at any point during the 12 months preceding a designation under section 2(d) or at any point during the 12 months preceding the filing of a complaint for an alleged violation of this Act—

(I) has at least 50,000,000 United States-based monthly active users on the online platform; or

(II) has at least 100,000 United States-based monthly active business users on the online platform;

(ii) at any point during the 2 years preceding a designation under section 2(d) or at any point during the 2 years preceding the filing of a complaint for an alleged violation of this Act, is owned or controlled by a person with United States net annual sales or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; and

(iii) is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.

(5) CRITICAL TRADING PARTNER.—The term "critical trading partner" means an entity that has the ability to restrict or impede the access of—

(A) a business user to its users or customers; or

(B) a business user to a tool or service that it needs to effectively serve its users or customers.

(6) PERSON.—The term "person" has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(7) DATA.—

(A) IN GENERAL.—Not later than 6 months after the date of enactment of this Act, the Commission shall adopt rules in accordance with section 553 of title 5, United States Code, to define the term "data" for the purpose of implementing and enforcing this Act.

(B) DATA.—The term "data" shall include information that is collected by or provided to a covered platform or business user that is linked, or reasonably linkable, to a specific—

(i) user or customer of the covered platform; or

(ii) user or customer of a business user.

(8) ONLINE PLATFORM.—The term "online platform" means a website, online or mobile application, operating system, digital assistant, or online service that—

(A) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;

(B) facilitates the offering, sale, purchase, payment, or shipping of products or services, including software applications, between and among consumers or businesses not controlled by the platform operator; or

(C) enables user searches or queries that access or display a large volume of information.

(9) CONTROL.—The term "control" with respect to a person means—

(A) holding 25 percent or more of the stock of the person;

(B) having the right to 25 percent or more of the profits of the person;

(C) having the right to 25 percent or more of the assets of the person, in the event of the person's dissolution;

(D) if the person is a corporation, having the power to designate 25 percent or more of the directors of the person;

(E) if the person is a trust, having the power to designate 25 percent or more of the trustees; or

(F) otherwise exercises substantial control over the person.

(10) STATE.—The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(h) ENFORCEMENT.—

(1) IN GENERAL.—Except as otherwise provided in this Act—

(A) the Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act;

(B) the Attorney General shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms of the Sherman Act (15 U.S.C. 1 et seq.), Clayton Act (15 U.S.C. 12 et seq.), and Antitrust Civil Process Act (15 U.S.C. 1311 et seq.) were incorporated into and made a part of this Act; and

(C) any attorney general of a State shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers and duties as though all applicable terms of the Sherman Act (15 U.S.C. 1 et seq.) and the Clayton Act (15 U.S.C. 12 et seq.) were incorporated into and made a part of this Act.

(2) UNFAIR METHODS OF COMPETITION.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

(3) COMMISSION INDEPENDENT LITIGATION AUTHORITY.—If the Commission has reason to believe that a person violated this Act, the Commission may commence a civil action, in its own name by any of its attorneys designated by it for such purpose, to recover a civil penalty and seek other appropriate relief in a district court of the United States.

(4) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(i) EMERGENCY RELIEF.—

(1) The Commission, Assistant Attorney General of the Antitrust Division, or any attorney general of a State may seek a temporary injunction requiring the covered platform operator to take or stop taking any action for not more than 120 days and the court shall grant such relief if the Commission, the United States, or the attorney general of a State proves—

(A) there is a plausible claim that a covered platform operator took an action that violates this Act; and

(B) that action impairs the ability of at least 1 business user to compete with the covered platform operator.

(2) The emergency relief shall not last more than 120 days from the filing of the complaint.

(3) The court shall terminate the emergency relief at any time that the covered platform operator proves that the Commission, the United States, or the attorney general of the State seeking relief under this section has not taken reasonable steps to investigate whether a violation has occurred.

(4) Nothing in this subsection prevents or limits the Commission, the United States, or any attorney general of any State from seeking other equitable relief as provided in subsection (f) of this section.

(j) STATUTE OF LIMITATIONS.—A proceeding for a violation of this section may be commenced not later than 6 years after such violation occurs.

SEC. 3. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a covered platform designation under section 2(d) of this Act, a decision in response to a request to remove a covered platform designation under section 2(e) of this Act, a final order issued in any district court of the United States under this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act may within 30 days of the issuance of such designation, decision, or order, petition for review of such designation, decision, or order in the United States Court of Appeals for the District of Columbia Circuit.

(b) TREATMENT OF FINDINGS.—In a proceeding for judicial review of a covered platform designation under section 2(d) of this Act, a decision in response to a request to remove a covered platform designation under section 2(e) of this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act, the findings of the Commission or the Assistant Attorney General as to the facts, if supported by evidence, shall be conclusive.

SEC. 4. BUREAU OF DIGITAL MARKETS.

(a) ESTABLISHMENT OF BUREAU.—As soon as practicable, but not later than 180 days after the date of enactment of this Act, the Commission shall establish within the Commission a bureau of digital markets for purposes of enforcement of this Act.

(b) LEADERSHIP.—The head of the Bureau of Digital Markets shall be the Director of the Bureau of Digital Markets, who shall—

(1) report directly to the Chair of the Commission; and

(2) be appointed by the Chair of the Commission.

(c) BUREAU STAFF.—The Bureau of Digital Markets shall retain or employ legal, technology, economic, research, and service staff sufficient to carry out the functions, powers, and duties of the Bureau.

(d) REPORTING REQUIREMENT.—Not later than 1 year after the date of enactment of this Act, the Bureau of Digital Markets shall on an annual basis publish and submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the Bureau's enforcement activities during the previous 12-month period.

SEC. 5. ENFORCEMENT GUIDELINES.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Commission and the Assistant Attorney General of the Antitrust Division shall jointly issue guidelines outlining policies and practices, relating to agency enforcement of this Act, with the goal of promoting transparency and deterring violations.

(b) UPDATES.—The Commission and the Assistant Attorney General of the Antitrust Division shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 4 years beginning on the date of enactment of this Act.

(c) OPERATION.—The Joint Guidelines issued under this section do not confer any rights upon any person, State, or locality, nor shall they operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 6. SUITS BY PERSONS INJURED.

(a) IN GENERAL.—Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in this Act may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under this Act and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) AMOUNT OF DAMAGES PAYABLE TO FOREIGN STATES AND INSTRUMENTALITIES OF FOREIGN STATES.—

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) INJUNCTIVE RELIEF.—Any person shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

SEC. 7. RULE OF CONSTRUCTION.

(a) Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18 of the United States Code is not dispositive of whether the defendant has established an affirmative defense under this Act.

(b) An action taken by a covered platform operator that is reasonably tailored to protect the rights of third parties under sections 106, 1101, 1201, or 1401 of title 17 of the United States Code or rights actionable under sections 32 or 43 of the Lanham Act (15 U.S.C. §§ 1114, 1125), or corollary state law, shall not be considered unlawful conduct under subsection 2(a) or (b) of this Act.

(c) Nothing in this Act shall be construed to limit any authority of the Attorney General or the Commission under the antitrust laws, the Federal Trade Commission Act (15 U.S.C. 45), or any other provision of law or to limit the application of any law.

SEC. 8. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act and of the amendments made by this Act, and the application of the remaining provisions of this Act and amendments to any person or circumstance shall not be affected.

Amend the title so as to read:

A bill to provide that certain discriminatory conduct by a covered platform operator shall be unlawful, and for other purposes.

Purpose and Summary

H.R. 3816, the "American Innovation and Choice Online Act," was introduced on June 11, 2021 by Representative David N. Cicilline (D–RI), the Chair of the Subcommittee on Antitrust, Commercial, and Administrative Law, with Representative Lance Gooden (R–TX), Judiciary Committee Chair Jerrold Nadler (D–NY), and Subcommittee Ranking Member Ken Buck (R–CO) as original cosponsors of the bill. H.R. 3816 clarifies prohibitions on various types of anticompetitive and exclusionary conduct by dominant online platform companies. The bill is supported by the U.S. Department of Justice (DOJ),[1] the U.S. Department of Commerce,[2] and a bipartisan group of 32 state attorneys general.[3] The bill proscribes

[1] Letter from Peter Hyun, Acting Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Justice, to Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary (Mar. 28, 2022), https://www.justice.gov/ola/page/file/1488741/download.

[2] Brian Fung, *Major Tech Antitrust Bill Gets Backing of US Commerce Department*, CNN BUS. (Apr. 27, 2022), https://www.cnn.com/2022/04/27/tech/commerce-antitrust-bill/index.html.

[3] Letter from Phil Weiser, Att'y Gen., Colorado, et al., to Hon. Nancy Pelosi, Speaker, H.R., et al. (Sept. 20, 2021), https://coag.gov/app/uploads/2021/09/Antitrust-Package-Support-Letter-.pdf.

conduct by a dominant online platform that advantages the platform's own products or services, disadvantages actual or potential competitors, or economically discriminates against other business users of the platform. The legislation also restricts other specific categories of abusive and anticompetitive conduct that the Committee uncovered during its bipartisan investigation into competition in digital markets, such as conditioning access to or preferred status on a covered platform on the purchase of other products or services, using non-public data from users of the covered platform to compete against those users, and giving favorable treatment to the covered platform's own products and services in search rankings. The legislation establishes that a violation of the Act is enforceable by the DOJ, the Federal Trade Commission (FTC or Commission), and state attorneys general, and it allows enforcers to seek significant penalties for violations of the Act. The legislation also creates a cause of action for individuals harmed or threatened with harm by a violation of the Act.

Background and Need for the Legislation

I. Investigation of Competition in Digital Markets

A. OVERVIEW

The open internet has delivered significant benefits to Americans and the U.S. economy. Following the advent of the internet, the availability of online products and services has led to greater economic opportunity, capital investment, and access to information, commerce, communications, education, financial services, and arts and culture.

Over the past decade, however, the digital economy has become highly concentrated and proven prone to monopolization. Several dominant platform companies have established control over key channels of the digital economy and now function as gatekeepers for online commerce and communications. These firms abuse their gatekeeper power to preference their own products and services and destroy competition, harming the competitive process, innovation, privacy, and consumers.

In response to these trends, the House Judiciary Committee (Committee) announced a bipartisan investigation into competition in the digital marketplace in June 2019,[4] which culminated in a 450-page report detailing the Committee's findings and recommendations, entitled "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations" (Digital Markets Report).[5] Over the course of 16 months, the Committee

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[4] Press Release, H. Comm. on the Judiciary, House Judiciary Antitrust Subcommittee Announces Series of Hearings on Proposals to Curb the Dominance of Online Platforms and Modernize Antitrust Law (Feb. 18, 2021), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4379.

[5] STAFF OF SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (originally released 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. The Committee released the Report in October 2020 and, in April 2021, the Committee voted favorably to adopt and report it. *See Markup of H.R. 1333; H.R. 1573; H.R. 40; H.R. 2393; Report on Investigation of Competition in Digital Markets (Subcommittee on Antitrust, Commercial and Administrative Law) Before the H. Comm. on the Judiciary*, 117th Cong. (2021), https://www.congress.gov/event/117th-congress/house-event/111451. The Report was published in July 2022. STAFF OF SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH & 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (Comm. Print 2022)

conducted a top-to-bottom review of competition online, including an examination of the dominance and business practices of Amazon, Apple, Facebook, and Google.[6] In total, the Subcommittee on Antitrust, Commercial, and Administrative Law (Subcommittee) held seven hearings during the 116th Congress to review competition in digital markets, including hearings on the free and diverse press, innovation, privacy, enforcement of the antitrust laws, conduct by dominant online platforms, harms to competition and consumers, and potential remedies.[7] These hearings included testimony from market participants, antitrust enforcers, practitioners, consumer groups, and executives—including the chief executive officers—of Amazon, Apple, Facebook, and Google.

The Subcommittee also convened a series of 12 briefings for Members of the Subcommittee and staff. These briefings provided additional opportunities for oversight and engagement—with antitrust experts, former technology industry executives, civil society organizations, current and former antitrust enforcers, and market participants—on the state of competition and other issues in digital markets.[8] Additionally, these briefings allowed representatives from the investigated companies to make presentations to Subcommittee staff, answer questions, and provide details regarding their companies' business practices, structures, and strategies in the marketplace.[9]

In September 2019, the Committee sent bipartisan requests for information (RFIs) to the four investigated firms.[10] These requests

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[hereinafter DIGITAL MARKETS REPORT], https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf. Citations in this Report to the Digital Markets Report reference the pagination of the July 2022 Committee Print version.

[6] In 2015, Google reorganized under a new parent company, Alphabet, and in 2021, Facebook renamed itself Meta. Because this Report refers to conduct both predating and postdating the name changes, for consistency, the Report will refer to the relevant entities as Google and Facebook.

[7] *See* DIGITAL MARKETS REPORT at 21–23 (describing hearings). These hearings were: *Online Platforms and Market Power, Part 1: The Free and Diverse Press: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter Free and Diverse Press Hearing], https://www.govinfo.gov/content/pkg/CHRG-116hhrg39839/pdf/CHRG-116hhrg39839.pdf; *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019), https://www.govinfo.gov/content/pkg/CHRG-116hhrg39901/pdf/CHRG-116hhrg39901.pdf; *Online Platforms and Market Power, Part 3: The of Role of Data and Privacy in Competition: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter Data and Privacy Hearing], https://www.govinfo.gov/content/pkg/?CHRG-116hhrg39840/pdf/CHRG-116hhrg39840.pdf; *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2019), https://www.govinfo.gov/content/pkg/CHRG-116hhrg40787/pdf/CHRG-116hhrg40787.pdf; *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2020), https://www.govinfo.gov/content/pkg/CHRG-116hhrg40788/pdf/CHRG-116hhrg40788.pdf; *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2020), https://www.govinfo.gov/content/pkg/CHRG-116hhrg41317/pdf/CHRG-116hhrg41317.pdf; and *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter Remedies Hearing], https://www.govinfo.gov/content/pkg/CHRG-116hhrg42250/pdf/CHRG-116hhrg42250.pdf.

[8] DIGITAL MARKETS REPORT at 23–24.

[9] *Id.* at 24.

[10] Letter from Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, to Jeff Bezos, CEO, Amazon.com, Inc. (Sept. 13, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/amazon%20rfi%20-%20signed.pdf; Letter

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sought comprehensive information about the products and services of these firms, as well as communications among high-level executives relating to various acquisitions and potentially anticompetitive conduct. The Committee also sent RFIs to more than 100 market participants; solicited input and analysis from dozens of leading antitrust scholars, experts, and practitioners; and conducted hundreds of interviews with market participants and other experts.[11] The Committee also sent RFIs to the DOJ and FTC for documents relating to the agencies' decisions to open or close investigations into potential violations of the antitrust laws in digital markets, decisions to challenge mergers or conduct, and decisions to forgo litigation in favor of settlement agreements.[12] Senior officials from the DOJ's Antitrust Division provided several briefings to Members of the Subcommittee and staff, which enabled Members to obtain information and updates about the current state of antitrust enforcement in digital markets.[13]

In sum, the Committee's investigation compiled a considerable oversight and evidentiary record over the course of 16 months. This record included 1,287,997 documents and communications; testimony from 38 witnesses; a hearing record spanning more than 1,800 pages; 38 submissions from 60 antitrust scholars, experts, and practitioners from across the political spectrum; and interviews with more than 240 market participants and technology experts.[14]

B. FINDINGS

1. Anticompetitive Practices in Digital Markets

In October 2020, the Committee released the Digital Markets Report, marking the culmination of the Committee's investigation.[15] The Report was adopted by a vote of the Committee in April 2021 and formally published on July 19, 2022.[16] As a result of the investigation, the Committee uncovered significant evidence that several dominant online platforms possess gatekeeper power over segments

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from Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, to Tim Cook, CEO, Apple Inc. (Sept. 13, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/apple%20rfi%20-%20signed.pdf; Letter from Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, to Mark Zuckerberg, CEO, Facebook, Inc. (Sept. 13, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/facebook%20rfi%20-%20signed.pdf; Letter from Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, to Larry Page, CEO, Alphabet Inc. (Sept. 13, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/alphabet%20inc.%20rfi%20-%20signed%20(003).pdf. *See also* DIGITAL MARKETS REPORT at 14–18 (describing requests for information).

[11] DIGITAL MARKETS REPORT at 18–20.

[12] *Id.* at 20–21.

[13] *Id.* at 21.

[14] *Id.* at 3.

[15] Press Release, H. Comm. on the Judiciary, Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted by Monopoly Power (Oct. 6, 2020), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429.

[16] *See Markup of H.R. 1333; H.R. 1573; H.R. 40; H.R. 2393; Report on Investigation of Competition in Digital Markets (Subcommittee on Antitrust, Commercial and Administrative Law) Before the H. Comm. on the Judiciary,* 117th Cong. (2021), https://www.congress.gov/event/117th-congress/house-event/111451; DIGITAL MARKETS REPORT, https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

of the digital economy, as well as the incentive and ability to use that power to enter and dominate adjacent or vertically related markets. As explained in the Digital Markets Report, the dominant online platforms investigated by the Committee each possess significant and durable market power, as well as the incentive and ability to abuse this power.[17] Moreover, these platforms operate as gatekeepers over key channels of distribution and communication.[18] When a large swath of the economy depends on particular platforms "to access users and markets," those platforms have "gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market."[19]

The investigation also produced a detailed record of conduct by dominant platform companies that raised significant concerns about competition online,[20] and demonstrated the need for legislation to confront these abuses.[21] In the Digital Market Report, the Committee detailed its findings on four companies: Facebook, Google, Amazon, and Apple.

Facebook. The Committee found that, once Facebook became the dominant firm in the personal-social-networking market, it abused its monopoly power by, for example, identifying competitive threats and then copying, killing, or acquiring these threats.[22] Facebook recognized that some social apps had become popular enough to compete with its family of products. Facebook's internal documents showed that the company's senior executives grew concerned as "startups siphon our [social] graph and create awesome new experiences faster than we can."[23] Rather than competing vigorously to provide better products and services, Facebook's executives agreed that the company should be "more aggressive and nimble in copying our competitors."[24]

Alternatively, Facebook blocked the access of companies it viewed as competitive threats to its platform altogether.[25] As Mike Vernal, Facebook's Vice President of Product and Engineer, explained:

> When we started Facebook Platform, we were small and wanted to make sure we were an essential part of the fabric of the Internet. We've done that—we're now the biggest service on earth. When we were small, apps helped drive our ubiquity. Now that we are big, (many) apps are looking to siphon off our users to competitive services. We need to be more thoughtful about what integrations we allow . . . .[26]

Facebook's CEO, Mark Zuckerberg, agreed, saying that "we want as much control here as we can get," and that the "right solution

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[17] *See, e.g.,* DIGITAL MARKETS REPORT at 5–13 (summary of findings).
[18] *See, e.g., id.* at 29–30 (summarizing the role of dominant online platforms as gatekeepers).
[19] *Id.* at 29.
[20] *See, e.g., id.* at 5–13 (summary of findings), 110–317 (findings concerning dominant online platforms). *See also* HON. KEN BUCK, MEMBER, SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, ET AL., THE THIRD WAY 3–5 (2020) [hereinafter THIRD WAY REPORT], https://buck.house.gov/sites/evo-subsites/buck-evo.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf (discussing the Majority's findings).
[21] DIGITAL MARKETS REPORT at 13–14 (summary of recommendations), 317–42 (recommendations).
[22] *See id.* at 124–41 (Facebook's relevant acquisitions and conduct).
[23] *Id.* at 136.
[24] *Id.* at 135.
[25] *Id.* at 139.
[26] *Id.* at 138 (emphasis removed).

here is just to be a lot stricter about enforcing our policies and identifying companies as competitors."[27]

Facebook also leveraged its power to destroy competitors to facilitate acquisitions of nascent rivals, such as Instagram.[28] Prior to being acquired by Facebook, Instagram's internal documents showed that its co-founder, Kevin Systrom, expressed concern that Mr. Zuckerberg would "go into destroy mode" if Instagram did not agree to be acquired by Facebook.[29] Indeed, Mr. Systrom said as much to Mr. Zuckerberg directly, telling him that he "wouldn't feel nearly as strongly [about the acquisition] if independently you weren't building a mobile photos app that makes people choose which engine to use."[30]

In sum, Facebook recognized that some social apps had become popular enough to compete with Facebook's family of products. When this occurred with apps such as Vine, Ark, and MessageMe, Facebook cut off these apps' access to Facebook's social graph.[31] In contrast, Facebook gave preferential treatment to firms, like Amazon, that purchased advertising and worked to integrate Facebook's services into other products.[32] Facebook also leveraged its power to destroy competitors to facilitate acquisitions of nascent rivals, such as Instagram.[33]

As a result, the Committee concluded that the absence of competition in the personal-social-networking market has led to a deterioration of the quality of Facebook over time, "resulting in worse privacy protections for its users and a dramatic rise in misinformation on its platform."[34] One consequence of this deterioration of consumer privacy is that Facebook has repeatedly faced FTC enforcement actions stemming from the company's deceptive user privacy representations and practices, resulting in a record $5 billion civil penalty judicially approved in 2020.[35]

Google. The Committee found that Google, among other things, has abused its monopoly power in the market for general online search, in part by misappropriating data from rivals and preferencing its own products and services over those of rivals.[36] For example, Google's internal documents demonstrate that it made changes to its search product to increase traffic to its other products and services, preferencing affiliated products over those of

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[27] *Id.* at 139 (emphasis removed).
[28] *See id.* at 135–37 (Facebook's strategy to acquire, copy, or kill competitors).
[29] *Id.* at 136.
[30] *Id.*
[31] *See id.* at 137–41 (Facebook's weaponizing access to its platform).
[32] *Id.* at 140.
[33] *See id.* at 135–37 (Facebook's strategy to acquire, copy, or kill competitors).
[34] *Id.* at 8. *See also* Complaint at 8, ¶8, *New York v. Facebook, Inc.,* 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20–cv–3589), ECF No. 4, https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf ("Users of personal social networking services have suffered and continue to suffer a variety of harms as a consequence of Facebook's illegal conduct, including degraded quality of users' experiences, less choice in personal social networks, suppressed innovation, and reduced investment in potentially competing services. Facebook's conduct deprives users of product improvements and, as a result, users have suffered, and continue to suffer, reductions in the quality and variety of privacy options and content available to them.").
[35] *See* Decision and Order, *In re Facebook, Inc.,* No. C–4365 (F.T.C. July 27, 2012), https://www.ftc.gov/sites/?default/files/documents/cases/2012/08/120810facebookdo.pdf; Proposed Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief at 3, *United States v. Facebook, Inc.,* 456 F. Supp. 3d 115 (D.D.C. 2020) (No. 1:19–cv–2184), ECF No. 2–1, https://www.ftc.gov/system/files/documents/cases/182_3109_?facebook_order_filed_7-24-19.pdf (stipulated order proposed in July 2019 and issued by the court in April 2020).
[36] *See* DIGITAL MARKETS REPORT at 151–63 (Google's leveraging of dominance in search through data misappropriation and self-preferencing).

third parties, even when Google's offerings were not the best or most relevant for users.[37]

Google also uses its control over the Android mobile operating system to maintain and expand the dominance of online search and other apps on mobile devices. In exchange for licensing Android and Google's popular suite of apps, Google requires device manufacturers to pre-install and set Google's apps as defaults. It also leverages its control over Android to stop device manufacturers from giving prominent placement to rival apps or developing competing mobile operating systems, undermining competition in multiple markets.[38]

Amazon. The Committee found that Amazon functions as a gatekeeper for online commerce, and as a result, it has monopoly power over most-third party sellers and many of its suppliers.[39] Amazon abuses its gatekeeper power through extensive anticompetitive conduct in its treatment of third-party sellers on its platform. For example, Amazon abuses its power as an e-commerce marketplace to force third parties to accept contract terms and conditions unrelated to retail distribution and to undermine competition from other retailers.[40]

Additionally, Amazon exploits its gatekeeper power to access third-party seller data to identify popular and profitable products, create a competing private-label product, and then engage in predatory pricing to drive the original vendors from the market.[41] Amazon also uses its control over the marketplace and unmatched access to market data to preference its own products and services over third-parties' similar products and services.[42] And it leverages its dominance in e-commerce to force third-party sellers to purchase Amazon's fulfillment services and advertising.[43]

Apple. The Committee found that Apple has significant and durable market power in the mobile-operating-system market through its control over the mobile-software-applications market for more than 100 million iPhones and iPads in the United States.[44] The Committee further found that Apple exploits its dominance to establish and enforce anticompetitive and self-preferencing rules for the marketplace, to preference its own software products and services, to exclude rivals, and to pick winners and losers.[45]

Apple's abusive practices are varied and include requiring app developers to use Apple's in-app payment system, charging large commissions for apps and in-app purchases, and prohibiting app developers from using alternative payment processing systems or communicating with customers about the availability of lower-cost payment options elsewhere.[46] By contrast, Apple's apps enjoy a competitive advantage because they are not subject to the fees and commissions Apple charges rivals, such as Spotify or Proton Mail. Rivals must either increase prices on consumers or forgo investments in new services. App developers have repeatedly detailed

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[37] *See id.* at 155–60 (Google's self-preferencing).
[38] *See id.* at 177–81 (certain of Google's Android-related conduct).
[39] *See id.* at 215–19 (Amazon's market power, as concerning sellers and suppliers).
[40] *See id.* at 224–29 (Amazon's bullying of third-party sellers and forced arbitration).
[41] *See id.* at 230–37 (Amazon's appropriation of third-party seller data).
[42] *See id.* at 237–40 (Amazon's self-preferencing).
[43] *See id.* at 240–45 (Amazon's tying and bundling).
[44] *Id.* at 10, 279.
[45] *See id.* at 285–314 (Apple's relevant conduct).
[46] *See id.* at 285–96 (Apple's App Store commissions and control of in-app purchases).

how Apple threatened them with expulsion from the App Store if apps did not implement in-app payments that allow Apple to take a commission from transactions.[47]

Apple also uses its control over the iOS ecosystem to preference its own apps in App Store search rankings, device functionality, and access to application programming interfaces.[48] Additionally, Apple exploits competitively sensitive information from third-party app developers to build competing apps and then incorporates these apps into iOS itself—often driving the third-party developer and other competitors out of the market entirely—a practice so pervasive it has a name: "Sherlocking."[49]

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In response to the Committee's Report, Representative Ken Buck (R–CO), along with several other Republicans, released a separate report entitled "The Third Way: Antitrust Enforcement in Big Tech" (Third Way Report), which agreed that the Digital Markets Report "offers a comprehensive review of the technology marketplace and accurately depicts the harmful effects of Big Tech's anticompetitive reign over the digital economy."[50] The Third Way Report described the Digital Markets Report's factual findings as "undeniable" and agreed that it "accurately portrays how Apple, Amazon, Google, and Facebook have used their monopoly power to act as gatekeepers to the marketplace, undermine potential competition, . . . pick winners and losers," and aggressively pursue anticompetitive mergers to snuff out competitors and reinforce their dominance.[51]

2. Adequacy of Current Law

As the Committee's investigation showed, several dominant online platforms have engaged in conduct that raises significant competition concerns, demonstrating the pressing need for legislation to address the rise, persistence, and abuse of market power online. In recent decades, however, the antitrust laws have been unduly narrowed by the courts. As a result, the Committee found that current laws can often be insufficient to address the abuse of gatekeeper power or barriers to entry that typify today's digital marketplace.[52] Further, it can be unnecessarily difficult for antitrust enforcers—as well as private plaintiffs—to successfully challenge anticompetitive conduct and mergers through litigation.[53] Leading antitrust scholars have observed that these trends "reflect[] the now outdated learning of an earlier era of economic thought, and [the courts] appear in some respects inhospitable to new learning."[54]

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[47] *See id.* at 293–96 (Apple's conduct regarding in-app purchases).

[48] *See id.* at 296–305 (certain of Apple's self-preferencing conduct).

[49] *See id.* at 305–07 (Apple's treatment of competitively sensitive information).

[50] THIRD WAY REPORT at 3. *See also id.* at 6 ("These concerning behaviors are the fruit of Big Tech's poisonous and monopolistic tree.").

[51] *Id.* at 3.

[52] *See* DIGITAL MARKETS REPORT at 330–37 (strengthening the antitrust laws).

[53] *See* Jonathan Sallet, *Competitive Edge: Protecting the "Competitive Process"—The Evolution of Antitrust Enforcement in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 31, 2018), https://equitablegrowth.org/competitive-edge-protecting-the-competitive-process-the-evolution-of-antitrust-enforcement-in-the-united-states/. *See also* THIRD WAY REPORT at 10 ("With its laser-like focus on price and output, modern antitrust appears to have missed the marketplace realities in Big Tech markets.").

[54] CHI. BOOTH STIGLER CTR. FOR THE STUDY OF ECON. & STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT 85 (2019) [hereinafter STIGLER REPORT], https://

Between 1890 and 1914, Congress enacted the Sherman Antitrust Act of 1890,[55] the Clayton Antitrust Act of 1914,[56] and the Federal Trade Commission Act of 1914 (FTC Act)[57] to preserve and promote competition by preventing cartelization, monopolization, and mergers or acquisitions that may substantially lessen competition or tend to create a monopoly. Over the past century, Congress has amended the antitrust laws in response to increased economic concentration or shortcomings in the law. These later-enacted statutes include the Robinson-Patman Act of 1936[58] and the Celler-Kefauver Act of 1950,[59] which together evince particular concern with arresting trends toward concentration in their incipiency, as well as the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[60] which further underscored the risks posed to competition from economic concentration due to mergers.

Despite this legislation, over the past several decades, some courts have inappropriately narrowed the grounds for antitrust liability, particularly under section 2 of the Sherman Act, which broadly prohibits monopolization. For certain forms of exclusionary conduct—including predatory pricing, refusals to deal, tying, bundling, price squeezing, and monopoly leveraging—such decisions may require plaintiffs to meet high legal and evidentiary burdens that are inconsistent with the original purpose of the antitrust laws.[61]

Courts' recent treatment of the essential-facilities doctrine offers one example. That doctrine provides that, in certain circumstances, when a dominant firm operates as a bottleneck gatekeeper in the market for an essential input, the firm may not deny competitors access to that essential input.[62] Enforcement of this doctrine could help restore competition in digital markets. As leading antitrust experts noted during the Committee's investigation, several dominant online platforms operate as de facto essential facilities. For example, as Professors Harry First and Eleanor Fox of the New York University School of Law explained in a submission to the Subcommittee: "Many businesses, to do business, must use the platform. They have almost no choice. [Google, Amazon, Facebook, and Apple] compete with the businesses on their platforms."[63]

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www.chicagobooth.edu/-/media/research/stigler/?pdfs/digital-platforms---committee-report---stigler-center.pdf.

[55] Ch.647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§1–7).

[56] Pub. L. No. 63–212, ch.323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§12–27).

[57] Pub. L. No. 63–203, ch.311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§41–58).

[58] Pub. L. No. 74–692, ch.592, 49 Stat. 1526 (codified at 15 U.S.C. §13).

[59] Pub. L. No. 81–899, ch.1184, 64 Stat. 1125 (amending 15 U.S.C. §18).

[60] Pub. L. No. 94–435, §§201–202, 90 Stat. 1383, 1390–94 (codified as amended at 15 U.S.C. §18a).

[61] *See, e.g., Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991).

[62] *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977) (citing, among other cases, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912)).

[63] Submission from Harry First, Charles L. Denison Prof. of L., N.Y.U. Sch. of L., & Eleanor Fox, Walter J. Derenberg Prof. of Trade Reg., N.Y.U. Sch. of L., to H. Comm. on the Judiciary, 5 (Aug. 6, 2020), https://judiciary.house.gov/uploadedfiles/submission_from_harry_first_and_eleanor_fox.pdf. *See also, e.g.*, Submission from Albert A. Foer, Founder & Senior Fellow, Am. Antitrust Inst., to H. Comm. on the Judiciary,1–2 (Apr. 14, 2020), https://judiciary.house.gov/uploadedfiles/submission_from_bert_foer.pdf; Submission from Sally Hubbard, Dir. of Enf't Strategy, Open Mkts. Inst., et al., to H. Comm. on the Judiciary,5–7 (Apr. 17, 2020), https://judiciary.house.gov/uploadedfiles/submis-

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But judicial decisions have inappropriately limited the essential-facilities doctrine as a tool to protect competition,[64] by holding that dominant companies are "under no obligation to provide rivals with a 'sufficient' level of service."[65] As a result, a refusal by a monopolist to deal with rivals can operate to effectively cement that monopolist's dominance while also making it more difficult for potential competitors to enter the market, enhance competition, and ensure that consumers, trading partners, and workers have choices in the marketplace.[66]

Another example is monopoly leveraging, a practice by which a dominant firm uses its monopoly power in one market to advantage its position in a second market—and one that the Committee's investigation revealed that dominant online platforms engage in. As with other types of exclusionary conduct, monopoly leveraging was previously a widely accepted theory of harm under the antitrust laws.[67] However, in recent years, some courts have created undue barriers to the enforcement of monopoly-leveraging claims that defy Congress' intent. For instance, some courts now require that antitrust enforcers or private antitrust plaintiffs show that a firm's use of its monopoly power in one market results in, or seriously threatens to result in, the monopolization of a second market.[68]

In chipping away at the protections against monopolization afforded by section 2 of the Sherman Act, some courts have incorrectly focused on the costs of false positives (i.e., the costs of erroneous enforcement actions), demonstrating a strong preference for Type II errors (i.e., erroneous inaction) over Type I errors (i.e., erroneous action), effectively creating a judicial bias against antitrust enforcement.[69] Professor Herbert Hovenkamp explained that "[a]ntitrust today suffers from an antienforcement bias that is scientifically obsolete and produces too many false negatives."[70] And Michael Kades from the Washington Center for Equitable Growth testified before the Subcommittee that, "[o]ver the past 40 years, . . . federal courts, showing an almost neurotic fear of overenforce-

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sion_from_sally_hubbard_and_antitrust_expert_coalition.pdf; Remedies Hearing at 100–01 (statement of K. Sabeel Rahman, President, Demos).

[64] *See* Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, 23 YALE J.L. & TECH. 301, 307, 309–11 (2021); *id.* at 310 n.39 (citing Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989); Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 965 (1987); William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 485 n.122 (2020)).

[65] *Pac. Bell Tel. Co. v. linkLine Commc's, Inc.*, 555 U.S. 438, 444 (2009) (describing holding of *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 (2004)).

[66] *See, e.g.*, Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 253–55, 305 (2021).

[67] *See, e.g., United States v. Griffith*, 334 U.S. 100, 107, 108 (1948) (explaining that "the use of monopoly power, however lawfully acquired, . . . to gain a competitive advantage . . . is unlawful," and further that,"[i]f monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed"); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir. 1978) (concluding that a drug company violated section 2 by linking rebates for products on which it faced no competition to a competitive product); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) (holding that "a firm violates §2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market").

[68] *See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458–59 (1993); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547–49 (9th Cir. 1991).

[69] *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J.1, 5 (2015).

[70] Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2049 (2021).

ment, have increased burdens on plaintiffs in antitrust cases and narrowed the scope of antitrust law." [71]

As a result, these decisions have undermined the effective enforcement of antitrust law to curtail anticompetitive conduct in the digital marketplace. Indeed, as Chair Nadler and Subcommittee Chair Cicilline noted in a joint statement accompanying the release of the Digital Markets Report, the Committee's investigation demonstrated that "there is a clear and compelling need for Congress and the antitrust enforcement agencies to take action that restores competition, improves innovation, and safeguards our democracy. This Report outlines a roadmap for achieving that goal." [72]

II. PROPOSALS AND SUPPORT FOR MODERNIZING THE ANTITRUST LAWS FOR THE DIGITAL ECONOMY

During the 117th Congress, the Subcommittee held further hearings, and reviewed additional reports and recommendations from experts and stakeholders, addressing the need to modernize the antitrust laws.

In February 2021, the Subcommittee held a hearing on proposals to address gatekeeper power and lower barriers to entry online.[73] Several witnesses testified in support of legislation to curb economic discrimination and other anticompetitive online conduct. For example, Charlotte Slaiman, Competition Policy Director at Public Knowledge, explained why Congress should adopt new legislation: "In dealing with quickly changing technology, you need speed and flexibility. In dealing with markets prone to tipping, you need ongoing monitoring and enforcement." [74] Ms. Slaiman identified as a particular problem the fact that dominant online platforms' business models inevitably create conflicts of interest and give these firms the incentive and ability to discriminate against, and harm, potential rivals.[75] She noted that dominant platforms can "use their gatekeeper power to pick themselves as winners in a market while ensuring rivals and potential rivals remain losers," and Congress should enact legislation to "remove the ability for platforms to self-preference or anticompetitively discriminate." [76] In short, Ms. Slaiman stated, digital markets "need a non-discrimination rule." [77]

Morgan Harper, Senior Advisor at the American Economic Liberties Project, similarly testified that "[d]ominant firms should be banned from discriminating against other firms" and "should give market players equal access to their platforms and not pick winners or losers." [78]

Hal Singer, Managing Director at Econ One, agreed in his testimony that American antitrust law could not currently address cer-

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[71] Remedies Hearing at 29 (statement of Michael Kades, Dir., Mkts. & Competition Pol'y, Wash. Ctr. for Equitable Growth).

[72] Press Release, H. Comm. on the Judiciary, Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted by Monopoly Power (Oct. 6, 2020), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429.

[73] *Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. 24 (2021) [hereinafter Lower Barriers to Entry Hearing], https://www.govinfo.gov/content/pkg/CHRG-117hhrg47295/pdf/CHRG-117hhrg47295.pdf.

[74] *Id.* at 16 (statement of Charlotte Slaiman, Competition Pol'y Dir., Pub. Knowledge).

[75] *Id.* at 20.

[76] *Id.* at 21.

[77] *Id.*

[78] *Id.* at 79 (statement of Morgan Harper, Senior Advisor, Am. Econ. Liberties Project).

tain types of anticompetitive conduct that permeate the digital markets and stifle innovation. Dr. Singer advised: "Given this gap in protection, there is an urgent need to supplement antitrust enforcement with regulatory protections." [79] He explained that a variety of complementary approaches were warranted because, even if structural separations or line-of-business restrictions are imposed on dominant digital platforms, "this approach must be bolstered with rules against control via contracting, such as bans on exclusive dealing." [80]

In March 2021, the Subcommittee held a hearing with current and former competition-law enforcers on strengthening the antitrust laws to address monopoly power.[81] Seventh Circuit Court of Appeals Judge Diane P. Wood, formerly a Deputy Assistant Attorney General of the DOJ's Antitrust Division, testified that, although "[t]his is obviously hardly the first time Congress has considered legislative changes to the antitrust laws," "this is a time where clarification of the intent of Congress is really called for." [82] Judge Wood observed that there was an "under-enforcement of the law" stemming from, among other things, the fact that "courts have become so unfavorable," citing decisions like *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[83] and noted that "there is room for Congress" to offer "reinforcement of the fact that . . . monopolistic practices are part of what the [antitrust] law covers." [84]

Colorado Attorney General Phil Weiser similarly testified that courts have "rendered a number of decisions that imposed artificial hurdles to antitrust liability." [85] He stressed that, "to enable effective antitrust enforcement, corrective legislative action is clearly warranted to address recent misguided Supreme Court decisions." [86]

FTC Commissioner Rebecca Kelly Slaughter, then Acting FTC Chair, agreed with these observations in her testimony, explaining that "[t]he antitrust statutes were drafted broadly and with the intent to cover evolving patterns of conduct or market structure in a variety of industries; however, especially in light of recent jurisprudence, the burden on plaintiffs to succeed in court is high." [87] She explained that the effect of this case law has "led to an extremely limited application of the antitrust laws," harming con-

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[79] *Id.* at 25 (statement of Hal Singer, Managing Dir., Econ One).

[80] *Id.*

[81] *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. (2021) [hereinafter Strengthening the Laws Hearing], https://www.govinfo.gov/content/pkg/CHRG-117hhrg47296/pdf/CHRG-117hhrg47296.pdf.

[82] *Id.* at 21 (statement of Hon. Diane P. Wood, Judge, U.S. Ct. of App. for the Seventh Cir.).

[83] 540 U.S. 398 (2004).

[84] Strengthening the Laws Hearing at 21–22 (statement of Hon. Diane P. Wood, Judge, U.S. Ct. of App. for the Seventh Cir.).

[85] *Id.* at 46 (statement of Hon. Phil Weiser, Att'y Gen., Colorado) (citing BILL BAER ET AL., WASH. CTR. FOR EQUITABLE GROWTH, RESTORING COMPETITION IN THE UNITED STATES 11 (2020), https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 70 (2019), https://faculty.haas.berkeley.edu/shapiro/protectingcompetition.pdf). *See also* STIGLER REPORT at 85 ("there have been few antitrust challenges to exclusionary conduct since the government's 1998 case against Microsoft, and courts have in several instances been hostile to such cases and have imposed daunting proof requirements on plaintiffs").

[86] Strengthening the Laws Hearing at 48 (statement of Hon. Phil Weiser, Att'y Gen., Colorado).

[87] *Id.* at 19 (statement of Hon. Rebecca Kelly Slaughter, Acting Chair, Fed. Trade Comm'n).

sumers, workers, and entrepreneurs.[88] Accordingly, she stated, "current market conditions, including the role of digital platforms, have caused nearly everyone to question whether our competition laws and enforcement approaches are adequate to protect consumers from anticompetitive conduct and mergers."[89]

In addition, the Subcommittee reviewed letters and other materials demonstrating the pressing need for modernization of the antitrust laws. Among other things, these materials showed significant, bipartisan agreement among current and former antitrust enforcers that legislative changes are necessary because judicial decisions have constrained the application of the antitrust laws. Bill Baer, the former head of the DOJ's Antitrust Division, co-authored a report noting that courts "increasingly saddle plaintiffs with inappropriate burdens, making it unnecessarily difficult to prove meritorious cases and allowing anticompetitive conduct to escape condemnation."[90] In a submission to the Subcommittee, Utah Attorney General Sean Reyes wrote that "judicial decisions over time have added requirements not found in the plain language of the federal antitrust laws which have created unworkable barriers to effective antitrust enforcement."[91] And a bipartisan group of 32 state attorneys general submitted a letter encouraging and applauding Congress' efforts "to ensure that federal antitrust laws remain robust and keep pace with that of modern markets," particularly "[g]iven changes in technology, decreased competition in important sectors, and undue judicial skepticism towards robust enforcement."[92]

Public-interest organizations submitted similar correspondence in support of modernizing antitrust legislation. For example, George Slover, then the Senior Policy Counsel of Consumer Reports, advocated "[i]mposing non-discrimination requirements to limit self-preferencing by dominant online platforms."[93]

Rashad Robinson, President of Color of Change, wrote that "underenforcement of the antitrust laws forces Black consumers, workers, and small business owners to rely on extortive online marketplaces and racially biased search algorithms that disproportionately cut into their profits."[94] Color of Change, therefore, sup-

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[88] *Id.* at 20 (citing *Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko LLP.*, 540 U.S. 398 (2004); *Brooke Grp. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993); *Ohio v. Am. Express Co.,* 138 S. Ct. 2274 (2018)).

[89] *Id.* at 12.

[90] BILL BAER ET AL., WASH. CTR. FOR EQUITABLE GROWTH, RESTORING COMPETITION IN THE UNITED STATES 11 (2020), https://equitablegrowth.org/wp-content/ uploads/2020/11/111920-antitrust-report.pdf.

[91] Letter from Hon. Sean D. Reyes, Att'y Gen., Utah, to Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary,4 (Mar. 25, 2021), https://docs.house.gov/meetings/JU/JU05/20210318/111350/HHRG-117-JU05-20210318-SD005.pdf.

[92] Letter from Phil Weiser, Att'y Gen., Colorado, et al., to Hon. Nancy Pelosi, Speaker, H.R., et al.,1 (Sept. 20, 2021), https://coag.gov/app/uploads/2021/09/Antitrust-Package-Support-Letter-.pdf.

[93] Letter from George P. Slover, Senior Pol'y Couns., Consumer Reps., & Sumit Sharma, Senior Researcher, Tech. Competition, Consumer Reps., to Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 4 (Mar. 18, 2021), https://docs.house.gov/meetings/JU/JU05/20210318/111350/?HHRG-117-JU05-20210318-SD003.pdf.

[94] Letter from Rashad Robinson, President, Color of Change, to Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm.

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ported legislation that would ban dominant online platforms from, among other things, "[s]ystematically disadvantaging those businesses through racially discriminatory algorithms in search, fees, access, or public reach" and "[m]isappropriating data to copy products and services offered by those businesses." [95]

III. SIMILAR DETERMINATIONS BY AUTHORITIES OUTSIDE THE UNITED STATES

Internationally, several jurisdictions are developing measures that would prohibit self-preferencing and economic discrimination by dominant online platforms. For example, in December 2019, the European Commission proposed the Digital Markets Act to establish enhanced procompetitive obligations for the largest digital gatekeepers to prevent them from abusing their dominance to harm competitors or impede competition, and from expanding or entrenching their dominance by engaging in self-preferencing or monopoly leveraging.[96] The European Parliament adopted the Digital Markets Act in July 2022,[97] and it went into force in November 2022.[98]

In the United Kingdom, the Competition and Markets Authority (CMA) published a report finding that dominant online platforms can use their power to engage in self-preferencing, harmful discrimination, and monopoly leveraging, which harm competition and innovation.[99] To address these concerns, the CMA recommended that the U.K. government establish a competition regime that would apply enhanced procompetitive rules to dominant online platforms.[100] The CMA noted that these rules would prohibit "practices by the firm[s] which could undermine fair competition," thereby preventing them "from taking advantage of their powerful positions" and protecting "consumers and businesses from being exploited." [101] In July 2021, the U.K. government sought public comment on a legislative proposal to launch the new regime; and in May 2022, it reported the outcome of that public consultation.[102] In November 2022, the U.K. Chancellor confirmed that the U.K. government intended to introduce legislation giving the CMA "new

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on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 1 (Aug. 12, 2021) (on file with Comm.).

[95] *Id.* at 8.

[96] *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act*), at 36–41, COM (2020) 842 final (Dec. 15, 2020), https://eur-lex.europa.eu/?legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en.

[97] European Parliament Press Release 20220701IPR34364, Digital Services: Landmark Rules Adopted for a Safer, Open Online Environment (July 5, 2022), https://www.europarl.europa.eu/news/en/press-room/20220701IPR34364/?digital-services-landmark-rules-adopted-for-a-safer-open-online-environment.

[98] European Commission Press Release IP/22/6423, Digital Markets Act: Rules for Digital Gatekeepers to Ensure Open Markets Enter into Force (Oct. 31, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423.

[99] U.K. COMPETITION & MKTS. AUTH., A NEW PRO-COMPETITION REGIME FOR DIGITAL MARKETS: ADVICE OF THE DIGITAL MARKETS TASKFORCE 16–19 (2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f?98286c/Digital_Taskforce_–_Advice.pdf.

[100] *Id.* at 26–28.

[101] *Id.* at 34.

[102] U.K. Competition & Mkts. Auth., *Digital Markets Unit,* GOV.UK (July 20, 2021), https://www.gov.uk/?government/collections/digital-markets-unit; U.K. Dep't for Digit., Culture, Media & Sport & U.K. Dep't for Bus., Energy & Indus. Strategy, *Consultation Outcome: A New Pro-Competition Regime for Digital Markets—Government Response to Consultation*, GOV.UK (May 6, 2022), https://www.gov.uk/government/consultations/ a-new-pro-competition-regime-for-digital-markets/outcome/ a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation.

powers to challenge monopolies and increase the competitive pressure to innovate" in digital markets.[103]

International competition authorities have also identified the need for greater focus and specialization on the unique business models and competition challenges in the digital marketplace. For example, the United Kingdom has established a dedicated unit within its antitrust agency to focus on competition issues in the digital economy.[104] The Australian Competition and Consumer Commission (ACCC) similarly recommended that the Australian government establish a new entity within the ACCC that would develop expertise on digital markets and algorithms, monitor and investigate anticompetitive conduct, enforce competition laws, and make recommendations to the government regarding harms to consumers and impediments to competition online.[105]

IV. H.R. 3816, THE AMERICAN INNOVATION AND CHOICE ONLINE ACT

A. Restoring Competition in Digital Markets

In response to concerns identified during the Committee's investigation and documented in the Digital Markets Report, Subcommittee Chair Cicilline introduced H.R. 3816, the "American Innovation and Choice Online Act," with Representative Gooden, Committee Chair Nadler, and Subcommittee Ranking Member Buck as original cosponsors of the bill. This legislation was introduced alongside a suite of bipartisan bills that would strengthen the antitrust laws and enforcement in the digital economy.[106]

H.R. 3816 establishes clear rules for fair competition online by prohibiting various types of anticompetitive and exclusionary conduct by dominant online platform companies, such as favoring their own products or services, disadvantaging rivals, or discriminating among businesses that rely on their platforms for legitimate business activity. These rules are designed to prohibit the practices that the Committee's investigation revealed to be anticompetitive without any redeeming procompetitive benefit, such as misappropriating a business's data to clone its products or services or manipulating search results in favor of the dominant firm. The bill also includes strong protections for privacy and user safety to ensure that it addresses only anticompetitive conduct by gatekeeper

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[103] Jeremy Hunt, U.K. Chancellor of the Exchequer, Autumn Statement 2022 (Nov. 17, 2022), https://www.gov.uk/?government/speeches/the-autumn-statement-2022-speech.

[104] U.K. Competition & Mkts. Auth., *Digital Markets Unit*, GOV.UK (July 20, 2021), https://www.gov.uk/?government/collections/digital-markets-unit.

[105] AUSTL. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY FINAL REPORT 142 (2019), https://www.accc.gov.au/system/files/Digital%20platforms% 20inquiry%20-%20final%20report.pdf. *See also Digital Platforms*, ACCC, https://www.accc.gov.au/focus-areas/digital-platforms (last visited Dec. 9, 2022).

[106] In addition to H.R. 3816, this legislation included H.R. 3843, the Merger Filing Fee Modernization Act of 2021; H.R. 3460, the State Antitrust Enforcement Venue Act of 2021; H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021; H.R. 3826, the Platform Competition and Opportunity Act of 2021; and H.R. 3825, the Ending Platform Monopolies Act. Together, this legislation was intended to promote competition in digital markets by increasing antitrust enforcement, to prohibit self-preferencing and discrimination by dominant platforms, to reduce switching costs for consumers, and to stop anticompetitive mergers. *See* Press Release, Rep. David N. Cicilline, House Lawmakers Release Anti-Monopoly Agenda for "'Stronger Online Economy: Opportunity, Innovation, Choice" (June 11, 2021), https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-for-a-stronger-online-economy-opportunity-innovation-choice ("'A Stronger Online Economy: Opportunity, Innovation, Choice' consists of five bipartisan bills drafted by lawmakers on the Antitrust Subcommittee, which last year completed a 16-month investigation into the state of competition in the digital marketplace and the unregulated power wielded by Amazon, Apple, Facebook, and Google.").

platforms, rather than the platforms' legitimate efforts to curtail unlawful activity, protect privacy, or enforce broadly applicable policies to protect the safety of the platform or its users. Finally, the bill includes new tools to ensure that antitrust enforcers can effectively police and deter abusive conduct. These include new emergency-relief authority to halt abusive conduct in its incipiency before it causes harm to competition, as well as authority for enforcers to seek the forfeiture of executive compensation from corporate officers at companies that have repeatedly violated the bill.

The conduct of dominant online platforms uncovered during the investigation underscores the urgent need for H.R. 3816. For example, during and after the investigation, credible reporting detailed how Amazon abused data collected from third-party sellers on Amazon's platform to compete against those sellers.[107] Reporting also showed that Amazon manipulated e-commerce search results to favor its own private-label products over third-party sellers' products.[108] Members expressed concern that Amazon may have lied in sworn testimony about these practices during the Committee's investigation, attempted to mislead the Committee to cover up its statements, and then attempted to stonewall the Committee's efforts to uncover the truth. The Committee therefore referred the matter to the Department of Justice to investigate whether Amazon or its executives obstructed Congress or violated other applicable federal laws.[109] Despite Amazon's misrepresentations, the Committee was able to determine that Amazon and other dominant online platforms are undeterred by existing law from engaging in discriminatory and self-preferencing conduct. H.R. 3816 thus establishes clear prohibitions against those forms of conduct.

Recent monopolization litigation against dominant online platforms—raising allegations consistent with the Committee's findings—also demonstrates the need for H.R. 3816. In each of these cases, courts have failed to grasp the reality of competition in digital markets and created unjustified hurdles to the enforcement of the antitrust laws against anticompetitive conduct.

In December 2020, the FTC filed a lawsuit against Facebook for anticompetitive conduct and unfair methods of competition in violation of section 2 of the Sherman Act and section 5(a) of the FTC Act.[110] The FTC alleged that "Facebook has maintained its monopoly position by buying up companies that present competitive threats and by imposing restrictive policies that unjustifiably hinder actual or potential rivals that Facebook does not or cannot

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[107] Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products,* WALL ST. J. (Apr. 23, 2020), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015; Adita Kalra & Steve Stecklow, *Amazon Copied Products and Rigged Search Results to Promote Its Own Brands, Documents Show*, REUTERS (Oct. 13, 2021), http://www.reuters.com/investigates/special-report/amazon-india-rigging/.

[108] Adrianne Jeffries & Leon Yin, *Amazon Puts Its Own "Brands" First Above Better-Rated Products*, MARKUP (Oct. 14, 2021), https://www.themarkup.org/amazons-advantage/2021/10/14/amazon-puts-its-own-brands-first-above-better-rated-products.

[109] Letter from Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. Law of the H. Comm. on the Judiciary, Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. Law of the H. Comm. on the Judiciary, Hon. Pramila Jayapal, Vice-Chair, Subcomm. on Antitrust, Com., & Admin. Law of the H. Comm. on the Judiciary, Hon. Matt Gaetz, Member, Subcomm. on Antitrust, Com., & Admin. Law of the H. Comm. on the Judiciary, to Hon. Merrick B. Garland, Att'y Gen., U.S. Dep't of Justice (Mar. 9, 2022), https://judiciary.house.gov/uploadedfiles/hjc_referral_amazon.pdf.

[110] Complaint, *Fed. Trade Comm'n v. Facebook, Inc.,* 560 F. Supp. 3d 1 (D.D.C. 2021) (No. 20–3590), ECF No. 51, https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf.

acquire."[111] The U.S. District Court for the District of Columbia nevertheless dismissed the complaint.[112] It found that the FTC had not sufficiently pleaded Facebook's monopoly power.[113] The court also found that "the conduct that [the FTC] alleges regarding Facebook's interoperability policies cannot form the basis for Section 2 liability" under the Sherman Act.[114]

H.R. 3816 would clarify that claims of the nature pleaded by the FTC against Facebook are cognizable under the law, providing a new legal basis for such claims and streamlining litigation. Instead of having to plead and prove monopoly power, enforcers would have to demonstrate only that the defendant operated a covered platform. And instead of having to establish a section 2 claim under the narrow interpretation adopted by some courts, an enforcer would need only demonstrate that the defendant violated one of H.R. 3816's specific prohibitions.

Also in December 2020, a bipartisan coalition of 48 state attorneys general filed a lawsuit against Facebook, alleging that Facebook has a monopoly in the personal-social-networking market, and its anticompetitive and exclusionary conduct violates section 2 of the Sherman Act and section 7 of the Clayton Act.[115] The D.C. District Court dismissed the states' case in its entirety.[116] The court rejected the states' claim that Facebook's exclusionary conduct against rivals violated section 2 of the Sherman Act, in part because Facebook's actions had, as intended, already destroyed potential competition. The court stated that "there is nothing the Court could order Facebook to do that would remedy that specific injury. . . . It cannot turn back the clock . . . and order Facebook to provide API access to Voxer, MessageMe, Path, or any other potential competitor (many of which are now defunct, per the Complaint), or somehow otherwise undo or ameliorate the destruction of competition."[117] Under the court's reading of the Sherman Act, a monopolist could escape any liability if its abusive conduct was so thoroughly devastating that it succeeded in destroying the competitive landscape before the filing of litigation challenging the exclusionary conduct. H.R. 3816, by contrast, would make clear that a covered platform must provide potential competitors with certain access to its platform and related features, and it would allow those potential competitors or a government enforcer to seek immediate, temporary relief against denial of that access.

Litigation initiated by private parties also demonstrates the need for H.R. 3816. In August 2020, Epic sued Apple alleging violations of federal and state antitrust laws related to Apple's operation of the App Store.[118] In a 185-page opinion, the U.S. District Court for the Northern District of California entered judgment against Epic

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[111] *Id.* at 1, ¶1.
[112] *Fed. Trade Comm'n v. Facebook, Inc.,* 560 F. Supp. 3d 1 (D.D.C. 2021).
[113] *Id.* at 4. *See also id.* at 15–21.
[114] *Id.* at 5. *See also id.* at 24–30.
[115] Complaint, *New York v. Facebook,* Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20-cv-3589), ECF No. 4, https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf.
[116] *New York v. Facebook, Inc.,* 549 F. Supp. 3d 6 (D.D.C. 2021).
[117] *Id.* at 30.
[118] Complaint, *Epic Games, Inc. v. Apple Inc.,* 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20–cv–5640), ECF No. 1; *see* Nick Statt, *Epic Games Is Suing Apple,* VERGE (Aug. 13, 2020), https://www.theverge.com/2020/8/13/?21367963/epic-fortnite-legal-complaint-apple-ios-app-store-removal-injunctive-relief.

on its antitrust claims.[119] In so ruling, the court struggled to identify the relevant product market, rejecting the markets proposed by both parties and coming up with its own relevant product market.[120] Among other things, the court rejected claims by Epic that the mobile-operating-system market is a foremarket and the App Store and Apple's in-app payment-processing service is an aftermarket.[121] As the American Antitrust Institute explained in an amicus brief to the U.S. Court of Appeals for the Ninth Circuit, the District Court made numerous errors in defining the relevant markets, including making the fundamental error of "assuming that the way markets currently operate reflects the way competitive markets would operate" in its analysis of Apple's practice of bundling many features and services with the iPhone.[122]

H.R. 3816 would respond to the problems plaguing this and other courts' product-market analyses by abrogating the need to define a relevant product market. H.R. 3816 specifies the persons governed by its prohibitions (covered platforms) and prohibits covered-platform operators from engaging in particular conduct. The bill thus would remove many of the current judicially imposed barriers to enforcement of the antitrust laws by providing clear legal principles for courts to follow.

B. Broad Public Support of H.R. 3816, the American Innovation and Choice Online Act

H.R. 3816 is supported by the DOJ,[123] the U.S. Department of Commerce,[124] and a bipartisan group of 32 state attorneys general.[125]

In its letter of support, the Justice Department said that it "views the rise of dominant platforms as presenting a threat to open markets and competition, with risks for consumers, businesses, innovation, resiliency, global competitiveness, and our democracy."[126] The Justice Department explained that dominant platforms have the power "to pick winners and losers across markets . . . , and given the increasing importance of these markets, the power of such platforms is likely to continue to grow unless

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[119] *Epic Games, Inc. v. Apple Inc.,* No. 4:20–cv–5640, slip op. (N.D. Cal. Sept. 10, 2021), https://cand.uscourts.gov/?wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-812-Order.pdf.

[120] *See Epic Games, Inc. v. Apple Inc.,* 559 F. Supp. 3d 898, 921, 954–87 (N.D. Cal. 2021).

[121] *See id.* at 955, 971–72.

[122] Brief of the American Antitrust Institute as Amicus Curiae in Support of Plaintiff, Counter-Defendant—Appellant at 15, *Epic Games, Inc. v. Apple Inc.,* Nos. 21–16506 & 21–16695 (9th Cir. filed Jan. 27, 2022), 21–16506 ECF No. 57, 21–16695 ECF No. 44, https://www.antitrustinstitute.org/wp-content/uploads/2022/01/2022-1-27-AAI-Amicus-Brief-Apple-v.-Epic-FILED.pdf.

[123] Letter from Peter Hyun, Acting Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Justice, to Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary (Mar. 28, 2022), https://www.justice.gov/ola/page/file/1488741/download.

[124] Brian Fung, *Major Tech Antitrust Bill Gets Backing of US Commerce Department,* CNN BUS. (Apr. 27, 2022), https://www.cnn.com/2022/04/27/tech/commerce-antitrust-bill/index.html.

[125] Letter from Phil Weiser, Att'y Gen., Colorado, et al., to Hon. Nancy Pelosi, Speaker, H.R., et al. (Sept. 20, 2021), https://coag.gov/app/uploads/2021/09/Antitrust-Package-Support-Letter-.pdf.

[126] Letter from Peter Hyun, Acting Assistant Att'y Gen., Off. of Legis. Affs., U.S. Dep't of Justice, to Hon. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, & Hon. Ken Buck, Ranking Member, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 1 (Mar. 28, 2022), https://www.justice.gov/ola/page/file/1488741/download.

checked."[127] Unchecked power of this nature "contravenes the foundations of our capitalist system" and "puts at risk the nation's economic progress and prosperity, ultimately threatening the economic liberty that undergirds our democracy." [128] Importantly, the Justice Department noted that, by prohibiting behaviors that "reduce incentives for smaller or newer firms to innovate and compete, the legislation would supplement the existing antitrust laws in preventing the largest digital companies from abusing and exploiting their dominant positions to the detriment of competition and the competitive process.[129]

Similarly, in her testimony before the Senate Commerce Committee in April 2022, Secretary of Commerce Gina Raimondo explained: "[I] clearly agree that we need to improve competition, which increases innovation," and "the Department and I certainly support [] and concur with the aim of the legislation," along with the Justice Department's letter in support of H.R. 3816.[130]

H.R. 3816 is also supported by a broad coalition of antitrust experts and public-interest organizations, including Public Knowledge, Open Markets Institute, the Electronic Frontier Foundation (EFF), AFL–CIO, Color of Change, the Institute for Local Self Reliance, and Small Business Rising.

For instance, Professors Fiona Scott Morton of the Yale School of Management, Steven C. Salop of the Georgetown University Law Center, and David C. Dinielli of Yale Law School submitted a letter stating, "[w]e believe the American Innovation and Choice Online Act . . . would improve competition in digital markets, prevent further enhancement of market power, increase innovation, and benefit consumers. It therefore should become law in the U.S." [131]

Bill Baer, the former Assistant Attorney General for DOJ's Antitrust Division, likewise wrote that "[d]ominant platforms possess enormous economic power, with the ability and demonstrated willingness to impede competition in ways that damage both [competitors] and consumers." He continued: "We need tools to challenge abuses of that power. The American Innovation and [Choice Online] Act does that." [132]

A coalition of 30 digital rights organizations, including Access Now, Athena Coalition, and Fight for the Future, noted that "Big Tech owns the world's eyeballs, and with no competition to challenge and offer a way out from their abusive practices, they won't change their ways unless regulation ends their dominance." [133] "This is why," the coalition explained, "we support the American

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 2.

[130] Brian Fung, *Major Tech Antitrust Bill Gets Backing of US Commerce Department*, CNN BUS. (Apr. 27, 2022), https://www.cnn.com/2022/04/27/tech/commerce-antitrust-bill/index.html.

[131] Letter from Fiona M. Scott Morton, Theodore Nierenberg Professor of Econ., Yale Sch. of Mgmt., et al., to Hon. Amy Klobuchar, Chair, Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts. of the S. Comm. on the Judiciary, & Hon. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary, 1 (July 7, 2022), https://som.yale.edu/sites/default/files/2022-07/AICOA-Final-revised.pdf.

[132] Bill Baer, *Why Amazon Is Wrong About the American Innovation and [Choice Online] Act*, BROOKINGS (June 14, 2022), https://www.brookings.edu/blog/techtank/2022/06/14/why-amazon-is-wrong-about-the-american-innovation-and-online-choice-act/.

[133] Letter from Access Now et al., to Hon. Chuck Schumer, S. Majority Leader, et al., 1 (July 11, 2022), https://techoversight.org/wp-content/uploads/2022/07/Access-Now-Letter.pdf.

Innovation and Choice Online Act"—because it "tackle[s] the dangerous dominance of Big Tech head-on." [134]

The Center for American Progress endorsed the legislation, explaining that, "[b]y purposefully targeting the anti-competitive practices of most concern," the American Innovation and Choice Online Act is one of the pending tech bills that "offer the United States a means to materially improve consumer choice in the near term and create a more dynamic online economy in the long term." [135] It offers a "bipartisan pathway for the 117th Congress to address challenges to American competitiveness." [136]

Consumer Reports also endorsed the legislation and wrote that the bill "narrowly targets policy intervention and proposes fair market rules which will enable more competition in online marketplaces and incentivize companies big and small to innovate to better meet consumer needs and increase choices." [137]

More than 40 Black entrepreneurs and small business owners wrote to leaders of the Judiciary Committee in support of H.R. 3816, stating that "[a]ntitrust enforcement is an indispensable tool to reduce racial economic inequalities. . . This legislation will be crucial in giving our businesses a chance to survive Big Tech's influence on the online marketplace." [138]

A coalition of small and independent business associations, including the American Booksellers Association, Small Business Rising, the American Independent Business Alliance, Main Street Alliance, and the Institute for Local Self-Reliance, wrote to Congressional leadership to "express [their] support and underscore [the] urgency for Congress to advance legislation aiming to address Big Tech's monopoly power." [139]

And more than 40 technology firms, including Beeper, Neeva, Proton Technologies, Sonos, DuckDuckGo, and Y Combinator, wrote to the leadership of the Senate Judiciary Committee in favor of the American Innovation and Choice Online Act, highlighting that the legislation "targets self-preferencing to help restore competition in the digital marketplace and remove barriers for consumers to choose the services they want." [140] They explained the legislation is crucial because "[d]ominant technolog[y] companies"

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[134] *Id.*

[135] ADAM CONNER & ERIN SIMPSON, CTR. FOR AM. PROGRESS, EVALUATING 2 TECH ANTITRUST BILLS TO RESTORE COMPETITION ONLINE 2 (2022), https://americanprogress.org/wp-content/uploads/2022/06/OnlineCompetition-report.pdf.

[136] *Id.* at 3.

[137] SUMIT SHARMA, CONSUMER REPS., A PRIMER ON THE AMERICAN INNOVATION AND CHOICE ONLINE ACT (AICO)—SETTING FAIR MARKET RULES FOR GIANT ONLINE PLATFORMS 5 (2022), https://advocacy.consumerreports.org/wp-content/uploads/2022/06/AICO-Primer-June_2022.pdf.

[138] Letter from 42 Black Small-Business Owners & Entrepreneurs, to Hon. Jerrold R. Nadler, Chair, H. Comm. on the Judiciary, & Hon. David N. Cicilline, Chair, Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 1 (Mar. 28, 2022) (on file with Comm.).

[139] Letter from Small Bus. Rising et al., to Hon. Charles Schumer, S. Majority Leader, et al., 1 (Apr. 11, 2022), https://static1.squarespace.com/static/5fd5323e3c1f6275809e64cd/t/6272d34e1c5ae03fd14e989f/1651692366844/SBR+Letter_Support+for+Big+Tech+Bills_04.2022_v.final.pdf. *See also* Letter from Small Bus. Rising et al., to Hon. Charles Schumer, S. Majority Leader, & Hon. Mitch McConnell, S. Minority Leader, 1 (July 12, 2022), https://static1.squarespace.com/static/5fd5323e3c1f6275809e64cd/t/62cd9140c772702a18e26b62/1657639232244/SBR+Letter_Support+for+Big+Tech+Bills_07.2022_v.+FINAL.pdf ("Concentrated market power is the single biggest threat facing independent businesses, and the status quo in our digital markets is untenable. The bipartisan bills represent an unprecedented opportunity to start leveling the playing field for our small, independent businesses.").

[140] Letter from Andi Search et al., to Hon. Dick Durbin, Chair, S. Comm. on the Judiciary, & Hon. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary (Jan. 18, 2022), https://wesupportsb2992.medium.com/re-s-2992-the-american-innovation-and-choice-online-act-f49cc61abd87.

ability to give their own products and services preferential placement, access, and data on online platforms and operating systems prevents companies like us from competing on the merits." [141]

Finally, polling demonstrates that there is broad public support for the American Innovation and Choice Online Act. A January 2022 nationwide survey by Data for Progress found that 58% of likely voters support the American Innovation and Choice Online Act.[142] June 2022 polling by Lake Research Partners of likely voters in Arizona, Georgia, New Hampshire, Nevada, North Carolina, Ohio, Pennsylvania, and Wisconsin found that 72% of likely voters support the legislation.[143] Similarly, a May 2022 survey by Hart Research Associates of voters in Arizona, Georgia, New Hampshire, and Nevada found that 76% of voters favor the American Innovation and Choice Online Act, and 71% of voters in those states want their senators to vote for the legislation.[144]

Hearings

For the purposes of clause 3(c)(6)(A) of House rule XIII, the following hearings were used to develop H.R. 3816 during the 117th Congress:

On February 25, 2021, the Subcommittee held a legislative hearing entitled, "Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online," to examine gatekeeper power and barriers to entry in digital markets and to explore potential legislative reforms to address these concerns.[145] The Majority witnesses were: (1) Eric Gundersen, Chief Executive Officer, Mapbox; (2) Morgan Harper, Senior Advisor, American Economic Liberties Project; (3) Hal Singer, Managing Director, Econ One; and (4) Charlotte Slaiman, Competition Policy Director, Public Knowledge. The Minority witnesses were: (1) Tad Lipsky, Director, Competition Advocacy Program, Global Antitrust Institute, George Mason University; and (2) John Thorne, Partner, Kellogg, Hansen, Todd, Figel & Frederick P.L.L.C.

On March 18, 2021, the Subcommittee held a legislative hearing entitled, "Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power," to address the rise and abuse of market power online and to strengthen and modernize the antitrust laws—in particular, the laws that are intended to combat monopolization and anticompetitive mergers.[146] The Majority witnesses were: (1) the Honorable Rebecca Kelly Slaughter, Acting Chair, Federal Trade Commission; (2) Mike Walker, Chief Economic Advisor, United Kingdom Competition and Markets Authority; (3) the Honorable Philip Weiser, Attorney General, Colorado; and (4) the Hon-

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[141] *Id.*

[142] DATA FOR PROGRESS, AICO NATIONAL POLL (2022), https://techoversight.org/files/AICO-National-Poll.pdf.

[143] ONMESSAGE PUBLIC STRATEGIES AND LAKE RESEARCH PARTNERS, KEY FINDINGS—A SURVEY OF EIGHT KEY POLITICAL STATES (2022), https://appfairness.org/wp-content/uploads/2022/06/202206-Key-Political-States-Memo.pdf.

[144] HART RSCH. ASSOCS., TECH OVERSIGHT 4 STATE STUDY 3, 5 (2022), https://techoversight.org/wp-content/uploads/2022/05/FI14304-Tech-Oversight-4-State-ns.pdf (answers to questions 5 and 10); *see also* BRIAN F. SCHAFFER, PUBLIC DEMAND FOR REGULATING BIG TECH: FINDINGS FROM RECENT POLLING (2022), https://techoversight.org/wp-content/uploads/2022/06/Schaffner-Big-Tech-Polling.pdf.

[145] Lower Barriers to Entry Hearing, https://www.congress.gov/event/117th-congress/house-event/111247 (hearing page).

[146] Strengthening the Laws Hearing, https://www.congress.gov/event/117th-congress/house-event/111350 (hearing page).

orable Diane P. Wood, Judge, U.S. Court of Appeals for the Seventh Circuit. The Minority witnesses were: (1) the Honorable Doug Peterson, Attorney General, Nebraska; and (2) the Honorable Noah Phillips, Commissioner, Federal Trade Commission.

In addition, the following related hearing was held:

On March 12, 2021, the Subcommittee held a legislative hearing entitled "Reviving Competition, Part 2: Saving the Free and Diverse Press" to examine legislative reforms to address the effects of platform dominance on trustworthy sources of news online.[147] The Majority witnesses were: (1) Emily Barr, President and Chief Executive Officer, Graham Media Group; (2) David Chavern, President and Chief Executive Officer, News Media Alliance; (3) Jonathan Schleuss, President, NewsGuild-Communications Workers of America; and (4) Brad Smith, President, Microsoft. The Minority witnesses were: (1) Glenn Greenwald, Journalist and Constitutional Lawyer; and (2) Clay Travis, Founder, OutKick Media.

As further background, in the 116th Congress the following hearing was held: On October 1, 2020, the Subcommittee held a legislative hearing entitled "Proposals to Strengthen the Antitrust Laws and Restore Competition Online."[148] The Majority witnesses were: (1) William (Bill) Baer, Visiting Fellow at the Brookings Institution; (2) Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute; (3) Michael Kades, Director of Markets and Competition Policy, Washington Center for Equitable Growth; (4) K. Sabeel Rahman, President, Demos; and (5) Zephyr Teachout, Associate Professor, Fordham University School of Law. The Minority witnesses were: (1) Rachel Bovard, Senior Director of Policy, Conservative Partnership Institute; (2) Tad Lipsky, Assistant Professor, Antonin Scalia Law School, George Mason University; and (3) Christopher Yoo, John H. Chestnut Professor of Law, Communication, and Computer and Information Science, University of Pennsylvania Carey Law School.

In addition, as part of its investigation into competition in digital markets, the Subcommittee on Antitrust, Commercial, and Administrative Law held a series of six hearings covering "Online Platforms and Market Power," which are discussed in the Background and Need for Legislation section of this report.[149]

Committee Consideration

On June 23, 2021 and June 24, 2021, the Committee met in open session and ordered the bill, H.R. 3816, favorably reported with amendments, by a rollcall vote of 24 ayes to 20 noes, a quorum being present.[150]

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[147] Free and Diverse Press Hearing, https://www.congress.gov/event/116th-congress/house-event/109616 (hearing page).

[148] Remedies Hearing, https://www.congress.gov/event/116th-congress/house-event/111072 (hearing page).

[149] *See Digital Markets Investigation,* H. COMM. ON THE JUDICIARY, https://judiciary.house.gov/issues/issue/?IssueID=14921 (last visited Dec. 9, 2022) (Hearings).

[150] *Markup of H.R. 3843, H.R. 3460, H.R. 3849, H.R. 3826, H.R. 3816, and H.R. 3825 Before the H. Comm. on the Judiciary*, 117th Cong. (2021), https://www.congress.gov/event/117th-congress/house-event/112818.

Committee Votes

In compliance with clause 3(b) of House rule XIII, the following rollcall votes occurred during the Committee's consideration of H.R. 3816:

1. An amendment offered by Rep. Jordan (R–OH) to add a private right of action was defeated by a rollcall vote of 18 ayes to 24 noes. The vote was as follows:

Roll Call No. 20 **Date:** 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 3 ( ) to ANS HR 3816 offered by Rep. Jordan

☐ PASSED
☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Prámila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)	✓		
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)		✓	
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	18	24	

2. An amendment offered by Rep. Lofgren (D–CA) to add a rule of construction was defeated by a rollcall vote of 5 ayes to 36 noes. The vote was as follows:

Roll Call No. 21 Date: 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 4 ( ) to ANS HR 3816 offered by Rep. Lofgren

☐ PASSED
☑ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)	✓		
Karen Bass (CA-37)			
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)	✓		
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)	✓		
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)		✓	
Steve Chabot (OH-01)		✓	
Louie Gohmert (TX-01)		✓	
Darrell Issa (CA-50)		✓	
Ken Buck (CO-04)		✓	
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)		✓	
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Greg Steube (FL-17)			
Tom Tiffany (WI-07)		✓	
Thomas Massie (KY-04)		✓	
Chip Roy (TX-21)		✓	
Dan Bishop (NC-09)		✓	
Michelle Fischbach (MN-07)		✓	
Victoria Spartz (IN-05)		✓	
Scott Fitzgerald (WI-05)		✓	
Cliff Bentz (OR-02)		✓	
Burgess Owens (UT-04)		✓	
	AYES	NOS	PRES.
TOTAL	5	36	

3. An amendment offered by Rep. Bentz (R–OR) to add an affirmative defense passed by a rollcall vote of 22 ayes to 21 noes. The vote was as follows:

Roll Call No. 22 Date: 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # S ( ) to ANS HR 3816 offered by Rep. Bentz

☒ PASSED
☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)	✓		
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)	✓		
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)	✓		
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)		✓	
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)	✓		
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)		✓	
	AYES	NOS	PRES.
TOTAL	22	21	

4. An amendment offered by Reps. Fitzgerald (R–WI) and Issa (R–CA) to add an affirmative defense was defeated by a rollcall vote of 15 ayes to 26 noes. The vote was as follows:

Roll Call No. 23 **Date:** 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 8 ( ) to ANS HR 3816 offered by Rep. Fitzgerald / Issa

☐ PASSED
☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)			
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)			
	AYES	NOS	PRES
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)		✓	
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)		✓	
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)	✓		
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	15	26	

5. An additional amendment offered by Reps. Fitzgerald and Issa to add an affirmative defense was defeated by a rollcall vote of 20 ayes to 24 noes. The vote was as follows:

Roll Call No. 24 **Date:** 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives
117th Congress

Amendment # 10 ( ) to ANJ HX 3816 offered by Rep. Fitzgerald/Issa

☐ PASSED

☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-22)		✓	
Karen Bass (CA-37)		✓	
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Veronica Escobar (TX-16)		✓	
Mondaire Jones (NY-17)		✓	
Deborah Ross (NC-02)		✓	
Cori Bush (MO-01)		✓	
	AYES	NOS	PRES.
Jim Jordan (OH-04)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Darrell Issa (CA-50)	✓		
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Greg Steube (FL-17)	✓		
Tom Tiffany (WI-07)	✓		
Thomas Massie (KY-04)	✓		
Chip Roy (TX-21)	✓		
Dan Bishop (NC-09)	✓		
Michelle Fischbach (MN-07)	✓		
Victoria Spartz (IN-05)	✓		
Scott Fitzgerald (WI-05)	✓		
Cliff Bentz (OR-02)	✓		
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	20	24	

6. An amendment offered by Rep. Fitzgerald to add an affirmative defense was defeated by a rollcall vote of 18 ayes to 25 noes and 1 present. The vote was as follows:

Roll Call No. 25 **Date:** 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives

117th Congress

Amendment # 11 ( ) to ANS HR 3816 offered by Rep. Fitzgerald

☐ PASSED

☒ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		√	
Zoe Lofgren (CA-19)		√	
Sheila Jackson Lee (TX-18)		√	
Steve Cohen (TN-09)		√	
Hank Johnson (GA-04)		√	
Ted Deutch (FL-22)		√	
Karen Bass (CA-37)		√	
Hakeem Jeffries (NY-08)		√	
David Cicilline (RI-01)		√	
Eric Swalwell (CA-15)		√	
Ted Lieu (CA-33)		√	
Jamie Raskin (MD-08)		√	
Pramila Jayapal (WA-07)		√	
Val Demings (FL-10)		√	
Lou Correa (CA-46)		√	
Mary Gay Scanlon (PA-05)		√	
Sylvia Garcia (TX-29)		√	
Joseph Neguse (CO-02)		√	
Lucy McBath (GA-06)		√	
Greg Stanton (AZ-09)		√	
Madeleine Dean (PA-04)		√	
Veronica Escobar (TX-16)		√	
Mondaire Jones (NY-17)		√	
Deborah Ross (NC-02)		√	
Cori Bush (MO-01)		√	
	AYES	NOS	PRES
Jim Jordan (OH-04)	√		
Steve Chabot (OH-01)	√		
Louie Gohmert (TX-01)	√		
Darrell Issa (CA-50)	√		
Ken Buck (CO-04)	√		
Matt Gaetz (FL-01)	√		
Mike Johnson (LA-04)	√		
Andy Biggs (AZ-05)	√		
Tom McClintock (CA-04)	√		
Greg Steube (FL-17)	√		
Tom Tiffany (WI-07)	√		
Thomas Massie (KY-04)			√
Chip Roy (TX-21)	√		
Dan Bishop (NC-09)	√		
Michelle Fischbach (MN-07)	√		
Victoria Spartz (IN-05)	√		
Scott Fitzgerald (WI-05)	√		
Cliff Bentz (OR-02)	√		
Burgess Owens (UT-04)	√		
	AYES	NOS	PRES.
TOTAL	18	25	1

7. A motion by Chair Nadler to order H.R. 3816, as amended, favorably reported to the House passed by a rollcall vote of 24 ayes to 20 noes. The vote was as follows:

Roll Call No. **Date:** 6/24/21

COMMITTEE ON THE JUDICIARY

House of Representatives

117th Congress

Final Passage on: HR 3816

☒ PASSED

☐ FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)	✓		
Hank Johnson (GA-04)	✓		
Ted Deutch (FL-22)	✓		
Karen Bass (CA-37)	✓		
Hakeem Jeffries (NY-08)	✓		
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)		✓	
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)	✓		
Veronica Escobar (TX-16)	✓		
Mondaire Jones (NY-17)	✓		
Deborah Ross (NC-02)	✓		
Cori Bush (MO-01)	✓		
	AYES	NOS	PRES
Jim Jordan (OH-04)		✓	
Steve Chabot (OH-01)		✓	
Louie Gohmert (TX-01)		✓	
Darrell Issa (CA-50)		✓	
Ken Buck (CO-04)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)		✓	
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Greg Steube (FL-17)		✓	
Tom Tiffany (WI-07)		✓	
Thomas Massie (KY-04)		✓	
Chip Roy (TX-21)		✓	
Dan Bishop (NC-09)		✓	
Michelle Fischbach (MN-07)		✓	
Victoria Spartz (IN-05)		✓	
Scott Fitzgerald (WI-05)		✓	
Cliff Bentz (OR-02)		✓	
Burgess Owens (UT-04)	✓		
	AYES	NOS	PRES.
TOTAL	24	20	

Committee Oversight Findings

In compliance with clause 3(c)(1) of House rule XIII, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of House rule X, are incorporated in the descriptive portions of this report.

Committee Estimate of Budgetary Effects

Pursuant to clause 3(d)(1) of House rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

New Budget Authority and Congressional Budget Office Cost Estimate

Pursuant to clause 3(c)(2) of House rule XIII and section 308(a) of the Congressional Budget Act of 1974, and pursuant to clause (3)(c)(3) of House rule XIII and section 402 of the Congressional Budget Act of 1974, the Committee sets forth, with respect to the bill, H.R. 3816, the following analysis and estimate prepared by the Director of the Congressional Budget Office:

At a Glance

H.R. 3816, American Innovation and Choice Online Act
As ordered reported by the House Committee on the Judiciary on June 24, 2021

By Fiscal Year, Millions of Dollars	2023	2023-2027	2023-2032
Direct Spending (Outlays)	0	0	0
Revenues	0	*	*
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	20	172	not estimated

Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Over Threshold

* = between -$500,000 and $500,000

The bill would

- Prohibit large online platforms from conferring an advantage on their own products and services to the detriment of the products and services of their business users, among other restrictions
- Require the Federal Trade Commission (FTC) and Department of Justice (DOJ) to issue guidelines and supervise and enforce violations
- Impose a private-sector mandate by prohibiting large online platforms from engaging in certain behavior, as defined by the bill

Estimated budgetary effects would mainly stem from

- Spending subject to appropriation by the FTC and DOJ to implement the bill's requirements

- Insignificant increases in revenues from additional civil monetary penalty collections

Bill summary: H.R. 3816 would restrict some types of business activities for large online platforms, specified in the bill, including discriminating against products offered by business users and preferentially boosting their own products. The new restrictions would apply to federally designated "covered platforms," which have at least 50 million active users each month or 100,000 active business users each month, are owned or controlled by a company with a market capitalization or annual sales exceeding $600 billion, and have the ability to impede business users from accessing the platform's customer base.

Some of the behaviors the bill would prohibit for large online platforms include:

- Excluding or disadvantaging business users' products or services in order to benefit the covered platform's products or services;
- Restricting business users' access to platforms, operating systems, hardware, or software features that the covered platform uses for its own products or services;
- Compelling business users to purchase products or services to obtain access to or preferred placement on the platform;
- Using nonpublic data generated from business users' activity on the platform to advantage the platform operator's products and services; and
- Treating the platform's products and services more favorably than those of business users in search or ranking functions.

Under the bill, covered platforms would be designated by the Department of Justice (DOJ) or the Federal Trade Commission (FTC), and would be required to adhere to the bill's provisions. That designation as a covered platform would apply for 10 years or until removed by DOJ or the FTC. H.R. 3816 would direct those agencies to issue enforcement guidelines, supervise and enforce violations, and collect civil monetary penalties from violators.

Estimated federal cost: The costs of the legislation, detailed in Table 1, fall within budget function 370 (commerce and housing credit) and 750 (administration of justice).

TABLE 1.—ESTIMATED INCREASES IN SPENDING SUBJECT TO APPROPRIATION UNDER H.R. 3816

	By Fiscal Year, Millions of Dollars—					
	2023	2024	2025	2026	2027	2023–2027
Federal Trade Commission						
Estimated Authorization	20	33	33	34	34	154
Estimated Outlays	16	30	33	34	34	147
Department of Justice						
Estimated Authorization	5	5	5	6	6	27
Estimated Outlays	4	5	5	5	6	25
Total Changes						
Estimated Authorization	25	38	38	40	40	181
Estimated Outlays	20	35	38	39	40	172

Basis of estimate: For this estimate, CBO assumes that H.R. 3816 will be enacted near the end of calendar year 2022. Using information from the affected agencies, CBO estimates that imple-

menting H.R. 3816 would cost $172 million over the 2023–2027 period, assuming appropriation of the estimated amounts.

Spending subject to appropriation

CBO estimates that it would cost the agencies $4 million over the 2023–2027 period to issue and update enforcement guidelines and another $2 million to establish new offices and hire staff. Designating and updating the status of covered platforms would cost the agencies about $8 million over the 2023–2027 period; the designation process could take up to two years.

In addition, CBO estimates that it would cost the agencies about $158 million to supervise and enforce violations of H.R. 3816, mainly for employee salaries and overhead. CBO anticipates that DOJ and the FTC would begin hiring in 2023 and that the new enforcement offices and staff would be fully operational in 2024. Using information from the agencies about current salaries and overhead costs for antitrust staff, CBO estimates each new employee would cost about $200,000 annually, on average. The FTC would establish a bureau of digital markets with about 85 employees. DOJ currently has more than 30 employees dedicated to antitrust efforts related to large technology companies. Using information provided by the agency about projected workload under the bill, CBO expects that the department would need 25 additional staff members to conduct enforcement.

Revenues

Covered platforms found to violate the provisions of H.R. 3816 would be subject to civil monetary penalties, which are generally remitted to the Treasury and recorded as revenues. The collection of most civil fines would depend on the level of appropriations provided in future appropriation acts. In addition, whether the FTC would pursue civil penalties or some other remedy for violations is unclear. In any event, CBO estimates that any increases in revenues from civil penalties would be insignificant.

Pay-as-you-go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The increases in revenues that are subject to those pay-as-you-go procedures would not be significant in each year or over the 2023–2032 period.

Increase in Long-Term Deficits: None.

Mandates: H.R. 3816 would impose private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates that the aggregate cost of the mandates would exceed the threshold for private-sector mandates established in UMRA ($184 million in 2022, adjusted annually for inflation).

The bill would require the FTC to enforce new regulations prohibiting covered platforms from engaging in behavior that discriminates against products offered by business users and preferentially boosts their own products. The cost of the mandate would be any income lost as a consequence of the regulations.

Because the FTC has not issued the regulations required by the bill, CBO cannot determine the exact cost of the mandates. However, the entities likely to be affected are large multinational companies with market capitalizations in the hundreds of billions of dollars. Using market research on the fees that some platforms

charge developers of applications or for "in-app" purchases, CBO estimates that the aggregate cost of the mandate would greatly exceed the threshold established in UMRA for private-sector mandates.

The bill contains no intergovernmental mandates as defined in UMRA.

Estimate prepared by: Federal Costs: David Hughes (Federal Trade Commission); Jon Sperl (Department of Justice); Mandates: Fiona Forrester.

Estimate reviewed by: Justin Humphrey, Chief, Finance, Housing, and Education Cost Estimates Unit; Kathleen FitzGerald, Chief, Public and Private Mandates Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis; Theresa Gullo, Director of Budget Analysis.

Duplication of Federal Programs

Pursuant to clause 3(c)(5) of House rule XIII, no provision of H.R. 3816 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program.

Performance Goals and Obectives

The Committee states that, pursuant to clause 3(c)(4) of House rule XIII, H.R. 3816 would provide antitrust enforcers with new tools to police anticompetitive conduct by dominant online platforms that may be difficult to address under current law. It would correct federal courts' undue weakening of the antitrust laws by defining specific prohibitions and broadening available remedies, thereby allowing meaningful enforcement against dominant online platforms. The legislation would also establish within the Commission a Bureau of Digital Markets for purposes of enforcement of this bill, and it would require that the Commission and the Antitrust Division jointly issue guidelines outlining their enforcement policies and practices.

Advisory on Earmarks

In accordance with clause 9 of House rule XXI, H.R. 3816 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of House rule XXI.

Section-by-Section Analysis of H.R. 3816 As Reported Out of Committee

Section 1. Short Title. Section 1 identifies the short title of the Act as the "American Innovation and Choice Online Act."

Section 2. Unlawful Discriminatory Conduct. Section 2 sets forth the discriminatory conduct that shall constitute a violation of this Act.

Section 2(a) establishes that it is unlawful for a covered platform operator to engage in conduct that: (1) advantages the covered platform's own products, services, or lines of business over those of another business; (2) excludes or disadvantages the products, services, or lines of business of another business relative to those of the covered platform; or (3) discriminates among similarly situated

business users of the covered platform, including, but not limited to, those business users employed by businesses owned by women and minorities.

Section 2(b) specifies additional prohibited forms of discriminatory conduct: (1) restricting or impeding the capacity of a business user to access or interoperate with the same platform, operating system, or hardware or software features that are available to the covered platform operator's own products, services, or lines of business; (2) conditioning access to the covered platform, or preferred status on the covered platform, on the purchase or use of another product or service offered by the covered platform operator; (3) using non-public data obtained from or generated on the platform by the activities of a business user to support the covered platform's own products or services; (4) restricting or impeding a business user from accessing data generated on the covered platform by the activities of the business user; (5) restricting or impeding covered platform users from un-installing preinstalled software applications on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator; (6) restricting or impeding businesses users from communicating information or providing hyperlinks on the covered platform to covered platform users to facilitate business transactions; (7) in connection with any user interface, including search or ranking functionality offered by the covered platform, treating the covered platform operator's own products, services, or lines of business more favorably than those of another business user; (8) interfering with or restricting a business user's pricing of its products or services; (9) restricting or impeding a business user, or a business user's customers or users, from interoperating or connecting to any product or service; and (10) retaliating against any business user or covered platform that raises concerns with law enforcement about actual or potential violations of state or federal law or that initiates or participates in litigation to enforce this Act.

Section 2(c) sets forth three affirmative defenses to otherwise unlawful conduct under the Act. It provides that the prohibitions in subsections (a) and (b) do not apply if the defendant proves a specified affirmative defense by clear and convincing evidence. The specified affirmative defenses are that the conduct (1) would not harm the competitive process by restricting the legitimate activity of a business user; (2) was narrowly tailored, could not be achieved through less discriminatory means, was nonpretextual, and was necessary either to prevent a violation of, or to comply with, state or federal law or to protect user privacy or other non-public data; or (3) increases consumer welfare. As later stated in section 7, whether any user conduct violates 18 U.S.C. § 1030 is not dispositive of the establishment of an affirmative defense.

Section 2(d) provides that the FTC or the DOJ will designate a covered platform, based on the criteria established in the Act, and issue the designation in writing to be published in the Federal Register. It further provides that the designation will apply for 10 years regardless of changes in ownership or control of the covered platform; however, the FTC or the DOJ may remove the designation per subsection (e).

Section 2(e) establishes that the FTC or the DOJ may remove the covered-platform designation prior to the expiration of the 10-year period set forth in section 2(e) if the operator files a request with one of the agencies that shows the online platform no longer meets the criteria for a covered platform under the Act. The FTC or the DOJ must determine whether to grant the request no later than 120 days after the filing of the request and must obtain the concurrence of the FTC or the DOJ, as appropriate, before granting the request.

Section 2(f) sets forth the remedies for violations of the Act. This section authorizes the FTC and the DOJ to seek civil penalties for violations of the Act and renders an offending platform liable for up to the greater of 15 percent of its total U.S. revenue from the previous calendar year or 30 percent of its U.S. revenue from the previous calendar year in any line of business affected by the unlawful conduct. Additionally, the agencies may seek court-ordered restitution, contract rescission and reformation, refunds, return of property, disgorgement of unjust enrichment, and injunctive relief. Further, if the factfinder determines that a violation of the Act arises from a conflict of interest, the court shall consider requiring a divestiture of the line of business that was the source of the conflict. Finally, if a covered platform operator repeatedly violates the Act, the court shall consider requiring its chief executive officer and any other corporate officer to forfeit any compensation received during the 12 months preceding or following the filing of the complaint for an alleged violation of this Act.

Section 2(g) sets forth the definitions of terms used in this Act, including "covered platform," "critical trading partner," "data," and "online platform."

This section defines a "covered platform" as one (A) that has been designated as a covered platform by the FTC or the DOJ or (B) that—(i) has at least 50 million United States-based monthly active users on the online platform or at least 100,000 United States-based monthly active business users on the platform; (ii) is owned or controlled by a person with net annual sales of $600,000,000,000 adjusted for inflation based on the Consumer Price Index at the time of designation; and (iii) is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.

This section defines "critical trading partner" as an entity that has the ability to restrict or impede the access of (A) a business user to its users or customers, or (B) a business user to a tool or service that it needs to effectively serve its users or customers.

With respect to the term "data," this section requires that, no later than six months after the enactment of this Act, the FTC shall adopt rules, in accordance with 5 U.S.C. § 553, to define "data" for the purposes of implementing and enforcing this Act. It further provides that the term "data" shall include information collected by or provided to a covered platform or business user that is reasonably linkable to a specific user or customer of the covered platform or user or customer of a business user.

This section defines "online platform" as a website, online or mobile application, operating system, digital assistant, or online service that (A) enables users to generate or interact with content on the platform; (B) facilitates the offering, sale, purchase, payment,

or shipping of products or services between and among third-party businesses or consumers; or (C) enables searches that access or display a large volume of information.

Section 2(h) provides that the FTC shall enforce this Act in the same manner; by the same means; and with the same jurisdiction, powers, and duties as through the FTC Act. The DOJ shall enforce this Act in the same manner; by the same means; and with the same jurisdiction, powers, and duties as through the Sherman Act, the Clayton Act, and the Antitrust Civil Process Act. Any state attorney general shall enforce this Act in the same manner; by the same means; and with the same jurisdiction, powers, and duties, as through the Clayton Act. This section also establishes that a violation of this Act constitutes an unfair method of competition under section 5 of the FTC Act. It further grants the FTC independent litigation authority, and it grants any attorney general of a state the authority to bring a civil action as parens patriae on behalf of natural persons residing in that state.

Section 2(i) provides that the FTC, the Assistant Attorney General of the DOJ's Antitrust Division, or any attorney general of a state may seek a temporary injunction against a covered platform operator for up to 120 days. The court shall grant such relief if there is a plausible claim that a covered platform operator violated this Act, and the challenged conduct impairs the ability of at least one business user to compete with the covered platform operator. The court shall terminate the relief early if the covered platform can prove that the FTC, the DOJ, or the attorney general of the state has not taken reasonable steps to investigate whether a violation has occurred.

Section 2(j) provides that the statute of limitations for violations of this section is 6 years.

Section 3. Judicial Review. Section 3 provides that any party that is subject to the covered-platform designation, a decision in response to a request to remove a covered-platform designation, a final order issued in district court under this Act, or a final order of the FTC issued in an administrative adjudicative proceeding under this Act, may petition for review of the decision by the U.S. Court of Appeals for the D.C. Circuit within 30 days of issuance of the designation, decision, or order. This section also provides that the reviewing court shall treat as conclusive the findings of the FTC or the DOJ as to the facts, if supported by evidence.

Section 4. Bureau of Digital Markets. Section 4 sets forth the requirement that the FTC establish within the Commission a Bureau of Digital Markets for purposes of enforcing this Act. It provides that the head of the Bureau shall be a director who is appointed by, and reports directly to, the chair of the FTC. It requires the Bureau to retain or employ sufficient legal, technology, economic, and service staff. And it requires the Bureau, within one year of the enactment of this Act and on an annual basis thereafter, to publish and submit a report on its activities to the House Committee on the Judiciary and Senate Committee on the Judiciary.

Section 5. Enforcement Guidelines. Section 5 provides that, no later than one year after the enactment of this Act, the FTC and the Assistant Attorney General of the DOJ's Antitrust Division shall jointly issue guidelines outlining policies and practices relating to the enforcement of this Act. It requires the agencies to up-

date the guidelines as needed, but not less frequently than once every four years. This section additionally establishes that the guidelines neither confer rights nor are binding.

Section 6. Suits by Persons Injured. Section 6 provides that any person injured in his business or property by a violation of this Act may file suit. The section states that a court may award simple interest on actual damages for the duration of the litigation up to the date of judgment, if just under the circumstances. It lists the exclusive considerations for the court to evaluate when determining whether the award of interest is just: (1) whether a party or its representative made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith; (2) whether, during the course of the litigation, a party or its representative violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and (3) whether a party or its representative engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

This section prohibits any foreign state from recovering an amount in excess of actual damages, plus the cost of the suit including a reasonable attorney's fee, unless the foreign state meets the requirements of the provided exception. The limitation on a foreign state's recovery set forth in this subsection does not apply if the foreign state (1) would be denied immunity under 28 U.S.C. § 1605(a)(2) if a claim based on the same subject matter were asserted against it; (2) waives all defenses based upon its status as a foreign state; (3) engages primarily in commercial activities; and (4) does not function—with respect to the commercial activity, or the act, that is the subject matter of its claim under this section—as a procurement entity for itself or for another foreign state.

This section provides that any person may sue for injunctive relief against threatened loss or damage caused by a violation of this Act. A person is entitled to such relief when, and under the same conditions and principles as, courts of equity would grant injunctive relief against threatened conduct that will cause loss or damage. It provides that a preliminary injunction may issue upon the execution of a proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate. And it clarifies that nothing herein contained shall be construed to entitle any person, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49 of the U.S. Code.

Finally, in any action under this section in which the plaintiff substantially prevails, this section requires the court to award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Section 7. Rule of Construction. Section 7 provides that the existence vel non of a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, is not dispositive of whether the defendant has established an affirmative defense to a violation of this Act. This section also establishes that an action taken by a covered platform operator that is reasonably tailored to protect the rights of third parties under certain sections of the Copyright Act, 17 U.S.C. §§ 106, 1101, 1201, 1401, or sections 32 or 43 of the Lanham Act,

15 U.S.C. §§ 1114, 1125, or corresponding state law, shall not be considered violations of section 2(a) or 2(b) of this Act. This section further states that nothing in this Act may be construed to limit the authority of the Attorney General or the FTC under the antitrust laws, the FTC Act, or any other provision of law.

Section 8. Severability. Section 8 establishes that, if a provision of this Act is held to be unconstitutional, the remainder of the Act shall not be affected.

Section-by-Section Analysis of Senate Bill 2992

Following the passage of H.R. 3816 out of the Committee, Members of the Subcommittee worked closely with Members of the Senate Committee on the Judiciary and its Subcommittee on Competition Policy, Antitrust, and Consumer Rights to further refine the bill text. The product of that collaborative effort is S. 2992, an amended version of which was released by its sponsor, Senator Amy Klobuchar (D–MN), on May 25, 2022.[151] What follows is a section-by-section analysis of the May 25, 2022 version of the Senate Bill. Among other things, this analysis identifies and explains the Senate Bill's changes from the House Bill.

Section 1. Short Title. Like the House Bill, section 1 of the Senate Bill identifies the short title of the Act as the "American Innovation and Choice Online Act."

Section 2. Definitions. Section 2 of the Senate Bill reflects a structural reorganization of the House Bill. It sets forth the definitions for certain terms used in the bill, serving the same function as section 2(g) of the House Bill.

Section 2(a)(1) incorporates the definitions for "antitrust laws" and "person" as used in subsection (a) of the first section of the Clayton Act (15 U.S.C. § 12). The House Bill does the same in section 2(g)(1) and section 2(g)(6).

Section 2(a)(2) defines "business user" as a person that uses or is likely to use a covered platform for the advertising, sale, or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered-platform operator. This definition makes several changes to the House Bill version, broadening the meaning of the term to include persons who use or are likely to use a covered platform for advertising, in addition to persons who use or are likely to use the platform for the sale or provision of products or services, as stated in the House Bill. The Senate Bill also adds a clarification, stating that those who operate, or are controlled by, a covered platform may qualify as business users.

The Senate Bill adds a new exclusion from the definition of "business user" to identify the entities that are *not* protected by the provisions of the Act. It excludes any person that is a clear national security risk or is controlled by the Government of the People's Republic of China or by the government of a foreign adversary.

Section 2(a)(3) defines the term "Commission" to mean the Federal Trade Commission. The House version does the same.

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[151] The May 25, 2022 version of S. 2992 (SIL22713) is available at https://www.klobuchar.senate.gov/public/ cache/files/b/9/b90b9806-cecf-4796-89fb-561e5322531c/B1F51354E81BEFF3EB96956A7A5E1D6A.sil22713.pdf.

Section 2(a)(4) defines the term "control." It makes a few stylistic changes to the definition in the House Bill, but the two bills share the same substantive definition for the term. A first person has control over a second person if the first person (1) holds 25 percent or more stock of the second person; (2) has the right to 25 percent or more of the profits of the second person; (3) in the event of dissolution of the second person, has the right to 25 percent or more of the assets of the second person; (4) if the second person is a corporation, has the power to designate 25 percent or more of the directors of the second person; (5) if the second person is a trust, has the power to designate 25 percent or more of the second person's trustees; or (6) otherwise exercises substantial control over the second person. The meaning of "control" used in subpart (6) is the plain and ordinary meaning of the word.

Section 2(a)(5) defines the term "covered platform," which term identifies the types of businesses that are subject to the prohibitions and requirements of the Act. The term is defined in the Senate Bill in a manner similar to the House Bill, although the Senate Bill makes a few modifications. Both versions limit the definition to include only the very largest online platforms with gatekeeper power.

Pursuant to section 2(a)(5), a covered platform must be an "online platform," as defined by the Act. An online platform qualifies as a covered platform in either of two ways:

The first way—set forth in section 2(a)(5)(A)—is that the DOJ and the FTC (the federal enforcers) jointly designate the online platform as a covered platform pursuant to Section 3(d) of the Act. Section 3(d), which is discussed in greater detail below, provides that the federal enforcers may designate an online platform as a covered platform if, among other things, they find that the three criteria in section 2(a)(5)(B) are met. This provision is the same in the House Bill.

The second way—set forth in section 2(a)(5)(B)—identifies the three necessary criteria for a covered platform. It applies when, for instance, a state attorney general files a complaint asserting a claim under this Act against an online platform that the federal enforcers have not yet designated as a covered platform. This provision is substantially similar to the House Bill, with the modifications identified below.

Pursuant to section 2(a)(5)(B), an online platform qualifies as a covered platform if the person who owns or controls the online platform meets three requirements:

First, the person must have a specified nexus to the United States. The nexus is described in terms of the number of *U.S.-based* users of the online platform, owned or controlled by the person, for which qualification as a covered platform is being considered. The nexus exists if—at any point in the 12 months preceding either a designation under section 3(d) of this Act or the filing of a complaint for an alleged violation of this Act—the online platform has 50 million U.S.-based monthly active users or 100,000 U.S.-based monthly active business users. The phrase "monthly active users" has the meaning commonly understood in the online-services industry, and it likewise applies to the subset of users that are "business users" as defined by this Act. If the online platform at issue crosses this user threshold at any one point during the speci-

fied 12-month period, the person who owns or controls the online platform satisfies this first requirement. This requirement is the same in the House Bill.

Second, the person must have a particular size or global reach. It may satisfy this requirement in either of two ways:

- The first is based on the person's size in the two years preceding either a designation under Section 3(d) of this Act or the filing of a complaint for an alleged violation of this Act. The person satisfies the requirement if, at any point during the applicable two-year period, it has U.S. net annual sales of greater than $550,000,000,000 ($550 billion), adjusted for inflation on the basis of the Consumer Price Index. Or, the person satisfies the requirement if, for any 180-day period during the two-year period, it has an average market capitalization greater than $550,000,000,000 ($550 billion), adjusted for inflation on the basis of the Consumer Price Index. Both options appear in the House version as well, but the Senate Bill lowers the threshold for both from $600 billion to $550 billion.
- The second is described in terms of the number of global users of the online platform, owned or controlled by the person, for which qualification as a covered platform is being considered. The threshold is met if—at any point in the 12 months preceding either a designation under Section 3(d) of this Act or the filing of a complaint for an alleged violation of this Act—the online platform has at least 1,000,000,000 (one billion) worldwide monthly active users. The phrase "monthly active users"' has the meaning commonly understood in the online-services industry. If the online platform at issue crosses this user threshold at any one point during the specified 12-month period, the person who owns or controls the online platform satisfies this requirement. This option is new to the Senate Bill.

Third, the person must act as an online gatekeeper. The person does so if it is a "critical trading partner," as defined by the Act, for the sale or provision of any product or service offered on, or directly related to, the online platform at issue. This third requirement is identical in the Senate Bill and the House Bill.

Section 2(a)(6) defines the term "critical trading partner" in a manner substantially similar to the definition in the House Bill. It states that the term "critical trading partner" means a person that has the ability to restrict or materially impede the access of a business user to the users or customers of the business user; or a business user to a tool or service that the business user needs to effectively serve the users or customers of the business user. Both the Senate and House versions of this definition describe a critical trading partner as a person that has the ability to restrict (i.e., block or limit by direct means) or impede (i.e., block or limit by indirect means) specified access of business users. The Senate Bill adds the word "materially" to modify "impede," meaning that the person must have the ability to impede the specified access in a more than de minimis manner to violate this provision. Otherwise, the Senate Bill's changes to the definition are stylistic.

Reading section 2(a)(6) together with section 2(a)(5)(B)(iii), the critical-trading-partner criterion for a covered platform considers whether the online platform is a gatekeeper—that is, an important

intermediary—for the sale or provision of products or services. It assesses the extent to which a business user's access to the online platform to sell or provide a product or service, on or directly related to the online platform, affects the business user's ability to sell or provide that product or service in general. It does so by requiring the factfinder to evaluate whether the person who owns or controls the online platform at issue—that is, a means by which a business user sells or provides a product or service, either on or directly related to the online platform—has the ability to restrict or materially impede, with respect to that product or service, the business user's access to its users, customers, or a tool or service that the business user needs to effectively serve its users or customers. If ownership or control of the online platform confers that ability, the online platform is a gatekeeper, and the third criterion for a covered platform is satisfied.

Section 2(a)(7) defines the term "data" to include information that is collected by or provided to a covered platform or business user that is linked, or reasonably linkable, to a specific user or customer of the covered platform, or to a specific user or customer of a business user. The Senate Bill definition makes a structural change to the House version of this definition. It moves, to the end of the definitions section, the direction to the federal enforcers to implement regulations further specifying the meaning of the term.

Section 2(a)(8) is new to the Senate Bill and defines the term "foreign adversary" by reference to another statute. The term has the meaning given to it in 47 U.S.C. § 1607(c).

Section 2(a)(9) defines the term "online platform." The Senate Bill modifies the definition from that in the House Bill to offer greater clarity as to which businesses are included and which are excluded. Both versions define an online platform as a website, online or mobile application, operating system, digital assistant, or online service that has any of three characteristics (although the precise characteristics required differ between the two):

The first is that the website, online or mobile application, operating system, digital assistant, or online service enables a user to generate or share content that can be viewed by other users on the platform or to interact with other content on the platform. The Senate Bill adds the words "or share" before "content" to recognize that a popular feature of many online platforms is that they enable content sharing, in addition to content creation.

The second is that the website, online or mobile application, operating system, digital assistant, or online service enables the offering, advertising, sale, purchase, or shipping of products or services, including software applications, between and among consumers or businesses not controlled by the platform operator. The Senate Bill made a stylistic change to this language, changing "facilitates"' to "enables." It added "advertising" to the list of covered services, recognizing that a common way that online platforms make money is through advertising—apart from the sale, purchase, or shipping of products or services. And it removed "payment" from that list to clarify that the provision of online financial services alone does not make a business an online platform under this Act.

The third is that the website, online or mobile application, operating system, digital assistant, or online service enables user searches or queries that access or display a volume of information.

The Senate Bill removed the requirement that the volume of information accessed or displayed be "large"; as a result, the quantum of information accessed or displayed by the platform is no longer an element of the definition.

In addition, the Senate Bill contains a new exclusion from the definition of "online platform." The term does not include an internet-access service, described as a service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service.

Section 2(a)(10) defines the term "state" as a state, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States. This definition is identical to the one in the House Bill.

Section 2(b) appears at the end of the definitions section of the Senate Bill and directs the federal enforcers to promulgate regulations to further define the term "data" for the purpose of implementing and enforcing this Act. The language is substantially the same as the equivalent provision in the House Bill, section 2(g)(7)(A), although section 2(b) of the Senate Bill makes express that the regulations should be a joint effort between the DOJ and the FTC. The federal enforcers are directed to promulgate the regulations in accordance with 5 U.S.C. § 553 no later than 180 days after the enactment of the Act.

Section 3. Unlawful Conduct. Section 3 of the Senate Bill, which is the analog of substantial portions of section 2 of the House Bill, sets forth the conduct that is unlawful under the Act, the affirmative defenses to a claim for violation of the Act, the authority of federal and state enforcers under the Act, and the process for the federal enforcers to follow when designating a covered platform.

Section 3(a) identifies the conduct by a person operating a covered platform that is unlawful. All such conduct must be in or affecting commerce to fall within the prohibitions set forth in section 3(a). Generally, the person operating the covered platform is the person that owns or controls the platform—even when the operator is separately organized or incorporated, so long as the operator is under the ownership or control of the person that owns or controls the platform. When the Act refers to the products, services, or lines of business of the covered platform operator, therefore, the Act is referring to those products, services, or lines of business that are owned or controlled by the person who owns or controls the covered platform.

Section 3(a)(1) makes it unlawful for a covered-platform operator to preference the products, services, or lines of business of the covered-platform operator over those of another business user on the covered platform in a manner that would materially harm competition. The Senate Bill makes some stylistic changes to the language used in section 2(a)(1) of the House Bill. It also clarifies that the operator's self-preferencing must occur *on* the covered platform to be prohibited by this provision. And it adds a new requirement—that the self-preferencing materially harm competition.

Under this Act, there are no conduct-specific tests for harm to competition, such as those that exist in the case law for section 2 of the Sherman Act, 15 U.S.C. § 2. Instead, this Act is intended to

incorporate a more broadly applicable standard focused on the competitive process, as intended by Congress in the original enactment of the federal antitrust laws.[152] The guiding principle is that the process of competition leads to the best outcomes, such that so-called efficiencies or other supposed economic benefits cannot excuse a loss of competition.[153] Conduct by a dominant firm—under this Act, a covered-platform operator—harms competition if it "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[154] Stated differently, conduct harms competition if it "act[s] as a clog on competition" and "deprives rivals of a fair opportunity to compete."[155] Under this definition, conduct that impairs the competitive process on any part or side of the platform harms competition, such that the Act does not require consideration of harm to competition on the platform as a whole.[156] Conduct harms competition "materially" if the harm is more than de minimis.

Section 3(a)(2) makes it unlawful for a covered-platform operator to limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered-platform operator in a manner that would materially harm competition. The Senate Bill refines the language used in section 2(a)(2) of the House Bill to clarify that the prohibition is intended to protect fair and open competition on the covered platform between the covered-platform operator's products, services, and lines of business, and those of other businesses. It adds the requirement that the conduct must materially harm competition to fall within the prohibition. The meaning of "materially harm competition" is the same as that described above in section 3(a)(1).

Section 3(a)(3) makes it unlawful for a covered-platform operator to discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users in a manner that would materially harm competition. It is designed to prevent the covered-platform operator from, for example, burying successful nascent competitors in search results or downgrading service for a business user that declines to purchase the covered-platform operator's other products or services. The bill prohibits anticompetitive discrimination against users or potential users, whether or not they have a prior course of using the platform or the platform has a demonstrably exclusionary purpose.

The Senate Bill narrows the prohibition that appeared in section 2(a)(3) of the House Bill by limiting the relevant discrimination among similarly situated business users to discrimination in the

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[152] *See, e.g.*, DIGITAL MARKETS REPORT at 330–31 (noting that interpretations treating '"consumer welfare' as the sole goal of the antitrust laws" limit "the analysis of competitive harm to focus primarily on price and output rather than the competitive process—contravening legislative history and legislative intent" (footnotes omitted)).

[153] *Cf.* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2545 (2013) ("the imbalance between democratic control and technocratic control has put antitrust on a thin diet of efficiency, one that has weakened antitrust's ability to control corporate power").

[154] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW 78 (1978)).

[155] *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962) (brackets, ellipsis, and quotation marks removed; citations omitted).

[156] Therefore, the two-sided market-definition principles propounded in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), do not apply to cases brought under this Act.

application or enforcement of the covered platform's terms of service. This change clarifies that the target of the prohibition is unequal treatment under the rules of the road that the covered-platform operator has established. The Senate Bill does not include language from the House Bill that specified that similarly situated business users include, but are not limited to, those business users employed by businesses owned by women and minorities. This change is not substantive; the term "business users" in this provision includes those that are owned by women and minorities. The Senate Bill adds the requirement that the conduct materially harm competition to be prohibited by this provision. The meaning of "materially harm competition" is the same as that described above in section 3(a)(1). In short, the covered-platform operator may not materially harm competition by applying and enforcing its terms of service in a manner that discriminates among similarly situated business users.

Section 3(a)(4) makes it unlawful for a covered-platform operator to materially restrict, impede, or unreasonably delay the capacity of a business user to access or interoperate with the same platform, operating system, or hardware or software features that are available to the products, services, or lines of business of the covered platform operator that compete or would compete with products or services offered by business users on the covered platform, except where such access would lead to significant cybersecurity risk.

This is the Senate Bill's version of section 2(b)(1) in the House Bill. Both the Senate Bill and the House Bill prohibit a covered-platform operator from engaging in certain conduct related to its business users' capacity to access or interoperate with its platform, operating system, or hardware or software features. In both versions, the prohibition is triggered when a covered-platform operator makes its platform, operating system, or hardware or software features available to its other products, services, or lines of business. But the Senate Bill narrows the triggering condition to apply only when the covered-platform operator makes its platform, operating system, or hardware or software features available to *certain of* its other products, services, or lines of business—specifically, those that compete or would compete with products or services offered by business users on the covered platform. The Senate Bill thus focuses the provision on the competition between the covered-platform operator and its business users on the covered platform.

The Senate Bill revises the House Bill's language concerning the prohibited conduct as well. The Senate Bill makes it unlawful for a covered-platform operator to "unreasonably delay" a business user's access or interoperability—in addition to the prohibition against the covered-platform operator acting to restrict or impede such access or interoperability as provided in the House Bill. The Senate Bill also adds the requirement that the listed actions be material—that is, more than de minimis—to fall under this provision. In other words, if the covered-platform platform offers materially similar access and interoperability to business users that it offers its own products or services, the operator does not violate this provision.

In addition, the Senate Bill includes a new exception to the prohibition. The prohibition does not apply when a business user's access to the platform, operating system, or hardware or software

features would lead to significant cybersecurity risk. This exception should be interpreted under "the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." [157] An enforcer need not plead the absence of the exception in the complaint or prove its absence to establish a prima facie case. Instead, the defendant bears the burden of pleading and proving that its conduct falls within this exception and therefore is not in violation of section 3(a)(4)'s prohibition.

Section 3(a)(5) makes it unlawful for a covered-platform operator to condition access to the covered platform, or preferred status or placement on the covered platform, on the purchase or use of other products or services offered by the covered platform operator that are not part of or intrinsic to the covered platform. This provision is substantially similar to section 2(b)(2) in the House Bill, although the Senate Bill narrows the prohibition by requiring that the other products or services not be part of or intrinsic to the covered platform. In other words, if the other products or services described in this provision are part of or intrinsic to the covered platform, there is no unlawful conduct under this provision. This language adopts a functional approach for determining whether the other products or services are separate from the covered platform, rejecting the demand-based approach adopted by some courts to evaluate the separate-products requirement for tying claims. The designation process established in section 3(d) gives discretion to the FTC and the DOJ to define the scope of which products or services are separate from the covered platform with respect to specific platforms or companies.

Section 3(a)(6) makes it unlawful for a covered-platform operator to make certain use of nonpublic data that are obtained from, or generated on, the covered platform by the activities of a business user or by the interaction of a covered-platform user with the products or services of a business user. The covered-platform operator may not use that data to offer, or support the offering of, the products or services of the covered-platform operator that compete or would compete with products or services offered by business users on the covered platform.

This provision reflects a restructuring of section 2(b)(3) of the House Bill, with some additional modifications. Whereas the House Bill prohibited the offering, or support of the offering, of (any of) the covered-platform operator's products, services, or lines of business, the Senate Bill narrows the prohibition to bar the offering, or support of the offering, of the covered-platform operator's products or services that compete or would compete with products or services offered by business users on the covered platform. Like several of the other changes in the Senate Bill, this modification focuses the provision on the competition between the covered-platform operator and its business users on the covered platform.

Section 3(a)(7) makes it unlawful for a covered-platform operator to materially restrict or impede a business user from accessing data generated on the covered platform by the activities of the business user, or through an interaction of a covered-platform user with the products or services of the business user, such as by es-

[157] *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

tablishing contractual or technical restrictions that prevent the portability by the business user to other systems or applications of the data of the business user. This provision is substantially similar to section 2(b)(4) in the House Bill. Aside from stylistic revisions, the Senate Bill adds the requirement that the covered-platform operator "materially" restrict or impede a business user. This change clarifies that the restriction or impediment must be more than de minimis to fall within the prohibition.

Section 3(a)(8) makes it unlawful for a covered-platform operator to materially restrict or impede covered-platform users from uninstalling software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered-platform users to products or services offered by the covered-platform operator. There are two exceptions to this prohibition. The first is that the restriction or impediment is necessary for the security or functioning of the covered platform. The second is that the restriction or impediment is necessary to prevent data from the covered-platform operator or another business user from being transferred to the Government of the People's Republic of China or the government of a foreign adversary.

This provision, like the others in section 3(a), applies to the conduct of a covered-platform operator only. It does not apply to the conduct of smaller, independent competitors and thus does not limit their ability to control their own products. It also does not limit their ability to enter into agreements with covered platforms in relation to their own products, so long as the agreement did not materially restrict or impede users from uninstalling software applications or from changing default software settings.

The prohibition is the analog to section 2(b)(5) of the House Bill. The Senate Bill adds the requirement that the covered-platform operator "materially" restrict or impede a business user. This change requires that the restriction or impediment must be more than de minimis to fall within the prohibition.

The Senate Bill also adds two exceptions to the prohibition designed to ensure that covered-platform operators are encouraged to continue to protect the security and functioning of the covered platform, as well as national security. Like for the exception in section 3(a)(4), an enforcer need not plead the absence of these exceptions in the complaint to state a claim or prove their absence to establish a prima facie case. Instead, the defendant bears the burden of pleading and proving that its conduct falls within this exception and therefore is not in violation of section 3(a)(8)'s prohibition. The covered-platform operator seeking to avoid liability under section 3(a)(8) bears the burden of pleading and proving that the restriction or impediment is necessary for the security or functioning of the covered platform, or it is necessary to prevent data from the covered platform operator or another business user from being transferred to the Government of the People's Republic of China or the government of a foreign adversary.[158]

Section 3(a)(9) makes it unlawful for a covered-platform operator—in connection with any covered-platform user interface, including search or ranking functionality offered by the covered platform—to treat the products, services, or lines of business of the cov-

[158] *See, e.g., Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948).

ered-platform operator more favorably relative to those of another business user and in a manner that is inconsistent with the neutral, fair, and nondiscriminatory treatment of all business users.

This provision addresses a covered-platform operator's conduct on the platform's user interfaces, where the operator often functions in two roles—both selecting what information to display and being the source of some of that information. For instance, a covered-platform operator could act as both the operator of an online marketplace and as a seller on that marketplace. As a marketplace operator, it could allow customers to search for products available on the marketplace. And as a marketplace seller, it could offer some of the products that are displayed in the search results. Section 3(a)(9) would prohibit that covered-platform operator from self-preferencing by unfairly rigging the search results in favor of its own products.

This provision of the Senate Bill makes stylistic changes to the language in section 2(b)(7) of the House Bill. It also adds the requirement that, to fall within the prohibition set forth in this provision, the covered-platform operator must self-preference in a manner that is inconsistent with the neutral, fair, and nondiscriminatory treatment of all business users. This addition clarifies that the principle underlying this provision is fair competition on the merits: A covered-platform operator is free to display its own products and services first in search results if those products and services have earned the top ranking under a neutral, fair, and nondiscriminatory algorithm, for example. If, on the other hand, the covered-platform operator favors its own products or services in search results or rankings, it violates this provision.

Section 3(a)(10) makes it unlawful for a covered-platform operator to retaliate against any business user or covered-platform user that raises good-faith concerns with any law enforcement authority about actual or potential violations of state or federal law on the covered platform or by the covered platform operator. This language is similar to that in section 2(b)(10) of the House Bill, with modifications. The Senate Bill narrows the provision, changing the prohibition from retaliation against any person to retaliation against the covered platform's users and business users. It adds the requirement that the concerns raised to law enforcement must be "good-faith" concerns. And it clarifies that the concerns must involve conduct occurring on the covered platform or conduct by the covered-platform operator (on or off the platform). If a user raises concerns to law enforcement in bad faith—or raises concerns of potential violations of the law neither occurring on the covered platform nor perpetrated by the covered-platform operator—this provision does not apply.

Neither Section 3(a) nor any other provision of the Senate Bill contains provisions equivalent to section 2(b)(6), 2(b)(8), or 2(b)(9) of the House Bill.

Section 3(b) of the Senate Bill describes the affirmative defenses to a claimed violation of section 3(a). The affirmative-defenses section appears in section 2(c) of the House Bill. Both bills impose a vigorous burden on covered-platform operators to prove that an affirmative defense applies. An enforcer need not plead the absence of any affirmative defense in the complaint or prove its absence to

establish a prima facie case. The Senate Bill modifies the House Bill in several ways, as explained below.

There are two types of affirmative defenses in the Senate Bill. The first appears in section 3(b)(1). To prove an affirmative defense under this provision, the defendant must prove that the challenged conduct was reasonably tailored and reasonably necessary to at least one of the values listed in section 3(b)(1)(A)–(C), such that there are not materially less discriminatory means to achieve that value.

The means-end test for this affirmative defense is different from the test set forth in section 2(c) of the House Bill, which required that the conduct be narrowly tailored, nonpretextual, necessary, and the least discriminatory means to achieve the listed value. The Senate version no longer requires that the defendant prove that its affirmative defense is nonpretextual, instead limiting the inquiry to an objective analysis. The Senate Bill also modifies the House version by no longer requiring that the conduct be the least discriminatory means of achieving the listed value. Instead, the Senate Bill adopts a standard of reasonableness.

There are three permissible values listed for the first type of affirmative defense, any one of which suffices to support such a defense. The first is to prevent a violation of, or comply with, federal or state law—language that is identical to the House Bill. The second is to protect safety, user privacy, the security of nonpublic data, or the security of the covered platform—which incorporates the language from the House Bill (protect user privacy or other non-public data) and adds to it (protect safety or security of the covered platform, as well). The third is to maintain or substantially enhance the core functionality of the covered platform. This is different from the House Bill, which sets forth, as the third value, increasing consumer welfare.

The second type of affirmative defense appears in section 3(b)(2). It applies only to claims alleging violations of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 3(a). A defendant proves this second type of affirmative defense by establishing that the challenged conduct has not resulted in and would not result in material harm to competition. The Senate Bill makes two changes to the House Bill's version of this affirmative defense.

First, whereas the House Bill's version was applicable to all claims under the Act, the Senate Bill's version is permitted only for a subset of claims—those alleging a violation of the paragraphs of section 3(a) that do not require that the challenged conduct materially harm competition to constitute a violation. It thus is inapplicable to claims alleging violations of paragraphs (1), (2), or (3) of section 3(a). This change was necessary to accommodate the Senate's inclusion of a material-harm-to-competition requirement in the prohibitions set forth in those three paragraphs.

Second, the Senate Bill modifies the language to describe the affirmative defense, changing the language from "would not result in harm to the competitive process by restricting or impeding legitimate activity by business users" to "has not resulted in and would not result in material harm to competition." The change is not intended to be substantive. Harm to the competitive process by restricting or impeding legitimate activity by business users *is* harm to competition. And that harm is material so long as it is more

than de minimis. Accordingly, the phrase "material harm to competition" has the same meaning as "materially harm competition" as described above in section 3(a)(1).

Section 3(b)(3) provides that, notwithstanding any other provision of law, whether user conduct would constitute a violation of 18 U.S.C. § 1030—which prohibits fraudulent, unauthorized, and other uses of a computer—shall have no effect on whether the defendant has established an affirmative defense under this Act. This text incorporates language from section 7(a) of the House Bill and clarifies that, not only will a user's potential violation of 18 U.S.C. § 1030 not determine the question of whether the defendant has established an affirmative defense, but it also will have no effect whatsoever on the question.

Section 3(b)(4) identifies the burden of proof applicable to the affirmative defenses. The defendant has the burden of proving an affirmative defense set forth in the Act by a preponderance of the evidence. The Senate Bill therefore lowers the burden from House Bill section 2(c), which had required proof by clear-and-convincing evidence. This change equalizes the defendant's burden to prove an affirmative defense with the enforcers' burden to prove a violation.

Section 3(c) sets forth enforcement authority under the Act. Section 3(c)(1) is the equivalent of section 2(h)(1) in the House Bill and states that—except as otherwise provided in the Act—the FTC shall enforce the Act as it does the Federal Trade Commission Act; the DOJ shall enforce the Act as it does Sherman Act, the Clayton Act, and the Antitrust Civil Process Act; and state attorneys general shall enforce the Act as they do the Sherman Act and the Clayton Act. The Senate version is identical to the House version, except that the Senate version changes the "Attorney General" to the "Department of Justice." This change was made to use a single term to refer to the DOJ throughout the Act, in a manner equivalent to references to the FTC.

Section 3(c)(2) is identical to section 2(h)(3) in the House Bill. Both the Senate Bill and the House Bill confer independent litigating authority on the FTC to enforce the Act in a civil action, to recover a civil penalty, and to seek other appropriate relief in a district court of the United States.

Section 3(c)(3) is substantively the same as section 2(h)(4) of the House Bill, with stylistic revisions. The Senate Bill provides that any attorney general of a state may bring a civil action in the name of such state for a violation of this Act as parens patriae on behalf of natural persons residing in such state, in any district court of the United States having jurisdiction of the defendant for any form of relief provided for in this section.

Section 3(c)(4) states that the FTC, the DOJ, or any attorney general of a state shall only be able to enforce this Act through a civil action brought before a district court of the United States. This provision is new to the Senate Bill. It limits enforcement of the Act to civil actions in U.S. district courts, foreclosing administrative or state-court adjudications.

Section 3(c)(5) is new to the Senate Bill and expressly adopts the default civil burden of proof for actions to enforce the Act. It states that the DOJ, the FTC, or the attorney general of a state shall establish a violation of the Act by a preponderance of the evidence.

Section 3(c)(6) sets forth the remedies available under the Act. A similar provision appears in the House Bill as section 2(f).

Section 3(c)(6)(A) is substantively the same as the first sentence of section 2(f)(2) of the House Bill. It states that the remedies provided in this paragraph are in addition to, and not in lieu of, any other remedy available under federal or state law.

Section 3(c)(6)(B), which is similar to section 2(f)(1) of the House Bill, provides that any person who violates this Act shall forfeit and pay to the United States a civil penalty in an amount that is sufficient to deter violations of this Act, but not greater than 10 percent of the total U.S. revenue of the person for the period of time the violation occurred. The Senate Bill adds a clarification that deterrence is the principle that should determine the civil penalty imposed for violations of this Act. The Senate Bill also narrows and lowers the maximum penalty that may be imposed.

Section 3(c)(6)(C) establishes that equitable relief is available under the Act. Section 3(c)(6)(C)(i) sets forth the general availability of such relief, stating that the DOJ, the FTC, or the attorney general of any state may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act. This provision is identical to Section 2(f)(2)(C) of the House Bill, except that the Senate Bill changes "Assistant Attorney General of the Antitrust Division" to "Department of Justice." This change was made to use a single term to refer to the DOJ throughout the Act, in a manner equivalent to references to the FTC.

Section 3(c)(6)(C)(ii) sets forth the substantive and procedural requirements for temporary injunctive relief under the Act. It is analogous to section 2(i) of the House Bill. Subclause (I) states that the FTC, the DOJ, or any attorney general of a state may seek a temporary injunction requiring the covered platform operator to take or stop taking any action for not more than 120 days. Subclause (II) states that the court may grant a temporary injunction under this clause if the FTC, the DOJ, or the attorney general of a state, as applicable, demonstrates three things:

First, the enforcer must demonstrate that there is a plausible claim, consistent with the House version. The Senate Bill adds to this first element by requiring that the enforcer satisfy a portion of what some courts have called the serious-questions test for preliminary relief. Specifically, the enforcer must demonstrate that its plausible claim is supported by substantial evidence, raising sufficiently serious questions going to the merits to make them fair ground for litigation, that a covered-platform operator violated this Act.

Second, the enforcer must demonstrate that the conduct alleged to violate this Act materially impairs the ability of business users to compete with the covered-platform operator. The Senate Bill modifies the House version of this element by requiring that the impairment be material (that is, not de minimis). It also changes the subject of the impairment from "at least 1 business user," as in the House version, to "business users." Accordingly, an enforcer satisfies this requirement if the enforcer demonstrates that the alleged violation impairs, to a greater than de minimis extent, the ability of some or all business users to compete with the covered-platform operator.

Third, the enforcer must demonstrate that a temporary injunction would be in the public interest. This element is new to the Senate Bill and incorporates the public-interest inquiry common to judicial analyses of requests for preliminary injunctions. Through this element, courts should consider the broader public consequences of granting or not granting the requested temporary relief, as demonstrated in, for example, *Parler LLC v. Amazon Web Services, Inc.*[159]

Subclause (III) of section 3(c)(6)(C)(ii) specifies that a temporary injunction under this clause shall expire not later than 120 days after the date on which a complaint under this subsection is filed. Subclause (IV) then identifies the circumstances under which a court must terminate the temporary injunction before that time. The court must do so if the covered-platform operator demonstrates that either (a) the FTC, the DOJ, or the attorney general of the State seeking relief under this subsection has not taken reasonable steps to investigate whether a violation has occurred, or (b) allowing the temporary injunction to continue would harm the public interest. The first option is substantively the same as section 2(i)(3) of the House Bill. A showing of this nature should be based on information known to the covered-platform operator or that can be obtained through the normal course of litigation; this provision is not designed to undermine the presumption of regularity owed to the Executive Branch, open the door into the enforcer's investigation process, or abrogate any privileges. The second option is new to the Senate Bill and allows the covered-platform operator to come forward with evidence, which may include evidence of changed circumstances, demonstrating that continuation of the injunction is harming the public interest.

Subclause (V), like section 2(i)(4) of the House Bill, states that nothing in section 3(c)(6)(C)(ii) of the Senate Bill shall prevent or limit the FTC, the DOJ, or any attorney general of any state from seeking other equitable relief, including the relief provided in section 3(6). In other words, the availability of a temporary injunction requiring the covered platform operator to take or stop taking any action does not foreclose an enforcer from seeking other forms of temporary relief, or permanent equitable relief of any kind.

Section 3(c)(6)(D), which is similar to section 2(f)(3) of the House Bill, authorizes forfeiture for repeat offenders. Several features appear in both the Senate and House versions of this provision. The potential for forfeiture arises when a person has engaged in repeated violations of this Act. If this condition is satisfied, the court shall consider requiring, and may order, that the chief executive officer of the person, and any other corporate officer of the person as appropriate to deter violations of this Act, forfeit to the United States Treasury any compensation received by that chief executive officer or corporate officer during a specified 12-month period. Like for the civil-penalty provision, the principle underlying this forfeiture provision is deterrence.

The Senate Bill narrows the specified 12-month period to the 12 months preceding the filing of a complaint for an alleged violation of this Act. The House Bill had allowed that the period could be the 12 months preceding or following the filing of such a complaint.

[159] 514 F. Supp. 3d 1261, 1270 (W.D. Wash. 2021).

The Senate Bill also adds a new clause describing the process required for forfeiture. Before a court may order forfeiture, it must provide the relevant chief executive officer or corporate officer with reasonable notice that the court is considering ordering forfeiture and provide an opportunity for such chief executive officer or corporate officer to appear and be heard before the court at a hearing on such potential forfeiture.

Neither section 3(c)(6) nor any other provision of the Senate Bill contains provisions equivalent to section 2(f)(2)(A), 2(f)(2)(B), or 2(f)(2)(D) of the House Bill. The remedies described in those sections of the House Bill are not foreclosed by the Senate Bill; they simply are not expressly provided for by the bill text.

Section 3(c)(7) sets forth the Act's statute of limitations. It is identical to section 2(j) of the House Bill. It provides that a proceeding for a violation of this section may be commenced not later than six years after such violation occurs.

Section 3(c)(8) sets forth the rules of construction limiting the Act's prohibitions. For these rules of construction, to the extent that they identify a condition that would allow a covered-platform operator to avoid liability, they function as an exception to the statutory prohibitions. Accordingly, the covered-platform operator bears the burden of pleading and proving that the condition exists.[160]

Section 3(c)(8)(a) is new to the Senate Bill and is designed to clarify expressly that certain conduct is not prohibited by the Act. There are six rules of construction:

The first two rules clarify that the Act does not disturb intellectual-property rights. Clause (i) states that nothing in section 3(a) shall be construed to require a covered-platform operator to divulge or license any intellectual property, including any trade secrets, business secrets, or other confidential proprietary business processes, owned by or licensed to the covered-platform operator. Clause (ii) states that nothing in section 3(a) shall be construed to prevent a covered-platform operator from asserting its preexisting rights under intellectual-property law to prevent the unauthorized use of any intellectual property owned by or duly licensed to the covered-platform operator.

Clause (iii) states that nothing in section 3(a) shall be construed to require a covered-platform operator to interoperate or share data with persons or business users that are on any list maintained by the federal government by which entities—(I) are identified as limited or prohibited from engaging in economic transactions as part of United States sanctions or export-control regimes; or (II) have been identified as national security, intelligence, or law enforcement risks. This rule clarifies that a covered-platform operator's refusal to provide this interoperability or data sharing is excluded from section 3(a)'s prohibitions. This rule is designed to complement and reinforce other exclusions within section 3(a), such as the final clause of section 3(a)(4), which exempts access that would lead to a significant cybersecurity threat from section 3(a)(4)'s prohibition against the restriction, impediment, or delay of certain access to or interoperability with the covered platform, among other things.

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[160] *See, e.g., Fed. Trade Comm'n v. Morton Salt Co.,* 334 U.S. 37, 44–45 (1948).

Clause (iv) states that nothing in section 3(a) shall be construed to prohibit a covered-platform operator from promptly requesting and obtaining the consent of a covered-platform user prior to providing access to the nonpublic, personally identifiable information of the user to a covered-platform user under that subsection. Personally identifiable information means information that can be used to distinguish or trace a specific individual, either alone or when combined with other information that is linked or linkable to a specific individual. Pursuant to this rule, a covered-platform operator does not violate the Act merely for giving users the option to opt in or opt out of usage tracking across the platform, for example. This rule does not, however, excuse consent requests that are discriminatory or self-preferencing—such as if a covered platform were to request consent only for third-party services, but not the covered-platform operator's own services.

Clause (v) states that nothing in section 3(a) shall be construed in a manner that would likely result in data on the covered platform or data from another business user being transferred to the Government of the People's Republic of China or the government of a foreign adversary. This rule is designed to ensure that the prohibitions in section 3(a) are not interpreted in a manner that would harm national security.

The sixth and final rule of construction in this provision, clause (vi), states that nothing in section 3(a) shall be construed to impose liability on a covered-platform operator solely for offering full end-to-end encrypted messaging or full end-to-end encrypted communication products or services, or a fee-for-service subscription that provides benefits to covered platform users on the covered platform. This exclusion covers the offerings themselves, but it does not extend to other conduct involving or related to those offerings.

Section 3(8)(c)(B) is a rule of construction that is substantively identical to section 7(b) of the House Bill. It is another provision that clarifies that the Act does not disturb intellectual-property rights. It provides that an action taken by a covered platform operator that is reasonably tailored to protect the rights of third parties under 17 U.S.C. §§ 106, 1101, 1201, or 1401; 15 U.S.C. §§ 1114 or 1125; or corollary state law, shall not be considered unlawful conduct under section 3(a).

Section 3(d) sets forth the process and requirements relating to the designation of a covered platform. Section 3(d)(1), which is analogous to section 2(d) of the House Bill, describes the initial designation. It states that the FTC and the DOJ may jointly, with the concurrence of the other, designate an online platform as a covered platform for the purpose of implementing and enforcing the Act. This language makes two changes to the House version. First, it makes the designation permissive ("may . . . designate") rather than mandatory ("shall designate"), as the House Bill does. This change is designed to clarify that the agencies making the designation decision will determine whether a designation is appropriate under the Act, subject to judicial review. Second, the Senate Bill states that, if a designation is made, it must be joint by both the FTC and the DOJ, whereas the House Bill allows a designation by either agency acting alone.

The Senate Bill and the House Bill both include three requirements for any covered-platform designation by the federal enforcers:

First, section 3(d)(1)(A) of the Senate Bill states that a covered-platform designation must be based on a finding that the criteria set forth in section 2(a)(5)(B) are met. Those criteria are discussed above in the analysis of section 2(a)(5)(B) of the Senate Bill. This first requirement matches the first requirement in the House Bill.

Second, section 3(d)(1)(B) states that a covered-platform designation must be issued in writing and published in the Federal Register. This second requirement appears identically in the House Bill. It is designed to facilitate both the transparency of agency decision-making and the creation of a record for judicial review.

Third, section 3(d)(1)(C) states that, except as provided in section 3(d)(2), a covered-platform designation shall apply for a seven-year period beginning on the date on which the designation is issued, regardless of whether there is a change in control or ownership over the covered platform. This third requirement makes stylistic changes to the language in the House Bill and lowers the default designation period from ten years to seven years.

Section 3(d)(2) is analogous to section 2(e) of the House Bill and describes under what circumstances, and through what process, a federal enforcer must remove a covered-platform designation.

Section 3(d)(2)(A) sets forth the triggering condition for a federal enforcer to consider the removal of a designation of a covered platform under section 3(d)(1) prior to the expiration of the seven-year period. It requires the FTC or the DOJ, as applicable, to consider such removal if the covered platform operator files a request with the FTC or the DOJ that shows that the online platform no longer meets the criteria set forth in section 2(a)(5)(B). This provision is substantially the same as the House version, although it reflects the Senate's lowering of the default designation period from ten years to seven years.

Section 3(d)(2)(B) sets forth the deadline for the federal enforcer's administrative process to consider designation removal. It requires that one of the federal enforcers must determine whether to grant a request submitted under section 3(d)(2)(A) not later than 120 days after the date on which the request is filed. This is the same deadline provided by the House Bill.

Section 3(d)(2)(C) establishes that granting a request for designation removal may occur only if both federal enforcers agree to the removal. It states that the FTC or the DOJ must obtain the concurrence of the DOJ or the FTC, as appropriate, before granting a request submitted under section 3(d)(2)(A). The House Bill contains the same requirement.

Section 3(d)(2)(D) is new to the Senate Bill. It requires the FTC or the DOJ, as applicable, to publish any decision to grant or deny the removal of a covered platform designation in the Federal Register. This requirement matches the similar publication requirement for an initial designation and is likewise designed to facilitate both the transparency of agency decision-making and the creation of a record for judicial review.

Section 3(d)(3) sets forth the judicial-review mechanism for decisions involving covered-platform designations. It is analogous to section 3(a) of the House Bill, but it describes with greater particu-

larity the persons that may seek judicial review of such decisions. It states that any person operating an online platform that has been designated as a covered platform under section 3(d)(1), or whose request for the removal of such a designation under section 3(d)(2) is denied, may, within 30 days of the issuance of such designation or decision, petition for review of such designation or decision in the U.S. Court of Appeals for the D.C. Circuit. The Senate version of this provision, unlike the House version, does not specify an applicable standard of judicial view. This omission means that the D.C. Circuit should apply the deferential standards it usually applies as an appellate court reviewing agency decisions.[161]

Section 4. Enforcement Guidelines. Section 4 of the Senate Bill, like section 5 of the House Bill, requires the federal enforcers to jointly issue agency enforcement guidelines outlining policies and practices under the Act. These guidelines should function similarly to, for example, the agencies' jointly issued *Horizontal Merger Guidelines*.[162]

Section 4(a) sets forth the general requirements for the enforcement guidelines. It states that, not later than 270 days after the date of enactment of this Act, the FTC and the DOJ, in consultation with other relevant federal agencies and state attorneys general, shall jointly issue the agency enforcement guidelines. The Senate Bill makes several changes to the equivalent text of the House Bill. It shortens the deadline from the one year provided in the House version to 270 days. This change ensures that the guidelines are in place before the effective date for section 3(a) of the Act, as set forth in section 7(b) of the Act. The Senate version changes "Assistant Attorney General of the Antitrust Division" to "Department of Justice;" this edit was made to use a single term to refer to the DOJ throughout the Act, in a manner equivalent to references to the FTC. The Senate version also requires the federal enforcers to consult with other relevant federal agencies and state attorneys general when developing the guidelines. This consultation requirement is designed to ensure that the federal enforcers consider stakeholder interests across the federal government, as well as the views of the state attorneys general, who also are empowered to enforce this Act.

In addition, section 4(a) specifies, in greater detail than the House version, what the guidelines must contain. The guidelines must outline policies and practices relating to conduct that may materially harm competition under section 3(a), agency interpretations of the affirmative defenses under section 3(b), and policies for determining the appropriate amount of a civil penalty to be sought under section 3(c). These specifications are a floor for the matters covered by the guidelines, not a ceiling. The underlying goals of the guidelines are to be, as set forth in this provision, promoting transparency, deterring violations, fostering innovation and procompetitive conduct, and imposing sanctions proportionate to the gravity of individual violations.

Section 4(b) provides that the FTC and the DOJ shall update the joint guidelines issued under section 4(a) as needed to reflect cur-

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[161] *See* 5 U.S.C. § 706.

[162] *E.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010); *see also United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (describing the *Horizontal Merger Guidelines* as a "helpful tool" for "analyzing proposed mergers").

rent agency policies and practices, but not less frequently than once every four years beginning on the date of enactment of this Act. The House version of this provision contains the same requirement.

Section 4(c) is new to the Senate version of the Bill and requires that the federal enforcers provide an opportunity for public notice and comment on draft guidelines and updates. It states that, before issuing guidelines, or updates to those guidelines, the FTC and the DOJ shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the draft guidelines are published. This addition promotes transparency and public participation in the formulation of the guidelines and updates to those guidelines.

Section 4(d) clarifies that the joint guidelines are just that: guidelines. They do not confer any rights upon any person, state, or locality; and they do not operate to bind the FTC, the DOJ, or any person, state, or locality to the approach recommended in the guidelines. This clarification appears in the House Bill as well.

Section 5. Rule of Construction. Section 5, which is substantively the same as section 7(c) of the House Bill, sets forth a general rule of construction for the Act as a whole. It clarifies that, although the Act is designed to complement the federal antitrust laws, it does not modify, supersede, repeal, abrogate, or limit those or other laws. It states that nothing in the Act may be construed to limit any authority of the DOJ or the FTC under the antitrust laws, section 5 of the Federal Trade Commission Act (15 U.S.C. 45), or any other provision of law; and nothing in the Act may be construed to limit the application of any law. Other still-applicable laws are too numerous to list here, but they include, as an example, section 230(c) of the Communications Decency Act,[163] as well as, of course, all the protections afforded by the U.S. Constitution. Laws, such as section 230(c) of the Communications Decency Act, that bar liability by certain persons and/or for certain conduct, typically function as affirmative defenses to liability under this Act.[164]

Section 6. Severability. Section 6 sets forth the Act's savings clause, and it is the analog of section 8 of the House Bill. The Senate version streamlines the language in the House Bill and provides that, if any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and the application of the remaining provisions of this Act, to any person or circumstance, shall not be affected.

Section 7. Effective Date. Section 7 is new to the Senate Bill and specifies the effective date for the Act. Section 7(a) states that, except as provided in section 7(b), the Act shall take effect on the date of enactment of the Act. Section 7(b) states that section 3(a) shall take effect one year after the date of enactment of the Act.

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[163] 47 U.S.C. § 230(c). As Chair Cicilline has explained in detail, section 230(c), along with other laws and practical and procedural protections, ensure that platforms will be able to continue to enforce their content-moderation policies. *See* Letter from Hon. David N. Cicilline, Chair, Subcommittee on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, to Hon. Brian Schatz, Sen., Hon. Ben Ray Luján, Sen., Hon. Ron Wyden, Sen., & Hon. Tammy Baldwin, Sen. (June 15, 2022), https://cicilline.house.gov/sites/evo-subsites/cicilline.house.gov/files/evo-media-document/2022-0615-cicilline-letter-to-senators-re-content-moderation.pdf.

[164] *See, e.g., Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019) (affirming dismissal of multiple claims, including Sherman Act sections 1 and 2 claims, under 47 U.S.C. § 230(c)(1)).

And section 7(c) clarifies that the exception in section 7(b) to the effective date of the Act shall not limit the authority of the FTC or the DOJ to implement other sections of the Act. Taken as a whole, this section enables the federal enforcers to begin promulgating the joint guidelines, required by section 4, immediately upon enactment of the Act. These joint guidelines will then be in place in advance of the effective date of section 3(a) of the Act, which sets forth the conduct that violates the Act. In short, implementation of the Act begins immediately upon enactment, and enforcement of the Act beings one year after enactment.

The Senate Bill does not contain any provisions equivalent to section 4 or 6 of the House Bill.

MINORITY VIEWS

H.R. 3816 is part of a Democrat-led package of so-called antitrust bills designed to fuse Big Tech and Big Government in ways that will lead to more censorship. The radical package of bills will create a new and expansive regulatory framework that empowers the Biden Administration to micromanage many types of business decisions. By putting additional pressure on regulated entities to please their federal regulators, this Democrat-led package will lead to more—not less—censorship of online speech.

As Republicans emphasized time and time again during the Committee's consideration of H.R. 3816, the Democrats' efforts will not solve the paramount problem with Big Tech: politically biased censorship. We know that Big Tech companies censor conservatives.[1] This bill will only make that problem worse by joining tech companies and Democrat-led agencies at the hip—giving large companies every reason to appease and placate woke regulators in the Biden Administration. Democrats rejected a Republican amendment to ban wrongful censorship and to create a private cause of action—just as Democrats repeatedly rejected other Republican-offered amendments that would have improved the legislation.

There should be no mistake: this bill would give the Biden Administration much more leverage to lean on companies to do its bidding, including partisan censorship online. Federal bureaucrats, including antitrust regulators, wield enormous direct and indirect influence over the industries and firms they regulate. The Federal Trade Commission (FTC) monitors businesses for anticompetitive conduct, reviews planned mergers, and challenges business decisions as it sees fit. Challenging an FTC order or investigation can be costly, both to a business's finances and its finite resources. If the FTC sues, these expenses can multiply—creating significant pressure on a private business to settle and otherwise comply with the FTC's demands. For these reasons, regulated parties are incentivized to heed the agency's threats and suggestions even without a finding of wrongdoing. H.R. 3816 radically strengthens this existing dynamic, and the unelected bureaucrats in the Biden Administration will exploit their new power. Under the bill, companies facing potential regulation or liability will have every reason to work hand in glove with federal bureaucrats before making all manner of decisions, which makes censorship more likely.

The bill effectively lets federal bureaucrats decide which companies to regulate—enabling the government to pick winners and los-

[1] REPUBLICAN STAFF OF H.R. COMM. ON THE JUDICIARY, 116TH CONG., REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES 5–26 (2020).

ers,[2] and entrenching those decisions by largely insulating them from judicial review. The bill uses broad language that gives the FTC and the Department of Justice discretion to designate firms for regulation.[3] Accordingly, firms that curry political favor in Washington may escape unscathed, while others will be targeted.[4] There is no true independent check on those decisions, either, because the bill requires courts to defer to agency findings about which companies to regulate.[5] Under this framework, private companies will have every incentive to please bureaucrats and to follow their lead at every turn—undermining the rule of law and fundamental fairness that should characterize the American legal system.

After the agencies choose which companies to regulate, the bill empowers the regulators to shape companies' behavior—creating additional business uncertainty, and making companies even more susceptible to regulation by raised eyebrow,[6] including jawboning over censorship. For example, Section 2(a) of the bill bans certain conduct and permits other practices. But the language is high-level, leaving companies in the dark about what conduct will lead to liability. As Representative Bishop explained during the bill's markup, "[y]ou can't tell what it is that [the language] bans . . . . [I]t's [not] understandable," and this language "empower[s] regulators . . . ." Similarly, Representative Spartz described aspects of the bill as "very broad." Because companies will not know exactly what is prohibited, and will want to avoid major penalties,[7] they will check with enforcers before making decisions. The bill leaves companies almost entirely beholden to federal regulators. Representative Roy offered an amendment that would have reduced regulators' discretion, better aligned the bill with the incentives of traditional antitrust enforcement, and "take[n] the heavy hand of government out of the process." Committee Democrats rejected Mr. Roy's approach.

The bill also creates a regulatory environment in which companies are guilty until proven innocent—even when their underlying behavior is beneficial. As drafted, the bill prohibits certain conduct, *even if* the conduct is not anticompetitive and *even if* it benefits consumers and customers. During discussion of this issue in Committee, Democrats rejected an amendment that would have prohibited only conduct that actually harms the competitive process. Instead of targeting only harmful conduct, the bill assumes conduct is harmful and then burdens regulated parties with proving it is not—for example, requiring them to prove that their conduct does not harm "the competitive process."[8] In other words, the bill makes

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[2] H.R. 3816, 117th Cong. § 2(d), (g)(4) (2021); *see also* Rebecca Kern, *Apple Can't Block Pre-Installed App Removal Under Bill*, BLOOMBERG (June 16, 2021), https://www.bloomberg.com/news/articles/2021-06-16/apple-pre-installed-apps-would-be-banned-under-antitrust-package.

[3] H.R. 3816, 117th Cong. § 2(d), (g)(4) (2021).

[4] *Cf.* Thomas Catenacci, *Whistleblower Document Appears To Show Microsoft Helped Write Big Tech Bills*, DAILY CALLER (June 23, 2021), https://dailycaller.com/2021/06/23/microsoft-house-judiciary-committee-thomas-massie/.

[5] H.R. 3816, 117th Cong. § 3(b) (2021).

[6] A former Obama FTC official and Biden White House official responsible for competition policy has even argued that agency threats can be "attractive" and useful. *See* Tim Wu, Essay, *Agency Threats*, 60 DUKE L.J. 1841, 1848–54 (2011).

[7] *See* H.R. 3816, 117th Cong. § 2(f)(1) (2021).

[8] *Id.* § 2(c)(1); *see also id.* § 2(c)(3).

the company guilty until it can prove itself innocent,[9] which departs from fundamental tenets of American law and puts significant pressure on regulated parties. That pressure gives the Biden Administration more leverage to lean on private companies to carry out its censorship agenda.

Beyond giving the federal government the ability to pick which companies to regulate and what conduct to prohibit, H.R. 3816 will fuel FTC rulemaking and needlessly grow the administrative state. Conduct the bill prohibits is also an "unfair method of competition" under Section 5 of the FTC Act.[10] The Biden FTC's Chair, Lina Khan, strongly supports aggressive agency regulations and has taken the position that the FTC has wide rulemaking authority under Section 5.[11] In light of the bill's broad language, the FTC would likely use this bill to issue new regulations under Section 5—ignoring the Constitution's mandate that *Congress* make federal law and thus undermining the separation of powers.

H.R. 3816 also creates a new and unnecessary Bureau of Digital Markets at the FTC and authorizes more hiring.[12] The Trump Administration already created a tech-focused enforcement division, appropriately placed in the FTC's existing Bureau of Competition.[13] Creating a new bureau with expansive hiring authority is duplicative and wastes federal resources.

Like the rest of the Democrats' antitrust package, H.R. 3816 was rushed to markup. The bill's development and deliberation were inadequate. Those failures are apparent. Instead of solving legitimate concerns with tech companies, the bill puts private-sector companies under Big Government's thumb and drastically empowers Biden regulators in ways that empower censorship. For these and other reasons, an overwhelming majority of Republicans opposed this bill in Committee. We believed that the Committee should instead focus on legislative reforms that will protect the freedom of speech online and benefit the American people.

JIM JORDAN,
Ranking Member.

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[9] *See id.* § 2(c) (defense must be shown with "clear and convincing evidence").
[10] *Id.* § (2)(h)(2).
[11] *See, e.g.*, Lina M. Khan & Rohit Chopra, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 369–71 (2020).
[12] H.R. 3816, 117th Cong. § 4 (2021).
[13] *Technology Enforcement Division*, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division (last visited Dec. 13, 2022).