



January 19, 2022

The Honorable Richard J. Durbin
Chair, Senate Judiciary Committee
United States Senate
711 Hart Senate Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member, Chair, Senate Judiciary Committee
United States Senate
135 Hart Senate Building
Washington, DC 20510

Re: S. 2992, the American Choice and Innovation Online Act; and S. 2710, the Open App Markets Act (January 19, 2022)

Dear Senators:

Last June, majority staff of the House Judiciary Committee’s Antitrust Subcommittee issued a report entitled the “Investigation of Competition in Digital Markets.”¹ Bills based on that report moved swiftly through both the Subcommittee and the full Committee, whose chairs insisted that no hearings were necessary because hearings that informed the drafting of the report had thoroughly vetted the issues. Now, your committee appears poised to make the same mistake: marking up, without the benefit of hearings, two similar bills. Both bills purport to prevent the abuse of market power by tech companies. The House Report concludes that the result of the “significant and durable market power” of “Big Tech” platforms is not only “less innovation” and “fewer choices for consumers,” but also “a weakened democracy.” Yet, as drafted, *these bills* will be used to weaken democracy.

We urge your Committee to hold hearings to consider these bills more carefully before marking them up and sending them to the Senate floor. Only with the benefit of hearings can the

¹ See generally Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, H.R. Rep. at 378-87 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

Committee fix critical ambiguities in these bills. Otherwise, those provisions will be exploited by extremists as ways of pressuring digital platforms to continue carrying dangerous misinformation, incitement to violence, hate speech and the like.

I. Critical Ambiguities Requiring Correction

We warned the House Judiciary Committee about how their bills could be misused before the June markup in a letter attached hereto as Appendix A.² Rep. Zoe Lofgren (D-CA) articulated many of our concerns at the markup, warning that “[e]xtremist outlets and disinformation sites could sue platforms for blocking them.”³ For example, “Infowars may sue Apple for being kicked out of the app store, while other conservative political outlets are left up. (Same is possible for Parler, Gab, and 4Chan.)”⁴ She proposed to amend the American Choice and Innovation Online Act to require plaintiffs to show “harm to the competitive process.”⁵ Her amendment was rejected out of hand by the bill’s sponsors as unnecessary.

Your committee appears to be receptive to her concerns, having modified each of the core violations set forth in Sections 2(a) and 2(b)(1) of the House bill to include, in the bill you introduced in August (S.2992), the following proviso: “in a manner that would materially harm competition on the covered platform.”⁶ Presumably, these amendments aim to prevent the bill from being weaponized by the likes of Infowars and Parler. We support that goal. Unfortunately, neither amendment is sufficient.

Rep. Lofgren’s amendment implicitly invoked the longstanding principle that an antitrust plaintiff “must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.”⁷ This framing equates Lofgren’s amendment with the term added in the Senate bill (“harm competition”). The Senate language *might* be an improvement in one way. Requiring that the harm be “material” may help courts weed out non-meritorious lawsuits up front. But this benefit likely is not as great as it might seem; courts would likely have required that the harm alleged be material (as in not *de minimus*) anyway.

² Berin Szóka & Corbin Barthold, Letter to Reps. Jerrold Nadler & Jim Jordan, House Judiciary Committee (June 22, 2021), <https://techfreedom.org/wp-content/uploads/2021/06/TechFreedom-Letter-re-HJC-Bills-6.2021.pdf>.

³ Press Release, Zoe Lofgren, Lofgren Statement Ahead of Judiciary Committee Markup of Tech Antitrust Bills (Jun. 23, 2021), <https://lofgren.house.gov/media/press-releases/lofgren-statement-ahead-judiciary-committee-markup-tech-antitrust-bills>.

⁴ *Id.*

⁵ H.R. 3816, 116th Cong. (2021) (amendment offered by Rep. Lofgren), <https://docs.house.gov/meetings/IU/IU00/20210623/112818/BILLS-117-HR3816-L000397-Amdt-6.pdf>.

⁶ S.2992 § 3(a).

⁷ *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

In another way, however, the Senate bill may in fact be a step back. Saying that a practice must harm competition *on the platform*, rather than overall, could provide a crucial assist to extremists. Say a social media app that hosts extremists gets banned from one of the major app stores. Early in a conventional antitrust suit, the parties would dispute what the relevant market is. The owner of the app store would argue that the market is, say, *mobile phones* (with their various app stores), whereas the app maker would, of course, argue that the market is *that app store*. Under the Sherman Act, the app maker would have to *prove*, using sound economics, that the *individual app store* is the pertinent market. Under S.2992, however, the plaintiff's work is already done: "the platform" — the individual app store — is "the market" as a matter of law. As we discuss below, moreover, the neo-Brandeisian antitrust movement would arm the app maker with arguments about why removing a single social media app from an app store "materially harm[s] competition." Although it is far from clear that S.2992 would in fact prevent material harm to competition, it is quite obvious that it would provide material support to extremists.

Even if S.2992 is interpreted narrowly enough to prevent an app from making claims based on general harms to competition, making such claims would be easy under S.2710 — at least, for some plaintiffs. Under Section 3(e), a "Covered Company shall not provide unequal treatment of Apps in an App Store through unreasonably preferencing or ranking the Apps of the Covered Company or any of its business partners over those of other Apps." This would have broader implications than it may seem. For example, Facebook is clearly a "business partner" of Google and Apple;⁸ thus, any social network app could allege that Facebook's app is being "unreasonably preferenced" over its own. S.2710 does not define "unreasonably preferencing" except to say that it "includes applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners" and "does not include clearly disclosed advertising." While it might be easier to question the "reasonableness" of preferencing one social media app over another, S.2710 does not actually require that the apps in question be in the same market. The bill contains nothing like the "in a manner that would materially harm competition on the covered platform" language added to S.2992.

The other supposed limiting principle in S.2992, that conduct must "materially harm competition," is defined nowhere in the bill. Nor does this term have any fixed meaning elsewhere in statute. This uncertainty invites abuse and should be remedied by a clarifying amendment.

⁸ See, e.g., Paige Vickers, *Behind a Secret Deal Between Google and Facebook*, NY TIMES (Jan. 17, 2021), <https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html>; see also *Let's Clear Up a Few Things About Facebook's Partners*, Meta (Dec. 18, 2018), <https://about.fb.com/news/2018/12/facebooks-partners/>.

Defendant platforms will doubtless argue that, in accord with established principles of federal antitrust law, plaintiffs must show harm not simply to themselves, but to competition itself.⁹ Every “deplatformed” plaintiff will, of course, frame its claims in broad terms, claiming that the unfair trade practice at issue isn’t the decision to ban them specifically, but rather a more general problem — a lack of clarity in how content is moderated, a systemic bias against conservatives, or some other allegation of inconsistent or arbitrary enforcement — and that these systemic flaws harm competition on the platform overall. This kind of argument would have broad application: it could be used against platforms that sell t-shirts and books, like Amazon, or against app platforms, like the Google, Apple and Amazon app stores, or against website hosts, like Amazon Web Services.

In their efforts to expand “materially harm competition” beyond the bounds of the courts’ extant Sherman Act jurisprudence, plaintiffs will surely note that Congress felt compelled to write a new law entirely distinct from that Act, and that it framed violations as a species of “unfair methods of competition.” The Federal Trade Commission (FTC), they will note, last year rescinded its 2015 policy statement, under which the Commission declared its intention to be “guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare.”¹⁰ The FTC’s UMC authority, according to the three Commissioners who voted to rescind the policy statement, was “not limited to an extension of the Sherman Act.”¹¹ Plaintiffs will cite to the House Judiciary Committee’s report’s discussion of such allegedly arbitrary decision-making and its emphasis on “consumer choice,”¹² insisting that Congress intended the law to cover a broad range of “values” beyond what might be cognizable under the consumer welfare standard.

State laws being what they are, S.2992 could end up being given an expansive reading by a *single state court*. Take, for example, the law of California. It allows a plaintiff to use a violation of federal law—absent a preemption clause, which S.2992 does not contain—as a

⁹ *Nynex Corp.*, 525 U.S. at 128, 135.

¹⁰ Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf; Fed. Trade Comm’n, Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, at 3 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

¹¹ Fed. Trade Comm’n, Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, at 3 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

¹² See, e.g., H.R. Rep. No. 378-87 (2020) (“In the absence of competition, Apple’s monopoly power over software distribute on to iOS devices has resulted in harm to competitors and competition, reducing quality and innovation among app developers, and increasing prices and reducing choices for consumers...”)

predicate for a suit under California Business & Professions Code Section 17200.¹³ Meanwhile, California courts do not consider themselves bound by the lower federal courts' reading of federal law.¹⁴ Regardless how the federal courts read "materially harm competition," therefore, one of California's 1,754 superior court judges¹⁵ could decide that that term means something like "remove a competitor from the market." (Obviously, such a ruling could be appealed. But even then, the prospect of regulated entities facing a patchwork of idiosyncratic readings of the law, by different states, would remain.)

II. Administrative Litigation by the FTC

The plaintiff that will get the greatest deference in making such arguments is the FTC itself.¹⁶ and when the FTC brings suit under Part III, it enjoys significant advantages that normal plaintiffs do not: It is not bound by the normal rules of evidence. When the Commission reviews appeals of decisions made by its Administrative Law Judge, it owes no deference to findings of fact by the ALJ and may, indeed, re-try the case. When the Commission's final decisions are appealed to the circuit courts of appeals, they enjoy extraordinary deference on facts.¹⁷ The FTC will also enjoy some degree of deference in trying to push the boundaries of ambiguous provisions of the law.¹⁸

If a majority of FTC Commissioners were bent on a partisan agenda — *e.g.*, forcing mainstream platforms to carry Parler — it would be significantly easier for them to use the administrative litigation process to do so. If nothing else, the mere threat of having to go through two rounds of litigation (first before the ALJ, then before the Commission), could suffice to pressure Big Tech platforms to comply. Requiring the FTC to litigate in federal court like the DOJ, state attorneys general, and private litigants would be one way to guard against abuse of the law.

¹³ See, *e.g.*, *Roskind v. Morgan Stanley Dean Witter Co.* 80 Cal. App. 4th 345, 353 (Cal. Ct. App. 2000); see generally Cal. BUS. & PROF. Code § 17200 (West).

¹⁴ See, *e.g.*, *Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1142 (2020).

¹⁵ Judicial Council of California, *Fact Sheet: California Judicial Branch* (Oct. 2020), https://www.courts.ca.gov/documents/California_Judicial_Branch.pdf.

¹⁶ S.2922 § 3(a).

¹⁷ 15 U.S.C. § 45(c) ("[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive.").

¹⁸ "The legal issues presented [in a case] — that is, the identification of governing legal standards and their application to the facts found — are ... for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

III. FTC Rulemaking Will Be Abused

Both bills declare any violation to be an unfair method of competition (UMC) under Section 5. This may seem familiar: when Congress writes bills governing privacy, data security, child protection and other consumer protection issues, it commonly declares violations of the law to be “unfair and deceptive trade practices” (UDAP). But the bespoke rulemaking process created by Congress for UDAP rulemakings (after the FTC’s abuses of this power in the 1970s), make it unlikely that the FTC will attempt to fill in statutory gaps with rulemakings.

Invoking the FTC’s UMC authority does precisely that: it invites the Commission to exercise the power it has recently begun claiming for the first time in decades to make UMC rules using the standard “informal” notice-and-comment rulemaking procedures of the Administrative Procedure Act. Indeed, a panel of the D.C. Circuit ruled that the FTC has such power in 1973.¹⁹ Democrats have supported the current FTC Chair’s assertions that the FTC has such power. They should assume the next Republican President will attempt to leverage this power by asking the FTC to make UMC rules that advantage the likes of Parler, Gettr, and Infowars, and by asking the FTC, the DOJ, and Republican state attorneys general to bring suit under both bills.²⁰

S.2992 directs the FTC and DOJ to issue, and update at least every four years, “agency enforcement guidelines outlining policies and practices relating to conduct that may materially harm competition..., agency interpretations of the affirmative defenses..., and policies for determining the appropriate amount of a civil penalty to be sought.”²¹ The bill also provides that these shall not bind the agencies, nor create any legal rights. Yet the FTC could also, under its theory of UMC rulemaking authority, do each of these things anyway. Indeed, it could also:

- Define the scope of “platforms” broadly enough to make it easy for plaintiffs to bring claims, and potentially win, under S.2992 — and applying those rules in the determinations issued by the FTC and DOJ as to what constitutes a “platform”; and
- Prescribe how platforms may moderate content, both as “reasonable preferencing” in app stores under S.2710 and as “reasonable discrimination” more generally under S.2992. Such rules could build on those the Trump Administration asked the FCC to

¹⁹ National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

²⁰ Lest anyone assume that a Republican-controlled FTC is unlikely to make such a rule because the two Republicans currently on the Commission have clearly opposed UMC rulemaking, note that both of their terms will have expired by the time the next president takes office in 2025, as will the term of Chair Lina Khan. Thus, a Republican president would be able to appoint three new commissioners immediately.

²¹ S.2292 § 4(a).

make in 2020 as conditions of Section 230 eligibility.²² They might, for example, require platforms to be so specific about grounds for content moderation that a platform might be limited to moderating specific words, and then have to justify adding new words to its banned list before it can take action against those using them.

Issuing a UMC rule would do more than allow the FTC to provide “guidance.” If, indeed, the Commission has the authority to make UMC rules, it will also argue for *Chevron* deference for those rules when challenged in court.²³

We do not believe the FTC actually has the authority to make UMC rules, and have urged the FTC not to waste scarce taxpayer resources attempting to do so.²⁴ But the Commission seems determined to try, and it may be many years before the Supreme Court decides the question. In the meantime, however poorly reasoned the D.C. Circuit’s *National Petroleum Refiners* decision is, the court may feel bound by it, and other appeals courts may defer to it. In other words, we cannot assume the question will be decided before 2025. The next Republican administration will likely attempt to make rules that help services like Parler use the threat of litigation to coerce platforms into hosting extremist content. Only by explicitly declaring that the FTC shall have no authority to make rules under this statute can lawmakers ensure that they, not future Presidents, decide how the bill will be used.

IV. Civil Penalties Will Amplify Harm to Content Moderation

Both bills rest on significant ambiguities in their key provisions, which make it difficult, if not impossible, for regulated parties to anticipate how the laws will be applied. Building laws around terms like “discriminatory,” “unfair” or “harmful” is not inherently problematic, but marrying that ambiguity with civil penalties raises serious constitutional concerns. A civil penalty is not a mere “compensati[on]” to “a victim for his loss.”²⁵ It is, rather, a

²² National Telecommunications and Information Administration, Petition for Rulemaking to Clarify Section 230 of the Communications Act of 1934, Docket No. RM-11862, (July 27, 2020), https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf; see also TechFreedom, Comment Letter on NTIA Petition for Rulemaking to Clarify Section 230 (Sept. 2, 2020), <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-9.2.2020.pdf>; Exec. Order No. 13925, 85 Fed. Reg. 34,079 (June 2, 2020), <https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship>.

²³ Justin Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 250–52 (2014).

²⁴ Berin Szóka & Corbin Barthold, *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts*, TECHFREEDOM (Sep. 30, 2021), <https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf>.

²⁵ *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017).

“punishment” that aims “to deter others from offending in like manner.”²⁶ Although “elementary notions of fairness” always “dictate a person receive fair notice” of what conduct to avoid, the “strict[er] constitutional safeguards” around “judgments without notice” are “implicated by civil penalties.”²⁷ When “penalties threaten to inhibit the exercise of constitutionally protected rights,” in particular, “a more stringent vagueness and fair-notice test should apply.”²⁸

Although, in civil enforcement cases, these principles arise most frequently in the context of an agency’s shifting how it reads its regulations,²⁹ “clarity in regulation” is, *in general*, “essential to the protections provided by the Due Process Clause”; and due process, *in general*, “requires the invalidation of laws” — and, in particular, penal laws — “that are impermissibly vague.”³⁰ FTC Chair Lina Khan and former Commissioner Rohit Chopra showed a clear understanding of the danger of vague laws, and of the importance of due process, in a 2020 article.³¹ Ambiguous laws, they wrote, deprive regulated parties “of notice about what the law is, thereby undermining due process—a fundamental principle in our legal system.”³²

Our letter to the House Judiciary Committee last June explores these principles of due process in greater detail. Here, what is important to note is that civil penalties create an additional, greater constitutional problem when they magnify the chilling effect of unclear laws on the exercise of editorial discretion. The threat of large penalties may exert a significant *in terrorem* effect over platform owners, causing them to refrain from enforcing their terms of service, afraid of those that might violate them but then sue if they suffer consequences.

²⁶ *Id.*

²⁷ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 & n.22 (1996); *see also* *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”).

²⁸ *Karem v. Trump*, 960 F.3d 656, 664 (D.C. Cir. 2020) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).

²⁹ *See, e.g., Fox*, 567 U.S. at 253 (“The Commission’s lack of notice to Fox and ABC that its interpretation had changed ... failed to provide a person of ordinary intelligence fair notice of what is prohibited.”) (quotation omitted); *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 155 (2012) (declining to adopt agency reading of a regulation that would create “unfair surprise” to the regulated party); *Gates & Fox Co. v. OSHA*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.) (“Where the imposition of penal sanctions is at issue, however, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”); *Phelps Dodge Corp. v. Fed. Mine Safety & Health Rev. Comm.*, 681 F.2d 1189, 1192 (9th Cir. 1982) (“[T]he application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited.”).

³⁰ *Fox*, 567 U.S. at 253.

³¹ Rohit Chopra & Lina M. Khan, Symposium: Reassessing the Chicago School of Antitrust Law, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020), <https://bit.ly/3gMtXCk>.

³² *Id.* at 360.

V. Conclusion: These Bills Are Not Ready for Markup

These are complicated issues and the stakes could hardly be higher: if our concerns are not addressed properly, these bills will help extremists continue to share content on mainstream platforms, offer apps at mainstream app stores, and sell goods through mainstream online markets. It is not possible to resolve these issues at a markup, and once the bill is sent to the Senate floor, it will be too late to fix them.

We urge you to hold hearings on these bills, as is the normal process for even minor legislation. These bills would represent the largest change to American Internet policy in a quarter century, and to competition law in many decades. Congress should give these issues the careful consideration they deserve. We stand ready to assist your committee in any way we can.

Sincerely,

Berin Szóka
President
TechFreedom

Corbin K. Barthold
Internet Policy Counsel
TechFreedom