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Senate Judiciary Committee Hearing
Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets

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Big Tech's enormous size and market power pose challenges to the continued vitality of vibrant political discussion in this country as well as democratic deliberation sufficiently robust to hold government accountable to the people. While, as Elon Musk showed America in the Twitter files, Big Tech has focused much of its effort at limiting the ability of all Americans to fully participate in our nation's political discourse.

Consider Big Tech's treatment of Parler. Beginning in 2021, the social media company, which differentiated itself from its competitors by its dedication to free speech and its lack of censorship, held the number one spot on the list of most-downloaded apps on the Apple Play Store. The app was the 10th most downloaded social media app in 2020 with 8.1 million new installs, according to TechCrunch. It was a competitor to incumbent Big Tech platforms, offering consumers a different sort of online experience.

But, then, on vague seemingly pretextual grounds, in early 2021, Apple removed Parler from the App store and soon after Google removed it from the Play Store. Then, Amazon Web terminated its hosting agreement. The Parler app was quite literally "taken down," only returning online months later. It never recovered its business momentum and growth—which are vital for the survival of emerging social media platforms because they depend upon rapidly accelerating network effects. Consumers lost a differentiated social media—and American democracy lost a valuable platform for public debate.

And, sadly, the Parler incident is not a one off. Big Tech appears to be continuing to block many Americans' full participation in political discussion and democratic deliberation. To name just a few recent examples, the RNC is now suing Google over discriminatory email delivery practices that allegedly throttled Republican campaign communications. And, of course, the Twitter files have revealed a long and concerted effort to silence a whole host of often dissenting political views.

The problem of Big Tech stems from its market power. The problem is not simply bias at those companies or a general cultural, moral and political outlook in Silicon Valley that differs dramatically from that of most Americans. Rather, these biases can have massive societal impact because these companies are enormous and dominate internet communications and services.

Firms with significant market power are price givers. They can take actions which may not please some, or even many, of their users without facing competitive challenge or loss of revenue. Their domination of various niches in online business assures them that even if they

decrease the quality of their services, at least as judged by a large segment of America, they will not experience a consequent drop in revenue.

One of the tools of addressing market power is of course antitrust law. And, that presents a dilemma to those like myself who generally stand on the side of economic freedom and business enterprise. But, we must at the same time recognize the challenges that Big Tech poses to fundamental institutions in American society. Many wish to preserve antitrust's productivity, innovation, and allocative efficiency focus. An economics-based consumer welfare standard limits potential bad-effects of a mistaken or overly broad application of antitrust law. But, many cannot close their eyes to Big Tech's deleterious effects on the institutional resilience of our democracy, free speech, children's health and development as well as quite possibly bad effects on economic innovation and growth.

And, this ambivalence comes to the fore when examining how Big Tech's market power allows it to limit the speech of vital voices in our democracy. As the Parler examples shows, a strong culture of free speech requires not simply the First Amendment's formal protections but also demands openness in key avenues and platforms and modes of distribution—such as Google's Play Store or the Apple Store as well as the dominant social media platforms.

Antitrust law has long recognized that special rules could apply when dealing with market power deployed to stifle speech. The Supreme Court's famous statement made in *Associated Press v. United States*, 326 U.S. 1, 20 (1945) makes that point:

"The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some." Associated Press v. United States, 326 U.S. 1, 20 (1945)

Similarly, in a different context, the Supreme Court has stated, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 663 (1994).

So, from my perspective—that of concern for the effects of Big Tech on fundamental American institutions such as free speech and the family, I ask whether these bills further a freer country, a stronger democracy as well as a more vital and innovative on-line economy. There is much to admire about these bills, in particular Open App Markets Act But I do have some concerns and suggestions and take the liberty of respectfully sharing them with the committee.

Open App Markets Act

The Open App Markets Act (OAMA) is an admirable effort to combat the power of the large smartphone and internet platforms that host the myriad program and applications we use every day, i.e., mobile apps. Its openness mandates would seem at first to solve the Parler problem. It would seem so, but it's not clear it would. There is no "unreasonable discrimination" provision that prohibits mobile platforms—by which I mean the Apple Store or the Google Play Store—from making arbitrary or discriminatory exclusion of apps from their platforms. Rather, there is a requirement in Section 3(a)(2) that would prohibit a mobile platform from offering prices or terms and conditions worse than any other platform—which does not address the problem directly.

But, even if that provision would solve the problem, which I'm not sure it would, Section 4 has a rather extensive set of exceptions, allowing covered platforms to exclude firms if "necessary to achieve . . . digital safety." Section 4(a)(1)(A).

What is "digital safety"? Make sure you don't take a bath with your iPhone lest you get electrocuted? As a law professor who specializes in communications law, I confess I never heard of the term until I read it in the bill. But, a little research reveals that it is indeed a concept with an accepted meaning—and, interestingly, it is a concept strongly pushed by, and perhaps even coined, by the World Economic Forum.

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The World Economic Forum has, in fact, a Global Coalition for Digital Safety that "aims to accelerate public-private cooperation to tackle harmful content online and will serve to exchange best practices for new online safety regulation, take coordinated action to reduce the risk of online harms, and drive forward collaboration on programs to enhance digital media literacy."[1]

Of course, trying to figure out how the World Economic Forum defines "harmful content" or perhaps we should say "digitally unsafe," content is not an easy matter. The WEF never defines it explicitly. But, sifting through their documents, written in vague bureaucratic language, we find a white paper from June 2021, "Advancing Digital Safety: A Framework to Align Global Action."[2] Here we learn that "in the United States, for example, these private companies are not obligated to protect First Amendment speech rights and can moderate certain categories of harmful but legal ("lawful but awful") content."[3]

Or we can look to the policies of the large tech companies themselves. Apple's app developer guidelines, requirements that apps censor "discriminatory, or mean-spirited content," are under the "Safety" guidelines.[4]

So, it would seem as if this section would allow for the censorship of apps or other material that would be "lawful but awful." As the Twitter files unequivocally show, the employees of the

[1] World Economic Forum, https://initiatives.weforum.org/global-coalition-for-digital-safety/home.
[2] World Economic Forum, White Paper, *Advancing Digital Safety: A Framework to Align Global Action* (June 2021).
[3] *Id.* at 7.
[4] Apple Developer Guidelines, https://developer.apple.com/app-store/review/guidelines/#user-generated-content.

major platforms have notions of what constitute "awful" that align more closely with the Davos crowd than with American traditions of free expressions.

As written and in practice, therefore, I fear the current wording without a general viewpoint antidiscrimination provision would not solve the Parler problem. There is a large loophole—a loophole through which Apple, Google, and Amazon would be able to kick out Parler or anyone else for that matter.

American Innovation and Choice Online Act

The American Innovation and Choice Online Act (AICOA) is a far more expansive and comprehensive bill. It's primary operative provision, Section 3, contains a list of ten prohibited practices that go beyond what is currently prohibited under antitrust law. It is not exactly clear how they will apply and what they prohibit so that the act explicitly empowers the DOJ and FTC to interpret them so as to make sense for the platforms.

Even as one who shares many conservatives' ambivalence toward Big Tech, the prohibitions give me pause. And, I suspect my fellow witnesses today will provide an economic critique far more incisive than any I could offer. I will only say that these prohibitions go far beyond what current antitrust law provides, include very difficult and vague standards, and may not achieve the goals of significantly weakening Big Tech. Furthermore, it won't solve the problem of Parler and unfair discrimination by the platforms, a concern of many Americans.

On the other hand, given that their prohibitions are focused on, at least on the consumer side, a handful of firms, i.e., those with over 50,000,000 users, any deleterious inefficiencies will not be visited on the entire economy but concentrated in a few firms. Further, we must ask ourselves whether these firms actually increase consumer surplus. Some—but certainly not all—of the affected firms are large social media companies. They provide free services—and any consumer surplus must be inferred through often complex economic calculations. This is opposed to normal goods which have prices that indicate value. As research has shown, however, many of these services have a negative hedonic effect, i.e., using social media seems to make us unhappier. And, the value users place on social media is time-inconsistent, not unlike addictive substances.[5] This may result in over estimation of the value of social media—and indeed an indeterminacy in all economic claims about social media's benefit.

Further, the macro-effects of social media, as many leading psychologists have concluded, have been horrible for young people, particularly adolescent girls and young women, who face epidemic levels of loneliness and mental illness.[6] A recent CDC report sadly documents the frighteningly bad mental state of American youth.[7] Typical economic analysis has difficulty

[5] Allcott, H., Braghieri, L., Eichmeyer, S., & Gentzkow, M., *The welfare effects of social media*. 110 AMERICAN ECONOMIC REVIEW 629-67 (2020).
[6] Twenge, J. M., Haidt, J., Blake, A. B., et al., "Worldwide increases in adolescent loneliness." Journal of Adolescence 93 (2019); Hunt, M. G., Marx, R., Lipson, C., & Young, J., *No more FOMO: Limiting social media decreases loneliness and depression*, *37* J. SOCIAL AND CLINICAL PSYCHOLOGY, 751-768 (2018).
[7] Center for Disease Control, Youth Risk Behavior Survey 2011-2021 (Feb. 2022).

grappling with these effects. But, these effects do lessen the concerns about law-induced inefficiencies in the provision of social media.

Yet, even with these caveats, the American Innovation and Choice Online Act may simply be ineffective—particularly at promoting free speech. Indeed, it might produce the opposite. And, that's because of its enforcement mechanism. There is no private action. It's a very big stick that DOJ, the FTC, and the state attorney generals can use to hit Big Tech.

As the Twitter files reveal, government's power over the Big Tech can have bad effects on free speech. In today's information economy a few platforms have enormous power over public and private conversation, professional journalism and citizen debate and engagement. As we have seen, government can too easily apply pressure to have the platforms silence speech it doesn't like. The American Innovation and Choice Online Act, with its vague terms and discretionary and exclusive governmental enforcement, simply adds to the available pressure government can employ on the major internet platforms to silence government's critics.